

## EQUAL MANAGEMENT AND CONTROL UNDER SENATE BILL 569: "TO HAVE AND TO HOLD" TAKES ON NEW MEANING IN CALIFORNIA

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests.<sup>1</sup>

[E]ither spouse has the management and control of the community personal property, with absolute power of disposition, . . .<sup>2</sup>

### I. INTRODUCTION

The 1973 California legislature took a progressive step in the spirit of the pending Equal Rights Amendment by amending the California community property laws<sup>3</sup> to give equal management and control over the marital community property<sup>4</sup> to both spouses. Numerous changes were made in the present law which will alter the legal relationship between spouses concerning the community and separate property interests of each spouse; between spouses and their creditors in credit transactions;<sup>5</sup> and between spouses and third party claimants in certain tort actions.<sup>6</sup> Most of these changes will take effect January 1, 1975, but some changes will become operative during the period between January 1, 1974 and January 1, 1975.<sup>7</sup>

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1. CAL. CIV. CODE § 5105 (West Supp. 1974). [hereinafter all references cited to the West Supplement 1974 will become effective January 1, 1975, unless otherwise noted. Additionally, all references made to a section number will be to the California Civil Code unless otherwise noted]. For parallel citations of the sections cited from the West Supplement 1974, see *West's Legislative Service, Statute and Code Amendments, 1973-1974 Regular Session*, ch. 987, at 2238-42.

2. CAL. CIV. CODE § 5125 (West Supp. 1974).

3. CAL. CIV. CODE §§ 5100-38 (West 1970). [hereinafter referred to as the "old law" where unchanged by the 1973 legislation, whereas changed sections effective January 1, 1975, will be referred to as the "new law"].

4. "Marital community property" for the purposes of this Comment includes all the community property exclusive of the community property that was under the management and control of the wife under the old law, which included her earnings and damages received in satisfaction of a judgment for personal injury. See CAL. CIV. CODE §§ 5124-27 (West 1970).

5. See text accompanying footnotes 36-60, *infra*.

6. See text accompanying footnotes 84-109, *infra*.

7. See CAL. CIV. CODE § 5116 (West Supp. 1974). Section 5116 is the

On its face, it would appear simple to give both spouses equal management and control of the community property without undue complications. The problem arises in the fact that present community property laws date back to the annexation of California as a State. Spanish-Mexican civil law controlled the relationship between husbands and wives at that time and vestiges of that law are still present in the Civil Code and decisional law of California.

A dominant feature of prior and existing law is the principal role played by the husband as head of the family and manager of the community property.<sup>8</sup> His role will be altered significantly as a result of granting to the wife an equal voice in the management and control of the community property.<sup>9</sup> As a general proposition, the right to manage and control the community property gave rise to many incidental legal consequences and the single element of control had direct legal consequences on almost the entire community property law system. It is therefore the purpose of this comment to isolate and analyze the direct and indirect ramifications of some of the changes made to the Civil Code<sup>10</sup> and to forecast the potential problem areas these changes may create. In furtherance of this objective, the discussion emphasizes the new law's effect on post-marital obligations, separate property liability and tort liability emanating from California's "Permissive Use" statute.<sup>11</sup>

## II. EQUAL MANAGEMENT AND CONTROL OF THE COMMUNITY PROPERTY BY BOTH SPOUSES

It can be assumed from the changes in the present law that the primary intention of the legislature in enacting Senate Bill No. 569<sup>12</sup> was to put the wife on equal terms with her husband under

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only amended section which provides for changes operative between January 1, 1974 and January 1, 1975. See text accompanying footnotes 44-46, *infra*.

8. See generally, CAL. CIV. CODE §§ 5105, 5125 and 5127 (West 1970).

9. See notes 14, 16-18 *infra*.

10. California Senate Bill No. 569 (*West Cal. Stats.* 1973, ch. 987) made extensive changes to the California Civil Code sections pertaining to the community property law. This Comment makes no pretense of thoroughly analyzing all of these changes, although most of them are mentioned within the text.

11. See Anonymous, *Review of Selected 1973 California Legislation*, 5 PAC. L. REV. 352 (1974), for a section-by-section analysis of the changed sections. (note that there have been subsequent amendments to Senate Bill 569 since this article went to print which materially affect some portions of the article not herein cited).

12. *West Cal. Stats.* 1973, ch. 987, §§ 1-17, at 2238-42. [hereinafter referred to as Senate Bill 569]. There will be a cleanup bill for S.B. 569 (S.B. 1601-1974) which will include a section clarifying the Legislature's

the community property laws.<sup>13</sup> To this end Section 5105<sup>14</sup> was partially deleted, Sections 5110,<sup>15</sup> 5125<sup>16</sup> and 5127<sup>17</sup> were amended and Section 5124<sup>18</sup> was repealed. These changes have successfully achieved consistency in the statutory language relevant to management and control of the community property in the various sections; however, throughout this comment emphasis will be placed on the projected impact of the changes themselves rather than a survey of their physical changes.<sup>19</sup>

The repeal of Section 5124 and the deletions to Section 5105, taken together with the amendments to Sections 5125 and 5127, constitute the key changes which grant equal management and control of the community property to both spouses. All incidents of management and control that previously accrued to the husband or wife under these sections will now flow equally to each spouse, including the obligations and liabilities as well as the beneficial aspects that accompanied the right to manage and control the community property under the old law.

In this regard, a married woman will realize new freedom to alienate the marital community property incident to her equal right to manage and control such property. This freedom will ex-

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intent as to the prospective or retroactive application of S.B. 569. However, it was clear from the discussions during the Senate hearings that the intent of the Legislature was for S.B. 569 to apply to all property, whenever acquired. See Letter from Mari Goldman, Chief Consultant, Joint Committee on Legal Equality, California Legislature, to John A. Adamske, February 19, 1974, on file in the University of San Diego Law Library.

The constitutionality of retroactive application of S.B. 569 is beyond the scope of this Comment, but there appears to be no impairment of vested property rights by the granting of equal management and control to both spouses that cannot withstand constitutional scrutiny. See *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965); Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 So. CAL. L. REV. 240, 266-73 (1966). [hereinafter cited as Knutson]. But see *Spreckles v. Spreckles*, 116 Cal. 339, 48 P. 228 (1897).

13. See note 11 *supra*, at 352-53.

14. CAL. CIV. CODE § 5105 (West Supp. 1974).

15. *Id.* § 5110.

16. *Id.* § 5125.

17. *Id.* § 5127.

18. CAL. CIV. CODE § 5124 (West 1970, *repealed by* (West Supp. 1974)).

19. For a section-by-section breakdown of the additions and deletions occasioned by the amendments to the various sections referenced, see CAL. CIV. CODE §§ 5100-38 (West Supp. 1974), or *West's Legislative Service, Statute and Code Amendments*, 1973-1974 Regular Session, ch. 987, at 2238-42.

tend to both community personal property<sup>20</sup> and to community real property,<sup>21</sup> subject to a few specified exceptions equally applicable to the husband.<sup>22</sup> In effect, the wife will be able to act upon the community property previously under the management and control of the husband; in like manner, the husband will be able to act upon the community property previously under the sole control of the wife.

