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# California's New Community Property Law-- Its Effect on Interspousal Mismanagement Litigation

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# California's New Community Property Law— Its Effect On Interspousal Mismanagement Litigation

*Senate Bill 569, enrolled as Chapter 987 and operative January 1, 1975, provides that both partners in marriage shall have an equal right to manage, control, and obligate the marital estate. This enactment effects a substantial change in community property law and represents a significant step in the oft delayed march toward sexual equality, yet may prove to be a mixed blessing. Although apparently resolving the issue of credit for married women and negating the possibility of a constitutional attack on the California community property system, the legislation has created due process questions and left unanswered the interminable problem of mismanagement. The author, analyzing the changes in light of present tort and contract law and the purposes and policies behind the enactment, determines that the legislature has intentionally declined to define the duties of each spouse to the community and concludes that it will be the task of the judiciary, left between Scylla and Charybdis by Chapter 987, to navigate the Straits of Mismanagement.*

During the past few years there has been considerable interest in promoting sexual equality. Courts have indicated that classifications made solely on the basis of sex will be carefully scrutinized,<sup>1</sup> and Congress has passed a constitutional amendment which, if ratified, will expressly prohibit sex discrimination.<sup>2</sup> In California, the attack against sexual discrimination has extended to the inequities inherent in this state's community property system.<sup>3</sup> In response to this legal and political agitation the California Legislature conducted hearings to consider the need for community property law reform.<sup>4</sup> The testimony

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1. See *Reed v. Reed*, 404 U.S. 71 (1971); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Note, *Equal Rights and Equal Protection: Who Has Management and Control?*, 46 S. CAL. L. REV. 892 (1973).

2. H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. 4619 (1972).

3. See, for example, Grant, *How Much of a Partnership is Marriage?*, 23 HAST. L.J. 249 (1971).

4. *Hearings Before the Joint Interim Committee on Judiciary, on Community Property*, Sept. 25-26, 1972, Monterey, Calif., Oct. 10, 1972, San Francisco, Calif., Oct. 20, 1972, San Diego, Calif.

offered at these hearings focused on three problem areas—the credit status of married women, the constitutionality of giving married men the exclusive right to manage and control a majority of the community assets, and mismanagement of the community property. The ideas expressed at these hearings, as modified by the political bargaining system, culminated in the enactment of Chapter 987,<sup>5</sup> which will become operative on January 1, 1975.

The provisions of Chapter 987, in essence, provide that either spouse shall have an equal right to manage, control, and obligate the marital estate. In contrast, under pre-1975 law there was a marked disparity in each spouse's respective powers of management and control.<sup>6</sup> The historical justification for this disparity was that the wife usually remained the homemaker and the husband the breadwinner. Since the community assets were generally derived from the earnings of and property acquired by the husband, the management and control remained in his hands.<sup>7</sup> However, as of 1972 approximately 42.4 percent of all married women were employed;<sup>8</sup> therefore it would seem that the traditional rationale used to justify the husband's exclusive management and control is no longer supported by fact. Chapter 987 has brought the law into conformity with this reality of modern society.

One of the more practical consequences of this legislation is that a married woman should now be able to engage in credit transactions on an equal footing with her husband.<sup>9</sup> In the past, many stores and credit agencies had apparently adopted the blanket policy of requiring the husband's signature before extending credit to married women. The husband's consent was required even in instances where the wife's salary or separate property was greater in amount and value than her husband's.<sup>10</sup> In essence, a married woman was treated as "financially incompetent" merely because she was unable to obligate the community assets and because the average businessman declined to take the time to investigate the extent of the assets under her control.<sup>11</sup> In contrast, under the provisions of Chapter 987 married women should no longer be subjected to this unequal treatment.

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5. S.B. 569, CAL. STATS. 1973, c. 987, at 2238.

6. See text accompanying notes 21-26 *infra*. It should be noted that only two other states, Texas and Washington, have adopted new community property systems stressing sexual equality. See TEX. FAM. CODE ANN., tit. 1, §502 (Supp. 1972); WASH. REV. CODE ANN. §26.16.030 (Supp. 1972).

7. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §95 (2d ed. 1971).

8. U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 222 (1972).

9. See also CAL. CIV. CODE §§1812.30, 1812.31 (married women's credit); 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 358 (1974).

