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ARTICLES

EQUALITY FOR SPOUSES IN WASHINGTON COMMUNITY PROPERTY LAW—1972 STATUTORY CHANGES

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INTRODUCTION

The past two decades have witnessed an expanded drive for equal treatment before the law. Although courts, using the fourteenth amendment's equal protection hammer, have built coffins for discrimination based on race, lineage, and financial status, centuries-old discrimination based on sex largely has avoided legal interment. However, the need for change recently has been recognized by both the

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   1. State laws placing special restrictions on women with respect to hours of work and weightlifting on the job;
   2. State laws prohibiting women from working in certain occupations;
   3. Laws or practices operating to exclude women from state colleges and universities (including higher standards required for women applicants to institutions of higher learning and in the administration of scholarship programs);
   4. Discrimination in employment by state and local governments;
   5. Dual pay schedules for men and women public school teachers;
   6. State laws providing for alimony to be awarded, under certain circumstances, to ex-wives but not to ex-husbands;
commentators and lawmakers. In November 1972 voters in Washington adopted an amendment to the Washington Constitution which provides:

(1) Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.
(2) The legislature shall have the power to enforce, by appropriate legislation, the provisions of this article.

In addition, 30 states have ratified an amendment to the United States Constitution which provides that equality of rights under the law shall not be denied or abridged by the United States or by any state on ac-

7. State laws placing special restrictions on the legal capacity of married women or their capacity to establish a legal domicile;
8. State laws that require married women but not married men to go through formal procedure and obtain court approval before they may engage in an independent business;
9. Social Security and other social benefits legislation which give greater benefits to one sex than the other;
10. Discriminatory preferences, based on sex, in child custody cases;
11. State laws providing that the father is the natural guardian of minor children;
12. Different ages for males and females in (a) child labor laws, (b) eligibility for marriage, (c) cutoff of the right to parental support, and (d) juvenile court jurisdiction;
13. Exclusion of women from the requirements of the Military Selective Service Act of 1967;
14. Special sex-based exemptions for women in selection of state juries;
15. Heavier criminal penalties for female offenders than for male offenders committing the same crime.

count of sex. Further, title VII of the 1964 Civil Rights Act includes "sex" as an equal employment opportunity classification.

For the most part, however, courts have been unwilling to proclaim absolute equality between the sexes. Mr. Justice Bradley declared 100 years ago that the "constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." In Muller v. Oregon the Supreme Court brought Justice Bradley's social ideas into a legal context and in dicta stated the principle that sex is a valid basis for classification. This principle is sustained in Reed v. Reed. Discrimination on the basis of sex is permissible if rationally related to a legitimate state purpose.

Community property laws which discriminate on the basis of sex heretofore have not received adequate judicial or legislative attention. By having an ownership share in property acquired by her husband,
the housewife in a community property jurisdiction is in a position more favorable than that of her counterpart in a common law jurisdiction. But her status is not one of equality. Most of the management power rests in the husband. The employed wife in a community property jurisdiction is in a less advantageous position than her common law counterpart, for the ownership of her acquisitions is halved and the management of her acquisitions is vested largely in her husband. The 1972 legislature significantly changed these aspects of Washington community property law.

The 1972 amendments do not alter the requirement that a marital


13. See WASH. REV. CODE ch. 26.16. Although equality of ownership is inherent in community property, prior to the 1972 amendments all management power was delegated to the husband under WASH. REV. CODE §§ 26.16.030-.040 (1959). The case law held that the wife possessed only an "emergency" power of management. See generally W. DeFuniak & M. Vaughn, Principles of Community Property 276-79 (2d ed. 1971) [hereinafter cited as DeFuniak & Vaughn].


Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

(1) Neither spouse shall devise or bequeath by will more than one-half of the community property.

(2) Neither spouse shall give community property without the express or implied consent of the other.

(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.

(4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.

(5) Neither spouse shall create a security interest other than a purchase money security interest as defined in RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances unless the other spouse joins in executing the security agreement or bill of sale, if any.

(6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: Provided, That where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.

relationship exist before there can be community property,\textsuperscript{15} or the presumption that property onerously acquired during marriage is community property.\textsuperscript{16} The general thrust of the legislation is to establish equality between the husband and wife in regard to their community property.\textsuperscript{17} This article analyzes the impact of the 1972 amendments on Washington community property law.\textsuperscript{18}

I. CHARACTER AND MEANS OF ACQUISITION

A. "Living Separate and Apart"

Prior to the 1972 amendments, a Washington statute provided that the wife's acquisitions during marriage were her separate property if she was living separate and apart from her husband at the time of acquisition.\textsuperscript{19} There was no comparable provision for the husband, although approximately the same result was achieved through the \textit{Togliatti v. Robertson}\textsuperscript{20} line of cases. The 1972 amendments adopted the \textit{Togliatti} rationale\textsuperscript{21} by expanding the ambit of the statute to in-

\textsuperscript{15} See, e.g., Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951), and Chase v. Carney, 199 Wash. 99, 90 P.2d 286 (1939).
\textsuperscript{16} Yesler v. Hochstettler, 4 Wash. 349, 30 P. 398 (1892).
\textsuperscript{18} This article does not purport to be an exhaustive exposition of Washington community property law. However, such an article is scheduled to appear in this law review later this year, and will be authored by Professor Cross and Harvey Chamberlin.
\textsuperscript{20} In Togliatti v. Robertson, 29 Wn. 2d. 844, 190 P.2d 575 (1948), the court held that the husband's acquisition, long after he and his wife had permanently separated, was his separate property. Later cases in which the court followed \textit{Togliatti} include \textit{In re Armstrong's Estate}, 33 Wn. 2d 118, 204 P.2d 500 (1949); Estate of Osicka, 1 Wn. App. 277, 461 P.2d 585 (1969).
\textsuperscript{21} A "defunct marriage" presented the factual pattern for the application of the \textit{Togliatti} rule, according to the explanations of later cases. See, e.g., Estate of Osicka, 1 Wn. App. 277, 461 P.2d 585 (1969). It seems probable that this standard is really nothing more than "permanent separation" and that the amendment thus is merely codification of the \textit{Togliatti} rule. For a discussion of the \textit{Togliatti} rule, see Cross, \textit{The Community Property Law in Washington}, 15 La. L. Rev. 640, 656-57 (1955) [hereinafter cited as Cross, La. L. Rev.].
clude the acquisitions of the husband when living "separate and apart."22

The phrase "living separate and apart" is not defined in the statute. Decisions of other jurisdictions indicate that the bare fact that the spouses are living in different places does not constitute "living separate and apart" absent marital rift and an intent to separate permanently. In an early case, Tobin v. Galvin,23 the California Supreme Court declared:24

A temporary absence of the wife from her husband does not come within the meaning of the [living Separate and Apart] Act. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final.

