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## Prospective Changes In California Community Property Law

(Editor's note: Since the writing of this article, two amendments affecting the treatment of community property in a decedent's estate have been enacted. S.B. 1846, c. 752, approved and filed September 18, 1974, is a clean-up measure of S.B. 570 and provides a procedure whereby a court may determine whether or not the assets of a deceased spouse are community property and then enter an order that title to such property be transferred to the surviving spouse. S.B. 12 was passed as an emergency measure on Dec. 2, 1974. Its effect is to postpone the effective date of S.B. 570 and S.B. 1846 from January 1, 1975, to July 1, 1975.

(Also since the writing of this article the California legislature has enacted S.B. 1601, c. 1206, revising the earlier changes made in community property law. The main thrust of the changes is to meet the problem discussed in this article of determining whether the changes in community property laws are to operate retroactively. Clearly stating in Section 1 of the bill that the right to manage and control community property is not a fundamental right which may not be divested by the legislature, the legislature has amended Sections 5116, 5125 and 5127 to state that all community property whether acquired before or after January 1, 1975, will be governed by the new law. The reasoning of Justice Traynor quoted, *infra*, in this article has apparently been followed. Section 5117 which provided that the earnings and community property personal injury damages of the wife were not to be applied to the debts of the husband incurred prior to January 1, 1975, has been repealed. Section 5130 dealing with necessities has also been repealed. Section 5125 has been further amended to provide that "[e]ach spouse shall act in good faith with respect to the other spouse in the management and control of the community property." Section 7 of the Act provides that the changes made shall not apply to any act or transaction which occurred prior to January 1, 1975. These changes, then, have clarified the new community property laws and will aid in a smoother transition, assuming that these changes are upheld by the judiciary.)

The community property system existed in California during the period of time when the territory was owned and controlled by Mexico.<sup>1</sup> This system of marital property rights was retained after California was annexed to the United States and was incorporated into the State's first Constitution.<sup>2</sup> Despite its origin under the Mexican-Spanish law of the nineteenth century, the modern community property system in California differs materially from its parent system as a result of many legislative changes.<sup>3</sup> As early as 1896, the California Supreme Court referred to the community property system as "a creature of statute."<sup>4</sup> Once again, the California legislature has acted, and the community property law of California will be altered.

The latest changes in California community property law were enacted by the legislature in 1973 and will become operative on January 1, 1975.<sup>5</sup> As a result of this legislation, marital property rights will be substantially altered. Although the full impact of these alterations upon existing law remains to be seen, it is certain that the entire system must be reexamined in the light of the new changes. The husband no longer enjoys sole management and control of community property assets, long-established presumptions have been overturned, the rights of creditors to reach community property have been expanded, and the law applied in the administration of decedents' estates has been altered. Not only have the rights of the spouses themselves been altered, but the rights of third parties dealing with a married person have been changed as a result of this new legislation.

Although the statutes make reference to "spouses," "married persons" and "husband and wife,"<sup>6</sup> it must be remembered that community property law may be applied to relationships outside of a valid and binding marriage. The courts have long accorded a putative spouse the protection of the community property system.<sup>7</sup> Even those persons not enjoying putative spouse status have

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1. See McMurray, *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 CALIF. L. REV. 359 (1915); Loewy, *The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California*, 1 CALIF. L. REV. 32 (1912).

2. CALIFORNIA CONST. art. XI, § 14 (1849).

3. See, for example, CAL. STATS. 1927, c. 265, CAL. STATS. 1935, c. 707, CAL. STATS. 1969, c. 1608.

4. *In re Burdick's Estate*, 112 Cal. 387, 393, 44 P. 734, 735 (1896).

5. S.B. 569, CAL. STATS. 1973, c. 987.

6. See, for example, CAL. CIV. CODE § 5105, as enacted CAL. STATS. 1969, c. 1608, p. 3338; CAL. CIV. CODE § 5110 as enacted CAL. STATS. 1969, c. 1608, p. 3339; CAL. CIV. CODE § 5114, as enacted CAL. STATS. 1969, c. 1608, p. 3340.