10. Hearings Before the Joint Interim Committee on Judiciary, on Community Property, Oct. 10, 1972, at 123.

11. *Id.*

Chapter 987 has also eliminated any threat that California's community property system may have been found unconstitutional under the state or federal equal protection clauses<sup>12</sup> or under the proposed equal rights amendment.<sup>13</sup> The constitutionality of California's pre-1975 community property system was brought into question by the recent decision of *Sail'er Inn, Inc. v. Kirby*,<sup>14</sup> in which the California Supreme Court declared that classifications based upon sex must be treated as suspect. It is clear that the pre-1975 law favored married men as a class. Husbands were vested with the exclusive authority to manage, control, and obligate substantially all of the community property, while their wives were only given such authority over their segregated earnings and personal injury damages.<sup>15</sup> Thus under the *Sail'er Inn* decision, the pre-1975 management and control provisions created a suspect classification which would be subjected to close judicial scrutiny. In order to sustain the constitutionality of a suspect classification under either the state or federal equal protection clauses, the state must establish not only that it has a compelling interest which justifies the law but also that the distinctions drawn are necessary to further its purpose.<sup>16</sup> The state's interest in depriving married women of the right to manage their "present, existing, and equal" interest in the community estate could hardly be described as "compelling." Therefore, had the legislature not acted, California's community property system would probably have been subjected to constitutional attack in the near future.

While dealing successfully with the questions of credit and constitutionality, Chapter 987 remains deficient in one major area—it makes no attempt to resolve the problem of mismanagement. In fact, the potential for mismanagement or waste of the community assets has apparently been compounded rather than minimized by placing the marital estate under the management and control of either spouse. Under pre-1975 law married women were often powerless to prevent vindictive or financially inexperienced or incompetent husbands from dissipating the community assets.<sup>17</sup> This problem could have been resolved by placing the community property under the joint management and control of both spouses or by imposing the duties of a fi-

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12. U.S. CONST. amend. XIV, §1; CAL. CONST. art. I, §§11, 21.

13. H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. 4619 (1972).

14. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

15. See text accompanying notes 21-26 *infra*.

16. As recognized in *Sail'er Inn*, the California Supreme Court has adopted the tests employed by the United States Supreme Court in determining the validity of state action under California's equal protection clause. 5 Cal. 3d at 16, 485 P.2d at 538, 95 Cal. Rptr. at 338.

17. See text accompanying notes 44-59 *infra*.

duciary upon the manager of the community assets. Both of these alternatives were considered by the legislature and rejected.<sup>18</sup> Instead, the legislature chose to vest married women with an equal right to manage the community property. Considering the sometimes ephemeral and always vicissitudinous nature of the marital relationship, it appears that both husband and wife will have an equal opportunity to abuse their respective powers of management to defeat the other's interest in the community assets.

This comment will question whether the enactment of Chapter 987, in conjunction with existing case law, has indirectly laid a framework from which the judiciary may fashion a remedy for wrongful expenditures of community assets.<sup>19</sup> Incidental to the discussion of this issue, it will be of assistance to review the major provisions of Chapter 987 concerning the power to manage, control, and obligate the community property,<sup>20</sup> the impact of these provisions on a few related areas, and the constitutionality of retroactive application of the new marital property system.

## CHAPTER 987

### A. *Equal Management and Control*

Prior to the enactment of Chapter 987, the husband was vested with the exclusive authority to manage and control marital assets,<sup>21</sup> other than the wife's segregated earnings and personal injury damages.<sup>22</sup> However, his power of management was not unlimited. Specific statutory restrictions prohibited him from transferring any of the following community assets without the express consent of his wife: the furniture,

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18. See S.B. 569, 1973-74 Regular Session, *as introduced* Apr. 2, 1973.

19. See text accompanying notes 44-77 *infra*.

20. In addition to the statutory changes discussed, the legislature also made important modifications in the rules governing spousal support obligations and the presumptions governing the characterization of property as separate or community. See 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 352 (1974). Pursuant to the theme of sexual equality demonstrated by Chapter 987, the legislature also amended the Probate Code to provide that neither the wife's nor the husband's interest in the community estate will have to be included within the probate of his or her deceased spouse's estate. See S.B. 570, CAL. STATS. 1974, c. 11.

21. CAL. CIV. CODE §5105, *as enacted* CAL. STATS. 1969, c. 1608, at 3338; CAL. CIV. CODE §§5125, 5127, *as amended by* CAL. STATS. 1969, c. 1609, at 3358. The fact that the husband was the manager of the community property often acted as the premise from which many legal opinions were derived. For example, in one case the court held that the discharge of the husband in bankruptcy also discharges the community because the husband, as manager of the community estate, represents the community as well as himself in the bankruptcy proceedings. Consequently, the wife's interest in the community could not subsequently be reached by creditors even though she was a party to the contract creating the community's liability. *General Insurance Co. of America v. Schian*, 248 Cal. App. 2d 555, 56 Cal. Rptr. 767 (1967). By placing the management and control of the community property under both husband and wife, the bankruptcy rule and all other legal opinions based on the husband's right to management will have to be reexamined.