In Makeig v. United Security Bank and Trust Co.,25 the California Court of Appeals said:26

Living separate and apart... does not apply to a case where a man and wife are residing temporarily in different places due to economic or social reasons, but applies to a condition where the spouses have come to a parting of the ways and have no present intention of resuming the marital relations and taking up life together under the same roof.

In Makeig, the spouses, although married for 14½ years, lived together for only six weeks immediately after their marriage. The wife spent most of her time in San Francisco as a sales clerk, while the husband lived in various other cities where he worked as a barber. Nevertheless, even though the couple seldom cohabited, they regarded their living apart as only temporary, intending to establish a common home someday. In a more recent case, Kerr v. Kerr,27 the same court held that a husband who, desiring to resume marital relations with his wife, left her for fear of being incarcerated in a state mental hospital

22. See WASH. REV. CODE § 26.16.140 (Supp. 1972): When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each. The earnings and accumulations of minor children shall be the separate property of the spouse who has their custody or, if no custody award has been made, then the separate property of the spouse with whom said children are living.
23. 49 Cal. 34 (1874).
24. Id. at 36-37 (emphasis added).
26. 296 P. at 675 (emphasis added).
27. 182 Cal. App. 2d 12, 5 Cal. Rptr. 630 (1960).
was not "living separate and apart" within the meaning of the statute. In *Succession of Le Jeune* 28 the Louisiana Supreme Court held that spouses were not "living separate and apart" where the husband, suffering from a malady offensive to the wife, lived in a garage located on the leased premises of the wife "and did not at any time occupy [her] sleeping quarters . . . ." 29

The conclusion to be drawn from these and other cases 30 is that "living separate and apart" requires permanent separation involving absence of will to live together as man and wife and a lack of present intention to resume the marital relationship. The cases do not require an intent to dissolve the marriage by divorce, 31 but do require more than a trial separation, since in the latter instance the spouses have not decided whether to resume living together or to separate permanently. The trial separation may be temporary for the purpose of resolving their difficulties so that they can live together in greater harmony.

Although the language of the statute both before and after the amendment is broad enough to permit a separate property acquisition by a deserting spouse, it is possible that the permanent separation or defunct marriage needed to invoke application of the statute requires concurrence of both spouses in the determination to go their separate ways, at least to protect the deserted spouse's claim against the individual acquisitions of the deserter. Such a requirement should not be used to permit the deserter to assert any right in the acquisitions of the other spouse. 32

The status of property acquired after a permanent separation is only one of the issues emanating from the "living separate and apart" situation. Another issue is the question of continuing management of the community property assets, which will be discussed in section II-B, *infra*.

**B. Credit Acquisitions—Generally**

Acquisition of an asset through the extension of credit falls within

28. 221 La. 437, 59 So. 2d 446 (1952).
29. 59 So. 2d at 449.
32. See *DEFUNIAK & VAUGHN* at 110-12.
the general presumption that an asset onerously\textsuperscript{33} acquired is community property. Traditionally, if the husband was the acquirer-debtor, his obligation was enforceable against the community property presumably by reason of his managing power.\textsuperscript{34} There was no presumption that the obligations of the wife bound the community property.\textsuperscript{35} Since the amendments give the wife equal management powers,\textsuperscript{36} henceforth her obligations also should be regarded as presumptively community obligations.

\section{C. Acquisition of Real Property}

Prior to the amendments, the husband in exercising his management powers could contract to buy real property without the concurrence of his wife.\textsuperscript{37} Under the basic presumption, the acquired asset would be community property and the obligation to pay would be a community liability. Also it is probable that the husband acting alone could have acquired encumbered real property even though it became encumbered simultaneously with the acquisition,\textsuperscript{38} but he could not encumber or convey real property after acquisition without the wife's participation.\textsuperscript{39} The restriction on conveying and encumbering community real property is continued under paragraph (3) of the new statute. The new paragraph (4) requiring joint action in acquisition will preclude acquisition of realty by one spouse whether or not simultaneously encumbered.\textsuperscript{40} The earlier law permitted an effective encumbrance or transfer of community real property if the wife "par-

\textsuperscript{33} A property right or asset is "onerous" when "the obligations attaching to it counter-balance or exceed the advantage to be derived from it . . . ." \textsc{Black's Law Dictionary} 1241 (rev. 4th ed. 1968). Thus, acquisition by purchase is onerous, while acquisition by gift is not.

\textsuperscript{34} \textsc{Malotte v. Gorton}, 75 Wn. 2d 306, 450 P.2d 820 (1969); \textsc{Bryant v. Stetson & Post Mill Co.}, 13 Wash. 692, 43 P. 931 (1896).

\textsuperscript{35} \textsc{Cross}, \textsc{La. L. Rev.} at 650.

\textsuperscript{36} \textit{See} note 14 \textit{supra}.

\textsuperscript{37} \textsc{Baker v. Murrey}, 78 Wash. 241, 138 P. 890 (1914).

\textsuperscript{38} In \textsc{Morgan v. Firestone Tire & Rubber Co.}, 68 Idaho 506, 201 P.2d 976 (1948), the court held that the husband, as manager and agent of the community, could acquire real property which is subject to liens, reservations and exception. The court said that it was only \textit{after} acquisition, that the wife must join in the execution of a lien or reservation against community real property.

\textsuperscript{39} \textsc{Wash. Rev. Code} § 26.16.040 (1959).