7. *Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911).

been treated as "spouses" by the courts in recent months for community property purposes.<sup>8</sup> The statutory changes in the existing law will almost certainly apply to putative spouses and other persons previously found governed by community property law.

#### MANAGEMENT AND CONTROL

Historically, management and control of community property have been vested in the husband.<sup>9</sup> Since 1927, the interest of the wife in the community property has been defined as present, existing and equal.<sup>10</sup> However, this equal interest did not extend to an equal right of management and control. To be sure, certain restrictions have been placed upon the husband in his exercise of management and control. For example, the wife's consent is necessary to effect any conveyance or encumbrance of the community real property.<sup>11</sup> In interpreting this provision, however, the courts have held that a conveyance without such consent is merely voidable and not void.<sup>12</sup> If the husband conveyed only half of the community real property to a stranger and the other half to his wife in the same instrument, the conveyance could not be set aside by the wife after the husband's death since such a conveyance was considered tantamount to testamentary disposition. Since the wife received the one-half to which she was entitled, she had no right to set the conveyance aside.<sup>13</sup> The husband is similarly prohibited from making a gift of the community personal property.<sup>14</sup> Such a gift, however, is also merely voidable and not void.<sup>15</sup> The husband is also not allowed to "sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children, without the wife's written consent."<sup>16</sup> Any attempt to do so is void and not merely void-

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8. *In re Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

9. CAL. CIV. CODE § 5105, as enacted CAL. STATS. 1969, c. 1608, p. 3338 (formerly 161a, added by CAL. STATS. 1927, c. 265, p. 484).

10. *Id.*

11. CAL. CIV. CODE § 5127, as enacted CAL. STATS. 1969, c. 1608, p. 3342.

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

13. *Lahaney v. Lahaney*, 208 Cal. 323, 281 P. 67 (1929).

14. CAL. CIV. CODE § 5125, as enacted CAL. STATS. 1969, c. 1608, p. 3342.

15. *Harris v. Harris*, 57 Cal. 2d 367, 369 P.2d 481, 19 Cal. Rptr. 793 (1962).

16. CAL. CIV. CODE § 5125, as enacted CAL. STATS. 1969, c. 1608, p. 3342.

able.<sup>17</sup> The wife has also been given the right to manage and control her earnings<sup>18</sup> and the damages recovered from a third person in a tort action.<sup>19</sup> But these rights are limited since any comingling with community property subject to the husband's management and control rendered the entire amount subject to the husband's management and control.<sup>20</sup> Thus, during the existence of the marital community, the husband, subject only to the above limitations, has enjoyed an exclusive right of management and control.

The newly enacted Civil Code sections<sup>21</sup> completely alter the presently existing law governing the management and control of community property, essentially granting to the wife rights equal to those enjoyed by the husband in managing and controlling community property. While an examination of all the factors which resulted in this change is beyond the scope of this article, it appears that both recent societal concern over the rights of women and recent judicial concern in California that discrimination based on sex is "suspect"<sup>22</sup> have been of persuasive importance.

Civil Code Section 5105, which expressly states that the husband has management and control over community property, has been amended by deletion, so that no reference is now contained therein to management and control.<sup>23</sup> Instead, the section merely states that the interests of husband and wife in community property are now present, existing and equal.<sup>24</sup> That present, existing and equal rights now include the right of management and control is clearly apparent from the changes made in Civil Code Sections 5125 and 5127. These sections, which previously operated to restrict the rights of the husband in dealing with community personal property and community real property, respectively, have been amended so that the provisions contained therein apply to both spouses.<sup>25</sup> Section 5125 states that "either spouse has the management and control of the community personal property,"<sup>26</sup> and Section 5127 pro-

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17. *Dynan v. Gallinatti*, 87 Cal. App. 2d 553, 197 P.2d 391 (1948).