22. CAL. CIV. CODE §5124, *as enacted* CAL. STATS. 1969, c. 1608, at 3341.

furnishings, or fittings of the home; the clothing or wearing apparel of his wife or minor children; and the community real property or any interest therein.<sup>23</sup> In contrast, the wife was given the right to manage her segregated earnings and personal injury damages. Additionally, there was an overriding restriction prohibiting either spouse from gratuitously transferring community assets without the other's express consent.<sup>24</sup>

Chapter 987 has radically altered the statutory provisions governing management and control. The same rights and restrictions which previously controlled the husband's power of disposition over the community assets now apply equally to both husband and wife.<sup>25</sup> There is, however, a limitation on this new theme of equality. Whenever a spouse is operating or managing a business or an interest therein which is community personal property, then he or she is vested with the sole right to manage and control that business.<sup>26</sup> This limitation was imposed to prevent the obvious problems which would arise if one spouse attempted to use his or her power of management and control to interfere with the other's business enterprises.

### *B. Tort Obligations*

Under prior law the tort liability of a married person could be satisfied only from the tortfeasor's separate property and the community property subject to his or her management and control.<sup>27</sup> This rule, in its practical effect, worked to the disadvantage of the wife's judgment creditors. In most cases substantially all of the community assets could be reached to satisfy the husband's tort liabilities whereas the wife's judgment creditors were limited to her segregated earnings and personal injury damages.<sup>28</sup> Of course, the entire community property and both spouse's separate property could be reached when either the husband or wife would have been vicariously responsible for the other's tort even if the marriage relation had not existed.<sup>29</sup>

Under the provisions of Chapter 987 the extent of the community's liability will no longer be based upon the tortfeasor's right to management and control. Instead, a differentiation has been drawn between

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23. CAL. CIV. CODE §§5125, 5127, *as amended by* CAL. STATS. 1969, c. 1609, at 3358.

24. CAL. CIV. CODE §5124, *as enacted* CAL. STATS. 1969, c. 1608, at 3341.

25. CAL. CIV. CODE §§5125, 5127.

26. CAL. CIV. CODE §5125(b).

27. CAL. CIV. CODE §5122, *as enacted* CAL. STATS. 1969, c. 1608, at 3341.

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

29. "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." CAL. CIV. CODE §5122 (provision unchanged by the enactment of Chapter 987).

activity which benefits the community and that which does not. Where the tortfeasor was performing an activity for the benefit of the community, any judgment or settlement must first be satisfied from the community assets and, if these are insufficient, then from his or her separate property. Conversely, where the tortfeasor was not engaging in an activity for the benefit of the community, any judgment or settlement must first be satisfied from his or her separate property and then from the community. In order to reach the separate property of the nontortious spouse, some basis for the imposition of vicarious liability other than the mere existence of the marital relationship must still be established.<sup>30</sup>

During the judicial proceeding the plaintiff will be required to introduce evidence demonstrating that the activity which gave rise to the tort was being performed for the benefit of the community. Since the concept of "community benefit" is entirely foreign to California jurisprudence,<sup>31</sup> an analysis of this doctrine as established in Arizona<sup>32</sup> and Washington<sup>33</sup> may be of assistance in determining whether the community was being benefited by the activity in question. Both of these jurisdictions seem to rely heavily upon the principles of agency,<sup>34</sup> but there is dicta and at least one law review article which suggest that when the community is actually benefited by the tortious conduct, it may be subjected to liability regardless of whether or not an agency relationship can be established.<sup>35</sup>

### C. Contractual Obligations

Prior to the enactment of Chapter 987, substantially all of the community property could be reached to satisfy the husband's contrac-

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30. CAL. CIV. CODE §5122.

31. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 563, 432 P.2d 709, 711, 63 Cal. Rptr. 13, 15 (1967).

32. *Hays v. Richardson*, 95 Ariz. 64, 386 P.2d 791 (1964) (community liable for husband's auto accident caused by his gross negligence); *Shaw v. Greer*, 67 Ariz. 223, 194 P.2d 430 (1948) (community not liable for sheriff's unlawful arrest).

