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How Much of a Partnership is Marriage?

Community Property Rights Under the California Family Law Act of 1969

By ISABELLA H. GRANT*

THE California Family Law Act of 1969¹ has been heralded as a much needed reform of state divorce law which had remained relatively unchanged since 1872.² The removal of fault in the determination of whether a marriage should be dissolved³ and the exclusion of evidence of specific acts of misconduct⁴ are the most apparent changes and have received the most attention.⁵ However, by far the most significant provision for husbands and wives is the mandatory requirement of an equal division of community property at the termination of marriage.⁶

Prior to the Family Law Act, in cases involving extreme cruelty, which were by far the majority, the trial court was obliged to award the innocent party more than one-half of the community property.⁷ How much more, however, was entirely within the court's discretion.⁸ As a practical matter, although fault was considered in the determination, it was not usually a major consideration in apportioning community property. Consideration was given to the amount of property, the age of the parties, their physical and mental condition, their ability to support themselves, and the needs of any children of the parties.⁹ All of these

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1. CAL. CIV. CODE §§ 4000-5100 (West 1970).

2. Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156, 158 (1970).

3. See CAL. CIV. CODE § 4506 (West 1970).

4. CAL. CIV. CODE § 4509 (West 1970). However, when child custody is being litigated, specific acts of misconduct may be introduced into evidence. *Id.*

5. See, e.g., Comment, *Dissolution and Voidable Marriage under the California Family Law Act*, 4 LOYOLA L. REV. 331 (Los Angeles 1971).

6. CAL. CIV. CODE § 4800(a) (West Supp. 1971).

7. *Visini v. Visini*, 212 Cal. App. 2d 183, 188, 27 Cal. Rptr. 782, 785 (1963), citing *Gonzales v. Gonzales*, 152 Cal. App. 2d 103, 312 P.2d 333 (1957).

8. *Id.*, citing *Dowd v. Dowd*, 111 Cal. App. 2d 760, 245 P.2d 339 (1952).

9. *Markovitz v. Markovitz*, 272 Cal. App. 2d 150, 153, 77 Cal. Rptr. 96, 98 (1969), quoting *Hill v. Hill*, 150 Cal. App. 2d 34, 37, 309 P.2d 44, 46 (1957).

matters ranked higher on the scale of importance than inflicting punishment for wrongdoing.¹⁰

The Family Law Act now provides that upon dissolution of a marriage or in a judgment decreeing a legal separation, the community property shall be divided equally.¹¹ Fault is eliminated as a factor in property division as is the trial court's discretionary power to make disproportionate awards.¹² Only minor discretion is given to the court to mitigate the potential hardship of this standard.¹³ The possibility of an additional award to offset deliberate misappropriation of property by a spouse will be discussed later in this article.¹⁴

The basic theory of the Family Law Act is that in disposing of property the dissolution of a marriage is comparable to the dissolution of a business partnership.¹⁵ Regardless of their economic circumstances or their moral conduct the parties are now considered partners whose respective one-half interests in the community property are not subject to the discretion of a trial judge.¹⁶

The legislators responsible for the Family Law Act of 1969 claim that its provisions are based on the growing recognition of women's rights. Assemblyman James A. Hayes, one of the proponents of the act and the chairman of the Assembly Committee on Judiciary, has said:

When our divorce law was originally drawn, woman's role in society was almost totally that of mother and homemaker. She could not even vote. Today, increasing numbers of married women are employed, even in the professions. In addition, they have long been accorded full civil rights. Their *approaching* equality with the male should be reflected in the law governing marriage dissolution and in the decisions of courts with respect to matters incident to dissolution.¹⁷

10. *Id.*

11. CAL. CIV. CODE § 4800(a) (West Supp. 1971). Notwithstanding this, the parties may by oral stipulation in court or written agreement divide the community property as they see fit. *See id.*

12. *Compare id.* § 4800(a) (West Supp. 1971) with *id.* § 146 (West 1954) (repealed Cal. Stat. 1969, ch. 1608, § 3, at 3313).

