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## Community Property—Washington Allows Separate Tort Recovery from Community Property—*deElche v. Jacobsen*, 95 Wn. 2d 237, 622 P.2d 835 (1980)

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COMMUNITY PROPERTY—WASHINGTON ALLOWS SEPARATE TORT RECOVERY FROM COMMUNITY PROPERTY—*deElche v. Jacobsen*, 95 Wn. 2d 237, 622 P.2d 835 (1980).

Historically, community property was exempt in Washington from satisfying judgments arising from separate torts. Separate torts are those that do not arise from management of community property or do not provide any benefit to the community.<sup>1</sup> Since 1917<sup>2</sup> victims of separate torts had no means of satisfying judgments against solvent, married tortfeasors unless sufficient separate property was available.<sup>3</sup> In 1980 the Washington Supreme Court, in *deElche v. Jacobsen*,<sup>4</sup> reconsidered the justification for the exemption, and concluded that community property should be available to satisfy separate tort judgments.

Plaintiff *deElche* was awarded damages in a civil action for rape. Because the trial court determined the tort was separate,<sup>5</sup> recovery was allowed from defendant's separate property only.<sup>6</sup> The *Jacobsons* had executed a valid community property agreement converting all of their separate property into community property, leaving the judgment uncollectible.<sup>7</sup> Reversing a long-standing rule, the Washington Supreme Court

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1. The tortfeasor spouse was separately liable for his or her tort, whether separate or community, but the availability of community property to satisfy a judgment depended on whether the tortious act was committed in the course of managing community property or was committed for the benefit of the community. Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 834 (1974). See Pruzan, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948); part I.A. *infra*.

2. In 1917 the Washington Supreme Court rejected the proposition that community personal property should be available for a judgment on a husband's separate tort and overruled prior decisions allowing recovery from community personal property for the husband's separate debt. Schramm v. Steele, 97 Wash. 309, 314-18, 166 P. 634, 636-37 (1917). See part I.A. *infra*.

3. Because of the presumption in favor of community ownership, this has frequently meant that no recovery for the victim has been possible. See *Yesler v. Hochstettler*, 4 Wash. 349, 353-54, 30 P. 398, 399 (1892) (assets acquired for consideration during marriage are presumed to be community property, rebuttable only by clear and convincing proof that they were acquired in such a way as to be separate property). See also Cross, *supra* note 1, at 746-47.

4. 95 Wn. 2d 237, 622 P.2d 835 (1980).

5. *Id.* at 238, 622 P.2d at 836.

6. The trial court determined that the tort was separate. On appeal the supreme court did not analyze the issue, although it was presented to the court. See Brief for Appellant at 23, *deElche v. Jacobsen*, 95 Wn. 2d 237, 622 P.2d 835 (1980).

7. By statute, community property agreements shall "not derogate from the right of creditors." WASH. REV. CODE § 26.16.120 (1979). Once an agreement is executed, however, subsequent creditors' rights are the same as if the property had originally been community property. In dissent, Justice Horowitz suggested that an alternative to overruling the separate tort rule would have been to hold that such an agreement did not prevent a separate judgment creditor from levying against property which would be separate except for the agreement. 95 Wn. 2d at 252, 622 P.2d at 844. See Cross, *supra* note 1, at 805. See generally Brachtenbach, *Community Property Agreements: Many Questions, Few Answers*, 37 WASH. L. REV. 469 (1962).

held that if the tortfeasor's separate property is insufficient to satisfy a separate judgment, the tortfeasor's one-half interest in community personal property can be reached.<sup>8</sup> The court further held that if resort to community personal property is necessary, upon dissolution of the community relationship the innocent spouse has a right of reimbursement protected by an equitable lien.<sup>9</sup>

With the *deElche* decision, Washington joined the majority of community property states,<sup>10</sup> but did not address several important questions, which will be the subject of this note. This note begins by reviewing prior case law and the structure of community property ownership in general. An analysis of the majority and dissenting<sup>11</sup> opinions in *deElche* follows. The majority's reasoning and the impact of the decision will then be analyzed. The note concludes that the *deElche* holding is basically sound, but that the lack of clarity in the opinion leaves several community property questions unsettled.

## I. LEGAL BACKGROUND

### A. Tort Liability

Under early Washington law, community personal property could be sold to satisfy the husband's separate contractual debts.<sup>12</sup> The basis for this rule was the husband's absolute management and control of personal property.<sup>13</sup> Real property, on the other hand, was subject to the requirement of joinder or consent by the wife in voluntary transactions and the statutory limitations on subjecting community real estate to community

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8. 95 Wn. 2d at 246, 622 P.2d at 840.

9. *Id.* at 246, 622 P.2d at 840. The non-tortfeasor spouse will hold as separate property the same amount as he or she would have received had the separate tort judgment not been satisfied out of community property. The equitable lien will also protect the remaining community property from subsequent separate judgment creditors attempting to levy on the remaining half of the property. *Id.* at 246-47, 622 P.2d at 840.

