STRATEGIES FOR STRENGTHENING THE CASE FOR SEPARATE PROPERTY CLASSIFICATION OF ASSETS UNDER IDAHO LAW

WILLIAM A. REPPEY, JR.*

I. INTRODUCTION

It is axiomatic that estranged wives and husbands seeking to maximize their wealth vis a vis the other spouse want as many assets as possible out of the total mass of marital property¹ to be classified as separate property of the claimant spouse rather than as community property.²

During the marriage, a spouse has, of course, exclusive management of his or her separate property,³ and usually the creditors of the other spouse cannot reach that property.⁴

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* Professor of Law, Duke University. A research leave grant by the Cannon-Bost Faculty Research Fund supported Professor Reppy's authorship.

1. The term "marital property" is used in this article, as it is in several community property states, to refer to all assets or interests in assets owned as community property or as the separate property of either spouse. See W. Reppy, Debt Collection from Married Californians: Problems Caused by Transmutation, Single-Spouse Management and Invalid Marriage, 18 SAN DIEGO L. REV. 143, 145 n. 3 (1981) (citing, inter alia, Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977)).

2. Obviously if the only possible classifications on the facts are community property or separate property of the other spouse, the former classification is desired for wealth maximization purposes.

3. See IDAHO CODE § 32-904 (1983) (wife has exclusive management of her separate property in same manner husband has of his).

4. See id. § 32-911 (wife's separate property not liable for the husband's debts); Twin Falls Bank & Trust Co. v. Holley, 111 Idaho 349, 723 P.2d 893 (1986); Young, Joint Management and Control of Community Property in Idaho: A Prognosis, 11 IDAHO L. REV. 1, 7 (1974).

It is unclear whether Idaho follows the "necessaries doctrine" under which separate property of the husband or wife is liable on contracts entered into by the other spouse or even by third parties to supply necessaries of life to either spouse or their children. See W. Reppy and C. Samuel, Community Property in the United States 252 (2d ed. 1982). As stated there, the doctrine rests on the duty of one spouse to support the other. In Martin v. Soden, 81 Idaho 274, 279-80, 340 P.2d 848, 851 (1959), the court declared that separate property of the husband was liable to the wife on his support obligation established in a separate maintenance suit.
At the death of the nonowner spouse, the decedent's will cannot deal in any way with the survivor's separate property. At the owner spouse's death, survived by the nonowner, the decedent has full power of testamentary disposition of his or her own separate property (except for half of what is referred to as quasi-community property).

Where one spouse contracts to acquire necessaries on credit for himself or herself and the supplier must bring an action for payment and contemplates the need to levy execution on the other spouse's separate property under the doctrine, the plaintiff-supplier should name that other spouse a co-defendant and not let the judgment obtained run solely against the contracting spouse. (Under the necessaries doctrine, the spouse of the contracting party is personally liable and is subject to a well-pled cause of action against him or her as a type of surety on the contract made by the other spouse.) Plaintiff will want to avoid possible problems caused by Section 11-204 of the Idaho Code, which exempts all separate property owned by "any married woman" (as well as the community-owned rents and profits thereof and unpaid community salaries earned by her) from "execution against her husband."

Notwithstanding Kahn v. Shevin, 416 U.S. 351 (1974) (some legislation biased in favor of females may be a valid method to redress past or existing societal or legal sexist discrimination against women), Section 11-204 is unconstitutional on its face. As noted at note 23 and accompanying text, infra, however, the likely "cure" is to extend the benefits of the exemption statute to married men as well as married women.

5. One qualification must be recognized. Idaho will almost certainly recognize, when the issue arises, the theory of the widow's or widower's election doctrine, which has been accepted in all community property states where it has appeared in reported decisions. See W. Reppy and C. Samuel, supra, n. 4, at 318-19 (citing cases from California, New Mexico, Texas, and Washington). Under this doctrine, if the decedent attempts by will to leave to a third party some property interest owned by his or her surviving spouse—usually the survivor's half interest in a community asset—the survivor may have such attempted disposition voided by electing against the will. In order to assert ownership rights and prevent the testamentary disposition from being executed, the survivor must forfeit all benefits to him or her under the will. The doctrine also applies when the decedent's will attempts to dispose of property separately owned by the surviving spouse.

Simons v. Ewing, 96 Idaho 380, 383, 529 P.2d 776, 778 (1974), observes that IDAHO CODE § 15-2-206(b) recognizes the election doctrine to the extent that it empowers a spouse to specifically draft his or her will so that bequests and devises of the decedent's separate property and his half of the community property are forfeited if the survivor asserts statutory rights to homestead and exempt property allowance. Simons gives no clue as to whether Idaho courts will ever imply from a silent instrument that the decedent is putting the surviving spouse to an election, as other states are willing to do.


In an Idaho divorce where Idaho law applies, as in all but two community property jurisdictions, separate property must be con-


9. Washington is the community property state where the separate character of property is least significant in the process of dividing property at divorce. Konzen v. Konzen, 103 Wash. 2d 470, 478, 693 P.2d 97, 101 (1985), cert. denied 473 U.S. 906 (1985), states that the fact that an item of divisible property is separate rather than community is a relevant factor in a court’s decision as to how to dispose of it, but it is to be given no more weight than is accorded to other relevant factors listed in the division statute. Wash. Rev. Code § 26.09.080 (1986) (“community or separate” property divisible “as shall appear just and equitable”).

In Wisconsin, some classes of separate property—assets acquired by a spouse by gift, devise, bequest, or intestate succession—are divisible at divorce only by a showing by the other spouse of hardship. Wis. Stat. Ann. § 767.255 (West 1981). But separate properties derived from different sources—e.g., pre-marriage earnings of husband or wife—are part of the estate subject to Wisconsin’s equitable division law. See id. and Marriage of Arneson, 120 Wis. 2d 236, 355 N.W.2d 16 (App. 1984). A number of complex apportionment problems arise. An increase in value by natural causes of inherited or donated property, see Plachta v. Plachta, 118 Wis. 2d 329, 348 N.W.2d 193 (App. 1984), remains nondivisible absent hardship but must be distinguished from an increase caused by labor of a spouse (even before marriage), which is divisible. See Marriage of Haldemann, 145 Wis. 2d 296, 426 N.W.2d 107, rev. denied 145 Wis. 2d 917, 430 N.W.2d 352 (1988). Fruits, rents, and profits of inherited or donated property are divisible no matter when accrued. See Arneson, 355 N.W.2d 16. Where a spouse has elected, pursuant to Wisconsin Statute section 766.59, to have rents and profits of inherited capital be his or her separate property, Wisconsin courts will face an apportionment problem arising in no other state: distinguishing separately owned rents and profits from separately owned “natural” increase.

A form of cotenancy between divisible and nondivisible separate and community estates was recognized in Marriage of Torgerson, 128 Wis. 2d 465, 383 N.W.2d 506 (App. 1986), overruled on other grounds, Warren v. Warren, 147 Wis. 2d 704, 433 N.W.2d 295, 298 (App. 1988), where the wife made a down payment on a duplex with inherited funds and subsequent mortgage payments came from other (divisible) sources. The court held that “[t]he value portion of the duplex in excess of the down payment is” divisible. Id. at 469-70, 383 N.W.2d at 508. This holding is erroneous, as the wife’s nondivisible sepa-
firmed to the owner spouse—no portion of it can be awarded to the nonowner as part of the property division.10 (Certain types of separate property of one spouse may be awarded by an Idaho divorce court to the other under the division law of another jurisdiction—a former domicile of the couple—when choice of law theory renders Idaho’s nondivisibility rule for separate property inapplicable.)11

Happily-married spouses will seldom employ the strategies explored in this article for increasing the amount of one spouse’s separate property or making it easier to prove separate ownership should it ever

rate estate was entitled to a share of the increase in value of the property occurring after its acquisition.

The nondivisible character of separate properties can be lost upon commingling with any type of divisible asset, so that uncommingling is impossible. See Brandt v. Brandt, 145 Wis. 2d 394, 427 N.W.2d 126 (App. 1988), indicating there is a presumption of divisible status of all separate property.

For division at divorce purposes, Wisconsin rejects the merger theory of the improvements doctrine. Thus, if the husband uses separate earnings to build a house on land he received by gift, the land is not divisible, but the house is (although surely, it could only be awarded to the owner of the land). See Schwegler v. Schwegler, 142 Wis. 2d 362, 417 N.W.2d 420 (App. 1987), rev. denied, 144 Wis. 2d 954, 428 N.W.2d 552 (1988).


11. See Berle v. Berle, 97 Idaho 452, 546 P.2d 407 (1976), where the court applied New Jersey division law to assets onerously acquired by the husband during marriage while the couple were domiciled in New Jersey. Apparently this choice of law will be applied only to property which would be classified as quasi-community property upon dissolution at death. See Idaho Code § 15-2-201 (1979). That is, if the couple had been domiciled in a state that makes all separate property divisible (see Foote, Levy and Sander, Cases and Materials on Family Law, Statutory Supplement 43-46 (3d ed. 1985), and note 9 herein) or certain classes of separate property inherited during marriage divisible (see note 9, describing the law of Wisconsin) and while domiciled there one spouse lucratively obtained an asset divisible at divorce, when the couple moves to Idaho, the Idaho court would not apply the law of the former domicile because Idaho does have a rule addressed to lucratively acquired (e.g., inherited) separate property—it is nondivisible. Out-of-state law is applied only to the category of property which cannot exist under a legal regime in Idaho, onerously acquired separate property. Where such assets exist because an Idaho couple contracted to live separate in property, presumably the only law on division that a divorce court could apply is the rule that separate property is nondivisible, even though that rule was not created to apply to a spouse’s earnings during marriage but instead to property owned before marriage or acquired during marriage by gift or inheritance.

The serious problems facing judges, attorneys, and spouses caused by Idaho courts’ declining to apply the quasi-community property solution to the choice of law problem at divorce (confining it to death dissolutions) are explored by W. Reppy, Conflict of Law Problems in the Division of Marital Property § 10.02[2], in 1 Valuation & Distribution of Marital Property (Matthew-Bender ed. 1984).
be controverted. If both the husband and the wife share such goals and agree on what property is separately owned by each of them (or should be when acquired in the future), their goals can best be achieved by a written transmutation agreement signed by both of them.\textsuperscript{12} Separated or otherwise feuding spouses and their legal advisors will be most interested in the "separate property strategies." First, a spouse may execute and record an inventory listing what he or she contends is his or her separate property. Second, a spouse may do everything possible to create documents of title for assets that recite they are his or her separate properties and additionally that rents and profits thereof will likewise be separately owned. Third, if a spouse labors at a business containing capital owned separately by such spouse, he or she should

\textsuperscript{12} Idaho Code § 32-906 (1983) recognizes that a written agreement signed by both spouses may "declare that all or specifically designated property and the income from all or the specifically designated property shall be the separate property of one of the spouses or the income from all or of specifically designated separate property shall be the separate property of the spouse to whom the property belongs." (emphasis added) I believe the "and" I have italicized should be read as "and/or." That is, Section 32-906 is not intended to exclude a written agreement that transmutes an item of community property into separate property of the husband or wife while not transmuting future rents and profits therefrom into that spouse's separate property.

It is now also settled that non-statutory, judge-made law—one hesitates to call it common law when the subject matter is the community property regime, drawn from Spanish civil law—recognizes, for example, a separate-to-community property transmutation. See Suchan v. Suchan, 106 Idaho 654, 682 P.2d 607 (1984). Where ownership of realty is altered by transmutation, a writing is required. See Estate of Keeven, 110 Idaho 452, 716 P.2d 1224 (1986); Stockdale v. Stockdale, 102 Idaho 870, 643 P.2d 82 (App. 1982). It must be signed by the spouse who is the transferor of an interest in real property or who agrees that in the future an interest will not vest in him (e.g., husband or wife agrees that future inheritances he or she receives will be community property), and the spouse not adversely affected need not sign. See Hunt v. Hunt, 110 Idaho 649, 718 P.2d 560 (App. 1985). Where only personality is involved, the transmutation agreement can be oral, but if so, it must be established by clear and convincing evidence. See Freeburn v. Freeburn, 97 Idaho 845, 555 P.2d 385, 390 (1976); Estate of Bogert, 96 Idaho 522, 526, 531 P.2d 1167, 1171 (1975).

If a spouse uses separate funds to buy land and has the vendor execute a deed naming both husband and wife as grantees, and the husband has the deed recorded or moves on to the land or otherwise acts as if the deed were effective, a transmutation should occur even if the husband signed neither the deed nor any other document that related to the transaction. His acceptance of the instrument reducing his ownership interest by half should suffice under any statute of frauds as legally in lieu of his signature. Covenants burdening land, for example, must be created in a writing satisfying the statute of frauds, but a buyer who agrees to restrictions initially placed on land at the time of his purchase often does not sign the deed, even though he is the party adversely affected. His acceptance of the deed is invariably held to satisfy the real property transfer statute of frauds. See 20 Am. Jur.2d Covenants §§ 2, 169 (1965).
have the business incorporated, thereafter retaining in the business as much of its earnings as possible.

