Management Powers and Duties under California's Community Property Laws: Recommendations for Reform

Carol S. Bruch

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By Carol S. Bruch

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Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*

By Carol S. Bruch†

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 intact major areas in which the sole management and control of community assets by one spouse continues to be authorized. As a result, an earning spouse who banks wages in an account held solely in his or her 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

* © 1982 Carol S. Bruch. This Article is the second of two works prepared by the author for the California Law Revision Commission and is published here with the Commission's consent. The first study, Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769 (1982), proposes reforms in the definition of community property and in the rules for property division at divorce or upon the death of one spouse. This Article was written to provide the Commission with background information to assist the Commission in its study of this subject. However, the opinions, conclusions, and recommendations set forth are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

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2. CAL. FIN. CODE §§ 851, 7601 (West Supp. 1982); id. § 852 (West 1968); id. § 11200 (West 1981).
the community property business is run, including the question of how much capital is left in the business and how much is withdrawn by way of salary, than before the 1975 reforms.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. Under the current statutes, only at divorce is relief for improper management provided. It is unlikely that interspousal remedies will often be pursued during an ongoing marriage; however, a system that guarantees relief only in the divorce court surely enhances marital breakdown. In more than one state the realization that divorcing spouses were better protected than married ones has prompted proposals for broad-scale reform of marital property rights, including rights for relief during marriage. Louisiana recently adopted major amendments to its community property laws, and a Wisconsin proposal to establish a new marital (community) property system has received considerable legislative attention in recent years and is

3. CAL. CIV. CODE § 5125(d) (West Supp. 1982).

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 California Commission on the Status of Women, 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 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, They Tell It Like It Is, CALIFORNIA WOMEN, Jan. 1980, at 10, col. 1; see also id., July 1980, at 6. For the text of a second letter, see infra note 29.

5. See text of letter supra note 4. This Article 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 infra text following note 231.

scheduled for reintroduction during the coming legislative session.  

Finally, the National Conference of Commissioners on Uniform State Laws has begun consideration of a Uniform Marital Property Act, the current draft of which contains interesting management and control provisions. 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.

**Current Management Powers and Duties**

Since 1975, the general management rule in California has been that each spouse has the power to manage and control both that spouse's separate property and all of the community property. However, sole management is explicitly authorized for a community property business, or if the other spouse has a conservator; it additionally arises de facto under rules that require financial institu-
tions to deal only with named account holders. In yet other cases, both spouses must agree on management decisions. Termed "restraints on alienation," these joint management provisions require consent or joinder of both spouses for gifts of community property in any form, for sales of community personal property for less than valuable consideration, for sales or encumbrances of household goods or wearing apparel of the other spouse or the parties' minor children, and for sales, encumbrances, or leases for longer than one year of community realty.

More general standards of management behavior are established by two additional Civil Code provisions: Section 5125(e) imposes an obligation of "good faith" upon a spouse exercising management powers, and 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. There is little case law to illuminate either the reference in section 4800 to deliberate misappropriation or the relatively new "good faith" language of section 5125. While it appears that a breach of the good faith obligation should constitute deliberate misap-

12. CAL. FIN. CODE §§ 851, 7601 (West Supp. 1982); id. § 11200 (West 1982); id. § 852 (West 1968).
13. The controlling statutes, CAL. CIV. CODE §§ 5125 and 5127 (West Supp. 1982), are set forth infra at notes 41 & 42.
14. CAL. CIV. CODE §§ 5125(b), 5127 (West Supp. 1982).
15. Id. § 5125(b).
16. Id. § 5125(c).
17. Id. § 5127.
18. "Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property." Id. § 5125(e).
19. Notwithstanding the equal division rule of California Civil Code § 4800(a) (West Supp. 1982), § 4800(b)(2) permits the court "[a]s an additional award offset against existing 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."
20. This section has been specifically considered in only two cases since the "deliberately misappropriated" language was added. See In re Marriage of Moore, 28 Cal. 3d 366, 374-75, 618 P.2d 208, 212, 168 Cal. Rptr. 662, 666 (1980); In re Marriage of Schultz, 105 Cal. App. 3d 846, 855, 164 Cal. Rptr. 653, 660 (2d Dist. 1980). Marriage of Moore is discussed infra at note 39. However, there are numerous cases upholding 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. For a discussion of the case law, see infra note 35.
21. 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 a husband does not abuse his management duties 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.
appropriation, permitting a compensatory award to the injured spouse at divorce, good faith alone may not provide a defense against a section 4800 misappropriation claim. In *In re Marriage of Walter*, 22 decided under the law in effect before equal management and control and a statutory "good faith" duty were instituted, the court held that 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" on its face appears 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 when community funds are used for the separate benefit of one spouse.

**Proposed Management Powers and Duties**

Left totally unclarified by current law are the extent to which other actions by one spouse may violate the statutory good faith management duty and the nature of possible remedies during marriage for a spouse injured by a violation of the Civil Code's management standards. Several situations can be imagined in which a remedy might fairly be requested to vindicate such marital property rights. If a spouse refuses to reveal what community property he or she has, or in which form it 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. Moreover, 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, if spousal consent is required by statute but is withheld without good reason, or if one 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.

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 financially prudent spouse be made solely re-

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sponsible 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. If gifts or other transfers have been wrongfully made, or if community property has been wrongfully applied to debts for which separate property was initially 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 as a result of the other spouse’s irresponsibility. These remedies would include rights to rescind or to 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 satisfied. Finally, the mutual obligations and protections governing property management by spouses should extend into the post-divorce period for so long as common property remains undivided by agreement or court order.

The following discussion of marital property management and control addresses 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.

The Right to Know

Surely one of the most basic attributes 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, but remains largely unacknowledged as to marital property. The only suggestion in California case law that such a right may exist at times other than upon dissolution of marriage is found in Wilcox v. Wilcox, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (4th Dist. 1971), in which the court allowed the husband to sue his wife for restoration of community funds she wrongfully withheld from his sole management. See infra note 33.
fusing to divulge the extent of their assets. Although financial institutions are properly precluded from releasing information on account balances to those whose names are not on the signature cards, 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 his or her own earnings and the other spouse's interest was little more than an expectancy, rights to disclosure in community property states have developed primarily in the context of divorce litigation, when the couple's final balance sheet is struck. Full implementation of equal management and control rights will not be achieved until each spouse is obligated to divulge to the other the assets under that spouse's control, even if no request to divide them has been made. This rule is included in both the Wisconsin proposal and the draft Uniform Marital Property Act. Because it is for a court to resolve doubts about what is

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29. 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? "We've been married 16 years and I don't know anything about any savings or have my name on any credit union savings.

"Would appreciate knowing my rights to income proportionally as he will not budget."
California Commission on the Status of Women, supra note 4, at 10, col. 2; see also id., July 1980, at 6.

30. 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): "The 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 U.C.L.A. L. Rev. 1, 35-39, 47-52 (1976).

31. Such relief is expressly authorized at divorce by statute in Texas and in conjunction with any interspousal property litigation in the draft Uniform Act. Tex. Fam. Code Ann. tit. 1, § 3.56 (Vernon 1975); Uniform Marital Property Act § 14(b) (May 15, 1982 Discussion Draft). Case law in several states has recognized the right in connection with termination of the community. See 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, 519 P.2d 161, 164, 112 Cal. Rptr. 401, 404 (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) (duty of disclosure terminates when the parties are independently represented and dealing at arm's length in an adversary proceeding); In re Ytatchos' Estate, 60 Wash. 2d 179, 373 P.2d 125 (1962). The term "accounting" sometimes refers to an inventory of assets without also denoting a partition of the property. See generally D. Dobbs, supra note 27, at 252-54. See also infra note 35.

32. 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.93(8) ("A spouse may request. . . . an accounting of marital property and debts or of separate debts incurred prior to marriage. . . . which affect marital property."); Uniform Marital Prop-
separate and what is community property, this disclosure requirement 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, reasoning that for every right there must be a remedy, statutory clarification is in order. If the new language works as can be anticipated, litigation to compel disclosure will rarely occur. Rather, a statutory provision that equal management and control provides both spouses with the right to be fully informed about the community property will both obviate the current need for test litigation and encourage voluntary compliance.

The Right to Sound Management

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 be seen as expressions of the more general doctrine of fiduciary duty in confidential relationships that has developed in California law, which expressly applies to interspousal contracts by way

erty act § 14(b) (May 15, 1982 Discussion Draft) (“In a civil action asserting a claim for relief by one spouse against the other [for specified management wrongs], a spouse may... be awarded an accounting of marital property and of the individual, premarital and marital property debts of both spouses...”).

33. 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 she wrongfully withheld from his sole management, in an opinion citing CAL. CIV. CODE § 3523 (West 1970): “For every wrong there is a remedy.”). Accounting or disclosure rights also appear to exist by implication under the statutes of Arizona and Louisiana and are expressly authorized by the Wisconsin draft legislation. ARiz. REV. STAT. § 25-318 (West Supp. 1981-82) (permitting divorce court, when dividing community property, to consider concealment, fraudulent disposition or destruction of the parties’ joint property); LA. CIV. CODE AN. art. 2354 (West Supp. 1982) (authorizing interspousal suit for fraud or bad faith in the administration of community property); see also id. art. 2341; 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.93(8), set forth in note 32 supra.

34. See supra notes 9-22 & accompanying text.

35. 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 liquidated 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
of Civil Code section 5103.36 Clarifying language should be added to section 5125(e) to negate any inference that the obligation to manage and control is measured against a lower standard than that ordinarily controlling the marital relationship37 or becomes inapplicable when undivided community property is converted into tenancy in common property by operation of law upon divorce.38

Although greater clarity as to the meaning of section 4800(b)(2) might also be useful, the present language could be fairly construed to authorize compensation for damages caused by a breach of the good

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, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (2d Dist. 1971) (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 the fiduciary duty 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 CALIFORNIA CONTINUING EDUCATION OF THE BAR, ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 260-63 (2d ed. 1972); Grant, How Much of a Partnership is Marriage?, 23 HASTINGS L.J. 249 (1971); Prager, supra note 30, 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).

36. California Civil Code § 5103 (West 1970) provides: "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 of this Code]."

37. Although one court was under the impression that the good faith requirement had obviated the fiduciary duty imposed by pre-1975 case law, it nevertheless applied old precedent in a case involving fraud at the time of dissolution. In re Marriage of Brennan, 124 Cal. App. 3d 598, 604, 177 Cal. Rptr. 520, 523 (2d Dist. 1981).

