Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage

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I. Introduction

Under California law, property that is by statutory definition community or separate property of husband (H) or wife (W) may be changed into another form of ownership by a contract between the spouses or by a gift made by one to the other. The term "transmutation" is generally used to refer to changes in ownership rights in marital property that depart from the ordinary

1. The primary definitonal statutes are CAL. CIV. CODE §§ 5107, 5108, 5110 (West Supp. 1980).
3. This article uses the term "marital property" to mean all community property and the separate property of both spouses. See Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977); Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 555 (1961). In California, quasi-community property is usually a type of separate property (although it apparently can be community where the pre-California domicile was a commu-
rules of classification.

The freedom of contract enjoyed by California spouses\(^4\) also empowers them to alter the principles of management and control of marital property contained in the statutes without altering the ownership of marital property.\(^5\) Since the right of creditors to reach marital property generally follows management and control in California,\(^6\) this latter type of agreement can be as significant in a creditors' rights case as an agreement altering ownership. Nevertheless, to distinguish the two types of agreements, the term transmutation is used in this article to refer solely to agreements altering ownership. The term "management agreement" is used to refer to the other type of contract between spouses.

This article observes that usually no formalities, such as a signed writing or recordation, are required for a transmutation or management agreement to be binding between \(H\) and \(W\). The little authority that is on point also suggests that the informal transmutation is binding on third parties, including creditors and transferees for value, unless actual or constructive fraud is established. In assessing the creditors' rights issue, the article notes some uncertainty in pre-existing California law as to liability for debts of various types of marital property even in the absence of transmutation. Clarifying legislation is proposed including statutes addressed to liability of parties to a void or voidable marriage and parties living in a Marvin relationship.\(^7\)

The article suggests that if the transmutation is to bind creditors, it may be desirable to change the statutes to require both a writing and recordation. It is noted that until 1980 there was such a statutory procedure to ensure a public record in cases where


\(^5\) See, e.g., CAL. CIV. CODE § 5103 (West Supp. 1980).

\(^6\) See Huluman v. Ireland, 205 Cal. 345, 270 P. 948 (1928) (\(W\) acquired power by arrangement with statutory manager \(H\) to run a community business); see also Althof v. Conhelm, 38 Cal. 220, 99 Am. Dec. 363 (1899); Meyer v. Thomas, 37 Cal. App. 2d 720, 100 P.2d 369 (1940). Currently the primary statutes concerning management power are CAL. CIV. CODE §§ 5107-5108 (West 1970) (separate property), and §§ 5125, 5127 (West Supp. 1980) (community property).


This term is used to describe a man and a woman cohabiting together without any attempt to marry but under such circumstances that one or more of the remedies given one cohabitor against the other in Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), are available. This type of relationship was formerly called "meretricious." E.g., Bridges v. Bridges, 125 Cal. App. 2d 359, 612-63, 270 P.2d 89, 70 (1954).
what would ordinarily be \( W \)'s community earnings were converted into her separate property because she functioned as a "sole trader." The article recommends enactment of a somewhat similar procedure for public recordation of transmutation agreements if they are to be binding on creditors. The new law should be applicable to husbands as well as wives and to transmutations affecting the income of salaried persons, income from partnerships and corporate stock, etc., as well as income of individual entrepreneurs.

With one type of transmutation—community to joint tenancy—even when there is a writing there frequently is litigation over whether the spouses actually intended to change the community character of the property. Often the spouses appear to intend merely to engraft a right of survivorship onto community ownership, creating a type of concurrent ownership not now recognized in California. To reduce litigation in this area and further the policies of freedom of contract, this article proposes enactment of legislation recognizing a hybrid community-property joint-tenancy form of ownership for married persons.

II. "Easy" Transmutation Under California Law

A. Ownership Controlled by Source of Acquisition, not "Title"

1. Civil Law Roots

California community property has its roots in the civil law of Spain and Mexico, specifically in the marital property regime called sociedad de gananciales.\(^8\) Three aspects of this civilian marital property system are important to the development of California transmutation law. First, the central concept of co-ownership by \( H \) and \( W \) of the earnings of each during marriage and of the rents and profits of the separate property of each accruing during marriage\(^9\) made it highly impracticable to determine own-

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In California the initial statutory scheme made the rents and profits accruing during marriage from one spouse's separate wealth community property. As applied to \( W \)'s separate capital, this was held violative of the provision of the 1849 California constitution that assures a married woman the right to own property separately from her husband in *George v. Ransom*, 15 Cal. 322 (1860) (an errone-
ership rights based on paper "title." For example, if $H$, in exchange for his labor, were granted some asset by way of a document of title, the grantor might well put the "title" in $H$'s name, rather than in the names of $H$ and $W$. Yet because of the source of the acquisition—in exchange for labor by a spouse during marriage— the acquisition was unquestionably community property. Likewise if $H$ owned as his separate property the equivalent of a block of corporate stock under contemporary securities law, any documents evidencing payment of dividends would logically refer to $H$ as the owner. A dividend check would be made payable to him, the payor being unconcerned about his marital status and knowing only that $H$ was the owner of the stock. Again, at civil law the dividend was community owned.

The second aspect of civil law bearing on development of California transmutation law was that $H$ was practically the exclusive manager of the community property. Since he was the one with power to alienate an asset owned in community, there was little reason to put $W$'s name as co-owner on a document of title. Indeed, adding $W$'s name on a document of title might have caused confusion and inconvenience by suggesting to a third party dealing with $H$ that $W$'s interest was her separate property (e.g., the ownership was in what we would now call tenancy in common) which she alone might convey. Also in situations where $W$ performed services during marriage and thereby earned ownership of an asset granted to her with documents of title, she might reasonably have directed the grantor to place $H$'s name on the document of title to facilitate his management of the asset without any

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10. Unlike present California law, see Cal. Civ. Code § 5118 (West Supp. 1980), onerous acquisitions by spouses living separate and apart were nevertheless community property. See 1 Feferro Meijcano, supra note 9, at § 3. However, if one of the spouses was at fault in bringing about the separation and the other spouse was innocent, all post-separation gains of the innocent spouse were his or her separate property although the gains by the "guilty" party were community. Pugh, supra note 8, at 9; W. de Funiak & M. Vaughn, supra note 9, at § 159 (observing that the sexist standards of Spanish law made it easy for $W$ to be at "fault" but not $H$).

11. See 1 Feferro Meijcano, supra note 9, at §§ 19-20 (observing that $W$ did have control over small sums of community property so that she could make small gifts to the poor and purchase feminine clothing and adornments); Pugh, supra note 8, at 12-14; W. de Funiak & M. Vaughn, supra note 9, at § 113; Vaughn, The Policy of Community Property and Inter-Spousal Transactions, 19 Baylor L. Rev. 29, 46-47 (1967).
intention of making a gift to him by changing the ownership to his separate property.

Third, at civil law a married woman was not a *feme covert* but was recognized as an individual who could enter into her own contracts including contracts with her husband.\(^\text{12}\) *W* could renounce her interest in all or portions of the community, as could *H*.\(^\text{13}\) By marriage contract, the spouses could agree to live wholly separate in property or to limit the scope of the community. Also at Spanish law when the *sociedad de ganancias* developed, marriage contracts could be changed during marriage.\(^\text{14}\) Thus, at least formal transactions that would today be viewed as transmutations were sanctioned because the law recognized *W* as having capacity to contract despite her married status.

2. Peculiar Pre-1927 California Marital Property System

The significance of the civil law roots in development of the transmutation doctrine in California is clouded by the fact that before 1927 California was not really a community property jurisdiction. The state constitution of 1849 contained a provision calling for legislation relating to property “held in common” by *H* and *W*.\(^\text{15}\) It is very clear from the debates that this provision intended to continue Spanish-Mexican marital property law then in effect.\(^\text{16}\) The earliest legislation and court decisions, nevertheless, employed English common law principles with the exception that *W*

\(^{12}\) Vaughn, *supra* note 11, at 67-68; W. De Funiak & M. Vaughn, *supra* note 9, at § 333. But see id. § 140 (Spanish law greatly restricted the power of one spouse to give his property to the other, probably to protect rights for forced heirship unknown in the United States outside of Louisiana). See Pugh, *supra* note 3, at 27. It should be noted that this freedom of contract under 18th century Spanish law was much broader than existed in Louisiana from 1808 to 1880. Compare present La. Civ. Code Ann. arts. 2328-2332 (West 1971) with former arts. 2327, 2329, and especially 2446 (all repealed by 1978 La. Acts No. 821).

\(^{13}\) See W. De Funiak & M. Vaughn, *supra* note 9, § 140, at 343 (observing that such renunciation was not one of the prohibited gifts, see note 12 *supra*).

\(^{14}\) See Pugh, *supra* note 3, at 27. By the time California became part of the United States the trend was against such freedom of contract La. Civ. Code of 1808, art. 6, at 324 (derived from Code Napoleon art. 1395 (1804)) prohibited post-marriage changes to an antenuptial contract. The initial California legislation regulating marital property relationships adopted the no-change rule. 1849-50 Cal. Stats. ch. 103, § 21, at 293.

\(^{15}\) Cal. Const. of 1849 art. XI, § 14.

was recognized as capable of owning separate property despite her married status. The first statute concerning management provided: “The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate.”18 This appeared to give H much more control than Spanish law did, since it seemed to allow unrestricted gifts by him of community assets.19 Then in 1860 the California Supreme Court held that W had no ownership interest in community property: “The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor.”20 Obviously, with the courts taking this extraordinary approach to defining “community” property it would be considered appropriate for deeds and documents of title to name H alone as grantee even if W by her labor or acquisitions furnished part or all of the consideration.

Since W both owned no interest in and had no management power over so-called community property, such assets were not liable for her ordinary debts. This meant she could not feasibly engage in business by herself because the very profits she earned would not be liable for the obligations incurred to earn them. This made credit purchases impossible because no one would deal with her except as H’s agent or under some separation of property arrangement.

Not surprisingly, the courts were quick to find W operating a business as H’s agent on the flimsiest of proof. For example, in Hulsmann v. Ireland,21 W and a friend began operating a restaurant as joint venturers. They hired H as an employee of the restaurant. W purchased food on credit, and when she did not pay, the creditor sued both her (to reach any separate property she might have) and H. The court held W had made the purchase as agent for H because H “had knowledge” that she was using community assets at the restaurant and also took the benefit of her

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18. 1849-50 Cal. Stats. ch. 103, § 9, at 254 (emphasis added).
19. Although this implication was ignored in one case, Lord v. Hough, 43 Cal. 581 (1872), subsequent decisions established that H’s “absolute” power of alienation under this statute before its amendment by 1891 Cal. Stats. ch. 220, § 1, at 425 (requiring W’s written consent to a gift of community property), did give him such power. See Scott v. Austin, 87 Cal. App. 553, 207 P. 710 (1922).
20. Van Maren v. Johnson, 15 Cal. 308, 311 (1860), followed in Packard v. Arellanes, 17 Cal. 525, 539-40 (1861). Even if the earnings were W’s they were this same type of so-called community property owned by H (unless she had become a sole trader, see notes 369-82 infra and accompanying text). See Washburn v. Washburn, 9 Cal. 475 (1858). See also Street v. Bertolone, 193 Cal. 751, 754, 226 P. 913, 914 (1924); Martin v. Southern Pacific Co., 130 Cal. 285, 286, 62 P. 515, 516 (1900).
endeavor by allowing community profits to be generated. The latter made this a "clear case of ratification of the acts of the wife." This resulted in not only the community property but H's separate property being liable, since the implied agency made the obligation H's. Other remedies for the wife who wanted to work used transmutation to enable her to do so. Legislation enacted in 1852 empowered the self-employed married woman to become a "sole trader." If she did so the earnings from her trade or profession were her separate property under her own management, and hence liable to her creditors. As discussed more fully below, this legislation provided for formal documentation and recordation of the transmutation arrangement that made the sole trader W's earnings her own separate property.

For the majority of working women who did not or could not utilize the sole trader procedure, the courts on the weakest of evi-

22. W had started the business when H was out of town, and he returned to find a fait accompli. Exactly what he was supposed to do to stop W from operating the business is unclear. As manager of the community he could have removed the particular community-owned items W was using at the restaurant, but if W could have found replacements, the law would hardly permit H to forbid her from applying her labor to the non-community assets. Cf. Garver v. Thomann, 15 Ariz. 38, 135 P. 724 (1913) (even under exclusive male management regime W may contract out her services).

23. Hulsman v. Ireland, 205 Cal. 345, 352, 270 P. 948, 951 (1928). On this theory H would be a principal any time he knew W was generating community income, since ordinarily he will have no power to prevent her from doing so. Under present law, see CAL. CIV. CODE § 5123(d) (West Supp. 1980), H could not even remove the community assets from W's business.

24. At the time of Hulsman, prevailing management and control and creditors' rights principles provided the court with no method for making the community liable without also making H's separate estate liable. The court obviously stretched the law of agency to the breaking point to provide some remedy for the creditor. Under existing law, CAL. CIV. CODE § 5116 (West Supp. 1980), the community property alone would be liable. Since the assets of the business will be liable to the credit vendor, fairness does not demand torturing H's acquiescence in W's endeavor into an agency (which would make his separate property liable as well). The California Supreme Court should overrule Hulsman and kindred cases at the earliest opportunity.


In Washington tort cases, the equitable lien in favor of the non-tortfeasor spouse attaching to the remaining half of the property for all practical purposes makes it her separate property. See note 107 infra.

26. See notes 377-83 and accompanying text infra.

27. Indeed, by an 1852 amendment, the procedure for becoming a sole trader was changed from registration to the completion of a judicial proceeding. 1852 Cal. Stats. ch. 121, at 108.
dence would leap to the conclusion that the spouses had made a transmutation agreement concerning W’s business that converted it into her separate property. Some of the decisions were based on testimony of an actual oral discussion in which H told W that her earnings would be her separate property. In others H told W she could manage and control her own earnings; the court then jumped to the conclusion that this necessarily meant H was giving up his ownership in the community property as well. Prior to 1927, when W had no ownership interest in community property, any management power she had over it was not as co-owner but as H’s agent. But H’s “gift” to W of management power could well have been construed as creating a naked agency or creating an agency coupled with an interest by recognizing W as a co-equal owner, as she was in the various pre-1927 jurisdictions that actually practiced the community system. It was almost as if the court considered a gift of mere management power to be unmasculine.

The most disturbing cases where property that was or would have been community was converted into W’s separate property based the transmutation on H’s acquiescence in or failure to object to W’s taking control of community assets. In a case where H watched contentedly as W took some community funds or community tangible property for use in a business that generated profits, it would seem logical to infer that H did not object because he was pleased to see the community assets being used to produce community profits. The inference that his silence was an expression of donative intent (giving up his ownership of the community property and not just allowing W to exercise management power) seems strained. These pre-1927 cases of “easy”
transmutation in W's favor are perhaps best explained as the judiciary's attempt to ameliorate some of the unfairness to W inherent in the statutory scheme denying her management and control of community property and the judicial decisions denying her any ownership of community property.33

3. Retention of “Easy” Transmutation After Reform of California Community Property Law

Reform of the California marital property law to ameliorate or eliminate various aspects of it that were unfair to wives was a slow, piecemeal process that began with the 1852 enactment of the Sole Trader Act.24 Another significant step for purposes of transmutation law was legislation passed in 188935 providing that

33. The overwhelming majority of pre-1927 transmutations conferred a benefit on W. In most she acquired separate property. See Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 P. 190 (1909); Kaitschmidt v. Weber, 145 Cal. 596, 79 P. 272 (1904); Wren v. Wren, 100 Cal. 276, 34 P. 775 (1893); Diefendorff v. Hopkins, 95 Cal. 343, 28 P. 265 (1892); Von Glahn v. Brennan, 81 Cal. 261, 22 P. 596 (1889); Larson v. Larson, 15 Cal. App. 531, 115 P. 340 (1911); Carlson v. Carlson, 10 Cal. App. 300, 101 P. 923 (1909). In a few cases the transmutation was from H's separate property to so-called community property. E.g., Yoakam v. Kingery, 126 Cal. 30, 58 P. 324 (1899). This type of arrangement gave W no immediate proprietary benefits, but at divorce or H's death her rights would be substantially greater because of the transmutation.

One unusual case where W came out the loser is Estate of Wahlefeld, 105 Cal. App. 770, 258 P. 870 (1925) (involving a 1925 transmutation). W had invested $17,000 of her separate funds in a business; the opinion suggests H's contribution was some amount less than $10,000. After H's death W overcame the problem of the pre-marriage "title" in H's name to some of the assets by establishing an oral agreement converting all of the business to community property.

W was technically the loser in Martin v. Pritchard, 52 Cal. App. 724, 199 P. 846 (1921). W's parents intended to make a gift that would be co-owned by H and W as tenants in common. W, however, treated the acquisition as community property, thus giving away her proprietary interest to H (retaining only the expectancy of obtaining at least half ownership at divorce or H's death).

34. The various steps in the movement to reform the law to make it fairer to W are analyzed in Prager, supra note 16, at 39-56. Legislation in 1870 removed liability of W's "community" earnings for H's debts and classified her earnings while living apart from H as her separate property. Id. at 43. In 1872 H's almost exclusive management power over W's separate property—an extraordinary feature of the initial 1849-50 convention given the purpose of the 1849 constitutional provision to protect W's separate property—was given to W. Id. at 39-40.

35. 1889 Cal. Stats. ch. 219, at 328. The presumption now applies only to instruments taking effect prior to January 1, 1975. Cal. CIV. Code § 5110 (West Supp. 1980). Retention of this presumption in situations where it was not relied upon by either spouse or by a third party is of doubtful constitutionality because of unnecessary discrimination based on gender. See Reppy, Retroactivity of the 1975 California Community Property Reform, 48 S. CAL. L. REV. 977, 990-95 (1975).
where a written instrument named $W$ as transferee or owner of property it was presumptively her separate property. This greatly facilitated transmutations from community to $W$'s separate property and from $H$'s separate property to $W$'s separate property.

Although a series of pre-1927 acts gave $W$, in specific situations, veto power over $H$'s attempt to alienate so-called community property, she was still held to lack the co-ownership of spouses in a true community regime. It was not until the 1927 legislation that $W$ was declared an equal owner of community property. Following the enactment of the 1927 legislation California treated the property rights of married women in many respects according to principles of the civil law and as married women were treated in the seven other community property states. Indeed, because of the pre-1927 reform legislation, California wives had more rights than married women in most other community jurisdictions.

The 1927 Act could have occasioned a tightening up of the transmutation doctrine, such as requiring greater formalities for the

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36. Under the pre-enactment law the mere fact that $W$ was the named grantee in an instrument would not affect the general presumption that properties possessed during marriage are community, and that was true even when $H$ himself was the grantor (unless the deed recited a gift rather than using bargain-selling terminology). Woods v. Whitney, 42 Cal. 358 (1871). Where the grantor was a third party the presumption in favor of the community was not dispelled even by a recital in the deed that $W$ had used separate property to pay for the grant and was taking the property as part of her separate estate. Tolman v. Smith, 65 Cal. 280, 24 P. 743 (1890) (a dubious decision in rejecting the inference that $H$ had directed the deed to be so worded).

37. Veto power over gifts was granted by 1891 Cal. Stats. ch. 220, § 1, at 425 (see Cal. Civ. Code § 5125(b) (West Supp. 1980) for the present anti-gift statute), over all conveyances and encumbrances of household furnishings by 1901 Cal. Stats. ch. 100, § 1, at 528 (see contemporary provision in Cal. Civ. Code § 5155(e)) (West Supp. 1980), and over conveyances and encumbrances of community realty by 1917 Cal. Stats. ch. 533, § 2, at 828 (today part of Cal. Civ. Code § 5127 (West Supp. 1980)). Each of these enactments was held to be nonretroactive in the sense that it did not apply to assets acquired before the effective date. Spreckels v. Spreckels, 116 Cal. 539, 48 P. 225 (1897) (gift); Duncan v. Duncan, 6 Cal. App. 494, 92 P. 30 (1907) (sale of household items); Roberts v. Wehneyer, 191 Cal. 601, 216 P. 22 (1923) (conveyance of realty).

38. 1927 Cal. Stats. ch. 265, § 1 (now, as amended, Cal. Civ. Code § 5105). This statute, too, was held inapplicable to pre-enactment acquisitions. Stewart v. Stewart, 204 Cal. 546, 269 P. 439 (1928); W. REPPY, supra note 2, at 17.

39. The presumption in favor of $W$ arising from a written instrument naming her grantee, see note 35 supra, existed only in New Mexico (where it now applies only to pre-July 1, 1973, instruments, N.M. Stat. Ann. § 40-3-2 (1978)). The majority of community property states had not given wives the veto powers listed in note 37 supra. Legislation in 1923 had given $W$ a testamentary power over half the community property when she died before $H$. 1923 Cal. Stats. ch. 18, at 23. See Cal. Prob. Code § 201 (West 1956). This right was not enjoyed by New Mexico wives until very recently. See W. DE FUMIAK & M. VAUGHN, supra note 9, at § 188.
transfering of ownership between spouses. But that did not happen; if anything the law became even looser. In Pacific Mutual Life Insurance Co. v. Cleverdon,\textsuperscript{40} W, a school teacher, placed her earnings during 1930-36 in a bank account in her own name. \( H \) deposited other funds in this account and sometimes he “borrowed” from the account, intending to pay back the withdrawal. From these facts the court could “see no escape from the conclusion” that \( H \) had “relinquished to the wife the right” to her earnings.\textsuperscript{41} That is, he had transmuted the earnings to \( W \)’s separate property.

The eagerness of the Cleverdon court to find a transmutation perhaps stemmed from judicial distaste for the law’s failure to grant \( W \) management power over her earnings even though male management was the traditional community principle. Legislation in 1951 did give \( W \) such management power, provided she kept her earnings segregated from \( H \)-managed property.\textsuperscript{42} But still transmutations favoring \( W \) were found on the flimsiest of evidence. The case of O’Connor v. Travelers Insurance Co.,\textsuperscript{43} involved post-1951 earnings of \( W \) which she kept in her own bank account. \( H \) was aware that \( W \) was sending some money from the account to her young son living in another state. \( H \)’s failure to object caused not only a transmutation of all of the funds in the bank account but also of all the fringe benefits of \( W \)’s employment including her life insurance coverage. The statute giving \( W \) management power over her own earnings required \( H \)’s written consent to \( W \)’s gifts of such community property, but the court’s opinion does not state that the sums \( W \) sent were gifts as opposed to amounts she owed because of a support obligation. Moreover, there are numerous other explanations for \( H \)’s failure to make a written consent than that he was transmuting the funds at issue to \( W \)’s separate property. The extension of the transmutation to the fringe benefits of her employment was preposterous.

In re Marriage of Ashodian,\textsuperscript{44} also involved post-1951 earnings of \( W \) and arose before the 1975 equal management reform. \( W \) was a real estate broker who also made gains by purchasing and resel-

\textsuperscript{40} 16 Cal. 2d 788, 108 P.2d 405 (1940).
\textsuperscript{41} Id. at 791, 108 P.2d at 406.
\textsuperscript{42} 1951 Cal. Stats. ch. 1102, § 1, at 2651 (the closest equivalent of which is the current CAL. CIV. CODE § 5125(d) (West Supp. 1980)).
\textsuperscript{44} 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979).
ling real property in her own name. *H*, a bus driver, did not participate in the business and did not know that *W* was taking title in her own name after using community funds to make the purchases. The trial court found from *H*’s disinterest in *W*’s business that he had “sort of abandoned his wife to practice in the field of real estate and didn’t want to be bothered by it.” This was held sufficient evidence of a gift transmutation by *H*.

California became an equal-management state with the enactment of Civil Code Section 5125 in 1975 but still the courts find transmutations in *W*’s favor without any supporting evidence. In *In re Marriage of Lucas* *W* purchased a 1976 “mini-motorhome” with $2,567 of community funds, obtained by trading in a community owned vehicle, and $8,195 of her separate funds. Since the motorhome was a 1976 model, the purchase must have been made after January 1, 1975 when equal management was in effect. Moreover, even if the purchase had been made pre-1975 the statute specifically makes the equal management system retroactive to pre-1975 acquisitions. According to the court, “[t]he purchase contract was made out in the name of Gerald [*H*] alone, but title and registration were taken in Brenda’s [*W*’s] name only. Brenda wished to have title in her name alone, and Gerald did not object.” Nevertheless, both spouses referred to the motorhome as a “family vehicle.” Incredibly, *H*’s failure to object to the form of title constitute[d] substantial support for the trial court’s con-

45. 96 Cal. App. 3d at 46, 157 Cal. Rptr. at 557.
46. Another factor relied on in *Ashodian* is that at *W*’s request *H* signed two grant deeds of real property involved in her business. It is not stated that *W* was the grantee in the deeds; surely that would have been stressed if she were. If a vendee of *W*’s were the grantee, *H*’s signature on the deed would establish that the reality was being treated as community property because CAL. CIV. CODE § 5127 (West Supp. 1990) would require *H*’s joinder even though “title” was in *W*’s name.
50. 27 Cal. 3d at 817, 614 P.2d at 290, 165 Cal. Rptr. at 856.
51. In *Lucas*, *H*’s assisting *W* in obtaining a document of title in her name for the vehicle would have satisfied the manual delivery requirement for a completed gift generally imposed by property law. But despite such delivery the courts will find no gift if the alleged donor shows an absence of donative intent. 6A R. POWELL, REAL PROPERTY § 891 (P. Rohan rev. 1980); 4 F. TIFFANY, REAL PROPERTY § 1034 (rev. 1975). Estate of Hall, 154 Cal. 327, 98 P. 269 (1908) involved a deed signed by *H* manually delivered to *W* purporting to give her his property. The court declared that “in every case, although the writing may by its terms purport to presently pass title, the validity of the attempted gift will depend on the intention of the donor.” Id. at 322, 98 P. at 271. See also Fullkerson v. Stiles, 156 Cal. 703, 105 P. 956 (1909) (*H* used community funds to buy land taking title in *W*’s name but overcame presumption of gift by convincing trier of fact he had no donative in-
clusion that Gerald was making a gift to Brenda of his community property interest in the motorhome.\textsuperscript{52}

Under equal management $H$ had no reason to or right to make such an objection. $W$ was entitled to manage the $2,567 of community funds. She could purchase something with them in her own name if she wished to do so. The \textit{Lucas} decision will result in thousands, perhaps millions, of transmutations because there is simply no reason why one spouse, living happily with the other and not contemplating a divorce, would “object” when the other spouse exercises the statutory equal management powers. Indeed, \textit{Lucas} seems contrary to public policy, as it penalizes the husband for acceding to his wife’s exercise of equal management powers. Rather the opinion interjects disharmony into marriages by encouraging husbands to demand that their wives carry on management powers only in the husband’s or both partner’s names.\textsuperscript{53}

4. Nonapplicability of the Statute of Frauds Respecting Real Property Transfers

The post-1927 case law not only continued “easy” transmutation of personal property such as a spouse’s earnings but removed all doubts as to the validity of an oral (or implied) transmutation of real property despite non-compliance with the statute of frauds\textsuperscript{54} normally applicable to real property conveyances. It is only necessary to find that the transmutation was fully “executed” by the oral statement or by the conduct implying a transmutation.\textsuperscript{55} The

\textsuperscript{52} 27 Cal. 3d at 618, 614 P.2d at 290, 166 Cal. Rptr. at 858.

\textsuperscript{53} Since the motor home in \textit{Lucas} was 75% $W$’s separate property without a transmutation, it would not have been appropriate for $H$ to ask $W$ to have the title list them as co-equal owners. Apparently the \textit{Lucas} court thinks $H$ ought to have asked for a written side agreement wherein $W$ stipulated that notwithstanding the form of title to the vehicle the community interest was not lost.

What can explain the dreadful \textit{Ashodian} and \textit{Lucas} decisions? Both arose at divorce, and the findings of transmutation allowed the wives in both cases to end up with more than half of what should have been classified as community property, contrary to the equal division mandate of \textit{CAL. CIV. CODE} § 4800 (West Supp. 1980). Perhaps the courts in these cases thought equal division was unfair because of some “fault” of $H$ that led to the divorce. But the legislative policy is to keep “fault” out of divorce. See \textit{CAL. CIV. CODE} § 4559 (West Supp. 1980).

\textsuperscript{54} \textit{CAL. CIV. CODE} § 1691 (West 1954).

\textsuperscript{55} \textit{E.g.}, Woods v. Security First Nat’l Bank, 46 Cal. 2d 697, 701, 299 P.2d 657, 659
transaction is "executed" if neither party has any undertaking left to perform. Thus, unless the spouse declaring the transmutation has at the same time declared that the transmutation will be achieved by changing documents of title to reflect the new ownership or unless the spouse benefiting from the declared transmutation is required to furnish some consideration, the informal transmutation will always be "executed" and no writing will be required.

Community property scholars express doubts whether a separate to separate oral transmutation of real property is possible. These doubts seem illogical for two reasons. First, the many cases involving community-to-separate and separate-to-community transmutations have established that the real property statute of frauds simply is not applicable to "executed" agreements and gifts between married persons. Second, if somehow a separate-to-separate transmutation is distinguishable, an oral attempt to effectuate such a transmutation can readily be recast by the law so as to achieve validity under existing case law. For example, H may say, "I am making my ranch Blackacre, my separate property, community property"; and one minute later, "I give you, W, my community half interest in Blackacre." This plainly achieves H's purposes under existing transmutation case law. If instead he says, "I am giving you as your separate property my separate ranch Blackacre," the law can impute to him the intent that the transmutation he desires will occur in two steps so that Blackacre is momentarily community.