33. *Kilcup v. McManus*, 64 Wash. 2d 771, 394 P.2d 375 (1964) (community liable for false arrest); *Smith v. Retallick*, 48 Wash. 2d 360, 293 P.2d 745 (1956) (community not liable for assault and battery); *McHenry v. Short*, 129 Wash. 247, 186 P.2d 900 (1947) (community liable for assault and battery); *Fruheim v. Floe*, 188 Wash. 368, 62 P.2d 706 (1936) (community not liable for tort arising out of business transaction intended to benefit husband's separate estate); *Bergman v. State*, 187 Wash. 622, 60 P.2d 699 (1936) (community not liable for husband's arson); *Newbury v. Remington*, 184 Wash. 664, 52 P.2d 312 (1935) (community not liable for assault and battery); *De Phillips v. Neslin*, 155 Wash. 174, 283 P. 691 (1930) (presumption that husband acting for benefit of community when engaged in ordinary and usual work); *McGregor v. Johnson*, 58 Wash. 78, 107 P. 1049 (1910) (community liable for fraudulent real estate transaction); Annot., 10 A.L.R.2d 988 (1950).

34. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §§181-182 (2d ed. 1971); Annot., 10 A.L.R.2d 988, 990 (1950).

35. *Pruzan, Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948); Annot., 10 A.L.R.2d 988 (1950).

tual debts regardless of whether the obligation was incurred before or after marriage.<sup>36</sup> In contrast, the entire community estate, except for the husband's earnings, could be reached to satisfy a married woman's prenuptial debts<sup>37</sup> while only her earnings could be used to satisfy her postnuptial contractual obligations.<sup>38</sup> Under Chapter 987 a married woman may obligate the community estate to the same extent as her husband.<sup>39</sup> Any contractual obligation, whether prenuptial or postnuptial, incurred by either spouse after January 1, 1975, will subject substantially all of the community property to liability.<sup>40</sup> The only limitation is that the earnings of one spouse cannot be reached to satisfy the other's prenuptial debts.<sup>41</sup>

In addition to delineating the contractual obligations which may be satisfied from the community assets, the legislature has amended the statutory provisions governing the liability of either spouse's separate estate for debts incurred by the other. The separate property of either spouse is not liable for the other's contractual debts, whether incurred before or after marriage, except to the extent necessary to fulfill their respective obligations of support;<sup>42</sup> nor is it liable for any debt or obligation secured by a mortgage, deed of trust, or other hypothecation of the community property executed after January 1, 1975, unless the spouse agrees in writing that his or her separate property will be so liable.<sup>43</sup>

### MISMANAGEMENT

Under pre-1975 law it was often claimed that married women could not prevent their husbands from mismanaging the community assets. In analyzing the continued validity of this claim in light of Chapter 987, two questions must be answered. First, is there a sound judicial policy which justifies barring interspousal tort suits regarding the mismanagement of community property? And, if not, to what extent will the judiciary be willing to impose the obligations of a "fiduciary" upon either spouse in his or her capacity as administrator of the marital estate?

36. *Grolemund v. Cafferata*, 17 Cal. 2d 679, 688, 111 P.2d 641, 645 (1941); *Lovetro v. Steers*, 234 Cal. App. 2d 461, 473, 44 Cal. Rptr. 604, 611 (1965).

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

38. *Tinsley v. Bauer*, 125 Cal. App. 2d 724, 271 P.2d 116 (1954) (wife's earnings can be reached even if commingled with other community property); CAL. CIV. CODE §5116, as enacted CAL. STATS. 1969, c. 1608, at 3340.

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

40. CAL. CIV. CODE §5116 (operative Jan. 1, 1975), §5120.

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

42. CAL. CIV. CODE §§5120, 5121, 5132.

43. CAL. CIV. CODE §5123.



## A. Judicial Policy

Many advocates of community property law reform have repeatedly denounced the wife's inability either to restrain her husband from mismanaging the community estate or to hold him personally liable for any losses incurred as a result of such mismanagement.<sup>44</sup> The view that a woman generally could not maintain an action against her husband regarding the management of the community property during the continuance of the marriage finds support in legal periodicals,<sup>45</sup> dicta,<sup>46</sup> and Spanish civil law.<sup>47</sup> The proponents of this view apparently based their conclusion upon the premise that the husband's statutory authority to manage and control the community estate necessarily denied the wife power to check such management and control through the judicial process,<sup>48</sup> except of course when the husband acted in violation of a specific statutory limitation upon his power of disposition.<sup>49</sup> Thus in 1926 the United States Supreme Court stated, *obiter dictum*, that the law of California gave the husband power to spend the community funds substantially as he chose and, if he wasted it in debauchery, the wife had no redress.<sup>50</sup> In reaching this conclusion the Court emphasized that the wife's interest in the community estate was a mere expectancy and that the husband was vested with

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44. One of the most common complaints heard at the committee hearings on community property reform was that the wife could not prevent her husband from wasting the community assets. *Hearings Before the Joint Interim Committee on Judiciary, on Community Property*, Sept. 25-26, 1972, at 23, 36. But cf. Note, *The Husband's Fiduciary Duty—More Protection for the California Wife*, 14 STAN. L. REV. 587 (1962).

