#D-312 6/4/82

First Supplement to Memorandum 82-33

Subject: Study D-312 - Debtor-Creditor Relations (Liability of Marital Property for Debts and Obligations)

Support Obligations

The Commission has adopted as a general policy the rule that community property of a second marriage is liable for a pre-existing support obligation of one of the spouses, but not the earnings of the non-obligor spouse. At the May meeting the Commission heard a presentation by Michael E. Barber for the District Attorney's Family Support Council addressed to this matter. The Commission requested the staff to draft a provision to make clear that the earnings of the non-obligor spouse may be taken into account by the court in setting the amount of the support obligation. The Commission also requested the staff to draft a provision that would make the earnings of the non-obligor spouse liable in special circumstances where no other property is available to satisfy the support obligation and equity seems to warrant taking the earnings of the non-obligor spouse. The staff draft is attached as Exhibit 1.

Liability for Tort Debts

Attached as Exhibit 2 is a proposed State Bar Conference of Delegates resolution that would do two things: (1) A tort debt incurred after separation of the parties would be presumed to be incurred for the separate benefit of the tortfeasor. (2) Where a tort debt incurred after separation of the parties is for the separate benefit of the tortfeasor, the liability must be satisfied first out of separate property and then out of the tortfeasor's one-half (as opposed to all) of the community property.

This proposal is comparable to that made to the Commission by the State Bar Business Law Section, that all post-separation debts (not just tort debts) be classified as separate debts of the incurring spouse and only that spouse's one-half the community property would be liable to satisfy such debts. This proposal is not without its problems, as discussed at page 8 of Memorandum 82-33. The Commission should also note that Professor Bruch's recommendation is to the opposite effect--debts incurred after informal separation and earnings acquired would all be community. See discussion at pages 7-8 of the memorandum.

The staff believes the same issues are involved in treatment of post-separation tort debts as are involved in treatment of post-separation debts generally, and would address the State Bar Conference of Delegates resolution together with the proposals of the State Bar Business Law Section.

Reimbursement

Where community property has been used during marriage to satisfy a separate debt or obligation of one of the spouses, and where separate property of one of the spouses has been used during marriage to satisfy a community obligation, as a general rule there is a right to reimbursement of the community or separate estate only in limited situations. At dissolution the parties do not ordinarily go back through all the transactions that have occurred over the course of a marriage and attempt to ascertain whether a particular expenditure was for a community or separate purpose and whether the particular expenditure was made with community or separate funds. There are several important exceptions to this generalization.

Separate property used to satisfy community debt. If a spouse uses separate property to pay a community debt, the spouse is not entitled to reimbursement from the community. This rule applies even if the spouse had no choice but to use separate property because there were no community funds available at the time. See, e.g., See v. See, 64 Cal.2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966). The spouse is deemed to have made a gift to the community, regardless whether the separate property is used for community expenses or to improve community property. Thus, for example, no reimbursement is allowed for a down payment for or improvements to community property paid out of separate funds (e.g., In re Marriage of Smith, 79 Cal. App.3d 725, 145 Cal. Rptr. 205 (1978)), or for renovation of community property (e.g., In re Marriage of Gonzales, 116 Cal. App.3d 556, 172 Cal. Rptr. 179 (1981)). This rule appears to apply even where the separate property was used to purchase and improve a community property family residence. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 166 Cal. Rptr. 853, 614 P.2d 285 (1980). The cases are not consistent, however, and it has been held that where a house is built with separate funds on community real property, the house remains separate and no gift is presumed. In re Marriage of Sparcks, 97 Cal. App.3d 353, 158 Cal. Rptr. 638 (1979).

The rule of no reimbursement does not apply to cases where a spouse pays a community debt with separate funds after the spouses have separated. In re Marriage of Epstein, 24 Cal.3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979). Here the gift presumption fails, so that sums paid out of separate property to preserve and maintain the family residence would be reimbursable (unless made pursuant to a support obligation).

