#F-641 9/12/83

Memorandum 83-75

Subject: Study F-641 - Limitations on Disposition of Community Property (Comments on Tentative Recommendation)

Attached to this memorandum is a copy of the Commission's tentative recommendation relating to disposition of community property, which was distributed for comment after the Commission's May 1983, meeting. We have received the comments attached to this memorandum as Exhibits 1 to 4 and the comments of officers of the Probate and Trust Law Section of the Los Angeles County Bar Association (attached to Memorandum 83-65). In addition, the Family Law Section of the Los Angeles County Bar Association and the California Judges Association have written to indicate that their comments will be late; we will forward them to the Commission whenever we receive them. The staff has met with a subcommittee of the State Bar Family Law Section Executive Committee, but we have not yet received written comments from them; we will try to report their views in this memorandum as accurately as possible.

Henry Angerbauer, CPA, (Exhibit 1) approves and agrees with the tentative recommendation. The Los Angeles County Bar Association Probate and Trust Law Section officers believe the tentative recommendations to be basically sound; they also point out a typographical error that the staff will correct.

Disposition of Real Property

Existing law requires joinder of both spouses for a disposition of community real property. The tentative recommendation would limit this rule so that joinder is required for a disposition of real property only in the following situations: (1) The property is the family home. (2) The disposition is a gift. (3) Title is of record in the names of both spouses.

Dorothy N. Jonas and Bonnie K. Sloan (Exhibit 2), who are affiliated with the California Commission on the Status of Women, Barbara Eiland McCallum (Exhibit 3), who is affiliated with the California Federation of Business & Professional Women and other women's and family law organizations, and Harriet Buhai (Exhibit 4), Chair of the Family Law Section of the Women Lawyers Association of Los Angeles, all oppose this change in the law and believe joinder should be required for any

community real property disposition. They take the position that women generally are not aware of the holdings and dealings of their husbands with community property and that the joinder requirement is a practical means by which they may exercise their property rights. Moreover, they do not believe the "good faith" mismanagement remedy is an adequate substitute for the control given by the joinder requirement. The State Bar Family Law Section subcommittee also believes that women often are ignorant of property transactions by the husband and that the joinder requirement is useful because it gives women some knowledge of what community property there is or has been when they are seeking to discover assets at dissolution of marriage.

The major reason for the Commission's proposal with respect to the real property joinder requirement is the title problems the requirement causes. Some of the opponents of the tentative recommendation point out that, while the problems are there, we do manage to live with them. They believe that solving the title problems is not worth the loss of protection to the wife.

The staff's feeling is that this is a sensitive matter in which the Commission should not proceed unless it has a consensus among interested persons and groups that the proposed change is desirable. It is obvious there can be no consensus here, and the staff recommends that we not pursue this change in the law, unless we propose along with it mismanagement remedies that are perceived to be adequate.

Disposition of Personal Property

Existing law is that either spouse alone may make a disposition of community personal property, except a disposition that is a gift or that involves personal effects or household furnishings. The tentative recommendation would allow a unilateral gift by a spouse if moderate or reasonable in amount and would allow a unilateral disposition (other than an encumbrance) of personal effects or household furnishings. The reason for these changes is recognition of the actuality that spouses do unilaterally make charitable gifts that are reasonable in amount and do sell personal and household items at garage sales without obtaining the written consent of the other spouse.

These changes are opposed by Dorothy N. Jonas and Bonnie K. Sloan (Exhibit 1) and by Barbara Eiland McCallum (Exhibit 2) on the same basis that they oppose the change in the requirement of joinder for disposition of all community real property--the non-managing spouse needs

protection against mismanagement and the damage remedies for mismanagement are inadequate. Ms. McCallum recognizes the conflict between the law requiring written consent and the reality that this is ignored, but doesn't believe there's a real problem. "The law is there if needed, and no one to my knowledge or any of my family law committee's knowledge has abused it in the manner you are suggesting. What can I say, it works, there is no problem, so why change it? Upon separation or dissolution, this law becomes quite helpful, when one spouse goes on the rampage disposing of the furniture and furnishings."

What is the Commission's experience and feeling in this area? The Commission should weigh the burden imposed by limitations on disposition against the benefits to be gained by the limitations. The Commission should also consider improving the mismanagement remedies, if existing remedies are inadequate.

Ms. McCallum would go beyond the present law on disposition of community personal property and add several requirements:

(1) Joinder would be required for all dispositions over a certain value.

(2) The managing spouse would be required to add the name of the non-managing spouse to any title papers.

(3) The non-managing spouse would have the right to disclosure of assets and an accounting.

The first of these suggestions is addressed to the fact that existing law places no restrictions on unilateral disposal of personal property, which can be quite extensive, e.g., a large stock sale or exchange. The second suggestion is analogous to the Commission's proposal to allow the non-managing spouse to add his or her name to real property title; this could be adapted to apply to personal property title as well. The third suggestion was the subject of a bill defeated at the current legislative session, although the Commission has done work on a disclosure right that is more sophisticated than the bill and that might stand a chance of enactment; it could be incorporated in the present recommendation. Is the Commission interested in pursuing any of these matters?