13. *Id.* § 4800(b)(1) (West Supp. 1971) provides: "Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property." *Id.* § 4800(b)(3) allows the court to grant all community property to one party if the net value of that property is less than \$5,000 and the other party cannot be found.

14. See text accompanying notes 44-47 *infra*.

15. ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 152 (Cal. Cont. Educ. Bar ed., 1970).

16. *Id.* at 152-56.

17. *Assembly Comm. Report on Assembly Bill No. 530 & Senate Bill No. 252*

It is significant that the concept of equality is mentioned only in connection with dissolution of the marriage, and that women are only "approaching" equality in the mind of the California legislature. Viewing marriage as a union in the nature of a partnership has not been accepted.¹⁸ In a partnership, "[a]ll partners have equal rights in the management and conduct of the partnership business."¹⁹ Every partner is an agent of the partnership and the act of every partner binds the partnership.²⁰

Although radically changing the grounds for dissolution of the marriage partnership and the economics of its termination, the Family Law Act does not change the basic law of community property. The definitions and legal incidents of community and separate property are the same as they have been since 1927²¹ and the rights and obligations of husband and wife during marriage are relatively unchanged. For the most part, community property is still under the sole management and control of the husband.²²

There are certain restrictions. The husband may dispose of only one-half of the community property by will,²³ and he may not make a gift of community property or dispose of household furniture or any clothing of the wife or children without the wife's written consent.²⁴ However, with these exceptions, and the requirement that the wife join in any transfer of community real property,²⁵ the husband has the same unqualified right to dispose of that part of the community property which is subject to his management and control as he has with respect

in 1969 JOURNAL OF THE CALIFORNIA ASSEMBLY 8053, 8062 (emphasis added). See also Hayes, *California Divorce Reform: Parting is Sweeter Sorrow*, 56 A.B.A.J. 660 (1970).

18. The author does not advocate an across-the-board adoption of the Uniform Partnership Act, CAL. CORP. CODE §§ 15001-15045 (West 1955), as the basis for a revised community property system but does suggest that partnership principles should have application in the area of management and control over the property.

19. CAL. CORP. CODE § 15018(e) (West 1955).

20. *Id.* § 15009(1).

21. Compare CAL. CIV. CODE § 5105 (West 1970) with Cal. Stat. 1927, ch. 265, § 1, at 484.

22. CAL. CIV. CODE § 5105 (West 1970). An exception to the general rule is contained in *id.* § 5124 which provides: "The wife has been given the management and control of the community personal property earned by her, and the community personal property received by her in satisfaction of a judgment for damages for personal injuries suffered by her . . . until it is commingled with community property subject to the management and control of the husband"

23. CAL. PROB. CODE § 201 (West 1956); CAL. CIV. CODE § 5125 (West 1970).

24. CAL. CIV. CODE § 5125 (West 1970).

25. *Id.* § 5127.

to his separate property.²⁶

For example, a husband may sell or mortgage community property and enter into contracts affecting it;²⁷ his divorced wife may levy upon the community property of the second marriage in order to discharge his alimony obligations;²⁸ he may properly pay all living expenses of the family from the community property and preserve his separate estate;²⁹ and he may invest community funds in life insurance without any interference on the part of the wife.³⁰ The Supreme Court of California has even said that a wife has no right to interfere and may not prevent her husband's use of community funds when making a transfer to defraud creditors.³¹ It has also recently been reaffirmed that a wife, having no present interest in community property, should not be joined in an action to recover any loss or injury to such property.³²

There is also dictum that a husband's discretion with respect to community property is such that his wife has no redress even when he wastes the property.³³ In *United States v. Robbins*, a case involving income tax, the Supreme Court said:

Although restricted in the matter of gifts, etc., he [husband] alone has the disposition of the funds. He may spend it substantially as he chooses and if he wastes it in debauchery the wife has no redress.³⁴

In reaching this conclusion the Court relied on a prior case, *Garrozi v. Dastas*,³⁵ which involved the community property law of Puerto Rico. In *Garrozi*, the lower court had found that the husband spent community funds amounting to \$47,000 on various trips to Europe. The lower court also found that \$22,000 of these expenditures were unreasonable and ordered that the amount be credited to the community and divided equally upon dissolution of the marriage. In reversing the lower court,

26. *Id.* § 5125.

