#D-312 9/17/80

Memorandum 80-88

Subject: Study D-312 - Enforcement of Judgments (Liability of Marital Property for Debts--Comments on Tentative Recommendation)

This summer the Commission distributed for comment its tentative recommendation relating to liability of marital property for debts. A copy of the tentative recommendation is attached. The major features of the tentative recommendation are:

(1) The tentative recommendation preserves California's existing system that all the community property and the judgment debtor's separate property are liable for debts.

(2) The tentative recommendation eliminates the few situations in California law where a priority scheme requires a creditor to exhaust one class of assets (e.g., separate property of the judgment debtor) before proceeding to another class of assets (e.g., community property).

(3) The tentative recommendation reverses the existing provision that protects the separate property of a nondebtor spouse after separation from liability for the support of the debtor spouse unless support is stipulated in the separation agreement--under the tentative recommendation, the separate property would be liable unless support is waived in the agreement.

(4) The tentative recommendation codifies the rule that the Uniform Fraudulent Conveyance Act applies to interspousal transfers and transmutations, but would impose no further limitations pending a broader study of interspousal relations.

(5) The tentative recommendation abrogates the rule that the creditor may seek former community property in the hands of the nondebtor after dissolution and division of assets--the court in dividing the property would assign the debts for payment taking into account the rights of creditors and the person assigned the debt would be personally liable.

Other lesser and clarifying changes in the law are also proposed.

The Commission has received the letters appended as Exhibits 1-4 commenting on the tentative recommendation. The comments are analyzed

below following the order of the provisions in the tentative recommendation. We expect also to receive comments from the Commission's consultants, Professors Reppy, Riesenfeld, and Bruch, when the tentative recommendation is considered at the October meeting. In addition, Professor Bruch will provide material relating to the questions specifically reserved in the tentative recommendation--whether there should be a reimbursement right between spouses when a "community" debt is satisfied out of separate property and vice versa, and whether there should be any further limitations on the right of interspousal transfer or transmutation of property.

General observations. A practicing attorney, Mr. Dennis Cornell (Exhibit 4), agreed with the general trend of the Commission's proposals and felt that they would encourage the extension of credit to individual spouses. Another practicing attorney, Mr. Luther Avery (Exhibit 2), disagreed with many of the Commission's proposals and suggested that we seek the comments of the State Bar Family Law Section. In fact, we have sought the comments of the State Bar and Ms. Sandra Musser (Exhibit 3) has replied on behalf of the Executive Committee of the Family Law Section. They feel that the area of debts and community property and marital dissolution is one that needs a thorough examination and new legislation, and they have offered us their assistance in this area (an offer we have gladly accepted).

Civil Code § 4800. As a part of its tentative recommendation, the Commission proposed that upon dissolution the allocation of debts to the spouses should take into consideration the rights of creditors and the debts should be divided in a "just and equitable" manner. The intent of this proposal was to permit the court to assign debts in such a way that the person to whom a debt is assigned has sufficient assets to be able to pay the debt. This may result in an unequal division of the community property.

This proposal was opposed by the State Bar Committee (Exhibit 3) because it allows or favors an unequal division and could be interpreted as allowing an award of debts based on fault, which would be a retrogression to pre-1970 status. "We see this proposal as a return to the ways of the past. The house to the wife, the business and the debts to

the husband. It has been a long battle to convince the trial court that equal division meant equal and that the marital community could not be divided without valuing the assets." A similar view was stated by Mr. Cornell (Exhibit 4), who noted the tendency of the courts to find amendments such as the one proposed to be a directive for less than an equal division of property. He suggests that the amendment be revised to emphasize that the division is one that "takes into account the distribution of both the assets and the obligations and divides the net result equally."