10. See, e.g., CAL. CIV. CODE § 5122 (West Supp. 1980); LA. CIV. CODE ANN. arts. 2345, 2364, 2365 (West 1981); N.M. STAT. ANN. § 40-3-10 (1978); TEX. FAM. CODE ANN. tit. 1, § 5.61 (Vernon 1975); *Cirac v. Lander County*, 602 P.2d 1012, 1017 (Nev. 1979). After the *deElche* decision, only Arizona and Idaho provide separate tort victims no access to community property. See *Schilling v. Embree*, 118 Ariz. 236, 575 P.2d 1262, 1265 (1978); *Hansen v. Blevin*, 84 Idaho 49, 367 P.2d 758, 760 (1962) (unnecessary to determine whether community property available to satisfy separate tort judgments, as court ruled the tort to be community in nature).

11. Justice Horowitz dissented. 95 Wn. 2d at 248, 622 P.2d at 841.

12. *Powell v. Pugh*, 13 Wash. 577, 578, 43 P. 879, 879 (1896), *overruled by Schramm v. Steele*, 97 Wash. 309, 318, 166 P. 634, 638 (1917).

13. *Id.*

debts.<sup>14</sup> Real property was thus excluded from satisfying the husband's debts.<sup>15</sup>

The Washington Supreme Court rejected the reasoning that personal property could be used to satisfy the husband's debts in 1917 in *Schramm v. Steele*,<sup>16</sup> a case involving separate tort liability.<sup>17</sup> The court found that the theoretical basis of community liability for the acts of the husband was *respondet superior*,<sup>18</sup> based on the then-prevailing view that the marital community was a distinct legal entity.<sup>19</sup> Under this analysis, the "entity" was the principal to the agent husband, and it owned the property. Because a principal is not liable for acts committed by an agent outside the scope of authority, the court held that community property was reachable only when the husband had acted for the benefit of the "entity."<sup>20</sup> Thus the court held that community property, whether real or personal, was not available for execution on a judgment for a separate obligation arising in tort or contract.<sup>21</sup> Consistent with the "entity" theory of ownership, and the agent/principal relationship of the husband to the community, community property was only available to satisfy a tort judgment if the tort was committed during the course of managing community property<sup>22</sup> or provided some benefit to the community.<sup>23</sup>

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14. See *Brotton v. Langert*, 1 Wash. 73, 79–80, 23 P. 688, 688–89 (1890); WASH. TERR. CODE ch. 183, § 2410 (precluding husband from alienation of community real estate without the joinder of the wife, and providing that community real estate is subject to liens for community debts). Current legislation also precludes unilateral alienation of community real estate, and provides that community real estate is subject to liens for community debts. WASH. REV. CODE §§ 26.16.030(3), .040 (1979).

15. *Brotton v. Langert*, 1 Wash. 73, 79–80, 23 P. 688, 688–89 (1890).

16. 97 Wash. 309, 166 P. 634 (1917).

17. The plaintiff argued that since persons having claims to tort damages had been held to be creditors of the tortfeasor, a separate tort creditor should be able to reach community personal property, as could creditors with contract claims. The *Schramm* court rejected the suggested distinctions both between contractual and tortious liability, and between real and personal property, and held that a separate creditor could not levy against any community property. 97 Wash. at 314–15, 166 P. at 636–37. For an analysis of these distinctions, which may have been revived by *deElche*, see part III *infra*.

18. 97 Wash. at 313–15, 166 P. at 636.

19. See *id.*; *Stockand v. Bartlett*, 4 Wash. 730, 731, 31 P. 24, 24 (1892).

20. The wife incurred liability either, by acting under emergency powers of management, see *Marston v. Rue*, 92 Wash. 129, 133, 159 P. 111, 113 (1916), or by acting as agent in the purchase of daily necessities, see *Werker v. Knox*, 197 Wash. 453, 459–60, 85 P.2d 1041, 1044 (1938). With the advent of equal management in 1972, the analysis for the husband also applies to the wife. See *Cross*, *supra* note 1, at 789.

21. 97 Wash. at 316–17, 166 P. at 636–37.

22. See *Hartman v. Anderson*, 49 Wn. 2d 154, 298 P.2d 1103 (1956) (community held liable for wife's misrepresentation to buyer of boundary lines on property); *McHenry v. Short*, 29 Wn. 2d 263, 186 P.2d 900 (1947) (defendant husband fatally assaulted plaintiff attempting to eject him from community property); *De Phillips v. Neslin*, 139 Wash. 51, 245 P. 749 (1926) (community liable for tortious slander, assault, and malicious prosecution in attempt to recover from plaintiff property allegedly stolen from the community business); *Miller v. Gerry*, 81 Wash. 217, 142 P. 668 (1914) (community liable for fraudulent misrepresentation made by the husband during the sale of commu-

The “entity” view of community ownership was rejected in 1930.<sup>24</sup> Under current law, each spouse owns a presently vested one-half interest in each item of community property.<sup>25</sup> The rejection of the “entity” theory of ownership destroyed the agent/principal analysis,<sup>26</sup> but the *Schramm* rules of community and separate liability remained.