Community property used to satisfy separate debt. In three types of situations the community may obtain reimbursement for expenditures for separate debts--where the separate property of the spouse making the expenditure is benefited by the expenditure, where the expenditure is for a child or spousal support obligation that predates the marriage, and where the expenditure is made within a short time before dissolution. These reimbursement rights are limited, however, as described below.

(1) The first situtation where reimbursement is commonly allowed is where community property has been used to preserve, improve, and benefit the separate property of one of the spouses. If one spouse has applied community property for this purpose, at dissolution or death the community is entitled to reimbursement. See, e.g., Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (1929); In re Marriage of Warren, 28 Cal. App.3d 777, 104 Cal. Rptr. 860 (1972); In re Marriage of Jafeman, 29 Cal. App.3d 244, 105 Cal. Rptr. 483 (1972). Cases have held, for example, that the community is entitled to reimbursement for taxes and assessments paid for the benefit of the separate property (e.g., Estate of Turner, 35 Cal. App.2d 576, 96 P.2d 363 (1939)), for improvements (e.g., Bare v. Bare, 256 Cal. App.2d 684, 64 Cal. Rptr. 335 (1967)), for incidental expenses (e.g., Somps v. Somps, 250 Cal. App.2d 328, 58 Cal. Rptr. 304 (1967)), and for mortgage payments (e.g., In re Marriage of Walter, 57 Cal. App.3d 802, 129 Cal. Rptr. 351 (1976)).

There is some confusion in the cases as to the amount of reimbursement that should be allowed. The latest ruling of the Supreme Court is that the community is entitled to reimbursement not on the basis of actual expenditures for interest, taxes, and insurance, but on the basis of the proportionate contribution of the community to the equity in the property. In re Marriage of Moore, 28 Cal.3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980); see also In re Marriage of Marsden, 130 Cal. App.3d 426, ___ Cal. Rptr. ___ (1982). The conflict in the cases as to the reimbursement formula that is used seems to depend to some extent upon

whether the spouses were aware of or consented to the payments, whether the spouses have resided on the property and used it as the family home, whether the community is, because of the nature or amount of the contribution, deemed to have acquired an interest in the property, and whether the spouses believed the property to be separate or community or whether there has been a deliberate misappropriation. In cases where the spouses have resided on the property, its fair rental value may also be a factor. Suffice it to say that although there are many cases dealing with this type of situation, the law is far from clear.

A different rule applies to the converse of this situation, where one spouse has spent community funds for the improvement not of the spouse's own separate property but for the improvement of the other spouse's separate property. Here a gift is presumed, and the community is not entitled to reimbursement. See, e.g., Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931). This rule applies even though the spouses have made trust deed payments, paid refinancing expenses, taxes, and insurance, and made improvements out of community funds while living on the separate property as the family home. In re Marriage of Camire, 105 Cal. App.3d 859, 164 Cal. Rptr. 667 (1980). Although the gift presumption was first announced in cases where the husband, the manager and controller, applied community property to the separate property of the wife, the Camire case adheres to the gift presumption even though the husband no longer has sole management and control.

(2) The second type of situation where reimbursement is commonly allowed if one spouse has applied community property to the spouse's separate debt involves payment of a pre-existing child or spousal support obligation. The rule here is that if a spouse pays the support obligation with community funds of the second marriage, the community is entitled to some reimbursement based on the amount of separate and community property that would be available to satisfy the support obligation. See, e.g., Bare v. Bare, 256 Cal. App.2d 684, 64 Cal. Rptr. 335 (1967). The rationale is that although the support obligation is the spouse's separate obligation, the amount of the obligation is based to some extent on the availability of community funds, so the community should bear a share of the cost of satisfying the obligation. Weinberg v. Weinberg, 67 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967). Thus if the support obligor has no separate property and only community property of the second marriage is available to satisfy the support

obligation, the community is not entitled to any reimbursement. In re Marriage of Smaltz, 82 Cal. App.3d 568, 147 Cal. Rptr. 154 (1978).