5. Avoiding the Antenuptial Contract Statute of Frauds

California Civil Code section 5134 provides: "All contracts for marriage settlements must be in writing . . . ." Several devices have been recognized for avoiding this provision, and no contemporary reported case has invalidated a prenuptial agreement simply because it was oral. Not unexpectedly, antenuptial agreements that have been "fully executed" are not within section 5134. Where no documentary transfers are contemplated by


56. CAL. CIV. CODE § 5134 (1970). It goes on to require that the instrument be "executed and acknowledged or proved" like a grant deed of realty. According to In re Marriage of Cleveland, 76 Cal. App. 3d 357, 142 Cal. Rptr. 783 (1977), because of the use of "or" in § 5134, acknowledgment is not mandatory; the execution may be "proved" by any admissible evidence. Section 5135 requires recording of the contract in each situus county in order to have effect on real property.
the spouses, apparently marriage itself completes the "execution" of the contract.\(^{57}\) If changing of documents of title is contemplated, that act together with the marriage executes the contract.\(^{59}\) A different approach is to focus on the post-marriage conduct of the spouses. If the parties act in accordance with a pre-marriage oral transmutation arrangement, a new post-marriage transmutation can be implied from the conduct of the parties and section 5134 does not apply.\(^{59}\) However, if land is involved, some "execution" must be found. Obviously a post-marriage fresh oral declaration restating the transmutation would provide a means of circumventing section 5134.\(^{60}\)

The final device for evading section 5134 is estoppel. Two types of estoppel are recognized, one based on the unconscionability of allowing the promisor in the oral contract to repudiate the promise, the other based on the promisee's action in reliance on the oral agreement.\(^{61}\)

B. The Significance of "Title": Transmutations to Joint Tenancy

1. Statute of Frauds Is Applicable

Civil Code section 683, requiring a "written transfer" for the creation of a joint tenancy,\(^{62}\) has been construed to have far more teeth in it than the real property and marriage settlement statutes of frauds. Attempts to circumvent this statute have repeatedly failed due to a flat ruling that an oral agreement for joint tenancy is void.\(^{63}\) A leading case is \textit{California Trust Co. v. Bennett.}\(^{64}\)


\(^{59}\) See Estate of Wahlefeld, 105 Cal. App. 770, 288 P. 870 (1930) (post-marriage meeting of minds revealed by conduct of spouses).

\(^{60}\) Apparently this is what the \textit{Wahlefeld} court had in mind when it spoke of a possible post-marriage oral "ratification" of an oral antenuptial transmutation agreement. \textit{Id. at} 776, 288 P. at 873.


\(^{62}\) \textit{CAL. CIV. CODE} \S\ 683 (West Supp. 1980). As presently worded, \S\ 683 is construed to require a writing for creation of joint tenancies in personal as well as real property. Donovan v. Donovan, 223 Cal. App. 2d 691, 697, 36 Cal. Rptr. 225, 229 (1963).

\(^{63}\) See cases discussed at notes 64, \textit{infra}; \textit{Wheeland v. Rodgers}, 20 Cal. 2d 216, 124 P.2d 816 (1942); \textit{Estate of Harris}, 9 Cal. 2d 649, 72 P.2d 873 (1937). Note,
orally told $H$ she was depositing some $8,000$ of her separate funds in a bank account so that it would pass to $H$ at her death. $H$ relied on statements in *Tomaier v. Tomaier*, that as between married persons formal declarations of title in deeds and other documents did not govern ownership but the source of the acquisition and the intention of the spouses did. The *Bennett* court replied:

This decision [*Tomaier*] carried out the well-established policy that the use of common law forms of conveyances should not be permitted to alter the community character of real property contrary to the intention of the parties. There is no claim that the property involved here was ever community property, or that it was the intention of the parties to convert it into community property, and, therefore, the reasoning in the *Tomaier* decision has no application to the facts of this case.

This is merely to say that intention of the parties is given effect in one situation but is defeated by the statute of frauds in another. It, of course, does not consider whether a "fully executed" oral transmutation to joint tenancy is outside section 683. This case would arise where one spouse declared all of his or her separate property to be held in joint tenancy or where both spouses declared all community property (or separate property as well) to

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however, that an oral transmutation from joint tenancy to some other forms is permitted. *Estate of Watkins*, 16 Cal. 2d 793, 109 P.2d 1 (1940); *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P.2d 905 (1944).

64. 33 Cal. 2d 694, 204 P.2d 324 (1949).

65. Obviously, this declaration is not unambiguously a statement of a present separate-to-joint-tenancy transmutation. $W$ could have had in mind a contingent remainder for $H$, an executory interest for $H$, or a mere expectancy that he would inherit her interest by some form of will substitute. Additionally, the *Bennett* facts do not smack of a "fully executed" transmutation, for it seems that $W$ undertook in her discussion with $H$ to reduce the agreement to writing via a deposit agreement with her bank, but an enforceable writing was not executed by her.

66. 23 Cal. 2d 754, 146 P.2d 905 (1944), holding that although a deed to $H$ and $W$ recited a joint tenancy, they were free to prove that community funds were used for the acquisition and that they had in fact transmuted such funds to joint tenancy. Obviously, *Tomaier* was not the best authority for $H$ to cite because it did not involve a "fully executed" transmutation that defeated the real property or marriage settlement statutes of frauds.

67. 33 Cal. 2d at 698, 204 P.2d at 327.

68. Although the point has sometimes escaped the notice of the courts, since 1923, after which year both spouses have had testamentary power over half the community property, a unilateral attempt by the manager spouse to transmute community property to joint tenancy property should be ineffective. The other spouse would be deprived of the statutorily granted testamentary power without his or her consent and have a survivorship right in favor of the other spouse imposed by the unilateral action of that spouse. Moreover, since 1975 the unilateral community-to-joint-tenancy transmutation would deprive the non-acting spouse of management power as well, reducing it from a power to alienate all the community property, see *Cal. Cvr. Code* § 5125 (West Supp. 1980), to power to alienate only half. (With respect to realty, the power reduced by half is not the power to alienate directly—the joinder requirement of *Cal. Cvr. Code* § 5127 (West Supp. 1980) already prevents such action—but the power to obligate the property to the spouse's creditors.)
be held in joint tenancy, and there was no undertaking to prepare
documents of title witnessing the transmutation (i.e., no act left
to “execute” under the agreement). In two decisions69 involving
such apparently “fully executed” transmutations the courts sim-
ply held the statute of frauds for joint tenancies applicable with-
out distinguishing the cases involving “fully executed”
transmutations and the real property and marriage settlements
statutes of frauds.

The fact that joint tenancy involves a right of survivorship does
make it a form of will substitute, yet it would seem that this type
of transmutation is no more likely to be asserted for the first time
after the death of the alleged donor than a transfer of ownership
not involving a right of survivorship.70 Moreover, the writing that
satisfies section 683 does not begin to satisfy the Statute of
Wills:71 the spouse making the transfer of an ownership interest
or giving up testamentary power need not even sign the deed
(and seldom does, as most deeds are executed solely by the grant-
or(s) and not by the grantee(s)). Mere acceptance of the deed—
taking possession under it, for example—is all that usually con-
nects the grantee joint tenant spouses to the writing.72

69. Estate of Baglione, 65 Cal. 2d 192, 417 P.2d 693, 53 Cal. Rptr. 139 (1966); Es-
tate of Horn, 102 Cal. App. 2d 635, 228 P.2d 99 (1951). Both involved alleged oral
separate-to-joint-tenancy transmutations by the decedent spouse. In Horn the ar-
ument was made that if the statute of frauds precluded creation of a joint ten-
ancy, tenancy in common should be found (i.e., if the survivor cannot have the
whole loaf, try for half). The court held that a declaration of joint tenancy did not
contain within it an alternative second choice of tenancy in common if the joint
(because the attempted oral separate to joint tenancy transmutation failed be-
because of the statute of frauds, it should be construed as a separate to community
property transmutation—another recipe for half a loaf). The court held that the
trial judge could not be reversed for declining to infer such alternative intent. One
should question whether it ever would be proper to impute to the donor an alter-
native intent as to a form of conveyance not actually considered.

70. Whether the transmutation is to separate property of one spouse, to com-
modity property, or to joint tenancy, if it involves a gift—a change of ownership
rights—its validity will certainly be litigated at divorce, at death of a spouse, and
(unless both pre- and post-transmutation classes of property are either both liable
or not liable to a creditor) during marriage in a debt collection case. A community
to joint tenancy transmutation does not alter ownership rights, but creditors can
certainly be affected. Moreover, at divorce joint tenancy property cannot be
awarded wholly to one spouse like community property. That is, an “aggregate”
division cannot be made of joint tenancy property. See W. REPPY, supra note 2, at
237. Thus it is quite probable that the validity of such an attempted transmutation
will be litigated at divorce as well as at the death of one alleged joint tenant.

71. CAL. PROB. CODE §§ 50 (witnessed wills), 53 (holographs) (West 1956).

72. Moreover, acceptance by one spouse of a deed tendered for delivery is
Thus, the refusal to date to recognize a "fully executed" oral transmutation to joint tenancy cannot be explained by the "smell of death" surrounding such an arrangement. Since the "fully executed" precedents arising under the real property and marriage settlement statutes of frauds have not been urged on the California Supreme Court in a case involving a fully executed transmutation to joint tenancy, it may be that some time in the future such an "exception" to section 683 will be recognized. This article assumes for the time being, however, that every transmutation to joint tenancy will involve a writing.

2. Transmutation Agreement Presumed from Recital in Deed

As has been noted, a recital in a deed not signed by either spouse (or not signed by the spouse whose property or managerial rights are reduced if the recital is given effect) that, for example, the property is one spouse's separate property ordinarily does not displace the general presumption that property possessed by either or both spouses during marriage is community. In other situations, the form of title of a document obviously should, and does under California law, indicate that a change of ownership may have been found to have occurred. Where one spouse—in the cases it has almost always been H executes a deed or other document of title naming the other spouse as grantee or owner of an item of property there is reason to find he or she has done so in order to make a gift. That is, if the property was community, a gift of his half interest, or if the grantor's separate property, a gift of his entire interest. Rather than a mere


73. See Ramsdell v. Fuller, 28 Cal. 37, 42 (1865) and note 36 supra.

74. This is the legally correct formulation of the general pro-community presumption. See Lynam v. Vorwerk, 13 Cal. App. 507, 110 P. 355 (1910). The general presumption is the creation of caselaw and is not described in any statute. See Marriage of Lusk, 86 Cal. App. 3d 228, 150 Cal. Rptr. 63 (1978); Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1104-05 n.465. Lynam quite properly applied the civil law rule (which did not require proof of the time of acquisition of an asset but attached the presumption if H or W or both possessed the asset during marriage). Dictum in In re Marriage of Lucas (See text accompanying notes 48-53 supra.) that there is a "general presumption set forth in Civil Code section 5110 that property acquired during marriage is community property," however, is erroneous. 27 Cal. 3d 806, 814, 614 P.2d 265, 269, 165 Cal. Rptr. 653, 656 (1980). "Acquired during marriage" is part of § 5110's definition of community property. As Lusk aptly observes, § 5110 does not provide for any general presumption. The only statute that might be said to do so is Cal. Civ. Code § 5111 (West 1970). See W. REPPY, supra note 2, at 63.

75. Extrinsic evidence might show that the transaction was intended to transmute the grantor's separate property to community property with the grantee-
inference of gift, a presumption of gift is held to arise in such a situation.\textsuperscript{76} The modern cases raise the same presumption when the alleged donor spouse does not execute the deed but furnishes consideration to the grantor (either community or alleged donor's separate property) and directs the grantor to name as grantee in the deed or document of title the payor's spouse.\textsuperscript{77}

The presumption of transmutation by gift where the alleged donor spouse has signed the deed at issue or directed the grantor to

\begin{quote}
spouse as sole manager thereof, but under present California law such a deed does dispel the presumption of community ownership.\textsuperscript{78} Dunn v. Mullan, 311 Cal. 583, 295 P. 894 (1931); Estate of Klumpke, 167 Cal. 415, 139 P. 1082 (1914); Ayoob v. Ayoob, 74 Cal. App. 2d 238, 168 P.2d 465, 473 (1946). Estate of McCauley, 138 Cal. 546, 71 P. 438 (1903), applied this rule where the deed by \textit{H} to \textit{W} recited a consideration of love and affection (\textit{e.g.}, it was a gift deed). If the deed were in bargain-and-sale form and cited a consideration paid by the grantee spouse, it is believed the presumption of gift would still apply insofar as it would be presumed the funds possessed by the grantee spouse and used for the payment to the grantor were community property.

The early cases always spoke of the presumption of gift arising in husband to wife conveyances, and there was authority that in a wife-to-husband deed a resulting trust rather than gift would be presumed. Under contemporary gender-neutral principles of law, see Sal'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 465 P.2d 529, 85 Cal. Rptr. 329 (1971), the presumption of gift will be extended to grants by \textit{W}. \textit{See, e.g.}. In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 657 (1980), applying against \textit{W} the rule that a gift is presumed when a spouse uses his separate property for community purposes (as to pay mortgage payments on a community owned house).

Recognition of a presumption arising from the form of the deed has important benefits that an inference lacks. Often in these title disputes cases the person whose state of mind (donative intent) is at issue is dead or otherwise unavailable. If, as is likely, there is just no direct evidence on the issue of donative intent, the presumption enables the parties to predict the result of litigation. A mere inference might or might not be accepted by the trier of fact, and the parties will be in doubt until a verdict returned by a jury or a decision announced by the judge. Compare the unfortunate situation presently existing with respect to alleged gifts not accompanied by formal documents of title. One spouse's statement to the other that an item bought with community funds is a "gift" to the other at birthday, anniversary, etc., raises, the trier of fact is told, merely an inference that the trier of fact may accept if it wishes. \textit{See} Estate of Walsh, 66 Cal. App. 2d 704, 152 P.2d 750 (1944) (\textit{H} presented jewelry to \textit{W} at Christmas and their anniversary; trial judge declined to infer donative intent).\textsuperscript{79} Hamilton v. Hubbard, 194 Cal. 603, 65 P. 321 (1901); Jackson v. Torrence, 83 Cal. 521, 23 P. 695 (1890) (where deed to \textit{W} erroneously recited she had paid the full consideration). A number of such cases involving deeds to \textit{W} during 1899-1975 also recite such a presumption without relying on the statute then in effect that compelled it. \textit{E.g.}, Nordquist v. Malinberg, 213 Cal. 394, 2 P.2d 334 (1931); Miller v. Brode, 186 Cal. 408, 199 P. 531 (1921). The early case not raising a presumption of gift in such a situation is Peck v. Brumagim, 31 Cal. 441 (1866) (deed recited consideration was \textit{W}'s separate property but evidence established \textit{H} paid grantor community funds; presumption of community ownership overcome by proof of donative intent).

\end{quote}
name the donee as grantee is reasonable. A much more dubious presumption is recognized in California where grant by deed poll (i.e., not signed by the grantee spouses) for a consideration recites that the spouses take as joint tenants. Since the consideration is paid during marriage to the grantor, the general presumption would apply and the property acquired would be community unless the spouses transmuted the community funds to joint tenancy property.\footnote{78}

Case law has firmly established, however, that the mere recital of joint tenancy raises a presumption that $H$ and $W$ by agreement transmuted the community consideration to joint tenancy property.\footnote{79} The presumption of transmutation is overcome either by

\footnote{78. Prior to 1927 such a transmutation involved $H$ giving $W$ a present half ownership interest in the property including management power over the interest. Between 1927 and 1951 such a transmutation merely altered management power. $H$ lost power to obligate a half interest to pay the debts of his non-necessaries creditors, $W$ gained both the ability to obligate and to convey a half interest. If the acquisition in joint tenancy was obtained by $H$ and $W$ trading community realty, $H$ also enjoyed in one respect an increase in management power: he could voluntarily convey his half ownership interest without $W$'s joinder. Between 1951 and 1975, if $W$'s earnings subject to her exclusive management were used for the acquisition, the alteration of management power caused by the transmutation could be reversed, gender-wise. After 1975, if community personality or money is used for the acquisition, each spouse gives up equal management power over the other's half interest while, at the same time each is benefited by having his or her half interest freed of the other's management power (except in the case of involuntary seizure by the other spouse's necessaries creditors, see text accompanying notes 184-63 infra).}

\footnote{79. See, e.g., Machado v. Machado, 59 Cal. 2d 501, 375 P.2d 501, 25 Cal. Rptr. 87 (1962); Sibell v. Sibell, 214 Cal. 767, 7 P.2d 1000 (1932); Mears v. Mears, 150 Cal. App. 2d 484, 4 Cal. Rptr. 618 (1958). This presumption does not apply at divorce when property is a single family residence and the issue is division of marital property. Cal. Civ. Code § 5110 (West Supp. 1980); In re Marriage of Lucis, 27 Cal. 3d 808, 614 P.2d 285, 165 Cal. Rptr. 653 (1980). Although the anti-joint tenancy provision in § 5110 is restricted to division "upon dissolution of marriage or legal separation only," In re Marriage of Trantafello, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979), extended it to annulment proceedings so that the acquisition was presumed to be quasi-marital property under Cal. Civ. Code § 4452 (West Supp. 1980) rather than joint tenancy property. Section 5110 purports to raise a pro-community presumption when the residence "is acquired by them [$H$ and $W$] during marriage as joint tenants." Of course, if the spouses did in fact acquire the prop-}
proof that the spouses actually agreed to own the property in some form other than joint tenancy, such as community property, or that both spouses did not understand the difference between community property and joint tenancy (a state of mind obviously precluding an agreement to transmute).

By all logic, if one spouse was wholly unaware that the other was using community funds to purchase property under a joint tenancy form of title, no transmutation should occur that disturbs management powers or encumbers testamentary powers of the ignorant spouse, as a community to joint tenancy transmutation does. At least one case is construed as so holding, but there is contrary authority.

property in joint tenancy there would be no room for any contrary presumption. Obviously the quoted phrase means acquired by deed reciting a joint tenancy.

The anti-joint tenancy proviso in § 5110 seeks to facilitate a division of property whereby the wife can be awarded the family house and the husband offsetting property (such as the community business), in the face of the rule that title to separate property cannot be disturbed at divorce. In re Marriage of Lucas, 27 Cal. 3d 806, 614 P.2d 285, 165 Cal. Rptr. 853 (1980).


82. See note 78 supra.

83. Palazuelos v. Palazuelos, 103 Cal. App. 2d 826, 230 P.2d 431 (1951), explained by, Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (1954). In Schindler, where W participated in the transaction and consented in writing to the transfer of community funds to joint tenancy property, although she maintained that her hidden intention was that the property remain community, the holding that the property was owned in joint tenancy can be explained by two principles of contract theory. First, under the objective theory of contract formation, even without a meeting of the minds, a party will be bound—manifestation or expression of intent is controlling. Brant v. California Dairies, Inc., 4 Cal. 2d 128, 133, 48 P.2d 13, 16 (1935); Blumfeld v. R.H. Macy & Co., Inc., 92 Cal. App. 2d 38, 46, 154 Cal. Rptr. 652, 656 (1979). Also, in some situations (e.g., a special relationship between the parties) silence may be a valid acceptance. See Southern Cal. Acoustics Co., Inc. v. C.V. Holder, Inc., 71 Cal. 2d 719, 722, 456 P.2d 970, 978, 79 Cal. Rptr. 519, 522 (1969); McAulay v. Jones, 110 Cal. App. 2d 302, 309, 234 P.2d 950, 651 (1952). Cf. Lovetro v. Steers, 234 Cal. App. 2d 461, 44 Cal. Rptr. 609 (1965).

84. See Estate of Kruse, 7 Cal. App. 3d 471, 86 Cal. Rptr. 491 (1970), where H used community funds to acquire land with title taken in joint tenancy and W was unaware of the acquisition. A transmutation was found to have occurred. (The result is conceivably correct on a weak form of estoppel theory, for W had treated the property as joint tenancy after H's death to avoid probate administration expenses.) Kruse is surely wrong in declaring that only proof of an agreement by H
In any event, where the spouse harmed by the presumption arising from the recital is dead or otherwise unable to testify, the presumption of transmutation will control the characterization of the property. This state of the law must result in the sanctioning of numerous abuses of management power by one spouse in derogation of the rights of the other. It is possible that the presumption would still be acceptable if empirical evidence indicated that in most instances of a deed poll reciting a joint tenancy, the grantee spouses had in fact agreed to a community to joint tenancy transmutation. However, what evidence there is shows that the great majority of deeds of land to married persons recite a joint tenancy. It is difficult to believe that most married couples acquiring land either discuss the transmutation that occurs when a joint tenancy form of deed is used or for that matter understand the difference between joint tenancy and community property.

Perhaps the presumption of transmutation arising from joint tenancy recitals in a deed poll was fashioned by the courts to facilitate passing of title without the expenses of probate court administration. Prior to the enactment in 1974-75 of the community property set-aside law, a transmutation to joint tenancy form could eliminate some expense and inconvenience. However, recent reform has made formal administration optional in many situations where the decedent’s interest in community property passes to the surviving spouse. On the other hand, unsettled federal law poses a risk of adverse estate tax consequences if joint

and \( W \) not to transmute will overcome the presumption that they did transmute. The same error was made in \textit{In re Marriage of Frapwell}, 49 Cal. App. 3d 593, 122 Cal. Rptr. 718 (1975), where \( H \) used separate funds to acquire property and took a deed reciting a \( H-W \) joint tenancy. The trial court found \( H \) had no donative intent but was reversed on a theory that only an express \( H-W \) agreement that there was no gift could overcome the presumption arising from the title. \textit{Accord, In re Marriage of Well}, 30 Cal. App. 3d 143, 106 Cal. Rptr. 680 (1973) (\( W \) put separate funds in \( H-W \) joint tenancy bank account but had no donative intent); Cash v. Cash, 110 Cal. App. 2d 534, 234 P.2d 115 (1952) (\( H \) put separate funds in joint tenancy account without donative intent). The error of the last two decisions is aptly analyzed in Sims, \textit{Consequences of Depositing Separate Property in Joint Bank Accounts}, 54 Cal. St. B.J. 452 (1979). It is not required by Cal. Fin. Code § 852 (West 1968), which merely raises a rebuttable presumption of gift because of the form of bank account "title."

85. Consider the case where \( W \) has a will leaving all to the son of a former marriage. Without telling \( W \), \( H \) invests all of the community property in acquisitions with deeds or title documents reciting a joint tenancy between him and \( W \). \( W \) dies. The chances that the son can muster evidence that \( W \) in fact did not agree to the presumed transmutation are surely slim.

87. \textit{See Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961).}

87. Recall that if their only agreement is to select a form of ownership that avoids probate this is not enough understanding to support a conclusion of transmutation. \textit{See note 81 supra.}

tenancy form of ownership is used, and certain income tax benefits are certain to be lost in many situations where joint tenancy form is employed. The presumption of transmutation arising

89. When a joint tenant dies, L.R.C. § 2040 includes all of the property in his estate for estate tax purposes until it is shown that the surviving joint tenant made a contribution in money or money's worth for the acquisition and that such contribution did not come to the survivor by way of gift from the decedent. Although I can find no authority directly on point, it would seem that the survivor cannot simply rely on California's general presumption in favor of the community to prove his or her contribution. If the deed recited a consideration and the date showed the joint tenancy property was acquired during marriage, the presumption might well establish that community funds were used for the purchase. However, the cases say that the burden of proof is on the estate to show that all components of the exception to inclusion are present. Tuck v. United States, 262 F.2d 405 (9th Cir. 1958); English v. United States, 270 F.2d 976 (7th Cir. 1959). The California presumption would not bear on the question whether the survivor's community interest in the funds arose as a result of a separate-to-community transmutation by the decedent at some time prior to the joint tenancy acquisition.

If for some reason the survivor is unable to testify as to the source of community funds for the acquisition (e.g., because she is incompetent, dies before the matter is litigated, or doesn't remember), all of the joint tenancy property will be included in the decedent's gross estate. The amount of the contribution by the survivor is included, not just the appreciation traceable thereto. Treas. Reg. § 20.2040-1(b); Wenig, Marital Status and Taxes, in UNMARRIED COUPLES AND THE LAW 246 (G. Douthwaite ed. 1979).

Observe that if a bank account is used, any form of survivorship, and not just standard common law joint tenancy, triggers § 2040. The same is true with United States Savings bonds. Rev. Rul. 68-269, 1968-1 C.B. 399. The regulations do not say that tenancy in common is within § 2040, but do not specifically consider the case of a contingent remainder following a tenancy in common life estate. Treas. Reg. § 20.2040-1(b) (1958). See Bill Froelich Motor Co. v. Estate of Kohler, 240 Cal. App. 2d 897, 50 Cal. Rptr. 200 (1965) (bill of sale in which vendor conveyed property to herself and a vendee “with sole right of survivorship” held to convey to the vendee a life estate held in common with the vendor, with a remainder in fee, contingent on survival).

If the creation of the joint tenancy involves a gift and an appropriate gift tax return is filed, § 2040 has since 1976 removed the tainted source of the survivor's contribution. Where community funds are used that became community in a previous separate-to-community transmutation, the creation of the joint tenancy does not involve a gift at that time. Literally applied, the 1976 amendments to § 2040 afford no relief even if a gift tax had been filed at the time of the earlier transmutation.

Since the relief is available if “the creation of such (joint tenancy) interest constituted in whole or in part a gift,” § 2040(b)(2)(B)(i) (dealing with personality), it would be wise for the decedent spouse to contribute a dollar of separate funds. (The spouses, however, will not know who the decedent spouse will be, and if both contributed $1 of his separate funds, there would be no gift.)

90. If onerously acquired community funds are shown to have been used to acquire property taken in joint tenancy (i.e., there was a transmutation), the surviving spouse's half interest is not in the gross estate of the decedent for estate tax purposes but does not obtain a stepped up basis under L.R.C. § 1014(b)(8). Bordenave v. United States, 150 F. Supp. 920 (N.D. Cal. 1957); Murphy v. Commissioner, 41 T.C. 618 (1964); Petersen v. Commissioner, 35 T.C. 962 (1961). If,
from a joint tenancy recital in a deed poll is illogical and will cause far more harm to married persons than any benefits conferred. 91

C. Summary of Transmutation Problem

California law gives married persons great freedom to alter the nature of the proprietary interests in assets owned or even yet to be acquired. Usually, no formalities are required, even where real property is at issue. In the case of transmutations of property to joint tenancy a writing is required. However, the law presumes a transmutation without any evidence at all that either spouse knew the contents of the writing. Obviously, this state of the law invites litigation and tends to encourage perjury. These problems are compounded if the same looseness of the law applies when third parties are in a dispute with either or both spouses.

III. THE “MANAGERIAL” SYSTEM OF DEBT LIABILITY IN CALIFORNIA

The problems in the debt collection area caused by transmutations are quite different depending on the method used by the community property jurisdiction for initially assessing liability. Before the effect of transmutation agreements on creditors’ rights can be analysed, one must understand the California system for determining the debt liability of marital property. 92

A. Basic Rule: What H or W Could Voluntarily Use to Pay a Debt the Creditor Can Seize

From the outset, California has utilized what is called the “managerial system” for determining the rights of creditors to reach marital property. 93 The basic rule is that all property subject to the debtor spouse’s management and control can be reached by his or her creditors. 94 A leading case has explained the theory partly on the notion that if a debtor spouse could use his manage-

however, there was no transmutation, a stepped up basis would be obtained for the community half interest of the survivor.

91. At pp. 240-41 infra a statute is proposed which would require H and W to sign the deed reciting joint tenancy before it could be the basis of finding a transmutation.

