#F- 01/13/84

Memorandum 84-12

Subject: Study F - Family Law (Review of Comments Received on Recommendations to 1984 Session)

Attached to this memorandum as Exhibits 1 to 5 are letters we have received commenting on various of the Commission's family law recommendations to the 1984 Legislature. The first four letters are from members of the Family Law Committee of the California Judges Association; these letters reflect the position of that Committee or its members and not the position of the California Judges Association Executive Board, which is not taking a position on the Commission's recommendations.

Many of the comments in the letters are directed to aspects of the recommendations that the Commission either has already revised consistent with the comment or has previously considered and rejected. This memorandum summarizes only new information or new perspectives we have abstracted from the letters.

Disposition of Community Property

The Commission's recommendation relating to disposition of community property is being introduced by Senator Lockyer. One aspect of this recommendation that is causing some dispute is the Commission's proposal that written consent no longer be required for a sale of community property household goods and personal effects. Women's groups have written to the Commission in the past that this unduly weakens the protections in existing law for the wife, and the same view has been expressed to the staff by a consultant for the Assembly Judiciary Committee and even by a member of Mr. Lockyer's own staff. The California Judges Association Family Law Committee believes this change in the law has merit, but some members of the Committee feel that as a trade-off to the elimination of the requirement of written consent, the fiduciary obligations of the spouses to each other should be strengthened.

The staff believes these concerns should not be ignored, and that the Commission should modify its recommendation to alleviate them. One approach, suggested by the judges, is to revise the general duty of good faith between the spouses to apply the standard of prudence required of a trustee and to require the spouses to keep complete and accurate

records of the income received or disbursements made from community assets. The staff believes this change would be unwise and unrealistic in the context of the informal relations and practices of a marriage. A better approach, in the staff's opinion, would be to provide that a spouse may make a unilateral disposition of the household goods and personal effects unless to do so would be contrary to the best interest of the community. This is a reasonable standard that would provide some protection for the non-dominant spouse and yet still allow garage sales and other small transactions by one spouse acting alone. It could be accomplished by revising the recommendation to read:

§ 5125.260. Disposition of household goods

5121.260. (a) Except as provided in subdivision (b), a married person may not make a disposition of the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the person's spouse or minor children, that is community property, without the written consent of the person's spouse.

(b) A married person may make a disposition of property described in subdivision (a) without the written consent of the person's spouse unless the disposition is contrary to the best interest of the community.

Comment. Subdivision (a) of Section 5125.260 continues the substance of former Section 5125(c).

Subdivision (b) is new. It enables a disposition of community personal property without written consent of a spouse in cases where the disposition is not detrimental to the community. This will facilitate a finding of deliberate misappropriation of the property in an appropriate case. Cf. In re Marriage of Moore, 28 Cal.3d 366, 374-375, 618 P.2d 208, 168 Cal. Reptr. 662 (1980). The limitation of subdivision (b) is supplemented by the general duty of good faith between the spouses. Section 5125.130.

Marital Property Presumptions and Transmutations

This recommendation has been introduced by Assembly Member McAlister as Assembly Bill 2274. One feature of the bill is that all property of a married person is presumed to be community, the presumption being rebuttable by tracing the property to a different source or by proof of a transmutation of the character of the property. Judge Fitch (Exhibit 3) comments that this scheme places a substantial tracing burden on the parties, especially as to untitled personal property owned by each prior to the marriage for which there is no sales receipt or negotiated check for that specific item. "Keep in mind that mere proof of ownership prior to the marriage does not overcome the proposed presumption, only tracing and transmutation."

Although the staff believes that tracing includes mere proof of ownership prior to marriage, this is not the first time this concern has been raised. The staff believes we should add to the statute an express statement that the presumption may be rebutted by "proof of ownership of the property before marriage."

Liability of Stepparent for Child Support

This recommendation is being introduced by Assembly Member Agnos. It immunizes the earnings of a stepparent from liability for a child support obligation of the parent. The Judges Association Family Law Committee believes that the proposal needs further work to deal with evidentary problems that arise when stepparents claim a privilege as to financial information and to determine whether the cases in this area can be reconciled.

The staff does not believe either the cases or the statutes in this area can be reconciled; the confusion in the law is one of the reasons the Commission is proceeding with a clear statement of the rules governing liability. The privilege question arises where the court seeks to take into account the earnings of the stepparent for purposes of modification of a child support award. We are not attempting to deal with this issue in this recommendation; we are involved with stepparent liability only as an offshoot of the Commission's general recommendation on liability of marital property for debts. The staff recommends that the Commission stay away from the broader issues at this time.

Reimbursement for Educational Expenses

We are in the process of finding an author for the Commission's recommendation on reimbursement of educational expenses. The Assembly Judiciary Committee is working on a bill that combines the Commission's recommendation with an additional provision allowing the court to make an additional discretionary lump sum award for enhancement of earning capacity.

