#F-641 8/6/82

Memorandum 82-104

Subject: Study F-641 Community Property (Limitations on Disposition)

At the May 1982 Meeting the Commission reviewed the law relating to disposition of community property by either spouse alone in response to Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980), which held that an encumbrance of the community property family home by the husband during marriage is effective as to the husband's interest in the community property. The Commission came to the following general conclusions:

(1) Either spouse should generally be able to dispose of community real or personal property, subject to the duty of good faith.

(2) Where there are title papers in the name of a spouse, that spouse must join in the disposition.

(3) Both spouses must join in a gift of community real or personal property, but one spouse alone may make a personal property gift if it is usual or moderate.

(4) Both spouses must join in a disposition of the community real or personal property family dwelling.

(5) Both spouses must join in an encumbrance (other than a purchase money encumbrance) of household goods. [This was a previous Commission decision].

Attached to this memorandum is a staff draft of a tentative recommendation that embodies these decisions. There are a few points worth noting about the draft.

Scope of draft. This is a limited draft, dealing with existing restrictions on the disposition of community property. As part of its management and control study the Commission is considering other possible restrictions, such as joinder required for disposition of a community property business or change in benefits or beneficiaries under insurance policies and pension plans. These other restrictions are not the subject of this draft and it does not purport to be a comprehensive treatment of management and control.

§ 5125.130. Duty of good faith. The last time the Commission considered the duty of "good faith", the Commission attempted to give the words some concrete definition by drawing language from the then

current draft of the the Uniform Marital Property Act: the duty of good faith includes "the obligation to act in a manner which a spouse reasonably believes to be in or not opposed to the best interests of the family." The now current draft of the Uniform Act omits this language; accordingly, the staff draft does likewise.

§ 5125.220. Person in whose name title stands must join. With the deletion of the requirement that both spouses join in a disposition of community real property, it is necessary that a spouse who seeks protection against mismangement by the other spouse have some other quick and inexpensive means of obtaining protection. The staff draft attempts to provide such a means by allowing the spouse to record a declaration of interest in the property. The effect of the declaration is that the spouse's joinder is required for any transaction affecting the property. If the declaration is erroneous the other spouse can have the cloud removed; slander of title remedies are also available.

§ 5125.250. Encumbrance of household goods. The decision to delete the current requirement of written consent by a spouse to disposition of community property household goods is based on a recommendation by Professor Bruch. The spouses now have equal management and control and are capable of taking care of household goods, if they are capable of taking care of anything. The written consent requirement makes it dangerous for a bona fide purchaser to buy items in shops. The written consent requirement is unrealistic in an era of garage sales.

Professor Paul Goda has written to the staff (see Exhibit 1) expressing his disagreement with this change in the law:

> You propose the change because of garage sales. But you forget the poor in whose situation one would most likely have the unwanted sale or disposition of even minor items of apparel. The elimination of the protection against sale and conveyance of household furnishings and personal effects may be legitimate for the middle class and for garage sales but I think the elimination will hurt the poor. I can agree with eliminating the need for written consent in this situation to meet the problems of protecting bona fide purchasers since I presume you are casting the onus of proof on the spouse who seeks to avoid the transaction.

Professor Goda suggests that dispositions of household goods be treated the same as gifts of personal property--consent is required except that either spouse alone may make a disposition that is usual or moderate under the circumstances of the case. This treatment makes some sense to the staff--it would not invalidate dispositions of individual items but

would invalidate a large transfer. If this suggestion is adopted, oral as well as written consent should be acceptable, as well as implied consent; estoppel should also be recognized.

§ 5125.260. Avoiding and setting aside disposition. In response to the Mitchell case the staff draft makes clear that a disposition in violation of the statutory limitations is voidable during marriage in its entirety and not merely as to the interest of the non-joining or non-consenting spouse. To enhance security of transactions the staff draft also makes clear that a disposition in violation of the limitations is voidable rather than void (existing law is to the same effect, with the exception of one case) and imposes a statutory limitation period for setting aside the disposition. After termination of marriage the general rule is that the disposition can be set aside only as to the interest of the non-joining or non-consenting spouse. But the staff draft permits the court to set the whole property aside in an appropriate case. The staff draft also makes clear the equitable authority of the court in dealing with a disposition to require restitution or permit recovery of the value of the property rather than the property itself or to impose such other terms as may be proper in the particular case.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

# LOYOLA HIGH SCHOOL

**JESUIT COLLEGE PREPARATORY**

June 21, 1982

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

Dear John:

I write from Loyola High School since I am teaching at Loyola Law School this summer.

Thank you for the copy of the Tentative Recommendation relating to Non-Probate Transfers. I have no difficulties with it and only observe that it tries to deal with the joint tenancy problem by shifting the burden of proof. As I observed in my last letter to you, I think joint tenancy should be eliminated between spouses but the shift of presumptions in proposed PrC 6305 may solve most of the problems.

The main purpose of my writing, however, is to discuss Study F-600, Memorandum 82-59: Community Property (the Mitchell Case--Requirement of Joinder to Transfer or Encumber Real Property). You have three main purposes:

I. To deal with Mitchell and joinder problems with regard to community real property.
II. To give a bit more leeway in giving community personal property because of certain minor problems.
III. To deal with presumptions in CC 5110.

I agree with the first purpose, although I disagree with the reasoning and the solution. I agree with the second purpose and with most of the solution. I agree with the third purpose and solution with a caveat.

I.
As to the first purpose, "To deal with Mitchell and joinder problems with regard to community real property," I disagree with your reasoning and solution.

I certainly agree that there are problems. And I do not think that the problems are new ones. The notion that community property might be divisible before death was stated in inarticulate fashion before Mitchell as the courts were trying to figure out what the limitations of gift-giving meant.

For example, in Pretzer v. Pretzer 215 Cal 659 at 661, it is stated:

> A deed to community property, executed without the wife's consent, while ineffective as to her interest is valid and binding as to the husband's interest.

Dargie v. Patterson 176 Cal 714 at 719 had the same notion earlier in saying the wife could not recover the whole of the property during marriage because the conveyance was binding on the husband, although she could recover ½ after death. Britton v. Hammell allowed recovery of the whole of t he property during life and seemingly changed the rationale as well, suggesting that the gift could be made when it was quasi-testamentary but otherwise during life, it was voidable in entirety.

I think that what these earlier cases did was to set the pattern for a kind of half-disposition of community real property during life in Mitchell. The rationales were never made clear in earlier cases and they were misapplied in various cases up to the present. When you state on p. 1 of Memo 82-59 that "The Mitchell case represents a marked shift in California law," it seems to me that what is really happening is the illogical extension of earlier premises which were only partially thought through.

