#F-600 9/19/80

Memorandum 80-90

Subject: Study F-600 - Community Property (Professor Bruch's study of management powers and duties)

Attached to this memorandum is a copy of the study prepared by the Commission's consultant, Professor Carol Bruch, concerning problems in the California community property laws involving management and control. The second half of Professor Bruch's study of community property law, involving division of the community property, will not be available until early in 1981.

You should read the study with care and be prepared to make preliminary decisions concerning the matters raised in the study at the October meeting. A list of Professor Bruch's recommendations appears as Exhibit 1, and is duplicated at the front of the study. We plan to have Professor Bruch at the meeting as well as the Commission's other consultants, Professors Reppy and Riesenfeld. We also hope to have in attendance one or more members of the State Bar Family Law Section.

With these resources the Commission should be in a position, following discussion of the issues, to commence drafting necessary changes in the community property laws. Our objective is to develop a tentative recommendation for reform of the community property law to distribute for comment by late spring of 1981.

There are a number of issues in the study that relate to the liability of marital property for debts. These issues the staff will discuss separately in the First Supplement to Memorandum 80-88, in connection with the Commission's tentative recommendation on liability of marital property.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

MANAGEMENT POWERS AND DUTIES

Summary of Recommendations

#F-600 9/18/80

MANAGEMENT POWERS AND DUTIES UNDER CALIFORNIA'S COMMUNITY PROPERTY LAWS*

*This study was prepared for the California Law Revision Commission by Professor Carol S. Bruch. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

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

MANAGEMENT POWERS AND DUTIES UNDER CALIFORNIA'S COMMUNITY PROPERTY LAWS*

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* Background study for the California Law Revision Commission prepared by Carol S. Bruch, Professor of Law, University of California, Davis.

MANAGEMENT POWERS AND DUTIES UNDER CALIFORNIA'S COMMUNITY PROPERTY LAWS*

by

Carol S. Bruch+

FOREWORD

For the Commission's convenience, certain aspects of the study on management and division of community property have been put in final form now, rather than upon the completion of the entire project. In an effort to place this paper in perspective, occasional references will be made to topics, arguments and recommendations that will be included in later portions of the study. The proposals made here are therefore necessarily qualified.

Most importantly, the attached discussion of creditors' rights is set in the context of a married couple's obligations to one creditor at a time. This permits a thorough treatment of the family and community property policy issues, as it emphasizes the spouses' relative

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+ Professor of Law, Martin Luther King School of Law, University of California, Davis. The author expresses her deep appreciation to Allison Mendel, King Hall '80, Diane Wasznicky, King Hall '80, Timothy Roake, King Hall '81, Madeleine Weiss, King Hall '81, and John Chasuk, King Hall '81, for their fine research assistance.

responsibilities for the events that gave rise to their debts. Questions that arise when more than one creditor seeks satisfaction at the same time from the same property, including procedures for a marshalling of assets on the creditors' behalf, however, are not included here. A later study to be conducted jointly by Professor Bruch and Professor Stefan Riesenfeld is planned to address these issues. The topic of creditor access following divorce is also reserved.

In addition, the concluding portion of Professor Bruch's community property study (originally scheduled for completion in January 1981) will suggest a broader definition of community property (increasing the pool of funds available to creditors who look to the community property and simplifying the characterization of community and separate property), and will propose increased flexibility concerning property division at divorce (both as to the kind of property that may be divided and in the standards to be applied).

The ultimate adoption of proposals that are to be included in the two later studies will entail conforming amendments in varying degrees to the recommendations that are set forth in this paper. Proposals which should be given final consideration only after additional materials have been presented are identified where possible, both in the discussion itself and in the attached summary of recommendations.

INTRODUCTION

Equality in property matters has been slow in coming to married people, even under California's community property regime. Despite a model of economic partnership, it was 1975 before California moved to a

system of equal management and control.[1] Few changes were made, however, to enhance the likelihood that the new theoretical equality would in fact be carried out. Concerns for the ongoing success of businesses and for certainty in banking transactions, for example, have left major areas in which the sole management and control of community or community assets by one spouse continues to be authorized. As a result, an earning spouse who banks wages in an account in his or her own name need not be concerned that the other spouse will have access to those funds,[2] and an entrepreneur's spouse has no more say about how the community property business is being run (including the question of how much capital is left in the business and how much is withdrawn by way of salary)[3] than before the 1975 reforms.

Although it is difficult to gauge how many spouses have been frustrated by the lack of recourse provided to them for problems in property management, there is no question that a comprehensive scheme of remedies is needed.[4] Under the current statutory law, only at

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1. 1973 Cal. Stats, ch. 987, at 1901 (amending Cal. Civ. Code §§ 5125, 5127).

2. Cal. Fin. Code §§ 851, 7601, 1120 (West Supp. 1980); Cal. Fin. Code § 852 (West 1968).

3. Cal. Civ. Code § 5125(d) (West Supp. 1980).

4. The State of California's Commission on the Status of Women has an expanding file of letters from women who describe management problems. Interview with Pamela Faust, Executive Director of the Status of Women Commission, in Sacramento (Sept. 10, 1980). One letter reads:

> Please send me available information on a married woman's rights to support for food, housing, etc., while still

divorce is relief for improper management provided. Although it is unlikely that interspousal remedies will often be pursued during an ongoing marriage, surely a system that guarantees relief only in the divorce court enhances marital breakdown.[5] In more than one state the realization that divorcing spouses were more adequately protected than married ones has promoted a broad-scale reform of marital property rights, including rights for relief during marriage. Louisiana

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married and how she can secure these without suing for divorce.

If the husband puts all monies in (his) individual checking account and refuses to pay for food, what recourse does the wife have?

Also, if bill collectors, persons holding unpaid notes, demand payment can the wife use property to pay and avoid going to court if the husband refuses and just continues to spend all the income?

Can a wife do anything to protect herself financially against an alcoholic husband--he has a good job and still is able to hold his job but refuses any treatment and neglects responsibility as a husband financially.

Your help will be greatly appreciated. Thank you.

California Commission on the Status of Women, California Women, They Tell it Like it is, at 10, col. 1 (Jan. 1980). See also id at 6 (July 1980).

For the text of a second letter, see note 24 infra.

5. See the letter set forth in note 4 supra. This paper is based upon the assumption that societal interests as well as human values are served in the preservation of marriages, even those in which significant disagreements as to financial matters exist. It also assumes that divorce will be promoted if it is the only avenue to redress economic injuries between spouses or to free one spouse from the financially irresponsible behavior of the other spouse. On the other hand, the disruptive potential of interspousal litigation is recognized, and recommendations are made that would permit but not force interspousal litigation to secure the substantive rights that are identified or proposed. See text following note 197 infra.

recently adopted major amendments to its community property laws[6] and a Wisconsin bill that would establish a new marital partnership (community) property system is pending before that state's legislature, where it is expected to be enacted during the coming session.[7] Because these measures have been carefully researched, analyzed, and drafted, they will receive special attention in the following discussion of needed reforms in California law.

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6. La. Civ. Code Ann. §§ 2325-2437 (West Supp. 1980), enacted by 1979 La. Acts, No. 709. Extensive commentaries are contained in the Act.

7. The most recent version of the proposal is found in 1979 Wisconsin Assembly Bill 1090 (Assembly Substitute Amendment 4), passed by the Assembly Judiciary Committee on February 19, 1980, and reported out of that committee to the Joint Committee on Finance on March 11, 1980. Weisberger, Marital Property Reform in Wisconsin, at 1 (March 1, 1980) (outline of the legislation prepared by Professor June Miller Weisberger of the University of Wisconsin Law School); Curran, Wisconsin Legislative Reference Bureau, Memorandum Update on the Marital Partnership Property Bill, at 1 (June 30, 1980). The Wisconsin State Department of Revenue has been directed to report to the legislature's Joint Committee on Finance by January 1, 1981, with forms and schedules for a joint state income tax return for married persons in Wisconsin. 1979 Wis. Sess. Laws ch. 221, § 2046.

   For convenience, citations to the Wisconsin legislation will be made to the section numbers that will eventually appear in the statutes, not to the section numbers of either the original bill or its amended version that set forth the proposed statutory numbers and language. Because both the original bill and Assembly Substitute Amendment 4 present materials in numerical order, according to the proposed statutory numbers, this form of identification will permit quick access to both the proposed language and to the statutes once enacted.

CURRENT MANAGEMENT POWERS AND DUTIES

Since 1975, the general management rule in California (found in Section 5125(a) of the Civil Code) has been that each spouse has the power to manage and control both that spouse's separate property and the community property. However, sole management is authorized in the conduct of a community property business,[8] or where the other spouse has a conservator,[9] and sole management in fact arises under rules that require financial institutions to deal only with named account holders.[10] In yet other cases, defined by Civil Code Sections 5125[11]

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8. Cal. Civ. Code § 5125(d) (West Supp. 1980).

9. Cal. Civ. Code § 5128 (West Supp. 1980) (operative Jan. 1, 1981); Cal. Prob. Code §§ 3000-3154. (West Supp. 1980) (operative Jan. 1, 1981).

10. Cal. Fin. Code §§ 851, 7601, 11200 (West Supp. 1980); Cal. Fin. Code § 852 (West 1968).

11. Cal. Civ. Code § 5125 (West Supp. 1980) reads:

> (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.
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> (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.
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> (c) A spouse may not sell, convey, or encumber 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.
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> (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.

and 5127[12], the joint management of both spouses replaces the norm in which either spouse may deal alone with the property. These last provisions, termed restraints on alienation, require the consent or joinder of both spouses for gifts of community property in any form,[13] for sales for less than valuable consideration of community personal

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12. Cal. Civ. Code § 5127 (West Supp. 1980) reads:

> 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 then 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.

13. Cal. Civ. Code § 5125(b) (West Supp. 1980); Cal. Civ. Code § 5127 (West Supp. 1980).

property,[14] for sales or encumbrances of household goods or wearing apparel of the other spouse or the parties' minor children,[15] and for sales, encumbrances, or leases for longer than one year of community realty.[16]

More general standards of management behavior are established by two additional Civil Code provisions, Sections 5125(e) and 4800(b)(2). Section 5125(e) imposes an obligation of "good faith" upon a spouse exercising management powers,[17] while Section 4800(b)(2) authorizes a divorce court to award an additional amount to an injured spouse as compensation for the other spouse's deliberate misappropriation of community or quasi-community property.[18] There is little case gloss to

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14. Cal. Civ. Code § 5125(b) (West Supp. 1980).

15. Cal. Civ. Code § 5125(c) (West Supp. 1980).

16. Cal. Civ. Code § 5127 (West Supp. 1980).

17. Cal. Civ. Code § 5125(e) (West Supp. 1980):

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

18. Notwithstanding the equal division rule of Cal. Civ. Code § 4800(a), Cal. Civ. Code § 4800(b)(2) (West Supp. 1980) permits the court "[a]s an additional award or offset against property, [to] award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party."

illuminate either Section 4800's reference to deliberate misappropriation,[19] or the relatively new "good faith" language of Section 5125.[20] While it appears that a breach of the good faith obligation imposed by Section 5125 should constitute deliberate misappropriation, permitting a compensatory award to the injured spouse under Section 4800 at divorce, good faith alone may not provide a defense against a Section 4800 claim. In In re Marriage of Walter,[21] decided before equal management and control under a "good faith" standard was provided by statute, the court held that the payment of separate expenses with community property funds constitutes deliberate misappropriation, even if the managing spouse believes in good faith that the property being consumed is his own separate property and not community property. Thus, although Section 4800's reference to "deliberately misappropriated" appears on its face to be a more narrow ground for relief than the one provided by Section 5125's good faith requirement, it in fact imposes a form of strict liability where community funds are used for the separate benefit of one spouse.

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19. This section has been specifically considered in only one case since the "deliberately misappropriated" language was added. See the discussion of In re Marriage of Moore at note 31 infra. However, there are numerous cases which have upheld reimbursement awards to the community to compensate for a spouse's mismanagement. The basis of liability has not been fully and consistently articulated, but appears to be grounded in fiduciary duties and trust concepts. See note 28 for a discussion of the case law.

20. See In re Marriage of Smaltz, 82 Cal. App. 3d 568, 147 Cal. Rptr. 154 (1st Dist. 1978), which came to the sensible conclusion that no abuse of a husband's management duties occurs when he pays spousal support to his former wife out of his current earnings. In Smaltz, the husband's support obligation was based entirely upon his current earnings, as he had no separate property.

21. 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1st Dist. 1976).

II

PROPOSED MANAGEMENT POWERS AND DUTIES

Left totally unclarified by current law is the extent to which other actions by one spouse may violate the good faith management duty imposed by Section 5125, and the nature of possible remedies during marriage for a spouse who is injured by a violation of the Code's management standards. Several situations can be imagined where a remedy might fairly be requested to vindicate such marital property rights. First, if a spouse refuses to disclose what community property he or she has or in what form the property is being held, relief should be made available by way of an action for disclosure. Further, if one spouse controls community assets in a business or account that is subject to his or her sole management and control, and refuses to make those assets or some reasonable portion of them available to the other spouse for legitimate community purposes (such as the payment of outstanding obligations), an action for access to the community property for good cause shown should be authorized. A spouse whose name has not been included on the title of a community asset should be able to insist that the title be corrected to give notice of his or her ownership interest. On the other hand, where the consent of a spouse is required by statute but is withheld for no reason or a bad reason, or the other spouse is unable to consent due to physical or mental incapacity, procedures should permit a court to dispense with the consent requirement for that transaction or course of transactions. Too, if there has been long-term mismanagement by one spouse, the other spouse should be permitted to request that the couple's finances be severed, or that the spouse be made solely responsible for the

management and control of the couple's community property. A division of existing community property and clarification of the parties' obligations to existing creditors should be available in conjunction with such litigation. Where gifts or other transfers have been wrongfully made, or community property has been wrongfully applied to debts for which separate property was primarily liable, the injured spouse should have options available during marriage to require that the other spouse's separate property or other community property be used to redress the injury. Additionally, a number of remedies or protections against third parties are in order that would not unduly infringe upon their interests, yet would avoid serious hardship to one spouse at the hands of the other spouse's irresponsibility. These remedies would include rights to rescind or set aside unauthorized transfers of community property and a right to insist upon a fair marshalling of assets on behalf of the debtor when creditors' claims are being satisfied. Finally, the mutual obligations and protections assigned to property management by spouses should extend into the post-divorce period for so long as common property remains that has not been divided by agreement or court order.

The following discussion of marital property management and control treats these issues one by one, under the rubrics The Right to Know, The Right to Sound Management, The Right to Participate, and The Right to be Made Whole.

A. THE RIGHT TO KNOW

Surely one of the most basic components of property ownership is the right to know the nature and extent of one's holdings. This

principle is well established in most areas of joint ownership,[22] but remains largely unacknowledged as to marital property.[23] Recent letters to the Status of Women Commission have come from wives whose husbands have placed their earnings in individual bank accounts, refusing to divulge the extent of their assets.[24] While financial institutions are properly precluded from releasing information on account balances to those whose names are not on the signature cards, it seems clear that some mechanism should be made available to permit one spouse to inquire of the other as to their shared property.

Perhaps as a holdover from the days in which each spouse managed their own earnings and the other spouse's interest was little more than an expectancy,[25] rights to accounting in the community property states

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22. D. Dobbs, Remedies 252 (1973).

23. The only suggestion in California case law that such a right may exist at times other than upon dissolution of marriage is found in the Wilcox case, discussed in note 27 infra.

24. One such letter reads:

> Is there anywhere in the legal rights of women that would say what and how a wife could know what's right in the process of determining the income received from a husband?
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> We've been married 16 years and I don't know anything about any savings or have my name on any credit union savings.
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> Would appreciate knowing my rights to income proportionally as he will not budget.

California Commission on the Status of Women, California Women, They Tell it Like it is, at 10, col. 2 (Jan. 1980). See also id. at 6 (July 1980).