Exhibit 5 includes comments of the California Family Women critical of the recommendation. The comments are not easily summarized, but the staff believes the gist of them is that reimbursement for educational expenses is too limited a remedy--the community has made an investment in one spouse and should be entitled to realize the profits of the

investment in the form of the future earnings of the spouse. This is a basic policy difference, and the staff recommends no change in the Commission's recommendation.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT I

CHAMBERS OF
The Superior Court
1540 N. MOUNTAIN AVENUE
ONTARIO, CALIFORNIA 91762
KENNETH G. ZIEBARTH, JR., JUDGE

October 20, 1983

Hon. Fred W. Marler, Jr.
Judge of the Superior Court
County of Sacramento
720 - 9th Street
Sacramento, CA 95814

Re: Review of Tentative Recommendations of California Law Revision Commission

Dear Fred:

As the new president of CJA you may be aware that the Family Law Committee of CJA has been asked to review four different Tentative Recommendations of the California Law Revision Commission which relate to the field of family law. Those Testative Recommendations have reference to the following subjects:

1. Disposition of Community Property
2. Marital Property Presumptions and Transmutations
3. Liability of Stepparent for Child Support
4. Awarding Temporary Use of Family Home

With regard to the first Tentative Recommendation, my predecessor as chairman of the CJA Family Law Committee, Justice Don King, asked me to review that particular document for the benefit of the committee. My review was contained in my letter to Don dated August 23, 1983, a copy of which is enclosed herewith. At our organizational meeting at Irvine on September 13, 1983, the members of the Family Law Committee discussed this Tentative Recommendation. The consensus of the members present was that this CLRC proposal had merit -- particularly with respect to eliminating the necessity for written consents by spouses to dispose of personal property during a marriage. It was felt that because of the changes in the law in 1975 which made both parties co-managers of the community property, the requirement of written consent to sales, transfers, or gifts of same was no longer necessary. However, some members of the committee felt that as a trade-off to the elimination of the requirement of written consent, the fiduciary obligations of the spouses to each other should be strengthened. Present law does not hold each

spouse to the standard of the prudence required of a trustee nor is either spouse required to keep complete and accurate records of the income received or disbursements made from community assets. (See Williams v. Williams (1971) 14 Cal.App.3d 560, 567.)

Concerning the second Tentative Recommendation, it appears to be an effort to correct some of the problems created by the Lucas decision. Don King has asked Judge John Fitch of the Fresno Superior Court to review that CLRC proposal for the benefit of the Family Law Committee. He responded with his letter to Don dated August 30, 1983; a copy of that letter is enclosed. Our committee members were not able to discuss this CLRC proposal at our Irvine Meeting because none of us had access to copies of the proposal. I subsequently received a copy from CLRC and sent out copies of same to all of our members for their review and comments. Those members who have responded either by letter or by phone are in agreement with John Fitch's analysis. John recommends our approval of the proposal with some modifications as set forth in his letter. However, you should keep in mind that the Legislature recently enacted AB 26 (McAlister) which was signed by the Governor back on July 23, 1983 which had as its objective the overruling of the Lucas decision. This new legislation, which will become effective next January, amends Section 5110 and adds Sections 4800.1 and 4800.2 to the Civil Code. The bill changes existing law by providing that for purposes of dividing property upon a marital dissolution or legal separation, any property acquired by the parties during the marriage in joint tenancy is presumed to be community property. (This presumption may be rebutted by proof of a contrary intention by a statement in the deed or other evidence of title.) This bill also provides that in the division of community property under the Family Law Act, a party may acquire a right to reimbursement for his or her separate property contributions to the acquisition of any item of property, unless a valid waiver of that right has occurred. It would appear that the enactment of AB 26 may have eliminated to a great extent the need for this second CLRC proposal.

As to the third CLRC proposal, we were able to discuss this one at our Irvine meeting. During our rather spirited discussion of this proposal, Judge J.E.T. Rutter from the Orange County Superior Court pointed out several ambiguities in the proposed statutes. (He has since sent me a letter dated September 20, 1983 in which he discusses this matter in some detail. A copy of that letter and its enclosure is also

enclosed herewith.) The result of our discussion was to agree that this proposal needs further work to deal with the evidentiary problems which arise when step-parents claim a privilege as to certain financial information. We also felt that CLRC needs to address the question of whether the Shupe decision can be reconciled with the Gammel, Fuller and Haven decisions which preceeded it.

Regarding the fourth and last Tentative Recommendation, copies of same were recently sent out by me to all of our committee members. From the limited responses that I have received, there seems to be wholehearted support for this proposal -- particularly to the extent that it seeks to overrule the effect of the Escamilla decision. Judge Domnitz from San Diego comments in a letter to me that "(A)fter the issuance of the Escamilla case, I found it extremely difficult to settle family law matters regarding the community home since the husbands, who were normally the non-custodial parent, would not agree to allow the wife to live in the house with 'another man'." Judge Jerry Ragan from San Mateo County was also in agreement with the proposal in principle, but he suggested that in paragraph (d) of proposed Civil Code §4708, the phrase "the spouse and" be deleted as being inconsistent with the rationale of the exception to the general rule which allows the court to set apart the family dwelling for the use of the custodial parent and minor children as a form of child support. I believe that Jerry's suggested modification has real merit.