38. 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." The proposed new language is italicized. This confidential relations standard is identical to that imposed by California Civil Code § 5103 (West 1970), which regulates the parties' contracts with one another. See supra note 36.
faith management obligation (such as squandering), as well as for those occasioned by an enrichment of one spouse's separate wealth at the expense of the community estate. The need for redrafting should be examined at the same time that broader questions of debt and property division at divorce are resolved.

Restraints on Acquisition and Alienation

Specific standards for good faith management can be inferred from a number of other code provisions. First, Civil Code sections 5125 and 5127 impose restrictions on alienation by gift of community personalty or realty, by sale of community household goods, clothing, or realty; and by encumbering or leasing community realty. These

39. The relation between California Civil Code §§ 5125 and 4800(b)(2) was involved in In re Marriage of Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980), a divorce case in which the wife alleged that her husband had sold community property items taken from their home without her consent and squandered the proceeds on his drinking habit. Because there was no proof that the goods were sold for less than adequate consideration, the California Supreme Court concluded that the trial court had erred when it found a violation of § 5125, subdivision (b), which prohibits unilateral gifts or sales of community personal property for less than adequate consideration. See infra note 41. However, it remanded the case for a finding as to whether subdivision (c), which requires written spousal consent for a sale of community property household goods, was violated. The opinion appears to assume that any proved breach of the standards imposed by § 5125 would constitute grounds for relief at divorce under § 4800(b)(2). Unfortunately, however, it does not discuss whether Mr. Moore's use of the funds for excessive consumption of alcohol could establish either a direct breach of § 4800(b)(2) as a deliberate misappropriation, or a violation of the good faith management duty imposed by subdivision (e) of § 5125.

The current scope of § 4800(b)(2), including the degree to which it incorporates §§ 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 made in the first study are ultimately approved. See Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 HASTINGS L.J. 769, 824-28 (1982) [hereinafter cited as Bruch, Definition and Division]. Should they not be, clarification by way of amendment to §§ 4800(b)(2), 5125, and 5127 would be advisable.

40. See Bruch, Definition and Division, supra note 39, at 856-57.

41. California Civil Code § 5125 (West Supp. 1982) provides:

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

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

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

"(d) A spouse who is operating or managing a business or an interest in a business
provisions seek to ensure that both spouses agree to transactions 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 a spouse's written consent to transfers of community personal property by gift or for less than a valuable consideration. No other community property state imposes such a stringent requirement. A similar writing requirement is imposed by section 5125(c) on sales of household goods and the wearing apparel of other family members. In this time of United Fund campaigns at the office and garage sales at home, these writing requirements are not realistic. A court faced with an objection to customary transfers might find a ratification of the gift or sale or an implied waiver of the writing requirement, but there seems no sound reason to require such doctrinal machinations. Other statutory models are available; none imposes a writing requirement. Washington, for example, prohibits gifts of com-

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.”


44. See supra note 41.

45. See id.
munity property without the express or implied consent of the other spouse, while the Louisiana statute requires consent only when a gift is not "usual or customary" in view of the couple's economic status at the time of the donation. The Wisconsin and Uniform Act drafts require consent only when a gift is not "usual and customary."

Although there is some virtue in retaining a written consent requirement for large gifts—with the expectation that courts will occasionally find implied waivers and ratifications even in this restricted area—it seems doubtful that any gift, 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 for sales of used household goods or clothing. A statute that requires written consent, if enforced, will permit one spouse in most 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. This solution, however, is problematical in that one spouse will rarely challenge the other's mismanagement during an ongoing marriage. In practice, remedies that require, rather than permit, relief during marriage are apt to be more illusory than real.

Statutes that recognize implied as well as express consents to gifts and to sales of household goods and clothing seem best designed to permit courts to reach sensible conclusions. Were California law revised, it is doubtful that litigation would be more frequent than under the harsh current rule, which invites evasionary equitable arguments. Ambiguity could always be avoided when desired by securing the written consent of the other spouse.

The section 5125 provision on management and control of a community property business also needs amendment. 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 to divest the business of substantially all of its assets. Three states require that both spouses consent to the alienation of a

49. 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.932(4) (one year).
50. See supra note 5 and infra text following note 231. A better solution would restrict recovery only to the degree necessary to protect justifiable reliance by the transferee. See infra notes 238-42 & accompanying text.
community property business or substantially all of its assets, distinguishing these transfers from the normal purchases and sales during the life of the concern that may be handled unilaterally by the managing spouse.\(^5^2\) This joinder requirement seems sound and should be added to section 5125, restricted by a statute of limitations to cut off claims of bona fide purchasers without knowledge of the marriage relationship, much as currently exists as to transfers of realty under section 5127.

Joinder of both spouses appears equally desirable in the converse situation, when community property funds are used to purchase an interest in realty or in a business that is to be managed or operated by one or both of the spouses. Nevada and Washington both have such legislation.\(^5^3\) Two policies support a rule of joint decisionmaking in these situations. First, such acquisitions usually entail major financial consequences for the family. Second, 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 notice of the marital relationship.\(^5^4\)

A further joinder provision that recognizes the wisdom of joint

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\(^5^2\) See LA. CIV. CODE ANN. art. 2347 (West Supp. 1982); NEV. REV. STAT. § 123.230(6) (1979); WASH. REV. CODE ANN. § 26.16.030(6) (West Supp. 1982). Under the Louisiana statute, partnership interests are exempted from the joinder requirement. LA. CIV. CODE ANN. art. 2352 (West Supp. 1982). 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.” Accord 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.61(1), (5)-(6). The Wisconsin proposal requires written consent of both spouses “to any sale, lease, exchange, encumbrance or other disposition of all or substantially all of the marital personal property, whether or not that property is owned in the name of only one spouse, used in the operation of a business or for an agricultural purpose . . . .” 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.61(1) (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. §§ 706.02(1)(fm), 766.51(2)(c), 766.61(2) with CAL. CIV. CODE § 5127 (West Supp. 1982). Joinder, under the Wisconsin draft, may be satisfied in three ways: signing the conveyance, providing a written consent, or ratifying an improper sole transfer. 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 706.02(1)(fm).

\(^5^3\) See NEV. REV. STAT. § 123.230(4), (6) (1979); WASH. REV. CODE ANN. § 26.16.030(4), (6) (West Supp. 1982). The Wisconsin proposal also requires joinder for purchases of marital property real estate. 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, §§ 706.02(1)(fm), 766.51(2)(c) (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 California Civil Code § 5127.

\(^5^4\) For a proposed independent remedy that would permit a spouse to have title corrected to reflect an ownership interest, see infra text accompanying note 227. Should a spouse wish to ratify an unauthorized acquisition, yet obtain the protection of having his or her name included on the title, such relief would be appropriate.
decisionmaking in matters of fundamental importance is suggested by an early draft of the Wisconsin legislation. A 1979 version of the bill would have provided that "the selection of a settlement or payment option . . . upon retirement . . . shall require the written consent of both spouses."  

A similar rule should be incorporated into California law.

Finally, some states have concluded that sound management is more likely to occur when both spouses are required to participate in agreements to insure, guaranty, or indemnify third parties. 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.

**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 satisfaction and the questions that arise when a single creditor seeks payment from the parties' assets.

**Torts**

The most explicit order-of-satisfaction provisions are found in California Civil Code section 5122, which deals with liability to third

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55. 1979 Wis. Assembly Bill 1090, Substitute Amendment 4, §§ 766.31(3)(a), 766.51(3). It is unfortunate that the 1981 version would dilute this requirement. See 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.51(2)(f). Consideration should also be given to a joinder requirement for the designation of beneficiaries under life insurance policies. See id. § 766.62.


57. The Code sometimes directs that a debt be satisfied from one kind of property until it is exhausted and only thereafter from another. See, e.g., Cal. Civ. Code § 5122 (West Supp. 1982). Because such provisions prescribe the order in which property is to be applied to satisfy a debt, this Article refers to them as "orders of satisfaction."

58. This discussion 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. Such marshalling of assets for the benefit of creditors is beyond the scope of this Article.
parties for a spouse's tortious conduct. The section reflects the legislature's view that tortious actions not undertaken while acting for the benefit of the community should be the primary responsibility of the tortfeasor, and not of the community. In Arizona, such torts implicate only the separate property of the tortfeasor. In contrast, California's rule is more protective 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 during activity undertaken for the community's benefit.

Although in need of a minor amendment to clarify the role of insurance proceeds and of quasi-community property, the statute repre-

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59. California Civil Code § 5122 (West Supp. 1982) provides:

"(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."

60. Apportionment of liability, where appropriate, should be possible. Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 SAN DIEGO L. REV. 143, 183 (1981). 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 infra at text accompanying notes 95-96.


62. This rule is preferable to the somewhat confused rule developing in Washington case law, where payment from a separate tortfeasor's one-half interest in the community is now authorized once the tortfeasor's separate property has been exhausted. See the intelligent critique of deElche v. Jacobsen, 95 Wash. 2d 237, 622 P.2d 835 (1980), in Note, Community Property—Washington Allows Separate Tort Recovery from Community Property, 57 WASH. L. REV. 211 (1981).

63. California Civil Code § 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 § 5113(c) (West 1970) (containing such a rule as to interspousal torts). A recommendation included in the first portion of this study would replace quasi-community property with vested community property rights. If enacted, there will be no need to amend § 5122 to specify where such funds fall in the satisfaction system. See Bruch, Definition and Division, supra note 39, at 827-28. If not, § 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.
sents a sound balance between the interests of the tort plaintiff and those of the uninvolved spouse.\textsuperscript{64} Without orders of satisfaction, primary responsibility on the part of one spouse or the community could be imposed only through enactment of a statute defining the other spouse's right to reimbursement when payments were made to the injured party from one fund as opposed to another. Such a reimbursement system would have serious shortcomings.