18. CAL. CIV. CODE § 5124, as enacted CAL. STATS. 1969, c. 1608, p. 3341.

19. *Id.*

20. CAL. CIV. CODE § 5124, as enacted CAL. STATS. 1969, c. 1608, p. 3341.

21. S.B. 569, CAL. STATS. 1973, c. 987.

22. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); *Hardy v. Stumpf*, 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (1974). Both of these cases dealt with discrimination based on sex.

23. CAL. CIV. CODE § 5105 (operative Jan. 1, 1975).

24. *Id.*

25. CAL. CIV. CODE § 5125 (operative Jan. 1, 1975).

26. CAL. CIV. CODE § 5125 (operative Jan. 1, 1975).

vides that "either spouse has the management and control of the community real property."<sup>27</sup>

In gaining the right of joint management and control of the community property with her husband, the wife has lost the right she previously enjoyed of exclusive management and control of her earnings and tort damages received by her from a third party.<sup>28</sup> By completely repealing Civil Code Section 5124, the legislature has provided that the right of management and control of the earnings and tort damages recovered from third persons by either spouse is vested in both.

The Code does provide that either spouse who operates and manages a business which is community personal property will have the exclusive right of management and control of the business.<sup>29</sup> This provision represents a concession to the practical reality that joint management and control of a business could pose innumerable problems and confusion. Interestingly enough, the wife may continue to operate a business under the Sole Trader's Act,<sup>30</sup> enjoying all acquisitions received through her efforts as exempt from liability for her husband's debts. Whether she alone should continue to enjoy this right, no matter how circumscribed, is questionable. If the spouses are to be treated equally, it seems patently unfair that a married woman may insure that her earnings are exempt from liability for her husband's debts, while her husband has no such right. The wife will now have the sole right of management and control of her business so that the Sole Trader's Act is no longer necessary to guarantee this right. Whether the Legislature will continue to allow a wife and not a husband to conduct a business and to treat the earnings therefrom as exempt from the debts of the other remains to be seen. Complete equality of treatment would seem to indicate that the Sole Trader's Act should be repealed.

The practical problems that will almost certainly arise when joint management and control are implemented are many. The legislature has not seen fit to provide guidelines for the resolution of disputes. Presumably, then, the law in this area will be formulated by the judiciary.

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27. CAL. CIV. CODE § 5127 (operative Jan. 1, 1975).

28. CAL. CIV. CODE § 5124, *as enacted* CAL. STATS. 1969, c. 1608, p. 3341.

29. CAL. CIV. CODE § 5125(b) (operative Jan. 1, 1975).

30. CAL. CODE CIV. PROC. § 1811 *et seq.*

## PRESUMPTIONS

A longstanding presumption applied in community property law is that "whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property . . ." <sup>31</sup> This presumption will still be applied to property so acquired by a married woman prior to January 1, 1975. By amendment, the presumption will no longer be applied to property acquired by a married woman after January 1, 1975. <sup>32</sup> Previously, the above presumption was conclusive in favor of bona fide purchasers for value. <sup>33</sup> After January 1, 1975, the status of property acquired in the name of a married woman will be the same as that of property now held in the name of a married man. In order to establish that any real or personal property which she acquires in her name after marriage is her separate property, a married woman will be forced to overcome the general presumption that all property acquired during marriage by a married person is community property. The husband has always carried this burden to prove that property acquired in his name after marriage is separate rather than community property.

The interesting result that presently follows when a husband and wife receive property as tenants in common where they are not described as husband and wife should no longer follow after January 1, 1975. In such a situation under the present law, the husband takes his one-half share as community property, while the wife by virtue of presumption takes her one-half interest as separate property. The effect is that property acquired by a husband and wife as tenants in common where they are not designated as being husband and wife results in the acquisition by the wife of a three-quarter interest and by the husband of a one-quarter interest. <sup>34</sup> Since, after January 1, 1975, the presumption that a married woman takes property acquired in her name as separate property does not apply, all property acquired by a husband or wife, whether or not they are so described, will be acquired as community property.