And I think that your reasoning that one can dispose of his or her own interest in community property is a contradiction in terms if it leaves the other spouse his or her own interest in community property. I don't think that one can talk about his or her own interest in this way. If there is equql mqnagement and control of the property, one should be able to dispose of all the property, barring joinder for a moment. If, as you suggest, one spouse gets rid of his or her own interest, then the remaining interest is still subject to equql management and control. The Britton v. Hammell rationale of the continuum of transactions is still good unless you allow single management and control of the community real property to the spouse whose interest was not transferred.

The paradox is compounded by the joinder requirement. I personally think that Gantner v. Johnson 274 CA2d 869 is wrong insofar as it allows the vendors to ret ain more than what would have put them in the position that they would have been in had the contract been carried out. The way the court allowed that retention was based on the logical extreme of allowing the husband to transfer his interest without joinder of the wife.

To be perfectly frank, I do not understand Mitchell at all. It seems to me that the case did not address the real issue. The real issue should be whether the policy of the joinder requirement of CC 5127 is to protect a bona fide purchaser or to protect the other spouse. Britton v. Hammell, despite your attempts to demolish it, is correct in its reasoning as far as gifts are concerned. The real problems arise when realty is transferred for consideration without joinder.

Although Mark v. Title Guarantee 122 CA 301 decided an issue with regard to pre-1927 property, I think that that is irrelevant and that the decision was logical in that it allowed the wife to recover all the property if she repaid the bona fide purchaser. The decision was logical because it allowed priority to the bona fide purchaser and made sense of the joinder provision byallowing recovery in entirety to the wife who had not joined, upon restitution to the bona fide purchaser.

Mitchell is an illogical straddle and you accept its basis except

for the family home. It seems to me that a distinction should be clearly drawn as to whether a transaction is void or voidable and a decision made as to what policy element is paramount. If there is non-joinder in the case of a family home, allow recovery as in thecase of furnishings of the home because the transaction should be void. If there is non-joinder in the case of other real property, allow recovery only upon restitution of the consideration. I think that this distinction makes more sense and is more specific than your own suggestions. Thus, on the bottom of p. 7 of Memo 82-59, change proposed CC 5127d as follows:

(1) If both spouses do not join in a transaction that affects a family dwelling which is community real property, the transaction is void.
(2) If both spouses do not join in a transaction that affects community property other than the family dwelling and record title to the community real property does not reveal the community character of the real property or the existence of the marriage relation, the transaction is valid insofar as it relates to the interests of both spouses if made with a person in good faith without knowledge of the community character of the real property or the existence of the marriage relation, unless an action to avoid the transaction is commenced within one year after the recordation of the transaction in the office of the recorder of the county in which the real property is situated. If such action is brought within one year after recordation or if there is no recordation, the property may be recovered upon payment of the consideration paid for it.

I have phrased subsection (1) the way I have because you do not say in your suggestion what should happen to such property. Your criticisms of Mr. Elmore's letter are correct in that his suggestions are indefinite but so are yours with respect to the family home. I take it that you want the same result as Dynan v. Gallinatti for personal property. It is strong stuff.

I have phrased subsect ion (2) the way I have because I think the combined variables of equal management and control and joinder needed to transmit community real property lead to a surd if one spouse can transmit his or her half. I base my suggestion on Mark v. Title Guarantee.

II.
As to the second purpose, "To give a bit more leeway in giving community personal property because of certain minor problems," I stated that I agreed with your purpose and with most of the solution.

I must say that I disagree with the rationale on p. 1 of Exhibit 1, 1st Supp. to Memo 82-59. Or rather, I think that there is an additional rationale which should be considered. It seems to me that major gifts during the lifetime of the spouses should be a joint endeavor by the spouses. I can agree that the original rationale may have been negative against the husband's power, and that today it is negative against the power of both spouses, but there should also be a positive rationale that major gifts should be from both spouses.

I specifically disagree in your proposed limitation of CC 5125c to encumbrances. You propose the change because of garage sales. But you forget the poor in whose situation one would most likely have the unwanted sale or disposition of even minor items of apparel. The elimination of the protection against sale and conveyance of household furnishings and personal effects may be legitimate for the middle class and for garage sales but I think the elimination will hurt the poor. I can agree with eliminating the need for written consent in this situation to meet the problems of protecting bona fide purchasers since I presume you are casting the onus of proof on the spouse who seeks to avoid the transaction.

Thus, I would suggest combining your suggestion from CC 55125b2 on usual and moderate transactions as being allowable and amend proposed CC 5125c to state:

> (c) Both spouses must join in the sale or conveyance of community personal property used as the family dwelling, furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is more than usual or moderate, taking into consideration the circumstances of the case, or in a transfer of or creation... (remainder as in your version)

I presume that transactions prohibited by thissection would still be void under the rule of Dynan v. Gallinatti.

III.
As to your purpose "To deal with presumptions in CC 5110," in the Second Supplement to Memo 82-59, I agree. Although it will throw out a good part of my course in Community Property, it does what Prof. Bruch and you have set out to do, simplify the law and proof of community property.

Let me add a caveat. In your comment on the top of p. 6 of the Second Supplement, you indicate that "The provisions of Section 5110 relating to a single family residence held in joint tenancy are superseded by Section _____." Why wouldn't your proposed 5110b take care of this in the same way that proposed PrC 6305 does?

Good luck.....

Sincerely,

Paul J. Goda S.J.

Paul J. Goda, S.J.
Professor of Law
University of Santa Clara

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

DISPOSITION OF COMMUNITY PROPERTY

In 1975 California commenced a system of equal management and control of community property by spouses.[1] Under this system, either spouse may manage and control the community property,[2] subject to a duty of good faith to the other spouse[3] and subject to a number of limitations on the ability of the spouse to control specific types of community property[4] or to dispose of specific types of community property. This recommendation proposes clarifications of the community property law to implement the state policy of equal management and control with regard to disposition of community property.[5]

Real Property

Section 5127 requires joinder of both spouses for a disposition of community real property. This limitation on the right of either spouse to manage and control the community property was originally enacted in 1917 as a protection of the wife against the husband's then unilateral managerial powers.[1]

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1. 1973 Cal. Stats., ch. 987, 1901, operative January 1, 1975. See Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1974, 24 U.C.L.A. L. Rev. 1 (1976).

2. Civ. Code §§ 5125 (personal property) and 5127 (real property).

3. See discussion under "Duty of Good Faith," below.

4. See, e.g., Civil Code § 5125(d) (community property business operated or managed by spouse); Fin. Code § 851 (community property bank account in name of spouse); Prob. Code § 3051 (where spouse has conservator).

