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Community Property—Antenuptial Debts—Eliminating Immunity of Earnings and Accumulations of Debtor Spouse.—RCW 26.16.200, as amended by Ch. 121, Laws of 1969, 1st Extraordinary Session

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COMMUNITY PROPERTY—ANTENUPTIAL DEBTS—ELIMINATING IMMUNITY OF EARNINGS AND ACCUMULATIONS OF DEBTOR SPOUSE.—RCW 26.16.200, as amended by Ch. 121, Laws of 1969, 1st Extraordinary Session.

At common law, the husband assumed his wife's antenuptial debts.[1] The various married women's acts have often relieved him of this liability, so that each spouse controls the disposition of his or her sole property.[2] In Washington, a community property state,[3] the determination of debt liability of spouses has followed a more labyrinthine process. Husband, wife, and the community[4] represent a trio of interests, and it is necessary to categorize assets and obligations as community

[1] R. TYLER, INFANCY AND COVERTURE § 216 (2d ed. 1882). The creditor was required to obtain judgment against the husband during coverture.

[2] 18 VA. L. REV. 795 (1932). *See* Smith v. Martin, 124 Mich. 34, 82 N.W. 662 (1900); *contra*, Kies v. Young, 64 Ark. 381, 42 S.W. 669 (1897).

[3] The community property system is also followed in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Texas. There is, however, no uniform treatment of antenuptial obligations among the community property states.

[4] The marital community "seems to defy precise definition." Household Finance Corp. of Sioux Falls v. Smith, 70 Wn. 2d 401, 403, 423 P.2d 621, 622 (1967). In some situations it has been treated as an entity distinct from husband and wife as individuals, Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892); yet in others the entity analysis has been rejected, Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930). Its existence requires a valid marriage, although equity may protect an innocent party if the marriage proves to be void, Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951). The community generally continues for as long as the marital relationship—until death or divorce, Barkley v. American Sav. Bank, 61 Wash. 415, 112 P. 495 (1911). While the spouses are separated, however, no community interest arises with respect to the earnings and accumulations of the wife. WASH. REV. CODE § 26.16.140 (1958):

> The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

Despite a lack of similar statutory protection, the husband's earnings during separation are also held to be separate in nature, unless the separation was, in fact, desertion. The court has based this result either on an implied agreement between the separated spouses, *In re* Janssen's Estate, 56 Wn. 2d 150, 351 P.2d 510 (1960), or on the absence of joint acquisition of the affected property, Togliatti v. Robertson, 29 Wn. 2d 844, 190 P.2d 575 (1948); *In re* Armstrong's Estate, 33 Wn. 2d 118, 204 P.2d 500 (1949). In Rustad v. Rustad, 61 Wn. 2d 176, 377 P.2d 414 (1963), however, the "community" survived the separation. The wife was confined to a mental institution; the husband could have obtained a divorce, but did not. Despite a lack of opportunity to acquire property jointly, the court held that property acquired during this time was community in nature, since the husband had not affirmatively renounced the marital relationship.

See also Yates v. Dohring, 24 Wn. 2d 877, 168 P.2d 404 (1946), where the absence of a "community" or "family relationship" barred the creditor's recovery for family support specified in WASH. REV. CODE § 26.16.205 (1958).

or separate.[5] In the past, community assets could be reached only by community creditors.[6] Separate obligations, whether incurred before or after marriage, were identified solely with the individual incurring them; only the debtor spouse's separate property could be attached to satisfy them.[7]

As a consequence, the separate creditor was often frustrated in attempting to collect a debt. So long as the marriage continued, community assets were reserved for community obligations. Further, while the marriage continued, creditors could not secure partition of community assets.[8] Overriding the frustration of creditors was a policy favoring protection of the community. The statutory means selected was insulation of community assets from separate debts, to assure the community enough integrity to allow development without handicaps unrelated to its own undertakings.[9] Since this insulation is most apparent at the instant of marriage, it has been known popularly as marital bankruptcy.[10]

Washington case law has made some inroads into the insulation of community assets, based on policy considerations favoring alimony. In *Fisch v. Marler*,[11] the husband's remarriage did not prevent his first wife from garnishing his salary to satisfy alimony obligations. In

[5] 1 W. De Funiak, Principles Of Community Property § 158 (1943) [hereinafter cited as De Funiak]; Brotton v. Langert, 1 Wash. 73, 23 P. 688 (1890). As to the definition of community property, Wash. Rev. Code § 26.16.030 (1958) provides in part:

> Property not acquired or owned [,] as prescribed in RCW 26.16.010 and 26.16.020 [defining the separate property of the husband and wife] [,] acquired after marriage by either husband or wife or both, is community property.