One can imagine a spouse who negligently causes an accident en route to the airport to pick up his or her spouse, who is returning from a business trip. Presumably the tort occurred during activity undertaken for the benefit of the community, and the community property is primarily liable. 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 that look to the respective liabilities of separate and community property recognize equally valid concerns of the spouses. If 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 remedies proposed in the following section, which deals with the right to participate in management decisions, would complement the existing satisfaction scheme. First, there should be a method for the nonmanaging spouse to request access to community property funds for good cause shown, such as to pay an obligation for which the com-

\textsuperscript{64} 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 on 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.
munity is 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 spouse's action for access could take the form of an action to direct the managing spouse to pay the tort victim out of appropriate funds. If the creditor had not yet taken enforcement steps, this would permit the tortfeasor to effect voluntary payment. If attachment had already been made against secondarily liable property, satisfaction of the obligation pursuant to an access order would dissolve the attachment. Second, the current rules on marshalling of assets, which provide orders 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 statutory orders of satisfaction on his or her own behalf.

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 the community is primarily liable. If stalling cannot 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 marginal benefit to a tort plaintiff in removing such orders of satisfaction 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 to implement orders of satisfaction might take place via a special verdict in the tort case in which a married defendant is named or,

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65. See infra text accompanying notes 222-31.

66. See infra note 230 & accompanying text. Similar issues arise if a community property home or business is executed upon despite the tortfeasor spouse's primary liability and the tortfeasor refuses to make payment out of separate property beyond the management reach of the innocent spouse. In seeking to protect the jeopardized community assets, 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 infra text accompanying note 225.

67. Development of a system of marshalling on the debtor's 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, *supra* note 60, at 193. For a proposal for such marshalling, see infra text accompanying notes 228-31.

68. This option could be made available by permitting a spouse to intervene in a tort suit 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 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 the tort occurred in connection with activity undertaken for the community's behalf, but has serious limitations. First, difficulties would arise if witnesses who had testified in the earlier trial were not avail-
preferably, 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 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.69

Prenuptial obligations

Legislative views regarding relative spousal responsibility for obligations to third parties other than tort liabilities are more deeply hidden. Close examination of Civil Code section 5120,70 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, the reference to “contracted” debts is appropriately read to include all debts, however incurred, that are attributable to the prenuptial period.71

A prenuptial creditor who seeks recovery during the debtor’s subsequent marriage is given access to the debtor’s separate property and to all of the community property except the earnings of the nondebtor spouse.72 Rather than restricting access to the separate property and

able for the spouse’s cross-examination. Next, intervention would have to be permissive rather than mandatory to avoid forcing premature and perhaps destructive interspousal litigation. See supra note 5 & infra text following note 231. Finally, only a relatively small number of tort claims reach trial; other procedures would be required to resolve characterization issues following settlements.

69. If California Civil Code § 5122 is amended as recommended supra at note 63, no order-of-satisfaction issues will arise if there is sufficient insurance to recompense the tort victim’s loss. As to uninsured liability, an order-of-satisfaction system can 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 infra text following note 245.

70. Civil Code § 5120 (West Supp. 1982) provides: “Neither the separate property of a spouse nor the earnings of the spouse after marriage is liable for the debts of the other spouse contracted before the marriage.”

71. CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION RELATING TO LIABILITY OF MARITAL PROPERTY FOR DEBTS 22 (#D-312, Dec. 1, 1982 Staff Draft) (proposed § 5120.010). However, current support obligations to former spouses and to children of former relationships are not prenuptial obligations. The Law Revision Commission has made an unfortunate tentative decision to recommend a change in the rule. The result would disfavor these creditors in favor of others whose claims also arise during the current marriage. See id. at 22-23, 25-26 (proposed §§ 5120.10, 5120.20, 5120.50). See also infra text accompanying notes 102-11.

72. Again, the Civil 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 infra text following note 245.
earnings of the debtor spouse, which would continue into marriage the same basic responsibility that existed prior to marriage, the law extends the creditor's rights to all community property other than the earnings of the nondebtor spouse. Thus, items acquired with exempted earnings apparently are also available to the creditor.\textsuperscript{73} This potential windfall is offset, however, by a possible disadvantage to the creditor that may also accompany the marriage: if 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 creditor's windfall, the legislature adopted the compromise of section 5120. This balance seeks to assure the nondebtor spouse of consumption at a standard commensurate with his or her current earnings, subjecting only acquisitions from those earnings, other sources of community property, and the debtor's separate property to liability for the debtor's preexisting obligations.

In contrast to 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 the portion of the community property that is liable for the debt. Yet there appears to be widespread agreement among married people that a debtor spouse's separate property and current earnings should be used to pay 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 satisfaction 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.\textsuperscript{74} Finally, reformers should consider whether the obligation of mutual support under section 5100\textsuperscript{75} justifies extending access to the nondebtor's earnings when no other sources of separate and community property are available to the creditor. This additional category of recourse would avoid the danger of "marital bankruptcy" that might otherwise attend the decision of

\textsuperscript{73} The section clearly protects the nondebtor's wages from garnishment but does not specify at what point savings or purchases traceable to such earnings may be reached.

\textsuperscript{74} The extent to which this or other satisfaction schemes should be modified in order to simplify the problems that arise under the rules of marshalling on behalf of creditors is beyond the scope of this Article.

\textsuperscript{75} California Civil Code § 5100 (West 1970) states: "Husband and wife contract toward each other obligations of mutual respect, fidelity and support."
a spouse to become a homemaker and ignore outstanding obligations.\footnote{76}

Contract creditors

No general statutory provisions establish the relative responsibilities of spouses for contract liabilities incurred during marriage other than an order of satisfaction for necessaries, discussed below in connection with interspousal support obligations.\footnote{77} 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, the Judicial Council created forms treating debts as subject to equal division.\footnote{78} This assumption that debts constitute divisible property 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 . . . ."\footnote{79} The unfairness of an equal division of debt was immediately evident. For example, equal division of a debt incurred to finance one spouse's education seemed harsh because the former student retained the education, 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 their abilities to repay, increasing the likelihood of one party's bankruptcy. In response to these problems, the legislature enacted a special statutory provision assigning responsibility for educational loans at divorce solely to the spouse who had received the education,\footnote{80} and case law simply ignored the per-
received equal division mandate to permit an unequal division of debt if the couple's debts totalled more than their assets.81 No accommodation, however, has yet been made for less extreme situations.82

A second statutory change rendered earnings received while spouses are living "separate and apart" separate property.83 This rule destroyed the earlier symmetry that had preserved both the community property characterization of a husband's earnings and the community property's liability for debts during periods of separation.84 Instead, community property liability for post-separation debts is permitted to mount at a time when the community is receiving no earned income. This anomaly has prompted a spate of cases dealing with the characterization of debts incurred during separation and with rights to reimbursement.85
Although it has long been the practice of some courts to characterize debts as either separate or community at the point of divorce, as is consistent with the current dubious notion that debts are a negative form of property subject to the dictates of equal division, California's statutes do not mention such a process, and the cases are of little assistance. Much of the confusion can be traced to cases involving borrowed funds. As between spouses, California has characterized proceeds of a credit acquisition according to the "lender's intent" test. When a lender relies upon existing separate property wealth in extending credit, the loan proceeds are seen as traceable to that wealth and classified accordingly as separate property. If no such intent on the part of the lender is discerned, the proceeds are characterized as community property, a product of the general credit worthiness of one or both spouses.

If, under this test, credit produces community property assets, it would appear logical to characterize the obligation to repay 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.


87. 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's 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.'" (citing 16 CAL. JUR. 2d, Divorce and Separation § 295, at 593)); Estate of Haselbud, 26 Cal. App. 2d 375, 383, 79 P.2d 443, 448 (4th Dist. 1938) ("[T]he 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.").

88. 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?, 17 CAL. W.L. REV. 173 (1981). A reform that would obviate the difficulties caused by the current rule is proposed in Bruch, Definition and Division, supra note 39, at 857-60.

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

For example, a loan to enable a new lawyer to purchase an office library is typically given to one who has no separate property, with the expectation that subsequent earnings will provide the funds for repayment. Under the "lender's intent" test, the library is clearly community property. 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. In these circumstances, equal division of debt unfairly burdens the non-lawyer spouse.

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 to the financial community. 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 at divorce.

Four important reforms together could bring order into this unsettled area. First, symmetry is needed between periods in which community property is implicated by a spouse's actions and periods 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 subject to special rules in the absence of contractual or legal action on their part, earnings, like debts, should maintain their community property character until an agreement or court order terminates the community. In recent years, both the State Bar's Family Law Section and the Advisory Commission on Family Law to the Senate Subcommittee on Administration of Justice have endorsed this proposal. It would obviate much of the unrest in the cases by mooting the current question of reimbursement when separate property earnings during separation are used to pay for continuing community

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92. For a recommendation that CAL. CIV. CODE § 5118 be so amended and a discussion of the problems of separated couples, see Bruch, Informal Marital Separations, supra note 83, passim.

93. The Section supported Senate Bill 2038 (Sieroty), California Legislature 1977-78 Regular Session, which would have made this change in the Code, but has since changed its position.

94. 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).
obligations. Under the proposed reform, both the earnings and the obligations would be characterized as community.

The second important change would replace the lender's intent test with an inquiry similar to that suggested above with respect to tortfeasors 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 consumption of alcohol, which might currently be characterized as expenses incurred in violation of the good faith obligation to manage community property and hence be subject to unequal division as deliberate misappropriations, would be more directly characterized as separate obligations. Normal living expenses, on the other hand, would be incurred for 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. Permitting apportionment would greatly facilitate equitable results.

The third reform is related to interspousal management obligations in relationship to third parties. Extension of the order of satisfaction currently imposed for tortious conduct to contractual obligations 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 to marshalling on behalf of the debtor discussed above in relation to tort liabilities should be made similarly available under the proposed rule.

Finally, broader authorization for unequal division of debt, similar to that recently considered by the Law Revision Commission, is needed. The provision should, however, look not only to the rights of

95. See supra notes 59-64 & accompanying text.
96. A similar apportionment problem exists in the torts areas, where a tort committed by an entity that is owned partly by the community and partly by separate property may require apportionment for order-of-satisfaction purposes under California Civil Code § 5122 (West Supp. 1982). See supra note 60 & accompanying text. Compare Texas law, which contains a flexible satisfaction 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); accord Uniform Marital Property Act § 9 (May 15, 1982 Discussion Draft).
98. See id. § 5125(e) (West Supp. 1982), set forth supra at note 41.
99. See supra note 96, describing the Texas and Uniform Marital Property Act approach, applicable to all forms of debt, and text accompanying notes 59-69.
100. California Law Revision Commission, supra note 71, at 18 (proposed § 4800(b)(5)).
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 new orders of satisfaction to determine the relative liabilities of the separate and community property for payment of the couple's obligations.\textsuperscript{101}

The seeming vagueness of the suggested test is deceptive. All theories aside, it is relatively easy to agree as to which debts are appropriately borne by which spouse in a concrete situation. A rule permitting the court 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, and largely incoherent standards of the current statutes and case law. When nothing indicates that a particular debt should be borne by one party or the other, the court would be expected to assign the debt in a fashion that reflects the parties' relative abilities to pay. Substantial equity would be the result—a significant improvement on current law. In addition, the current post-divorce debt collection litigation and bankruptcy actions that reflect unfair and unrealistic debt allocations at divorce would decrease in number.

