The Community Property Law in Washington (Revised 1985)

Harry M. Cross

University of Washington School of Law

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THE COMMUNITY PROPERTY LAW
IN WASHINGTON

(REVISED 1985)

Harry M. Cross*

* Professor Emeritus of Law, University of Washington; B.A., 1936, Washington State University; J.D., 1940, University of Washington. The author gratefully acknowledges the careful and timely consideration afforded his work by the editorial staff of the Washington Law Review and, in particular, the efforts of Helen A. Boyer, Executive Articles Editor. Reproduction of this article without permission of the Washington Law Review or the author is prohibited. Reprints are available from the Washington Law Review. Copyright © 1985 by Harry M. Cross.
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I. INTRODUCTION

The author has twice previously summarized the community property law of Washington. In the eleven years since the most recent effort there have been enough changes to warrant a repetition of the task. Much of the discussion in the 1974 article is still appropriate, needing only reference to any later cases; accordingly, some parts of this article will essentially be an updated and revised version of the earlier article. There are also areas, however, in which the more recent cases prompt a new, more extensive, or modified analysis. The article undertakes that new analysis as well as incorporating the appropriately revised material from 1974, to provide a comprehensive discussion.

Community property law in the United States is principally of Spanish origin. Washington, however, has no history of significant contact with Spanish culture, as do many of the original "old line" community property states. Nonetheless, Washington's community property system may derive from a Spanish source, via California, whose laws apparently furnished the principal model for the territorial laws in Washington.

In contrast to the philosophical premise of the common law system, in which the wife's juridical personality is submerged into that of her husband at the time of marriage, the marital property relationship in the community
property system may be regarded as a type of partnership. Although spouses in the community property system are not possessed of the rights and liabilities of ordinary business partners, each spouse is regarded as contributing equally to and sharing equally in the economic well-being of the marital enterprise. The fundamental principle of the community property system is thus more in line with the principle of an Equal Rights Amendment than is the “unity of husband and wife” principle of the common law system. While the detailed operations of the rules in the community property states before statutory changes in the seventies may not have met an “equal rights” standard, the 1972 changes in Washington, a purpose of which was “to establish equality between the husband and wife in regard to their community property,” probably do.

Washington’s present community property regime, with the major exception of the 1972 amendments, has remained largely unchanged in its basic structure since enactment by the territorial legislature in 1879. The statutes, in two separate sections, provide that property and pecuniary rights owned by each spouse at the time of marriage, any property thereafter acquired lucratively, and the rents, issues, and profits therefrom constitute separate property. All property acquired after marriage that is not separate property is community property.

in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. . . .” 1 W. BLACKSTONE, COMMENTARIES *442 (citation omitted). See generally W. DE FUNIAK & M. VAUGHN, supra note 2, §§ 1, 2.

6. See W. DE FUNIAK & M. VAUGHN, supra note 2, § 1; W. MCCLANAHAN, supra note 2, § 2:27.

7. A leading commentator writes:

Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that all wealth acquired by the joint efforts of the husband and wife shall be common property; the theory of the law being that, with respect to marital property acquisitions, the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution.

W. DE FUNIAK & M. VAUGHN, supra note 2, § 1, at 2–3.

8. The equality requirement exists locally through WASH. CONST. art. XXXI, §§ 1, 2 (adopted in the November 1972 election as Amend. 61):

§ 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.

Articles on the impact of the then proposed federal equal rights amendment on community property jurisdictions are cited in Cross (1974), supra note 1, at 734 n.10.


10. See generally Hill, supra note 4.


12. See infra note 70.

Community Property

Under the 1972 changes each spouse has equal management power over the community property. Each spouse has a general inter vivos power to dispose of the community personal property, but neither alone can acquire, convey, or encumber community real property, convey or encumber community household goods, or purchase or transfer community business assets in some situations. Each spouse may devise or bequeath his or her half of the community property and may deal in all respects with his or her separate property as if unmarried.

The statutory skeleton outlined above is supplemented, of course, by a large body of case law that interprets and fills in the lacunae between these statutes. Before launching into the body of this article, the author feels obligated to comment generally on several themes underlying the development of this case law. One rather constant theme is the solicitude with which the Washington court has viewed the community property position, manifested in various rules and presumptions: acquisitions by a spouse are presumptively community property; separate property commingled with community property becomes community property by operation of law; obligations incurred by a spouse are presumptively community in character; separate property agreements between spouses must be established by a higher standard of proof than that required to establish community property agreements, and so forth. Another theme, or perhaps more of an observation, is the relative independence and self-reliance of the Washington court in generating this body of case law. Only infrequently has the Washington court relied upon or even cited precedents from other community property jurisdictions. This inbreeding may help to account for the relative stability which Washington's community property system has enjoyed. However, in the last ten years there have been a number of instances in which a "community property" preference has been given less weight, as the discussion hereafter will reveal.

II. THE NECESSARY RELATIONSHIP

The Washington Supreme Court has said that for an asset to be community property it is first necessary that a lawful marital relationship exist

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14. Id. But neither spouse can make a gift of community property, personal or real, without the express or implied consent of the other. Id. § 26.16.030(2).
15. Id. § 26.16.030(3), (4).
19. Id. §§ 26.16.010, .020.
between the owners. This proposition is inherent in section 26.16.030 of the Revised Code of Washington, which defines community property. The validity of the marriage is determined by the law of the jurisdiction where the marriage occurred. Thus, while Washington law does not recognize a common law marriage, such a marriage validly established in another jurisdiction is recognized in Washington as creating the necessary marital relation.

The division of property acquired during cohabitation of a man and woman who are not validly married, either under Washington law or the law of another jurisdiction, raises special problems. Such property is not community property, but nonetheless it frequently would be inequitable to deny that both parties to the relationship may possess interests in their acquisitions. Although some community property jurisdictions solve such problems by means of a "putative marriage" doctrine, Washington does not. Under existing Washington rules, the nonacquiring or nontitle-holding party to an innocent or to a meretricious relationship may be able to assert an interest in the acquisitions of the other.

Recently, the court has made a substantial change in its analysis of the property rights of unmarried persons living together in a "meretricious" relationship, as is discussed below, but it is probable that some of the situations previously involved will still be resolved as they were before the change. Therefore, attention is paid to the distinction drawn by the court between innocent and meretricious relationship cases.

22. The source, Spanish law, is the same. W. De Funiak & M. Vaughn, supra note 2, § 55, at 94.
26. See W. De Funiak & M. Vaughn, supra note 2, §§ 55–56.8. "A putative marriage . . . is a marriage which is forbidden but which has been contracted in good faith and in ignorance of the impediment on the part of at least one of the contracting parties." Id. § 56, at 96. See also H. Clark, supra note 23, at 52–55; W. McClanahan, supra note 2, §§ 5:7–24 (1982 & Supp. 1984); Luther & Luther, Support and Property Rights of the Putative Spouse, 24 Hastings L.J. 311 (1973); Comment, Rights of the Putative and Meretricious Spouse in California, 50 Calif. L. Rev. 866 (1962); Comment, The Putative Marriage Doctrine in Louisiana, 12 Loy. L. Rev. 89 (1965); Comment, Right of a De Facto Wife to Obtain a Share of Jointly Accumulated Property, 2 Willamette L.J. 207 (1962).
27. See infra notes 38–64 and accompanying text (Parts II.B, C).
Community Property

A. The Innocent Relationship

In Creasman v. Boyle the court defined and stated the principles governing innocent relationships:

Even though there be no lawful marriage . . . if either or both of them in good faith enter into a marriage with the other, or with each other, and such marriage proves to be void, a court of equity will protect the rights of the innocent party in the property accumulated by the joint efforts of both.

A relationship thus may be defined as innocent if the party to be protected believed in good faith that a valid marriage existed.

In Poole v. Schrichte, Mrs. Poole contended that her relationship with Mr. Schrichte was innocent, rather than meretricious, since she believed that a common law marriage occurred while the two lived together in Illinois during the first seven years of their thirteen-year relationship. The court held that sufficient evidence had been presented to support her contention and that an innocent relationship had been established.

At issue in Poole were the rights of the parties in a tavern and in personal property acquired in Washington where they had lived together for six years without a formal marriage. The court found authority to divide the property acquired during their relationship upon the following reasoning:

We agree . . . that the authority and jurisdiction of the court to divide the property accumulated during such a relationship is in consequence of the court’s inherent equity power, and not because of the divorce statute. It is likewise our view that the court is not limited, under an equal partnership concept, to an even division of the property accumulated, but that the innocent party may be awarded such proportion of the property accumulated as would under all the circumstances be just and equitable.

Mrs. Poole was held to be owner of a half interest in the personal property and was allowed $5000 for her interest in the tavern, apparently an evaluation of a half interest.

Equitable division of the accumulated property between the parties to the pseudo-marital relationship reflects the fact that in effect the innocent party

28. 31 Wn. 2d 345, 196 P.2d 835 (1948), noted in 24 WASH. L. REV. 164 (1949). The plaintiff, Harvey Creasman, had lived meretriciously with Caroline Paul for a period of seven years until her death. Mr. Creasman was the breadwinner, but he left the management of their financial affairs to her. After her death, he sought to be adjudged the owner of real estate purchased with his funds. Title was placed in Mrs. Paul’s name. The court held she was the owner.

29. 31 Wn. 2d at 352, 196 P.2d at 838.


31. Id. at 569, 236 P.2d at 1051. Other possibilities include application of trust principles or an analysis on the basis of a quasi-marital partnership.
is a tenant in common in such property with the other party, but this fact does not necessarily establish the size of the parties' respective shares. In other ordinary situations of multiple party acquisitions, a tenancy in common results when property is acquired with multiple contributions, and "courts will presume they intended to share the property, in proportion to the amount contributed, where it can be traced, otherwise they share it equally."32 This presumption could furnish a controlling analogy but it is not clear that it will or should. Under the cases, when the innocent party has directly contributed to the acquisition of the property before the court, apparently a precise measurement of the amount of the contribution is not required in order to conclude that the innocent party should be awarded at least one-half.33

Special difficulty arises, however, where the contribution of the innocent party is indirect, for example, where one party has merely "run the home" and has not directly furnished the consideration for the asset. That such indirect contributions as "running the home" must be weighed in making the property division was recognized in Knoll v. Knoll: "So long as the parties lived together as husband and wife both labored in their respective fields, and the property acquired during this time was the result of their joint efforts."34 The weight to be accorded such a contribution, however, is unclear; is it an equal "contribution," as it would be under the community property rules for married persons?35

It seems reasonable to start with the assumption that a proper division of the accumulated property would give the innocent party a half interest without particular regard to the nature of the "contribution." The final equitable division, however, will also reflect consideration of each party's future needs and continuing ability for self-support. For example, in Buckley v. Buckley,36 where the man had deserted his wife and cohabited with another woman, and thus could hardly be considered the innocent party in the pseudo-marital relationship, the court said: "Bearing in mind that appellant Buckley accumulated this property, and that he is now 66 years old, in feeble health, requiring support, medical attendance, and

32. West v. Knowles, 50 Wn. 2d 311, 313, 311 P.2d 689, 691 (1957) (citing Iredell v. Iredell, 49 Wn. 2d 627, 305 P.2d 805 (1957)).
33. See Powers v. Powers, 117 Wash. 248, 200 P. 1080 (1921) (proceeds from sale of her property furnished part of funds to buy property awarded to her); In re Estate of Benchley, 96 Wash. 223, 164 P. 913 (1917) (woman kept boarders at a lodging house, and was a nurse and midwife; her earnings contributed to payment of purchase obligations).
34. 104 Wash. 110, 115, 176 P. 22, 24 (1918). The case was returned to the trial court, which had refused to rule on property rights, to permit the defendant to be heard on the question of proper disposition of the property.
35. See supra note 7.
36. 50 Wash. 213, 96 P. 1079 (1908).
nursing, we cannot say that the disposition of the property, as made by the trial court, was erroneous, inequitable, or unjust." \(^{37}\) (Buckley received half of all the real property accumulated during the relationship. Each of the two women received one-fourth of the real property.)

The infirm, needy innocent party should not fare less well. There is, however, no certainty about the factors to be considered or the weight to be given them in the court's equitable division of the property.

B. The Meretricious Relationship

In contrast to an innocent relationship, in which at least one party possesses a good faith belief that a valid marriage exists, a meretricious relationship exists when both parties cohabit with knowledge that a lawful marriage between them does not exist. \(^{38}\) Prior to In re Marriage of Lindsey \(^{39}\) the court treated acquisitions during a meretricious relationship differently than those during an innocent relationship, declaring in Creasman v. Boyle that "property acquired by a man and a woman not married to each other, but living together as husband and wife, is not community property, and, in the absence of some trust relation, belongs to the one in whose name the legal title to the property stands." \(^{40}\) The court stated what became known as the Creasman presumption: "[W]e think that, under these circumstances and in the absence of any evidence to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it." \(^{41}\)

Various routes were developed to rebut the Creasman presumption \(^{42}\) but the court waited until there was the "appropriate set of circumstances" in Marriage of Lindsey \(^{43}\) to abandon and explicitly overrule the presumption. The court stated: "In its place we adopt the rule that courts must 'examine

\(^{37}\) Id. at 223, 96 P. at 1083.

\(^{38}\) See H. Clark, supra note 23, at 52-54; W. De Funiak & M. Vaughn, supra note 2, § 56; W. McClanahan, supra note 2, § 5:26 (1982 & Supp. 1984); Comment, Rights of the Putative and Meretricious Spouse in California, 50 Calif. L. Rev. 886, 873 (1962). If one was innocent, but the other not, protection in the other's acquisitions was afforded the innocent one but not vice versa. W. De Funiak & M. Vaughn, supra note 2, § 56, at 97. For a provocative discussion of developments in the meretricious relationship generally, see Note, Meretricious Relationships—Property Rights: A Meretricious Relationship May Create an Implied Partnership, 48 Wash. L. Rev. 635 (1973).


\(^{40}\) 31 Wn. 2d 345, 351, 196 P.2d 835, 838 (1948) (emphasis in original).

\(^{41}\) Id. at 356, 196 P.2d at 841 (emphasis in original). The court concluded the couple intended Mrs. Paul to possess and own the property since title was taken in her name. Chief Justice Mallery, in dissent, argued that it was obvious from the record that the couple intended to enjoy and possess the property in common. Id. at 362 (Mallery, C.J., dissenting).

\(^{42}\) See infra notes 49–55 and accompanying text.

\(^{43}\) 101 Wn. 2d at 304, 678 P.2d at 331.
the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.”

In *Lindsey*, rights in a barn/shop were disputed. The structure was built prior to the marriage, while the two lived in the meretricious relationship, on land the husband owned separately. As the barn/shop was built on land in the husband’s name, the trial court relied on the *Creasman* presumption and made no evaluation of the wife’s premarriage interest in the barn/shop (and the proceeds from the insurance on the building). Apparently, only community property was divided. The case was remanded for the trial court to determine under the “just and equitable” approach whatever property interest the wife might have in the barn/shop. Thereupon the trial court directed the husband to pay the wife $1200, calculated at $6.00 an hour for her work in building, but did not award her any share in the proceeds of the insurance on the building.\(^45\)

The abandonment of the *Creasman* presumption is welcome. The adoption of a rule requiring a just and equitable disposition suggests application of the approach used in marriage dissolution cases; the trial court’s determination on remand seems to require some sort of durable relationship before any equity arises in the nontitled partner,\(^46\) even though the supreme court specifically indicated that a family-type relationship was not required.\(^47\) Although their relationship did develop into a “permanent” one by the subsequent marriage, apparently it did not start with any such mutual intention. Suppose there had never been a marriage but the cohabitation had continued for several years.\(^48\) At what point in time, if ever, would there be some sharing in the accumulations? It may be that unless there is proof of an intention to have a long-lasting relationship the sharing under a just and equitable disposition will only occur if a family-type relationship can be inferred from a long-continued cohabitation. Even so, as *Lindsey* implies, it may be that there will be no automatic “relation back” to the beginning of the cohabitation to create a sharing of rights in any acquisitions.

The above discussion suggests that although *Creasman* no longer gives us the starting point, the cases in which the *Creasman* presumption was found to have been rebutted have continuing importance because in them the court essentially gave relief on equitable grounds, and that now in similar situations a comparable result ought to be reached. Thus the

\(^{44}\) *Id.* (quoting *Latham v. Hennessey*, 87 Wn. 2d 550, 554, 554 P.2d 1057, 1059 (1976)).

\(^{45}\) Seattle Times/Post Intelligencer, Nov. 18, 1984, at C15, col. 1.

\(^{46}\) Letter from Douglass A. North, counsel for the wife, to author (May 3, 1985) (copy on file with the *Washington Law Review*) also reflects this appraisal.

\(^{47}\) *Lindsey*, 101 Wn. 2d at 305, 678 P.2d at 331.

cohabitor who does not have legal ownership should share if the property was acquired through a joint venture or an implied partnership, and should be permitted to show a right either on a resulting or constructive trust basis. In addition, through tracing it should be possible to show a tenancy in common property relationship.

In a special concurring opinion to West v. Knowles, Judge Finley urged that a fair and equitable distribution of property should be made:

A fair and equitable distribution of property does not imply an accounting operation with the precision and delicacy of a surgeon's scalpel. It merely connotes a reasonable and rough approximation and appraisal of earnings and other factors, and a division of property that will in a general way be reasonable, fair, and equitable by the standards of just, tolerant, and understanding individuals.

This and other passages in the cases rebutting the Creasman presumption suggested there might be three standards for disposition of property acquired by unmarried persons living together: (1) a refined protection of the equities for the innocent relationship cases; (2) a rough, equitable measurement in the meretricious relationship intended to be a stable, continuing "family-type" arrangement; and (3) no sharing merely by reason of a short term meretricious relationship not intended to be a stable continuing relationship.

C. Meretricious and Innocent Relationships After Marriage of Lindsey

There is nothing to suggest that there will or should be any change in the innocent relationship situations. While the court has expressly denied that the divorce statute controlled in these situations, there probably is guidance to be found in the cases of property disposition under the current marriage dissolution law which directs "such disposition . . . as shall appear just and equitable after considering all relevant factors."

The meretricious relationships may still pose problems, particularly whether there must be something more in the relationship than mere

55. 50 Wn. 2d at 321, 311 P.2d at 695 (Finley, J., concurring).
56. Poole, 39 Wn. 2d 558, 236 P.2d 1044.
cohabitation. If there must be more, there would appear to be the three types of relationships between unmarried persons living together mentioned above. The trial court in In re Marriage of Lindsey did not award the wife any share in the improvement made on the husband’s separate property prior to the marriage, apparently because the relationship was too casual.\textsuperscript{58} This suggests that in order to invoke the equities, there would need to be proof of some intention (at the time of the acquisition) to have a more durable arrangement, even though the relationship subsequently became “durable” or of a family type, as reflected in the subsequent marriage.\textsuperscript{59}

On the other hand, it would be an easier rule to apply if the factual situation of Lindsey were held to be enough to necessitate an equitable division. The “relation back” quality of this approach would provide a certain simplicity and the risk of an unreasonable result is minimized by the court’s unquestioned power to award the property in the marriage dissolution action. In those situations in which there is no marriage, it seems to this writer that the conduct of the parties during the relationship and its duration would be essential elements in the reasoning, which comes close to requiring a family-type relationship before any equities would arise against the legal owner.

If the controversy is between the parties at the end of the relationship, there would be testimony from both that should indicate whether there should be a sharing. If the controversy arises after the death of one, the matter may be more difficult,\textsuperscript{60} but if in fact there was a family-type relationship, sharing should follow. No sharing should result, however, if there was an adequate showing that a different result was in fact intended by the parties, as in Latham v. Hennessey.\textsuperscript{61}

\textsuperscript{58} See supra note 45 and accompanying text.

\textsuperscript{59} In a factual situation as to time of acquisition much like that in Lindsey, the trial court found there was a long term, stable relationship from the outset which preceded the acquisition of the property, and that the Creasman presumption had been rebutted. It held that there was co-ownership of the property. The court of appeals affirmed, noting that it was not necessary to decide whether Lindsey should be applied retroactively. In re Marriage of Hilt, 41 Wn. App. 434, 704 P.2d 672 (1985).

\textsuperscript{60} Warden v. Warden, 36 Wn. App. 693, 676 P.2d 1037, review denied, 101 Wn. 2d 1016 (1984). The court of appeals approved the trial court’s division in a manner which was “just and equitable after considering all relevant factors” and stated, “We believe the time has come for the provisions of RCW 26.09.080 to govern the disposition of the property acquired by a man and a woman who have lived together and established a relationship which is tantamount to a marital family except for a legal marriage.” Id. at 698, 676 P.2d at 1039. A narrow reading of this proposition would not answer the division problems for a survivor after the death of one cohabitor, or the problems arising in situations other than a breakup of the relationship between the two persons. A better reading is that the statute furnishes an analogy which can be applied in the death or other situations. This approach is, in the author’s opinion, the one likely to be used.

\textsuperscript{61} 87 Wn. 2d 550, 554 P.2d 1057 (1976).
Under the Lindsey rule a different result (favorable to the surviving woman) would have been reached in West v. Knowles. The same is probably true for In re Estate of Thornton, which involved active participation by the surviving woman in the development of a ranching enterprise to which the decedent had held title.

The Washington courts have not yet presented information for related areas not involving property claims of the cohabitants. Some are explored by McClanahan in his treatise.

III. CHARACTER OF OWNERSHIP OF PROPERTY

A. Statutory Scheme and Basic Presumptions

As noted previously in the introduction, the statutory scheme controlling the character of ownership of property acquired by either or both spouses has remained unchanged since territorial days. "Property and pecuniary rights" owned by either spouse at marriage, or thereafter lucratively acquired, and the rents, issues and profits thereof constitute separate property of that spouse. All assets otherwise acquired after marriage by either or both spouses are community property. In ascertaining whether assets fall within the separate or community property section of the statutes, the Washington court frequently has emphasized the rule that the facts existing at the time of acquisition control: "[T]he status of property... becomes fixed as of the date of its purchase or acquisition; and... the status, when once fixed, retains its character until changed by agreement of the parties or operation of law."

The fundamental premise of the community property system is that both spouses contribute to property acquisitions in a joint effort to promote the welfare of the relationship. Hence, an asset onerously acquired during

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62. 50 Wn. 2d 311, 311 P.2d 689.
63. 81 Wn. 2d 72, 499 P.2d 864 (1972). The Lindsey rule probably would have changed the result in Thornton, even though on remand the trial court concluded, and the court of appeals affirmed, that the woman was an employee rather than a partner in the ranching enterprise. In re Estate of Thornton, 14 Wn. App. 397, 541 P.2d 1243 (1975), review denied, 86 Wn. 2d 1009 (1976).
66. Id. § 26.16.030. The extensive changes in this section in 1972 affect management and disposition but not the character of ownership of community property.
67. In re Estate of Binge, 5 Wn. 2d 446, 484, 105 P.2d 689, 705 (1940); see also In re Estate of Madsen, 48 Wn. 2d 675, 296 P.2d 518 (1956).
68. Togliatti v. Robertson, 29 Wn. 2d 844, 852, 190 P.2d 575, 578 (1948).
69. Onerous acquisition is by labor or industry or other valuable consideration. W. DeFunlak & M. Vaughn, supra note 2, § 62.
marriage is presumptively community property whereas one lucratively acquired ordinarily is not. The Washington court’s preference for community property is clear, however, and this preference permeated the court’s basic statutory analysis that property acquired by a spouse is community property unless the transaction falls within a separate property section. Recently the court has retreated from this “wastebasket” definition to emphasize the factor of onerousness, holding that a fortuitous acquisition through tortious personal injury can be separate property.

1. The Basic Presumption

In Yesler v. Hochstettler, the Washington court stated the basic presumption that an asset acquired during marriage is community property and, if the transaction indicates a valuable consideration was paid, the presumption can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property section. If nothing indicates the circumstances of an acquisition during marriage or whether a valuable consideration was paid, the basic presumption may not be so strong, but practically speaking, at least a recited valuable consideration can be shown in most instances. Even if one cannot be shown, the Yesler proposition that the basic presumption can be weighed against and will control over doubtful proof that the transaction falls within the separate property section probably means that to prevail the separate property proponent’s proof must be persuasive, not merely plausible.

Application of the basic presumption that assets acquired during marriage are community property assumes the existence of the marital relationship at the time of acquisition, and, if that assumption is challenged, the fact of marriage must be established. Probably in most contested situations the relationship is shown by testimony or documentary evidence of

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70. Lucrative acquisition is by gift, succession, inheritance, or other nonvaluable means. See W. DE FUNIAK & M. VAUGHN, supra note 2, § 62. Gift, inheritance, devise and bequest involve lucrative (donative) acquisitions which usually are not but may be community property. Id. A gift to both spouses normally creates community property. See infra notes 85–97 and accompanying text (Part III.B).

71. See, e.g., Stephens v. Nelson, 37 Wn. 2d 28, 221 P.2d 520 (1950); In re Estate of Witte, 21 Wn. 2d 112, 150 P.2d 595 (1944); In re Estate of Slocum, 83 Wash. 158, 145 P. 204 (1915).

72. That is, the community property section or category is a wastebasket in which falls all property not within the separate property sections.


74. 4 Wash. 349, 30 P. 398 (1892). In the Yesler case land was acquired by ordinary deeds expressing a valuable consideration. The court held that if proof against the presumptive community character left the matter in doubt, the presumption controlled. This principle was applied in Woodland Lumber Co. v. Link, 16 Wash. 72, 47 P. 222 (1896).

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marriage prior to the time of acquisition, but circumstantial evidence can be sufficient. Of course, if the acquirer was unmarried, the character of the asset at the time of acquisition is necessarily separate.

A presumption that an asset possessed by a married person is community property may arise even though the particular time of acquisition has not been established. This presumption may be a reflection of the commingling and tracing rules hereafter discussed which tend to induce the conclusion that an asset in dispute is community property. This presumption is unlikely to arise, or to have much strength, however, until the marital relationship has existed for a substantial period of time.

2. Rebutting the Basic Presumption

The basic presumption of the community character of a postnuptial acquisition can be rebutted by evidence putting the acquisition transaction into a separate property section (e.g., gift, bequest); it can also be rebutted by showing, through tracing, that the asset used to acquire the one in question was separate property. As the court has said, “Separate property continues to be separate property through all of its changes and transitions so long as it can be clearly traced and identified . . . .” Mere assertion that the acquisition was by use of separate funds does not overcome the basic presumption, however; rather, there must be clear tracing of the separate funds into the asset in controversy. Placing the title in the name of one of the spouses neither controls nor has any particular significance in determining the character of ownership; therefore, it is of little use in rebutting the Yesler presumption. If community funds are used to purchase property by the husband with title taken in the wife’s name, he

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77. State ex rel. Marshall v. Superior Court, 119 Wash. 631, 206 P. 362 (1922) (presumption of community property character of all assets possessed by married men supports finding they were insolvent as regards separate liability).
78. See, e.g., In re Jolly’s Estate, 196 Cal. 547, 238 P. 353 (1925); Riddle v. Riddle, 62 S.W. 970 (Tex. Civ. App. 1901). The longer the marital relationship has continued the greater the likelihood that the time of acquisition was after marriage or that commingling has made a source asset community property.
81. Merritt v. Newkirk, 155 Wash. 517, 520, 285 P. 442, 444 (1930). The matter was neatly stated:

Under our somewhat perplexing statutes relating to the acquisition of property, title to real property taken in the name of one of the spouses may be the separate property of the spouse taking the title, the separate property of the other spouse, or the community property of both of the spouses, owing to the source from which the fund is derived which is used in paying the purchase price of the property.
intending that she own separately, it may be necessary, and certainly it is safer, that he also execute a quitclaim deed to her. With the equal management rules the same possibility and problem will exist if the wife is the actor and the husband the grantee.

Tracing to determine the character of the funds used to purchase an asset often is necessary to establish its character. If the acquisition funds were the earnings of a spouse, that normally would be the end of the search—the source asset would have been identified and since earnings of spouses while living together are community property, the acquired asset would be a community asset. However, if the acquisition funds were acquired by sale of an asset, analysis of the ownership character of that asset would be necessary, and so on, until a source either in a spouse's earnings or within the separate property section is identified. Only the latter source will rebut the basic presumption.

B. Acquisition by Gift

An acquisition by one spouse by gift, or otherwise within the separate property section, will apparently, but not necessarily, be separate property. The substance rather than the form of the transaction will control so that an acquisition which appears to be lucrative can be found to be onerous. Thus in Andrews v. Andrews the court concluded that a devise to the husband, had it been made, would have been in performance of a contract to devise in return for services to the decedent, and thus an onerous acquisition of community property in which the wife would have an interest. The intention of the transferor is probably determinative of whether an acquisition that in form fits within the separate property section is in fact lucrative. If a donation is not intended, the acquisition falls within the language of the community property section, even though it might be difficult to conclude the acquisition was "onerous."

82. The court indicated the statute of frauds applied in In re Estate of Parker, 115 Wash. 57, 196 P. 632 (1921). The author believes this is unsound because it jumps over the problem of the character of the acquisition. The use of the quitclaim deed is important to change, or raise the presumption of change, to separate ownership. In re Estate of Carmack, 133 Wash. 374, 233 P. 942 (1925).

83. See infra notes 315–469 and accompanying text (Part IV).

84. It is sometimes helpful to think of a spouse's productive or earning capacity as the basic community property asset (it is, of course, the basic source of community property). This approach would present a two-step rather than a one-step tracing—tracing to earnings, then to earning capacity—but of course with the same result.

85. 116 Wash. 513, 199 P. 981 (1921).


87. See United States v. Elfer, 246 F.2d 941 (9th Cir. 1957); In re Estate of Gold, 170 Cal. 621, 151 P. 12 (1915). W. de Funiak and M. Vaughn criticize the sweeping inclusion within the community property section as a failure to recognize that the system contemplates onerous acquisition through
A special problem arises where a gift is not to one, but to both of the spouses. In substance, the community property statutes establish permissible types of property ownership, rather than solely specifying particular means by which community property may be acquired. Thus, despite the language of the separate property sections, which could be interpreted to mean that a gift to both spouses necessarily creates a separate property ownership in each, the court in In re Estate of Salvini held that such a gift creates community property in the donee spouses.