The staff agrees with these comments. Our objective here should be to help assure payment to the creditor following dissolution of marriage, rather than to encourage or even permit an unequal division of assets. Our commentators point out that the court has authority to take into account the rights of creditors in assigning debts to the spouses absent any amendment to Civil Code Section 4800. However, in Section 5120.050, we preclude the creditor from reaching former community property after dissolution, so we do need specific language directing the court to consider the rights of creditors in assigning the debts. The staff suggests the following language:

> (5) In dividing the debts the court shall take into consideration such factors as the earning capacity of, and the exempt character of property received by, the party to whom a debt is assigned so as to protect the rights of creditors to the extent practical, provided the division of the property is equal.
>
> Comment. Paragraph (5) is added to Section 4800(b) to make clear the court's discretion to allocate debts in a way that will protect the rights of creditors. However, the division of debts must be made in such a manner that the totals of the assets awarded to the parties after deduction of the obligations allocated to the parties are equal. See, e.g., In re Marriage of Fonstein, 17 Cal.3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976) (equal division required); In re Marriage of Eastis, 47 Cal. App.3d 459, 120 Cal. Rptr. 86 (1975) (unequal division in "bankrupt family" situation); In re Marriage of Schultz, 105 Cal. App.3d 846, ___ Cal. Rptr. ___ (1980) (court has no discretion to adjust the division of the residual assets to reflect equitable considerations).

A related problem is whether "separate" and "community" debts should be distinguished at dissolution, with the separate debts assigned to the person who incurred them and the community debts divided. This problem will be dealt with later in connection with reimbursement rights

between spouses and in connection with characterization and division of property at dissolution.

§ 5120.010. Liability of community property. Section 5120.010(a) provides that all of the community property is liable for debts of any kind, tort or contract, incurred before or during marriage. Mr. Avery (Exhibit 2) is opposed to this basic scheme. He believes that it is based on a false assumption of equal management and control of community property, whereas in practical fact there is not equal management and control--either one spouse manages and controls the community property or each spouse manages and controls the community property acquired with that spouse's earnings. As a consequence, Mr. Avery does not believe that the community property should be liable for the debt of a spouse unless the other spouse has signed for the debt or unless the separate property of the debtor is exhausted, in which case the debtor's half of the community property only would be liable.

What Mr. Avery is proposing is in effect the New Mexico scheme with all its attendant problems--classifying a debt as community or separate, classifying marital property as community or separate, partitioning the community property. Mr. Avery recognizes the problems but believes they will be resolved by creditors refusing to extend credit unless both spouses sign. He believes this will have the salutary effect of cutting down the over-liberal extension of credit; he also believes that the rights of creditors should not be strengthened.

The staff disagrees. Public policy favors the extension of credit to individuals who happen to be married. Moreover, the law should strive to make it feasible for creditors to collect their debts; the staff can see no legitimate reason to make debt collection from married persons procedurally or substantively difficult. We believe the policy of the Commission's tentative recommendation is sound and should not be altered.

Section 5120.010(b) creates an exception to the liability of the community property for debts of a spouse--the earnings during marriage of the nondebtor spouse are not liable for a prenuptial debt of the debtor spouse. This is existing law. See Code Civ. Proc. § 5120. Consistent with his position on liability of community property generally, Mr. Avery does not believe that community property should be liable

at all for prenuptial debts of the spouses since liability "works an added hardship on a new marriage and contributes to marital discord." He favors a rule that "community property is not available to prenuptial creditors until all separate property is exhausted and possibly also until two years after marriage."

Mr. Avery's position is based on the notion that prenuptial debts are separate in nature and therefor only the debtor's separate property should be liable for them. However, once the debtor marries, the debtor's earnings are community property, as are assets acquired with community property. To deny creditors access to the community property for a prenuptial debt is plainly unfair to them. Professor Reppy's comments concerning the Washington/Arizona system that limits liability of separate debts to separate property are enlightening:

> In its pure form the community vs. separate debt system was also grossly unfair to antenuptial contract (as well as tort) creditors. An antenuptial debt was per se a separate debt under the system. All an unmarried debtor had to do to protect his future earnings from his creditors was to marry. This state of the law was termed "marital bankruptcy," and was so unsatisfactory that in the last ten years both Arizona and Washington had to alter it by legislation that to a considerable extent in Arizona but only a limited extent in Washington, allows antenuptial creditors to reach some community property. [Study at p. 5; footnotes omitted.]

