STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Liability of Marital Property for Debts

January 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

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STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

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January 21, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to community property should be revised. The Commission submits this recommendation relating to one aspect of the study—the liability of marital property for debts. The recommendation recodifies and clarifies the law governing the rights of spouses and creditors, including provisions governing reimbursement rights between the spouses.

The Commission wishes to express its thanks to its community property consultants for their assistance in the development of this recommendation. Professor William A. Reppy, Jr., Duke Law School, is the Commission's principal consultant on this phase of the community property study. The background study he prepared for the Commission is published as Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143 (1981). Background studies prepared for the Commission by Professor Carol S. Bruch, U.C. Davis Law School, also cover aspects of this topic. See Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769 (1982), and

Management Powers and Duties Under California's Community Property Laws (1980) (unpublished study on file in Commission's office).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

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RECOMMENDATION

relating to

LIABILITY OF MARITAL PROPERTY FOR DEBTS

General Approach

The eight community property jurisdictions in the United States have developed three distinct systems of applying marital property to the debts of one or both spouses.[1] Each system protects the marital property from creditors to varying degrees by creating exceptions to liability of the property for debts.[2]

The system least favorable to creditors is that developed in Washington and Arizona, which requires a classification of debts as community or separate.[3] All community property and the debtor's separate property is liable for a "community" debt, but only separate property of the debtor spouse is liable for a "separate" debt. Since in the ordinary case a substantial portion of the marital property is community, a creditor holding a separate debt may find the debt uncollectable. A practical consequence of this system is that creditors require consent of both spouses before extending credit and courts strive to classify debts as community in order to avoid unfairness to creditors.

A system more favorable to the interests of creditors is that developed in New Mexico. Under this system, debts are classified as community or separate, community property being liable for community debts and separate property of the debtor spouse being liable for that spouse's separate debts. In the case of a separate debt, if the separate property is exhausted and the debt remains unsatisfied, the

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[1] Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143, 168-75 (1981).

[2] Marital property consists of the community property and the separate property of either of the spouses, but the separate property of the nondebtor spouse is ordinarily immune. In California, the separate property of a nondebtor spouse is liable for necessaries debts of the debtor spouse in limited situations. Civil Code §§ 5121, 5132.

[3] For a discussion of the debt classification system, see Reppy, *supra* note 1, at 171-74.

creditor may reach the debtor's half-interest in the community property, in effect forcing a partition. The mechanical operation of such a scheme, and the subsequent readjustment of property rights between the spouses, is not clear.[4]

Most community property states, including California, employ a system that is most favorable to creditors. Creditors under this system may satisfy their debts out of property over which the debtor spouse has management and control. In California, this means that generally a creditor may reach the separate property of the debtor spouse and all the community property since the spouses have equal management and control of the community property.[5] This general rule is subject to exceptions, which are discussed below.

Of the possible approaches to liability of marital property for debts, the managerial system (which is the present California system) is generally most sound in theory and practice. It gives greatest assurance that debts of the spouses will be satisfied, subject to the statutory scheme of exemptions which will preserve property necessary for basic needs of the spouses.[6] Systems that require characterization of type of debt and partition of community property create serious administrative problems. Moreover, liability of the property over which the debtor has management and control conforms to the reasonable expectations of both spouses and creditors. The Commission recommends that the general approach of existing California law to liability of marital property for debts be preserved.

Property Under Management and Control of One Spouse

Under California's managerial approach to liability of marital property, property over which a spouse has management and control is liable for the debts of the spouse.[7] Since both spouses have equal management and

[4] For a discussion of the partition system, see *id.* at 174-75.

[5] For a discussion of the California managerial system, see *id.* at 168-70.

[6] See discussion below of "Related Matters."

[7] See Reppy, *supra* note 1, at 168-70. See also 1974 Cal. Stats. ch. 1206, § 1, p. 2609 ("The Legislature finds and declares that . . . the liability of community property for the debts of the spouses has been coextensive with the right to manage and control community property and should remain so . . . .").

control of the community property, this yields the rule that all community property is liable for a debt of either spouse.

California law, however, prescribes three situations where community property is under the management and control of only one spouse. A spouse who is operating or managing a business that is community personal property has the sole management and control of the business.[8] A community property bank account in the name of a spouse is free from the control of the other spouse.[9] If one spouse has a conservator, the other spouse having legal capacity has exclusive management and control of the community property.[10] Whether these types of community property are liable for a debt of the spouse not managing and controlling the property is not clear.[11]

The policy supporting liability of community property for a debt of either spouse incurred before or during marriage—maximum protection of creditors' rights with minimum procedural burdens—also supports liability of the property regardless whether it is under the management and control of one or both spouses. The law should make clear that the community property is liable for a debt of either spouse notwithstanding the concept that liability follows management and control.

Liability of Quasi-Community Property

The most significant provisions of existing law refer only to community and separate property in prescribing rules governing the property that is liable for debts incurred by one or both spouses.[12] These provisions make no reference to quasi-community property—property acquired by a spouse while domiciled in another jurisdiction that would have been community property if acquired while domiciled in California.[13] The result of the failure specifically to recognize quasi-community property is that the liability of the property for debts appears to be governed by the rules that apply to separate property rather than the rules that apply to community property.

[8] Civil Code § 5125(d).

[9] Fin. Code § 851.

[10] Prob. Code § 3051.

[11] See Reppy, *supra* note 1, at 195-99.

[12] Civil Code §§ 5120-5123; but see Civil Code § 5132 (support obligation).

[13] Civil Code § 4803.

Quasi-community property should be treated as community property for the purpose of determining liability for debts.[14] This rule is consistent with the public policy of California that the marital unit shares its assets and its liabilities. This policy is particularly important in the area of creditors' remedies not only because it promotes sharing of common obligations but also because it both helps ensure equal access to credit by both spouses and protects California creditors who extend credit in reliance on the availability of marital assets to satisfy debts.

Out-of-State Real Property

Community property, as defined by Civil Code Section 5110, does not include real property situated outside California, even though the property may have been acquired by the spouses with community property during their marriage while domiciled in California.[15] The reason for this gap in the community property law is the assumption that California courts will apply the universally accepted choice of law rule that the law of the situs of real property governs the nature of the interests acquired therein. Therefore, it is for the situs state to determine the kinds of estates in real property that exist there and to

[14] The Commission sees no significant constitutional issue presented by this rule. While 1917 legislation equating quasi-community property with community property was invalidated by *Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1 (1934), it is likely that the *Estate of Thornton* reasoning would no longer be applied in determining the constitutionality of the legislation to treat quasi-community property as community property. Marsh, *A Study Relating to Inter Vivos Rights in Property Acquired By Spouse While Domiciled Elsewhere*, 3 Cal. L. Revision Comm'n Reports I-21, I-26 (1960); Bruch, *The Definition and Division of Community Property: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 828 (1982). The Supreme Court has declared that "the correctness of the rule of *Thornton* is open to challenge." Addison v. Addison, 62 Cal.2d 558, 565-66, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). Under the approach now used by the court in determining vested property rights issues, the impairment of rights must be weighed against the importance of the public policy promoted by the change in the law. *In re* Marriage of Bouquet, 16 Cal.3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976). The constitutionality of legislation enacted to equate quasi-community property with community property for the purposes of rights at dissolution of marriage and rights of a surviving spouse in property acquired by the decedent has been upheld. See Civil Code § 4800; Probate Code § 201.5; Addison v. Addison, 62 Cal.2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965); Estate of Rogers, 245 Cal. App.2d 101, 53 Cal. Rptr. 572 (1966). In the case of applying community property creditors' remedies principles to quasi-community property, the public policy being served is so fundamental as to outweigh the possible impairment of private property rights. Moreover, application of community property treatment to the interest of a spouse in quasi-community property may be viewed simply as an extension of the general support obligation of the spouse or of agency principles.