45. See, for example, Grant, *How Much of a Partnership is Marriage?*, 23 HAST. L.J. 249 (1971).

46. *United States v. Robbins*, 269 U.S. 315, 327 (1926); *Berniker v. Berniker*, 30 Cal. 2d 439, 446, 182 P.2d 557, 562 (1947); *Fields v. Michael*, 91 Cal. App. 2d 443, 451, 205 P.2d 402, 407 (1949).

47. See W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §§ 120, 151 (2d ed. 1971).

48. Unquestionably, however, the right of the wife to sue the husband in relation to her rights in the community property should be subject to the husband's right of management and control of the community property. In ordinary circumstances, she cannot demand an accounting of the community property during marriage, since the power of management is placed in the husband . . . .

*Id.* §151.

49. See, for example, *Gartner v. Johnson*, 274 Cal. App. 2d 869, 79 Cal. Rptr. 381 (1969) (conveyance of real property without wife's consent); *Novo v. Hotel Del Rio*, 141 Cal. App. 2d 304, 295 P.2d 576 (1956) (wife allowed recovery for husband's gambling losses); *Fields v. Michael*, 91 Cal. App. 2d 443, 205 P.2d 402 (1949) (liability of husband's estate for gift); *Matthews v. Hamburger*, 36 Cal. App. 2d 182, 97 P.2d 465 (1939) (voidable nature of unauthorized gift); *Duncan v. Duncan*, 6 Cal. App. 404, 92 P. 310 (1907) (wife can avoid transfer of furnishings and fittings of home made without her consent); Note, *Community Property—Management and Control—Liability of Husband's Estate for Unauthorized Gifts of Community Funds*, 23 SO. CAL. L. REV. 84 (1949) (questioning liability of husband during the continuance of the marriage for unauthorized gifts).

50. *United States v. Robbins*, 269 U.S. 315, 327 (1926).

virtually an absolute power of disposition over the community assets.<sup>51</sup> Similarly, a California court by way of dictum stated,

If [the wife] could not . . . have maintained an action against [the husband during marriage] for the value of her interest in the property which he had given away, it would have been due to the policy of the law to forbid vexations and unnecessary litigation between spouses, and also upon the ground that during the existence of the marriage the husband has control and management of the community property of which he cannot be divested except through procedure authorized by statute.<sup>52</sup>

The judicial objections to entertaining interspousal suits concerning the mismanagement of community property seem to focus on three factors. First, since the husband was vested with the right to management and control, the wife was thought to have assumed the risk of loss resulting from his lack of financial skill, just as she stood to gain in any benefits accruing from his expertise.<sup>53</sup> Consequently, in the absence of an express statutory limitation upon his power of disposition, the husband's mismanagement of the community assets did not infringe upon the wife's interest in the community estate. Secondly, courts have historically felt that the judicial forum was not the appropriate setting for resolution of family disputes.<sup>54</sup> Lastly, prior to 1927 the wife's interest in the community estate was considered a "mere expectancy" analogous to an heir's interest in his ancestor's property.<sup>55</sup> Her interest was therefore not afforded the same judicial protections as a vested interest.

Judicial objections to the maintenance of interspousal suits regarding the mismanagement of community property have largely been dispelled by modifications in statutory and case law governing marital property relations. The legislature has declared that the wife's interest in the community estate is "present, existing and equal,"<sup>56</sup> and commencing January 1, 1975, she will have an equal right to manage and control same.<sup>57</sup> Furthermore, California courts have abandoned the common law doctrine of interspousal tort immunity for property dam-

51. *Id.*

52. *Fields v. Michael*, 91 Cal. App. 2d 443, 451, 205 P.2d 402, 407 (1949).

53. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §120 (2d ed. 1971).

54. Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650 (1966).

55. *Spreckels v. Spreckels*, 172 Cal. 775, 780, 158 P. 537, 539 (1916); *Greiner v. Greiner*, 58 Cal. 115, 121 (1881); *Van Maren v. Johnson*, 15 Cal. 308 (1860). But see *Stewart v. Stewart*, 199 Cal. 318, 342, 249 P. 197, 207 (1926).

56. The legislature first used the terminology "present, existing and equal" one year after *United States v. Robbins*, 269 U.S. 315 (1926). See CAL. STATS. 1927, c. 265, at 484. This terminology is now embodied in CAL. CIV. CODE §5105.