92. Regarding the definition of “marital property,” see note 3 supra


ment power to voluntarily pay over community assets to his creditor, the creditor should be able to compel him to do so.95 That the creditor can seize what the debtor can convey, is consistent with California law when the debtor’s separate property and community personality is at issue. Subject to exceptions to be discussed below each spouse has power to convey all community personality,96 and his or her creditor can reach all of it.97 Also if $H$ and $W$ co-own real property separately as tenants in common or joint tenants, each has power to convey only a half interest and that is the interest a creditor can reach.98 This is true even though in some respects management power is broader.99

The same is not true with community realty. With community realty the creditor reaches what the spouse can manage, not what he or she can convey. One spouse alone has managerial power over community realty, in that one alone can license third parties to enter, plant and harvest crops, etc.100 Since 1917,101 however, one spouse alone has been unable to voluntarily convey any interest in community realty. Joinder of the other spouse in the instrument of conveyances is required.102

California nonetheless allows the creditor of one spouse to levy execution on community realty. In effect, one spouse alone can indirectly alienate community realty by incurring an enforceable obligation and refusing to pay it.103 California, like the majority of

96. CAL. CIV. CODE § 5125 (West Supp. 1980).
97. Id. §§ 5116, 5122.
99. For example, one cotenant by lease or license can confer upon another person the right to use and occupy all of the property as fully as he could have under the cotenancy, Verdier v. Verdier, 152 Cal. App. 2d 349, 313 P.2d 123 (1957); Carbine v. Meyer, 126 Cal. App. 2d 386, 339, 272 P.2d 849, 854 (1954); Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal. App. 213, 194 P. 757 (1920); or one cotenant may farm all of the land and is not required to account for crops grown or harvested by him as long as he has not reduced the value of the property. See, e.g., 2 AMERICAN LAW OF PROPERTY § 6.14 (A.J. Casner ed. 1952).
100. CAL. CIV. CODE § 5127 (West Supp. 1980).
101. 1917 Cal. Stats. ch. 583, § 2, at 829, now codified as part of CAL. CIV. CODE § 5127 (West Supp. 1980); see Reppy, Retroactivity of the 1973 California Community Property Reforms, 48 S. CAL. L. REV. 977 (1975); Prager, supra note 16.
102. Section 5127 excepts leases of a year or less. CAL. CIV. CODE § 5127 (West Supp. 1980).
103. The statute is most strangely worded. It first requires both spouses join in “executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encum-
other community property jurisdictions which use the “managerial system” for determining rights of creditors to reach marital property, however, recognizes several exceptions to a strict equation between property over which a debtor spouse has management power and property his or her creditor can seize.\textsuperscript{104}

B. \textit{Alternatives to the Managerial System}

The states of Arizona, Washington and New Mexico determine the marital property that a creditor can reach in part by classifying the obligation as a community or separate debt.\textsuperscript{105}

bered.” Then it provides “that the sole lease, contract, mortgage, or deed” of one spouse alone is presumptively valid in favor of “a lessee, purchaser, or encumbrancer in good faith, without knowledge of the marriage relation.” \textit{Cal. Civ. Code} § 5127 (West Supp. 1980) (emphasis added). At least prior to the time equitable conversion occurs (i.e., when each side is so ready to perform that the contract is specifically enforceable, \textit{Mamula v. McCulloch}, 278 Cal. App. 2d 184, 194, 79 Cal. Rptr. 571, 578-77 (1969)), a contract does not convey realty. Moreover, even when equitable conversion applies, the contract itself is not an “instrument” that causes a conveyance of an equitable interest in many cases where post-contracting events (such as clearing up an impediment to title) are necessary before the contract is specifically enforceable. \textit{See In re Dwyer’s Estate}, 159 Cal. 684, 675, 115 P. 235, 240 (1911). On the other hand, if the “instrument” in the first clause of the statute does not include a contract, why does the provision about presumptive validity refer to contracts as well as deeds, leases, and mortgages?

Apparently without realizing the problem existed, \textit{Mark v. Title Guarantee & Trust Co.}, 122 Cal. App. 301, 9 P.2d 639 (1932), held that an executory installment contract to sell land executed by \textit{H} alone was a conveyance voidable by \textit{W} who could overcome the presumption of validity by showing that in fact the land was community property.

In two other states where the management statute requires joinder of both spouses in an “instrument” by which community realty is sold or conveyed, there is a strong suggestion that a contract to sell also must be executed by both spouses. It arises from holdings that one spouse alone may not enter a binding contract to pay a real estate broker to locate a buyer for community realty. \textit{See Whiting v. Johnson}, 64 Wash. 2d 135, 390 P.2d 395 (1964); \textit{Lockwood v. Mattingly}, 97 Ariz. 65, 337 P.2d 64 (1959). In other states the management statutes specifically require joinder in the contract of sale by both spouses. \textit{N.M. Stat. Ann.} § 40-5-13 (1978).

\textsuperscript{104} The California exceptions are discussed at text accompanying notes 144-231 \textit{infra}. The other community jurisdictions using the managerial system are Louisiana, Nevada, Idaho, and Texas. \textit{See W. REPPY \\& W. DE Fungi, supra note 2, at 370-73}. Under a proposal pending in Wisconsin to make it the ninth community property state, the managerial system will be the basic approach in the case of all liabilities except torts and criminal fines. Wis. Assembly Bill No. 1090 (1980), proposing enactment of § 765.71(3) of the Wisconsin Statutes.

\textsuperscript{105} The Wisconsin proposal, \textit{supra} note 104, would follow the Arizona approach with respect to tort liability and liability for criminal fines. \textit{See proposed 765.71(2)(g)-(h)}, the latter conclusively establishing the separate nature of all such fines. Assembly Amendment No. 4 to Bill 1090 would classify obligations arising because of a “forfeiture” as separate or community depending on whether “the actions which gave rise to the forfeiture were undertaken for a marital partnership (community) purpose.”
1. The Approach of Arizona

In Arizona and Washington if an obligation receives the "community" label, all non-exempt community property as well as the obligor-spouse's separate property is liable. This result is the same as under California law. However, if the debt is a "separate debt" in Arizona and previously Washington, no portion of the community property is liable, and the creditor can reach only the debtor's separate property. Generally, whether an obligation is separate or community turns on whether it arose out of activities that did or which, if successful, could have conferred a commu-

106. See, e.g., W. De Funiak & M. Vaughn, supra note 9, at 374, 377. At least where the obligation is contractual, its "community" character is presumed. See, e.g., Oil Heat Co. of Port Los Angeles, Inc. v. Sweeney, 26 Wash. App. 351, 613 P.2d 169 (1980).

107. Washington law in this respect has recently been changed. DeElche v. Jacobsen, — Wash. 2d —, 622 P.2d 835, (1980) (6-3 decision). H and W had by written transmutation agreement converted all of the separate property of each of them into community property. Subsequently, H raped the plaintiff after a social event they had both attended. Under prior law, there was no community benefit and plaintiff would have recovered no damages. Under DeElche, the separate tort victim may, after exhausting the tortfeasor's separate property, seize his half of community property. The remaining half is still community property but is subject to an implied-by-law lien to secure the reimbursement to the non-tortfeasor spouse that is owed because community funds went to pay off a separate debt. (This prevents another creditor of the tortfeasor spouse from seizing the remaining half interest.)

The court specifically declined to state whether the new approach to liability would be extended to non-tortious obligations (e.g., breach of contract liabilities). It also cautioned that in the tort area, adoption of the New Mexico system might lead to reclassifying some tort liabilities previously labeled "community" as separate torts, since the community label need not be unreasonably stretched to avoid no recovery at all under the new approach.

DeElche obviously overrules many of the Washington cases cited herein, but they will remain precedents under Arizona jurisprudence.

108. See, e.g., Babcock v. Tam, 156 P.2d 116 (9th Cir. 1946) (Arizona law); Cross, The Community Property Law in Washington, 49 WASH. L. REV. 729, 819-20 (1974). Cross says it is "likely" that one spouse found liable for a "separate" obligation will have no separate property, in which case the creditor can recover nothing. Id. at 819. See, e.g., Alchimayr v. Lynch, 6 Wash. App. 434, 493 P.2d 1026 (1972) (H committed separate torts of alienation of affection and criminal conversation and it is obvious from opinion he had no separate property). Obtaining judgment for the creditor in this situation is not a senseless act. The debtor spouse may inherit separate property. Also his marriage could end by death of either spouse before the judgment expires, and the creditor can then reach the obligor's half of the community property which dissolution converts into equal shares of separate property. See Edmonds v. Ashe, 13 Wash. App. 690, 537 P.2d 812 (1975). If divorce ends the marriage, as much of the community property as the Washington or Arizona court awards the debtor spouse can now be reached by the judgment creditor.
The Arizona system imposes a substantial burden on third parties asked to enter into a contractual arrangement with one spouse alone. To avoid the risk that facts unknown to the third party might support a characterization of the obligation incurred by H or W as separate debt and thus possibly uncollectable, the obligee will require the obligor's spouse to join in the contract or at least consent to community liability. It is of no benefit to the third party to have the spouse he is dealing with conversant that a community obligation is being created.

While third parties expecting to become contract creditors of a married person are able to protect themselves from the harshness of the community-versus-separate-debt system of marital property liability, few if any tort creditors will be able to obtain in advance of suffering injury an agreement to assure that community wealth of a tortfeasor spouse is not immune from liability. If the tort victim is entitled to recovery, he probably will not know until long after the injury whether he was fortunate enough to have been harmed by an unmarried person or a married person on a community mission.

Sympathy for creditors has caused courts in Arizona and previ-
ously Washington to greatly expand the concept of community benefit to avoid separate tort characterizations.113 The very need to “cheat” on the definitions employed suggests there is something wrong with the system.114 The clinching proof is that, in those instances where stretching of the concept of community debt is impossible, a seriously injured creditor may receive nothing while H and W live in splendor on a multi-million dollar community estate.115 The family unit should be protected instead by generous exemptions laws that do not protect excess wealth at the expense of a deserving creditor.

Not surprisingly, the Arizona approach has come under heavy criticism in California.116 It seems highly unlikely that reform of

113. See, e.g., Moffit v. Krueger, 11 Wash. 2d 658, 120 P.2d 512 (1941), where W was on a beer-drinking binge with a man who obviously was her boyfriend. She let him drive the community-owned car, and he struck plaintiff. In Washington and Arizona, recreational activity (even of one spouse alone) is viewed as a community endeavor for creditors’ rights purposes. E.g., Reckart v. Avra Valley Air, Inc., 19 Ariz. App. 538, 509 P.2d 231 (1973) (H crashed airplane while taking flying lessons for pleasure). In Moffit, W’s “recreation” with her boyfriend was held to be a community activity!

Because the courts in Washington and Arizona have been stretching the concept of community debt in order to get some recovery for a tort victim who would otherwise take nothing, the precedents developed in those states as to what constitutes “community benefit” are of dubious relevance in applying that concept under Cal. Civ. Code § 5122 (West Supp. 1980). Under it the issue is not recovery—or not for the victim but whether separate property of the tortfeasor is primarily liable. See text accompanying notes 144-50 infra. If there are little or no such separate funds, the victim of the “separate tort” will still recover from the community. There is no reason to skewer the classification process in sympathy for the plaintiff.


115. The lack of logic in the concept underlying the Arizona system is further evident from the fact that both Washington and Arizona in the last decade had to engage in some legislative tinkering to avoid near absurdity. By the logic of the system, an obligation incurred by H or W alone before they marry could not have been incurred to benefit the community (as none existed). Thus it was a separate debt. Yet as soon as the debtor spouse married, his earnings—sole source of wealth for many obligors—were community and not liable for the “separate” obligation. Marriage by a debtor in this situation was called “marital” bankruptcy. Note, Community Property—Antenuptial Debts—Eliminating Immunity of Earnings and Accumulations of Debtor Spouse, 46 WASH. L. REV. 191, 192 (1970). The remedial legislation in Arizona, Ariz. Rev. Stat. Ann. § 25-215(b) (1976), analyzed in Comment, Community Assets and Separate Debts: Increased Community Vulnerability in Arizona, 1975 Ariz. St. L.J. 791, gives creditors considerable relief from “marital bankruptcy.” To a much lesser extent, the Washington remedial act, Wash. Rev. Code § 26.18.209 (1979), allows antenuptial “separate” creditors to reach some community assets. See Waiters v. Doud, 92 Wash. 2d 317, 598 P.2d 280 (1979).

California debt collection law would embrace the Arizona approach; it should not.117

2. The System in New Mexico: The Partitionable Community

Like Arizona, New Mexico characterizes obligations as separate or community under a similar "benefit" test. However, the obligee of a "separate" debt, after exhausting the debtor spouse's separate property, can levy on community property.118 But only the debtor's half interest can be taken. Apparently if the community asset is partitionable in kind, like a bank account or a supply of fungible goods or products, the levying officer just takes half of it. If the asset is land partitionable in kind either some sort of judicial action is necessary to divide it or the debtor spouse's undivided half interest will have to be sold. Where the asset is not partitionable in kind, the debtor's community half interest must be sold.

The New Mexico statute does not say what happens to the nondebtor spouse's half interest after such involuntary partition.119 It may be that the nondebtor spouse is left as a tenant in common with the purchaser at the judicial sale. One would think this interest should be converted into the nondebtor spouse's separate property. In a case decided before the partitionable community system was codified, however, the New Mexico Supreme Court implied that the remaining half retains its character of community property and the community gets a reimbursement claim.

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117. Not only is the Arizona approach unfair to creditors and a breeder of litigation (over whether a contract or tort is to be characterized as community or separate), but its adoption in California where transmutations occur so easily will raise a host of new problems. For example, what effect would there be on the debt characterization process if the spouses had agreed that all of W's acquisitions would be her separate property, all of H's community? (Suppose W injured someone while at recreation, for example.) Presumably every obligation in Arizona is separate if the spouses have contracted to live separate in property.


119. This problem can also arise in California, which has never addressed it in a reported case. See text accompanying notes 226-30 infra. Under the supremacy clause of the United States Constitution, the federal government has compelled Washington and Arizona to use the partitionable community system when the "separate" creditor of a spouse is the Internal Revenue Service collecting a separate (i.e., prenuptial) tax debt from community property (such as the nondebtor spouse's earnings) that state law would immunize from liability. United States v. Overman, 424 F.2d 1142 (9th Cir. 1970) (Washington property); In re Ackerman, 424 F.2d 1148 (9th Cir. 1970) (Arizona property). Neither decision even suggests what happens to the half of the community property remaining after the I.R.S. takes the debtor's interest.

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against the debtor's separate estate.\footnote{120}

The New Mexico system, in not immunizing all of the community property from the reach of deserving "separate" creditors of a spouse is superior to the Arizona approach. If the present California law is to be radically changed, New Mexico's approach would be the preferable alternative to adopt.

C. Reimbursement in California to Prevent a "Taking"

Prior to adoption of a true community of property in California in 1927,\footnote{121} the managerial system of debt liability was arguably logical. So-called community property really was not family property; \( W \) had no proprietary interest in it that was lost when \( H \)'s obligation arose out of a transaction not related to community affairs. Also the wife, lacking management power, could not incur a "community" debt, except for "necessaries"\footnote{122} and for such a debt of \( W \)'s all of \( H \)'s property, including the community, was liable.

It was urged that California's legislative adoption in 1927 of the community concept of equal ownership required shifting to the Arizona approach (New Mexico's partitionable community notion not yet having been invented) so that \( W \)'s ownership rights in post-1927 community property would not be sacrificed to pay \( H \)'s separate debts. The California Supreme Court rejected the contention in an unfortunate opinion that implied \( W \)'s proprietary interest in post-1927 community property was less "vested" than \( H \)'s despite the statutory mandate that the interests were "equal."\footnote{123} The same decision contained equally unfortunate lan-

\footnote{120. McDonald v. Senn, 53 N.M. 198, 213, 204 P.2d 990, 999 (1949): "Proper charges and credits may be made, as in cases where community funds are used to improve the separate property of one of the spouses." One should question, however, if the remaining half is to be treated as community property in all situations. What if another "separate" creditor of the debtor spouse whose half interest has been taken already levies on the remaining interest? Surely there is no half interest of the debtor in the property sought to be seized, as there would be if it were really community. Perhaps the McDonald court intended the remaining half to be community simply for management and control purposes. That is, if it were really, the nondebtor spouse could not without joinder of the other spouse convey it (as he could if it were his separate property). I think it would be much simpler for any partitionable community system for marital property liability to convert the remaining half interest into separate property.}

\footnote{121. See note 38 supra.}

\footnote{122. See text accompanying notes 154 et seq. infra.}

\footnote{123. Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941), stating the 1927 act did "not change the nature of the wife's interest to a vested one so as to give her creditors the right" to reach community property. Id. at 686. The appropriate
guage to the effect that $H$ could use community funds to pay "separate" debts because he has the power "to divest the parties of their community property by his own act in the same manner that he might divest himself of his separate property, so long as he did not make a gift . . .". Such language implied that $W$'s interest was simply lost when $H$ paid his separate debt with community funds. This caused other community property states to conclude that the 1927 legislation had not adopted a true community of equal owners in California.

Later, it became settled that there was no "divesting" of the community interest in such a situation, and $W$'s ownership rights did not just dissolve. Rather, what the community owned changed from money, or whatever property $H$ used to pay the "separate" debt, to a reimbursement claim against $H$'s separate estate that could be asserted at dissolution of the community. Thus, at divorce, debts already paid are classified as separate or community under a benefit test somewhat similar to that used in Arizona and New Mexico. This is done to determine if the community, actually the nondebtor spouse asserting half the community's claim, is entitled to reimbursement because a separate debt was paid with community funds.

Similar classification of outstanding debts must be made at divorce. "Separate" debts can be assigned for payment to the appropriate spouse and the amount of community indebtedness subtracted from the value of total community assets. Then the dis-

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126. See e.g., In re Marriage of Walter, 57 Cal. App. 2d 822, 129 Cal. Rptr. 351 (1976); Somps v. Somps, 50 Cal. App. 2d 328, 118 Cal. Rptr. 304 (1962); generally Gutierrez, Apportionment of Debts, Handling Disputes in Probate 11 (1976). In the converse situation where separate funds were used to pay a community debt, reimbursement is not available except on proof that the spouses had an agreement for reimbursement. E.g., In re Marriage of Lucas, 27 Cal. 2d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).
vorce court can determine what constitutes the required equal division of the next community wealth under Civil Code section 4800.127

Section 4800(b)(2) gives the divorce court itself jurisdiction to order reimbursement to the nondebtor spouse out of the other’s half of community property and quasi-community property if the use of community funds to pay separate debts can be classified as “misappropriation.”128 It is unclear whether the divorce court has jurisdiction to issue an order enabling the nondebtor spouse to reach separate property of the spouse who used community funds to pay his separate debt. Such separate property is, of course, liable on the obligation. Also unsettled is whether the divorce court has jurisdiction to apply not only the misappropriation test of section 4800(b)(2) but the “benefit” test developed in case law.129 If the answer to either question is no, a separate action in addition to the divorce suit may have to be brought to obtain reimbursement.130

127. Cal. Civ. Code § 4800 (West Supp. 1980). See In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979); In re Marriage of Barnert, 85 Cal. App. 3d 413, 149 Cal. Rptr. 616 (1978); In re Marriage of Eastis, 47 Cal. App. 3d 459, 120 Cal. Rptr. 661 (1975). The latter decision holds that if community debt exceeds community liability, § 4800 does not require the excess debt be assigned equally. It is true that the statute calls for division of “property” and that the mention of debt is in a 1976 (and hence post-Eastis) amendment calling on the court to “value the assets and liabilities as near as practicable to the time of trial.” 1976 Cal. Stats. ch. 762, § 1, at 1801. Eastis is inconsistent with the notion of a community as an equal partnership and should be judicially disapproved or legislatively abrogated. If the wife is unable—because for example she must stay home with the children—to earn money to pay her half of the net excess debt, the appropriate remedy is a support award for her which will terminate upon change of circumstances (e.g., she inherits $1 million). An unequal assignment of excess debt between the supposed equal partners (Cal. Civ. Code § 5105 (West Supp. 1980)) would be in the form of a nonmodifiable final property award.


129. Divorce courts have granted reimbursement under the “benefit” test but jurisdiction to do so was not contested. See cases cited note 128 supra.

130. A separate action would waste the time of bar, bench, and the spouses. Statutory amendments are in order to provide specifically that the divorce court has jurisdiction to adjudicate reimbursement claims arising between spouses out of expenditures of community and separate property and to render a judgment that can be enforced against the obligor’s separate property as well as his share of the community property. A similar amendment to the Probate Code to give probate courts such jurisdiction is needed to prevent senseless multiplicity of actions.
Although one spouse's use of community funds to pay off a "separate" debt smacks of a loan, apparently no California case has awarded reimbursement with interest.\textsuperscript{131} It seems under present law interest could be obtained only upon proof that the spouses agreed to an actual loan. Arguably, one spouse's seizing without consent of the other community funds to pay separate debts without agreeing to pay interest is bad faith management prohibited by Civil Code section 5125(e).\textsuperscript{132} I should think the better rule would be a presumption that interest\textsuperscript{133} is owing unless the spouses have an agreement to the contrary or unless the debtor spouse can establish some benefit to the community from the use of its funds.

1. Departure from Benefit Test\textsuperscript{134}

In one area present case law does deny reimbursement for pay-

\textsuperscript{131} The writer is unaware of a single case granting reimbursement with interest. It appears that the no-interest rule was borrowed from early Texas and Louisiana cases. But in those states income from a spouse's separate property during marriage was then community owned; thus the community often benefited directly by keeping a spouse's separate estate in financial good health by the payment of some separate debts. It is suggested that the no-interest rule is a trade-off for the special community benefit of ownership of rents and profits of the separate estate in Texas and Louisiana. Keppy, \textit{Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA}, 23 U.C.L.A. L. Rev. 417, 456-67 & n.178 (1976). Thus, the reason for the no-interest precedent in the civil law jurisdiction does not obtain in California, where the rents and profits from separate property are also separate. \textit{Cal. Cpt. Code} §§ 5107-5108 (West Supp. 1980). For a useful survey of reimbursement cases in all community property jurisdictions, see Bartke, \textit{Yours, Mine and Ours—Separate Title and Community Funds}, 44 Wash. L. Rev. 370 (1969). See also Comment, \textit{The Husband's Use of Community Funds to Improve His Separate Property}, 50 Calif. L. Rev. 844 (1962).

\textsuperscript{132} \textit{Cal. Cpt. Code} § 5125(e) (West Supp. 1980). One can imagine, however, situations in which the community did receive some benefit from the payment of the separate debt to serve as a return to it in lieu of interest. The payment may have prevented judicial sale of separate property of the debtor spouse regularly used by the family (such as a pleasure boat, vacation cabin, etc.). Or the payment may have been necessary to restore the debtor spouse's general credit in the community necessary for him or her to generate community gains (as well as to carry on separate property projects).

\textsuperscript{133} If the payor spouse had no intent to defeat the rights of the other spouse, simple interest should be calculated. If bad faith were found, a basis for ordering compound interest would be present.

\textsuperscript{134} \textit{Cal. Cpt. Code} § 4800(b)(4) (West Supp. 1980), applicable at divorce, provides: "Educational loans shall be assigned to the spouse receiving the education in the absence of extraordinary circumstances . . . ." Note that this does not direct the characterization of the loan debt, merely the assignment. Education enables a person to earn either separate or community profits or both. Unless some injury or the like has rendered the educated spouse unable to work, it becomes a known fact that much of the earnings traceable to the education will be separate. Thus a portion of the overall cost of the education is appropriately classified as a separate debt. (California does apportion a debt as part separate, part community. See Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal.
ing a “separate” debt with community funds. Following Weinberg v. Weinberg, the recent decision of In re Marriage of Smaltz classified alimony obligations owed by H to his first wife and paid during marriage to his second wife as community debts! Although H used community funds to make the payments, reimbursement was denied at dissolution of the second marriage. The benefit test was not used. Rather, the debt was found community because the existence of community funds during the second marriage (i.e., ability of H to pay) prevented H from having his alimony obligation reduced. The court in Smaltz also stressed that H acted in good faith, since he had no separate funds with which to pay the alimony.

Under the appropriate community—or—separate benefit test used to determine reimbursement rights good faith is irrelevant. If W is to be an equal owner along with H of the community under a scheme of equal management, her ownership rights are lost if H’s use of community funds for his separate purposes does not convert W’s community interest from a share of specific assets into a reimbursement claim. The approach to reimbursement taken in Weinberg and Smaltz is illogical and fails to protect

Rptr. 13 (1967)). Most likely all of the community benefit from the education can be attributed to tuition already paid, hence all of the remaining loan debt at divorce is likely to be characterized as separate and would be assigned to the educated spouse without need of § 4800(b)(4).

At the death of the noneducated spouse, the unpaid loan debt should be characterized as separate for the same reason. However, at the death of the educated spouse, if the loan was acquired during marriage and the education was not used to generate separate gains (as by investing separate property), the obligation will have to be characterized as community.

133. 67 Cal. 2d 557, 422 P.2d 709, 63 Cal. Rptr. 13 (1967).

137. In Weinberg, unlike Smaltz, H had both community property of the second marriage and separate property to use to pay alimony and child support and the debts were apportioned as part separate and part community based on the amount of each estate on hand when the payments were made.

138. Suppose before marriage H maliciously battered P while trying to remove P from H’s separate property. After marriage H earns great wealth. In P’s tort suit where punitive damages are sought, undoubtedly the jury will be advised as to the amount of community wealth in deciding the appropriate measure of punitive damages. And under CAL CIV. CODE § 5122(b) (West Supp. 1980) the community property can be reached to pay such damages once H’s separate estate is exhausted. Under the Weinberg-Smaltz approach to debt classification, at dissolution the obligation to pay punitive damages would be at least partly a community debt (entirely so if at the time the damages were assessed H no longer had any separate property) because the amount of damages depended on the amount of community property.

Or consider a case where H before marriage settles a tort suit by agreeing to pay
each spouse's community interest. Legislative correction is in order.

2. Uncertainty at Death Dissolution

While divorce courts are clearly required to classify outstanding debts as community or separate in dividing the community property, the statutes are unclear as to whether the same approach is to be taken by a probate court with respect to outstanding debts when death dissolves the community. California Probate Code section 980(e) says that if the parties before a probate court (e.g., surviving spouse and decedent's personal representative) cannot agree on how outstanding debts should be paid:

> each debt shall be apportioned to all of the property of the spouses liable for the debt, as determined by the laws of this state, in the proportion determined by the value of the property less any liens and encumbrances at the date of death, and the responsibility to pay the debt shall be allocated accordingly.\(^{139}\)

Since community property is liable to creditors of H to pay most of his separate debts, literally applied section 980(e) turns what would be a separate debt at divorce into a partly community debt at dissolution by death. For example, suppose H before marriage defaulted on a contract with P and P obtained a judgment for $100,000. H then marries and earns considerable community property. The marriage is dissolved when there is on hand $300,000 of H's separate property and $300,000 community property (all H's earnings). If dissolution is by divorce, the court will order H to pay the debt and disregard it, as a separate debt, in dividing the $300,000 of community funds. If dissolution is by the death of W with a will naming her child as universal legatee, section 980(e) appears to order reduction of the community estate (half of which is subject to W's testamentary power) by $50,000, taken to pay P even though the obligation to P was H's separate debt.\(^{140}\) Possibly the injustice can be avoided by allowing W's estate a creditor's claim against H for $50,000 after P has been paid, perhaps in a collateral proceeding. But a strong argument can be made that the legislature would not have wanted such circular proceedings and would have provided for payment of separate debts at death with separate funds if that was considered appropriate.


\(^{140}\) If H's death had dissolved the community with a will leaving all to his mother, § 980(e) would apparently reduce by $25,000 the half of the community property owned by W. See Cal. Prob. Code § 201 (West 1956).
San Francisco attorney Max Gutierrez,\(^{141}\) has proposed a reasonable interpretation of section 980(e) to avoid the injustices caused by literal interpretation. He contends the words “as determined by the laws of this state” makes reference to the case-law doctrine that, ultimately, a spouse’s separate estate should be responsible for his separate debts as well as to such statutory provisions as California Civil Code section 5116,\(^ {142}\) allowing a separate creditor of H to levy on community property.\(^ {143}\) Literally, however, the phrase “as determined by the laws of this state” refers to property that is liable on a debt and not to the reimbursement process. Thus, amendment of section 980(e) is urgently needed to make clear that the apportionment called for is to be used only when an outstanding debt cannot be classified as community, separate, or a specific mixture of both as determined under the benefit test.

**D. Exceptions to the Managerial System in California**

1. Tort Obligations

California Civil Code section 5122(b)\(^ {144}\) imports from Arizona the concept of “community” and “separate” torts not for the purpose of determining liability \textit{vel non} but priority of liability. Since all of the property subject to a spouse’s management is ultimately liable to his or her tort victim, section 5122(b) is a refinement of rather than an exception to the managerial system of determining liability of marital property.

The statutory test for characterizing torts is whether the injury was inflicted while the obligor spouse was performing an activity for the benefit of the community. If so, community property is primarily liable, the tortfeasor’s separate estate secondarily liable. If the benefit test is not satisfied, the tortfeasor’s separate estate is primarily liable. After exhausting such separate property that is nonexempt, the judgment creditor can reach community assets. Undoubtedly the seizure of them gives the non-tortfeasor spouse a right of reimbursement on behalf of the community at dissolution by death or divorce,\(^ {145}\) although section 5122 says nothing

\(^{141}\) \textit{Supra} note 125.


\(^{143}\) Gutierrez, \textit{supra} note 126, at 12-13 \textit{passim}.


\(^{145}\) There is no reported case of the community obtaining reimbursement from the other spouse’s separate estate prior to dissolution. The “black letter” law has
about that.

Any revision of the California statutes concerning debt collection should clarify an uncertainty created by section 5122 with respect to the procedures to follow in implementing it. Should a court rendering a tort judgment classify the tort as separate or community if asked to do so by a spouse, or is the classification to be done in ancillary enforcement proceedings? If it is to be done in the tort victim's suit, the spouse of the tortfeasor, one of the parties protected by section 5122(b), must be given the right to intervene.

always been that dissolution is the proper time of reimbursement. See generally Provost v. Provost, 103 Cal. App. 775, 258 P. 842, 844 (1929). Prior to 1975 and the adoption of equal management it made little difference when the reimbursement occurred. If H's community earnings had been used to pay a separate tort obligation of H's and H later inherited great wealth, immediate restitution to the community would not have benefited W, for she would not have had any management power over the newly constituted community assets. That is not true now. When a separate tort creditor abiding by § 5122 has exhausted the tortfeasor's separate property and then has seized some community property and the tortfeasor subsequently inherits separate wealth, an immediate reimbursement of the community would be most beneficial to the spouse of the tortfeasor and her creditors. The courts should realize that the older cases delaying reimbursement until dissolution of marriage are not compatible with the present equal management system in effect in California since 1975. In particular, creditors of the spouse having the right to claim reimbursement ought not to have to wait until dissolution to reach the inchoate community property. Under pre-1975 law it was fairly clear in California that the creditors in such a situation could not benefit from the existing reimbursement claim. See Peck v. Brumagim, 31 Cal. 440 (1866). Even before equal management, creditors in Washington were treated more favorably in such a case. See Conley v. Moe, 7 Wash. 2d 355, 110 P.2d 172 (1941). It is not clear in Conley whether the creditor, permitted to levy on the community-owned reimbursement claim, would be allowed to assert it immediately and reduce it to cash by bringing the cause of action against the separate estate or whether the creditor would have to wait until dissolution to bring the cause of action he had garnished.