(3) The third reimbursement situation is where a spouse has applied community property to a separate debt within a short time before dissolution. Cases have permitted reimbursement where shortly before dissolution income taxes on separate property income were paid with community funds (In re Marriage of Epstein, 24 Cal.3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979) (taxes paid after separation); Cooper v. Cooper, 269 Cal. App.2d 6, 74 Cal. Rptr. 439 (1969) (taxes paid at an unspecified time during the year preceding dissolution)), where a separate property debt was paid and other separate expenditures were made with community funds (Somps v. Somps, 250 Cal. App.2d 328, 58 Cal. Rptr. 304 (1967) (payments made within one month before trial)), and where premiums on separate life insurance policies were paid out of community funds (Gelfand v. Gelfand, 136 Cal. App. 448, 29 P.2d 271 (1934) (payments made out of community property for 3-1/2 years preceeding dissolution)). Many of the cases allowing reimbursement of the community for payment of support obligations also involve payments made within a short time before dissolution.

Statutory treatment of reimbursement. The California case law relating to reimbursement has been uniformly blasted by the commentators as being confused and uncertain, with no sound logical or policy basis. See, e.g., De Funiak, Improving Separate Property or Retiring Liens or Paying Taxes on Separate Property with Community Funds, 9 Hastings L.J. 36 (1957); Comment, The Husband's Use of Community Funds to Improve His Separate Property, 50 Calif. L. Rev. 844 (1962); Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Calif. L. Rev. 240, 259-260 (1966); Bartke, Yours, Mine and Ours--Separate Title and Community Funds, 44 Wash. L. Rev. 379 (1969). After reviewing the law of all the other community property jurisdictions, Bartke states:

> The law of California must be discussed separately. It defies not only classification, but rationalization as well. It is based on misconceptions, faulty principles and errors compounded over the years. It harbors two mutually inconsistent lines of cases, and its confusion is such that consensus is lacking not only as to what it should be, but what it is. 44 Wash. L. Rev. at 405.

The commentators generally propose that where community funds are used to improve separate property, either the property becomes impressed with an equitable lien in favor of the community or the improvements simply retain their community character. Statutory treatment is usually recommended to accomplish this result.

The staff believes the wretchedness of the condition of California law is somewhat overstated by the commentators. In general outline, the law makes a certain amount of sense. Allowing reimbursement for any expenditure of community funds for separate purposes made shortly before dissolution satisfies a sense of fairness; it also presents a minimum of accounting and proof problems. Expenditures of community funds for the benefit of separate property or for a pre-existing support obligation are special cases where it does seem appropriate to permit reimbursement, regardless when during marriage the expenditures were made. What is needed primarily is a clarification of the formula to be applied to determine the amount of reimbursement.

The staff recommends adoption of clarifying legislation along the following lines:

(1) The rule should be continued that if a spouse uses separate property to satisfy a community contract or other community obligation the spouse is not entitled to reimbursement. The chances are that such an expenditure is made pursuant to the mutual obligation of the spouses to support each other and is made to maintain them in a lifestyle they feel comfortable with. The staff does not believe it is proper at dissolution of marriage to go back through all the debts and expenditures of the marriage, even for a limited period, to decide which should be reimbursable and which should not. The Commission should note that this treatment is different from that we have adopted with respect to tort liabilities; under our draft, if a spouse satisfies a community tort obligation out of separate funds the spouse is entitled to reimbursement.

(2) If a spouse uses community funds to pay a separate contract or other separate obligation, there should be a reimbursement right limited to three years, just as the Commision has limited the tort reimbursement right to three years. This limitation would take care of many of the proof problems and would speak to the egregious situations that we see in the cases where the spouses make questionable expenditures as the marriage heads towards dissolution. The three-year limitation would not

apply to improvements of separate property or payments of a pre-existing support obligation.