Predictably, case law proliferated on the question whether specific tortious acts should be viewed as community or separate.<sup>27</sup> In 1938 the Washington Supreme Court recognized a trend toward finding ways to make community property available to tort judgment creditors.<sup>28</sup> Consequently, the court broadly interpreted the requirement that a tortious act provide some community benefit to include not only pecuniary benefits,<sup>29</sup> but also community recreation<sup>30</sup> and community purpose.<sup>31</sup>

The result has been that community liability has been found in most cases except those involving purely personal altercations<sup>32</sup> and alienation

nity-owned real estate); *Blais v. Phillips*, 7 Wn. App. 815, 502 P.2d 1245 (1972) (defendant assaulted plaintiff in court parking lot; community liable because the trial concerned community property, and the wife allegedly supported him); *Benson v. Bush*, 3 Wn. App. 277, 477 P.2d 929 (1970) (during dogfight, defendant sprayed plaintiff's dog and plaintiff with chemicals; community liable because altercation part of continuing dispute over community property).

23. For example, acts committed in the course of employment give rise to community liability. *E.g.*, *Brink v. Griffith*, 65 Wn. 2d 253, 396 P.2d 793 (1964); *LaFramboise v. Schmidt*, 42 Wn. 2d 198, 254 P.2d 485 (1947); *McHenry v. Short*, 29 Wn. 2d 263, 186 P.2d 900 (1947); *Jacobson v. Lawrence*, 9 Wn. App. 786, 514 P.2d 1396 (1973).

24. *Bortle v. Osborne*, 155 Wash. 585, 589–90, 285 P. 425, 427 (1930). Originally, the analysis had been that the legislature created a statutory entity. *Schramm v. Steele*, 97 Wash. 309, 315, 166 P. 634, 637 (1917); *Brotton v. Langert*, 1 Wash. 73, 78, 23 P. 688, 688 (1890). The *Bortle* court rejected this, holding that the statutory scheme merely classified the character of the property. 155 Wash. at 589, 285 P. at 427.

25. *deElche v. Jacobsen*, 95 Wn. 2d 237, 243–44, 622 P.2d 835, 838–39 (1980); *In re Estate of Patton*, 6 Wn. App. 464, 471–76, 494 P.2d 238, 242–45, *appeal denied*, 80 Wn. 2d 1009 (1972). *See also* *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1972); *In re Towey's Estate*, 22 Wn. 2d 212, 214, 155 P.2d 273, 275 (1945).

26. *See* *Cross*, *supra* note 1, at 835.

27. *See* notes 22 & 23 *supra* (examples of cases).

28. *Werker v. Knox*, 197 Wash. 453, 456, 85 P.2d 1041, 1042 (1938).

29. Torts committed during the course of employment are an example. *See* cases cited in note 23 *supra*.

30. The reasoning is that legitimate recreational activities promote the general welfare of the community. *E.g.*, *Moffitt v. Krueger*, 11 Wn. 2d 658, 661, 120 P.2d 512, 513–14 (1941) (quoting *King v. Williams*, 188 Wash. 350, 356, 62 P.2d 710, 710 (1936)).

31. *See, e.g.*, *Werker v. Knox*, 197 Wash. 453, 85 P.2d 1041 (1938).

32. *Cross*, *supra* note 1, at 836. *See, e.g.*, *Verstraelen v. Kellog*, 60 Wn. 2d 115, 372 P.2d 543 (1962); *Smith v. Retallick*, 48 Wn. 2d 360, 293 P.2d 745 (1956); *Newberry v. Remington*, 184 Wash. 665, 52 P.2d 312 (1935) (cases finding separate liability where husband was driving family car, with spouse in the car, because the auto was not used as the instrument by which the tortious act was committed).

of affections.<sup>33</sup> Even though a broad interpretation of community benefit now prevails, the *deElche* court did not attempt to reason that the rape committed by Jacobsen fell into this category.<sup>34</sup>

### B. Structure of Community Property Ownership

Before the *deElche* decision, Washington courts consistently held that one spouse could not use community property for his or her separate purposes. For example, an attempt unilaterally to give away community property is conclusively void *ab initio*.<sup>35</sup> The courts were less strict with tort liability, allowing imposition on the community when some type of community benefit was shown.<sup>36</sup> The court was most liberal with contractual debts, presuming that community liability existed.<sup>37</sup> This presumption was rebuttable by proof of purely separate benefit.<sup>38</sup>

The legislature also has restricted use of community property for separate purposes. The statutory joinder requirements for transactions involving community real estate,<sup>39</sup> community business transactions,<sup>40</sup> and household appliances<sup>41</sup> serve to protect each spouse from loss through the other's unprincipled decisions involving important assets.