The proposed community property act for Wisconsin, supra note 104, creates a cause of action for immediate reimbursement to the nondebtor's separate estate of half the community property seized in satisfaction of a separate debt (proposed § 766.75). This sum would come from remaining community property, which will be called marital partnership property in Wisconsin.

146. Protection afforded the non-tortfeasor spouse (the present preservation of community property subject to equal management by the non-tortfeasor spouse under Cal. Civ. Code §§ 5125, 5127 (West Supp. 1980)) is obviously preferable in the eyes of that spouse (and particularly his or her creditors) to the loss of such property (while tortfeasor's separate assets remain) and its replacement with a community reimbursement claim not assertable until dissolution.

147. The tortfeasor himself is a protected party when the tort can be labeled community, for § 123 enables the tortfeasor to shield his separate property if sufficient community property exists to pay the tort judgment creditor. Note that tortfeasor, having committed a community tort, however, will not always be able to engage in self help in this situation. The community assets may be in a bank account in W's name so that H cannot withdraw the funds to pay his tort victim. See Cal. Fin. Code § 651 (West Supp. 1980) and discussion in notes 183-87 and accompanying text infra. If W is not going to cooperate in enabling H to protect his separate property, as he is entitled to under Cal. Civ. Code § 5122(b)(2) (West Supp.
If the tort litigation does not result in classification of the debt as separate or community, there must be an opportunity to obtain such a classification in separate proceedings. A new statute is needed authorizing the debtor or his spouse to seek an order directing the creditor to levy on properties of the spouses in an order to be determined. Both spouses and the creditor are obviously necessary parties to such a proceeding and must be given notice. The hearing preceding such an order would necessarily be an occasion for characterizing assets as separate or community as well as classifying the debt. The statute should provide for charging the costs of the proceeding to the tortfeasor or conceivably to the tortfeasor’s spouse if he or she initiates the proceeding.

A creditor needs statutory assurance that his levy of execution will not be upset under section 5122 after it has been accomplished. Therefore, the statutory scheme should invite the creditor to give notice to the spouse of the tortfeasor (the tortfeasor himself as a party to the tort suit is well aware that a levy of execution is imminent) that he or she has so many days to file with the creditor a list of properties claimed to be primarily and secondarily liable under section 5122. The tortfeasor spouse should be entitled to a court hearing in order to controvert the accuracy of the priority list submitted by the non-tortfeasor spouse. If no action is taken by the notified spouse, a levy of execution conducted after the specified period of time should be immune from an attack based on section 5122. Until a statutory procedure is enacted the spouse seeking to invoke section 5122 apparently must utilize whatever equitable procedures are generally appropriate to retain a levy of execution. The author is unaware of any existing basis for shifting the costs of such proceeding to the tortfeasor when it is initiated by his spouse.

Any legislative attention to section 5122 should consider the following additional problems. First, the statute should authorize characterization of a tort debt as part community and part separate in specific fractions.\footnote{See the example in W. Reppy, supra note 2, at 218, where the victim was walking by a structure when a wall collapsed on him. The structure was owned partially by H’s separate estate and partially by the community. As § 5122 is now written a literal interpretation could lead to the conclusion that any community benefit}
now makes the complete tort obligation community. Second, the statute now applies only when the tort involves “death or injury to person or property.” Was this language intentionally chosen to be narrower than all tort liability, and if so what torts are excluded? For example, is invasion of privacy an injury to the person? Third, should a provision be added to allow one spouse to enjoin the other from paying the tort debt with funds that are secondarily liable under section 5122? This problem is likely to arise when the spouses are living separate and apart and jockeying for property advantages. Suppose X has a personal injury judgment against H. If it is classifiable as separate, H would like to use community funds under his management to voluntarily pay off the creditor. If the debt were community and W had access to a joint bank account that included a large amount of H’s separate property, W might want to exercise her power to withdraw funds from this account to pay X.

2. Obligations Not in Tort

One prong of the basic premise of the managerial system of debt liability, that property of the community is liable for the contracts of either spouse made after marriage, is codified in California Civil Code section 5116. The other prong, that a person’s separate property is liable for all of his or her obligations, is codified in section 5121. Section 5116 was enacted as part of the 1975 equal management reform package. A preamble to one of the four acts that constitute the reform states in pertinent part: “The Legislature finds and declares that . . . the liability of community property for the debts of the spouses has been coextensive with the right to manage, and control community property and should remain so . . . .” This is a statement of the mana-
gerial system theory. The reform legislation, however, left the rule in some areas clouded, since it continued from prior law or created several specific exceptions to the managerial system approach.

a. The "Necessaries" Doctrine

Under the "necessaries" doctrine the separate property of one spouse may be liable for obligations incurred by the other and probably even for contracts and quasi-contracts to which neither spouse is a party. The doctrine is based on three statutes, all of which were renumbered in 1973-74 as part of the equal management reform legislation to be gender neutral. (Previously the statutes imposed heavier burdens on H's separate property than on W's.)

Civil Code section 5121 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 5132.154

Section 5132 reads as follows: "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..."155 The third relevant statute cuts back on the necessaries doctrine with Civil Code section 5131, providing: "A spouse is not liable for the support of the other spouse when the other spouse is living separate from the spouse by agreement

155. Id. § 5122. The statute refers to Cal. Civ. Code § 4802 (West Supp. 1980) for the definition of quasi-community property. In brief, that is property acquired during marriage by a spouse while domiciled in another state which would have been community on the facts had the spouse been domiciled in California. The legislators probably had in mind domicile in a non-community property state, but § 4802 is more broadly drafted. It classifies as quasi-community property H's earnings while the couple were domiciled in Nevada, Idaho, Arizona, etc., before moving to California. It is suggested that § 4800 be amended so that its wording does not make such out-of-state community property quasi-community for "pecking order liability" under § 5132.
unless such support is stipulated in the agreement.”

(1) Problems Defining a “Necessary of Life”

There are several cases defining “necessaries of life.” As expected, they would include food, shelter, and medical care. But some rather surprising debts have been granted “necessaries” status to make liable property not subject to the management of the debtor spouse. In *Wisnom v. McCarthy*, W, who apparently was in good health, hired a maid to do housework. The spouses were living apart but not by agreement so that the predecessor of section 5131 was not applicable. Because of the “economic and social position” of the spouses, a maid for W was held to be a “necessary of life,” and H was held personally liable for the maid’s salary. The *Wisnom* court seems to have tortured the necessities doctrine out of sympathy for the maid, because when the case arose community property was not liable for W’s non-necessaries contract. The decision reeks of elitism that seems inappropriate under contemporary attitudes about wealth and the role of women. In such a situation today W should budget support funds she receives before divorce under Civil Code section 4357 to pay for the maid, and by no logic should H’s separate property be liable.

What is reasonably debatable is whether the wealth of the spouses should ever affect the characterization of a debt as a “necessaries” obligation. For example, hospital care is obviously a “necessary” if a spouse is seriously ill. If a private room is contracted for though, should the added expense above that required for the typical hospital room fall under the “necessaries” doctrine? It would be unfortunate to answer this question based on the economic let alone social standing of the family. The fact that the patient had always had the most expensive health care in the past should not convert an extravagance into a “necessary.” Given cases like *Wisnom*, however, it is probably necessary to

156. *Id.* § 5131.

157. See, e.g., *Davis v. Fyfe*, 107 Cal. App. 281, 290 P. 468 (1930); *Evans v. Noonan*, 20 Cal. App. 2d 128, 128 P. 2d 794 (1941); *Smith v. Bentson*, 127 Cal. App. 2d Supp. 789, 15 P.2d 910 (App. Dep’t Super. Ct. 1952). Washington has held that defense counsel for a spouse accused of crime is a “necessary” so that if the accused’s spouse has separate wealth, the defendant is not a pauper entitled to the services of the public defender. *State v. Clark*, 88 Wash. 2d 533, 563 P.2d 1253 (1977). Such a conclusion is logical but will lead to such bizarre results as requiring W to use her separate inheritance from Mother to pay for H’s defense against criminal charges that he murdered Mother.


159. CAL. CIV. CODE § 4357 (West Supp. 1980).
amend sections 5121 or 5132 to prevent the courts from using a sliding scale based on wealth to determine what is a “necessary.”

An ambiguity exists whether the necessaries doctrine applies to debts contracted by third persons or to contract obligations to which neither spouse is a party. In Credit Bureau of San Diego v. Johnson,160 an accident rendered H unconscious and H’s family physician hired a specialist surgeon to operate on H. The court said W would be liable.161 The applicable statutes then contained wording similar to that found in section 5121, making that statute applicable to “debts contracted by either spouse,” and section 5132, imposing an obligation of “support” not limited to contracts entered into by a spouse. Johnson apparently did not see the problem—that the contract was made by the family physician, not be either of the spouses. Or else it was clear to the court that notwithstanding section 5121, the support statute, section 5132, made W liable to the surgeon.

Before the 1975 reform legislation the statute directed at liability of H’s separate property avoided the problem, as the language did not require a spouse to be party to the contract.162 Thus, in St. Vincent’s Institution for Insane v. Davis,163 the creditor found the insane W wandering around and took care of her without even knowing of H’s existence. The court had no difficulty holding H liable under the “necessaries” statute applicable then to husbands. Probably the courts would reach the same result today, holding that section 5132 is the pertinent statute, and it does not require that the obligations have been entered into by W (who was insane in Davis and simply could not have made a contract). However, to avoid uncertainty an amendment to section 5121 is

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161. At that time under former CAL. CIV. CODE § 171 (current version at CAL. CIV. CODE § 5121 (West Supp. 1980)) most of W’s separate property was exempt from “necessaries” liability. Property that was separately hers because of gift from H was liable, and if the couple had transmuted community property to joint tenancy or any other form of separate property, W’s separate interest was liable.
162. Former California Civil Code § 174, enacted in 1972, provided: “If the husband neglect to make adequate provision for the support of his wife, except in cases mentioned in 5131, any other person may in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.” CAL. CIV. CODE § 174 (current version at CAL. CIV. CODE § 5130 (West Supp. 1980)). It certainly was sound of the 1972-74 legislature to drop the language that limited the credit vendor to a quantum valebant suit and did not allow a suit to recover the actual contract for the stipulated price.
163. 129 Cal. 20, 61 P. 477 (1900).
advisable. It should impose liability on a spouse’s separate property for “necessaries” obligations whether or not contracted by the other spouse.

(2) Problems Arising From Reference to Quasi-Community Property

Redrafting of section 5132 is urgently needed. It makes no sense as written. The problem arises from the reference to quasi-community property. This concept usually has legal significance only at dissolution of marriage by death or divorce, although the homestead law and gift tax law do recognize the concept during the marriage.

Suppose $W$ buys necessaries on credit and does not pay. Her creditor obtains judgment. In seeking to collect on it he learns all the community property of the spouses is exempt under Civil Code sections 690.1 et seq. and other applicable exemption statutes. $W$ has no separate property. Assuming for the present, that the judgment runs against $H$ as well as $W$, can a creditor levy on $H$'s separate property? Section 5121 incorporates the limitations in the necessaries doctrine found in section 5132, which applied literally finds no support duty attaching to $H$'s separate property because community property does exist. That cannot be the legislature intended. The word "nonexempt" should be implied to

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164. At what time Cal. Prob. Code §§ 201.5-8 give the surviving spouse an interest in the quasi-community property closely analogous to a community property half ownership. The Probate Code sections do not use the term quasi-community property, but the definition of property covered by the sections is very similar to the definition of quasi-community property in the divorce context. See Cal. Prob. Code § 201.5(a) (West Supp. 1980). The difference is that at divorce, but not death, the doctrine includes out-of-state realty. When the title holder dies, it seems clear the Probate Code sections envision any court determining the rights of the survivor to use situs law rather than California law. The quasi-community property doctrine has no application when the marriage is dissolved by death of the spouse not holding "title" to the property. Paley v. Bank of America, 139 Cal. App. 2d 506, 324 P.2d 35 (1958). However, Cal. Prob. Code § 201.5(b) (West Supp. 1980) seems literally to confer a testamentary power of appointment over half the quasi-community property on the nonacquiring spouse who predeceases the title-holding spouse where there has been a change in form of the asset (e.g., a sale and reinvestment of proceeds) after its initial acquisition in another domicile. A technical amendment to conform subsection (b) to the language of subsection (a) so that it covers only acquisitions originally made by the decedent spouse and not the survivor spouse is in order.

165. In which case Cal. Civ. Code § 4800(a) (West Supp. 1980) calls for dividing the quasi-community property in the same manner as community property.

modify the term "community property" in section 5132. An amendment to the section clarifying this ambiguity is in order.

Suppose the necessaries creditor's judgment is for $1,000 and the nonexempt community property totals $500. There is some community property on hand that is liable. Does section 5132 mean the separate property cannot be reached at all and the necessaries creditor obtains only $500? Of course the legislature did not intend such a result, and section 5132 must be construed to authorize the creditor himself to exhaust the community property by levy of execution so that H's separate property is then liable.

A similar construction is compelled if the debt is $1,000 and there is on hand $500 of quasi-community property owned by W plus non-quasi community separate property of H. The creditor can by initial levy exhaust the quasi-community property of W's so that the conditions of section 5132 making H's separate property liable for necessaries are met.

Suppose, however, the $500 of quasi-community property is owned by H, not W. By what authority may creditor levy on anything now? The quasi-community property is H's separate property, which, clearly, is liable under section 5121, but section 5132 qualifies section 5121 and limits its scope. Taking the statutes literally, apparently the creditor cannot reach any of the property owned by H.\textsuperscript{167}

Obviously that was not what the legislature intended. Section 5132 must have been intended to be a pecking-order statute. The necessaries creditor can be required by the spouses to levy in the following order: community property; and when it is exhausted, quasi-community property; and when it is exhausted, separate property of the nondebtor spouse. What is completely unclear is where the separate property of the debtor spouse fits into the pecking order? Suppose debtor W is separately wealthy but there is no community property and none of W's separate property is quasi-community. H has some quasi-community property. Can W compel creditor to levy on H's quasi-community property? Probably she can. Can H compel creditor to levy on W's ordinary separate property because she is the debtor spouse? Probably

\textsuperscript{167} That is, read literally, § 5132 never imposes liability on nondebtor H's quasi-community property and shields his "regular" separate property from liability to the necessaries creditor so long as that quasi-community property exists.
not. Likewise, suppose both $H$ and $W$ have separate property that is not quasi-community. Can nondebtor $H$ compel the creditor to levy on $W$'s separate property? Apparently not.\footnote{168}{ Cf. Estate of Weringer, 100 Cal. 345, 34 P. 825 (1893), where the issue was whether $W$'s estate, which may have included separate property, or $H$ should pay medical bills for care rendered to the dying $W$. Citing the necessaries statute, former CAL. CIV. CODE § 174 (current version at CAL. CIV. CODE § 5130 (West Supp. 1980)), the court apparently holds $H$ responsible.}

The logic that leads to section 5132's placing quasi-community property on the pecking order before ordinary separate property calls for revision of the statute to place the debtor spouse's separate property ahead of the nondebtor spouse's separate property if the pecking order approach is to be retained. Apparently the quasi-community property is to be reached by creditors before the nondebtor spouse's regular separate property in order to preserve for him, the nondebtor, what will be 100% his (or his estate's) at dissolution by death or divorce. Where the necessary debt was incurred to benefit the debtor spouse herself (rather than, for example, consisting of clothes bought on credit for the couple's children) the case for protecting the nondebtor's spouse's regular separate property at the expense of the debtor spouse's separate property is arguably just as strong as the case of protecting quasi-community property.

Rather than revising the current pecking order to make it even more complex, the legislature ought simply to repeal section 5132 and remove reference to it in section 5121.\footnote{169}{ Elsewhere it has been recommended that § 5121 be reworded to extend the necessaries doctrine to debts not contracted by either $H$ or $W$. See text following note 163 supra.}

(3) Problems Concerning Rights of Reimbursement

If a "necessaries" creditor elects to levy on $W$'s property or on $H$'s, can the spouse who ends up paying for the necessaries get reimbursement as to a half share of the amount paid when the marriage is later dissolved by divorce or death? Some language in the case of See v. See,\footnote{170}{ 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1965).} implies a flat rule that any time separate property of a spouse is used to pay for necessaries there can be no reimbursement unless such reimbursement is based on an agreement between the spouses. But See is readily distinguishable from similar situations arising today. See arose before equal management under circumstances where all the community property of the couple was managed solely by $H$. The court was in a position to declare that it was $H$'s fault that the community property was exhausted when $H$ used separate funds to pay for family...
expenses.\footnote{171}

Under equal management it may be the “fault” of the spouse not owning separate property that there was no community property on hand when the necessaries creditor had to be paid, allowing the seizure of the other spouse’s separate property. The nondebtor spouse may have foolishly invested the community property or exhausted it on an extravagant spending spree. It certainly is not the fault of the separate property owner in such a case that no community property was on hand.

The See rule is also undesirable because a well-advised spouse in most instances can readily avoid it. If he can get an unsecured loan with the lender relying primarily on expected future community earnings for repayment,\footnote{172} these loan proceeds can be used rather than separate funds to pay the necessaries creditor. If subsequently acquired community funds are used to repay the lender, See could not have any application. Even if separate funds were used to repay the loan it is not clear whether the loan itself would be treated as a family expense under See.

If, to avoid See, \( H \) as the owner of separate property borrowed community funds from a bank to pay a necessaries creditor, the community would have to repay with interest. Can \( H \) also avoid See by the device of writing out a memo to the effect that his separate estate was making a loan (interest free) to the community?\footnote{173} Why shouldn’t the community get the benefit of such an

\footnote{171} The court held \( H \) could not use “total recapitulation” accounting to classify assets on hand as his separate estate—a process which has a built-in reimbursement of separate funds used to pay community debts, including necessaries—because \( H \) there had commingled separate and community property and “fail[ed] to keep adequate records.” \textit{Id.} at 784, 415 P.2d at 789, 51 Cal. Rptr. at 932. But if the commingling and absence of records occurred “through no fault of the husband” he could employ total recapitulation accounting. \textit{Id. See Beam v. Bank of America}, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971). Reimbursement would be improper, according to See, because “the husband has both management and control of the community property . . . [and] his use of separate property to maintain a standard of living that cannot be maintained with community resources alone” offered no equitable basis for a reimbursement claim. 64 Cal. 2d 778, 785, 415 P.2d 776, 781, 51 Cal. Rptr. 888, 893 (1966).

\footnote{172} There is a presumption that money borrowed during marriage is community; to overcome it the proof must show that the lender relied for repayment primarily on the separate property of a spouse. \textit{Gudelj v. Gudelj}, 41 Cal. 2d 202, 259 P.2d 636 (1953); \textit{Ford v. Ford}, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435 (1969). As yet there is no authority for apportioning the loan proceeds into part separate and part community when the lender relied on both estates in making the loan.

\footnote{173} \textit{Cf. Newland v. Newland}, 529 S.W.2d 105 (Tex. Civ. App. 1975) (writ dismissed) (\( H \)’s after-the-fact testimony that a transfer of funds from a community to
interest-free loan? But if See can so readily be avoided by H scribbling out a memorandum of "loan" when he pays the necessary creditor, the no-reimbursement rule is simply a snare for the separate property owner lacking sharp legal advice.

See has been cited by the California Supreme Court in a case dealing with post-1975 law as if its no-reimbursement rule were still in effect, although apparently the full range of anti-See arguments have not been presented to the court. If See was correct when decided, it was only because the case law as well as the statutes were at that time conferring special benefits on wives to indirectly compensate them for the more extensive management powers over community property given husbands simply because of their sex. For example, at the time of See, H had an unqualified duty to support W with his separate property but her separate property was liable for his support only if he was unable to work because of "infirmity." See should be legislatively abrogated or judicially overruled. If it is to be retained at all, the See rule of no-reimbursement should be made inapplicable to situations where, when community property is exhausted, both H and W own separate wealth. See should also be inapplicable where, at the time a necessary creditor must be paid, one spouse has separate property and the other spouse none, but the latter, prior to dissolution of the marriage, inherits or otherwise obtains separate wealth. If one of them pays a necessary creditor voluntarily or if the creditor levies only on the property of one of them, it seems shocking, since the spouses' support obligations are equal now under sections 5121 and 5132, not to allow a reimbursement at dissolution that will result in the spouses' separate estates sharing the task of supporting the family. Alternatively, a new statutory scheme could authorize one

separate account was actually a loan allowed H to avoid a rule of Texas law somewhat analogous to See).

174. In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979), holding H could not obtain reimbursement for necessaries paid for with his post-separation earnings that were separate property of H's under the living-apart doctrine, CAL. CIV. CODE § 5118 (West Supp. 1980). But Epstein was not a case where W herself had separate wealth. The See rule was also reiterated in the unfortunate Lucas decision. See discussion of Lucas pp. 812-13 supra.

175. Compare former CAL. CIV. CODE § 174 (current version at CAL. CIV. CODE § 5130 (West Supp. 1980)) (H's separate property liable) with former § 176 (current version at CAL. CIV. CODE § 5132 (West Supp. 1980)) (W's separate property liable only upon H's "infirmity").

176. The new reimbursement rule could require W's separate estate to pay to H's half of the net amount of family expenses paid for with his separate property in excess of that paid for by W's separate property. Or pro-ration could be based on the relative amounts of separate property each owned when the debt was paid. That is, if H used $1,000 of his separate funds to pay a necessary creditor when there was no community property and he had $20,000 separate property and W
spouse to direct the levying creditor to seize equal amounts of the separate property of both $H$ and $W$.

In sum, extensive revision of Civil Code sections 5121 and 5132 is needed to correct problems concerning rights of reimbursement. All reference to quasi-community property should be eliminated. Moreover, if the legislation abrogates See, distinguishing between quasi-community and ordinary separate property in the pecking-order statute (section 5132) will be unnecessary because the separate estate will be reimbursed at dissolution.

(4) Need to Clarify Procedures

Sections 5121 and 5132 should be replaced by a statute that defines necessary creditor so as to eliminate distinctions based on wealth and social status. The statute should empower a necessary creditor to levy execution on all marital property: community, $H$'s separate property, and $W$'s separate property, without distinction. If the pecking order approach must be retained, the statute should provide a procedure whereby a spouse can invoke a priority-of-liability provision, directing the creditor to community property not managed by that spouse or to community property which that spouse cannot unilaterally convey to the creditor. Where it is necessary to resort to separate property to pay the necessary creditor, the statute should authorize reimbursement to the separate estate that paid the obligation, at least if the other spouse has or later obtains separate property. The statute should specifically state that if neither spouse invokes the priority-of-liability provisions, the creditor's levy cannot later be set aside even if the creditor seizes separate property when nonexempt community funds were on hand.

The legislature should consider whether to continue in effect the rule that the necessary creditor cannot reach the separate

had $50,000, $H$'s claim for reimbursement is for $750, since $W$ should pay for 75% of the obligation.

Reimbursement approached in either such manner should be granted even if there was community property on hand at the time $H$ paid the debt. Particularly, this should be so if the community property was not liquid. It would be absurd to require $H$ to sell the family community-owned car, for example, in order to avoid an anti-reimbursement rule that would apply if he used his separate cash then on hand to pay the necessary creditor. Reimbursement should be denied only if the evidence shows that the spouse using separate funds for family expenses intended to waive the right to have the other spouse ultimately share a fair portion of the family support burden.

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property of a spouse who was not made a party to the action and did not become a judgment debtor.\textsuperscript{177} This rule developed at a time when the spouses practically lived separate in property. There was no shared management. Under contemporary equal management, if $W$ is defendant she represents $H$ in the litigation so as to bind his half interest in the community property. Should his separate estate be treated differently? Yes, if the spouses are then living separate and apart, particularly if there is no community property (or very little of it) compared to the amount of the nondebtor spouse’s non-quasi-community separate estate. In such a situation the debtor spouse would have little incentive to defend the suit. In other situations, however, a needless multiplicity of actions results. The plaintiff who sues only the debtor spouse may be surprised that nonexempt community funds on hand are insufficient to pay off the judgment. Now, since plaintiff did not add the spouse as a defendant, he has to burden the courts with another suit if legally possible.\textsuperscript{178}

(5) Problems Arising when Spouses Are Separated

Section 5131,\textsuperscript{179} creates an exception to the necessaries doctrine when the spouses are living apart by agreement. It should be repealed or redrafted. It should make no difference, when the issue is the liability of one spouse’s separate property for necessaries supplied the other spouse while they are separated, whether the separation was amicable (by agreement) or violent (no agreement). Indeed, the statute could penalize a spouse, who after the separation, becomes destitute because of his or her reasonable attitude at the time of the separation.

It was recently suggested that the “agreement” referred to in section 5131 is a formal, written contract governing the rights of the parties while living apart.\textsuperscript{180} Such a limited scope for the statute would make it more acceptable, but still the question arises


\textsuperscript{178} Certainly a good argument can be made that there is no separate cause of action against the debtor spouse and that the right to obtain a judgment against the latter has been merged into the judgment against the former.

\textsuperscript{179} It provides: “A spouse is not liable for the support of the other spouse when the other spouse is living separate from the spouse by agreement unless such support is stipulated in the agreement.” Cal. Civ. Code § 5131 (West Supp. 1950).

why, if the formal agreement is silent about support obligations, the law should assume that each spouse is waiving the right to support. When ambiguity arises, it would seem logical to construe the contract in favor of a continuing obligation of spousal support. This is particularly so when the contrary approach compelled by section 5131 could force an indigent married person to rely on welfare payments despite having a wealthy spouse.

In any event, there is authority contrary to the limited construction proposed for section 5131. Therefore at least some legislative consideration of the statute is imperative. The writer recommends outright repeal; the support obligation should continue until it is specifically waived by agreement.

b. One-spouse Community Bank Accounts

California Financial Code section 851 provides:

A bank account by or in the name of a married person shall be held for the exclusive right and benefit of the person, shall be free from the control or lien of any other person except a creditor, and shall be paid to the person or to the order of the person, and payment so made is a valid and sufficient release and discharge to the bank for the deposit or any part thereof.

Where one spouse has deposited community funds in an account in the name of that spouse alone, this statute creates an exception to equal management of the community by both spouses. However, the statute says, "a creditor" can levy execution on the funds in the account. Does this mean just a creditor of the depositor? Section 851 was amended to sex neutral form in one of the

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181. In an antenuptial agreement the support obligation cannot be waived as a matter of California's strong public policy. See, e.g., In re Marriage of Higgason, 10 Cal. 3d 471, 510 P.2d 289, 110 Cal. Rptr. 897 (1973). The same rule would apply to a contract made between the spouses after marriage but before a rupture of their marriage relation.

182. Estate of Bose, 158 Cal. 428, 111 P. 258 (1910) (W left H without any discussion of property rights yet what is now § 5131 held to be applicable because, apparently, of an implied agreement to live apart).


184. CAL. CIV. CODE § 5125 (West Supp. 1980). The exception for bank accounts seems reasonably necessary to avoid utter chaos for bankers. When W seeks to withdraw money deposited by H, the bank cannot know if it is separate property of H or perhaps community money of his § 5125(d) business. CAL. CIV. CODE § 5125(d) (West Supp. 1980); see text accompanying notes 188-97 infra. The bank really cannot even be sure that the woman is the depositor's wife. It must be able to rely on the contract of deposit and signature card in determining whether or not to approve a withdrawal of funds.
four acts making up the 1975 reforms. It will be recalled, a preamble to a companion act declared an intent to have debt liability follow management and control.\textsuperscript{185} If this preamble is a gloss on section 851, "a creditor" would refer only to a creditor of the spouse having management power over the bank account.

I do not believe that was the legislative intent. The preamble referred to stated a legislative policy intended to expand creditors' rights by giving retroactive effect to various new liability rules;\textsuperscript{186} there is no suggestion in the legislative history that the preamble would be turned against the creditor. Thus, Financial Code section 851 should be read in conjunction with Civil Code section 5116\textsuperscript{187} making community property generally liable for the contract debts of both spouses and Civil Code section 5122(b), making community property liable for the torts of a spouse. One-spouse community bank accounts appear to be an instance where a creditor can obtain by levy of execution property the debtor's bank account is not available to voluntarily draw on to pay the obligation.

c. One-spouse Community Business Assets

Civil Code section 5125(d) provides: "A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest."\textsuperscript{188} Once again the debt-liability issue is whether this is to be construed in conjunction with the statement of policy adopting the managerial system of creditors' rights or California Civil Code sections 5116 and 5122(b) declaring community property liable for the obligations of both spouses. If $W$ is the judgment debtor, can the creditor levy on community assets used in $H$'s community business if $W$ has never participated in its management?\textsuperscript{189} Resolving this question is much more difficult than resolving the related problem involving Financial Code section 851, for section 5125(d) is obviously intended to give protection to the business-operating spouse, while the Financial Code provision is intended to protect only the bank. If the man-

\textsuperscript{185} See text accompanying note 153 supra.
\textsuperscript{186} See note 153 supra; Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1007-25 (1975).
\textsuperscript{187} See text at note 151 supra.
\textsuperscript{188} CAL. CIV. CODE § 5125(d) (West Supp. 1989).
\textsuperscript{189} Just what $H$ might do to permit $W$ to be viewed as participating in the operation or management of the business is wholly unsettled and raises issues that will be faced if community assets in a § 5125(d) business are not to be treated as an exception to the managerial system of debt liability. I would assume that if $W$ even works as a clerk in a community-owned store where $H$ is the nominal boss, $W$ will be viewed as sharing in the "operation" of the business so that the problem does not arise. What if she just keeps the books?
ager spouse is $H$, allowing $W$ to deplete the community assets of his business by going into debt and having judgments taken against her followed by levy of execution on the community assets in $H$’s business will very clearly cause substantial interference for $H$.