II. UNILATERAL EXECUTION AND RECORDATION OF AN INVENTORY OF SEPARATE PROPERTY

A. Constitutional Problems Due to Gender Discrimination

Two sections of the Idaho Code, first enacted in 1867\textsuperscript{13} provide:

Section 32-907. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of real property by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside.\textsuperscript{14}

Section 32-908. The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife.\textsuperscript{15}

An immediate reaction to these statutes may be that, since they refer only to a wife, they can be of no benefit to a husband who wishes to strengthen his claim to separate ownership of certain assets of personality. A second thought may be that not even a wife can utilize the statutes because they unconstitutionally violate the equal protection clause of the federal constitution by discriminating on the basis of the gender of a married person.

Certainly the scheme is unconstitutional on its face under the holding of \textit{Suter v Suter},\textsuperscript{16} which invalidated Idaho Code section 32-909.\textsuperscript{17} That statute—which is still in the code books despite the twelve-year-old holding of its invalidity\textsuperscript{18}—provides that post-separation earn-

\textsuperscript{13} 1867 Idaho Terr. Laws ch. 9, §§ 3-5 at 66. At this time the inventory law extended to realty as well as personality. The legislation was restricted to personality when the 1867 law was re-enacted, as amended, as Section 2500 of the Idaho Revised Statutes of 1887. 1887 Idaho Terr. Laws tit. II, ch. III, at 308.
\textsuperscript{14} Idaho Code § 32-907 (1983).
\textsuperscript{15} Idaho Code § 32-908 (1983).
\textsuperscript{16} 97 Idaho 461, 546 P.2d 1169 (1976).
\textsuperscript{17} Id. at 467, 546 P.2d at 1175.
\textsuperscript{18} Of course the courts continue to follow the holding of \textit{Suter} that the unconstitutionality of Section 32-909 means that post-separation earnings of both husband and wife are community property. See Beesley v. Beesley, 114 Idaho 536, 758 P.2d 695 (1988). The state of the law produces very unfair results. See Comment, \textit{Marital Property: When Does “Ours” Become “Yours” and “Mine”?} 25 Hous. L. Rev. 173 (1988),
ings of a wife are her separate property. The Suter court held that the statutory rule is “arbitrary on its face and demonstrates no substantial relation to the object of community property legislation.” At least with respect to singling out females for special treatment, the same has been true since 1974 of sections 32-907 and 32-908, the recorded inventory legislation. When enacted in 1867, the statutes served to protect the wife against abuse by the husband of his control at that time of all the community property, by identifying property of hers that he

which includes a collection of cases from Texas, where the law is similar, including one in which a court declared a married person the half owner in community of acquisitions by the other as much as twenty years after they separated, never to see each other again. The mutual moral support that is the foundation of community sharing is clearly absent in such a situation.

The Idaho Legislature should follow the lead of California and Washington by enacting a gender-neutral version of section 32-909, the “living apart” statute. See Cal. Civ. Code § 5118 (1983); Wash. Rev. Code § 26.16.140 (1986). The Idaho Legislature may want to consider the compromise solution to the problem proposed in Kepply, The Uniform Marital Property Act: Some Suggested Revisions for a Basically Sound Act, 21 Hous. L. Rev. 679, 692-697 (1984). That article, recognizing that when spouses first physically separate their feelings about the breakdown of their marriage may be ambivalent so that the community between them is not absolutely dead, proposes that the statute altering the classification of post-separation earnings from community to separate property of the acquiring spouse apply only to earnings accrued one year or more after the initial separation.

Meanwhile, since unwritten transmutations of personality are recognized in Idaho if proved by clear and convincing evidence (see note 12, supra), Idaho divorce attorneys should explore the possibility that the spouses had at the time of their separation discussions in which they concluded their marriage was dead and each was going his or her separate way. If they actually stated at such time that future earnings would not be co-owned, such agreement should be given effect. Query whether even though no such words were specifically uttered, a trier of fact could find in the face of the clear-and-convincing-evidence standard an implied understanding between the spouses of such an intent. Compare Marriage of Fong, 121 Ariz. 298, 589 P.2d 1330 (App. 1978) (intention of spouses to share acquisitions in community ended when their “will to union” terminated some time after their separation); Togliatti v. Robertson, 29 Wash. 2d 844, 190 P.2d 575 (1948) (decided with respect to husband’s acquisitions at time Washington living-apart statute applied, like Idaho Code § 32-909, only to wives, holding that spouses separated for 18 years “[b]y their conduct” recognized they were living separate in property).

19. Suter, 97 Idaho at 467, 546 P.2d at 1175. For the reasons stated in n. 18 and the authorities there cited, I believe the Suter court was wrong. A proper “object” of community property legislation is to recognize when the sharing and mutual support between spouses has terminated and to provide that future financial sharing of gains made by one alone should also then terminate.

20. 1867 Idaho Terr. Laws ch. 9, §§ 3, 5 at 66.

21. In 1867 the legislature provided that “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 . . . .” See 1867 Idaho Terr. Laws ch. 9, § 9 at 67.
could not unilaterally alienate. But male management was scuttled in favor of equal management in 1974.\textsuperscript{22}

Hence, the arbitrary gender preference in sections 32-907 and 32-908 is indefensible; but what is the appropriate remedy once the conclusion of unconstitutionality is reached? The general rule in Idaho is that when the legislature creates a benefit for people of one gender but the law is unconstitutional due to such discrimination, the cure is to extend the benefit to persons of the other gender.\textsuperscript{23} The Suter holding was an exception to the general rule based essentially on the court's dubious notion (see the quotation above about a lack of any relation to objects of community property law) that terminating community sharing of future gains after a couple separates is stupid. "Since the basic concept of community property law is to recognize that all property acquired during marriage is presumably community property, the exception created by Idaho Code section 32-909 to this basic principle must fall."\textsuperscript{24} In a subsequent case in which the Idaho Court of Appeals declined to apply the Suter exception to the general approach to curing statutes unconstitutional because of discrimination based on gender, the court's explanation of Suter narrows the scope of the italicized language above in a manner particularly significant to the present inquiry concerning the appropriate remedy to cure the unconstitutionality of the inventory statutes. To extend the living-apart statute in Suter to male spouses, explained the court in Neveau v. Neveau, "would be inconsistent with the general presumption that all earnings during marriage are community property."\textsuperscript{25} The special principle of Suter was explained in Neveau as follows: "[W]here broadening an ex-

\textsuperscript{22} 1974 Idaho Sess. Laws ch. 194, § 2 at 1502, codified as Idaho Code § 32-912. Moreover, male management of the type in force in Idaho before 1974 was held unconstitutional because of gender discrimination in Kirchberg v. Feenstra, 450 U.S. 455 (1981).

\textsuperscript{23} Harrigfeld v. District Court of the Seventh Judicial District, 95 Idaho 540, 511 P.2d 822 (1973), invalidated a statute fixing the age of majority for women at 18 but requiring men to attain 21. The cure was to recognize a 20-year-old male as a major (so that his heirs rather than his parents could sue for his wrongful death). "The procedure of extending the benefit of legislation to an improperly excluded class has been employed in sex discrimination cases." Id. at 545, 511 P.2d at 827.

Murphey v. Murphey, 103 Idaho 720, 653 P.2d 441 (1982), held that a statute entitling only wives to be awarded alimony at divorce was unconstitutional because it discriminated against males. The unconstitutionality was cured by extending to husbands the right to an alimony award under circumstances in which a wife was entitled to such a remedy. Accord, Neveau v. Neveau, 103 Idaho 707, 652 P.2d 655 (App. 1982).

\textsuperscript{24} Suter, 97 Idaho at 467, 546 P.2d at 1175 (emphasis added). See n. 18, supra, for this author's disagreement with the idea that sharing of earnings after spouses have separated is a "basic concept" of a marital regime of community property.

\textsuperscript{25} 103 Idaho 707, 711, 652 P.2d 655, 659 (App. 1982).
ception to a general statute would defeat an important policy embodied by the general statute, excision [of the discriminatory law] may be preferred" to cure by expanding its scope to include the class the legislature discriminated against.\textsuperscript{26}

Assuming that in Idaho the general presumption in favor of community ownership of property does not arise until a party proves that an asset was acquired after marriage,\textsuperscript{27} one spouse's invoking the in-

\begin{itemize}
  \item \textsuperscript{26} \textit{Id.} at 710-11, 652 P.2d at 658-59.
  \item \textsuperscript{27} The overwhelming majority of Idaho cases define the general pro-community presumption in such a manner. \textit{See} W. Brokelbank, \textit{The Community Property Law of Idaho}. 123-124 (1962). \textit{But see} Houska v. Houska, 95 Idaho 568, 570, 512 P.2d 1317, 1319 (1973) which, after stating the standard acquired-during-marriage version of the presumption, adds: "The presumption places the burden of persuasion on the party asserting that certain assets are separate property." For similar language, see Guy v. Guy, 98 Idaho 205, 209, 560 P.2d 876, 880 (1977); Stanger v. Stanger, 98 Idaho 725, 571 P.2d 1126 (1977); Ramsey v. Ramsey, 96 Idaho 672, 679, 535 P.2d 53, 60 (1975); Speer v. Quinlan, 96 Idaho 119, 131, 525 P.2d 314, 326 (1973). This kind of language is associated with what is called the "unlimited presumption" in favor of the community, one that arises without necessity of any preliminary proof (such as acquisition date) being made, simply because the pleadings put separate vs. community ownership of an asset at issue. \textit{See} W. Reppy and C. Samuel, \textit{supra} n. 4, at 54. In context, the \textit{Houska} quote, \textit{supra}, seems not to adopt the unlimited presumption but only to note that once the presumption arises upon proof of a post-marriage acquisition date, the effect is to place the burden of proof on the separate property claimant.

It is possible that over 100 years of settled law concerning the effect of and strength of the general presumption in favor of a community property characterization was overturned in 1985 with the promulgation of the Idaho Rules of Evidence. Rule 301 provides:

\begin{quote}
Presumptions in general in civil actions and proceedings.—In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.
\end{quote}


I predict the Idaho courts will hold that this rule does not change the case law under which the pro-community presumption controls the placement of the burden of proof, \textit{at least not in divorce cases}. Filing of an action seeking divorce and a division of community property arguably does not "originally cast" the burden of persuasion on anyone on any issue. (At the most, civil procedure law casts upon the party seeking a division of property the burden of proving acquisition during marriage of an asset, thus raising the general presumption which then casts the overall burden of persuasion.) Rule 301 can only apply when the fact that a litigant has pleaded a particular fact to be true causes the "casting" of the burden of proof. Where the casting of it is initially done by a presumption, the Rule makes no sense and cannot apply.

Suppose, however, a case in which a wife sues to rescind her husband's conveyance without her joinder of a parcel of land he acquired during marriage. To state a cause of action, the wife must affirmatively allege the property was community in character. \textit{Idaho Code} § 32-912 (1983). Apparently under Rule 301, if the husband's grantee
ventory statutes to list assets which the other spouse is unable to prove were acquired after marriage conflicts with no policy of community property law. Suppose, however, that one spouse lists on his or her separate property inventory assets which the other can prove to have been acquired during marriage, without showing at the same time a source in the labor of either of them (and thus not mooting the classification issue). Now the inventory statute is operating to displace the general presumption in favor of the community, but it in no way conflicts with the basic definitions of community and separate property. The statutes would not then be subject to the Suter exception to normal “cure” procedure employed in cases of constitutional gender discrimination, as Suter was explained in Neveau.28 Although one passage from Suter29 suggests that any inconsistency with the general presumption calls for excision of the unconstitutional statute rather than curing it by extension, that passage is unnecessarily broad. Elsewhere in Suter, the court, consistent with Neveau’s understanding of Suter, said the living apart statute had “no substantial relation to the object of community property legislation,”30 i.e., it was substantively out of line with basic principles rather than just undermining the procedural presumption.

The inventory statutes as drafted do not properly attain the legislative goal because they require the signature of the wrong spouse. The spouse who has no community interest in an asset—or for that matter who does not own it entirely as his or her separate property—is the party whose signature should appear on the inventory, since he or she is the party against whom it will be used and whose concurrence in its accuracy the law should be concerned about. As stressed by the first national commentator on community property law, inventories of alleged separate property signed only by the claimant spouse “are purely self serving declarations” and are, logically, “no admission” by the other spouse of the nature of the property.31 But obviously the legisla-

presents a bit of weak evidence that the husband bought the land with inherited funds, the pro-community presumption drops out of the case and the burden of proof is on the wife to show the husband used community funds.

A statute must be promptly passed to preclude Rule 301 from having any effect on the pro-community presumption.

28. See the underscored portion of the Neveau quotation at n. 25 pg 8, supra, stressing that the statute involved in Suter sought to classify as separate property acquired during marriage and thus conflicted with important, general substantive policies of community property law.