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33. Cross, *supra* note 1, at 836. See, e.g., *Schramm v. Steele*, 97 Wash. 309, 166 P. 634 (1917) (alienation of affection); *Aichlmayer v. Lynch*, 6 Wn. App. 434, 493 P.2d 1026 (1972) (same). The Washington Supreme Court, in 1980, abolished the cause of action for alienation of a spouse's affections. *Wyman v. Wallace*, 91 Wn. 2d 99, 105, 625 P.2d 452, 455 (1980).

34. Appellant argued that the rape in the instant case fell within the community recreation rule because appellant *deElche* had been socializing with both Jacobsen and his wife prior to the incident, and the assault had taken place while Jacobsen was in an intoxicated state as a result of the socializing. See Brief for Appellant at 23, *deElche v. Jacobsen*, 95 Wn. 2d 237, 622 P.2d 835 (1980).

35. WASH. REV. CODE § 26.16.030(2) (1979); *Parker v. Parker*, 121 Wash. 24, 28, 207 P. 10, 13 (1922); See also *In re Estate of Patton*, 6 Wn. App. 464, 474–75, 494 P.2d 238, 244, *appeal denied*, 80 Wn. 2d 1009 (1972), wherein an explanation of the reasoning behind the rule was given: under the "item" theory each spouse owns an undivided one-half interest in each item of property; therefore if one spouse could make *inter vivos* gifts of community property without the consent of the other, the whole of the community property would be lessened, in violation of the rights of the non-giving spouse. *Id.* at 475, 494 P.2d at 244. See note 93 and accompanying text *infra*. Some federal law exceptions exist. See, e.g., *Free v. Bland*, 369 U.S. 663 (1962) (treasury regulation creating right of survivorship in United States Savings Bonds preempts inconsistent state community property law); *Wissner v. Wissner*, 338 U.S. 655 (1950) (federal law controls effectiveness of beneficiary designation of National Service Life Insurance).

36. See notes 23, 29–30 and accompanying text *supra*.

37. The ordinary debt transaction will involve acquiring an asset, which raises the basic presumption that property acquired for consideration during marriage is community in nature. See *Yesler v. Hochstetler*, 4 Wash. 349, 30 P. 398 (1892). Correlatively, the obligation incurred is presumptively community in nature. See, e.g., *Oregon Improvement Co. v. Sagmiester*, 4 Wash. 710, 30 P. 1058 (1892).

38. See, e.g., *Beyers v. Moore*, 45 Wn. 2d 68, 70, 272 P.2d 626, 627 (1954).

39. WASH. REV. CODE §§ 26.16.030(3), .040 (1979).

40. *Id.* § 26.16.030(6).

41. *Id.* § 26.16.030(5).

It is not until the relationship is dissolved by death<sup>42</sup> or divorce<sup>43</sup> that each spouse attains independent dispositive control over his or her half of the property. Thus, although each spouse is said to "own" one-half of the community assets,<sup>44</sup> this ownership is not absolute. By allowing recovery from community property, even though no benefit accrued to the community, the *deElche* court departed from the protective model of the court and the legislature. The effect of this departure on community property law will depend on subsequent interpretation of the questions left unanswered by the *deElche* court.

## II. THE *deELCHE* COURT'S REASONING

The *deElche* court began by observing that the analysis employed in Washington to determine the community or separate character of a tort has yielded unpredictable and unjust results.<sup>45</sup> It declined to change the characterization rules, however.<sup>46</sup> Instead, it relied upon the rejection of the "entity" theory of community ownership.<sup>47</sup> Because this rejection established ownership in the spouses of an undivided one-half interest in the community assets, the court found no reason why property owned by a person should be exempt from tort judgments.<sup>48</sup> Support for the holding

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42. At death, disposition is limited by strict application of the "item" theory of ownership, precluding one spouse from devising more than one-half of each asset to someone other than the surviving spouse. *In re Estate of Patton*, 6 Wn. App. 464, 477, 494 P.2d 238, 245, *appeal denied*, 80 Wn. 2d 1009 (1972). See also WASH. REV. CODE § 26.16.030(1) (1979) (limiting disposition of community property to one-half, but not indicating if the half can be measured as half of the aggregate estate or as half of each item).

43. At divorce, the trial judge has great discretion in awarding property, and is not limited by the characterization of property as separate or community. See WASH. REV. CODE § 26.09.080 (1979); *In re Marriage of Hadley*, 88 Wn. 2d 649, 565 P.2d 790 (1977).

44. See note 25 and accompanying text *supra*.

45. 95 Wn. 2d at 242, 622 P.2d at 838. See, e.g., *LaFramboise v. Schmidt*, 42 Wn. 2d 198, 254 P.2d 485 (1953) (community liability found where husband committed indecent liberties upon a child staying in home); *Moffit v. Kruegar*, 11 Wn. 2d 658, 120 P.2d 512 (1941) (community liability where wife permitted a male friend with whom she had been drinking to drive the community automobile and his negligent driving caused an accident).

46. Justice Horowitz, in dissent, suggested that the extensive review of cases undertaken by the majority distinguishing separate and community torts was superfluous, given the fact that the majority failed to resolve the underlying problem that it raised. 95 Wn. 2d at 248 n.5, 622 P.2d at 841 n.5. See note 65 and accompanying text *infra*.