25. The term "mere expectancy" was first used to describe a wife's interest in the community property in Van Maren v. Johnson, 15 Cal. 308, 311 (1860): "[T]he title to [common] property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor." See generally Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 UCLA L. Rev. 1, 35-39, 47-52 (1976).

have developed primarily in the context of divorce litigation, where the couple's final balance sheet is struck.[26] Now that equal management and control rights have been established, however, the implementation of those rights requires that each spouse be willing to divulge to the other the assets under that spouse's control, even if no present request to divide the assets has been made. Because it is for a court to determine what is separate property and what is community property if there is any lack of clarity, disclosure should extend to all assets, not just those that the managing spouse concedes to be community property. Although it is possible that a court would imply a right to disclosure from the present good faith management provision alone, on the reasoning that where there is a right there must be a

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26. Such relief is expressly authorized at divorce by statute in Texas and in conjunction with any interspousal property litigation in the Wisconsin proposal. / Tex. Fam. Code Ann. tit. 1, § 3.56 (Vernon 1975); 1979 Wisconsin Assembly Bill 1090, § 766.93(8) (Assembly Substitute Amendment 4) ("In conjunction with any other remedy, a spouse may petition the court for an accounting of the marital partnership property assets and liabilities.") Case law has recognized the right in several states in connection with termination of the community. In re Marriage of Connolly, 23 Cal. 3d 590, 591 P.2d 911, 153 Cal. Rptr. 423 (1979); Boeseke v. Boeseke, 10 Cal. 3d 844, 849-50, 519 P.2d 161, 164-65, 112 Cal. Rptr. 401, 404-05 (1974) ("By reason of his management and control, one spouse normally has a fiduciary duty to account to the other while negotiating a property settlement agreement. The duty . . . includes disclosure of the existence of community assets and material facts affecting their value."); Sande v. Sande, 83 Idaho 233, 360 P.2d 998 (1961); Unser v. Unser, 86 N.M. 648, 526 P.2d 790 (1974) (holding that the duty of disclosure terminates when the parties are independently represented and dealing at arm's length in an adversary proceeding); In re Yiatchos' Estate, 60 Wash. 2d 179, 373 P.2d 125 (1962). Where the term "accounting" is used, it sometimes refers to an inventory of assets without also denoting a partition of the property. See generally D. Dobbs, supra note 22; see also note 28 infra.

remedy,[27] statutory clarification is in order. If the new language works as can be anticipated, litigation to compel disclosure would rarely occur. Rather, the statement that equal management and control means that both spouses have the right to be fully informed about the community property will both obviate the current need for test litigation and encourage voluntary compliance.

B. THE RIGHT TO SOUND MANAGEMENT

1. Duty of Care

As noted, existing statutes express management duties in both general and specific terms. The Section 5125(e) requirement of good faith management, and the Section 4800(b)(2) remedy for deliberate misappropriation can both be seen as expressions of the more general doctrine of fiduciary duty in confidential relationships that has

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27. Cf. Wilcox v. Wilcox, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (4th Dist. 1971) (husband allowed to sue wife for restoration of community funds that she had wrongfully withheld from his sole management in opinion citing Cal. Civ. Code § 3523 (West 1970): "For every wrong there is a remedy.") Accounting or disclosure rights appear to exist by implication as well under the statutes of Arizona and Louisiana, and are expressly authorized by the draft Wisconsin statute. Ariz. Rev. Stat. § 25-318 (1976) (permitting divorce court, when dividing the community property, to consider concealment, fraudulent disposition or destruction of the parties' joint property); La. Civ. Code Ann. art. 2354 (West Supp. 1980)(authorizing interspousal suit for fraud or bad faith in the administration of the community property; see also art. 2341); 1979 Wisconsin Assembly Bill 1090, § 766.93(8) (Assembly Substitute Amendment 4) (set forth in note 26 supra.)

developed in California law[28] and applies to interspousal contracts by

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28. In delineating management duties between spouses, the courts have frequently analogized to the law governing the relations of fiduciaries or partners. See, e.g., See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966) (duty of spouse commingling funds to account for separate property); Vai v. Bank of America, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961) (husband who asked wife to discontinue adversary proceedings and promised to supply full and complete information concerning the community property had fiduciary duty to account to wife during the property settlement negotiations); Williams v. Williams, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (2d Dist. 1971) (husband who liquidates assets as dissolution was approaching held to duty to account for the community property); Fields v. Michael, 91 Cal. App. 2d 443, 447, 205 P.2d 402, 405 (2d Dist. 1949) (in action against husband's estate to recover for his wrongful gift of community property to a third party, the court stated, "It is clear that, being a party to the confidential relationship of marriage, the husband must, for some purposes at least, be deemed a trustee for his wife in respect to their common property."). How far this fiduciary duty extends has been questioned. See, e.g., Williams v. Williams, supra (questioning whether a husband is liable to his wife for an improvident stock investment or whether a husband is required to be a meticulous bookkeeper). The California Supreme Court has held that it may end once the spouses are represented by independent counsel in an adversarial situation. See, e.g., In re Marriage of Connolly, 23 Cal. 3d 590, 591 P.2d 911, 153 Cal. Rptr. 423 (1979); Boeseke v. Boeseke, 10 Cal. 3d 844, 519 P.2d 161, 112 Cal. Rptr. 401 (1974); In re Marriage of Hopkins, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (2d Dist. 1977). For discussions of the correlation between this case law and the legislature's attempts to codify management standards see generally C.E.B., Attorney's Guide to Family Law Practice 260-63 (2d ed. 1972); Grant, How Much of a Partnership is Marriage?, 23 Hastings L. J. 249 (1972); Prager, supra note 25, at 76-77; 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). See also Report of the Assembly Judiciary Committee, 1969 Journal of the California Assembly 8062; Hayes, California Divorce Reform: Parting is Sweeter Sorrow, 56 A.B.A.J. 660, 663 (1970).

the express language of Civil Code Section 5103.[29] To negate any inference that the obligation to manage and control partakes of a lower standard than that ordinarily controlling the marital relationship or that the standard is inapplicable if the property is converted into common property by operation of law if the parties divorce without dividing their property, clarifying language should be added to Section 5125(e).[30] (2)

While greater clarity as to the meaning of Section 4800(b)(2) might also be useful, the current lanaguage seems susceptible of a construction that would include compensation for damages caused by a breach of the good faith management obligation (such as squandering), as well as those occasioned by an enrichment of one spouse's separate (3)

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29. Cal. Civ. Code § 5103 (West 1970):

> Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

30. The section, as amended, might read:

> Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property, in accord with the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3. This duty shall extend to former community property that is converted into common property by operation of law upon dissolution of the marriage until the property has been divided by the parties or by a court of law. (new language underlined)

The confidential relations standard is that which is imposed by Civil Code Section 5103, which regulates the parties' contracts with one another. See note 29 supra.

wealth at the expense of the community estate.[31] This question, however, should be reserved until the Commission has considered the broader questions of debt and property division at divorce in conjunction with the next installment of this study.

2. Restraints on Acquisition and Alienation

Specific standards for good faith management can be inferred from a number of other code provisions. There are, first, the restrictions on alienation imposed by Civil Code Sections 5125[32] and 5127,[33] relating to all community property gifts; to sales of community household goods, clothing, and realty; and to encumbrances or leases of

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31. The relation between Sections 5125 and 4800(b)(2) was involved in In re Marriage of Moore, 104 Cal. App. 3d 128, 163 Cal. Rptr. 431 (1st Dist. 1980) (hearing granted May 29, 1980), where the wife alleged that the husband had sold household goods without her consent and used the proceeds for drinking. Although the trial court ruled that deliberate misappropriation had been established within the meaning of Section 4800(b)(2) and awarded the wife one-half of the value of the misappropriated items, the appellate court held that there was insufficient evidence to support the decision. Independently, the appellate court concluded that even a wrongful sale of community property under Section 5125(b) would not be recompensable under Section 4800(b)(2) unless the proceeds from the sale had been "misappropriated." Excessive consumption of liquor was not seen as misappropriation, even on these facts. The opinion contains no mention of the possible relevance of Section 5125(e)'s good faith management standard.

    The current scope of Section 4800(b)(2), including the degree to which it incorporates Sections 5125 and 5127, is particularly unclear as to two groups: putative spouses and those who have moved to California from common law property states. These parties' rights could, however, be equated with those of married persons if recommendations to be included in the final portion of this study are ultimately approved. Should they not be, clarification by way of amendment to sections 4800(b)(2), 5125 and 5127 would be advisable.

32. The text of this section is set forth at note 11 supra.

33. The text of this section is set forth at note 12 supra.

community realty. These provisions seek to insure that agreement between the spouses accompanies transactions that are central to their well-being. Although generally satisfactory and consistent with similar provisions in other community property states, a few amendments are recommended.

Section 5125(b) requires the written consent of a spouse to transfers of community personal property by way of gift for less than a valuable consideration. No other community property state imposes such a requirement. A similar writing requirement attends sales of household goods and the wearing apparel of other family members. In an era of United Fund campaigns at the office and of garage sales, these writing requirements are not realistic. Although it is possible that a court faced with an objection to customary transfers could find either a ratification of the gift or sale, or an implied waiver of the writing requirement, there seems no sound reason to require such doctrinal machinations. Other statutory models are available, none of which imposes a writing requirement. Washington, for example, prohibits gifts of community property without the express or implied consent of the other spouse,[34] while Louisiana does not even require the consent of both spouses for usual or customary gifts of value commensurate with the economic status of the spouses at the time of the donation,[35] and

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34. Wash. Rev. Code Ann. § 26.16.030(2) (West Supp. 1980). See, e.g., Munson v. Haye, 29 Wash. 2d 733, 189 P.2d 464 (1948).

35. La. Civ. Code Ann. art. 2349 (West Supp. 1980).

the Wisconsin draft requires consent only when a gift is not "reasonable or moderate."[36]

It is, of course, unlikely that gifts of other than major proportions relative to a couple's financial situation will become the subject of litigation. Whether one imposes the Louisiana standard of "usual or ordinary" gifts, the Wisconsin "reasonable or moderate" language, or the Washington test of "express or implied consent" is unlikely to make much difference, as it could be expected that a court would find an implied consent to "usual or customary" or "reasonable or moderate" gifts. Although there is some virtue in retaining a writing requirement for large gifts (with the full expectation that judicial recourse to implied waivers and ratifications would occasionally occur in even this restricted area), it seems doubtful that any gifts, however benign, will in practice meet a written consent requirement except, perhaps, in the case of major charitable donations. Nor is it likely that written consent will be secured to sales of used household goods or clothing. A statute that requires written consent, therefore, will in practice permit one spouse in almost all cases to seek relief from such transfers of community property. Perhaps in recognition of this fact, the Wisconsin proposal imposes a short statute of limitations.[37] This solution is, however, problematical in turn, since mismanagement by one spouse will rarely be challenged by the other spouse during an ongoing marriage. In practice remedies that require,

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36. 1979 Wisconsin Assembly Bill 1090, § 766.932(1)(Assembly Substitute Amendment 4).

37. Id.

rather than permit, relief during marriage are apt to be more illusory than real.[38]

Statutes that recognize both express and implied consents to gifts and to sales of household goods and clothing seem best designed to permit a court to reach a sensible conclusion on the facts in a given case. Were the law revised, it is doubtful that litigation would be more frequent than under the overly harsh current rule which invites evasionary equitable arguments. Ambiguity can always be avoided by securing the written consent of the other spouse.

Amendment is also suggested to the Section 5125 provisions on (5) management and control of a community property business. The policies that support unilateral decisionmaking in the conduct of daily business affairs do not extend to a decision to divest the community of its ownership interest or of substantially all of its assets. Three states require the consent of both spouses for the alienation of a business or of substantially all of its assets, distinguishing these steps from the normal purchases and sales during the life of the concern that may be handled unilaterally by the managing spouse.[39] This joinder

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38. See text following note 198 infra. A better solution would restrict recovery only to the degree necessary to protect justifiable reliance by the transferee. See notes 207-209 infra and accompanying text.

39. See La. Civ. Code Ann. art. 2347 (West Supp. 1980)(applies only to "commercial enterprise and moveables issued or registered as provided by law in the names of the spouses jointly"); Nev. Rev. Stat. § 123.230(6)(1977); Wash. Rev. Code Ann. § 26.16.030 (West Supp. 1980). The degree of restriction placed upon a spouse who is a sole manager of the business under the Nevada and Washington statutes is somewhat unclear. Although the statutes authorize unilateral acquisitions and sales in such cases, they are restricted to those occurring "in the ordinary course of . . . business." The Wisconsin proposal requires written consent of

requirement seems sound and should be added to Section 5125, restricted by a statute of limitations that would cut off claims as to bona fide purchasers without knowledge of the marriage relationship, much as currently exists as to transfers of realty under Section 5127.

Joinder appears equally desirable in the converse situation--the purchase of an interest in realty or in a business that is to be managed or operated by one or both of the spouses, as suggested by the statutes of Nevada and Washington.[40] Two policies support a rule of joint decisionmaking in this connection. First, it is likely that such acquisitions will entail major financial consequences for the family. Secondly, joinder is more likely to result in the placing of both spouses' names on the title, enhancing protection against a later unilateral transfer of the property to a bona fide purchaser without

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both spouses "to any sale, lease, exchange, encumbrance or other disposition of all or substantially all of the marital partnership personal property used in the operation of a business or for an agricultural purpose . . . . " 1979 Wisconsin Assembly Bill 1090, § 766.61(1)(a) (Assembly Substitute Amendment 4) (emphasis added). The sale of real property belonging to a business under the Wisconsin proposal, as under California law, is controlled by the joinder requirement that applies to all community realty. Compare id. at §§ 706.02(1)(f), 766.51(5), 766.61(2) with Cal. Civ. Code § 5127 (West Supp. 1980).

Under both the Louisiana statute and the Wisconsin proposal, partnership interests are exempted from a joinder requirement. La. Civ. Code Ann. art. 2352 (West Supp. 1980); 1979 Wisconsin Assembly Bill 1090, § 766.61(1)(d) (Assembly Substitute Amendment 4).

40. Nev. Rev. Stat. § 123.230(4), (6) (1977); Wash. Rev. Code Ann. § 26.16.030(4), (6) (West Supp. 1980). The Wisconsin proposal also requires joinder for purchases of marital property real estate. 1979 Wisconsin Assembly Bill 1090, §§ 706.02, 766.51(5) (Assembly Substitute Amendment 4) (also providing that "[f]or the purposes of this section, a mobile home used as a family home constitutes real property."). Protection of such homes should be added to Civil Code Section 5127.

notice of the marital relationship.[41]

A further joinder provision that recognizes the wisdom of joint decisionmaking in matters of fundamental importance is suggested by the Wisconsin legislation. The bill provides that "the selection of a settlement or payment option . . . upon retirement . . . shall require the written consent of both spouses."[42] A similar rule should be incorporated into California law.

Finally, some states conclude that sound management is more likely to occur when both spouses are required to participate in agreements to insure, guaranty or indemnify third parties.[43] These states recognize the special vulnerability of the community if its assets are placed at risk under a contract in which ultimate liability depends upon the behavior of someone other than the spouses themselves. These protections, too, should be adopted.

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41. An independent remedy that would permit a spouse to have title corrected to reflect an ownership interest is proposed in the text accompanying note 194 infra. Should a spouse wish to ratify an authorized acquisition, yet obtain the protection of having his or her name included on the title, such relief would be appropriate.

42. 1979 Wisconsin Assembly Bill 1090, §§ 766.31(3)(a), 766.51(3) (Assembly Substitute Amendment 4). Consideration should also be given to a similar requirement as to the designation of beneficiaries under life insurance policies.

43. Ariz. Rev. Stat. § 25-214(c)(2) (1956)(transactions of guaranty, indemnity, or suretyship); N.M. Stat. Ann. § 57-4-10 (1970) (contracts of indemnity); 1979 Wisconsin Assembly Bill 1090, § 766.51(6) (Assembly Substitute Amendment 4)(requiring joinder for some contracts of guaranty, indemnity or suretyship; marital property is otherwise not implicated by the agreement).

3. Obligations to Others

Additional code sections indirectly establish management standards. For example, to the extent that debts are primarily payable from one source of funds as opposed to another, legislative judgments about spousal responsibilities can be detected. The following discussion considers the interspousal implications of orders of priorities and the questions that arise when a single creditor seeks satisfaction from the parties' assets. It does not deal with an allocation between creditors when multiple claims are asserted that exceed in amount the value of the couple's liable property.

a. torts

The most explicit priority provisions are found in Civil Code Section 5122, which deals with liability to third parties for a spouse's tortious conduct.[44] The section indicates the legislature's

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44. Cal. Civ. Code § 5122 (West Supp. 1980) reads:

> (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 a 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.

view that certain torts should be the primary responsibility of the tortfeasor, and not of the community. Although not directly setting management standards, the orders of priority indicate that primary responsibility for tortious actions that were not undertaken for the benefit of the community rests with the spouse who committed the tort.[45] In some community property states such torts implicate only the separate property of the tortfeasor,[46] In contrast California's rule is more solicitous of plaintiffs, making the community property a back-up source of payment should the tortfeasor's separate resources be insufficient to satisfy the claim. Similarly, the converse rule, with primary liability in the community and secondary liability in the tortfeasor's separate property, controls recoveries when the tort occurred in conjunction with activity that was undertaken for the community's benefit.

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45. Apportionment of liability, where appropriate, should be possible. For the suggestion of a similar scheme, and the recognition of a corresponding need for apportionment in some cases, see the discussion of contract obligations in the text accompanying note 75 infra.

46. Ariz. Rev. Stat. § 25.215B (1956); Wash. Rev. Code Ann. § 26.16.200 (Supp. 1980).

Although in need of a minor amendment to clarify the role of insurance proceeds and quasi-community property,[47] the statute as written represents a sound balance between the interests of the tort plaintiff and those of the uninvolved spouse.[48] Without orders of priority, any primary responsibility on the part of one spouse would be imposed only through the enactment of a statute defining the other spouse's right to reimbursement if payments were made to the injured party from one fund as opposed to another.