Support for children and former spouses

Under California law, a child is entitled to share in the standard of living of its parents; Civil Code section 4807 accordingly authorizes a court to look to all forms of parental wealth and apportion the responsibility for child support among them as it deems just.\textsuperscript{102} The rule applies whether the children are offspring of the current marriage or of some prior relationship.\textsuperscript{103} Although a child from a former relation-

\textsuperscript{101}. Interim relief through 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." For more comprehensive reform suggestions that would also affect creditors, see Bruch, \textit{Definition and Division}, supra note 39, at 857-60. \textit{Cf.} \textsc{Tex. Fam. Code Ann.} tit. 1, § 5.62(b) (Vernon 1975); \textsc{Uniform Marital Property Act} § 9 (May 15, 1982 Discussion Draft).

\textsuperscript{102}. \textsc{California Civil Code} § 4807 (West 1970) provides: "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."

ship may be a prenuptial creditor to the extent that support arrearages exist for prenuptial periods, the child should not be considered a pre-nuptial 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 circumstances in setting the amount due. No support liability is imposed directly on a stepparent by virtue of the marriage alone; however, the degree to which that person's income or wealth frees the child's parent to contribute to the child's support from his or her own assets is seen as relevant. Also relevant are the parent's own wealth, income or ability to earn, and responsibilities to others.

Public policy supports this approach. 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, exclusive responsibility for the parent's contribution to their support must rest with this source of wealth, and 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. For the same reason, the nonparent should have no automatic reimbursement right, either during or upon the termination of the marriage. 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 natural parent) would have to be made to the nonparent to recompense the

104. See supra note 71 & text accompanying notes 71-76.
107. Even without this disincentive the nonpayment of support is a problem of major proportions. U.S. DEP’T OF COMMERCE, 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 (1979); Carrad, A Modest Proposal to End Our National Disgrace, FAM. ADVOC., Fall 1979, at 30; Seal, A Decade of No-Fault Divorce, FAM. ADVOC., Spring 1979, at 10; Weitzman & Dixon, 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).
support payment’s diversion of that stepparent’s one-half dollar. 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 the specter of impoverishment to the obligated parent, discouraging voluntary compliance with outstanding support orders. To the extent that separate property wealth, however, is the basis for the support award, payment out of that wealth is appropriate, and a stepparent should be protected by orders of satisfaction as to the payment source and by reimbursement rights, as in any case where payment from one source versus another is directed by law.\textsuperscript{108}

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 marshalling rights of their stepparent. Civil Code 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 and earnings, and not against other sources of community property.\textsuperscript{109} Even if freed of its discriminatory language, the statute would be unsound. Access to all sources of community property in such cases is not tantamount to imposing a support obligation upon the stepparent. Such access simply recognizes that a parent’s continuing support obligations are legitimately enforced against the same sources of funds as are other obligations incurred during marriage by that spouse, subject to the court’s existing authority to marshall assets.\textsuperscript{110}

This analysis of child support obligations applies with equal force to support obligations owed prior spouses. The same policies that encourage the payment of pre-existing, continuing child support obligations during an obligor’s subsequent marriage encourage realistic creditor access and interspousal responsibility rules for obligations to prior spouses. Here, too, the new spouse should be required to share

\textsuperscript{108} See Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); \textit{accord In re} Marriage of Smaltz, 82 Cal. App. 3d 568, 147 Cal. Rptr. 154 (1st Dist. 1978).

\textsuperscript{109} Civil Code § 199 (West 1982) provides: “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 § 199 unconstitutionally discriminates against legitimate children since it restricts the community property that may be reached by children of a former marriage to a parent’s earnings, while illegitimate children are not so restricted. 59 Op. Cal. Att’y Gen. 15, 17 (1976).

extended-family burdens to the degree that support orders are based upon the obligor's current earnings. Section 4807, which permits a court to apportion 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 case law that has already reached this result. 111

One final area of support obligations to third parties needs reform. Confusion about the nature of community property interests, and a desire to reduce the Aid to Families with Dependent Children (AFDC) eligibility of children living with their stepparents have inspired two highly inarticulate Civil Code provisions, sections 5127.5 112 and 5127.6. 113 Each was designed to reduce a child's projected need under AFDC eligibility tests by imputing to the custodial parent an ability to contribute to the child's support. 114 The model obviously in the mind

111. See Weinberg v. Weinberg, 67 Cal. 2d 557, 562-63, 432 P.2d 709, 711, 63 Cal. Rptr. 13, 15 (1967). For a discussion of interspousal support obligations during an ongoing marriage and a suggestion that the statute also be extended to this area, see infra notes 174-79 & accompanying text.

112. Civil Code § 5127.5 (West Supp. 1982) provides:

"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 liability 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."

113. Civil Code § 5127.6 provides:

"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."

114. Zumbrun, Momboisse & Findley, Welfare Reform: California Meets the Challenge, 4 Pac. L.J. 739, 778-79 (1973) (discussing Cal. Civ. Code § 5127.5); see also Assembly Comm. on the Judiciary, California Legislature, 1979-80 Regular Session, Bill Digest for A.B. 381, at 1-2 (Hearing Date: May 2, 1979); Assembly Comm. on Human
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 provided an inappropriate remedy for the woman’s then-existing lack of management power over her husband’s earnings. 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 no support obligation be imposed on the stepparent, the statute’s drafters gave 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 dis, appearing now as a form of gender discrimination.\footnote{The discrimination, given current management rules, operates against women. 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.}

The penultimate blow to the scheme was delivered in July 1979, when \textit{Camp v. Swoap} \footnote{94 Cal. App. 3d 733, 156 Cal. Rptr. 600 (3d Dist. 1979).} 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.\footnote{45 C.F.R. § 233.90(a)(1) (1980) (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).} 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 part of a welfare reform package.\footnote{1979 Cal. Stat. ch. 1170, § 2.} The new section recognizes that equal management and control entails the power of one spouse to dispose of the community property earnings of either, but maintains the section 5127.5 quagmire of apparent partition. At the same time, it reveals its continued AFDC concern with the otherwise mysterious statement that a stepparent’s earnings...
are "considered unconditionally available" for the care and support of any child who resides in the stepparent's home. More telling than this gentle rewrite of a section that had already proved ineffective was the legislature's contemporaneous repeal of Civil Code section 209, which had made express the California rule that a stepparent is not liable for a child's support.

It is time to address directly questions of stepparent support obligations 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 therefore not subject to reimbursement) is based on sound policy. Any imposition of legal responsibility 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 his or her own support. The result would be a disincentive to marriage that would increase nonmarital cohabitation by couples with children of prior relationships.

Unfortunately, the asserted impropriety of a family receiving public support funds for children of a parent married to someone with current income shifts attention from its proper focus: the responsibilities of the child's own parents, only one of whom is in the household in which the child resides. Section 5127.6 displays some recognition of this problem; it purports to make the stepparent support that is taken into account for AFDC purposes irrelevant if the issue is one of support rights against the noncustodial parent.

\[\text{CAL. CIV. CODE } \S 5127.6 \text{ (West Supp. 1982), set forth supra at note 113 (emphasis added).}\]

\[\text{120. 1979 } \text{Cal. Stat. ch. 1170, } \S 1.3. \text{ Former Civil } \text{Code } \S 209 \text{ had read: "A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and, where such is the case, they are not liable to him for their support, nor he to them for their services." } \text{CAL. CIV. CODE } \S 209 \text{ (West 1954) (repealed 1979).}\]

\[\text{121. Although } \text{Civil Code } \S 209 \text{ was repealed, no language imposing a duty of support upon stepparents was enacted. At common law there is no obligation on the part of a stepparent to support. H. } \text{CLARK, DOMESTIC RELATIONS } \S 6.2, \text{ at 188-89 (1968).}\]

\[\text{122. It is only partially successful. Although the section provides that stepparent support actually provided "shall not be considered a change in circumstances that would affect a court ordered support obligation of a natural or adoptive parent for that child," it does not prevent a court from taking such support into account when there is an independent change in circumstances that would justify a modification of support. In AFDC cases it is unlikely that the noncustodial parent will often appear and seek a reduction in child support; that parent is probably paying no support. Other noncustodial parents may, however, attempt to take advantage of the section.}\]
A certain air of unreality attends all these machinations. In 1979, the Department of Social Services acknowledged that it could not estimate what amount of public funds, if any, would be saved under section 5127.6.123 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.124 The Department apparently concedes, as one would expect, that such contributions are made in many stepparent families.125 Moreover, 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 had expressly precluded stepparent support responsibilities, no section was enacted to impose such responsibilities. 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—that is, one that applies whether or not AFDC monies are at issue.126 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.127 The situation would be

123. LEGISLATIVE ANALYST, CALIFORNIA LEGISLATURE, 1979-80 REGULAR SESSION, ANALYSIS OF ASSEMBLY BILL NO. 381 (Boatwright), as amended in Senate on Aug. 21, 1979, at 1 (Aug. 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.").


125. ASSEMBLY COMM. 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.").


127. See supra note 106 & accompanying text.
greatly improved if sections 5127.5 and 5127.6 were repealed, section 209 (which frees stepparents of support obligations) were restored, and section 199 (which limits a child to support enforcement against his or her parent's earnings once that parent has remarried) were repealed. The artificial partition of community property 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 benefit a noncustodial parent who seeks a reduced child support obligation.

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 relation to the spouses' responsibilities to one another. Here, too, substantive legal doctrines should dictate management rules, but the current code lacks a comprehensive scheme that rationalizes these aspects of marital property law.