So long as either spouse does not make a gift of community personal property or dispose of the same without a valuable consideration, each will be able to alienate the community personal property *without the consent* of the other spouse. Ostensibly this merely allows the wife to do what the husband was able to do under the old law. In this regard, however, the fact that under the new law there will be a "pooling" of all the community property into a single entity, affords each spouse increased access to community property previously beyond his or her control.<sup>23</sup>

In the case of a harmonious marital relationship this newly created ability of either spouse to secretly encumber the community property may be of little significance. On the other hand, if the marriage relationship is unstable because one of the spouses is secretly contemplating separation or dissolution, or if one of the spouses has spendthrift tendencies, disastrous results might befall the community with little, if any, recourse available to the unsuspecting spouse. One might question whether such broad power to alienate the community property is wise under many circumstances, especially if one spouse contributes a disproportionate share of the "income"<sup>24</sup> to the community.

It was just such a fear that led some commentators<sup>25</sup> and the earlier draft of Senate Bill No. 569<sup>26</sup> to propose a modified joint

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20. CAL. CIV. CODE § 5125 (West Supp. 1974).

21. *Id.* § 5127.

22. *Id.* §§ 5125, 5127.

23. The wife's increase will come from the marital community property previously under the management and control of the husband. See CAL. CIV. CODE §§ 5125, 5127 (West 1970). The husband in turn will now have control of the community property previously under the wife's management and control. See CAL. CIV. CODE § 5124 (West 1970).

24. "Income" as used in the text is interpreted broadly to include services performed in the home by the non-working spouse. See Note, *Management and Control of Community Property: Sex Discrimination in California Law*, 6 U.C.D. L. REV. 383, 398 n.31 (1973).

25. Note, *Equal Rights and Equal Protection: Who Has Management and Control?*, 46 SO. CAL. L. REV. 892, 909-21 (1973); Note, *The Equal Rights Amendment and Inequality Between Spouses Under the California Community Property System*, 6 LOYOLA OF LOS ANGELES L. REV. 66, 91-92 (1973).

26. Senate Bill No. 569, April 2, 1973.

control approach with a dollar amount limitation on each spouse's ability to alienate the community property without the joinder or written consent of the other spouse. Instead of adopting this limitation, the California legislature elected to place few restraints on the equal management and control by both spouses. The prudence of this decision is yet to be tested; however, there is little doubt that this may place increased tension on the relationship between spouses given the prominence that financial affairs play in fostering marital discord.

There will be a certain amount of restraint imposed upon improvident alienation of the community property due to the fiduciary duty between spouses. Under the old law a fiduciary duty attached incident to the power to manage and control the community property which required the managing spouse to act in good faith when dealing with the community property under his control.<sup>27</sup> To the extent a fiduciary duty is imposed upon both spouses under the new law (as logically it should be, given their equal power to secretly alienate the community property)<sup>28</sup> some degree of protection will be afforded to the community assets.

In one area the new law specifically precludes interference by one spouse in the other's power to manage and control a portion of the community property. There will be a significant new exception to equal management and control when one of the spouses is operating or managing a business, or an interest in a business, which is community personal property. A provision in new Section 5125(b)<sup>29</sup> assures that a spouse who is operating and managing a business, or an interest therein, which is community personal property, will have sole management and control over the business or interest.

As a consequence, the non-managing spouse will be foreclosed from asserting management and control over the business when that spouse has little or no expertise in managing the business.

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27. See *Baker v. Baker*, 260 Cal. App. 2d 583, 586, 67 Cal. Rptr. 523, 524 (1968).

28. See text accompanying footnotes 36-60, *infra*.

29. CAL. CIV. CODE § 5125(b) (West Supp. 1974), amending CAL. CIV. CODE § 5125 (West 1970), which states:

(b) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

What exactly will constitute a "business" under this provision is open to speculation, but controversy on this issue could arise when one of the spouses chooses to characterize a borderline activity, such as stock market transaction, as an independent business for the purpose of excluding the other spouse.

The consequences of one spouse asserting sole control over a community personal property business may not be as drastic as it might seem; that is, the sole control will be limited to managing the business or interest therein and not to control over the profits or earnings therefrom. Since such profits or earnings are derived from a community property source they will be presumed to be community property under the equal management and control of both spouses, a result which logically follows when Section 5125(b) is given a statutory construction consistent with the general presumption favoring community property in Section 5110. Furthermore, in this area a distinction must be made between the "Sole Trader" provisions of the Civil Procedure Code,<sup>30</sup> which allow a wife to go into business for herself with the earnings therefrom becoming her separate property and Section 5125(b) which pertains to either spouse, with the profits or earnings becoming community personal property under the management and control of both spouses.

Consistent with the foregoing grant of equal treatment of the spouses, a longstanding presumption under Section 5110 has succumbed by placing the spouses on equal terms in regard to taking property by an instrument in writing. Prior to the new changes, if a wife held real or personal property, acquired during the marriage by an instrument in writing and placed in her name alone, she held it presumptively as her separate property.<sup>31</sup> Section 5110 as amended will limit this presumption to property acquired before January 1, 1975<sup>32</sup> and thereafter the section is silent as to the significance of either spouse taking property by an instrument in writing.

It is suggested that the legislature's silence on this issue should be given its normal construction; that is, the general presumption favoring community property under section 5110 should apply.<sup>33</sup> It would follow that real or personal property taken by an instrument in writing after January 1, 1975, by *either* spouse, will be

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30. *See generally*, CAL. CODE CIV. PROC. §§ 1811-21 (West 1972).

31. CAL. CIV. CODE § 5110 (West 1970).

32. *Id.* § 5110 (West Supp. 1974).

33. CAL. GOV. CODE § 9605 (West Supp. 1974); cf. *Alford v. Pierno*, 27 Cal. App. 3d 682, 688, 104 Cal. Rptr. 110, 114 (1972).

presumed to be community property. As a consequence of this change, the exclusive presumption clause of Section 5110 will apply in favor of bona fide purchasers of property from either spouse, but with the important proviso that the presumption is changed in favor of community property rather than separate property.

After January 1, 1975, a bona fide purchaser will no longer be able to rely on the presumed separate property character of property acquired from a married woman just because the property appears solely in her own name in the instrument of title. If the property held solely in the wife's name is personal property, she will be able to alienate such property to the same extent a husband was able to under the old law. In contrast, if the property involved is community real property within the provisions of Section 5127, then the presumptions under that Section will be extended to apply equally to the wife after January 1, 1975. Henceforth the sole execution by the wife of a lease, contract, mortgage or deed relating to community real property shall be presumed to be valid.<sup>34</sup> Heretofore this presumption, along with the provisions to avoid such transactions, applied only to the husband.