The bona fide purchaser for value who previously could acquire property held by a married woman in her own name with impunity <sup>35</sup> no longer may rely on such title. Instead, Civil Code Section 5127 will undoubtedly apply, allowing the husband one year

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31. CAL. CIV. CODE § 5110, as enacted CAL. STATS. 1969, c. 1608, p. 3339.

32. CAL. CIV. CODE § 5110 (operative Jan. 1, 1975).

33. CAL. CIV. CODE § 5110, as enacted CAL. STATS. 1969, c. 1608, p. 3339.

34. *Dunn v. Mullan*, 211 Cal. 583, 296 P. 604 (1931).

35. CAL. CIV. CODE § 5110, as enacted CAL. STATS. 1969, c. 1608, p. 3339.

in which to set aside a conveyance of real property which was accomplished without his consent. This is the law which presently applies when the husband conveys away community real property without his wife's consent even though title is in his name alone.<sup>36</sup>

The net result of overturning the above presumption is to render the law applied to community property held solely in the name of one spouse the same whether the spouse be husband or wife. Any person relying on the existing law in dealing with property held in the name of a married woman must understand these changes or he may soon be unpleasantly surprised to find that the protection he once enjoyed no longer exists as to property acquired after January 1, 1975.

Because the husband has enjoyed almost exclusive management and control of the community property, certain presumptions have arisen as a result of action taken by him. For example, where the husband used community property funds to pay off an encumbrance on all or part of the purchase price of property held by his wife as separate property, the funds expended were presumed to have been a gift. Since the funds were under the management and control of the husband, his voluntary action was deemed sufficient to constitute an intent to make a gift to his wife.<sup>37</sup> Since the husband will no longer have exclusive management and control of the community property, it is doubtful whether such a presumption will be applied. Of course, either the husband or the wife may make a gift of his or her share of the community property to the other, but there must be sufficient evidence to show an intention to make a gift.<sup>38</sup> In such a situation, however, no presumptions will apply.

#### LIABILITY OF COMMUNITY PROPERTY FOR DEBTS

The amendments to the Civil Code, in addition to altering management and control of community property and overturning certain presumptions, have also changed the liability of the community property for spousal debts. The following charts provide a quick summary of the property liable for each particular type of debt under the presently existing law and under the law as it will be

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36. CAL. CIV. CODE § 5127, as enacted CAL. STATS. 1969, c. 1608, p. 3342.

37. Estate of Bernatas, 162 Cal. App. 2d 693, 328 P.2d 539 (1958); Estate of Inman, 148 Cal. App. 2d 952, 307 P.2d 953 (1957).

38. Odone v. Marzocchi, 34 Cal. 2d 431, 211 P.2d 297 (1949).



as of January 1, 1975:

**LIABILITY FOR DEBTS UNDER PRESENTLY  
EXISTING LAW**

All of the sections cited are in the California Civil Code	Husband's Separate Property	Wife's Separate Property	Community Property Under Wife's Management & Control (Earnings & Tort Recovery)	General Community Property Under Husband's Management & Control (Except Husband's Earnings)	Community Property—Husband's Earnings Under Husband's Management & Control
Wife's Contracts Before Marriage	NO § 5120	YES § 5121	YES (By Implication) § 5120 <b>Johnson v. Taylor</b> , 120 Cal. App. Supp. 771, 4 P.2d 999 (1931)	YES (By Implication) § 5120	NO § 5120
Wife's Contracts After Marriage	NO § 5120	YES § 5121	YES (Earnings Only) § 5116	NO § 5116	NO § 5116
Husband's Contracts	YES (Direct Liability)	NO § 5121	NO § 5117	YES <b>Grolemund v. Cafferata</b> 17 Cal. 2d 679, 111 P.2d 641 (1941)	YES
Wife's Torts	NO § 5122	YES § 5122	YES § 5122	NO § 5122	NO § 5122
Husband's Torts	YES § 5122	NO § 5122	NO § 5122	YES § 5122	YES § 5122
Necessaries	YES (By Implication) § 5130 § 242	YES (Except for Separate Property Specified In § 5121)	YES § 5117	YES (By Implication) § 5130 § 242	YES (By Implication) § 5130 § 242