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

7/24/83

Law Revision Commission

Many Thanks for mailing the Tentative Recommendation relating to Disposition of Community Property.

I approve and agree with the Tentative Recommendation relating to the disposition of property ~~the~~ community, and propose that the Commission recommend it to the Legislature to be enacted into law.

Sincerely

H

Exhibit 2

Dorothy N. Jonas
2445 Century Hill
Los Angeles, CA 90067

August 24, 1983

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

RE: Law Revision Commission's Tentative Recommendations Relating to Disposition of Community Property

Dear Commissioners:

In our work for the California Commission on the Status of Women on behalf of homemakers' rights, we have identified several problem areas in existing marital property law in California. We have, therefore, examined your proposed recommendations with great concern.

Please note, however, that the opinions to be expressed in this letter are only our personal opinions as private citizens, and are not the opinions nor the position of the California Commission on the Status of Women -- which, because of the existing injunction, cannot at this time take a position on this issue.

It was our understanding these revisions were to be merely a "housecleaning" procedure.

However, they appear alarmingly far-reaching in their implications, and fail to offer any remedy for abuses already occurring under present law.

Particularly disturbing is the recommendations' assumption that the "good faith" clause in California's equal management and control code (Section 5125e) is a major restriction on a spouse's freedom to mismanage community assets. As early as 1974, Arnold Kahn and Paul Frimmer (in Management, Probate and Estate Planning in California's new Community Property Law) raised serious questions about the extent of protections offered by the "good faith" standard. In the years we have been studying this area of the law, we have found no case history which would support the notion that the "good faith" standard provides a meaningful legal remedy for the nonmanaging spouse during an ongoing marriage.

Therefore, we cannot agree that there is any basis for assuming the current "good faith" clause is now, or ever has been, adequate protection against spousal mismanagement.

Also puzzling is the author's referral to "fiduciary standards" which he/she lists as "applicable before 1975." In fact, our state courts placed increasingly narrow interpretations on a husband's fiduciary duty to his wife -- until, in 1973, the State Supreme Court (in Bank of America v. Connolly) limited this duty to property settlements at divorce, specifically excluding management behavior within a marriage.

Our observations are crucial because these proposed revisions stand or fall on the presumption of a strong standard of protection being offered by the "good faith" clause. Based totally on this questionable assumption, the author proceeds to suggest removing several current restrictions on:

-- requiring joinder on disposition of community personal property, and

-- requiring joinder (except on the family home) on the disposition of real property.

Although the author does propose some exceptions, they are completely inadequate for the spouse who can be, and often is, legally excluded from any participation in the management and control of the community resources. One spouse may be, and often is, kept completely in the dark about community income, assets, and liabilities. In such a case, no legal avenue exists whereby the non-managing spouse may obtain an accounting of assets and liabilities while the marriage is ongoing. Such practices have had particularly serious consequences for the homemaker wife (traditionally, the nonmanaging spouse) and her family.

The Commission's recommended revisions address none of these problems. Instead, the suggested changes appear to represent a formalization of such exclusionary acts, opening the door to further abuses of power.

Cordially yours,

Dorothy Jonas
(213) 557-9000 x. 469

Bonnie K. Sloane

copies to:

Hannah-Beth Jackson, Chair, California Commission on the Status of Women
Commissioners, California Commission on the Status of Women
Joan Patsy Ostroy, President, Los Angeles Women Lawyers
Los Angeles Women's Leadership Network
Ms. Barbara McCallum, Legislative Advocate, California Business & Professional Women

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Hon. Bill Lockyer, member, Judiciary Comm.
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Hon. Rose Ann Vuich

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Hon. Teresa Hughes
Hon. Lucy Killea
Hon. Marian LaFollette
Hon. Marian Bergeson
Hon. Gloria Molina
Hon. Gwen Moore
Hon. Jean Moorhead
Hon. Sally Tanner
Hon. Cathie Wright

Exhibit 3

LAW OFFICES OF
McCALLUM & McCALLUM
708 10TH STREET, SUITE 230
SACRAMENTO, CALIFORNIA 95814-1884
TELEPHONE (916) 444-7486
IN REPLY REFER TO

Aug. 30, 1983

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

re: Tentative Recommendation relating to
Disposition of Community Property

The undersigned was one of the Family Law consultants, who were involved in the original formulation of the equal management and control laws which were finally passed in their present form after five years of debate and lots of compromises. I am shocked to read some of the statements in your recommendation which seem to say that the laws are working so well that safeguards may be lifted.

First may I state, that the law as it stands was passed as a compromise, and not as originally formulated. That the originators requested and still wanted after passage JOINT management and control, instead of the socalled EQUAL management and control. That in many instances the new laws changed nothing in the unequal treatment of many spouses, mostly women. That today, we are still attempting to get passage of laws which would enable a spouse to force recognition of his/her ownership of community property. That under our present laws, the subservient spouse is the victim of the dominant spouse, because there is no method of obtaining an accounting of the community property or its debts EXCEPT where voluntarily given or upon termination of the marriage. That socalled equal management and control of property which does not have your name on the title or account is of dubious value to the disfranchised party.