29. See text at n. 23, supra.

30. Suter, 97 Idaho at 467, 546 P.2d at 1175.

31. R. Ballinger, Property Rights of Husband and Wife, Under the Community or Genancial System § 69, at 108 (1895). Ballinger proposed limiting the foolish operation of an inventory statute calling for execution by the wrong spouse by a rule authorizing
ture intended to enact a silly statute for the benefit of wives, and it is by no means clear that, under Suter stupidity alone is a reason to ex-
cise the statute when its gender discrimination is held unconstitutional rather than curing the denial of equal protection by extending to hus-
bands the right to file an inventory.

B. Do The Statutes Extend to Post-Marriage Inventories and Separate Property Assets Acquired After Marriage?

It is likely, then, but not certain, that Idaho Code sections 32-907 and 32-908 remain operative and can be invoked by husbands as well as wives. The foolishness of the provision calling for the signature of the wrong party would be almost wholly eliminated if the courts could construe these statutes as applicable only to inventories made out prior to marriage. Based on the plain language of these sections, such construction seems implausible, despite the fact that the spouse's inventory of separate property was historically a pre-marriage docu-
ment often made in conjunction with an antenuptial agreement.

Community property came to Idaho—apparently via Califor-
nia—from roots in Spanish-Mexican law. According to De Funiak, at Spanish law, to facilitate proof of what property was owned sepa-
rately, “at the time of the marriage contract an official record of an 
inventory should be made out of all the goods brought by either spouse

the signatory spouse to use the inventory only against a creditor unable to levy on separ-
ate property of the signatory spouse. Id. But he was analyzing an old Washington stat-
ute, construed in such manner in Yesler v. Hochstettler, 4 Wash. 349, 359-360 (1892), in
the face of a wife's claim that her recordation of the document unsigned by the husband
was an admission by the husband of lack of a proprietary interest. The statute in Yesler
specifically tied the inventory of the wife to claims of the husband's creditors. An Act
Defining the Rights of Husband and Wife, 1873 Wash. Terr. Stats. § 5 at 451 (wife's
inventory “shall be notice of the title of the wife, and all property belonging to her in-
cluded in the inventory . . . . shall be exempt from seizure on execution for debts of the
husband . . . .") IDAHO CODE § 32-908 (1983) is not tied to creditors' claims, and, espe-
cially in light of its being borrowed from California, not Washington, as noted below, the
limiting construction proposed by Ballinger for inventory statutes calling for the signa-
ture by the wrong party seems unavailable in Idaho.

32. To the extent that the man and woman about to marry had acquired co-owned property (e.g., tenancy in common property) before the marriage and to the extent that the signing party lists on his or her inventory an asset he or she intends to acquire after marriage, the problem of use of the inventory against a party who does not sign it and can be totally ignorant of it would remain.

33. See W. McClanahan, Community Property Law in the United States § 3.29 (1982); W. De Funiak and M. Vaughn, Principles of Community Property § 46 (2d ed. 1971).

34. See generally W. De Funiak and M. Vaughn, supra n. 33, §§ 19-51.
to the marriage . . . .” 35 The Spanish legal expert Alphonso de Azevedo, writing in the sixteenth century, said: “[I]t is useful for husbands and wives to make, in the presence of a notary and witnesses, a public inventory of the property which each brings to the marriage.” 36 In a more recent historical source, Escrive, whose legal works were consulted in Mexico as well as Spain, stated in 1831: “[I]t is customary at the time of the marriage to execute a public document which clarifies what was owned by each spouse.” 37

The separate property inventory concept first appeared in American law 38 in the Texas constitution of 1845, which directed that the Texas Legislature should pass laws “providing for the registration of the wife’s separate property.” 39 This departed from Spanish-Mexican practice by confining the inventory to the wife and, apparently, by not limiting it to property brought to the marriage. That was certainly the understanding of the Texas Legislature when it responded to the constitutional directive. Legislation enacted in 1846 provided that “[a]ll property, real and personal, which may be owned or claimed at the time of marriage by any woman, or which she may acquire after marriage by gift, devise or descent, shall be registered as herein directed.” 40 This statute differed from the Spanish-Mexican practice in

35. Id. § 60.2. The quotation is taken almost word for word from De Funiki's translation of the sixteenth century Spanish juriscounsel Juan de Matienzo's Commentary on Novisima Recopilacion [a Spanish code of laws], book 10, title 3, law 4, gloss II, (p) 2, quoted in 2 W. De Funiki, Principles of Community Property 268 (1st ed. 1943).

36. Commentary on Novisima recopilacion, book 10, tit. 4, law 4, gloss III, (p) 3, quoted in 2 De Funiki, supra n. 35 at 272. See also R. Mennell, Community Property in a Nutsheil (2d ed. 1988) (inventory at Spanish law “a means to avoid confusion and facilitate proof of separate property character”).


38. The first state to codify community property as a marital property regime, Louisiana, with its Civil Code of 1808, has never had a statute providing for filing of an inventory of separate property. See R. Ballinger, supra n. 31, § 55 at 90-91.


40. 1846 Tex. Acts 153. This became article 6647 of the Texas Revised Civil Statutes of 1925. The implementing provisions, articles 6648 and 6649 of that Code, also traceable to 1846 legislation, were not written in mandatory terms (such as the “shall” in the 1846 statute) but said, for example, that if the wife inherited property after marriage, she “may have a schedule of the same recorded . . . .” The statutes made the inventory effective upon the wife’s acknowledgment under oath without any approval of it by her husband. Article 6651 provided that the inventory of the wife “shall be conclusive as against all subsequent creditors of and purchasers from her husband.” For existing Texas law see Tex. Fam. Code Ann. § 5.03 (Vernon 1975), which provides that either spouse may file an inventory of separate property. This imparts constructive notice to purchasers and creditors, but, rather clearly, not to the nonsigning spouse. The present law does not specifically say the inventory is “conclusive” on anybody.
three ways: only the wife could file an inventory; she could file it after marriage and include on it post-marriage acquisitions; and, a passage of the 1846 law not quoted above indicated that the only parties bound by the inventory were creditors of the husband. The husband himself was not.41

Idaho apparently borrowed its inventory statutes42 not from Texas, but from California. In 1850, the California legislature provided:

A full and complete inventory of the separate property of the wife shall be made out and signed by the wife, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of land, and recorded in the office of the recorder of the county in which the parties reside.43

This was enacted verbatim by Idaho’s territorial legislature in 1867.44

The California legislation of 1850, like the Texas legislation four years earlier, linked the wife’s inventory to creditor’s claims by providing that “all property belonging to her, included in the inventory, shall be exempt from seizure or execution for the debts of the husband.” The Idaho territorial legislature also picked up this provision from California while, oddly, deleting the words “included in the inventory.”45 In 1887, however, when the Idaho territorial legislature departed from the California model by limiting the Idaho inventory to personality, it also struck from the legislation all mention of creditors.46 Because this decision to disconnect the Idaho legislation from creditors’ rights was deliberate, a holding that a separate property inventory filed in Idaho is binding only on creditors and not on the other spouse would be improper. Apparently, then, the wife was to have the ability in Idaho to

41. See note 40, supra.

42. 1867 Idaho Terr. Laws, § 3 at 66. Nevada is the only other community property state to have enacted a separate property inventory statute. It was enacted initially in 1873. (1873 Nev. Stat. ch. CXIX, §§ 3-5 at 193-94). Thus it could not have been consulted by the Idaho territorial legislature in 1867. The Nevada legislation was not included in the books (as §§ 501-503 of the Nevada General Statutes of 1885, currently Nev. Rev. Stat. Ann. §§ 123.150 - 123.160) when the Idaho legislation was amended in 1887; see text accompanying note 45, infra. However, the Nevada legislation was much more complex than the California-Idaho version of the separate property inventory law. Nevada’s law (§ 503 of the 1887 General Statutes) contained a unique feature making the wife’s failure to record inventory prima facie evidence in favor of a purchaser from the husband that uninvoritoided realty was not her separate property.

43. 1849-50 Cal. Stat. ch. 103, § 3 at 254. As amended by 1935 Cal. Stat. ch. 102, § 1 at 455, to be gender neutral, this statute is now California Civil Code § 5114.

44. 1867 Idaho Terr. Laws ch. 9, § 3 at 66. It was reenacted in this form by 1875 Idaho Terr. Laws, § 3, at 6735, of An Act Defining the Rights of Husband and Wife.

45. 1867 Idaho Terr. Laws ch. 9, § 5 at 66.

invoke the inventory statute against her husband. Although in 1887 (as in 1867), an Idaho husband had the general power of management and control over his wife's separate property, he nevertheless could not alienate it without her joinder, and he could not claim any of it at divorce or prevent her from disposing of such separate property by her will at her death. Thus, the wife's right to employ the inventory statute against the husband was significant in the nineteenth century. Nothing has happened to the legislation since 1887 to suggest the wife has been deprived of the right then granted to her to use a filed inventory against her husband. She thus has standing so to employ the inventory legislation today, and, if it is subject to gender-neutral reconstruction, so does a husband.

In passing its initial inventory legislation, California did not, like Texas, make it clear that the wife's separate property inventory could include assets acquired by her after marriage. However, in 1857, well before Idaho borrowed the basic concept from California, the California Supreme Court said that the inventory scheme "was intended to give notice of what property the wife claimed to have owned before marriage, or acquired afterwards by gift, bequest, or devise." Canons of statutory construction indicate that the territorial legislature had no disagreement with this interpretation when it largely copied the California statute ten years later.

Arguably, since Idaho confined the separate property inventory statute to personalty, it was intended to apply only to property owned before marriage. Apparently the Idaho territorial legislature in 1887 felt that the basic recording act for real property then in effect would provide notice of a wife's separate ownership of realty. This is true of property acquired by her before marriage; a title searcher need only compare the date on the recorded deed to the wife to the date of her marriage to see that she probably owned the realty separately before marriage. It is also true as to post-marriage acquisitions by devise or

47. Id. at § 2498.
51. That is, if she completed all payments on the purchase price before marriage or, if she did not, the inception of title doctrine is applied so that post-marriage payments could not buy in a share of title for the community. Idaho remains committed to the inception of title doctrine. See Winn v. Winn, 105 Idaho 811, 673 P.2d 411 (1983).
intestate succession; official records would show such lucrative source of title in the wife. As to post-marriage gifts of land deeded to the wife alone, "ordinary" recordation would not always disclose the lucrative source of title. The legislature could not have intended such confusion, the argument might go, thus, it never considered any type of recording scheme that would create notice via an inventory of a wife's separate ownership of post-marriage acquisitions.

The point about post-marriage gifts of realty under the recording act is so subtle that one can have little confidence that the legislature might have considered it. This is too frail a reed from which to structure a conclusion that the inventory statute, not limited by any wording to pre-marriage assets, does not extend to any property a married person wishes to claim as separately owned by her or him.

C. Is an Inventory Ineffective if Filed Solely to Gain an Advantage at a Forthcoming Divorce?

May a spouse make initial use of the inventory legislation after the couple has quarreled and separated—indeed, after a divorce action has been filed and trial is imminent—for the purpose of improving her litigation posture in a dispute she knows exists over whether the property

For its rejection in whole or in part in other community property states, see W. Reppy and C. Samuel, supra n. 4, at 79-84.

The text states that the title search can conclude from the date on the deed that the grantee spouse "probably" owns it separately. Actually, the date of recordation is more likely to correspond to the date of delivery, when title to the grantee spouse actually passes—a date that can be much later than the date when the instrument was signed. See generally Brett v. Dooley, 80 Idaho 237, 327 P.2d 355 (1958).

Recordation ordinarily means the grantor has given up dominion and control and intends to pass title. But as the Brett court, supra, recognized, recordation by mistake is ineffective. Id. at 240-41, 327 P.2d at 356-57. Suppose a case in which a vendor gave a deed granting land to a named person to an escrow agent to hold. The escrow agent wrongly recorded the deed. Later the grantee married, and after that the vendor was paid the purchase price and advised the escrow agent that title should now pass and the deed should be recorded. If no one has the original recordation cancelled, record title looks like the grantee acquired the land before marriage, when legally he or she did not.

52. Obviously this is so if the deed recited neither consideration nor that a gift was being made. Moreover, it is possible that under the basic recording act, recitals in deeds to one spouse not signed by the other which are inserted to show separate ownership by the grantee (e.g., that the grantor was making a gift) are not presumed to be true. See text accompanying notes 75-82, infra.

Actually, an occasional case will arise in which a transfer would look like a devise or inheritance, and thus a lucrative, separate property acquisition, yet in fact, the property came to the devisee or heir by way of a contract based on community consideration, so that despite the apparent separate property record title, the asset is community. See Andrews v. Andrews, 116 Wash. 513, 199 P. 981 (1921).
is separate or community? Nothing on the face of the statutes or their legislative history suggests the legislature intended any restrictions on use of the inventory, although I cannot imagine there was any actual intent that it be employed as a litigation tool. Would professional ethics bar an attorney from urging or facilitating such use of the inventory statutes? Surely not, if the client related to the attorney facts, which the client said were true, although disputed by the other spouse, that would support a holding that the inventoried assets were the client’s separate property.