5. This is one aspect of the Law Revision Commission's general study of community property. As the Commission completes its work on management and control of community property the Commission may make additional recommendations relating to disposition.

1. 1917 Cal. Stats., ch. 583, § 2; see Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 53-56 (1976).

One effect of the joinder requirement is that title to both separate and community real property disposed of by a married person is clouded unless both spouses join in the disposition.[2] The existing statute attempts to mitigate this problem by providing that if community property stands of record in the name of one spouse, a disposition of the property by that spouse alone is presumed valid as to a bona fide purchaser and an action to avoid the disposition must be commenced within one year after the disposition is recorded.[3] However, the statutory presumption is of questionable utility in clearing land titles.[4]

The absolute limitation on disposition of community real property without the joinder of both spouses, in addition to causing title problems, is unnecessarily restrictive. Either spouse now has general authority to unilaterally dispose of community personal property,[5] which may be of substantially greater value than community real property. The broad protection of the 1917 statute is no longer as important as it once was, now that each spouse has management and control of the community real property and can take action to protect against mismanagement by the other spouse, and now that each spouse is governed by the duty of good faith management.[6]

However, the joinder requirement does provide important protection[7] in a number of special situations:

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2. E. Washburn, 1 Ogden's Revised California Real Property Law § 8.28A (Cal. Cont. Ed. Bar 1982 Supp.); P. Basye, Clearing Land Titles § 60 (2d ed. 1970).

3. Civil Code § 5127.

4. It is unclear whether the presumption is conclusive or rebuttable. Compare Rice v. McCarthy, 73 Cal. App. 655, 239 P. 56 (1925) (presumption conclusive) with Mark v. Title Guaranty & Trust Co., 122 Cal. App. 301, 9 P.2d 839 (1932). See discussions in Marsh, Property Ownership During Marriage, 1 The California Family Lawyer § 4.34 (Cal. Cont. Ed. Bar 1961) and H. Miller & M. Starr, 2 Current Law of California Real Estate § 13:31 (rev. 1977).

5. Civil Code § 5125(a).

6. Civil Code § 5125(e).

7. Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 80 (1976).

(1) Disposition of real property family dwelling. The family home is of particular importance to both spouses and is properly subject to joint control by the spouses. California law expressly requires joint action for disposition of the community personal property family home despite the general rule that either alone may dispose of community personal property.[8] The same rule should continue to apply to the community real property family home.[9]

(2) Gifts of real property. A gift is unique among the varieties of disposition of community property in that it yields no assets or tangible benefits for the community and tends to deplete the community. Although it is desirable to permit either spouse alone to make a moderate or reasonable gift of community property,[10] it is improbable because of the intrinsic value of real property that a gift of real property would be considered moderate or reasonable. For this reason joinder of both spouses should be required for a gift of community real property, regardless of value. This will enable the parties to follow a clear and simple rule and will avoid the occasion to litigate whether a particular gift of community real property is moderate or reasonable.

(3) Real property title records. Where record title to community real property stands in the name of either or both spouses, the law should make clear that each spouse in whose name record title stands must join in a transaction affecting the property. This will enable reliance by the parties on the public record system and facilitate clear land titles; it will also codify existing practice. For protection of a spouse against mismanagement by the other spouse, a spouse should be

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8. Civil Code § 5125(c), as amended 1982 Cal. Stats., ch. 497, § 23, operative July 1, 1983.

9. This is particularly important in light of the repeal of the declared homestead law, under which a spouse could protect against disposition of the family home. See Civil Code § 1242, repealed by 1982 Cal. Stats., ch. 497, § 8, operative July 1, 1983. The repeal of the declared homestead law was predicated in part on the general rule that disposition of community real property requires joinder of both spouses. Tentative Recommendation proposing the Enforcement of Judgments Law, 15 Cal. L. Revision Comm'n Reports 2095 (1980).

10. See discussion under "Gifts of personal property," below.

permitted to have his or her name added to the record title to community property.[11]

Personal Property

The general rule is that either spouse has absolute power of disposition over community personal property.[1] This rule has generally worked well in practice. It is subject to a number of qualifications, however, that need refinement:

(1) Gifts of personal property. Prior to 1891 California followed the Spanish rule that a manager spouse may without consent of the other make reasonable gifts of community property.[2] In 1891 the law was revised to require the written consent of the wife to a gift by the husband. The 1891 anti-gift statute[3] became necessary because at that time the husband was considered the sole owner of community property, the wife's interest in the community property being a mere expectancy, and the wife needed the ability to protect the community property from depletion by gifts of the husband.[4]

The reasoning upon which the anti-gift legislation was based is no longer applicable. Both spouses own the community property in equal shares,[5] and each may protect the property from dissipation by the other.[6] Moreover, tips given waiters, waitresses, and others, offerings given at church, United Fund contributions, and other gifts are routinely

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11. See Bruch, Management Powers and Duties Under California's Community Property Laws 85 (1980).

1. Civil Code § 5125(a).

2. See, e.g., Lord v. Hough, 43 Cal. 581 (1872).

3. The statute is now codified as Civil Code Section 5125(b) and is applicable to gifts of community personal property by either spouse.

4. See discussion in W. Reppy, Community Property in California 191 (1980); Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 49-52 (1976).

5. Civil Code § 5105 (interests of husband and wife during marriage are present, existing, and equal).

6. Cf. Civil Code § 5125 (either spouse has management and control of community personal property).

made without thought of written consent by the other spouse. If a case were to arise involving such a gift the courts would undoubtedly find a ground to validate the gift, through ratification, waiver, implied consent, or other means.[7] The law should clearly state the traditional community property rule that a spouse may make a gift of the community property without the written consent of the other spouse if the gift is usual or moderate in the circumstances of the particular marriage.[8]

(2) Household furnishings and personal effects. Section 5125(c) of the Civil Code precludes a spouse from selling, conveying, or encumbering the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children that is community personal property, without the written consent of the other spouse. Like the other statutory limitations on the ability of a spouse to unilaterally dispose of community property, this provision had its origins in a time when the husband had management and control of the community property and the wife needed some protection against mismanagement.[9]

The written consent requirement for sale or conveyance of household furnishings and personal effects is unrealistic in an era of garage sales; it is unlikely that written consent will be sought for a sale of used furniture or clothing. The statute that requires written consent in effect permits a spouse to seek relief from a transfer of community personal property in nearly every case. Broadly applied, the statute would make it dangerous for a buyer to purchase any furniture or wearing apparel in a warehouse or shop without inquiring into marital status and authority.[10] This problem is compounded by the fact that a transfer without the written consent of the other spouse is void and not merely voidable. The result is that either spouse can rescind (possibly

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7. See discussion in Bruch, Management Powers and Duties Under a California's Community Property Laws 18-19 (1980).