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 damages owed by the tortfeasor should in all cases come initially from that spouse's separate property. Sensibly, however, the section also authorizes the use of insurance proceeds to recompense the wrong, even if the policy was purchased with community property. The initial order of satisfaction imposed by the section resembles that provided under section 5122 for compensation to third parties for a tort committed by a spouse who was not act-

128. Civil Code § 5113(a) (West 1970) provides: "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. Id. § 5113(b).

129. Id. § 5113(c). For a recommendation that a similar provision be added to California Civil Code § 5122, which concerns tort liabilities to third parties, see supra note 63.
ing for the benefit of the community.\textsuperscript{130}

What rule should apply once the tortfeasor's separate property is exhausted, however, is less clear. One model distinguishes an injury that occurs while the tortfeasor is acting for the benefit of the community (as in driving the other spouse to a family gathering), and in such cases permits payment of the residual damages from the community property.\textsuperscript{131} The substantive policy decision that supports this approach is a conclusion that the community should be the guarantor of a spouse's failings even in these cases and that it is as appropriate to place secondary liability on the community here as it is in cases of injury to third parties.\textsuperscript{132} Under this view the relative disadvantage to a spouse who participates in the payment of his or her own damages is offset by the fact that such damages become the victim's separate property,\textsuperscript{133} an exception to the usual rule that makes personal injury recoveries community property.\textsuperscript{134} Torts committed while the responsible spouse is not acting for the benefit of the community receive different treatment. Here, resort to the community property for satisfaction is computed at a two-for-one rate to insure that the portion of the total amount paid from community property which represents the one-half ownership interest of the tortfeasor fully pays for the damages inflicted by that spouse.\textsuperscript{135} 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.\textsuperscript{136}

A somewhat different scheme simply incorporates interspousal


\textsuperscript{131} The relative responsibility of the tortfeasor's quasi-community property should be handled as is recommended supra at note 63.

\textsuperscript{132} For a discussion of community property liability for tortious injury to a third party, see supra text accompanying notes 59-69.

\textsuperscript{133} Cal. Civ. Code § 5126(c) (West Supp. 1982).

\textsuperscript{134} Id. § 5126(a).

\textsuperscript{135} 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 § 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 ensure that the tortfeasor's half interest in the transferred property equalled the amount of the spouse's injuries—$5,000. 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 are undoubtedly recompensed by a set-off in the computation of damages, the current right to reimbursement of expended community funds is not clear.

torts into the provisions of section 5122 that govern damage liability to third parties.\textsuperscript{137} The orders of satisfaction then depend solely upon whether the activity giving rise to the injury is 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\textsuperscript{138} and, perhaps, by directing a two-for-one payment out of community property if the tort is not committed in conjunction with community activities. A final approach retains section 5113, yet clarifies it only by specifying whether recoveries out of community property are to be made on a two-for-one basis, refusing to distinguish cases of community benefit as between the spouses. 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.

Interspousal property transactions

The standard of good faith in confidential relations\textsuperscript{139} would seem to require that contracts entered into between 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 first treats 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 in writing. Accordingly, should a contract dispute arise, proof will often turn upon statements as to what was said or intended and evidence of actions taken. 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 reasons 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 persuasively argued that courts exist precisely to permit the determination of parties' disputes and that disagreements

\textsuperscript{137} See id. § 5122 (West Supp. 1982), set forth supra at note 59.

\textsuperscript{138} See id. § 5126(c) (West Supp. 1982).

\textsuperscript{139} Civil Code § 5103, set forth supra at note 36, imposes this duty.
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 by way of presumptions or of writing requirements, are inequitable. Their imposition does not eliminate breached agreements, only legal relief for such breaches, promoting disenchantment with the legal process in those who have been injured. Judicial recognition that such requirements operate most harshly to the disadvantage of the unsophisticated explains the long history of cases that avoid writing requirements through doctrines such as execution, part performance, and estoppel.\footnote{140}

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 considerations, 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 sole management and control of the community property.\footnote{141} Recognizing that

\footnote{140} See, e.g., Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 702, 299 P.2d 657, 659-60 (1955) ("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. ... 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 ... ") (quoting In re Estate of Raphael, 91 Cal. App. 2d 931, 939, 206 P.2d 391, 395 (1st Dist. 1949)); Estate of Sheldon, 75 Cal. App. 3d 364, 142 Cal. Rptr. 119 (5th Dist. 1977) (estoppel). These cases avoided the writing and recordation requirements of Civil Code §§ 5133, 5134 (West 1970) that apply to antenuptial agreements. The rule is codified in Civil Code § 1698(b), (d) (West Supp. 1982): "(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 injustice that might 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, \textit{Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial-Legislative Interaction}, 29 \textit{Amer. J. Comp. L.} 217, 228 n.46 (1981) (discussing Cal. A.B. 564 (Ingalls), California Legislature, 1979-80 Regular Session).

\footnote{141} See Prager, \textit{supra} note 30, at 43-44, 77-78.
something unusual had happened if the husband chose to place prop-
erty in the name of his wife and beyond his own management reach,
the courts concluded that a gift could fairly be presumed. At the
same time, fear that a husband might use his community management
powers to enrich his separate property led the courts to imply an auto-
matic right of reimbursement to the community when its funds had
been applied to the husband’s separate property. Thus the rule be-
came “gift unless agreement to the contrary” when community prop-
erty was placed in the wife’s name, and “reimbursement unless
agreement to the contrary” when community property was used to in-
crease or maintain the husband’s separate property estate. This gift
presumption was partially codified in Civil Code section 5110, 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. Most other acquisitions by married people are pre-
sumptively community property under the section.

No statute has clarified the effect of equal management and con-
trol on these presumptions of gift and reimbursement. The statutory
restriction of the special separate property presumption to a wife’s ac-
quisions prior to the era of equal management and control arguably
evidences legislative intent to do away with the gift presumption for
later acquisitions. The matter is, however, by no means clear. Al-

142. 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).

143. See, e.g., Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931); In re Marriage of War-
App. 755, 283 P. 842 (2d Dist. 1929).

144. Civil Code § 5110 (West Supp. 1982) provides: “Except as provided in Sections
5107, 5108, and 5109, all real property situated in this state and all personal property where-
evver 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 com-
mon, 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 pre-
sumption is that such property is the community property of the husband and wife . . . .”

145. Id. Joint tenancy title, however, is treated as establishing a “different intention,”
one that the parties hold equal separate property interests. Siberell v. Siberell, 214 Cal. 767,
7 P.2d 1003 (1932). A special provision in § 5110 reestablishes the community property
presumption at dissolution or legal separation for a couple's joint tenancy single family resi-
dence, however, if it was acquired during marriage. See infra note 153.
though a spouse's purchase of property in his or her own name under a regime of equal management and control should, of course, raise a community property presumption, what should the result be when one 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. The view was followed without question in the recent case of In re Marriage of Lucas, where community property was used in partial payment for a camper, title to which was taken in the wife's name. It is, however, of dubious continuing utility. Under a regime of equal management and control, considerations of convenience, happenstance, or concerns for 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 in which monetary decisions are made by one person alone, the other spouse may implement those decisions by paying the bills. Now that courts have been freed to look to actual intent in transactions between members of nonmarital unions, subject only to a presumption of intended fair dealing, it seems high time to extend the rule to married couples.

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 together with community property in the purchase of an item. This most frequently occurs in two situations: when an acquisition is made over a long period of time beginning before the marriage, with payment coming first from separate, then from community, income and when a purchase requires a substantial down payment which is made from separate property sources, with the balance paid from community property earnings. In the case of life

146. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

147. 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; the old gift cases would not have looked so similar.


150. The facts in In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 855 (1980), which also involved a dispute over a house, were typical. During a 12-year marriage, the wife used her separate property assets to provide a down payment 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 payments came from community property earnings. See infra note 153.
insurance and pensions, the theory that an acquisition occurs over time has replaced the traditional theory that the character of an initial payment establishes ownership, and the cases have therefore apportioned ownership interests according to the relative contributions of separate and community wealth. A related rule seems necessary for other types of purchases. It no longer makes sense to presume that a separate property down payment on a home, title to which is taken in joint ownership with a spouse, is contributed as a gift by the separate property's owner. Although the rule has the benign purpose of favoring the community, it appears harsh in an era of frequent divorce and increasingly short marriages. Common experience indicates that home purchases, especially in recent years, 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 small. Instead, an inheritance, prenuptial earnings, or property from a prior marriage is used in conjunction with community property. Although the parties may 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 expects to have it returned 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 unless the spouses agree that the separate property interest will be preserved. After a marriage of twenty or thirty years, the rule seems


152. See, e.g., In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 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). These cases are properly distinguished from those in which separate property is placed in joint ownership, but no commingling occurs. See, e.g., In re Marriage of Cademartori, 119 Cal. App. 3d 970, 174 Cal. Rptr. 292 (1st Dist. 1981).

153. See In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980). The court held that, in the absence of an agreement to the contrary, the special community property presumption of Civil Code § 5110 for a single family residence acquired during marriage in joint tenancy title would prevail: "In the present case, there is no evidence of an agreement or understanding that [the wife] was to retain a separate property interest in the house. . . . The only findings in this regard are that neither party in-
fair enough. After a marriage of two years or seven, however, the result can be harsh.

A previously published, related study proposes 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. Whether or not those recommendations are adopted, gift presumptions should be expressly removed from the law by statute. This change would objectify a court's inquiry and permit separate property investments to be returned without penalty. To prevent overly favoring the separate property interest, a supplemental rule is proposed: that only reimbursement (to the degree possible without impinging upon community interests) be granted, rather than a proportionate ownership interest, if separate property funds were traced into a mixed asset other than insurance, pensions, or the like. This would strike a compromise: traceable separate property interests would not be subject to forfeiture, yet they would receive 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.

This rule should be distinguished from that which should apply if funds are commingled, for example, in a bank account, with numerous deposits and withdrawals. If tracing of the separate property could not be persuasively shown, commingling should be held to result in a trans-

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1. See supra note 150.

2. Bruch, Definition and Division, supra note 39, passim.

3. In the case of contributions to a retirement or pension fund, or the payment of premiums on life insurance from current income, the mixing of assets occurs because payments are made over time, with the source of each contribution or payment 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 will 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.

4. Of course, where only small amounts of community property are 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).
mutation of the whole to community property. In this case, convenience alone rather than a genuine familial purpose would have been served by the act of commingling, and the separate property owner might fairly be held to have commingled at his or her own peril.