While no reported cases deal with the problem, the commentators have stated widely varying views. One commentator assumes the principles of the managerial system of debt liability stated in the preamble apply so that none of the community assets in a section 5125(d) business operated by one spouse can be reached by ordinary creditors (i.e., not necessaries creditors) of the other spouse.190 Another author apparently agrees that principles of the managerial system at least presumptively render community assets in a section 5125(d) business not liable for the debts of the non-manager spouse.191 However, it seems he would permit such a creditor to reach those assets if the debtor spouse would otherwise be insolvent.192

Still another commentator, Professor Alan Pedlar in a student comment, opined that the spouse operating the section 5125(d) business can compel the creditors of the other spouse to first exhaust other property that is liable on the debt (i.e., the debtor’s separate property and community property that is neither exempt nor nonliable) before attempting to reach the assets of the business.193 According to Professor Pedlar, if the creditor was still un-

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Agreeing with Prof. Bruch is Note, Dissolution of Marriage After the Discharge in Bankruptcy: The Not So Fresh Start Doctrine, 10 PAC. L.J. 861, 884 n.27 (1979).


192. [C]ommon property can be removed from common control by investment in a business managed and controlled by one spouse. That removal of control of one of the spouses can be justified but if the effect is to deprive the creditors of that spouse of assets available to satisfy their claims, equitably and perhaps constitutionally, justification becomes difficult. In the past creditors have been allowed to trace community assets from their debtor to the spouse of that debtor on dissolution of the marriage. It would seem that any transaction removing assets from availability to creditors other than in return for fair value should permit similar tracing by creditors.

Id. at 401 (footnotes omitted).

193. Comment, The Implications of the New Community Property Laws for Creditors’ Remedies and Bankruptcy, 63 CALIF. L. REV. 1610, 1630-31 (1975). The writer is Professor Alan Pedlar in his law student days.
paid he could not simply levy execution on the community assets in the section 5125(d) business but would have to bring a special creditor's bill in equity against the manager spouse. The judge would determine how much community equity the manager spouse needed to keep his business alive and would declare this not liable. The judge would then make a charging order in the amount of the additional community interest in the business (that is, the value of the remaining equity not declared exempt) which would be an equitable lien on the community profits of the section 5125(d) business. Apparently, too, Professor Pedlar would allow creditors of the manager spouse whose claims relate to the business to intervene and establish a priority in reaching the community interest in the section 5125(d) business.

Professor Pedlar's theory might reasonably be adopted in a legislative revision of the statutes relating to management power and debt liability. But there is simply no legislative history at all to support his idea that present section 5125(d) envisions treating the one-spouse community business rather like a partnership when it comes to creditors' rights. I have made what I hope is a thorough review of the legislative history and conclude that the legislature just did not think about the creditors' rights problem. The present law, therefore, is what the statutes say on their face, and section 5116 says the community property is liable without qualification for the contract debts of both spouses. Section 5122 makes the community property liable for the tort obligations of both spouses. If W is the debtor and H the manager spouse, H simply has no basis for objection if W's judgment creditor sends the sheriff on a writ of execution to collect nonexempt equipment, stock in trade, cash, etc., that happens to be an integral part of the community business. The remedy for H is to borrow some money and pay off the creditor. Or he can incorporate the business. Then W's creditors would be able to reach corporate stock rather than specific assets.

The legislature should provide a method short of incorporating the business whereby the manager spouse could obtain the kind of protection advocated in Professor Pedlar's comment. The statute could provide for recodification of an election by the manager spouse to have a one-spouse community unincorporated business treated as entity for creditors' rights purposes. The creditor of the

194. Id. at 1633 n.125.
195. Id. at 1632.
196. See Reppy, supra note 186, at 990-1044.
197. It is assumed the business is neither incorporated nor an asset of a commercial partnership.
nonmanager spouse would acquire a share of the business rather
than breaking up the operation by a seizure of specific assets.

d. *Prenuptial Contract Debts*

California Civil Code section 5120 provides: “Neither the sepa-
rate 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.”\(^\text{188}\) Of course, unless the nondebtor's com-
munity earnings have been placed in his or her own bank account
or are tied up in a business the debtor is free to use such funds to
pay a prenuptial creditor.

There is uncertainty as to how readily the nonliability benefit
can be lost. There is no case law under section 5120 interpreting
this question. However, an analysis of cases decided under for-
erm California Civil Code section 168\(^\text{199}\) is useful. The cases de-
cided under section 168, which made \(W\)'s earnings not liable for
\(H\)'s debts, seem inconsistent. In one, a tractor had been
purchased partly with a known amount of \(W\)’s community earn-
ings and partly with other community funds. It was held \(W\) by
authorizing such an investment had “waived” the protection of
section 168 so that \(H\)'s creditor could seize the entire tractor.\(^\text{200}\)
This would suggest that any change in form of the earnings
removes them from the protection of section 5120. The decision
also seems to bar any type of “uncommingling” where nonliable
earnings have been combined with separate property, as in a
bank account, or with other community property that is liable.

Other cases under former section 168 suggested \(W\) would suc-
cessfully assert nonliability by identifying the earnings through
tracing and uncommingling.\(^\text{201}\) Since the legislature thought
there was good reason for providing for nonliability of certain
classes of earnings, these latter cases seem correct in not holding
the benefit to be lost when tracing was possible.

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(West Supp. 1980)).
Bertolone, 193 Cal. 751, 226 P. 913 (1924) (earning spouse is obliged to keep earn-
ings “separate and distinct” from property that is liable to the creditors).
Nelson, 42 Cal. App. 2d 750, 109 P.2d 966 (1941). Both cases state that the ques-
tion is whether the commingling of the earnings caused them to “lose their identity as
separate property.”
The uncommingling problems raised by section 5120 are somewhat different from the usual case of uncommingling separate from community property. Under section 5120 the problem arises when one type of community property, earnings of the nondebtor spouse, are mixed with other types of community property. In this situation the presumption or inference that separate funds are withdrawn to pay separate debts and community to pay family or community debts cannot be employed to determine whether the earnings are still in or have been withdrawn from a commingled bank account. About the only presumption that could apply is that each withdrawal consists of a pro-rata amount of the earnings and of other community property in the account.

Probably the courts will reach these sensible conclusions without amendment to section 5120. However, if the legislature is going to rewrite the statutes applicable to debt collection from married persons, section 5120 should either be repealed or a clause added that the nonliability benefit is available so long as the spouse can trace the earnings through changes of form and any commingling back to the source in earnings. The amendment should also make clear whether the legislature intends the nonliability benefit to attach to rents and profits of the earnings, as when the spouse places them in a savings account and collects interest.

202. See, e.g., In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).
204. Where the issue was separate or community characterization of withdrawals for investment, such a pro-rata approach to uncommingling was used in one case arising under Texas law. Duncan v. United States, 241 F.2d 845 (5th Cir. 1957). But cf. rejection of this approach in an analogous circumstance in Estate of Adams, 132 Cal. App. 2d 190, 282 P.2d 190 (1955). See also Falk v. Falk, 48 Cal. App. 2d 762, 120 P.2d 714 (1941).
205. Apparently the reason for nonliability is to encourage marriage and eliminate one of the benefits of “living in sin.” Absent § 5120, marriage would increase the amount of property one party’s creditors could reach by allowing access not just to his or her own earnings but to those of the partner as well. However, under current law the parties could achieve the same effect on creditors by an antenuptial contract to live separate in property after marriage. See text accompanying notes 314-20 infra. One wonders why the legislature decided to encourage only persons who had “contracted” a debt to marry. It would seem impossible to construe § 5120 as applicable to pre-marriage tort obligations, for example. If § 5120 is not repealed, similar treatment of similar problems calls for expanding its coverage to all types of pre-marriage creditors.
e. **Prenuptial Debts Neither “Contracted” for Nor Having Caused “Injury or Damage”**

Some commentators believe there remains after the 1975 reform of the community property statutes a judge-made exception to the managerial system of debt liability whereby one spouse’s separate property is liable for certain types of prenuptial obligations of the other spouse.206 The theory is that there is still life in the extraordinary decision of *Johnson v. Taylor*.207 Applying the English common law of coverture, *Johnson* held that when *H* married *W*, her debts208 became his under the “one flesh” fiction English law applied to marriage.209

With respect to all tort liability, *Johnson* is abrogated by Civil Code section 5122(a), providing: “A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefore if the marriage did not exist.”210 In addition the only sensible construction of Section 5120, dealing with debts “contracted” by *H* or *W* before the marriage, is that it lays out the only exception from the managerial system of liability that will be applicable to such debts.211 The exception provided by section 5120 is that the nondebtor’s community earnings are not liable for debtor’s premarital contractual obligations even though the earnings are subject to the debtor’s equal management. This construction would not permit a judicially created further exception whereby the separate property of

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208. H. VERALL, *supra* note 191, at 399, says the effect of the 1975 statutory reform eliminating gender discrimination from almost all aspects of California marital property law is to provide that “a married woman can be subjected to a similar judgment [i.e., as *H* suffered in *Johnson*] for the premarital debts of her husband.” He says § 5120 so provides. Nothing about it supports the assertion.

209. Because California became a community property jurisdiction in 1927, see text accompanying notes 15, 38 *supra*, the *Johnson* court’s reliance on the English common law of marital property is plainly erroneous unless the record indicated that only pre-1927 property was at issue. (Cases applying English common law to pre-1927 California marital property include *Van Maren v. Johnson*, 15 Cal. 308 (1860); and Medical Finance Ass’n v. Allum, 22 Cal. App. 2d Supp. 747, 65 P.2d 761 (App. Dep't Super. Ct. 1937) (dictum).) However, nothing in the *Johnson* opinion suggests that was the case. Apparently the court simply forgot that the 1927 enactment switched California to a civilian system of marital property.


211. Section 5120 is quoted in full in text preceding note 198 *supra*. 
the nondebtor spouse would be liable.212

Prenuptial obligations not in tort and not contracted for, such as statutory penalties, criminal fines, are unprovided for by specific statute. However, the preamble to the 1975 reform declaring that liability generally follows management and control213 is applicable and would not authorize imposing liability on the nondebtor spouse’s separate property. As to all prenuptial obligations, Johnson was erroneous when decided214 and should not be the basis of any exception to the managerial system of debt liability.

f. Nonliability of Separate Property Where Community Security Is Given

A little-known and unique statute, Civil Code section 5123(b) provides:

The separate property of a spouse is not liable for any debt or obligation secured by a mortgage, deed of trust, or other hypothecation of the community property which is executed on or after January 1, 1975, unless the spouse expressly assents in writing to the liability of the separate property for the debt or obligation.215

This is a strange form of anti-deficiency judgment protection. If the community security is insufficient, unlimited amounts of community property half owned by the debtor spouse and half by the other spouse may be seized, but the debtor spouse’s own separate property is not liable.

The reason for the statute, originally giving protection only to $W$, seems fairly evident. In 1917, legislation was enacted requiring $W$’s joinder when $H$ sought to mortgage community realty.216 It must have become commonplace when $W$ attended the closing

212. It would seem to be a good idea for the legislature to avoid this construction problem by specifically providing that the nondebtor spouse's separate property is not liable.

With respect to community property not subject to the debtor spouse's control (either under the financial code provisions concerning one-spouse bank accounts or CAL. CIV. CODE § 5125(d) (West Supp. 1980) creating one-spouse community businesses) the implication of § 5116 is that the common law theory of Johnson should not be used to impose liability for prenuptial contract debts. This is a possible implication of § 5116's declaration that community property is liable for "contracts of either spouse which are made after marriage."

213. See text accompanying note 153 supra.

214. See note 208 supra.

215. CAL. CIV. CODE § 5123(b) (West Supp. 1980). With respect to pre-1975 instruments, only $W$’s separate property is not liable, CAL. CIV. CODE § 5123(a) (West Supp. 1980), although arguably the discrimination is unconstitutional because of sex discrimination. See Arp v. Workers' Comp. Appeal Bd., 19 Cal. 3d 935, 563 P.2d 849, 138 Cal. Rptr. 293 (1977) (anti-male rule held invalid) with the "cure" being to strike the language of § 5123(a), restricting it to post-1974 instruments.

216. 1917 Cal. Stats. ch. 583 § 2, at 829 (as amended, CAL. CIV. CODE § 5127 (West Supp. 1980)).
of a credit transaction to pass her the promissory note itself to sign as well as the mortgage or deed of trust. That signature made W a co-debtor, and of course her separate property became liable.

Why the legislature in 1973-74 extended the benefits of the protective statute to H rather than repealing section 5123 is unclear. The statute is a snare that will trap unsuspecting creditors who believe that taking security can only increase the rights the creditor obtains. The statute requires adding “boiler plate” waivers of section 5123 to secured credit transactions. It should be repealed.217

217. See Carroll v. Puritan Leasing Co., 77 Cal. App. 3d 481, 143 Cal. Rptr. 772 (1978) (Kaus, J., concurring), suggesting that § 5123 was not intended to apply when W signed a separate promissory note rather than a combination mortgage and note. If the statute can be so construed, its repeal is not significant. I think it incapable of Justice Kaus’ interpretation, however.

Another reason for repeal of both § 5123 and § 5120’s nonliability provisions is suggested by Comment, The Implications of the New Community Property Laws for Creditors’ Remedies and Bankruptcy, 62 Cal. L. Rev. 1610 (1975), and Pedlar, Community Property and the Bankruptcy Reform Act of 1978, 11 St. Mary’s L.J. 349 (1979). The reason suggested is that these nonliability provisions will be disregarded by federal bankruptcy courts. In the common situation where a debtor spouse owns no separate property, § 5120 is of no significance to a creditor (who doesn’t care whose community earnings he is seizing) unless the nonliability provision excludes him from collecting on the debt. Similarly, § 5123 is primarily important where the creditor with community security cannot collect fully on the obligation because the obligor’s separate property is not liable. If the unpaid creditor forces the debtor spouse into bankruptcy, the nonliability may well be removed by force of federal bankruptcy law superceding state law regarding liability. The new bankruptcy act permits the bankrupt to select either state law or federal law exemptions. 11 U.S.C. § 522 (1979). Because §§ 5120 and 5123 render nonliable classes of property of unlimited value, it could very well be that the federal courts will hold that they are not “exemptions.”

Under the old bankruptcy act, the Arizona rule making community property nonliable for separate debts was respected in federal bankruptcy courts even without statutory authorization to do so. Comment, supra, at 1657. See also In re Wallace, 22 P.2d 171 (E.D. Wash. 1927); Moore, The Community Property System and the Economic Reconstruction of the Family Unit: Insolvency and Bankruptcy, 11 Wash. L. Rev. 61 (1936). Prof. Pedlar’s comment finds legislative history to the effect that the new bankruptcy act was to be enforced according to its literal terms making all nonexempt community property the “estate” which all classes of creditors can reach, see 11 U.S.C. § 541(a)(2) (1979), notwithstanding the contrary law of Washington and Arizona where a debt was separate. Comment, supra, at 1660 n.282 (citing Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess. pt. I at 196-97 (1973).

The fate of the Arizona nonliability rule under the new act has yet to appear in a reported decision. Logically, whatever happens to that rule should apply to the nonliability provisions of §§ 5120 and 5123 of the California Civil Code, which are really no more state “exemptions” than the Arizona rule. If bankruptcy courts are going to disregard these nonliability provisions of California law, they will have an
g. Child Support Obligations

Present California law is chaotic when it comes to child-support obligations. Statutes are seemingly inconsistent, but it appears that exceptions to the managerial system of liability do exist. A large exception is carved out by Civil Code section 199, which provides: "The obligation of a father and mother to support their natural child[218] . . . 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 [judicial] dissolution of their marriage. . . ."[219]

However, Civil Code section 5127.6[220] creates an apparent exception to the immunity of some classes of community property extended by section 199. Section 5127.6 provides that "the community interest" of a parent in the earnings of his or her spouse "shall be considered unconditionally available" for the support of "any child who resides with the child's natural or adoptive parent who is married to such spouse."[221]

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[218] Section 199 of California Civil Code was ruled unconstitutional in 59 Op. Cal. Att'y Gen. 15 (1976) because of discrimination in favor of bastards and against legitimate children. The attorney general construed "natural" to mean legitimate. This meant that a bastard could reach all his father's wife's earnings under Cal. Civ. Code § 5116 (West Supp. 1980) while a legitimate child could reach none. Because of the use of the word "natural" in § 5127.6, see note 221 and accompanying text infra, it appears that the legislature intended the word to mean a child related by blood rather than adopted. Cal. Civ. Code § 5127.6 (West Supp. 1980). Under this approach, § 199 is unconstitutional for discriminating in favor of adopted children and against children born to the parents. The former can reach all of the earnings of their father's wife for support, while similarly situated nonadopted children can reach none. The "cure" seems to be to remove the special benefit for adopted children by applying § 199 to them too. Legislation amending § 199 to make it apply to adopted as well as "natural" children is in order. Moreover, since natural normally means bastard when applied to a child, Black's Law Dictionary 303 (4th ed. 1951), the connective legislation should substitute the term blood-related for natural in both § 199 and § 5127.6 if it wishes to draw such lines.

Section 199 does not apply when the first marriage of a parent is dissolved by death and the parent then remarries. Suppose father H is the survivor and the children are placed in the custody of their maternal grandparents. To the extent that § 199 controls liability, the earnings of W-J are liable (because the statute makes no exception to the basic rule that what H manages, his creditors can reach) but they would not be if W-J were alive. Whether such discrimination in favor of children who have only one parent living denies equal protection is unclear.


[221] Here the word "natural" obviously means related by blood. Section 5127.6 goes on to state that the amount available is to be reduced by the amount of "any existing previously ordered child support obligations of such spouse." One com-
Certainly a question exists whether the language "is considered unconditionally available" means that it really is available to the children. If so, then section 199 does not fully apply\footnote{222} where the children are living with one parent and a spouse of that parent who is not the children's parent. Rather, such children can reach the parent's half interest in the nonparent spouse's earnings. Thus, a partition of the community of the kind the supreme court says cannot happen\footnote{223} will happen. Presumably the remaining half interest becomes the separate property of the wageearner spouse.\footnote{224} Whether a change of form in the money earned, as by investment in securities, changes the nonparent's earnings into some other form of community property protected by section 199 has yet to be considered in any reported case or by any commentator.\footnote{225}

Where the children are not living with the parent owing child support and the wife is the obligor parent an exception to section 199 arises under Civil Code section 5127.5.\footnote{226} Section 5127.5 extends liability of the community for the wife's child support be-
yond her own earnings as follows: "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 of support is owed . . . ." 227

Section 5127.5 was enacted in 1971 when H's earnings were subject only to his management and would not have been liable at all for any obligations of W except for "necessaries." Since the subsequently enacted section 199 was inconsistent with it, section 5127.5 seemed to have been impliedly repealed by the 1975 reform legislation. 228 However, legislation in 1979 referred to section 5127.5 as if still in effect, 229 and it is therefore not surprising that at least one appellate court agreed that it was. 230

The statute, by calling for a partition of the community, thus reduces the extent of the exception to the managerial system of liability created by section 199 for child support cases. However, section 5127.5 as written is surely unconstitutional for a discrimination against women that cannot be rationalized. 231 The likely cure is to apply it to the support obligation of male parents as well as female parents.

E. Debt Liability When Spouses Live Separate and Apart

The rules of law concerning liability for debt do not change when the spouses begin living separate and apart, but the practical differences are extensive. California Civil Code section 5118 makes the "earnings and accumulations"232 of both H and W after such a separation233 the acquiring spouse's separate property. It

227. Cal. Civ. Code § 5127.5 (West Supp. 1980). The section goes on to exempt W's half interest in the first $300 per month earned by H and her interest in community earnings H uses to pay his own child support obligations.


229. Section 5127.5, quoted in part in text preceding note 221, supra, begins as follows: "Notwithstanding Section 5127.5, the community property interest . . . [etc.]."


231. See C. Bruch, supra note 221, at 66 n.90. The male parent's half interest in his wife's wages is immunized by § 199 to his benefit, so he can bequeath this half interest at his death, will be awarded it at divorce, and can manage it prior to dissolution.

232. Cal. Civ. Code § 5118 (West Supp. 1980). Support H pays to W while they are separated has been held an "accumulation" of hers which becomes her separate property under § 5118. In re Marriage of Wall, 29 Cal. App. 3d 76, 105 Cal. Rptr. 201 (1972). Probably all gains accruing after the separation will be separate property on one theory or another except rents and profits from pre-separation community property. See In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975).

233. As to what kind of living arrangement triggers § 5118 to make subsequent earnings separate, see Loring v. Stuart, 79 Cal. 200, 21 P. 651 (1889); In re Marriage
is thus not liable for the other spouse's debts.\textsuperscript{234}

Second, $H$ and $W$ probably each take with them or keep certain community assets existing at the time of separation and purchase with community cash then on hand new assets necessary when one household splits into two. A judgment creditor of $H$ is perfectly free to levy execution on the nonexempt community assets located at $W$'s household, for under no theory of marshaling of assets\textsuperscript{235} is such community property any less liable on the preseparation community debt than community assets in $H$'s apartment.\textsuperscript{236} If debtor $H$ is uncooperative and is concealing as-
sets, the well-advised creditor will not bother with supplemental proceedings but simply send the sheriff to W’s house to collect nonexempt community assets.237

Third, separated spouses who obtain legal advice save the post-separation earnings that are separate property under section 5118 and consume community funds on hand. This is done because the community funds can be seized by the other spouse’s general creditors, while only that spouse’s necessaries creditors can reach the post-separation earnings (and only on a showing that the separation was not by agreement). Additionally, the community property will be divided at a subsequent divorce while separate property is retained by the owner.238

With respect to the separated spouse’s own community debts, use of separate funds to make payment risks a finding later of gift that might bar reimbursement.239 If the debts are separate, as most post-separation obligations will be, the voluntary use of community funds to pay them while conserving separate property will not technically provide much of a benefit to the spouse, since the other spouse will have a right of reimbursement.240 From a practical standpoint, however, the spending spouse and his attorney could reasonably conclude it was beneficial to have nondivisible separate property on hand at divorce, with the burden on the other spouse to prove a debt paid was a separate debt in order to obtain reimbursement.241

If one of the spouses is in a position to obtain support payments from the other, Civil Code section 4805 is some help in preventing

to invoke this agreement as a basis for deferring H’s creditors from community property now managed solely by her. The effect of § 5116 in such a case is unsettled. In any event, such a management contract could no more defeat H’s creditors than could a transmutation of ownership interests.

237. The very difficult problem of how many exemptions exist in this situation is an issue happily beyond the scope of this article.


The no-reimbursement rule has been relaxed for a separated spouse to one extent: if earnings that are separate under § 5118 after separation are used to pay a community debt existing before separation that is not for necessaries (i.e., not covered by the spouse’s duty to use separate funds to support the other spouse and their children), such use of separate funds is not a gift and the right to reimbursement may be later asserted. In re Marriage of Epstein, 24 Cal. 3d 76, 552 P.2d 115 (1976), In re Marriage of Smith, 78 Cal. App. 3d 725, 145 Cal. Rptr. 205 (1978).


241. There is also the point that interest has never been granted in a reimbursement situation. See note 131 supra. Using community funds to pay the post-separation separate debt allows the debtor spouse to keep separate funds in an interest-paying account or otherwise use them to generate separate income.
the payor spouse from draining off the community property. If suit for divorce or legal separation is commenced, the court may order support or alimony payments to be made. Section 4805 provides that the order shall require the payor spouse to first draw on postseparation earnings which would have been community property had there been no separation; only when such separate earnings are exhausted shall the payor resort to community funds to pay support. Section 4805 also assures the payor the right, however, to exhaust community and quasi-community property before resorting to ordinary separate property.

Revision of section 4805 in 1974 to require separate earnings to be used before community property in paying spousal support during separation reflects concern that the debt-payment process where spouses are living apart can cause harm to one or both spouses. Additional statutory protection seems advisable. A statute specifically allowing the nondebtor spouse to require the other spouse's separate creditors to first exhaust separate property of the debtor spouse would resolve any doubts as to whether the general marshaling statute, section 3433, applies in such a case. Additionally, a statute should provide that where during or after separation the spouses made a voluntary division of physical possession of the community property (even if they did not intend to transmute the property to separate property), the nondebtor spouse can compel community or separate creditors of the other spouse to first exhaust community property in the possession of the debtor before levying on property possessed by the spouse seeking this type of marshaling.

244. See 1974 Cal. Stats. ch. 1329, § 1, at 2685.
245. Section 4805 states that its order-of-payment provisions apply to "any decree, judgment or order of support" rendered under the family law act. This would include a decree of ordering post-divorce alimony. However, § 4805 cannot be construed to allow the alimony obligor to pay with community property not divided by the divorce court and now tenancy in common property. See, e.g., Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (1979). Use of such funds to pay the support obligation would require turning over $2 for every $1 owed.
247. The procedure should authorize the creditor to object on the ground that forcing him to locate community assets of the debtor spouse would cause him to incur costs that he might not be able to recover. The nondebtor spouse should be cautious in invoking the proposed remedy. For example, suppose the debtor is W; she now possesses such assets that no support order will be issued against H. If her creditor takes the community property in her possession, her financial status
F. Liability on Predivorce Debts Where Levy Occurs After Dissolution

In making an equal division of the community property, the divorce court must identify all unpaid outstanding or contingent debts, value them, and order one of the spouses to pay each debt or a specified part thereof. But such an order is not binding on a creditor of either spouse unless the order was entered in a proceeding in which the creditor was a party. Former community assets awarded to the nondebtor spouse, say W, become her separate property after divorce. However, the assets remain liable to H's creditors who at the time of divorce have a judgment against him or creditors to whom H is in default and who obtain their judgment after the divorce. By the logic of these decisions the former community property now owned solely by W would also be liable, if the contract was entered into before the divorce although the breach occurred after the divorce, even though the divorce court ordered H to be responsible for the obligation. A Washington case illustrates this. During marriage, in operating a community motel business, H contracted to rent from plaintiff television sets for the motel rooms. H and W were divorced, the court awarding H the motel and W other community property. H was ordered to be responsible for the debts of the motel business. At the time the community was dissolved the motel owed some $500 in television set rentals; thereafter further defaults on rental occurred. The court held the rental contract not severable into subrental periods, and thus in its entirety it was an obligation made by H during marriage. W was an appropriate defendant in plaintiff's suit for breach of contract, since property she owned was liable for the breach.

In all cases where W pays any part of a debt assigned to H by the divorce court, she will have a cause of action against him for reimbursement of the amount paid, hopefully with interest from

(continued with the other criteria considered under CAL. CIV. CODE § 4801 (West Supp. 1980)) will entitle her to a support order, which H must pay out of separate earnings. H might possibly be better off and probably could not be hurt by just paying W's creditor with community property in his possession.


the date of her payment. Additionally, the law should imply a right on her part to reimbursement of all litigation expenses, including attorney's fees. Additionally, when the creditor institutes action after H and W have been divorced, there is authority that a court of equity will order marshaling of assets by an order compelling the creditor to first exhaust the assets now owned by the debtor spouse.253

May the creditor levy against former community property now owned by W after divorce when the judgment runs only against H? In other words, is W a necessary party if post-divorce execution is to be levied against her property? Clearly she is not a necessary party if the judgment is obtained before divorce.254 Under current California law it would seem not to matter that the suit was filed against H and the judgment obtained while he and W were living separate and apart, since the equal management statute does not cut off the power of each spouse acting alone to bind the community property when a separation occurs.255

When the suit is commenced against H before a final divorce decree and the creditor obtains his judgment on the debt after divorce, one California case indicates W is bound although she was not made a party.256 This seems necessary as a practical matter. If the creditor begins the suit while divorce is pending, equal management is in effect. Also before a final divorce decree, even if the spouses are separated, the creditor cannot be sure there will ever be a divorce. W's lawyer in the divorce suit should be able to find out about the litigation and bring it to the attention of the divorce court. Probably, a separated W can intervene in the suit against H as a party defendant to protect her interests.257 So

256. Bank of America Nat'l Trust & Sav. Ass'n v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935) (assuming, which is not clear from the facts, that the final divorce decree was obtained after the interlocutory decree period without substantial delay). The problem of whether W was bound by the judgment against H as a privy of his was not discussed.
257. The fact of separation distinguishes the situation where one spouse becomes a party during marriage and cohabitation in litigation affecting the community. I have elsewhere taken the view as to this situation that the spouse first
long as \( H \) is the statutory co-manager of the community property when suit is filed, it would not deny due process to place on \( W \) the status of \( H \)’s privy in order to make the judgment binding on her interest in the community property awarded to her at a subsequent divorce.

Where the creditor begins the suit after divorce, the state of Washington requires that \( W \) be made a party if former community property now owned by her is to be bound. Due process would seem to require as much, since the co-manager relationship on which privity could be based if the suit began before divorce is absent. California courts can be expected to follow the Washington precedent without a statute, yet legislative codification is desirable because there are difficult related problems that need legislative solution. First, may \( W \) assert counterclaims and set-off available to \( H \)? Surely she should be able to do so, but some procedure must be fashioned to assure that the judgment of the court on such defensive claims is binding on \( H \) so that the creditor will not have to re litigate them with \( H \). The statute then should provide that \( W \) may assert defensively all claims \( H \) could, including those claims not related to the community. However, to do so \( W \) must make \( H \) a party.