47. 95 Wn. 2d at 242-44, 622 P.2d at 838-39.

48. *Id.*

came from Spanish law, from which community property evolved,<sup>49</sup> and from the absence of statutory barriers.<sup>50</sup>

The court's purpose in making the change was to continue to impose liability on the community when the tort is committed for the benefit of the community, to protect the property of the innocent spouse if the tort is separate, and to allow recovery by the victim of a solvent tortfeasor.<sup>51</sup> To implement these goals the court retained the distinction between community and separate torts,<sup>52</sup> but changed existing law to allow the victim of a separate tort to recover to the extent of the tortfeasor's one-half interest in community personal property.<sup>53</sup> Although the court held that property remaining after satisfaction of the judgment retains its community character,<sup>54</sup> it protected the innocent spouse with a right of reimbursement, protected by an equitable lien, arising upon dissolution of the community.<sup>55</sup>

The court left three questions unanswered: first, whether real property would also be subject to execution;<sup>56</sup> second, whether contractual debts will be treated differently from tort judgments;<sup>57</sup> and third, precisely how the judgment will be enforced and the right of reimbursement implemented.<sup>58</sup>

Justice Horowitz, in dissent, was sharply critical of the majority's reasoning. He objected especially to the court's justifying the rule change in terms of present ownership. He suggested that the majority confused the concept of ownership with the availability of property for immediate pos-

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49. *Id.* at 244, 622 P.2d at 839. *See, e.g., In re Estate of Salvini*, 65 Wn. 2d 442, 447-48, 397 P.2d 811, 814 (1964). Spanish law allowed tort victims of married persons to recover from the wrongdoer's separate property and his or her one-half interest in community property. *deElche v. Jacobsen*, 95 Wn. 2d 237, 244, 622 P.2d 835, 839 (1980) (citing *Novísima Recopilación*, 1805 A.D. Book 10, Title 4, *De los Bienes Gananciales o Adquiridos en el Matrimonio*, Law 10, *quoted in* 2 W. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* app. I (1943)). *See* W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 181 (2d ed. 1971).

50. 95 Wn. 2d at 244, 622 P.2d at 839. The only statute cited by the court for this proposition was R.C.W. § 26.16.190, which provides that the separate property of the non-tortfeasor spouse is immune from recovery except where there would be joint liability if the marriage did not exist. The court apparently overlooked R.C.W. § 26.16.040, which provides that community real estate is liable for community debts and, by implication, that community real estate is not liable for separate debts. *See* note 89 and accompanying text *infra*.

51. 95 Wn. 2d at 244-45, 622 P.2d at 839.

52. *See generally* note 46 *supra*.

53. 95 Wn. 2d at 246, 622 P.2d at 840.

54. *Id.*

55. *Id.* *See generally* part III. C. *infra*.

56. 95 Wn. 2d at 246, 622 P.2d at 840. The determination was unnecessary because it was undisputed that the defendant owned sufficient personal property to satisfy the judgment. *See generally* part III. B. *infra* (discussion of the validity of distinguishing between real and personal property).

57. 95 Wn. 2d at 246 n.3, 622 P.2d at 840 n.3. *See generally* part III. A. *infra* (discussion of the validity of distinguishing between contractual debts and tort liabilities).

58. 95 Wn. 2d at 247 n.4, 622 P.2d at 840 n.4.



sessory satisfaction.<sup>59</sup> Citing gift cases<sup>60</sup> and the treatment of community assets at divorce,<sup>61</sup> he accused the majority of eroding the unique protective function of Washington community property law.<sup>62</sup> Because the majority's analysis could be extended to contractual debts, encumbrances for non-community benefits, and gratuitous transfers, Justice Horowitz feared that community property ownership could be reduced to a form of cotenancy, divisible at the will or whim of a spouse or of his or her creditors.<sup>63</sup>

Justice Horowitz preferred solving the old rule's problems by awaiting legislative action,<sup>64</sup> because of the difficult policy determinations to be resolved in such a major change in the law.

### III. ANALYSIS

The *deElche* court directed its analysis to two problems: first, the difficulty of distinguishing between separate and community torts; and second, the inequity of denying recovery to tort victims of those solvent tortfeasors who hold only community property.

The impact of the decision on the first problem will be negligible. The court did suggest, however, that torts previously classified as community might now be classified as separate because the increased availability of recovery would remove judicial reluctance to rule that a tort is separate.<sup>65</sup> Although the analysis is still necessary because victims of separate torts are restricted to one-half of the community property, whereas victims of community torts may recover from all of the community property, the court provided no direction to future decision-makers as to how the determination can be made in a more consistent and equitable manner. The likely effect of the opinion will be only to aid those persons in the position of plaintiff *deElche*—those victims of torts unquestionably separate.

59. *Id.* at 249, 622 P.2d at 841.