However, the sweep of the concluding statement in Salvini that “[a] gift to a husband and wife is a gift to the community under our statutes,” needs clarification. This statement may announce a flat rule that when the donees are husband and wife the asset acquired is necessarily community property; but preferably the statement should be considered as the expression of a presumption which will control in the absence of proof of a different intention in the donor. The donor, if he so intends, should be permitted to create in his donees some recognized form of common law (separate property) co-ownership. Although in Salvini both spouses were named as grantees and were in fact identified as “husband and wife,” the presumption of a gift to the community should arise, even though the transfer instrument does not indicate the marital relationship of the donees. Avoiding a flat rule and permitting a presumption of community property character to arise would recognize “[t]he policy of the law . . . in favor of community property,” but still permit the intention of the parties to control.

In In re Marriage of Martin, the trial court divided community property between the parties, including the home built on a lot conveyed “in consideration of love and affection” to “Paul Logan Martin and Gloria Martin, his wife,” and concluded the lot was the husband’s separate property. The appellate court determined the facts and the deed did not support the conclusion, and therefore remanded for the entry of additional findings. After reference to Salvini, the court explained:

industry, labor, or talent of the spouse(s). W. DE FUTIAK & M. VAUGHN, supra note 2, §§ 62, 76. The statutory language does support the inclusion: “Property not acquired . . . as prescribed in [the separate property sections] acquired after marriage by either [spouse or both] is community property.” WASH. REV. CODE § 26.16.030 (1983).

88. In Stockstill v. Bart, 47 F. 231 (C.C.W.D. Wash. 1891), the federal court concluded the Washington statutes had the latter effect. The Washington court rejected this view in In re Estate of Salvini, 65 Wn. 2d 442, 397 P.2d 811 (1964).
89. 65 Wn. 2d 442, 397 P.2d 811 (1964). The Spanish law is the same. W. DE FUTIAK & M. VAUGHN, supra note 2, § 69.
90. 65 Wn. 2d at 448, 397 P.2d at 814.
91. Id. (quoting Volz v. Zang, 113 Wash. 378, 383, 194 P. 409, 410 (1920)).
93. Id. at 94, 645 P.2d at 1149.
We agree that a gift to a married couple should only be presumed to be community property. The presumption is a rebuttable one. We hold that clear and convincing evidence that the property is separate is required to overcome the presumption that it is community in character. On remand for the entry of findings, the trial court should be careful to distinguish whether Mr. Martin's mother and stepfather intended at the time the gift was given by transfer of the deed (1) to convey the land to him as his separate property or (2) to convey the land to both spouses, but on the unstated condition, expectation, or desire that the parties would remain married or (3) to convey the land to both as community property outright. Further, on remand for the entry of additional and consistent findings, the trial court should consider that in order for a gift to be found, there must exist (1) an intention on the part of the donor presently to give, (2) a subject matter capable of passing by delivery, and (3) an actual delivery. An executed gift becomes effective and irrevocable upon delivery and divests the donor of all present control. If the court finds that the parents intended to convey the land to both spouses, the land must be characterized as a community asset. Including both Paul and Gloria on the deed and the stepfather's testimony lend support to the second or the third proposition.94

At first blush the direction to consider three possible variations of the donors' intent seems unusual, but it may be prompted by the proposition that the location of the title does not necessarily control the character of ownership,95 and the discretion that the dissolution court has to consider the circumstances surrounding the acquisition, even conceding the community character of the asset at the time of the action.96 If the land became the community property of the two "outright," there would appear to be no purpose to seek additional information on the origin of the acquisition.

Another gift transaction should be mentioned. When one spouse uses separate property to acquire an asset, title to which is taken in the name of the other spouse, there is under Washington law a rebuttable presumption of gift.97

C. Acquisition While Living Separate and Apart: Marriages That Are No Longer Accompanied by Community Relationships

As previously discussed, the existence of the marital relationship is prerequisite to a finding that an acquisition is community property, and an

94. Id. at 96, 645 P.2d at 1150 (emphasis in original; footnote and citations omitted).
95. See supra notes 79–84 and accompanying text (Part III.A.2).
96. See infra notes 541–49 and accompanying text (Part V.D).
97. Scott v. Currie, 7 Wn. 2d 301, 109 P.2d 529 (1941) (husband bought with separate funds, took title in wife's name; presumption not rebutted, she owned as her separate estate); Plath v. Mullins, 87 Wash. 403, 151 P. 811 (1915) (presumption of gift by wife not overcome); Denny v. Schwabacher, 54 Wash. 689, 104 P. 137 (1909) (presumption of gift by wife found rebutted; husband held under resulting trust for wife).
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asset acquired onerously during the marital relationship will ordinarily be presumed to be community property. Such an acquisition may be found to be the separate property of the acquirer, however, by reason of the “living separate and apart” provisions of section 26.16.140 of the Revised Code of Washington.98 Prior to the 1972 amendments, that section provided only that the wife’s earnings and accumulations while “living separate from her husband” were her separate property.99 However, the case law had developed the requirement that a community relationship—as distinguished from merely a marital relationship100—exist between the husband and wife to establish his onerous acquisitions to be community property. The principal case enunciating this proposition is Togliatti v. Robertson,101 in which savings bonds acquired by the husband, after a long separation during which neither spouse relied on the efforts of the other, were found to be his separate property. The court’s conclusion was reached on the dual bases that (1) neither spouse had contributed to the acquisitions of the other, contrary to the fundamental theory of community property, and that (2) a separate property agreement could be inferred from their conduct during the long and permanent separation.102 The Togliatti rules apply only to a “defunct marriage” and not merely to a physical separation of the spouses, however, as the court explained in Rustad v. Rustad,103 which held that acquisitions by the husband during the long separation of the spouses by reason of the wife’s confinement in a mental institution outside of Washington were community property.104

Whether the inclusion of the husband in the 1972 amendments to section 26.16.140 is essentially a codification of the Togliatti rules or whether it effects a change from them to a different pattern previously limited to the wife’s acquisitions is uncertain. Unquestionably both spouses should have

98. **WASH. REV. CODE** § 26.16.140 (1983) states:
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.


100. Existence of the marital relationship depends upon the legal requirements for marriage. Existence of the community relationship depends upon facts in addition to the marriage.

101. 29 Wn. 2d 844, 190 P.2d 575 (1948).

102. The first rationale was applied in In re Estate of Armstrong, 33 Wn. 2d 118, 204 P.2d 500 (1949), and the second in In re Estate of Janssen, 56 Wn. 2d 150, 351 P.2d 510 (1960).


identical positions, not only by reason of the new phraseology of the section, but also because of the thrust of the 1972 amendments for equality between the spouses. The problem, however, is to identify that position.

Nothing in earlier Washington cases establishes the content of the "living separate" language of the pre-1972 statute, but "living separate and apart" in the amended version obviously should have the same meaning. In Kerr v. Cochran the defendant wife testified she was living separate and apart from her husband; the court said mere separation would not dissolve the community, and that:

The statute merely states that the earnings of the wife are her separate property while she is living separate and apart from her husband. It has no effect on the status of property acquired prior to the separation, nor does it dissolve the marital community. The statute operates while the spouses are living separate and apart, and is effective regardless of whether there has been a dissolution of the community.

It is unclear whether the court in that case made the distinction between continued existence of a marital relationship and termination of a "community relationship" as we have used that term above.

The preferable analysis of "living separate and apart" is that the statute contemplates a permanent separation, which may be established by factual patterns such as those existing in the Togliatti line of "defunct marriage" cases. Permanent separation, in essence, exists when both spouses no longer have the will to continue a "community relationship." A deserted spouse who desires that the relationship continue despite desertion or abandonment by the other—a frustration of the deserted spouse's community expectations—should remain protected by the community property rules and should be able to assert an interest in the deserting spouse's after-acquired property. In no event, however, should the deserting spouse be

106. 65 Wn. 2d 211, 396 P.2d 642 (1964).
107. Id. at 225, 396 P.2d at 650 (emphasis added). This last sentence does indicate mere separation brings the statute into play even though there is not a "defunct marriage." Note, however, the proposition is not essential to the holding of no community liability. Similarly, the statement in Rustad that the spouses were living separate and apart (she being confined in an out-of-state mental hospital) does not compel a determination that mere physical separation, even though long continued, brings the statute into operation. See also Oil Heat Co. v. Sweeney, 26 Wn. App. 351, 613 P.2d 169 (1980), in which husband's contract created community liability even though he was home only infrequently and there was no normal marital relationship; there was no clear and convincing evidence that they were living separate and apart or that the marriage was then defunct, although he later disappeared.
108. The holding in the case, however, is that the plaintiff in the tort action had failed to prove that defendant wife had incurred any community liability on any possible theory.
109. In Peters v. Skalman, 27 Wn. App. 247, 617 P.2d 448 (1980), the permanent separation and defunct marriage situation was adequately shown so that husband could adversely possess against wife.
able to assert an interest in the deserted spouse's after-acquired property.\textsuperscript{110} This approach accords with the Spanish rules.\textsuperscript{111} There is also support for this approach both in the rule that the husband loses his managing power upon his abandonment of the wife,\textsuperscript{112} and in the inference in \textit{Hicks v. Hicks} that the deserting husband's acquisitions subsequent to separation but prior to his divorce are community property to be divided between him and his former wife. When the deserted spouse accepts the futility of hope for restoration of a normal relationship, the marriage should be considered "defunct" or the separation permanent so that the statute applies.\textsuperscript{114} Finding the statute applicable when the deserted spouse accepts, or perhaps just acquiesces, in the separation seems to be in philosophical harmony with the dissolution of marriage act;\textsuperscript{115} to dissolve a marriage the act does not require affirmative concurrence in the other spouse's allegation that the marriage is "irretrievably broken," but only that the spouse does not deny the allegation.\textsuperscript{116} A decree of separate maintenance likewise should invoke the "living separate and apart" language of section 26.16.140.\textsuperscript{117}

**D. Acquisitions From or Through the Federal Government**

If a particular asset is acquired from or through the federal government, federal law may intervene and control by virtue of the supremacy clause of the federal Constitution,\textsuperscript{118} effecting a result contrary to that dictated by ordinary community property rules. If the source of the acquisition is community property funds or the labor of a spouse, the ordinary rule would establish the community character of the asset, and the dispositive and succession rights to the asset would be controlled by local law.

\textsuperscript{110} This analysis is more fully explored in Cross, \textit{supra} note 9, at 531–33.
\textsuperscript{111} W. DE FUNIAK & M. VAUGHN, \textit{supra} note 2, § 57. The problem not having been resolved in Washington, the Spanish law should be persuasive. See \textit{In re Estate of Salvini}, 65 Wn. 2d 442, 397 P.2d 811 (1964); \textit{see also} G. MCKAY, \textit{COMMUNITY PROPERTY} § 299 (2d ed. 1925).
\textsuperscript{112} Wampler v. Beinert, 125 Wash. 494, 216 P. 855 (1923).
\textsuperscript{113} 69 Wash. 627, 125 P. 945 (1912).
\textsuperscript{114} This should be established by the deserting spouse and not be merely a matter of elapsed time. \textit{Cf. Johnson v. Department of Labor & Indus.}, 3 Wn. 2d 257, 100 P.2d 382 (1940) (separation for two years without attempt to enforce support obligation is abandonment; wife abandoned for more than one year is ineligible for benefits under the workman's compensation statute).
\textsuperscript{116} \textit{Id.} § 26.09.030(1).
\textsuperscript{117} This would be so even though the formerly limited purpose of the action for separate maintenance did not permit the decree to fix the character of property held or which may be acquired in the future. Cohn v. Cohn, 4 Wn. 2d 322, 103 P.2d 366 (1940). In the present separate maintenance action the court has power to dispose of property. WASH. REV. CODE § 26.09.080 (1983).
\textsuperscript{118} U.S. CONST. art. VI, cl. 2.
In the early federal homestead cases, federal law controlled with whom the federal government would deal, but when a patent was issued the nature of the ownership of the land was determined by local law. However, in Wissner v. Wissner the United States Supreme Court held that federal law controlled the effectiveness of the beneficiary designation of national service life insurance even though the result was contrary to state community property law. In In re Estate of Allen, the Washington court held that ownership in United States savings bonds was determined by state community property law; the applicable federal regulations, in the Washington court's view, were a matter of administrative convenience only and did not control substantive rights in the bonds. The United States Supreme Court subsequently rejected the position of the Washington court in Allen, and held that federal law governs substantive rights of power of disposition of United States savings bonds. The Supreme Court's interference in Yiatchos v. Yiatchos with local rules also reversed the state burden of proof in gift transactions by holding that to successfully attack the husband's disposition of the bonds the wife must show she had not concurred in his donative transfer. The local rule, on the other hand, puts the burden on the proponent of a "separate" property claim when the wife has not participated in the gift.

The federal intrusion through the supremacy clause into areas previously thought to be controlled by local law expanded in marriage dissolution cases involving retirement pay or pensions covered by federal statutes. In Hisquierdo v. Hisquierdo involving Railroad Retirement Act benefits, the cases are Free v. Bland, 369 U.S. 663 (1962) (Texas law) and Yiatchos v. Yiatchos, 376 U.S. 306 (1964). The latter reversed the Washington court's holding in In re Estate of Yiatchos, 60 Wn. 2d 616, 343 P.2d 867 (1959).

119. G. McKay, supra note 111, §§ 547-49, at 555-57, explained the result on the basis of a federally created right of survivorship.


121. 338 U.S. 655 (1950). A particularly interesting reaction to this holding is Davis, The Case of the Missing Community Property, 5 SW. L.J. 1 (1951).

122. 54 Wn. 2d 616, 343 P.2d 867 (1959).

123. The cases are Free v. Bland, 369 U.S. 663 (1962) (Texas law) and Yiatchos v. Yiatchos, 376 U.S. 306 (1964). The latter reversed the Washington court's holding in In re Estate of Yiatchos, 60 Wn. 2d 179, 373 P.2d 125 (1962), as to the husband's half interest and remanded for further clarification of the Washington law on the wife's interest in community property. The court concluded it was uncertain whether the wife's vested half interest in community property applied to all community property in the aggregate or inhered in each item. The item theory of community property ownership is reflected in the holdings discussed infra notes 315-417 and accompanying text (Parts IV.A, B) on transfers and infra notes 550-672 and accompanying text (Part VI.A) on availability to reach of creditors. There was no direct holding as regards death succession prior to In re Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972), in which the court of appeals concluded the item theory was applicable there also.


125. See infra notes 315-469 and accompanying text (Part IV) for discussion of the transfer power. The author has never been reconciled to the idea that a debtor (U.S.) should be able to tell a creditor (bond holder) how the bond is owned, as distinct from with whom the debtor will deal.

the Court held that the California court could not divide the pension and further, could not offset its value by awarding a larger part of community property to the nonemployed spouse. In *McCarty v. McCarty*, the Court extended the reasoning of *Wissner* and *Hisquierdo* in concluding that military retired pay could not be treated as divisible community property by the state courts, despite a vigorous dissent. In *Hisquierdo* the Court had indicated that the supremacy clause would apply only if the federal law “positively required by direct enactment” that state law be preempted (a mere conflict in words would not be sufficient) and state family and family property law did “major damage” to “clear and substantial” federal interests. In *McCarty* the Court applied a less rigorous test, apparently only requiring some conflict in words. This latter analysis was used in *Ridgway v. Ridgway*, which held that a state court could not make the beneficiary widow hold insurance proceeds, under Servicemen's Group Life Insurance Act, in trust for children to accomplish the purpose of an earlier divorce decree requiring the husband to keep the children of the earlier marriage as beneficiaries of the policy.

The direct result of *McCarty* has been eliminated by the 1982 enactment in Congress of the Uniformed Services Former Spouses' Protection Act. Under 10 U.S.C. § 1408(c)(1), a court may treat nondisability military retired pay “either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.” If the marriage had existed for at least ten years during military service, there may be direct payment to the spouse (or former spouse), under sections 1408(d)(1) and (2), but not after the death of the member or spouse (or former spouse), under section 1408(d)(4). The transition provisions of the law eliminate the possible retroactivity of

130. Those, such as the author, who believe the federal law should not supplant local law any more than necessity requires, have concern that *McCarty* and *Ridgway* have created a new standard reflecting an increased willingness to find state domestic relations law (or other law) preempted. See Hershberger, *Federal Preemption of State Family Property Law: The Marriage of McCarty and Ridgway Has Not Been Dissolved by Congress*, 9 COMM. PROP. J. 259 (1982). Thus far, at least, the Washington court applies the more rigorous *Hisquierdo* test. See Purser v. Rahm, 104 Wn. 2d 159, 702 P.2d 1196 (1985) (no preemption of Washington community law which controls what part of community income is to be considered in determining eligibility for federal Medicaid benefits).
McCarty as to decrees final before June 26, 1981, the date of the McCarty decision, and the law is not to be interpreted as permitting reopening of decrees which did not divide retirement pay.\textsuperscript{133}

If the federal law completely occupies the area the conflict is such that there is no room for a contrary state rule. This is reflected in the comprehensive scheme for social security benefits with provisions for former wives in some instances as well as survivors.\textsuperscript{134} As to a survivor's benefit acquired through the military retirement program, provision is made for a surviving spouse or children, and a former spouse (not the widow) cannot successfully claim a share in the benefit. In \textit{Barros v. Barros},\textsuperscript{135} the court of appeals reasoned that the survivor's benefit acquired through the retirement program is community property but by reason of the federal law only the person designated by the retiree can have an interest. The \textit{Barros} court pointed out that the Uniformed Services Former Spouses' Protection Act clearly so provides in 10 U.S.C. § 1448(b), and only permitted division of retired pay to avoid the effect of \textit{McCarty}.

Benefits under the Railroad Retirement Act no longer are fully controlled by \textit{Hisquierdo} since the 1983 amendment of 45 U.S.C. § 231m, and are now subject to division except for that part which is a substitute for social security benefits.

Disability benefits are not covered by the federal statute which nullified \textit{McCarty} and there continues to be a problem as to whether local law can control. While \textit{McCarty} still had force, the Washington court had concluded in \textit{In re Marriage of Dessauer} that rights in military retired pay were an economic circumstance which could be considered when dividing property in the dissolution action.\textsuperscript{136} While the \textit{Dessauer} holding was abandoned\textsuperscript{137} because of the change in the federal statutes pertaining to military pensions, the \textit{Dessauer} rationale was applied to railroad retirement rights in \textit{In re Marriage of Roark}.\textsuperscript{138} Similar reasoning could be

\begin{footnotes}


\textsuperscript{136} \textit{In re Marriage of Dessauer}, 97 Wn. 2d 831, 650 P.2d 1099 (1982).

\textsuperscript{137} \textit{In re Marriage of Smith}, 100 Wn. 2d 319, 669 P.2d 448 (1983).

\textsuperscript{138} 34 Wn. App. 252, 659 P.2d 1133 (1983). \textit{Roark} was decided only several months before the above-described 1983 amendment to 45 U.S.C. § 231m that allowed states to treat the railroad workers’ pensions as divisible community property.
\end{footnotes}
applied to federal disability retired rights. The reasoning in *Dessauer* may be unsound, however, in light of the impermissibility under *Hisquierdo* of offsetting the retirement right against available community property to give the nonemployed spouse a larger share in those other assets.

In California there is authority that military disability retired pay (although separate property there and thus not in conflict with federal control), to the extent it is a substitute for longevity retired pay, may be held to be community property. The reasoning is that there is no federal law to the contrary and the exclusion of such income from the federal statute is irrelevant.\(^\text{139}\)

There are, apparently, more than two dozen federal retirement systems,\(^\text{140}\) so which standard of preemption is used may be important. Rights under the Employee Retirement Income Security Act of 1974 (ERISA),\(^\text{141}\) may be affected but it is not believed that a community/separate property problem exists in this instance.\(^\text{142}\)

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**E. Time of Acquisition: Inception of Title or Apportionment—Fully Financed Acquisitions (e.g., by mortgaging or using borrowed funds), Installment Purchases, Life Insurance, Pensions, Goodwill, and Professional Degrees**

The ownership character of an asset is determined "at the time of acquisition" which has posed no problem in cash purchases, nor in fully financed purchases in which the legal title is transferred at the time. On the other hand, the life insurance asset and assets acquired through payments on an installment contract where transfer of legal title (and ownership) is postponed have presented problems. Installment acquisitions of retirement or pension rights have recently been before the courts and have usually been resolved on the basis of deferred compensation, resulting in an apportionment by time of the ownership rights, ignoring for the moment the federal


supremacy problems discussed above in Part III.D. Professional goodwill and the professional degree, both developed or acquired over a period of time, have also been recently analyzed.

1. Mortgages

In a mortgage financing situation, where the buyer acquires legal title at the outset in exchange for a cash payment and an obligation to pay the remainder of the purchase price, the fractional share of the ownership represented by the cash payment will be owned as the cash was owned, and the character of ownership of the balance will be determined by the character of the credit pledged to secure the funds to pay the seller or to secure payment to the seller. It does not matter that funds of a different character are subsequently used to pay the obligation; the character of the asset is determined by the character of the cash and of the obligation at the time legal title (and ownership) is obtained. In three factual situations, however, difficulty arises in ascertaining, as between husband and wife, the character of the obligation and thus of the credit acquisition.

If legal title is secured by partial payment without any personal obligation to pay the remainder of the purchase price, for example, when taking title subject to a mortgage, the basic community or separate property presumptions will clearly apply as to that fraction for which payment then has been made. However, the effect of payment for the fraction represented by the unassumed mortgage debt with funds not having the same character as the presumption is unclear.

143. See supra notes 118-42 and accompanying text.
144. Financing through a deed of trust should be similarly treated.
145. Ownership of the cash is determined by application of the source doctrine, i.e., by tracing to the original source.
146. See, e.g., In re Estate of Dougherty, 27 Wn. 2d 11, 176 P.2d 335 (1947). See infra notes 550-761 and accompanying text (Part VI) for further discussion of the character of obligation question. There has long been a presumption that the husband’s contract obligation is community in character. See Bryant v. Stetson & Post Mill Co., 13 Wash. 692, 43 P. 931 (1896); Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892). Under the 1972 changes the same presumption should apply to the wife’s obligation. An obligation by assuming an existing mortgage should be similarly treated. The requirement of joinder in acquiring real estate may mean that a promissory note executed by one spouse in the purchase of real estate will, in the absence of proof of participation by the other spouse in the acquisition transaction, create only separate liability and therefore only separate property in that portion. See Colorado Nat’l Bank v. Merlino, 35 Wn. App. 610, 668 P.2d 1304, review denied. 100 Wn. 2d 1032 (1983), discussed infra text accompanying note 761.
147. In re Estate of Finn, 106 Wash. 137, 179 P. 103 (1919).
148. Finn involved payment of the unassumed mortgage debt with community funds which, as the court said, supported the presumption of the community character of that share (Dawson tract). However, in Merkel v. Merkel, 39 Wn. 2d 102, 234 P.2d 857 (1951), land conveyed to the husband prior to his marriage, subject to a mortgage, was held to be his separate property though the mortgage debt
If the security given for the obligation is the asset acquired and the credit's character is uncertain, it may be difficult to avoid a result based upon the basic community property presumption. In *Walker v. Fowler*, the court held the wife owned a quarter of the land in question separately because she had used her separate funds to pay that portion of the purchase price, but the balance was owned as community property because there was nothing to overcome a presumption that it was acquired by use of community credit. If the asset acquired is income producing and in fact produces the funds to discharge the acquisition obligation, it is arguable that the character of the funds used to make the initial payment ought to control the character of the obligation and hence the ownership as between the spouses. There is some support for this argument in the proposition that similar funds, if available, are presumed to have been used to pay similar obligations; for example, separate funds pay separate obligations.

There is nothing in the Washington cases that indicates clearly that the expectation of the creditor is controlling on the question of the community or separate character of the funds or other asset acquired on credit. An intra-family loan (e.g., parent to child) might indicate that only separate credit was extended if no family or community purpose was advanced. Also, it would not be unreasonable to permit the separate claimant to prevail by showing a pattern of investing or borrowing and the existence of

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150. Even though part of the debt was subsequently paid by use of the wife's separate funds, the community creditor was able to reach the three-quarters community property ownership. Both spouses were bound on the note and mortgage. Note that under the 1972 changes the act of either spouse will be presumptively community in character, unless, of course, the statute requires joinder of both.
151. See, e.g., Guye v. Guye, 63 Wash. 340, 352, 115 P. 731, 735 (1911). The argument is obviously circular: the character of the credit is determined by the character of the security given which is determined by the character of the credit by which the asset (used as security) is acquired. This may mean that the presumption of community credit must prevail when there are no other available facts to consider.
152. The closest to a test is the statement by Judge Horowitz in *National Bank of Commerce v. Green*:

The "acid test" for determining whether the obligation or liability is separate or community in nature is the purpose for which the note is executed. If the note is executed for the benefit of the marital community, the presumption of community obligation is not overcome. Thus money borrowed to pay off a community debt or to acquire a community asset is for a community purpose. If the debt is separate in character, the note is collectible only out of separate property. The wife's signature presumptively does not create a community obligation and hence such a signature is not necessary to the creation of a community obligation. The husband's act or signature is enough. The purpose or proposed benefit may be evidenced by the community or separate uses to which the proceeds of a note or other obligation are put.

sufficient separate assets to support the credit extended even though none were used directly as security. Commingling of community skill and separate credit or the possibility of an inadequacy in “paying” for the community contribution, however, militates against finding that the community presumption has been overcome.

As between the husband and wife, the controlling character of the obligation to pay the balance of the purchase price is not necessarily determined by the extent to which the creditor could enforce payment. The obligation may be separate primarily because one of the spouses provided his or her separate property as security even though it could be enforced against either spouse or the community property. For example, in *In re Estate of Finn*, the wife’s obligation, secured by a mortgage on other separate property of the wife, involved her separate credit and was the character-controlling obligation even though the husband (and thereby presumptively the community) was also bound by his signature on the note, the husband apparently having signed at the insistence of the creditor. As between the spouses a primary-secondary debtor’s relationship may be established that is relevant to the determination of the character of the credit used in acquisition, without necessarily creating a principal-surety relationship affecting the creditor. Query whether the assertion by the claiming spouse, without at least some corroborative evidence, is or should be enough.

Since knowledgeable creditors are unlikely to accept a transaction that clearly creates only a separate liability, it may be impractical to attempt to characterize a transaction by the recitals in the documents. The spouses may have to fix the transaction’s character by independent, contemporary interspousal documents, if the separate character as between them is to be unequivocally established.

2. *Life Insurance Policies*

Until the decision in *Aetna Life Insurance Co. v. Wadsworth*, the rules with reference to the ownership of life insurance policies and their proceeds were clear and involved only tracing to determine the character of the funds used to pay the premiums. The previous holdings prorated the ownership and hence the proceeds according to the separate or community character of the funds used to pay the premiums, without regard to the nature of the

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153. 106 Wash. 137, 179 P. 103 (1919) (Drew tract).
154. See also Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934), in which under similar borrowing conditions community liability was enforced by the creditor.
156. This history is presented in *Wadsworth*.
policy (e.g., endowment, ordinary life, group term, etc.). In *Wadsworth* the
court held that only the most recent premium was to be considered for a
group term policy and therefore the policy provided by the employer as a
fringe benefit of the employment was acquired by the husband’s earnings
and was entirely community property of the deceased husband and his
second wife, the surviving widow, against the claim of his previous wife
that a substantial portion was separate property.157 In a sense this does not
adopt a new principle in that the tracing controls the ownership character of
the policy and its proceeds, but in *Small v. Bartyzel*,158 the previously
controlling case, the court had prorated the proceeds according to the
number of premiums paid before the marriage (separate) and those paid
during the marriage (community). The explanation lies in the adoption by
the *Wadsworth* court of the “risk payment” theory by which each premium
buys protection for a fixed period of time so that the source of ownership of
the policy (and hence, the proceeds) is the premium which paid for the
period of time during which the insured died. In its analysis the court
distinguished between the policy (i.e., the inter vivos contract right) which
could be community property, and the proceeds which result from perfor-
mance of the company in paying.159

While there are many forms of life insurance, the court indicated it was
enough to recognize only two: term insurance and cash value insurance.
The court carefully limited its decision to term policies,160 but noted that
there is argument to support applying the risk payment theory in part to
policies which also have elements in addition to the bare protection against
death of term insurance.

At the moment, then, for all term policies, whether group term or not,
apparently the risk payment theory is to be applied. For all other policies,
the rule to be applied involves prorating or apportioning according to the
separate or community character of the funds used to pay the premiums
since the inception of the life insurance contract.

The insurance, that is, the contract right reflected in the policy, is itself
an asset, not a mere expectancy,161 and is the immediate source of proceeds
payable on the death of the insured. If there is a partial or total community
property ownership of the policy and the noninsured spouse dies, the
decedent’s community property interest is necessarily owned by the dece-
dent’s successors, with the consequent possibility of liability for death

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157. The dispositive power of the insured is discussed infra notes 374–78 and accompanying text
(Part IV.B.1.a).
158. 27 Wn. 2d 176, 177 P.2d 391 (1947). *Wadsworth* expressly overrules *Small*.
159. The proceeds obviously are not community property because the insured spouse is dead.
160. *Wadsworth*, 102 Wn. 2d at 659 n.2, 689 P.2d at 50 n.2.
succession tax. Of course subsequent premium payments will reduce the community percentage of the ownership. As an asset, the policy needs to be taken into account in marriage dissolution property arrangements.

3. Installment Contracts

Earlier cases involving installment purchases stated the basic rule that the ownership is determined at the time of acquisition, but the cases were not always consistent in identifying that time. There are two principal possibilities: (1) an inception of title approach by which the time of acquisition is at the signing of the contract (i.e., the rule in Washington for the mortgage acquisition cases); and (2) an apportionment rule under which the ownership is prorated between the community and separate asset.