One obvious solution to the conflicting policies involved here, and the one adopted in California, is to allow the prenuptial creditor to reach community property but not the community property earnings of the nondebtor spouse. This solution speaks to the case that bothers Mr. Avery the most--"where the debtor spouse is not earning the community income and the earnings of the innocent earning spouse are partially available to prior creditors."

This solution does not satisfy Justice Kingsley, however. See Exhibit 1. He believes the California system still permits a form of "marital bankruptcy":

> Marriage should not be a substitute for bankruptcy. But the rule exempting the "earnings" of a spouse for premarital debts of his new spouse operates exactly that way. A person (more usually but not necessarily a woman) incurs debts she (or he) prefers not to pay. She (or he) discovers a prospective spouse with good earning capacity but no substantial savings, marries, and thumbs her (or his) nose at the creditors. Neither good policy nor common sense can support such a system.

The Commission's draft would satisfy Justice Kingsley's concern somewhat by providing that the earnings of the nondebtor spouse are immune from liability only so long as the earnings are identifiable and traceable in deposit accounts. Once the earnings are converted into other forms of community property, they become liable to the prenuptial creditors. While the staff is not completely happy with the artificiality of this dividing line, it seems to make some practical sense. The staff recommends no change in the tentative recommendation.

§ 5120.030. Liability for necessaries. Subdivision (a)(1) states the rule of existing law that the separate property of the nondebtor spouse is liable for the necessaries of life of the other spouse while the spouses are living together. Mr. Cornell (Exhibit 4) suggests that the separate property of the nondebtor spouse be liable only for the "common" necessaries of life. The Commission has previously rejected such a suggestion on the ground that spouses living together should be required to support one another in accordance with their station in life.

The Commission has adopted a "common necessaries" test and rejected a "station in life" test in subdivision (a)(2), which states the standard of liability where the spouses are living separate and apart. Mr. Avery (Exhibit 2) disagrees with this decision--"It is basically unfair, for example, to an older woman, age 55, who has been out of the job market for 25 years to say the other spouse should only be liable for debts for common necessities of life; he should maintain her accustomed style of life." The staff disagrees; it is one thing to subject separate property to liability where the spouses reside together and can make mutual decisions concerning their life style and attempt to limit their liability exposure, and quite another thing where the spouses reside separate and apart and have no control over the debt-incurring process. If one spouse desires greater support than for the common necessaries of life, the court mechanisms are available for obtaining support.

The State Bar Committee (Exhibit 3) is concerned with the interaction between the provisions governing liability for necessaries and the provisions permitting a spouse to obtain a court order for temporary

support pending dissolution. The committee members fear that the liability provisions are "contrary to the family law act, would abrogate the legal procedure for obtaining support and would nullify any order entered."

The liability provisions proposed by the Commission are intended only to cover an informal separation and not intended to cover the situation where separation or dissolution proceedings are commenced and a support order is obtained. The staff believes that this should be made clear by revising Section 5120.030(a)(2) to provide that the separate property of a spouse is liable for a debt of the other spouse incurred during marriage if:

> (2) The debt was incurred for common necessaries of life of the other spouse while the spouses were living separate and apart, unless (A) the spouses were living separate and apart by a written agreement that waived the obligation of support or (B) the debt was incurred while there was in effect a court order for support of the other spouse .

§ 5120.040. Interspousal transfer. Mr. Avery (Exhibit 2) favors transmutation of property by interspousal transfer but believes that it is socially necessary and desirable to place some limitations on transmutations, such as a requirement that they be in writing. "This would certainly clarify what is now a troublesome area and it would probably also contribute greatly to certainty in the field of income, estate and gift taxation." The staff agrees with this position. The Commission has deferred action on this point pending receipt of a study from its consultant, Professor Bruch, analyzing the problems.

§ 5120.050. Liability of property after division. The Commission's tentative recommendation abrogates the rule that a creditor can reach property of a nondebtor spouse following dissolution on the basis that the property was formerly community property and therefor remains liable for the debt. Under the Commission's proposals, the creditor would be able to reach all property of the person to whom the debt was assigned in the dissolution. In addition, to protect the rights of creditors, who are not parties to the dissolution proceeding, the creditor would be able to reach property of the debtor if the debt was assigned to a person other than the debtor.