**LIABILITY FOR DEBTS AS OF JANUARY 1, 1975**

All of the sections cited are in the California Civil Code as Amended	Husband's Separate Property	Wife's Separate Property	Community Property
Wife's Contracts Before Marriage	NO § 5120	YES § 5121	YES (Except Earnings of Husband) § 5120
Wife's Contracts After Marriage	NO § 5121	YES § 5121	YES § 5116
Husband's Contracts Before Marriage	YES § 5121	NO § 5120	YES (Except Earnings of Wife) § 5120
Husband's Contracts After Marriage	YES § 5121	NO § 5121	YES § 5116
Wife's Torts	NO (By Implication) § 5122	YES § 5122 (But if committed while benefitting community, only after community property is exhausted)	YES § 5122 (But if committed while not benefitting community, only after separate property is exhausted)
Husband's Torts	YES § 5122 (But if committed while benefitting community, only after community property is exhausted)	NO (By Implication) § 5122	YES § 5122 (But if committed while not benefitting community, only after separate property is exhausted)
Necessaries	YES (If no community property) § 5121	YES (If no community property) § 5121	YES § 5117

Section 5116 of the Civil Code as it presently reads exempts the community property, except for the wife's earnings, from the contract debts of the wife made after marriage.<sup>39</sup> On the other hand, all community property with the exception of the husband's earnings can be reached to satisfy the wife's prenuptial debts.<sup>40</sup> As of January 1, 1975, the community property will be liable for the contract debts incurred after marriage of both the husband and wife.<sup>41</sup> This change will operate to allow the married woman to enter into contracts in her name alone with a great deal more impunity than is now possible. Presently, businessmen are reluctant to enter into any contract with a married woman, knowing that the community property except for her earnings will not be liable for satisfaction of the debt. It is for this reason that many business enterprises demand that the husband also sign the contract or execute a pledge of security. When the new amendments become effective, it should no longer be necessary to continue this business practice. The creditors of the wife will be able to reach community property assets. No longer will any distinction be drawn between the general community property and the community property earnings of the spouses. All community property is liable for the contracts of either spouse made after marriage.

As amended, Section 5117 of the Civil Code provides that the husband's debts incurred before January 1, 1975, may not be satisfied out of the earnings and community property personal injury damages of the wife.<sup>42</sup> It also states that such earnings and damages are liable for necessities contracted for prior to January 1, 1975. This conforms to present law.<sup>43</sup>

The separate property and earnings of a spouse will not be liable for the premarital debts of the other spouse.<sup>44</sup> However, the separate property of a spouse will be liable for his/her debts contracted before or after marriage.<sup>45</sup> The separate property will not be liable for the debts of the other spouse contracted after marriage,

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39. CAL. CIV. CODE § 5116, as enacted CAL. STATS. 1969, c. 1608, p. 3340.

40. *Johnson v. Taylor*, 120 Cal. App. Supp. 771, 4 P.2d 999 (1931); CAL. CIV. CODE § 5120, as enacted CAL. STATS. 1969, c. 1608, p. 3341.

41. CAL. CIV. CODE § 5116 (operative Jan. 1, 1975).

42. CAL. CIV. CODE § 5117 (operative Jan. 1, 1975).

43. CAL. CIV. CODE § 5117, as enacted CAL. STATS. 1969, c. 1608, p. 3340.

44. CAL. CIV. CODE § 5120 (operative Jan. 1, 1975).

45. CAL. CIV. CODE § 5121 (operative Jan. 1, 1975).

except for necessities, in situations where the community property is exhausted.<sup>46</sup>