The second question is whether the creditor has any prejudgment remedy such as attachment to prevent \( W \) from consuming the only property she possesses that is liable on the debt, former community property. It would seem that so long as \( W \) receives consideration for her expenditures such as food, medical care, rental housing, etc., the creditor has no legitimate basis for com-

making an appearance as a party “seizes control” of the community interest in the suit, disabling the other spouse from filing documents, dismissing counsel, etc. See Reppy, supra note 101, at 1021.


259. If \( W \) has moved out of state, the transaction entered into by \( H \) will have sufficient connections to California (at least if \( H \) and \( W \) were domiciled in California when \( H \) entered into it) that long-arm jurisdiction can constitutionally be had over \( W \). The community, of which \( W \) was a member, will almost certainly have sufficiently availed itself of the benefits of California law so that either community partner can be subjected to service of process out of state or by publication. As to the present due process standard for long-arm service, see Kulko v. Superior Court, 436 U.S. 84 (1978). Section 410.10 of the Code of Civil Procedure provides for long-arm jurisdiction in all situations where the state and federal constitutions permit its exercise. Cal. Civ. Proc. Code § 410.10 (West 1973).

260. For the reasons stated in the preceding footnote, \( W \) ought to be able to get long-arm jurisdiction over \( H \) with respect to the issues she seeks to raise because of the likely close connection between \( H \) and the debt that has brought \( W \) into court. The California divorce decree ordering \( H \) to pay that debt should itself be ample basis for such long-arm jurisdiction.
plaint. Anytime the law makes certain classes of property liable to a creditor and other classes not liable or exempt, the debtor is invited to consume the former and preserve the latter. That $W$ will do all she possibly can to consume the former community property prior to rendition of judgment against her is something the creditor is well aware of prior to bringing suit.

Finally, what form should the creditor’s judgment against $H$ and $W$ (or just $W$) take? Should it determine what assets are former community property? Should it be an unlimited judgment against $W$ with the issue of what property is liable postponed to the execution stage of proceedings? Analogous cases indicate that the creditor need not identify at the trial any property $W$ possesses that is liable on $H$‘s debt. If $W$ permits an unlimited judgment to be entered against her, she may waive the nonliability status attached to her property that is not former community property. Since there is no authority directly on point, legislation resolving all such uncertainties would be useful.

G. Debt Liability and Property of Unmarried Persons Living Together as if Married

1. Voidable Marriages

A marriage declared voidable by California Civil Code sections 4401 and 4425 is treated as a marriage for all purposes under the law until a party with standing to attack it obtains a judgment of nullity, California’s cumbersome new term for annulment.


262. See Carroll v. Puritan Leasing Co., 77 Cal. App. 3d 481, 143 Cal. Rptr. 772 (1979), holding nonliability of separate property under CAL. CRIM. CODE § 5323 is waived if not raised at trial and recited in the judgment. Carroll is distinguishable in that it involved a wife who was a primary debtor, not just the owner of property that is liable. The distinction may not be significant, however, because the requirement that the judgment list the nature of property that is not liable may be for the benefit of the sheriff levying execution subsequently. A smooth execution procedure is needed whether or not the spouse sued is primarily liable or derivatively liable as the owner of property that is liable.

263. Section 4401 (as well as section 4425(b)) make a bigamous marriage voidable and not void if the former spouse was missing for five years before the second "marriage" and reputed to be or believed to be dead. Section 4425 makes marriages voidable where consent of a "spouse" is tainted by minority, insanity, or fraud or when one spouse has proved to be permanently impotent. CAL. CRIM. CODE §§ 4401, 4425(b) (West 1970).

264. Estate of Gregorson, 160 Cal. 21, 116 P. 60 (1911), indicating standing is conferred on the aggrieved "spouse" and such persons as conservators who protect
The annulment then retroactively wipes out the community. If a spouse establishes putative status by showing a good faith belief in the validity of the marriage, acquisitions which were community property are called quasi-marital property in the annulment proceedings. If neither spouse establishes putative status, the rules applicable to “Marvin” relationships apply. No case has decided whether a preannulment creditor of one of his or her interests but not on strangers to the marriage. Certainly a creditor will not have such standing. (Seldom would a creditor benefit from such an attack, but he could if he had contractually agreed to look only to separate property of a spouse to obtain repayment of a loan, for example. Voiding the marriage would make at least half of the debtor “spouse’s” earning debtor’s separate property, and perhaps all of it.)

266. Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911) (declaring property that had been community no longer was and that community property rules regarding division on dissolution would “apply by analogy” in favor of a putative spouse); In re Marriage of Dracifello, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979). See generally Comment, The Void and Voidable Marriage: A Study in Judicial Method, 7 Stan. L. Rev. 529 (1955), observing the retroactive invalidation of all effects of the voidable marriage is the “black letter rule” but that many exceptions are recognized (citing, e.g., People v. Godines, 17 Cal. App. 2d 723, 62 P.2d 787 (1938) (annulment does not eliminate claim of marital privilege for pre-annulment communications)). Cal. Civ. Code § 4429 (West 1970) states: “The effect of a judgment of nullity is to restore the parties to the status of unmarried persons.” This certainly does not mandate retroactive change in the community status of acquisitions prior to the annulment.

267. It is unsettled whether, if one of the “spouses” was in good faith but the other knew of the defect preventing a valid marriage, the latter can take a quasi-marital half share in the acquisitions of the good faith “spouse” that were community property before annulment. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 75, 134 Cal. Rptr. 615 (1976), notes and specifically refrains from deciding the issue while overruling on other grounds In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), which had declared the nonputative “spouse” could benefit from the quasi-marital property doctrine.

Kay & Amyx, Marvin v. Marvin: Preserving the Options, 65 Calif. L. Rev. 937, 947-52 (1977). The authors think Cary was wrong and that only a putative spouse has standing to invoke § 4452. Under Cary it would be impossible for one party to the union to be a putative spouse but the other not, yet § 4452 directs the court to “declare such party or parties to have the status of putative spouse” (emphasis added).

Apparent the very instant one of the “spouses” learns of the invalid marriage he or she loses putative spouse status. Lazarevich v. Lazarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948). Suppose Pam “married” Ed in good faith, but he knew that he had never been divorced to dissolve a prior marriage. The couple had several children. Years later Ed confessed the bigamy and agreed to get a divorce quickly from his first wife. Pam chose to stay with Ed and forgive him, especially because of the children. The Lazzarevich rule means that Pam has no community or quasi-marital interest in any of Ed’s earnings accruing after his confession. The rule apparently reflects what I consider a totally unrealistic notion of morality. The rule is preposterous and should be legislatively abrogated. Section 4452 should be amended to provide that putative status once attaching continues until annulment or death of a party, at least absent unusual facts making this inequitable. See Jackson v. Swift & Co., 151 So. 816 (La. App. 1934).

269. See note 7 supra and text accompanying notes 283-82 infra.

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the "spouses" to a voidable marriage can be adversely affected by an annulment's retroactively eliminating the community. For example, Joe and Sue marry, he having obtained her consent by fraud. Joe incurs large debts. Sue frugally saves her earnings and successfully invests them. Sue learns of the fraud and sues for annulment, with a judgment rendered shortly before Joe's creditors levy execution based on judgments they obtain against him. If the marriage had been valid we know the dissolution judgment would not bar creditors from levying on Sue's earnings awarded her at divorce. But what happens when Joe and Sue's marriage has been declared void and annulment decreed? If the effect is retroactive as to creditors, all of Sue's earnings are not liable on the ground they were retroactively converted to her separate property.\textsuperscript{270}

It seems possible that if Joe's creditor could establish that Sue and Joe had held themselves out as married and the creditor relied on that in entering into his transaction with Joe, some sort of estoppel might arise to prevent Sue from denying the community status of her preannulment earnings.\textsuperscript{271} However, it is unlikely a creditor could prove that he knew Sue was holding herself out as married or, if he could prove that, establish the further element of estoppel that he dealt with Joe in reliance on his being married to Sue.\textsuperscript{272}

Interestingly, however, the cases involving estoppel and the effect of annulment on third parties have not required evidence of

\textsuperscript{270} Joe's necessary creditors could not reach Sue's separate property if full retroactive effect were given to the annulment decree, because Sue would never have had a duty to support the man she was never married to. It is conceivable that, notwithstanding the fraud that tainted the marriage, an implied Marvin-style sharing contract could be found between Joe and Sue. If that agreement made her earnings co-owned by Joe, his creditors could perhaps reach a half interest after the annulment. See text accompanying notes 271-73 infra.

\textsuperscript{271} There certainly would be no problem raising an estoppel if Sue were the spouse who knew of the defect of the marriage. On the hypothetical facts, however, if Joe defrauded Sue and she had no reason to know that when she held herself out as his wife, she has no knowledge of the true facts superior to that of the creditor, and one of the usual elements of estoppel in pais is absent. Mott v. Nardo, 73 Cal. App. 2d 159, 166 P.2d 37 (1946) (no estoppel where knowledge of facts by parties is "equal").

\textsuperscript{272} See CAL. EVID. CODE § 623 (West 1986). Comment, The Void and Voidable Marriage: A Study in Judicial Method, 1 Stan. L. Rev. 529 (1955), opines that the relation back of the fiction of annulment law should not be used to the harm of third parties who relied on the existence of the marriage and that the "reasonable expectation of creditors" should be given weight.
any reliance by the third party. In one,273 a woman’s status as trust beneficiary would terminate on her marriage. She “married” but then obtained an annulment. The court held her estopped to deny the marriage, conceding the alternate trust beneficiaries had not taken any action in reliance on the apparent marriage but holding this was irrelevant. A statute provides that “[a] judgment of nullity is conclusive only as to the parties to the proceeding and those claiming under them.”274 In enacting this, it is doubtful that the legislature had in mind the rights of creditors of the parties to an annulment. However, the statute is susceptible of the interpretation that creditors can avoid the retroactive effect of annulment without proving the elements of estoppel in pais such as reliance, unequal knowledge of actual facts, etc.275

Since the law is so uncertain in this area, a specific statute is advisable. The statute should provide that annulment of a void marriage shall not bar creditors from asserting the former community property status of assets now owned by the “husband” or “wife”.

2. Void Marriages

Incestuous and most bigamous marriages are declared void ab initio by statute.276 If both parties know of the defect, the union will be treated as a “Marvin” arrangement.277 If both parties believed in good faith that the union was valid, at annulment their earnings will be quasi-marital property and distributed like community property at divorce.278 The case law is also quite clear that prior to annulment the earnings of the parties that would be

274. CAL. CIV. CODE § 4451 (West 1970).
275. See note 272 supra.
277. See text accompanying notes 284-92 infra.
278. CAL. CIV. CODE § 4432 (West Supp. 1980). See note 267 supra, observing the uncertainty as to whether both “spouses” obtain the benefits of the quasi-marital property doctrine when only one was in good faith. Obviously this uncertainty should be legislatively resolved. Legislation specifically extending the quasi-marital property doctrine to dissolution of the union by death is also needed. At present, the courts must apply the doctrine by analogy on the basis of equities when dissolution is by death. Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974). See also Estate of Krone, 63 Cal. App. 2d 766, 189 P.2d 741 (1948) (decided before the quasi-marital property statute was enacted). The quasi-community property system is made applicable at death (although that term is not used), CAL. PROB. CODE §§ 201.5-201.8 (West Supp. 1980), as well as at divorce, CAL. CIV. CODE §§ 4803, 4800(a) (West Supp. 1980). Similar symmetry seems desirable for the quasi-marital property doctrine.
community in a valid marriage are not community property. One decision implies that the "spouses" prior to annulment own such property as tenants in common. Under basic principles of debt liability the creditor of each could seize only a half interest. There is no authority whether a necessaries creditor of one "spouse" to a void marriage can reach separate property of the other spouse when the creditor cannot raise an estoppel in pats.

However, most cases dividing earnings at annulment of the void marriage speak of doing equity. These cases necessarily deny any ownership interest in the "spouse" of the party making the acquisition. On this theory, the creditors of the acquiring "spouse" could seize all of his earnings but none of the other "spouse's" earnings.

For creditors' rights purposes a void marriage should be treated as valid. The voidness of the marriage should be a problem between the spouses, not something reducing the rights of third parties. For debt liability purposes, at least, the creditor should be able to treat the earnings of each party as community property. Since the courts are unwilling to take this step, it is up to the

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279. See, e.g., Goff v. Goff, 52 Cal. App. 2d 23, 125 P.2d 948 (1942). It matters not that both may have believed in good faith that their marriage was valid.

280. Sousa v. Freitas, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970). Earnings from a business in which both parties to the marriage worked might also be held as business partnership property.

281. In the context of married couples, the necessaries doctrine seems to rest on the obligation of support. See CAL. CIV. CODE § 5121 (West Supp. 1980) (referring to CAL. CIV. CODE § 5132 (West Supp. 1980)). See also CAL. CIV. CODE § 5131 (West Supp. 1980). A statute authorizes a good faith putative spouse to a void or voidable marriage to obtain alimony pendente lite. CAL. CIV. CODE § 4455 (West Supp. 1980). Thus, at least where the necessary debtor is such a putative spouse, it would appear that the basis for permitting the creditor to reach the separate property of the debtor's "spouse" exists. I recommend legislation imposing the duty of mutual support on parties who have gone through a marriage ceremony (whether the marriage was void or voidable). The statute should make clear that creditors can invoke it.

282. See, e.g., Schneider v. Schneider, 183 Cal. 335, 191 P. 533 (1920); Estate of Vargas, 39 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974). A curious statute, CAL. CIV. PROC. CODE § 872.210(b) (West 1980), provides that no action to partition quasi-marital property can be brought. This does not necessarily mean, however, that the nonacquiring spouse has a property interest before annulment in what CAL. CIV. CODE § 4452 (West Supp. 1980) calls quasi-marital property. If the parties to the invalid marriage (each being a putative spouse) combined their earnings to buy land, it would be quasi-marital, and partition before annulment would be available absent the bar of § 872.210.

283. Under Spanish civil law, on which the post-1927 California system is based,
legislature to make such a reform.

3. "Marvin" Relationships

Persons who live together as if they were married but who have never attempted to marry, or have gone through a ceremony both knew was invalid, are said to be involved in a meretricious relationship. This term suggested a sort of lawless union, but now that the much discussed case of Marvin v. Marvin gives considerable legal protection to parties based on the implications of that relationship, some new term seems needed. This article will refer to these relationships as Marvin relationships or arrangements and the parties thereto M (for male) and F for (female).

The Marvin decision approved enforcement at the termination of a living-together arrangement of an expressed or implied contract to share earnings so long as the contract was not for prostitution. Disapproving a contrary court of appeal case, Marvin also held that provisions of the Family Law Act, such as Civil Code sections 5105 and 5110, did not apply to such a relationship to make the earnings of M or F community property by force of statute. Marvin is silent on how, prior to a judgment enforcing the express or implied contract, the earnings and other onerous acquisitions of M and F are owned. Under the contract theory of Marvin, this could depend on the intent of the parties.

Suppose the agreement was that M and F would co-own the onerous acquisitions of each as tenants in common. Once that form of ownership was achieved, the creditor of each could seize a half interest in each asset but could not reach the half interest of the nonobligor cohabitant. The problem is whether the law would give effect to a contract that sought to have tenancy in common status arise ipso facto as money was earned or property was otherwise onerously acquired without the acquiring spouse mak-

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there is in fact a community of property when both spouses are in good faith. See La. CIV. CODE ANN. arts. 117, 118 (West 1952). The many cases stating that there can be no community of property without a valid marriage reject the civil law. This has forced California courts to turn to equitable principles and analogies to achieve the just results that are straightforward under the civil law doctrine. Occasionally the California courts have refused to fashion a device to give a good faith spouse the benefit of the civil law rule. Thus, a putative spouse was denied the status of heir of her "husband" in Estate of Levie, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975), an outrageously bad decision especially in its misunderstanding of the policy behind CAL. CIV. CODE § 4104 (West 1970) to validate rather than invalidate marriages. Enactment in California of La. CIV. CODE ANN. arts. 117-18 (West 1952) is long overdue.

284. W. REPPY & W. DE FUNIAK, supra note 2, at 66.
ing any assignment or delivery. If some act of assignment or deliv-
ery were required to create the cotenancy and if the acquiring
cohabitant had not carried out such act with respect to acquisi-
tions on hand when the other party's creditor levied execution,
the creditor would have to assert the right to garnish the debtor's
contractual claim (to sue for damages or specific enforcement).
There is no authority whether a Marvin-based contract claim can
be garnished or creates third party beneficiary rights.288

The problem of the need for delivery or assignment to carry out
the promise of coownership also arises if the express agreement
between M and F is that their onerous acquisitions will be commu-

nity property. Such an agreement raises additional problems.
Since there is no marriage, the assets cannot be owned as true
community property. The contract should be construed as mak-
ing applicable to the M-F relationship as much of the community
property law as can lawfully apply. That should include the rules
of Civil Code sections 5116 and 5122 that the earnings, and other
onerous acquisitions, of M are liable for the contract and tort
debts of F incurred during the relationship.289 A contract speci-
cically declaring such liability would surely be construed as creat-
ing third party beneficiary rights in F's creditors.290

288. There is no reported case yet of a creditor claiming as third party beneficiary under a Marvin contract. In Planck v. Hartung, 98 Cal. App. 3d 638, 159 Cal. Rptr. 673 (1979), M, while using F's barbecue apparatus, negligently caused a fire destroying plaintiff's property. Plaintiff apparently sought an unlimited judgment in tort against F on the theory that barbecuing the meal was a joint venture. The court affirmed a judgment dismissing the claim against F. That was erroneous. Plaintiff should have been allowed to prove a Marvin-style contract adopting by analogy the principles of community property and sue on it as a third party beneficiary. Applying Cal. Civ. Code § 5122(b) (West Supp. 1980) by analogy, M committed a community tort and F's earnings during the relationship are primarily liable. If the parties were married, it is true, F would not be a necessary defendant, but that type of analogy to community property law was not the reason for dismissal. Given the uncertainty of remedy against a Marvin relationship cohabitant under facts like Planck v. Hartung, obviously F had to be made a party defendant if plaintiff was to reach F's earnings. The court said: "If Hartung [M] and McDavid [F] had been married, there would have been no liability on the part of McDavid (see Civ. Code, § 5122, subd. (a).)" 36 Cal. App. 3d at 922, 139 Cal. Rptr. at 675. The court's failure then to deal with the implications of subdivision (b) is surprising.


290. The argument against the creditors would be as follows: sections 5116 and 5122 make only co-owned earnings liable to the creditors of both H and W. The earnings of M, a Marvin relationship cohabitant, are separate property and not co-owned until he carries out his promise to share by making a delivery to F or executing documents of assignment.

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Of course, few parties to a Marvin relationship will have made a formal, written contract. Even where such a contract exists, it may be vague on the issue being considered, such as, "We agree to share everything fifty-fifty." Probably most often any contract found under the Marvin doctrine will be implied rather than expressed. In such circumstances the law has to fill in the gaps for the parties. The possibilities are: (1) incorporation of as much of the community property rules as the law allows, including the promise to subject one's earnings to liability for debts of the other party incurred during the relationship; (2) ownership of earnings as tenants in common; (3) ownership by the acquiring party alone subject to a contractual duty to share fifty-fifty such acquisitions when the relationship ends by death or splitting up.

In a case where the creditor is lead to believe that M and F are married and acts in reliance thereon, both parties should be estopped to deny that their agreement is alternative number (1). The analogy to community property that alternative (1) provides probably allows the creditor to reach all the earnings of both spouses in most instances. Even when the creditor cannot raise a technical estoppel, public policy ought to place the burden of proof on the cohabiters to establish that their Marvin contract was not of the type most favorable to third parties. Legislation codifying such a rule is recommended.

The legislature should also consider the wisdom of a statute imposing obligations of mutual support on parties to a Marvin relationship so that if the contract between the parties were clearly not type No. (1) a supplier of necessaries to one of them could still reach the separate property of the other.\(^{291}\) It may be argued that the recommended package of legislation almost approaches recognition of a common law marriage.\(^{292}\) But fairness to credit vendors would be served by such a step. After the Marvin decision has given legitimacy, and so many of the benefits of community of property, to the relationship the supplier of medical care, food, rent, etc., on credit should not be denied the benefits of the

\(^{291}\) Compare Gerlach v. Terry, 75 Cal. 290, 17 P. 308 (1888). Apparently M and F were living in a meretricious relationship. M employed a physician to care for F. The court held her separate property not liable on M's contract with the physician.

\(^{292}\) There is an important area, however, where community-style obligations built upon a Marvin contract foundation will be treated very differently from the effect given to a true community of property following a marriage: federal taxation. When the community arises out of a contract and not as a matter of law at the time of marriage, the Internal Revenue Service treats the resulting co-equal ownership as arising from an assignment of income. Commissioner v. Harmon, 323 U.S. 44 (1944). There appears to be no consideration in money or money's worth for the assignment, see 26 U.S.C. § 2511 (1979), so the gift tax implications are staggering.
necessaries doctrine applicable to married persons when it turns out the debtor is actually living "in sin."

IV. Interaction Between Creditors’ Rights Law and Transmutation Principles

The basic rule is that a third party entering into a transaction with \( H \) or \( W \) wherein the spouse may become an obligor takes his debtor as he finds him. To state the obvious, if third-party \( T \) contracts with \( H \) at a time \( H \) has already been divorced from \( W \), when \( T \) later obtains judgment against \( H \) for breach \( T \) cannot possibly have any claim on \( W \)'s earnings accrued at any time, except insofar as \( H \) had a cause of action against \( W \) that \( T \) might garnish. \( T \) also could not reach any property \( H \) had given to \( W \) at any time unless the conveyance was made with actual intent to defeat \( H \)'s creditors.293

Where the method of conveyance under attack by a subsequent creditor is a husband-wife transmutation, two major problem areas arise: (1) the timing of the conveyance and what is necessary to make it effective; and, (2) the proof and formalities necessary to establish the conveyance, in particular whether the spouses can assert against third parties the right to make oral transmutations of realty and whether third parties can impeach the spouses' written records to increase their creditors' rights. Somewhat different problems arise from agreements merely shifting management and not ownership.

A. Transmutations and the Problem of Delivery

1. Gifts and Sales

As has already been noted,294 gift transmutations between \( H \)
and $W$ can be made informally; no documents of assignment are necessary and no delivery of tangible items is required for the gift to be valid between the spouses. However, a number of informal transmutations changing ownership which were seemingly valid between the spouses have been held not to bind creditors because of Civil Code section 3440, providing in pertinent part:

Every transfer of personal property . . . made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor’s creditors while he remains in possession . . . .

The statute has been applied unflinchingly in the context of marital property transfers where a formal delivery and change of possession could have been expected only for the sake of legal ritual. In *Murphy v. Mulgrew*, sauce $W$ purchased sauce some horses from $H$ pursuant to a bill of sale signed by him. The animals remained in a barn on the homestead occupied by $H$ and $W$, and $H$ continued in his capacity as manager of the homestead to use the horses. Notwithstanding the formalities of the bill of sale, $H$’s creditors were allowed to seize the horses under section 3440. Similar

are unmarried, if they live together the law loosen up the delivery requirement—at least to bind the parties to the alleged gift. Where the new owner wishes to keep the gift in the same location occupied by both parties, no symbolic movement of the tangible property off the premises and back on again is required. See Robinson v. Houton, 215 Cal. 370, 2 P.2d 344 (1931) (father-to-son gift of livestock on farm where both lived); Estate of Raphael, 115 Cal. App. 2d 523, 252 P.2d 979 (1953) (mother-to-son gift of furniture in house they both lived in); Graham v. Griffin, 68 Cal. App. 2d 116, 153, 151 P.2d 679, 882 (1944) (father-to-daughter gift of cow on ranch where both lived).

295. Cal. CIV. CODE § 3440 (West 1970). The statute lists several exceptions—such as transfers of choses in action, cargoes at sea, and wines in wineries. The transferee can also bind creditors by recordation of the transfer in certain instances. It has been noted that the exceptions relate to “transactions of limited importance to the domestic setting.” C. Bruch, supra note 221, at 67 n.137. Section 3440 is not part of the Uniform Fraudulent Conveyances Act. It evolved from an 1830 New York law that exempted good faith transactions. S. Reisefeld, Creditors’ Remedies and Debtors’ Protection 405-06 (3d ed. 1979). It was first enacted in California as part of the 1872 Field Code.

296. 102 Cal. 547, 36 P. 857 (1894).

297. Section 3440 applies to transfers for full consideration as well as to gifts.

298. An earlier and apparently contrary decision, Morgan v. Boll, 81 Cal. 68, 22 P. 331 (1899), held that $W$ did take possession of a horse and buggy she acquired from $H$ even though $H$ continued to use it much as before the transfer. See also Kane v. Desmond, 63 Cal. 461 (1883) ($H$ “delivered” piano to $W$—how he could do so without keeping possession himself not explained). Morgan has been limited to its fact situation in which the horse and buggy “seem[ed] to have been publicly known and recognized as hers by all who used it.” 61 Cal. at 97, 22 P.2d at 332. In O’Kane v. Whelan, 124 Cal. 200, 56 P. 889 (1899) ($H$ gives $W$ horse and wagon by written assignment), there was no such public knowledge, but $W$ had recorded an inventory listing the assets as her separate property. Such constructive public knowledge did not prevent $H$’s creditors from seizing the horse and wagon pursuant to § 3440.
cases involve a purchase by one spouse from the other, by way of formal bill of sale, of commercial equipment not moved from a business where both H and W worked\textsuperscript{299} and an automobile housed after the transfer in a garage at their home owned by the purchaser-spouse who permitted the vendor-spouse to use the vehicle.\textsuperscript{303}

2. Transmutations Neither Gifts Nor Sales

Whether a transmutation that does not change the quantum of ownership of the spouses but merely the nature of ownership and management powers is a section 3440 “transfer” has yet to be decided. A community-to-joint tenancy transmutation is of this type.\textsuperscript{301} In Allen v. Meyer,\textsuperscript{302} a business consisting of community personal property was formally transmuted by a property settlement contract executed by H and W into tenancy in common. There was no delivery, and H by agreement with W continued to manage the business as before. A bankruptcy referee held this was a section 3440 transfer void as to H’s creditors. The Ninth Circuit Court of Appeals affirmed on an agency theory.\textsuperscript{303}

The referee was wrong to apply section 3440 to a transmutation that involves no change in the quantum of ownership. It is absurd to require delivery and change of possession when community property is converted into joint tenancy property, or vice versa, because the right of coequal possession by H and W has not changed. Merely management rights and succession rights have changed. If such a transmutation harms creditors—and clearly it can—it should be attacked for actual or constructive fraud, not on technicalities respecting delivery. Under this approach, post-transmutation creditors will seldom be able to object


\textsuperscript{300} Blaney v. Cline, 53 Cal. App. 696, 200 P. 751 (1921).

\textsuperscript{301} So is the converse joint-tenancy-to-community, but it will always benefit creditors unless the community property falls under some special exception to Cal. Civi. Code §§ 5116, 5122 (West Supp. 1980) (e.g., if the assets become community property in a single spouse business and Cal. Civi. Code § 5125(d) (West Supp. 1980) is construed as creating an exception to §§ 5116 and 5122).

\textsuperscript{302} 195 F.2d 940 (9th Cir. 1952).

\textsuperscript{303} Specifically that because W had appointed H to manage her tenancy in common half of the business, he entered into business-related contracts as her agent and bound her as principal.
to the transaction. However, if at the time of a community-to-joint-tenancy transmutation one of the spouses is heavily in debt, on obligations not for "necessaries," and the other is not, the arrangement, which would, if effective, cut in half the amount of property the creditors could reach smells of actual fraud. Section 7 of the Uniform Fraudulent Conveyances Act (Uniform Act) provides a remedy for both existing and subsequent creditors.304

Where there is no actual fraud, but the transmutation renders the debtor-spouse insolvent, no remedy is provided by the Uniform Act because of adequate consideration.305 However, one federal case construed California case law as giving relief to existing creditors. In *Wikes v. Smith*,307 *H* and *W* divided $2,000 of community funds into portions of $1,000 for each spouse, and each deposited his portion in a bank account in his name. Without specifically deciding whether this was a transmutation of community funds into equal parts of separate property or an arrangement shifting management power over community property,308 the court held there had been a "transfer" that *H*’s creditors could attack. Any agreement between *H* and *W* to transmute to separate property or otherwise defeat creditors "came too late to affect the rights of creditors of Gerald [*H*], since all such creditors extended credit while the property retained its community status."309 Reliance was placed on cases holding that conversion by court decree at divorce of community property into equal shares

304. CAL. CIV. CODE § 3439.07 (West 1970) provides: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

305. CAL. CIV. CODE § 3439.04 (West 1970) is the statute dealing with constructive fraud based on transfers creating insolvency. It provides: "Every conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made . . . without a fair consideration."

306. CAL. CIV. CODE § 3439.03 (West 1970) provides: "Fair consideration is given for property . . . when in exchange for such property . . . as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied." Obviously, insofar as a community-to-joint tenancy transmutation is construed as debtor *H* conveying anything to *W*, she conveys to him in consideration something of equal value.

307. 455 F.2d 1143 (9th Cir. 1972).