May the inventory legislation be used to shift the burden of proof as to just a portion of an asset? For example, the client tells counsel a car acquired during marriage was purchased with $5000 of community funds and $3000 of his or her separate property. May the inventory properly list as one of the items separately owned by the filing spouse “% interest in a 1984 Buick station wagon?”

The undivided interest is certainly “property”—the key term of Idaho Code section 32-907. Surely when the original legislation was enacted in 1867, the legislators intended for a wife to be able to inventory a half interest (shared, for example, with her brother as co-heir in tenancy in common) in realty. The fact that the statute now embraces only personality, as to which fractional interests may be more unusual, suggests to me no change in legislative intent.

The fact that separate and community fractional interests in a bank account used by both spouses are continually shifting, as new deposits of various classes of cash are made along with withdrawals known or presumed to be separate or community, is troublesome. One assumes that just days after an inventory is filed listing a particular fraction of a bank account as a spouse’s separate property, the figure listed is likely to have become inaccurate. But do the courts have the power to exclude from the scope of the inventory legislation certain types of assets because of these problems? Similar commingling problems can occur with stock-market investment accounts which the spouses establish with a broker or investment advisor. Surely, however, this would not warrant a conclusion that corporate stock cannot be inventoried under the statutes at issue. I predict that a mere possibility, or even a probability, that a type of property interest will shift over time in the size of its fractional interest will not bar inventorizing it as separate property of a spouse.63

53. Suppose the wife worked for her employer for two years while single and then married her husband. Two years later, still employed at the same enterprise, the wife decides to file a separate property inventory and list a 50% interest in benefits under her employer’s defined-benefit pension plan. It is clear that as the wife continues after the
D. The Inventory Statutes Should be Repealed

In sum, the inventory legislation can be a very useful divorce litigation tool where there are going to be problems establishing the separate character of an item of personalty. Most likely, the legislation will be made constitutional by extending to males the right to file an inventory. Also, the legislation most likely applies to all kinds of personal property assets, including fractional interests in assets, without regard to whether acquired before or after marriage. Additionally, it probably does not matter that the inventory is filed while a divorce action is pending for the sole purpose of improving a spouse’s litigation posture.

Because the statutes call for the signature of the wrong spouse on the inventory, the state of the law is very unfair. At the very least, the statute should be amended to provide that the inventory has no legal effect unless formally approved by the non-owner spouse. However, if one spouse signs a document that formally states that certain properties are separately owned by the other spouse, why should not the document be conclusive evidence of the separate nature of the listed assets at least in disputes between the spouses, rather than raising a mere presumption? If the wife can get the husband to agree that she has a prima facie case of separate ownership to the listed assets, surely he would also agree that she actually owned them under the law as her separate property. Also, if the issue is to be settled conclusively between the spouses by the inventory signed by both, should it not likewise be conclusive as to subsequent creditors of either of them (unless actual fraud can be proved)? In other words, once the scheme is amended to require the signature of both spouses, the inventory should have more legal effect than shifting the burden of proof. It can operate the same as a transmutation agreement.54

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filing to earn more pension benefits by labor during marriage the separate property fraction will steadily drop below 50%. See Ramsey, 96 Idaho at 672, 678-79, 535 P.2d at 53, 59-60 (applying a “time” apportionment in this fact pattern). Yet her inventory is accurate when filed and lists a personal property interest. I think the courts will have to hold she has the right to file such an inventory. It does not follow, however, that the inventory shifts the burden of proof with respect to the increase in value of her pension after the filing date. That portion of the pension could be viewed as a property interest distinct from that which was the subject of the wife’s inventory. Still, the wife’s filing would apparently require the husband, in order to claim a right to division at divorce of more than a half interest in the pension, to come forward with more than proof of acquisition during marriage, the usually applicable general presumption of community ownership. He must show the value of the pension at the time the wife filed her inventory, which is probably all the proof he needs to establish the full community interest without use of any presumption.

54. See note 12, supra.
Is there any reason to clutter up the files and indices of the various county records offices with such inventories of personality? The absence of any reported case involving use of a separate property inventory suggests that the device is seldom used. The Idaho Legislature may find no need to relieve county recorders of a nonexistent flow of records that will seldom, if ever, be the object of a document search. (An unsecured creditor contracting with only one spouse, after all, is willing to take the risk that marital property assets will be consumed or seized by others before he or she is ready to levy execution; the risk that property assumed by such a creditor to be community and hence liable for the debt is actually separate property of the other spouse seems much less.) The legislature could reasonably decide that recordation of personal property inventories is unnecessary, in which case the statutes at issue should simply be repealed, since transmutation law would serve all the purposes of an “inventory” statute that requires signatures of both spouses, makes the separate property classification conclusive absent fraud on creditors, and does not provide for recordation.

III. CREATION OF RECORD TITLES WITH RECITALS OF SEPARATE PROPERTY OWNERSHIP AND SEPARATE PROPERTY CLASSIFICATION OF RENTS AND PROFITS

The second strategy for bolstering the case for separate ownership of property is to create “separate property titles” for all assets which, under law, are capable of being “titled.” Under Idaho case law discussed below, a recital in a deed that the property transferred by it is separate property of the grantee spouse rebuts the ordinary presumption of community ownership. Even if the deed on its face shows an acquisition date during marriage, the recital may raise a presumption of separate ownership. Additionally, by statute a recital in a deed, which concededly transfers separate property to a spouse, that the rents and profits accruing from such property will likewise be separate is effective under certain circumstances. The recital thereby replaces the normal statutory rule that would classify such rents and profits as community property. The statute authorizing recitals concerning rents and profits will be analyzed first.

55. Once the law requires both spouses to sign an inventory, a spousal record search for such documents is improbable. The only party likely to make a record search for a separate property inventory is a purchaser from or secured lender to the husband or the wife alone. It would be a lot easier for such a party to ask for and get the signature of the other spouse consenting to the transfer or confirming that the item being sold or encumbered is community.
A. How Broad is the Scope of Idaho Code Section 32-906?

Idaho Code section 32-906(1) presently provides in pertinent part:

'... the income from . . . [the] separate property be the separate property of the spouse to whom the property belongs."

Apparently, this provision has never been construed in a reported Idaho case, and one rarely encounters in the decisions an instance in which a spouse has taken advantage of it in an instrument of title. This proviso allowing a departure from the basic rule that rents and profits of separate property are community, absent a contrary agreement of both spouses, first appeared, in a somewhat different form, in Idaho legislation in 1887, having been borrowed verbatim from an 1853 California act. Professor Brockelbank has commented: "Just why it was inserted in our law in 1887 is not known." Originally, only rents and profits from a wife's separate property could be made separate by such a recital in the instrument of conveyance; the statute was rewritten and reenacted to be gender neutral (and include the husband) in 1980.

The 1867 version of what is now Idaho Code section 32-906(1), as well as the California model from which it was copied, was on its face narrower in scope than the present statute. This difference takes on major significance in determining whether Section 32-906(1) extends to separate properties other than those acquired from a donor or testator. The language of the California statute of 1853 and Idaho Territory law of 1867 contained restrictive language that probably did so limit the scope. Each stated a general rule that rents and profits of both spouses' separate property were community subject to the following exception:

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57. One of the rare instances in which a deed employed the invitation of Section 32-906(1) for an unconsented-to transmutation of rents and profits is Bowman v. Bowman, 72 Idaho 266, 268, 240 P.2d 487, 488 (1952) (language in deed stated: "... and the rents and profits thereof to be applied to her [wife's] sole and separate use").
58. 1853 Cal. Stat. ch. 116, § 1 at 165. At this time the general rule in California, as it has always been in Idaho, was that the rents and profits from separate property were community. 1849-50 Cal. Stats. ch. 103, § 9 at 254. Not until 1860 by way of the decision in George v. Ransom, 15 Cal. 322 (1860), which held that the civil law rule violated the state constitution, did California shift to the "American" rule that rents and profits have the same separate character as the capital estate producing them.
59. W. Brockelbank, supra n. 27, at 111, referring to 1887 Revised Statutes of Idaho § 2497.
... unless in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised or given to her, that the rents and profits thereof shall be applied to her sole and separate use; in which case the entire management and disposal of the rents and profits of such property shall belong to the wife...  

In California in 1853 and Idaho in 1867, all other kinds of separate property of the wife were subject to the husband's management, although he could not alienate or encumber without her joinder in the instrument (after a private examination of her by a judge to determine she was not acting under duress by him).

Dean Prager has noted that the California statute was part of a series of enactments passed in California's first decade seeking to ameliorate the harshness of the original 1850 marital property legislation, especially insofar as it denied the wife management of her own separate estate. The California statute was enacted a year after the passage of an act that empowered a wife, who owned a separate property business or wished to commence such a business using separate property, to register as a "sole trader." Profits from her labors at such a business and the separate capital she employed there were, under the sole trader act, classified as her separate property subject to her exclusive management. The 1853 California enactment broadened this class of the wife's separate property subject to her exclusive management.

In view of the 1852 sole trader legislation, the narrow scope of the 1853 California statute—applicable only to instruments by which a wife obtained separate property by bequest, devise or gift and not applicable by its terms to investments made by her with property she had exclusive control over—is surprising. What did the California legislature intend with respect to management power over dividends a wife received by investing profits from her sole trader business in corporate stock? Were such dividends her separate property subject to her control because they were directly traceable to a sole trader business, or were they community properties subject to absolute control of the husband? I do not know, but it is certainly likely that the 1853 Califor-

64. 1852 Cal. Stat. ch. XLII, § 3 at 13.
nia legislation did not envision sole trader wives resolving the problem by "giving" the money to be invested to a straw person who would buy the stock and who would then "give" such instruments to the wife under certificates reciting that dividends should be applied to the wife's sole and separate use. I assume the California legislature of 1853 had in mind genuine gifts involving actual donative intent and that the Idaho statute of 1867 had the same scope.

Idaho, like California, apparently intended donors and testators to be able to create a class of the wife's separate property subject to her exclusive management. In 1887, however, the Idaho territorial legislature rewrote what is now Section 32-906(1) to employ much broader language. The legislature then authorized the insertion of language classifying rents and profits as separate property in any "instrument by which such property is acquired" rather than just devised, bequeathed or given.65

This new language is obviously broader in scope and includes instruments obtained by using separate funds of the wife as consideration. The 1887 territorial legislature must be assumed to have deliberately broadened the scope of the statute—removal of the restrictive terms "bequeathed, devised, or given" could not have been inadvertent. It may be objected that in Idaho in 1887 the wife herself could not have invested separate property in such a manner because her husband had power of management over her separate funds.66 However, he could have acted as her agent in making the investment by instruments of title reciting that rents and profits would be her separate property, thereby formally relinquishing control over future separate property income of the wife. Or, he may have had an agreement with her that she could manage her separate funds, allowing her to make such investment. I know of no old Idaho cases where this had occurred, but it was probably possible under 1887 law.67

Moreover, the 1887 legislature could have foreseen that if a testator or donor transferred stocks and bonds to a wife with the appropri-

65. Idaho Revised Statutes of 1887, § 2497 (emphasis added).
66. Id. at § 2498.
67. In California, under similar statutes, courts readily held that a husband had authorized the wife to manage property she could not otherwise have managed. See W. Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 SAN DIEGO L. REV. 143, 150-56 (1981). In Sencerbox v. First National Bank of Idaho, 14 Idaho 95, 100, 93 P 369, 371 (1908), the court says in dictum: "She [the wife] was not authorized to take charge of and manage her separate property under any conditions or facts" under pre-1903 Idaho law. The court simply had not considered the possibility of the husband delegating his management power over such property to the wife.
ate recitals to make gains her separate property subject to her control, she would want to re-invest dividends and interest received in like manner. Surely the broad scope of statutory language employed in 1887 would be viewed by the legislators then as clarifying that the wife was supposed to be able to protect the management power granted her in 1867 in the suggested manner.

In sum, then, the 1887 predecessor statute to Idaho Code section 32-906(1) was intended to empower wives to unilaterally convert their separate properties that would ordinarily produce community rents and profits into separate property generating separately owned rents and profits by investing in assets taken under instruments of title stating such an intention.

Of course, when the Idaho Legislature in 1974 gave a wife equal management over community property, the need for a special rule for classifying rents and profits as separate in order to retain a wife’s management power over the fruits of her investments ended. Yet, the legislature then made no change in Section 32-906(1), and it is extravagant to argue that its scope was decreased by implication. That is, it ceased in 1974 to apply, as it had since 1887, to unilateral investments of separately owned funds (or other untitled properties) by a wife and became confined to instruments of title drafted by donors and testators. Whatever rule applicable to wives survived the 1974 legislative reforms surely applies to husbands after Section 32-906 was made gender neutral in 1980.