A distinction is drawn between debts which arise out of contract and debts resulting from the commission of a tort. Presently, the tort liability of a spouse to a third party may be satisfied out of the tortfeasor's separate property and the community property over which he/she has management and control.<sup>47</sup> In the future, a distinction will be drawn between those torts which were committed "while the married person was performing an activity for the benefit of the community"<sup>48</sup> and those torts committed while the married person was not acting for the community's benefit. In the former situation, liability is to be satisfied first from the community property and second from the separate property of the tortfeasor. When the latter situation obtains, the liability is to be satisfied first from the separate property of the tortfeasor and second from the community property.<sup>49</sup> The statute does not specify any standard to be applied in determining whether or not a spouse was performing an activity for the benefit of the community. Those cases dealing with "respondent superior" and "scope of employment" in ascertaining the liability of an employer for the torts of an employee may prove helpful, but the marriage relationship is obviously far different from an employer-employee relationship. Once again, the judiciary will be called upon to interpret the statute.

A married person will not be held personally liable for the torts of his/her spouse unless such liability would exist absent the marital relationship.<sup>50</sup> Thus, the law in this area will remain unchanged.

It should be noted that the law to be applied in the cases of interspousal torts remains similarly unchanged. Any liability must first be discharged from the separate property of the tortfeasor, and the community property is liable only when such separate property has been exhausted.<sup>51</sup>

#### PROBATE CODE CHANGES

While the Civil Code governs community property in existence during marriage and provides for its division upon dissolution, the

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46. CAL. CIV. CODE § 5132 (operative Jan. 1, 1975).

47. CAL. CIV. CODE § 5122(b), *as enacted* CAL. STATS. 1969, c. 1608, p. 3341.

48. CAL. CIV. CODE § 5122(b)(1) (operative Jan. 1, 1975).

49. CAL. CIV. CODE § 5122(b)(2) (operative Jan. 1, 1975).

50. CAL. CIV. CODE § 5122(a) (operative Jan. 1, 1975).

51. CAL. CIV. CODE § 5113, *as enacted* CAL. STATS. 1969, c. 1608, p. 3314.

Probate Code governs the disposition of community property upon the death of one or both spouses. In keeping with the tenor of the Civil Code amendments providing for equal treatment of husband and wife, the Probate Code has been amended<sup>52</sup> to equalize treatment of husband and wife with respect to the community property in existence at the time of death of one of the spouses.

Upon the death of a married person, one-half of the community property belongs to the surviving spouse, and the remaining one-half is subject to the testamentary disposition of the deceased spouse.<sup>53</sup> In the event that the deceased spouse has made no testamentary disposition of the remaining one-half, it passes to the surviving spouse by intestate succession.<sup>54</sup> This law applies equally to both spouses.

The statutory provisions governing the administration of estates, however, differ depending whether the deceased spouse is the husband or the wife. Presently, when the husband dies either testate or intestate, all the community property then in existence is subject to administration.<sup>55</sup> The rationale for such a provision is readily apparent. When he is alive, the husband enjoys management and control of the community property, and the community property is liable for his debts. Even after his death the community property continues to be liable for the satisfaction of his obligations. On the other hand, when the wife dies testate or intestate, the community property is not necessarily subject to administration. Only that portion of the community property which is passing from the control of the husband by virtue of testamentary disposition by the wife is subject to his debts and administration.<sup>56</sup> Therefore, when the wife dies intestate, the community property is not subject to administration. Even when the wife has disposed of one-half of the community property by testamentary disposition, the husband continues to enjoy the same rights of management and control of the community personal property as he did during her lifetime. Community real property will be transferred to the personal

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52. S.B. 570, CAL. STATS. 1974, c. 11.