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47. Section 5122 should be amended to provide that insurance proceeds may be used to satisfy an indebtedness without regard to the source of funds used to purchase the coverage. Cf. Cal. Civ. Code § 5133(e) (West 1970) (containing such a rule as to interspousal torts). A recommendation to be included in the final portion of this study would replace quasi-community property with vested community property rights. If it is enacted there will be no need to amend Section 5122 to specify where such funds fall in the priority system. If not, Section 5122 should be amended to provide that quasi-community property funds belonging to the tortfeasor should be resorted to after separate property but before community property in the case of a "separate" tort, and after community property but before the tortfeasor's other separate property in the case of "community" torts. Because quasi-community property under current doctrine remains a spouse's separate property during marriage, the quasi-community property of the nontortfeasor should not be included in any order of priority. (10) (11)

48. The current rule seems overly harsh to the extent that it permits members of the tortfeasor's family to be impoverished, perhaps for years, for behavior not undertaken in their behalf. It encourages divorce as the only satisfactory means of protecting the nontortfeasor's future earnings should the judgment be large in relation to the couple's current assets and their earning capacities. Corrective legislation may well be in order. The problem seems to lie less with the treatment of the family as an economic unit, however, than with rules governing compulsory insurance, exemptions from execution, and the nondischargeability of personal injury awards. Study of this problem is recommended. (12)

One can imagine a spouse who negligently injures another in an accident that occurs en route to the airport where the tortfeasor's spouse is arriving home from a business trip. Presumably the tort occurred during activity undertaken for the benefit of the community, and the community property is primarily liable on these facts. If the tort victim seeks recovery against the tortfeasor's inherited jewelry or family farm, however, while community assets are tied up in a business managed by the other spouse or in savings accounts to which the tortfeasor has no access, it seems harsh to force the tortfeasor to part with separate property and seek monetary reimbursement from the other spouse, who refuses to pay out of solely managed community funds.

While the tort victim's legitimate concern is with prompt monetary recovery, the rules which look to the respective liabilities of separate and community property recognize equally valid concerns of the spouses. When recovery is permitted out of a business or inherited property, the defendant's costs are emotional as well as financial. Given the sensible legislative conclusion that some torts are more fairly seen as community expenses and others as individual burdens, a humane enforcement system would seek to support that distinction to the extent possible while encouraging speedy payment.

Two of the remedies proposed in the following section, which deals with the right to participate in management decisions, would complement the existing priority scheme. First, there should be a method for the nonmanaging spouse to request access to community property funds for good cause shown, such as their use in payment of an obligation for which they are primarily liable. Since the creditor is free to pursue that source of assets, it is clearly appropriate to give

a spouse the same recourse. In this context, the action for access by the spouse could take the form of an action to direct the managing spouse to pay the tort victim out of appropriate funds.[49] Where no enforcement steps had yet been taken by the creditor, this step would permit the tortfeasor to effectuate voluntary payment. If attachment had already been made against secondarily liable property, satisfaction of the obligation pursuant to an access order would serve to dissolve the attachment.[50] Second, when enforcement is undertaken, the current provisions on marshalling of assets that insure a fair order of execution when multiple creditors have interests in the subject assets, should be clarified and adapted to permit the defendant or the defendant's spouse to implement the statutory priorities on his or her own behalf.[51]

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49. See text accompanying notes 189-193 infra.

50. See note 197 infra and accompanying text. Similar issues arise if a community property home or business is executed upon despite the tortfeasing spouse's primary liability and the tortfeasor refuses to make payment out of existing separate property that is beyond the management reach of the innocent spouse. In seeking to protect the specific community assets that are in jeopardy, the innocent spouse's right of access would take the form of a suit to direct the tortfeasor to pay the obligation out of separate property to the extent possible. See note 192 infra and accompanying text.

51. Marshalling on behalf of creditors will be considered in the forthcoming study by Professors Riesenfeld and Bruch. Development of a system of marshalling on the debtor or the debtor spouse's behalf has been suggested in a student comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Calif. L. Rev. 1610, 1624-28 (1975), and endorsed by Professor Reppy. Reppy, Debt Collection from Married Persons in California 65 n.100 (January 7, 1980) (unpublished study completed for the California Law Revision Commission). A proposal for such marshalling is set forth in the text accompanying notes 195-198 infra.

Recovery possibilities will be enhanced at the same time that interspousal rights are vindicated if a scheme of remedies makes clear that community property will in fact be applied first when it is primarily liable. Once stalling will not ultimately change which property will be held responsible for payment, the incentive to defeat the statutory scheme through such tactics will have been removed. The (13) marginal benefit to a tort plaintiff in removing such orders of priority does not justify the harm to family members that would be condoned by a repeal of Section 5122. Whatever characterization of the tort is required might take place via a special verdict in the tort case in which a married defendant is named[52] or whenever the issue first becomes relevant: in an action for access, by way of a suit to stay enforcement of a judgment against certain assets, upon a motion

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52. This option could be made available by permitting a spouse to intervene in a tort suit that was pending against his or her spouse. To avoid extraneous issues that might cloud trial of the liability question itself, however, a bifurcated proceeding would be required. Trial of the characterization issue would take (14) place only after the defendant's liability to the tort victim had been established. This procedure would be efficient to the extent that the jury would have already heard testimony relating to the question of whether or not the tort occurred in connection with activity undertaken for the community's behalf, but has limitations. First, difficulties would arise if witnesses who had testified in the earlier trial were not available for the spouse's cross-examination. Next, intervention must be permissive rather than mandatory to avoid forcing premature and perhaps destructive interspousal litigation. See text following note 198 infra. Finally, only a relatively small number of tort claims reach trial; other procedures must be made available to resolve characterization issues following settlements.

for marshalling by either a creditor or a spouse, or upon an interspousal suit for reimbursement if payment from an improper fund (whether voluntary or involuntary) has been made.[53]

b. prenuptial obligations

Legislative views regarding relative spousal responsibility for other obligations to third parties are more deeply hidden. A close examination of Civil Code Section 5120, which deals with debts "contracted" before marriage, however, reveals another compromise between family and third party interests. As clarified by the Law Revision Commission's suggested amendments to Section 5120, its reference to "contracted" debts is appropriately read to include all debts, however incurred, that are attributable to the prenuptial period.[54] (15)

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53. If Section 5122 is amended as recommended above at note 47, no priority issues will arise if there is sufficient insurance to recompense the tort victim's loss. As to uninsured liability, there is room for a priority system to operate only if the tortfeasor has both separate property and community property wealth. If only one funding source is available for payment of the obligation, no priority issue arises and no reimbursement rights should arise. See text following note 212 infra.

54. California Law Revision Commission, Tentative Recommendation Relating to Liability of Marital Property for Debts, Proposed §§ 5120.005.(a), 5120.010.(b) & Comment (June 1980). However, current support obligations to former spouses and to children of former relationships are not prenuptial obligations. See discussion accompanying notes 79-86 infra. (15)

A prenuptial creditor who seeks recovery during the debtor's subsequent marriage is given access to the debtor's separate property and all of the community property except for the earnings of the nondebtor spouse.[55] Rather than restrict access to the separate property and earnings of the debtor spouse (a rule that would continue into marriage the same basic responsibility that existed prior to marriage), the creditor's rights are extended to all community property other than the earnings of the nondebtor spouse. Thus, items acquired with exempted earnings are also available to the creditor. This apparent windfall is offset, however, by a possible disadvantage to the creditor that may also attend or follow the marriage: where the debtor changes or reduces employment because of a changed family situation, there may be much less property available for satisfaction than if the marriage and change in career had not taken place. In an effort to maintain reasonable creditor protection, while not unduly penalizing the institution of marriage with a creditors' windfall, the legislature has adopted the compromise of Section 5120. This balance seeks to assure the nondebtor spouse of consumption at a standard commensurate with that spouse's current earnings, subordinating only acquisitions from those earnings and other sources of community property plus the debtor's separate property to the debtor spouse's preexisting obligations.

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55. Again, the Code does not specify what right to reimbursement, if any, exists if the obligation is in fact paid from the exempted earnings of the nondebtor spouse. These earnings are, of course, subject to the management and control of both spouses. See the discussion of reimbursement accompanying note 212 infra.

Unlike the tort provisions of Civil Code Section 5122, there is no requirement that such payments come first from the separate property of the indebted spouse and only secondarily from that portion of the community property that is liable for the debt. Yet there appears to be widespread agreement among married peoplethat a debtor spouse's separate property and current earnings should be used to make payments on obligations that predate his or her marriage.

To implement this view Section 5120 should be clarified to expressly include all forms of obligation and an order of priority should be added, making the debtor spouse's separate property primarily liable, with the community property other than the nondebtor's earnings only secondarily liable, at least where creditor marshalling concerns do not arise.[56] Beyond that, the Commission may wish to consider whether the obligation of mutual support imposed on spouses by Section 5100 should not also implicate the nondebtor's earnings when no other sources of separate and community property are available to the creditor. This final category of resort would avoid the danger of "marital bankruptcy" that might otherwise attend the decision of a spouse to become a homemaker and ignore outstanding obligations.[57]

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56. The extent to which this or other priority schemes should be modified in order to simplify the problems that arise under the rules of marshalling on behalf of creditors will be considered in the forthcoming study to be completed by Professors Riesenfeld and Bruch.

57. Compare the related problem that arises in the context of parental support obligations should the child's parent cease working upon remarriage. See text accompanying notes 87-102 infra.

c. contract creditors

No general statutory provisions establish the relative responsibilities of spouses for contract liabilities incurred during marriage beyond the order of priority for necessaries that is discussed below in connection with interspousal support obligations.[58] However, case law and a specific code provision on educational loans have begun to fill the gap. Two statutory changes and the responses to them outline this development.

First, the adoption of mandatory equal division of community property at divorce created difficulty with the treatment of a couple's debts. Although it could have been argued that debts were not property within the meaning of the equal division statute, forms provided by the Judicial Council under the new law treated debts as subject to equal division.[59] This assumption that debts constitute divisible property seems to have later crept into the statutory language, which now calls for the valuation of "assets and liabilities . . . to accomplish an equal division of the community property . . . ."[60] The unfairness of an equal division of debt was immediately evident. Equal division of a debt that was incurred to finance one spouse's education seemed harsh since the education was retained by the former student, free of community property claims. Equally troublesome were cases in which equal amounts of debt were placed on parties who were far from equal in

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58. See text accompanying notes 144-149 infra.

59. Judicial Council of California, Forms Adopted by Rules 1281, 1282, 1285, 1286. (Effective January 1, 1970) (no longer in force). The same assumption has been carried forward into the current forms. Id. Rules 1281, 1282, 1285.50, 1285.55 (effective January 1, 1980).

60. Cal. Civ. Code § 4800(a) (West Supp. 1980).

their abilities to repay, enhancing the likelihood of one party's bankruptcy. In response to these problems, a special statutory provision, assigning the responsibility upon divorce for educational loans solely to the spouse who had received the education, was enacted,[61] and case law simply ignored the perceived equal division mandate in order to permit an unequal division of debt in the case of marriages where the couple's debts totalled more than their assets.[62] No accommodation, however, has yet been made for less extreme situations.

A second statutory change provided that earnings are separate property while spouses are living "separate and apart."[63] This rule destroyed the earlier symmetry that had preserved both the community property characterization of a husband's earnings and the community

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61. Cal. Civ. Code § 4800(b)(4) (West Supp. 1980) ("Educational loans shall be assigned to the spouse receiving the education in the absence of extraordinary circumstances rendering such an assignment unjust."), added by 1978 Cal. Stats. ch. 1323, § 2.

62. See In re Marriage of Eastis, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (4th Dist. 1975).

63. Cal. Civ. Code § 5118 (West Supp. 1980) ("The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse."), amended by 1971 Cal. Stats. ch. 1699, § 1. For a discussion of the statute's many negative implications for separated couples, see Bruch, The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change, 65 Calif. L. Rev. 1015 (1977).

property's liability for debts during periods of separation.[64] Instead community property liability for post-separation debts is permitted to mount at a time when no further income additions to the community property occur, spawning a new spate of cases that deal with the characterization of debts incurred during separation and rights to reimbursement.[65]

Although it has long been the practice in some courts to characterize debts as either separate or community at the point of divorce,[66] and this practice would appear to be consistent with the current dubious notion that debts are a negative form of property that are subject to the dictates of equal division, there is no statutory expression of such a process and the cases are of little assistance.[67]

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64. No statute terminates community property liability for the debts of either spouse during separation. Before the 1971 amendment to Section 5118, a wife's earnings but not a husband's became separate property following separation. Former Civil Code Section 5118, 1969 Cal. Stats. ch. 1608, § 8. The special rule for a wife's earnings dated to the period when the wife had no mangement and control over her earnings unless they were her separate property; the rule permitted an abandoned woman to obtain credit since her creditors would have access to her earnings as they would not if they remained subject to the sole management and control of her husband. 1849-50 Cal. Stats. ch. 103, § 9 gave the husband sole management of all of the community property; a wife's power to manage her own community property earnings was first granted by 1951 Cal. Stats. ch. 1102, § 1. See also Bruch, supra note 63, at 1020-22 and accompanying notes.

65. See, e.g., In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979); In re Marriage of Oldfield, 94 Cal. App. 3d 259, 156 Cal. Rptr. 224 (1st Dist. 1979); In re Marriage of Smith, 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (4th Dist. 1978).

66. See, e.g., Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); In re Marriage of Walter, 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1st Dist. 1976).

Much of the confusion can be traced to cases involving borrowed funds. As between the spouses, California has characterized the proceeds of a credit acquisition according to what has come to be known as the "lender's intent" test.[68] Where a lender has relied upon existing separate property wealth in extending credit, the loan proceeds have been seen as traceable to that separate property wealth and, accordingly, separate property.[69] Where no such intent on the part of the lender could be discerned, the proceeds were characterized as community property, a product of the general credit worthiness of one or both spouses.[70]

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67. See, e.g., Somps v. Somps, 250 Cal. App. 2d 328, 340, 58 Cal. Rptr. 304, 312 (1st Dist. 1967); Wong v. Superior Court, 246 Cal. App. 2d 541, 547, 54 Cal. Rptr. 782, 784 (2d Dist. 1966) (dispute over whether husband's attorney fees were community obligations): "It is settled that the community property that must be distributed on dissolution of the community by divorce is the residue that remains after discharge of the community obligations. 'Before a division of the community property can be made legally, the nature of certain debts charged against the husband must be definitely ascertained. If it is determined that they are community debts, then they should be deducted from the gross value of the community property before a division is made.'" (quoting 16 CAL. JUR. 2d, Divorce Separation § 295, p. 593); Estate of Haselbud, 26 Cal. App.2d 375, 383, 79 P.2d 443, 448 (4th Dist. 1938): "[The] record does not inform us of the nature or origin of the debts proved against the estate. If they are debts incurred in behalf of the community manifestly the community ought to contribute toward their payment."

68. A chronicle and critique of California's doctrines concerning borrowed funds is contained in Young, Community Property Classification of Credit Acquisitions in California: Law Without Logic? 15 Cal. Western L. Rev. ____ (forthcoming 1980). The final portion of this study will propose a reform that would obviate the difficulties caused by the current rule.

69. E.g., Dyment v. Nelson, 166 Cal. 38, 134 P. 988 (1913); Estate of Ellis, 203 Cal. 414, 264 P. 743 (1928).

70. E.g., Bank of California v. Connolly, 36 Cal. App. 3d 350, 111 Cal. Rptr. 468 (4th Dist. 1974). See also Ford v. Ford, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435 (1st Dist. 1969).

If, under this test, community property wealth has been produced by credit, it would appear logical that the obligation to repay would also be characterized as a community property debt, at least for the purposes of property and debt allocations between the spouses. This characterization, however, is of remarkably little assistance in the fair allocation of debts at divorce. A loan, for example, to enable a new lawyer to purchase an office library is typically given to one who is totally without separate property wealth, on the expectation that subsequent earnings will provide the funds for repayment. Such loan proceeds are clearly community property funds under the "lender's intent" test. However, the fair market value of the now-used books (which is subject to division at divorce) will probably not offset the still outstanding debt, despite the library's foreseeably greater actual value to the new practitioner over the life of his or her career.

Equally troubling are obligations incurred for the benefit of one spouse's extramarital relationships, or for behavior that is detrimental in other ways to the marriage or the financial community.[71] Because of the stress that accompanies marital disruption, such expenditures are especially common in a period of separation, although they are by no means restricted to this time period. Once again, case law has not yet clarified the relevance of such factors in a division of debt and property at divorce.

Four important reforms could together bring order into this unruly area. First, symmetry is needed between periods in which community property is implicated by a spouse's actions and the periods

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71. See, e.g., In re Marriage of Moore, 104 Cal. App. 3d 128, 134 (1st Dist. 1980) (summarized in note 31 supra).

in which earnings are denominated community property. Because parties do not expect their marital property rights to be altered by informal marital separations, nor to be subjected to special rules in the absence of contractual or legal action on their part, earnings should maintain their community property character until an agreement or court order terminates the community.[72] This proposed change has been endorsed by the State Bar's Family Law Section[73] and the Advisory Commission on Family Law to the Senate Subcommittee on Administration of Justice.[74] It would obviate much of the current unrest in the cases by mooting the current question of reimbursement when separate property earnings during separation are used to pay for continuing community obligations. Under the proposed reform both the earnings and the obligations would be characterized as community. (18)

The second important change would replace the lender's intent test with a test similar to that suggested above for assigning priority in payment during marriage: was the obligation incurred for the benefit of the community or for one spouse's individual benefit? Gambling debts or excessive debts for alcoholic consumption, which might currently be characterized as expenses incurred in violation of (19)

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72. For a recommendation that Civil Code Section 5118 be so amended and a thorough discussion of the problems of separated couples, see Bruch, supra note 64, passim.