27. *Grolemund v. Cafferata*, 17 Cal. 2d 679, 683, 111 P.2d 641, 643 (1941); *Rowe v. Holmes*, 63 Cal. App. 2d 46, 53, 146 P.2d 45, 48 (1944).

28. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 562, 432 P.2d 709, 711, 63 Cal. Rptr. 13, 15 (1967). The community may be entitled to reimbursement. *Provost v. Provost*, 102 Cal. App. 775, 283 P. 842 (1929).

29. *Morris v. Berman*, 159 Cal. App. 2d 770, 793, 324 P.2d 601, 614 (1958).

30. *Estate of Mendenhall*, 182 Cal. App. 2d 441, 445, 6 Cal. Rptr. 45, 48 (1960).

31. *Berniker v. Berniker*, 30 Cal. 2d 439, 446, 182 P.2d 557, 562 (1947).

32. *Wolff v. Hoaglund*, 11 Cal. App. 3d 227, 231, 89 Cal. Rptr. 778, 781 (1970).

33. *United States v. Robbins*, 269 U.S. 315 (1926). *But see* *People v. Schlette*, 139 Cal. App. 2d 165, 167, 293 P.2d 79, 80 (1956); ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 162 (Cal. Cont. Educ. Bar ed., 1970).

34. 269 U.S. at 327. *But see* *People v. Schlette*, 139 Cal. App. 2d 165, 167, 293 P.2d 79, 80 (1956).

35. 204 U.S. 64 (1907).

the Supreme Court held that the husband could not be called on to account and could not be compelled to return money to the community solely because a court thought the expenditures extravagant or even reckless. The Court compared the wife to a silent partner whose rights arise when the partnership ends. She would have had a right to a separation of property because of the husband's reckless conduct, but upon dissolution, after the goods of the community had been dissipated, the right did not give rise to an inference that the husband may be held to account for the money already expended.

Is this the law in California? What remedies does a wife have when her husband grossly mismanages or squanders community property? The *Robbins* and *Garrozi* cases provide little authority since community property jurisdictions each have distinct bodies of law.³⁶ In California, there are no cases directly in point although in a number of decisions there is dictum that a wife is safeguarded against fraudulent or inconsiderate acts of her husband and that she has appropriate judicial remedies both before and after termination of the marriage.³⁷ There is a case, decided after wives were given management and control of their own earnings,³⁸ saying that a husband's right to control the community real property does not give him a right as against his wife to burn it down with impunity.³⁹

But what about reckless stock market speculations or dissipation of funds at the race track? It is interesting to note that legislation was proposed in 1871 to give wives a definite right of redress during marriage in the case of gross mismanagement by a husband. The proposed section read as follows:

In cases of fraudulent transfers, gross mismanagement or profligate waste of common property by the husband, the wife may have her action in the proper Court, and is, upon proper showing, entitled to a judgment—

36. See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2705 (7th ed. 1960); H. VERRALL & A. SAMMIS, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 2 n.9 (2d ed. 1971). See also *People v. Schlette*, 139 Cal. App. 2d 165, 167, 293 P.2d 79, 80 (1956), discussing *Robbins* application to California law.