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, seems sound to the extent that it protects the community from unilateral removals. It might be improved upon, however, by codifying the rule that gives the community the maximum recovery, either reimbursement or pro rata ownership, in any separate property that was benefited. Once again, the community interest should be given the

157. Whether interest should be given to the separate property share if the property's value would permit such compensation after the community property and interest to that fund have been deducted depends on the ultimate characterization of earnings on separate property. A related study by the author recommends that such earnings be deemed community, not separate, property. See Bruch, Definition and Division, supra note 39, at 795-99. Windfalls should go to the community in any event.

158. 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 907, 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 property system would track the commingling rule of See: "If commingling separate and marital property occurs in a manner which makes tracing the separate property unreasonably difficult . . . the commingled property is presumed to be marital property." 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.33(1)(c).

Codification of the See commingling rule is recommended, with specific reference to the burden of proof. See generally 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; the commingled mass should be held to be separate property if 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. 1982).


greater protection, without causing a forfeiture of the separate property.

To the degree possible, courts that deal with third party claims against the couple's assets should respect these doctrines that control ownership as between the spouses. 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\(^\text{161}\) permits a creditor to avoid transfers,\(^\text{162}\) not only if they were made with fraudulent intent,\(^\text{163}\) but also if they were made for less than a fair consideration\(^\text{164}\) and either resulted in the transferor's insolvency or were made once the transferor was already insolvent.\(^\text{165}\) Civil Code section 3440 goes further, however, providing 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."\(^\text{166}\) This overbroad presumption permits creditors to avoid almost all interspousal transfers of personal property, since cohabiting couples will almost always be held to share possession of their personal property.\(^\text{167}\)

The *Lucas* case, which involved 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.\(^\text{168}\) Accordingly, absent proof of an agreement to the contrary, the new car was entirely Mrs. Lucas' separate property. Section 3440, however, gives a creditor

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162. *Id.* § 3439.09.
163. *Id.* § 3439.07.
164. Fair consideration is defined in § 3439.03 and the definition is incorporated into the definition of fraudulent conveyances that is set forth in §§ 3439.04 through 3439.06. *Id.* §§ 3439.03-3439.06.
165. *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.*
166. *Id.* § 3440 (exceptions provided for choses in action, property exempt from execution, and sundry transactions of limited importance to the domestic setting).
167. *See* cases cited *infra* note 169.
of the community the absolute right to treat such a gift as partially community property, even if the couple produces documentation 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 have been avoided under the provisions of the Uniform Fraudulent Conveyances Act that test transactions by insolvency or fraudulent intent.\textsuperscript{169} 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 context than it would in litigation between the spouses.\textsuperscript{170} Community creditors already benefit from Civil Code section 5110's presumption of community ownership for acquisitions during marriage,\textsuperscript{171} and the pool of property available to them will be enlarged further if changes in the definition of community property proposed in the initial portion of this project are adopted.\textsuperscript{172} Most importantly, however, a special Statute of Frauds for married couples would discriminate against marriage, contrary to the policies of encouraging marriage and protecting the family unit.\textsuperscript{173}

Interspousal support obligations

Although Civil Code section 5100 imposes mutual support obligations on spouses,\textsuperscript{174} the obligation during marriage is more limited than that accorded either the couple’s children or a prior spouse. While the support rights of these other classes of claimants may be predicated upon both community and separate property sources, with the court

\textsuperscript{169} 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) ($500 tractor sold by husband to wife for $10 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 the car for his business).

\textsuperscript{170} See supra notes 139-40 & accompanying text.

\textsuperscript{171} See CAL. CIV. CODE § 5110 (West Supp. 1982), set forth supra at notes 139-40.

\textsuperscript{172} See Bruch, Definition and Division, supra note 39, at 795-839.

\textsuperscript{173} See supra note 140. Professor Reppy has made this point respecting recordation requirements. W. Reppy, Comments on Memorandum 80-23—Liability of Marital Property 4 (April 9, 1980) (memorandum to the California Law Revision Commission staff) (copy on file with the author). The reasoning applies equally to writing requirements.

\textsuperscript{174} CAL. CIV. CODE § 5100 (West 1970), supra note 75.
apportioning responsibility between the sources as is just, the obligation to support a current spouse does not extend to separate property unless the community property and quasi-community property have been exhausted. This rule, codified in Civil Code section 5121, which details creditor access to the separate property of the supporting spouse for necessaries, and section 5132, which specifies the support obligation as between spouses, should be revised.

Clearly a family with a community property income of $25,000 per year will not maintain the same standard of living as a 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 wealthier marriages are imputed solely or initially to the community property, the elevated living standard that reflects total familial wealth will impoverish the community. A far better rule would recognize that a couple's living standard is fully as reflective of all sources of familial wealth as are the living standards of children and former spouses.

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. Indeed, as with postseparation earnings, experience indicates that spouses think that their legal rights remain constant until they have affirmatively indi-

175. See supra notes 102, 111 & accompanying text.
176. Civil Code § 5121 (West Supp. 1982) provides: "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."
177. Id. § 5132 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."
179. For example, if an independently wealthy spouse never pursued outside employment, but was occupied instead with management of that separate property, it should be possible to impute a reasonable community property income to that spouse's activity without vitiating it with the hypothetical payment of living expenses that were predicated upon the separate property wealth. These issues could be largely mooted if separate property income were also characterized as community property, a recommendation of the initial portion of this study. See Bruch, Definition and Division, supra note 39, at 795-99. 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 supra notes 102, 111 & accompanying text.
icated that they wish a change. Thus, there is no reason for a separated spouse to curtail normal expenses until he or she receives notice that the couple's finances have become strained by the separation. 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 would be awarded in any event in light of the parties' standard of living. Along with the litigation, it can be anticipated that further marital discord would be produced, enhancing rather than minimizing the chances of an ultimate breakdown of the marriage.

The Law Revision Commission has already made a preliminary decision that support rights should not be prejudiced by the fact of separation alone, indicated by its tentative recommendation to amend Civil Code section 5131, which currently bars support rights after separation unless they have been set by the separation agreement. Somewhat inconsistently, however, the Commission also plans to recommend restricting the support duty owed, at least as to creditors, to support for "common necessaries." This curtailment of the spouses' customary living habits without notice would be unfortunate. It would operate to the detriment of innocent third parties who have continued to provide services during separation, having neither knowledge of the financial aspects of the separation nor reason to believe that the parties could no longer afford their services. These creditors will have contracted with the spouse requiring support, who also has no reason to assume that expenditures must be lowered. Because a right against an obligor's separate property does not exist under current law unless all other sources of funds have been exhausted, the proposed revision is most likely to affect true separate property marriages, which typically involve considerable wealth. The problem does not arise as in

180. See supra notes 92-94 & accompanying text.
182. The Commission would bar support only if it were expressly waived in a written separation agreement. CALIFORNIA LAW REVISION COMMISSION, supra note 71, at 24, 35 (proposed §§ 5120.040(a)(2), 5131).
183. Id. at 24 (proposed § 5120.040).
184. 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 puzzling are Professor Reppy's suggestions that this result somehow follows from the tenets of women's liberation or that rules controlling court-ordered support are relevant to creditor access if no such order has been entered. See Reppy, supra note 60, at 186.
185. See supra notes 176-77.
exemption cases, where there are insufficient funds to meet the creditor's claim and the term "common necessaries" was developed. 187

The support cases do not often occur and can be expected even less frequently if Civil Code section 5118 is revised so that earnings during separation are community property 188 and thus available to such creditors. Even if earnings are community property, however, there will 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. 189 No greater burden should be placed in the path of the couple's creditors on these facts.

More serious problems exist when debts for new and inappropriate purposes are incurred during separation. Here, rather than disadvantage creditors, the preferable course appears to be to impose orders of satisfaction for creditor claims, as suggested above, 190 and to provide a series of remedies as described in the following sections on sole management, 191 separation of the community, 192 recapture, 193 and reimbursement. 194 Spouses should be entitled to recover for violations of the good faith management standard and should be able to restrict one spouse's ability to further endanger the financial well-being of the other. Absent formal interspousal action, however, the couple's creditors should remain entitled to the normal range of remedies, and marshalling on behalf of the debtor should be available to allocate responsibility according to the nature of the transaction and the relevant sources of familial wealth. 195

Sole Management

In a number of situations, sound management requires sole rather

188. See supra notes 92-94 & accompanying text.
190. See supra notes 59-69 (third-party tort creditors), 71-76 (prenuptial creditors), 77-101 (contract creditors), 102-111 (support creditors), 128-38 (interspousal tort creditors), 174-79 (interspousal support creditors) & accompanying text.
191. See infra notes 196-212 & accompanying text.
192. See infra notes 213-19 & accompanying text.
193. See infra notes 232-42 & accompanying text.
194. See infra notes 243-48 & accompanying text.
195. See infra notes 228-31 & accompanying text.
than joint management and control. California's statutes provide for sole management in three ways. First, sole management is expressly authorized for community property businesses or if one spouse has a conservator. Civil Code section 5125(d) makes the operation of a community property business subject to the sole management of the entrepreneur to assure the smooth functioning of the concern, on 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, while Civil Code section 5128 and provisions in the Probate Code that took effect on January 1, 1980, give sole management to a married person whose spouse has a conservator, subject to the continuing ability of the spouse lacking capacity to make reasonable provisions for the family's necessaries. Second, statutes that restrict financial institutions to dealings with named account holders functionally permit one spouse to exclude the other from control over funds by placing them in an individual account. Finally, the rule that compensation from one spouse for the other spouse's personal injuries becomes the separate property of the injured spouse rather than community property, as would otherwise be the case, removes the recovery from the management reach of the tortfeasor.

In contrast, there is no longer a provision authorizing exclusive management and control of community property personal injury damages received from third parties for causes of action arising during the marriage. However, should the couple later divorce, such recoveries are subject to a special rule of division if they have not been commingled with other forms of community property. In such cases, the tort victim receives the entire amount unless the interests of justice mandate giving up to one-half the award to the other spouse. While the rea-

196. Cal. Civ. Code § 5128 (West Supp. 1982); Cal. Prob. Code §§ 1871, 3012(c)(1)-(3) (West 1981) (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 for a spouse's property may be appointed when a party "is substantially unable to manage his or her own financial resources or resist fraud or undue influence .... Substantial inability [in this context] may not be proved solely by isolated incidents of negligence or improvidence." Id. § 1801(b).

197. See supra note 12 & accompanying text.

198. For a discussion of the possible need for a set-off or restitution to the community for expenses incurred, see supra note 135.