The State Bar Committee (Exhibit 3) favored the proposal to widen the liability of a party assigned a debt. Mr. Avery (Exhibit 2) agrees. Mr. Avery also feels that the best way to deal with the problem is to treat dissolution in the same manner as a probate proceeding, with notice to creditors, presentation of claims, and payment of the debt or assignment to one party or the other or both, which would bind creditors. The staff believes this idea has some merit; however, in practice it could turn a relatively simple dissolution into a major production. The Commission has discussed this idea before and rejected it.

§ 5120.060. Liability of property after judgment of nullity. Mr. Avery (Exhibit 2) disagrees with the Commission's proposal to allow a creditor the same rights against property of an annulled marriage as against property of a valid marriage. "Your proposal has the effect of making the property of the couple community property for debt payment purposes even if the marriage is bigamous or if it is annulled on the basis of fraud." The staff does not feel strongly about this point; the reason for the provision is to clarify the law in an area that is now unclear, and it could be clarified either for or against liability of the property of the "spouses." The Commission has recommended in favor of liability of the property of the "spouses" because the couple has held themselves out as being married and third-party creditors may well have acted in reliance.

Article 2. Reimbursement. Where a "community" debt is satisfied out of the separate property of a spouse, should the spouse be entitled to reimbursement from the community? Where a "separate" debt of a spouse is satisfied out of the community property, should the community be entitled to reimbursement from the spouse? If so, when and how? These questions are ones the Commission has reserved pending receipt of Professor Bruch's study.

Mr. Cornell (Exhibit 4) believes that reimbursement rights should be codified, "both as between parties and from the community." Mr. Avery (Exhibit 2) believes it would be better simply to require separate creditors to go after separate property and community creditors to go after community property. "However, if the concept of priorities is

rejected, then I would support reimbursement as a concept to protect the innocent spouse (i.e., non debt-incurring spouse)."

Article 3. Transition Provisions. The Commission's tentative recommendation did not include any transition provisions since none of the proposals were of a nature that would require transition provisions. If the Commission decides to recommend that transmutations be in writing or to provide for reimbursement rights, transition provisions should be adopted as part of the proposals. Otherwise, the staff suggests only one transition provision:

§ 5120.310. Enforcement of debts

> 5120.310. Except as otherwise provided by statute, the provisions of this chapter govern the liability of separate and community property for a debt enforced on or after the operative date of this chapter, regardless whether the debt was incurred before, on, or after the operative date.
>
> Comment. Section 5120.310 states the general rule that this chapter applies immediately to all debts regardless of the time they were incurred. (For exceptions to the general rule, see Sections _____.)

Civil Code § 5123. Mr. Avery (Exhibit 2) objects to the proposed repeal of Section 5123, which immunizes separate property of a spouse from liability for a debt secured by community property unless the spouse consents in writing to the liability. Mr. Avery offers no reasons for the objection other than that the Commission does not offer reasons for the repeal. In fact, the Commission does offer reasons for the repeal at page 9 of the tentative recommendation, but the reasons are somewhat succinctly stated. The staff recommends that the discussion of Section 5123 be expanded along the following lines:

> This provision is peculiar in protecting separate property of a spouse in the event of a deficiency but not other community property. It is thus inconsistent not only with general rules governing deficiency judgments[31], but also with general rules governing liability of property of a married person obligated on a debt.[32] Section 5123 was enacted at a time when the separate property of a married woman was not ordinarily liable for a debt; this is no longer the law. The historical reasons that led to its enactment are now obsolete[33], and the section should be repealed.

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31. See, e.g., Code Civ. Proc. §§ 580a, 580b.
32. See, e.g., Civil Code § 5121 (liability of separate property of spouse).
33. See Study at pp. 60-62.