[15] Civil Code Section 5110 provides, in relevant part, that "all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state . . . is community property."

determine which of these is acquired in consequence of a purchase by a married person domiciled in California.[16]

Notwithstanding the rule that marital real property situated outside California is not community property, the property may nonetheless be treated as community property for purposes of division of property at dissolution of marriage or legal separation.[17] Although the California court dividing the property cannot directly affect title to the property, if the court has personal jurisdiction over parties it can make appropriate orders to effectuate the division.[18]

Real property situated outside California that is acquired with community assets should also be treated as community property for the purpose of liability for debts. The fact that real property is located outside California should not immunize the property from claims of community creditors. A court that has personal jurisdiction of the parties can make appropriate orders for conveyance of the property to satisfy claims of creditors.[19]

Order of Satisfaction Against Property

Under the California approach to liability of marital property, all of the community property as well as the debtor's separate property is liable for a debt. However, existing California law prescribes an order of satisfaction against community and separate property in a few situations. Civil Code Section 5122(b) requires a determination whether or not a tort judgment arises out of an activity that benefits the community—if so, the judgment must be satisfied first out of community property and then out of the separate property of the tortfeasor; if not, the judgment must be satisfied first out of the separate property of the tortfeasor and then out of community property.[20] Civil Code Section 5132 requires a spouse to

[16] See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 Cal. L. Revision Comm'n Reports at I-12 to I-13 (1961).

[17] See, *e.g.*, Rozan v. Rozan, 49 Cal.2d 322, 317 P.2d 11 (1957); Ford v. Ford, 276 Cal. App.2d 9, 80 Cal. Rptr. 435 (1969).

[18] See Civil Code § 4800.5; Report of Assembly Committee on Judiciary on Assembly Bill 124, Assembly J. (March 11, 1970) at 1109.

[19] Code Civ. Proc. § 708.205 (order applying property to satisfaction of judgment).

[20] Civil Code Section 5122(b) provides:

> (b) The liability of a married person for death or injury to person or property shall be satisfied as follows:

support the other spouse out of separate property if there is no community or quasi-community property.[21]

An order of satisfaction scheme creates a number of practical problems. It requires a special mechanism in the procedure for enforcing a judgment to determine whether the debt is community or separate in character. It requires a creditor who seeks to satisfy the debt out of one type of property to ascertain whether the other types of property have been exhausted; this may involve cumbersome court proceedings. Moreover, even if there are other types of property that have not been exhausted, an order of satisfaction scheme may require the creditor to seek satisfaction from property that is likely to be exempt or that is of such a nature that the cost of applying it to the judgment will exceed its worth.

The California statutes do not attempt to resolve these problems and there is no useful experience of operation under them.[22] Other jurisdictions have enacted limited order of satisfaction schemes, but these schemes offer no useful guidance; apparently, elaborate court proceedings are required to make them operable.[23]

The Commission believes the mechanical problems caused by an order of satisfaction against property are too great to justify such a scheme. A creditor should be able to reach any property that is liable for the satisfaction of the judgment without the burden of first seeking out and attempting to exhaust particular classes of assets. The existing California order of satisfaction provisions should be repealed. In place of the order of satisfaction provisions, the

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(1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community property and second from the separate property of the married person.

(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community property.

[21] Civil Code Section 5132 provides:

5132. A spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms by Sections 4803 and 4804.

[22] See generally discussion in Note, *Tort Debts Versus Contract Debts: Liability of the Community Under California's New Community Property Law*, 26 Hastings L.J. 1575 (1975).

[23] See Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M. L. Rev. 1 (1974).

Commission recommends adoption of a reimbursement right between spouses, which is discussed below.

Reimbursement

Where community property has been used during marriage to satisfy a separate debt or obligation of one of the spouses, and where separate property of one of the spouses has been used during marriage to satisfy a community obligation, as a general rule there is a right to reimbursement of the community or separate estate only in limited situations. At dissolution the parties do not ordinarily go back through all the transactions that have occurred over the course of a marriage and attempt to ascertain whether a particular expenditure was for a community or separate purpose and whether the particular expenditure was made with community or separate funds. There are several important exceptions to this generalization.

In three types of situations the community may obtain reimbursement for expenditures for separate debts—where the separate property of the spouse making the expenditure is benefited by the expenditure, where the expenditure is for a child or spousal support obligation that predates the marriage, and where the expenditure is made within a short time before dissolution.

The California case law relating to reimbursement has been criticized by commentators as being confused and uncertain, with no sound logical or policy basis.[24] After reviewing the law of all the other community property jurisdictions, one critic states:[25]

> The law of California must be discussed separately. It defies not only classification, but rationalization as well. It is based on misconceptions, faulty principles and errors compounded over the years. It harbors two mutually inconsistent lines of cases, and its confusion is such that consensus is lacking not only as to what it should be, but what it is.

[24] See, *e.g.*, De Funiak, *Improving Separate Property or Retiring Liens or Paying Taxes on Separate Property with Community Funds*, 9 Hastings L.J. 36 (1957); Comment, *The Husband's Use of Community Funds to Improve His Separate Property*, 50 Calif. L. Rev. 844 (1962); Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. Calif. L. Rev. 240, 259-60 (1966); Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 44 Wash. L. Rev. 379 (1969).

[25] Bartke, *id.* at 405.

The Commission believes that the general rule of California law denying reimbursement except in limited situations is sound in principle. Reimbursement generally involves close questions of characterization of debts and property and generates difficult accounting and proof problems. It is litigation-breeding and not conducive to easy settlement of rights between the parties. Reimbursement is also inimical to sharing principles during marriage, since it encourages spouses to scrutinize the type of debt and nature of funds being applied in the event of future accountability.

Even though reimbursement as a general marital property principle is undesirable, specific types of cases demand reimbursement. If community funds are used by a spouse to pay a premarital support obligation[26] or improve separate property,[27] if separate property is taken for a necessaries debt of the other spouse,[28] or if property of a former spouse is taken for a debt assigned to the other spouse,[29] a right of reimbursement should arise. And of course if property not liable for a debt at all is applied by a spouse to the debt, there should be a reimbursement right.

In the case of a tort debt, California law requires that a separate debt be satisfied first out of separate property and then out of community property, and that a community debt be satisfied first out of community property and then out of separate property.[30] To implement the policy of this rule, the law should substitute a provision that where property of one type is in fact applied to a debt of the other type, a reimbursement right arises. The rule of reimbursement should not apply, however, where the tort debt is satisfied out of insurance proceeds, whether separate or community. The function of insurance is to spread the risk of loss, and reimbursement would not be appropriate in such a situation.

If the spouses are separated, any debt incurred should be the separate debt of the spouse who incurred it. This is consistent with the principle that after separation the

[26] See discussion below of "Support Obligations."

[27] This matter will be the subject of a separate Commission recommendation.

[28] See discussion below of "Liability for Necessaries."

[29] See discussion below of "Liability After Division of Property."

[30] Civil Code § 5122(b).

earnings of a spouse are the separate property of the spouse.[31] Thus if the spouse applies community property to the postseparation debt, the community should be entitled to reimbursement. This rule would not apply where the debt was incurred for production or preservation of community property or for the common necessaries of life of a spouse.

The reimbursement right in these cases should apply regardless whether the debt was satisfied voluntarily by payment by a spouse or involuntarily by action of the creditor. This will eliminate litigation over such matters as intent to make a gift, consent to the payment, and agency relationship, and will also encourage expeditious settlement of debts out of the most readily available assets without the need for concern about legal implications of use of those assets. However, the law should also make clear that a spouse may expressly waive reimbursement rights.[32]

A major problem with existing law as to reimbursement is that the character of the debt must be ascertained, the character of the property applied to the debt must be determined, and any gift, consent, or agency must be found, at the time of dissolution of marriage, which may occur many years after the operative events. This causes substantial discovery and proof problems and increases the likelihood of error. To minimize these problems, the reimbursement rights should be determinable during marriage as well as at dissolution, and the right should be strictly limited to a period of three years after application of the property to the satisfaction of the debt. It should be recognized that the reimbursement right will be largely unused during an ongoing marriage; nonetheless, the right should be authorized for those spouses concerned to keep an accurate accounting of property, particularly in second marriages or separate property marriages.

Prenuptial Debts

If a person contracts a debt before marriage, the earnings of the person's spouse after marriage are not liable for the debt.[33] This principle implies two related rules:

[31] Civil Code § 5118.