You quote "good faith" to the other spouse, as though this is a remedy. Again, the original proponents wanted a fiduciary duty, and ended up with good faith as a compromise. More wrongs have been committed under the guise of "good faith", than have been righted. We still want and need "fiduciary duty," especially where one party has deprived the other of management and control.

On page 2 of your document, you indicate that possibly the spouse has the authority to dispose of community personal property of more value than the real property and use this as a basis to do away with the requirement of two signatures. Contrarily, I believe, it should require both parties to dispose of personal property over a certain value. Instead of lifting safeguards, we should be expanding them. As to the socalled "title problems", I have found that the Title Companies are quite capable of protecting themselves, and their rules are more restrictive than the law. I have also seen no reason to believe they would change their rules just because the law becomes less restrictive. Title companies want ABSOLUTE security, and under their present rules they are in complete control.

Probably the greatest legal fiction is the statement on page 2 which states:

"The broad protection of the 1917 statute is no longer as important as it once was, now that each spouse has management and control of the community real property and can take action to protect against mismanagement by the other spouse, and now that each spouse is governed by the duty of good faith management."

Sometimes the first time a spouse is aware that real property exists is when s/he is called upon to sign the papers to sell it. How is a spouse to judge whether the property has been mismanaged, when the only right to an accounting is if s/he files for a dissolution or legal separation? Large sums of money, stocks, limited partnerships etc. are lost every day by "good faith" speculators. They thought they would get rich in good faith! But half of those funds, stocks etc. that were gambled away belonged to the spouse who was not consulted, and who would have objected, if s/he had been consulted. Even in dissolutions, where at least the issue can be tried, the "good faith" provision is a farce.

I have a problem with your statement on page 3 calling the family home "community personal property". Are you referring to mobile homes?

With regard to your paragraph (3) on page 3, doesn't this fly in the face of AB-26 McAlister, which came out of the Law Revision Commission. Since by passage of this bill, the LUCAS case has been reversed, it opens the door to tracing of funds into the property notwithstanding title. Accordingly, the Title Companies will continue to require all spouses to sign deeds in case one of them can trace funds into the property. While I agree with your statement: "For protection of a spouse against mismanagement by the other spouse, a spouse should be permitted to have his or her name added to the record title to community property." I disagree with the resulting recommendation.

The recommendation of having the spouse who claims an interest record a declaration is unrealistic. It presupposes knowledge that there is such property, that the law itself exists, and that the spouse will expose themselves to the wrath of the other party by so recording. I can give you chapter and verse on wives whose husband puts all the property in his name alone, never discusses their financial status or ownership, and if they were to question or "God help them" record a declaration of interest, would be given an ultimatum to either sign off or get out. Under the present system, IT IS THE LAW, that requires both parties to join in the transfer of real property. Therefor, it isn't her or his defiant act. When you get to the point of dissolving the marriage, the one sure thing is that at least the subservient spouse won't get cheated out of the real property, and often times, the value of the real property can offset the misappropriation of other community property by the dominant spouse.

What we really need is to expand this protection of the subservient spouse to other property. We need a method of forcing the dominant spouse to put both names on ALL community property so that both spouses actually do have equal management and control.

Again on page 4 you state: "The reasoning upon which the anti-gift legislation is based is no longer applicable. Both spouses own the community property in equal shares, and each may protect the property from dissipation by the other." HOW? I am married. I have community property bank accounts in my name alone. Say I write a $5,000.00 check and send it to my grandmother,

"Happy Birthday." Say that $5,000.00 was the only savings we had between us. But, also say, he didn't even know I had it because I had all my statements sent to a P. O. Box of which he had no knowledge. Similar sitution, husband has maintained a separate bank account from which he keeps a mistress. We have proved in dissolutions over and over again, expenses paid for girlfriends, mistresses, etc. prior to the separation of the parties and do the courts say this is a breach of "good faith?" management of the community property, or a gift without the consent of the spouse. NO!

Add to the above scenario, my husband discovers I have such a bank account. He says, as your husband and half owner of the community property, I demand an accounting, and that you put my name on that account. I say, it's none of your business how I spend the money I earn. What can he do about it besides file for a dissolution which he chooses not to do because I have other talents? What exactly does CC 5125 do for him?

Notwithstanding your quite proper scenario about garage sales etc. on page 5, there isn't a problem. The law is there if needed, and no one to my knowledge or any of my family law committee's knowledge has abused it in the manner you are suggesting. What can I say, it works, there is no problem, so why change it? Upon separation or dissolution, this law becomes quite helpful, when one spouse goes on the rampage disposing of the furniture and furnishings.

Then on page 6 you make an assumption: "Each spouse now has management and control of the community property and both should be able to protect their interests." Again I ask, HOW? YOU say "Good Faith". If one spouse is out spending all of the income on his/her good times, and runs out of money and sells off the grand piano, the antique chairs, and the color television, I don't believe reminding him/her of his/her duty of "good faith" is much protection. Good faith and a nickel still won't buy a cup of coffee. What about the spouse who trades in the paid for automobile normally driven by the second spouse on a brand new $25,000.00 stickshift Porsche automobile placed into his name alone which the second spouse cannot drive? Good faith? Can s/he do anything about it? How can s/he assert her/his community property management and control?