Civil Code § 5131. Section 5131 states the general support obligation of spouses while living separate from each other by agreement--they are not liable for support unless the support is stipulated in the agreement. The Commission has proposed to alter one aspect of this rule, making the separate property of a spouse liable for necessaries debts of the other spouse unless the support obligation is expressly waived. Mr. Cornell (Exhibit 4) believes the Commission's recommendation is sound but that the Commission should go the rest of the way and repeal Section 5131 outright. This would go beyond the scope of the present recommendation, as Mr. Cornell recognizes, which deals only with creditors' remedies and not rights of spouses as between each other. Professor Bruch's study will address the other aspects of Section 5131 and the Commission will be in a better position to make decisions concerning the other aspects after reviewing Professor Bruch's study.

Civil Code § 5132. Section 5132 provides that a spouse must support the other spouse while they are living together out of separate property if there is no community or quasi-community property. The Commission has proposed to amend this section to recognize that a necessaries creditor can reach the separate property without having first to exhaust the community and quasi-community property. The State Bar Committee feels that the proposed amendment is unnecessary and confusing. The staff agrees that it is somewhat confusing, but we believe that it is necessary to alert people to the interrelation of Sections 5132 and 5120.030. The staff would replace the proposed amendment to Section 5132 with a simple prefatory "Subject to Section 5120.030, . . .".

Respectfully submitted,

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Assistant Executive Secretary

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ROBERT KINGSLEY
ASSOCIATE JUSTICE

July 15, 1980

John H. DeMoully, Esq.,
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California Law Revision Commission,
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Palo Alto, California 94306

My dear Mr. Secretary:

I comment, at this time, on only one aspect of your Tentative Recommendation Relating To Liability Of Marital Property For Debts.

I have long thought that former section 5120 of the Civil Code, which you propose to carry forward in a modified form in Subdivision (b) of your section 5120.010, was bad policy. In the words of the usual marriage ceremony, one takes a spouse "for richer or poorer, for better or worse." Marriage should not be a substitute for bankruptcy. But the rule exempting the "earnings" of a spouse for premarital debts of his new spouse operates exactly that way. A person (more usually but not necessarily a woman) incurs debts she (or he) prefers not to pay. She (or he) discovers a prospective spouse with good earning capacity but no substantial savings, marries, and thumbs her (or his) nose at the creditors. Neither good policy nor common sense can support such a system. I would abolish the rule in its entirety.

Yours very truly,

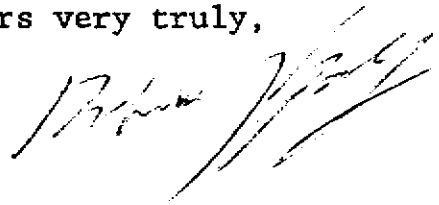

EXHIBIT 2

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July 27, 1980

OUR FILE NUMBER

9911.46-4A(1)

John H. DeMoully, Executive Secretary
The California Law Revision Commission
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LIABILITY OF MARITAL PROPERTY FOR DEBTS

Dear Mr. DeMoully:

This will follow up on your memo of June 26, 1980. I believe the two areas not covered, (1) exemption and (2) reimbursement of spouses are important and need study.

I would appreciate receiving a copy of Reppy, Debt Collection From Married Persons in California (1980).

In the June, 1980 report "Liability of Marital Property for Debts" and the discussion of the California system, there is an assumption I believe is in error. I do not agree that the system is "most sound in theory and practice" as the report claims. The report at page 2 blithely assumes that spouses have "equal management and control." Equal management and control is a legal fiction. In fact, most community debts are incurred by one spouse without consent or consultation with the other (except, for example, a home where the financial institution insists on the joint signature). Moreover, there is serious question from a standpoint of social policy whether creditors should be protected as they presently are under the law. In my opinion, it might be more equitable among spouses to revise the law to provide that both community and separate property are treated the same. The property is only available to creditors of the spouse incurring the debt and only to the limit of that spouse's assets.

California adopted a "fiction" when it legislated joint management of community property. For most marriages, debts incurred are more important as an economic fact than assets acquired. The law is written and assumes there will be joint management but that does not happen. One spouse usually manages most of the community property (in the traditional family relationship where one spouse works) or each spouse manages his or her community property (where both spouses work). I would recommend consideration of a rule of law that says the community property of one spouse is not liable for debts incurred by the other spouse without the written consent of the first spouse except in the case of "necessities".