8. The requirement of written consent should likewise be inapplicable to a gift of community property between the spouses.

9. Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 25 U.C.L.A. L. Rev. 1, 52-53 (1976).

10. 7 B. Witkin, Summary of California Law, Community Property § 68 (8th ed. 1974).

without the need to make restitution) and the transfer is not effective as to the transferor's interest even after the marriage has terminated by dissolution or death.[11]

The limitation on disposal of household furnishings and personal effects is unnecessary. Each spouse now has management and control of the community personal property and both should be able to protect their interests. This is particularly true in the case of household furnishings and personal effects--the very items to which the spouses are closest and with which they are most familiar. If one spouse mismanages property of this type, the general duty of good faith should be sufficient to protect the other spouse.[12]

The one statutory protection that should be retained is the requirement of joinder for an encumbrance (other than a purchase money encumbrance) of household furnishings. Such a requirement would not affect peoples' ordinary dealing with property and would protect the innocent spouse from a harmful transaction that could occur without the knowledge of the innocent spouse.

(3) Documentary evidence of title to personal property. Title to community personal property may be evidenced by documents such as stock certificates or automobile registrations. Where this is the case, the spouse or spouses whose names are on the title documents should join in a transaction affecting the property, notwithstanding the general rule that either spouse alone has absolute power of disposition. This will codify existing practice.

Setting Aside a Disposition of Property

Despite the language of Civil Code Section 5127 that both spouses "must join" in a transaction involving community real property, this requirement has not been held to invalidate a transaction except during marriage, when it can be avoided by the nonjoining spouse. Thus, during marriage the wife can set aside the husband's conveyance of community real property in toto.[1] After termination of marriage by dissolution or

11. Dynan v. Gallinatti, 87 Cal. App.2d 553, 197 P.2d 391 (1948); W. Reppy, Community Property in California 197 (1980).

12. Civil Code § 5125(e).

1. E.g., Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935); but see Mitchell v. American Reserve Insurance Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage).

death the wife can set aside the husband's conveyance of community real property only as to her one-half interest.[2] The same rules apply to transactions involving community personal property, to transactions involving gifts, and to transactions made for consideration, even though different statutes are involved in each of these situations.[3]

The reasons for these rules are deeply rooted in the history of California community property law. From the beginning of the California community property system in 1849, the husband had the exclusive management and control of the community property and was considered to be the true owner of the property; the wife's interest was a "mere expectancy" to be realized only if she survived the termination of the marriage by death of her husband or by dissolution of marriage.[4] The history of California community property can be viewed as an evolution from this position towards one of equality of the spouses, the major landmarks being the 1927 legislation declaring ownership of community property by the spouses as "present, existing and equal"[5] and the 1975 legislation giving either spouse the management and control of community property.[6]

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2. E.g., Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429 (1932) (dissolution); Dargie v. Patterson, 176 Cal. 714, 169 Pac. 360 (1917) (death); Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933) (death).

3. Civil Code § 5125; e.g., Lynn v. Herman, 72 Cal. App.2d 614, 165 P.2d 54 (1946) (gift of personal property, wife recovers all during marriage); Mathews v. Hamburger, 36 Cal. App.2d 182, 97 P.2d 465 (1939) (transfer of personal property for consideration, wife recovers all during marriage); Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629 (1937) (gift of personal property, wife recovers one-half after death of husband); Gantner v. Johnson, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969) (transfer of real and personal property for consideration, wife recovers one-half after death of husband); but see Dynan v. Gallinatti, 87 Cal. App.2d 553, 197 P.2d 391 (1948) (encumbrance of personal property, wife recovers all after death of husband). For a discussion of the cases, see Schwartz, Gifts of Community Property: Need for Wife's Consent, 11 U.C.L.A. L. Rev. 26 (1963).

4. Van Maren v. Johnson, 15 Cal. 311 (1860).

5. Now Civil Code Section 5105.

6. Civil Code Sections 5125 and 5127. This history is chronicled in Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1 (1976).

Within this broad progression of the law a series of smaller steps were taken to protect the interest of the wife from erosion by acts of the husband,[7] among them:

1891 Husband prohibited from making a gift of community property without wife's consent.
1901 Husband prohibited from encumbering or selling household furnishings without wife's written consent.
1917 Wife must join in any instrument whereby community realty is encumbered or conveyed.

In the historical context it is clear why the courts have interpreted these apparent blanket requirements to provide that the wife may, during marriage, recover all community property conveyed in violation of the statutes but after termination of marriage by death or dissolution may recover only her one-half interest.[8] Since the husband was the manager and controller, any conveyance he made was effective to bind his interest; the transaction was not void but only voidable by the non-joining wife. The husband has testamentary power over one-half the community property and is entitled to his share of the community property at dissolution of marriage; therefore, the husband's death or the dissolution of marriage has the effect of ratifying or validating the husband's transaction. The wife can thereafter recover only her one-half interest in the property.

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7. See Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977, 1053 (1975).

8. Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935), states four reasons for this rule:

(1) If only one-half were recovered and that half were considered community property, the husband would retain control and could repeat his actions until a miniscule amount was left.

(2) If only one-half were recovered and that half were considered separate property of the wife, this would amount to a partition of the community during marriage by arbitrary act of the husband, contrary to public policy that allows division of the community only at termination of the marriage by dissolution or death or during marriage with the consent of both spouses.

(3) The cases allowing the wife to recover only one-half are based on the right of the husband to testamentary disposition of half, hence gifts before death are will substitutes; this reasoning does not apply in an ongoing marriage.

(4) If the wife could not recover the whole property during marriage the husband could impair the wife's right to receive a larger share of the community property at dissolution in case of adultery or extreme cruelty of the husband.