73. The Section supported Senate Bill 2038 (Sieroty), California Legislature 1977-78 Regular Session, which would have made this change in the Code.

74. Advisory Commission on Family Law to the Senate Subcommittee on Administration of Justice, California Legislature, Substantive Family Law Proposals and Recommendations for Further Study 7 (Final Report 1979) (Recommendation 1D).

the good faith obligation to manage community property and hence be subjected to unequal division as deliberate misappropriations, would more directly be characterized as separate obligations under the new test. Normal living expenses, on the other hand, would be incurred for the community benefit whether or not the couple was cohabiting. In some cases, of course, it would be necessary to characterize a single transaction as serving both community and individual needs. For example, one spouse's education benefits the community so long as the marriage lasts, but uniquely the educated person after divorce. Permitting apportionment would greatly facilitate equitable results.[75]

The third reform is related to interspousal management obligations in relationship to third parties. Extension of the order of liability currently imposed for tortious conduct by Civil Code Section 5122 to contractual obligations would make more concrete the obligations of good faith management imposed by Civil Code Section 5125(e), while retaining creditor access to both community and separate property funds during marriage for the satisfaction of all debts incurred by the spouses. The rights to access and marshalling on

(20)

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75. A similar apportionment problem exists in the torts area, where a tort committed by an entity that is owed partly by the community and partly by separate property may require apportionment for priority purposes under Civil Code Section 5122. See note 45 supra and accompanying text. Compare Texas law, which contains a flexible priority system that directs the court to consider "the facts surrounding the transaction or occurrence upon which the suit is based" in determining the order of execution against the parties' separate property and the community property. Tex. Fam. Code Ann. tit. 1, § 5.62(b) (Vernon 1975).

behalf of the debtor discussed above in relationship to tort liabilities[76] should be made similarly available under the proposed rule.

Finally, a broader authorization for an unequal division of debt, similar to that currently being considered by the Law Revision Commission,[77] is needed. The provision should, however, look not only to the rights of creditors and the parties' relative abilities to pay, but also to the circumstances surrounding the inception of the debts--those very circumstances that should be used under a new system of priorities to determine the relative liabilities of the separate and the community property for the payment of the couple's obligations.[78]

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76. See text accompanying notes 44-53 supra.

77. California Law Revision Commission, Tentative Recommendation Relating to Liability of Marital Property for Debts, Proposed § 4800(b)(5) (June 1980).

78. The final portion of this study will include proposals for the division of property upon divorce. Accordingly, final consideration of this issue could appropriately be made then. However, the current division of debt rule is so inequitable that it seems deserving of immediate treatment. The addition of the following language to Civil Code Section 4800(b) is recommended:

> Debts are not property subject to the rule of equal division of community property set forth in subdivision (a) but are to be divided as set forth in this subdivision. Debts for which the community property is liable shall be allocated to the respective parties or ordered satisfied out of the community property as the court deems just and equitable, taking into account the abilities of the parties to pay and the facts surrounding the transaction or occurrence which gave rise to the debt. Such allocation shall be without prejudice to the rights of third parties.

(21)

Compare the Texas provision on orders of executing, described in note 75 supra.

The seeming vagueness of the suggested test is deceptive. All theories aside, it is relatively easy to agree on which debts are appropriately borne by which spouse in a concrete situation. A rule which permits the court, to the extent that the parties cannot discern an appropriate result, to focus on the questions of when and for what purpose a debt was incurred, or by whom the continuing benefits of the proceeds are being enjoyed, or who has the earning capacity that realistically permits repayment of the obligation, is less apt to inspire appellate activity than are the often unfair, sometimes conflicting, largely incoherent standards of the current statutes and case law. Where there is nothing to indicate that a particular debt should be borne by one party or the other, the court would be expected to assign the debt as a part of its overall effort to see that debts for which the community property is primarily liable are apportioned in a fashion that reflects the parties' relative abilities to pay. Substantial equity would be the result--a significant improvement on current law. Too, the current post-divorce debt collection litigation and bankruptcy actions that reflect unfair and unrealistic debt allocations at divorce will decrease in number.

d. support for children and former spouses

Because a child is entitled to share in the standard of living of its parents under California law, it is not surprising that a court is authorized by Civil Code Section 4807 to look to all forms of parental wealth (separate, quasi-community and community property) and apportion the responsibility for child support among them as it deems just.[79]

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79. Cal. Civ. Code § 4807 (West Supp. 1980) reads:

> The community property, the quasi-community property and the separate property may be subjected to the support, maintenance, and education of the children in such proportions as the court deems just.

The same rule applies whether the children are children of the current marriage, or from some prior relationship. Although a child from a former relationship may take on the role of a prenuptial creditor, to the extent that arrearages for support exist for prenuptial periods,[80] the child should not be considered a prenuptial creditor as to those support obligations that accrue during a parent's subsequent marriage. Instead, support is properly seen as a continuing obligation, with courts looking to current cirumstances in setting the amount of support due. Although no support liability is imposed directly on a stepparent by virtue of the marriage alone, the degree to which that person's income or wealth frees the ability of the child's parent to contribute to the child's support from his or her own assets is seen as relevant.[81] So, too, are the parent's own wealth, earnings or ability to earn, and responsibilities to others.[82]

Public policy supports this approach. Obligations to children are properly seen as continuing obligations, and a new spouse is appropriately expected to accommodate expectations of familial wealth to the needs of the other spouse's pre-existing family. In many cases, of course, only community property of the current marriage is available to pay support to children from a former relationship. In these cases

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80. See note 54 supra and the text accompanying notes 54-57.

81. In re Marriage of Gammell, 90 Cal. App. 3d 90, 153 Cal. Rptr. 169 (2d Dist. 1979); accord Fuller v. Fuller, 89 Cal. App. 3d 405, 152 Cal. Rptr. 467 (5th Dist. 1979) (income and property of nonmarital partner relevant to modification of child support).

82. See In re Marriage of Loehr, 13 Cal. 3d 465, 531 P.2d 425, 119 Cal. Rptr. 113 (1974); Pencovic v. Pencovic, 45 Cal. 2d 97, 287 P.2d 501 (1955); Meagher v. Meagher, 190 Cal. App. 2d 62, 11 Cal. Rptr. 650 (1st Dist. 1961); Woolams v. Woolams, 115 Cal. App. 2d 1, 251 P.2d 392 (1st Dist. 1952); Kyne v. Kyne, 70 Cal. App. 2d 80, 160 P.2d 910 (1st Dist. 1945); Halle v. Halle, 25 Md. App. 350, 333 A.2d 360 (Md. 1975).

it is quite clear that exclusive responsibility for the parent's contribution to their support must rest with this source of wealth, and that the payment of this obligation is entirely consistent with a spouse's good faith obligation to manage and preserve the assets of the current marriage. Any other rule would discourage the voluntary payment of support awards.[83] Similarly, no automatic reimbursement right, either during or upon the termination of the marriage, should be held by the nonparent in such cases. Again, a contrary rule would discourage the voluntary payment of support that was predicated on community property wealth, since reimbursement would mean that for every dollar of support paid (one-half of which represents the community property share of the nonparent), an additional payment of one dollar (one-half of which belongs to the parent and is being paid over to compensate for the diversion of the stepparent's one-half dollar through the support payment) would have to be paid to the nonparent. Since ability to pay, not one-half the ability to pay, is the test for support obligations, a rule of reimbursement on these facts would raise a specter of impoverishment to the obligated parent, discouraging compliance with outstanding support orders. To the extent that separate property wealth, however, is the basis for the support

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83. Even without this disincentive the nonpayment of support is a problem of major proportions. U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 84, Divorce, Child Custody, and Child Support (June 1979); D. Chambers, Making Fathers Pay: The Enforcement of Child Support (1979); Carrad, A Modest Proposal to End our National Disgrace, 2 Family Advocate 30 (Fall 1979); Seal, A Decade of No-Fault Divorce, 1 Family Advocate 10 (1979); Weitzman, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce, 12 U.C.D. L. Rev. 471, 499 (1979).

award, payment out of that wealth is appropriate, and a stepparent should be protected as to the priority of the payment source and with reimbursement rights in the same way as in any case where payment from (22) one source versus another is directed by law.[84]

At the same time, there is no reason to preclude children in their capacity as creditors from reaching all of the community property as well as their parent's separate property, subject to the defendant's marshalling rights of their stepparent. Section 199, undoubtedly unconstitutional as discrimination favoring nonmarital children, provides that the children of a former marriage may execute only against their parent's separate property[85] and earnings, and not against other sources of community property. Even if freed of its (23) discriminatory language, the section would be unsound. Access to all sources of community property in such cases is not tantamount to the imposition of an obligation of support upon the stepparent. Instead, such access is a recognition that a parent's continuing obligations are legitimately enforced against the same sources of funds as are other

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84. See Weinberg v. Weinberg, 67 Cal. 2d 557, 63 Cal. Rptr. 13 (1967); accord Marriage of Smaltz, 82 Cal. App. 3d 571, 147 Cal. Rptr. 154 (1st Dist. 1978).

85. Cal. Civ. Code § 199 (West Supp. 1980) reads:

> The obligation of a father and mother to support their natural child under this chapter, including but not limited to Sections 196 and 206, shall extend only to, and may be satisfied only from, the total earnings, or the assets acquired therefrom, and separate property of each, if there has been a dissolution of their marriage as specified by Section 4350.

The California Attorney General has concluded that Section 199 unconstitutionally discriminates against legitimate children since it restricts the community property that may be reached by legitimate children of a former marriage to a parent's earnings, while illegitimate children are not so restricted. 59 Ops. Cal. Att'y Gen. 15 (1976).

obligations incurred during marriage by that spouse, subject to the already existing authority of the court under Section 4807 to marshall assets.

This analysis of child support obligations applies with equal force to support obligations to prior spouses. The same policies which encourage the payment of pre-existing, continuing obligations during an obligor's subsequent marriage in the child support area, encourage realistic creditor access and interspousal responsibility rules for obligations to prior spouses. Here, too, the new spouse should be required to share extended family burdens to the degree that support orders are predicted upon the obligor's current earnings. Section 4807, which permits a court to apportion the responsibility for a child support award between the obligor's various forms of wealth, should be extended to payments for the support of a prior spouse, codifying the case law that has already reached this result.[86] (24)

One final area of support obligatous to third parties needs reform. Confusion about the nature of community property interests, combined with a desire to reduce the Aid to Families with Dependent Children (AFDC) eligibility of children living with their stepparents, has inspired two highly inarticulate Civil Code provisions, Sections

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86. Weinberg v. Weinberg, 67 Cal. 2d 557, 63 Cal. Rptr. 13 (1967). See the discussion infra at notes 143-148 on interspousal support obligations within an ongoing marriage for a suggestion that the statute also be extended to this area.

5127.5[87] and 5127.6.[88] Each was designed to reduce a child's projected need under AFDC eligibility tests by imputing an ability to contribute

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87. Cal. Civ. Code § 5127.5 (West Supp. 1980) reads:

> Notwithstanding the provisions of Section 5125 or 5127 granting the husband the management and control of the community property, to the extent necessary to fulfill a duty of a wife to support her children, the wife is entitled to the management and control of her share of the community property.
>
> The wife's interest in the community property, including the earnings of her husband, is liable for the support of her children to whom the duty to support is owed, provided that for the purposes of this section, prior support liability of her husband plus three hundred dollars ($300) gross monthly income shall first be excluded in determining the wife's interest in the community property earnings of her husband.
>
> The wife may bring an action in the superior court to enforce such right provided that such action is not brought under influence of fraud or duress by any individual, corporation or governmental agency.
>
> A natural father is not relieved of any legal obligation to support his children by the ability for their support imposed by this section and such contribution shall reduce the liability to which the interest of the wife in the community property is subject.

88. Cal. Civ. Code § 5127.6 (West Supp. 1980) reads:

> Notwithstanding Section 5127.5, the community property interest of a natural or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any child who resides with the child's natural or adoptive parent who is married to such spouse. The amount arising from such duty to care for and support shall be reduced by the amount of any existing previously court ordered child support obligations of such spouse.
>
> Any contribution for care and support provided by a spouse who is not a natural or adoptive parent of the child shall not be considered a change in circumstances that would affect a court ordered support obligation of a natural or adoptive parent for that child.

to the child's support on the part of the custodial parent.[89] The model obviously in the mind of the drafters was that of a housewife with children in her care from a former relationship, no current earnings, and a husband with a comfortable community property income. When first enacted, Section 5127.5 confronted the woman's then lack of management power over her husband's earnings with an inappropriate remedy. Apparently unaware of the community property rule that management of the community denotes management of the entire property rather than management of a spouse's one-half interest and concerned that a support obligation not be imposed on the stepparent, the statutory solution was to give the children's mother management powers over "her one-half" of the community property. The section's confusing language and the lack of clarity as to its purpose have undoubtedly insulated it from needed reform in the years since. Left untouched when equal management and control was enacted, the section has become even more disreputable, appearing now as a form of gender discrimination.[90] A penultimate blow was eventually received in July

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89. Zumbrum, Momboisse, and Findley, Welfare Reform: California Meets the Challenge, 4 Pac. L.J. 739, 778 (1973) (discussing Cal. Civ. Code § 5127.5). Assembly Comm. on Judiciary, California Legislature, 1979-80 Regular Session, Bill Digest for A.B. 381, at 1-2 (Hearing Date: May 2, 1979); Assembly Committee on Human Resources, California Legislature, 1979-80 Regular Session, Bill Digest for A.B. 381, at 1-2 (Hearing Date: April 17, 1979) (discussing Cal. Civ. Code § 5127.6).

90. The discrimination that exists, given current management rules, runs against women, not men, as suggested by Professor Reppy. See Reppy, supra note 31, at 21 n.37. It is the mother's one-half interest in her husband's earnings that is subjected to the support obligation. There is no corresponding burden placed upon a father's share in his wife's earnings.

1979, when Camp v. Swoap[91] was decided. The case held Section 5127.5 ineffective as a means of limiting AFDC eligibility under the tests established by the federal program because the stepparent support obligation it was seen as imposing was not a general obligation of support, but rather applied only in some cases.[92] For reasons that are no more clear than other aspects of the section's history, however, the section was not repealed despite its many apparent deficiencies. Instead, Section 5127.6 was added to the code as a part of a welfare reform package then in the legislature.[93] The new section, although recognizing that equal management and control entails the power by one spouse to dispose of the community property earnings of either, maintains the Section 5127.5 quagmire of apparent partition. At the same time, it reveals its AFDC concern with its otherwise mysterious statement that a stepparent's earnings are "considered unconditionally available for the care and support of any child" who resides in the

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91. 94 Cal. App. 3d 733, 156 Cal. Rptr. 600 (3d Dist. 1979).

92. 45 C.F.R. 233.90(a)(1) (1979) (setting AFDC standards) requires that:

> The determination whether a child has been deprived of parental support . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. (emphasis added)

93. Welfare Reform Act of 1979, § 2, 1979 Cal. Stats. ch. 1170.

stepparent's home.[94] More telling than this gentle rewrite of a section that had already proved ineffective for its intended purpose, was the legislature's contemporaneous repeal of Section 209, which had made express the California rule that a stepparent is not liable for a child's support.[95]

It is time to deal directly with questions of stepparent support, and to place in perspective the perceived opportunity for unfair access to welfare. California's perhaps still-existing rule that a stepparent is not liable for support (although support amounts actually contributed are presumed to be gifts and not subject to reimbursement)[96] is based on sound policy. Any imposition of legal

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94. Cal. Civ. Code § 5127.6 (West Supp. 1980) (emphasis added). The section reads:

> Notwithstanding Section 5127.5, the community property interest of a natural or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any child who resides with the child's natural or adoptive parent who is married to such spouse. The amount arising from such duty to care for and support shall be reduced by the amount of any existing previously court ordered child support obligations of such spouse.
>
> Any contribution for care and support provided by a spouse who is not a natural or adoptive parent of the child shall not be considered a change in circumstances that would affect a court ordered support obligation of a natural or adoptive parent for that child.

95. Id. § 1.3. Former Cal. Civ. Code § 209 had read:

> A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and, where such is the case, they are not liable to him for their support, nor he to them for their services.

96. Although Civil Code Section 209 was repealed, no language imposing a duty of support upon stepparents was enacted. At common law there is no obligation on the part of a stepparent to support beyond that which is voluntarily given. H. Clark, Domestic Relations § 6.2 at 188-89 (1968).

responsibilities for the children of one's spouse in the absence of adoption would create a negative dower. That is, a parent would bring liabilities into the marriage, beyond those associated with that parent's support itself. The result would be a disincentive to marriage and increased cohabitation in families where there are children of prior relationships.