162. In re Estate of Leuthold, 52 Wn. 2d 299, 324 P.2d 1103 (1958). The value at death is held to be the cash surrender value. For federal tax purposes the value is the interpolated terminal reserve plus the unearned part of the last premium paid. Treas. Reg. § 20.2031-8(a)(2), T.D. 7319, 1974-2 C.B. 297. Absence of cash surrender value is irrelevant on the question of ownership and succession rights in the contract right reflected in the policy itself.

163. Scott v. Commissioner, 374 F.2d 154 (9th Cir. 1967).

164. See, e.g., Note, Insurance—Effect of a Divorce Decree, 31 WASH. L. REV. 146 (1956). This is particularly important with the new rule adopted in Wadsworth as to the continuing effect of designation of the former spouse as beneficiary. The matter is discussed infra notes 541–49 and accompanying text (Part V.D).

165. The cases are discussed in an earlier article, Cross (1974), supra note 1, at 758–60.

166. A third possibility would be to determine ownership when legal title is transferred in performance of the seller's obligation. Under this possibility the ownership character would be controlled by the marital status at the time legal title is acquired. This result is wholly unsatisfactory and totally ignores the source doctrine, but remains as a slight possibility because of the holding in In re Estate of Kuhn, 132 Wash. 678, 233 P. 293 (1925). The land conveyed to a widower was his separate property even though the contract to buy had been made while he was married. The result was that his children by his deceased wife had no ownership share despite payment of a quarter of the price with community funds. The children were protected by a right to reimbursement in the amount of one-half of the payment made with community funds. The particular result followed from a strange proposition then extant in the Washington cases that the purchaser of land under an executory, forfeitable contract had no title or interest, legal or equitable. Obviously if nothing had been acquired by the time of the mother's death there was nothing for her children to inherit; but as later recognized in Norman v. Levenhagen, 142 Wash. 372, 253 P. 113 (1927), a contract right had been acquired and was property, the community or separate character of which would be determined by the usual rules. See, e.g., Farrow v. Ostrom, 16 Wn. 2d 547, 133 P.2d 974 (1943); Meltzer v. Wendell-West, 7 Wn. App. 90, 497 P.2d 1348 (1972). When the contract purchaser's right has been involved the court has held it to be community property when acquired during marriage, i.e., the contract obligation to buy has been created by the purchaser's signing the contract, even though some separate funds were used in part payment. Farrow, 16 Wn. 2d 547, 133 P.2d 974. Similarly, the court held land deeded to the husband after separation but before divorce was entirely community property even though he had completed the purchase by payment of the balance of the contract price after the separation with his separate funds. Half of his excess (separate property) contributions were charged as a lien against her half. Fritch v. Fritch, 53 Wn. 2d 496, 335 P.2d 43 (1959).
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estates according to the character of the funds used to make the successive payments (the former life insurance rule in Washington). 167

Prior to the 1972 amendments problems were the same for real and personal property acquisitions. There are now additional problems in real property purchases which will be discussed later. 168

The previous uncertainty as to the character of ownership of an asset acquired through an installment purchase contract has, apparently, been removed by the application of an inception of title concept (i.e., the mortgage rule) in Beam v. Beam. 169 The Beam court quoted from In re Estate of Binge 170 as follows:

Property acquired through contractual obligation, as between husband and wife . . . has its origin and is acquired as of the date when the obligation becomes binding, and not as of the time when the money is paid or the thing is delivered or conveyed. The fruit of the obligation is legally acquired as of the date when the obligation becomes binding. 171

In Beam, the husband and the wife had signed a contract to purchase land. The down payment was made in part from a bank loan secured by a pledge of the wife’s separate stock. The agreement and general pledge to the bank to secure the loan for the partial down payment was signed by both parties, the note to the bank was signed by the husband, and an unidentified amount of the down payment apparently came from the husband’s separate property. The husband testified that the balance of the contract was paid with separate funds. The trial court held the land was the husband’s separate property and awarded the wife a lien because of the pledge of her separate stock. The court of appeals concluded the holding was erroneous and reversed.

After pointing out that previous decisions left unclear the ownership character of such installment purchases and quoting, as above, from Binge, the court said:

The ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase, and the

167. Note the change to the "risk payment" approach for term life insurance, discussed supra notes 155–64 and accompanying text (Part III.E.2).

168. If funds of the same character are used to make all payments, the ownership of the asset will, by ordinary tracing rules, be the same as that of the acquiring funds. There is a presumption that, if both separate and community funds are available, payment of an obligation was made from the proper fund. In re Estate of Finn, 106 Wash. 137, 179 P. 103 (1919); Guye v. Guye, 63 Wash. 340, 115 P. 731 (1911).

169. See infra notes 205–10 and accompanying text (Part II.F).


171. Beam, 18 Wn. App. at 452–53, 569 P.2d at 725 (quoting Binge, 5 Wn. 2d at 484, 105 P.2d at 705) (emphasis omitted).
community or separate estates which subsequently make payments on the
obligation have the right of reimbursement or equitable lien.\textsuperscript{172}

The court reasoned that since there was a community obligation for the
down payment loan and, although both the husband and the wife had
contributed separately, it was impossible to distinguish or apportion the
relative amounts contributed to the down payment, the property must be
deemed community property.

The author believes the adoption of the inception of title approach (the
mortgage rule) is commendable. As was previously stated,\textsuperscript{173} this rule has
the attractiveness of certainty and permits similar resolution of ownership
questions in credit acquisitions, rather than variations based on the par-
ticular sort of credit transactions involved. If the spouses desire a different
result, that is, an apportionment of ownership, present rules permit them to
change the character by agreement.\textsuperscript{174}

There would still remain acquisitions by a process extending over some
time which would not necessarily involve any obligation, and the question
arises whether an inception of title approach should control. An important
asset of this sort is life insurance, other than term life insurance now
governed by the risk payment theory and not involving an installment
acquisition. Since there is no obligation on the insured to continue to pay
premiums, apportioning rights in the policy according to the character of
funds used to make the “voluntary” payments is not inconsistent with a
general applicability of the “mortgage” rule.\textsuperscript{175} In substance the “mort-
gage” rule (i.e., the inception of title concept) is that an asset acquired
through a transaction requiring the payment of installments over a period of
time has the ownership character of the initial obligation and the “time of
acquisition” is when the initial obligation is incurred, regardless of when
legal title actually passed. Similarly, the pension or retirement rights cases
do not involve any obligation, and apportionment between the separate and
community income which is deferred is appropriate. Other acquisitions
taking time are mentioned in the notes.\textsuperscript{176}

\textsuperscript{172} Id. at 453, 569 P.2d at 725.
\textsuperscript{173} Cross (1974), supra note 1, at 762.
\textsuperscript{174} See infra notes 470–549 and accompanying text (Part V) for further discussion of interspousal
agreements.
\textsuperscript{175} Note that the court in \textit{Binge} stated, “The fruit of the obligation is legally acquired as of the
date when the obligation becomes binding.” 5 Wn. 2d at 484, 105 P.2d at 705; \textit{see also supra} text
accompanying notes 170–71. The idea that there was no community interest in an insurance policy from
payment of premiums with community funds because that payment was not voluntary, and that
therefore apportionment should not be made, was controlling in Porter v. McLeod, 15 Wn. App. 650,
553 P.2d 117 (1976) (husband required to maintain insurance for a child of previous marriage).
\textsuperscript{176} Another situation of possible mixed-separate community ownership can be resolved by this
approach: an encumbered asset or a contract purchaser’s interest is devised to one spouse. The devisee
is not obligated to pay, remove the encumbrance, or pay out the contract, nor is the testator’s estate.
4. Pension and Retirement Plans

Analysis of the character of pension and retirement income rights is complicated by the wide variation in retirement income programs, concepts of “vesting” which affect the time of “acquisition” of rights, mixed separate and community labor sources, and valuation questions. McGough suggested four categories for the pension relationship: a mere expectancy, contingent (not vested but with contract right to continue in the plan), vested and unmatured (nonforfeitable right to future payment which could terminate by death prior to retirement), and vested and matured (nonforfeitable right to immediate payment).¹⁷⁷

It is common to classify pension plans as either defined-benefit or defined-contribution plans. In the former type there may be only an undertaking by an employer that a certain percentage of the employee’s pay will continue after retirement, with no current payments into pension fund by either the employer or employee. It is easy to recognize that in such an arrangement there could be a period during which the employee’s “right” could be fairly characterized as a mere expectancy not yet rising to the dignity of “property.” On the other hand, if the plan requires current contributions by the employee it would be surprising to discover that the employee’s right to those contributions was lost or became contingent, even if return of them (with, probably, earnings produced) was postponed to a “retirement” age. In between is an arrangement in which the employer makes payments into a pension fund; in this situation a requirement that the employment continue for a number of years, or that the employee reach a

¹⁷⁷. DESBROOK, supra note 142, § 14.4.
certain age, or both, before claims may be made against the fund would not be surprising. Of course the pension plan may be a mixture of some or all of the three patterns mentioned (e.g., contribution to a fund by both the employer and employee to create the accumulation from which the retirement income will come, supplemented by additional payments by the employer to reach some identified percentage of recent pay).

It is possible to conclude that a spouse's relationship to a pension scheme is too ephemeral to be called "property" and thereby remove the relationship from community property considerations or analysis. On the other hand, since the relationship has economic elements it is not inappropriate to treat it as involving property, thereby pushing the attention to difficult valuation questions. In the mere expectancy category it probably does not matter; even if there is "property," its value is probably nothing or unmeasurable. In any more substantial relationship, attention can properly go directly to questions of value. It seems preferable to the author to determine the community or separate character of the anticipated retirement income on the basis of community property rules, recognizing that there may be difficult problems of valuation which necessarily must affect the solution of any ownership question that may arise. The Washington position recognizes that the employee has a vested right in such programs, regardless of their forms.\textsuperscript{178}

Divorce (dissolution of marriage) is a common arena in which the complications surface. If division of the present value of the "asset" (i.e., the rights in the retirement program) is the only method to eliminate the complications, the valuation difficulty may be insurmountable, or at least undesirable, because of the uncertainty as to whether and how much income finally will be received. If the economic consequences of a long relationship with a retirement program can be reflected in a contingent award of maintenance or alimony, much of this valuation difficulty can be eliminated.\textsuperscript{179} Adjusting alimony to reflect the amount of retirement

\textsuperscript{178} The Washington court has concluded that there is a vested right and not a mere expectancy: [1]It is now firmly established in this jurisdiction that retirement provisions are in the nature of deferred compensation; and, as such, the employee has a \textit{vested right in the system} which cannot be altered to his detriment, whether such system be a public plan, a private, employee contributory plan negotiated through the collective bargaining process, or a voluntary, noncontributory (employer financed) plan. DeRevere v. DeRevere, 5 Wn. App. 741, 743, 491 P.2d 249, 251 (1971) (emphasis in original; citations omitted); see also Payne v. Payne, 82 Wn. 2d 573, 512 P.2d 736 (1973).

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income being received may also ameliorate valuation difficulties.\textsuperscript{180} Probably a sounder solution to this problem would be to award to the non-employed spouse an appropriate share of the retirement income if, as, and when it is received (or presently payable) to the employed spouse.\textsuperscript{181} The Washington court's flexibility in these situations is reflected in \textit{In re Marriage of Jacobs}.\textsuperscript{182}

If retirement income is already being received at the time its separate or community character must be determined, there normally will not be any difficulty other than determining whether it is all community income. If part of the labor by which the retirement income right was acquired occurred while the employee spouse was unmarried, the corresponding part of the retirement income would be separate property. In other words, the ownership of deferred compensation is the same as it would have been had it not been deferred. In addition to the marital or nonmarital quality of the labor, the character of the retirement right is affected by the domicile of the employee spouse in a common law or community property law state while the labor was performed, because the deferred compensation accumulated while domiciled in a common law state would not be community property.\textsuperscript{183}

When the employed spouse dies, any continuing rights probably will not involve valuation problems, and the funds can be apportioned according to the above rules. Upon the death of the nonemployed spouse, however, problems of succession and valuation, complicated by the uncertainty of receipt of future income and the length of time of such receipt, will arise. The Washington court rejected a terminable interest concept applied in California and held the successors of the nonemployed (former) spouse owned her share of the retirement income.\textsuperscript{184}

If retirement is from federal employment, there may be complications under the federal supremacy doctrine. The matter is discussed above in Part III.D.

\textsuperscript{180} Edwards v. Edwards, 74 Wn. 2d 286, 444 P.2d 703 (1968).
\textsuperscript{181} Obviously the nonemployed spouse, awarded a share in the retirement payments, would prefer to have those payments made directly rather than having to pursue a retired spouse who might not voluntarily pay over the share.
\textsuperscript{183} \textit{Id.; see also In re Marriage of Landry, 103 Wn. 2d 807, 699 P.2d 214 (1985).}
\textsuperscript{184} Farver v. Department of Retirement Sys., 97 Wn. 2d 344, 644 P.2d 1149 (1982). The difficulty of collecting that share is reflected in the case. The court held that the employed spouse must pay over the share of the retirement income as it was received, but refused to order the state to pay that share directly. The statute which appeared to terminate any obligation to pay after the death of the nonemployed spouse (a terminable interest concept) was held to be administrative, only relieving the state of direct payment but not eliminating the ownership interest, now inherited.
5. Professional Goodwill and Professional Degree or Education

While the development of professional goodwill or the acquisition of a professional education or degree involves activity extending over a period of time, the Washington cases have not yet considered whether there is need to apportion the identified value between separate and community categories, inasmuch as the particular facts in each case developed during a marriage. It must be recognized, however, that goodwill or a degree is not instantaneously acquired and undoubtedly some apportionment problems will someday be presented. Since there is no obligation that the spouse continue the effort that produces the goodwill or the degree, apportioning would be appropriate rather than concluding that no separate but only a community category would apply. If the spouse’s accomplishment is not characterized as creating “property,” then there may not be anything to divide or, more accurately, for which to account at the dissolution of the marriage, but the earning potential of that accomplishment and the cost of its acquisition can be considered in the dissolution settlement or awards.

In In re Marriage of Fleege,185 the court adopted the position that professional goodwill is a marital asset, holding that although professional goodwill is not readily salable, the important consideration is not whether the goodwill of the practice could be sold without the personal services of the professional, but whether it has value to him.

In In re Marriage of Hall,186 further clarification of the problems of goodwill was given. The case involved married professionals who had married in 1963 while both were in medical school, received their medical doctorates in 1966, served internships and pursued specialized training before returning to Seattle in 1972 where he entered private practice and she became a member of the University of Washington Medical School faculty.

After observing that professional goodwill is recognized as property in Washington and is often defined as “the expectation of continued public patronage”187 the court quoted Justice Story’s more thorough definition of goodwill:

[T]he advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or

185. 91 Wn. 2d 324, 588 P.2d 1136 (1979); noted in Note, Divorce and Dissolution: Goodwill, 15 Gon. L. Rev. 243 (1979).
187. Id. at 239, 692 P.2d at 177 (quoting In re Marriage of Lukens, 16 Wn. App. 481, 483, 558 P.2d 279, 280 (1976)).
from other accidental circumstances, or necessities, or even from ancient partialities, or prejudices.\(^{188}\)

The trial court had found that the husband had goodwill but the wife did not. In supporting this conclusion, the supreme court distinguished between earning capacity and goodwill, stating:

Goodwill is a property or asset which usually supplements the earning capacity of another asset, a business or a profession. Goodwill is not the earning capacity itself. It is a distinct asset of a professional practice, not just a factor contributing to the value or earning capacity of the practice. . . . Discontinuance of the business or profession may greatly diminish the value of the goodwill but it does not destroy its existence. When a professional retires or dies, his earning capacity also either retires or dies. Nevertheless, the goodwill that once attached to his practice may continue in the form of established patients or clients, referrals, trade name, location and associations which now attach to former partners or buyers of the practice.\(^{189}\)

The *Hall* court further stated that while the salaried professional also brings earning capacity comprised of skill and education to her position, upon leaving the position she would take everything to the new position. "There is nothing that increased [her] earning capacity in the old salaried position that cannot be taken to the new position."\(^{190}\) The court concluded, "We. . . . hold that as a matter of law a salaried employee such as [the wife] cannot have goodwill."\(^{191}\) This conclusion precluded a finding that the wife had an asset which could be offset against the husband's goodwill, even though she had acquired a good reputation and had received offers from other institutions for employment at a considerably higher salary.

The court held that the wife's earning capacity, however, was a factor to be considered in the property distribution in *Hall*, as it had previously held in connection with a professional degree in *In re Marriage of Washburn*,\(^ {192}\) and the court directed that on remand the trial court should articulate its reasoning in taking into account this substantial factor.

The court also reversed and remanded with reference to the determination that the husband had goodwill worth $70,000 for lack of adequate proof to support the figure. The valuation process must utilize what has

\(^{188}\) J. Story, *Commentaries on the Law of Partnership* § 99, at 147–48 (3d ed. Boston 1850), quoted in *Hall*, 103 Wn. 2d at 239, 692 P.2d at 177 and *Lukens*, 16 Wn. App. at 483–84, 558 P.2d at 281. (Story is slightly misquoted in the cases; the version in text above is from the edition cited.)

\(^{189}\) 103 Wn. 2d at 241, 692 P.2d at 178 (emphasis in original; citations omitted).

\(^{190}\) Id. at 242, 692 P.2d at 178.

\(^{191}\) Id. Under this reasoning there probably is no goodwill asset in *In re Marriage of Kaplan*, 23 Wn. App. 503, 597 P.2d 439 (1979), involving a "special partner" in a law firm.

become known as the *Fleege* factors: the practitioner's age, health, past
demonstrated earning power, reputation in the community for judgment,
skill, and knowledge, and the practitioner's comparative professional suc-
cess. The court added: "Two areas surrounding the *Fleege* factors must
be clarified: (1) the first step in evaluation under the *Fleege* factors is the
determination of the existence of goodwill and (2) several accounting or
appraisal methods may be used by the trial court in conjunction with the
*Fleege* factors."

In another case, after a similar remand so that the *Fleege* factors could be
taken into account, the trial court concluded goodwill could not exist in the
husband's solo practice because it could not be sold, but made an award to
the wife as her "spouse's economic benefit expectancy" (SEBE). At the
earlier stage of the same case the trial court had included goodwill of
$100,000, which on remand was to be reconsidered with further testimony
on the *Fleege* factors. The court of appeals affirmed, stating that regard-
less of the name used, the *Fleege* factors had been considered, but did
not analyze the nature of SEBE or consider the correctness of the finding of

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193. See *Fleege*, 91 Wn. 2d at 326, 588 P.2d at 1138.
194. *Hall*, 103 Wn. 2d at 242, 692 P.2d at 179. The court described the various accounting methods
as follows:

In valuing goodwill five major formulas have been articulated. . . . There are three accounting
formulas. Under the straight capitalization accounting method the average net profits of the
practitioner are determined and this figure is capitalized at a definite rate, as, for example, 20
percent. . . .

The second accounting formula is the capitalization of excess earnings method. Under the pure
capitalization of excess earnings the average net income is determined. From this figure the annual
salary of an average employee practitioner with like experience is subtracted. The remaining
amount is multiplied by a fixed capitalization rate to determine the goodwill.

The IRS variation of capitalized excess earnings method takes the average net income of the
business for the last five years and subtracts a reasonable rate of return based on the business'
average net tangible assets. From this amount a comparable net salary is subtracted. Finally, this
remaining amount is capitalized at a definite rate. The resulting amount is goodwill.

The fourth method, the market value approach, sets a value on professional goodwill by
establishing what fair price would be obtained in the current open market if the practice were to be
sold. . . .

The fifth valuation method, the buy/sell agreement method, values goodwill by reliance on a
recent actual sale or an unexercised existing option or contractual formula set forth in a partnership
agreement or corporate agreement. . . .

These five methods are not the exclusive formulas available to trial courts in analyzing the
evidence presented. Nor must only one method be used in isolation. One or more methods may be
used in conjunction with the *Fleege* factors to achieve a just and fair evaluation of the existence and
value of any professional's goodwill.

Id. at 243–45, 692 P.2d at 179–80 (citations omitted).
argument against the existence of professional goodwill and distinguishing SEBE is made in Scribner,
*Professional Goodwill in Dissolution Proceedings: the Personification of Property*, 17 GONZ. L. REV.
303 (1982).
196. 23 Wn. App. 27, 592 P.2d 1124 (1979) (*Freedman I*).
lack of goodwill.\textsuperscript{197} To the author SEBE appears to be just an ingenious label for goodwill.

The difficult question of how to treat the financing by one spouse of the education of the other apparently posed no problem in \textit{Hall}, probably because both were medical students at the time of their marriage and were on essentially parallel tracks throughout their educations. However, the question did arise in \textit{In re Marriage of Washburn}.\textsuperscript{198} Although an argument was made (and supported by Judge Rosellini in dissent) that the professional degree (doctor of veterinary medicine) was property to be taken into account in the division of the marriage, the supreme court declined to reach that conclusion. Instead, the court said that if one spouse supports the other through professional school in the mutual expectation of future financial benefit to them, the supporting spouse is entitled to compensation through a division of property, an award of maintenance, or a combination of both.

Two cases were consolidated for review in \textit{Washburn}. In one of the cases (\textit{Gillette}) the trial court awarded the wife $19,000 as “an equitable right to restitution” and $1.00 per year maintenance. In approving the award of $19,000 the supreme court directed that a trial court should consider four factors, among others, in determining the proper amount of compensation for the supporting spouse: (1) community funds expended for direct educational costs (excluding living expenses); (2) amount which would have been earned had the efforts of the student spouse not been directed toward the studies, that is, income foregone; (3) educational or career opportunities which the supporting spouse gave up; and (4) future earning prospects of each spouse, including the earning potential of the student spouse with the professional degree.\textsuperscript{199} This case was affirmed except that the $1.00 maintenance award was reversed as unnecessary, since the $19,000 was to be paid over a period of years and was in effect maintenance. In the other case (\textit{Washburn}) the trial court had made no award to the supporting spouse (the wife) for lack of identified authority to do so. The supreme court reversed and remanded for consideration of compensation due for the wife’s contribution toward the cost of the husband’s education.

\textsuperscript{197} Freedman II, 35 Wn. App. at 51–52, 665 P.2d at 904.
\textsuperscript{199} The factors are more fully stated in the opinion, 101 Wn. 2d at 179–80, 677 P.2d at 159.
In *In re Marriage of Fernau*, the court of appeals found that the trial court had properly considered the analysis and rules of *Washburn* in providing the wife temporary maintenance to secure additional graduate training rather than put a value on the husband’s medical education which had been acquired through support by the wife, and in other ways, while she also pursued her education.

A degree cannot be community property in the sense of being owned by two persons since it is awarded to an individual, but the earning capacity presumably represented by a degree may have been developed by the efforts of both spouses—the supporting spouse providing the livelihood enabling the student spouse to devote efforts to increase the earning capacity and acquire the degree. Earning capacity, as such, cannot be divided any more than a degree can be nor can it be separated from the person who has it; it thus requires an untraditional analysis, leading to a more equitable result, if it is to be classified as property. Assume it is property enhanced by community effort during the marriage—would not there be an analogy in the reimbursement/equitable lien concept? If the enhanced earning capacity (the “degree”) is considered a separate thing (not merely a contribution to an existing asset) it has at least the potential to produce income throughout the lifetime of the person; to deny the other spouse, who has also contributed to its acquisition, continued sharing in the income produced would be a different result than reached with ordinary assets. The results in *Washburn* (as to the degree) and *Hall* (as to the earning capacity) have established rules with only a minimum flexibility, in that they can accommodate an opportunity for the supporting spouse to acquire an enhanced earning capacity, as was done in *Fernau*.

It appears to the author that both *Washburn* and *Hall* reflect that earning capacity rather than a professional degree is the subject matter of the controversy. It follows that increased earning capacity acquired under comparable circumstances should be similarly treated even if no professional (or any) degree is involved.

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201. It has been held that a medical license is not community property because it cannot be the subject of joint ownership. Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972).
202. Note that in *Washburn* the court points out that “the supporting spouse may already have benefited financially from the student spouse’s increased earning capacity to an extent that would make extra compensation inappropriate.” 101 Wn. 2d at 181, 677 P.2d at 159.
204. An additional point can be made: the supreme court may have made a major change in potential consequences in *Washburn* by eliminating the $1.00 maintenance award because the $19,000 (*Gillette*) award was “in effect maintenance” even though the court affirmed the portion of the order providing “that the award shall not terminate upon [the wife’s] remarriage or death, so that her right to receive the full $19,000 may be preserved.” 101 Wn. 2d at 183, 677 P.2d at 160. Does that not open up that award to modification in the future whereas the trial court’s decree would not have done so? See
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F. Acquisition of Real Property

The 1972 amendments added a new paragraph to the basic community property statute requiring both husband and wife to join in the purchase or contract to purchase community real property.205 Previously the husband as manager acting alone could contract to buy community real property, even though the wife might disagree,206 but joinder of both husband and wife was required to transfer or encumber community real property.207 The earlier law made "participation" (less than actual signing) by the one spouse in the act of the other spouse sufficient "joining" to transfer or encumber the community real property.208 The same position has been taken by the court under the new "acquisition" requirement.209

The statute does not preclude the acquisition of separate real property by either spouse; hence a problem of practical importance to the seller will be whether a contract with only one spouse will be treated as a community property acquisition by the buyer with corresponding community liability, or rather as a separate property acquisition with only separate liability. The possibilities and suggestions for solution have been explored previously.210

G. Tracing and Commingling

The basic presumption that an asset acquired during marriage is community property can be overcome through use of the source doctrine, that is, by tracing to a separate property origin or source.211 Sometimes the

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205. WASH. REV. CODE § 26.16.030(4) (1983): "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."


208. See discussion infra notes 315-59 and accompanying text (Parts IV.A.1, 2, 3). The new language of the statute on transfer should not change the analysis. WASH. REV. CODE § 26.16.030(3) (1983).

209. Daily v. Warren, 16 Wn. App. 726, 558 P.2d 1374, review denied, 88 Wn. 2d 1017 (1977). In Reid v. Cramer, 24 Wn. App. 742, 603 P.2d 851 (1979), husband unsuccessfully asserted the lack of wife's signature as a defense to an action on the promissory note for the earnest money in a land purchase contract. See also Smith v. Hamilton, 26 Wn. App. 633, 613 P.2d 567 (1980), in which malpractice liability was not found for advice that wife's "participation" was sufficient in exercise of an option, even though in the subsequent action to enforce the option the court held wife's signature was necessary. The dissenting judge believed the attorney had committed malpractice because he was negligent in giving advice and permitting the question to arise in the action to enforce the option. Cross, supra note 9, at 534-37. In Colorado Nat'l Bank v. Merlino, 35 Wn. App. 610, 668 P.2d 1304, review denied, 100 Wn. 2d 1032 (1983), a mixture of the joinder requirement for acquisition and conflict of laws rules resulted in only separate liability when husband contracted to buy Colorado land without wife's participation.

210. It has previously been pointed out that the proof (i.e., the tracing) must be clear and
process is reversed chronologically and the attempt is to show that an admittedly separate property asset has maintained its separate character despite mutations and is the source of the present asset.\footnote{2}{If the links of the chain back to, or forward from, a separate property source can be clearly established, there will be separate property ownership of the disputed asset. However, if the character of one of the links is confused or uncertain, the basic community property presumption, in the form of the commingling doctrine or rule, breaks the chain. When this break occurs, the uncertain link will be found to be community in character and to be the origin or source with respect to any subsequent change in form: “Where separate funds have been so commingled with community funds that it is no longer possible to distinguish or apportion them, all of the commingled fund, or the property acquired thereby, is community property.”\footnote{213}{As this author has previously stated, the commingling doctrine is simply another form of the basic presumption that an asset on hand during marriage is community property; tracing is simply a method of asserting the clear evidence required to overcome the community presumption.\footnote{214}{There is one situation which may be of particular importance in determining the character of the “source” asset—the acquisition through the federal government. To the extent that the supremacy doctrine prevents the ordinary application of community property law,\footnote{215}{the question is presented whether that interference controls the character of acquisition so that the property is separate, or rather controls the manipulation of the asset (e.g., prevents assertion of a community property succession or inter vivos interest against the wish or direction of the spouse the federal law recognizes). For instance, in Barros v. Barros,\footnote{216}{the court of appeals held that even though the survivor’s benefit being paid to the husband’s widow, acquired through his retirement program, was “community property” of the husband and his former wife, she could not successfully assert an

convincing. See, e.g., Yesler v. Hochstetler, 4 Wash. 349, 30 P. 398 (1892). The burden of proof rests upon the proponent of the separate property claim. See, e.g., In re Estate of Witte, 21 Wn. 2d 112, 125, 150 P.2d 595, 601 (1944).}}\footnote{212}{The burden is on the proponent, similarly, to prove by clear and satisfactory evidence that the separate property asset in its changes in form has become the disputed asset (or is its product under the rents, issues, and profits category). See In re Estate of Witte, 21 Wn. 2d 112, 150 P.2d 595 (1944).}}\footnote{213}{The separate property source may be from individual ownership in a noncommunity property state. Brookman v. Durkee, 46 Wash. 578, 90 P. 914 (1907).}}\footnote{214}{Cross (1955), supra note 1, at 652–56.}\footnote{215}{See supra notes 118–42 and accompanying text (Part III.D).}\footnote{216}{34 Wn. App. 266, 660 P.2d 770 (1983).}
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interest in that survivor's benefit because the federal statute\(^{217}\) clearly provides that only the person designated by the retired person can have any interest in the survivor's benefit.\(^{218}\)

If, as the author believes should be so, the federal supremacy doctrine does not make military retired pay, for example, separate rather than community property, then an asset acquired with such funds would be community or separate under ordinary tracing analysis untrammeled by the manipulative control which federal supremacy provides for the military retired pay, as such. This position is recognized in \textit{Yiatchos v. Yiatchos},\(^{219}\) in which the Court notes that the United States savings bonds were community property, and had they been cashed before the husband's death there would have been no attempted invasion of the wife's community property interests.