[6] With the permission of the non-debtor spouse, of course, community assets may be applied to separate debts; the result is a gift by the non-debtor. Page v. Prudential Life Ins. Co., 12 Wn. 2d 101, 112, 120 P.2d 527, 532 (1942).

[7] Brotton v. Langert, 1 Wash. 73, 23 P. 688 (1890) (community real estate immune from husband's separate debt); Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917) (same result as to community personal property). In Stockand v. Bartlett, 4 Wash. 730, 731, 31 P. 24 (1892), the court reasoned:

> It has been held by us that neither the husband or wife can alienate or convey his or her interest in community real estate separately during the lifetime of the community, and if neither of them have a right to sell or convey the same to any third person, creditors can have no greater right therein.

[8] Stockland v. Bartlett, 4 Wash. 730, 31 P. 24 (1892).

[9] De Funiak, *supra* note 5, at § 156. The concept accords with Spanish law, which decreed that the community should pay only its own obligations.

[10] *See, e.g.*, Mechem, *Creditors' Rights in Community Property*, 11 Wash. L. Rev. 80, 87 (1936); Cross, *The Community Property Law in Washington*, 15 La. L. Rev. 640, 666 (1955).

[11] 1 Wn. 2d 698, 97 P.2d 147 (1939).

Stafford v. Stafford,[12] however, the policy considerations were not sufficiently strong to allow the first wife to attach community real property acquired during the second marriage of the husband. Federal tax law has also diluted the immunity.[13] The most recent and significant abrogation, however, is statutory. During the 1969 Extraordinary Session, the Washington Legislature rendered the community less inviolate by making the "earnings and accumulations" of each spouse liable for his antenuptial debts, provided the creditor secures judgment within three years of the marriage. The statute adds "[f]or the purpose of this section neither the husband nor the wife shall be construed to have any interest in the earnings of the other."[14]

The statute allows antenuptial creditors access to what would otherwise be insulated community assets. This note addresses questions raised by the new statutory language—the meaning of "debts" and "accumulations", the impact of the statute if the marriage preceded the effective date of the statute (August 11, 1969) by less than three years, and the effects on the husband's role as community manager.

I. DEBTS

The 1969 amendment represents a triumph of the credit economy over prior policy[15] by making certain assets available to creditors for

[12] 10 Wn. 2d 649, 117 P.2d 753 (1941).

[13] Draper v. United States, 243 F. Supp. 563 (W.D. Wash. 1965); *contra*, Stone v. United States, 225 F. Supp. 201 (W.D. Wash. 1963). *See also* 41 WASH. L. REV. 356 (1966).

[14] Ch. 121 [1969] Wash. Laws 1st Ex. Sess., amended WASH. REV. CODE § 26.16.200, to read:

> Neither husband or wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: PROVIDED, That the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to marriage, and the earnings and accumulations of the wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section neither the husband nor the wife shall be construed to have any interest in the earnings of the other: PROVIDED FURTHER, That no separate debt may be the basis of a claim against the earnings and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties. (Boldfacing indicates the amended portion)

[15] See 41 WASH. L. REV. 356 (1966); W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 284 (1962); Cross, *Law Revision in the State of Washington*, 27 WASH. L. REV. 193 (1952).

But cf. DE FUNIAK, *supra* note 5, § 158:

the satisfaction of antenuptial debts. In 1968, similar legislation was enacted in Texas.[16] Interestingly the Texas statute includes liabilities as well as debts. The Washington Legislature either deliberately excluded such antenuptial liabilities as tort judgments, overlooked them, or intended the term "debt" to apply broadly to a sum owed from whatever origin.

In dictum, the Washington court has stated that a debt ordinarily is an obligation arising from contract.[17] Other decisions have warned that statutory references to debts must be understood in context.[18] The portion of the statute unaltered by the 1969 amendment refers both to debts and liabilities, suggesting the legislature was aware of the distinction, made a conscious choice in not including the more inclusive term "liabilities", and did not intend a broader meaning be imputed to the term "debts." From the standpoint of either test—ordinary meaning or context—the term "debts" as used here appears limited to contractual obligations.