37. See 1 B. ARMSTRONG, CALIFORNIA FAMILY LAW 607 (1953); *McKay v. Laurston*, 204 Cal. 557, 563-64, 269 P. 519, 522 (1928); *Stewart v. Stewart*, 199 Cal. 318, 342, 249 P. 197, 207 (1926); *Johnson v. Nat'l Sur. Co.*, 118 Cal. App. 227, 5 P.2d 39 (1931). See also *Somps v. Somps*, 250 Cal. App. 2d 328, 58 Cal. Rptr. 304 (1967), where the court said the husband "has the duty of accounting for disbursements and keeping records if he intends charging the community with the obligation." *Id.* at 340, 58 Cal. Rptr. at 312.

38. CAL. CIV. CODE § 5124 (West 1970).

39. *People v. Schlette*, 139 Cal. App. 2d 165, 167, 293 P.2d 79, 80 (1956).

1. Securing to her the entire management and absolute power of disposition of it, in like manner and extent as the husband had before the commencement of the action; or,
2. Appointing a Trustee to manage it, as the Court may direct; or,
3. Equitably dividing the property, making the part awarded to each their separate property.⁴⁰

This section was not included in the Civil Code. Therefore, any safeguards the wife has against the husband's mismanagement depend on general community property principles and equity doctrine.⁴¹

During the continuance of a marriage, a wife has been allowed to recover from the payee funds paid by her husband for a gambling debt.⁴² Upon termination of the marriage, will she obtain any additional award from the husband's share of community property because of gambling losses or reckless investments and expenditures? The answer depends on the interpretation of an exception to the Family Law Act's provision requiring an equal division of community property.⁴³ In most cases, that answer would be negative.

Civil Code section 4800(b) (2) gives the court authority to make an additional award or offset against a party's share of existing property to the extent of any sum the court determines to have been deliberately misappropriated. The intent of this section as first explained by the Assembly Judiciary Committee was:

[I]f community funds have been deliberately *squandered* or misused by one spouse, the other may be granted a greater share of the remaining property, or if most of the community property has been squandered, payments to compensate for the misappropriation may be ordered.⁴⁴

This might seem to be a significant enlargement of the trial court's discretion in apportioning the property. However, Assemblyman Hayes, chairman of the Assembly Judiciary Committee, later qualified this statement in an article in the American Bar Association Journal. There he did not use the word squander but said:

The legislature did not intend this [California Civil Code section 4800(b) (2)] to apply to minimal spending sprees or to losses from

40. CAL. CIV. CODE § 178 (Gelwicks 1871); 1 B. ARMSTRONG, CALIFORNIA FAMILY LAW 607 (1953).

41. 1 B. ARMSTRONG, CALIFORNIA FAMILY LAW 608 (1953). There are many cases which expressly describe the husband's obligation as a fiduciary duty. See, e.g., *Fields v. Michael*, 91 Cal. App. 2d 443, 447, 205 P.2d 402, 405 (1949). See also *Lovetro v. Steers*, 234 Cal. App. 2d 461, 473, 44 Cal. Rptr. 604, 611 (1965); *Janes v. LeDeit*, 228 Cal. App. 2d 474, 487, 39 Cal. Rptr. 559, 568 (1964).

42. *Novo v. Hotel del Rio*, 141 Cal. App. 2d 304, 295 P.2d 576 (1956).

43. CAL. CIV. CODE § 4800(b)(2) (West Supp. 1971).

44. 1969 JOURNAL OF THE CALIFORNIA ASSEMBLY 8062 (emphasis added).

errors in business judgments but only when substantial assets or portions of the community property are siphoned off by deliberate acts amounting to a fraud upon the rights of the other spouse.⁴⁵

It is the general opinion that Civil Code section 4800(b)(2) does not make any substantive change in the law and that the type of misappropriation requiring an additional award would be limited to cases where a husband invests community funds in his own separate property or makes substantial unauthorized gifts of community property. Gambling, squandering money or expending unfair portions of the community represent only economic fault; they are too interwoven with the question of fault in conduct for a court to require an accounting of living expenses without ignoring legislative intent.⁴⁶

It is too early to tell just how Civil Code section 4800(b)(2) will be interpreted by the courts, but unequal awards do seem unlikely. In all probability there will have to be proof of wrongful intent or fraud before any additional award will be made. While a wife may have more rights today than she had in 1907 when the *Garrozi* case was decided, she would, in all probability, still be denied the return of any of her husband's unreasonable expenditures, such as those for European trips.