1. Community Labor on Separate Assets

The commingling doctrine is applicable if income is comprised of both community property and separate property ingredients. Such a pattern frequently occurs when separate property is managed by a spouse to produce income. The fruits of a spouse's personal efforts are community property,\(^{220}\) but, by statute,\(^{221}\) rents, issues, and profits of separate property are separate property. Thus, if a spouse produces income by working with a separate asset, the resulting income will be partly community and partly separate unless the asset can be established to be sterile, that is, nonproductive.

If the income is not consumed and is allowed merely to accumulate, the size of the respective separate and community parts in the accumulation could be identified and determined by some formula, such as the relationship of interest return on the given separate investment to reasonable pay for the stated amount of community labor.\(^{222}\) Such a formula should allow the possibility of proving that the income from the separate asset or the community labor had in fact produced a larger share than the formula

\(^{217}\) 10 U.S.C. § 1448(b) (1982).
\(^{218}\) See also \textit{In re Marriage of Williams}, 39 Wn. App. 224, 692 P.2d 885 (1984), in which a division of military retired pay was upheld but the trial court's decree in the marriage dissolution that wife be continued as beneficiary under the survivor's benefit plan was reversed because the decree would not amount to the statutorily authorized voluntary designation.
\(^{220}\) As suggested \textit{supra} note 84, the income-producing capacity of a spouse is the basic source of community property.
\(^{222}\) Possible formulas or approaches are identified and discussed in King, \textit{The Challenge of Apportionment}, 37 \textit{Wash. L. Rev.} 483 (1962).
would indicate. Periodic accounting, such as for income tax purposes, must focus on this sort of approach.

However, the more common problem between the spouses (or their successors) is likely to be determining respective shares in an accumulation of income remaining after current consumption or use of part of the income. Ordinarily the inquiry must consist of two steps: (1) determination of what part of the current income is fairly to be allocated to the separate and to the community "accounts" and (2) determination of how much and from which account the current income has been expended, permitting the remaining balances of the separate and community property accounts to be established. The second step usually will not be solved by application of any formula, but there are rules which assist in making the determination. A particularly important rule is that if funds of both kinds are available, the appropriate fund will be presumed to have been used to discharge an obligation or to pay an expense.223 Thus, separate funds are presumed to discharge separate obligations and community funds are presumed to discharge community obligations. The normal running expenses of the marriage (including family expenses) are to be charged principally to community property income. Thus it can easily develop that all of the community income has been currently consumed so that the accumulation can be identified as entirely separate.224 If the purposes for which income expenditures were made can be identified, and the extent of consumption of income for community and separate purposes thereby established, it should be possible to determine the character of the remaining unexpended income.

It is probable, however, that the use made of withdrawn and consumed income cannot be determined in the absence of some adequate recordkeeping or initial separation of the income into its component parts.225 This probability was stated by the court in *Hamlin v. Merlino:*

[I]t is clear that, where the separate property in question is real estate or an unincorporated business with which personal services ostensibly belonging

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223. *In re* Estate of Kruse, 52 Wn. 2d 342, 324 P.2d 1088 (1958); *In re* Estate of Finn, 106 Wash. 137, 179 P. 103 (1919); Guye v. Guye, 63 Wash. 340, 115 P. 731 (1911).


225. Factually this is the circumstance, for instance, in *Pollock v. Pollock,* 7 Wn. App. 394, 499 P.2d 231 (1972), in which the court stated the "rule" requiring contemporaneous segregation, quoted infra in text accompanying note 226, then concluded there had been no adequate tracing to separate sources and added that "[f]urthermore, because of the absence of a contemporaneous segregation of the income" the particular assets must be deemed to have been acquired with community income. *Id.* at 402, 499 P.2d at 237 (quoting *In re* Estate of Smith, 73 Wn. 2d 629, 631, 440 P.2d 179, 181 (1968)).
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to the community have been combined, the rule is that all the income or increase will be considered as community property in the absence of a contemporaneous segregation of the income between the community and the separate estates. Salisbury v. Meeker, 152 Wash. 146, 277 Pac. 276; In re Witte's Estate, 21 Wn. 2d 112, 150 P.2d 595.

On the other hand, where, as in the instant case, the husband at the time of marriage owned all or substantially all of the stock of a corporation, somewhat different principles are applicable. In such cases, where a salary is paid to the husband by the corporation, it is reasoned that the community is thereby compensated for his services, and that any dividends paid or any enhanced value of the stock resulting from profits reinvested in the corporation are separate property.226

The author has previously criticized the suggestion in Hamlin that contemporaneous segregation is required to avoid the conclusion that all income is community property because of commingling, even though such a rule would fit the result in at least most of the earlier cases, and as a prediction of a result such a rule is likely to be highly reliable.227 The necessity for contemporaneous segregation was reiterated in two subsequent cases, In re Estate of Smith228 and Pollock v. Pollock.229 However, in both cases the holding turned on the conclusion that the commingling of funds was so complete that there was no possibility of apportionment to the respective sources. In the Pollock case the facts also indicate that business and personal expenditures, including household expenditures, were rather indiscriminately made from the particular accounts.

In In re Marriage of Harshman,230 Justice Callow, speaking at that time for the court of appeals, said:

We do not agree that the contemporaneous segregation is the only way to maintain and prove the separate status of income. . . . [T]his concept was stated as dictum. The presumption may be overcome by clear and satisfactory evidence tracing the property to its origin or source as separate property. An owner of separate property should not be prohibited from proving the source of an increase in value of the separate estate because contemporaneous segregation did not take place if other admissible evidence is available to surmount the presumption. . . . Upon remand, the husband has the burden of establishing that the increase in the value of the property was due to the rents, issues, and profits of the separate estate as opposed to community labor. If the husband is unable to sustain this burden, the entire increase in

228. 73 Wn. 2d 629, 440 P.2d 179 (1968).
value is presumed to be community, and the community would be entitled to an equitable lien or right of reimbursement as to the increased value.\textsuperscript{231}

This last statement as to the character of rights in the increase in value will be discussed below, but now it is useful to comment further on the necessity of contemporaneous segregation.

A requirement of contemporaneous segregation unreasonably and unnecessarily deprives the separate owner of property; community property is adequately protected by the difficulty of overcoming the basic presumption. In the two cases cited in the above quotation from \textit{Hamlin v. Merlino}, the commingling resulted from an inability to segregate. Thus in \textit{Hamlin} the court was not compelled by precedent to impose such a requirement. In \textit{Salisbury} an antenuptial tort liability\textsuperscript{232} was sought to be enforced against funds paid to the tortfeasor husband for work performed during the marriage. The husband at marriage had assets used in his roofing business, consisting of shovels, brooms, wheelbarrows, office furniture, and the like, valued at $500. The business itself, as the court said, did not have the potential power to produce rents, issues, or profits and thus essentially all income was the result of the personal efforts of the spouses. Even if it were conceded that part of the money was the earnings of his established separate business, the court continued, the funds were beyond the reach of the separate creditor because there was no way to segregate the earnings of his separate business from the earnings of his community labor. The \textit{Salisbury} court relied on \textit{In re Estate of Buchanan},\textsuperscript{233} in which the original investment of separate funds was small and a large increase in value of the property was due principally to personal efforts of the husband; the whole was held to be community property, even though the asset was in fact shares in a corporation largely run by the husband as if it had been a partnership enterprise. In the other case referred to in the \textit{Hamlin} quotation above, \textit{Witte's Estate}, the court concluded that the attempt to trace farm income to "rents" (the landlord's share) rather than labor (the tenant's share) did not meet the required standard of a clear showing of the separate "rents" share; therefore, all of the accumulation had to be community property by reason of the commingling—not because of the absence of contemporaneous segregation:

\[ \text{Since it is now impossible [not impermissible] to disentangle, separate, or apportion the component parts of the mass and thereby designate how much is separate property and how much is community property, it must all . . . now be considered as community property.} \textsuperscript{234}\]

\textsuperscript{231} \textit{Id.} at 125–26, 567 P.2d at 673 (citations omitted).
\textsuperscript{232} At that time such a liability was enforceable only against separate property.
\textsuperscript{233} 89 Wash. 172, 154 P. 129 (1916).
\textsuperscript{234} 21 Wn. 2d at 128, 150 P.2d at 602, 603.
Thus the author believes the position stated by Justice Callow in the quotation from Harshman above is sound, and there is no requirement of contemporaneous segregation to avoid commingling of the separate and community parts of an accumulation.

There was disagreement between the courts of appeal on the character of the rights in the increase in value of separate property to which there was a community contribution, but it has now been resolved by In re Marriage of Elam, which held that there is a presumption that any increase in value of separate property is separate property. The Elam court added:

This presumption may be rebutted by direct and positive evidence that the increase is attributable to community funds or labors. This rule entitles each spouse to the increase in value during the marriage of his or her separately owned property, except to the extent to which the other spouse can show that the increase was attributable to community contributions. Moreover, the community should be entitled to a share of the increase in value due to inflation in proportion to the value of community contributions to the property. See McCoy v. Ware, 25 Wn. App. 648, 608 P.2d 1268 (1980) (Roe, J. concurring).

The husband was awarded a lien for half of the community contribution plus the share in the inflationary increase. The idea that there should be a sharing in the increase in value from inflation is discussed below in Part III.I, Right to Reimbursement: The Equitable Lien.

2. **Commingling of Separate Assets with Community Assets**

Commingling can, of course, totally submerge the separate property income ingredient of the commingled mass of separate and community income not only in situations involving a spouse's operation of a separately owned business but also in the ordinary management of separate assets. Further, it is possible that the separate property itself, as distinguished from its income, can be submerged by commingling. Such a result has been reached even where the commingled separate assets were shares in a corporation, though this result would be unlikely if at least minimal

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237. 97 Wn. 2d at 816–17, 650 P.2d at 216.

238. See infra notes 270, 299–303 and accompanying text.


240. In re Estate of Allen, 54 Wn. 2d 616, 343 P.2d 867 (1959), involving a stock brokerage account, is an illustration.

corporate records were kept. The usual problem, however, involves commingling of income rather than the asset, and although the whole of the incremental increase in value and all income from the separate asset may be found to be community as a result of commingling, the original value or amount of separate property may still exist in the unsegregated total. But separate property will not continue to exist if during the commingling process all value of separate property is dissipated.

3. **Commingling and the Time of Acquisition**

The rule that the ownership character of an asset is determined at the time of its acquisition may create special problems in the commingling context. If, for example, there has been mixing of separate and community funds in a single bank account, it may still be possible to show the respective amounts deposited in the account, and to show that the use made of withdrawals was separate or community in identified amounts. This type of identification should be sufficient to avoid a commingling conclusion as to the account itself, but when an asset is acquired with funds from the bank account it will nonetheless be necessary to show the character of the respective parts of the account at the time the particular asset was acquired to rebut the presumption that the asset is community property. For instance, to establish that the separate property part of the account was used to make the acquisition, it will not be sufficient merely to show that the total community expenditures for the operating expenses of the family exceeded the total of the salary or wage income of the spouses during the entire existence of the mixed fund account and contend that hence the community expense must have consumed the community contribution. To avoid the community property presumption and establish the separate character of the acquired asset, the separate claimant must show the dissipation of all community funds in the account at the time the asset in question was acquired, or clearly establish that the separate funds then in the account

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244. *DuPont de Nemours & Co. v. Garrison*, 13 Wn. 2d 170, 124 P.2d 939 (1942). The business at one time had only community funds acquired through borrowing by the husband, i.e., in the separate property sense the business could be said to have reached a negative position and nothing restored it to a positive position.

245. In substance this is the analysis in *Pollock v. Pollock*, 7 Wn. App. 394, 499 P.2d 231 (1972), in which the court rejected the argument that community property income had been consumed in paying family expenses. The analysis in *See v. See*, 64 Cal. 2d 778, 51 Cal. Rptr. 888, 415 P.2d 776 (1966), is particularly helpful.
were used.\textsuperscript{246} It should be noted that the allocation to community property income for the spouse’s labor in all of these cases must be reasonable and ordinarily is measured by the amount which would be paid for comparable services,\textsuperscript{247} although special circumstances may require a greater allocation.\textsuperscript{248}

H. Fortuitous Acquisition

1. Recovery of Damages for Injury to the Spouse

In \textit{In re Marriage of Brown}\textsuperscript{249} the court abandoned a long-standing rule and held that the recovery for personal injury is the separate property of the injured spouse.\textsuperscript{250} The abandoned contrary characterization as community property had its origin in the 1892 case of \textit{Hawkins v. Front Street Cable Railway}\textsuperscript{251} on the reasoning that the cause of action for the tortious injury was property which, not having been acquired by gift, bequest, devise or descent, was necessarily community property under the statutes. That wastebasket approach was disapproved in \textit{Brown}, which adopted the “basic principle that, except for gifts to the community, community property consists only of that which is acquired by onerous title, or in exchange for other community property.”\textsuperscript{252} At issue was the proper characterization of the potential recovery on a personal injury claim for purposes of distribution in the marriage dissolution action. The court of appeals applied the \textit{Hawkins} rule that the recovery was community property. The supreme court reversed, reinstating the trial court judgment, stating:

Under our opinion today, recovery for an injury inflicted upon a married person by a third party tortfeasor is the separate property of the injured spouse, except to the extent the recovery compensates the community for lost wages which would have been community property, or injury-related expenses which the community incurred.\textsuperscript{253}

\textsuperscript{246} \textit{See In re Marriage of Mix}, 14 Cal. 3d 604, 122 Cal. Rptr. 79, 536 P.2d 479 (1975). The facts were more elaborately stated in the vacated court of appeals opinion, \textit{id.}, 37 Cal App. 3d 801, 112 Cal. Rptr. 717 (1974).


\textsuperscript{248} In \textit{re Estate of Buchanan}, 89 Wash. 172, 154 P. 129 (1916).


\textsuperscript{250} \textit{In re Marriage of Hilt}, 41 Wn. App. 434, 704 P.2d 672 (1985), the court of appeals held that \textit{Brown} applied retroactively and in the dissolution action the husband’s cause of action for personal injury was his separate property.

\textsuperscript{251} 3 Wash. 592, 28 P. 1021 (1892).

\textsuperscript{252} \textit{Brown}, 100 Wn. 2d at 737, 675 P.2d at 1212 (citing W. De Funiak & M. Vaughn, \textit{supra} note 2, § 82, at 201).

\textsuperscript{253} \textit{id.} at 730, 675 P.2d at 1208.
The *Hawkins* reasoning that the cause of action is property is not changed by *Brown*, but now the character of that asset is mixed rather than totally community as it was under *Hawkins*. The separate pain and suffering element will probably be accompanied by harm to earning capacity (loss or potential loss of wages), and medical and hospital expenses of a community character. In *Brown* there was loss of wages before separation (community) and loss of wages after separation (separate) and, similarly, medical expenses before and after separation. In a situation not involving dissolution of the marriage, normally only the pain and suffering elements would be separate. In the event of a subsequent separation of the spouses, any asset then on hand which could be traced to recovery for loss of future wages ought to go to the spouse unable by reason of the tort to earn the wages.

In *Brown* the court expressly disapproved two recent court of appeals cases in which settlements for personal injury claims arising during the marriage were divided between the spouses, because of the community property characterization of the claims.\(^\text{254}\)

A related problem, the proper treatment of disability insurance or pension payments, should be reconsidered in light of the decision in *Brown*. In *Chase v. Chase*,\(^\text{255}\) the settlement for the disability incurred after the divorce hearing but before the decree was held to be community property not disposed of and therefore equally owned by the former spouses. The same reasoning was applied (and *Chase* followed) in *Ross v. Pearson*,\(^\text{256}\) in which the former wife was successful in her claim for one-half of both past and future payments resulting from a disability incurred during the marriage. The payments had started before the divorce but no mention of them was made in the decree.

Under *Brown*, to the extent such payments were for pain and suffering they should be separate property; but to the extent they replaced lost wages they would normally be community property. Whatever their proper character normally, by reason of a three-pronged community property agreement\(^\text{257}\) the disability payments were community property at the time of the divorce. To the extent the payments were for loss of future earnings, however, they should be awarded to the disabled spouse under the reasoning expressed in *Brown* and described above. For a spouse retired because of disability and receiving a pension, there are similar problems—is the

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\(^{255}\) 74 Wn. 2d 253, 444 P.2d 145 (1968).

\(^{256}\) *See infra* notes 430–33, 475 and accompanying text.
pension totally for loss of future earnings or is it in part the "deferred compensation" of a normal pension? To the extent it is deferred compensation it should be community or separate property according to the rules discussed before, but to the extent a "disability" pension reflects loss of earning power future rights should not have to be shared with a former spouse. This is the position recommended by the court of appeals in *In re Marriage of Kittleson*.

While the cause of action against a third party tortfeasor was held to be community property, the court took a different approach for the interspousal tort. In *Freehe v. Freehe*, the court concluded that interspousal immunity is not the law in Washington, inherently assuming the wife to be separately liable in an action by the husband for injury suffered from operation of her separate property farm tractor. The court stated that damages should be awarded to the husband in three parts: (1) special damages to reimburse for out-of-pocket community expenses from the injury; (2) general damages for loss of future earnings, which would have been community property, in the amount of one-half, as his separate property; and (3) general damages in full for pain and suffering, emotional distress, and the like as his separate property. The court reasoned that this result, that is, classifying the recovery for pain and suffering as separate property, precluded an indirect benefit to the tortfeasor spouse through sharing in a community property recovery. Although the court carefully noted that a third party tortfeasor was not involved, the fact that the wife was separately liable is not necessary to the conclusion that the pain and suffering recovery is separate property.

The court in *Freehe* could have applied the then traditional rule that recovery for pain and suffering is community property, although such a recovery perhaps would have benefited the wrongdoer wife. Nonetheless, basic community property rules dictate that the character of an asset (here the recovery) depends upon how it is acquired, rather than from whom it is acquired. This basic principle would indicate that the fortuitous circumstance of the wife being separately liable in *Freehe* should not dictate the character of the recovery.

Prior to the 1972 amendments, the husband as manager of the community property was held to be the only necessary party plaintiff in a tort action, and in the case of divorce was owner of an undivided half of the

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258. See *supra* notes 177–84 and accompanying text (Part III.E.4).
261. If one thinks in terms of the estates involved (as is sometimes useful), her separate estate would have to respond to their community estate—but of course, this speculation may be irrelevant with the change coming from *Brown*.
undisposed community cause of action and therefore a necessary party in an action for injury to the wife, even after divorce.\textsuperscript{262} After the 1972 amendments equalizing the managing power of the spouses, the injured spouse, whether husband or wife, is the only necessary party plaintiff.\textsuperscript{263} Doctrines of contributory negligence and imputation of negligence between spouses have also confounded the problems of tort actions by the spouses.\textsuperscript{264} Previously the husband’s contributory negligence barred an action for the wife’s injury.\textsuperscript{265} These rules have been changed by section 4.22.020 of the Revised Code of Washington and its 1981 amendment, which adopt the rule of comparative negligence in Washington and apparently eliminate the imputation of negligence between spouses.\textsuperscript{266}

2. **Recovery of Damages for Injury to Property**

While the basic asset in the recovery of damages is the cause of action for the harm done, whether to the person or property of the spouse,\textsuperscript{267} tracing to the source asset is obviously appropriate in the case of injury to property. Upon recovery there is, in effect, an involuntary exchange with the cause of action and the character of the subsequent recovery determined by tracing to the character of the damaged property; thus, if the damaged property is separate property, so too is the recovery,\textsuperscript{268} and if community property, of course, the recovery is community.

\begin{thebibliography}{9}
\bibitem{262} Schneider v. Biberger, 76 Wash. 504, 136 P. 701 (1913).
\bibitem{263} \textit{WASH. REV. CODE} § 4.08.030 (1983).
\bibitem{264} \textit{See, e.g.}, Chase v. Beard, 55 Wn. 2d 58, 346 P.2d 315 (1959), \textit{noted in} 35 \textit{WASH. L. REV.} 249 (1960).
\bibitem{265} Ostheller v. Spokane & Inland Empire R.R., 107 Wash. 678, 182 P. 630 (1919).
\bibitem{266} \textit{See} McGough, \textit{Editor’s Notes}, 28 \textit{WASH. ST. B. NEWS}, Apr. 1974, at 4; \textit{Comment, Comparative Negligence}, 49 \textit{WASH. L. REV.} 705 (1974). The amendment by Act of Apr. 17, 1981, ch. 27, § 10, 1981 Wash. Laws 112, 118 (tort reform), provides a spouse’s contributory fault shall not be imputed to the other spouse to diminish the recovery for fault resulting in injury to person or property, whether separate or community. See a provocative discussion in Akers, \textit{Blood and Money—Separate or Community Character of Personal Injury Recovery}, 9 \textit{TEX. TECH. L. REV.} 1 (1977), reprinted in 5 \textit{COMM. PROP. J.} 107 (1978), in which the author properly points out that the character of the asset should be determined independently of the effect of contributory or comparative negligence of the noninjured spouse, and suggests the \textit{Freehe} solution offers the most equitable compromise of the competing considerations. \textit{See also} Christie v. Maxwell, 40 Wn. App. 40, 696 P.2d 1256 (1985), which reversed the trial court’s determination that wife’s recovery for loss of consortium should be reduced by the 62.5% negligence attributable to husband. The court of appeals held the cause of action was separate and independent, not derivative. Wife had argued that in any event husband’s negligence could not be imputed to her under the statute.
\bibitem{267} Clark v. Beggs, 138 Wash. 62, 244 P. 121 (1926).
\bibitem{268} W. \textit{DE FUNIAK} & M. \textit{VAUGHN}, \textit{supra} note 2, § 86.
\end{thebibliography}
I. Right to Reimbursement: The Equitable Lien

The community or separate property character of an asset becomes fixed at the time of acquisition, but subsequent to acquisition, assets or labor of a different character may be used to make payments in connection with the transaction or to contribute to the quality or enhance the value of the asset. Such contributions may give rise to an equitable lien in favor of the contributing fund or estate and thereby provide a protection to the contributor without ordinarily creating in the contributor a share or fraction of ownership in the asset. This proposition has become somewhat confused by the holding in In re Marriage of Elam, in which the equitable lien was given for the contribution and for a proportionate part of the inflationary increase in value. Elam is discussed below.

Analysis of these problems should focus upon the following questions: (1) What is the nature of the right protected? (2) Under what circumstances will it arise? (3) How is it valued? (4) When and by whom may it be asserted?

1. The Nature of the Right Protected

Although the right is commonly referred to as an “equitable lien,” the author believes that the better analysis postulates that the contributor has a right to reimbursement protected by an equitable lien. Under the usual analysis a lien arises to assure performance of an obligation or duty, or payment of a debt. For the right to arise, therefore, the creating transaction must in effect involve a loan.

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269. Whether the multiple character of assets devoted to the transaction control the character of the asset is discussed above, particularly in the mortgage and installment acquisition cases. See supra notes 144–76 and accompanying text.

270. 97 Wn. 2d 811, 650 P.2d 213 (1982). For extensive discussion of problems in the area including Elam, see Comment, Serving Two Masters: Expenditure of Community Labor and Assets on Separate Property in Washington, 19 Gonz. L. Rev. 519 (1984); Note, supra note 236.

271. See supra notes 235–38 and accompanying text; infra notes 292, 299–303 and accompanying text.

272. This is the basic Spanish law view. See W. de FUNIAK & M. VAUGHN, supra note 2, § 73.

2. **Circumstances Under Which the Right Will Arise**

The right to reimbursement is undoubtedly predicated upon equitable considerations. Thus, the facts surrounding the contribution must be evaluated to determine where the equities lie and whether the right to reimbursement will arise. In the usual case, money of a character different from the improved asset has been expended to discharge an obligation or to build or improve a structure, but the contribution may also take the form of labor of the spouse which is in effect a community property contribution. Any one of the funds, separate-wife, separate-husband, or community property, could be the source of the contribution to enhance the asset held in any one of the other two categories.

The typical factual situation giving rise to a right of reimbursement has involved the use of community property funds by the husband to improve his separately owned real estate. Use of community funds by the managing spouse to improve his or her own separate property presents the clearest case for recognizing the right. Such use of funds does not change the ownership of the improved asset and if no protection were given to the community property position, the transaction would amount to a fraud on the community property position and the other spouse.

If the managing spouse uses community property to improve his or her separate property, there is a probability that reimbursement will be due and the community right protected through an equitable lien. On the other hand, if the manager uses his or her separate property to improve community property or the other's separate property, the likelihood that reimbursement will be due is smaller. The determination in both of these cases depends upon the circumstances, including expectations, at the time of the contribution; the right to reimbursement is created then, if at all.

When the managing spouse uses community funds to improve the other spouse's separate property, the possibility of a gift exists so that the right to

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274. For example, payment of contract installments, mortgage principal and interest, taxes, maintenance expenses. See cases cited infra note 288.

275. E.g., In re Marriage of Elam, 97 Wn. 2d 811, 650 P.2d 213 (1982); Jones v. Davis, 15 Wn. 2d 567, 131 P.2d 433 (1942); Conley v. Moe, 7 Wn. 2d 355, 110 P.2d 172 (1941); In re Estate of Hart, 149 Wash. 600, 271 P. 886 (1928).

276. Legg v. Legg, 34 Wash. 132, 75 P. 130 (1904); In re Estate of Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971); see also Baker v. Baker, 80 Wn. 2d 736, 498 P.2d 315 (1972); In re Estate of Pugh, 18 Wn. 2d 501, 139 P.2d 698 (1943).

277. The lien was found for the wife's separate contribution to the husband's separate properties in In re Estate of Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971). See generally W. De Funjak & M. Vaughn, supra note 2, § 73.


279. The reimbursement might later be found to have been made, however. See infra note 294 and accompanying text.
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reimbursement may never arise. The circumstances surrounding such use of the community property by the manager must be examined to determine the intention of the contributing spouse. It may be clear that the husband intended a gift, particularly when a home is built upon the wife's separate real property, but his expectation that he would inherit the home can be sufficient to establish the absence of a donative intent. On the other hand, if the contribution can reasonably be viewed as a business investment or as supporting the operation of a business, it is unlikely that a gift of the community property funds will be found. The community property preference and the difficulty of overcoming the basic community property presumption in cases involving a direct gift of an asset to a spouse also suggest that a community property "interest" is likely to remain in such contributions. While the traditional problem has been the husband's use of community funds to improve the wife's separate property, the use of community funds by the wife to improve the separate real property of the husband should pose identical problems under the equal managing power she now has by reason of the 1972 amendments.

If separate property is contributed to improve either the community property or the other spouse's separate property, the claim of the contributor to a right to reimbursement is probably weaker. If the separate property contribution is to community property, the preference with which community property is treated militates against any right in the contributor. Further, in this case as well as where separate property is contributed to the other spouse's separate property, there is a probability that the contribution is a gift; the presumption of a gift when one spouse purchases property with separate funds taking title in the other spouse's name furnishes a close analogy. Although the contribution is not a title-acquiring transaction, the rule that title to the benefited property is not changed by the contribution in effect shifts the title of the separate property contribution, when it is used for the improvement or payment of the obligation relating to the other spouse's separate property, or their community property, to the owner.

280. There is some suggestion that a gift is presumed, though probably not from the mere fact of such use of the funds. See Sackman v. Thomas, 24 Wash. 660, 64 P. 819 (1901).
281. In re Estate of Hart, 149 Wash. 600, 271 P. 886 (1928).
283. In re Estate of Carmack, 133 Wash. 374, 233 P. 942 (1925), as explained in In re Estate of Hart, 149 Wash. 600, 271 P. 886 (1928); In re Estate of Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971) (community contribution to the husband's separate asset used in business).
284. E.g., In re Estate of Slocum, 83 Wash. 158, 145 P. 204 (1915).
285. The "interest" is not an ownership share, however. See the explanation in W.T. Rawleigh Co. v. McLeod, 151 Wash. 221, 224-25, 275 P. 700, 702 (1929), of the use of the term in In re Estate of Carmack, 133 Wash. 374, 233 P. 942 (1925).
286. See cases cited supra note 97.
287. See cases cited supra note 278.
of the benefited property. Rebutting this presumption of gift involves measuring the facts of the contribution transaction and should be similar to showing the absence of a donative intent when community property is used to improve the other spouse’s separate property.