[32] For clarity and certainty, the waiver should be in writing, as in a prenuptial contract.

[33] Civil Code § 5120.

(1) Community property other than the earnings of the person's spouse after marriage is liable for prenuptial contract debts.

(2) The earnings of the person's spouse after marriage are liable for tort and other noncontractual prenuptial debts.

The first related rule is sound. Since the debtor spouse owns the community property, all community property other than earnings of the nondebtor spouse (which is peculiarly personal) should be liable for the satisfaction of the prenuptial debt. This principle should be codified expressly.

The second related rule is not sound. There is no logical basis to distinguish prenuptial tort and other debts from contract debts. The earnings of the nondebtor spouse should not be liable for any prenuptial debts of the debtor spouse, whether based on contract or tort, with the exception of certain support obligations.[34]

Another matter is how long the earnings of the nondebtor spouse should remain not liable for a prenuptial debt of the debtor spouse.[35] The Commission recommends that the earnings should lose their protection from liability upon a change in form, but that they should retain their protection so long as traceable in bank accounts. This will ensure that substantial amounts of community property are not immunized from creditors, that the judicial system is not burdened by extensive tracing requirements, and that earnings will remain exempt so long as they retain their peculiarly personal character. This will also parallel the protection given to funds exempt from enforcement of judgments.[36]

Support Obligations

The extent to which marital property of a second marriage is liable for a child support obligation of a first marriage is unclear. Civil Code Section 199 provides that after dissolution of marriage a child support obligation may be satisfied "only" from the total earnings (or assets

[34] See discussion below. Because it will not always be apparent whether earnings are liable for a particular debt, the Commission also recommends that wage garnishment of the debtor's spouse not be permitted except upon court order.

[35] See Reppy, *supra* note 1, at 199-200.

[36] Code Civ. Proc. § 703.080 (tracing exempt funds).

acquired therefrom) of each spouse.[37] Whether this provision is intended to place the child in a worse position than a general creditor is unclear. Civil Code Section 4807 appears to subject community property, including the community property interest in the earnings of a nonobligor spouse, to a child support obligation.[38] In this regard, Civil Code Section 5127.5 and 5127.6 also appear to create exceptions to the rule of Section 199 under certain factual situations. These provisions were intended to comport with AFDC standards.[39] However, the provisions are ineffective, unworkable, confusing, obsolete, and possibly unconstitutional.[40]

The liability of marital property for child support obligations (and for spousal support obligations as well) should be dealt with clearly and directly. A child or former spouse to whom a person owes an obligation of support should be in at least as good a position as a general creditor. This means that in the case of remarriage of the support obligor, the child or former spouse should be permitted to enforce the support obligation not only against the separate property of the support obligor but also against all community property of the subsequent marriage except the earnings of the nonobligor spouse.[41] However, the earnings of the nonobligor spouse should be taken into account in setting the amount of the child support obligation.[42]

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[37] Civil Code Section 199 provides:

> The obligation of a father and mother to support their natural child under this chapter, including but not limited to Sections 196 and 206, shall extend only to, and may be satisfied only from, the total earnings, or the assets acquired therefrom, and separate property of each, if there has been a dissolution of their marriage as specified by Section 4350.

[38] *In re* Marriage of Brown, 99 Cal. App.3d 702, 160 Cal. Rptr. 524 (1979).

[39] Beilenson and Agran, *The Welfare Reform Act of 1971*, 3 Pac. L.J. 475, 485 (1972); *Review of Selected 1979 California Legislation*, 11 Pac. L.J. 531-32 (1980); Wood v. Woods, 133 Cal. App.3d 954, 184 Cal. Rptr. 471 (1982).

[40] Bruch, *Management Powers and Duties Under California's Community Property Law* 40-52 (1980) (unpublished study on file in office of California Law Revision Commission); Reppy, *supra* note 1, at 204-06; *In re* Marriage of Shupe, 139 Cal. App.3d 1026 (1983). Welfare and Institutions Code Section 11261, which was identical to and enacted together with Civil Code Section 5127.6, was repealed by 1981-1982 Cal. Stats. 1st Ext. Sess., ch. 3, § 20, and replaced with Welfare and Institutions Code Section 11008.14, which simply makes the earnings of the stepparent "considered available for purposes of eligibility determination and grant computation to the extent required by federal law."

[41] See discussion above of "Prenuptial Debts."

[42] *In re* Marriage of Havens, 125 Cal. App.3d 1012, 178 Cal. Rptr. 477 (1981).

Where community property is applied to a premarital support obligation of one of the spouses, the community should be entitled to reimbursement to the extent the amount of community property used is disproportionate to the amount of separate property of the obligor spouse that was available but not used to satisfy the obligation.[43]

The law should make these rules clear and the inconsistent and confusing provisions of existing law should be repealed.

Liability for Necessaries

Under existing law, separate property of a spouse is not liable for the debts of the other spouse except in one situation: The separate property is liable for the necessaries of life contracted by either spouse while living together.[44] This exception is based on the obligation of the spouses to support one another.[45]

The requirement that the necessaries be "contracted" is unduly restrictive. This language has the effect of immunizing the separate property from debts for necessaries such as emergency medical care not contracted by one of the spouses.[46] In such situations, the separate property of the nondebtor spouse should be liable for the necessaries debt regardless of the contractual nature of the debt.

The separate property of the nondebtor spouse is liable for necessaries debts incurred only while the spouses are living together. After separation by agreement there is no liability unless support is stipulated in the agreement.[47] The provision abrogating the support obligation of the spouses in a separation by agreement penalizes spouses who need support following an informal separation and violates the policy of the Family Law Act requiring mutual support

[43] This codifies the rule of *Weinberg v. Weinberg*, 67 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967). See also Bare v. Bare, 256 Cal. App.2d 684, 64 Cal. Rptr. 335 (1967); *In re* Marriage of Smaltz, 82 Cal. App.3d 568, 147 Cal. Rptr. 154 (1978). The reimbursement right should be subject to a three-year limitation period. See discussion above of "Reimbursement."

[44] Civil Code § 5121.

[45] Civil Code § 5132.

[46] See, *e.g.*, Credit Bureau of San Diego v. Johnson, 61 Cal. App.2d Supp. 834, 142 P.2d 963 (1943). *Cf.* St. Vincent's Institution For The Insane v. Davis, 129 Cal. 20, 61 P. 477 (1900) (earlier statute).

[47] Civil Code § 5131.

during marriage.[48] The presumption should be reversed—the separate property of the spouses should remain liable for the necessaries obligations incurred following separation unless liability is expressly waived in the separation agreement. However, after informal separation the property should be liable only for debts for "common" necessaries of life;[49] the nondebtor spouse should not be required to maintain the estranged spouse after informal separation in the accustomed style of life.[50]

The separate property of the nondebtor spouse may not be applied to the satisfaction of a judgment unless the nondebtor spouse is made a party to the action.[51] This rule is sound and should be recodified in terms of the personal liability of the nondebtor spouse. This will satisfy due process demands and will assure the nondebtor spouse the opportunity to contest the validity of the debt before his or her separate property is applied to its satisfaction.

Existing law permits satisfaction of a necessaries debt out of separate property of the nondebtor spouse only after all other types of marital property have been exhausted.[52] Such a limitation on the right of a creditor is undesirable.[53] A preferable means of implementing the policy of existing law is to permit the creditor to reach separate property of the nondebtor spouse but to provide reimbursement if this is done when other marital property is available but not used. The proposed law adopts the reimbursement procedure.

Anti-Deficiency Protection of Separate Property

Civil Code Section 5123 provides that in the case of a security interest in community property, the separate property of a spouse is not liable for any deficiency in the

[48] Bruch, *The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change*, 65 Calif. L. Rev. 1015, 1030-31 (1977); Reppy, *supra* note 1, at 194-95.

[49] *Cf.* Code Civ. Proc. § 706.051 (common necessaries exception to wage exemption); Ratzlaff v. Portillo, 14 Cal. App.3d 1013, 92 Cal. Rptr. 722 (1971) ("common" necessary is necessary required to sustain life).