As a practical matter, the wife will be able to deal with the community personal and real property on the same terms as her husband under the new law. In this regard, if the wife seeks to perfect a separate property acquisition or conveyance of either personal or real property she will have to do so in the same manner as her husband. In many situations a wife will have to produce adequate evidence of the separate property character of the consideration or property exchanged if she wants to perfect or retain that characterization of the property.

The foregoing discussion of the amended equal management and control sections merely scratches the surface in regard to the full impact that the redistribution of control will have to certain aspects of California's community property laws. For this reason a closer look at some specific collateral effects of the new changes must be undertaken to more accurately depict the magnitude of, and offer some helpful insight into, the full ramifications of these changes.

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34. CAL. CIV. CODE § 5110 (West Supp. 1974).

35. *Id.* § 4 (West 1954).

### III. COMMUNITY LIABILITY FOR EITHER SPOUSE'S POST-MARITAL OBLIGATIONS

A husband in California has long enjoyed a superior position in the community affairs regarding his ability to encumber and borrow against the community assets; hereafter, if the new statutory language can be taken at face value, a married woman will share equally in both these respects. The husband's advantageous position under the old law was a natural incident of his dominant role as manager of the marital community assets and consequently the community was not liable for the post-marital obligations of the wife<sup>36</sup> because she did not share the management and control responsibilities. To the extent that the general proposition under the old law—the ability to bind the community property flows directly from the right to manage and control such property—is carried over to the new law, it follows that both spouses will have an equal capacity to bind the community property by their post-marital obligations.

To lend statutory support to married women's newfound ability to bind the community in credit transactions, several changes in the law were designed to specifically ensure that wives would be treated on equal terms with their husbands in this respect. Chapter 999 of the 1973 California Statutes<sup>37</sup> created new Civil Code Sections 1812.30<sup>38</sup> and 1812.31<sup>39</sup> which, respectively, provide for equal treatment of women in credit transactions and create a civil remedy for a denial of credit under designated conditions.<sup>40</sup> Companion changes were made to Section 5116<sup>41</sup> to lend consistency and compatability to these interrelated sections of the Civil Code.

A transition period of one year's duration was needed in this area because commencing January 1, 1974, the community will be liable for the wife's contracts to the extent that her earnings or separate property have been commingled with the community property; however, the wife will not receive her right to equal management and control of the community property until January

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36. *Id.* § 5116 (West 1970), *as amended*, CAL. CIV. CODE § 5116 (West Supp. 1974).

37. *See West Cal. Stats.* 1973, ch. 999, §§ 1-4, at 2318-19.

38. CAL. CIV. CODE § 1812.30 (West Supp. 1974), which in pertinent part provides in subsection (a) that:

No married woman shall be denied credit in her own name if her *uncommingled earnings* or separate property are such that a man possessing the same amount of property or earnings would receive credit. [Emphasis added].

39. CAL. CIV. CODE § 1812.31 (West Supp. 1974).

40. *Id.* § 1812.31(a), (b).

41. *Id.* § 5116.



1, 1975. Consequently, during the one year period creditors needed assurance that they could reach the community assets to secure credit extended to the wife. Under the old law a creditor was unable to reach the wife's earnings or separate property which had been commingled with the marital community property because once such property was commingled it was beyond the control of the wife<sup>42</sup> and hence, was beyond the reach of her creditors.<sup>43</sup> To foreclose the possibility of creditors using this fact as an argument to frustrate the purpose of new Section 1812.30, Section 5116 was amended so that part of that section became effective on January 1, 1974,<sup>44</sup> with additional changes to take effect on January 1, 1975.<sup>45</sup>

The thrust of the change to Section 5116 that became effective January 1, 1974, is to create an exception, to last for one year, to the previous rule that the husband gained control over the wife's earnings and separate property if commingled with the marital community property. During the period between January 1, 1974 and January 1, 1975, the earnings and separate property of the wife which become commingled with the marital community property *will be available* to satisfy creditors' claims arising from the wife's contracts. It is felt that this will help ease the reluctance of creditors to extend credit to married women, thus alleviating one of the obstacles which prevented married women from attaining equal status with their husbands under the old law.<sup>46</sup>

The transition period between January 1, 1974 and January 1, 1975, may still present some formidable problems for both creditors and married women. Creditors may have to bear the burden of

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42. CAL. CIV. CODE § 5124 (West 1970) [*repealed* effective January 1, 1975, by *West Cal. Stats.* 1973, ch. 987, § 13, at 2241].

43. *Id.* This, in effect, brought such property under the management and control of the husband. See CAL. CIV. CODE § 5110 (West 1970).

44. CAL. CIV. CODE § 5116 (West Supp. 1974).

45. *Id.*

46. It was the author's experience after talking to knowledgeable individuals in major banking institutions in Southern California that: (1) Credit requirements have been relaxed on married women seeking personal loans as a direct result to the enactment of Section 1812.30(a); (2) Creditors intend to rely on the provisions of Section 1812.30(a) to reach commingled earnings of the wife when necessary; but (3) Whenever possible attempts are made to join the husband in the transaction when credit is extended to married women. For obvious reasons the source of this information requested to remain anonymous.

tracing marital community property to a separate property source of the wife, or to community property which was previously under her management and control, to overcome the well-established rule that the husband had sole control over the marital community property regardless of its original source. If this contention is correct, creditors will be subjected to an additional burden when credit is extended to married women which does not arise when credit is extended to married men; hence, creditors might justifiably differentiate between married men and women without violating the provisions of Section 1812.30(a) during 1974.

In like manner, married women may find that the general presumption favoring the community property characterization of property acquired during the marriage is a hindrance to obtaining credit during 1974. Taking the proviso in Section 1812.30 (a) that "if her [married woman's] uncommingled earnings or separate property are such that a man possessing the same amount of property would receive credit,"<sup>47</sup> it is arguable that a married woman will carry the burden of demonstrating that there are *in fact* such funds commingled, and remaining, within the marital community property under the husband's control. Absent such a showing (to the satisfaction of the creditor) credit could be denied without exposing the creditor to civil liability under Section 1812.31.<sup>48</sup>

Consistent with the foregoing analysis it is suggested that before a married woman can benefit from Sections 1812.30 (a) and 1812.31, she will have to demonstrate independent financial resources which would have enabled her to obtain credit under the prior law. As a practical matter, and in the majority of cases, such a burden on the wife would effectively foreclose any hope for an improved credit standing during the transition period of 1974.