308. Under Financial Code provisions similar to those now in effect, see text accompanying notes 183–87 supra, *W*’s depositing $1,000 of her funds in the bank account gave her sole control. It was assumed by the *Wikes* court that the managerial system of liability meant that unless the transfer could be voided, *H*’s creditor could not reach community funds in *W*’s bank account notwithstanding that the Financial Code provisions gave the depositor-spouse control free from interference by all persons except creditors." As indicated above, see text accompanying note 186 supra, I believe this interpretation of the Financial Code provision is erroneous.

309. 455 F.2d at 1146.
of separate property does not bar a creditor seizing assets now owned by the nondebtor spouse by tracing to former community status.\textsuperscript{310}

Section 3440 should also be held inapplicable to transmutations intended to act \textit{in futuro} and which are not technically gifts because the object of the transmutation does not now exist. For example, an “agreement” by \textit{H} that all of his future inheritances would be community property or that all of \textit{W}'s future earnings will be her separate property may involve in some sense “transfers” of personal property. However, the transferor is not in possession of the assets at issue at the time of the agreement, and if this is considered the time of “transfer” then section 3440 does not apply.\textsuperscript{311} If the transfer is viewed as delayed until the property subject to the transmutation agreement comes into existence, there may be a few cases where the transferor has a possession of which to divest himself. That is unlikely in the case of converting inheritances into community property or converting one spouse’s earnings into her own separate estate. However, an unusual transmutation contract wherein \textit{H} agreed his own earnings would be \textit{W}'s separate property might trigger section 3440 delivery problems. They are avoided if \textit{W}'s ownership is viewed as relating back to the time of the original agreement so that no property interest of \textit{H}'s, that he might “transfer”, ever attached to the earnings.

\section*{B. Transmutations and the Problem of Insolvency}

Whether a transmutation can be avoided by creditors for constructive fraud under section 4 of the Uniform Act because it causes insolvency\textsuperscript{312} will often depend on when the transmutation

\begin{itemize}
\item \textsuperscript{310} See text accompanying notes 248-62 \textit{supra}.
\item \textsuperscript{311} See text at note 255 \textit{supra}.
\item \textsuperscript{312} See note 305 \textit{supra}. Insolvency is defined in \textsc{Cal. CIV. Code} § 3439.02 (West 1970). The transferor may be technically “in the black” after the transfer but still is insolvent under the Uniform Act if unable to meet debts that are likely to come due in the future, including contingent obligations. See Albertson v. Raboff, 183 Cal. App. 2d 372, 8 Cal. Rptr. 398 (1960); Baker v. Geist, 437 Pa. 73, 321 A.2d 634 (1974) (applying identically-worded Pennsylvania version of Uniform Act). \textit{See also} pre-Ac. California law, accord \textit{Alpha Hardware & Supply Co. v. Ruby Mines Co.}, 97 Cal. App. 508, 275 P. 984 (1929), Borgfeldt v. Curry, 25 Cal. App. 624, 144 P. 976 (1914).
\item An interesting problem exists as to whether \textit{W}'s “necessaries” creditors should be considered in assessing his insolvency if \textit{W} has adequate separate property to pay them in full. The way the statute is worded, apparently the amount of those
\end{itemize}
is considered to have occurred. As indicated above, there are several types of transmutation where the agreement between $H$ and $W$ is made before the asset subject to it comes into existence.

1. Antenuptial Contracts

California Civil Code section 5134 provides that parties anticipating marriage may make "marriage settlements." Section 5135 provides that insofar as such contracts have "granted or affected" real property, they must be recorded in the county where such realty is located. The implication of this is that with respect to assets other than real property, third parties are bound even if the contract is not recorded.

The inclusion of these statutes at the end of title 8 of the Family Law Act—which includes the sections defining community and separate property and the liability of each to creditors—implies that such a contract is a means for varying the statutory rules that would otherwise attach to a marriage. A typical "marriage settlement" is an agreement to live separate in property. By permitting such a contract, section 5134 creates a situation whereby a community of property never exists between the spouses. Thus when after marriage $W$ labors at her job and is paid wages, they are at all times hers. The alternative construction is that the community property statutes, such as section 5110, attach to $W$'s wages and then the antenuptial contract immediately converts the coownership between $H$ and $W$ to the sole ownership of $W$. The first interpretation is preferable. Under that interpretation, a creditor of insolvent $H$ unable to reach $W$'s separate property could not object to characterization of the earnings as $W$'s separate property on grounds $H$ was already or was thereby rendered insolvent. Under the alternative view, there is a transfer at the time $W$ is paid which is constructively fraudulent under section 4 of the Uniform Act.

Suppose the antenuptial agreement provides that all $H$'s future inheritances will be community property rather than separate

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314. Id. § 5135.
315. Id. § 5110 (West Supp. 1980).

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property but does not contract for a general community. Since the concept of H's separate property does exist in such marriage, it is a bit easier to characterize the contract as operating at the time of inheritance to make a transfer from H's separate estate to community property. Nevertheless, since the proper construction of the agreement to live separate in property is that California Civil Code section 5110 (creating a community) never applied at all to the marriage, symmetry suggests viewing the community-inheritance clause as restraining from the outset of the operation of Civil Code section 5108 (which would have made H's inheritance his separate estate) so that it never applied to inheritances (although it did apply to gifts and property owned by H before marriage). Thus, under this interpretation the property would never be separate with a transfer to community, but would be community from the moment of the inheritance.

With respect to creditors existing at the time of making of the antenuptial agreement, rather than at the time of an alleged subsequent "transfer", the agreement to live separate in property should not be constructively fraudulent. The debtor spouse simply changes his status from single to married with the creditor having the same rights as existed before the change of status. Of course actual fraud might be proved to give the creditor relief under section 7 of the Uniform Act.

2. Postnuptial Transmutations

With respect to a postnuptial transmutation, in many instances the analysis as to when—for purposes of determining if a transfer was by an insolvent or rendered the transferor insolvent—the transmutation is effective is the same as with an antenuptial agreement. Thus, an agreement shortly after marriage by H that future inheritances would be community property should be

317. This would seldom hurt creditors, but it is possible that H in order to assure that funds he borrowed would be his separate property (see note 172 supra), persuaded a lender to agree to look to H's separate estate alone for repayment.


319. Cf. Aufdemkamp v. Pierce, 4 Cal. App. 2d 275, 40 P.2d 599 (1935), where by antenuptial contract H agreed to convert some of his separate property to W's separate property. He did so after the marriage. The court found "relation back" to the extent that W's agreement to marry H was consideration for the transfer.

320. CAL. CIV. CODE § 3439.07 (West 1970). If unmarried H had somehow obtained a loan from a creditor who agreed to look solely to his separate property in the event of H's marriage, the agreement to make his future inheritances community seems patently fraudulent under § 7 of the Uniform Act.
viewed as expanding the scope of the community applicable to the marriage at the time $H$ makes his declaration just as an ante-nuptial declaration would take effect at marriage. A postnuptial agreement by $H$ and $W$ that both would thereafter live separate in property should be viewed as eliminating the community from their marriage at that moment. Accordingly, when one of the spouses later is paid earnings during marriage, they are his or her separate property *ab initio*; community status does not attach to the earnings, to be *eo instante* converted into separate property by a transfer, possibly fraudulent, from the nonearning spouse of his or her community half interest.

3. Tax Cases as Precedent

Before nationwide income splitting for federal income tax purposes was authorized in 1948, several decisions tested whether splitting could be obtained by a transmutation or whether the right to split was lost. The outcome depended on whether an interspousal agreement affecting future acquisitions was immediately executed or whether a transfer occurred later each time an affected asset was acquired. The results seem inconsistent, unless an approach generally favorable to the tax collector is a thread of consistency.

Where the transmutation sought to divide ownership of future acquisitions, it was treated as executory so that a transfer occurred each time affected property was obtained. Thus, in *Lucas v. Earl*, $^{321}$ Californians $H$ and $W$ made a pre-1927 agreement that their future onerous acquisitions would be co-owned in joint tenancy rather than so-called community property, which pre-1927 meant they were the acquiring spouse’s separate property. According to the United States Supreme Court, when $H$ subsequently had earnings, California law of so-called community property first attached to the earnings to make them $H$’s alone so that he became liable for the full income tax. Then the transmutation agreement operated on the earnings, converting them into joint tenancy property by way of assignment from $H$ to $W$ of a half interest.$^{322}$ *Commissioner v. Harmon*, $^{323}$ involved Oklahoma

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322. The *Lucas* court did not discuss the disturbing gift tax implications. As to them, see Rev. Rul. 77-355, 1977-2 C.B. 24. The spouses—they were from Washington, although that makes no difference to the applicability of the ruling in other states—contracted that all future inheritances and gifts received by either would be community property. The Internal Revenue Service said there would be a taxable gift (as to half the value) each time $H$ or $W$ received a gift or inheritance, and it could be reduced for gift tax liability purposes only to the extent the other spouse also received an inheritance or gift during the same calendar quarter. Thus, if $H$ inherited $1$ million in December 1960 and $W$ inherited $1$ million in Jan-

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spouses at a time that state had a statutory community of property regime that was optional; spouses who did not affirmatively elect to come under the regime lived separate in property.324 The election of H and W to live in a community of property was treated like the agreement in Lucas v. Earl causing an assignment of income every time one of the spouses received a pay check.

On the other hand, where the agreement was to live separate in property rather than under California's post-1927 community of property regime, at least for income tax purposes, the agreement is viewed as fully executed when made. Under two Ninth Circuit decisions, earnings are viewed as separate property from the moment of acquisition, and no assignment of a half interest by the non-earning spouse is hypothesized.325 Clearly, these holdings cannot be squared with the tax treatment of agreements to make community that which would otherwise be separate.

The Ninth Circuit approach is far more logical than Lucas and Harmon and avoids a host of problems in giving effect to the intention of the spouses. For example, if the logic of Lucas and Harmon is applied, California spouses would dare not separate amicably with any semblance of an "agreement" to live apart. The courts could construe any such agreement as the spouse's opting to make Civil Code section 5118 applicable. If H earned

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324. A somewhat similar state of the law obtains today in many civil law jurisdictions. In Quebec, the legal regime is a form of deferred community (separate until dissolution) unless the spouses by agreement elect the community of movables and gains or a regime of separation of property. Que. Civ. Code arts. 1266 et seq. (legal regime); 1270 et seq. (community of movables and gains); 1436 et seq. (separation of property) (Y. Renaud & J. Baudoin eds. 1974). In France, the spouses have a choice of six statutorily-defined conventional regimes ranging from separation of property to a universal community, the legal regime being a deferred community. C. Civ. arts. 1400-91 (legal regime); 1498 et seq. (details of six other regimes) (Dalloz 1977-78).

325. See, e.g., Sparkman v. Commissioner, 112 F.2d 774 (9th Cir. 1940); Helvering v. Hickman, 70 F.2d 985 (9th Cir. 1934). Both cases upheld the non-earning spouse's claim of no income tax liability. However, because of progressive tax rates, the overall effect is beneficial to the IRS where the spouses cannot agree on the filing of a joint return.

$40,000 while separated from W, Harmon would treat W as assigning half of it to him under their agreement to live separate and apart; she would have to report $20,000 of this income on her separate return. One can imagine California lawyers instructing spouses on how to effectuate a violent separation that could not be construed by the I.R.S. and federal courts as involving any agreement.\textsuperscript{327}

C. Formalities of Transfer and the Effect on Creditors and Other Third Parties

The rules permitting spouses to transmute real property without a signed writing and to effectuate transmutations without either consideration or delivery could reasonably have been confined to disputes between the spouses themselves, not affecting third parties. The same is true of the doctrine dispensing with the Parol Evidence Rule in husband-wife disputes and permitting community ownership to be established where a deed recites a joint tenancy. However, the law has developed to the contrary. Perhaps it is not surprising that a creditor of H or W should be able to prove the “true” state of property ownership and not be defeated by the spouse’s invoking formalities of transfer that do not apply to transactions between them. But to permit the spouses to impeach through transmutation theory unambiguous record “title” in order to defeat creditors’ claims can be viewed as abuse of the doctrine of “easy transmutation.”

1. Creditors Using the Doctrine Against the Spouses

One of the earliest cases inviting creditors to impeach formal “record” title was Hurlburt v. Jones.\textsuperscript{328} The wife had filed and recorded a formal declaration making her a sole trader and her income from her trade her separate property.\textsuperscript{329} A creditor of H sought to reach earnings of this business on the theory they were really community property. The court said such creditor would prevail if the evidence showed W only nominally engaged in the business, “it being understood between them [H and W] that all

\textsuperscript{327} For tax purposes the ideal form of separation would be found in Patillo v. Norris, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976) (putative wife ordered from family home at gunpoint). If the parting is extremely amicable, it may not qualify as a § 5118 separation at all (and income will still be community) according to the analysis of In re Marriage of Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (1977), discussed in Comment, Living Separate and Apart Under Section 5118 of the Family Law Act—Effects and Implications of the Baragry Decision, 6 W. St. U.L. Rev. 163, 193 (1979).

\textsuperscript{328} 25 Cal. 225 (1864).

\textsuperscript{329} See text accompanying notes 25-27 supra and 377-83 infra.
... profits should belong to him as between them..."\(^{330}\)

More recently, in *Hansford v. Lassar*,\(^{331}\) *H*'s creditor sought to levy on the entire interest of the spouses in land which had been conveyed to them by deed reciting a joint tenancy. Creditor contended that the property was really community and that all rather than just debtor *H*'s half would be liable. Creditor prevailed by establishing that the spouses did not know the difference between community property and joint tenancy and thus could not have transmuted from community to joint tenancy the funds used to buy the land. Similarly, in *Hulse v. Lawson*,\(^{332}\) *H*'s creditor impeached a joint tenancy deed by showing community funds were used for the purchase and there had been no actual agreement to transmute. In *Tinsley v. Bauer*,\(^{333}\) *W* had established a joint tenancy bank account, but her creditor was able to reach all of the funds in it rather than just her half by tracing deposits to *W*'s community earnings and showing there had been no transmutation.

2. Spouses Using the Doctrine Against Creditors

The tables were turned against the creditor in *Oak Knoll Broad-
casting Corp. v. Hudgings.\textsuperscript{334} W’s creditor levied on a joint tenancy bank account, seeking to seize W’s half interest. H resisted the levy on the theory the funds in the account were actually community property, his earnings at that time not liable for W’s ordinary debts, those debts not for “necessaries”. The spouses testified they didn’t know what joint tenancy was, and so the holding was no transmutation had occurred and creditor’s claim nothing.

H’s creditors were also defeated in Spear v. Farwell,\textsuperscript{335} when they levied on a bank account nominally held in joint tenancy in order to reach H’s half interest. Intervening, W testified funds in the account were her separate property and that, although she deliberately chose the joint tenancy designation for the account, all she intended was that H would get the money at her death. The court found a mistake of law and further found that H’s creditor in extending credit had not relied on H’s owning a half interest in the account. Creditor’s judgment lien did not reach any of the funds because

[i]t is not the lien of judgment affects the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show that the apparent ownership of another is or was not real; and when the judgment debtor has no other interest except the naked legal title, the lien of judgment does not attach.\textsuperscript{336}

In two other cases, title was in H’s name, but when his creditor sought to levy on it, W successfully objected that she had supplied separate property consideration and had not made a gift.\textsuperscript{337}

\textsuperscript{334} 275 Cal. App. 2d 563, 80 Cal. Rptr. 175 (1969).
\textsuperscript{335} 5 Cal. App. 2d 111, 42 P.2d 391 (1935).
\textsuperscript{336} Id. at 114.
\textsuperscript{337} Murphy v. Clayton, 113 Cal. 153, 45 P. 267 (1896); Owings v. Laugharn, 53 Cal. App. 2d 789, 128 P.2d 114 (1942). In both cases the finding of no transmutation was bolstered by the English common law doctrine of purchase money resulting trust.

Section 853 of the California Civil Code recites a general presumption of resulting trust where the title in a deed of Realty is not the same source as the funds paid in consideration. CAL. CIV. CODE § 853 (West 1954). However, the statute has been construed in a discriminatory manner: applicable where W was the party directing title be placed in H’s name (see, e.g., Socol v. King, 56 Cal. 2d 342, 223 P.2d 627 (1950); Shaw v. Bernal, 163 Cal. 262, 124 P. 1012 (1912); McKinnon v. McKinnon, 181 Cal. App. 2d 97, 5 Cal. Rptr. 43 (1959)) but inapplicable, with a presumption of gift arising instead, where H had title put in W’s name (see, e.g., Altramano v. Swan, 20 Cal. 2d 622, 128 P.2d 533 (1942); Estate of Claussenius, 90 Cal. App. 2d 690, 216 P.2d 465 (1950)). So construed § 853 is clearly unconstitutional because of indefensible sex discrimination. See note 78 supra. The obvious “cure” is to apply it according to its terms without creating an exception where H is the acting party. Yet, the recent cases strongly indicate that the state supreme court will cure by the other alternative: excepting from the statute all interspousal transactions and presuming a gift in such cases. See In re Marriage of Lucas, 27 Cal. 3d 806, 614 P.2d 285, 166 Cal. Rptr. 653 (1980) (down payment on house paid by W with separate funds; title taken in joint tenancy; gift presumed).
In other cases where the spouses have sought to impeach record title to defeat creditors the trier of fact has not been convinced, but no such case had held that a creditor could rely on record title or apparent ownership under the statutes defining community and separate property.

A third party's reliance on apparent title was frustrated in *Diefendorff v. Hopkins*. W was operating a boarding house but was not a registered sole trader. From the profits of that operation W had purchased various furnishings. To raise money she sought to sell the furnishings to the plaintiff, who would then lease them to her. On advice of counsel, plaintiff requested that the bill of sale for the furniture be signed by H and name him as vendor, the proper form if the wife's business were community property. Later, W's creditors seized the furniture, and plaintiff's

338. See Snell v. Telehala, 274 Cal. App. 2d 61, 78 Cal. Rptr. 780 (1969). Husband's creditor levied on property held in joint tenancy; the court considered a "fabrication" W's testimony that in fact H had transmuted the community funds used to buy the property to W's separate property and that the spouses intended it to be her separate property. See also O'Callaghan v. People, 165 Cal. App. 2d 359, 352 P.2d 170 (1955) (W's attempt to defeat H's creditor by establishing property held in joint tenancy was her separate property); Tinsley v. Bauer, 125 Cal. App. 2d 724, 271 P.2d 116 (1954) (H's attempt to defeat W's creditor by establishing funds in joint tenancy bank account where his community earnings not then liable to her creditors).

339. However, one decision indicates that the attack on title by the spouses to defeat the creditor must be made at or prior to the time of levy. In Pepin v. Stricklin, 114 Cal. App. 32, 299 P. 307 (1931), H's creditor levied on H's half interest in land held under a deed reciting joint tenancy. An execution sale was conducted and the creditor purchased H’s interest. W then asserted the land was her separate property because her separate funds had been used to buy the land and she had not intended a transmutation by the use of a joint tenancy title. The court held that by purchasing at the sale the creditor had become a bona fide purchaser for value entitled to rely on the actual title (i.e., he had changed his position in reliance on the title of record and W was estopped from asserting her separate property claim).

The entering into a contract of purchase, even though no money has yet changed hands, ought to be sufficient action in reliance on record title to protect a third party. Thus, in Jeffers v. Martinez, 93 N.M. 505, 601 P.2d 1204 (Ct. App. 1979), W had record "title" to realty with the date of the instrument showing she owned it before marriage. By an unrecording instrument she had transmuted the land to community property. She alone contracted to sell the property, and then the spouses tried to resist specific performance on the basis of New Mexico's equivalent of Cal. Civ. Code § 5127 (West Supp. 1980), which required H to join in the contract of sale. The court held the spouses bound by the record title unless W's vendees knew of the transmutation. The court did not indicate whether the buyers actually knew that title was in W's name alone and relied thereon in entering into the contract.

340. 95 Cal. 343, 30 P. 542 (1892).
suit to establish his lessor's interest was unsuccessful. It was held the business and hence the furniture were at the time of the sale to plaintiff \( W \)'s separate property because \( H \) had relinquished his community interest through a "course of conduct." Thus the bill of sale should have been signed by \( W \).

3. **Alleviating the Problem by Recognizing Community Property with Right of Survivorship**

The foregoing survey of cases reveals that most of the cases where transmutation principles have interacted with creditor rights involve one or both spouses investing community wealth under a document of title that recites a joint tenancy. This is particularly common in the case of purchase of a family residence.\(^{341}\) Apparently real estate brokers and financial institutions are recommending this form of title; at least on some basis one or both of the spouses comes to believe there will be savings in money and paperwork at dissolution of marriage by death where the decedent's half ownership passes to the other spouse by survivorship rather than will or intestate succession.\(^{342}\)

Confusion concerning the legal effect of deeds with joint tenancy recitals taken in such circumstances necessarily results because what the spouses actually want, a right of survivorship affixed to community property, the California courts have said they cannot have.\(^{343}\) At least they cannot do so merely by way of a joint tenancy or right of survivorship recital in a deed of property purchased with community funds.\(^{344}\)

\(^{341}\) See, e.g., *In re Marriage of Lucas*, 27 Cal. 3d 808, 616 P.2d 285, 166 Cal. Rptr. 853 (1980), and numerous cases there analyzed.


\(^{344}\) No reported case has yet arisen where the spouses supported a joint tenancy deed with a contract providing that the property would indeed be joint tenancy property with right of survivorship but that the co-owners agreed to equal management over the entire property and agreed that the creditors of each could reach the entire property. Certainly such a contract would be enforceable (not contrary to public policy) and also would likely be found to confer third party beneficiary rights on creditors. See *Carter v. Carter*, 419 A.2d 1018 (Me. 1980), arising
Legislation specifically authorizing the affixing of a right of survivorship to community ownership has been previously suggested.\textsuperscript{345} It remains a sound idea. It is senseless that the law should defeat the intentions of the parties that are not against public policy and can, in fact, be achieved by more complex legal devices than the parties have yet used.\textsuperscript{346}

What is needed is not just legislation permitting a right of survivorship attached to community property but also setting forth rules of construction of deeds and other instruments that would eliminate much of the presently generated litigation over what was intended by the instrument referring either to joint tenancy or to a right of survivorship. Without such qualification, the proposed statute would simply multiply the amount of such litigation by creating a new question: whether the recital evidences intent for a true joint tenancy or a community of property with survivorship.

Real estate brokers and lending institutions can be expected to continue to encourage use of joint tenancy form deeds by spouses who have no intent to transmute community property to true joint tenancy, but rather are looking for some savings in paperwork and possibly in money through a right of survivorship. Therefore, the proposed statute should create a presumption that a recital of joint tenancy in any form,\textsuperscript{347} in a deed or other instrument conveying property purchased in whole or in part with community funds, does not transmute the property into joint tenancy property but merely affixes to the community ownership a right of survivorship.\textsuperscript{348} The recital should be ineffective unless the deed

\footnotesize{under Maine's equitable distribution system (a form of deferred community).} \textsuperscript{345} \textsuperscript{346}

\footnotesize{used separate funds to acquire property and had title placed in joint tenancy. At divorce the property was treated as marital property (deferred community property), notwithstanding the survivorship feature \textit{H} had created, and thus was subject to equitable division.}

\footnotesize{Community ownership coupled with mutual wills executed pursuant to a written contract to will would not achieve what the parties desire, even if the contract provided for unilateral withdrawal by either spouse (similar to the right of severance of a joint tenancy), because at least the informal probate administrative proceedings under the Community Property Set-Aside Law, enacted in 1974-75, would be required. \textit{See CAL. PROB. CODE} § 202 (West Supp. 1980).}

\footnotesize{\textsuperscript{345} See Mills, \textit{supra} note 342, Griffith, \textit{supra} note 342.}

\footnotesize{\textsuperscript{346} See note 344 \textit{supra}.}

\footnotesize{\textsuperscript{347} \textit{E.g.}, "to \textit{H} and \textit{W} as joint tenants"; "to \textit{H} and \textit{W} as joint tenants with right of survivorship"; "to \textit{H} and \textit{W} in joint tenancy"; "to \textit{H} and \textit{W} in joint tenancy with right of survivorship."}

\footnotesize{\textsuperscript{348} The statute should make clear that this form of ownership can be obtained
is executed (or ratified in writing) by the spouse who at his or her death will have lost testamentary power because of the instrument.\textsuperscript{340} A requirement that the recital is ineffective unless both grantee spouses execute the deed or other writing adopting the deed would be a reasonable alternative.

The statute should also provide that where community funds are used to purchase property, a true joint tenancy (arising by way of transmutation from community to separate property) will be formed only if the instrument negates community ownership,\textsuperscript{350} and if it (or some other writing adopting or ratifying it) is executed by both spouses.\textsuperscript{351} Where the language of the instrument, executed or ratified in writing by the necessary spouse(s), is unambiguous—\textit{i.e.}, there is either a mere survivorship or joint tenancy recital or there is a joint tenancy recital coupled with a negation of community ownership—it should be conclusive not only in favor of third parties,\textsuperscript{352} but between the spouses themselves.\textsuperscript{353} No subsequent oral transmutation should be recognized either to defeat creditors who assert the community status by any language showing such an intention, such as: "to $H$ and $W$ as community property with right of survivorship."

\textsuperscript{340} Since the purpose of the requirement \textit{is} to prevent fraudulent claims and reduce litigation, execution of any writing adopting the joint tenancy recital should suffice.

\textsuperscript{350} \textit{E.g.}, "to $H$ and $W$ as joint tenants with right of survivorship and not as community property."

\textsuperscript{351} Since the transmutation to joint tenancy has immediate effects of cutting management and control in half rather than merely the postponed effect of a testamentary substitute when one community owner dies, both spouses are at once affected by the instrument and proof is needed that both have agreed to it.

\textsuperscript{352} See Griffith, supra note 342, at 106.

Concededly the proposed statute gives creditors more protection in the marital property transmutation context than they have against other types of claims resting in parol under which the debtor's record title is impeached. There is considerable authority that a third party can successfully resist levy of execution on property held in the debtor's name by proof (not in writing) establishing a constructive or resulting trust. See V. A. Scott, \textit{Trusts} § 462.5 (3d ed. 1967) (constructive trust); 90 C.J.S. \textit{Trusts}, § 185 (1955) (constructive and resulting trusts); McGee v. Allen, 7 Cal. 2d 468, 60 P.2d 1026 (1936); Murphy v. Clayton, 113 Cal. 153, 45 P. 297 (1896); Breeze v. Brooks, 97 Cal. 72, 31 P. 742 (1892) (debtor's brother defeats levy under theory of purchase-money resulting trust); Richion v. Mahoney, 62 Cal. App. 3d 604, 133 Cal. Rptr. 623 (1976); Wheeler v. Treffitz, 228 Cal. App. 2d 271, 39 Cal. Rptr. 507 (1964); Bank of Cottonwood v. Henriquez, 91 Cal. App. 88, 266 P. 836 (1928).

Husband-wife transmutation cases can be distinguished from constructive and resulting trusts arising outside the context of the marriage relation. There would seem clearly to be less opportunity for and likelihood of a fraud on creditors when the third party who claims an equitable title is not married to the debtor. The third party may well be adverse to the debtor spouse. In any event, it will be an unusual case where the debtor spouse will continue the same degree of use and enjoyment of the preserved asset when the successful claimant is a third party as he does when the claimant is his spouse.

\textsuperscript{353} See Mills, supra note 342, at 89.
of the property or a surviving spouse asserting a right of survivorship. Where the instrument negates community ownership, a creditor should not be permitted to prove either a subsequent oral transmutation to community property status or that in signing the instrument the spouses really did not intend the transmutation stated on its face.

Finally, the statute should be drafted so that a contemporaneous understanding between the spouses existing at the time title is taken with a joint tenancy recital that some other form of ownership is intended is unenforceable as against third parties and preferably between the spouses themselves. That is, California's new "soft" version of the Parol Evidence Rule should not apply to instruments of title governed by the new statute.354 The statute should also address the issue of how a severance destroying the right of survivorship can be achieved. Analogous legislation in Washington355 and apparently Idaho356 aimed at avoidance of pro-

354. This California invention permits extrinsic evidence to be received even where no ambiguity appears on the face of the instrument if it is urged such evidence will establish an ambiguity. See Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Inc., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968). Cf. Riley v. Bear Creek Planning Comm., 17 Cal. 3d 500, 551 P.2d 1213, 131 Cal. Rptr. 381 (1976) (California Supreme Court concedes it has "modified" the common law parol evidence rule by case law). The case law has yet to resolve whether a court is to hold that an ambiguity is created by extrinsic evidence which reveals simply that the parties to the agreement had an understanding contrary to the normal meaning of the language of the instrument.

The proposed statute should be drafted so that the written agreements made pursuant to it are not subject to CAL. CIV. CODE § 1698 (West Supp. 1980). Section 1698 authorizes an oral modification of a written contract if the modification is "executed." As noted herein, California courts are quick to find execution of transmutation agreements, usually requiring nothing other than the recitation of a change of status of property. See text accompanying notes 21-22 supra. One question still unsettled is whether § 1698 applies to a contract that includes a clause expressly stating that all modifications and rescissions must be in writing. Hopefully, it is not against public policy for parties to waive § 1698's authority to modify contracts orally. The type of clause proposed would increase certainty in commercial dealings. The argument could be made, however, that the clause requiring a written modification could itself be eliminated by an "executed" oral agreement to eliminate it. If this modification were "executed," substantive provisions of the agreement could then be modified orally.