I would also urge clarification of the law to establish a priority that separate property of the spouse who incurred a debt must be utilized first and only if that separate property is insufficient should there be a right to a charging lien on the community property (that is against the half of the community property belonging to the debt incurring spouse who did not obtain consent of the other spouse in writing). Too often in a marriage debts are incurred by one spouse without the consent of the other spouse (usually the "innocent spouse" who tried to control spendthrift habits of an inprudent spouse but has no ability because his or her signature is not required when that spendthrift spouse buys clothes, furniture, autos, and luxuries that the community cannot afford. The restraint on granting credit caused by requiring the signatures of both spouses would, I believe, eventually lead to a decline in personal bankruptcies and a decline in all of the other personal tragedies arising out of too liberal of granting credit.

I believe the report is correct in its appraisal at page 4 of the difficulty of determining what is separate or what is community. However, if the law were what I advocate, in my opinion, much of the uncertainty would be removed because credit grantors would uniformly seek and obtain joint signatures.

I disagree with the Commission's conclusion on page 5 that improving the rights of creditors or strengthening the rights of creditors is the best solution. Most debtor-creditor disputes take place below the level of court action and to strengthen the bargaining position of creditors is not in the best interest of society. The adoption of a reimbursement right between spouses is not the correct solution. I believe the solution should be to establish priorities as I have advocated. However, if the concept of priorities is rejected, then I would support reimbursement as a concept to protect the innocent spouse (i.e., non debt-incurring spouse).

I am not in agreement with the conclusion on page 6 that the community property should automatically be liable for prenuptial

debts. When persons marry, they frequently do not exchange economic information, particularly as to the extent of their debts. Great unfairness has been worked on debt-free persons who marry improvident persons. The rule that the community property becomes liable for the prenuptial debts works an added hardship on a new marriage and contributes to martial discord. This is particularly true where the debtor spouse is not earning the community income and the earnings of the innocent earning spouse are partially available to prior creditors. I would favor the opposite rule; a rule that would say that community property is not available to prenuptial creditors until all separate property is exhausted and possibly also until two years after marriage.

Without such a time protection, the law encourages non-married cohabitation. It is better to live together and not have earnings subject to pre-cohabitation debt then it is to marry and subject community property earnings to separate debt.

I disagree with the recommendations on page 7 relating to the handling of debts for necessities after separation. I believe you have overlooked the present increase in separations where the parties have been married 25 or 30 years and children reared and a dependent spouse is dumped because the supporting spouse goes through some emotional or physiological change and wants a drastic life style change. It is basically unfair, for example, to an older woman, age 55, who has been out of the job market for 25 years to say the other spouse should only be liable for debts for common necessities of life; he should maintain her accustomed style of life.

I agree with the conclusion at the top of page 8 about joinder of a non-debtor spouse.

While transmutation of property by interspousal transfers is something I favor, I believe it is socially necessary and desirable to tighten up the law in this area. Therefore, I would urge a requirement that such transmutation be in writing. This would certainly clarify what is now a troublesome area and it would probably also contribute greatly to certainty in the field of income, estate and gift taxation.

On page 9, I see a discussion of the Anti-Deficiency Protection of Separate Property and a recommendation for repeal based on the fact the law arose "for historical reasons." There is no social justification for repeal and for historical reasons (i.e., stability of the law), I would recommend retention of the present law.

On page 9, the study discusses division of debts as if it were easy or an area of certainty. In the case of separation, the

usual practice is that both spouses remain liable and the "responsible" spouse (not necessarily the debt incurring spouse) pays the debts. In the case of dissolution of marriage, the allocation of debts is frequently erroneously ignored or lately has been the subject of extensive litigation because of its effect upon property rights of spouses who have contributed separate property for payment of community debts. In my opinion, the liability after division of property should be handled like a probate proceeding.

If there is to be a dissoluton of marriage, there would be a notice to creditors and the non-debt incurring spouse would be absolved from the debts other than those he or she incurred if the creditors did not come to court for a determination of their rights and a determination of what property was available to creditors.