[50] *Cf.* Wisnom v. McCarthy, 48 Cal. App. 697, 192 P. 337 (1920) (under necessaries standard, made necessary because of economic and social position of spouses).

[51] See, *e.g.*, Evans v. Noonan, 20 Cal. App. 288, 128 P. 794 (1912); Credit Bureau of Santa Monica Bay Dist. v. Terranova, 15 Cal. App.3d 854, 93 Cal. Rptr. 538 (1971).

[52] Civil Code §§ 5121 and 5132.

[53] See discussion above of "Order of Satisfaction Against Property."

security unless the spouse gives express written consent to liability.[54] This provision is peculiar in protecting separate property of a spouse in the event of a deficiency but not other community property. It is thus inconsistent not only with general rules governing deficiency judgments,[55] but also with general rules governing liability of property of a married person obligated on a debt.[56] Section 5123 was enacted at a time when the separate property of a married woman was not ordinarily liable for a debt; this is no longer the law. The historical reasons that led to enactment of the section are now obsolete.[57] The section should be repealed and replaced by a statement of the basic rule that the separate property of a spouse cannot be taken to satisfy a debt unless the spouse is personally liable for the debt.

Liability After Division of Property

Upon legal separation or dissolution of marriage, the community and quasi-community property and the debts are divided between the spouses.[58] Notwithstanding the division of property and debts, a creditor may seek to satisfy the debt out of any property that would have been liable for the debt before the division.[59] Thus, a creditor may reach former community property awarded to a nondebtor spouse even though the property division requires that the debtor spouse pay the debt. In such a situation the nondebtor spouse has a cause of action against the debtor spouse for reimbursement.[60]

[54] Civil Code Section 5123 provides:

> 5123. (a) The separate property of the wife is not liable for any debt or obligation secured by a mortgage, deed of trust or other hypothecation of the community property which is executed prior to January 1, 1975, unless the wife expressly assents in writing to the liability of her separate property for such debt or obligation.
>
> (b) The separate property of a spouse is not liable for any debt or obligation secured by a mortgage, deed of trust, or other hypothecation of the community property which is executed on or after January 1, 1975, unless the spouse expressly assents in writing to the liability of the separate property for the debt or obligation.

[55] See, *e.g.*, Code Civ. Proc. §§ 580a, 580b.

[56] See, *e.g.*, Civil Code § 5121 (liability of separate property of spouse). See generally, discussion in Carroll v. Puritan Leasing Co., 77 Cal. App.3d 481, 143 Cal. Rptr. 772 (1978).

[57] See Reppy, *supra* note 1, at 202-03.

[58] Civil Code § 4800.

[59] See, *e.g.*, Mayberry v. Whittier, 144 Cal. 322, 78 P. 16 (1904); Bank of America v. Mantz, 4 Cal.2d 322, 49 P.2d 279 (1935); Vest v. Superior Court, 140 Cal. App.2d 91, 294 P.2d 988 (1956).

[60] Reppy, *supra* note 1, at 210-11.

This scheme is unsound. It creates procedural burdens of tracing former community property in the hands of the nondebtor spouse and raises problems whether any increase in value of the property, due to improvements, inflation, or otherwise, is also liable[61] and whether the property should be traceable through changes in form after it has lost its community identity. These practical difficulties also demonstrate that the principles supporting liability of community property during marriage are not applicable after division of the property upon dissolution. Community property is liable during marriage because this avoids the serious administrative problems of characterizing the type of property and debt and partitioning the community property, and gives greatest assurance that creditors will be satisfied.[62] Upon dissolution, however, the property and debts are characterized as separate or community, and the community property and debts are partitioned among the parties; one or both of the spouses are required to satisfy the creditors. The administrative and policy reasons for undifferentiated liability of community property are thus eliminated upon dissolution and division of the property and debts.

Liability of community property for debts should cease upon dissolution and division of the property.[63] A creditor should be able to collect a debt from the person to whom the debt is assigned for payment, without regard to the type of property—former community or separate property—from which the debt is satisfied. This eliminates tracing problems and is consistent with the purposes of the Family Law Act to require payment of a debt by the person to whom the debt is assigned,[64] but does not impair the creditor's rights against the debtor.[65] In allocating the debts

[61] See Ryan v. Souza, 155 Cal. App.2d 213, 317 P.2d 655 (1957).

[62] See discussion above of "General Approach."

[63] Division of the community property does not affect enforceability of a valid lien on the property. See, *e.g.*, Kinney v. Vallentyne, 15 Cal.3d 475, 541 P.2d 537, 124 Cal. Rptr. 897 (1975).

[64] The Family Law Act demands division of property and obligations so that the parties are placed in a position of equality. See Civil Code § 4800; *In re* Marriage of Schultz, 105 Cal. App.3d 846, 164 Cal. Rptr. 653 (1980).

[65] Permitting a creditor to satisfy a debt out of property of a nondebtor spouse to whom the debt is assigned does not preclude the creditor from seeking to satisfy the debt out of the property of the debtor spouse as well. If the creditor satisfies the debt out of property of the debtor spouse, the debtor spouse has a right of reimbursement against the nondebtor spouse to whom the debt is assigned.

to the parties, the court in the dissolution proceeding should take into account the rights of creditors so there will be available sufficient property to satisfy the debt by the person to whom the debt is assigned, provided the net division is equal.[66] If a judgment on the debt is entered after division of the property and debts, the judgment should not be enforceable against the nondebtor spouse to whom the debt is assigned unless the nondebtor spouse is made a party. This preserves the due process rights of the nondebtor spouse after division by providing the nondebtor spouse the opportunity to contest the validity of the debt, raise defenses, and take other necessary actions.

Liability After Judgment of Nullity

The law relating to creditors' rights against property of former spouses whose marriage has been annulled as void or voidable is not clear.[67] In the case of putative spouses, upon annullment the property and debts may be divided as quasi-marital property. In this situation the statute should make clear that creditors' rights against the property are the same as against property of a valid marriage that ended in dissolution. The parties held themselves out as being married and third persons relied to their detriment. The ultimate invalidity of the marriage is a fortuity and should not affect the rights of creditors or the community property protections between the parties.

Related Matters

A complex aspect of the liability of marital property for debts is the extent to which exemptions from enforcement of a judgment are recognized for community property and separate property of the nondebtor spouse. This matter has been dealt with separately in the new Enforcement of Judgments Law.[68]

[66] Existing law requires an equal division of property and debts except in the case where liabilities exceed assets, in which case the court may adjust the division to reflect equitable considerations. See, *e.g.*, *In re* Marriage of Fonstein, 17 Cal.3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976) (equal division); *In re* Marriage of Eastis, 47 Cal. App.3d 459, 120 Cal. Rptr. 861 (1975) (unequal division). The court should have greater discretion to allocate debts taking into account the rights of creditors, but the net division should be equal. *Cf. In re* Marriage of Schultz, 105 Cal. App.3d 846, 164 Cal. Rptr. 653 (1980) (no discretion).

[67] See Reppy, *supra* note 1, at 213-18.

[68] Code Civ. Proc. §§ 703.020, 703.110, 703.130, 704.010-704.990; 1982 Creditors' Remedies Legislation, 16 Cal. L. Revision Comm'n Reports 1001, 1079-1103 (1982).

A system prescribing the liability of separate and community property for the debts of spouses is subject to the ability of the spouses to transfer property between themselves thus affecting the character and liability of the property. California law is liberal in permitting transmutation of the character of property by spouses and requires few formalities. This matter will be the subject of a separate Commission recommendation.

Recommended Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 4452, 4800, 4800.6, 4807, 5131, and 5132 of, to add Section 5101 to, to add headings to Chapter 1 (commencing with Section 5100), Article 1 (commencing with Section 5100) and Article 2 (commencing with Section 5104) of Chapter 1, Chapter 2 (commencing with Section 5107), Chapter 4 (commencing with Section 5125), Chapter 5 (commencing with Section 5129), Chapter 6 (commencing with Section 5133), and Chapter 7 (commencing with Section 5138) of, and to add Chapter 3 (commencing with Section 5120.010) to, Title 8 of Part 5 of Division 4 of, and to repeal Sections 199, 5116, 5120, 5121, 5122, 5123, 5127.5, and 5127.6 of, the Civil Code, and to add Section 706.108 to the Code of Civil Procedure, relating to family law.