57. CAL. CIV. CODE §§5125, 5127.

age<sup>58</sup> as well as personal injury.<sup>59</sup> Therefore, it seems clear that there remains no sound reason for denying an injured spouse access to the courts when the other spouse has mismanaged the community property.

## B. Fiduciary Obligations

For several years the courts of California have struggled with the paradoxical situation in which married women were vested with a present, existing, and equal interest in the community property but were denied the right to manage or dispose of their interests therein.<sup>60</sup> In an attempt to reconcile this civil law concept with familiar common law principles the courts have repeatedly analogized to the law governing the relations of fiduciaries or partners.<sup>61</sup> In the case of *Fields v. Michael*, for example, the court stated, "It is clear that, being a party to the confidential relationship of marriage, the husband must, for some purposes at least, be deemed a trustee for his wife in respect to their common property."<sup>62</sup> Outside the area of interspousal agreements<sup>63</sup> the cases do not, however, support the proposition that the husband is charged with the duties of an express trustee in his capacity as administrator of the community estate. On the contrary, the husband's duties in relation to management and control of the community property seem to be fairly limited. Case law defining the husband's duties, and the wife's correlative rights, may be roughly broken down into the following four categories: (1) threatened or completed transfers of community assets in violation of a statutory provision requiring the wife's consent;<sup>64</sup> (2) failure to disclose the extent of the

58. *Langley v. Schumacker*, 46 Cal. 2d 601, 603, 297 P.2d 977, 979 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §122 (4th ed. 1971).

59. Note, *Interspousal Tort Immunity—California Follows the Trend*, 36 So. CAL. L. REV. 456 (1963).

60. Many lawyers trained in the common law, and viewing the matter in light of common-law concepts, seem to feel that if the husband, under the Spanish community property system, had "control," i.e., the administration of the community property, he must have been the virtual owner of the property, [and] that the wife, accordingly, was not the owner in any real sense.

W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §102 (2d ed. 1971).

61. See, for example, *Vai v. Bank of America*, 56 Cal. 2d 392, 364 P.2d 247, 15 Cal. Rptr. 71 (1961).

62. 91 Cal. App. 2d 443, 447, 205 P.2d 402, 405 (1949).

63. Either husband or wife may enter into an engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other . . . .

CAL. CIV. CODE §5103. The statutory imposition of fiduciary duties with respect to interspousal agreements may partly account for the judicial confusion over the extent of the manager's duties regarding the community property.

64. See authorities cited in note 49 *supra*.

community property during property settlement negotiations;<sup>65</sup> (3) use of the community assets to enhance the value of the husband's separate assets;<sup>66</sup> and (4) failure to account for specific community funds which existed immediately prior to dissolution proceedings.<sup>67</sup> In each of these situations the wife was allowed to proceed against her husband's estate, the transferee of the community assets, or her husband, after termination of their marital relationship, in order to protect her interest in the marital estate. Thus it will be useful to define the factors used by the courts in deciding whether the husband had disposed of community funds in such a manner as to infringe upon the wife's legally protected interest.

The cases concerning transfers made in violation of statutory provisions and interspousal agreements are inapposite because the respective rights and duties of husband and wife are defined by statute.<sup>68</sup> The judicial attitude towards the duties imposed upon the power of management and control are more accurately reflected by the cases discussing the husband's use of the community assets to enhance the value of his separate estate or his failure to account for specific community funds which existed immediately prior to dissolution. In *Williams v. Williams*<sup>69</sup> the husband, with dissolution in view, liquidated approximately \$100,000 worth of assets which were partly community and partly separate in character. The husband did not demonstrate what portion of this figure was community property or the percentage expended for the benefit of the community. The trial court did not consider this sum in dividing the marital property. The appellate court held that where a specified sum of money was intact immediately prior to the filing of a dissolution action, the husband would obtain an "unfair advantage" over his wife if he were not required to account for that portion of the money which was community property and to reimburse his wife for her share of the community property not shown to have been used for community purposes.<sup>70</sup>

65. See, for example, *Boeseke v. Boeseke*, 255 Cal. App. 2d 848, 63 Cal. Rptr. 651 (1967); *Fairbairn v. Fairbairn*, 194 Cal. App. 2d 501, 15 Cal. Rptr. 548 (1961).

66. See, for example, *Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); *Morghee v. Rouse*, 224 Cal. App. 2d 745, 37 Cal. Rptr. 112 (1963); *Gelfand v. Gelfand*, 136 Cal. App. 448, 29 P.2d 271 (1934); *Provost v. Provost*, 102 Cal. App. 775, 283 P. 842 (1929).

67. See, for example, *Williams v. Williams*, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971); *Pope v. Pope*, 102 Cal. App. 2d 353, 227 P.2d 867 (1951); *White v. White*, 26 Cal. App. 2d 524, 79 P.2d 759 (1938).