Many marriages break up over mismanagement of finances. It is socially undesirable to continue the burden of the marriage on an innocent spouse who seeks to dissolve the marriage but remains saddled with the "community debts". He or she should be bound by debts specifically assumed but not by debts incurred by the other spouse. The cause of action for reimbursement from the other spouse is probably socially desirable to protect the innocent spouse, but it is no relief and no solutin to the problem of a spouse trying to escape the debts of the other spouse.

The solution on page 10 that a creditor should only be permitted to pursue the person to whom the debt is assigned at the time of dissolution is a good one, but does it not take away rights of the creditor? Moreover, I doubt that it is constitutionally sound unless the creditor is given the right to intervene in the dissolution proceedings to obtain a determination of which spouse will be liable for the debt. Otherwise, marital dissolution could be a way of informally eliminating creditors by assigning debts to an impecunious spouse.

I do not understand why the law should be that creditors should have the same rights against property of an annulled marriage. If my proposal requiring that both spouses sign or only the signing spouse's assets are liable were adopted, the problem would take care of itself. If the marriage is annulled, the creditor has recourse only to the assets of the debt incurring spouse.

Your proposal has the effect of making the property of the couple community property for debt payment purposes even if the marriage is bigamous or if it is annulled on the basis of fraud.

The law of exemptions is one that needs reexamination, particularly the law relating to probate homesteads. Here the problems

include not only the ability to defeat creditors, but also the problem of defeating the will of the decedent even where one spouse dies while a martial dissolution is in process.

On reviewing my letter, I see that I disagree with many of the study conclusions. My disagreement is mainly based upon my perceptions of reality as a practicing lawyer. I do not know if many other lawyers would agree with you either. As an idea, I suggest you submit the study to the California State Bar Section of Family Law and ask its chairperson to have a group of family law specialists analyze the study and give the Commission a practical appraisal.

Yours sincerely,

Luther J. Avery

LJA:ble(2745b)

cc: William Cantwell
Prof. Mary Wenig

EXHIBIT 3

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August 11, 1980

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Re: Tentative Recommendation re Liability of Marital Property for Debts

Dear Mr. DeMoully:

I am replying on behalf of the Executive Committee of the Family Law section of the State Bar. Because our standing committees meet infrequently if at all during July and August our reply is more cursory than we would like.

Because our review of the proposals was not thorough I would like only to point out and discuss those proposals which we felt would be detrimental to the efficient practice of marital law and/or undesirable and give our reasons.

1. The proposal to extend liability to a spouse for necessaries obligations incurred following separation is contrary to the family law act, would abrogate the legal procedure for obtaining support and would nullify any order entered. In my opinion this proposal would increase litigation, create uncertainty and place a premium on avoiding pendente lite support awards.

Under the present state of the law, each party is responsible for the obligations he incurs after separation. In re Marriage of Hopkins.

If a spouse is in need of support he or she may apply to the court for support pendente lite by noticed motion after a response is on file or by order to show cause prior thereto. Under extreme circumstances the court may ex parte prior to the order to show cause award support.

In our opinion under your proposal the following would and/or could occur.

a. There would be no purpose in seeking an order to show cause. The non-working spouse could merely charge groceries, clothing, medical care, furniture and housing as desired or invade community assets for the payment of these obligations. This places a premium on spending freely at a time when families can least afford it and gives the non-working spouse an advantage.

The employed spouse would by law be responsible for the fill. The amounts charged might well exceed the amount the court would award pendente lite. Similarly if the non-earning spouse has invaded the community the wage earner has no recourse and no right of reimbursement.

b. A pendente lite award is entered. The non-working spouse believing the award insufficient spends the support on non-necessary items and charges the necessaries, i.e. groceries, medical care, clothing and/or fails to pay the mortgage. The earning spouse is legally responsible and must pay these bills as well as the pendente lite support.

Several years ago the law required the payment of necessaries obligations incurred during separation by the wage earning spouse on behalf of the non-earning spouse. My understanding is that both of the above scenarios were common problems.