O~ page 10, you again state a "major limitation". . . . "is the duty of each spouse to act in good faith ..." then you state that prior to adoption of this law, the California law analogized the management duties to the laws

governing relations of fiduciaries or partners. That law no longer applies. This was debated at great length when the 1975 law was passed, and they replaced "fiduciary duty" with "good faith" because this was a lesser duty. This should be clear from legislative history. Therefor, how can it be a major limitation? Then you state that the proposed law does not impose a right to the value of the property disposed of, or give the spouse a right of reimbursement. My question is WHY? Why shouldn't the spouse whose property has been disposed of without their knowledge or consent have an absolute right to reimbursement?

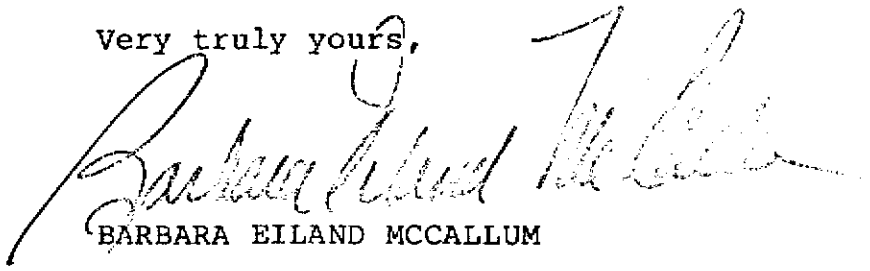
While I agree the laws need revision in this area, I do not agree that your commission's recommendations will improve the situation. If reality were as stated, these changes may be fine. However, in actuality, very little has changed in some families since the passage of these laws in 1975. There is no equal management and control in most one wage earner families. There is no equal management and control where there is one dominant spouse who rules the roost. There is no equal management and control in large segments of minority households which are built upon another culture. There is no equal management and control where one spouse is unequally educated. In short, there is on the whole only a very small number of families where equal management and control is a reality. After 8 years under this law, I would venture that there is still a large segment of our population which has no knowledge that this law even exists. Over and over in my office I hear, "It's his money, or it's his retirement, or his stock, because he is the only one earning the money." Or, he told me that I wouldn't get anything because it all belongs to him.

What I would recommend is that the Commission review the first draft of the proposed Uniform Marital Property Act, which has a whole section dealing with the rights of married persons (during the marriage), and formulate some changes which will give a remedy during marriage to all those spouses who are being deprived of their equal management and control. Give us a law which would give us the ability to utilize our community property, discover it, put our names on it, spend it, invest it in the true partnership sense. Don't tell us the present laws are working so well that the few safeguards therein should be lifted. In a state where 1.1 marriages out of 2 end in dissolution, please don't tell me we are protected by the duty of "good faith", better I should have no faith, then I might take steps to protect myself.

As the legislative advocate for the California Federation of Business & Professional Women, a representative for California Women Lawyers on the California Legislative Roundtable, a member of the California State Bar Family Law Legislation Committee, and a Commissioner on the El Dorado Commission on the Status of Women, as well as a consultant to a number of other bar association Family Law Committees, and an active Family Law practitioner, I can assure you that there will be opposition to these proposals should they come to the legislature in their present form.

I would be happy to discuss any of the above with any member wishing to do so. Having spent most of my professional life attempting to gain equality under the law, and having been an integral part of the five years it took to obtain passage of any management and control law recognizing the rights of wives, I have a great interest in seeing to it that those few rights obtained are not diluted, but strengthened.

Very truly yours,



BARBARA EILAND MCCALLUM

BEM:s
cc: Dorothy N. Jonas
Homemaker's Rights Task Force
California Commission on the
Status of Women

WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES

P.O. Box 480197, Los Angeles CA 90048-1197 Telephone 213 653-3322

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August 30, 1983

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

I did not receive a copy of the Tentative Recommendation Relating to Disposition of Community Property until August 29, 1983. Though I have read the document, there is not sufficient time for me to make specific suggestions for changes. I do have one substantial concern and am, therefore, writing about it in general terms.

My concern is reliance by the Commission on Civil Code Section 5125, which gives both parties on paper equal control of the community property assets. I use the words, "on paper" purposely, because I have found as have many other family law practitioners that a wife has the actual management and control of community property in form only and not in substance. Husbands, in my experience, continue to manage and control the community assets in a large majority of cases.

In fact, it is still more common than not for a wife to be unaware of the nature and extent of community property. That is why I think that it is important that both signatures be required when real property is transferred, sold or encumbered.

I also think that the Commission should recommend that joint tenancy cash bank accounts and securities, which are acquired during marriage, should be treated as community property; now, if those assets are held in joint tenancy, either party can transfer them on his or her own signature alone. In order to protect both parties, the court should have jurisdiction over those items as community property, and either spouse who does transfer without the knowledge of the other should be required to account to the other for the disposition of the funds involved.

I shall appreciate receiving any further revisions the Commission makes.