On behalf of the members of the 1983-84 CJA Family Law Committee, I would recommend that the CJA Executive Board indicate to CLRC the general approval of CJA to the first, second and fourth proposals along with the suggested modifications noted above. I would recommend that CJA indicate that it cannot approve the third proposal in its present form for the reasons noted above.

If you or any of the members of the Executive Board should need any additional information concerning any of these CLRC proposals, please feel free to give me a call at 714/988-1370.

Very truly yours,

KENNETH G. ZIEBARTH, Chairman
CJA 1983-84 Family Law Committee

KGZ:ws

cc: Ms. Connie Dove, Executive Director, CJA
Hon. William A. Stone, Liaison
w/enclosures
Members of the CJA Family Law Committee

EXHIBIT 2

CHAMBERS OF
The Superior Court
1540 N. MOUNTAIN AVENUE
ONTARIO, CALIFORNIA 91762
KENNETH G. ZIEBARTH, JR., JUDGE

August 23, 1983

Associate Justice Donald B. King
Court of Appeal
First District, Division Five
State Building - Civic Center
San Francisco, CA

Re: California Law Revision Commission Tentative Recommendation Relating to Disposition of Community Property

Dear Don:

Please excuse my delay in responding to your letter to me dated July 22, 1983 regarding the above-referenced subject. Since July 1st I have been the Supervising Judge and Master Calendar Judge here at our Ontario branch court and the press of other duties has kept me from responding to you earlier.

I have had the opportunity to review this tentative recommendation of CLRC. What this tentative recommendation attempts to accomplish is to clarify community property law here in California, and also to implement the new system of equal management and control of community property by married persons that we have had since 1975. (See 1973 Cal. Stats. Ch. 987, operative January 1, 1975.) Under the new system, either spouse may manage and control their community property, subject to a reciprocal duty of good faith and also subject to a number of limitations on the ability of a spouse to control specific types of community property or to dispose of specific types of community property. This proposal would not only clarify community property law, but would also eliminate some of the aforementioned limitations which are no longer needed in California law because of the changes in our law that became effective in 1975.

This CLRC proposal suggests changes in the following statutes for the reasons indicated:

(A) Civil Code §5106 - would be amended merely to correct section references.

(B) Civil Code §5113.5 - would also be amended merely to correct section references.

(C) Civil Code 5125 - would be repealed because the substance of its various subdivision would be continued by other statutes. The substance of subdivision (a) would be continued in new Sections 5125.120 (either spouse has management and control) and 5125.210 (power of disposition absolute); the substance of subdivision (b) would be continued in new Section 5125.230(a) (gifts) and subdivision (c) would be superseded by new Sections 5125.240 (disposition of family dwelling) and 5125.250 (encumbrance of household goods). The substance of subdivision (d) would be continued in new Section 5125.140 (community property business) and the substance of subdivision (e) would be continued in new Section Section 5125.130 (duty of good faith).

(D) Civil Code §§ 5125.110 - 5125.299 would be added. Those particular sections and their respective titles would be as follows:

(1) Civil Code §5125.120. Either spouse has management and control

(2) Civil Code §5125.130. Duty of good faith

(3) Civil Code §5125.140. Community property business

(4) Civil Code §5125.150. Where spouse has conservator or lacks legal capacity

(5) Civil Code §5125.210. Power of disposition absolute

(6) Civil Code §5125.220. Person in whose name title stands must join

(7) Civil Code §5125.225. Adding name to record title to real property

(8) Civil Code §5125.230. Gifts

(9) Civil Code §5125.240. Dispostion of family dwelling

(10) Civil Code §5125.250. Encumbrances of household goods

(11) Civil Code §5125.260. Avoiding and setting aside disposition

(12) Civil Code §5125.299. Transitional provisions.

(E) Civil Code §5127 - would also be repealed in its entirety because the substance of its various provisions would be superseded by new Sections 5125.10, 5125.220, 5125.230 and 5125.240.

(F) Civil Code §5128 - would also be repealed in its entirety because subdivision (a) would be continued by new Section 5125.150 (Where one spouse has conservator or lacks capacity). Subdivisions (b) and (c) were merely elaborations of subdivision (a) and would not be continued because they are unnecessary.

(G) Corporations Code §420 - would be amended merely to correct a section reference.

(H) Probate Code §3071 - would be amended merely to correct a section reference.

(I) Probate Code §3072 - would also be amended merely to correct a section reference.

In substance, these various proposed statutory changes would eliminate the present requirement for written consent for the sale or conveyance of all community property except for the community real property, family home, or a gift of any community real property. Any community personal property could be sold or transferred without the written consent of the other spouse and could also be given away if the gift is usual or moderate in the circumstances of the particular marriage. The proposed law continues without changing the duty of each spouse to exercise good faith with respect to the other spouse in the management and control of their community property. However, the proposed law does not impose a fiduciary standard requiring each spouse to be as prudent as a trustee nor require the keeping of complete and accurate records of income received and disbursed.