Even in situations other than gifts, the right to reimbursement may not arise because the contributor may have realized some current benefit by using the asset. In re Marriage of Miracle is the clearest expression of this proposition. During the marriage the wife owned separately two houses in one of which she and her husband lived. Wage and rental income was deposited in a single account and payments on the purchase contracts for both houses were made from that account. The husband appealed the trial court’s determination that the rental value of the house occupied as a home ($250 to $300 per month) should be offset against the community payments on the purchase contract for the home ($124 to $151 per month). The court of appeals remanded on this issue implying that the trial court had erred in failing to impress the wife’s separate property with an equitable lien in favor of the community for the community funds expended on the family residence. The supreme court reversed, reinstated the judgment of the trial court, and said, “We believe that the trial court properly refused to impose an equitable lien in favor of the community in view of the finding that the community had been adequately compensated for its expenditures by its beneficial use of the premises.” The court concluded, “We cannot find that the trial court abused its discretion in refusing to recognize a right to reimbursement in this case.” In addition, if the improved asset is income producing, the claim of contribution may fail by reason of the presumption that the proper fund (the income from the asset) has been used to make the improvement, and also because of the possibility that the use

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288. Payments on a mortgage obligation can give rise to the equitable lien, Merkel v. Merkel, 39 Wn. 2d 102, 234 P.2d 857 (1951); so also with payments on a purchase contract, Fritch v. Fritch, 53 Wn. 2d 496, 335 P.2d 43 (1959); Farrow v. Ostrom, 16 Wn. 2d 547, 133 P.2d 974 (1943).
291. 101 Wn. 2d at 139, 675 P.2d at 1230.
292. Id. It should be noted that In re Marriage of Elam, 97 Wn. 2d 811, 650 P.2d 213 (1982), discussed supra notes 235–38, 270 and accompanying text, infra notes 299–303 and accompanying text, may be inconsistent although it involved rights stemming from improvements made on separate property and not payments on a purchase contract. In Miracle there was neither improvement nor a labor contribution, only monetary contributions. Elam is like most other marriage dissolution cases in that there is no indication that argument was made that reimbursement had already been made, or that the contribution was a gift, or that reciprocal benefit was provided, or that there was some other basis for concluding an equitable lien should be denied. It is therefore difficult to determine whether the possibilities were overlooked or whether in marriage dissolution cases the reimbursement/equitable lien pattern has attached almost automatically.
293. See, e.g., cases cited supra notes 167, 223.
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of subsequent income from the asset has in substance effected repayment so that there is no longer an equity existing for the contributor.294

3. The Value of the Right

When money has been contributed, the amount advanced has been the measure of the right,295 without particular attention being given to the possibility that the use of the money may not have increased the value of the asset by the amount advanced.296 If the contribution is labor, the value of the right should be determined by calculating what would be reasonable wages, but it could be fixed as the resulting increase in value of the thing on which the labor is bestowed. Choosing between the alternatives may be facilitated by considering for whom the protection is sought and the possible results had the contribution been directed to some other purpose. Thus, if a spouse expends community funds in connection with his or her separate property, the claim for the community estate should be the full expenditure, both because the other spouse’s interest in those funds would otherwise be depleted without consent and because the funds could be used to secure a full return by almost any other use. A comparable argument can be made if the contribution is labor, that is, the reasonable value of the labor should be the measure. However, if one spouse works on or expends community funds on the other spouse’s separate property, without intending a gift, only the increased value should be the measure, because the contributing spouse hardly needs to be protected against an unintended use of the community asset, and there would be a danger that a contrary result could involve giving a power to one spouse to “improve the other out” of his (or her) separate property.297

294. This probably was the factual situation in In re Estate of Woodburn, 190 Wash. 141, 66 P.2d 1138 (1937). Spouses moved onto unimproved, undeveloped land that was separately owned and made it productive. Income therefrom, which during the marriage exceeded all expenses relating to the land and with other income was devoted to normal family expenses and investments, was conceded to be community property. The court held there was no equitable lien for the community improvement.

295. See cases cited supra note 288; Jones v. Davis, 15 Wn. 2d 567, 131 P.2d 433 (1942). However, in Conley v. Moe, 7 Wn. 2d 355, 110 P.2d 172 (1941), the community contributed $2500 to build a home, but the lien was fixed by the trial court at $2000. There is nothing in the opinions or the briefs to explain the difference.

296. If the money is used to pay an obligation, e.g., taxes, mortgage note, or contract installment, there would be that much increase in the recipient’s worth (though probably not in the net equity in the asset), but if the money is used to make physical improvements or repairs, the market value of the asset would not necessarily be enhanced equally.

297. An analogy may be drawn to the partition of property that is subject to a co-ownership. In such a partition proceeding a co-owner may not demand an allocation before a division of sale proceeds of more than the amount his improvements increased the sale price. In short, the rules of equity control. 2 AMERICAN LAW OF PROPERTY § 6.18 n.15 (A.J. Casner ed. 1952); 4A R. POWELL, REAL PROPERTY ¶¶ 604, 614 (1973).
In addition, it is conceivable that the reimbursement amount should be augmented by an interest factor, although consideration of all the equities probably would indicate that the "contributor" has received some benefit through the use of the improved asset which could offset any argument for such an addition to the recovery.298

If in addition to the "contribution" there is an inflationary increase in value, the analysis becomes more complex because of the holding in In re Marriage of Elam,299 in which the court held there should be an equitable lien for the amount of the contribution plus a proportionate part of the inflationary increase in value. On the basis of the husband's testimony the supreme court calculated that at the time of the marriage the wife's separately owned home was worth $15,000, and that during the marriage $5500 had been contributed as community funds and labor to improve the home. The trial court had found the contribution was $9000 and awarded the husband $5000 (protected by a lien) for his share of that contribution; but the supreme court noted that $3500 of the total contribution was made before the marriage, hence the $5500 figure.

The trial court set the value of the house at $34,000 at the time of dissolution. The husband argued that the entire $26,500 increase in value from the $7500 at marriage to the $34,000 at dissolution should be community property (of which he should have half) in the absence of proof by the wife to rebut a presumption of the community character of the increase. The trial court obviously did not adopt that argument and the court of appeals certified to the supreme court the question of the extent of community interest in the inflationary increase in value of separate property where community funds and labor were used to improve the property.

The supreme court held that there is a presumption that an increase in value of separate property is separate, which can be rebutted by direct and positive evidence that the increase is attributable to community funds or labor. The court then approved the trial court's determination that $5000 should be awarded to the husband for his share of the community's interest as being sufficiently supported by the evidence and consistent with the principles articulated in the case, and because the trial court found without objection that the distribution was fair and equitable.

298. The late Professor Bartke cautioned that if separate property is improved with community funds, the increased benefit may be realized as community property if rents, issues, and profits of the separate property constitute community property or if the improved asset is used for community purposes. However, where rents, issues, and profits are separate property (as in Washington) or the improved asset is not used for community purposes, the contrary result is reached. Bartke, supra note 273, at 385–86.

299. 97 Wn. 2d 811, 650 P.2d 213 (1982). Elam also points out that a mere increase in value during marriage of a separate asset does not create any community interest or right in the asset. See supra notes 235–38, 270, 292 and accompanying text.
The supreme court's calculation identified $2750 as the husband's share of the improvements and added $1809 as his share of the inflationary increase for a total of $4559. The $1809 figure was derived by first determining that the increase in value by inflation, from the $20,500 value without inflation (a combination of the $15,000 value at marriage and the $5500 community improvements) to the $34,000 value at dissolution, was $13,300 \text{ (sic)}; second, that thirteen percent was the husband's part of the "beginning" improved value (the ratio of half of the community contribution over the improved value of the house, that is, $2750/$20,500 equals approximately thirteen percent); and finally, that the husband should share in the inflationary increase in value by that percentage.

The formula the court developed approaches a proposition that a community improvement creates share of ownership in the improved asset, but certainly the court's analysis does not reflect a purposeful change from the long stated position that the ownership of an asset is not modified by contributions that might lead to an equitable lien and for which there must be reimbursement. Note that the court separately calculated the contribution to be protected and the sharing in the inflationary increase, even though it added the amounts together to fix the total for the equitable lien.

The author believes that Elam introduces an unnecessary and undesirable complexity into the reimbursement/equitable lien area. Furthermore, Elam may be inconsistent with the later case of In re Marriage of Miracle,\textsuperscript{300} in which the community benefit from living rent free in the improved separate property offset the duty to reimburse, unless a distinction is to be drawn between payments on a purchase (or mortgage) obligation and physical improvements. There has been no indication that the nature of the contribution is significant except as it complicates the calculation of the amount of reimbursement due.

Elam is difficult to apply. If the improvement contribution was made shortly before the settling of the "accounts" at separation or dissolution or gradually during the marriage, should there be a sharing of the inflationary increase from the time of marriage? The author thinks that this should not occur, but in effect that did occur in Elam unless all the $5500 of improvements were made promptly after marriage, which seems improbable. How should Elam be applied to the situation of a large tract of land in which only a small area has been improved? Should the sharing be in the inflationary increase in value of the "unimproved" portion or should it only apply to the small area where the improvement is? Reimbursement that merely calls for return of the same amount that has been contributed, dollar for dollar, obviously can, by reason of inflation, leave the contributor in a less

\textsuperscript{300} 101 Wn. 2d 137, 675 P.2d 1229 (1984); see supra note 292.
advantageous position. This may be what prompted Judge Roe in *McCoy v. Ware*\(^{301}\) to assert that protection against inflation ought to be provided. Does the reasoning indicate there should be an adjustment if the value deflates or otherwise decreases? The lack of clear delineation in the cases of how the right of reimbursement is to be valued may be the source of the unfortunate difficulties the author perceives likely to develop. They will be minimized if *Elam* is confined to the narrowest application possible, or preferably abandoned altogether.

The right of reimbursement/equitable lien concept is obviously based on equitable principles and inherently has capacity to adjust to the particular circumstances of a situation. It would be possible to fix the amount to be reimbursed at the increase in value measured at the time reimbursement was sought and traceable to the contribution made. This would adjust the amount automatically for inflation or deflation and would approach equitable ownership by the contributor in the improvement. It would put the risk of loss on the contributor; for example, there would be no reimbursement if the improvement were destroyed. Perhaps a comparable treatment of monetary contributions through payment of installments on a purchase obligation or mortgage note would call for reimbursement in the amount of the increased equity, that is, the amount by which the principal obligation was reduced, but this would not recognize that the contribution also covered an interest factor.\(^{302}\)

In light of the above considerations, the author believes the following to be the most workable approach to these problems. First, the size of the contribution should be established as the amount of money advanced or, if a labor contribution, as reasonable wages, or both, measured at the time the contribution is made. Then, that figure should be increased, if need be, by an addition of interest in the event of inflation or absence of any concurrent benefit to the contributor, or the figure should be decreased or not adjusted, if there has been benefit received by the contributor. By this method, one will arrive at the amount to be reimbursed and to be protected by the equitable lien against appropriate assets of the recipient of the contribution. The process would basically involve a loan or advancement analysis, and the adjustments would depend upon equitable considerations permitting recognition of which “estate” was the contributor and the circumstances of the contribution, as suggested above.\(^{303}\)

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\(^{301}\) 25 Wn. App. 648, 608 P.2d 1268 (1980). There is merely the statement by Judge Roe to the effect that inflation was not considered in the evolution of the “equitable lien” rules and it should now be a factor. In *Elam* the court adopts Judge Roe’s idea without any further analysis.

\(^{302}\) These varying solutions are reached in one or more of the community property states. See W. McClanahan, *supra* note 2, §§ 6:15 to 6:17 (1982 & Supp. 1984).

\(^{303}\) See *supra* notes 278–88, 295–97 and accompanying text.
4. When and by Whom the Right May Be Asserted

Obviously, the right to reimbursement is most likely to be asserted when the asset is liquidated or when there is the general settling of "accounts" of the respective spouse's estates; but the right of reimbursement should not be lost merely by dissipation of the asset, or because the contribution was consumed.304 Between the spouses, the problems have typically arisen when one dies so that there is a settling or ordering of the accounts of their respective estates and interests in connection with the estate administration.305 They also can arise in identifying community and separate property interests preliminary to a division in divorce.306

As between themselves, the husband or wife can assert the right or waive it, assuming no equities between them require a different result, but the assertion of the right by or against creditors presents a more complicated problem. In Conley v. Moe307 the Washington Supreme Court, in a five-four decision, concluded that the trustee in bankruptcy could assert the community equitable lien against the husband's improved separate realty. The dissent contended that since the wife was not asserting any need for such protection of her community position, there was no right that a creditor could reach. There was nothing in the facts of the case to show persuasively that the contributions were intended as gifts of community property to the husband separately, and the argument against finding an equitable lien essentially goes to the effectiveness of relinquishing the right to reimbursement rather than to its creation. As against the creditor, the nature of the original (creating) transaction or the later (relinquishing) transaction ought to be resolved in the creditor's favor unless the opponent(s) can show the good faith quality of the contrary position. The statute308 supports such a proposition and would protect against the spouses' taking the position currently most advantageous, even though that position did not accord with the facts of the transaction. It is also possible that the transaction (creating or relinquishing) could amount to a gift in fraud of existing creditors.309

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305. Most of the cases cited previously involve estate administration. In such cases reimbursement would normally be made without any necessity of equitable lien analysis.
307. 7 Wn. 2d 355, 110 P.2d 172 (1941).
308. WASH. REV. CODE § 26.16.210 (1983) states:
   In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.
In *Farrow v. Ostrom*, reimbursement to the wife for separate funds applied toward the purchase of community property was granted priority over the claim of the community creditor, although an earlier case has apparently reached a contrary result. Three other cases suggest the possibility that the “equitable lien” could come ahead of creditors, although the secured creditor may be protected by the recording act. The court concluded in *Leroux v. Knoll* that there was no need to protect the claim against a contract purchaser because the equitable lien could be satisfied out of the proceeds the seller received.

IV. MANAGEMENT AND VOLUNTARY DISPOSITION

The rules controlling management and voluntary disposition of community property, largely settled over the years, were changed by the 1972 amendments so that now either spouse is authorized to act alone, whereas previously only the husband could do so. The 1972 amendments also specified new situations in which the joint action of the spouses is required and added a puzzling paragraph concerning community businesses, discussed briefly below. The analysis in pre-1972 cases that defined the scope of the management and transfer power of the husband before the statutory equalization of the power between the spouses is now applicable to the wife’s acts as well.

A. *Inter Vivos Transfers: Joinder Requirements*

The statute has long required joint action of the spouses to sell, convey, or encumber community real estate. The 1972 amendments added a joint action requirement in four new situations: (1) to purchase or contract to purchase community real property; (2) to sell, convey, or encumber

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310. 16 Wn. 2d 547, 133 P.2d 974 (1943).
311. Walker v. Fowler, 155 Wash. 631, 285 P. 649 (1930). Despite the urging by the dissent in *Walker*, the possibility was not even discussed by the majority.
314. 28 Wn. 2d 964, 184 P.2d 564 (1947).
318. See infra notes 400–02 and accompanying text (Part IV.B.2).
320. Id. § 26.16.030(4); see supra notes 205–10 and accompanying text (Part III.F).
community household goods, furnishings, or appliances;\textsuperscript{321} (3) to acquire, purchase, sell, convey, or encumber community business assets where both spouses participate in the management of the business;\textsuperscript{322} and (4) to give community property,\textsuperscript{323} although this requirement had been judicially established prior to the 1972 amendments. Not surprisingly, most of the cases in which there is discussion of a joinder requirement involve real property. Some personal property assets are now included. In both the old and new situations, the analysis developed to satisfy the statutory joinder requirement in the real estate context will probably be acceptable.

1. \textit{Classification as Real or Personal Property; Household Goods}

Whether the community property asset involved in a particular transaction is to be classified as real property so that joint action of the spouses is required, or as personal property (other than household goods, etc.) so that action of either alone is sufficient is determined by the rules ordinarily applied in other legal contexts. Accordingly, it has been held that joint action is necessary to convey or contract to sell a fee estate in land,\textsuperscript{324} encumber the estate by mortgage\textsuperscript{325} or lease,\textsuperscript{326} or create an easement or profit.\textsuperscript{327} A community property leasehold, however, is personal property, and it has been held that the husband can transfer it without the wife's participation.\textsuperscript{328}

The difference between the effectiveness of the transfer and the character of the asset acquired by the transfer should be noted. The leasing of community real estate requires joint action because it is either a conveyance of or creates an encumbrance on real estate, but the leasehold acquired is personal property. In contrast, although the granting of an easement or profit similarly encumbers the community real estate, it creates a real property interest in the transferee.\textsuperscript{329}

\textsuperscript{321} WASH. REV. CODE § 26.16.030(5) (1983). In 1981, the legislature added community mobile homes to this list. \textit{Id.}

\textsuperscript{322} See \textit{id.} § 26.16.030(6); see infra notes 400-02 and accompanying text (Part IV.B.2).

\textsuperscript{323} WASH. REV. CODE § 26.16.030(2) (1983).

\textsuperscript{324} Colpe v. Lindblom, 57 Wash. 106, 106 P. 634 (1910).

\textsuperscript{325} Campbell v. Sandy, 190 Wash. 528, 69 P.2d 808 (1937).

\textsuperscript{326} Bowman v. Hardgrove, 200 Wash. 78, 93 P.2d 303 (1939); Kaufman v. Perkins, 114 Wash. 40, 194 P. 802 (1921).


\textsuperscript{328} Gabrielson v. Swinburne, 184 Wash. 242, 51 P.2d 368 (1935); Tibbals v. Ifland, 10 Wash. 451, 39 P. 102 (1895).

\textsuperscript{329} This interest probably can be transferred only by joint action of the spouses, despite the difference in the statutory language of the management statute—real property—and the transfer
The community property interest of the vendor, after creation of a contract purchaser’s interest, has been held to be personal property.\(^{330}\) The purchaser’s interest should, therefore, be real property,\(^{331}\) and either an assignment of that interest to a third person or its release to the vendor should require joint action by the spouses. A number of cases support these conclusions.\(^{332}\) The extent to which the vendors’ interest in the real estate can be modified by one spouse acting alone, however, is unclear. As a personal property asset, it can be managed by either spouse, and modification might be merely management so far as community property principles\(^{333}\) are concerned. If so, the effectiveness of the act would depend upon contract principles beyond the scope of this discussion.\(^{334}\) Should the court require some kind of joint action,\(^{335}\) practical resolution of the problem could lie in finding a presumption of the other spouse’s approval or concurrence, as has been done in a reformation case.\(^{336}\)

Despite a dissenting opinion that the policy of the statute to protect certain major assets against unilateral disposition by one spouse should have given protection, the court held in *Cooper’s Mobile Homes v. Simmons*\(^{337}\) that a mobile home was neither real property nor household goods within the meaning of the statute requiring joinder. This probably triggered the 1981 amendment adding a mobile home to the “joinder” list.

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\(^{332}\) *In re Washburn*, 98 Wn. 2d 311, 654 P.2d 700 (1982) (purchaser who had “conveyed” his interest to the seller in a rescission of the real estate contract had a vendor’s lien for the balance of the down payment not returned, effective against a claim of homestead); Freeborn v. Seattle Trust & Sav. Bank, 94 Wn. 2d 336, 617 P.2d 424 (1980) (assignment of vendor’s interest as security for debt must be filed to be perfected as a security interest under the U.C.C. and if title is conveyed, interest must also be recorded in the county land records); Cascade Security Bank v. Butler, 88 Wn. 2d 777, 567 P.2d 631 (1977) (purchaser’s interest in real estate is subject to judgment lien); Monegan v. Pacific Nat’l Bank, 16 Wn. App. 280, 556 P.2d 226 (1976); see also *WASH. REV. CODE* § 4.56.190 (1983), providing that the seller’s interest in a real estate contract is not real property subject to the lien of a judgment rendered after the effective date of the Act (Aug. 23, 1983).

\(^{333}\) It was at least suggested that the husband’s act of modifying the contract terms was effective in *In re Horse Heaven Irrigation Dist.*, 19 Wn. 2d 89, 95, 141 P.2d 400, 403 (1943).

\(^{334}\) For example, could the spouse of the contracting party effectively act?

\(^{335}\) As personal property, its disposition should not require joint action.


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There is some indication that the husband (and after the 1972 amendments, the wife) acting alone could put someone in possession of community real property as a periodic tenant, suggesting that a management rather than a transfer power had been exercised. Under the 1972 amendments, the tenant could be confronted with a dilemma if the other spouse disagreed and gave notice of the termination of the periodic tenancy. A tenant at will could face similar problems.

The substance of a transaction may support the conclusion that it does not fall within the statutory requirement of joinder. The court has reasonably held that the legal title held by a trustee can be transferred without joinder of the trustee's spouse, the trustee having no beneficial interest in the subject matter of the transfer. This reasoning also might be applied to a fulfillment deed by a vendor of land, particularly if the vendor's interest had been previously transferred to another, but it would be safer to insist that both spouses execute any fulfillment deed of land formerly owned as community real property. The court also has held that some transactions—assignment for the benefit of creditors and abandonment of oyster lands—do not constitute conveyances within the meaning of the statute and hence do not require joinder. A quitclaim deed from a contract purchaser to his vendor (technically a conveyance by release) might involve a comparable situation if it is really the recognition of the loss of a right by forfeiture. Prior to the extension of management power to the wife, the husband alone could have forfeited the community property interest in a forfeitable executory contract of purchase by defaulting on payments permitting the vendor to declare the forfeiture. Now, however, either spouse can make the payments in the community interest and avoid accrual of the right to forfeit.

2. The Joinder Requirement: Community Realty or Household Goods, etc.

Although the present statute requires the real estate transfer instrument to be executed by both spouses, the court has held under the previous statute (when only the husband had managing power) that an instrument

executed only by the husband was effective to create the intended rights in
the transferee if it could be shown that the wife had authorized the husband
to act,345 estopped herself to deny the effectiveness of the act,346 or ratified
the act.347 The substance of the joint action requirement is that effective-
ness depends upon “participation” by both spouses, and the statutory
requirement of joinder in execution of the instrument is only one means of
participation. Thus, the failure to meet the statutory standard does not
make the husband’s (now the spouse’s)348 act void, but merely voidable. In
addition to becoming bound by “participation,” the spouse will become
bound on the contract if he or she joins as plaintiff to compel the pur-
chase.349

The court has concluded essentially that the requirement of joinder is for
the protection of the wife (now the nonjoining spouse) and cannot be
affirmatively asserted by the transferee. Rather, the transferee must first
request joinder and be refused before he can withdraw from the transac-
tion.350

As noted above in Part III.F, there is comparable analysis that “par-
ticipation” without formal signing is enough to satisfy the new real prop-
erty acquisition provision.351 The indications are that the same reasoning is
to be applied for transfer of household goods, furnishings, and appli-
cances.352

Under the new provision in 1972 concerning management of a com-


345. Whiting v. Johnson, 64 Wn. 2d 135, 390 P.2d 985 (1964); Konnerup v. Frandsen, 8 Wash.
551, 36 P. 493 (1894).
346. E.g., Campbell v. Webber, 29 Wn. 2d 516, 188 P.2d 130 (1947).
347. E.g., In re Horse Heaven Irrigation Dist., 19 Wn. 2d 89, 141 P.2d 400 (1943).
348. The equal management power of each spouse should mean the initial formal act of the wife can
be effective if the husband “participates.”
350. See, e.g., Stubbett v. Atlas Imperial Diesel Engine Co., 39 Wn. 2d 789, 238 P.2d 1212 (1951);
Colcord v. Leddy, 4 Wash. 791, 31 P. 320 (1892).
home” should be added to the list because of its inclusion by the 1981 amendment of WASH. REV. CODE
§ 26.16.030(5).
354. See infra notes 400–02 and accompanying text.
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As noted above in Part III.A, the location of the paper title between the spouses does not necessarily establish the location of ownership, nor its character. Consequently, the appearance of an adequate title in just one spouse in the land records, when in fact the title is held as community property, may mislead a prospective purchaser by suggesting that he may obtain good title by obtaining a conveyance from only that spouse. An 1891 statute is designed to protect a bona fide purchaser from such a record title holder unless the other spouse has recorded a claim of interest in the real estate. However, the difficulty of establishing the position of bona fide purchaser against a community property claim is great. Indeed, it is arguably excessive, and practically speaking, the statute is a dead letter. Title examiners assume a person who appears to be the sole owner of real estate is married and that the real estate is community property.

3. Joinder Through Agency

Prior to the 1972 amendments, the court had held that the husband could make the wife an agent to conduct community affairs or transactions either directly or indirectly through estoppel or ratification. In ordinary situations, there now will be no need to find that one spouse has been made an agent by the other because both spouses have equal management powers. However, when joint action is required, agency reasoning may be a route to finding the necessary "participation" by both spouses. An intended agency can be established by means of a power of attorney granted by one spouse to the other, as provided by statute.

4. Emergency Powers—Guardianship

In Marston v. Rue, the wife, who at that time possessed no management power, was held to have an emergency power to act to protect and preserve community property and to transfer perishable personal property to avoid loss while the husband was unavailable. Such acts now would clearly be within her statutory power as comanager and would not call for analysis on the basis of emergency. However, where joint action is required to act, there may still be some occasion to premise the effectiveness of the

355. See supra notes 65–84 and accompanying text.
357. See, e.g., Campbell v. Sandy, 190 Wash. 528, 69 P.2d 808 (1937).
360. 92 Wash. 129, 159 P. 111 (1916).
"other" spouse's sole act on an emergency power. The serious absence or the total incompetence of a spouse could present situations in which there should be found an emergency power of one to act for the other or both, although the "perishable" nature of the asset involved, upon which the emergency power in Marston was premised, probably no longer will be a factor.

The court has held that the managing power of a spouse is constrained while acting as guardian of the other spouse and must conform to the more restrictive fiduciary responsibilities of a guardian. In the case cited, the court noted that the wife had voluntarily become guardian and inventoried the land and other assets in the guardianship estate, thereby necessarily relinquishing some management power. The potential awkwardness in management is patent. Perhaps the complications could be avoided by exclusion of some assets from an inventory or, more reasonably, court authorization in advance for normal managing power as to particular assets or actions.

B. Inter Vivos Management and Transfer Powers of Spouses Acting Alone

Each spouse acting alone, in the best interests of the community property in a business sense, may now manage and transfer community personal property, with the exception of household goods, furnishings, or appliances, a community mobile home, assets of community businesses, and gifts. In those situations in which one spouse may effectively act alone, the disagreement of the other as to the wisdom of the transaction is immaterial. Under the pre-1972 decisions, when the husband exercised his discretion in the community interest as he saw it, the wife was without power to frustrate his acts; good faith rather than good judgment

361. Id. at 129, 159 P. at 113.
363. The particular example is the new statutory requirement that the injured spouse or the employed spouse is the necessary party in the actions for personal injury, and for compensation for services, respectively. Wash. Rev. Code § 4.08.020 (1983).
364. Seattle-First Nat'l Bank v. Brommers, 89 Wn. 2d 190, 570 P.2d 1035 (1977) (wife was held liable for treble damages for waste for improperly authorizing logging of all merchantable timber, and was required to account for unauthorized sales of personal property).
368. See, e.g., Hanley v. Most, 9 Wn. 2d 429, 115 P.2d 933 (1941) (husband put enough corporate shares in voting trust to give his business associate voting—and managing—control of corporation which previously was in husband's control; wife's challenge unsuccessful); Bellingham Motors Corp.
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was the rule. Similarly, the wife's acts should now be equally effective under the 1972 amendments despite the husband's disagreement.

Because in ordinary personal property transactions each spouse may now act alone, there obviously can be competing transferees, each relying on the act of a different spouse; these problems do not appear to be any different than those involved in competing transfers by partners or competing transfers to more than one transferee in other contexts, and will not be analyzed in this discussion.

1. Management of Community Personal Property: Requirement of a Business Purpose

As previously mentioned, the basic rule is that the manager must act in the best interests of the community property in a business sense. While this rule has been traditionally applicable to the husband alone as a community manager, the wife must exercise the equal management powers conferred upon her by the 1972 amendments in a like manner. Essentially, this judicial doctrine originated to preclude the unilateral gift of community property; inter vivos gifts of community property are void ab initio and in toto without the consent of both spouses. While it has been argued that a community purpose, or at least a permissible disposition of

v. Lindberg, 126 Wash. 684, 219 P. 19 (1923) (husband contracted to buy a truck despite wife's belief (known to seller) that the transaction was unwise; she was right but community liability was found nonetheless). If either spouse could contest the judgment of the other, as a practical matter joint participation by the spouses would always be necessary before a third party could safely transact business with the community.

Sun Life Assurance Co. of Canada v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933). The statute, however, indicates that the managing power over the community property is similar to that over separate property. Wash. Rev. Code § 26.16.030 (1983). Before the 1972 changes, the husband's power was similarly stated in Wash. Rev. Code § 26.16.030 (1958) (personalty) (amended 1972), but § 26.16.040 (1958) (realty) (amended 1972) stated that he had management power over community realty but joint action was required for transfers.

The proposition is the basis of the holding in Sun Life Assurance Co. of Canada v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933), which overruled Stevens v. Naches State Bank, 136 Wash. 137, 238 P. 918 (1925), wherein the court reasoned that the husband's act of pledging a certificate of deposit as security for their son's debt would have been approved by the wife in all probability.

See Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 74 P.2d 27 (1937); In re Estate of Yiatchos, 60 Wn. 2d 179, 373 P.2d 125 (1962), rev'd on other grounds, Yiatchos v. Yiatchos, 376 U.S. 306 (1964). Since the gift serves no business purpose, it is not within the manager's power and cannot be fully effective; it cannot be partially effective without causing the impermissible division of community property. See Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892). Spouses own an undivided one-half interest in each community item—the so called "item" theory. In re Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972). The Powers case has been overruled because it does not involve an inter vivos gift but rather a quasi-testamentary gift by beneficiary designation; the result is that the insured spouse's half interest in the proceeds of community property life insurance may go to the named beneficiary without consent of the surviving spouse. Francis v. Francis, 89 Wn. 2d 511, 573 P.2d 369 (1978). See infra notes 374–84 and accompanying text (Part IV.B.I.a).
community property, should be found when a child or parent is benefited by the gift, the court has held to the contrary.\(^{372}\)

The 1972 amendments merely codified the judicial rule that both spouses must consent to gifts of community property.\(^{373}\) The following paragraphs describe a major change the Washington court made in 1978 in the analysis of gift transactions that focuses on the immediate or postponed effect of the transaction, rather than considering merely the donative character of the act and whether both spouses participated. The gift reasoning involved may indicate the result to be reached in some joint bank account situations.

### a. Life Insurance and United States Savings Bonds

The major 1978 change mentioned above occurred in *Francis v. Francis*\(^{374}\) in which the court overruled the long-standing rule of *Occidental Life Insurance Co. v. Powers*\(^{375}\) that an insured spouse could not without the consent of the other spouse designate the beneficiary of a life insurance policy purchased with community funds (a community asset). The court said:

Having reexamined the *Powers* case and its progeny, we have come to the conclusion that the case was erroneously decided and should be overruled. The majority opinion proceeded upon the incorrect assumption that a designation of a life insurance beneficiary operates as an inter vivos gift of community property, failing to recognize that such a designation is merely a means of transmitting property at death. The opinion confuses the right of the wife to void an inter vivos gift of community property in its entirety with her right to receive the value of one-half of the community property at the husband’s death. The designation of an insurance beneficiary is quasi-testamentary in nature, since the beneficiary has only an inchoate right prior to the death of the insured, at least where the insured retains the right to change the beneficiary. And even where he does not retain this right the beneficiary’s interest is contingent upon the maintenance of the policy in good standing up to the time of the insured’s death.