68. CAL. CIV. CODE §5103 (interspousal agreements), §5125 (providing that one spouse may not, without a valuable consideration, transfer community personal property or convey or encumber the furniture, furnishings, or fittings of the home or the clothing of the other spouse), §5127 (requiring joint transfer of community real property).

69. 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971).

70. *Id.* at 567, 92 Cal. Rptr. at 389.

The California Supreme Court has also employed the terminology of "unfair advantage." In *Weinberg v. Weinberg*<sup>71</sup> the husband paid alimony to his first wife from the community property acquired during his second marriage. In a suit for dissolution his second wife argued that these payments should have been charged against the defendant's separate estate. The court held that allowing the husband to preserve his separate estate by using only community funds to meet alimony and child support obligations would visit an injustice upon the wife. Thus the "defendant's total separate and community income during the period of his second marriage must be used in determining the proportionate amounts that his separate and community property will be charged."<sup>72</sup> The rationale which apparently underlies the unfair advantage principle enunciated in both of these decisions is that the manager of the community assets may not intentionally seek to obtain a personal benefit by sacrificing his or her partner's interest in the marital estate. The wrongful intent may be readily inferred from the factual circumstances of *Williams*. The unaccounted for assets could have been misappropriated by the husband too easily. Similarly, in *Weinberg* the wrongful intent may be found in the husband's preservation of his separate estate in derogation of his wife's interest in the community property. Since Chapter 987 has placed the management and control of the community assets in the hands of either spouse, the unfair advantage principle would appear to authorize appropriate judicial relief<sup>73</sup> when either spouse's interest in the community is intentionally diminished by his or her marital partner. Furthermore, by instituting a system of equal management and control, the legislature has destroyed the last vestige of judicial reasoning upon which courts have relied in refusing to entertain interspousal litigation regarding mismanagement *during the continuance* of the marriage. Therefore, it would appear that the unfair advantage principle could be used as the basis for a cause of action *during* as well as upon termination of the marriage.

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71. 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

72. *Id.* at 564, 432 P.2d at 712, 63 Cal. Rptr. at 16.

73. Appropriate judicial relief should include any remedial device necessary to protect the injured spouse's interest in the community estate, including, but not limited to, injunctive or declaratory relief. See *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197 (1926) (impliedly approving wife's suit for declaratory relief against husband concerning the title to community assets); *Greiner v. Greiner*, 58 Cal. 115 (1881) (approving, in dictum, wife's action to enjoin husband from making gift of community property without her consent). In many cases such relief will be the only adequate remedy. For example, consider the situation where one spouse, who is without separate property, repeatedly depletes the community estate through heavy gambling losses. Clearly in such a case injunctive relief would be a far superior remedy than an action for money damages which could not be satisfied except upon dissolution. Another example would be when one spouse claims an exclusive right to manage a particular portion of the community assets. Declaratory relief would be the most appropriate remedial device.

In another California case, *Wilcox v. Wilcox*,<sup>74</sup> the manager of the community estate was allowed to bring an action against his wife for interfering with his right to manage and control the community assets. In that case it was held that the husband had stated a cause of action by alleging that his wife had taken and was in exclusive possession of \$30,000 of the community property. Since Chapter 987 vests either spouse with the right to manage and control the community property, it would seem that neither may take exclusive possession of a specific portion of the community assets without invading the other's right to management and control. Assuming this to be true, a cause of action would apparently arise whenever one spouse unilaterally disposes of a portion of the community assets over the objection of his or her partner.<sup>75</sup> Any such disposition would necessarily deprive the other spouse of a right to manage and control that specific segment of the community estate. Such an extension of the *Wilcox* rationale would, in effect, judicially impose the requirement of joint management and control on husband and wife in their management of the community estate, an approach expressly rejected by the legislature.<sup>76</sup> Thus if the *Wilcox* rationale is to be followed at all, it should be limited to situations where either spouse, intentionally or through gross negligence, uses his or her power of disposition in such a manner that it defeats the other's interest in or control of a significant portion of the community property. This rule, if adopted, would give either spouse protection against serious injury to his or her community property rights without encouraging frivolous or vindictive suits.

To recapitulate, in the past the law purportedly did not protect the wife's interest in the community property from her husband's improvident expenditures. Now that the management and control of the community estate has been placed equally in the hands of the husband and wife, this problem would appear to be compounded. The legislature, although recognizing the potential danger, chose not to resolve the problem of mismanagement by statute. Absent further legislation, if any relief is to be given at all the judiciary must take the lead.