I agree with the objective of the proposal to eliminate the necessity of written consent before any community personal property can be sold, transferred or given away. However, I am not sure that it is fair and reasonable not to require the spouse making such sale, transfer or gift of community property to adhere to a fiduciary standard on him or her and require him or her to keep complete and accurate records of any income

received from any sale or transfer or of any community property given away.

I would recommend that our CJA Family Law Committee support the objective of the proposal to eliminate the requirement of written consent of both spouses for the sale, transfer or gift of community personal property. However, the proposed Section 5125.130 which now reads "Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property", should have an additional sentence added which would impose the standard of conduct on each spouse that would be applicable to a fiduciary in an investment contest. In other words, the holding of Williams v. Williams (1971) 14 Cal.App.3d 560, 567 should be corrected by statute. (Williams held that a husband's duty not to obtain an unfair advantage over his wife by reason of his (pre-1975) control of the community property did not require him to be prudent as a trustee or that he be required to keep complete and accurate records of the income be received and the disbursements that he made.)

In giving up the protection afforded by the present requirements of written consent, it seems to me that each spouse should have the additional protection which would result from each spouse being held to the standard of good faith imposed on fiduciaries in general.

I hope that the contents of the letter satisfy your request and will permit you to make a recommendation to the new Family Law Committee concerning this particular proposal by the Law Revision Commission.

Best personal regards.

Very truly yours,

KENNETH G. ZIEBARTH
Judge of the Superior Court

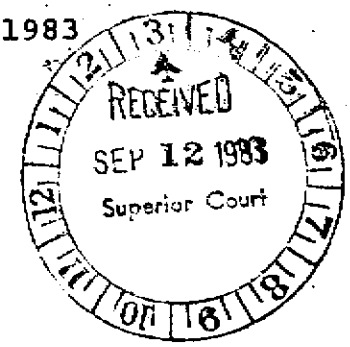
KGZ:ws

EXHIBIT 3

Juvenile Court
COUNTY OF FRESNO
744 SOUTH TENTH STREET
FRESNO, CALIFORNIA 93702

CHAMBERS
OF THE
PRESIDING JUDGE

August 30, 1983



Donald B. King
Associate Justice
Court of Appeal
State Bldg.-Civic Center
San Francisco, CA

Dear Don:

The task undertaken by the Law Revision Commission regarding presumptions relating to marital property was far-reaching. In general, I believe we should approve of their conclusions and their suggestions for revision with some modifications.

The following are my comments, section by section.

Section 3444. Eliminate the words "this chapter" and substitute "Civil Code Section 3440." This precludes one from having to read the entire chapter of code sections before discovering that only section 3440 is affected.

Section 5110.110. This section should be entitled "Definition of Community Property." The phrase "community property shall be defined as" should be inserted before the words "all real property and all personal property..."

This section is a definition, not a presumption, and should be clearly labeled as such. The distinction is important. Definitions are informative. Presumptions are evidentiary tools. They are not necessarily the same.

In accordance with the discussion by the Commission, I have no particular quarrel with the idea of extending the definition of community property to include out-of-state realty.

Commas should be placed on either side of "wherever situated," so that it is absolutely clear that this phrase relates to real property as well as personal property.

Section 5110.620. The use of the word "owned" rather than "acquired," constitutes a sweeping change to existing community property law. Where a marriage is of lengthly duration, the "owned"

concept may play no real havoc and might even be beneficial at the time of divorce. However, the "owned" concept, upon termination of a short marriage, places a substantial tracing burden on the parties, especially as to untitled personal property owned by each prior to the marriage for which there is no sales receipt or negotiated check for that specific item. Keep in mind that mere proof of ownership prior to the marriage does not overcome the proposed presumption, only tracing and transmutation (see 5110.610b.).

Accordingly, I suggest we stick with the tradiitonal "acquired" concept, and substitute "acquired" for "owned" in this proposed section.

Also, the "owned" concept of 5110.620 is at odds with the "acquired" definition of community property set forth in 5110.110.

Section 5110.630(a). If a husband wishes to quit claim the community home to his wife as her sole and separate property what is he to do? Tracing would reveal the source as community property. Title is of no consequence. It appears, however, that the conventional quit claim deed would meet the standards of a "transmutation" as set forth in proposed section 5110.730, i.e. a writing signed by the party adversly affected.

Although form of title itself is of no consequence, the deed (writing plus a signature), is of evidentiary consequence. Therefore, it appears that this proposed section is workable and indeed avoids victimizing the passive spouse who does nothing while the aggressive spouse runs about acquiring community property in his or her name alone.

Section 5110.630(b). Perhaps a semicolon, instead of a period, after "title" and before "If," would avoid any possible misinterpretation of the fact that the second sentence of (b) pertains only to death and not to divorce.