Cordially,

HARRIETT BUHAI
CHAIR, FAMILY LAW SECTION

HB/mg

cc: Joan Patsy Ostroy, President

#F-~~600~~ 641

5/6/83

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

DISPOSITION OF COMMUNITY PROPERTY

May 6, 1983

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN AUGUST 31, 1983.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

#F-600 5/6/83

TENTATIVE RECOMMENDATION

relating to

DISPOSITION OF COMMUNITY PROPERTY

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

Real Property

Section 5127 requires joinder of both spouses for a disposition of community real property. This limitation on the right of either spouse to manage and control the community property was originally enacted in 1917 as a protection of the wife against the husband's then unilateral managerial powers.[6]

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

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

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

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

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

6. 1917 Cal. Stats. ch. 583, § 2; see Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 53-56 (1976).

One effect of the joinder requirement is that title to both separate and community real property disposed of by a married person is clouded unless both spouses join in the disposition.[7] The existing statute attempts to mitigate this problem by providing that if community property stands of record in the name of one spouse, a disposition of the property by that spouse alone is presumed valid as to a bona fide purchaser and an action to avoid the disposition must be commenced within one year after the disposition is recorded.[8] However, the statutory presumption is of questionable utility in clearing land titles.[9]

The absolute limitation on disposition of community real property without the joinder of both spouses, in addition to causing title problems, is unnecessarily restrictive. Either spouse now has general authority to unilaterally dispose of community personal property,[10] which may be of substantially greater value than community real property. The broad protection of the 1917 statute is no longer as important as it once was, now that each spouse has management and control of the community real property and can take action to protect against mismanagement by the other spouse, and now that each spouse is governed by the duty of good faith management.[11]

However, the joinder requirement does provide important protection[12] in a number of special situations:

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

8. Civil Code § 5127.

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

10. Civil Code § 5125(a).

11. Civil Code § 5125(e).

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

(1) Disposition of real property family dwelling. The family home is of particular importance to both spouses and is properly subject to joint control by the spouses. California law expressly requires joint action for disposition of the community personal property family home despite the general rule that either alone may dispose of community personal property.[13] The same rule should continue to apply to the community real property family home.[14]

(2) Gifts of real property. A gift is unique among the varieties of disposition of community property in that it yields no assets or tangible benefits for the community and tends to deplete the community. Although it is desirable to permit either spouse alone to make a moderate or reasonable gift of community property,[15] it is improbable because of the intrinsic value of real property that a gift of real property would be considered moderate or reasonable. For this reason joinder of both spouses should be required for a gift of community real property, regardless of value. This will enable the parties to follow a clear and simple rule and will avoid the occasion to litigate whether a particular gift of community real property is moderate or reasonable.

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

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13. Civil Code § 5125(c).

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

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

permitted to have his or her name added to the record title to community property.[16]

Personal Property

The general rule is that either spouse has absolute power of disposition over community personal property.[17] This rule has generally worked well in practice. It is subject to a number of qualifications, however, that need refinement:

(1) Gifts of personal property. Prior to 1891 California followed the Spanish rule that a manager spouse may without consent of the other make reasonable gifts of community property.[18] In 1891 the law was revised to require the written consent of the wife to a gift by the husband. The 1891 anti-gift statute[19] became necessary because at that time the husband was considered the sole owner of community property, the wife's interest in the community property being a mere expectancy, and the wife needed the ability to protect the community property from depletion by gifts of the husband.[20]

The reasoning upon which the anti-gift legislation was based is no longer applicable. Both spouses own the community property in equal shares,[21] and each may protect the property from dissipation by the other.[22] Moreover, tips given waiters, waitresses, and others, offerings given at church, United Fund contributions, and other gifts are routinely made without thought of written consent by the other spouse. If a case

16. See Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 227, 280-81 (1982).

17. Civil Code § 5125(a).

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

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

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

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

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

were to arise involving such a gift the courts would undoubtedly find a ground to validate the gift, through ratification, waiver, implied consent, or other means.[23] The law should clearly state the traditional community property rule that a spouse may make a gift of the community property without the written consent of the other spouse if the gift is usual or moderate in the circumstances of the particular marriage.[24]

(2) Household furnishings and personal effects. Section 5125(c) of the Civil Code precludes a spouse from selling, conveying, or encumbering the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children that is community personal property, without the written consent of the other spouse. Like the other statutory limitations on the ability of a spouse to unilaterally dispose of community property, this provision had its origins in a time when the husband had management and control of the community property and the wife needed some protection against mismanagement.[25]

The written consent requirement for sale or conveyance of household furnishings and personal effects is unrealistic in an era of garage sales; it is unlikely that written consent will be sought for a sale of used furniture or clothing. The statute that requires written consent in effect permits a spouse to seek relief from a transfer of community personal property in nearly every case. Broadly applied, the statute would make it dangerous for a buyer to purchase any furniture or wearing apparel in a warehouse or shop without inquiring into marital status and authority.[26] This problem is compounded by the fact that a transfer without the written consent of the other spouse is void and not merely voidable. The result is that either spouse can rescind (possibly

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23. See discussion in Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 227, 239-40 (1982).