B. Unilateral Actions by a Spouse to Convert Community Rents and Profits to Separate Property

May, then, an Idaho spouse convert separate property having a source in property owned before marriage or acquired by intestate succession from property producing community rents and profits to property producing separate rents and profits by investing such property under instruments of title containing recitals addressed to the rents and profits? With little doubt, I say “probably” he or she can. Certainly an attorney would not be irresponsible in suggesting to a fully informed client that he or she attempt to do so. Unlike the earliest

69. The question embraces the situation in which a spouse has already invested cash inherited or owned before marriage in land, securities, etc., with documents of title silent as to ownership of rents and profits, the spouse sells such assets, and the spouse invests the proceeds employing instruments of title with the recitals in Section 32-906. I see no difference between converting land that produces community profits into land that produces separate profits and converting cash in similar fashion.
version of the statute, the present wording of Section 32-906(1) does not tie the classification of rents and profits from a husband or wife's separate property to the expressed intent of a donor who conveyed or testator who bequeathed or devised the profit-producing asset. The wishes of the spouse having no ownership in such asset continues to be as irrelevant under present law as they were in 1867.

C. Application of Idaho Code Section 32-906(1) to Gifted and Inherited Properties

In a situation in which a donor or testator executes an instrument naming both the husband and wife as co-grantees or devisees, obviously there is nothing that either spouse can do acting alone to create a new title under Section 32-906(1) that will make rents and profits from the asset that spouse's separate property. Suppose instead the will or instrument of gift names one spouse, say the wife, as sole grantee or devisee, but goes on to specify that rents and profits shall be community property of the grantee and his spouse. The grantee spouse purports to convey the asset to a straw-person who reconveys it to that spouse with recitals that the rents and profits shall be that spouse's separate property. This attempt to unilaterally employ Section 32-906(1) should fail. The grantee's spouse, or the marital community if one prefers, has an interest that ought not to be able to be destroyed in this fashion. Stated differently, the donor or testator has exercised an option that appears to be accorded to him or her under Section 32-906(1) to determine the classification of rents and profits. Certainly that power was accorded to the donor or testator by the original 1867 Idaho legislation. Subsequent enactments broadening the scope of Section 32-906(1) suggest no legislative intent to retreat from that original judgment concerning the power of the donor/testator.

Suppose, however, the parents of a spouse, say the husband, make to him a gift deed of Blackacre that says nothing about future rents

70. Assume the instrument does not mention that spouse by name. If it did, such individual would have a strong argument that his right to claim half the profits was not dependent on his being married to the grantee so that his claim could be asserted after their divorce or even after the first-named grantee's death under tenancy in common law.

71. Note, however, that even if the profit-producing asset were land, the interest of the spouse in future rents and profits is probably not community real property that neither spouse acting alone could convey to the straw person due to the joinder requirement of Section 32-912 of the Idaho Code. The future profits appear to be an intangible interest that would pass to the straw person under the hypothesized conveyance. Certainly all the interests would pass by the grantee-spouse's unilateral conveyance to the straw person if the gifted or inherited asset were capital stocks.
and profits. Before taking delivery, the husband asks his parents to rewrite the deed to state that rents and profits from the land to be given to him will be his separate property. If the donors do so, the recital in the deed should be effective, even though the idea to include it was the husband’s.

May the husband direct the donors to create a “title” for an asset that ordinarily is untitled? If the parents intend to give him an unregistered bearer bond with coupons to clip, what is the effect if they deliver to him, along with the bond, a formal document declaring that they are making a gift assignment to him and that the interest payments he receives via the coupons are to be his separate property under Section 32-906(1)? The document of assignment is quite unnecessary to pass title to the husband—delivery coupled with donative intent does that. However, the written assignment is not a legal nullity, but is the best evidence of the existence of donative intent and the rightfulness of the husband’s possession of the bond. I believe the Idaho courts will hold the recital of separate ownership of the interest payments to be effective.

A problem arises, however, if the husband takes delivery of the untitled bond and only later asks for the instrument of assignment referring to his separate ownership of interest payments. Or, suppose a case in which the donors convey Blackacre, by deed making no reference to its rents and profits to the husband, who later learns about Section 32-906 and conveys the realty back to his donors. They then, as expressly and implicitly understood at the time of the reconveyance to them, execute and deliver another gift deed, this time providing in it that rents and profits from Blackacre will be the husband’s separate property.

One issue is whether the donors’ first instrument, which is silent about ownership of future rents and profits, should be viewed as implicitly expressing an intent to have the ordinary classification rule applied. That is, the courts will assume the donors wanted the rents and profits to be community. While individuals are in many contexts presumed to know the law, the suggested assumption seems like an unnecessary legal fiction to me. I predict, with some doubt, that a deed silent as to classification of rents and profits will not be treated as a flat bar to subsequent use by the grantee-spouse of Section 32-906(1) to create

72. Note that the language of Section 32-906(1) calls for the recital of separate ownership of rents and profits from a capital asset to appear in “the conveyance by which it is acquired.” Apparently, the legislature did not consider the situation in which the acquisition technically occurs without a written instrument, although the parties do use one.
a title that makes the rents and profits his or her separate property (as
ought to be the case in which the will or gift specifically provides that
such rents and profits will be community property).

A second issue in the situation where the donee orchestrates a re-
conveyance to him or her after the initial instrument of gift contains
no recital concerning ownership of rents and profits is which one of two
conveyances of the same asset—the original without the recital or the
second employing it—is "the conveyance by which it is acquired," the
language of Section 32-906(1). In a technical sense, it is the second
conveyance, since in the case of Blackacre, the title was not vested in
the husband during the brief time between his reconveyance to his par-
ents and their delivery to him of the second deed including the recital.
(In the case of the bearer bond given without any documentation, with
a formal assignment later handed over, even the technical argument on
the husband's behalf fails unless he was careful enough to give the
bond itself back to his donors so it could be re-delivered to him.) If
this technical argument succeeds, an Idaho spouse has the same right
to unilaterally opt out of the civil law rule that classifies rents and
profits of separate property as community in favor of the "American"\textsuperscript{73}
rule, under which such rents and profits have the same separate char-
acter as the capital asset producing them (without labor by the own-
erspouse), as does a married person in the community property states of
Louisiana and Wisconsin.\textsuperscript{74}

For practical purposes, of course, the husband's title dates from
the original conveyance to him. The reconveyances are straw-person
transfers not intended to vest any beneficial ownership in the donor-
parents. Quite possibly the husband could, if his parents refused to
reconvey to him after accepting legal title from him, establish himself
as the beneficiary of a constructive trust arising out of breach of a con-
fidential relationship.\textsuperscript{75} Probably if the beneficial ownership was in the
husband at all times after the initial conveyance, the first deed or

\textsuperscript{73} Concerning the terms "civil law" and "American" rules, see \textit{generally} W.
Reppy and C. Samuel, \textit{supra} n. 4, at 131-32.

\textsuperscript{74} \textit{See} La. CIV. CODE ANN. ART. 2339 (1985); Wis. Stat. ANN. § 766.59 (1988). In
Louisiana recordation of the instrument is necessary; in Wisconsin, the spouse invoking
the opt-out statute must notify the other spouse of having done so.

If the technical argument succeeds, the primary difference between Idaho law and
that of Louisiana and Wisconsin is that the Idaho spouse needs to create a distinct in-
nstrument of title for every capital asset he or she wishes to remove from the civil law
system concerning rents and profits. In the two other states one writing declaring the
spouse's intent is effective for all his or her separate property or all such assets he or she
wishes to list on that document.

\textsuperscript{75} \textit{See} \textit{generally} Klein v. Shaw, 109 Idaho 237, 706 P.2d 1348 (App. 1985); 8 G.
transfer will control whether the rents and profits become his separate property under Section 32-906(1). The husband will undoubtedly find it difficult to convince any court that there was not, from the moment of his reconveyance to his parents (or any other straw-person he may use in attempt to create a new title with full separate property recitals), an understanding that the transfer back to the husband had to be made—even if the parties to these transactions let the title remain for some considerable time in the parents or straw-person. Rarely, then, will the reconveyance device following an initial gift to the husband not effective under the proviso of Section 32-906 succeed in altering the community character of future rents and profits. On the other hand, if the gift to the husband is of stock in ABC Corporation, which he reconveys to the donor who then makes a fresh gift of XYZ stock with Section 32-906 recitals, the case is strong that the instrument by which the XYZ stock was acquired can only be the second assignment instrument (with the recitals).

Legislative action is plainly needed to clear up the ambiguities in Section 32-906 that have been noted. If a broad scope is intended, Idaho should borrow the simpler procedure of Louisiana and Wisconsin, whereby the spouse who owns separate properties can specify on just one instrument which of them are to produce separately owned rents and profits. (Usually the spouse will want to just designate all of his or her separate property.) If a narrow scope is intended, the statute should be amended to specifically state that the choice of whether rents and profits are to be separate or community is entrusted to a donor and testator only, not to the owner-spouse.

D. Obtaining a Presumption of Separate Ownership at Common Law by a Recital in the Title Instrument

The second separate-property strategy based on creating a particular form of title rests on a judge-made rather than a statutory rule of law and involves not a change of ownership from community to separate property, but a displacing of the ordinary pro-community presumption in favor of a presumption of separate ownership. It thus has the same function as the inventory legislation discussed above, but, unlike that legislation, this strategy can be used to shift the presumption

76. Where the husband's acquisition by instrument not containing the recital concerning separate ownership of rents and profits is by devise rather than inter vivos gift, he per force cannot ask the transferee to orchestrate a reconveyance. He can only use a straw-person. Where the donor makes the reconveyance, the argument is available that the donor is entitled to change his mind about the terms of the gift. That is an argument unavailing where the initial conveyance to the husband is a devise.
with respect to realty acquired during marriage. Moreover, those who fear the inventory statutes will simply be held inoperative due to gender discrimination, rather than extended to husbands to cure the constitutional infirmity, will want to consider use of this strategy: unilateral creation of a deed or instrument of title that recites separate ownership by the grantee spouse of the asset itself (as compared to its rents and profits, to which the part of Idaho Code section 32-906(1), analyzed above, is addressed).

One might think that a deed granting property to a person dated before his marriage firmly establishes separate ownership; but if the grantee’s spouse proved that delivery did not occur until after marriage, such proof should raise the general presumption of community ownership, requiring the titled spouse to show a separate source for the acquisition in separately owned funds or a gift from his or her grantor.\textsuperscript{77} I assume, however, that except in rare cases the grantee will not anticipate such results from a delayed delivery and will be content to rely on the pre-marriage date without use of a separate property recital as an alternative basis for avoiding the general community presumption.

Almost all cases, then, involving an attempt by way of recital of separate ownership in an instrument of title to shift from a presumption of community ownership to a presumption of separate ownership will involve assets presently untitled (or carrying a title consistent with either a community or separate property classification), which could include property acquired by the husband or the wife during marriage.\textsuperscript{78} If the asset at issue is itself one acquired under a will or decree

\textsuperscript{77} If the grantee of land could show pre-marriage payment of consideration despite a post-marriage delivery of the deed, he or she could, under the doctrine of equitable conversion, displace the pro-community presumption with respect to the interest having actual value, the equitable interest. However, the very act of displacing the presumption in this manner eliminates the relevancy of the presumption, since a pre-marriage payment of consideration could not be a payment of community funds but necessarily establishes a separate property source.

\textsuperscript{78} Such restructurings is not necessary for transfers during marriage from one spouse to another in order to avoid the pro-community presumption for the asset itself. Idaho Code § 32-906(2) (1983) provides: “Property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee . . . ; provided, however, that the income from such property shall not be the separate property of the grantee spouse unless this fact is specifically stated in the instrument of conveyance.” Where personality is at issue, the final clause above should not be construed as barring an oral transmutation of future rents and profits from community to separate property of the grantee spouse. See note 12, supra. With respect to realty, a post-grant written transmutation of future rents and profits could be valid notwithstanding the final clause of Section 32-906(2). If future rents and profits are viewed as a species of intangible
of distribution of intestate property, the owner already has such an easy case for establishing separate ownership that creating a title with a recital of separate ownership may not be worth the trouble. Where the asset at issue is, however, the result of several changes in form of an asset acquired by succession (or by gift), creating such a title may be especially useful. For example, the wife inherits stock in X Corporation during marriage. She then sells these shares, puts the cash proceeds in a bank, and later invests the proceeds in bonds of Y Corporation, which are in turn paid off, with the wife investing in shares of stock in Z Corporation. At a subsequent divorce, termination of marriage by death of a spouse, or appearance of a creditor who can reach community but not her separate property, it appears that the wife's case for tracing the Z stock back to the original inheritance will be bolstered if the certificates for the shares in Z Corporation recite that she owns the stock as her separate property.