\textsuperscript{40} \textit{See} \textsc{Wash. Rev. Code} § 26.16.030(3), (4) (Supp. 1972), \textit{supra} note 14.
The concept of "participation" was broadly applied to include the elements of authorization, ratification and estoppel. In addition, the Washington Supreme Court held that the joinder requirement was for the protection of the wife and could not be asserted by the purchaser to nullify his obligation without first giving the wife an opportunity to affirm the transaction. Under the 1972 amendments, the seller of realty to a spouse should be treated similarly—"participation" by both spouses should be enough to make the transaction binding and the seller should not be able to nullify the community real property purchase without first giving the "other" spouse an opportunity to affirm.

If both spouses do not "join" or "participate" in the transaction, the new law should give the nonjoining spouse power to disaffirm the transaction and recover community funds paid the seller. The purchase transaction, in a community property context, is beyond the power of one spouse acting alone.

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41. In this connection, the Washington Supreme Court has stated:

[I]t is not the rule in this state that a contract for the sale of community real property must be signed by the wife in order to be binding upon her. We have held it enough if the contract, when made by the husband, had the sanction and approval of the wife, or if it was subsequently ratified by her.


42. See In re Horse Heaven Irr. Dist., 19 Wn. 2d 89, 141 P.2d 400 (1943), where the court held that the wife had ratified the contract to sell. See also Stabbert v. Atlas Imperial Diesel Engine Co., 39 Wn. 2d 789, 238 P.2d 1212 (1951); and Colcord v. Leddy, 4 Wash. 791, 31 P. 320 (1892). In another case, Campbell v. Webber, 29 Wn. 2d 516, 188 P.2d 130 (1947), the court held that the wife was estopped to deny a contract to sell community real estate where she had indicated her willingness to abide by her husband's decision and had accepted payments from the purchasers with the knowledge that the payments were intended as purchase payments. But where the wife had no actual knowledge of the transaction, the Washington Supreme Court has refused to find participation.


44. An analogous result was reached in Jarrett v. Arnerich, 44 Wn. 2d 55, 265 P.2d 282 (1954). In Jarrett, the transfer of the community property interest to the contract vendor was beyond the power of the husband acting alone. The court reached this result because the husband was in breach of his fiduciary duty to the community property interest in essentially "giving" the purchaser's interest to the vendor and not necessarily because it was a real property transaction. However, under the old statute the manager-husband could default the installment payment and thereby put the vendor in a position to declare a forfeiture of the purchaser's interest even though the wife disagreed with the decision to default. See Halvorsen v. Pacific County, 22 Wn. 2d 532, 156 P.2d 907, 158 A.L.R. 555 (1945); Converse v. LaBarge, 92 Wash. 282, 158 P. 958 (1916);
Confronted with the new joinder requirement in a community property acquisition, the prospective transferor is potentially in a precarious position. A spouse is always free to engage in a separate property transaction. But after the amendment, if only one spouse enters into a transaction with a vendor of real property, there is nothing that inherently establishes the character of the purchaser's act. Certainly the joinder requirement can preclude a court from presuming the community character of a real property transaction entered into by one spouse, but nevertheless the vendor will be bound by the contract. If there is any applicable presumption, it may be that the acquisition is separate. From the vendor's viewpoint, it will thus be even more important under the new amendments to secure both spouses' signatures (or some form of "participation") to get, practically speaking, a meaningful purchase obligation. However, if the contract recites that the asset acquired is the community property of the purchaser, the vendor ought to be able to rescind the contract if the correlative obligation is denied him. But in the absence of any contract provision indicating the community character of the transaction, the vendor will bear both the risk of the purchaser's improper use of community funds to pay and the risk that the purchaser will be unable to perform the contract with separate funds. In addition, the vendor must await later developments before he is able to solidify his position either as a vendor in an effective transaction or as a vendor with a defaulting purchaser from whom he will need to extricate himself.

It is also possible that the nonparticipating spouse will decide not to upset the transaction to the inconvenience of the vendor despite the improper use of community funds to complete the purchase transaction. At this point there appear to be two possible results as between the spouses: either the transaction could be confirmed as a community property acquisition, or a community lien equal to the amount of the community assets used could be asserted against the separate property acquired. Existing case law does not furnish any clear guide as to whether there is a preferred result or as to whether the nonparticipating spouse has an election.

Thygesen v. Neufelder, 9 Wash. 455, 37 P. 672 (1894). This power is modified by the new statute only to the extent that the wife, as manager, now can use community personal property to prevent the default.

45. For a case which involved rescission under the prior law, see Colcord v. Leddy, 4 Wash. 791, 31 P. 320 (1892).
1972 Community Property Amendments

Probably most real property transactions will be handled as they have been in the past, with both the husband and the wife signing the earnest money agreement and, if the purchasers seek financing, both signing the mortgage or other financing agreement at the insistence of the lender. Since the purchase of a home is probably the most important single transaction most married couples undertake, the joinder requirement is useful in precluding the possibility of two inadvertent, concurrent purchases which otherwise could occur due to the new equal and independent management power of each spouse.

D. Acquisition or Transfer of Business Assets

An amendment to the original bill has produced a significant ambiguity in the new community property statute. R.C.W. § 26.16.030(6)\textsuperscript{46} states that if both spouses participate in the management of a community business, neither spouse can acquire, transfer or encumber the assets (including real estate) or goodwill of the business without the consent of the other. The proviso of the same paragraph states that if only one spouse participates in the management of a community business, that spouse without the other’s consent can acquire, transfer, or encumber the assets (including the real estate) or goodwill of the business when the transaction is in the ordinary course of business. But the statute fails to indicate whether both spouses must consent to such a transaction not in the ordinary course of business if only one spouse participates in the management of the business. By negative inference such a joinder requirement would seem to follow from the proviso of paragraph (6) declaring that joinder is not required if only one spouse participates in the business management and the transaction is in the ordinary course of business. Assuming the drafters intended to require joinder for a transaction not in the ordinary course of business when only one spouse participates in the management of the business, this drafting oversight can be remedied with corrective legislation such as the following:

(6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the goodwill of a business where both spouses participate in its management without the consent of the other.

Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the goodwill of a business where only one of the spouses participates in its management without the consent of the other: Provided, that where only one spouse participates in such management the participating spouse may, in the ordinary course of business, acquire, purchase, sell, convey, or encumber the assets, including real estate, or the goodwill of the business without the consent of the nonparticipating spouse.

"Participation," "consent," and "in the ordinary course of business," as used in R.C.W. § 26.16.030(6), will be difficult to define and probably will cause a great deal of litigation. Particularly confusing is the relationship between the term "participate in [the community business] management" and the concept of "participation" as a substitute for the statutory joinder requirement in transactions involving the transfer of community real property. The confusion is due to the fact that "participation" as a substitute for joinder is essentially equivalent to tacit consent to the particular transaction. In the context of the business management provision, "participation" refers to the general management of the business, whereas the term "consent" is used in referring to particular transactions within the general conduct of the business. Thus "participation," as related to the joinder requirement, should satisfy only the consent requirement of R.C.W. § 26.16.030(6) and not the requirement of "participation."

The purpose of requiring "participation" in transactions involving community real estate is to protect the nonacting spouse (and thus the community) from imprudent and arbitrary decisions involving major assets of the community. Similarly, the purpose of requiring consent in transactions involving the community business is to protect the nonacting spouse (and thus the community) from imprudent and arbitrary decisions involving "blue chip" community assets. In both situations the assets involved probably comprise the foundation of the community financial structure. Since the requirement of "participation" in real property transactions can be met by ratification, estoppel or authorization, it certainly follows that the "consent" requirement of


538
R.C.W. § 26.16.030(6) should be satisfied if the nonacting spouse authorizes or ratifies the transactions or is estopped to disaffirm the contract.

Requiring the consent of both spouses in community business transactions predominates in the new paragraph (6), reflecting a policy judgment that community business transactions should be subject to joint consent. It is at this point that the word "participate," as used in R.C.W. § 26.16.030(6), becomes significant. If both spouses “participate” in the community business, both must consent to all transactions in the ordinary course of business. But what kind of activity constitutes “participation”? If the purpose of the requirement of joint action in the community business operation is to protect both spouses, it may be that only minimal involvement in the operation of the business is enough to require that both consent even to transactions within the ordinary course of business. For example, keeping the books of the business may constitute sufficient minimal involvement.

At first glance it may appear that the spouse who principally manages the business will be under an undue burden if he or she is required to secure the consent of the other spouse for each transaction in the ordinary course of business. However, consent may be either express or implied. Thus, as a practical matter, the spouse who is only minimally involved in the operation of the business probably will be found to have impliedly consented to the other’s actions. The concepts of authorization, ratification and estoppel must be applicable if this section is to be at all workable. Otherwise, if “participation in management” is interpreted to require only minimal involvement, the consent requirement will impose a severe burden on the conduct of any community business. Must the purchaser in a Mom and Pop grocery store buy his groceries from both spouses for his purchase to be valid? Similarly, does the milk distributor dare deliver his products to Mom and Pop without both spouses signing the purchase order? The headache that would fall on both retail purchasers and wholesalers is apparent.

This analysis of the “participation” and “consent” requirements

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48. Consent of both spouses, express or implied, is required by the statute for all non-ordinary business transactions and for ordinary course of business transactions when the business is managed by both spouses. See WASH. REV. CODE § 26.16.030(6) (Supp. 1972), supra note 14.
provides protection for both spouses in transactions involving the major community assets. By finding that "participation" is satisfied by minimal involvement, the analysis requires that some form of dual consent be given to most community business transactions. At the same time, the analysis permits one spouse to carry on the business in the ordinary course even though both spouses participate in its management by calling for judicial adoption of an implied consent theory.

Whether a particular transaction is "in the ordinary course of business" will be a difficult issue to resolve. Perhaps the experience of the phrase "ordinary course of business" in the commercial law will provide some guidance. Depending on the interpretation given the phrase, many pre-amendment cases may be of limited precedential value. For example, in Fields v. Andrus the Washington Supreme Court held that the husband, as manager of the community property, could bring a new partner into the community business. Is bringing a new partner into a business in the ordinary course of such business? The answer is unclear. The ordinary course of business exception reflects a policy judgment that if only one spouse participates in the operation of the business, then it is his or her business acumen that should govern the ordinary operation of the business. Adequate protection is afforded the nonparticipating spouse by requiring his or her

49. See Uniform Commercial Code § 6-102(1). A general definition of "ordinary course of business" is:

The transaction of business according to the usages and customs of the commercial world generally or... (in some cases) of the particular individual whose acts are under consideration.


Rison, an early bankruptcy case, focused the meaning of "ordinary course of business" in the bankruptcy context on what was customary business to the particular person under scrutiny, not to the community at large:

In determining whether a given transaction is made in the ordinary course of business of a party, the question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation.

20 Fed. Cas. at 839. More recent cases tend to define the phrase in terms of specifics based on the particular factual situation at hand. See, e.g., Coryell v. Bluett, 251 Wis. 458, 29 N.W.2d 741 (1947), and Ostlind v. Ostlind Valve, 178 Ore. 161, 165 P.2d 779 (1946). These later cases indicate that the Rison court's emphasis on the specific practice of the individual or business involved, rather than the local commercial setting viewed as a whole, still captures the essence of what is meant by "in the ordinary course of business." It is likely that courts will give consideration to both elements before making a decision.