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

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

26. 7 B. Witkin, Summary of California Law, Community Property § 68, at ___ (8th ed. 1974).

without the need to make restitution) and the transfer is not effective as to the transferor's interest even after the marriage has terminated by dissolution or death.[27]

The limitation on disposal of household furnishings and personal effects is unnecessary. Each spouse now has management and control of the community personal property and both should be able to protect their interests. This is particularly true in the case of household furnishings and personal effects--the very items to which the spouses are closest and with which they are most familiar. If one spouse mismanages property of this type, the general duty of good faith should be sufficient to protect the other spouse.[28]

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

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

Setting Aside a Disposition of Property

Despite the language of Civil Code Section 5127 that both spouses "must join" in a transaction involving community real property, this requirement has not been held to invalidate a transaction except during marriage, when it can be avoided by the nonjoining spouse. Thus, during marriage the wife can set aside the husband's conveyance of community real property in toto.[29] After termination of marriage by dissolution

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

28. Civil Code § 5125(e).

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

or death the wife can set aside the husband's conveyance of community real property only as to her one-half interest.[30] The same rules apply to transactions involving community personal property, to transactions involving gifts, and to transactions made for consideration, even though different statutes are involved in each of these situations.[31]

The reasons for these rules are deeply rooted in the history of California community property law. From the beginning of the California community property system in 1849, the husband had the exclusive management and control of the community property and was considered to be the true owner of the property; the wife's interest was a "mere expectancy" to be realized only if she survived the termination of the marriage by death of her husband or by dissolution of marriage.[32] The history of California community property can be viewed as an evolution from this position towards one of equality of the spouses, the major landmarks being the 1927 legislation declaring ownership of community property by the spouses as "present, existing and equal"[33] and the 1975 legislation giving either spouse the management and control of community property.[34]

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

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

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

33. Now Civil Code Section 5105.

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

Within this broad progression of the law a series of smaller steps was taken to protect the interest of the wife from erosion by acts of the husband,[35] among them:

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

In the historical context it is clear why the courts have interpreted these apparent blanket requirements to provide that the wife may, during marriage, recover all community property conveyed in violation of the statutes but after termination of marriage by death or dissolution may recover only her one-half interest.[36] Since the husband was the manager and controller, any conveyance he made was effective to bind his interest; the transaction was not void but only voidable by the non-joining wife. The husband has testamentary power over one-half the community property and is entitled to his share of the community property at dissolution of marriage; therefore, the husband's death or the dissolution of marriage has the effect of ratifying or validating the husband's transaction. The wife can thereafter recover only her one-half interest in the property.

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

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

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

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

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

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

The same basic principles should apply in an era of equal management and control to those few special types of dispositions for which joinder or consent is required. Because of the nature of the dispositions for which joinder or consent is required, there will be few bona fide purchasers affected. However, the law should make clear that a transaction in violation of a joinder or consent requirement is voidable.[37] To give some assurance of transactional security, an action by a spouse to avoid a transaction for failure of joinder or consent should be limited to one year after the spouse had notice of the transaction or three years after the transaction was made, whichever occurs first.[38] If the transaction is set aside during marriage, it should be set aside as to the interests of both spouses.[39] If the transaction is set aside after termination of marriage by dissolution or separation or by death, it should ordinarily be set aside only as to the interest of the spouse who did not join in or consent to the transaction. However, the court should have discretion to set aside the transaction as to all interests in special circumstances, such as where it is desirable to award the family home to the spouse who has custody of the children or as a probate homestead. In any case, the court should have authority to fashion an appropriate order that may, for example, require restitution for the person to whom the transaction was made or provide for recovery of the value of the property rather than the property.[40]

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

38. This limitation period is consistent with existing law. See Civil Code Section 5127 (one year for action to avoid a disposition of real property); Code Civ. Proc. § 338 (three years for recovery of personal property).

39. This codifies general California law and overrules the contrary case of Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage). See, e.g., Andrade Development Co. v. Martin, 138 Cal. App.3d 330, 187 Cal. Rptr. 863 (1982) (Mitchell case irreconcilable).

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

Duty of Good Faith

A major limitation on the freedom of either spouse to manage and control community property and on the spouse's power of disposition is the duty of each spouse to act in good faith with respect to the other spouse in the management and control of the community property.[41] Prior to adoption in 1975 of equal management and control and the corresponding duty of good faith, California law analogized the management duties between spouses to the law governing the relations of fiduciaries or partners.[42]

The duty of good faith is more appropriate to California's current scheme of equal management and control than the fiduciary standards applicable before 1975, when the husband had sole management and control of the community property. Since either spouse may now manage and control the community assets, the good faith standard that the spouse have no fraudulent intent supersedes the older standards.[43]

The proposed law continues without change the duty of good faith. This codifies pre-1975 law to the extent the prior law precluded a spouse managing and controlling community property from obtaining an unfair advantage over the other spouse.[44] But it does not impose a

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the value of the property disposed of, or to give the spouse a right of reimbursement.

41. Civil Code § 5125(e).

42. Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 227, 236-37 (1982).

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

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

fiduciary standard that the spouse be as prudent as a trustee or keep complete and accurate records of income received and disbursed.[45]

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

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

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

368/243

Civil Code § 5106 (amended)

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

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

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

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

meaning as provided in Section 3 of the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended.