The asserted impropriety of receiving public support funds for the children of a parent who is married to someone with current income shifts attention from its proper focus on the responsibilities of the child's own parents (only one of whom is in the household in which the child resides). Indeed Section 5127.6 imperfectly attempts to label as irrelevant the very stepparent support that is taken into account for welfare purposes if the issue is one of support rights against the child's noncustodial parent.[97]

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97. Although the section provides that stepparent support that is actually provided "shall not be considered a change in circumstances that would affect a court ordered support obligation of a natural or adoptive parent for that child," it does not prevent a court from taking such support into account when there is an independent change in circumstances that would support a modification of support. In AFDC cases it is unlikely that the noncustodial parent will often appear and seek a reduction in child support; that parent is probably paying no support. Other noncustodial parents may, however, attempt to take advantage of the section.

A certain air of unreality attends all of these machinations. In 1979 the Department of Social Services acknowledged that it could not estimate what amount of public funds, if any, will be saved under Section 5127.6.[98] There is good reason to think that not much will be. First, AFDC computations do take into account, without regard to questions of legal responsibility, amounts actually contributed to a stepchild's support.[99] Apparently the Department concedes that such contributions are actually made in many stepparent families, as one would expect.[100]

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98. Legislative Analyst, California Legislature, 1979-80 Regular Session, Analysis of Assembly Bill No. 381 (Boatwright) As Amended in Senate August 21, 1979, at 1 (August 28, 1979)("The intent of this provision is to make an individual's income available to support his or her spouse's AFDC child, thereby reducing the AFDC grant payment. The Department of Social Services indicates that it is unable to estimate the amount of savings resulting from this provision.").

99. 45 C.F.R. § 233.90(a)(1) (1979).

100. Assembly Committee on Human Resources, California Legislature, 1979-80 Regular Session, Bill Digest for A.B. 381, at 2 (Hearing Date: April 17, 1979) (containing unattributed and unsubstantiated statement that "About three percent of the AFDC-FG cases have stepfathers. About 36 of these stepfathers contribute to the support of the AFDC-FG family.").

Beyond that, the current version of Section 5127.6 is probably no more consistent with the controlling federal AFDC statutory test than was Section 5127.5. Although the enactment of Section 5127.6 was accompanied by a repeal of Section 209, which expressly precluded stepparent support responsibilities, no section actually imposing such responsibilities was enacted. Further, Section 5127.6 itself imputes support only as to the income of a stepparent with whom the child resides, ignoring the income of a noncustodial parent's spouse. Federal rules, however, permit a state program to receive federal funds only if the state predicates its reference to a stepparent's income upon a generally applicable stepparent support obligation--i.e., one that applies whether or not AFDC monies are at issue.[101] The section's attempted omission of such computations when support from a noncustodial parent is at issue, together with the "considered unconditionally available" language, make clear that the section is for welfare purposes alone, and not a statute of general applicability. It, like Section 5127.5, brings confusion but no benefit to the code.

A more straightforward treatment of the issue is possible. Tests for child support do take into account the ability of a parent to earn, even if that parent does not choose to seek employment or voluntarily earns at a level below his or her capacity.[102] The situation would be greatly improved if Sections 5127.5 and 5127.6 were repealed, Section 209 (which frees step-parents of support obligations) were restored,

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101. 42 U.S.C.A. § 601 (West 1974); 43 C.F.R. § 233.90(a)(1) (1979).

102. See note 82 supra and accompanying text.

and Section 199 (which limits a child to support enforcement against its parent's earnings once that parent has remarried) were repealed. The artificial partition that is suggested by Section 5127.5 would be avoided, courts would continue to establish support obligations according to parental ability, and the Department of Social Services would be free to include in its computation the amount of such a direct parental obligation or, if larger, the amount actually contributed by the parent and stepparent to the child's support. Finally, there would be no further discrimination between the treatment of the household in which a child lives and that of its noncustodial parent and no danger that imputed but fictitious support payments might be used to advantage by a noncustodial parent who seeks a reduced child support obligation.

4. Obligations to Each Other

Many of the issues that arise in assessing the parties' relative duties to others reappear as one considers the appropriate management of property in relationship to the spouses' responsibilities to one another. Here, too, questions of substantive law should regulate property management but here, too, the current code lacks a comprehensive scheme that rationalizes these two aspects of property ownership.

a. interspousal torts

In recognition of the uniquely personal responsibility of one spouse for his or her tortious behavior that has injured the other, Civil Code Section 5113 directs that the damages owed by the tortfeasor should in all cases come initially from that spouse's separate

property.[103] Sensibly, however, the section also authorizes the use of insurance proceeds to recompense the wrong, even if the policy was purchased with community property.[104] The initial order of priority implied by the section resembles that provided under Section 5122 for compensation to third parties for a tort committed by a spouse who was not acting for the benefit of the community.[105]

What rule should apply once the tortfeasor's separate property is exhausted, however, is less clear. One model would distinguish at this point an injury that occurred while the tortfeasor was acting for the benefit of the community (as in driving the other spouse to a family gathering), and in such cases permit payment of the residual damages from the community property.[106] The substantive policy decision that would support this approach is a conclusion that even here the

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103. Cal. Civ. Code § 5113(a) (West 1970) reads:

> Where an injury to a married person is caused in whole or in part by the negligent or wrongful act or omission of his spouse, the community property may not be used to discharge the liability of the tortfeasor spouse to the injured spouse or his liability to make contribution to any joint tortfeasor until the separate property of the tortfeasor spouse, not exempt from execution, is exhausted.

However, a waiver of this rule is permitted. Cal. Civ. Code § 5113(b) (West 1970).

104. Cal. Civ. Code § 5113(c) (West 1970). A recommendation that a similar provision be added to California Civil Code Section 5122, concerning tort liabilities to third parties, is made at note 47 supra.

105. Civil Code Section 5122 is set forth at note 44 supra.

106. The relative responsibility of the tortfeasor's quasi-community property should be handled as is recommended at note 47 supra.

community should be the guarantor of a spouse's failings, and that it is no more inappropriate to place secondary liability on the community here than in cases of damages to third parties. Under this view the relative disadvantage to a spouse in participating in the payment of his or her own damages is offset by the fact that damages received from a spouse become the victim's separate property,[107] an exception to the usual rule that makes personal injury recoveries received by a married person community property.[108] Torts committed while the responsible spouse was not acting for the benefit of the community would receive different treatment. Here resort to the community property for satisfaction would be computed at a two-for-one rate so that the one-half of the total amount paid out of community property which represents the ownership interest of the tortfeasor would truly pay for the damages inflicted by that spouse.[109]

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107. Cal. Civ. Code § 5126(c) (West Supp. 1980).

108. Cal. Civ. Code § 5126(a) (West Supp. 1980).

109. If, for example, a spouse received a damages award of $5,000, payment of $5,000 from the separate property of the other spouse to the victim's separate property would be consistent with the primary liability imposed by Section 5113. Should the victim instead accept payment from the community property, a transfer of $10,000 to the victim's separate property would be necessary to insure that the tortfeasor's one-half interest in the transferred property equaled the amount of the spouse's injuries--$,5000. The other one-half of the $10,000 would represent the one-half ownership interest already held in that property by the injured spouse.

Section 5126 should be amended to clarify that damages received for interspousal torts are subject to the same duty to reimburse expenses incurred by reason of the injury as are other personal injury recoveries. Although expenses paid by the tortfeasor out of his or her separate property will undoubtedly be recompensed by way of a set-off in the computation of damages, the current right to reimbursement of expended community funds is not clear.

This model is based upon the current version of Section 5113 to the extent that it resorts initially to the tortfeasor's separate property in all cases of interspousal torts. A somewhat different scheme would simply incorporate interspousal torts into the provisions of Section 5122 that govern damage liability to third parties.[110] The relative priorities would then depend solely upon the question of whether or not the activity that gave use to the injury was undertaken for the benefit of the community. The rule could be adapted to the special circumstances of interspousal injury by retaining the provision that makes a damage recovery from a spouse the victim's separate property[111] and, perhaps, by directing a two-for-one payment out of community property if the tort was not committed in conjunction with community activities. A final approach might retain Section 5113, yet clarify it only by specifying whether recoveries out of community property should be made on a two-for-one basis or not, refusing to distinguish as between the spouses as to cases of community benefit. Whichever model is adopted, the existing provision in Section 5113 that permits the injured spouse to accept payment out of community property rather than existing separate property sources should be retained but clarified to require a two-for-one computation for such substituted recovery.

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110. Section 5122 is set forth at note 44 supra.

111. See Cal. Civ. Code § 5126(c) (West Supp. 1980).

b. interspousal property transactions

The standard of good faith in confidential relationships, as applied to interspousal contracts,[112] would seem to require that agreements made by husbands and wives be honored by them. This idea and the equally appealing one that husbands and wives should be treated neither better nor worse than third parties with contract claims pose special difficulties in implementation. The following discussion treats first the issues that arise in interspousal litigation, then touches briefly upon some of the implications for third parties who deal with the spouses.

Rarely, of course, will spouses deal with each other at arm's length and rarely will their agreements be concluded in writing. Accordingly, should there be a contract dispute between them, proof will often turn upon statements as to what was said or intended and evidence of actions taken by them. Precisely because the likelihood of informal transactions between family members is high, the benefit of presumptions or writing requirements that might avoid such disputes is low. Absent factual or policy bases to presume that people do not in fact enter certain contracts, rules that preclude proof of such agreements may empty courtrooms but not serve any equitable purpose.

Indeed, it can be argued persuasively that courts exist precisely to permit the determination of parties' disputes and that disagreements between family members are as deserving of judicial time as are similar claims between strangers. If one is concerned that married persons be permitted to agree and disagree with each other to the same extent that others are and that courts be permitted to grant relief where the facts support it, one is led to the conclusion that artificial barriers to recovery (whether presumptions or writing requirements) are

112. Civil Code Section 5103, which imposes this duty, is set forth at note 29 supra.

inequitable. Their imposition does not do away with broken agreements, but only with legal relief from them, and promotes disenchantment with the legal process by those who have been injured. The recognition by courts that such requirements operate most harshly to the disadvantage of the unsophisticated explains the long history of judicial avoidance of writing requirements through doctrines such as execution, part performance, and estoppel.[113]

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113. See, e.g., Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956) ("'The object of the oral agreement of transmutation was fully performed when the agreement was made for it immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done.' [citing In re Estate of Raphael, 91 Cal. App. 2d 931, 939, 206 P.2d 391, 395 (1st Dist. 1949)] . . . Recognizing the practice of informality in property dealings between husband and wife it appears there was nothing more to be done in this case . . . . It is not surprising under the facts in the instant case that nothing more was done . . . ."); Estate of Sheldon, 75 Cal. App. 2d 364, 142 Cal. Rptr. 119 (5th Dist. 1977) (estoppel). These cases avoided the writing and recordation requirements of Cal. Civ. Code §§ 5133, 5134 (West 1970) that apply to antenuptial agreements.

The rule is codified in Cal. Civ. Code § 1698(b),(d) (West Supp. 1980):

> (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.
>
> . . . .
>
> (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

Concern for the potential of injustice that would result from the imposition of a writing requirement as to property agreements between nonmarital cohabitants recently prompted the defeat of a proposal to extend the Statute of Frauds to this area. Bruch, Nonmarital Cohabitation in the Common Law Countries: Patterns of Judicial and Legislative Response, ____ Amer. J. Comp. L. ____, at n.46 (forthcoming) (discussing A.B. 564 (Ingalls), California Legislature, 1979-80 Regular Session).

Presumptions that do not totally bar relief, however, have played a significant role in shaping the current California law of interspousal transactions. Based in part on conclusions as to how people in fact behave and in part on policy decisions, many of these presumptions are in need of reform.

Theories of presumed gifts and automatic rights to reimbursement grew through case law during the years when a husband had the sole management and control of the community property.[114] Recognizing that something unusual had happened if the husband under these circumstances should choose to place property in the name of his wife and beyond his own management reach, the courts concluded that a gift from him to her could fairly be presumed from his behavior.[115] At the same time, the danger that a husband might use his management powers to invade the community and enrich his separate property led the courts to imply an automatic right of reimbursement to the community when its funds had been applied to the husband's separate property.[116] Thus the rule was

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114. See, Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 43-44, 77-78 (1976).

115. See, e.g., Taylor v. Opperman, 79 Cal. 468, 21 P. 869 (1889); Johnson v. Johnson, 214 Cal. App. 2d 29, 29 Cal. Rptr. 179 (1st Dist. 1963); Estate of Horn, 102 Cal. App. 2d 635, 228 P.2d 99 (2d Dist. 1951).

116. See, e.g., Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931); In re Marriage of Warren, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (2d Dist. 1972); Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (2d Dist. 1929).

"gift unless agreement to the contrary" when the community property was placed in the wife's name, and "reimbursement unless agreement to the contrary" when community property was used to increase or maintain the husband's separate property estate. This gift presumption was partially codified in Civil Code Section 5110,[117] which provides that an acquisition made in the name of a married woman prior to the date of equal management and control is presumptively her separate property. (Other acquisitions made by married people are presumptively community property under the Section.)

The effect of equal management and control on these presumptions of gift and reimbursement has not been clarified by statute. An argument can be made that the statutory restriction of the special separate property presumption to a wife's acquisition prior to equal management and control evidences legislative intent to do away with the gift presumption. The matter is, however, by no means clear. Although the purchase by one spouse of property in his or her own name under a regime of equal management and control should, of course, raise the community property presumption, what should be the result when one

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117. Cal. Civ. Code § 5110 (West Supp. 1980) reads:

> Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. . . .

spouse purchases property and places title in the other spouse's name? Under the reasoning of the older cases, if a spouse having management and control voluntarily places the property beyond his or her management reach, the act should raise a presumption of gift. This view was followed without question in the recent case of In re Marriage of Lucas,[118] where community property was used in partial payment for a camper, title to which was taken in the wife's name.[119] It is, however, of dubious continuing utility. Under a regime of equal management and control, convenience, happenstance, or concerns with insurance, taxation or probate may be more likely to dictate which spouse purchases or takes title to a given item or makes payments on a continuing obligation than is an independent decision as to ownership. Even (or perhaps especially) in those families where monetary decisions are made by one person alone, the other spouse may be assigned the task of implementing those decisions through payment of the monthly bills. Now that courts have been freed to look to actual intent in transactions between members to nonmarital unions, subject only to a presumption of intended fair dealing,[120] it seems high time to extend the same rule to married couples.

(31)

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118. 27 Cal. 3d 808, _____ P.2d _____, 166 Cal. Rptr. 853 (1980).

119. One wonders whether the California Supreme Court would have been prompted to take a closer look at this area if the van had been taken in the name of the husband, since the old gift cases would not have looked so similar.

120. Marvin v. Marvin, 18 C.3d 660, 682 & n.22, 557 P.2d 106, 121 & n.22, 134 Cal. Rptr. 815, 830 & n.22 (1976).

The "no presumptions" rule could be expected to have major consequences in a second area, where separate property of one or both of the spouses has been used to purchase an item in conjunction with community property funds. Most frequently, this occurs either when the acquisition is one that is made over a long period of time, beginning before the marriage (with payments coming first out of separate, then out of community income)[121] or when the purchase requires a substantial downpayment (which is made from separate property sources, although the balance due is paid from community property earnings).[122] In the case of life insurance and pensions, a theory of acquisition over time has replaced traditional reliance on initial ownership and the cases have simply apportioned ownership interests in proportion to the relative contributions of separate and community wealth.[123] A related rule seems needed as to other purchases. It no longer makes sense to presume that a separate property downpayment on a home, title to which was taken in joint ownership with a spouse, was contributed as a gift

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121. See, e.g., Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640 (1926).

122. The facts in Lucas, which also involved a dispute over a house, are typical: during a twelve year marriage, the wife used her separate property assets to provide a downpayment for the family residence, with the couple taking a loan for the balance. Title was taken in joint tenancy. The wife used more separate property to make improvements on the house, but the loan was paid off from community property earnings. See note 125, infra.

123. See, e.g., In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978) (retirement/disability pay); In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (non-vested pension); Biltoft v. Wooten, 96 Cal. App. 3d 58, 157 Cal. Rptr. 581 (4th Dist. 1979) (group life insurance); Modern Woodmen of America v. Gray, 113 Cal. App. 729, 299 P. 754 (1st Dist. 1931) (life insurance).

by the owner of the separate property. Although the rule has the benign purpose of favoring the community, it appears increasingly harsh in an era of frequent divorce and increasingly shorter marriages. Common experience indicates that home purchases require the mustering of assets in a way that most other purchases do not. For many if not most couples, such purchases are undertaken relatively early in marriage, when the likelihood of a significant pool of community property is slim. Instead an inheritance, prenuptial earnings, or property that came from a prior marriage is used in conjunction with community property.[124] Although the parties do not discuss their understanding, there can be little doubt but that, if asked at the time, a spouse who contributes separate property would indicate that he or she would expect to have it back if the marriage should founder. Yet the most recent California Supreme Court opinion on point forces a forfeiture of that spouse's separate property interest in the absence of a mutual agreement by the spouses that the separate property interest will be preserved.[125] After a marriage of twenty or thirty

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124. See, e.g., In re Marriage of Lucas, 27 Cal. 3d 808, _____ P.2d _____, 166 Cal. Rptr. 855 (1980) (trust proceeds of wife); In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975) (wife's premarital earnings from law practice); In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1st Dist. 1979) (savings account held in trust for wife by her parents); In re Marriage of Smith, 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (4th Dist. 1978) (wife's inheritance from uncle); In re Marriage of Jafeman, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1st Dist. 1973) (house acquired by husband during a previous marriage).