II. ACCUMULATIONS

Of more concern, because of novelty and effect, is the problem of accumulations. What are they, and to what extent are they available to antenuptial creditors? The new statute adds a proviso which makes each spouse's earnings and accumulations available, but also provides that "[f]or the purpose of this section neither [spouse] shall be con-

So far as the "bankruptcy" argument is concerned, the fact remains that few people marry or could be expected to marry for the reason that thereby they would escape existing debt liability. That is not and never will be the compelling reason for marriage. . . . The real question involved in the matter is whether the law . . . will give more consideration to the well-being and interests of the family or to the rights of the creditors.

[16] TEX. REV. CIV. STAT. ANN. art. 4620 (1968) provides in part:
The community property subject to sole or joint management, control and disposition of a spouse shall be subject to the liabilities of that spouse incurred before or during marriage.

[17] Commercial State Bank v. Curtis, 7 Wn. 2d 296, 298, 109 P.2d 558, 559 (1941).

[18] *Compare* Spokane Merchants' Assn. v. State, 15 Wn. 2d 186, 130 P.2d 373 (1942) ("Debts due to the United States" under 31 U.S.C. § 191 include delinquent taxes. Price v. United States, 269 U.S. 492 (1926)); *with* Hewitt v. Traders' Bank, 18 Wash. 326, 51 P. 468 (1897) (Taxes not debts in the ordinary sense of the word); *and* Haakenson v. Coldiron, 190 Wash. 627, 70 P.2d 294 (1937) (Alimony not a debt or liability under statute exempting the proceeds of accident and health insurance from husband's debts); *and In re* Cave, 26 Wash. 213, 66 P. 425 (1901) (Alimony not a debt in the sense that word is used in WASH. CONST. art. I, § 17, prohibiting imprisonment for debt).

strued to have any interest in the earnings of the other."[19] Does the omission of the term "accumulations" in the latter provision mean that each spouse may retain some interest in the accumulations? Such an interpretation could leave the *Stafford* result intact.

The term "accumulations" has apparently never been defined in Washington. It made an early appearance in a California statute relating to the wife's separate earnings.[20] Washington[21] and Arizona[22] adopted similar legislation later. The California court has defined the term as a catch-all description of any property which a person acquires and retains, regardless of the manner of acquisition.[23] In practical application, the term encompasses all property which cannot be deemed "earnings." From this perspective, examples of accumulations include property acquired by adverse possession,[24] funds advanced on a contract,[25] damages recovered through tort claims,[26] and property acquired through purchase or exchange.[27]

[19] Ch. 121 [1969] Wash. Laws 1st Ex. Sess., set out in full, note 14 *supra*.

[20] CAL. CIV. CODE § 169 (West 1954) (enacted in 1872) provides:
> The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

[21] WASH. REV. CODE § 26.16.140 (1958) (enacted in 1881) provides:
> The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

The husband has no similar statutory protection. *But see* note 4 *supra*.

[22] ARIZ. REV. STAT. ANN. § 25-213 (1956) (enacted in 1901) provides in part:
> The earnings and accumulations of the wife and the minor children in her custody while she lives separate and apart from her husband are the separate property of the wife.

[23] Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313 (1910).

[24] *Id.* The court held that the wife, separated from her husband, acquired some of his separate real property by adverse possession. It became a separate accumulation of the wife's and unavailable to the husband's separate creditor. Referring to accumulations, the court noted:
> When one speaks generally of accumulation of property, he is understood to refer to any property which a person acquires and retains, without regard to the means by which it is obtained. Of course, if it were acquired by the wife by purchase with community funds, or in exchange for other community property, it would not be [separately] accumulated in the sense here involved. Such an acquisition would be a mere exchange, and it would have the character possessed by that given in exchange for it. But where the wife, while living separate from her husband, through her own industry, labor, skill, or efforts of any kind, obtains property and holds it in possession, it is what would ordinarily be called an accumulation of property, and, under the rules stated in section 169, it would be a part of her separate estate.

Id. at 316.

[25] Tagus Ranch Co. v. First Nat'l Bank of Clovis, 7 Cal. App. 2d 457, 46 P.2d 809 (1935).

[26] City of Phoenix v. Dickson, 40 Ariz. 403, 12 P.2d 618 (1932); Christiana v. Rose, 100 Cal. App. 2d 46, 222 P.2d 891 (1950) (wrongful death).

[27] Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313 (1910).