After January 1, 1975, married women will truly acquire new freedom to bind the community by their contracts entered into during the continuance of the marriage. The transition Section 5116<sup>49</sup> will be superseded by a new Section 5116<sup>50</sup> which does not contain the restrictive language of the superseded sections. New Section 5116 clearly states that the property of the community is liable for the contracts of either spouse made after marriage and

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47. CAL. CIV. CODE § 1812.30(a) (West Supp. 1974).

48. *Id.* § 1812.31. Subsection (a) of this section provides in cases of wilful violations of Section 1812.30 for a woman to "Bring an action to recover actual damages and five hundred dollars (\$500) in addition thereto, for each and every wilful violation."

49. *West Cal. Stats*, 1973, ch. 999, § 2, at 2319.

50. *Id.* § 3. See also discussion accompanying note 7, *supra*.

subsequent to January 1, 1975.<sup>51</sup> Taken together with the other new sections giving both spouses equal management and control of the community property<sup>52</sup> the wife will be ostensibly equal with her husband in her ability to manage, control and obtain credit secured by the community property.

In addition to the equal treatment of both spouses in regard to the ability to bind the community assets, each spouse, and especially the wife, will have access to funds heretofor beyond either's control. Since the wages or earnings of both spouses will become community property, either spouse will be able to expose the entire community to liability to the full extent of the combined wages of both spouses. In contrast, under the old law each spouse had control over his or her own wages and thus such wages were exempt from liability for debts incurred by the other spouse, except in limited situations.<sup>53</sup>

Similar exemptions for each spouse's wages were contained in the original enactment of new Section 5116,<sup>54</sup> but this proviso was deleted in the final enactment of Section 5116(c).<sup>55</sup> If this restriction had not been removed it would have been devastating to a non-working spouse's ability to obtain credit, for in the majority of cases the bulk of the community assets are derived in substantial part from spousal wages. Under Section 5116 as finally adopted, the fact that there is only one wage-earner in the community will not work a detriment to the nonworking spouse; that is to say, indebtedness incurred by either spouse can be satisfied in turn from the wages of the other because there is no limitation

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51. CAL. CIV. CODE § 5116(c) (West Supp. 1974), which states:

(c) The property of the community is liable for the contracts of either spouse which are made after marriage and on or after January 1, 1975.

52. See text accompanying footnotes 12-34, *infra*.

53. The wife's earnings were liable for debts incurred by the husband "for the necessities of life furnished . . . while they are living together." CAL. CIV. CODE § 5117 (West 1970). Community property under the management and control of the husband (including his earnings), was available to the wife to the extent necessary to fulfill her duty to support her children. CAL. CIV. CODE § 5127.5 (West Supp. 1974). (It should be noted that the provisions of Section 5127.5 will be rendered superfluous after the new law takes effect January 1, 1975, yet the section was left unamended by the new changes).

54. *West Cal. Stats.* 1973, ch. 987, § 7, at 2240.

55. *West Cal. Stats.* 1973, ch. 999, § 3, at 2319.

on the source of community property subject to such liability. As a general proposition this new change will be more beneficial to married women than to their husbands since fewer wives are the sole wage earner in the community; furthermore, if and when they do work, wives ordinarily earn less on the average than their husbands.<sup>56</sup>

A logical consequence of the new provisions of Section 5116 would be the creation of a new presumption that general credit extended to a married woman is intended to be granted on the credit of the community. In contrast, the general rule in California is well established that the status of the credit extended (whether a creditor is relying on the borrower's separate or community assets as security) is determined by the subjective intent of the creditor.<sup>57</sup> Consequently under the old law when credit was extended to a husband the creditor could rely on either the separate property of the husband or the community property under the husband's control, depending on the creditor's intent.

Needless to say, a creditor seldom intended to extend credit to a married woman in reliance on the community property because of the aforementioned rule. Rather, the creditor was quick to require joinder of the husband in the transaction or obtain assurances that the wife possessed sufficient separate property. It is suggested that the new equal treatment of the wife will encompass the rationale of the longstanding rule that applied to the husband under the old law and will be extended to apply to the wife as well under the new law. After January 1, 1975, absent an express provision to the contrary, a creditor should be able to rely on the credit of the community for contracts when extending credit solely to the wife.

If the foregoing analysis is correct, then new Civil Code Section 1812.30(a) must be intended to operate only during the transition period between January 1, 1974 and January 1, 1975. Otherwise, after the wife is given equal management and control of the community property under the new law an important incident thereof (that is, an ability to obtain general credit secured by the community property) will be negated by the provisions of Section 1812.30(a).<sup>58</sup> In fact, the requirement that a wife must show that the community property partially consists of her commingled

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56. Note, *supra* note 24, at 385 nn. 10 & 11.

57. Estate of Ellis, 203 Cal. 414, 416-17, 264 P. 743, 744 (1928). See also *Gudelj v. Gudelj*, 41 Cal. 2d 202, 210, 259 P.2d 656, 661 (1953); *Kenney v. Kenney*, 128 Cal. App. 2d 128, 142, 274 P.2d 951, 960 (1954).

58. CAL. CIV. CODE § 1812.30(a) (West Supp. 1974).

wages or separate property is contrary to the spirit and purpose of the new changes. Once the new provisions take effect the commingling of earnings by either spouse will have no legal consequence because both spouses will have equal access to the entire community property. For these reasons it should follow that Section 1812.30(a) will be either amended or repealed prior to January 1, 1975, to maintain consistency with the intention of Senate Bill No. 569 to liberalize a married woman's ability to obtain credit as a natural incident of her new equal control over the community property.

There is another change concerning the post-marital liability of the community that is worth mentioning. With the repeal of old Section 5124 the wife has lost her exclusive right to manage and control her earnings and community property personal injury damages received by her during the marriage.<sup>59</sup> After January 1, 1975, debts incurred by the husband can be satisfied from these sources because such funds will become part of the community property accessible to both spouses. For most wives this should entail a small loss compared to the new access they will have to the majority of the community property previously under the husband's sole control.

An overall view of the preceding analysis leads one to conclude that the law has taken a step in the right direction, but the impact of the changes will depend in large part upon a workable relationship within the family itself. Some of the anachronistic views surrounding a wife's ability to manage the community financial affairs have been dealt a lethal blow and the wife will now have her chance to bury them for good. In the process, creditors will enjoy easier access to the community assets due to the power of either spouse to subject the entire community property to liability. The fact that each spouse has this unrestrained power over the entire community property may be a necessary evil worthy of toleration, especially when balanced against alleviating the dissimilar treatment of women (based upon the over-inclusive classification by their sex), which arguably was destined to succumb to scrutiny under the Equal Protection Clause or the Equal Rights

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59. CAL. CIV. CODE § 5124 (West 1970) [*repealed* effective January 1, 1975, by *West Cal. Stats.* 1973, ch. 987, § 13, at 2241].

Amendment if ratified.<sup>60</sup> From the husband's standpoint, the worst that can be said for the changes in this area is that some husbands will now have to live with the risk of improvident expenditures of the community assets by the wife—a risk the wife has long endured.