50. 20 Wn. 2d 452, 148 P.2d 313 (1944).
consent in all transactions which are not in the ordinary course of business.\textsuperscript{51}

Two final points need be made with reference to the community business section. First, although the section does not explicitly address itself to the purchase of a community business, it does state, in part, "Neither spouse shall acquire, purchase \ldots the assets, including real estate, and goodwill of the business without the consent of the other \ldots\."\textsuperscript{52} This language along with the policy of protecting the community "blue chip" assets suggests that both spouses always will need to consent to an acquisition of a community business. Second, the proviso to this section expressly states that a spouse who solely manages a community business may, in the ordinary course of business, acquire and convey real estate, thereby creating an exception to the general real property joinder requirement of paragraphs (3) and (4).\textsuperscript{53}

II. MANAGEMENT AND DISPOSITION OF COMMUNITY PROPERTY

A. In General

The 1972 amendments confer upon the wife managing power equal to that previously held by the husband alone. While the previous rule had been that the husband had to act for the best interests of the community in a business sense,\textsuperscript{54} the rule that the manager must act "for the community and in the community interest" now applies to both husband and wife.\textsuperscript{55} This precludes either spouse from making effective gifts of the community personal property without the consent of the other.\textsuperscript{56}

Prior to 1972, good faith rather than good judgment was the test of whether the husband was meeting his managerial responsibilities. "[S]o long as he exercises his discretion in the community interest as he

\begin{footnotes}
\footnotetext[51]{For example, a transfer of all the business assets would not be a transfer in the ordinary course of business.}
\footnotetext[52]{\textsc{Wash. Rev. Code} \S 26.16.030(6) (Supp. 1972), \textit{supra} note 14.}
\footnotetext[53]{\textsc{Wash. Rev. Code} \S 26.16.030(3) and (4) (Supp. 1972), \textit{supra} note 14.}
\footnotetext[54]{Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933).}
\footnotetext[55]{Hanley v. Most, 9 Wn. 2d 429, 461, 115 P.2d 933, 946 (1941) (emphasis added). \textit{See also} Jarrett v. Arnerich, 44 Wn. 2d 55, 265 P.2d 282 (1954).}
\footnotetext[56]{Prior to the 1972 amendments, this was a limitation placed on the husband by case law. \textit{See} Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933).}
\end{footnotes}
sees it, the wife is without power to frustrate his acts." This rule stemmed from the husband's sweeping power as statutory manager. Since the wife had no managing power, she obviously could not frustrate her husband's community management decisions unless she could show bad faith. Now that the wife has equal managing power the question arises whether good judgment rather than good faith is the standard by which management decisions are to be judged. Does the wife's newly acquired managing power confer upon her greater standing to object to her husband's management decisions and vice versa? It should not. If the answer were otherwise, courts would be asked to choose between alternative business decisions and thus would undertake to decide what is in the best interests of the community. This is impractical and undesirable. Absent some evidence of bad faith, a dispute over what is best for the community is nothing more than an internal disagreement between husband and wife. A contrary

Under the new law, this limitation is placed expressly on both spouses. See Wash. Rev. Code § 26.16.030(2) (Supp. 1972), which states: "Neither spouse shall give community property without the express or implied consent of the other."

A recurring related problem concerns the rights of the community or one of the spouses when the separate property of one of the spouses is improved or encumbrances thereon are paid off with community funds or the separate funds of the other spouse. There was some undercurrent in the cases that if the husband was the actor, a gift may be assumed, whereas if the wife was the actor, an equitable lien attached to protect her contribution. See In re Hickman's Estate, 41 Wn. 2d 519, 250 P.2d 524 (1952); In re Hart, 149 Wash. 600, 271 P. 886 (1928); Legg v. Legg, 34 Wash. 132, 75 P. 130 (1904). It would appear that with the wife's new management power a gift will be presumed when she uses either her separate funds or community funds to improve the husband's separate property. Where community funds are used, what appears to be involved is a joint consent to make a gift of the community funds. Policy considerations support such a presumption because the husband will be assumed to consent to a transaction benefiting himself. However, if there is in fact no intent to confer a gift, a community lien will attach. See Hickman's Estate, supra. On the other hand, when either spouse uses community funds to improve his or her separate property, an equitable lien running in favor of the community should attach. In this instance the facts do not raise prima facie an assumption that the other spouse consents to making a gift of the community funds. To remove the equitable lien, there must be a demonstration that the other spouse consented to make a gift.

In one case, Johnson v. DarDenne, 161 Wash. 496, 296 P. 1105 (1931), the court declared that the husband's purchase with community funds of articles of personal adornment particularly suitable for use by the wife would be found, on slight evidence, to be a gift. The new statute should make this rule reciprocal so that now either spouse will on slight evidence be found to have made a gift of community funds when he (or she) purchases an article of personal adornment with community funds which will be worn primarily by the other spouse. The rule now might be that an assumption of gift attaches because the benefitted spouse may be assumed to consent to a transaction that benefits himself (or herself).

57. Cross, La. L. Rev. at 642.
1972 Community Property Amendments

conclusion would be inconsistent with the traditional community property concept that only a few important transactions should require participation by both spouses. As a practical matter, if either spouse could contest the judgment of the other, joint participation by the spouses always would be necessary before a third party could safely transact business with the community.

B. Separated Spouses

In *Dizard & Getty v. Damson* the Washington Supreme Court held that the husband's power to manage the community property continued after he was separated permanently from his wife and until their divorce was final. Community liability for the husband's acts was held to extend to the community property awarded the wife by the divorce decree. In *Dizard*, counsel for the wife did not urge the court to restrict the husband's management power to that which was necessary under the circumstances of the separation. The scope of the husband's management power after a separation is still undefined. The wife's new management power under the 1972 amendments makes this inquiry even more complex. It is suggested that both spouses' power to manage community personal property during a period of "living separate and apart" should not be as plenary as during the existence of the community relationship.

Of course, any restrictions on the spouses' management powers should be defined by necessity and applied to protect the interests of the spouses and third parties. There is nothing in the "living separate and apart" situation to necessitate altering the requirement of joinder in transactions involving the transfer of community household goods or community real estate. However, there is a need to restrict a spouse from vindictively selling community personal property which is obviously a personal item (e.g., woodcutting equipment or knitting supplies) of the other spouse. Balanced against the need to protect estranged spouses from vindictive mates is the policy of protecting bona fide purchasers. To say the least, it is unreasonable to force an innocent purchaser to bear the loss when estranged spouses behave maliciously. A purchaser should be forced to bear the loss of a wrongful

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sale only when he can be charged fairly with notice that the selling spouse may be abusing his authority. Where the purchaser has no knowledge of the separation and has no reason to suspect marital problems, notice should not be imputed to him. If the purchaser is aware of the separation but the articles involved do not create a reasonable suspicion that they have been used primarily by the nonselling spouse, notice again should not be imputed to the purchaser. In this instance, the duty of the nonselling spouse to protect his interest in the property is greater than the duty of the purchaser to inquire into the authority of the spouse making the sale. However, where the purchaser knows of the separation and the articles for sale create a reasonable suspicion that they were used primarily by the nonselling spouse, e.g., a husband selling knitting equipment or a wife selling woodcutting tools, then it seems fair to impose upon the purchaser a duty to inquire into the seller's authority to make the sale and to make the purchaser bear the loss if he fails to do so. This conclusion is suggested by the Dizard court's statement that the purchaser cannot arbitrarily assume that the selling spouse's authority to sell exists.  