53. CAL. PROB. CODE § 201, as enacted CAL. STATS. 1931, c. 831, p. 595, as amended CAL. STATS. 1935, c. 831, p. 2249.

54. *Id.*

55. CAL. PROB. CODE § 202, as enacted CAL. STATS. 1931, c. 281, p. 596.

56. *Id.*

representative of the wife only to the extent necessary to carry her will into effect.<sup>57</sup>

An entirely new code section will come into effect on January 1, 1975.<sup>58</sup> Its provisions will apply to all persons dying on or after January 1, 1975. The decedent's estate will not be subject to different law depending on the sex of the decedent. Instead, the same law will apply whether the decedent be husband or wife. Any community property which passes to the surviving spouse, either by intestate succession or by testamentary disposition, will not be subject to administration.<sup>59</sup>

Because the community property which passes to the surviving spouse is not subject to administration, however, does not mean that it passes free from any valid debts otherwise chargeable against the community property. Any debt for which the community property is liable under the new Civil Code sections will be proportionately chargeable against 1) the interest of the surviving spouse in the community property; 2) the interest of the deceased spouse passing without administration; and 3) the interest of the deceased spouse subject to administration.<sup>60</sup>

Presently, the surviving husband is given full power to sell, lease, mortgage and convey the community real property after forty days have passed from the death of his wife, absent a recorded notice that another claims an interest in the property under the wife's will.<sup>61</sup> This provision will apply equally to both husband and wife in the future.<sup>62</sup>

When the deceased spouse has made a testamentary disposition of community property, including any dispositions in trust where the surviving spouse is given a limited interest, any of the community property so devised or bequeathed to any person other than the surviving spouse is subject to administration. This is expressly stated in the amended Probate Code.<sup>63</sup> Thus, whenever community property passes to the surviving spouse it will not be subject to administration in the decedent's estate, but any community property which will pass to other than the surviving spouse will be subject to administration.

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57. CAL. PROB. CODE § 202, as enacted CAL. STATS. 1931, c. 281, p. 596.

58. CAL. PROB. CODE § 202 (operative Jan. 1, 1975).

59. *Id.*

60. CAL. PROB. CODE § 205 (operative Jan. 1, 1975).

61. CAL. PROB. CODE § 203, as enacted CAL. STATS. 1931, c. 281, p. 596, as amended CAL. STATS. 1945, c. 1028, p. 1990.

62. CAL. PROB. CODE § 203 (operative Jan. 1, 1975).

63. CAL. PROB. CODE § 204 (operative Jan. 1, 1975).

## DOCTRINE AGAINST RETROACTIVE OPERATION OF AMENDMENTS

Historically, California courts have held that amendments to the existing community property statutes that change the characteristics of community property covered by the California system cannot be applied retroactively to wealth held by a married person at the time of the amendment. Thus, in *Spreckels v. Spreckels*<sup>64</sup> the court held that property acquired before the effective date of a statute requiring the husband to procure the wife's consent before making a gift of community property was not covered by such statute even though the gift was made after the effective date of the statute. A similar holding was made in the case of *Boyd v. Oser*<sup>65</sup> regarding the wife's power of testamentary disposition over the rents, issues and profits of community property acquired before the date of the amendment giving the wife testamentary rights in the community property.

In *Addison v. Addison*<sup>66</sup> the California Supreme Court upheld the application of the quasi-community property statutes to property acquired prior to the effective date of the statutes. Although the court stated that the statute was not being applied retroactively, because no rights were altered and created except upon a suit for divorce or separate maintenance, the court examined the due process arguments against application of the statute at length. Quoting Professor Armstrong,<sup>67</sup> the court held that the interest of the state may be so substantial that due process considerations may be overridden. In *Boyd v. Oser* Justice Traynor stated in his concurring opinion:<sup>68</sup>

The decisions that existing statutes changing the rights of husbands and wives in community property can have no retroactive application have become a rule of property in this state and should not now be overruled. It is my opinion, however, that the constitutional theory on which they are based is unsound. [Citations omitted] That theory has not become a rule of property and should not invalidate future legislation in this field intended by the Legislature to operate retroactively.

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64. 116 Cal. 339, 48 P. 228 (1897).

65. 23 Cal. 2d 613, 145 P.2d 312 (1944).

66. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

67. Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?, 33 CALIF. L. REV. 476 (1945).

68. 23 Cal. 2d at 623, 145 P.2d at 318.