The same basic principles should apply in an era of equal management and control to those few special types of dispositions for which joinder or consent is required. Because of the nature of the dispositions for which joinder or consent is required, there will be few bona fide purchasers affected. However, the law should make clear that a transaction in violation of a joinder or consent requirement is voidable.[9] To give some assurance of transactional security, an action by a spouse to avoid a transaction for failure of joinder or consent should be limited to one year after the spouse had notice of the transaction or three years after the transaction was made, whichever occurs first.[10] If the transaction is set aside during marriage, it should be set aside as to the interests of both spouses.[11] If the transaction is set aside after termination of marriage by dissolution or separation or by death, it should ordinarily be set aside only as to the interest of the spouse who did not join in or consent to the transaction. However, the court should have discretion to set aside the transaction as to all interests in special circumstances, such as where it is desirable to award the family home to the spouse who has custody of the children or as a probate homestead. In any case, the court should have authority to fashion an appropriate order that may, for example, require restitution for the person to whom the transaction was made or provide for recovery of the value of the property rather than the property.[12]

9. This codifies general California law and overrules the contrary case of Dynan v. Gallinatti, 87 Cal. App.2d 553, 197 P.3d 391 (1948) (disposition void rather than voidable). Codification of the action to avoid a transaction would not affect the equitable nature of the action, and equitable defenses such as estoppel would still be recognized. See, e.g., Mark v. Title Guarantee & Trust Co., 122 Cal. App. 301, 9 P.2d 839 (1932).

10. This limitation period is drawn from Section 5(g) of the Uniform Marital Property Act [July/August 1982 draft]. The limitation period is consistent with existing law. See Civil Code Section 5127 (one year for action to avoid a disposition of real property); Code Civ. Proc. § 338 (three years for recovery of personal property).

11. This codifies general California law and overrules the contrary case of Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage).

12. Setting aside the disposition should not be the exclusive remedy for a disposition made without the joinder or consent of a spouse. It may be proper in a dissolution case, for example, simply to allow one spouse an offset out of the share of the other spouse for the value of the property disposed of.

Duty of Good Faith

A major limitation on the freedom of either spouse to manage and control community property and on the spouse's power of disposition is the duty of each spouse to act in good faith with respect to the other spouse in the management and control of the community property.[1] Prior to adoption in 1975 of equal management and control and the corresponding duty of good faith, California law analogized the management duties between spouses to the law governing the relations of fiduciaries or partners.[2]

The duty of good faith is more appropriate to California's current scheme of equal management and control than the fiduciary standards applicable before 1975, when the husband had sole management and control of the community property. Since either spouse may now manage and control the community assets, the good faith standard that the spouse have no fraudulent intent supersedes the older standards.[3]

The proposed law continues without change the duty of good faith. This codifies pre-1975 law to the extent the prior law precluded a spouse managing and controlling community property from obtaining an unfair advantage over the other spouse.[4] But it does not impose a fiduciary standard that the spouse be as prudent as a trustee or keep complete and accurate records of income received and disbursed.[5]

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1. Civil Code § 5125(e).

2. Bruch, Management Powers and Duties Under California's Community Property Laws 14-15 (1980).

3. Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1013-1022 (1975); Comment, Toward True Equality: Reforms in California's Community Property Law, 5 Golden Gate L. Rev. 407 (1975); Comment, California's New Community Property Law--Its Effect on Interspousal Mismanagement Litigation, 5 Pac. L.J. 723 (1974).

4. See, e.g., Weinberg v. Weinberg, 67 Cal.2d 557, 63 Cal. Rptr. 13, 432 P.2d 709 (1967) (duty not to take unfair advantage); Vai v. Bank of America, 56 Cal.2d 329, 15 Cal. Rptr. 71, 364 P.2d 247 (1961) (duty to account during property settlement negotiations); Fields v. Michael, 91 Cal. App.2d 443, 205 P.2d 402 (1949) (duty not to fraudulently dispose of community property); Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (1929) (duty not to appropriate funds for improvement of separate property).

5. See Williams v. Williams, 14 Cal. App.3d 560, 92 Cal. Rptr. 385 (1971) (dictum).

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

An act to amend Sections 5106 and 5113.5 of, to add Chapter 4 (commencing with Section 5125.110) to Title 8 of Part 5 of Division 4 of, and to repeal Sections 5125, 5127, and 5128 of, the Civil Code, to amend Section 420 of the Corporations Code, and to amend Sections 3071, 3072, and 3073 of the Probate Code, relating to community property.

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

368/243

Civil Code § 5106 (amended)

SECTION 1. Section 5106 of the Civil Code is amended to read:

5106. ~~(a)~~ Notwithstanding the provisions of Section 5105 and ~~5125, whenever~~ Chapter 4 (commencing with Section 5125.110):

(a) Whenever payment or refund is made to a participant or his beneficiary or estate pursuant to a written employee benefit plan governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended, such payment or refund shall fully discharge the employer and any administrator, fiduciary or insurance company making such payment or refund from all adverse claims thereto unless, before such payment or refund is made, the administrator of such plan has received at its principal place of business within this state, written notice by or on behalf of some other person that such other person claims to be entitled to such payment or refund or some part thereof. Nothing contained in this section shall affect any claim or right to any such payment or refund or part thereof as between all persons other than the employer and the fiduciary or insurance company making such payment or refund. The terms "participant", "beneficiary", "employee benefit plan", "employer", "fiduciary" and "administrator" shall have the same meaning as provided in Section 3 of the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended.

(b) ~~Notwithstanding the provisions of Sections 5105 and 5125, whenever~~ Whenever payment or refund is made to an employee, former employee or his beneficiary or estate pursuant to a written retirement,

death or other employee benefit plan or savings plan, other than a plan governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended, such payment or refund shall fully discharge the employer and any trustee or insurance company making such payment or refund from all adverse claims thereto unless, before such payment or refund is made, the employer or former employer has received at its principal place of business within this state, written notice by or on behalf of some other person that such other person claims to be entitled to such payment or refund or some part thereof. Nothing contained in this section shall affect any claim or right to any such payment or refund or part thereof as between all persons other than the employer and the trustee or insurance company making such payment or refund.

Comment. Section 5106 is amended to correct a section reference.

37022

Civil Code § 5113.5 (amended)

SEC. 2. Section 5113.5 of the Civil Code is amended to read:

5113.5. Where community property, before or after the effective date of this section, is transferred by the husband and wife to a trust, regardless of the identity of the trustee, which trust originally or as amended prior or subsequent to such transfer (a) is revocable in whole or in part during their joint lives, (b) provides that the property after transfer to the trust shall remain community property and any withdrawal therefrom shall be their community property, (c) grants the trustee during their joint lives powers no more extensive than those possessed by a husband or wife under ~~Sections 5125 and 5127~~ Chapter 4 (commencing with Section 5125.110) , and (d) is subject to amendment or alteration during their joint lifetime upon their joint consent, the property so transferred to such trust, and the interests of the spouses in such trust, shall be community property during the continuance of the marriage, unless the trust otherwise expressly provides. Nothing in this section shall be deemed to affect community property which, before or after the effective date of this section, is transferred in a manner other than as described in this section or to a trust containing different provisions than those set forth in this section; nor shall this section be construed to prohibit the trustee from conveying any trust

property, real or personal, in accordance with the provisions of the trust without the consent of the husband or wife unless the trust expressly requires the consent of one or both spouses.