199. Cal. Civ. Code § 5126(a), (c) (West Supp. 1982); cf. 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.31(1)(e), (2)(d) (classifying damages received for pain and suffering as the separate property of the injured spouse in all cases).

200. 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. Stat. ch. 987, § 13.

201. California Civil Code § 4800(c) (West Supp. 1982) provides: "Notwithstanding the
sons for this 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 award. A sounder rule would ask whether the funds could be identified under normal tracing rules. Further, reformers may wish to consider whether sole management and control as to such damages should be reinstated, either as a complement to this scheme or on its own merits.

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, which assign sole management to one spouse when the other has a conservator, authorize the conservator to approve transactions that would otherwise require the consent of both spouses.\(^{202}\) They also allow judicial approval of transactions if a spouse without legal capacity to consent does not have a conservator.\(^ {203}\) Legal incapacity for these purposes exists "if the spouse is substantially unable to manage or control the community property,"

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 settlement 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." \(\text{Cf.}\) 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 767.255(l Im), 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 and separate property according to that portion of the award that applies as an income substitute during the time the person is married and that portion of the award that applies as an income substitute during the time the person is not married." Note that the draft also provides that recovery for pain and suffering is the separate property of the victim in all cases. \textit{See supra} note 199.

\(^{202}\) \textit{CAL. PROB. CODE} §§ 3071-3073 (West 1981).

\(^{203}\) \textit{Id.} §§ 3100-3154. The procedure is also available as to transactions for which the Civil Code does not require the consent of both spouses and to declare that a spouse does have the necessary legal capacity to consent to the transaction in question. California Probate Code § 3113 (West 1981) makes clear that no conservator need be appointed to bring a proceeding under these sections, which deal with consent to particular transactions.
"has a conservator," or otherwise fails to meet the standards imposed by "principles of law otherwise applicable to the particular transaction." 204

Other states substitute judicial approval of specific transactions for spousal consent under less extreme circumstances. Louisiana, for example, permits one spouse to act unilaterally 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. 205 Similar authority is provided by New Mexico statutes that deal with a spouse who has disappeared or is a prisoner of war 206 and by a Texas statute that deals with a spouse's incapacity, desertion, disappearance, or the parties' permanent separation. 207

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 impossibility of obtaining such consent. 208

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 or is likely to be substantially injured by the other spouse's gross mismanagement, waste or ab-

204. Id. § 3012(b)(1)-(3).
205. LA. CIV. CODE ANN. art. 2355 (West Supp. 1982). 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 infra note 209 & accompanying text.
206. N.M. STAT. ANN. §§ 40-3-5, 40-3-16 (1978).
207. 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 normally 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.
208. To the extent, however, that imprisonment is listed as an independent ground for dispensing with consent, the Louisiana model appears unsound. When 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. 1982).
The court may, but need not, appoint an independent guardian to protect the irresponsible spouse's interests. If one spouse has evidenced serious financial irresponsibility over an extended period, 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 unmarriages without forcing a divorce, California needs some means of separating their financial obligations or of protecting the more responsible spouse from the financial recklessness of the other. If each spouse has an independent earning capacity, it would seem preferable to allow them to operate as independent financial entities, except for their mutual support obligation. If instead there is one, or one primary, wage-earner, the financial stability of the parties could be protected without forcing a divorce by permitting the prudent spouse to ask the court to authorize sole management of the couple's community property. Such authorization should require that steps ordinarily requiring joiner of the spouses be undertaken only with the consent of a court or of an independent guardian, to provide the protection of joint decisionmaking.

Petition for a Separate Property Marriage

As just noted, when 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 available without forcing a dissolution of the marriage. Optimally the solution would also give the financially careless spouse considerable freedom, lest that spouse in turn be induced to seek divorce and an independent financial life. When both spouses have earnings or independent income, therefore, the best solution may be to permit a spouse to petition for a separate property marriage rather than for sole management and control of both parties' earnings.

Under the Wisconsin proposal, this relief would be available to separated spouses, but sole management and a division of previously

209. 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.53.
210. Id.
211. Of course, such a procedure could include provisions for recording the judgment or for giving notice to creditors in some other fashion.
212. 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 infra notes 217-19 & accompanying text.
213. 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.93(7); cf. id.
acquired assets would remain the only remedies during cohabitation. There seems no reason to restrict the spouse’s or the court’s options in this fashion. Instead, permitting unilateral termination of the community, both past and future, upon stated grounds and with court approval could prevent hardship while preserving marriages that the parties wish to continue despite financial disagreements. Louisiana permits such relief when 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.”

Enactment of similar relief, predicated upon a finding of threatened or actual substantial injury due to a spouse’s financial irresponsibility, is recommended. It will deter 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 desired; the other spouse will be neither hindered nor prejudiced thereby, except to the extent that the spouse remains liable out of separate property for support and necessaries.

Partition of Community Property and Debt

In conjunction with a suit for sole management or a separate property marriage, the court should be authorized, upon request, to partition the couple’s existing community property and divide their debts. Consistent with the policy of permitting property relief similar to that which would be afforded at divorce, the standards and consequences of the division should be those provided by Civil Code section 4800, which governs property divisions in other judicial terminations of the community.

§ 766.93(3)-(4), authorizing actions for partition and sole management, where no special provisions for after-acquired property are made.
214. See id. § 766.53.
216. These obligations exist without regard to the couple’s property regime. CAL. CIV. CODE §§ 5100, 5121, 5132 (West 1970 & Supp. 1982).
217. 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 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.93(7). No division of debt or provision for a separate property marriage would be authorized by that bill for cohabiting spouses. Cf. id. § 766.93(3)-(4).
218. See CAL. CIV. CODE § 4800 (West Supp. 1982).
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 in the section on access, this may be a sensible solution when one spouse, although fiscally responsible, has been effectively precluded from exercising management powers.

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 requires joint decisionmaking only in matters of central concern to the family's welfare, otherwise recognizing great freedom for individual action. This emphasis on equal, not joint, management and control is consistent with concern for the freedom of transactions. At times, however, it treads too heavily upon the cooperative model of decisionmaking. Accordingly, this Article makes several proposals 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.

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, some relaxing of the formalities as to gifts and sales of personal property would be in keeping with current customs. On the other hand, additional joinder requirements are recommended to increase the likelihood that formal title will reflect actual ownership and to ensure joint decisions in matters of central importance to the family. These provisions would control the purchase or sale of a business or a family mobile home, decisions concerning pensions or annuities, and agreements that the community indemnify or stand as surety for another.

Rights of Access

In certain areas, statutes permit sole management of community

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219. See infra notes 222-26 & accompanying text.
220. See supra notes 41-50 & accompanying text.
221. See supra notes 51-56 & accompanying text.
assets. The provisions that deal with community businesses and bank accounts are sound and should be retained.\textsuperscript{222} 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. A remedy potentially 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 and a partition of shared assets,\textsuperscript{223} there should be a mechanism for relief when no division of any part of the community property estate is needed. Rather, a spouse who has been frozen out of an opportunity to manage some appropriate share of the community's assets should be permitted to request access to designated funds or property. Because the parties' ownership rights extend to the undivided whole of their community property, no actual division of property should be required when only a transfer of management is at issue.

The request for access might take a number of forms. If funds were needed to pay an outstanding obligation, the petition might ask that the managing spouse be directed to apply specified property to its satisfaction.\textsuperscript{224} Because there might 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.\textsuperscript{225} In other cases a transfer of property to the petitioner's control might be requested. In yet others, management might be assured by adding the second spouse's name to the title of property or to a bank account.\textsuperscript{226} The directive of equal management and control should be implemented under a new statute that would authorize such forms of relief upon a showing of good cause.

\textit{Correcting Title}

To assure both parties' management rights and to protect their ownership interests in transactions with third parties, the Wisconsin proposal would authorize a spouse to petition to have his or her name added to the title of marital property (community property) held in the name of the other spouse.\textsuperscript{227} The provision is sound and should be

\begin{itemize}
  \item \textsuperscript{222} See supra notes 10-12 & accompanying text.
  \item \textsuperscript{223} See D. Dobbs, supra note 27, § 4.3, at 252-54.
  \item \textsuperscript{224} See supra text following note 64.
  \item \textsuperscript{225} See supra note 66.
  \item \textsuperscript{226} See infra note 227 & accompanying text.
  \item \textsuperscript{227} 1981 Wis. Assembly Bill 370, Senate Substitute Amendment 1, § 766.93(6): "When the title to marital property contains the name of only one spouse, the other spouse may
added to the California codes.

**Marshalling on the Debtor's or the Debtor's Spouse's Behalf**

When orders of satisfaction are set by law, a spouse should be permitted to insist that the other spouse and creditors alike respect that order. If a spouse is unable to make payment voluntarily out of appropriate funds because they are not in fact subject to that spouse's management and control, an action for access to direct the other spouse to make payment would avoid further steps by the creditor.\(^2\) If, however, such an action is not undertaken and the creditor moves to compel payment, other remedies should be available.\(^2\) At any point up to and including the time of levy, a suit or motion should be authorized to stay the enforcement of judgment against assets that are only secondarily liable, pending execution against sources which are primarily liable. Of course, a stay would only be granted if the debtor or the debtor's spouse could identify property that is both primarily liable and subject to execution. If 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.\(^2\) In codifying such protections for the debtor and the debtor's spouse, California would join those 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.\(^2\)

**The Right to Be Made Whole**

A spouse who has been injured by the other spouse's unauthorized

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\(^2\) See id. § 766.51(2)(e) (right of third parties to rely on record title). See supra note 54 & accompanying text.

\(^2\) See supra notes 64-66 and 224-25 & accompanying text.

\(^2\) Interspousal litigation should not be forced. See supra note 5 & infra text following note 231.

\(^2\) 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) (Supp. IV 1980). Any marshalling procedures on behalf of the debtor or the debtor's spouse should be designed to assure the creditor of the protection ordinarily afforded by an attachment against liable property.

\(^2\) See ARIZ. REV. STAT. ANN. § 25-215(D) (1976); N.M. STAT. ANN. § 40-3-11 (1978); TEX. FAM. CODE ANN. tit. 1, § 5.62 (Vernon 1975), discussed supra note 96; see also UNIF. MARITAL PROPERTY ACT § 9 (May 15, 1982 Discussion Draft). What marshalling rules should apply on behalf of creditors and how these rules might affect orders of satisfaction and marshalling as between the spouses are beyond the scope of this Article.
behavior should be made whole. Yet, in most cases, parties to ongoing marriages are understandably and properly more concerned with preserving their marriages than with preserving their wealth. To provide redress for interspousal wrongs while preserving marriages whenever 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 asserting 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.