Section 5110.640. Here we have, again, another sweeping proposal for revision. Interspousal gifts, as proposed, are not the separate property of the donee spouse; rather, it is presumed that interspousal gifts of stock, bonds, cash, a T.V. set, a stereo, a car, a home, etc. are or remain community property. The exception is the gift of a tangible article of a personal nature used principally by the donee, viz, jewelery, clothing and other wearing apparel. Even as to the latter, however, the exception disappears if the gift is of substantial value considering the "circumstances" of the marriage.

Again, the presumption of community property is rebutted by tracing or transmutation (writing confirmed by spouse adversely affected).

Despite the substantial change in community property law that would be effected by this proposed section, I rather like it. Again and again we are confronted as judges with the situation where the only time spouses can afford to purchase a gift for the household is at

Christmas or other special occassion. The new T.V., a "gift" to dad for Father's Day, is not really dad's sole and separate property, but is a gift to the "community," for use of mom and the kids as well.

I believe this proposed section will avoid alot of meaningless bickering as to the small stuff. As to the big stuff, assuming a gift is really intended, it does't seem unreasonable to require something in writing signed by the donor.

Section 5110.730. This proposal would eleminate California's "pillow talk" doctrine forever, and I say "good!" In fact, since transmutation of both real and personal property must be in writing, why not require the writing to be signed by the party adversely affected?

As to the exceptions of interspousal gifts of clothing, wearing apparel, jewelery, or other tangible articles of a personal nature, the remainder language from section 5110.640(b) should be added to this section to be consistent, namely: "used solely or principally by the person, except to the extent that the gift is substantial in value, taking into account the circumstances of the marriage."

Sincerely,

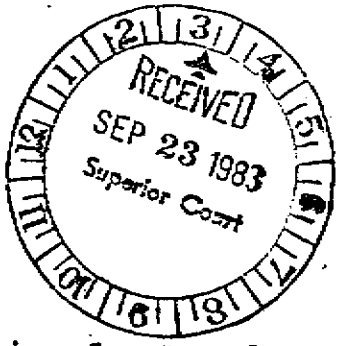
John Fitch
Presiding Judge
Juvenile Court

Superior Court of the State of California
County of Orange
700 CIVIC CENTER DRIVE WEST
Santa Ana, California 92701

Chambers of
J. E. T. RUTTER
Judge of Superior Court

(714) 834-3734

September 20, 1983



Honorable Kenneth G. Ziebarth
Judge of the Superior Court
1540 North Mountain Avenue
Ontario, CA 91762

Re: Tentative Recommendation for Amendments to Sections 5120 and 5120.150 of the Civil Code

Dear Ken:

I thought I would take the opportunity to put something in writing on this particular subject so it won't be necessary to poll me as to my feelings and if you wish to paraphrase, copy or otherwise pass on a portion of these comments, please feel free to do so.

My first comment is one which I have made before: I agree that some clarification is needed in this field. The whole subject of responsibility of the second community for the obligations of the parents for child and spousal support should be reviewed but I object to doing it piecemeal. Much as I hate commissions, I believe that some deliberative body should be set up to define the questions which need to be asked and then to propose answers. Legislation comes later. For example: What liability should a subsequent spouse take on or be subjected to when the other spouse has obligations to children of another union? What about spousal support? Should we distinguish arrearages from future payments? Should we distinguish present support levels from future increases? If marriage is a civil contract anything we do (and indeed anything we have already done) adds a term to the contract. Are we going to add terms to the contract whether the parties know about it or understand it or not? If so, are we going to make those terms apply unless they agree to the contrary as between themselves or despite any agreement they may have between themselves? Should such an agreement be oral or

in writing? To what extent should the custodial parent of a spouse's children by a prior marriage be disadvantaged by the second marriage and the creation of the new community? To what extent should she (and the children) be able to claim an advantage as a result of increased earnings of the new family or a buildup of community? Should amendments to the marital contract in the second marraige be permitted to affect these rights of the custodial parent with children? To what extent should the non-custodial parent benefit or be disadvantaged by the remarriage of the custodial parent and what duties devolve upon a stepparent who has married a custodial parent with children? May the payor father, for example, lower his obligation because the payee mother has married a very high wage earner? If not, may he avoid an increase on the same theory? May he use his increased expenses as the practical support of two stepchildren of his new wife who cannot collect her child support, as a reason for lowering support for his children or resisting a request for an increase? Should we approach this problem at all unless we are prepared to address the evidence question? If, for example, the answer is that we will balance the equities, the benefits and the hardships between the various family units (which is an answer which I tend to favor) then we must also provide that all information including income and tax returns, etc., etc., is available to both contesting parties. The questions above (and some others that could be asked about the moral duty to support adult children and aged mothers) indicate that we have never really approached the sociological and economic problem caused by the extended family. Until we do this there is little point in attempting to pick off the most irritating pieces of the problem with no consistent philosophy. As to the proposed legislation itself, see the attached addendum.

Hope the attachment is helpful (and intelligible).