Creating an instrument of title may be most useful to a spouse tracing to a separate source in a situation involving "uncommingling." For example, the husband during marriage inherits $10,000 in cash. When it is distributed to him, he deposits it in a bank account in his name containing $10,000 of community property, his earnings during marriage (or dividends paid on stock he owns separately, etc.). Later, when there is more than $20,000 in this account, he withdraws $10,000 which he invests in A Corporation stock with certificates saying nothing about the form of ownership. The investment is marvelously successful, and when the value of the stock has quadrupled, the husband sells it and invests the $40,000 in proceeds in a certificate of deposit at his bank. If he contends that the $10,000 withdrawn from the commingled account was the money he inherited, the husband should have the bank recite on the certificate of deposit that the $40,000 is his separate property. If this is not done, the certificate of deposit, having been acquired during marriage, is presumptively community property.

Although the issue seems not yet definitively decided in Idaho, in some community property states the husband's uncorroborated testimony that he intended to withdraw $10,000 of his separate funds when he invested in A Corporation is insufficient evidence to overcome the pro-community presumption. And even if Idaho were to follow Cali-

79. He will, of course, also want to utilize Idaho Code § 32-906(1) by going on to recite that the interest earned on the certificate of deposit will likewise be his separate property.

ifornia cases holding such uncorroborated testimony sufficient to uncommingle, if believed, the testimony is so self serving many a trier of fact is unlikely to be convinced. Moreover, the issue of tracing can arise after the death of the heir-husband or when he is incompetent to testify about his intent. Thus, whether the husband can set up a form of title for the certificate of deposit to shift the presumption of ownership in his favor is a very significant issue.

The case which seems to permit the husband to do just that is the Idaho Supreme Court's 1952 decision, Bowman v. Bowman. The Court's statement of the facts in Bowman began by declaring that the wife's case regarding the property issues in a divorce action consisted of a deed from vendors to her son by a prior marriage, reciting a consideration of $2,450, followed by a deed one and one-half years later from the son to his mother, the wife. The latter was a gift deed in form (reciting love and affection as consideration) and provided that the property was transferred to the wife "as her 'sole and separate property . . . .'" (There was also a recital that she was to own separately any rents and profits.) The wife testified that her son had used his own money to pay for the property. Immediately after recounting this evidence, the supreme court announced that "the recitals have been considered [by it] prima facie, but not conclusive proof of the status of the acquired estate."

In the portion of Bowman analyzing the applicable law, the supreme court stated the rule that the mere naming of one spouse, such as the wife, as grantee in the deed is not controlling as to the community or separate character of the property and quoted a California decision as follows:

"[R]ecitals of whatever transfers there may have been between such spouses regarding such properties or in transfers thereof to the one or other of them, are merely prima facie evidence of ownership and raise only disputable presumptions as to

81. See Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).
82. 72 Idaho 266, 268, 240 P.2d 487, 488 (1952).
83. Id.
84. Id. This part of the opinion also states that the 1924 deed from the son to the mother was "in accordance with" Section 4656 of the 1919 Compiled Statutes, which defined a wife's separate property. (It was at the time of the court's opinion and is now part of Idaho Code § 32-903.) Section 4656 provided no language for a deed to follow in order to create separate property of a wife, so the "accordance with" language must refer to the fact that the recital of love and affection as consideration was consistent with the statute's inclusion of gifts to a married woman as part of her separate estate.
whether such properties are the separate or community property of the parties to such transfers." 85

The husband in Bowman testified that he gave the wife money—presumptively community—that was used to buy the land. 86 There is no suggestion that the husband knew that the wife used the community money to acquire land under a deed reciting her separate ownership. Moreover, even if one were to infer from his testimony that he did so know and acquiesced in her doing so, from the way the court's opinion is structured, the presumption of separate ownership clearly arose from the wife's evidence alone, which would not have supported such an inference. While in addition to the recital of separate ownership, the court relied on the fact that the language of the deed, stating that the gift was based on love and affection, was consistent with the presumption of separate ownership it recognized, nothing indicates that the court considered it essential or even important that the wife's grantor was a close relative who might be expected to make her a gift. Everything about Bowman suggests that the same presumption would have arisen if the wife's evidence were that there was no mesne conveyance through her son and that she herself paid the vendors for the land and took title directly from them, at least if the deed recited that the consideration she paid was money she owned before marriage, had inherited, or for some other recited reason was her separate property.

Bowman does not unequivocally indicate whether the court would have raised the presumption of separate ownership if the deed to the wife had been silent about consideration (rather than reciting love and affection and thus stating it was a gift on its face). A more dubious consideration is whether such a presumption is created by a deed reciting both a monetary consideration paid and the grantee's taking as his or her separate estate without stating that the funds used were the


86. 72 Idaho at 269, 240 P.2d at 488. The husband's evidence suggested the wife took the community funds and paid the vendors, directing them to deed the land to her son. He would, of course, have held title to the land on resulting trust for the community under the husband's evidence.
grantee's separate property. A stronger case for a separate property presumption than the above two fact-patterns would be presented by a deed with the recitals of separate ownership and of the use of separate funds to pay for the asset. This kind of deed is not as precise as that in Bowman. There the instrument revealed the ultimate source of separate character in the gift from the son. In the last hypothetical, however, the separate property source is conclusory, there being no explanation whether the funds employed were inherited, obtained by gift or owned before marriage. I assume, however, it would raise the Bowman presumption because it is basically similar to the Bowman instrument from son to mother. Nevertheless, attorneys ought to be as precise as possible in drafting deed recitals in reliance on Bowman. The specific separate property source of any funds used should be laid out on the face of the instrument.

Assuming, as I do, that Bowman is not confined to gift deeds with a spouse as donee-grantee but can be employed, if appropriately complete recitals are used, when a spouse uses cash received by gift or inheritance, or which is otherwise separate because of ownership before marriage or a transmutation contract with the other spouse, the same questions arise about the scope of the doctrine as were analyzed when dealing with deeds reciting separate ownership of rents and profits pursuant to Section 32-906(1). May the spouse get the Bowman presumption for a normally untitled asset, such as a piano, by having the music store clerk write on the bill of sale when he or she buys it that the buyer will hold the piano as his or her separate property, having used inherited funds or donated funds, etc., to make the purchase? Suppose during marriage a spouse has purchased stock with certificates naming her alone as grantee. Since the certificates do not specify that separate property consideration was employed, the general presumption of community ownership has attached to the stock. Can this spouse now take advantage of Bowman by selling the stock and reinvesting the proceeds in other (or for that matter similar) securities, this time having appropriate Bowman recitals entered on the certificates? As with the case of recitals of separate ownership of rents and profits under Section 32-906(1), the answers to these questions are, yes, the Bowman rule probably can be successfully invoked in each such situation, but one cannot be wholly certain.

As with the inventory legislation, probably the case for separate ownership can be bolstered by the use of Bowman in transactions occurring after spouses have separated and, indeed, in those occurring on the eve of a divorce trial for the very purpose of shifting the burden of proof on ownership of an asset orchestrated by an attorney who has learned that his own client will testify to (or otherwise bring out) facts supporting a separate property classification for an asset while the
other spouse will controvert that evidence. If counsel has no reason to believe his client is going to produce false evidence, it would not be unethical to openly create a new title for the asset at issue containing Bowman-style recitals consistent with the client’s expected testimony in order to shift the burden of proof. (Would it be malpractice, in a close case, for counsel to fail to discuss with his or her client such a tactic?)

According to the recent Idaho Supreme Court decision in Hall v. Hall, a recital in a deed is sometimes conclusive. In that case, a husband used $60,000 of presumptively community funds to acquire from his grandparents a ranch then worth $100,000. The deed recited “value received” as consideration and named the husband and wife as granteees. At their divorce, the grandmother sought to testify that the grantors intended their grandson to own 40% of the ranch as his separate property by way of gift. Such evidence was held inadmissible because the deed was unambiguous. This application of the Parol Evidence Rule had the same effect as holding that the recital of consideration created a conclusive presumption.

Whatever one may think of Hall, it does not herald the converting of all Bowman presumptions from rebuttable to conclusive.


88. In the court’s original decision in the case, two justices dissented on the convincing ground that the Parol Evidence Rule did not apply when the issue was whether an asset acquired during marriage had its origin in a separate or community property source (or, as the husband urged in Hall, a bit of both). 15 Fam. L. Rptr., 1077, 1078 (Nov. 18, 1989).

I think the majority was wrong even if the Parol Evidence Rule did apply. The deed was ambiguous because it did not state that the two grantees were to take equal shares. (Had it so stated, the majority’s treatment of the Parol Evidence Rule would have been correct, if it was applicable.) The issue was whether each owned 50% or if the husband owned 70% and the wife 30%. Surely if the grandparents had been paid $100,000 rather than $60,000 and if in fact this constituted $30,000 of the wife’s separate property and $70,000 of the husband’s separate funds, such evidence would have been received and a 30-70 cotenancy recognized by the court. See generally 4 R. Powell, The Law of Real Property § 602[5] (Rohan rev. ed. 1986). The husband’s contention in Hall was not meaningfully distinguishable.

A number of precedents from other states are inconsistent with the broadest implications of Hall concerning applicability of the Parol Evidence Rule when the issue is the separate or community source of an acquisition during marriage. For example, in Marriage of Martin, 32 Wash. App. 92, 645 P.2d 1148 (1982), a husband’s mother and her spouse executed and delivered a deed naming both her son and his wife grantees and reciting love and affection as consideration. It was held this form of title raised only a presumption that the wife took an interest as grantee; if clear and convincing evidence established the grantors intended the property to be owned separately by the husband, that would be the legal effect of the instrument notwithstanding the recital that the wife was a grantee too. 32 Wash. App. at 96, 645 P.2d at 1150. Also, in Carter v. Carter, 736
The Hall holding should be confined to the issues of who owns gifted property and what their fractional interests are. Even as to those issues, Hall does not prevent impeaching the deed for fraud (as opposed to the nonfraudulent omission the Hall husband contended had occurred). Under Hall, the grantee wife's son in Bowman would have been precluded from testifying that he intended his mother and stepfather to be co-owners of the property despite the contrary recital. But if he received cash, the community property of his mother and her husband, for the transfer and nevertheless included a recital that the only consideration was love and affection, there would be fraud and the extrinsic evidence of the actual consideration would be admissible.

The Hall rule is essentially a variant of estoppel; donors drafting a deed should say what they mean or forever be silenced. Bowman presumptions are very different, as they appear to allow one spouse by unilateral act to shift the burden of proof with respect to an item of property acquired during marriage from presumptively community to presumptively separate.

Bowman is unsound policy and invites unfair manipulation by spouses with a view to their litigation position. Bowman-type recitals may raise an estoppel against the parties to the deed to controvert it, but such recitals should not adversely affect a spouse who did not acquiesce in the inclusion of the recital. Shifting the burden of proof in divorce litigation against a spouse is such an adverse effect.

S.W.2d 775 (Tex. App.—Houston [14th Dist.] (1987)), no writ, a husband purchasing land had the vendor execute a deed naming him and his wife as grantees, but in a divorce action the presumption arising of co-ownership was held to be rebuttable; the husband was entitled to prove that he used separate funds to make the purchase and that he intended no gift to his wife. 736 S.W.2d at 781, Accord, Hodges v. Hodges, 101 N.M. 67, 678 P.2d 695 (1984) (stock certificates).

I also agree with Chief Justice Bakes' dissent in Hall that a widely recognized exception to the Parol Evidence Rule applied there: that no matter what an instrument says, the true consideration for it can always be established by parol evidence. 116 Idaho at 498-500, 777 P.2d at 267-69 (dissenting opinion). In addition to the authorities cited there, see Gem-Valley Ranches Inc. v. Small, 90 Idaho 354, 363, 411 P.2d 943, 954 (1966) (a deed absolute on its face may be shown by extrinsic evidence to be a mortgage); Evans v. Evans, 766 S.W.2d 356 (Tex.App.—Texarkana, 1989) n.w.h.; Crow v. Crow, 66 Wash. 2d 108, 110, 401 P.2d 328, 329 (1965) (“Recitals of consideration... are not conclusive”); Cf. Rosenberry v. Clark, 85 Idaho 317, 324, 379 P.2d 638, 642 (1963) (dictum) (true consideration can be shown by extrinsic evidence "under certain conditions").

89. Not even an inference could be drawn in Bowman that the husband knew of the recitals his stepson (perhaps at the wife's urging, although this is unknown) put in the deed. Cf. Oylear v. Oylear, 35 Idaho 732, 736, 208 P. 857, 858 (1922), hinting that if a husband orchestrated a transaction whereby community property was conveyed, via straw people, to his wife with a recital in the deed to her from the straw people that she
Bowman's declaration that in husband-wife property disputes a recital in a deed is presumed to be true even though one spouse did not agree to it should be overruled judicially or legislatively abrogated. It is contrary to the law of the great majority of community property states, including, apparently, California, the jurisdiction whose cases were relied on by the Bowman court for the rule (a hallmark of owned the granted land as her separate property, vis a vis the husband, such recital would be presumed to be true.