125. The Court held that in the absence of an agreement to the contrary, the special community property presumption of Section 5110 will prevail: "[F]or purposes of division upon dissolution, a single family residence acquired in joint tenancy title during the marriage is presumed to be community property. Cal. Civ. Code § 5110 (West Supp. 1980). Since the trial court had not made a finding as to whether there had been such an agreement, the case was reversed and remanded. In re Marriage of Lucas, 27 Cal. 3d 808, 812-16, _____ P.2d at _____, 166 Cal. Rptr. at 855-57 (1980). See note 122 supra.

years, there would seem to be little inequity in such a rule. After a marriage of two years or seven, however, the result is harsh.

The final portion of this study will propose a number of changes in the treatment of forms of title, mixed investments, and the rules of property division at divorce that would contribute to a more realistic solution to such problems. Independent of that study, however, it is possible to recommend that gift presumptions be expressly removed from the law by statute. The result would be to objectify a court's inquiry and permit separate property investments to be returned without penalty. Since abandoning current gift presumptions would improve the opportunities for repayment to the separate property of one spouse, it seems fair to moderate that result with a second rule: that only reimbursement (to the degree possible without impinging upon community interests) rather than a proportionate ownership interest should be granted if separate property funds are traced into a mixed asset other than insurance, pensions or the like.[126] The result would strike a

(32)

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126. In the case of contributions to a retirement or pension fund, or the payment of premiums on life insurance, the mixing of assets occurs because payments are made over time, with the source of each contribution or payment being either separate property or community property, depending upon the marital status of the employee or policy holder at the time. (Whether the contributions are made by the employee or by the employer is irrelevant; employer contributions are seen as a form of compensation and are therefore classified as separate or community property in the same manner as the employee's wages would be.) Because the amounts attributable to different time periods are clear, there is no tracing difficulty. Nor is there much likelihood that a transmutation in ownership would occur. Finally, there seems no reason to penalize a spouse for the forced mixing of his or her assets that occurs. Accordingly, proportionate ownership interests are fair.

compromise: separate property interests would not be subject to forfeiture so long as they could be identified, yet they would receive only reimbursement rather than an ownership interest. Maximum accretions would be reserved for the community with separate property serving as the guarantor of the community interest.[127]

This rule should be distinguished from that which applies when funds are commingled, for example, in a bank account, with numerous deposits and withdrawals. Where tracing of the separate property cannot persuasively be shown, commingling should be held to result in a transmutation of the whole to community property.[128] In this case, convenience alone rather than a genuine familial purpose was served by the act of commingling, and the separate property owner can fairly be

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127. Of course, where only small amounts of community property were commingled in comparison to the amount of separate property funds, a de minimis rule would apply to affirm the separate property ownership interest. See Estate of Cudworth, 133 Cal. 462, 65 P. 1041 (1901).

128. Whether interest should be given to the separate property share where the property's value would permit such compensation after the community property and interest to that fund had been deducted is left for consideration in the final portion of this study. Windfalls should go to the community in any event.

held to have commingled at his or her own peril.[129]

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129. This rule is consistent with the rationale used by the California Supreme Court in See v. See, 64 Cal. 2d 778, 784, 415 P.2d 776, 780, 51 Cal. Rptr. 888, 892 (1966):

> The husband may protect his separate property by not commingling community and separate assets and income. Once he commingles, he assumes the burden of keeping records adequate to establish the balance of community income and expenditures at the time an asset is acquired with community property.

In See, the husband kept one account into which he usually deposited his community property earnings, although on occasion he would deposit them into an account otherwise composed of separate property assets. He also transferred separate assets into the community account when necessary to preserve his credit balance. His actions were clearly prompted by considerations of convenience rather than any familial purpose when he was unable to establish which funds were spent and which remained in the account. The court held that the presumption of community property would prevail. The precise burden of proof, however, has never been well articulated. Compare, Estate of Murphy, 15 Cal. 3d 911, 544 P.2d 956, 126 Cal. Rptr. 820 (1976) with In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).

Wisconsin's proposed marital partnership system would track the commingling rule of See:

> The intermingling of separate property and marital partnership property in a manner which makes tracing the separate property unreasonably difficult and which causes the separate property to lose its identity as separate property is presumed to make the intermingled property marital partnership property.

1979 Wisconsin Assembly Bill 1090, § 766.33(c) (Assembly Substitute Amendment 4). See also 1979 Wisconsin Assembly Bill 1090, § 766.32 (Assembly Substitute Amendment 4) ("Mixed property shall be presumed to be marital partnership property in the absence of adequate documentation as to the proportion of the property which is separate property.")

Codification of the See commingling rule, with specific reference to the burden of proof is recommended. See also Freese v. Hibernia Sav. & Loan Soc'y, 139 Cal. 392, 73 P. 172 (1903)(discussing the language of the cases). It should not, however, be permitted to preclude the application of a de minimis test for "reverse" commingling, where the commingled mass should be held to be separate property if only only insignificant amounts of community property have been included in it. See, e.g., Estate of Cudworth, 133 Cal. 462, 65 P. 1041 (1901); La. Civ. Code Ann. art. 2341 (West. Supp. 1979).

(33)

The current rule that presumes reimbursement when a spouse applies community property to that spouse's separate property, or uses community property to preserve or maintain such property,[130] seems grounded in sound policy to the extent that it seeks to protect the community from unilateral removals that benefit the managing spouse. It might be improved upon, however, by codifying the rule that gives the community the greater benefit of reimbursement or pro rata ownership in any property that was benefitted.[131] Once again, the community interest should be given the greater protection, without causing a forfeiture of the separate property.

To the degree possible, these doctrines that control ownership as between the spouses should be respected by courts that deal with third party claims against the couple's assets. Although there is understandable concern that couples will be tempted to falsify agreements in order to defeat creditor access, current law contains several protections to counter this danger. Most importantly, the Uniform Fraudulent Conveyance Act[132] permits a creditor to avoid transfers[133] not only if they were made with fraudulent intent,[134] but also if they were made for less than a fair consideration[135] and either

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130. See, e.g., Estate of Turner, 35 Cal. App. 2d 576, 96 P.2d 363 (2d Dist. 1939).

131. See, e.g., In re Marriage of Warren, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (2d Dist. 1972).

132. Cal. Civ. Code §§ 3439-3439.13 (West 1970).

133. Id. § 3439.09.

134. Id. § 3439.07.

135. Fair consideration is defined in Section 3439.03 and incorporated into the definition of fraudulent conveyances that are set forth in Sections 3439.04 through 3439.06. Id. §§ 3439.03-.06.

resulted in the transferor's insolvency or were made once the transferor was already insolvent.[136] In addition, the Code provides a conclusive presumption that a conveyance of personal property is fraudulent as to creditors if it is not "accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred."[137] This presumption, set forth in Section 3440 of the Civil Code, permits creditors to avoid almost all interspousal transfers of personal property, since couples who share the same household will almost always be held to share "possession" of their personal property.[138]

The Lucas case, which recently dealt with gift presumptions and the effects of title, highlights the problem. Mr. Lucas' purchase of a car in his wife's name, using a community property vehicle as a trade-in, was held to raise a presumption of gift to Mrs. Lucas.[139] Accordingly, absent proof of an agreement to the contrary, the new car

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136. Id. §§ 3439.04 (conveyance "by person who is or will be thereby rendered insolvent"); § 3439.05 (transfer made by person engaged in business or about to begin in business when, subsequent to the transfer, the business capital is unreasonably small; intent is irrelevant); § 3439.06 (as to both present and future creditors, conveyances made without fair consideration when the person making the transfer intends or believes that he will incur debts beyond his ability to pay). Transfers made for a fair consideration are not fraudulent under these sections. Id.

137. Id. § 3440 (exceptions are provided for choses in action, property exempt from execution, and sundry transactions of limited importance to the domestic setting).

138. See the cases described in note 140 infra.

139. In re Marriage of Lucas, 27 Cal. 3d 808, _____ P.2d _____, 166 Cal. Rptr. 853 (1980). See notes 118-119 supra and accompanying text.

is entirely Mrs. Lucas' separate property. Section 3440, however, gives a community property creditor the absolute right to treat it as partially community property, even if the couple is able to produce documented proof that the community was fairly compensated for the trade-in. Although a sham may legitimately be inferred in most cases in which a change of possession does not occur, Section 3440 does not reflect reality in the domestic context. In the reported cases dealing with family members, inequitable results to third parties could readily (34) have been avoided on the facts presented under the other provisions of the Uniform Fraudulent Conveyances Act that test transactions by insolvency or fraudulent intent.[140] Section 3440 is overly broad and should be amended to exclude transfers that take place within a household.

Similarly, a blanket requirement that transactions be concluded in writing would be no more likely to promote equitable results in this (35) context than in litigation between the spouses.[141] Community creditors already benefit from Civil Code Section 5110's presumption of community ownership for acquisitions during marriage,[142] and the pool of property

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140. See, e.g., Murphy v. Mulgrew, 102 Cal. 547, 36 P. 857 (1894) (wife purchased horses from husband, but the horses remained where they were and husband continued to manage them); Pfunder v. Goodwin, 83 Cal. App. 551, 257 P. 119 (2d Dist. 1927) (five hundred dollar tractor sold by husband to wife for ten dollars and husband continued to use it); Blaney v. Cline, 53 Cal. App. 686, 200 P. 751 (2d Dist. 1921) (husband delivered a bill of sale to wife one month after selling her his car, but nonetheless continued to use for his business).

141. See note 113 supra and accompanying text.

142. The language is set forth in note 117 supra.

available to them will be enlarged further if changes in the definition of community property that will be proposed in the concluding portion of this project are adopted. Most importantly, however, establishing a special Statute of Frauds for married couples would constitute a discrimination against marriage that is contrary to the policies of encouraging marriage and protecting the family unit.[143]

c. interspousal support obligations

Although Civil Code Section 5100 imposes mutual support obligations on the spouses,[144] the obligation during their marriage is somewhat more limited than that accorded the couple's children or a prior spouse. While these other classes of claimants may have their support rights predicated upon both community and separate property sources, with power in the court to apportion the responsibility as is just,[145] there is no obligation to support a current spouse out of separate property unless the community property and quasi-community property have been exhausted. This rule, codified in Sections 5121

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143. See note 113 supra. Professor Reppy has made this point respecting recordation requirements. Reppy, Comments on Memorandum 80-23--Liability of Marital Property, at 4 (April 9, 1980) (memorandum to the California Law Revision Commission staff). The reasoning applies equally to writing requirements.

144. Cal. Civ. Code § 5100 (West 1970) ("Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.").

145. See notes 79 and 87 supra and accompanying text.

(which defines creditor access to the separate property of the supporting spouse in the case of necessaries)[146] and 5132 (which specifies the obligation as between the spouses),[147] should be revised. (36)

Clearly a family with a community property income of $25,000 per year will not choose to live the same kind of life as another family which has community property income of $25,000 per year and separate property trust income of $150,000 per year. To the extent that support obligations in these marriages are imputed solely or initially to the community property, an elevated living standard that reflects total family wealth serves to impoverish the community.[148] A far better rule would recognize that a couple's living standard is fully as reflective of all sources of family wealth as are those of the children and former

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146. Cal. Civ. Code § 5121 (West Supp. 1980) provides that:

> The separate property of a spouse is liable for the debts of the spouse contracted before or after the marriage of the spouse, but is not liable for the debts of the other spouse contracted after marriage; provided, that the separate property of the spouse is liable for the payment of debts contracted by either spouse for the necessaries of life pursuant to Section 5132.

147. Cal. Civ. Code § 5132 (West Supp. 1980) states that "[a] spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property."

148. B. Bodenheimer, The Community Without Community Property: The Need for Legislative Attention to Separate-Property Marriages Under Community Property Laws, 8 Cal. Western L. Rev. 381 (1972); See, e.g., Beam v. Bank of America, 6 Cal. 3d 21, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

spouses.[149]

The situation is no different if the couple should separate informally. Absent an agreement or court action, the parties have no reason to expect that their financial rights have been altered. As with post-separation earnings, experience indicates that spouses think that their legal rights remain constant until they have affirmatively indicated that they wish a change.[150] Thus, there is no reason for a separated spouse who is not on notice that the couple's finances have become strained by the separation to curtail normal expenses. To the contrary, it is likely that usual expenditures will be maintained. The law should recognize this reasonable expectation of the parties. Any other rule forces formal action to secure support rights, which will then be awarded in any event in light of the parties' standard of living.[151] Along with the litigation, it can be anticipated that further marital discord will be produced, enhancing rather than minimizing the chances of an ultimate breakdown of the marriage. No useful purpose would be served by such a rule. The major financial problems of separated couples have to do with inappropriate new expenditures, not with the continuation of the old.

The Law Revision Commission has already indicated its tentative decision that support rights should not be prejudiced by the fact of

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149. For example, in cases where outside employment was never undertaken by an independently wealthy spouse, who was occupied instead with management of that separate property, it should be possible to impute a reasonable community property income to that person's activity without vitiating it immediately with the hypothetical payment of the very living expenses that were predicated upon separate property wealth. These issues could be largely mooted if separate property income were also characterized as community property, a topic that will be considered in the final portion of this study. In any event, it is appropriate to apportion the responsibility for support among all sources of a family's wealth, no matter how the funding sources are characterized. See notes 79 and 87 supra and accompanying text.

150. See notes 72-74 supra and accompanying text.

151. See Cal. Civ. Code § 4801(a)(8) (West Supp. 1980).

separation alone in indicating that it intends to recommend that Section 5131, which currently bars support rights after separation unless they have been set by the separation agreement, be amended.[152] Somewhat inconsistently, however, the Commission has adopted a position of restricting that support which is owed, at least as to creditors, to support for "common necessaries."[153] This curtailment of the parties' customary living habits without notice to the spouses would be unfortunate. It would operate to the detriment of innocent third parties who have chosen to continue providing services during separation, without any knowledge of the financial aspects of the separation or any reason to believe that the parties could not continue to afford their services.[154] By definition they have contracted with the spouse requiring support, a spouse who has no reason to assume that expenditures must be lowered below those appropriate to the parties' present financial status and customary standard of living. Because the right against an obligor's separate property does not exist under current law unless all other sources of funds have been exhausted,[155]

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152. Calif. Law Revision Comm'n, Tentative Recommendation Relating to Liability of Marital Property for Debts 24 (June 1980). The proposed version of Civil Code § 5131 must be read together with proposed Civil Code § 5120.030.

153. Id. at 18.

154. Why a Mrs. Rockefeller or a Mrs. Ford should be expected to fire the household help and take up cleaning the floors upon separation, when their husbands would hardly be expected to take on such duties in their own households, is unclear. Equally mystifying is Professor Reppy's suggestion that this result somehow follows from the tenets of women's liberation. See Reppy, supra note 51, at 31.

155. See notes 146 and 147 supra.

the proposed revision is most likely to affect true separate property marriages, ones that typically involve considerable wealth.[156] The problem does not arise as in exemption cases (where the term "common necessaries" was developed),[157] where there are insufficient funds to meet the creditor's claim.

These cases do not often occur, and can be expected to occur even less frequently if Civil Code Section 5118 is revised so that earnings during separation are community property[158] and are thus available for the creditor's recovery. Even if they were common, however, there would be no reason to apply a more stringent standard than "necessaries" for access to the separate property of the noncontracting spouse. This test automatically restricts recovery to amounts appropriate to the parties' financial situation.[159] No greater burden should be placed in the path of the couple's creditors on these facts.

More serious problems exist when debts are incurred during separation for new and inappropriate purposes. Here, rather than disadvantage creditors, the preferable course appears to be the imposition of orders of priority for creditor claims, as suggested above,[160] and the provision of a series of remedies as described in the

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156. See, e.g., Wisnom V. McCarthy, 48 Cal. App. 697, 192 P. 337 (1st Dist. 1920).

157. See Cal. Civ. Proc. Code § 723.051 (West 1980).

158. See notes 72-74 supra and accompanying text.

159. See, e.g., In re Marriage of Higgason, 10 Cal. 3d 476, 488, 516 P.2d 289, 297, 110 Cal. Rptr. 897, 905 (1973); Sanka v. Humborg, 48 Cal. App. 2d 205, 119 P.2d 433 (4th Dist. 1941); Wisnom v. McCarthy, 48 Cal. App. 697, 192 P. 337 (1st Dist. 1920).