A husband's duty to his wife with respect to community property has not been uniformly or satisfactorily defined by the cases. In some instances he is called a trustee with the resulting duties of a fiduciary.⁴⁷ However, a recent court of appeal case⁴⁸ said that he is not required to be as prudent as a trustee nor is he required to keep complete and accurate records of income received and disbursed. Although a trustee or fiduciary might be personally liable for a loss sustained by virtue of an improvident investment, the court indicated that a husband would not be liable under such circumstances.⁴⁹

De Funiak has said that under the Spanish view the wasting of community property was wrong but, in practice, no account was taken of it unless the losses were so extreme as to be undeniably a fraud on the wife. However, he also pointed out that a wife had redress in the divorce courts "where she [could] in most states [have] obtain[ed]

45. Hayes, *California Divorce Reform: Parting is Sweeter Sorrow*, 56 A.B.A.J. 660, 663 (1970).

46. ATTORNEY'S GUIDE TO FAMILY LAW PRACTICE 162 (Cal. Cont. Educ. Bar ed., 1970).

47. E.g., *Vai v. Bank of America*, 56 Cal. 2d 329, 337, 364 P.2d 247, 252, 15 Cal. Rptr. 71, 76 (1961); *Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 21, 193 P.2d 728, 733 (1948).

48. *Williams v. Williams*, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971).

49. *Id.* at 567, 92 Cal. Rptr. at 389.

all or a larger share of the community property in redress of such wrongdoing."⁵⁰

This is no longer the law in California. The only exception to a substantially equal division is the interpretation given to "willful misappropriation" under Civil Code section 4800(b)(2). Equal division of the property means equal division after deduction of community debts⁵¹ and most community property is liable for the husband's debts.⁵² The fact that the economic circumstances of the parties no longer have any bearing on division of property can work a serious hardship on a wife, particularly when there are minor children. She can no longer be awarded the equity in the family home or even the household furniture without a compensating award of community property or other method of payment to the husband for his one-half interest. This would be the case even though a husband has considerable separate property. In California, jurisdiction over property on dissolution of marriage is limited to community property and no award of separate property can be made.⁵³ A husband may exhaust the community property paying for his living expenses and debts of extravagance. He may sustain losses on speculative investments and jeopardize the community by failure to pay income taxes. All of these are actions over which his wife has no control. Nevertheless, on dissolution of the marriage a court may only determine the net community property and divide it equally.

Conclusion

How much of a partnership is marriage in California? The answer is too obvious. This discussion has attempted to do no more than illustrate some of the inequities which are now present because the 1970 changes in California family law have not been reflected by any similar adjustments in the community property system. While women may have greater protections now than formerly, they still must endure both their dependent status concerning management and control, and the mandatory equal division of the community on dissolution. Solutions have not been proposed since they are not easily formulated and because

50. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 120, at 296 (2d ed. 1971).

51. *Rethers v. Rethers*, 140 Cal. App. 2d 28, 32-33, 294 P.2d 968, 971 (1956).

52. Except for the wife's earnings and her personal injury recoveries which are community property, the husband's debts may be satisfied from community funds. CAL. CIV. CODE § 55117 (West 1970).

53. *Barker v. Barker*, 139 Cal. App. 2d 206, 210, 293 P.2d 85, 89 (1956). See CAL. CIV. CODE § 4800 (West Supp. 1971).

they should be offered only after a careful re-evaluation of community property law. To that end, the governor should establish a commission to examine the problem much as a commission on the status of the family examined California's divorce law. Whatever the outcome, the author suggests that the ultimate result should either accord wives a status closer to a true partnership interest in management and control or allow the California courts greater discretion in apportioning community property on the basis of economic circumstances when the marriage partnership ends.