The people of the State of California do enact as follows:

Civil Code § 199 (repealed)

SECTION 1. Section 199 of the Civil Code is repealed.

~~199. The obligation of a father and mother to support their natural child under this chapter, including but not limited to Sections 196 and 206, shall extend only to and may be satisfied only from, the total earnings, or the assets acquired therefrom, and separate property of each, if there has been a dissolution of their marriage as specified by Section 4350.~~

Comment. Former Section 199 is superseded by Sections 5120.110 (liability of community property), 5120.140 (liability of separate property), and 5120.150 (liability for support obligation).

Civil Code § 4452 (amended)

SEC. 2. Section 4452 of the Civil Code is amended to read:

4452. Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed "quasi-marital property." If the court expressly reserves jurisdiction, it may make the property division at a time subsequent to the judgment. *The property so divided is liable for debts of the parties to the same extent as if the property had been community property or quasi-community property.*

Comment. Section 4452 is amended to make clear that quasi-marital property is treated the same as community and quasi-community property for purposes of creditors' remedies. See Section 5120.160 (liability of property after division).

Civil Code § 4800 (amended)

SEC. 3. Section 4800 of the Civil Code is amended to read:

4800. (a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the

quasi-community property of the parties in an equitable manner.

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars ($5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties.

(4) Educational loans shall be assigned to the spouse receiving the education in the absence of extraordinary circumstances rendering such an assignment unjust.

(5) In assigning the liabilities to the parties the court shall take into consideration such factors as the earning capacity of, and the exempt character of assets awarded to, the party to whom a liability is assigned so as to protect the rights of the creditors to the extent practical, provided that, after deduction of the liabilities assigned to a party from the assets awarded to the party, the division of the community and quasi-community property is equal.

(c) Notwithstanding the provisions of subdivision (a), community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the

interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages, if the cause of action for such damages arose during the marriage but is not separate property as defined in Section 5126, unless such money or other property has been commingled with other community property.

(d) The court may make such orders as it deems necessary to carry out the purposes of this section.

Comment. Paragraph (5) is added to Section 4800(b) to make clear the court's discretion to allocate debts in a way that will protect the rights of creditors. However, the division of debts must be made in such a manner that the totals of the assets awarded to the parties after deduction of the obligations allocated to the parties are equal. See, *e.g.*, *In re* Marriage of Fonstein, 17 Cal.3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976) (equal division required); *In re Marriage of Schultz*, 105 Cal. App.3d 846, 164 Cal. Rptr. 653 (1980) (court has no discretion to adjust the division of residual assets to reflect equitable considerations). This overrules *In re Marriage of Eastis*, 47 Cal. App.3d 459, 120 Cal. Rptr. 861 (1975) (unequal division in "bankrupt family" situation).

Civil Code § 4800.6 (amended)

SEC. 4. Section 4800.6 of the Civil Code is amended to read:

4800.6. The interlocutory judgment of dissolution, or the final judgment of legal separation, shall contain the following notice: "Although ~~an~~ *a debt or* obligation ~~based on a contract~~ is assigned to one party as part of the division of the community, if the party to whom the *debt or* obligation was assigned ~~defaults on the contract~~ *fails to satisfy the debt or obligation*, the creditor may have a cause of action against the other party *if the other party incurred the debt or obligation.*"

Comment. Section 4800.6 is amended to reflect the enactment of Section 5120.160, governing the liability of property after division. Section 5120.160 is not limited to contract obligations. See Section 5120.030 (debts).

Civil Code § 4807 (amended)

SEC. 5. Section 4807 of the Civil Code is amended to read:

4807. ~~The~~ *Subject to Section 5120.150, the* community property, the quasi-community property, and the separate property ~~of the parents~~ *of a parent of a child* may be subjected to the support, maintenance, and education of the ~~children~~ *child* in such proportions as the court deems just.

Comment. Section 4807 is amended to make clear it is not intended to apply to the property of a stepparent but only to property of a parent of the child. The extent to which property of a stepparent may be subjected to support of the child is governed by Section 5120.150 (liability for support obligation). Nothing in Section 4807 precludes the income of a stepparent from being taken into account in setting the amount of a support obligation. See, *e.g.*, *In re* Marriage of Brown, 99 Cal. App.3d 702, 160 Cal. Rptr. 524 (1979).

Civil Code §§ 5100-5106 (chapter and article heading)

SEC. 6. A chapter and article heading are added immediately preceding Section 5100 of the Civil Code, to read:

CHAPTER 1. GENERAL PROVISIONS

Article 1. Relation of Husband and Wife

Civil Code § 5101 (added). Liability of married person for injury or damage caused by other spouse

SEC. 7. Section 5101 is added to the Civil Code, to read:

5101. A married person is not liable for any injury or damage caused by the other spouse except in cases where the married person would be liable therefor if the marriage did not exist.

Comment. Section 5101 continues without substantive change former Section 5122(a).

Civil Code §§ 5104-5106 (article heading)

SEC. 8. An article heading is added immediately preceding Section 5104 of the Civil Code, to read:

Article 2. Property Rights

Civil Code §§ 5107-5119 (chapter heading)

SEC. 9. A chapter heading is added immediately preceding Section 5107 of the Civil Code, to read:

CHAPTER 2. CHARACTERIZATION OF MARITAL PROPERTY

Civil Code § 5116 (repealed)

SEC. 10. Section 5116 of the Civil Code is repealed.

~~5116. The property of the community is liable for the contracts of either spouse which are made after marriage and prior to or on or after January 1, 1975.~~

Comment. The substance of former Section 5116 is continued in Section 5120.110(a).

Civil Code § 5120 (repealed)

SEC. 11. Section 5120 of the Civil Code is repealed.

~~5120. Neither the separate property of a spouse nor the earnings of the spouse after marriage is liable for the debts of the other spouse contracted before the marriage.~~

Comment. The portion of former Section 5120 making separate property of a spouse not liable for the debts of the other spouse contracted before marriage is continued in Section 5120.130(b)(1). The portion making earnings after marriage not liable is continued in Section 5120.110(b).

Civil Code §§ 5120.010-5120.330 (added)

SEC. 12. Chapter 3 (commencing with Section 5120.010) is added to Title 8 of Part 5 of Division 4 of the Civil Code, to read:

CHAPTER 3. LIABILITY OF MARITAL PROPERTY

Article 1. Definitions

§ 5120.010. Application of definitions

5120.010. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this chapter.

Comment. Section 5120.010 limits the application of the definitions, which have specialized uses. See, *e.g.*, Section 5120.020 and Comment thereto ("community property" defined).

§ 5120.020. Community property

5120.020. "Community property" includes:

(a) Real property situated in another state that would be community property if situated in this state.

(b) Quasi-community property.

Comment. Subdivision (a) of Section 5120.020 treats real property situated in another jurisdiction as community property for the purpose of liability for debts. Such property is already treated as community property for purposes of division at dissolution of marriage or legal separation. See, *e.g.*, Rozan v. Rozan, 49 Cal.2d 322, 317 P.2d 11 (1957); Ford v. Ford, 276 Cal. App.2d 9, 80 Cal. Rptr. 435 (1969). This provision does not expand the jurisdiction of a California court to control real property located in another state beyond the constitutional limits on its jurisdiction. Although a California court may not affect title to such property, it may effectuate rights in the property by appropriate orders to parties subject to the personal jurisdiction of the court, such as orders for reimbursement or conveyance.

Subdivision (b) is intended to help implement the policy of Section 5120.120 (liability of quasi-community property) that quasi-community property is treated as community rather than separate for purposes of this chapter.

§ 5120.030. Debt

5120.030. "Debt" means an obligation incurred by a spouse before or during marriage, whether based on contract, tort, or otherwise.

Comment. Section 5120.030 is intended to facilitate drafting.

§ 5120.040. Time debt is incurred

5120.040. A debt is "incurred" at the following time:

(a) In the case of a contract, at the time the contract is made.