After identifying a specific asset as an accumulation, the California court then characterizes it either as separate or community.[28] Where the accumulation was acquired through either exchange or purchase, it retains the character of the source assets. Determination of its character, therefore, is a tracing exercise. Where the asset was acquired in the first instance as an accumulation (no exchange or purchase), it is characterized according to the mode of acquisition[29] or status of the acquiring party. In a Washington tort situation, for example, the wife's recovery may be separate in nature if the spouses are separated,[30] or community in nature if cohabitation exists.[31]

Assuming the Washington court develops an analysis of accumulations not inconsistent with the California experience, the omission of the term from the latter portion of the new statute should have these consequences: Realty purchased with the debtor spouse's earnings, as in *Stafford*, will be available to the debtor spouse's antenuptial creditors, since the statute restricts the non-debtor spouse's interest in the source asset. Assets acquired in the form of community accumulations, without any element of exchange or purchase (such as a tort recovery),[32] however, are not *entirely* subject under the statute, if at all. The importance lies in the method of acquisition of this latter sort of

[28] *Id.*

[29] CAL. CIV. CODE § 162 (West 1954) provides in part:

> All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property.

The husband receives similar protection under CAL. CIV. CODE § 163 (West 1954).

[30] Goode v. Martinis, 58 Wn. 2d 229, 361 P.2d 941 (1961). *See* WASH. REV. CODE § 26.16.140 (1958), cited in full in note 21, *supra*.

[31] Chase v. Beard, 55 Wn. 2d 58, 346 P.2d 315 (1959); Clark v. Beggs, 138 Wash. 62, 244 p. 121 (1926).

[32] *See* Clark v. Beggs, 138 Wash. 62, 244 P. 121 (1926). The court affirmed a judgment *n.o.v.* The plaintiff failed to join the party who was her husband when the injuries were sustained, having become divorced from him after the cause of action arose. The plaintiff appears to have argued part of the damages were loss of income, which the wife could recover without joinder, but the court declined to investigate the elements of the recovery.

For discussion purposes, the tort situation has been chosen, rather than the case of adverse possession. The latter situation will not arise under the new statute, because the period of time necessary to claim by adverse possession exceeds the three year statute of limitations included in the principal statute.

Other examples of accumulations which are community in their inception are: (1) a gift, devise or bequest to husband and wife (*In re* Salvini's Estate, 65 Wn. 2d 442, 397 P.2d 811 (1964)) and (2) a similar transfer to one spouse after the spouses have executed a community property agreement which converts all separate property into community property, including future acquisitions (*In re* Brown's Estate, 29 Wn. 2d 20, 185 P.2d 125 (1947)).

accumulation. While a tort recovery is clearly an accumulation *of* the acquiring spouse,[33] the statute does not, unlike the situation with earnings, restrict the present interest of the other spouse in this community asset. Consequently, while the statute makes an accumulation of the debtor spouse (community in its inception) *available* to the debtor spouse's antenuptial creditors, it does not specify that the non-debtor spouse shall have no interest in such an accumulation.

Whether or not the statute authorizes the antenuptial creditor to attach this asset to the extent of the debtor spouse's interest therein is at best questionable. The normal way to reach only the debtor's interest in an asset is through partition. However, unlike property held in tenancy in common, community property is not subject to partition in the absence of mutual consent or divorce.[34] Each spouse has an undivided one-half interest[35] which permeates the whole asset; "neither member of the community has any independent *proprietary* interest or right in [community property]."[36] If the new statute is read to authorize partition, it must overrule this formidable line of authority; such divisibility would, as well, lead to considerable confusion in characterizing the remaining proceeds.[37]

[33] For some purposes, at least, the Washington court has considered the community as if it were a distinct entity. For purposes of defining the manner in which property acquires its community character, however, WASH. REV. CODE § 26.16.030 (1958) provides, insofar as is applicable here, that property acquired after marriage *by either husband or wife or both* is community property. Thus it is not entirely correct to say the community acquires property, but rather, that property is acquired by the spouse(s) as community property. *Compare* Ostheller v. Spokane & Inland Empire R. Co., 107 Wash. 678, 182 P. 630 (1919) *and* Holyoke v. Jackson, 3 Wash. Ter. 235, 3 P. 841 (1882) *with* Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930). *See also* G. MCKAY, COMMUNITY PROPERTY §§ 120, 121, 123, 124 (1910).

[34] *See* note 7 *supra.*

[35] In addition to the ownership interest in an undivided one-half of the community asset, one spouse could conceivably have a further claim against the asset in the form of an equitable lien. If separate property of one spouse is used to finance valuable improvements on the community realty, that spouse, in a subsequent action involving partition, may be entitled to an equitable lien for reimbursement. Bishop v. Lynch, 8 Wn. 2d 278, 111 P.2d 996 (1941).