356. See Comment, A First Look at the Community Property Agreement in
bate administration provide for a “community property agreement” with right of survivorship that can be defeated only if the two spouses mutually rescind or modify the agreement.\textsuperscript{357}

Apparently, however, the type of survivorship arrangement that Californians want—or at least the type they are used to—is the survivorship that can be eliminated by the unilateral act of either co-owner. Where a true joint tenancy exists, and one of the co-owners desires a severance, converting the joint tenancy into tenancy in common, California no longer requires use of a strawman conveyance.\textsuperscript{358} A deed whereby one joint tenant purports to convey an interest to himself causes a severance if that is the intent.\textsuperscript{359} The statute allowing community property with right of survivorship should permit any written instrument to terminate the survivorship but should call for notification of the spouse of the party terminating the survivorship so that the spouse is aware of the occasion for providing for succession of his interest by will. Where the spouses are separated, the only notice that may be possible could be constructive notice via recordation of the termination instrument.

\textit{Income Tax Complications}

It is unclear whether the Internal Revenue Service will treat a community property with right of survivorship as community property when one spouse dies survived by the other in order to give the survivor’s half interest a stepped-up basis.\textsuperscript{360} The survivor’s interest in the case of a true joint tenancy retains its old basis.\textsuperscript{361} It is likewise unclear whether the property would be

\textit{Idaho,} 12 Idaho L. Rev. 41 (1975), opining that \textit{Idaho Code} § 15-6-201 (1979), part of the Idaho Uniform Probate Code, now authorizes such probate-avoidance agreements. There being no Idaho case law dealing with the device, the commentator surmises that the considerable Washington case law will be applied.

\textsuperscript{357} On the present uncertainty in Washington as to whether an unwritten rescission is effective, see \textit{In re Wiltman’s Estate,} 58 Wash. 2d 241, 363 P.2d 17 (1961), and \textit{Cross, supra} note 355, at 800. The better rule, to avoid litigation and fraud, would require a written rescission.

\textsuperscript{358} \textit{Riddle v. Harmon,} 162 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980).

\textsuperscript{359} Id.

\textsuperscript{360} \textit{See I.R.C.} § 1014(b)(6). This statute accords the survivor’s half interest in community property the same basis as attaches to the decedent’s half interest (date of death or alternative valuation date fair market value). In inflationary times this usually means a step “up” for the survivor, but a step “down” is of course possible.

\textsuperscript{361} \textit{Compare} Bordenave v. United States, 150 F. Supp. 820 (N.D. Cal. 1957) (attempt to impeach joint tenancy recital in deed for § 1014(b)(6) purposes failed—no stepped up basis) \textit{with United States v. Pierotti,} 154 F.2d 738 (5th Cir. 1946) (even though surviving wife had treated property held under deed with joint tenancy recital as joint tenancy property to avoid probate she successfully established there had been no community to joint tenancy transmutation in order to benefit from the stepped up basis).
considered joint tenancy property for estate tax purposes under section 2040 of the Internal Revenue Code. This is of little practical import, however, because the presumption under that section that the decedent was the owner for estate tax purposes of all of the property passing to the survivor can probably be overcome by proof of the community nature of the property before the right of survivorship was attached.\footnote{I.R.C. § 2040. Somewhat surprisingly there is apparently no authority indicating whether § 2040 applies to unusual forms of survivorship, such as the joint life estate with contingent remainder in fee in the survivor. According to the test formulated by one expert, the section would apply to this form of a survivorship as well as to community property with a survivorship feature. Maxfield, Some Reflections on the Gift and Estate Taxation of Jointly Held Property, 34 Tax Law. 47, 48-49 (1980), states the test to be whether the surviving co-owner “automatically succeeds” to the deceased co-owner’s interest in the property. Compare the situation of a tenancy in common coupled with the co-owner’s having made an enforceable contract to leave by will all of his or her interest to the survivor. Here succession is not “automatic.” The will must be probated or, if it has not been executed, specific enforcement of the contract must be obtained.}

In discussing whether a new form of marital property proposed for Wisconsin will qualify as community property to get the benefit of stepped-up basis under section 1014(b)(6) of the Internal Revenue Code, Professor Irish states that it is “legislatively mandated joint ownership of marital property” that qualifies it as community under the Internal Revenue Code.\footnote{Irish, A Common Law State Considers a Shift to Community Property, 5 Community Prop. J. 227, 233 (1978).} However, he also adds that in the income tax cases arising before nationwide income-splitting of married persons “an important factor” in determining a wife’s half ownership of her husband’s earnings, labeled by the jurisdiction as community property, “was the wife’s testamentary power over one half of the community property.”\footnote{Id. at 230 n.23 (citing Poe v. Seaborn, 282 U.S. 101, 110-11 (1930)). The issue in such cases was whether the wife had an ownership interest or a mere expectancy. See United States v. Robbins, 289 U.S. 315 (1926). That will not be the issue when the courts must decide whether community property with right of survivorship is community property or joint tenancy property for purposes of a stepped up basis. Either characterization would concede a half ownership interest in the surviving spouse.}

In these early cases, testamentary power was especially significant as a test of her community ownership because she at that time lacked management power. Since the legislation herein proposed, authorizing attachment of a survivorship feature to California community property, would not alter equal management principles during the marriage, the early cases would be readily
distinguishable. Moreover, the proposed legislation would leave each spouse with testamentary power over a half interest in the property. It is true, the exercise of that power would require both the making of a severance or otherwise destroying the right of survivorship plus the making of a will, but testamentary power would exist.

That is not the case in Washington and Idaho. In those states, under the community property agreement made by the spouses, title automatically passes to the surviving spouse. The spouses have lost the right to unilaterally exercise testamentary power, since joint action is needed to rescind the survivorship contract. Surprisingly, apparently only one of several law journal articles about the community property agreement has considered its effect on the operation of section 1014(b)(6) of the Internal Revenue Code. The commentator, a former Internal Revenue Service attorney, assumes that Washington community property subject to a survivorship agreement is still community property for purposes of the stepped-up basis.365

Obviously, until there is a definitive ruling on the matter by federal courts or the Internal Revenue Service, counsel should warn married clients who consider using the statutory scheme for a community with right of survivorship that there is substantial risk the property will not be treated as community for stepped-up basis purposes.

4. A Statute of Frauds for Other Transmutations in Order to Protect Creditors

The policies in favor of a statute barring the spouses from impeaching an unambiguous tenancy deed in order to defeat creditors indicate the need for additional reform covering other types of transmutations other than those involving joint tenancy. As has been shown,366 creditors have been encountering a ploy whereby the nondebtor spouse claims that property, either presumptively community or the separate property of the debtor spouse, is actually the nondebtor spouse's separate property. The legislature should enact a statute whereby neither spouse, as against creditors, may impeach any recital in the instrument if two conditions are met. Impeachment should be prohibited where the recital in the instrument: 1) supports the character-

365. Randall, Community Property Agreement, Joint Tenancies, and Taxes, 10 Gonzaga L. Rev. 109, 115-16 (1974). Cf. Griffith, supra note 342, at 98 (it is sufficient that the California statute authorizing the affixing of a survivorship to community property declare that for tax purposes the property is community).

366. See text accompanying notes 334-39 supra.
tion asserted by the creditor; and, 2) is inconsistent with the characteriza-
tion asserted in opposition to the creditor. The statute
should apply at least where the instrument is executed by the
spouse seeking to impeach title.

For example, if the named transferee on the instrument were H
and the date of the instrument of title pre-marriage, these recitals
would support the contention of H’s creditor that the property
was H’s separate property and would be inconsistent with W’s
claim the asset was her separate property by way of subsequent
transmutation.367 On the other hand, if the date on the instru-
ment naming H as transferee were during marriage, the asset
would be presumptively community. Of course, H could have
purchased the asset with his separate funds and, if W were the
debtor spouse, H would necessarily be able to prove that fact
since it is not inconsistent with the recital in the instrument. If
however, the instrument recited community ownership and H ex-
cuted the document, the proposed statute would not permit him
to impeach the recital on either the theory that H used separate
funds to make the purchase or the theory that there had been a
post-acquisition unwritten transmutation.368 If there was a writ-
ten transmutation agreement executed before the debtor spouse
incurred his obligation, the opportunity for perpetrating fraud on
the creditor is greatly reduced. The written transmutation should
be provable to defeat the creditor’s claim, except where the in-
strument reciting community property was recorded and the sub-
sequent transmutation agreement was not and, in addition, the
creditor was actually aware of the recorded instrument and relied
on it.

The appropriate rule where the nondebtor spouse seeks to im-
peach a written recital of title in an instrument he has not ex-
cuted is debatable. Obviously, he must be able to do so if he can
prove he never consented to the recital in the instrument and
such recital is inconsistent with the actual legal classification of
the property at the time the instrument became effective. Where
the instrument at issue has not been executed by the spouse ob-

367. I do not suggest that the spouse could not prove the date to be inaccurate
or the document a fraud—merely that a subsequent nonwritten transmutation
could not be the basis for the contention.

368. In addition, impeachment should not be permitted under California’s
“modified” parol evidence rule or under a purchase money resulting trust theory.
See notes 337 & 354 supra.
jecting to its terms, a third party such as a creditor cannot reasonably rely on the recital as being accurate. Accordingly, the statute under discussion should permit a nonsignatory spouse to impeach the title unless the third party establishes that the spouse was responsible for the recital appearing in the instrument or knowingly consented to it.

5. The Sole Trader Act as Precedent

A statutory scheme enabling third parties engaging in commercial dealings with a married person to rely on documents of record to determine whether the marriage is affected by some arrangement departing from the ordinary rules as to power to manage and obligate property would not be wholly new to California. The “Sole Trader Act” of 1852\(^{369}\) the state’s first provision for management by a wife of her own business and business income, was greatly concerned with providing public notice to third parties who might deal with such a wife or her husband that the ordinary rules of marital property applied (which at that time classified W’s business income as community but gave exclusive management of it to H) unless sole trader status was established by a recorded document.

Prior to 1852, legislation had boxed in married women so that they could not effectively operate a business unless their husbands were present to ratify all transactions. The husband, of

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\(^{369}\) 1852 Cal. Stats. ch. 42, at 101. This was one of a series of early statutes by the state legislature that set about to make California in effect an English common law marital property jurisdiction, even though the California constitutional convention had, after spirited debate, adopted the civil law’s community property system. See Cal. Const. of 1849, art. XI, § 14 (defining W’s separate property and directing legislature to pass laws concerning W’s rights in “property . . . held in common with her husband”); J. Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October 1849 at 257-69 (making very clear that the quoted language intended to retain Mexican marital property law). The legislature’s efforts were supported by some supreme court decisions based on a similar “reformed” common law approach.

The movement by the legislature and courts in the 19th century to undercut community property principles and establish a limited “reformed” style common law system is well detailed in Prager, The Persistence of Separate Property Concepts in California’s Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 8-24 (1976), and briefly reviewed in W. Reffy, supra note 2, at 1-2, 13-17 (1980).

An expert on common law jurisdictions’ reform has described California’s sole trader legislation of 1852 as a form of Married Woman’s Property Rights Act (i.e., an English common law type of reform). Younger, Community Property, Women and the Law School Curriculum, 48 N.Y.U. L. Rev. 211, 222 (1973). The approach seems obviously to have been borrowed from American common law states. Cf. e.g., Pa. Stat. Ann. tit. 48, § 41 (Purdon 1965) (a sole trader statute for the wives of “absent mariners” dating from 1718); Adams v. Knowlton, 22 Cal. 283 (1863) (briefs of counsel cite as precedent under the California sole trader act cases from Pennsylvania arising under a statute of 1855 much like California’s).

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course, had management and control\textsuperscript{370} of what was called community property\textsuperscript{371} including \textit{W}'s earnings.\textsuperscript{372} An 1850 statute had even given the husband management and control also over \textit{W}'s separate property!\textsuperscript{373} Thus, under the basic managerial system of creditor's rights, there was no property \textit{W} could voluntarily utilize to pay her debts.\textsuperscript{374} She was thus incapable of entering into an enforceable contract.\textsuperscript{375}

To remedy these absurdities and to give at least married women engaged in business some relief from the oppressive property system fashioned by the early California legislation, the Sole Trader Act was passed. The Act applied to a married woman who was in "business" or was a "trader,"\textsuperscript{376} and after amendment to be

\begin{footnotesize}
\textsuperscript{370} This was consistent with the civil law of Spain and Mexico. \textit{W. de Furia, \& M. Vaughn, supra} note 9, at \S\ 113.

\textsuperscript{371} Shortly after the Sole Trader Act became effective, it became settled law that what was called "community property" was not owned in common. Contrary to Spanish-Mexican law, the state supreme court held that \textit{H} was the sole owner and \textit{W} had merely the expectancy of an heir of \textit{H}. \textit{See, e.g., Van Maren v. Johnson, 15 Cal. 398, 311 (1890).} This development is analyzed in Frager, \textit{supra} note 16, at 34-36, and Key, \textit{supra} note 17, at 1955-58 (1978).

\textsuperscript{372} \textit{See Washburn v. Washburn, 9 Cal. 475 (1858).} \textit{See also Street v. Bertolone, 103 Cal. 751, 754, 226 P. 913, 914 (1924); Martin v. Southern Pac. Co., 130 Cal. 285, 286, 62 P. 515, 515 (1900); Mosesian v. Parker, 44 Cal. App. 2d 544, 112 P.2d 705 (1941).}

\textsuperscript{373} 1849-50 Cal. Stats. ch. 103, \S\ 6, at 254. The husband could not alienate or encumber the wife's property, however, without her consent. The constitutionality of the statute under the constitutional provision assuring \textit{W} of ownership of her separate property was never tested in a reported decision. The statute is discussed in Frager, \textit{supra} note 16, at 25-27.

\textsuperscript{374} Applying the English common law, it was held that her pre-marriage contract debts became \textit{H}'s debts when the marriage united them into "one flesh." \textit{H} could use property he managed to pay them and, if followed, \textit{W}'s pre-marriage creditor could seize all such property (which included \textit{H}'s pure separate property as well as that called "community."). \textit{See Van Maren v. Johnson, 15 Cal. 398 (1890).} (California law changed common law so as to exempt \textit{H}'s separate property).

\textsuperscript{375} \textit{Smith v. Greer, 31 Cal. 476 (1866); Maclay v. Love, 25 Cal. 367 (1864).}

\textsuperscript{376} This rather clearly excluded women who were employees of someone else. To use the act \textit{W} had to be an independent businesswoman or the boss of the operation. In the 19th century, women in a wide variety of trades utilized the Act. \textit{See Thomas v. Desmond, 63 Cal. 426 (1883) (rooming house); Hurlburt v. Jones, 25 Cal. 223 (1864) ("general ranching business"); Abrams v. Howard, 23 Cal. 388 (1883) ("buying and selling of goods, wares, and merchandise, etc."); Alverson v. Jones, 10 Cal. 9 (1858) (W in "business of livery-stable keeping, and trading in horses"); Gray v. Perlis, 76 Cal. App. 511, 245 P. 221 (1926) (ladies' tailor shop). One case, Gutman v. Scannell, 7 Cal. 455, 459 (1857), said the trade or business engaged in by \textit{W} under the Act had to be "not unsuited to her sex" (although the statutory language suggested no such a limitation), but indicated a haberdashery business was not so unsuited.

No reported case concerns a married woman attempting to invoke the Act to make her wages as a salaried worker her separate property. Undoubtedly it was
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discussed below was on the books until repeal in 1980.377 In its initial form it entitled W to file a declaration that she was going to engage in business as a sole trader. To be effective the declaration had to be proper in form and recorded.378 Once these formalities were achieved, subsequent income from the venture would be W's separate property, rather than community, and subject to her exclusive management.379 Her creditors could then, of course, reach it by involuntary process.

understood that the concept of trade or business under the Act was not broad enough to include the job of serving as an employee of another person or entity. Thus the Act was of benefit to only a small fraction of married women who earn income by their labor.


The repealing act provides that the prior sole trader judgments shall "cease to have any effect for any purpose" but that "[r]ights acquired prior to the effective date of this act shall not be affected by the repeal . . . , but such rights shall be recognized only to the extent they would have been recognized had the repeal not been made." Id. § 2 (emphasis added). The peculiar nonretroactivity language underscored was chosen because of the legislature's awareness that the Sole Trader Act was probably unconstitutional because of discrimination against men and discrimination against wage-earning wives who were denied the opportunity to convert their incomes to separate property. The Sole Trader Act could be utilized only by independent entrepreneurs. See note 376 supra. In my view the discrimination against husbands has been unconstitutional since 1951, when wives got management and control of their own earnings, applying the "middle tier" test for denials of equal protection which the United States Supreme Court uses in gender discrimination cases. E.g., Orr v. Orr, 440 U.S. 268 (1979) (alimony for wives only at divorce held unconstitutional); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971). The California Supreme Court at one time employed a strict scrutiny test in gender discrimination cases arising under the state constitution equivalent of the equal protection clause. Arp v. Workers' Comp. Appeal Bd., 19 Cal. 3d 385, 563 P.2d 869, 138 Cal. Rptr. 239 (1977); Sailer Inns, Inc. v. Kirby, 5 Cal. 3d 148, 485 P.2d 329, 95 Cal. Rptr. 329 (1971) (applying what is now CAL. CONST. art. I, § 7). A majority of the court rather clearly abandoned this approach in Michael M. v. Superior Court, 25 Cal. 3d 608, 601 P.2d 372, 159 Cal. Rptr. 340 (1979) (constitutional to prosecute only the male participant where youth under 18 is seduced in consensual sex notwithstanding immunity of woman), affd., — U.S. —, 101 S. Ct. 1200, 67 L.Ed.2d 437 (1981) (statutory rape law under which men alone may be criminally liable held not violative of Fourteenth Amendment equal protection). The state supreme court's opinion permits such broad sex discrimination under the state constitution that there must be doubt as to whether it would invalidate the Sole Trader Act for anti-husband bias. See Recommendation Relating to Married Women as Sole Traders, 15 CAL. L. REV. COM.'S ANN. REP. 21, 26 (1980) (Sole Trader Act is "constitutionally suspect").


379. The 1652 Act also authorized investment of $5,000 of H's property (separate or "community") in the business, and apparently such investment transmuted such property to W's separate property. In any event, the Act was construed as barring H's creditors from reaching such property placed in W's sole trader business unless, at the time of such transfer, H was or was thereby rendered insolvent. Guttmann v. Scannell, 7 Cal. 458 (1877). The $5,000 limit on H's separate or community capital that could be shielded under the Act was repealed by 1862 Cal. Stats. ch. 121, § 4, at 109, but was restored at the level of $500 in 1872 by enactment of the recently repealed provision. CAL. CIV. PROC. CODE § 1814 (1872). See Thomas v. Desmond, 63 Cal. 426 (1883).
The great concern of the early cases under the Sole Trader Act was that it might be used as a device to improperly shield property from a husband's creditors. Apparently out of sympathy for such creditors, the Act was strictly construed so that minor mistakes or omissions in the wife's declaration papers precluded her from having sole trader status. To further strengthen the position of H's creditors under the Act, legislation in 1862 changed the procedure by which W became a sole trader from one of mere registration and recordation to a judicial proceeding in which husband's creditors could become parties and oppose the wife's request to obtain sole trader status. The 1852 and 1862 versions of the Sole Trader Act provided for a special index at the office of the county recorder to list married women who had become sole traders. Thus, third parties could quickly determine if the unu-

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380. See, e.g., Adams v. Knowlton, 22 Cal. 283 (1863). W's declaration that she would be a sole trader in operating a restaurant-hotel business neglected to include the statutory language that she would carry on the business "in her own name"; she was denied the protection of the Act in a suit with H's creditors. Also holding that in such litigation the burden of proof is on W to prove she properly registered as a sole trader is Alverson v. Jones, 10 Cal. 9 (1856). Cf. Reading v. Muller, 31 Cal. 104 (1866) (W's declaration was proper in form but H's creditor prevailed under best evidence rule when W produced merely a copy of the declaration).

That the purpose of such strict construction was to benefit H's creditors is clear from the cases denying standing to the wife to rely on such defects in defending a suit alleging W's breach of contract entered into in conducting the business. Proter v. Gamba, 43 Cal. 105 (1872).

381. W filed a petition in the superior court of the county where she had resided six months. Former CAL. CIV. PROC. CODE § 1811 (repealed 1890). Notice of the petition was published. Former CAL. CIV. PROC. CODE § 1812 (repealed 1890). W's petition had to state the "justification" for her application and aver that she did not seek to defraud, delay, or hinder any creditor of H. Former CAL. CIV. PROC. CODE § 1813 (repealed 1890). These averments could be contested by H's creditors, former CAL. CIV. PROC. CODE § 1815 (repealed 1890), and "the issues of fact joined, if any, must be tried as in other cases . . . ." Former CAL. CIV. PROC. CODE § 1816 (repealed 1890). Sole trader status attached when judgment for W was entered, but she had to have it recorded in every county where she did business as a sole trader, former CAL. CIV. PROC. CODE § 1819 (repealed 1890), if the judgment were to have effect beyond the county where judgment was rendered.

382. 1852 Cal. Stats. ch. 178, § 2, at 881-82; 1862 Cal. Stats. ch. 121, § 2, at 108. The 1872 revision simply provided that judgment should be "entered" declaring W a sole trader. Apparently such judgments were not indexed separately from ordinary judgments (e.g., declaring a liability). Inquiry of the county recorders for San Francisco, Santa Clara, and Los Angeles counties disclosed that special indices for sole trader judgments were not kept. Under that scheme locating a pertinent judgment would have been no easy matter for a person considering extending credit to H.
sual characterization of W's earnings as separate property would apply in a given marriage.

No case specifically addresses the question whether a married woman eligible to become a sole trader could defeat her husband's creditors because of a private contract with H transmuting her business earnings to separate property. However, the implication of the decisions in favor of H's creditors where W's attempt to utilize the statutory scheme was abortive\textsuperscript{383} is that such a contract, even though not a fraud on creditors because entered into long before H went into debt, would not affect third parties.\textsuperscript{384} Also, where W did mechanically follow all of the procedures of the Act, but only nominally operated the business, at least one case held that she should be denied the Act's protection (i.e., her earnings would be community property reachable by H's creditors). The court found that W and H had agreed to use the sole trader form "for the mere purpose of shielding their several and joint earnings against existing and subsequent creditors of the husband, it being understood between them that all profits would belong to him as between them . . . ."\textsuperscript{385}

So long as the law refuses to raise an estoppel in this type of situation—i.e., permits H, although not objecting to W's becoming a sole trader of record, to impeach the official transmutation documentation on the basis of an "understanding"\textsuperscript{386}—this type of limitation on the effect of the recorded transmutation is necessary. The statute proposed in this article requiring a writing, however, would operate in a different manner. Both husband and wife would have to sign the recorded transmutation agreement in order for it to be binding on creditors. This would preclude the situation possible under the Sole Trader Act whereby W set up official documents converting her earnings to separate property while H had a different understanding. There should be a system

\textsuperscript{383} See note 380 supra.

\textsuperscript{384} On the other hand, a transmutation of W's business to her separate property by private understanding with no attempt to follow the Sole Trader Act procedures would be binding between H and W at dissolution of their marriage, e.g., \textit{In re Marriage of Aehadian}, 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979) (involving such a fact situation but not advertizing to the Sole Trader Act), and undoubtedly during the marriage as well.

\textsuperscript{385} Hurlbut v. Jones, 25 Cal. 225, 228 (1884).

\textsuperscript{386} There are several cases where the "understanding" of H and W prevailed over written documentation of a transmutation. See \textit{In re Marriage of Keisler}, 79 Cal. App. 3d 527, 144 Cal. Rptr. 877 (1978) (ordered nonpublished) (declaration of community status filed with U.S. Bureau of Reclamation). See also Springer v. Commissioner, 36 T.C. Mem. 782 (CCH 1977) (formal antenuptial agreement to live separate in property defeated by the joint conduct of a business resulting in profits being held community); Estate of Neilson, 57 Cal. 2d 755, 371 P.2d 745, 22 Cal. Rptr. 1 (1962) (income tax return declaring property to be community).
available where, if there is no outright fraud, duress, or incapacity, the formal agreement made by spouses is binding on them as well as creditors and cannot be altered either by some implied contract, via an “understanding” or “treatment,”\textsuperscript{387} or even by an express oral agreement.\textsuperscript{388}

CONCLUSION

Considerable reform of California law respecting debt liability of community and separate property of married persons is needed. However, no change in underlying theory is warranted. The managerial system historically used by California is preferable to Arizona’s community versus separate debt system or New Mexico’s partitionable community approach.

\textsuperscript{387} I consider the Springer case an example of what the law should not tolerate. Springer v. Commissioner, 36 T.C. Mem. 782 (CCH 1977). H and W had a formal written antenuptial agreement to live separate in property. In addition H deeded all interest in a particular business over to W. But H worked at the business as well as W, and the tax court held that the spouses’ working together constituted “treatment” of the business as a community business. Thus, H was liable for tax on half the gain.

Under the approach I advocate, a secret understanding between H and W that the gains would be community despite the formal separation of property agreement could not be an instrument for fraud on anyone, creditor or IRS, because it would even be unenforceable between the spouses.

\textsuperscript{388} See note 354 supra. Where an agreement between H and W either creates separate property out of community or provides that certain assets are to remain separate (e.g., despite any future alleged oral transmutations), the existing “inventory” statutes allow for recordation of the list of items agreed to be separate. CAL. CIV. CODE §§ 5114-15 (West 1970).

It is unclear whether a spouse’s separate interest held in co-tenancy with the other spouse (either joint tenancy or tenancy in common) is to be listed in such inventories. In any event, the recordation is of little help to assure the formal agreement will not be subverted by claims of subsequent informal transmutations because the inventory is only “prima facie evidence” of the separate character of the assets listed. CAL. CIV. CODE § 5118 (West 1970). In other words, that statute just shifts from a pro-community to a pro-separate property presumption. Moreover, the inventory statutes are so inartfully drafted as to trap the spouses into a form of recordation that may not even constitutionally shift the pro-community presumption, in that the signature on the inventory is, by statute, to be that of the separate property claimant. Obviously, the important signature to get is that of the spouse who waives the pro-community presumption, namely the non-owner spouse. Where only the spouse claiming ownership signs the inventory, there may be no evidence to suggest it was the result of agreement rather than just some self-serving recordation secretly filed by the named owner. The latter should have no legal effect. Spouses utilizing the inventory procedure should both sign the recorded inventory. Meanwhile, the statutes should either be repealed in favor of the broader type of recording provision recommended by this article or at least amended so that the signature of the appropriate spouse is the one the statute requires on the inventory.
Legislation is needed to clarify the extent to which California recognizes exceptions to the managerial system approach. For example, doubts as to liability to H's creditors of community funds in W's bank account or community assets in W's section 5125(d) business should be resolved in favor of liability. The strange anti-deficiency judgment statute, section 5123, should be repealed.

This writer recommends repeal of section 5120, which shields the earnings of the non-debtor spouse from liability on the pre-marriage contract debts of the other spouse. But if this nonliability provision is to be retained, consideration should be given to extending it to antenuptial tort obligations. Legislation should clarify the extent to which the non-liable earnings can undergo change in form and retain nonliability status, as well as whether rents and profits from such earnings are likewise not liable.

Considerable revision of the law regarding liability to "necessaries" creditors is needed. Here is an area where simplification seems in order. The "pecking order" approach of section 5132 should be abrogated. On the other hand, case law barriers to reimbursement (such as See v. See) when one separate estate has paid an unfair amount of the basic family upkeep should be legislatively dismantled. Both H and W should bear equitably the ultimate burden of "family expenses." The "necessaries" doctrine should also be expanded so that it applies to spouses living apart "by agreement" unless that agreement waives support. This requires revision of section 5131.

Sections 199, 5127.5 and 5127.6 should be repealed. Ordinary principles of the managerial system of debt liability should apply to child support obligations. Reimbursement should be available when the property interests of the nonparent spouse have been used to pay such support (or alimony). This means legislative overruling of Weinberg v. Weinberg.

With respect to separated spouses, additional remedy may be in order to prevent one or both from applying community funds to pay "separate" debts.

Where the spouses are divorced and one of them is sued by a creditor seeking recovery of a debt assigned by the divorce court to the other spouse, the law should clearly permit the defendant ex-spouse to assert, to the extent possible, all the defenses and offsets that the other party liable could assert. A reimbursement action allowing recovery of both interest and attorney's fees should be specifically authorized by legislation in favor of the ex-spouse forced to pay a debt assigned to his or her former mate.

With respect to void and voidable marriages, the civil law rule
should be adopted by statute. Both a good faith spouse and his or her creditors should be able to treat the marriage as valid. The “necessaries” doctrine should also apply in such a case in favor of those supplying necessities to the good faith spouse and children of the “marriage.”

The legislature should at least consider enacting some statutory estoppel doctrine so that creditors of Marvinizers can obtain the benefits the law gives to creditors of lawfully married persons.

Turning, finally, to transmutation, section 3440 must be re-drafted so that where there is a written transmutation agreement between H and W “delivery” is not necessary to make that agreement binding on creditors.

The incidence of transmutation can be greatly decreased by a statute authorizing attachment of a right of survivorship to community ownership. Unambiguous written instruments executed in accordance with the statute should not be impeachable on the grounds of a different oral understanding. An even broader statute is desirable: Any unambiguous title or agreement should not be subject to impeachment by the spouses seeking to defeat the claims of creditors. Finally, the spouses themselves need some device allowing them to make an unambiguous agreement concerning how their property is owned, an agreement they can rely upon assured that the document cannot be invalidated by some oral or even implied transmutation.