#### IV. SEPARATE PROPERTY RAMIFICATIONS OF THE NEW EQUAL MANAGEMENT AND CONTROL PROVISIONS

The separate property holdings of both the husband<sup>61</sup> and the wife<sup>62</sup> will be affected in several important respects by the new changes. As with most of the changes under the new law, the impact of the changes in this area will depend to a great extent on the financial make-up of the particular marital unit. To generalize at the outset, it can be said that the wife's separate property will be exposed to increased liability by putting her on equal terms with her husband, but both spouses will enjoy an increased potential for acquisitions of separate property vis-a-vis interspousal gifts in various forms. These developments are occasioned by changes to Sections 5120,<sup>63</sup> 5121,<sup>64</sup> 5122<sup>65</sup> and 5132,<sup>66</sup> all effective January 1, 1975.

##### *New Liability for the Wife's Separate Property*

Section 5120 addresses itself to separate property liability for the antenuptial debts of the spouses. Under the old unamended provisions of this section the husband's separate property and earnings after marriage were not liable for the debts of the wife contracted before the marriage. As amended the section clearly states that, "Neither the separate property of a spouse nor the earnings of the spouse is liable for the debts of the other spouse contracted before the marriage."<sup>67</sup> This change is consistent with the new equal treatment of the spouses and should have little effect on the wife's separate property liability; however, in contrast, while the amendments to Section 5121 concerning post-nuptial liability of the spouses appears equally as innocent on its face, these changes will be of greater significance.

Separate property liability of the wife for post-marital debts in-

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60. Note, *supra* note 24, at 390-400.

61. CAL. CIV. CODE § 5108 (West 1970).

62. *Id.* § 5107.

63. CAL. CIV. CODE § 5120 (West Supp. 1974).

64. *Id.* § 5121.

65. *Id.* § 5122.

66. *Id.* § 5132.

67. *Id.* § 5120.

curred by her husband was very limited under the old law and attached only to debts contracted for the necessities of life furnished while the spouses were living together.<sup>68</sup> Furthermore, the extent of the wife's separate property liability was restricted to rents and profits from the separate property held by her at the time of the marriage.<sup>69</sup> New Section 5121, which applies to the separate property of both spouses removes the limitation on the source of the separate property subject to liability and qualifies "necessities of life" by incorporating the provisions of Section 5132,<sup>70</sup> which was also amended by the new changes.

The first significant consequence of the amendment to Section 5121 is that *all* the wife's separate property, regardless of its source or time of acquisition, will be liable for the satisfaction of debts incurred by her husband during the marriage, if the debts are incurred pursuant to Section 5132. Before making projections as to the scope of liability contemplated by amended Section 5132, further analysis of the changes made to Section 5121 is necessary to fully understand the crossover implications between these sections.

While old Section 5121 subjected the wife's separate property to liability for debts contracted by the husband for the necessities of life, there were significant limitations on the source of separate property available for such liability; that is, separate property held by the wife at the time of her marriage or acquired by her by devise, succession, or gift after the marriage (other than by gift or agreement from the husband) was *exempt* from liability.<sup>71</sup> In contrast, under the new law *all* of the wife's separate property will be subjected to liability under new Section 5121.<sup>72</sup> The key issue to be resolved before the full extent of this liability can be ascertained is to determine how amended Section 5132 will be construed by the courts.

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68. *Id.* § 5121.

69. *Id.*, quoting the pertinent part of the section which states:

[P]rovided, that the provisions of the foregoing proviso [wife's separate property liability for the husband's debts] shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage.

70. CAL. CIV. CODE § 5132 (West Supp. 1974), in relevant part provides: A spouse must support the other spouse while they are living together out of separate property of the spouse when there is no community property or quasi-community property.

71. CAL. CIV. CODE § 5121 (West 1970).

72. *Id.* § 5121 (West Supp. 1974).

Whatever the extent of liability under Section 5132, it is clear that such liability can be satisfied from the separate property of either spouse pursuant to Section 5121. To complicate matters, Section 5132 itself was amended in several material respects. On its face the section appears to impose a mutual duty of support on both spouses by stating, "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."<sup>73</sup> Noticeably missing from the amended version of this section are some of the conditions precedent which gave rise to liability under the old law.

Specifically, the former conditions required that the husband show: first, that he had no separate property of his own; and secondly, that he was suffering from an infirmity which rendered him unable to support himself. Both of these requirements have been deleted by the amendments to Section 5132. The significance of these changes might be aptly termed "the emancipation of malingering husbands," for surely the thrust of the section is a drastic departure from the traditional concept of the husband as the primary provider in the American family. A feasible construction of new Section 5132 is that it gives rise to an affirmative duty on the part of both spouses to support each other.

Superficially, Section 5132 presents a dilemma when both spouses have separate property but neither is willing to support the other from that property. Theoretically either spouse will be able to rely on the separate property of the other for support, even when the spouse needing support from the other has separate property of his or her own. To the extent that the old law is carried over in this area there should be little controversy because up to now the law has clearly held that the husband had the primary responsibility to support the community.<sup>74</sup>

If the courts construe new Section 5132 as imposing a mutual duty upon both spouses to support each other the issue of how this duty would be apportioned between the spouses will be ripe for clarification. When both spouses have separate property but there is insufficient community property to support them, a possible alternative would be for each spouse to provide for his or her own needs. The problem with such a "volunteer approach" is the possible detrimental effect it might have on the family unit itself.

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73. *Id.* § 5132 [emphasis added].

74. See *v. See*, 64 Cal. 2d 778, 784, 415 P.2d 776, 780, 51 Cal. Rptr. 888, 892 (1966); see also 1 *California Family Lawyer* §§ 5.12 and 5.14 (1961).



In the past the law has judiciously protected the family unit and a new challenge will confront the courts in this regard.

It is suggested here that the law should, and will, find a primary duty to support the community (rather than leaving the issue unsettled for resolution by the spouses themselves) by one or the other of the spouses dependent on the relevant considerations involved. Perhaps the primary duty to support the community should fall on the working spouse, but this may be unjust when the non-working spouse has extensive separate property holdings which could ease the burden on the working spouse. Another complication would arise under this approach if both spouses worked, but earned different amounts. In such a case would the duty to support be imposed in proportion to the contribution of each?

Perhaps the time has come to implement a "deeper pocket" approach to interspousal support obligations. The law could impose the primary duty to support the family upon the spouse in the better financial position at any given period during the marriage. Some readjustment in this area should be forthcoming, but it is suggested here that the alternative approaches just mentioned would impose administrative difficulties for our present court system. Additionally, the lack of a judicially recognized primary duty of support upon one of the spouses would complicate, and possibly encourage, litigation of this issue. This does not discount the fact that one or several of these alternatives might not be the "best" solution in a particular family situation.