(3) The rule that a married person is not entitled to reimbursement for separate funds expended to improve community property is not changed. In the usual situation the community property is the family home, and the expenditures are for mutual support and benefit in a comfortable lifestyle. In any case, any increase in value of the community because of the separate property expenditures will be fifty percent realized by the contributing spouse.

There is one limited situation where it may be appropriate to reimburse a married person for separate property expenditures that benefit community property. This is the situation where the expenditures are for the purchase price of the property. A proposed State Bar Conference of Delegates resolution (sponsored, we understand, by the Property Committee of the Family Law Section) addresses this issue:

> Civil Code § 4800.7 (added)
>
> 4800.7. Upon division of property under this part any separate property contributed for a principal payment on a community asset shall be reimbursed to the party making the contribution, without interest or appreciation, absent an agreement to the contrary; however, the amount to be reimbursed shall not exceed the net value of the asset at the time of division.

This provision would appear to take care of some of the worst cases in the area, such as In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980), where a married person who purchases a community property home with separate funds loses the separate property investment upon dissolution a short time later. The Commission should note that the proposal is quite limited--it applies only at dissolution of marriage and allows reimbursement only to the extent the purchase price is paid with separate funds. The Commission may wish to include such a provision in its recommendation.

(4) Where payments for improvement or benefit of separate property are made out of community funds, the law allows reimbursement of the community if the payments are made by a married person for the benefit of his or her own property but not if the payments are made for the benefit of the separate property of his or her spouse. The staff draft allows reimbursement in either situation. In the ordinary case where a spouse makes payments of community funds for the benefit of the separate property of the other spouse, the separate property is actually the

family home and there is no intent to make a gift or otherwise increase the separate estate of the owner spouse.

(5) The question of the amount of reimbursement allowed to the community in an improvement case is exceedingly complex and difficult. The Commission has discussed this matter previously at some length and considered a number of alternatives, including that any appreciation of the property be community. The resolution to this problem depends to some extent on the approach the Commission ultimately decides to take on the proposal that the community property law be changed so that the fruits of separate property are community. Other factors that might enter into the determination of the amount of reimbursement include the use value of the property to the community and the logistics of an equitable lien for reimbursement. The staff believes that all this will take a good deal of time to work out. We believe the present recommendation should not be delayed pending resolution of this problem, but the amount of reimbursement should for the time being be left to continued case law development, as it is now.

(6) The existing rule on reimbursement where community property is used for separate support support obligation of one of the spouses is that the community is entitled to reimbursement based on the proportion of community income to separate income of the obligor spouse. While different measures for reimbursement might be equally appropriate depending on the facts of a particular case, the staff can see no strong policy reason to abandon existing law which seems to give a rough measure of justice. The staff draft codifies this rule.

A staff draft of the relevant provisions is attached to this memorandum as Exhibit 3.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

STAFF DRAFT

§ 5120.070. Liability for support obligation

5120.070. (a) For the purpose of this chapter, a child or spousal support obligation is incurred before marriage if the support obligation arises out of a relationship created before marriage, regardless whether a court order for support is made or modified before or during marriage and regardless whether any installment payment on the obligation accrues before or during marriage.

(b) Notwithstanding Section 5120.010, the earnings of a spouse during marriage are liable for a child or spousal support obligation of the other spouse incurred before marriage to the extent ordered by the court, subject to any applicable limitation imposed by law. The court order shall be made upon a determination that there is no other property reasonably available to satisfy the support obligation and that it would be just and equitable to apply the earnings of the spouse to the support obligation of the other spouse under the circumstances of the particular case taking into account all relevant matters including, but not limited to, the situation and relationship of the parties and the adequacy of the earnings. The court order shall be made upon motion to the court in which the support order is entered. If the spouse resides in a county other than the county where the support order is entered, the person seeking enforcement of the support obligation shall do all of the following:

(1) Apply to the superior court in the county in which the spouse resides.

(2) File with the application an abstract of judgment in the form prescribed by Section 674 of the Code of Civil Procedure.

(3) Pay a filing fee of twelve dollars ($12). No law library fee shall be charged.