(b) In the case of a tort, at the time the tort occurs.

(c) In other cases, at the time the obligation arises.

Comment. Section 5120.040 makes more precise the meaning of the time a debt is incurred. For treatment of a pre-existing child or spousal support obligation as a premarital debt, see Section 5120.150 (liability for support obligation).

Article 2. General Rules of Liability

§ 5120.110. Liability of community property

5120.110. (a) Except as otherwise expressly provided by statute, the community property is liable for a debt of either spouse incurred before or during marriage, regardless which spouse has the management and control of the property and regardless whether both spouses are parties.

(b) The earnings of a married person during marriage are not liable for a debt of the other spouse incurred before marriage. The earnings remain not liable if they are held uncommingled in a deposit account by or in the name of the married person, to the extent they can be traced in the manner prescribed by statute for tracing funds exempt from enforcement of a money judgment. As used in this subdivision, "deposit account" has the meaning prescribed in Section 9105 of the Commercial Code, and "earnings" means compensation for personal services performed, whether as an employee or otherwise.

Comment. Subdivision (a) of Section 5120.110 continues the substance of former Section 5116 (contracts after marriage) and the implication of Section 5122(b) (torts), and makes clear that the community property (other than earnings of the nondebtor spouse) is liable for the prenuptial contracts of the spouses. The nondebtor spouse need not be made a party for the purpose of enforcing a judgment out of community property. However, special procedural provisions may apply. See, *e.g.*, Code Civ. Proc. § 706.108 (wage garnishment). Subdivision (a) applies regardless whether the debt was incurred prior to, on, or after

January 1, 1975. For rules governing liability after division of the community property, see Section 5120.160.

The introductory and concluding clauses of subdivision (a) are intended to negate the implication of language found in 1974 Cal. Stats. ch. 1206, § 1, p. 2609, that community property is liable only for the debts of the spouse having management and control. The introductory and concluding clauses make clear that the community property is liable for all debts of either spouse absent an express statutory exception. Thus community property under the management and control of one spouse pursuant to Section 5125(d) (spouse operating or managing business) or Financial Code Section 851 (one spouse bank account) or 3051 (conservatorship) remains liable for the debts of the other spouse. For an express statutory exception from liability of community property, see subdivision (b) (premarital debts). See also Section 5120.240 (reimbursement for postseparation debts).

The first sentence of subdivision (b) continues the substance of a portion of former Section 5120 and extends it to include all debts, not just those based on contract. The second sentence codifies the rule that, for purposes of liability, earnings may not be traced through changes in form. See, *e.g.*, Pfunder v. Goodwin, 83 Cal. App. 551, 257 P. 119 (1927). Earnings may be traced only into deposit accounts in the same manner as funds exempt from enforcement of judgments. See Code Civ. Proc. § 703.080 (tracing).

§ 5120.120. Liability of quasi-community property

5120.120. For the purposes of this chapter, quasi-community property is liable to the same extent, and shall be treated the same in all other respects, as community property.

Comment. Section 5120.120 reverses existing law which treats quasi-community property as separate property rather than community property for purposes of liability for debts. This change in the law is necessary to effectuate the public policy of the state to achieve sharing of marital assets and liabilities, to promote equal access to credit for both spouses, to treat all residents of the state equally, and to protect the interests of California creditors.

§ 5120.130. Liability of separate property

5120.130. (a) The separate property of a married person is liable for a debt of the married person incurred before or during marriage.

(b) Except as otherwise provided by statute:

(1) The separate property of a married person is not liable for a debt of the other spouse incurred before or during marriage.

(2) The separate property of a married person is not liable for a debt, whether or not the married person has joined in the encumbrance of community property to secure payment of the debt, unless the married person incurred the debt.

Comment. Subdivision (a) of Section 5120.130 continues the substance of a portion of former Section 5121 (contracts) and the implication of former Section 5122(b) (torts).

Subdivision (b)(1) continues the substance of former Section 5120 (prenuptial contracts), a portion of former Section 5121 (contracts after marriage), and the implication of former Section 5122(b) (torts). Subdivision (b)(2) supersedes former Section 5123 (liability of separate property for debt secured by community property). *Cf.* Carroll v. Puritan Leasing Co., 77 Cal. App.3d 481, 143 Cal. Rptr. 772 (1978). For an exception to the rule of subdivision (b), see Section 5120.140 (liability for necessaries).

§ 5120.140. Liability for necessaries

5120.140. (a) A married person is personally liable for the following debts of the other spouse incurred during marriage:

(1) A debt incurred for necessaries of life of the other spouse while the spouses are living together.

(2) A debt incurred for common necessaries of life of the other spouse while the spouses are living separate and apart, unless the spouses are living separate and apart by a written agreement that waives the obligation of support. A married person is not personally liable pursuant to this subdivision for a debt incurred while there is in effect a court order for support of the other spouse.

(b) If, pursuant to this section, separate property of a married person is applied to the satisfaction of a debt of the other spouse at a time when nonexempt community property or separate property of the other spouse is available but is not applied to the satisfaction of the debt, the married person is entitled to reimbursement to the extent the property was available.

Comment. Section 5120.140 is an exception to the rule of Section 5120.130 that the separate property of a spouse is not liable for a debt of the other spouse incurred during marriage. The separate property of a spouse may not be subjected to process by necessaries creditors of the other spouse unless the spouse is made a party for the purpose of enforcing the liability. See, *e.g.*, former Section 5121 (b); Evans v. Noonan, 20 Cal. App. 288, 128 P. 794 (1912); Credit Bureau of Santa Monica Bay Dist. v. Terranova, 15 Cal. App.3d 854, 93 Cal. Rptr. 538 (1971).

Subdivision (a) (1) continues the substance of a portion of former Section 5121, but eliminates the implication that the necessaries must have been contracted for. See, *e.g.*, Credit Bureau of San Diego v. Johnson, 61 Cal. App.2d Supp. 834, 142 P.2d 963 (1943) (medical care not contracted by either spouse). Subdivision (a) (1) is consistent with Section 5132 (support obligation while spouses live together) but does not require exhaustion of community property before separate property of a nondebtor spouse can be reached. But see subdivision (b) (reimbursement for necessaries).

Subdivision (a) (2) is an exception to the rule of Section 5131, which abrogates the obligation of support between spouses living separate and apart by agreement, unless support is stipulated in the agreement. Nothing in subdivision (a) (2) should be deemed to limit the obligation of a spouse for support pursuant to a court order pendente lite or in a judgment decreeing the legal separation of the spouses. A spouse who desires to limit the liability pursuant to subdivision (a) (2), or a spouse who desires a greater support obligation than provided in subdivision (a) (2), may seek a support order, which supersedes liability under subdivision (a) (2).

Subdivision (a) (2) also abolishes the "station in life" test of cases such as Wisnom v. McCarthy, 48 Cal. App. 697, 192 P. 337 (1920) (made necessary because of economic and social position of spouses), in determining what is a necessary of life; the separate property of the nondebtor spouse is liable only for debts for the "common" necessaries of life of the other spouse while living separate and apart. *Cf.* Ratzlaff v. Portillo, 14 Cal. App.3d 1013, 92 Cal. Rptr. 722 (1971) ("common" necessary is necessary required to sustain life).

Subdivision (b) implements a portion of former Sections 5121 and 5132 (order of satisfaction out of marital property). For general provisions governing reimbursement, see Section 5120.210.

§ 5120.150. Liability for support obligation

5120.150. (a) For the purpose of this chapter, a child or spousal support obligation of a married person that does not arise out of the marriage shall be treated as a debt incurred before marriage, regardless whether a court order for support is made or modified before or during marriage and regardless whether any installment payment on the obligation accrues before or during marriage.

(b) If community property is applied to the satisfaction of a child or spousal support obligation of a married person that does not arise out of the marriage, the community is entitled to reimbursement from the married person to the extent the amount of community property used to satisfy the support obligation exceeds the proportionate obligation of the community. As used in this subdivision, the proportionate obligation of the community is the proportion of the total community income during the marriage to the total separate income of the married person during the marriage.