60. *E.g.*, *Nimey v. Nimey*, 182 Wash. 194, 45 P.2d 949 (1935) (purported gift of community property made by one spouse without the consent of the other spouse void). *See* note 35 and accompanying text *supra*.

61. *See generally In re Marriage of Hadley*, 88 Wn. 2d 649, 656, 565 P.2d 790, 794 (1977) (characterization of the property is not necessarily controlling; the ultimate question is whether the final division of the property is fair, just and equitable under all circumstances); WASH. REV. CODE § 26.16.080 (1979).

62. 95 Wn. 2d at 251, 622 P.2d at 842.

63. *Id.* *But see* part III. A. *infra*.

64. 95 Wn. 2d at 252, 622 P.2d at 843. *But see* *Smith v. Retallick*, 48 Wn. 2d 360, 365, 293 P.2d 745, 747 (1956); *Aichlmayr v. Lynch*, 6 Wn. App. 434, 435, 493 P.2d 1026, 1027 (1972) (in both cases the court declined to overturn the separate tort rule in the absence of legislative action, indicating the legislature has been reluctant to act in this area).

65. 95 Wn. 2d at 245, 622 P.2d at 840. *See* *Smith v. Retallick*, 48 Wn. 2d 360, 365, 293 P.2d 745, 748 (1956) (Finley, J., dissenting).

The *deElche* result is sound with respect to the second problem, the compensation of tort victims. It comports with the policy declared in 1972 by the Washington Supreme Court, that “absent express statutory provision, or compelling public policy, the law should not immunize tortfeasors or deny remedy to their victims.”<sup>66</sup> The *deElche* court found no contrary statutory provision expressly precluding levy on community assets for separate torts.<sup>67</sup> With the demise of the “entity” theory, protection of the “entity” from the derelictions of the spouse was unnecessary.<sup>68</sup>

The sole policy justification left for the rule was the protection of the innocent spouse.<sup>69</sup> The court lessened the impact of the decision on the innocent spouse by providing a right of reimbursement, protected by an equitable lien, to arise upon dissolution of the community.<sup>70</sup>

The flaw in the decision, as identified by Justice Horowitz, is that the court attempted to fit the new separate tort recovery rule within the existing scheme of ownership,<sup>71</sup> leaving three important questions unresolved: first, whether the rule will be extended to contractual debts; second, whether real property will also be subject to execution on a separate tort judgment; and third, how precisely the judgment will be enforced and right of reimbursement implemented.

#### A. *Limiting the Decision to Tort Judgments*

The *deElche* court premised the change in the rule of separate tort recovery on the concept of present individual ownership.<sup>72</sup> If ownership were in fact the dispositive factor, it would be equally logical to extend the *deElche* rule to contractual debts.<sup>73</sup> Gratuitous transfers would also be eligible,<sup>74</sup> fulfilling Justice Horowitz’s apprehension that community property ownership will be reduced to cotenancy, partitionable at will.<sup>75</sup> Justice Horowitz’s fears are unfounded, however.

Although the court’s analysis can theoretically be extended beyond the tort situation, policy and statutory differences exist. The *deElche* court

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66. *Freehe v. Freehe*, 81 Wn. 2d 183, 192, 500 P.2d 771, 777 (1972).

67. *But see* note 82 and accompanying text *infra*.

68. *See* note 24 and accompanying text *supra*.

69. *See* *Brotton v. Langert*, 1 Wash. 73, 80, 23 P. 688, 688–89 (1890). The *deElche* court did not expressly identify protection of the innocent spouse as one of the policy goals of the rule.

70. *See* part III. C. *infra*.

71. *See* *deElche v. Jacobsen*, 95 Wn. 2d 236, 249–50, 622 P.2d 835, 841–42 (1980) (Horowitz, J., dissenting).

72. *Id.* at 244, 622 P.2d at 839. *See* note 25 and accompanying text *supra*.

73. *Id.* at 251, 622 P.2d at 843 (Horowitz, J., dissenting).

74. *But see* WASH. REV. CODE § 26.16.030(2) (1979).

75. *deElche v. Jacobsen*, 95 Wn. 2d 236, 249–50, 622 P.2d 835, 842–43 (1980).

suggested that contractual debts would be treated differently.<sup>76</sup> This would mark a return to a distinction between contractual and tortious liability abandoned as “absurd” in 1917 by the court in *Schramm v. Steele*.<sup>77</sup> The distinction is, actually, well founded. Torts, since they involve an innocent injured victim and a negligent or intentionally injurious tortfeasor, present a unique situation. In contrast, both parties enter a contract voluntarily and have a measure of control over the legal consequences of their acts. There is already a strong presumption of community liability when a married person enters a contract, eliminating the element of unpredictability present in the tort situation. Thus, the equities presented by the separate tort judgment-holder<sup>78</sup> are lacking in a contract case, and a court should treat the two situations differently.