C. Emergency Power

Prior to achieving her new status as a co-manager of the marital community, the wife had an inherent "emergency power" to act for the community. Emergencies were found during "a serious absence of the husband" and where "the husband had been reduced to a tragic specimen, totally incompetent to conduct the affairs of the marital community." Even with both spouses now acting as equal managers, the need for an inherent emergency power in these types of situations continues. Therefore, where the law requires joint action by both spouses, an "inherent [emergency] power to act on behalf of the community" should exist in either spouse when the other has become incompetent, has deserted, or for any other reason has been absent for a prolonged period of time without communication.

60. Id. at 531, 387 P.2d at 967.
63. Id. at 662, 484 P.2d at 440.
D. Litigation

As part of the thrust for equality between husband and wife, the legislature changed the law to permit management of community litigation by either the husband or the wife.\(^{64}\) Previously only the husband could bring an action on behalf of the community, and the husband was the only necessary party in any litigation involving community personal property interests. Under the new law, in actions for personal injuries to a spouse or in actions for compensation for services rendered, the injured spouse or the spouse who rendered the services is a necessary party. Where community rights in personal property are involved, either spouse can bring suit on behalf of the community even though the other spouse objects.\(^{65}\) The fact that the wife can now bring suit over the objection of her husband is a major change in Washington law.

R.C.W. § 26.16.030(5)\(^{66}\) provides that neither spouse can create a security interest (other than a purchase money security interest) in or sell household goods, furnishings or appliances without the other spouse's joining in the transaction. This provision is similar to the old and amended provisions regarding transfers of community real property. In actions involving community real property both spouses are necessary parties.\(^{67}\) The Washington Supreme Court so held because the power to maintain such an action included the power to compromise and "the effect of that compromise might be to effectually dispossess the community of the land, or, at least to seriously encumber it."\(^{68}\) This reasoning now should be equally applicable to the designated personal property, making both spouses necessary parties in actions involving community household goods, furnishings and appliances.

\(^{64}\) WASH. REV. CODE § 4.08.030 (Supp. 1972):
Either husband or wife may sue on behalf of the community: Provided, That
(1) When the action is for personal injuries, the spouse having sustained personal injuries is a necessary party;
(2) When the action is for compensation for services rendered, the spouse having rendered the services is a necessary party.

\(^{65}\) This is not true, of course, where the personal property involved is a household good, appliance or furnishing or where the suit is brought because of an injury received or a service performed and the spouse receiving the injury or performing the service chooses not to bring the suit.

\(^{66}\) See note 14 supra.

\(^{67}\) Lownsdale v. Gray's Harbor Boom Co., 21 Wash. 542, 58 P. 663 (1899).

\(^{68}\) Id. at 544, 58 P. at 644.
Previously a judgment entered in an action against the husband presumptively was a community obligation, apparently on the theory that the cause of action probably arose out of an exercise of his managing power. Thus, it was not necessary to join both spouses in actions not involving real property claims. Under the amendments the reasoning is equally applicable to the wife's obligatory acts except where joint action of both spouses is required. The community interests of the spouse not named in a suit will be protected through a right to intervene under R.C.W. § 4.08.040. Prior to the 1972 act, this provision applied only to the wife—the husband had to be named in any suit involving the community. The provision was interpreted to mean that the wife could intervene only where her separate property interests might be prejudiced by the suit. With her newly conferred capacity to represent the community in litigation, it is preferable to conclude that this provision will be read to permit the wife (or the husband) to intervene in a lawsuit involving community assets to protect her (or his) interest in those assets. This interpretation will enable either spouse to protect against an adverse community consequence when the other spouse, for whatever reason, chooses not to do so.

Since all judgments obtained against either spouse are only presumptively community obligations, it is to a plaintiff's advantage to join both spouses in the suit and secure a determination of the community character of the obligation in the original action. If both spouses are not joined and the non-named spouse does not intervene, that spouse may resist a levy upon community property by the successful plaintiff and, at that time, litigate the question of community liability vel non. This has been the law; there is nothing to indicate a different rule with the 1972 amendments.

70. The relevant language in that section reads: "[E]ach spouse may defend in all cases in which he or she is interested, whether that spouse is sued with the other spouse or not." WASH. REV. CODE § 4.08.040 (Supp. 1972).
72. See Merritt v. Newkirk, 155 Wash. 517, 285 P. 442 (1930); Brotton v. Langert, 1 Wash. 73, 23 P. 688 (1890).
E. Conveyance or Encumbrance of Community Household Goods

The 1972 amendments continue the requirement that both spouses join in the execution of a conveyance or encumbrance of community real property. A similar requirement of joinder is placed on the sale or encumbrance of certain types of community personal property: household goods, furnishings and appliances. However, this provision does not prevent one spouse from acquiring an equity in household goods, furnishings and appliances by creating a security interest in the seller.