Comment. Section 5113.5 is amended to correct a section reference.

5380 N/Z

Civil Code § 5125 (repealed)

SEC. 3. Section 5125 of the Civil Code[, as amended by 1982 Cal. Stats. ch. 497, § 23,] is repealed.

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

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

~~(c) A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.~~

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

~~(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.~~

Comment. The substance of subdivision (a) of former Section 5125 is continued in Sections 5125.120 (either spouse has management and control) and 5125.210 (power of disposition absolute).

The substance of subdivision (b) is continued in Section 5125.230(a) (gifts). Subdivision (c) is superseded by Sections 5125.240 (disposition of family dwelling) and 5125.250 (encumbrance of household goods).

The substance of subdivision (d) is continued in Section 5125.140 (community property business). The substance of subdivision (e) is continued in Section 5125.130 (duty of good faith).

Civil Code §§ 5125.110-5125.299 (added)

SEC. 4. Chapter 4 (commencing with Section 5125.110) is added to Title 8 of Part 5 of Division 4 of the Civil Code to read:

CHAPTER 4. MANAGEMENT AND CONTROL

Article 1. General Provisions

38451

§ 5125.110. Definitions

5125.110. Unless the provision or context otherwise requires, as used in this chapter:

(a) "Disposition" means a transaction that affects property, including a transfer, encumbrance, or lease of the property.

(b) "Management and control" includes disposition.

(c) "Property" means real and personal property and any interest therein, including the interest of either spouse in the property.

Comment. Subdivision (a) of Section 5125.110 makes clear that the term "disposition" is used in its broadest sense, and is not limited to a sale of the property. Subdivision (b) is intended for drafting convenience. Subdivision (c) reflects the fact that real and personal property are treated the same in this chapter, except in special cases.

38455

§ 5125.120. Either spouse has management and control

5125.120. (a) Except as otherwise provided by statute, either spouse has the management and control of the community property.

(b) This section applies to all community property, whether acquired before or on or after January 1, 1975.

Comment. Section 5125.120 continues the substance of the first portions of former Sections 5125(a) (personal property) and 5127 (real property). This chapter contains exceptions to and limitations on the rule of Section 5125.120. See also Section 5113.5 (management and control of community property by trustee) and Financial Code Section 851 (management and control of community property bank account by spouse in whose name account stands). Exceptions and limitations may also be found in a marital property agreement between the spouses.

§ 5125.130. Duty of good faith

5125.130. Notwithstanding any other provision of this chapter, each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

Comment. Section 5125.130 continues the substance of former Section 5125(e). Special provisions of this chapter relating to management and control are subject to the overriding duty of good faith. See, e.g., Section 5125.210 and Comment thereto (power of disposition absolute); see also Section 5125.110(b) ("management and control" includes disposition). The duty of good faith arises out of the confidential relationship of the spouses; it does not impose a standard of conduct that would be applicable to a fiduciary in an investment context. Section 5103 (confidential relationship); cf. Williams v. Williams, 14 Cal. App.3d 560, 92 Cal Rptr. 385 (1971) (dictum); see also discussions in Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1013-1022 (1975) and Comment, Toward True Equality: Reforms in California's Community Property Law, 5 Golden Gate L. Rev. 407 (1975) (subjective rather than objective standard of good faith would more appropriately fulfill legislative intent).

38457

§ 5125.140. Community property business

5125.140. A spouse who is operating or managing a business or an interest in a business that is community property has the sole management and control of the business or interest.

Comment. Section 5125.140 continues the substance of former Section 5125(d).

38458

§ 5125.150. Where spouse has conservator or lacks legal capacity

5125.150. Where one or both of the spouses either has a conservator of the estate or lacks legal capacity to manage and control community property, the procedure for management and control of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

Comment. Section 5125.150 continues subdivision (a) of former Section 5128. Subdivisions (b) and (c) of former Section 5128 were elaborations of subdivision (a) and are not continued because they are unnecessary. See Section 5125.110(b) ("management and control" includes disposition).

## Article 2. Disposition of Community Property

### § 5125.210. Power of disposition absolute

5125.210. (a) Subject to the limitations provided in this article, a spouse has absolute power of disposition, other than testamentary, of community property of which the spouse has management and control, and may make a disposition of the property without the joinder or consent of the other spouse.

(b) The limitations provided in this article do not apply to a disposition of community property between the spouses.

Comment. Subdivision (a) of Section 5125.210 continues the substance of the last portion of former Section 5125(a), which gave either spouse absolute power of disposition of community personal property. Subdivision (a) applies the same rule to community real property; this supersedes former Section 5127, which required joinder of both spouses for disposition of community real property. In addition to the specific limitations on the power of disposition provided in this article, a spouse is subject to the overriding requirement of good faith in the management and control of the community property. Section 5125.120. For the power of testamentary disposition of community property, see Probate Code Section 201.

Subdivision (b) is drawn from former Section 5127. The validity and effect of a disposition between spouses is governed by law other than this article. See, e.g., [Sections 5110.610-5110.650 (transmutations)]. The limitations in this article may also be subject to a marital property agreement.

38875

### § 5125.220. Person in whose name title stands must join

5125.220. (a) Each spouse in whose name record title or other documentary evidence of title to community property stands must join in a disposition of the property.

(b) If community real property stands of record in the name of one but not both spouses, the spouse in whose name record title does not stand may record a declaration of interest in the community real property. The declaration shall be recorded in the county in which the community real property is situated and shall be indexed in the index of grantors and grantees, with the spouse in whose name the community real property stands of record deemed to be the grantor and the spouse who records the declaration deemed to be the grantee. A recorded declaration of interest in community real property has the following incidents:

(1) The spouse who records the declaration is a spouse in whose name record title to community real property stands.

(2) The declaration has no evidentiary or other effect on the interests of the spouses in the community real property.

(3) The declaration is not privileged and is subject to cancellation by judicial decree.

Comment. Subdivision (a) of Section 5125.220 codifies practice under former law. Subdivision (b) is intended to protect the interest of a spouse in community real property by enabling the spouse to add his or her name to the record title to the property. The declaration of interest by the spouse necessitates joinder of both spouses for a transaction affecting the property and otherwise serves as constructive notice of title, but does not affect the interests of the spouses in the property. An erroneous declaration is subject to removal by quiet title action, action to remove cloud, or other judicial means. Nothing in subdivision (b) limits the remedies of the other spouse for slander of title or the ability of a spouse who records a declaration thereafter voluntarily to renounce, quitclaim, or otherwise relinquish any interest in the community real property. The manner of recording the declaration is prescribed in Government Code Section 27322 and the fee for recording is prescribed in Government Code Section 27361 et seq.