There is some support for the contention that the courts may be forced to implement an approach to this problem which will treat the spouses equally regardless of the burden it might impose on the courts. In this regard, a husband has lost his statutory status as head of the family by repeal of Section 5101,<sup>75</sup> effective January 1, 1975, which supports the view that judicial recognition of a relaxed position on the husband's obligations towards his family may be imperative.

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75. CAL. CIV. CODE § 5101 (West 1970) [*repealed* effective January 1, 1975, by *West Cal. Stats.* 1973, ch. 987, § 2, at 2238]. Under the old law the husband could choose any reasonable place or mode of living and the wife was required, under the law, to conform to his wishes. See *Waldeck v. Hedden*, 89 Cal. App. 485, 491, 265 P.2d 340, 343 (1928).

*New Potential For Separate Property Accumulations by Both Spouses.*

In addition to the possibility of increased separate property liability discussed in the preceding text, there will be some compensating changes which will enable either spouse to actually increase his or her separate property under the new changes. This development is primarily due to the enhanced ability of either spouse to make interspousal gifts as a natural incident of the equal control each will have under the new law.

It was well established under the old law that when a husband used marital community property to make improvements on his own separate property, the improvements became his separate property too, with the important proviso that the community was entitled to reimbursement.<sup>76</sup> It should follow from the changes made in the new law that the wife will have the same power with the same limitation. There are, however, exceptions to the requirement to reimburse the community and in such cases the opportunity of either spouse to increase his or her separate property will have its greatest significance.

Reimbursement to the community for community property improvements to a spouse's separate property is not required where the other spouse has expressly or impliedly consented,<sup>77</sup> ratified,<sup>78</sup> or has been estopped to deny<sup>79</sup> the use of the community property to improve the other's separate estate. When one of these exceptions applies, a gift in effect has been bestowed upon the spouse receiving the improvement to his or her separate property. Consequently, either spouse will be able to increase separate property holdings at the expense of the community under such conditions.

A significant development occasioned by the new changes will be the increased amount of community property under the management and control of the spouses and as a result both in turn

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76. *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 256, 105 Cal. Rptr. 483, 491 (1972), citing *Dunn v. Mullen*, 211 Cal. 583, 589-90, 296 P. 604, 607 (1931); *Estate of Bermatas*, 162 Cal. App. 2d 693, 698, 328 P.2d 539, 542 (1958). See generally, de Funiak, *Improving Separate Property or Retiring Liens or Paying Taxes on Separate Property with Community Funds*, 9 HAST. L. J. 36 (1957). [hereinafter cited as de Funiak].

77. *Pacific Mut. Life Ins. Co. v. Cleverdon*, 16 Cal. 2d 788, 791-92, 108 P.2d 405, 406-07 (1940); *Estate of La Belle*, 93 Cal. App. 2d 538, 545, 209 P.2d 432, 436 (1949); *Estate of Wooten*, 64 Cal. App. 2d 96, 101, 148 P.2d 33, 35 (1944). But see *Provost v. Provost*, 102 Cal. App. 775, 781, 283 P.2d 842, 844 (1929).

78. *Spreckles v. Spreckles*, 172 Cal. 775, 786-89, 158 P. 537, 541-42 (1916).

79. See *Vierra v. Pereira*, 12 Cal. 2d 629, 632, 86 P.2d 816, 818 (1939); *Lahaney v. Lahaney*, 208 Cal. 323, 281 P. 67 (1929).

will have greater power to bestow gifts upon the other. Under the old law gifts of community property given by the spouse with management and control of such property became the separate property of the donee spouse.<sup>80</sup> It is interesting to speculate about the significance of this change; for example, if one spouse is the sole wage earner and the other spouse generously bestows gifts upon the wage-earning spouse, it will be possible to convert the bulk of the wages into the wage-earner's separate property. Such a result was generally not possible under the old law, absent intervening circumstances (e.g., commingling of the wife's earnings with the marital community property) because the non-working spouse never acquired management and control over such wages and thus could not make gifts of them to the wage-earning spouse.

The possibility of converting community property into the separate property of the spouses by making interspousal gifts has several direct legal consequences. As between the spouses such gifts would be final, but could be set aside if made to defraud creditors.<sup>81</sup> A correlative aspect of the finality of the gift is the fact that the separate property characterization of the converted property will survive dissolution of the marriage, whether by court decree or by death of one of the spouses. Furthermore, at the time of the gift the donor spouse would lose his right to testamentary disposition of his one-half interest in the community property bestowed;<sup>82</sup> whereas, the donee spouse will have absolute power to dispose of such property in his will.<sup>83</sup>

#### V. DOES EQUAL CONTROL MEAN "EQUAL OWNERSHIP" UNDER CALIFORNIA'S "PERMISSIVE USE" STATUTES?

There is a longstanding public policy in California to protect the public from harm sustained from motor vehicles by imposing a statutory liability upon the "owner" of the vehicle which occa-

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80. Estate of Inman, 148 Cal. App. 2d 952, 955, 307 P.2d 953, 957 (1957) [overruled on other grounds in *Cooke v. Tsipouroglou*, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963)].

81. See *Gould v. Fuller*, 249 Cal. App. 2d 18, 24, 57 Cal. Rptr. 23, 27-28 (1967). See also *Marble v. Jackson*, 184 Cal. 411, 417, 193 P. 940, 943 (1901).

82. CAL. PROBATE CODE § 201 (West 1965).

83. *Id.* § 20.

sioned the harm. Vehicle Code Section 17150<sup>84</sup> sets forth the elements giving rise to this statutory liability and those elements have a direct bearing on the statute's application to married persons in California because of the community property laws. Traditionally the spouse with management and control of a community vehicle was treated as the owner of that vehicle for the purposes of the permissive use statute. Since both spouses will have equal control over the community vehicle under the new law, there may be significant changes forthcoming in the application of the permissive use statute in relation to community property vehicle accidents.

*Is Interspousal Imputed Contributory Negligence  
Back in California?*

The doctrine of imputed contributory negligence has virtually disappeared in most areas of the law,<sup>85</sup> and the doctrine has experienced an unsettled history in California primarily caused by the seemingly ever-changing community property laws of this state.<sup>86</sup> Yet in the realm of the permissive use statute in California there are situations where the negligence of the operator of a motor vehicle will be imputed to the owner of that vehicle by operation of the statute, so long as the owner has consented to the use of the automobile by the negligent driver.

To the extent that one of the spouses was considered the owner of the community vehicle, the provisions of the permissive use statute applied. In the majority of cases the community vehicle was purchased with community funds under the control of the husband; hence, he was treated as the owner under the permissive use statute. To illustrate the operation of the permissive use stat-

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84. CAL. VEH. CODE § 17150 (West 1971) [hereinafter referred to as the "permissive use statute"].