The requirement of joinder in the sale or encumbrance of household goods, furnishings or appliances provides equality, and although the requirement provides a new protection, "equality... [is] more important than protection." The language of R.C.W. § 26.16.030(5) seems to suggest that a sale or encumbrance of the specified types of community personal property can be accomplished only by a writing. However, several considerations militate against such a conclusion. First, the statutory language is, "unless the other spouse joins in executing the security agreement of bill of sale, if any," and the general proscription of the statute is that "neither spouse shall create a security interest... in, or sell... unless the other spouse

74. Wash. Rev. Code § 26.16.030(5) (Supp. 1972), supra note 14. The joint action necessary to transfer some personal property might expand the area in which the conflict between the immunity of community property for separate obligations and the antenuptial alimony or support obligation can arise. The distinction between the result in Fisch v. Marler, 1 Wn. 2d 698, 97 P.2d 147 (1939), permitting, and that in Stafford v. Stafford, 10 Wn. 2d 649, 117 P.2d 753 (1941), not permitting enforcement of the antenuptial claim against community property could now also apply to household goods, furnishings and appliances. The possibility is only noted here.
75. Wash. Rev. Code § 26.16.030(5) (Supp. 1972) provides that "[n]either spouse shall create a security interest, other than a purchase money security interest..." (emphasis added). This has previously been the rule regarding the acquisition of community real property by the husband. See Baker v. Murrey, 78 Wash. 241, 138 P. 890 (1914). Contrast the change in the rule for acquisition of community real property, discussed in the text accompanying note 37 supra.

There is a rather interesting possibility under Wash. Rev. Code § 26.16.030(5) (Supp. 1972) that either spouse could contract to buy a new piano, but neither (alone) could trade in the old piano on the purchase price (assuming of course that a piano is a household good or furnishing). Hence the spouses could end up with two pianos, both community property.
joins . . . ." Second, the thrust of the amendments is for equality between the spouses rather than general substantive change. Third, the language of this paragraph does not preclude permitting joint action to be achieved through "participation" of one or both rather than signing. A comparison of the language of R.C.W. § 26.16.030(5) with that in the earlier R.C.W. § 26.16.040 strongly suggests that such a construction was contemplated.\textsuperscript{78} Such a construction certainly would not conflict with the section's apparent "protection" purpose, as "participation" requires a knowing acquiescence in the moving spouse's acts.\textsuperscript{79}

Probably the most litigated question under R.C.W. § 26.16.030(5), if not under the whole community property statute, will be whether a particular item of community personal property is a household good, appliance or furnishing. This is not the place to annotate the cases holding what is or is not a household good,\textsuperscript{80} but as a general rule a household good, appliance or furnishing "includes every article of a permanent nature that [is] used or purchased or otherwise acquired . . . for . . . use in and about the house, excluding articles of consumption."\textsuperscript{81}

\textbf{F. Involuntary Disposition}

\textit{I. Contract}

Prior to the adoption of the 1972 amendment, liability for contracts of the husband could extend to community property, but not to the separate property of the wife.\textsuperscript{82} However, the husband was not afforded the same protection. If the wife incurred separate and com-

\textsuperscript{78} The language of the earlier section 26.16.040 provided that "the wife [must] join with him [husband] in executing the deed or other instrument of conveyance . . . ." The language in section 26.16.030(5) is almost identical. It provides that "the other spouse [must] join in executing the security agreement or bill of sale . . . ."

\textsuperscript{79} See note 42 and accompanying text supra.

\textsuperscript{80} A compilation of the cases can be found under the term "Household Goods" in 19A WORDS AND PHRASES 510-15 (1970).

\textsuperscript{81} \textit{In re Mitchell's Will}, 38 N.Y.S.2d 673, 674 (Sur. Ct. 1942).

community liability, there is authority⁸³ that the husband would also be separately liable. The basis of this liability has never been clear,⁸⁴ but it seems to rest on the husband's capacity as community manager. No other explanation accounts for the husband's being separately liable for the wife's obligations, while the wife is free of separate liability for the husband's obligations. Since the wife now has an equal managing power, the rule surely has been changed in one of two ways. Either each spouse will be separately liable when the other incurs an obligation which is separate and community in character, or neither spouse will be separately liable for the acts of the other. The correct conclusion depends on the effect of the new amendments on the theories underlying the husband's previous separate liability.

Two theories supported the husband's potential liability for the acts of his wife. First it could be argued that since the husband was the sole manager of community affairs, the wife could obligate community property only as an agent for her husband. Thus, if the agent's (wife's) conduct incurred liability for her and the community property, it followed that the principal (husband) should be separately liable as well. Second, it could be argued that the husband, as the sole manager, had an affirmative duty to control imposition of liability on the community property. Where this duty was breached and the community liability was incurred through a benefit received, the manager (husband) also should be separately liable.

Regardless of which rationale is approved, the basis for the husband's separate liability vanishes under the new law. Since the wife is now an equal manager of the community affairs, she no longer must be her husband's agent in order to act on behalf of the community. Similarly, since the husband is no longer the sole manager, his affirmative duty to control the acts of his wife disappears.

Conferring equal managing power upon the wife does not seem to confer upon her a corresponding separate liability for the separate and community liability incurred by her husband. Rather than extending the rationale for the husband's earlier separate liability, the new statute seems to eliminate it altogether. Thus, under the new statute,

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each spouse should be liable separately for his own acts which produce community liability, but neither spouse should be liable separately for the acts of the other which produce separate and community liability. If this analysis is correct, this will probably be the most significant substantive change in the liability of husbands and wives.

2. **Tort**

The Washington Supreme Court in *Werker v. Knox*\(^{85}\) noted that:\(^{86}\)

> [T]he trend of the law has not been toward relieving the community from liability for the torts of its members, but has been quite definitely in the direction of finding ways and means of imposing such liabilities upon the community.

While strictly speaking there has been no presumption that a tort committed by the husband is for the benefit of the community, as a practical matter the husband’s managing power has been extensive enough to enable the court to impose community liability by finding that some accrued community benefit or community purpose was involved.\(^{87}\) Prior to enactment of the 1972 amendments, it was more difficult to impose community liability when the wife was the acting spouse. Community liability for her acts was predicated upon the family expense statute,\(^{88}\) the “family car doctrine,”\(^{89}\) or an agency between the husband and wife. With the wife attaining the status of equal manager, the same tests should be applied to the wife’s tortious conduct as previously applied to the husband’s. Thus, community liability may be found when: (1) either spouse acts for the benefit of the community or (2) the act is one within the course of community business or activity.\(^{90}\)

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\(^{85}\) 197 Wash. 453, 85 P.2d 1041 (1938).