[36] Schramm v. Steele, 97 Wash. 309, 315, 166 P. 634, 637 (1917).

[37] If partition is allowed, proceeds from the severance which are not available might retain their community character. Under this analysis the new statute operates to dilute the interest of the non-debtor spouse in the community accumulation since each spouse has an undivided one-half interest in the remaining proceeds. Consequently, with reference to the community accumulation prior to partition, the interest of the non-debtor spouse is eventually reduced to one-fourth.

This result could be avoided by characterizing the assets which remain after partition as the separate property of the non-debtor spouse. However, if so characterized, the assets would then become available to separate creditors of the non-debtor spouse. Under this analysis, claims which have been consistently rejected by the Washington

An interim summary indicates the following items are available to the antenuptial creditor. First, as was the case before the 1969 amendment, an accumulation is available to the extent that its origin is traceable to the separate property of the debtor spouse. Second, an accumulation is available to the extent that its origin is traceable to the debtor spouse's earnings. Third, a spouse's individual earnings are available. Finally, an asset acquired by the debtor spouse as a community accumulation in the first instance *may* be available to the extent of the debtor spouse's interest therein, but only if the principal statute is construed to allow partition.

III. DUE PROCESS

The new statute introduces short-term vulnerability to community property. Certain types of community property are made vulnerable by the statute to specified creditors during the initial three years of marriage.[38] Although no effective legal objection can be raised regarding the application of the statute to marriages contracted after the effective date of the statute, serious doubts arise as to the possibility of its retroactive application. Under its three-year limitation period, the statute ostensibly could affect all persons who married after August 11, 1966. An argument can be made for comprehensively including assets of such unions within the scope of the statute on the ground that remedial legislation should be as far-reaching as possible, even

court, as in Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892) and Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917), would now be subject to realization through a two step process. First, a postnuptial separate creditor who seeks to satisfy his claim out of comunity property must find an antenuptial creditor of the other spouse who is able to accomplish partition under the principal statute. Then the postnuptial creditor could enforce his claim against the remaining proceeds.

Therefore, if divisibility is allowed under the new statute, the non-debtor spouse occupies a particularly unattractive position; for if the proceeds which remain after partition are deemed community, his original interest is diluted, and if those proceeds are deemed separate, they become available to his separate creditors.

[38] With respect to judgments rendered within the specified three years, the period of vulnerability will extend an additional six years under WASH. REV. CODE § 6.04.010 (1957), which provides for execution within six years of the judgment. Consequently, assuming a valid antenuptial obligation exists which is not itself barred by WASH. REV. CODE ch. 4.16 (1956) (Limitation of Actions), the period of vulnerability could conceivably extend for a total of nine years.

Query why the statute provides that the claim must be *reduced to judgment* within the initial three years. This would seem to place a premium on defendants who are particularly adept at securing continuances or other means to delay judicial resolution. Perhaps the legislature should have provided, rather, that *suit must be commenced* within the initial three years of the marriage.

when legislative intent is imperfectly expressed.[39] Furthermore, community property protections are not of an inherent nature, but rather result from statutory exemptions; the principal statute simply removes certain exemptions. Opposing these contentions are two others which seem more compelling—a statute cannot abrogate vested property rights, and the creation of a remedy where none existed previously is something more than remedial in nature, deserving only prospective application.[40]

That married couples have vested rights in community assets is well settled.[41] One spouse's interest in the future earnings of the other, however, would not appear to be a presently vested right protected by due process. With respect to community property extant at the effective date of the statute, the spouses have presently vested rights which should remain unaffected. The statute cannot affect any earnings or accumulations in existence on that date, nor assets traceable thereto. In contrast, the statute can, and therefore, probably does, affect the non-debtor spouse's inchoate interest in the other spouse's prospective earnings and accumulations which materialize subsequent to the effective date of the statute.

The statute, however, probably is not restricted to prospective debts. If the statute were applied to debts incurred prior to the effective date of the statute, it would not alter the contractual agreement between debtor and creditor, but merely would provide a remedy which had not previously existed, and any improper retroactive impact is eliminated if, as indicated above, that remedy is allowed only against earnings and accumulations which accrue after the effective date of the statute.

IV. THE HUSBAND AS MANAGER

The husband's role as community manager[42] poses an added problem under the statute. Prior to this enactment, he could not use com-

[39] Pape v. Dept. of Labor & Ind., 43 Wn. 2d 736, 264 P.2d 241 (1953).