Because of the strict statutory joinder requirements for transactions involving community real property,<sup>79</sup> community business assets,<sup>80</sup> and household appliances,<sup>81</sup> to allow contractual creditors of solely separate debts access to these assets would give them more than the benefit of their bargain. These joinder requirements indicate a legislative policy to protect community assets from voluntary depletion by one spouse, and to permit access to them would seem to be precluded by the legislation.<sup>82</sup> Gratuitous transfers, as well, would not be covered by the *deElche* rule because unilateral gifts are forbidden by statute.<sup>83</sup>

### B. Real Property versus Personal Property

The *deElche* court may also have renewed the importance of the distinction between real and personal property for satisfying separate obligations.<sup>84</sup> This distinction is valid. Although a spouse's management powers over community personal property must be exercised in the community interest,<sup>85</sup> the law permits wide discretion here and the com-

76. *Id.* at 246 n.3, 622 P.2d at 840 n.3. *But see* Pacific Gamble Robinson Co. v. Lapp, 95 Wn. 2d 341, 622 P.2d 850 (1981). In that case, the Washington court cited *deElche* as contrary authority to the proposition that the community property cannot be reached for payment of separate debts. *Id.* at 344, 622 P.2d at 854. The court also referred to tort liability as a debt, indicating that the court may fail to recognize the distinction. *Id.* at 347 n.2, 622 P.2d at 855-56 n.2.

77. 97 Wash. 309, 314, 166 P. 634, 636 (1917). *See* note 17 *supra*.

78. The equities identified by the *deElche* court were that the tort victim may be denied recovery based on tenuous distinctions. *See* note 45 and accompanying text *supra*.

79. WASH. REV. CODE § 26.16.030(3) (1979).

80. *Id.* § 26.16.030(6).

81. *Id.* § 26.16.030(5).

82. *See* Brotton v. Langert, 1 Wash. 73, 23 P. 688 (1890).

83. WASH. REV. CODE § 26.16.030(2) (1979).

84. This distinction was also abandoned by the Washington court in 1917. *Schramm v. Steele*, 97 Wash. 309, 315-16, 166 P. 636, 636-37 (1917). *See* note 17 and accompanying text *supra*.

85. *Schramm v. Steele*, 97 Wash. 309, 315, 166 P. 634, 637 (1917); Cross, *supra* note 1, at 788

plaining spouse must show that this discretion was abused to overturn any such decision.<sup>86</sup> With real property, by contrast, the statutory requirement of joinder in voluntary transactions allows a spouse to void decisions made without his or her joinder or consent.<sup>87</sup> Also by statute, community real property is subject to judgment liens recovered for community debts.<sup>88</sup> By implication, this section precludes subjecting community real estate to judgment liens recovered for separate torts or debts.<sup>89</sup> These statutes lend validity to a renewal of the distinction between the use of real and personal property to satisfy separate judgments.

### *C. Enforcement of the Judgment: Conflict with Community Property Theory*

Under *deElche*, if community property is used to satisfy a separate tort judgment, there arises a right of reimbursement protected by an equitable lien.<sup>90</sup> Upon dissolution of the community relationship the non-tortfeasor spouse will hold as separate property the same amount as he or she would have received had the judgment not been satisfied out of community property.<sup>91</sup> This equitable lien will also protect the community, pro tanto, from subsequent separate judgment creditors attempting to levy on the remaining half of the property.<sup>92</sup>

One difficulty with the court's reasoning is the means of enforcing the judgment without levying on the property of the innocent spouse. Under the "item" theory of ownership<sup>93</sup> each spouse owns an indivisible one-half interest in *each item* of community property; the sale of any asset to satisfy a judgment thus necessarily includes the sale of the innocent spouse's property as well as that of the tortfeasor spouse. The court was

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86. See, e.g., *Hanley v. Most*, 9 Wn. 2d 429, 459–60, 115 P.2d 933, 945 (1941); *Bellingham Motors Corp. v. Lindberg*, 126 Wash. 684, 686–87, 219 P. 19, 19–20 (1923).

87. WASH. REV. CODE § 26.16.030 (3) (1979).

88. *Id.* § 26.16.040.

89. See *Brotton v. Langert*, 1 Wash. 73, 79–80, 23 P. 688, 689 (1890) (construing similar provision); note 14 and accompanying text *supra*. By further implication "debts" as used in this provision could be read to exclude tortious liability.

90. 95 Wn. 2d at 246–47, 622 P.2d at 840. The right of reimbursement has generally been applied where community property has been used to improve a separate estate. See, e.g., *In re Marriage of Harshman*, 18 Wn. App. 116, 567 P.2d 677 (1977) (community given right of reimbursement when community funds were used to pay the principal on a separate mortgage). See generally *Cross*, *supra* note 1, at 776–82.

91. *deElche v. Jacobsen*, 95 Wn. 2d 237, 246–47, 622 P.2d 835, 840 (1980).

92. *Id.* at 247, 622 P.2d at 840. The court appears to give the innocent spouse a priority against subsequent separate tort creditors. See *Cross*, *supra* note 1, at 776.