Support for Bowman is found in an occasional passage in a treatise, see R. Mennell, supra n. 36, at 88 (recital in deed of separate ownership is presumptively true); Moore, What is Community Property § 3.11 in Community Property Law of Idaho, supra n. 7 (where wife alone is grantee in deed property is community "if there is no statement therein as to the character of the property, as community or separate . . . ," citing, inter alia, Bowman). See also Heard, Strieber, and Orsinger, Characterization of Marital Property, 39 Baylor L. Rev. 909, 920 (1987).

A number of Texas cases contain dictum such as that in Bowman. See Teas v. Texas Republic National Bank of Dallas, 460 S.W.2d 233, 243 (Tex. Civ. App.—Dallas 1970), writ ref'd n.r.e. (one of the few Texas cases in which the spouse of the person named in the deed as separate property owner did not acquiesce in the deed); see also Brick & Tile Inc. v. Parker, 143 Tex. 383, 186 S.W.2d 66 (1945). In several of the cases with such dictum the spouse of the grantee was responsible for including the recitals in favor of the grantee in the deed, making estoppel available as the basis for a presumption of validity. See Henry S. Miller Co. v. Evans, 452 S.W.2d 426 (Tex. 1970); Pointer v. Pointer, 197 S.W.2d 504 (Tex. Civ. App.—San Antonio 1946), no writ; see also Robbins v. Robbins, 125 S.W.2d 666 (Tex. Civ. App.—Fort Worth 1939), no writ (nongrantee spouse acquiesced in recital). A confusing decision, Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955), first correctly announced that a recital of wife's separate ownership in a deed should have no legal effect vis a vis the husband unless he participated in the transaction. The court then added that the ownership of the property in such a case becomes a question of fact "once there is adduced evidence of probative force tending to show the property to have been purchased with community funds." Id. at 349, 277 S.W.2d at 905. This quoted passage assumes that in fact the recital does raise a presumption of separate ownership that must be eliminated by the nongrantee's bringing forth at least some evidence to the contrary.

91. See Tolman v. Smith, 85 Cal. 280, 24 P. 743, 744 (1890), in which the deed recited that the grantee wife had used separate property money to buy land and was taking title as her separate property. Because the acquisition was during marriage, the ownership was nevertheless presumed to be community.

However, a number of California cases do declare that a recital of joint tenancy ownership in a deed granting land to spouses during marriage is presumed to be true. See, e.g., Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953). In most of these cases, both spouses knew about the recital, and the presumption of separate property ownership (in joint tenancy) can rest on this fact and principles of estoppel, not on the mere
English common law, not of Spanish law from which community of property is drawn) that recitals in a deed are presumed to be true.

IV. INCORPORATION OF A SEPARATE PROPERTY BUSINESS WHICH RETAINS ITS EARNINGS RATHER THAN PAYING THEM OUT IN DIVIDENDS

A spouse operating an unincorporated separate property business may incorporate it and have stock certificates issued in his name with a legend that dividends paid will be his separate property. Even if for some reason this is ineffective under Idaho Code section 32-906(1) (because, perhaps, that section applies only to instruments of gift expressing a donor's intent), under Idaho case law the fact of incorporation results in undistributed earnings of the business being classified as the owner-spouse's separate property (via his ownership of the stock), although they would clearly be community property if the form of business were not corporate but a partnership or an enterprise having no entity status at all. Thus incorporation of a separate property business is the fourth separate property strategy to be analyzed in this article.

In Speer v. Quinlan, the husband owned as his separate property 65% of the stock of a close corporation, which he also ran as its president. During marriage, the value of the stock quadrupled; the corporation never paid a dividend and had by the time of trial at the couple's divorce accumulated earnings of $340,000.

The Idaho Supreme Court first recognized that the community would have a claim under such circumstances if the corporation had paid the husband a salary inadequate to compensate the community for his labor, thereby increasing the accumulated gains of the corporation. It remanded to the trial court to make that determination. Turning to the appropriate remedy, the court declared:

If it is found that the community has been deprived of adequate compensation for its services, the community would be entitled to a judgment against the owner-spouse equivalent to the difference between the income actually received by the community in the form of compensation from the business, and the income which the community would have received had the owner-spouse been justly compensated.

92. See note 96, infra.
94. Id. at 128, 525 P.2d at 323 (emphasis added).
Apparently the payment of an inadequate salary would not cause any of the stock itself to turn into community property (contrary to the law of California discussed at some length in Speer). However, the separately owned stock would be liable to satisfy the personal judgment that would be granted to the wife for the amount of the community share she would be entitled to under Idaho law of division at divorce (presumptively half).

Significantly, the majority then shifted gear and, in a portion of the opinion captioned with the heading "RETENTION AND REINVESTMENT OF EARNED SURPLUS," addressed the wife's argument that even if the salary her husband was paid was adequate in view of his labor, the community was aggrieved because of the nonpayment of dividends because the husband, as majority stockholder, decided not to pay out any of the corporate earnings. The majority opinion stated that any dividends paid would have been community property:

Presumably, the Speer community would have received 65% of the hypothetical dividend distribution, in proportion to

95. The husband had made no attempt to make rents and profits of his separately owned business also separate property by way of recitals in the stock certificates of separate ownership of profits or dividends under Idaho Code § 32-906(1). See Speer, 96 Idaho at 129-30, 525 P.2d at 324-25.

Josephson v. Josephson, 115 Idaho 1142, 772 P.2d 1236 (App. 1989), first held that, unlike Speer, the record there firmly established that the salary paid by the close corporation was adequate to compensate the husband for his labor. The husband, as majority shareholder, had caused the corporation to pay no dividends at all for some twenty years. The divorce court had classified all the portion of retained earnings proportionate to the husband's shares of the corporate stock as his separate property. The Court of Appeals affirmed, rejecting the wife's contention based on Speer, with this brusque comment: "There was no evidence that the corporation retained its earnings to defraud the community." Id. at 1148, 772 P.2d at 1243. Like courts in Texas and Wisconsin, see text accompanying note 104 and note 105, infra, the Josephson court gave no legal effect to the adoption by the state of the civil law rule classifying rents and profits of separate property as community property. Proof of fraud is not a prerequisite to application of that statutory rule.

Wolford v. Wolford, ___Idaho___, 785 P.2d 625 (App. 1990), purports to find in Speer, a rule that the spouse not owning the stock has nothing to complain about if the owner-spouse is fully compensated for labor even though no dividends are paid. Like Josephson, this is a plainly erroneous reading of Speer, which recognized that nonpayment of dividends was a distinct issue to be meriting a remedy there for the wife even if the divorce court were to find on remand that an adequate salary had been paid the husband. Wolford was wrong as a matter of Idaho law but correct under the facts of the case because the spouses had executed a valid antenuptial agreement providing that rents and profits from separate property of either would be likewise separate. ___Idaho at ___, 785 P.2d at 629-30. Thus unpaid dividends in Wolford would have been the husband's separate property so that such nonpayment was simply irrelevant.
Raymond Speer's ownership of 65% of the corporate stock. Because the net earnings were never disbursed by the corporation, they cannot be considered to be "income" or "rents and profits" as contemplated in Idaho Code section 32-906. Therefore, the retention of the earnings in the business does not present a case of community funds being invested in a separate property business. Nevertheless, the fact remains that, because of business exigencies, monies that might otherwise have been distributed to the community as cash dividends, instead remained in the business in which Raymond Speer holds a separate property ownership interest.

Discretionary division of community property pursuant to Idaho Code section 32-712 is one mechanism by which many inequities may be remedied. 96

96. Speer, 96 Idaho at 129, 525 P.2d at 324 (emphasis added). Accord, re lack of any community interest in the stock, Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974) (in which the owner-spouse did not control a majority of the stock). The Speer court directed the trial court on remand, in determining the amount of hypothetical dividends, to deduct from the earned surplus not only the amount determined to be necessary to bring the husband's salary paid by the corporation up to an adequate level, but also the amount that the corporation's number two executive, Forrest Luthy, was underpaid. Speer, 96 Idaho at 129-30, 525 P.2d at 324-25. The fact that Mr. Speer was accorded standing to invoke a wrong done to Mr. Luthy (or perhaps, more accurately, Mrs. Luthy, if there was one) is remarkable. In my view, no such deduction should have been made by the trial court unless Mr. Speer, before the trial court's decision on remand, in fact used his control of the corporation to make payments to Luthy to compensate him for prior inadequate salary.

Any tax savings by retention of the earnings would not merit an adjustment, since the division at divorce of the community share of the stock would not generate a tax liability.

In Swope v. Swope, 112 Idaho 974, 739 P.2d 273 (1987), the court refused to apply the Speer rule that retention of earnings creates no community interest to undistributed earnings of a partnership (even though the husband owned separately only one fourth of the partnership). However, the Swope court held, where the spouse separately owns less than a controlling interest in a corporation, the rule of no community ownership arising out of undistributed profits applies even though it is a Subchapter "S" corporation for tax law so that the very profits at issue have already been taxed (presumably to the benefit of the taxpayers including the owner of the separate stock) as if they had been co-owned. 112 Idaho at 982, n. 9, 739 P.2d at 281, n. 9. Accord, Thomas v. Thomas, 738 S.W.2d 342 (Tex. App.—Houston [1st district] 1987) no writ (over a persuasive dissent). The Swope footnote, nevertheless, explains that Subchapter "S" status was irrelevant because it did not give the shareholder any more control over the decision not to pay dividends than he or she would have if the Subchapter "S" election had not been made. The Swope footnote is addressed to facts in which the husband apparently had the same one fourth interest in the Subchapter "S" corporation as he had in the partnership. Idaho has yet to decide whether there is a community interest created by retention of earnings in a corporation where, like Speer, the separate-property-owning spouse has a
At the conclusion of its opinion, the Speer majority directed the trial court on remand to reconsider four issues, including “the extent to which the community would have benefited from the disbursement of ‘distributable’ net earnings in the form of cash dividends,” and then to make “a reconsideration of the division of community property and the possibility of making an award of alimony, in light of the above.”

Hopefully, alimony (now called maintenance) is not the only “mechanism,” besides a disproportionate division of community property under Section 32-712, for correcting the injustice to the community arising from the refusal of the court to hold that the husband’s deliberate manipulation of the corporation in Speer so that all earnings from his separate capital were retained by the corporation did not create a fractional community interest in the corporate stock. Both such mechanisms are unavailable when the marriage ends by the death of the wife who leaves a will bequeathing her half of the community to a third party. They are also not available when the husband dies, leaving a will bequeathing all the stock to a third party. Unless there is at least some third “mechanism,” the deceased’s wife’s will might pass nothing to her legatee despite the $340,000 in retained earnings; as a surviving widow she could be left penniless except for what she could claim by way of family allowance, homestead, and exempt furnishings. Also, both mechanisms are unavailable during the marriage when the wife seeks to show she has management power over community property sufficient to pay her debts so that she should be extended credit in her own name, or when she seeks to draw on funds to make an investment that appeals to her, to make a modest gift to a charity of her choosing, etc..

Even at divorce, a maintenance award is often not an available remedy. Under Idaho Code section 32-705, only an “innocent” spouse is eligible for such an award, and he or she must be both unable to

majority of the stock and thus controls the decision whether to pay dividends and, like Swope, the spouse has made a Subchapter “S” election and has benefited by having the earnings taxed as if they had been distributed.

97. Speer, 96 Idaho at 133, 525 P.2d at 328.
99. See id. at § 15-2-403 (family allowance limited to reasonable support for period of estate administration); § 15-2-401 (homestead limited to $4,000 or $10,000, if there are dependent issues living with the surviving spouse); § 15-2-402 (exempt furnishings limited to $3,500).
100. Although the other spouse’s consent may ordinarily be required for gifts of community property, Anderson v. Idaho Mutual Benefit Ass’n, 77 Idaho 373, 292 P.2d 760 (1956), presumably such consent would be implied or dispensed with if the gift were small and made to an unobjectionable donee (i.e., not a rival suitor). See W. Reppy and C. Samuel, supra n. 4, 237-238.
provide for his or her support needs and unable to earn support by employment.

An unequal division of community property at divorce is also a useless mechanism for recognition of the community interest hidden away by retention of the earnings in the corporation if there is no community property, or if what exists is worth less than half of the retained earnings (more accurately, worth less than whatever fraction the nonowner spouse would have been awarded had the earnings been paid out as dividends).

Moreover, it is not entirely clear under post-Speer statutory law governing division of the community at divorce that an unequal division of the community, so that the nonshareholder spouse gets more than the other spouse in the precise amount of half the undistributed earnings, is possible. At the time of Speer in 1973, the property-division statute simply directed an equitable distribution. 101 Presently, Section 32-712(1)(a) requires an equal division unless there are "compelling reasons [to do] otherwise." 102 I think the Speer facts present a compelling case for unequal division and assume Idaho courts will too, in light of the Speer court's comments, but the existence of doubt must be conceded.