Very truly yours,

J.E.T. Rutter
Judge of the Superior Court

JETR:cp
Attachment

ADDENDUM -- SPECIFIC ANALYSIS OF PROPOSED SECTIONS

Preface

It appears that the purpose of these sections is to protect the second spouse within reasonable bounds. The question is whether or not there is an attempt to bite off more than one can chew.

Section 5120: I suppose it is appropriate to draw distinction between having earnings "available" and having those earnings taken into consideration in adjusting the obligations between members of two or more families and having earnings "liable". I presume the latter is intended to exempt those earnings from execution as community property liable for a debt of the other spouse. That is really such a tiny part of the problem, however, that I wonder if it's worth doing. What about the joint bank account? How about the jointly owned car? What of the residence with some value above homestead protection held in both names as joint tenants which is presumptively community property but in which the other spouse will, after January 1, 1984, have some right to trace separate property? What about claims of exemption in which the creditor seeks to dispose of the debtor payor spouse's claim of need by bringing up the earnings of the other party which contribute to the same need? My point is, again, that we have not approached the whole problem. The payor owns half the earnings of his or her spouse and vice versa. What help is it to say that the payee spouse can't go after them directly?

CC 5120.150: Presumptively the purpose of this wording is to treat the installment judgment for child support the same as other installment obligations arising before marriage. To the extent this protects earnings of the non-obligated spouse is consistent with the previous section. That doesn't say anything about the liability of the community so it is subject to the same criticism I have of the first part. Passing on, however, it has some other implications. If the community is liable for contracts entered into after marriage under 5116(c), what happens to a stipulated modification after the second marriage? What about a full settlement of all issues, including child and spousal support by husband and wife No. 1 after he has had a bifurcation and married wife No. 2?

Section (b): I think what the draftsman was attempting to do was to express the policy set forth in Weinberg that if the obligor spouse has the means, through his separate property, to pay his support obligation (child or spousal), then he ought to do so and not impoverish the community for what is morally (and legally(?)) his obligation. When you look at the facts of Weinberg, that sounds fair but this rule encompasses all situations including, of course, those in which the second spouse, with equal management and control, with full knowledge of the nature of the separate property of obligor spouse (and perhaps even writing the monthly checks) may come back against him at some time in the future. Is that such a good idea? (Bear in mind that any attorney who fails to investigate the question and raise it as an asset

of the community is likely to be guilty of malpractice.) After passing the "anti-Lucas Legislation", do we really want to interfere once again in the unspoken understanding that exists between spouses? When there's no rule about it and the non-obligor second spouse doesn't complain, the question seldom comes up. If we have to pass a rule, she raises the claim and he cries "waiver and estoppel" and the battle is joined. The battle is joined as to what? The last payment? The last three years' payments? All payments (on the theory that this was perhaps concealed or unknown)? Do we really want to identify this use of community funds as an abuse which is so widespread as to need legislation? Isn't Weinberg enough?

The second point has to do with the draftsman's problem which I really cannot solve. Philosophically the legislation is intended to say that if the obligor spouse could reasonably have paid the payment and satisfied the obligation, he should have done so. As a practical matter, the draftsman may have been thinking that that is a question that would drag people to court so he stated that this applied "at a time when non-exempt separate income of the person is available". Wait a minute -- why should it apply only to non-exempt income? If he has the ability, he has the ability. As a matter of fact, what would we do with the question of "income"? If he's an investor like Weinberg, should we look at the net cash flow monthly to see if he could have paid? Do we look at his gross income, even if he has a negative flow? If he's a commission salesman, do we look at his monthly income, his yearly income, or when the escrows close? If he has it all in CD's which become due

after the execution was levied on the house, is he home free?

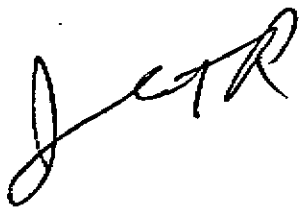
Does this apply to each payment? Do we have to do a marriage of See, accounting for each payment? Does it apply even when the community property used, had been separate before it was deposited in the joint bank account (but has lost its separate character under Marriage of Hayden)? As a matter of fact, why is this different than an installment payment due to the bank which husband or wife brought into the marriage? I think we've gotten into deep water.

Lastly, this sub-section provides for reimbursement which I do not understand: if, philosophically we say that obligor spouse should have paid a certain $1,000 support obligation from his separate funds and he should reimburse the community because he paid it from the joint account, why should the community get reimbursement "not exceeding one-half the community property so applied". It should be entitled to $1,000 to be made whole, not $500.

Excuse me, I just noticed something else! The proposed section states that the community is entitled to "reimbursement from the person in the amount of the separate income" (I suppose that means the amount that the obligor could have paid). To me, that means that we must discover on a payment-by-payment basis, not merely that the obligor has separate income which could have been used but how much he had available each month at the time the payment was made from community and not separate. Horrors!