(c) Nothing in this section limits the matters a court may take into consideration in determining or modifying the amount of a support order including, but not limited to, the earnings of the spouse of the person obligated for child or spousal support.

Comment. Subdivision (a) of Section 5120.070 makes clear that a support obligation that arises before the marriage is a prenuptial debt

for purposes of liability of marital property. As a result, the general rule is that the separate property of the obligor spouse and the community property of the marriage is liable for the support obligation, other than the earnings of the non-obligor spouse. See Section 5120.010 (liability of community property).

Subdivision (b) makes an exception to the general rule of nonliability of the earnings of the non-obligor spouse in special circumstances. Subdivision (b) is not intended to be applied routinely but is intended as a narrow exception to achieve an equitable result in an unjust case. The ability of the court to make earnings of the non-obligor spouse liable are subject to applicable limitations such as those found in Code of Civil Procedure Sections 723.030 and 723.052 (withholding order for support).

Subdivision (c) makes clear that despite the general rule that earnings of the non-obligor spouse are not liable for the support obligation, the earnings may be taken into account by the court in setting the amount of the support obligation. This codifies existing law. See, e.g., In re Marriage of Havens, 125 Cal. App.3d 1012, 178 Cal. Rptr. 477 (1981).

§ Civil Code § 4807 (amended)

4807. ~~The~~ Subject to Section 5120.070, the community property, the quasi-community property and the separate property of the parents may be subjected to the support, maintenance, and education of the children in such proportions as the court deems just.

Comment. Section 4807 is amended to make clear it is not intended to apply to the property of a stepparent but only to property of a parent of the child. The extent to which property of a stepparent may be subjected to support of the child is governed by Section 5120.070 (liability for support obligation). Nothing in Section 4807 precludes the income of a stepparent from being taken into account in setting the amount of a support obligation. See, e.g., In re Marriage of Brown, 99 Cal. App.3rd, 702, 160 Cal. Rptr. 524 (1979).

EXHIBIT 2

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Section 5122 of the Civil Code to read as follows:

§5122
(a) A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefor if the marriage did not exist.
(b) The liability of the married person for death or injury to person or property shall be satisfied as follows:
(1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community property and second from the separate property of the married person.
(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community property.
(3) ~~If a Petition for Dissolution, Legal Separation or Nullity of the Marriage has been filed~~, the parties not having reconciled, the liability shall first be satisfied from the separate property of the married person and second from the married person's one-half of the community property, except if the activity engaged in was for the benefit of the community, then the community shall be looked to first.

After separation

(Proposed new language underlined)

PROPONENT San Fernando Valley Bar Association

STATEMENT OF REASONS

Due to the congestion in our court system it is many months between the filing of a Petition for Dissolution of Marriage and entry of the Interlocutory Judgment of Dissolution of Marriage during which time the tort of one of the spouses could jeopardize the innocent spouse's interest in the community property. This proposed change is intended to protect the innocent spouse's one-half interest in the community property.

This proposed amendment does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT Barbara Jean Penny

RESPONSIBLE FLOOR DELEGATE Terri Lynch

EXHIBIT 3

STAFF DRAFT

404/793

§ 5120.220. Reimbursement for contracts and other obligations

5120.220. (a) Except as otherwise provided in this article, to the extent the liability of a married person for a contract or other obligation not incurred for the benefit of the community is satisfied in whole or in part, voluntarily or involuntarily, out of community property, the community is entitled to reimbursement from the married person.

(b) The right of reimbursement provided in this section shall be exercised within three years after satisfaction of the liability out of the community property.