A money judgment against the husband (or his estate if his death has terminated the community) ought to be one of the "mechanisms" available to correct the inequity arising out of nonpayment of dividends, just as the Speer court specifically held such a judgment was proper to compensate the community for inadequate salary. At divorce the amount of such a judgment should be the fraction of the community claim that would be awarded to the wife if the dividends had been paid in cash and put in a bank account (which means lost interest to the community should be taken into account). 103 At dissolution of the

102. Subsection (b) lists various factors, such as age, need, earning capacity, and duration of marriage, that are to be examined in determining if cause for an unequal division exists. Fortunately, today a wife in the position of Mrs. Speer in divorce court is "not limited to" consideration of the enumerated factors.
103. Query what adjustment, if any, should be made if the husband, or his estate, proves the following. During the period of time the corporation paid no dividends, the couple lived lavishly, the husband selling some separately owned assets and using the proceeds to finance expensive foods, drinks, parties, vacations, etc. The contention is made that if the corporation had paid dividends, these community funds would have been used for such expenditures and the husband would not have had to sell separate property assets to finance them. Thus there would not have been any community property at termination of the marriage even if dividends had been paid.

I would reject this argument as mere speculation. Because the husband caused no dividends to be paid, it is impossible to know just what assets he would have devoted to
community by death, half of the amount of unpaid dividends plus lost interest should be the amount of the judgment.

In the Texas case of Jensen v. Jensen,\textsuperscript{104} in which the court, like Speer, remanded the case to determine if the salary paid to the executive who controlled the corporation through his separately owned stock was adequate (the Texas court failed to discuss whether relief was also available if dividends, which had been paid, were also inadequate\textsuperscript{103}),

the costs of living high on the hog had both community and separately owned assets been available.

104. 665 S.W.2d 107 (Tex. 1984).

105. See the perceptive critique of this aspect of Jensen in J. Paulsen, Jensen III and Beyond: Exploring the Community Property Aspects of Closely Held Corporate Stock in Texas, 37 Baylor L. Rev. 653 (1985). See also Comment, Closely Held Corporations in the Wake of Vallone: Enhancement of Stock Value by Community Time, Talent, and Labor, 35 Baylor L. Rev. 47 (1983). The cited Jensen opinion was written after two rehearings. The Texas court's first opinion in the case gave broader relief consistent with Idaho's Speer analysis concerning the effect of nonpayment of dividends. See summary at 19 Fam. L. Rptr. 2581 (Tex., July 6, 1983) (especially compare the majority opinion to the dissent to realize the extent of relief the former was granting).

A curious Wisconsin case is somewhat like Jensen in failing to apprehend that in a community property state adhering to the civil law rule for classifying rents and profits, the fact that there was no community labor or that such labor was fully compensated does not exhaust the community's claim against undistributed profits. In Marriage of Wierman, 130 Wis. 2d 425, 387 N.W.2d 744 (1986), the wife owned as her separate property (by way of gift) an interest in a joint venture or partnership that bought and sold realty. She applied no labor to the enterprise, whose profits from buying and selling land were due to the skill of her father, one of the other partners. The Wisconsin court held that for purposes of determining if there was any marital estate divisible at divorce, all gain was nondivisible property (i.e., separate property of the wife in Idaho terminology) because of the absence of any labor by the husband or the wife responsible for the generation of such gain.

Wierman does not cite Section 766.31(4) of the Wisconsin Statutes, which states the basic rule that profits from a separate property business are community. Under that statute the real property joint venture should have produced some community gains attributable to the wife's interest—so much of the gain as was due not to natural increase in value of the properties held for resale, but to the skill of the manager of the enterprise (the father).

Section 766.31(4) had not been enacted at the time the profits in Wierman were generated, but was on the books when the court dealt with the issue of divisibility of property at divorce. Courts normally apply the division law in effect at the time of division, not at the time of acquisition of property. See generally Reppy, Applying New Law to Pre-Enactment Acquisitions—Must Prior Law Be "Rankly Unjust"? (part I), Com. Prop. J., Oct. 1988 at 1, (part II) Com. Prop. J., Jan. 1989 at 1. Wierman holds that the Wisconsin statutes, such as Section 766.31(4), that govern marital property questions during the marriage, are irrelevant in determining divisibility of property at divorce. See also Marriage of Mausing, 146 Wis. 2d 92, 429 N.W.2d 768 (1988). It recognized that Sections 766.31(13) and 766.62(5) of the Wisconsin Statutes—part of the legislation creating a community of property regime in Wisconsin effective during the mar-
the nature of the cause of action authorizing a money judgment against
the separate property owner was described as one to reimburse the
community. This concept is familiar to attorneys and parties involved
in winding up marital property affairs at divorce and the death of a
spouse. The label is as appropriate when the claim includes (or is lim-
ited to) relief sought for unpaid or inadequate dividends as it is in a
case like Jensen, in which only inadequacy of salary was considered.

A reimbursement remedy is far more useful to the claimant spouse
than the two "mechanisms" mentioned by the Speer court, because it
can be asserted at dissolution of marriage by death, not just divorce,
and because the spouse106 entitled to reimbursement can collect from
the other spouse’s separate property107 making the absence of commu-
nity property irrelevant. Moreover, in Idaho, when the obligation to
reimburse arises because one spouse has used community assets to
"improve" his separate estate (which is effectively what happens when
one in the position of Raymond Speer uses his control over a close
corporation to make sure it never pays any dividends and to retain
earnings in his separately owned company), a lien on the improved

riage—imposed the terminable interest doctrine on post-death interests in pension plans.
(Concerning this doctrine see generally W. Reppy, Update on the Terminable Interest
Doctrine: Abolished in California; Adopted and Expanded in Arizona, COM. PROP. J.,
July 1987 at 1.) Yet the Mausing court said the doctrine did not apply when the issue
was divisibility of property at divorce, allowing an award to the nonpensioner spouse of a
portion of future retirement benefits that would survive her death and thereafter require
payments to her heirs or legatees. Kuhlman v. Kuhlman, 146 Wis. 2d 588, 432 N.W.2d
295 (App. 1988), recently reiterated the basic principle that the statutory marital prop-
erty regime applicable during marriage does not apply at divorce.

It may be, then, that Wisconsin, having two distinct marital property regimes, is,
with respect to classification of rents and profits from separate property, a civil law rule
state, like Idaho, when the issue arises during marriage or at dissolution of marriage by
death, but an American rule state when the issue arises at divorce. Contra, Marriage of
Arneson, 120 Wis. 2d 236, 355 N.W.2d 16 (App. 1984).

106. In the death dissolution situation, either the claimant or the obligor on the
reimbursement claim will be the estate of a deceased spouse.

used separate funds to pay community debts, reimbursement as to half was general obli-
gation of husband for which his separate property is liable); see also Dakan v. Dakan,
125 Tex. 305, 83 S.W.2d 620 (1935) (where community funds were used to improve one
spouse’s separate estate, his separate property is liable for reimbursement). In Lindsay v.
Clayman, 151 Tex. 593, 254 S.W.2d 777 (1952), where the wife owed reimbursement due
to improvement of her separate estate, the court held the husband was entitled to an
order that her separate estate was primarily liable (reversing a lower court judgment
directing payment from the wife’s half of the community). This remedy is important if
the spouse claiming reimbursement will inherit the obligor spouse’s half of the commu-
nity but not her separate property, or if the claimant will at divorce receive an award of
more than half the community.
property to secure payment of the amount owed by way of reimbursement is impressed as a matter of law. 108

The reimbursement remedy is most likely of no use to the spouse of the shareholder when she or her creditors object during marriage to the concealing of community profits within the separate property corporation due to nonpayment of dividends. The right of reimbursement can be converted into a cash award only at dissolution of the marriage by death or divorce. One Washington decision permitted creditors to seize during marriage the debtor-spouse's right of reimbursement arising out of improvement of separate property with community funds,109 but there is no reason to believe this unusual decision would be followed in Idaho (and, additionally, no reason to believe that a third party asked to extend credit to the non-owner spouse would view the cause of action for reimbursement that it can levy on under Washington law as having much value).110

Yet a fourth remedy in the Speer-type case has been occasionally employed in Texas: treating the corporation as the alter ego of the owner spouse and piercing the corporate veil. If the corporate form is disregarded, a share of undistributed earnings (or assets in which they have been invested) can be treated by a court as community property and thus divided at divorce, permitted to pass as a half interest under the will of the spouse having no interest in the corporate stock, or awarded to a creditor who can reach community property but not the separate estate of the owner of the shares of stock. One Texas case pierced the veil where the husband was sole shareholder and had incorporated for the purpose of defeating community property claims by his


110. The Washington case allowed the creditor to levy on the reimbursement cause of action but did not say when the creditor could bring suit as assignee against the spouse owing reimbursement to the other spouse. Presumably the creditor had no greater rights after the levy than the spouse indebted to that creditor had at the time. He or she had to wait until the termination of the marriage to convert the cause of action to cash. Moreover, the reimbursement claim is usually held by the courts to be subject to equitable defenses and offsets existing at the time it is asserted. For example, if, after the creditor seized the reimbursement claim arising out of a husband's use of community funds to build a house on his separate property, the wife moved into that house and lived there many years, much or all of the claim would disappear as the value of her use of occupying the house offset the amount of community funds expended to build it. See generally, W. Reppy, Repayment with Community Funds of Consumer Loans Secured by Separate Realty: Seeking the Appropriate Remedy, COM. PROP. J., Jan. 1988 at 1. Such an offset could occur in the retained-earnings type case if corporate assets were occupied by or used for pleasure by the nonowner spouse or the family.
wife. There is also one Texas case piercing the veil simply to do justice to the wife without any evidence of improper motive, inadequate capitalization, failure to respect corporate form, etc., although most Texas cases decline to follow it.

In Idaho, the "'general rule'" is that one seeking to pierce the corporate veil must establish unity of interest between the shareholder and the corporation and that respecting the corporate entity would lead to "'an inequitable result'" or "'promote injustice.'" In the typical case in which the doctrine is invoked by a party who contracted with the corporation without demanding a guarantee of the shareholder, respecting the corporate entity may cause injustice only where there has been gross undercapitalization. The victimized wife in the Speer-type case does not voluntarily enter into a relationship with a corporation and can take no steps, such as asking for a personal guarantee, to protect her rights under community property law. Undercapitalization should be irrelevant where the issue of piercing the corporate veil arises at dissolution of the marriage and probably, also, when the creditor of the nonshareholder spouse seeks to levy execution on whatever interest she has in the corporation.

If the corporate veil can be pierced simply to do justice to the nonshareholder spouse, and if that will be done whenever the shareholder spouse has voting control over the corporation (even if not the sole shareholder), the holding of Speer that failure to pay dividends means there are no community property rents and profits is effectively gutted. It would be simpler to eliminate the need for the parties to even argue about veil piercing by overruling Speer and kindred cases and adopting the California approach that disregards the corporate form without declaring this is being done. If the Idaho Supreme Court is unwilling to take these steps to put teeth into the civil law rule of community ownership of rents and profits from separate property, the state legislature should do so. Meanwhile, incorporation of a separate property business

111. Zisblatt v. Zisblatt, 693 S.W.2d 944 (Tex. App.—Tyler 1985) writ dism’d.
112. See Dillingham v. Dillingham, 434 S.W.2d 459 (Tex. Civ. App.—Fort Worth 1968), writ dism’d.
113. See, e.g., Robbins v. Robbins, 727 S.W.2d 743 (Tex. App.—Eastland 1987), writ ref’d n.r.e.
114. This is satisfied if the spouse is sole shareholder. However, query what it means in a case such as Speer, where the husband separately owned 65% of the stock.
does seem to be one of the available strategies in Idaho for increasing the amount of separate property owned by a married person.

V. CONCLUSION

There may be four strategies available in Idaho for bolstering the case for separate property ownership by a married person. Two of these strategies, creating an instrument of title that recites separate ownership of rents and profits and incorporating a separate property business while retaining earnings, actually convert what would be community property into separate property. Two others, filing a separate property inventory and having an instrument of title recite that the asset conveyed is separate property, would substitute a presumption that an asset or income is separate property for the normal presumption of community ownership.

Considerable doubts exist about the vitality or scope of each of the four strategies. The inventory legislation may be incurably unconstitutional. Possibly, only a donor or devisor has standing to insert a recital that future rents and profits will be separate property. A recital that the asset itself is separately owned is, perhaps, of no legal effect against one who neither becomes a party to the instrument or accepts the benefits of it. Finally, various remedies may enable the spouse of the shareholder to defeat the technical effect of nonpayment of dividends. However, there is much fertile ground here for aggressive and creative attorneys representing spouses at war with each or other clients who anticipate spousal disagreements.

As a matter of legal policy each of the four strategies is unsound. Each should be eliminated or curtailed to the extent possible by the Idaho courts. Each should be legislatively abrogated or remodeled to operate without causing mischief.117

117. E.g., the inventory legislation can be amended to require the signature of non-owner spouse approving the list of separate property assets.