It is difficult, of course, to precisely define the parameters of the concept of mismanagement; but, as Justice Stewart once remarked about pornography, "I know it when I see it."<sup>77</sup> In any particular

74. 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (1971).

75. *But cf.* *Kean v. Dench*, 413 F.2d 1 (3d Cir. 1969) (unilateral conveyance by cotenant of specific segment of cotenancy).

76. S.B. 569, 1973-74 Regular Session, as amended June 11, 1973 (proposal to require joint consent for all expenditures of community assets in excess of \$1,000 was abandoned in favor of equal management and control without any such limitations). S.B. 45, 1972 Regular Session, as amended May 16, 1972.

77. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1969) (Stewart, J., concurring).

case a finding of mismanagement will depend upon the surrounding factual circumstances. *Williams*, *Weinberg*, and *Wilcox* seem to set forth guidelines which may be used in determining whether or not a spouse has mismanaged the community assets. Unilateral expenditures designed to enhance the value of one spouse's separate estate to the detriment of the community would appear to be prohibited under the unfair advantage principle enunciated in *Williams* and *Weinberg*. Additionally, the rationale employed in *Wilcox* could readily be extended to impose liability on a spouse who has grossly mismanaged the community estate. These cases should not, however, be extended to the point of imposing liability for mere negligence in handling the community assets. Any such rule would be tantamount to imposing the duties of a trustee on either spouse in his or her capacity as administrator of the marital estate. Furthermore, it might encourage families to resort to the courts when the resolution of domestic financial problems should rest primarily with the individuals concerned.

#### RETROACTIVE APPLICATION OF CHAPTER 987

The California Legislature has previously attempted to advance sexual equality by augmenting the marital property rights of women. These attempts, however, have often been judicially frustrated by due process considerations.<sup>78</sup> It has been held that a statute violates due process of law if it substantially impairs vested rights and purports to be retroactive in its application.<sup>79</sup> Chapter 987 subjects all the community assets to liability for any debts incurred by either spouse after January 1, 1975. No exemption is provided for property acquired before this date.<sup>80</sup> Similarly, all community property has been placed under the management and control of either spouse with no distinction drawn between property acquired before or after January 1, 1975.<sup>81</sup> Prior to the enactment of Chapter 987, married men were vested with an exclusive right to manage, control, and obligate a majority of the community assets. If the right to manage, control, and obligate the community property is considered a "vested right," it would appear that the provisions of Chapter 987 operate retroactively to impair such rights in community property acquired prior to 1975. These provisions may nevertheless be constitutionally permissible. There has been a marked change in due process thinking over the

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78. See Note, *Retroactive Application of California's Community Property Statutes*, 18 STAN. L. REV. 514 (1966).

79. *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897).

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

81. CAL. CIV. CODE §§5125, 5127.

past few decades; it is now generally conceded that vested rights may be impaired if such impairment is justified by an overriding public interest.<sup>82</sup> This modern reasoning has been used to sustain the constitutionality of the quasi-community property statutes<sup>83</sup> and zoning regulations.<sup>84</sup> In the present situation, the state's interest in promoting sexual equality would appear to clearly outweigh the husband's right to *exclusive* management and control. Thus, even though the "retroactive application rule" has not been expressly discredited, it seems highly unlikely that it will compel the judicial invalidation of Chapter 987.<sup>85</sup>

### CONCLUSION

The problem of mismanagement has long plagued the law of community property. To be sure, when the marital relationship is harmonious, there is little danger that either spouse will act in derogation of the other's property rights. But when dissolution is in view or when one spouse is incapable of carefully managing the community property, there is a distinct possibility that one spouse will abuse the power of management and interfere substantially with the other's interest in the community property.<sup>86</sup> The legislature could have eliminated this problem by expressly defining the rights and duties of husband and wife as managers of the community estate. This was not done. Thus the judiciary must act if there is to be a remedy for the wrong of mismanagement. It is suggested that courts begin by recognizing the tortious nature of such conduct and permitting interspousal suits. Consideration of the rationales employed in the *Williams*, *Weinberg*, and *Wilcox* decisions suggests that liability should be imposed only where a spouse has intentionally, or through gross negligence, destroyed the other's interest in, or control over, a significant portion of the community assets.

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82. Boddenheimer, *Justice Peters' Contribution to Family and Community Property Law*, 57 CAL. L. REV. 577 (1966).

83. *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

84. *Melton v. City of San Pablo*, 252 Cal. App. 2d 794, 61 Cal. Rptr. 29 (1967).

85. See, Boddenheimer, *Justice Peters' Contribution to Family and Community Property Law*, 57 CAL. L. REV. 577 (1969).

86. 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 352, 357 (1974).