We believe that certainty and order are of primary importance in a dissolution action. The parties should be encouraged to work out written pendente lite agreements or seek a court order. Any change in the law which would encourage avoidance of the pendente lite hearing and/or order and/or make it uncertain will open the door to abuse, increase litigation and will delay the ultimate resolution of the marital dissolution.

We can think of almost no situation where a party in need of necessaries could not obtain a pendente lite award.

2. We are opposed to the amendment of section 4800 as proposed.

In our experience the court almost always does consider the earning capacity of the parties and the rights of creditors.

This amendment is dangerous because it appears to allow or favor an unequal division of the assets and could be interpreted as allowing an award of debts based on fault.

Presently the law requires an equal division of community estates with a positive value. Where the debts exceed the assets the court may award the excess debts to one spouse.

As this proposal is written the Court could award the house to the Wife and the mortgage thereon to the Husband - a retrogression to pre-1970 status when we had fault decrees. See for example In re Marriage of Chala.

The committee is particularly sensative to the potential for unequal division which creates a greater potential for abuse. Recently there is case law allowing a wife with children to remain in the home for a number of years and proposed legislation to change pensions to non-community property - all tending towards unequal division.

We see this proposal as a return to the ways of the past. The house to the wife, the business and the debts to the husband. It has been a long battle to convince the trial court that equal division meant equal and that the marital community could not be divided without valuing the assets.

3. In conjunction with our comments on Necessaries we feel section 5132(a)(2) is unnecessary and confusing.

We favored your proposals regarding attorneys fees on actions regarding reimbursement, widening the liability of a party assigned a debt and removing the distinction between liability for and/or contract obligations.

We feel that the area of debts and community property and marital dissolution is one which needs a thorough examination and new legislation. If it is not too late in the process we would like to have a member of our standing committee keep in contact with you and perhaps make some proposals we feel would assist in clarifying this difficult and unclear area.

Very truly yours,

Sandra G. Musser

SGM:ry

EXHIBIT 4

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REPLY TO: Merced

August 15, 1980

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

Re: Law relating to liability of marital property for debts

Gentlemen:

I have reviewed the tentative recommendation relating to the liability of marital property, and I have the following comments to make:

1. Your amendment to Section 4800 (b) (5) is probably unnecessary as there is no method to require the Judge to make a specific allocation of an obligation to a specific party. Moreover, the tendancy of the Courts to find such amendments to be a directive for less than an equal division of property is very great. When the enactment of (b) (4) (educational loans) was made, a great many Judges assumed that that meant that the educational loans were not to be considered in the ultimate disposition of community property and obligations. In other words, the Court would make a "net" equal distribution to the parties by excluding the educational loans, and then would assign the educational loans to the person who received the education. The result would be less than an equal division. Accordingly, if subdivision (b) (5) is to be enacted, I suggest that it be reworded to emphasize that the equal division set forth in 4800 (a) be a "net equal division" which takes into account the distribution of both the assets and the obligations and divides the net result equally.

2. The entire work you are promoting should include an effort to codify the holding of the Supreme Court in In re marriage of Epstein. You make statements that you are considering the issue of reimbursement, and it appears that now is the time to do so, both as

between parties and from the community. You do specify the right to reimbursement at one portion of your tentative recommendation, Section 5120.050 (b).

3. Section 5120.030 (a) (1) should be amended to provide for the word "common" before necessaries of life. Such an amendment would be consistent with the rest of the act, and with the case law that deals with the subject.

I agree with the general trend of the rest of the proposal, and I feel the creditors will be more likely to advance credit to the woman who has been forced to leave the home if your proposals are adopted. However, although it may not be within the perameters of your review, I feel that Section 5131 of the Civil Code as presently constituted is antiquated and should be repealed. If attorneys chose to enforce the technical language of 5131, and Judges followed the technical language, havoc could be recked upon spouses who were forced to agree to leave the residence by their counterparts. The amendments that you provide in Section 5120.030 go along way to eliminate the effect of 5131, so there does not appear to be any reason to have the law on the books anymore.

Thank you for the opportunity to comment on your proposals.

Very truly yours,

ALLEN, IVEY, CORNELL, MASON & CASTELLUCCI

By Dennis A. Cornell

DENNIS A. CORNELL

DAC:kej