93. The fact that the "item" theory of ownership is followed in Washington was explicitly recognized in *In re Estate of Patton*, 6 Wn. App. 464, 476, 494 P.2d 238, 245, *appeal denied*, 80 Wn. 2d 1009 (1972).

correct in saying that, with the rejection of the "entity" theory, the tortfeasor spouse owns a presently vested interest in community assets.<sup>94</sup> The court overlooked, however, the indivisibility of this ownership.<sup>95</sup> Thus, while property belonging to the entity is not used to discharge an obligation having no relationship to the community, property belonging to the innocent spouse is.

Ignoring the implications of the indivisibility, the court declined to clarify the practical means of enforcement. It is unclear whether one-half or all of the proceeds of the sale of an asset would go to satisfy the judgment. Justice Horowitz suggests that because of the "item" theory, only one-half of any asset levied upon may be taken in satisfaction of the judgment.<sup>96</sup> The court did make clear that property remaining after satisfying the judgment retains its community character.<sup>97</sup> Because of this community nature, if only half of the value is used, the remaining half will again be divided in half. Therefore, the conflict with the "item" theory is still not avoided and the innocent spouse will have had some of his or her property used to satisfy the judgment. This destroys the reasoning of the court that, since the property is owned by the tortfeasor, it should be subject to execution.

A more practical method would be to levy against the whole of any asset and disregard the "item" theory in full.<sup>98</sup> A result would be that additional assets would not have to be taken.

An alternative method of protecting the innocent spouse would be to levy upon only one-half of the value of an asset, and to set aside the remaining half immediately as the separate property of the innocent spouse.<sup>99</sup> This result would be consistent with both the "item" theory of ownership<sup>100</sup> and the reasoning of the court,<sup>101</sup> and would ensure that the innocent spouse will in no way contribute to the satisfaction of the sepa-

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94. See note 25 and accompanying text *supra*.

95. See part I.B. *supra*; *deElche v. Jacobsen*, 95 Wn. 2d 237, 251, 622 P.2d 835, 843 (1980) (Horowitz, J., dissenting); *In re Estate of Patton*, 6 Wn. App. 464, 471-75, 494 P.2d 238, 242-44, *appeal denied*, 80 Wn. 2d 1009 (1972).

96. *deElche v. Jacobsen*, 95 Wn. 2d 237, 253, 622 P.2d 835, 843 (1980) (Horowitz, J., dissenting).

97. *Id.* at 246, 622 P.2d at 840.

98. The majority appears to have adopted Professor Cross's suggestion that the assets remaining after enforcing the separate judgment retain their community character and that the innocent spouse should be protected with the right of reimbursement. However, Professor Cross suggested that both halves of the particular assets levied upon be used to discharge the obligation. See Cross, *supra* note 1, at 832.

99. See Cross, *supra* note 1, at 832. This would eliminate the need for the protective lien.

100. See note 93 and accompanying text *supra*.

101. The court based its decision on the concept of ownership by the tortfeasor spouse. This reasoning is destroyed if the innocent spouse's property is used to satisfy the judgment.

rate tort.<sup>102</sup> Under the reasoning of the *deElche* court, however, the property remaining after satisfaction of the judgment is community in nature; thus this alternative method of protecting the innocent spouse is not available.

#### IV. CONCLUSION

The problems created by the *deElche* decision for contract debts, real property, and the right of reimbursement lend validity to Justice Horowitz's statement that such major changes in the law are best left to the legislature.<sup>103</sup> On the other hand, the problem of recovery for separate tort judgment creditors needed to be resolved. Perhaps if the court had spent less time attempting to justify the decision in terms of existing law, and instead had acknowledged its departure from the general scheme of community property ownership, it would have focused on the unique problems before it. As a result of the *deElche* decision, a victim of a separate tort may now recover to the extent of the tortfeasor's one-half interest in community personal property in addition to the tortfeasor's separate property. The rule should be limited to this narrow application. As to the innocent spouse's right of reimbursement, the best rule would have been to set aside half of the value of any asset sold as the innocent spouse's separate property. As this is impossible under the *deElche* analysis,<sup>104</sup> it is to be hoped that all of the proceeds from the sale of an asset will be used to satisfy the judgment, rather than the half suggested by Justice Horowitz.

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102. The use of the equitable lien is essentially an adoption of the "aggregate" theory of community ownership. This theory was rejected in *In re Estate of Patton*, 6 Wn. App. 464, 494 P.2d 238, appeal denied, 80 Wn. 2d 1009 (1972). Under the "aggregate" theory one spouse may unilaterally dispose of community assets to persons other than the surviving spouse, so long as in the long run each spouse holds one-half of the property when viewed in the aggregate. The difficulty with applying the theory in inter vivos situations, such as in *deElche*, is that there is no way to ensure that sufficient property will be available to compensate the other spouse when the community relationship is dissolved. The *deElche* court attempted to some extent to deal with this difficulty by holding that the equitable lien will protect the remaining property against subsequent separate tort creditors.

103. See note 64 and accompanying text *supra*.

104. This is because the right of reimbursement does not arise until the community relationship is dissolved.