160. See notes 44-53 (third party tort creditors), 54-57 (prenuptial creditors), 75-76 (contract creditors), 79-86 (support creditors), 103-111 (interspousal tort creditors), 144-149 (interspousal support creditors) supra and accompanying text.

following sections on sole management,[161] separation of the community,[162] recapture,[163] and reimbursement:[164] the spouses should be entitled to recovery for violations by either of the good faith management standard and to restrict one spouse's ability to further endanger the financial well-being of the other. Absent formal interspousal action, however, creditors should remain entitled to the normal range of remedies for the couple's indebtedness, and marshalling on behalf of the debtor should be available to allocate responsibility according to the nature of the transaction and the relative sources of familial wealth.[165]

5. Sole Management

In a number of situations, sound management means sole rather than joint management and control. California's statutes provide for sole management in three ways. First, sole management is expressly authorized under two circumstances: Under Civil Code Section 5125 (d), the operation of a community property business is made subject to the sole management of the entrepreneur in order to assure the smooth functioning of the concern, under the assumption that joint decisionmaking is potentially divisive in a way that would be destructive of the community's ultimate interest in the business' success. And, under Civil Code Section 5128 and provisions in the Probate Code that take effect on January 1, 1980, sole management is given to a married person whose spouse has a conservator, subject to

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161. See notes 166-182 infra and accompanying text.

162. See notes 183-187 infra and accompanying text.

163. See notes 199-209 infra and accompanying text.

164. See notes 210-215 infra and accompanying text.

165. See notes 195-198 infra and accompanying text.

the continuing ability of the spouse lacking capacity to make reasonable provisions for the family's necessaries.[166] Second, restricting financial institutions to dealings with named account holders functionally permits a spouse who exercises management powers to place funds in such an account to thereby exclude the other spouse from control over the money.[167] Finally, the ownership rule that compensation for a spouse's personal injuries from the other spouse become the separate property of the injured spouse rather than community property, as would otherwise be the case,[168] removes the recovery from the management reach of the tortfeasor.[169]

In contrast, there is no longer a provision authorizing exclusive management and control of community property personal injury damages (i.e., those received from third parties in compensation for causes of action arising during the marriage).[170] However, should the couple

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166. Cal. Civ. Code § 5128 (West Supp. 1980); Cal. Prob. Code § 3102(c)(4) (West Supp. 1980) (whether or not lacking legal capacity, the spouse also retains the right to make a will and to control wages and an allowance). A conservator of a spouse's property may be appointed when a party "is substantially unable to manage his own financial resources, or resist fraud or undue influence . . . . 'Substantial inability' [in this context] shall not be evidence [sic] by isolated incidents of negligence or improvidence." Cal. Prob. Code § 1751 (West Supp. 1980).

167. See note 10 supra and accompanying text.

168. The possible need for a set off or restitution to the community for expenses incurred is discussed in note 109 supra.

169. Cal. Civ. Code § 5126(a), (c) (West Supp. 1980) Compare the proposed Wisconsin solution which also classifies damages for pain and suffering received from the separate property of the injured spouse. 1979 Wisconsin Assembly Bill 1090, § 763.31(1)(k), (2)(d) (Assembly Substitute Amendment 4).

170. When California adopted the rule of equal management and control, the injured spouse's exclusive management and control of damages received from a third party was abolished. 1973 Cal. Stats. ch. 987, § 13.

later divorce, such recoveries are subjected to a special rule of division if they have not been commingled with other forms of community property. In such cases, the entire amount is to be awarded to the tort victim, unless the interests of justice require an award of up to one-half the amount to the other spouse.[171] While the reasons for this

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171. Cal. Civ. Code § 4800(c) (West Supp. 1980) reads:

> Notwithstanding the provisions of subdivision (a), community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlemernt or compromise of a claim for such damages, if the cause of action for such damages arose during the marriage but is not separate property as defined in Section 5126, unless such money or other property has been commingled with other community property.

Compare 1979 Wisconsin Assembly Bill 1090, § 767.255(11m) (Assembly Substitute Amendment 4), which authorizes the divorce court to consider:

> Whether any award of damages for personal injury included an award for loss of future income. If so, the court may divide this award into marital partnership and separate property prorated according to the anticipated amount of the award that applies as an income substitute during the time the person is married and during the time the person is not married.

Note that Wisconsin also provides that recovery for pain and suffering is the separate property of the victim in all cases. See note 169 supra.

special rule of division are clearly sound, the requirement that the funds remain uncommingled is troublesome, especially since the injured spouse does not have exclusive management and control of the property. A sounder rule would ask whether the funds could be identified under normal tracing rules. The Commission may also wish to consider whether (38) sole management and control as to such damages should be reinstated, either as a complement to this scheme or on its own merits.

a. dispensing with consent requirements

A number of states, California included, have developed standards for judicial relief from joinder requirements in some cases. For example, California's new Probate Code provisions that assign sole management to one spouse when the other has a conservator authorize the conservator to provide consent to transactions that would otherwise require joinder of the spouses.[172] They also provide for judicial approval of transactions in cases where a spouse without legal capacity to consent does not have a conservator.[173] Legal incapacity for these purposes exists "if the spouse is substantially unable to manage or control the community property," has a conservator, or otherwise fails to meet the standards imposed by "principles of law otherwise applicable to the particular transaction."[174]

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172. Cal. Prob. Code §§ 3071-3073 (West Supp. 1980).

173. Id. §§ 3100-3154. The procedure is also available as to transactions where the Civil Code does not require joint consent of the spouses, and to declare that the spouse does have the necessary legal capacity to consent to the transaction in question. Probate Code Section 3113 makes clear that no conservator need be appointed in order to bring a proceeding under these sections, which deal with consent to particular transactions. Id. § 3113.

174. Id. § 3012.

Other states have authorized judicial consent to specific transactions in lieu of spousal consent under less extreme circumstances. Louisiana, for example, permits one spouse to act without the consent of the other if the proposed transaction is in the best interest of the family and consent has been arbitrarily refused or cannot be obtained due to physical or mental incapacity, commitment, imprisonment or other absence of the nonconsenting spouse.[175] Similar authority is provided by New Mexico statutes which address the unavailability of a spouse who has disappeared or is a prisoner of war,[176] and by a Texas statute that deals with a spouse's incapacity, desertion, disappearance, or the parties' permanent separation.[177]

Such remedies should be made available in California. Of the existing models, one based on the Louisiana version seems most appropriate. It provides a two-part test, looking both to the family's best interest and to the improper refusal to consent or the

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175. La. Civ. Code Ann. art. 2355(West Supp. 1980). Some of the Louisiana language appears in a Wisconsin provision that would also authorize sole management when there has been substantial injury due to a spouse's long-term financial irresponsibility. See note 179 infra and accompanying text.

176. N.M. Stat. Ann. §§ 57-4-10, 57-4-11 (Supp. 1975).

177. Tex. Fam. Code Ann. tit. 1, § 5.25 (Vernon 1975). The section applies as well to an action to substitute one spouse's sole management and control for that which Texas law would ordinarily give to the other. Because each spouse has sole management of his or her own earnings, such relief provides one spouse with sole control over all but those commingled funds that require joint management under Texas law. See id. § 5.22.

impossibility of obtaining such consent.[178]

b. action for sole management and control

The proposed Wisconsin statute provides for ongoing sole management in a further case: when a court decrees such sole management after finding that it would be in the best interests of the couple because one spouse has been "substantially injured because of the other spouse's long-term financial irresponsibility."[179] No independent conservator or guardian for the irresponsible spouse is required, although the court may appoint a guardian "to protect [his or her] interests if [it] finds that the interests of justice so require."[180] In cases where one spouse has evidenced serious financial responsibility over an extended period of time, current California law provides no protection for the other spouse unless there is a divorce, and the parties' finances are permanently severed. To permit married couples to obtain the financial advantages of unmarrieds without forcing a divorce, some means for separating their financial obligations, or for protecting the more responsible spouse from the financial recklessness of the other, is needed. Where each spouse has an independent earning capacity, it would seem preferable to allow them to operate as independent financial entities, except for their mutual

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178. To the extent, however, that imprisonment is listed as an independent ground for dispensing with consent, it appears unsound. Where consent can be obtained from one who is imprisoned, it should be required unless an independent ground under the statute, such as arbitrary refusal, exists. If consent is in fact unavailable because the imprisonment is, for example, as a prisoner of war, absence and the impossibility of obtaining consent independently provide relief under the Louisiana codes. See La. Civ. Code Ann. art. 2355(West Supp. 1980).

179. 1979 Wisconsin Assembly Bill 1090, § 766.53 (Assembly Substitute Amendment 4).

180. Id.

obligation to support. However, this is not always the case. Where there is one or one primary wage-earner, the financial stability of the parties may be protected without forcing a divorce by permitting the other spouse to ask for judicial authorization for sole management of the couple's community property.[181] If so, provisions should be made to insure that decisions ordinarily requiring joinder of the spouses be undertaken only with the consent of a court or of an independent guardian, to insure the protections that are meant to result from the joint decisionmaking of two concerned individuals.[182]

(40)

6. Petition for a Separate Property Marriage

As just noted, where continuing the marriage under normal management and liability rules would leave one spouse vulnerable to the other spouse's continuing financial irresponsibility, relief should be given that would provide protection without forcing a dissolution of the marriage. Optimally the solution would also provide the careless spouse with considerable freedom, lest that spouse in turn be induced to seek divorce and an independent financial life. Where both spouses have earnings or independent income, therefore, the best solution may be to permit a spouse to petition a court to decree a separate property marriage rather than the sole management and control of both parties' earnings.

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181. Of course, such a procedure could include provisions for recording the judgment or for giving notice to creditors in some other fashion.

182. Should an action for sole management be accompanied by a partition of the community's assets, creditors from the period prior to the decree of sole management and control should be protected in the same fashion as they would be were the parties being divorced. See notes 186-187 infra and accompanying text.

Under the Wisconsin proposal, this relief would be permitted to separated spouses,[183] with sole management the only remedy available during cohabitation. There seems no reason to restrict the spouse's or the court's options in this fashion. Instead, permitting a unilateral termination of the community upon stated grounds and with court approval can prevent hardship while preserving marriages that the parties wish to continue despite financial disagreements. Louisiana permits such relief where the petitioner's interest in community property is threatened "by the fraud, fault, neglect, or incompetence of the other spouse, or by the disorder of [that spouse's] affairs affairs . . . ." [184]

Enactment of a similar cause of action, predicated upon a finding of threatened or actual substantial injury due to a spouse's financial irresponsibility, is recommended. It will serve as a deterrent to divorce in a small but real number of cases and will expand the possibilities for varying relationships within the traditional structure of marriage. Once separation of property has been ordered the result will be the same as if the spouses had privately agreed to a separate property marriage: each spouse may deal in the future as carefully or recklessly with his or her own assets as is desires; the other spouse will be neither hindered nor prejudiced thereby, except to the extent that the noncontracting spouse remains liable out of separate property for support and necessaries.[185]

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183. 1979 Wisconsin Assembly Bill 1090, § 766.93(7) (Assembly Substitute Amendment 4). Compare id. § 766.93(4) (action for sole management), where no reference to after-acquired property is made.

184. La. Civ. Code Ann. art. 2374 (West Supp. 1980).

185. These obligations exist without regard to the couple's property regime. Cal. Civ. Code §§ 5100, 5121, 5132 (West 1970 & West Supp. 1980).

In conjunction with a suit for sole management or for a separate property marriage, the court should be authorized to grant a request for partition of the couple's existing community property and a division of the couple's debts.[186] Consistent with the policy of permitting property relief similar to that which would be afforded at divorce at such times, the standards and consequences of the division should be those provided by Civil Code Section 4800, which governs property division in other judicial terminations of the community. (42)

Additionally, a partition of community property should be authorized for good cause in some cases where no other alteration in the couple's marital property regime is being requested. As discussed below in the section on access,[187] this may be a sensible solution when one spouse, although fiscally responsible, has been effectively precluded from exercising management powers.

C. THE RIGHT TO PARTICIPATE

As the legal model of marriage has changed from one in which the husband as head and master made all of the family's financial decisions to an egalitarian one in which the husband and wife cooperatively manage their affairs, so has marital property law increasingly reflected equal roles for the spouses. California's current model stresses joint decisionmaking only in matters of central concern to the family's welfare, otherwise recognizing great freedom for individual action by the spouses. This emphasis on equal, not joint, management and control is consistent with concern for the freedom of transactions.

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186. This would require an amendment to the section in the Code of Civil Procedure that prohibits the partition of community property. See Cal. Civ. Proc. Code § 872.210(b) (West 1980). The relief would approximate that available to separated spouses under the Wisconsin proposal. See 1979 Wisconsin Assembly Bill 1090, § 766.93(7) (Assembly Substitute Amendment 4).

187. See notes 189-193 infra and accompanying text.

At times, however, it treads too heavily upon the cooperative model of decisionmaking. Accordingly, this discussion makes several proposals that are designed to complement California's existing dual management scheme with protections for the spouse whose views or needs are not, in fact, taken into account by the other spouse when management decisions are made.

1. Joinder

Because joinder rules have long focused on the importance to both spouses of some management decisions, the existing rules are in large part appropriate to continuing familial needs. As discussed above,[188] some loosening of the formalities as to gifts and sales of personal property would be in keeping with current customs. And, additional joinder requirements have been recommended in areas where title is apt to be involved, both as a mechanism for increasing the likelihood that formal title will reflect actual ownership, and as a means of insuring joint decisions in matters of central importance to the family, such as the purchase or sale of a business or a family mobile home, decisions concerning pensions or annuities or on agreement that the community will indemnify or stand as surety for another.

2. Rights of Access

In certain areas, statutes permit one spouse to solely manage community assets. The provisions that deal with community businesses and bank accounts are sound and should be retained.[189] They may, however, operate to defeat the practical ability of one spouse to undertake independent management activities of the kind contemplated by the rule of equal management and control. Here a remedy potentially

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188. See notes 32-43 supra and accompanying text.

189. See notes 8-10 supra and accompanying text.

less drastic than that available to other co-owners, but similar in purpose, should be provided. Unlike the traditional right to an accounting, which usually produces both an inventory of shared assets and a partition of them,[190] there should be a mechanism for relief when neither a division of the entire community property estate nor of specific items belonging to the community is needed. Rather, a spouse who has functionally been frozen out of an opportunity to manage some appropriate share of the community's assets should be permitted to request that designated funds or property be made accessible. Because the parties' ownership rights extend to the undivided whole of their community property, no division as such of individual items of property should be required when only a transfer of management is at issue.

(43)

The request for access might take a number of forms. Where funds are needed to pay an outstanding obligation, the petition might ask that the managing spouse be directed to apply specified property to its satisfaction.[191] Because there may be need for an order that payment be made out of the other spouse's separate property, the court's jurisdiction in access cases should extend to all forms of property.[192] In other cases a transfer of property to the control of the petitioner might be requested. In yet others, management might be assured by the addition of the second spouse's name to the title of property or of an account in which funds are being held.[193] Where good cause has been

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190. See D. Dobbs, Remedies § 4.3, at 252-54 (1973).

191. See text following note 48 supra.

192. See note 50 supra.

193. See note 194 infra and accompanying text.

shown, the directive of equal management and control should be implemented under a new statute that would authorize such forms of relief.

3. Correcting Title

In the interests of both parties' management rights and the protection of their ownership interests in relationship to transactions with third parties, the Wisconsin proposal authorizes a petition by a spouse to have that spouse's name added to the title of marital partnership property (community property) that is held in the name of the other spouse.[194] The provision is sound, and should be added to the California codes. (44)

4. Marshalling on the Debtor's or the Debtor's Spouse's Behalf

Where priorities are indicated under law, their implementation requires that a spouse be permitted to insist that the other spouse and creditors alike respect that order. Where a spouse has not had power to voluntarily make payment out of appropriate funds, because they were not in fact subject to that spouse's management and control, an action for access that directs the other spouse to make payment would avoid further steps by the creditor.[195] Where such an action has not been

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194. 1979 Wisconsin Assembly Bill 1090, § 766.931 (Assembly Substitute Amendment 4):

> (1) When the title to property which is marital partnership property contains the name of only one spouse, the other spouse may petition the court for an order directing that the name of the other spouse be placed upon the title.
>
> (2) The fact that title to marital partnership property is in the name of only one spouse does not diminish the other spouse's rights in the marital partnership property.

See note 41 supra and accompanying text.

195. See notes 48-50 and 191-192 supra and accompanying text.

undertaken, however, other remedies should be available.[196] A suit or motion to stay the enforcement of judgment against assets that are only secondarily liable, pending execution by the creditor against sources which are primarily liable should be authorized, at any point up to and including the time of levy. Of course, a stay would only be granted if the debtor or the debtor's spouse identifies property that is both primarily liable and is subject to the creditor's execution. Too, when such marshalling occurs, any attachment already held by the creditor should be dissolved only after full satisfaction has been received and it is clear that the creditor's priority in the event of the debtor's later bankruptcy will not be endangered.[197]

(45)

In codifying such protections for the debtor and the debotr's spouse California would join these states which recognize that a fair balancing of interests between creditors and spouses should authorize marshalling on behalf of the debtor when more than one source of property exists to satisfy the creditor's claim.[198] What marshalling rules should apply on behalf of creditors and how these rules might affect priorities and marshalling as between the spouses will be considered in the study planned by Professors Riesenfeld and Bruch.