\(^{86}\) *Id.* at 456, 85 P.2d at 1042.

\(^{87}\) *See*, e.g., LaFramboise v. Schmidt, 42 Wn. 2d 198, 254 P.2d 485 (1953); McHenry v. Short, 29 Wn. 2d 263, 186 P.2d 900 (1947).

\(^{88}\) *See* *Werker v. Knox*, 197 Wash. 453, 85 P. 1041 (1938).

\(^{89}\) Perren v. Press, 196 Wash. 14, 81 P.2d 867 (1938).

III. RETROACTIVE OR PROSPECTIVE APPLICATION?

A final question concerns whether and to what extent the 1972 amendments will be applied retroactively. Specifically, can a wife exercise her newly acquired management power over community assets acquired before the effective date of the amendments? Except for a highly criticized line of California case authority the question could be answered unequivocally in the affirmative.

The validity of the California doctrine against retroactive application of amendments has been questioned by legal scholars both on and off the California bench.91 The doctrine originated in an 1897 case, *Spreckels v. Spreckels*,92 which involved an 1891 statute prohibiting a gift of community property by the husband without the wife’s consent. Before the 1891 statute, the husband’s power to convey community assets was not limited by any rights of the wife; his power over the community property was equal to that over his separate property. In *Spreckels* the court held that the statute could not operate constitutionally as to property acquired before the passage of the statute, reasoning that the wife had a “mere expectancy” in the community property and that the husband’s plenary control over community assets was a vested property right which could not be impaired by the statute.

The Washington Supreme Court never has approved the premises underlying the California doctrine. Rather, the Washington Supreme Court has long held that the wife has a vested interest and not a “mere expectancy” in the community property.93 In addition, Washington case law established long ago that the husband’s community management power is a “mere trust conferred upon him as a member and head of the community in trust for the community, and not a proprie-

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92. 116 Cal. 339, 48 P. 228 (1897).
In *Mabie v. Whittaker* the Washington Supreme Court held that a 1871 statute requiring joinder to convey community realty was effective as to community realty acquired earlier when such joinder was not required. The court concluded: "It [the 1871 act] did not make the interest of either spouse greater or less."

In *Arnett v. Reade* the United States Supreme Court ruled on the constitutional limitations of a New Mexico statute similar to that involved in *Mabie*. The New Mexico Supreme Court had held that the new statute could not apply constitutionally to real property acquired before its enactment because such application would impair vested property rights in violation of the due process clause. The United States Supreme Court reversed. Similarly, in *Warburton v. White* the United States Supreme Court affirmed a Washington Supreme Court decision holding that a statute giving each spouse testamentary power over one half of the community property could be applied retroactively, reasoning that the husband's management power was not a property right but rather stemmed from his capacity as "agent of the community."

Nothing in Washington or federal law should prohibit application of the 1972 amendments to property acquired before the effective

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94. Holyoke v. Jackson, 3 Wn. Ter. 235, 239, 3 P. 841, 842 (1882). In *Holyoke* the husband sought to convey community real estate without his wife's joinder. Under the 1873 act he could convey without her joinder, but an 1879 act restricted his power of disposition by requiring joinder of the wife in conveyances of community real property. The property involved was purchased before enactment of the 1879 act but the attempt to convey was made after its passage. The husband argued that he had vested rights under the laws of 1873 which could not be divested by the 1879 act. The court rejected the argument.

The idea that the community management power is a "trust" and not a vested property right is more consistent with the concept of community property. Briefly, the community property system is based on the principle that all acquisitions during marriage are the fruits of the joint efforts and contributions of both spouses and thus should belong to them jointly. This means that the spouses share equally, and one spouse should not acquire a greater property interest in the community treasury than the other. Thus, the management power which previously was located in only one spouse constituted a trusteeship and not an additional share in the community treasury. As one author concludes, "Equality is the cardinal precept of the community property system." Vaughn, *The Policy of Community Property and Inter-Spouse Transactions*, 19 Baylor L. Rev. 20, 26-27 (1967). See generally Defuniak & Vaughn at 23-28.

95. 10 Wash. 656, 39 P. 172 (1895).
96. *Id.* at 658, 39 P. at 174.
97. 220 U.S. 311 (1911).
98. 18 Wash. 511, 52 P. 233 (1898), aff'd, 176 U.S. 484 (1900).
99. *Id.* at 494.
1972 Community Property Amendments

date of the new law. However, this does not mean that the effectiveness of all transactions consummated before the 1972 amendments is to be measured by the new rules. Earlier transactions may have created vested property rights (in third persons ordinarily) which constitutionally cannot be disturbed.

While the substantive rights of pre-amendment transactions will have to be measured by the earlier law, litigation arising hereafter will be controlled by those procedural changes of the new law. For instance, the wife should be able to enforce community rights and where now required both spouses should be joined to defend the community interests. There is no reason to restrict the immediate effectiveness of the procedural changes, for these changes do not interfere with substantive rights but merely alter the procedural rules by which such rights can be enforced. How the spouses enforce or defend their rights is essentially immaterial to third parties.¹⁰⁰

¹⁰⁰ Conversely, where joinder of the spouses is required by the new law, e.g., litigation involving household goods, a third party should be able to assert the failure to join necessary parties if both spouses have not been joined. But see Lownsdale v. Gray's Harbor Boom Co., 21 Wash. 542, 58 P. 663 (1899). At odds with Lownsdale is Colcord v. Leddy, 4 Wash. 791, 31 P. 320 (1892), where the court stated that since joinder requirements are for the protection of the nonacting spouse, a third person cannot disaffirm a contract for failure to join both spouses without first requesting proper execution of the contract. Arguably, Lownsdale can be distinguished from Colcord on the ground that Colcord involved parties to a contract and not parties to a suit. However, substantively the cases contrast with one another. The principle that a third party should not be able to nullify his obligations without first giving the spouses an opportunity to meet the requirements of the statute, where the statute is designed for their protection and not his, is as applicable to litigation procedures as to contract rights.