**Setting Aside Unauthorized Transactions**

The traditional relief for a wrongful transfer has been an action by the injured spouse to recapture the community property that was unilaterally transferred to a third party.232 Because a spouse cannot unilaterally sever his or her one-half interest in the community property, suit during an ongoing marriage has resulted in return of the entire property to the community.233 If, however, recovery is attempted after the community has been terminated by divorce or the death of one spouse, only one-half the transferred property normally is recovered.234 This recovery becomes part of the separate property of the injured spouse, with the transferor's act treated as a continuing one that took effect upon the termination of the community, when a unilateral partition of the community property became possible.235

Although the history that produced these distinctions is understandable, the analysis is incomplete. First, the transferor should not be permitted unilaterally to force the partition of an item of community

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property through the mechanism of an unauthorized transfer of the whole property, only one-half of which can be recaptured by the other spouse.\textsuperscript{236} Together, however, the spouses can agree to divide community property into separate property interests.\textsuperscript{237} When a wrongful transfer has been made, therefore, it would be consistent to permit a wronged spouse who sues the transferee during marriage to make an election: to insist either upon the restoration of the whole property to the community (refusing to consent to its alienation, even in part), or to ratify what could be deemed the other spouse's offer to partition (by requesting that one-half the property be returned to the injured spouse's separate property). Indeed, partition might provide greater protection for an injured spouse, by removing his or her one-half interest from the management reach of a spouse who has already abused the Code's management powers.

Second, there is little case law discussing the proper measure of recovery. Where land or property that can be recovered in kind is transferred, the cases appear to assume that restoration of the property itself is sufficient.\textsuperscript{238} If the property has appreciated in value, the injured spouse is unlikely to complain. But if the property's use has value or if the property has deteriorated in some fashion, questions remain. Should the transferee ever be held liable for use? If the property has depreciated in value, has been exchanged for other property, or has been consumed, should the transferee nonetheless be compelled to pay an amount equal to the property's value at the time of the original transfer? Or, given such depreciation, exchange, or consumption, should the transferee instead pay the value of the property to which the alienated property can be traced or the value it would have had if it were intact at the time of the suit?\textsuperscript{239} Or should these costs be either the

\textsuperscript{236} The rule precluding partitions of community property by a 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 in CAL. CIV. PROC. CODE § 872.210(b) (West 1980). Its provisions are generally sound. However, amendment to permit a spouse's petition for judicial partition of the community upon a showing of good cause is recommended supra at note 217 & accompanying text.

\textsuperscript{237} The issue arises most frequently when community property funds are used to purchase a home, title to which is taken in joint tenancy. Although the form of title is not necessarily controlling, joint tenancy ownership, when established, transmutes the community property into equal separate property interests that are subject to rights of survivorship. See, e.g., Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (2d Dist. 1954).

\textsuperscript{238} See, e.g., Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933).

\textsuperscript{239} In Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537 (1916), the court did not consider the plaintiff's 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.
responsibility of the transferor or, to some degree, nonrecompensable losses? Statutory clarification would be useful.

Third, if 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, thereby avoiding the harm. Recovery in such cases should be conditioned upon compensation to the transferee for any damages incurred.240

If the Code is amended to require joinder for certain acquisitions of community property such as businesses and real estate,241 the set-aside procedure for unauthorized purchases should 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 of the property or business to the third party.242

Damages Owed by One Spouse to the Community or to the Other Spouse

A spouse can inflict damage upon the community or the other spouse in various ways. As just discussed, this may occur through a transfer made without the joinder of the other spouse, in contravention of Civil Code section 5125 or 5127. It may also occur when 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 the 1949 decision of Fields v. Michael,243 California law has

240. The author recently was consulted following an elderly woman's request for legal advice. Her husband, who had heart trouble, had just given the couple's business to his son from a former marriage. Unwilling to sue for recapture during her husband's lifetime and possibly endanger his health, what options should be available to her after his death? What relevance should be attached to the son's expenditure of considerable personal effort in the business in the meantime? Should it be relevant if he knew that his stepmother could avoid the gift? Should it make a difference if he knew she could avoid the gift but assumed that she had chosen not to when nothing was said? Although it would be inequitable to estop the woman from suing to protect her property once she is widowed, it seems equally harsh to force a forfeiture on her stepson. If 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.

241. See supra notes 53-54 & accompanying text.

242. Protections should be provided for a bona fide purchaser in good faith without knowledge of the marriage relation, similar to those currently provided for purchasers of community property realty. See CAL. CIV. CODE § 5127 (West Supp. 1982).

recognized that a spouse, instead of suing a transferee for recapture, may sue the estate of a deceased transferor for losses incurred through a wrongful alienation of community property. As the *Fields* court suggested, similar flexibility should exist during marriage. In effect, the transferor has injured the community to the extent of the entire amount alienated or, alternatively, has injured the other spouse to the extent of that spouse's one-half ownership interest. If recapture from the transferee is not sought, or if it does not fully compensate the injured spouse's interests (for example, if the property has use value or has been partially consumed), an appropriate damage recovery from the transferor spouse should be available.244

Further, as outlined above, a statutorily prescribed order of satisfaction expresses a legislative decision that payment from one or another funding source is preferable for a given debt.245 The policies that support such rules equally support a right to reimbursement if a fund has been inappropriately dissipated. However, if payment was not made from a source of primarily liable funds because no such funds existed when that the debt fell due, no right to later reimbursement should arise. In these circumstances, the legislature has decided that it is appropriate to compensate the third party with other available funds.

In order to encourage the payment of debts as they fall due, availability at the time of normal payment should be the test. So, for example, if a tort victim whose primary source of collection under Civil Code section 5122 is the tortfeasor's separate property seeks payment at a time when the tortfeasor has no separate property, payment should be made from the community property. There should be no right to later indemnification. The obligation was in essence a support expense met

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244. If for example, property has depreciated in value through use that has benefited 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." *Id.* at 448-49, 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." *Id.* at 450, 205 P.2d at 407.

245. *See supra* notes 59-69 (third-party tort creditors), 71-76 (prenuptial creditors), 97-99 (contract creditors), 102-11 (support creditors), 128-38 (interspousal tort creditors), 174-95 (interspousal support creditors) & accompanying text.
with funds then available. Should the tortfeasor later inherit separate property, that property in turn will be subject 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 the time. To attempt a recapitulation of all separate expenses and community expenses at some later point would turn the family’s finances into a record-keeping nightmare rather than a series of discrete decisions, each made in light of the current financial situation. Later reimbursement should be permitted only if a decision is wrongful in terms of funds then available. Otherwise, bygones should be bygones.

To summarize, a right to damages or reimbursement from one spouse to the other exists in three circumstances: when one spouse has received personal injuries for which the other spouse is responsible,246 when community property has been unilaterally alienated in violation of a joinder provision, and when a debt has been paid from an inappropriate fund according to the Civil Code’s orders of satisfaction. If such damages are owed, their measurement must reflect the dissipated ownership interests as well as the nature of the property used for reimbursement.

As long as one focuses on these two factors, the results can be computed for any set of facts. For example, if a spouse had $5,000 in separate property that was primarily liable for a debt, but used $5,000 of community property instead for its satisfaction, the other spouse will have been damaged to the extent of his or her one-half interest in the $5,000 of community property, or to the equivalent extent of $2,500 in separate property. (This result follows because the other $2,500 that was transferred represented the tortfeasor’s own one-half interest in the community.)

The injured spouse’s recovery, then, 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 would have a $2,500 interest in the community, and the tortfeasor, in effect, would have paid the $5,000 of damages out of his or her own separate property (a $2,500 interest was alienated through the original $5,000 community property payment and a $2,500 interest in $5,000 of separate property was later transferred to the injured spouse’s community share). Second, there could be a direct transfer of

246. See supra text accompanying notes 128-38.
$2,500 from the separate property of the tortfeasor to the separate property of the other spouse. Again, the total cost to the tortfeasor would be $5,000 ($2,500 in ownership of the original $5,000 community property payment, and $2,500 later to the other spouse), and the wronged spouse would have recovered $2,500 in separate property, the amount of his or her ownership interest that was lost when the $5,000 of community property was dissipated. Third, if the tortfeasor had dissipated his or her separate property by the time that the reimbursement action was brought, $5,000 of community property could be transferred to the injured spouse as separate property to recompense the wrong. In effect, there would then be a partition of $10,000 of the community property, with $5,000 going to pay the tortfeasor's separate property obligation and $5,000 becoming the separate property of the nontortfeasor spouse. This result can also be explained by noting that the original transfer cost each spouse $2,500, and that the later transfer of $5,000 of community property to the wronged spouse constitutes reimbursement of $2,500 by the tortfeasor, the remaining $2,500 reflecting the share that the injured spouse already owned in the community.

The same analysis can be applied if, for example, the wrongful act were an improper unilateral gift of $5,000 in community property by one spouse to a child of a former marriage. Three remedies would be 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 settled a tort damage claim with $5,000 of his or her separate property although community property was primarily liable and was then in existence, 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

247. Just as community funds may be mistakenly used to pay 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 will remain free to find that payments from separate property were intended as gifts to the community, should the facts so indicate. See supra notes 141-48 & accompanying text. If support obligations rest upon both community and separate forms of wealth, as also recommended, the presumption that expenses paid from separate property are intended as gifts becomes less important. See supra notes 174-79 & 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 recommended in Bruch, Definition and Division, supra note 39, passim, the need for such presumptions will decrease still further.
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 his or her community property share should have been decreased through payment of the damages from $5,000 in community funds). Either form of relief would decrease each spouse’s wealth by $2,500, as contemplated by the order of satisfaction.

When 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 funding source should be used and to which fund payment should be made. As discussed above, damages should be computed as is appropriate to that election. If, 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.248

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. First, 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. Second, there should be no prejudice to those who delay litigation because their primary concern is with the preservation of their marriage. The proposals set forth in this Article and summarized in the following appendix seek a balanced approach to the practical issues that arise under California’s system of equal management and control of community property.

248. In these cases, to the extent that community property funds are available, it would be inequitable to require restitution out of the separate property of the spouse who did not make the management error. 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.
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