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196. Interspousal litigation should not be forced. See note 5 supra and text following note 198 infra.

197. Under the Bankruptcy Code of 1978 a transfer of property of the debtor made 90 days or less before the date of the filing of the bankruptcy petition may be voidable by the trustee. 11 U.S.C. § 547(b). Any marshalling procedures on behalf of the debtor or the debtor's spouse should be designed so as to assure the creditor of the protection ordinarily afforded by an attachment against liable property. This issue will be addressed in the study to be completed by Professors Riesenfeld and Bruch.

198. See Ariz. Rev. Stat. § 25-215(D) (1976); N.M. Stat. Ann. § 57-4A-5 (1970/Supp. 1975); Tex. Fam. Code Ann. tit. 1, § 5.62 (West 1975) (discussed in note 75 supra.

D. THE RIGHT TO BE MADE WHOLE

A spouse who has been injured by the other spouse's unauthorized behavior should be made whole. Yet, parties to ongoing marriages are understandably and properly more concerned in most cases with preserving their marriages than in preserving their wealth. To provide redress for interspousal wrongs while preserving marriages wherever feasible, the law should recognize that although some spouses may be prepared to undertake interspousal litigation (and that speedy and fair relief is called for in such cases), many others are not. A spouse who fears that an assertion of property rights will jeopardize his or her marriage may well defer taking action until the relationship ends. So long as the decision to postpone litigation does not result in harm to innocent third parties, the current law, which permits such actions at dissolution of marriage by either death or divorce, is sound and should be preserved. An express statement that there is no Statute of Limitations on a spouse's right to seek recovery except as specified in the Family Law Act, should be added to the Code.

(51)

1. Setting Aside Unauthorized Transactions

The traditional relief from a wrongful transfer has been an action by the injured spouse to recapture the community property that was unilaterally transferred to a third party.[199] Because a spouse cannot unilaterally sever his or her one-half interest in the community property, suit in such cases during an ongoing marriage has resulted in the return of the entire property to the community.[200] Where the

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199. See, e.g., Britton v. Hammell, 4 Cal. 2d 690, 52 P.2d 221 (1935); Novo v. Hotel Del Rio, 141 Cal. App. 2d 304, 295 P.2d 576 (3d Dist. 1956); Lynn v. Herman, 72 Cal. App. 2d 614, 165 P.2d 54 (4th Dist. 1946).

200. Britton v. Hammell, 4 Cal. 2d 690, 52 P.2d 221 (1935); Lynn v. Herman, 72 Cal. App. 2d 614, 165 P.2d 54 (4th Dist. 1946); Mathews v. Hamburger, 36 Cal. App. 2d 182, 97 P.2d 465 (2d Dist. 1939).

transferee purchased the property (as in the case of an unconsented to transfer of community realty), restitution of the purchase price is a condition of recovery.[201] If, however, recovery is attempted after the community has been terminated by divorce or the death of one spouse, recovery of only one half of the transferred property normally occurs. This recovery comes to the separate property of the injured spouse, with the transferor's act being treated as a continuing one that took effect upon the termination of the community, when a unilateral partition of the community property became possible.[202]

Although the history that produced these distinctions is understandable, the analysis is incomplete. First, although the transferor should not be permitted to unilaterally force the partition of an item of community property through the mechanism of an unallowed transfer of the whole property (which is subject to a spouse's recapture claim of only one-half),[203] the spouses together are permitted to divide community property into separate property interests by agreement.[204] Where a wrongful transfer has been made, therefore,

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201. Gantner v. Johnson, 274 Cal. App. 869, 79 Cal. Rptr. 381 (1st Dist. 1969).

202. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933).

203. The rule precluding partitions of the community property by the unilateral act or upon the demand of one of the spouses, enunciated in Jacquemart v. Jacquemart, 142 Cal. App. 2d 794, 299 P.2d 281 (2d Dist. 1956), has been codified. See Cal. Civ. Proc. Code § 872.210(b) (West 1980). Amendment of that provision to permit a petition for partition of the community for good cause is recommended at note 186 supra and accompanying text.

204. The issue arises most frequently when community property funds are used to purchase a home, title to which is taken in joint tenancy. Although form of title is not necessarily controlling, joint tenancy ownership, where established, results in the transmutation of the community property into the parties' equal separate property interests (which are subject to rights of survivorship). E.g., Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (2d Dist. 1954).

it would be entirely consistent to permit the wronged spouse who sues the transferee during marriage to make an election to either insist upon the restoration of the whole property to the community (continuing to refuse to agree to its alienation, even in part), or to ratify what could be deemed to be an offer by the other spouse to partition (by requesting that one-half of the property be returned to the injured spouse's separate property). Indeed, the option of accepting partition would possibly provide greater protection for the injured spouse, by removing his or her "share" from the management reach of the spouse who has already abused the Code's management powers. Where the spouse is willing to accept this remedy, it should be made available.

Second, there is little case law that addresses what the proper measure of recovery should be. Where land or property is transferred (47) that can be recovered in kind, the cases appear to assume that restoration of the property itself is sufficient.[205] Should the property have appreciated in value, the injured spouse is unlikely to complain. But if the property's use had value or if the property has deteriorated in some fashion, questions remain. Should the transferee ever be held liable for the use of the property? If the property has depreciated in value, has been exchanged for other property, or has been consumed by the transferee, should that person be nonetheless compelled to pay over an amount equal to the value of the property at the time of the original transfer or, perhaps, the property to which it can be traced or the value it would have had were it intact at the time

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205. See, e.g., Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933).

of the suit?[206] Or should these costs be held to be either the responsibility of the transferor or, to some degree, nonrecompensable losses? Statutory clarification would be helpful.

Third, where the transferee has detrimentally relied in good faith upon the transfer, it is fair to require that the recapture not injure the transferee if the wronged spouse could have acted earlier and avoided the damage to that party. Recovery in such cases should be conditioned upon compensation to the transferee for the damages incurred.[207]

If the Code is amended to require joinder in the case of certain acquisitions of community property (such as businesses and real

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206. In Spreckels v. Spreckels, 172 Cal. 775, 153 P. 537 (1916), the court did not have to reach the plaintiffs' request that the value of Mrs. Spreckels' interest in the gifts made by her husband be returned to her estate if the specific property could not be returned, as it concluded that she had ratified the gifts. The value of the use of wrongfully alienated property was raised in Gantner v. Johnson, 274 Cal. App. 869, 79 Cal. Rptr. 381 (1st Dist. 1969), but in unusual and complicated context; the court's opinion is unfortunately opaque. See note 211 infra.

207. An elderly woman recently asked for legal advice when her husband, who has heart trouble, gave the couple's business to his son from a former marriage. Unwilling to sue for recapture during her husband's lifetime and endanger his health, what should be the options available to her after his death? Of what relevance should it be if the son has expended considerable personal effort in the business in the meantime? Of what relevance should it be if he knew that his stepmother could avoid the gift? Should it make a difference if he knew that she could avoid the gift but assumed that she had chosen not to when nothing was said? Although it would be inequitable to hold the woman estopped from suing to protect her property once she is widowed, it seems equally harsh to force a forfeiture on her son-in-law. Where restoration of the property itself would unfairly damage the transferee, an undivided ownership interest in the property or compensation by way of damages should be available to the injured spouse.

estate),[208] the set-aside procedure for unauthorized purchases would function in the same fashion. In this case, the amount paid or promised for the property would have been wrongfully alienated and would be subject to restoration to the community, conditioned upon restitution to the third party of the business or property that was received in the transaction.[209]

2. Damages Owed by one Spouse to the Community or to the Other Spouse

A spouse may inflict damage upon the community or the other spouse in various ways. As just discussed, this may occur through a transfer that is made without the joinder of the other spouse in contravention of Civil Code Section 5125 or 5127. It may also occur where a spouse exercises permissible management powers that are nonetheless inconsistent with the community's interests--for example, by paying a debt with community funds although his or her existing separate property is primarily liable. Finally, one spouse may owe the other damages for personal injuries. When should these injuries be recompensed, and in what fashion?

Since Fields v. Michael,[210] California law has recognized that a

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208. See notes 40-42 supra and accompanying text.

209. Protections for a bona fide purchaser in good faith without knowledge of the marriage relation, similar to those currently provided for purchasers of community property real property, should be provided. See Cal. Civ. Code § 5127 (West Supp. 1980).

210. 91 Cal. App. 2d 443, 205 P.2d 402 (2d Dist. 1949).

spouse may sue the estate of a deceased transferor for losses incurred through a wrongful alienation of the community property in lieu of suing the transferee for recapture. As indicated by the Fields court, similar flexibility should exist during marriage. In effect, the transferor has injured the community to the extent of the alienation or, alternatively, the other spouse to the extent of that spouse's one-half community property ownership interest. Where recapture from the transferee is not sought or where it is pursued but does not fully compensate the injured spouse's interests (for example, where the property has had use value or has been partially consumed), an appropriate damage recovery from the transferor spouse should be available.[211] (47)

Further, as outlined above,[212] a statutory system of priorities expresses a legislative decision that payment out of one or another

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211. Where, for example, property has depreciated in value through use that has benefitted the transferee, the rationale of Fields v. Michael would support a combination of remedies: recapture from the transferee and damages for the decreased value of the property from the transferor. In Fields, the court commented that an injured spouse "is entitled to pursue whatever course is best calculated to give her effective relief. Where the amount of the gifts and identity of the donees are known, and the property can be readily reached, [recapture] may be decidedly more advantageous . . . . [W]here recourse against the donees would be ineffective to give relief, a denial of [a remedy against the transferor spouse] would . . . amount to a concession that the law is powerless to accord to the wife's community interest the full protection which [the gift section] was evidently designed to ensure. We think the law is not so toothless." 91 Cal. App. 2d at 448, 205 P.2d at 406. The court dismissed the contention that the plaintiff's suit was barred because it could not have been brought against her husband during his lifetime, stating, "[W]e think that a cause of action in favor of plaintiff did exist prior to [her husband's] death." 91 Cal. App. 2d at 450, 205 P.2d at 407.

212. See notes 44-53 (third party tort creditors), 54-57 (prenuptial creditors), 75-76 (contract creditors), 79-86 (support creditors), 103-111 (interspousal tort creditors), 144-149 (interspousal support creditors) supra and accompanying text.

funding source for a given debt is preferable. The policies that support such rules support equally a right to reimbursement if a fund has been inappropriately dissipated. However, if payment was not made out of a source of primarily liable funds simply because in fact there were no such funds at the time that the debt fell due, no right to later reimbursement should arise. At this point, the legislature has decided that it is appropriate to compensate the third party out of other available funds. In order to encourage the payment of debts as they fall due, there should be no ambiguity about the result and availability at the time of normal payment should be the test. (48)

So, if a tort victim whose primary source of collection under Civil Code Section 5122 is the tortfeasor's separate proprty seeks payment at a time when the tortfeasor has no separate property, payment should be made out of the community property. There should be no right to later indemnification. The expense was in essence a support expense that was met out of funds then available. Should the tortfeasor later inherit separate property, that property in turn will be subjected to potential support liabilities. Over the lifetime of a marriage, the availability of various funding sources will fluctuate, but the family can be expected to meet each day's expenses in light of the family situation at that time. To attempt a recapitulation of all separate expenses and community expenses at some later point would turn the family's finances into a recordkeeping nightmare rather than a series of discrete decisions, each of which is made in light of the current financial situation. Only where a decision is wrongful in terms of funds then available should later reimbursement be permitted. Otherwise, bygones should be bygones.

To summarize, a right to damages or reimbursement from one spouse to the other exists in three circumstances: where one spouse has received personal injuries for which the other spouse is responsible,[213] where community property has been unilaterally alienated in violation of a joinder provision, and where payment of a debt has been made from an inappropriate fund according to the Code's priority rules. Where such damages are owed, their measurement must reflect the ownership interests that were dissipated as well as the ownership interests in the property that is being used for reimbursement. (49)

So long as one focuses on these two factors, the results on any set of facts can be computed. For example, if a spouse who had $5,000 in separate property that was primarily liable for a debt used instead $5,000 of community property for its satisfaction, the other spouse has effectively been damaged to the extent of his or her one-half interest in the $5,000 of community property, or the equivalent of $2,500 in separate property. (This result follows because the other $2,500 that was transferred represented the tortfeasor's one-half interest in the community.) Recovery, then, by the injured spouse could take a number of forms. First, the tortfeasor could be required to restore the $5,000 to the community property from his or her separate property, indemnifying the community for its earlier expense. At this point, the wronged spouse once again has a $2,500 interest in the community, and the tortfeasor has in effect paid the $5,000 of damages out of his or her own separate property (having alienated a $2,500 interest through the original $5,000 community property payment and now retaining only a $2,500 interest in the $5,000 that was transferred to the community).

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213. See text accompanying notes 103-143 supra.

Second, there could be a direct transfer of $2,500 from the separate property of the tortfeasor to the separate property of the other spouse. Again, the total cost to the tortfeasor is $5,000 ($2,500 in ownership of the original $5,000 community property payment, and $2,500 now to the other spouse), and the wronged spouse has recovered in separate property $2,500, the amount of his or her ownership interest that was lost when the $5,000 of community property was dissipated. Third, if the tortfeasor has dissipated his or her separate property by the time that the reimbursement action is brought, $5,000 of community property could be transferred to the injured spouse to recompense the wrong. In this case, there has been a functional partition of $10,000 of the community property, with $5,000 going to the tortfeasor's separate property obligation and $5,000 going to the separate property of the wronged spouse. (Alternatively, this last result can be explained by noting that the original transfer cost each spouse $2,500, and that the transfer of $5,000 of community property to the wronged spouse now constitutes an additional payment of $2,500 by the tortfeasor, with the remaining $2,500 representing the share that the injured spouse already owned in the community.)

The same analysis can be applied if the wrongful act was an improper unilateral gift of $5,000 in community property by one spouse to a child from a former marriage. Three remedies are possible: transferring $5,000 of the donor's separate property to the community, paying $2,500 from the donor's separate property to the damaged spouse's separate property, or transferring $5,000 in other community property to the separate property of the damaged spouse.

If, on a contrary set of facts, a spouse has settled a tort damage claim with $5,000 of his or her separate property although

community property was primarily liable and then in existence,[214] reimbursement could be made in either of two ways. First, there could be a transfer of $5,000 of community property to the tortfeasor's separate property (at a cost to the other spouse of that spouse's $2,500 one-half interest in the community property--the amount that should have been used in the first place), or the nontortfeasor could make a direct transfer of $2,500 from separate property to the separate property of the tortfeasor (reducing the tortfeasor's loss to $2,500--the amount that should have been lost through a one-half interest in an initial payment of $5,000 from community funds). Either form of relief will provide an end result of each spouse's wealth having been decreased in an amount of $2,500, as contemplated by the order of priority.

Where damage has been done by the improper alienation of community property funds and more than one payment scheme is possible on the facts, the injured spouse should be permitted to elect which (50)

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214. Just as community funds may be mistakenly applied to the payment of a debt for which separate property was primarily liable, the converse may occur. In either case, it is equally likely that questions of convenience or circumstance rather than the form of ownership controlled the payment decision. If gift presumptions are removed, as recommended above, courts would remain free to find that payments made out of separate property were intended as gifts to the community should the facts so indicate. See notes 114-120 supra and accompanying text. If support obligations rest upon both community and separate forms of wealth, as also recommended, the presumptions that expenses made from separate property are intended as gifts become less important. See notes 144-149 supra and accompanying text; See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966). Finally, if the definition of community property is expanded, as will be recommended in the final portion of this study, the need for such presumptions decreases still further.

funding source should be used and to which fund payment should be made. As discussed above, damages will be computed as is appropriate to that election. Where, however, separate property has been mistakenly dissipated through no fault of the nonowner spouse, recovery should come from community property sources to the extent possible.[215]

CONCLUSION

A system of laws that outlines spousal responsibilities for property management should also provide means for guaranteeing that its provisions will be effective. During marriage or upon its termination, one spouse or both may wish to have property disputes resolved. A policy that supports marriage yet seeks to meet these needs requires two characteristics: Remedies should be available during marriage to those who wish to pursue them, so that divorce does not become the only means to protect legitimate property interests. At the same time, there should be no prejudice to those who delay litigation because their primary concern is with the preservation of their marriages. The proposals set forth in this paper seek a balanced approach to the practical issues that arise under California's system of equal management and control of community property.

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215. In these cases, it would be inequitable to require restitution out of the separate property of the spouse who did not make the management error to the extent that community property funds are available. A waiver of this rule would, of course, be possible. Finally, there will be a small number of cases in which one spouse has damaged the separate property interests of the other spouse. Here, too, the same principles should control recovery: the sources from which recovery is to be made and to which it is to be paid dictate the amount of damages to be awarded.