(c) Nothing in this section limits the matters a court may take into consideration in determining or modifying the amount of a support order including, but not limited to, the earnings of the spouse of the person obligated for child or spousal support.

Comment. Subdivision (a) of Section 5120.150 makes clear that a support obligation that arises before the marriage is a prenuptial debt for purposes of liability of marital property. As a result, the general rule is that the separate property of the obligor spouse and the community property of the marriage is liable for the support obligation, other than the earnings of the non-obligor spouse. See Section 5120.110 (liability of community property).

Subdivision (b) codifies the rule of *Weinberg v. Weinberg*, 67 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967). See also Bare v. Bare, 256 Cal. App.2d 684, 64 Cal. Rptr. 335 (1967); *In re* Marriage of Smaltz, 82 Cal. App.3d 568, 147 Cal. Rptr. 154 (1978).

Subdivision (c) makes clear that despite the general rule that earnings of the non-obligor spouse are not liable for the support obligation, the earnings may be taken into account by the court in setting the amount of the support obligation. This codifies existing law. See, *e.g.*, *In re* Marriage of Havens, 125 Cal. App.3d 1012, 178 Cal. Rptr. 477 (1981).

§ 5120.160. Liability of property after division

5120.160. (a) Notwithstanding any other provision of this article, after division of community and quasi-community property pursuant to Section 4800:

(1) The separate property owned by a married person at the time of the division and the property received by the married person in the division is liable for a debt of the married person incurred before or during marriage and the married person is personally liable for the debt, whether or not the debt was assigned for payment by the other spouse in the division.

(2) The separate property owned by a married person at the time of the division and the property received by the married person in the division is not liable for a debt of the married person incurred before or during marriage, and the married person is not personally liable for the debt, unless the debt was assigned for payment by the married person in the division of the property. Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property.

(3) The separate property owned by a married person at the time of the division and the property received by the married person in the division is liable for a debt of the other spouse incurred before or during marriage, and the married person is personally liable for the debt, if the debt was assigned for payment by the married person in the division of the property. If a money judgment for the debt is entered after the division, the property is not subject to enforcement of the judgment and the judgment may not be enforced against the married person, unless the married person is made a judgment debtor under the judgment for the purpose of this paragraph.

(b) If the separate property owned by a married person at the time of the division or the property received by the married person in a division of community and quasi-community property pursuant to Section 4800 is applied to the satisfaction of a money judgment for a debt of the married person that is assigned for payment by the other spouse in the division, the married person has a right of reimbursement from the other spouse to the extent of the property applied, with interest at the legal rate, and

may recover reasonable attorney's fees incurred in enforcing the right of reimbursement.

Comment. Section 5120.160 prescribes rules of liability of former community and quasi-community property and former separate property following a division of the property pursuant to a court judgment of separation, dissolution, or later division.

Subdivision (a) (1) states the rule that the rights of a creditor against the property of a debtor are not affected by assignment of the debt to the other spouse for payment pursuant to a property division. A creditor who is not paid may seek to satisfy the debt out of property of the debtor. Former law on this point was not clear. The debtor in such a case will have a right of reimbursement against the former spouse pursuant to subdivision (b).

Paragraphs (2) and (3) of subdivision (a) reverse the case law rule that a creditor may seek enforcement of a money judgment against the former community property in the hands of a nondebtor spouse after dissolution of the marriage. See, *e.g.*, Bank of America N.T. & S.A. v. Mantz, 4 Cal.2d 322, 49 P.2d 279 (1935). Subdivision (a) (2) makes clear that former community property received by the nondebtor spouse at division is liable only if the nondebtor spouse is assigned the debt in division. In the case of a judgment entered after the division of property, the nondebtor spouse must be made a party for due process reasons. If the property division calls for the one spouse to pay the debt and the creditor satisfies the judgment out of property of the other spouse, the other spouse will have a right of reimbursement pursuant to subdivision (b). Subdivision (a) (2) does not affect enforceability of liens on the property. See, *e.g.*, Kinney v. Vallentyne, 15 Cal.3d 475, 541 P.2d 537, 124 Cal. Rptr. 897 (1975).

Subdivision (b) states the rule as to reimbursement where a debt is satisfied out of the property of a spouse other than the spouse to whom the debt was assigned pursuant to a property division. Former law on this point was not clear. For general provisions governing reimbursement, see Section 5120.210 (reimbursement).

Article 3. Reimbursement

§ 5120.210. General provisions

5120.210. A right of reimbursement provided by this chapter is subject to the following provisions:

(a) The right arises regardless which spouse applies the property to the satisfaction of the debt, regardless whether the property is applied to the satisfaction of the debt voluntarily or involuntarily, and regardless whether the debt to which the property is applied is satisfied in whole or in part. The right is subject to an express written waiver of the right by the spouse in whose favor the right arises.

(b) The measure of reimbursement is the value of the property or interest in property at the time the right arises.

(c) The right shall be exercised not later than the earlier of the following times:

(1) Within three years after application of the property to the satisfaction of the debt.

(2) In proceedings for division of community and quasi-community property pursuant to Section 4800 or in proceedings upon the death of a spouse.

Comment. Section 5120.210 governs not only the reimbursement rights provided in this article but also reimbursement rights provided elsewhere in this chapter. See Sections 5120.140 (reimbursement for necessaries), 5120.150 (reimbursement for support), and 5120.160 (reimbursement after division). The reimbursement rights are strictly limited to a three-year enforceability period, or less if a dissolution occurs within the three-year period. *Contrast* Weinberg v. Weinberg, 67 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967) (community property applied to support payments entitled to reimbursement at dissolution); *In re* Marriage of Walter, 57 Cal. App.3d 802, 129 Cal. Rptr. 351 (1976) (community property applied to separate tax and mortgage debts entitled to reimbursement at dissolution). Under Section 5120.210, the reimbursement right applies even though the spouse seeking reimbursement may have satisfied or consented to satisfaction of the debt out of a particular type of property, unless the spouse expressly waived the reimbursement right. *Contrast In re* Marriage of Smaltz, 82 Cal. App.3d 568, 147 Cal. Rptr. 154 (1978) (no reimbursement where community property applied to support payments and no separate property available to make payments).

§ 5120.220. Reimbursement for property not liable for debt

5120.220. (a) If community property is applied to the satisfaction of a debt for which the community property is

not liable, the community is entitled to reimbursement from the spouse who incurred the debt to the extent of the property so applied.

(b) If separate property of a married person is applied to the satisfaction of a debt for which the separate property is not liable, the married person is entitled to reimbursement from the other spouse to the extent of the separate property so applied.

Comment. Section 5120.220 recognizes that even though some marital property is not liable for certain debts, the property may nonetheless in fact be applied by either spouse to the satisfaction of the debts. In such a case a right of reimbursement arises unless the spouse entitled to reimbursement expressly waives the right. See Section 5120.210. The reimbursement right provided in this section is limited to three years or division of the marital property, whichever occurs first. Section 5120.210.

§ 5120.230. Reimbursement for torts

5120.230. (a) This section applies to the liability of a married person for death or injury to person or property. This section does not apply to the extent the liability is satisfied out of proceeds of insurance for the liability, whether the proceeds are community or separate.

(b) If the liability of a married person is based upon an act or omission that occurred while the married person was performing an activity for the benefit of the community, the married person is entitled to reimbursement from the community to the extent the liability is satisfied from the separate property of the married person.

(c) If the liability of a married person is not based upon an act or omission that occurred while the married person was performing an activity for the benefit of the community, the community is entitled to reimbursement from the married person to the extent the liability is satisfied from community property.

Comment. Section 5120.230 continues the portion of former Section 5122 that provided an order of satisfaction for tort debts, to the extent the order of satisfaction implied a reimbursement right.

§ 5120.240. Reimbursement for postseparation debts

5120.240. (a) If community property is applied to the satisfaction of a debt incurred by a married person while the spouses are living separate and apart, the community is entitled to reimbursement from the married person to the extent of the property applied.

(b) This section does not apply to any of the following debts:

(1) A debt incurred primarily for the production or preservation of community property.

(2) A debt incurred for common necessaries of life of the married person to the extent the other spouse would be personally liable for the debt pursuant to Section 5120.140.