(b) ~~Notwithstanding the provisions of Sections 5105 and 5125, whenever~~ Whenever payment or refund is made to an employee, former employee or his beneficiary or estate pursuant to a written retirement, death or other employee benefit plan or savings plan, other than a plan governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended, such payment or refund shall fully discharge the employer and any trustee or insurance company making such payment or refund from all adverse claims thereto unless, before such payment or refund is made, the employer or former employer has received at its principal place of business within this state, written notice by or on behalf of some other person that such other person claims to be entitled to such payment or refund or some part thereof. Nothing contained in this section shall affect any claim or right to any such payment or refund or part thereof as between all persons other than the employer and the trustee or insurance company making such payment or refund.

Comment. Section 5106 is amended to correct section references.

37022

Civil Code § 5113.5 (amended)

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

5113.5. Where community property, before or after the effective date of this section, is transferred by the husband and wife to a trust, regardless of the identity of the trustee, which trust originally or as amended prior or subsequent to such transfer (a) is revocable in whole or in part during their joint lives, (b) provides that the property after transfer to the trust shall remain community property and any withdrawal therefrom shall be their community property, (c) grants the trustee during their joint lives powers no more extensive than those possessed by a husband or wife under ~~Sections 5125 and 5127~~ Chapter 4 (commencing with Section 5125.110) , and (d) is subject to amendment or alteration during their joint lifetime upon their joint consent, the property so transferred to such trust, and the interests of the spouses in such trust, shall be community property during the continuance of the marriage, unless the trust otherwise expressly provides. Nothing in this section shall be deemed to affect community property which, before

or after the effective date of this section, is transferred in a manner other than as described in this section or to a trust containing different provisions than those set forth in this section; nor shall this section be construed to prohibit the trustee from conveying any trust property, real or personal, in accordance with the provisions of the trust without the consent of the husband or wife unless the trust expressly requires the consent of one or both spouses.

Comment. Section 5113.5 is amended to correct section references.

5380 N/Z

Civil Code § 5125 (repealed)

SEC. 3. Section 5125 of the Civil Code is repealed.

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

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

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

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

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

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

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

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

Civil Code §§ 5125.110-5125.299 (added)

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

CHAPTER 4. MANAGEMENT AND CONTROL

Article 1. General Provisions

§ 5125.110. Definitions

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

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

(b) "Management and control" includes disposition.

(c) "Property" means real and personal property and any interest therein.

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

38455

§ 5125.120. Either spouse has management and control

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

Comment. Section 5125.120 continues the substance of the first portions of former Sections 5125(a) (personal property) and 5127 (real property). It applies to all community property, whether acquired before or on or after January 1, 1975, the date of inception of equal management and control. This chapter contains exceptions to and limitations on the rule of Section 5125.120. See also Section 5113.5 (management and control of community property by trustee) and Financial Code Section 851 (management and control of community property bank account by spouse in whose name account stands). Exceptions and limitations may also be found in a marital property agreement between the spouses.

§ 5125.130. Duty of good faith

5125.130. Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

Comment. Section 5125.130 continues the substance of former Section 5125(e). Special provisions of this chapter relating to management and control are subject to the overriding duty of good faith, which applies notwithstanding any implication in any provision of this chapter to the contrary. See, e.g., Section 5125.210 and Comment thereto (power of disposition absolute); see also Section 5125.110(b) ("management and control" includes disposition). The duty of good faith arises out of the confidential relationship of the spouses; it does not impose a standard of conduct that would be applicable to a fiduciary in an investment context. Section 5103 (confidential relationship); cf. Williams v. Williams, 14 Cal. App.3d 560, 92 Cal Rptr. 385 (1971) (dictum); see also discussions in Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1013-22 (1975) and Comment, Toward True Equality: Reforms in California's Community Property Law, 5 Golden Gate L. Rev. 407 (1975) (subjective rather than objective standard of good faith would more appropriately fulfill legislative intent).

38457

§ 5125.140. Community property business

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

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

38458

§ 5125.150. Where spouse has conservator or lacks legal capacity

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

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

Article 2. Disposition of Community Property

§ 5125.210. Power of disposition absolute

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

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

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

Subdivision (b) is drawn from former Section 5127. The validity and effect of a disposition between spouses is governed by law other than this article. The limitations in this article may also be subject to a marital property agreement.

38875

§ 5125.220. Person in whose name title stands must join

5125.220. (a) Except as provided in subdivision (b), each spouse in whose name record title or other documentary evidence of title to community property stands must join in a disposition of the property.

(b) If record title or other documentary evidence of title to community property stands in the names of both spouses in the alternative, either spouse may make a disposition of the property without the joinder of the other spouse.

Comment. Subdivision (a) of Section 5125.220 codifies practice under former law. Subdivision (a) governs community property, but not separate property of the spouses, including community property in joint tenancy form.

Subdivision (b) makes clear that the joinder requirement is subject to an express direction in the title of alternative rights.

§ 5125.225. Adding name to record title to real property

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

(b) A recorded declaration of interest in community real property has the following incidents:

(1) The spouse who records the declaration is a spouse in whose name record title to community real property stands for the purpose of any joinder requirement.