39380

§ 5125.230. Gifts

5125.230. (a) Except as provided in subdivision (b), a spouse may not make a gift of community property or make a disposition of the property without a valuable consideration, without the written consent of the other spouse.

(b) A spouse may make a gift of community personal property, or make a disposition of the property without a valuable consideration, without the written consent of the other spouse, if the gift or disposition is usual or moderate, taking into account the circumstances of the case.

Comment. Subdivision (a) of Section 5125.230 continues the substance of former Section 5125(b), which related to gifts of community personal property. Subdivision (a) extends this rule to gifts of community real property; this is consistent with former Section 5127 (both spouses must join in conveyance of community real property).

Subdivision (b) is new. It is drawn from comparable provisions in other jurisdictions and is consistent with the traditional community property rule applicable in California prior to 1891. See, e.g., La. Civ. Code Ann. art. 2349 (usual or moderate gifts of value commensurate with economic status of spouses); Lord v. Hough, 43 Cal. 581 (1872)

(manager spouse may without consent of the other make reasonable gifts of community property). In making a determination after the death of the donor spouse whether a gift is usual or moderate the court should take into account such factors as amounts received by the other spouse by will, succession, gift, or other disposition, including insurance proceeds, joint tenancy, and inter vivos and testamentary trusts, and any special or unique character of the community personal property given.

40311

§ 5125.240. Disposition of family dwelling

5125.240. Both spouses must join in a disposition of the community property family dwelling.

Comment. Section 5125.240 continues the substance of a portion of former Section 5125(c), which precluded disposition of the community personal property family dwelling without the written consent of the other spouse. Section 5125.240 extends this rule to the community real property family dwelling; this is consistent with former Section 5127 (both spouses must join in disposition of community real property).

2178

§ 5125.250. Encumbrance of household goods

5125.250. Both spouses must join in the creation of a security interest, other than a purchase money security interest, in the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children, that is community property.

Comment. Section 5125.250 supersedes former Section 5125(c). Written consent is no longer required for a sale of community property household furnishings and clothing.

2197

§ 5125.260. Avoiding and setting aside disposition

5125.260. (a) A disposition of community property made without the joinder or consent of a spouse required by this article is voidable upon order of the court in an action commenced by the spouse before the earlier of the following times:

(1) One year after the spouse had notice of the disposition.

(2) Three years after the disposition was made.

(b) A court order pursuant to subdivision (a) made during marriage shall set aside the disposition of community property as to the interests

of both spouses. A court order pursuant to subdivision (a) made after termination of marriage by dissolution or legal separation or by death shall set aside the disposition of community property as to the interest of the spouse who did not join or consent and may, in the discretion of the court, set aside the disposition as to the interests of both spouses. The court order shall be made upon such terms and conditions as appear equitable under the circumstances of the case, taking into account the rights of all the parties.

(c) Nothing in this section affects any remedy a spouse may have against the other spouse for a disposition of community property made without the joinder or consent required by this article.

Comment. Subdivision (a) of Section 5125.260 makes clear that a disposition in violation of the joinder and consent requirements of this article is voidable rather than void. This codifies general California law and overrules the contrary case of Dynan v. Gallinatti, 87 Cal. App.2d 553, 197 P.3d 391 (1948) (disposition void). Although subdivision (a) codifies the action to avoid a disposition, the action remains equitable in nature and equitable defenses such as estoppel may still be recognized. See, e.g., Mark v. Title Guarantee & Trust Co., 122 Cal. App. 301, 9 P.2d 839 (1932). Subdivision (a) also imposes a statutory limitation period on an action to avoid the disposition, drawn from Section 5(g) of the Uniform Marital Property Act [July/August 1982 draft]. The limitation period is consistent with prior law. See former Section 5127 (one year for action to avoid a disposition of real property); Code Civ. Proc. § 338 (three years for recovery of personal property).

Subdivision (b) codifies general California law that a disposition avoided during marriage must be set aside as to the interests of both spouses, not just as to the interest of the non-joining or non-consenting spouse. See Section 5125.110 ("property" includes interest of either spouse); Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935) (community real property); Lynn v. Herman, 72 Cal. App.2d 614, 165 P.2d 54 (1946) (gift); Mathews v. Hamburger, 36 Cal. App.2d 182, 97 P.2d 465 (1939) (personal property). This overrules Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage). Where a disposition is set aside after termination of marriage by dissolution, separation, or death, the court will in the usual case set aside the disposition only as to the non-joining or non-consenting spouse so as to effectuate the disposition as to the interest of the spouse who made the disposition. See, e.g., Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429 (1932) (community real property after dissolution); Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933) (community real property after death); Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629 (1937) (community personal property after death); Gantner v. Johnson, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969) (community real and personal property after death). However, the statute does not mandate this result and recovery of the whole property may be proper in

a case, for example, where it is desirable to award property such as a family home to the spouse who has custody of the children or as a probate homestead. Under subdivision (b) the court has discretion to fashion an appropriate order, depending on the circumstances of the case. The order may, for example, require restitution for the person to whom the disposition was made, or provide for recovery of the value of the property instead of the property.

Subdivision (c) makes clear that this section does not provide the exclusive remedy where a spouse has made a disposition of community property without the joinder or consent of the other spouse. It may be proper in a dissolution case, for example, simply to allow one spouse an offset for the value of the property disposed of out of the share of the other spouse.

969/043

§ 5125.299. Transitional provisions

5125.299. (a) This article applies to a disposition of community property made on or after January 1, 1985, regardless whether the property was acquired before, on, or after January 1, 1985.

(b) A disposition of community property made before January 1, 1985, is governed by the law applicable to the disposition immediately before January 1, 1985, which is continued in effect for this purpose.

Comment. Section 5125.299 makes clear that enactment of this article is not intended to validate or invalidate any disposition made before its enactment; such a disposition is governed by former law.

27939

Civil Code § 5127 (repealed)

SEC. 5. Section 5127 of the Civil Code is repealed.

~~5127. Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community~~

~~real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.~~

Comment. The substance of the first portion of former Section 5127 is continued in Section 5125.120 (either spouse has management and control). The remainder is superseded by Sections 5125.220 (person in whose name title stands must join), 5125.230 (gifts), and 5125.240 (disposition of family dwelling).