(c) I like it..... but, courts would presently take earn-

ings of the second spouse on both sides into account (and regularly do so where information is available) were it not for the evidence problem presented. Privileged tax returns, privileged W-2's (?), privilege not to be called as a witness, claims of irrelevancy due to ante-nuptial agreements, objections of "hearsay" when one of the parties is asked what the spouse earns. I suggest we try to solve that problem first. I think the trial judge can determine what's relevant.



California Family Women

November 26, 1983

Members of the Assembly Committee on the Judiciary:

We respectfully ask you to allow us to clarify the *fundamental issue* involved in AB 525: the issue which has somehow escaped the attention of the Assembly Judiciary Committee in the hearings on this bill.

It is that of the *equality of the marriage partnership*: a partnership which cannot be stable unless husband and wife mutually recognize their *equal worth* to the family, society and posterity *irrespective of role*. It is not only wrong, but irrational, under no-fault divorce law, to retrospectively *deny* this equality if the marriage ends in divorce. And this is precisely what is happening under present law, despite the state's wise affirmation, inherent in community-property law, of the equal worth of husband and wife *while the marriage was intact: The state is party to violation of the implicit contract, provided by the state, under which the marriage existed.* This violation, economically disastrous for women, is having consequences not only in their increasing distrust of men (called "the gender gap"), but also in their lack of respect for governmental authority.

AB 525 carries the fundamental principle inherent in community-property law to its logical conclusion. Any proposal suggesting *less* than what this bill would require and allow falls short of affirming the *equal worth* of husband and wife, denies the no-fault principle and fosters the arrogant notion that one's *self* is better than one's spouse.

Is the state going to continue with a family-law milieu which, dovetailing with the economy, is forcing both husband and wife out of the home? Or will lawmakers change this to permit them, as far as family law is concerned, to make an uncoerced *choice*, without potential economic penalty to either, as to how they live their lives, subject only to the arrangement they make *between themselves* (and of course to their not becoming a burden to the state)? *Without* AB 525, *there is no viable choice*.

May we look to you to cast your vote *for* choice: *for* AB 525.

Sincerely,

CALIFORNIA FAMILY WOMEN

Patricia L. Hamrick

(Mrs.) Patricia L. Hamrick
President

1057 Middlefield Road / Palo Alto, CA 94301 • 415/323-2144, 322-5178, 327-3496

COMMENTS ON TESTIMONY AT THE ASSEMBLY JUDICIARY COMMITTEE INTERIM HEARING IN SAN DIEGO ON THE ISSUES INVOLVED IN ASSEMBLY BILL 525, November 16, 1983:

To require that the community reimburse the earner spouse for community funds which he/she had generated for the education of the other spouse, whose career was thus enhanced during the marriage, is to retroactively make *separate* income of what was *community* income and thus to undermine the sound principle of the equality of the marriage partnership -- in reality, to make a mockery of marriage. To "pay off" Janet Sullivan in this manner would be to outrageously belittle her role as wife and mother and to overlook the myriad intangibles that caused Mark Sullivan to choose to marry her in the first place -- presumably as *worthy* of him (for why would he choose to marry someone "beneath" himself?).

To require that compensation be made to the nonstudent spouse on the basis of the "loss" that the community incurred by the lack of the student spouse's continuous full-time gainful employment is a totally speculative approach having no merit whatever. For one thing, that which was never in existence can never be *lost*. If the "loss" *per se* were a sound reason for compensation, it follows that it should apply to a "loss" to the community incurred because of a spouse's nonemployment for *any* reason, such as having children and remaining in the home to care for them, instead of working at a paying job. The absurdity of establishing such a legal precedent is apparent at once.

The suggestion of limiting compensation (*however* made) to cases wherein the community has not benefited from a degree acquired during the marriage is arbitrary. And arbitrariness is what clogs the courts with litigation. Would sharing the benefits of a career for only one year be sufficient compensation for the spouse who had helped the other gain the degree? Two years? In the context of the jointly incurred responsibilities of the marriage, is the non-degreed spouse to be regarded as of no help in the advancement of the career *subsequently* to the attainment of the degree?

The clearcut principle underlying community-property law -- namely, that husband and wife are *equal in worth irrespective of role* -- *demands* that they be legally obliged and entitled to share 50-50 after divorce whatever economic benefits were generated in the operations of their marriage partnership, whether such benefits were acquired or *accrued* ("accrued" signifying that the *means* to their realization was gained *prior* to their realization). These include the earnings realized as accrued benefits in consequence of the earning-capacity *increase* gained by each spouse in those operations. The increase represents an *investment* of the partnership: one which neither spouse had before the marriage and to which the two spouses' contributions -- whether direct or indirect, financial or nonfinancial -- were, according to the fundamental principle underlying community-property law, *equal in worth*. AB 525 is the *only* sound way of dealing with this investment on dissolution of the marriage.