Comment. Section 5120.240 implements the policy that postseparation debts are the obligation of the spouse that incurred them. It is consistent with Section 5118 (postseparation earnings are separate property). The right provided in Section 5120.240 is limited to reimbursement; it does not exempt the interest of the nondebtor spouse in community property from judicial process. See Section 5120.110 (liability of community property).

Article 4. Transitional Provisions

§ 5120.310. "Operative date" defined

5120.310. As used in this article, "operative date" means January 1, 1984.

Comment. Section 5120.310 is intended for drafting convenience.

§ 5120.320. Enforcement of debts

5120.320. Except as otherwise provided by statute, the provisions of this chapter govern the liability of separate and community property for a debt enforced on or after the operative date of this chapter, regardless whether the debt was incurred before, on, or after the operative date.

Comment. Section 5120.320 states the general rule that this chapter applies immediately to all debts regardless of the time they were incurred. For an exception to the general rule, see Section 5120.330 (reimbursement rights).

§ 5120.330. Reimbursement rights

5120.330. (a) The provisions of this chapter that govern reimbursement apply to all debts, regardless whether satisfied before, on, or after the operative date of this chapter.

(b) If the time within which a reimbursement right provided by this chapter expires before or on the operative date of this chapter pursuant to subdivision (c) (1) of Section 5120.210, the time prescribed in subdivision (c) (1) of Section 5120.210 is extended until one year after the operative date.

Comment. Section 5120.330 makes clear that reimbursement rights provided in this chapter apply to debts satisfied before as well as after the operative date. A one-year grace period for enforcement is provided in the case of a marriage not already terminated on the operative date.

Civil Code § 5121 (repealed)

SEC. 13. Section 5121 of the Civil Code is repealed.

~~5121. (a) The separate property of a spouse is liable for the debts of the spouse contracted before or after the marriage of the spouse, but is not liable for the debts of the other spouse contracted after marriage; provided, that the separate property of the spouse is liable for the payment of debts contracted by either spouse for the necessaries of life pursuant to Section 5132.~~

~~(b) The separate property of a spouse is not subject to enforcement of a money judgment for a debt of the other spouse unless the spouse is made a judgment debtor under the judgment for the purpose of liability.~~

Comment. The substance of former Section 5121 is continued in Sections 5120.130 and 5120.140.

Civil Code § 5122 (repealed)

SEC. 14. Section 5122 of the Civil Code is repealed.

~~5122. (a) A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefor if the marriage did not exist.~~

~~(b) The liability of a married person for death or injury to person or property shall be satisfied as follows:~~

~~(1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community property and second from the separate property of the married person.~~

~~(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community property.~~

Comment. Subdivision (a) of former Section 5122 is continued without substantive change in Section 5101.

Subdivision (b) is superseded by Section 5120.230 (reimbursement for torts).

Civil Code § 5123 (repealed)

SEC. 15. Section 5123 of the Civil Code is repealed.

~~5123. (a) The separate property of the wife is not liable for any debt or obligation secured by a mortgage, deed of trust or other hypothecation of the community property which is executed prior to January 1, 1975, unless the wife expressly assents in writing to the liability of her separate property for such debt or obligation.~~

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

Comment. Section 5123 is superseded by Section 5120.130. Section 5123 is a form of antideficiency judgment that purports to protect some but not all assets of a spouse for obligations secured by any community property, real or personal, residential or otherwise. It is thus inconsistent with general rules governing deficiency judgments.

Civil Code §§ 5125-5128 (chapter heading)

SEC. 16. A chapter heading is added immediately preceding Section 5125 of the Civil Code, to read:

CHAPTER 4. MANAGEMENT AND CONTROL OF MARITAL PROPERTY

Civil Code § 5127.5 (repealed)

SEC. 17. Section 5127.5 of the Civil Code is repealed.

~~5127.5. Notwithstanding the provisions of Section 5125 or 5127 granting the husband the management and control of the community property, to the extent necessary to fulfill a duty of a wife to support her children, the wife is entitled to the management and control of her share of the community property.~~

~~The wife's interest in the community property, including the earnings of her husband, is liable for the support of her children to whom the duty to support is owed, provided that for the purposes of this section, prior support liability of her husband plus three hundred dollars ($300) gross monthly income shall first be excluded in determining the wife's interest in the community property earnings of her husband.~~

~~The wife may bring an action in the superior court to enforce such right provided that such action is not brought under influence of fraud or duress by any individual, corporation or governmental agency.~~

~~A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed by this section and such contribution shall reduce the liability to which the interest of the wife in the community property is subject.~~

Comment. Former Section 5127.5 is superseded by Sections 5120.110 (liability of community property), 5120.130 (liability of separate property), and 5120.150 (liability for support obligation). Repeal of Section 5127.5 is not intended to affect any consideration of the earnings of a person's spouse under AFDC regulations. See Welf. & Inst. Code § 11008.14.

Civil Code § 5127.6 (repealed)

SEC. 18. Section 5127.6 of the Civil Code is repealed.

~~5127.6. Notwithstanding Section 5127.5, the community property interest of a natural or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any~~

~~child who resides with the child's natural or adoptive parent who is married to such spouse. The amount arising from such duty to care for and support shall be reduced by the amount of any existing previously court ordered child support obligations of such spouse.~~

~~Any contribution for care and support provided by a spouse who is not a natural or adoptive parent of the child shall not be considered a change in circumstances that would affect a court ordered support obligation of a natural or adoptive parent for that child.~~

Comment. Former Section 5127.6 is superseded by Sections 5120.110 (liability of community property), 5120.130 (liability of separate property), and 5120.150 (liability of support obligation). Repeal of Section 5127.6 is not intended to affect any consideration of the earnings of a person's spouse under AFDC regulations. See Welf. & Inst. Code § 11008.14.

Civil Code §§ 5129-5132 (chapter heading)

SEC. 19. A chapter heading is added immediately preceding Section 5129 of the Civil Code, to read:

CHAPTER 5. SUPPORT

Civil Code § 5131 (amended)

SEC. 20. Section 5131 of the Civil Code is amended to read:

5131. ~~A spouse~~ *Except as provided in Section 5120.140, a married person* is not liable for the support of the other spouse when the other spouse is living separate from the ~~spouse~~ *married person* by agreement unless such support is stipulated in the agreement.

Comment. Section 5131 is amended to recognize Section 5120.140(a)(2), which continues the liability of property of a spouse for common necessaries debts incurred after separation unless expressly waived in the separation agreement.

Civil Code § 5132 (amended)

SEC. 21. Section 5132 of the Civil Code is amended to read:

5132. ~~A spouse~~ *Subject to Section 5120.140, a married person* must support the other spouse while they are living together out of the separate property of the ~~spouse~~ *married*

person when there is no community property or quasi-community property.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms by Sections 4803 and 4804.

Comment. Section 5132 is amended to incorporate Section 5120.140 (liability for necessaries). Section 5132 is consistent with Section 5120.140(a)(1) and (b), but Section 5120.140(a)(1) and (b) do not require exhaustion of community and quasi-community property before separate property of a nondebtor spouse can be reached by a third-party creditor.

Civil Code §§ 5133-5137 (chapter heading)

SEC. 22. A chapter heading is added immediately preceding Section 5133 of the Civil Code, to read:

CHAPTER 6. PREMARITAL AGREEMENTS

Civil Code § 5138 (chapter heading)

SEC. 23. A chapter heading is added immediately preceding Section 5138 of the Civil Code, to read:

CHAPTER 7. MISCELLANEOUS PROVISIONS

Code of Civil Procedure § 706.108 (added)

SEC. 24. Section 706.108 is added to the Code of Civil Procedure to read:

706.108. An earnings withholding order may not be issued against the earnings of the spouse of the judgment debtor except by court order upon noticed motion.

Comment. Section 706.108 recognizes that despite the general rule that community property is liable for debts of a spouse, community property earnings are unique and may not be liable in some situations. See, *e.g.*, Civil Code § 5120.110 (liability of community property). For this reason an earnings withholding order against the spouse of the judgment debtor may only be issued upon noticed motion.

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