[40] *See* National Bank of Commerce v. Green, 1 Wn. App. 713, 721, 463 P.2d 187, 192 (1969) (apparently holding the statute does not affect assets acquired prior to statute's effective date.)

[41] Schramm v. Steele, 97 Wash. 309, 116 P. 634 (1917); *see also* Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 74 P.2d 27 (1937) (although the right does not extend so far as to allow a spouse to sell separately his interest in community property, Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892)).

[42] WASH. REV. CODE § 26.16.040 (1958) provides in part:

The husband has the management and control of the community real property,

munity assets to satisfy a separate obligation.[43] May he do so now and apply his own contributions to an antenuptial debt? If he does, should he be considered a "volunteer"? May the wife apply her earnings to a similar debt of her own? Presumably, as manager of the community and controller of litigation,[44] the husband might apply his earnings in the face of an undisputed debt which the antenuptial creditor was assured of reducing to judgment within the three year period. Rather than being a mere volunteer, he would, indirectly, be acting for the benefit of the community,[45] reducing its losses should the creditor present a costs-added judgment.

The same conclusion may attach to the wife's voluntary satisfaction of antenuptial debts. Although the husband is community manager, the assets he manages are unsettled under the statute. Since neither spouse has an interest in the other's earnings with respect to creditors' remedies under the statute, the certainty of a judgment might allow the wife a similar power of protective satisfaction.

CONCLUSION

Under the 1969 amendment to the Washington community property scheme, community assets are temporarily vulnerable to the claims of antenuptial creditors. Until a three-year period closes it will be impossible to identify insulated community assets with any precision. In view of the legislature's decision not to use the more inclusive term "liabilities", debts would appear to be limited to those of a contractual

but he shall not sell, convey or encumber, the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife.

WASH. REV. CODE § 26.16.030 (1958), provides in part:

The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

[43] *See* note 6 *supra*.

[44] The husband is a necessary party in actions involving community personal property, Hynes v. Colman Dock Co., 108 Wash. 642, 185 P. 617 (1919). The wife is a necessary party to actions involving community real property, Lownsdale v. The Gray's Harbor Boom Co., 21 Wash. 542, 58 P. 663 (1899). Thus, in a suit for injury to the wife, the husband was a necessary party, while the wife was only a proper party, Erhardt v. Havens, Inc., 53 Wn. 2d 103, 330 P.2d 1010 (1958).

[45] Gannon v. Robinson, 59 Wn. 2d 906, 371 P.2d 274 (1962); Thygesen v. Neufelder, 9 Wash. 455, 37 P. 672 (1894); Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892).

origin. The statute probably cannot be read to affect community assets in existence prior to August 11, 1969, although debts incurred prior to that date are probably within the statute's purview. Both spouses would appear to have some freedom to apply individual earnings to satisfy antenuptial debts.

There remains, then, the statute's impact on accumulations. In providing that the accumulations *of* the debtor-spouse are available to antenuptial creditors, the legislature could not have been referring to separate accumulations. Those were already available. If the legislature is content to make available only the accumulations traceable to earnings of the debtor spouse, it very likely has done so. Given existing doctrines relating to tracing, it might not have been necessary to mention accumulations at all, however, unless the legislature intended to avoid a narrow interpretation of the statute that would preclude tracing. If, instead, the legislature intended to make available all accumulations (including those which are community at inception) acquired *by* the debtor spouse, but only to the extent of that spouse's interest therein, it very likely has not succeeded. Absent clear evidence of intent to produce that result, and certainly such evidence is lacking here, the court is not likely to reverse long-standing holdings that community assets cannot be partitioned. If partition is desired, the legislature should provide that, for purposes of the statute, accumulations acquired *by* the debtor spouse as community assets may be partitioned. Such a provision would, however, severely limit the protection a community property system provides the non-debtor spouse.[46]

Had the legislature provided that the non-debtor spouse has no interest in the accumulations *of* the other, to avoid a redundancy similar to that discussed above, one would have to conclude that not only would all accumulations acquired by the debtor spouse be subject, but, as well, the entire accumulation would be available. The wisdom of such a provision is somewhat less than apparent, since the protection afforded the non-debtor spouse is less here than if partition were available. Absent an amendment to the contrary, then, the court probably will find that only earnings of the debtor spouse, and accumulations traceable thereto, are made available under the subject statute.

[46] *See* note 37 *supra.*