85. W. PROSSER, *THE HANDBOOK OF THE LAW OF TORTS* 488 (4th ed. 1971).

86. The rationale underlying the doctrine of imputed contributory negligence was to prevent the negligent spouse from being unjustly enriched by acquiring a community property interest in the damages received by the other spouse. Before 1957 the damages received by an injured spouse were community property, hence the courts invoked the doctrine of imputed contributory negligence to bar recovery to the injured spouse. See *Hooper v. Romero*, 262 Cal. App. 2d 574, 578-79, 68 Cal. Rptr. 749, 752-53 (1968) (dicta). Legislative attempts to put the doctrine of imputed contributory negligence finally to rest proved unsuccessful. See Knutson, *supra* note 12, at 244-47; Brunn, *California Personal Injury Damage Awards to Married Persons*, 13 U.C.L.A. L. REV. 587, 598-603 (1966). The latest legislative attempt to abolish imputed contributory negligence between spouses is evidenced in Civil Code Section 5112, which was not amended by the new changes effective January 1, 1975. See CAL. CIV. CODE § 5112 (West 1970).

ute in a community property law context the following analysis will assume the hypothetical factual situation of a community property vehicle accident in which the driver-spouse negligently contributed to the injury of the passenger-spouse and a negligent third party to the accident.

On these facts and under the old law, if the passenger-spouse was the wife, the negligence of her husband as driver-spouse *could* not be imputed to her to bar her claim for personal injury damages against the negligent third party.<sup>87</sup> Such a result followed when the husband had management and control of the community vehicle because his power to control the vehicle made him "owner" of the vehicle for purposes of the permissive use statute.<sup>88</sup> The reasoning for this result was that the husband's sole control of the vehicle rendered the "consent of the wife, express or implied, to her husband's use or operation of the community automobile . . . futile . . . [and] superfluous."<sup>89</sup>

In contrast, if the husband was the passenger-spouse the contributory negligence of the wife as driver-spouse *could* be imputed to the husband and prevent his recovery from the negligent third party. Again the rationale for this result was based on the husband's control over the community vehicle which gave him power to consent to its use as the "owner" under the permissive use statute.<sup>90</sup> It is apparent at this point that there are two essential elements which must be present before a person other than the driver of a vehicle can be held liable under the permissive use statute for damages resulting from the negligent operation of the vehicle: (1) "It must have been *owned* at the time of the accident by such person, and (2) *it must have been operated with the permission, express or implied, of such owner.*"<sup>91</sup> For purposes of this discus-

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87. *Hooper v. Romero*, 262 Cal. App. 2d 574, 578, 68 Cal. Rptr. 749, 752 (1968). See *McCloud v. Roy Riegels Chemicals*, 20 Cal. App. 3d 928, 932-33, 97 Cal. Rptr. 910, 912-13 (1971).

88. *Rody v. Winn*, 162 Cal. App. 2d 35, 39, 327 P.2d 579, 582, (1958) [overruled on other grounds in *Cooke v. Tsipouroglou*, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963)]; 1 *California Family Lawyer* § 7.42 (1961).

89. *Cox v. Kaufman*, 77 Cal. App. 2d 449, 452, 175 P.2d 260, 261 (1946).

90. *Id.*

91. *Vallejo v. Montebello Sewer Co. Inc.*, 209 Cal. App. 2d 721, 732, 26 Cal. Rptr. 447, 454 (1962).

sion it is sufficient to note that both of these elements flow directly from *control*, by either spouse, of the community vehicle.

If the element of control over the community vehicle is given its same importance under the new law (that is, that consent by the spouse with control of the vehicle will result in imputed negligence), then under the rationale of the prior cases<sup>92</sup> both spouses may be foreclosed from bringing an action for damages against a negligent third party. Since under the new law both spouses will have *equal control* over the community vehicle, it seems likely that they will both be treated as "co-owners"<sup>93</sup> under the permissive use statute.

Support for this projected result under the new changes is premised on the fact that when spouses held ownership of a vehicle under the old law as joint tenants or tenants in common they were both subject to the operation of the permissive use statute.<sup>94</sup> Furthermore, it is arguable that the effect of the new changes will be to make both spouses "owners" under the use statute as a matter of law.<sup>95</sup> If this supposition is correct, an affirmative showing of consent, express or implied, by either spouse will bring them within the purview of the statute. The close relationship between the spouses may additionally make it easier for a third party to prove the implied permissive use of the community property vehicle by the other.<sup>96</sup> In short, if the spouses are treated as co-owners with equal control over the community property vehicle, both spouses would appear to be foreclosed from pursuing a claim for damages against a negligent third party because of the imputation of negligence to both spouses due to the operation of the permissive use statute.

On the other hand, an alternative argument might be made that since both spouses will have equal control of the community

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92. See notes 87-91 *supra*.

93. Technically the spouses were co-owners of the community vehicle under the old law because of the "... present, existing and equal interests" of the spouses in the community property. CAL. CIV. CODE § 5105 (West 1970). See also CAL. CIV. CODE § 682 (West 1954). However, for purposes of the permissive use statute the element of *control* over the vehicle's use was the factor which invoked the operation of the statute.

94. See *Hooper v. Romero*, 262 Cal. App. 2d 574, 579, 68 Cal. Rptr. 749, 752 (1968); *Rody v. Winn*, 162 Cal. App. 2d 35, 40, 327 P.2d 579, 582 (1958) [*overruled on other grounds in* *Cooke v. Tsipouroglou*, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963)].

95. See *Cox v. Kaufman*, 77 Cal. App. 2d 449, 452, 175 P.2d 260, 261 (1946).

96. *Northwestern Security Ins. Co. v. Monarch Ins. Co.*, 256 Cal. App. 2d 63, 63 Cal. Rptr. 802 (1967); *Elkinton v. Cal. State Auto Assn.*, 173 Cal. App. 2d 338, 344, 343 P.2d 396, 399 (1959).

vehicle under the new law, it should follow that *neither* has the power to consent to or deny its use by the other. Under this approach only the operator-spouse would be subject to liability for his direct negligence and the permissive use statute would not apply. Whenever both spouses are riding in the same vehicle as either operator/passenger respectively, they would be exempt from the operation of the statute, as each would lack the power to consent which is requisite to invoking the statute.<sup>97</sup>

Innocent third parties would still be protected under this alternative because the direct negligence of either spouse would expose the negligent spouse's separate property *and all of the community property* to liability.<sup>98</sup> An advantage of making this exception to the permissive use statute would be that the innocent passenger-spouse would not be precluded from pursuing a claim for damages against a negligent third party, as would be the case if the spouses are treated as owners under the permissive use statute.<sup>99</sup> Overall, this approach would further the policy of abolishing imputed contributory negligence between spouses,<sup>100</sup> and at the same time afford adequate protection of the public from harm sustained in accidents involving the community vehicle, because in all other cases where either spouse has consented to the community property vehicle's use by anyone except the other spouse the permissive use statute would be fully operative.