While the designation of a beneficiary is quasi-testamentary in nature, it is not subject to the requirements of the statute of wills (RCW 11.12), since it is expressly excepted under RCW 11.02.090.\(^{376}\)


\(^{375}\) 192 Wash. 475, 74 P.2d 27 (1937); Annot., 114 A.L.R. 531 (1937).

\(^{376}\) 89 Wn. 2d at 514, 573 P.2d at 371.
The last paragraph above answered the argument in Powers that the testamentary character of a beneficiary designation triggered the application of the statute of wills.

In Francis there were two policies on the husband's life in both of which he had designated his wife and a son by a previous marriage as beneficiaries. His wife's claim to all proceeds, successful in the trial court, failed on the appeal and the court directed that the proceeds should be paid according to the terms of the policies—that is, half to each named beneficiary.

Francis does not necessarily control the effect of a designation of a son (or anyone other than the spouse) as the sole beneficiary of the community property life insurance policy. It is probable that the rule will be that such a designation will be effective as to the insured's half interest only, as in California.377

The statement in the quotation above that the wife had a right to receive the value of one-half of the community property at the husband's death needs comment. Under the item theory of community property, which the Washington court applies, the statement is acceptable if it means that the wife would get half of the proceeds of each policy, but it would change the existing rule if it means that the wife would get half of the proceeds of all community property policies. In other words, if there were two community policies of equal amounts, with the son as beneficiary in one and the wife in the other, the result should be that the wife could claim three-fourths of the total proceeds, that is, all from the policy in which she was beneficiary and half from the policy in which the son was beneficiary. Perhaps some minimal application of an "election" approach could be applied and the wife would only be permitted to assert her rights in half of the proceeds in one policy if she relinquished her claim to frustrate the insured's attempt to dispose of all of the other policy. With multiple policies and beneficiaries the problem could become complex. While such an election approach has an initial appeal, it would amount to partial abandonment of the item theory and a step toward adoption of an aggregate theory which was purposely

377. Compare Wash. Rev. Code § 26.16.030(1) (1983), limiting testamentary power to half, and the preference for finding no purpose to exceed the limit in the will situations posing election problems, discussed infra notes 418–25 and accompanying text. In many beneficiary designation situations it seems probable that the insured's spouse has agreed, or at least would not disagree if the question were put. A provision in the insurance code creates a presumption of consent when the beneficiary is a child, parent, brother, or sister of either spouse. Wash. Rev. Code § 48.18.440(2) (1983). The presumption is rebuttable, National Bank of Commerce v. Lutheran Bhd., 40 Wn. 2d 790, 246 P.2d 843 (1952). It applies even though the naming preceded marriage. Miller v. Paul Revere Life Ins. Co., 81 Wn. 2d 302, 501 P.2d 1063 (1972). Thus, the abandonment of the Powers reasoning, 192 Wash. 475, does not necessarily give more than "half effect" to the beneficiary designation with the surviving spouse taking the other half.

The particular point made in the text is identified in a very useful Comment, Life Insurance Proceeds as Community Property, 13 Wash. L. Rev. 321, 326 (1938).
rejected in *In re Estate of Patton*. The author believes such a step should be taken only if careful study persuades that an aggregate theory produces better results at the death of a spouse.

In *In re Estate of Yiatchos*, a United States savings bonds case, the Washington court applied the Powers reasoning and held that the husband's purchase of bonds with community funds, issued in his name and payable on death to his brother, amounted to an attempt to give and was ineffective for lack of consent by the wife; therefore the husband's will disposed of his half interest in the bonds and the wife owned the other half interest. The United States Supreme Court reversed by invoking federal law, holding that the brother as beneficiary owned the husband's half interest, and that he also should get the wife's half unless she could show the absence of her consent to such use of the funds. The Supreme Court concluded that until the husband's death there had been no interference with the wife's community property position—community property funds had merely been converted into community property bonds—thereby flatly rejecting the Powers reasoning that the Washington court had applied. As to the husband's half interest, this holding is consistent with the present Washington rule under *Francis* regarding the permissibility of the quasi-testamentary gift. The difference as to the wife's half has been noted above in Part III.D.

The survivorship feature of the "or" bonds prevailed, by reason of federal supremacy, over Texas community property law in *Free v. Bland*. The Court held the surviving spouse owned the bonds issued to the husband "or" the wife, against any claim direct or indirect of the decedent spouse's legatee. Certainly if there is immediate control over the asset by either of the co-owners, it would be inappropriate to analyze the rights as being based on a quasi-testamentary disposition, even though the total ownership would only accrue upon the death of one of the co-owners. If a stranger rather than the other spouse is named as co-owner, the result should be the same as in *Yiatchos v. Yiatchos*, that is, the disposition by survivorship should operate as to the decedent spouse's half community interest, but not necessarily as to the surviving spouse's. The effect of attempts to convert a community property ownership into something else without federal supremacy complications is discussed below.

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380. See also *In re Estate of Allen*, 54 Wn. 2d 616, 343 P.2d 867 (1959).
382. See supra notes 122–25 and accompanying text.
384. See infra notes 385–91, 514–40 and accompanying text.
b. Common Law Co-Ownership Including Bank Accounts

Two patterns may exist—a co-ownership between one spouse and a stranger or between the spouses only. In addition, the co-ownership form could be joint tenancy or tenancy in common. Either is a separate property rather than a community property holding.

The attempt by one spouse to convert community property into a joint tenancy with a third person without the consent of the other spouse will fail, by reason of the statutory requirement that both spouses join in the writing creating a joint tenancy with community property unless “participation” might be sufficient. Similarly, the court has held that it requires a writing signed by both spouses to create a joint tenancy between them with community property.

A new statute, originally enacted in 1984 as a part of a comprehensive trust law and reenacted in 1985 separately to avoid possible unconstitutionality by reason of the narrowness of the 1984 bill’s title, affects the husband/wife joint tenancy situation by creating a presumption that their interests are community property but preserving the survivorship of a joint tenancy. The language of the law is puzzling: does it mean that interests held in joint tenancy form are presumed to be community property, or does the statute operate only after a joint tenancy interest is created through meeting the requirements mentioned above under the basic joint tenancy statute? The latter interpretation would trigger a rather pointless circuity—both spouses would have to join in the writing to create a joint tenancy.

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386. Lambert v. Peoples Nat’l Bank, 89 Wn. 2d 646, 574 P.2d 738 (1978) (registration of mutual fund shares in names of husband and wife as joint tenants was not enough to satisfy the statutory requirement of a writing by both); In re Estate of Olson, 87 Wn. 2d 855, 557 P.2d 302 (1976) (note and mortgage to husband and wife as joint tenants for community funds loaned held as community property); Rogers Walla Walla, Inc. v. Ballard, 16 Wn. App. 81, 553 P.2d 1372 (1976), review denied, 88 Wn. 2d 1004 (1977) (community property stock reissued in joint tenancy form held to be community property); see also Note, Property—Community Property and Joint Tenancy: Creating Survivorship Rights in Washington, 53 Wash. L. Rev. 557 (1978).
388. The statute reads:

(1) Joint tenancy interests held in the names of a husband and wife, whether or not in conjunction with others, are presumed to be their community property, the same as other property held in the name of both husband and wife. Any such interest passes to the survivor of the husband and wife as provided for property held in joint tenancy, but in all other respects the interest is treated as community property.

(2) This section applies as of January 1, 1985, to all existing or subsequently created joint tenancies.

Id.
389. Or at least “participate.”
interest which would then be presumed to be a community property holding. If the spouses really want a joint tenancy, apparently their writing will require the recitation, "as a joint tenancy and not as community property or a tenancy in common" or some such phraseology. It might have been better merely to provide for a special community property holding with a right of survivorship, adequately indicated on the creating instrument. 390

The spouses could change community property into a tenancy in common, but an attempt by one spouse to convert a community property holding into a tenancy in common between the two of them should fail under the reasoning of In re Estate of Allen 391 because clearly the attempt could have only inter vivos and not, in any manner, a quasi-testamentary effect. Such an effort would fail if joinder of both spouses is required by statute for any manipulation of the asset, that is, if the subject matter is real property, a mobile home, or household goods, furnishings, or appliances.

The "bank" account problem has been changed by statute effective July 1, 1982, 392 so that the type of account or of the financial institution in which the account is does not affect the community or separate property rights. Previously a distinction needed to be drawn between a joint account that was merely a multiple party account with or without survivorship, and a joint tenancy account that raised the kinds of questions indicated formerly. 393 The new statute does not preclude the purposeful creation of a joint tenancy in an account but it seems probable that this will not be done; rather there will be joint accounts with a right of survivorship or just joint accounts, but as to any account authorized by the statute it provides that the act shall not be deemed to alter the community or separate property nature of funds held on deposit, and community or separate rights shall not be affected by the form of the account. 394 Further, subject to community property rights, joint account funds belong to depositors in proportion to the net funds owned by each unless the contract provides otherwise, or there is clear and convincing evidence of a contrary intent at the time the

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390. The effect of the new statute will be important because, for instance, the rights of creditors differ with respect to joint tenancy and community property, the power of a spouse to manipulate a half interest differs in joint tenancy and community property holdings, and involuntary or voluntary transactions could occasion the need to sustain or rebut the community presumption, the burden of which probably should fall on the disputing spouse.

391. 54 Wn. 2d 616, 343 P.2d 867 (1959).

392. WASH. REV. CODE ch. 30.22 (1983) (Financial Institution Individual Account Deposit Act). Banks, trust companies, mutual savings banks, savings and loan associations, and credit unions are all included. Id. § 30.22.040(12).


account was created. Ownership at death is subject to community property rights and the provisions of a community property agreement.

The effect of the new statutory provisions appears to be as follows. If community property funds are deposited by one spouse there will be merely a change of form of the community property asset even though the account is in the names of the depositor and someone other than the depositor's spouse. The result will be the same as in *Munson v. Haye*, although that case held that showing the community character of the funds deposited rebutted a presumption of a joint tenancy between the spouses in the account so that one spouse could not by gift create any rights in another in the funds withdrawn. If the account provides for survivorship in a third person, the quasi-testamentary quality of the arrangement ought to support the claim of the third person to the decedent's half interest in the account under the reasoning of *Francis v. Francis*. If the account is in the name of both spouses it will normally be community property (not separate property in either joint tenancy or tenancy in common), and a provision for payment to the survivor would make the ownership complete in that person. The provision in favor of the survivor for an account in the names of a spouse and a third person should continue to operate for the spouse upon the death of the third person under the holding of *In re Estate of Webb*, but conceivably the funds from the third person would be owned by the spouse as separate property by gift, rather than as community property (as presumably the funds from the spouse in the account would be).

2. **Community Business Assets**

Management or transfer of community business property (including real estate) involves unique problems because of the 1972 addition of section 26.16.030(6) to the Revised Code of Washington. The paragraph provides:

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.

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395. *Id.* § 30.22.090.
396. *Id.* § 30.22.100.
397. 29 Wn. 2d 733, 189 P.2d 464 (1948).
398. *See supra* notes 374-84 and accompanying text (Part IV.B.1.a).
399. 49 Wn. 2d 6, 297 P.2d 948 (1956).
This provision creates two exceptions to the general rules on managing and
transfer power: (1) when both spouses participate in the business, their joint
action is required to transfer community business personalty (as well as
realty); and (2) when only one spouse participates in the business, that
spouse acting alone (and apparently not the other spouse) may transfer
community business personalty and also realty. Three principal questions
arise: (1) Under what circumstances do “both spouses participate in . . .
management” of the community business? (2) What suffices as “consent”
of the other spouse? (3) What are the acts within “the ordinary course” of
the business?

It seems probable that an incorporated business will not be within the
new provision. The “sole proprietorship” poses the greatest potential
difficulty as to participation by both spouses, because such incidental
support activity as “keeping the books” may be enough to constitute
“participation” and require consent of the “sole proprietor’s” spouse. As
suggested elsewhere, if such minimal involvement is sufficient to con-
stitute “participation,” some sort of implied consent to the acts of the
principal manager of the business will be necessary to avoid serious
practical complications in the conduct of a business. Even if both spouses
actively manage the business, implications of authority of each will be
necessary to consummate most transactions, that is, those not clearly of an
extraordinary character. Although the protection the required consent
provides against total sale of the business may be desirable, and perhaps all
the protection that is necessary, the language of the paragraph is too
detailed to limit its application to total sale, and the scope of interference
with less extensive transactions continues to be uncertain.

3. Litigation

The 1972 amendments have changed the rules involving litigation. Previously the husband as community manager was a necessary party to
any community property litigation. Under the 1972 amendments equaliz-
ing management power, as a general proposition either spouse can sue or be
sued in a community property matter. At least presumptively, proceeds or

401. If all, or almost all, shares of a corporation are owned by the spouses, it would not be
surprising to conclude that the paragraph applied if in the operation of the business the corporate form
was largely ignored. Situations in which such a result might be reached are illustrated by State ex rel.
Van Moss v. Sailors, 180 Wash. 269, 39 P.2d 397 (1934) and In re Estate of Buchanan, 89 Wash. 172,
154 P.129 (1916).

402. Cross, supra note 9, at 537-41. The problems raised in the text are more fully discussed in that
article.

403. See id. at 545-46, where the author has identified the changes somewhat more fully.
liabilities flowing from such a suit would be community in character.\textsuperscript{404} Note, however, that the agency of a spouse ceases at dissolution of the marriage so that the subsequent judgment by confession by the husband for himself and the former "community" does not affect the now independent interest of his former wife not served or joined in the suit.\textsuperscript{405} If only one spouse is named as a defendant and a community liability is sought, it is probable that the equal managing power of each spouse will support intervention by the other spouse.\textsuperscript{406}

Several exceptions exist to the general proposition that either spouse may now sue or be sued in a community property sense. By the 1972 amendments the injured spouse is the necessary party in an action to recover for personal injuries,\textsuperscript{407} and the employed spouse is the necessary party in an action to recover compensation for services rendered.\textsuperscript{408} In addition, the court long ago held that both spouses were necessary parties to an action involving community real estate, on the reasoning that the power to maintain such an action included the power to compromise and "[t]he effect of that compromise might be to effectually dispossess the community of the land, or, at least, to seriously incumber it."\textsuperscript{409} This reasoning should equally apply to controversies involving the transfer or encumbrance of community household goods, furnishings, or appliances, or a community mobile home,\textsuperscript{410} and probably those involving a community business "where both spouses participate in its management."\textsuperscript{411}

\textsuperscript{404} See Oil Heat Co. v. Sweeney, 26 Wn. App. 351, 613 P.2d 169 (1980) (service on wife was enough to support community liability on debt incurred by husband who had disappeared); Komm v. Department of Social and Health Servs., 23 Wn. App. 593, 597 P.2d 1372 (1979) (husband unsuccessfully sought to prevent garnishment of wages to contribute to cost of foster care for stepchildren based on community liability established in an administrative proceeding to which only wife was party).

\textsuperscript{405} Northern Commercial Co. v. E.J. Hermann Co., 22 Wn. App. 963, 593 P.2d 1332 (1979); see also Griggs v. Averbeck Realty, 92 Wn. 2d 576, 599 P.2d 1289 (1979) (default judgment against husband after dissolution of the marriage, in suit commenced against husband and wife before the dissolution, was set aside by wife who then prevailed on the merits; attempt to reach former community property in wife's hands on the default judgment against husband was unsuccessful—husband had no authority to act for the "community" after the dissolution of the marriage).

\textsuperscript{406} WASH. REv. CODE § 4.08.040 (1983). Prior to the 1972 amendments the statute applied only to the wife's intervention to protect her separate property interests which might be prejudiced by the suit against her husband. With power under the amendments in each spouse to be sued or sue, the present language of the section should mean that either spouse may intervene and defend in a suit involving community assets to protect against an adverse community consequence when the other spouse (defendant in the suit), for whatever reason, chooses not to do so.

\textsuperscript{407} Id. § 4.08.030(1).

\textsuperscript{408} Id. § 4.08.030(2).

\textsuperscript{409} Lownsdale v. Gray's Harbor Boom Co., 21 Wash. 542, 544, 58 P. 663, 664 (1899).

\textsuperscript{410} By reason of the joinder requirement of WASH. REv. CODE § 26.16.030(5) (1983).

\textsuperscript{411} Id. § 26.16.030(6).
4. Management Power While Living Separate and Apart

If the spouses have permanently separated, under the analysis above in Part III.C, so that future acquisitions will be separately owned, there may nonetheless remain community property to be managed—mere separation does not affect the community character of existing assets. In addition there may be continuing authority to represent community interest in litigation. Prior to the 1972 amendments the court recognized the necessity of a continuing managing power in the husband, but cautioned that a third person (e.g., a creditor) may not be able to deal with the husband with impunity, for there may be situations in which known facts would suggest that the managing power was being abused. With each spouse now having equal managing power, the potential difficulties are compounded; the author has discussed some possibilities elsewhere, and has suggested that the power be restricted to the reasonable necessities of the situation.

C. Testamentary Powers

1. Intestate Succession and Testamentary Powers in General

Although earlier statutes provided otherwise, since October 1, 1974, the surviving spouse takes by intestate succession the decedent spouse’s share of community property, and continues in ownership of the other half.

Each spouse has testamentary power over one-half of the community property, but no more. Indirectly, however, one spouse could dispose of both halves of the community property in particular assets, or of the

412. See supra notes 98–117 and accompanying text.
416. Cross, supra note 9, at 543–44.
417. After dissolution of the marriage neither party has a management power over the other’s interest in former community property. Griggs v. Averbeck Realty, 92 Wn. 2d 576, 599 P.2d 1289 (1979) (default judgment against husband after divorce did not affect wife’s interests under the circumstances since husband had no continuing managing power).
419. Id. § 11.02.070. Under an earlier statute the decedent’s half went by intestate succession to legitimate issue, then by a change effective July 1, 1967, it went half to the surviving spouse and the other half to issue or parents of the decedent. If there were no issue or in-laws, the surviving spouse took the decedent’s share, but both statutes left the potential for awkward tenancy in common ownerships between the surviving spouse and children, stepchildren, or in-laws.
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whole estate, by putting the survivor to an election. In effect, by putting the survivor to an election the decedent proposes to dispose of the survivor's interest in community property and offers in exchange to the survivor some interest or asset of the decedent's. The crucial question, however, is under what circumstances the surviving spouse will be put to an election. The court of appeals has stated the rule as follows:

To create the necessity for a widow's election upon the husband's death, there must appear on the face of the husband's will a clear and unmistakable intention to dispose of property which is not in fact his own and which was not within his power of disposition. . . . It has been determined that it is immaterial whether the testator knew the property he purported to dispose of in his will was not within his power of disposition, or whether he erroneously believed it to be, because, in either case, if the intention to dispose of it specifically appears, the necessity for an election exists.

What would otherwise be the change of ownership at death may be frustrated by the beneficiary (i.e., the intended recipient) disclaiming the interest under the broad powers of the 1973 disclaimer statute, which reaches essentially all methods of disposition. The power is likely to be used primarily in post-death tax planning.

There is full testamentary power over separate property, which may pose a practical problem of some consequence to a surviving spouse if the domicile of the spouses had been in a common law state most of the time. Assets accumulated under those circumstances would not be community property, and as far as Washington law is concerned could be freely devised by the owner spouse, resulting in what has been called “disinheritance” of the surviving spouse. The protection for a surviving spouse afforded by the common law state would not apply, and the protection under Washington law would not be available due to the absence of community property. McClanahan has suggested a possible escape from this result: apply, under

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423. See generally Comment, The Widow’s Election as an Estate Planning Device in Washington, 43 WASH. L. REV. 455 (1967). For the decedent to succeed, of course, the survivor has to make the election.

424. Contrast the election problem in common law states where typically the widow could elect to take a dower interest (or some statutory substitute) in her husband’s estate or take part of his estate under the terms of his will, i.e., a choice between how and on what basis she took some of his estate, not an exchange of some of her estate for some of his. In re Estate of Cooper, 32 Wn. 2d 444, 202 P.2d 439 (1949), involved facts which could have been, but were not, analyzed on the basis of the common law election, which probably affected the outcome.


427. Id. §§ 26.16.010, .020.

the conflict of laws rules, the death succession scheme of the common law state of origin or acquisition.429

2. The Community Property Agreement

Although negatively stated, a statute430 authorizes the husband and wife to enter into an agreement “concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either.” The statute requires the agreement to be executed in deed form, provides that it may be “altered or amended” in the same manner, and specifies that it shall not derogate from the rights of creditors.431

Many community property agreements actually executed, which the author calls “three-pronged,” go beyond the disposition of the deceased spouse’s community property as contemplated by the statute (the third prong) by including, as two more prongs, provisions to convert existing separate property into community property (the first prong) and to establish that future acquisitions by either spouse shall be community property even though such an acquisition would otherwise be separate property (the second prong). These first two “prongs” are discussed below in Part V.A;432 the present discussion refers only to a “statutory community property agreement” rather than the broader “three-pronged” agreement and assumes that only community property, however it may come about, is the subject matter of the agreement.

As a dispositive instrument, the agreement takes effect at death, as provided by the statute, and normally prevails against the will of the decedent,433 but Norris v. Norris434 teaches that if an inconsistent will is probated and the estate administered, there may be an election to take under the will and against the community property agreement or a disclaimer of rights under the agreement.435 The inter vivos effect of the agreement is

430. WASH. REV. CODE § 26.16.120 (1983). “Nothing contained in any . . . law of this state, shall prevent the husband and wife from jointly entering into any agreement [whateoever].”
432. See infra notes 470-513 and accompanying text.
434. 95 Wn. 2d 124, 622 P.2d 816 (1980).
435. In Norris, husband and wife had made reciprocal wills by which the survivor got a life estate.
controlled by normal contract principles, including the possibility that by reason of mistake or misunderstanding as revealed by all surrounding circumstances, the community property agreement will be found to have no operative effect. While the agreement deprives the spouse who dies first (but not the surviving spouse) of the power to make an effective inconsistent will, it does not modify the rules concerning management or transfer of community property during the lifetime of both spouses. One spouse acting alone cannot revoke the agreement, and even inconsistent acts by both will not nullify the agreement unless there can be found a mutuality of purpose to terminate the agreement.

Although a will cannot prevail against the community property agreement disposition, it is not uncommon for spouses, on advice of counsel, to execute both wills and a community property agreement at the same time, probably with two purposes in mind: first, to increase the likelihood that a common plan for ultimate disposition by the survivor will come into

and the remainder went to their son and grandson. Thereafter, without their lawyer's advice they made a survivorship community property agreement. After wife died, husband was advised of the tax consequences, probated the will and administered the estate through to the decree of distribution, without revealing to the court the existence of the community property agreement. Husband remarried and controversy arose between him and his son about rent and other matters concerning the farm. Husband then brought this quiet title action, asserting he was sole owner by reason of the community property agreement. The trial court so held. The court of appeals reversed, holding that probating the will was a disclaimer of rights under the community property agreement. 

The supreme court affirmed, concluding there had been an election, but did not directly address the disclaimer analysis.

In re Estates of Wahl, 31 Wn. App. 815, 644 P.2d 1215 (1982), aff'd, 99 Wn. 2d 828, 664 P.2d 1250 (1983), in which husband and wife each had a will in favor of the other contingent upon survival for 90 days, and subsequently executed confirming codicils on the same day that they executed a survivorship community property agreement (with no provision for the 90-day survival). Husband survived wife less than 90 days. On appeal from a summary judgment for husband's relative, the court of appeals reversed and remanded for trial, holding that contract rules of interpretation should be applied with consideration given to the provisions of the community property agreement, the wills, the codicils, and the surrounding circumstances to determine the intent of husband and wife. (Roe, A.C.J., concurred that summary judgment for husband's relative was inappropriate, but would have granted one for wife's relatives because by a mistake of fact the agreement was not effective.) The supreme court affirmed that contract construction rules applied and the court must consider and determine the spouses' intent, when on the same day they had executed codicils and a community property agreement which were inconsistent.

Although what property interest the survivor has in former community property can be affected by the agreement which, therefore, indirectly may affect the survivor's testamentary power.

For example, it does not modify the power to convey to a trustee, Hesselten v. First Methodist Church, 23 Wn. 2d 315, 161 P.2d 157 (1945).

In re Estate of Brown, 29 Wn. 2d 20, 185 P.2d 125 (1947) (surviving husband had become incompetent; wife's will, apparently designed to accomplish plans the spouses had, held to be ineffective); In re Estate of Wittman, 58 Wn. 2d 841, 365 P.2d 17 (1961); In re Estate of Lyman, 7 Wn. App. 945, 503 P.2d 1127 (1972), aff'd 82 Wn. 2d 693, 512 P.2d 1093 (1973) (wife commenced divorce action, asking court to fix rights in community property; husband then made will inconsistent with survivorship provision in agreement; wife took as survivor by force of agreement).

operation;\textsuperscript{441} and second, to avoid the consequence that the community property agreement could not operate for lack of an identified survivor,\textsuperscript{442} in the event of simultaneous death of both. Of course, a more complicated scheme in the agreement could accomplish both purposes directly.

As a conveyance, the agreement transfers title at the death of one spouse, and if real property is included in the affected assets, the agreement should be recorded to establish the necessary link in the record title. Recordation is not otherwise necessary to the effectiveness of the agreement, although it may be useful to preserve evidence of the existence of the agreement.

While the statute specifically states that a proper writing is necessary to alter or amend the agreement, in \textit{In re Estate of Ford}\textsuperscript{443} the court held that the survivorship provision of the agreement did not control against the wife's will as to land quitclaimed by the husband to the wife after execution of the agreement, on the basis that the conveyance amounted to a partial revocation.\textsuperscript{444} The result is sound. The complete inter vivos power the spouses have, despite the existence of the community property agreement, supports the reasoning that the quitclaim deed made the asset the wife's separate property, thereby removing it from the scope of the agreement just as a conveyance to a stranger would have done. While it appears to the author to be improbable, it is unclear whether total elimination of the agreement can be effected only by a writing. The analysis in both the Wittman and Lyman cases\textsuperscript{445} indicates that adequate mutuality of purpose of both spouses may be shown without a writing. However, the concern expressed by the court in Wittman about the stability of recorded titles\textsuperscript{446} leaves the matter in doubt, at least as regards a possible bona fide purchaser from the surviving spouse who claims under the agreement.

\textsuperscript{441} Note why the wife executed a will; it was argued the agreement was rescinded by reason of his incompetence and her act of making the will. \textit{In re Estate of Brown}, 29 Wn. 2d 20, 27, 185 P.2d 125, 129 (1947). The decedent could not be certain the survivor would not change the will, of course.

\textsuperscript{442} Cf. \textit{In re Estates of Clise}, 64 Wn. 2d 320, 391 P.2d 547 (1964). Apparently, at times, spouses execute both wills and a community property agreement with the purpose that the survivor can destroy the agreement executed by the decedent that is less advantageous. The risk of not succeeding merely by physically destroying the agreement is patent.


\textsuperscript{444} The dissenting judge contended there had been no mutual rescission and there was no basis for concluding there was partial revocation.

\textsuperscript{445} See supra note 439.

\textsuperscript{446} The court said:

Even if mutual repudiation may, under certain circumstances not here present, constitute a rescission, we are not prepared to subject the statutory community property agreement, which serves as a recorded conveyance of property to the surviving spouse, to the cloud of uncertainty such a rule would cast upon the record and, hence, the title to the property.

\textit{Wittman}, 58 Wn. 2d at 845, 365 P.2d at 20.
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The usual agreement provides simply that the survivor of the spouses shall take all community property without identifying the property particularly. However, the statutory language is broad enough to permit agreements affecting only certain assets rather than all, and also to permit dispositions other than solely to the survivor. It is the author's belief that complete flexibility in dispositive schemes is available and that multiple agreements, each affecting some particular assets but not others, could be executed. By the latter route, spouses could provide for survivorship, for example, with respect to particular assets and at the same time clearly preserve their community property character until one of them died. A somewhat similar result may be realized under the new statute which provides that joint tenancy interests held in the names of the husband and wife are presumed to be their community property, and "[a]ny such interest passes to the survivor of the husband and wife as provided for property held in joint tenancy, but in all other respects the interest is treated as community property." In many situations, a survivorship disposition by a community property agreement is too simple, causing complications which could be avoided by testamentary dispositions tailored to the particular situation of the spouses.

448. See In re Estate of Verbeek, 2 Wn. App. 144, 158–60, 467 P.2d 178, 187–88 (1970) (certain property was treated as being community property and, therefore, subject to the agreement, even though it was not described in any way).
449. WASH. REV. CODE § 26.16.120 (1983). The statute provides that the agreement may affect "the status or disposition of the whole or any portion of the community property"; this language does not require disposition to surviving spouse.
450. See In re Estate of Dunn, 31 Wn. 2d 512, 526, 197 P.2d 606, 614 (1948) (life use and remainders over were set up by an agreement in a form adequate for the statutory community property agreement and a joint will). Cf. Raab v. Wallerich, 46 Wn. 2d 375, 383, 282 P.2d 271, 275 (1955).
452. Would such a survivorship insulate the asset from the creditors of the deceased "joint tenant," as in pure joint tenancy, or would the community property rules apply? A more direct way to achieve the result apparently intended would have been to authorize specifically a form of community property with survivorship and avoid the complications which can arise in application of a presumption, as well as the difficulty of determining how the joint tenancy law is now to be applied. A true joint tenancy might achieve the same result; the author has previously expressed discontent (which continues) with that sort of approach:
   An alternative approach would be conversion from community property to joint tenancy ownership, but the inseverability of community property would be lost in joint tenancy (either voluntary or involuntary severance of the half of either spouse) and the certainty that the survivor would take all would also be lost. Such inconsistencies in the incidents of these two types of ownership indicate the illogic, and undesirability, of "community property in joint tenancy form," a hybrid out of California largely occasioned by the absence of dispositive power in the divorce court over separate (i.e., here, joint tenancy) property. See Griffith, Community Property in Joint Tenancy Form, 14 STAN. L. REV. 87 (1961); Griffith, Joint Tenancy and Community Property, 37 WASH. L. REV. 30 (1962).