- Elaine Elwell

11/19/83

3588 Payne Avenue
San Jose, CA 95117
November 16, 1983

To Whom It May Concern:

I was married for 20 years. My ex-husband and I are parents of five children, two of whom are now adults. I was a homemaker during most of our marriage; however, beginning when our first baby was 6 months old, I left her with a babysitter for a few hours each weekday and took a part-time job to help pay the family's expenses while her father attended college. My care of his child while I was *not* at my part-time job *also* helped him financially, by making a paid caretaker unnecessary during that time. With veterans' benefits, he concentrated on full-time studies and was not gainfully employed during most of his four-year course. Upon receiving an engineering degree, in June 1961 (when, also, our second child was born), he began a highly successful, rapidly advancing career.

Without any warning, or any provision for us, he left our five children and me in March 1973, when the youngest, Katrina, was 2 weeks old (that's 2 *weeks* old). From his monthly salary of $3,750, the court awarded me child support of $150 for each child, and spousal support of $250: $1,000 a month for six people. When Katrina was 3 years old, my ex-husband (who had remarried) petitioned the court for, and was awarded, custody of our son, then 7.* Our four daughters remained with me, with the court increasing child support to $195 for each of *three* of them. The eldest had turned 18 a few months earlier and, although she was still financially dependent on me, I no longer received anything for her. Concurrently with all of this, the court reduced my spousal support to $125.

Total spousal and child support now came to $710 a month, or $8,520 a year: 14 percent of the $60,000 annual salary of the children's father. His earning capacity when we married had been scarcely more than the equivalent of the present minimum wage. The increase gained during our marriage had been about $36,000, or 80 percent, of the $45,000 annual salary he was receiving when he left the family.

I was now told to "rehabilitate" myself (as though I were some sort of derelict) and get a job. At taxpayers' expense, I enrolled in a word-processing training program, receiving a CETA subsidy of $300 a month for six months. I then began a series of dehumanizing word-processing jobs, attempting to advance in my new so-called "career" while still carrying out my domestic responsibilities as best I could. None of the jobs, even with my $125 monthly spousal support, has enabled me to set aside anything for the future. With my daughters and, earlier, my son, I have had a living standard far below that achieved during my marriage. Nor have I been able to afford a single vacation in any of the brief periods allotted for this in a "career" that was launched but a relatively short time ago.

Meanwhile, my ex-husband, long established in *his* career, has had extensive vacations in Europe, Hawaii and the Far East and has acquired valuable real-estate properties. He has also been able to acquire sub-

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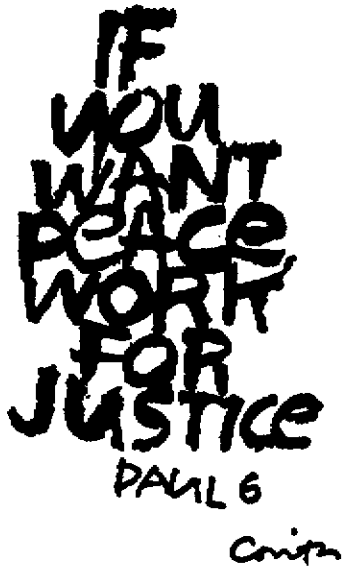
*An earlier version of this letter, mailed to the members of the Judiciary committees and several other persons, gave Katrina's age at this time as 5. That was in error, as she was in fact 3.

stantial retirement interests, based on earnings which include those realized from his earning-capacity *increase* gained in the operations of our marriage partnership.

I regarded our marriage, from its outset, as an *equal* partnership. So did principles of community-property law, *as long as it was intact.* My husband was enabled to concentrate on his career full time and continuously during our marriage (and largely for three years afterward) because of my having taken on our domestic responsibilities: responsibilities incurred *jointly* by, and belonging *equally* to, *both* of us. I was enabled to support *him* in *this* manner because he supported me financially. And *my presence in the home was of no less worth to the family, society and posterity than was his presence in his career field.* My equality with him in *worth* entitled me, in accord with the expectation implied by our partnership, to share with him *on an equal basis* whatever economic benefits -- whether acquired or *accrued* -- were generated by the *operations* of the partnership. The post-divorce earnings realized as a result of his earning-capacity *increase* -- an increase gained *in the context of the responsibilities of our marriage* -- are *accrued* benefits of those operations.

It might be said that my half of the interests in the increase was earned during half of my husband's workday: the half released to him, in accord with our mutually agreed-upon arrangement, by my taking on *his* half of our jointly incurred domestic responsibilities during that time -- while I was *not* pursuing a paying career of my own.

I am angry over the hypocrisy of law that retrospectively *denies* the equality of my *worth* with that of my husband. . . . angry over having been placed in retroactive *indentured servitude* to him for the duration of our marriage (and largely so for three years afterward). . . . angry over having been forced into the position of a beggar in the courts. . . . angry over the *put-down* implicit in the courts' treatment of me under law that is *supposed* to treat the two parties to a divorce as having had equal worth and dignity throughout their marriage, with no fault charged to *either* party, but which has treated me as though *I* had been the culprit. And I am angry that millions of other women have been treated with the same kind of injustice -- in short, *exploited!*



JoAnn Mader

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