2346 N/Z

Civil Code § 5128 (repealed)

SEC. 6. Section 5128 of the Civil Code is repealed.

~~5128. (a) Where one or both of the spouses either has a conservator of the estate or lacks legal capacity to manage and control community property, the procedure for management and control (which includes disposition) of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.~~

~~(b) Where one or both spouses either has a conservator of the estate or lacks legal capacity to give consent to a gift of community personal property or a disposition of community personal property without a valuable consideration as required by Section 5125 or to a sale,~~

~~conveyance, or encumbrance of community personal property for which a consent is required by Section 5125, the procedure for such gift, disposition, sale, conveyance, or encumbrance is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.~~

~~(c) Where one or both spouses either has a conservator of the estate or lacks legal capacity to join in executing a lease, sale, conveyance, or encumbrance of community real property or any interest therein as required by Section 5127, the procedure for such lease, sale, conveyance, or encumbrance is that prescribed in part 6 (commencing with Section 3000) of Division 4 of the Probate Code.~~

Comment. Subdivision (a) of former Section 5128 is continued in Section 5125.150 (where spouse has conservator or lacks capacity). Subdivisions (b) and (c) were elaborations of subdivision (a) and are not continued because they are unnecessary.

368/239

Corporations Code § 420 (amended)

SEC. 7. Section 420 of the Corporations Code is amended to read:

420. Neither a domestic nor foreign corporation nor its transfer agent or registrar is liable:

(a) For transferring or causing to be transferred on the books of the corporation to the surviving joint tenant or tenants any share or shares or other securities issued to two or more persons in joint tenancy, whether or not the transfer is made with actual or constructive knowledge of the existence of any understanding, agreement, condition or evidence that the shares or securities were held other than in joint tenancy or of a breach of trust by any joint tenant.

(b) To a minor or incompetent person in whose name shares or other securities are of record on its books or to any transferee of or transferor to either for transferring the shares or other securities on its books at the instance of or to the minor or incompetent or for the recognition of or dealing with the minor or incompetent as a shareholder or security holder, whether or not the corporation, transfer agent or registrar had notice, actual or constructive, of the nonage or incompetency, unless a guardian or conservator of the property of the minor or incompetent has been appointed and the corporation, transfer agent or registrar has received written notice thereof.

(c) To any married person or to any transferee of such person for transferring shares or other sucurities on its books at the instance of the person in whose name they are registered, without the signature of such person's spouse and regardless of whether the registration indicates that the shares or other securities are community property, in the same manner as if such person were unmarried.

(d) For transferring or causing to be transferred on the books of the corporation shares or other securities pursuant to a judgment or order of a court which has been set aside, modified or reversed unless, prior to the registration of the transfer on the books of the corporation, written notice is served upon the coproration or its transfer agent in the manner provided by law for the service of a summons in a civil action, stating that an appeal or other further court proceeding has been or is to be taken from or with regard to such judgment or order. After the service of such notice neither the corporation nor its transfer agent has any duty to register the requested transfer until the corporation or its transfer agent has received a certificate of the county clerk of the county in which the judgment or order was entered or made, showing that the judgment or order has become final.

(e) The provisions of the California Commercial Code shall not affect the limitations of liability set forth in this section. ~~Section 5125~~ Chapter 4 (commencing with Seciton 5125.110) of Title 8 of Part 5 of Division 4 of the Civil Code shall be subject to the provisions of this section and shall not be construed to prevent transfers, or result in liability to the corporation, transfer agent or registrar permitting or effecting transfers, which comply with this section.

Comment. Section 420 is amended to correct a section reference.

2347

Prob. Code § 3071 (amended)

SEC. 8. Section 3071 of the Probate Code[, as amended by 1982 Cal. Stats. ch. 497, § 157,] is amended to read:

3071. (a) In case of a transaction for which the joinder or consent of ~~both spouses~~ a spouse is required by ~~Section 5125 or 5127~~ Article 2 (commencing with Section 5125.210) of Chapter 4 of Title 8 of

Part 5 of Division 4 of the Civil Code or by any other statute, if one or both spouses lacks legal capacity for the transaction, the requirement of joinder or consent shall be satisfied as provided in this section.

(b) Where one spouse has legal capacity for the transaction and the other spouse has a conservator, the requirement of joinder or consent is satisfied if both of the following are obtained:

(1) The joinder or consent of the spouse having legal capacity.

(2) The joinder or consent of the conservator of the other spouse given in compliance with Section 3072.

(c) Where both spouses have conservators, the joinder or consent requirement is satisfied by the joinder or consent of each such conservator given in compliance with Section 3072.

(d) In any case, the requirement of joinder or consent is satisfied if the transaction is authorized by an order of court obtained in a proceeding pursuant to Chapter 3 (commencing with Section 3100).

Comment. Section 3071 is amended to correct section references.

2348

Prob. Code § 3072 (amended)

SEC. 9. Section 3072 of the Probate Code is amended to read:

3072. (a) Except as provided in subdivision (b), a conservator may join in or consent to a transaction under Section 3071 only after authorization by either of the following:

(1) An order of the court obtained in the conservatorship proceeding upon a petition filed pursuant to Section 2403 or under Article 7 (commencing with Section 2540) or 10 (commencing with Section 2580) of Chapter 6 of Part 4.

(2) An order of the court made in a proceeding pursuant to Chapter 3 (commencing with Section 3100).

(b) A conservator may ~~consent~~ join without court authorization ~~to a sale, conveyance, or encumbrance of~~ in the creation of a security interest in community personal property requiring ~~consent under subdivision (e) of Section 5125~~ joinder under Section 5125.220 of the Civil Code if the conservator could sell or transfer such property under Section 2545 without court authorization if the property were a part of the conservatorship estate.

Comment. Section 3072 is amended to correct a section reference.

2349

Prob. Code § 3073 (amended)

SEC. 10. Section 3073 of the Probate Code[, as amended by 1982 Cal. Stats. ch. 497, § 158,] is amended to read:

3073. (a) The joinder or consent under Section 3071 of a spouse having legal capacity shall be in such manner as complies with ~~Section 5125 or 5127~~ Article 2 (commencing with Section 5125.210) of Chapter 4 of Title 8 of Part 5 of Division 4 of the Civil Code or other statute that applies to the transaction.

(b) The joinder or consent under Section 3071 of a conservator shall be in the same manner as a spouse would join in or consent to the transaction under the statute that applies to the transaction except that the joinder or consent shall be executed by the conservator and shall refer to the court order, if one is required, authorizing the conservator to join in or consent to the transaction.

Comment. Section 3073 is amended to correct section references.