The following factors need to be considered in deciding whether to use the simple survivorship agreement: availability of the nonclaim, the award-in-lieu of homestead, and the family allowance statutes of the probate code; out-of-state acceptability of the device;\textsuperscript{453} irrevocability of the agreement; valuation of assets at death for capital gains tax purposes; and value of determinations inherent in the final decree in probate as to ownership and character of particular assets. Transfer of corporate shares by means of the agreement is facilitated by a 1965 statute,\textsuperscript{454} but no statute of general coverage exists. Particularly in larger estates, straight survivorship might be costly in terms of death taxes, but there may be an escape from the worst of such consequences through the 1973 disclaimer statute,\textsuperscript{455} the existence of which might also warrant the execution of a will inconsistent with the dispositive scheme of the agreement.

3. \textit{Simultaneous Death}

If the dispositive scheme, however set up, contemplates that a spouse will survive, the simultaneous death of both obviously will frustrate it. Washington has enacted the Uniform Simultaneous Death Act\textsuperscript{456} which generally provides that if there is no sufficient evidence that the spouses have died other than simultaneously, and if the spouses have not provided to the contrary, each spouse's property shall devolve as if he or she survived the other.\textsuperscript{457} The Act also provides that in the event of simultaneous death of the insured and beneficiary of an insurance policy, the proceeds of the policy shall be distributed as if the insured survived.\textsuperscript{458} The Washington court's application of this insurance provision warrants comment.

\textit{In re Estates of Saunders}\textsuperscript{459} involved the simultaneous death of both spouses, each of whom had life insurance policies in which the other


\textsuperscript{454} \textit{WASH. REV. CODE} § 23A.08.325 (1983).

\textsuperscript{455} \textit{Id.} ch. 11.86.

\textsuperscript{456} \textit{Id.} ch. 11.05.

\textsuperscript{457} The statute provides:
Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

\textit{Id.} § 11.05.010.

\textsuperscript{458} The statute provides:
Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

\textit{Id.} § 11.05.040.

\textsuperscript{459} 51 Wn. 2d 274, 317 P.2d 528 (1957).
spouse was the only beneficiary.\textsuperscript{460} The court held that the insurance provisions of the Uniform Simultaneous Death Act controlled, so that the asset to be distributed continued to be proceeds of the respective policies falling within the particular section of that Act by which the insured is determined to be the survivor,\textsuperscript{461} rather than the section which controlled with respect to assets generally, in which the owner of the asset is determined to be the survivor.\textsuperscript{462} The court reasoned that the wife had a vested interest in half of the proceeds of the policy on the husband's life which went to her personal representatives, and then to the husband as her heir under the general inheritance statute\textsuperscript{463} rather than to her collateral heirs. The result, after applying the same reasoning to the policies on the wife's life, was that all proceeds of policies on the husband's life went to his collateral heirs and all on her life to her collateral heirs. Unfortunately, there was more insurance on his life than on hers. This authority was followed and the same result was reached in \textit{In re Estates of Clise.}\textsuperscript{464}

The result seems to the author to be unsatisfactory, involving an unfortunate concentration on the word "proceeds" in the statute, and in the latter case overlooking the reasoning of an intervening case, \textit{In re Estate of Leuthold.}\textsuperscript{465}

It seems unlikely that either spouse would wish the collateral heirs of the other to have a larger share of the property of both spouses, if it is to go at once to collateral heirs, that is, if the other spouse is not at least initially to own the whole in a meaningful, substantial sense. In addition, the framework of the Uniform Simultaneous Death Act is designed primarily for situations in which an individual owner dies simultaneously with a potential successor in ownership,\textsuperscript{466} and in the only section which clearly involves deaths of two co-owners,\textsuperscript{467} each is deemed to be the survivor as to a half interest. This reasoning militates against the results reached in \textit{Saunders} and \textit{Clise}.

\textsuperscript{460} Some policies provided that the proceeds should go to the executor, etc. of the insured, if the beneficiary was not living at the insured's death. This should not affect the ultimate result.

\textsuperscript{461} \textit{See supra} note 458.

\textsuperscript{462} \textit{See supra} note 457.

\textsuperscript{463} \textit{WASH. REV. CODE} § 11.04.015 (1983).

\textsuperscript{464} 64 Wn. 2d 320, 391 P.2d 547 (1964).

\textsuperscript{465} 52 Wn. 2d 299, 324 P.2d 1103 (1958).


\textsuperscript{467} \textit{WASH. REV. CODE} § 11.05.030 (1983) (simultaneous deaths of joint tenants).
The court in *Saunders* reasoned that half of the proceeds of the policy in which the husband was the insured went to the wife's personal representatives, but this can be so only if the wife, before her death, had the right to the proceeds, and the payment in fulfillment of the duty to deliver proceeds to the owner of them was merely made after her death. However, if the beneficiary wife predeceased the insured husband, there were then no proceeds which she could own, because proceeds do not exist until the insured dies. While it has been convenient to refer to the beneficiary spouse's community interest in a life insurance relationship as existing in the proceeds,\(^4\) in fact the community property interest is in the policy, not the proceeds.\(^4\) Successors of the beneficiary spouse's estate eventually get part of the proceeds upon death of the insured because of their ownership of the source asset, that is, the policy.

Under this analysis, and that in *Leuthold*, if the beneficiary spouse is deemed to have died first (as the Act stipulates if in fact both the insured and beneficiary die simultaneously) there necessarily is included in the beneficiary's estate a half ownership in the policy. Thus, his or her successors as half-owners of the policy should own half of the proceeds by reason of ownership of the source asset, that is, the policy. Ownership in this source asset should pass under the provisions of the Act governing the disposition of assets generally, under which neither spouse is deemed the intestate successor of the other, rather than by focusing upon proceeds. This analysis would place half of the proceeds of all community property life insurance policies in the successors of each spouse, and accord with what the author thinks would be the probable wish of each spouse.

V. TRANSACTIONS AND AGREEMENTS BETWEEN SPOUSES

The statutes bestow full power on either spouse to deal with the other concerning separate property\(^4\) or community property interests,\(^4\) and to give power of attorney to the other or to a third person to deal with separate or community property interests.\(^4\) Civil disabilities unique to the wife

\(^4\) See cases discussed *supra* notes 155–64 and accompanying text (Part III.E.2), concerning life insurance policy ownership questions.

\(^4\) This was recognized in Francis v. Francis, 89 Wn. 2d 511, 573 P.2d 369 (1978).

\(^4\) Either may act alone with respect to his or her separate property as fully and to the same extent as if unmarried. *WASH. REV. CODE* § 26.16.010 (1983) (husband); *id.* § 26.16.020 (wife).

\(^4\) *Id.* § 26.10.050 (either may convey the community interest in real property to the other, thereby making it the grantee's separate property); *id.* § 26.16.150 (every married person has "right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued, as if he or she were unmarried").

\(^4\) *Id.* §§ 26.16.060–.090. Both also can give power of attorney to a third person concerning community property.
Community Property

have been abolished, and she may contract and incur liabilities to the same extent as if she were unmarried.

A. Agreements Between the Spouses

Transactions between the spouses affecting their property may assume the form the author calls “three-pronged” community property agreements—the first “prong” of such agreements converts each spouse’s existing separate property into community property; the second “prong” provides that each spouse’s future acquisitions which otherwise may be separate property shall be community property; and the third “prong” disposes of their community property upon the death of one of the spouses. Of course, the spouses may effect the reverse of the first two “prongs” and provide by “separate property agreement” that their existing property and the future acquisitions of each which otherwise would be community property shall be the separate property of the acquiring spouse. The favor with which community property is viewed, however, imposes a higher standard of proof to establish the existence of separate property agreements than community property agreements.

A question of good faith may arise in a transaction between spouses. When good faith is challenged, the burden of proof is on the party asserting the good faith. The question, however, cannot be raised by subsequent creditors, that is, those whose interests do not exist at the time of the transaction between the spouses, particularly in light of the statute authorizing direct conveyances between the spouses which protects only “existing equity in favor of creditors of the grantor.”

1. Transfers of Presently Owned Property

As provided by statute, a deed of the community interest in real property from one spouse to the other will make that property separately

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473. Id. § 26.16.160.
475. This third “prong” is the statutory community property agreement, discussed supra notes 430-55 and accompanying text (Part IV.C.2).
478. Id. § 26.16.050. See also Smith v. Weed, 75 Wash. 452, 463, 134 P. 1070, 1075 (1913).
owned by the grantee spouse "unless there is clear and convincing evidence that such was not the intention of the parties." 480 Although there is no statute specifically authorizing the reverse transaction, the court in Volz v. Zang 481 established that the spouse(s) may change separate property into community property if the transaction is in proper form and the spouses so intend. 482 In Volz both spouses executed an instrument, in accordance with deed requirements, which clearly expressed the intent and purpose that their separate property become community property. After the wife's death, her mother claimed that certain real estate was separate property; the husband contended that it had been changed into community property by the agreement. In holding for the husband, the court noted the policy of the law in favor of community property, that separate property could be changed into community property by commingling or estoppel, and concluded if that be so, then “[separate property] should be allowed to change [into community property] when the parties intend such a change to take place and evidence this intention by a conveyance, conforming in all essentials to the requirements of the law affecting the transfer of real property.” 483

Changing the character of property from community to separate or vice versa is essentially a transfer or conveyance, and the proper form of the transaction depends upon the applicability of the statute of frauds. If a chattel is involved, ordinarily an oral transfer is enough—the cases dealing with gifts of chattels are illustrative, 484 and no question is presented there of the necessity of a writing. Obviously, if real property is the subject of the transfer, an acknowledged writing is required by the deed statute. 485

Unfortunately, the matter is somewhat confused by the assertion in Rogers v. Joughin, 486 unsupported by citation of any authority, that “the character of property cannot be changed from that of separate property to community

481. 113 Wash. 378, 194 P. 409 (1920).
482. A wife's conveyance to her husband of an undivided half interest in her separate property does not create a community property holding but rather a tenancy in common between them. Powers v. Munson, 74 Wash. 234, 236–37, 133 P. 453, 454 (1913).
483. 113 Wash. at 384, 194 P. at 411.
484. See infra notes 514–24 and accompanying text (Part V.B).
485. WASH. REV. CODE §§ 64.04.010, .020 (1983). The statutory community property agreement of § 26.16.120 must be executed as deeds are. In re Estate of Verbeek, 2 Wn. App. 447, 467 P.2d 178 (1970), involved the question of the effect of such an agreement to cover separate property not described but, as the court concluded, intended by the spouses to be the subject matter of the agreement. The lack of description was immaterial on the statute of frauds question for the agreement, just as it was, arguably, in Volz v. Zang, 113 Wash. 378, 194 P. 409 (1920). The assertion by the spouses in the agreement that there was community property, which could have referred only to land that was in fact separate property, was held to show an intention that it be disposed of as (in effect be converted to) community property.
486. 152 Wash. 448, 277 P. 988 (1929).
property, or community to separate by the oral agreement of the spouses alone. The court in Leroux v. Knoll mentioned the same general proposition, citing Rogers v. Joughin, and properly concluded that the wife's separate real property had not been converted into community property in that case. However, the sounder statement, recognizing that oral agreements may be sufficient in particular circumstances, was made by the court in State ex rel. Van Moss v. Sailors: "It is undoubtedly true that husband and wife may, by proper agreement or conveyance, change their separate property into community property and their community property into separate property." 

2. Agreements Affecting Future Acquisitions

The agreement between the spouses may provide that in addition to existing property, all future acquisitions by either spouse (which would otherwise be separate property) shall be their community property; the result of such an agreement is that unless the agreement is somehow eliminated, neither spouse will have any separate property while both live. Two cases forcefully illustrate this proposition and reflect the favor with which community property is viewed. They are Neeley v. Lockton and Lyon v. Lyon.

The court in Neeley concluded that the conversion of separate property to community property by execution of a "three-pronged" community property survivorship agreement prevailed over an inconsistent designation of beneficiary pursuant to the provisions of a pension trust. The majority in Neeley held that the expectation of the spouses that the agreement fixed the rights of both of them in all property, free of any overlooked contrary schemes, should be protected in promotion of the policy of community property law. In Lyon the court held that a three-pronged community property agreement controlled the character of the husband's ownership acquired by a gift to him and his brother as joint tenants. As a result, the community property interest the husband acquired through the gift was totally owned after his death by his wife (as tenant in common with the

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487. Id. at 456, 277 P. at 991. The court in Rogers found the agreement to be ineffective by reason of the statute of frauds relating to contracts in contemplation or consideration of marriage, Wash. Rev. Code § 19.36.010(3) (1983), and no agreement to change separate property to community property was considered by the court.

488. 28 Wn. 2d 964, 968, 184 P.2d 564, 566 (1947).


brother), rather than going entirely to the brother by survivorship under the joint tenancy.

It should be noted, however, that agreements making all future acquisitions community property could be phrased to operate only at the time of death so that all assets would then be transferred as "community property," whether or not otherwise separate property, but the inter vivos character of the assets would remain unaffected. *Volz v. Zang* and *Neeley v. Lockton* reveal the court's desire to give effect to the intention of the spouses, and, therefore, the particular language of the agreement will be important. As to future acquisitions, the following differences in phraseology should result in different conclusions about the inter vivos effect of the agreement:

> "It Is Agreed, that upon the death of either of them such property as they now own or may hereafter acquire from any source whatsoever, shall be considered as community property and shall, upon such death immediately become the sole property of the survivor of them."\(^{492}\)

This language should not affect the inter vivos character of a subsequent acquisition of separate property, permitting such acquisitions to be managed and transferred as separate property until death. With this language compare the following:

> "All property, whether real or personal, now or hereafter standing in the name of either party hereto, or in the names of both, or in which either or both of us now or hereafter shall have any interest, is hereby constituted and shall be treated for all purposes as the community property of both of us, and upon the death of either one of us the title thereto shall vest in the survivor to the exclusion of everyone else."\(^{493}\)

This language should preclude classification of any subsequent acquisition as separate property.

If after the execution of an agreement providing that their future acquisitions shall be community property, the spouses live separate and apart so that their respective subsequent acquisitions in the absence of the agreement would normally be separate property,\(^{494}\) it is unclear whether the agreement remains effective. The author believes, however, that the agreement should be held mutually abandoned and ineffective so that their subsequent acquisitions are separate property. *In re Estate of Lyman*\(^{495}\) perhaps tends in the opposite direction.

Spouses may agree, as indicated by the above discussion, that their future acquisitions shall be community property; conversely, spouses may

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492. *In re Estate of Brown*, 29 Wn. 2d 20, 24, 185 P.2d 125, 128 (1947) (emphasis added).
494. See discussion supra notes 98–117 and accompanying text (Part III.C).
agree that subsequent acquisitions by either, which ordinarily would be community property, shall be the separate property of the acquirer.\footnote{496} Although in \textit{Yake v. Pugh}\footnote{497} the court reasoned that the separate character of the wife’s earnings pursuant to a separate property agreement resulted from consummation of the husband’s continuing intention to make a gift to her, later cases indicate the separate character exists immediately and directly upon acquisition of the asset by force of the agreement. Both the confidential relationship between spouses and the statutory requirement of proof of good faith in transactions between them require that separate property agreements be fair and just.\footnote{498}

Characterization of an asset acquired by the efforts of either spouse as separate property runs counter to fundamental principles and presumptions of community property law, and the rule is well fixed that clear and convincing evidence is necessary to sustain the contention that a separate property agreement exists.\footnote{499} In two cases, \textit{Kolmorgan v. Schaller}\footnote{500} and \textit{Mumm v. Mumm},\footnote{501} the court has indicated that in addition to showing the existence of the agreement, there must also be a clear showing that the agreement has been mutually observed.

In \textit{Kolmorgan} there was a written agreement\footnote{502} under which the wife argued that her subsequent earnings were her separate property and thus not reachable by a community creditor. However, the wife had used her earnings to pay ordinary family expenses. The court thus concluded that the agreement had not been observed and, therefore, did not control to prevent the application of the ordinary community property rules under which her earnings would be community property. While in earlier cases the court had commented on the spouses’ observance of their agreement, no particular point was made that it was an independent element to establish the effectiveness of the agreement. Since particular expenditures in \textit{Kolmorgan} were made to cover family expenses, which by statute\footnote{503} would be her separate liability in any case, the author is not persuaded that such potentially involuntary payments should indicate a lack of observance of

\begin{footnotes}
\footnotetext[496]{See, e.g., Union Securities Co. v. Smith, 93 Wash. 115, 160 P. 304 (1916); Gage v. Gage, 78 Wash. 262, 138 P. 886 (1914); Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 P. 1088 (1911).}
\footnotetext[497]{13 Wash. 78, 42 P. 528 (1895).}
\footnotetext[498]{See, e.g., Hamlin v. Merlino, 44 Wn. 2d 851, 865, 272 P.2d 125, 132 (1954) (antenuptial agreement); \textit{In re Estate of Madden}, 176 Wash. 51, 55, 28 P.2d 280, 282 (1934).}
\footnotetext[499]{State v. Miller, 32 Wn. 2d 149, 158, 201 P.2d 136, 141 (1948).}
\footnotetext[500]{51 Wn. 2d 94, 316 P.2d 111 (1957), noted in Note, \textit{Community Property—Mutual Observance by Spouses of Separate Property Agreements}, 33 Wash. L. Rev. 112 (1958); Annot., 67 A.L.R.2d 704 (1959).}
\footnotetext[501]{63 Wn. 2d 349, 387 P.2d 547 (1963).}
\footnotetext[502]{The briefs reflect that the agreement may not have done more than divide existing assets. No point is made of this in the opinion.}
\end{footnotes}
the separate property agreement,\textsuperscript{504} even if continued observance is necessary for its vitality.

In \textit{Mumm} the court concluded that the continued commingling of funds by the spouses after executing a written separate property agreement prevented adequate tracing to individual earnings or separate property of either party; hence, the disputed assets were found to be community property. The result in \textit{Mumm}, however, does not seem supportable on this reasoning. If the agreement originally took effect, there would have been only separate property, and the confusion of the separate property of two persons cannot create community property; while the respective separate property shares of the spouses might be difficult to establish, certainly there could have been no difficulty in initially identifying earnings of each.

In addition to the commingling rationale, the court in \textit{Mumm} also relied on the fact that “the evidence established that the separate property agreement was not mutually observed by the parties; hence, it did not change the status of the community property.”\textsuperscript{505} However, the result in \textit{Mumm} is sound on either one of two bases without relying on mutual observance as an element to establish the effectiveness of the agreement: (1) the written agreement was never implemented so that there was no way to identify which then-existing assets were traceable to community earnings or to separate property of either, and consequently the community property status from the preexisting commingling just continued; or (2) their subsequent disregard of the agreement amounted to an abandonment of it, so that the separateness of property created by the agreement was subsequently lost by commingling with community property acquired after the abandonment of the agreement. The latter explanation seems factually improbable because the agreement was made on August 25, 1958, and the action for divorce was started on June 28, 1960. As a result, the time between execution of the agreement and commencement of the divorce was so short that it would be hard to show that the agreement had been effective initially, but by subsequent conduct the spouses had abandoned it. The author believes, therefore, that the correct explanation of the \textit{Mumm} case is the former explanation: that despite execution of the formal agreement, the parties failed to implement it. Thus the question of the significance of lack of mutual observance after initial implementation of the agreement still remains, this point not being necessary to, and therefore left unresolved by, the decision in either \textit{Kolmorgan} or \textit{Mumm}.

In most cases, the separate property agreement has not been put in writing, and adequate proof of the agreement will be found only if there is

\textsuperscript{504} See Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923) (rejecting argument that separate property agreement made voluntary the payment of expenses of last illness); Note, \textit{supra} note 500.

\textsuperscript{505} 63 Wn. 2d at 352, 387 P.2d at 549 (citing \textit{Kolmorgan}).
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conduct of the spouses from which there can be a strong inference supporting their assertion that they had made such an agreement. In this sense, therefore, mutual observance probably will be essential to establish the existence of the asserted oral agreement. If the agreement's existence is beyond dispute, however, for example, because it is in writing, mutual observance should be significant only as to such questions as abandonment of the agreement or the agreement's operative effect in particular factual situations, but not as an independent element to establish the effectiveness of the agreement.

Do separate property agreements have a different operative effect depending upon whether the subsequent acquisition is real or personal property? In *Graves v. Graves*,506 the court stated that an oral separate property agreement affecting real property would be void as contrary to the basic community property statute and contrary to the requirement that conveyances of real estate be by deed. An oral agreement, however, should control the character of acquired property whether that property is real or personal. As previously indicated, if the real property asset is community property, the statute of frauds prevents an oral change in its character, but that analysis is irrelevant to the question of the character of the asset upon acquisition.507

For instance, when the spouses effectively change all assets into separate property of one or the other, all income from such assets will be separate property under the statutes,508 and if the spouses have agreed that subsequent earnings shall be the separate property of the acquirer,509 there will be no assets of a community character which can be the source of a community property acquisition.510 Hence, a comprehensive separate property agreement may dissolve the community property position.

The separate property agreement will not be given effect to insulate what otherwise would be community property from the community creditor whose basic claim existed at the time of the agreement.511 It will be effective against the subsequent creditor whether he knew of the agreement512 or not.513

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506. 48 Wash. 664, 94 P. 481 (1908). In addition to the statement referred to in the text, the court concluded the facts indicated there was no agreement.
507. See G. McKay, supra note 111, § 968.
509. This can be done. See, e.g., Gage v. Gage, 78 Wash. 262, 138 P. 886 (1914).
510. It might be argued that a credit acquisition would be community property because the obligation would presumptively be a community debt, but the absence of existing community property to establish credit in substance should mean the credit, too, is separate.
513. Files v. Bovee, 168 Wash. 538, 12 P.2d 914 (1932). The suggestion in G. McKay, supra note 111, § 902, that the agreement would not be effective against the subsequent creditor if the spouses
B. "Donative" Acquisitions and Gifts

Prior to the 1972 amendments, if community funds were used by the husband to acquire an asset, title to which was put in the wife's name, there was inherently some indication that the husband, as manager, intended by placing title in his wife's name to consummate a gift (either of the funds or the asset) which she would then own as her separate property. However, the basic community property presumption and the requirement that there be clear proof of a gift impeded the establishment of a title-changing transaction.514 Where the wife, who at that time possessed no managing power, acquired an asset with title placed in her name, she was likely to be treated as a substitute manager in a community property acquisition rather than as a donee.515 After the 1972 amendments equalizing management power between the spouses, the acquisition of an asset with community funds by either spouse and placement of title in either the acting spouse's or the nonacting spouse's name clearly should rest within the basic community property presumption.516

Ownership of an insurance policy on the life of a spouse may involve similar questions. In Kern v. United States,517 the beneficiary wife asserted that the proceeds of the policies on her husband's life should not have been included in his estate for tax purposes because the two policies had been given to her. She signed a standard form of application as applicant for both policies and in one there was a typed endorsement elaborating on her ownership and control of the policy. Half of the proceeds of the policies was included in the gross estate, presumably on the grounds that the policies were community property, and after a claim for refund was disallowed, this action for refund was initiated. The trial court dismissed the action on the

continued to live together, obviously was not applied; it appears possible, however, that the nonacting spouse claiming insulation by reason of the agreement might have misled the creditor and thereby be unable to get the protection claimed.

A provision in the marriage dissolution statute, Wash. Rev. Code § 26.09.070(2) (1983), may support an argument that recording a separate property agreement is required. The section does not necessitate such a result. Rather, it authorizes recording a separation contract, which with published notice "shall constitute notice to all persons . . . of the facts contained in the recorded document."

514. The basic analysis, involving three different factual patterns, appears in In re Estate of Slocum, 83 Wash. 158, 145 P. 204 (1915). If the spouses, for instance, desire a life insurance policy to be the separate property of the noninsured spouse (to keep the proceeds out of the estate of the insured spouse) the gift problem is likely to be involved. See, e.g., Kern v. United States, 491 F.2d 436 (9th Cir. 1974), in which the court concluded there was adequate proof to make one policy the separate property of the surviving, noninsured spouse but not another policy.

515. Cf. Jones v. Duke, 151 Wash. 108, 275 P. 72 (1929) (car acquired with community funds in wife's bank account; wife stated in license application to be owner; county assessed car as owned by wife; held, community property).

516. See supra note 514.

517. 491 F.2d 436 (9th Cir. 1974).
grounds that the policies were community property, reasoning that the community property presumption could be overcome only by a separate instrument with the recitation that the property was separate property and not community property. The court of appeals noted that Washington law required clear, definite, and convincing proof of the gift to overcome the strong community property presumption, and concluded that the standard form statement of control by the applicant in the applications did not provide the necessary proof, but the special endorsement (and other testimony) as to one policy did. Accordingly, the trial court was affirmed as to one policy but as to the latter it was reversed, and the case was remanded to determine the effect of section 48.18.440 of the Revised Code of Washington that a policy made payable to the spouse of the insured "shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse." In Estate of Madsen v. Commissioner, the court determined in answering a question certified by the Court of Appeals for the Ninth Circuit that the same section applied only to proceeds of life insurance and did not affect the ownership of the policy inter vivos. There is at least a hint in the opinion that the court might have found that a gift of the policy had been made to the wife (who was beneficiary) but as the Washington Supreme Court observed, the contrary determination by the Tax Court was not reviewable.

Somewhat similarly an argument that, in effect, there had been cross gifts by the spouses creating two separate property Totten trust bank accounts failed in In re Estate of Bonness. Community funds had been deposited in a bank account in the name of the wife in trust for the husband, and an equal amount in the name of the husband in trust for the wife, who survived. The court held that the account in the wife's name was community property and that the husband's rights as beneficiary lapsed upon his prior death (with the wife's rights to the husband's half controlled by

   Every life insurance policy heretofore or hereafter made payable to or for the benefit of the spouse of the insured, and every life insurance policy heretofore or hereafter assigned, transferred, or in any way made payable to a spouse or to a trustee for the benefit of a spouse, regardless of how such assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse: Provided, That the beneficial interest of a spouse in a policy upon the life of a child of the spouses, however such interest is created, shall be deemed to be a community interest and not a separate interest, unless expressly otherwise provided by the policy.

519. 97 Wn. 2d 792, 650 P.2d 196 (1982).

520. The Washington court stated that the certified question presented the problem of statutory interpretation: "Does RCW 48.18.440(1) convert community property life insurance policies into the sole and separate property of the beneficiary spouse?" Id. at 798, 650 P.2d at 200.

community property succession rules), and the wife owned the account in
the husband's name as her separate property under the beneficiary designa-
tion.

Despite the basic community property presumption and the resulting
practical difficulty in establishing a gift from one spouse to the other, either
subsequent to the acquisition transaction or as the inherent character of that
transaction, there is one factual pattern in which comparatively slight
evidence may be sufficient to establish separate ownership in one spouse by
gift. In *Johnson v. Dar Denne*\(^5\)\(\text{22}\) the question arose whether rings pur-
chased with community funds were the separate property of the wife or
subject to replevin by the surviving husband against the wife's donee. In
affirming the trial court's determination that one ring was the separate
property of the wife, the court said:

> In an action such as this, when the rights of creditors are not involved, and
> as between the husband and wife only, jewelry or articles of personal
> adornment, acquired after marriage with community funds, but worn and
> used solely by the wife, will be held to be the separate property of the wife by
gift from the husband upon comparatively slight evidence.\(^5\)\(\text{23}\)

Thus, two elements appear to be required to establish a gift on this theory:
(1) that the acting spouse has acquired an article peculiarly appropriate for
the use and enjoyment of the other spouse; and (2) that the other spouse has
in fact so used it. The gift character of the total transaction will still be the
ultimate question,\(^5\)\(\text{24}\) although after the 1972 amendments it should be
proper to substitute "spouse to spouse" for the "husband to wife" reason-
ing of the court in *Johnson*.

C. Joint Tenancies and Tenancies in Common

In addition to changing community property into the separate property
of one spouse, the spouses can convert their community property owner-
ship into a common law form of co-ownership, either a joint tenancy or a
tenancy in common. Survivorship and other incidents of the joint tenancy
are sufficiently different from community property incidents to indicate
that the respective interests of spouses as joint tenants are separate prop-
erty,\(^5\)\(\text{25}\) although a recent statute\(^5\)\(\text{26}\) has confused the matter by establishing

\(^5\)\(\text{22}\). 161 Wash. 496, 296 P. 1105 (1931).
\(^5\)\(\text{23}\). *Id.* at 497, 296 P. at 1106.
\(^5\)\(\text{24}\). *Note* the conclusion as to jewelry of the husband in *In re Estate of Dougherty*, 27 Wn. 2d 11,
176 P.2d 335 (1947) (diamond-studded wrist watch given, but not a ruby tie clasp or a diamond ring).
\(^5\)\(\text{25}\). *Cf.* W. de FUNIAK & M. VAUGHN, *supra* note 2, § 134.
\(^5\)\(\text{26}\). WASH. REV. CODE ANN., § 64.28.040(1) (West Supp. 1986) provides:

> Joint tenancy interests held in the names of a husband and wife, whether or not in conjunction
> with others, are presumed to be their community property, the same as other property held in the
that joint tenancy interests held in the names of a husband and wife are presumed to be their community property. The automatic survivorship of a joint tenancy may have enough of an appeal to persuade spouses to abandon community property protections by converting to a joint tenancy holding, but of course survivorship may not operate because of a severance of the joint tenancy before the death of one of the joint tenants. However, unless the new statutory presumption is rebutted, unilateral severance would not be allowed, so it appears there would be a survivorship indestructible by any voluntary act of one of the spouses. Normally if the spouses agree not to have community property, an acquisition to which both contributed would apparently be a tenancy in common. The author does not perceive any particular reason why the spouses would change community property into a separate property tenancy in common.

By Washington law, a joint tenancy may be created in real or personal property, but only by a written instrument, which may be “from husband and wife, when holding title as community property, or otherwise, to themselves or to themselves and others, or to one of them and to another or others.” The new statute mentioned in the preceding paragraph will apparently require an express recitation in the creating instrument that community property holding is not intended, if the spouses desire to create a joint tenancy between a husband and wife. Perhaps some such language as “to hold in joint tenancy with right of survivorship and not as community property” will be needed.