Comment. Section 5120.220 continues case law that allows reimbursement of the community for separate contract and other separate obligations paid out of community funds within a short time before dissolution of marriage. See, e.g., Cooper v. Cooper, 269 Cal. App.2d 6, 74 Cal. Rptr. 439 (1969) (separate property income taxes paid with community funds during year preceding dissolution); Somps v. Somps, 250 Cal. App.2d 328, 58 Cal. Rptr. 304 (1967) (separate property debt and other separate expenditures paid with community funds one month before dissolution trial); Gelfand v. Gelfand, 136 Cal. App. 448, 29 P.2d 271 (1934) (separate life insurance premiums paid with community funds for 3-1/2 years preceding dissolution). The reimbursement right provided in this section is a property right and therefore survives the death of either spouse. The right is strictly limited to a three-year enforceability period, however. It is not enforceable at dissolution of marriage unless the dissolution occurs within the three-year period.

Section 5120.220 does not provide reimbursement where separate property of a spouse is used to satisfy a community contract or other community obligation. Reimbursement is not permitted in such a situation except where made after separation (unless pursuant to a support obligation). See, e.g., See v. See, 64 Cal.2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966); In re Marriage of Epstein, 24 Cal.3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413, (1979). Section 5120.220 applies only to contracts and other obligations. Reimbursement in other situations is governed by other provisions of this article. See Sections 5120.210 (torts), 5120.230 (improvement or benefit to property), and 5120.240 (support payments).

404/799

§ 5120.230. Reimbursement for improvement or benefit to property

5120.230. (a) If the separate property of a married person is improved or benefited by the payment of community funds, the community is entitled to reimbursement from the married person.

(b) The right of reimbursement provided in this section shall be exercised during marriage or at termination of marriage by dissolution or death.

Comment. Section 5120.230 codifies the rule that the community is entitled to reimbursement for expenditures for the improvement of separate property with community funds. See, e.g., Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (1929); Estate of Turner, 35 Cal. App.2d 576, 96 P.2d 363 (1939); In re Marriage of Walter, 57 Cal. App.3d 802, 129 Cal. Rptr. 351 (1976). Section 5120.230 applies equally whether the separate property benefited belongs to the person who made the expenditures or the spouse of the person who made the expenditures. This overrules cases such as Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931), and In re Marriage of Camire, 105 Cal. App.3d 859, 164 Cal. Rptr. 667 (1980), which denied reimbursement where a married person expended community funds for the benefit of the separate property of the spouse. Section 5120.230 does not affect the rule that a married person is not entitled to reimbursement for expenditures of separate property made for the benefit of community property. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 166 Cal. Rptr. 853, 614 P.2d 285 (1980); In re Marriage of Smith, 79 Cal. App.3d 725, 145 Cal. Rptr. 205 (1978).

Unlike Sections 5120.210 (reimbursement for torts) and 5120.220 (reimbursement for contracts and other obligations), Section 5120.230 imposes no limitation period other than duration of the marriage for reimbursement for benefit to separate property. This is consistent with existing case law.

Reimbursement is permitted under Section 5120.230 regardless of the good or bad faith of the spouse making the payments and regardless of the knowledge or consent of the other spouse. Section 5120.230 does not specify the reimbursement measure or formula. This is determined pursuant to case law under the facts of the particular case. See, e.g., In re Marriage of Moore, 28 Cal.3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980).

404/941

§ 2120.240. Reimbursement for support payments

5120.240. (a) If a child or spousal support obligation of a married person is satisifed in whole or in part, voluntarily or involuntarily, out of community property, the community is entitled to reimbursement from the married person to the extent the amount of community property used to satisfy the support obligation exceeds the proportionate obligation of the community. As used in this subdivision, the proportionate obligation of the community is the proportion of the total community income during marriage to the total separate income of the married person during marriage.

(b) The right of reimbursement provided in this section shall be exercised during marriage or at termination of marriage by dissolution or death.

Comment. Section 5120.240 codifies the rule of Weinberg v. Weinberg, 67 Cal.2d 557, 63 Cal. Rptr. 13, 432 P.2d 709 (1967). See also Bare v. Bare, 256 Cal. App.2d 684, 64 Cal. Rptr. 335 (1967); In re Marriage of Smaltz, 82 Cal. App.3d 568, 147 Cal. Rptr. 154 (1978).