#### *New Community and Separate Property Liability Incident to the Permissive Use Statute*

Up to this point the discussion has concentrated on the imputed contributory negligence aspects of the permissive use statute; however, an equally significant development occasioned by the new law will be the *new liability* created by the statute if the spouses

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97. See note 94 *supra*.

98. See text, *supra* at page 12.

99. See text and accompanying notes, *supra* at pages 24-26. An obstacle to be overcome under this approach, however, would be the longstanding policy against allowing the negligent spouse to be indirectly benefitted by the damages received by the injured spouse. Since Section 5124 has been repealed (effective January 1, 1975) and personal injury damages received by the wife will no longer be under her exclusive control, it is arguable that the negligent husband's potential for being unjustly enriched is enhanced.

100. See CAL. CIV. CODE § 5112 (West 1970).

are considered co-owners due to their equal control over the community vehicle. Again it will be useful to compare the old law with the new changes (as each relates to the operation of the permissive use statute) by utilizing the same hypothetical facts as before.<sup>101</sup>

If an innocent third party was injured in a community property vehicle accident under the old law, the owner-spouse (who generally was the husband)<sup>102</sup> was subjected to liability to the extent provided by the statute.<sup>103</sup> Such liability could be satisfied from the community property under that spouse's management and control or from his separate property, or both.<sup>104</sup> In the context of our hypothetical as it relates to the operation of the permissive use statute it followed that the husband could subject the community property under his control and his separate property to liability in two ways. First, as driver-spouse irrespective of the permissive use statute; and secondly, as passenger-spouse under the use statute because as "owner" he had consented to the use of the vehicle by the wife.

On the other hand, if the wife was the passenger-spouse with the husband operating the vehicle, then the permissive use statute would not apply to her because she was not considered the "owner" for purposes of the statute. Consequently if the wife was the passenger-spouse under the old law her separate property could *not* be reached to satisfy third party claims because she had no power to consent to the husband's operation of the vehicle.<sup>105</sup> To the extent a wife is treated under the new law as a "co-owner" under the permissive use statute she too will be able to subject *the entire community property and her separate property* to liability up to the statutory limit provided by law. It should be noted here that if the wife is treated as a co-owner under the statute, then for the first time in the history of California's community

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101. See text, *supra* at pages 1018-19.

102. Note that under the old law the wife had no such liability except in those unusual situations where the vehicle was her separate property or community property under her management and control. See CAL. CIV. CODE §§ 5107, 5124 (West 1970).

103. CAL. VEH. CODE § 17151 (West 1971). Section 17151 provides in pertinent part for maximum monetary limits of \$15,000 per person, \$30,000 total for each accident for personal injuries and \$5,000 per accident for property damage.

104. *de Funiak, supra* note 76, at 71; cf., *Grolemund v. Cafferata*, 17 Cal. 2d 679, 111 P.2d 641 (1941).

105. See CAL. CIV. CODE § 5121 (West 1970); *Shepardson v. McLellan*, 59 Cal. 2d 83, 87, 378 P.2d 108, 111, 27 Cal. Rptr. 884, 887 (1963). See also *Hooper v. Romero*, 262 Cal. App. 2d 574, 578, 68 Cal. Rptr. 749, 753 (1968).



property laws a wife will be subject to liability as a passenger in a community property vehicle driven by her husband.<sup>106</sup>

Furthermore, if the wife is treated as a co-owner within the purview of Vehicle Code Section 17150 there will be unlimited access to all the community property to satisfy the statutory liability because the wife will have equal control of the entire community property under the new law. It should follow that the entire community assets will be subject to liability for third party claims arising out of a community property vehicle accident, whether the cause arises from the wife's direct negligence or from the statutory liability imposed by the use statute.

Consistent with the foregoing analysis of the liability of the community and separate property of the spouses, Section 5122<sup>107</sup> has been amended to establish priority as to the type of property available to satisfy a claim depending on the nature of the activity at the time of the tortious act or omission. If the new changes are construed to incorporate the general law principles applied to the old sections, then each spouse can create, and would be subject to, community property liability and separate property liability, respectively. The amended version of Section 5122 merely sets forth the priority of liability from these two sources as illustrated by the following examples.

If the liability of a spouse is based upon an act or omission which occurred while the spouse was performing an activity for the benefit of the community, the liability will be satisfied first from the community property and second from that spouse's separate property.<sup>108</sup> Conversely, if the activity was *not* for the benefit of the community, the liability shall first be satisfied from the separate property of that spouse and second from the community property.<sup>109</sup> A key issue to be resolved in applying the provisions of new Section 5122 will be the factual determination of what constitutes an "activity for the benefit of the community". Practically speaking nearly every act of either spouse could be construed, at least tangentially, as benefiting the community directly or indirectly.

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106. See note 102 *supra*.

107. CAL. CIV. CODE § 5122 (West Supp. 1974).

108. *Id.* § 5122(b) (1).

109. *Id.* § 5122(b) (2).

If the "activity benefitting the community" is construed liberally by the courts, it will follow that the bulk of spousal liability will be satisfied first from the community property. Should this construction of the statute be adopted then the relative solvency of the spouses versus the wealth of the community will become important. For example, when a negligent spouse has very limited separate property assets and the community has substantial resources, it would behoove the negligent spouse to contend that the activity was for the benefit of the community so the liability would be satisfied first from the community assets.

In contrast, if the negligent spouse has substantial separate assets and the community property is limited, then the non-negligent spouse will want the activity characterized as not benefitting the community so the liability will be satisfied first from the negligent spouse's separate property, thus preserving the community property interest of the non-negligent spouse. In short, an important triable issue of fact is created by the amended version of Section 5122 with potentially divergent interests of the spouses at stake. It should be noted that third party claimants will not be adversely affected by this section because ultimately a judgment can be satisfied from either the community property or the negligent spouse's separate property.

## VI. CONCLUSION

For the first time in the history of this state, married women in California will be on equal terms with their husbands under the community property laws. There is no doubt that married women in general will enjoy new rights under the equal management and control system that heretofore were denied them. On the other hand, along with these new rights will come new obligations and liabilities previously borne only by the husband under the old law.

Whether the new rights afforded married women will outweigh these new responsibilities will depend in large part upon the individual attributes of any given wife and also upon the financial and social makeup of each marital relationship. Wives with substantial separate property assets will find the new changes pose a potential threat to these holdings; however, wives with limited separate property resources will welcome the increased access they will have to the entire community property.

In contrast to the potential ramifications affecting married women, the husband will remain in essentially the same relative

position in regard to his rights and liabilities in community affairs. If anything, his obligations as head of the household have been diminished by the new changes. Finally, while some marriages may experience difficulties adapting to the new changes, creditors will warmly receive the new changes which will enhance the potential for credit transactions with married women and at the same time afford additional security for such transactions.

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