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

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

Comment. Section 5125.225 is intended to protect the interest of a spouse in community real property by enabling the spouse to add his or her name to the record title to the property. The declaration of interest by the spouse necessitates joinder of both spouses for a transaction affecting the property and otherwise serves as constructive notice of title, but does not affect the interests of the spouses in the property. An erroneous declaration is subject to removal by quiet title action, action to remove cloud, or other judicial means. Nothing in Section 5125.225 limits the remedies of the other spouse for slander of title or the ability of a spouse who records a declaration thereafter voluntarily to renounce, quitclaim, or otherwise relinquish any interest in the community real property. The manner of recording the declaration is prescribed in Government Code Section 27322 and the fee for recording is prescribed in Government Code Section 27361 et seq.

39380

§ 5125.230. Gifts

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

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

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

Subdivision (b) is new. It is drawn from comparable provisions in other jurisdictions and is consistent with the traditional community property rule applicable in California prior to 1891. See, e.g., La. Civ. Code Ann. art. 2349 (usual or moderate gifts of value commensurate with economic status of spouses); Lord v. Hough, 43 Cal. 581 (1872) (manager spouse may without consent of the other make reasonable gifts of community property). In making a determination after the death of the donor spouse whether a gift is usual or moderate the court should take into account such factors as amounts received by the other spouse by will, succession, gift, or other disposition, including insurance proceeds, joint tenancy, and inter vivos and testamentary trusts, and any special or unique character of the community personal property given.

40311

§ 5125.240. Disposition of family dwelling

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

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

2178

§ 5125.250. Encumbrance of household goods

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

(b) This section does not apply to the creation of a purchase money security interest.

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

2197

§ 5125.260. Avoiding and setting aside disposition

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

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

(2) Three years after the disposition was made.

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

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

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

Subdivision (b) codifies general California law that a disposition avoided during marriage must be set aside as to the interests of both spouses, not just as to the interest of the non-joining or non-consenting spouse. See, e.g., Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935) (community real property); Lynn v. Herman, 72 Cal. App.2d 614, 165 P.2d 54 (1946) (gift); Mathews v. Hamburger, 36 Cal. App.2d 182, 97

P.2d 465 (1939) (personal property); Andrade Development Co. v. Martin, 138 Cal. App.3d 330, 187 Cal. Rptr. 863 (1982) (contract to convey real property). This overrules Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage). Where a disposition is set aside after termination of marriage by dissolution, separation, or death, the court will in the usual case set aside the disposition only as to the non-joining or non-consenting spouse so as to effectuate the disposition as to the interest of the spouse who made the disposition. See, e.g., Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429 (1932) (community real property after dissolution); Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933) (community real property after death); Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629 (1937) (community personal property after death); Gantner v. Johnson, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969) (community real and personal property after death). However, the statute does not mandate this result and recovery of the whole property may be proper in a case, for example, where it is desirable to award property such as a family home to the spouse who has custody of the children or as a probate homestead. Under subdivision (b) the court has discretion to fashion an appropriate order, depending on the circumstances of the case. The order may, for example, require restitution for the person to whom the disposition was made, or provide for recovery of the value of the property instead of the property.

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

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§ 5125.299. Transitional provisions

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

(b) A disposition of community property made before January 1, 1985, is governed by the law in effect at the time of the disposition.

(c) A reference to, or an incorporation by reference of, former Sections 5125 or 5127 in a trust or other instrument executed before January 1, 1983, shall, on or after January 1, 1985, be deemed to refer to or incoporate this article.

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

Civil Code § 5127 (repealed)

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

~~5127. Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.~~

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

Civil Code § 5128 (repealed)

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

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

~~(b) Where one or both spouses either has a conservator of the estate or lacks legal capacity to give consent to a gift of community personal property or a disposition of community personal property without a valuable consideration as required by Section 5125 or to a sale, conveyance, or encumbrance of community personal property for which a consent is required by Section 5125, the procedure for such gift, disposition, sale, conveyance, or encumbrance is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.~~

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

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

368/239

Corporations Code § 420 (amended)

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

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

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

evidence that the shares or securities were held other than in joint tenancy or of a breach of trust by any joint tenant.

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

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

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

(e) The provisions of the California Commercial Code shall not affect the limitations of liability set forth in this section. ~~Section 5125~~ Chapter 4 (commencing with Seciton 5125.110) of Title 8 of Part 5 of Division 4 of the Civil Code shall be subject to the provisions of

this section and shall not be construed to prevent transfers, or result in liability to the corporation, transfer agent or registrar permitting or effecting transfers, which comply with this section.

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

2347

Prob. Code § 3071 (amended)

SEC. 8. Section 3071 of the Probate Code is amended to read:

3071. (a) In case of a transaction for which the joinder or consent of ~~both spouses~~ a spouse is required by ~~Section 5125 or 5127~~ Article 2 (commencing with Section 5125.210) of Chapter 4 of Title 8 of Part 5 of Division 4 of the Civil Code or by any other statute, if one or both spouses lacks legal capacity for the transaction, the requirement of joinder or consent shall be satisfied as provided in this section.

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

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

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

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

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

Comment. Section 3071 is amended to correct section references.

2348

Prob. Code § 3072 (amended)

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

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

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

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

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

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

2349

Prob. Code § 3073 (amended)

SEC. 10. Section 3073 of the Probate Code is amended to read:

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

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

Comment. Section 3073 is amended to correct section references.