Many of the statutes to take effect on January 1, 1975, explicitly state that only community property acquired after January 1, 1975, will be affected by the statute. For example, the presumption that property acquired by a married woman in her name alone is her separate property will continue to be applied to all property acquired before January 1, 1975. The presumption will not be applied to property acquired on or after January 1, 1975.<sup>69</sup> The Probate Code changes will apply only to the estates of decedents dying on or after January 1, 1975.<sup>70</sup>

However, the statutes providing for joint management and control of community personal property<sup>71</sup> and community real property<sup>72</sup> draw no distinction between property acquired prior to January 1, 1975, and property acquired after such date. Although the community property will be liable for the contracts of the wife made on or after January 1, 1975, the statute does not state whether the community property acquired prior to January 1, 1975, will be liable for contracts made by the wife after that date.<sup>73</sup> It is possible that the courts, relying on *Spreckels*,<sup>74</sup> may apply the Doctrine Against Retroactive Application of Amendments and refuse to apply the amendments retroactively on the ground that the vested rights of the husband may not be disturbed without violations of due process. If such an approach is taken, only community property acquired after January 1, 1975, will be subject to joint management and control. Similarly, only community property acquired after January 1, 1975, will be liable for the wife's contract debts.

The language in *Addison*,<sup>75</sup> however, that the state interest may override due process objections, provides a basis for upholding retroactive application of the amendments in question. The interest of the state in guarantying equal protection and in invalidating discrimination based on "suspect" classifications<sup>76</sup> may well be held to outweigh the husband's vested property rights. Justice Traynor's observation in *Boyd v. Oser* that the Doctrine is based on an unsound constitutional theory is also persuasive.<sup>77</sup> Whether or not the amendments will be applied to subject pre-January 1, 1975 com-

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69. CAL. CIV. CODE § 5110 (operative Jan. 1, 1975).

70. S.B. 570, CAL. STATS. 1974, c. 11, Sec. 8.

71. CAL. CIV. CODE § 5125 (operative Jan. 1, 1975).

72. CAL. CIV. CODE § 5127 (operative Jan. 1, 1975).

73. CAL. CIV. CODE § 5116 (operative Jan. 1, 1975).

74. *Supra*, note 64.

75. *Supra*, note 66.

76. *See* note 22, *supra*.

77. *Supra*, note 68.

munity property to joint management and control and to allow the wife's post-January 1, 1975 contract debts to be satisfied out of pre-January 1, 1975 community property rests solely in the discretion of the judiciary.

#### SUMMARY

It is apparent that on January 1, 1975, the rights of married persons in community property will be substantially altered. No longer will different laws apply to a husband and wife. The marriage ceremony will no longer operate to deprive a woman of rights in her own property. Both husband and wife will have the right of management and control of their community property assets. The difficulties faced by the married woman in the business world should diminish, since creditors will soon be able to reach community property assets to satisfy the debts of the wife, as well as of the husband. To be sure, the married woman has lost rights as well as gained them. The presumption that property taken in her own name is her separate property will no longer operate. Instead, her rights will be commensurate with those enjoyed by her husband. The law to be applied in the administration of decedents' estates reflects the changes made in management and control; the husband and the wife will be treated equally. No longer will all community property be subject to administration upon the death of the husband.

In addition to standardizing the rights of husbands and wives, totally new concepts have been introduced. The liability of separate and community property for tort damages recovered by a third person will depend upon whether the tortfeasor was acting for the benefit of the community at the time the tort was committed. A new facet of California law is herein introduced. The application of this law will not depend on the sex of the tortfeasor either; it is equally applicable to husband and wife.

The immediate impact of the new law is difficult to foresee. While the right of management and control may be legally guaranteed, the degree of its social implementation is not easily estimable. However, the increased rights given to creditors should result in a relatively immediate impact as will the Probate Code changes.

The "creature of statute," community property law, has again



been altered. It can now truly be said, for the first time in the complete sense of the word, that the rights and interests of a husband and wife in community property will be "present, existing and equal."<sup>78</sup>

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78. CAL. CIV. CODE § 5105 (operative Jan. 1, 1975).