In addition to these joint tenancy statutes there have been “bank” account statutes in which co-ownership, including joint tenancy, problems could arise, but these probably no longer have any uniqueness by reason of the provisions in the 1982 statute that the form of the account shall not affect community or separate property rights, funds deposited belong to the depositors as before the deposit, and ownership at death is subject to community property rights and provisions of a community property agreement. While the 1982 statute does not preclude creation of a

name of both husband and wife. Any such interest passes to the survivor of the husband and wife as provided for property held in joint tenancy, but in all other respects the interest is treated as community property.


528. WASH. REV. CODE § 64.28.020 (1983).

529. Id. § 64.28.010. The attempt to create a joint tenancy between the husband and a child from community property was frustrated by lack of the necessary writing in In re Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972).

530. Separate statutes existed for commercial banks, mutual savings banks, savings and loan associations, and credit unions.

531. WASH. REV. CODE ch. 30.22 (1983). It applies to all four types of financial institutions.
joint tenancy account it seems probable that such an account will be unusual, and the account created by either one or both of the spouses with community funds will be a community property asset—the transaction amounting merely to a change in form but not a change in character of the property. The result will accord with the holding in *Munson v. Haye* that a presumption of the joint tenancy character of the account “ceased to exist” when it was shown that the funds deposited were community property. The court added that it would take evidence that was clear, certain, and convincing “to establish that [the spouses] intended to change the status of community property by giving to either the right to appropriate all or any part of the account to his or her own use.”

The statutory requirement of a writing to change community property into joint tenancy, the new statute creating a presumption of a community property holding, and the reasoning in *Munson v. Haye* indicate that if real property acquired by the spouses is intended to be held in joint tenancy, the transaction ought to be accompanied by their signatures accepting the joint tenancy form on the deed or in a separate writing clearly stating their intention.

A similar problem exists with respect to bonds, corporate shares, and similar assets. The court has held that registration of mutual fund shares in the names of both spouses as joint tenants did not satisfy the statutory requirement of a writing by both, that a note and mortgage to the spouses as joint tenants, for community funds loaned, were community property, and that community property shares of stock reissued in joint tenancy form were still community property. In an Idaho case involving a “joint tenancy” account with a stockbroker and on reasoning likely to be applied in Washington, the court held there was no adequate showing of clear intent to change an asset from community property status; therefore, a half interest was necessarily in the wife’s estate because of its community property character. It is thus not clear that a standing order to a stockbroker to acquire in the name of the customers as joint tenants should by itself be adequate to convert an otherwise community acquisition into a joint tenancy acquisition. The power of the spouses to agree that future acquisitions by either be the separate property of the acquirer is not

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532. 29 Wn. 2d 733, 189 P.2d 464 (1948).
533. 29 Wn. 2d at 743, 189 P.2d at 470.
534. WASH. REV. CODE § 64.28.010 (1983).
539. See the discussion *supra* text accompanying notes 496–98.
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entirely analogous to a continuing agreement that future acquisitions by both be other than the preferred community property ownership. On the other hand, the signature card signed by both spouses creating a joint tenancy bank account arguably would be enough to preclude a conclusion of its community property character, and the difference between the two situations would be only in the relatively narrower scope of the bank account asset.

D. Divorce (Dissolution)

While transactions which convert all community property to the separate property of one or the other spouse are possible, such total conversion is not likely unless the spouses plan dissolution of either the community relationship or the marital relationship. Such a conversion changes titles immediately, but remains subject to the power of the court to make a different allocation in the dissolution action. Under the current dissolution of marriage statute, the power of the court to change the disposition made by the spouses has been restricted to situations in which the court finds that "the separation contract was unfair at the time of its execution." All property of the spouses, both separate and community, is before the court for allocation. The separate or community character of the assets is an important element to be considered by the court in arriving at a just and equitable disposition of the assets as mandated by the statute, but it is not required that the trial court’s finding be specific if the record reflects that the

541. Both a marital and a family relationship can exist without community of property, e.g., when there is present conversion to separate property and an agreement that future acquisitions be separate property. See also Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923); G. McKay, supra note 111, § 897; cf. W. De Funiak & M. Vaughn, supra note 2, §§ 134–36.
In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:
(1) The nature and extent of the community property;
(2) The nature and extent of the separate property;
(3) The duration of the marriage; and
(4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.
court had the character of the property in mind in making an award proper under all the circumstances.\textsuperscript{545}

If the marital relationship between the parties is dissolved the prerequisite to community property is gone. Therefore, the former community property, if not changed from its community status by a transfer while the two were married and if not allocated by the court in the dissolution action,\textsuperscript{546} will be held by the former spouses as equal tenants in common.\textsuperscript{547} It is possible that the tenancy-in-common claim of the former spouse may be barred by collateral estoppel,\textsuperscript{548} but if the ownership is not in some way barred, it can be asserted after the title-holding former spouse dies. Moreover, the ownership asserted by the surviving former spouse is unaffected by any probate nonclaim-statute reasoning because the assertion is not a claim against the decedent’s estate but rather exercise of an ownership right.\textsuperscript{549}

\section{VI. INVOLUNTARY DISPOSITION}

The statute has long provided that “[c]ommunity real estate shall be subject . . . to liens of judgments recovered for community debts, and to sale on execution issued thereon.”\textsuperscript{550} This statutory provision necessitated classifying debts as community, enforceable against community real property, or as separate, and therefore enforceable only against the separate property of the obligor. Each spouse has power to incur separate obligations,\textsuperscript{551} but in general neither spouse has power to impose separate liability on the other.\textsuperscript{552} The important question usually is whether the act of a spouse creates community liability in addition to separate liability, since as a practical matter it is likely that the acting spouse has no separate property out of which a judgment may be satisfied but only community property interests held with the nonacting spouse.

The early cases distinguished between enforcement of the husband’s separate debts against community personal property (over which he then

\begin{itemize}
\item \textsuperscript{545} \textit{In re Marriage of Dalthorp}, 23 Wn. App. 904, 598 P.2d 788 (1979).
\item \textsuperscript{546} It is the duty of the court to allocate property brought before it. \textit{Bernier v. Bernier}, 44 Wn. 2d 447, 267 P.2d 1066 (1954).
\item \textsuperscript{547} \textit{Ambrose v. Moore}, 46 Wash. 463, 90 P. 588 (1907).
\item \textsuperscript{549} \textit{Smith v. McLaren}, 58 Wn. 2d 907, 365 P.2d 331 (1961); \textit{Olsen v. Roberts}, 42 Wn. 2d 862, 259 P.2d 418 (1953).
\item \textsuperscript{550} \textit{Wash. Rev. Code} \textsection{26.16.040} (1983).
\item \textsuperscript{551} \textit{id.} \textsection{26.16.150}.
\item \textsuperscript{552} \textit{id.} \textsection{26.16.010}, .020, .190, .200. The family expense statute provides the exception. \textit{id.} \textsection{26.16.205}.
\end{itemize}
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was held to possess greater management power because of the statutory provision that he had "a like power of disposition as he has of his separate personal property") and enforcement of his separate debts against community real property (over which the dispositive power was joint). In addition, there was the possibility that debts referred only to voluntary obligations and that a different rule controlled enforcement of involuntary obligations, such as those imposed by statute or resulting from tort liability. Both of these distinctions were eliminated in Schramm v. Steele, in which the court concluded that the husband's broader management power over personal property was not based on greater proprietary rights, but rather on a management agency which could not support enforcement of his separate obligation, whether voluntary or involuntary, against either community real or personal property. Further, the court had already concluded that a separate creditor could not reach his debtor's undivided half interest in community property, because the resulting ownership of the nondebtor spouse would fit neither the separate nor the community property definitions. Thus, basically the entire community property interest was protected from separate obligations. This orderly scheme was disrupted in 1980 when Schramm was overruled by deElche v. Jacobsen, in which a separate tort creditor was permitted to reach the tortfeasor spouse's half interest in community personal property. The ramifications of this change will be discussed in the appropriate places below. In Nichols Hills Bank v. McCool, the court refused to extend deElche to the husband's separate contract obligation, thereby preserving that much of the indivisibility of community property first confirmed in Stockand v. Bartlett. In Nichols the husband signed a guaranty agreement in support

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554. Powell v. Pugh, 13 Wash. 577, 43 P.879 (1896).


556. See Broton v. Langert, 1 Wash. 73, 23 P. 688 (1890), particularly the dissent.

557. 97 Wash. 309, 166 P. 634 (1917).


559. The awkwardness can arise through enforcement of federal liens, discussed infra in text accompanying notes 647–56 (Part VI.A.2.b).

560. 95 Wn. 2d 237, 622 P.2d 835 (1980).


563. 4 Wash. 730, 31 P. 24 (1892).
of their son's obligation without the consent of the wife. The transaction was found to be a gift of community credit proscribed by the statute, which requires the consent of both spouses; the wife's knowledge alone was not enough to support the plaintiff's arguments that she had "participated" in the transaction. The court distinguished deElche by pointing out that there was no statutory barrier to enforcement of the separate tort judgment against the tortfeasor's half interest in community personal property and considerations of equity favored that result. In Nichols, there was the statute, the policy of protecting the innocent spouse and the integrity of community property, and the control the parties had of the situation in creating the obligation. "Thus," said the court, "because of the minimal countervailing policy considerations and the specific statutory mandate, we decline to extend the holding of deElche to a transaction involving a contractual gift of community property." A separate obligation not involving a gift is not directly covered by Nichols, but all of the elements except the prohibitory statute do exist, which strongly suggests the desirable result that community property indivisibility should remain secure against separate contract obligations.

A. Contractual and Other Non-Tort Obligations

1. Postnuptial Obligations

The contracting spouse of course incurs separate liability by making the contract, and the important question usually is whether a community liability also was incurred. The basic presumption that a debt incurred by either spouse is a community debt, and thus enforceable against the community property, is not easily rebutted.

a. The Basic Presumption of a Community Obligation

The ordinary debt transaction of the manager will involve the acquisition of an asset, which by the rules previously discussed will be presumptively community property; correlative, the debt incurred by the contracting spouse is presumptively community in character. Debts incurred in

565. I.e., avoiding in effect the substitution of a common law cotenancy for the community property concept.
566. 104 Wn. 2d at 88, 701 P.2d at 1119.
567. E.g., one in connection with management or transfer of separate property.
569. Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892).
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direct management of community property similarly are presumptively community debts, and if there is an intent to benefit the community property position by incurring the debt, it will be enforceable against community property.\(^{570}\)

Prior to the 1972 amendments, all debts of the husband were presumed to be community debts,\(^ {571}\) since he was the manager of the community property and presumably was acting for the community.\(^ {572}\) The wife, lacking management power at that time, did not create community liability by her ordinary obligatory acts.\(^ {573}\) The husband could make the wife the agent to conduct community affairs,\(^ {574}\) however, so that community liability would follow, or, by his ratification or through estoppel, he could be precluded from denying that she created a community obligation.\(^ {575}\) Such reasoning is, of course, no longer necessary after the 1972 amendments establishing the wife's equal management authority; rather, a debt incurred by either spouse now will be presumptively a community debt.

If both spouses join in the contract, both will be separately liable and usually there will be community liability.\(^ {576}\) The signature of the other spouse, however, adds nothing to the character of the liabilities, the only significance of that joinder being to create the second separate liability. This was the explanation by the court in Northern Bank & Trust Co. v. Graves,\(^ {577}\) where the wife was found separately liable when she signed notes executed by her husband.

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The harshness of the odd conclusion that no community liability attached to the husband's employment of a broker to find a buyer of community real estate, see Geoghegan v. Dever, 30 Wn. 2d 877, 194 P.2d 397 (1948), because it would in effect encumber the real estate without the necessary participation by the wife, was ameliorated in Whiting v. Johnson, 64 Wn. 2d 135, 390 P.2d 985 (1964), where she was held to have authorized his act. The Geoghegan case analysis is, in the author's opinion, unsound inasmuch as the obligation to pay for the personal service would encumber real estate only if it were reduced to judgment, in the same way as for any contract debt.


576. See, e.g., Conrad v. Mertz, 45 Wash. 119, 87 P. 1118 (1906).

577. 79 Wash. 411, 140 P. 328 (1914). Note that this point was also made by Judge Stiles, quoted infra note 588.
While most of the problems discussed in this part of the article do not arise until enforcement of the obligation is sought, and hence are appropriately discussed as involuntary dispositions, several aspects of contractual obligations are more appropriately discussed in a management context. Thus, as discussed above in Part IV, neither the disagreement of the nonacting spouse over the wisdom of the obligation, nor the acting spouse’s lack of good judgment in undertaking the obligation, nor the nonacting spouse’s lack of knowledge of the obligation affects its community character. It is necessary, however, that the obligation not amount to a gift, that is, that it be incurred for a community “business” purpose, although the community benefit need not be actually realized.

b. Rebutting the Basic Presumption

The basic presumption of community liability can be rebutted only by clear and convincing evidence and the burden of proving that only separate liability was incurred by the acting spouse rests on the proponent of the limited liability. Except in situations of a gift of community credit, transactions clearly related to separate property, or an effective separate property agreement between the spouses, it may be impossible to establish the separate character of the debt of either spouse without a clear understanding with the creditor that there was to be no community liability. As the following discussion indicates, there has been almost a

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579. See cases cited supra note 578.


582. Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954); Way v. Lyric Theater Co., 79 Wash. 275, 140 P. 320 (1914). It is sufficient if there is some benefit received even though it is not initially equal to the obligation incurred. Lincoln Trust Co. v. Spangler, 121 Wash. 267, 209 P. 321 (1922).

583. Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954). In Zarbel v. Mantas, 32 Wn. 2d 920, 204 P.2d 203 (1949), absence of even indirect community benefit was shown.


587. A community obligation may arise in favor of an intended transferee (essentially quantum meruit) who has partly performed in a transaction not specifically enforceable because both spouses had not participated. In Graves v. Smith, 7 Wash. 14, 34 P. 213 (1893), plaintiff recovered the value of surveying services even though they were intended as part payment for an unenforceable contract to convey community real property. The requirement of joinder in transactions involving community

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total erosion of the holding (and the apprehensions it raised) that a community liability could not be found in transactions principally of benefit to third persons, such as obligations arising through accommodation endorsement, guaranty, or suretyship; the dimensions of "community debt" have become, in effect, extremely broad.

The presumption of the community character of the debt created when funds are borrowed is supported when they are used for community purposes, but their use for separate purposes, whether or not previously contemplated by both spouses, does not overcome the community presumption. As between the spouses, if the security given the lender is separate property, the funds acquired may reasonably be considered to be separate property, but this has no bearing on the character of the obligation. The ownership character of funds borrowed as between husband and wife does not control the character of the debt.

The negative inferences from the quoted language of Judge Stiles' dissent identify well the dimensions of the community debt concept.

588. Brotton v. Langert, 1 Wash. 73, 86, 23 P. 688, 690–91 (1890) (Stiles, J., dissenting): A community debt, within the meaning of the act of 1881, ought to be any liability incurred by either husband or wife during their marriage, and which is not a separate debt by its express terms, or by reason of its being patently for the exclusive benefit of the separate property of the party contracting it.

I cannot believe that it was the intention of the legislature of 1881 to withdraw all this community real estate from liability for accommodation indorsements, guaranties, and especially official bonds, as well as the hundred engagements that married men enter into every day, but which have no relevancy to their community interests, and cannot be said to benefit them. It is said that these obligations can be made good by securing the signature of the wife, but I deny it. If the signature of a husband to the bond of a county treasurer does not make the obligation collectible out of his community real property, because the debt is not one for the benefit of the community, it is idle to say that adding the signature of the wife will change the character of the debt, and make it so collectible; and so on. The combinations and confusions are endless, if this doctrine is once announced.

The combinations and confusions are endless, if this doctrine is once announced.


590. See, e.g., Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934); In re Estate of Finn, 106 Wash. 137, 179 P. 103 (1919); see also Gould v. Culver, 148 Wash. 148, 270 P. 93 (1928). In Gould, the wife did not know of the transaction; the court concluded that the transfer of the funds to the husband's brother was not shown to be a gift, but rather there was some indication of conveyance of land by the brother to the husband, which supported the presumption of the community character of the transaction. The court also noted that the funds borrowed were presumptively community.


592. In re Estate of Finn, 106 Wash. 137, 179 P. 103 (1919). The court in Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934), asserted the borrowed funds were community property available for any community use. This conclusion is contrary to the intention of the spouses as reflected by the uses made of the funds. Cf. National Bank of Commerce v. Green, 1 Wn. App. 713, 463 P.2d 187 (1969), where the distinction between the character of the obligation and the character of funds borrowed also is unfortunately blurred.

593. Consider also Riverside Finance Co. v. Griffith, 140 Wash. 322, 248 P. 786 (1926); the court
Estate of Finn\textsuperscript{594} and Auernheimer v. Gardner,\textsuperscript{595} the funds acquired were separate, but the lender insisted upon the husband's joinder in the notes; the only reasonable inference is that the creditor intended to acquire a community obligation, which makes it extremely difficult to overcome the presumption of a community obligation.

If some community property benefit, direct or indirect, can be found, the presumption of community liability will not be overcome. For example, a purpose to benefit the corporation which employs the husband or of which he is an officer or director will supply sufficient indirect benefit,\textsuperscript{596} even though the corporation is insolvent.\textsuperscript{597} The position of the surety spouse as shareholder also evidences sufficient community property benefit, although if the shares are separate property the indirect benefit and the attendant obligation will be separate.\textsuperscript{598} Expectation of employment likewise will suffice as a community benefit,\textsuperscript{599} as will promotion of sale of a community property asset.\textsuperscript{600} The obligation by which funds are acquired will create community liability even though there is an accompanying lending transaction of the borrowed funds to a third person which cannot do more than balance the borrowing;\textsuperscript{601} the same result follows even though the composite result promotes only recreational opportunities for the spouse.\textsuperscript{602} The latter possibility, and the reasoning in tort cases that recreational activity is beneficial to the community,\textsuperscript{603} suggest that a community “business” purpose test may be met by any activity except one clearly related to separate property or clearly donative.\textsuperscript{604}

\textsuperscript{594} 106 Wash. 137, 179 P. 103 (1919).
\textsuperscript{595} 177 Wash. 158, 31 P.2d 515 (1934). In Finn, the acquisition was held to be the wife's separate property. Graves v. Columbia Underwriters, 93 Wash. 196, 160 P. 436 (1916), has the same result. As to Auernheimer, see supra note 592.
\textsuperscript{596} Horton v. Donohoe Kelly Banking Co., 15 Wash. 399, 46 P. 409 (1896).
\textsuperscript{597} Proff v. Maley, 14 Wn. 2d 287, 128 P.2d 330 (1942).
\textsuperscript{599} Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954).
\textsuperscript{600} Armour & Co. v. Becker, 167 Wash. 245, 9 P.2d 63 (1932); see also Kuhn v. Groll, 118 Wash. 285, 203 P. 44 (1922).
\textsuperscript{601} Malotte v. Gorton, 75 Wn. 2d 306, 450 P.2d 820 (1969); Northern Bank & Trust Co. v. Coffin, 113 Wash. 326, 194 P. 404 (1920); see also Acme Finance Co. v. Zapffe, 161 Wash. 312, 296 P. 1050 (1931).
\textsuperscript{602} Olympia Bldg. & Loan Ass'n v. McCroskey, 172 Wash. 148, 19 P.2d 671 (1933).
\textsuperscript{603} See infra note 700 and accompanying text.
\textsuperscript{604} See, e.g., Sun Life Assurance Co. of Canada v. Outler, 172 Wash. 540, 20 P.2d 110 (1933); Peterson v. Zimmerman, 142 Wash. 385, 253 P. 642 (1927); Union Securities Co. v. Smith, 93 Wash.
While the husband alone cannot give community credit, which is treated the same as any community asset, an obligation which has no correlative benefit in a community property sense may be incurred in return for a previous community benefit. This was the situation, for example, when the husband joined his son on a note for the price of land the son purchased, the son previously having worked on the family farm without compensation. Unless the wife objects, the husband can give community credit to her just as he can give her his interest in any community property. Such a gift of credit was involved when borrowed money was used to acquire property subsequently held to be the wife’s separate property in one case, and was used for the wife’s separate purposes in another.

A renewal obligation normally will have the same character as the original obligation, so that a separate obligation will not bind the community property merely by renewal. However, a subsequent community obligation may result from an intent to give community credit in support of the separate obligation of a spouse, even though no benefit can be found to the community property position. A similar problem exists in a transaction reviving an obligation the enforcement of which has been barred by the statute of limitations. If the original obligation was community in character and the managing spouse has made a payment after enforcement was barred, presumptively a community purpose was served by the revival of the obligation, and in the absence of proof to the contrary, community liability will continue. In Gannon v. Robinson, the court held that the presumption of community liability by the husband’s revival, without the wife’s knowledge or consent, of an obligation discharged in bankruptcy had been clearly overcome by proof that the act was not for the benefit of the community. Although the revival would not fall into the category of a gift of community credit in support of a separate obligation, it is possible that a

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115, 160 P. 304 (1916). On this reasoning community liability could be found if a spouse joined in the obligation of a nonprofit corporation in whose activity the spouse participated, e.g., a charitable or recreational organization.

605. Reed v. Loney, 22 Wash. 433, 61 P. 41 (1900).
606. In re Estate of Finn, 106 Wash. 137, 179 P. 103 (1919).
607. Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934). In both this case and Finn the wife’s separate real estate was mortgaged to secure payment of the notes both spouses had signed.
609. This argument was presented in Meng v. Security State Bank, 16 Wn. 2d 215, 133 P.2d 293 (1943), but the payee was unable to establish that the wife had agreed to give community credit.
610. Catlin v. Mills, 140 Wash. 1, 247 P. 1013 (1926), explained in Gannon v. Robinson, 59 Wn. 2d 906, 371 P.2d 274 (1962); Annot., 47 A.L.R. 545 (1927). Mapes v. Mapes, 24 Wn. 2d 743, 167 P.2d 405 (1946), followed Catlin, concluding that the husband’s note for previous loans, which were barred by the statute of limitations, was executed within his managing power.
community purpose was served which ought to recreate the community obligation. The court in *Gannon* recognized this possibility: "We leave open the question as to the liability of the community if the husband, in order to establish a necessary credit standing or to otherwise benefit the community, revives a discharged community obligation."612

c. Separate Liability of the Nonacting Spouse and the Family Expense Statute: Three-Way Liability

A spouse’s act creating both community liability and separate liability in the acting spouse ordinarily does not create separate liability in the nonacting spouse who has not participated in the transaction, that is, it ordinarily does not create three-way liability.613 For example, the listing of the nonacting spouse’s separate assets in a financial statement does not establish the necessary promise to pay,614 nor is separate liability established by the nonacting spouse’s mere signing of a financial statement.615 Finding the husband as manager separately liable for the wife’s contracts which create a community liability is still possible on the basis of *Lucci v. Lucci*,616 but the author believes such a result is no longer sound after the 1972 amendments.617

An exception to the general rule that the acting spouse binds only himself or herself separately, and presumptively the community property, but not the nonacting spouse separately, is the family expense statute.618 That statute provides that "expenses of the family and the education of the children, including stepchildren, are chargeable" upon the community property of both and the separate property of either, for which they may be sued jointly or separately. A family may be without children or dependents and consist simply of husband and wife.619

In *Yates v. Dohring*,620 the court held that the existence of a family relationship was a prerequisite to extending liability separately621 to the

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612. *Id.* at 907, 371 P.2d at 275.
615. Yakima Plumbing Supply Co. v. Johnson, 149 Wash. 257, 270 P. 829 (1928). She may be a party to the contract, however; see cases cited * supra* note 568.
616. 2 Wn. 2d 624, 99 P.2d 393 (1940).
621. *Id.*; see also Van Dyke v. Thompson, 95 Wn. 2d 726, 630 P.2d 420 (1981) (stepchild not part of family of noncustodial stepparent, whose earnings may not be reached to satisfy obligations of spouse to support child of prior marriage). Mere separation does not end family relationships, Russell v. Graumann, 40 Wash. 667, 82 P. 998 (1905); nor does confinement for incompetence, *In re Guardianship of DeNisson*, 197 Wash. 265, 84 P.2d 1024 (1938); see also Rustad v. Rustad, 61 Wn. 2d
husband for expenses incurred for the wife’s room and board, at least when the creditor knew that the wife had commenced a divorce action and the spouses were permanently separated. It is possible that dissolution of the spouses’ family relationship would not restrict the application of the family expense statute on behalf of a creditor who continued a preexisting pattern of extending credit or on behalf of a new creditor who knew nothing of the lack of the family relationship. However, the separate property agreement cases arguably indicate that the subsequent creditor at least could not successfully assert that the nonacting spouse was separately liable in the absence of the family relationship, except on the basis of estoppel or similar reasoning.

Whether the obligation falls within the statutory “expenses of the family and the education of the children” will depend on the type of expense and on the situation of the particular family. Prior to the 1972 amendments, the court had indicated that the husband’s managing power gave him considerable discretion in determining whether a doubtful acquisition should be accepted as family expense. That managing power now rests in either

622. In Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923), the husband was able to recover the expenses of his wife’s last illness from her estate despite a separate property agreement in which she agreed not to make any demand for maintenance and support on the basis, in part, that the payment was not voluntary. The court said, “As between Mr. and Mrs. Parsons, the relationship of husband and wife had ceased by mutual agreement, but as to the public they were still husband and wife and as such, under the statutes and decisions of this court, the husband was liable to pay these bills.” Id. at 223, 220 P. at 814. No cases or statutes were cited by the court.
623. See supra notes 512–13 and accompanying text.

The expenses for education of the children would seem in some families to include college expenses, but the reduction of the age of majority to 18 may affect the result. Cleaver v. Cleaver, 10 Wn. App. 14, 516 P.2d 508 (1973) (trial court erroneously decreed support after age 18 to cover four years of undergraduate college education).

Three other marriage dissolution cases indicate that in appropriate situations child support may be required after the child reaches majority to provide a college education. Childers v. Childers, 89 Wn. 2d 592, 575 P.2d 201 (1978); In re Marriage of Gimlett, 95 Wn. 2d 699, 629 P.2d 450 (1981); In re Marriage of Studebaker, 36 Wn. App. 815, 677 P.2d 789 (1984). The matter is complicated in these cases by the provisions of the marriage dissolution act, but in Childers, particularly, it is recognized that in some families a college education could fall within the scope of the family expense statute.
625. Bush & Lane Piano Co. v. Woodard, 103 Wash. 612, 175 P. 329 (1918), and Jones-Rosquist-Killen Co. v. Nelson, 98 Wash. 539, 167 P. 1130 (1917), each involved purchase of a piano, in which only separate liability against the wife was found, the husband not having authorized the purchase,
spouse, with the result that the concern of the nonacting spouse will relate to his or her potential separate liability rather than the ordinary previous concern of the husband about both his separate and the community liability. This will necessitate, in the doubtful areas, a focus on the appropriateness of the purchase for the particular family, whether the asset has been used by the family, whether a family expense statute has a broader sweep than a “necessities” statute, and similar factors. 626

d. Effect of Living Separate and Apart

An awkward and undefined area of potential community liability exists when the spouses have permanently separated, under the analysis in Part III.C, 627 without eliminating the community property character of existing assets. Obviously, the community property does not lose its character merely by separation, and the necessary management of the community property while the spouses are separated can create obligations. In Dizard & Getty v. Damson, 628 the wife had expressly authorized the husband to continue as manager of the community business, and by implication, the court held, to incur community debts. Therefore, the creditor could enforce his claim against nonbusiness assets, formerly community property, which were assigned to the wife in the subsequent divorce. If there were no express authorization by the nonacting spouse to continue the community business, there would be some force in the argument that the scope of the acting spouse's power to incur community liabilities should be no greater than required by the reasonable necessities of the situation; a creditor might be able to reach only the assets actually “managed,” for example, the assets used in the business.

After a permanent separation, no community relationship exists between the spouses to support a presumption of the community character of a debt unrelated to the community property at hand. 629 Unless the nonacting spouse could be bound by estoppel or on some similar basis, insulating the community property held by that spouse would be reasonable, 630 even if it

626. The problems are generally discussed in 41 AM. JUR. 2D Husband and Wife §§ 371–82 (1968).
627. See supra notes 98–117 and accompanying text.
629. Compare the effect of the separate property agreement on subsequent creditors, discussed supra notes 499–513 and accompanying text.
630. The acting spouse could create only separate liability (except through managing the continuing community property). The community property held by the nonacting spouse probably would become that spouse's separate property which would not thereby become reachable; the other community property would probably become the actor's separate property and thereby reachable by his (or
should not be insulated from a "business" creditor. Some other possibilities have been discussed briefly elsewhere.631

2. **Antenuptial Obligations**

As a general proposition, antenuptial obligations of either spouse, which are necessarily separate obligations, cannot be enforced against the community property of the spouses,632 or against the separate property of the other spouse.633 Even the obligation of both which has been renewed after their marriage cannot be enforced against their community property.634 This so-called "marital bankruptcy" discharge from antenuptial obligations has been narrowed in scope in three areas: (1) alimony and child support; (2) federal tax liens imposed by federal supremacy reasoning; and (3) expanded statutory vulnerability of postnuptial earnings and accumulations.635

a. **Alimony and Child Support**

In *Fisch v. Marler*,636 the court identified the conflict between the principle protecting community property from separate obligations and the principle supporting enforcement of alimony and child support responsibilities after a divorce. The court held the former principle was subordinate to the latter; alimony and child support claims are enforceable by garnishment of the husband’s wages, after his remarriage, at least to the extent that there will not be an inequitable invasion of the community property rights of the new wife (and family). The court held that the trial

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631. Cross, *supra* note 9, at 543–44.
632. Consider, for example, *Wash. Rev. Code* § 26.16.040 (1983), permitting enforcement against community real estate only for community debts, and the inability of a separate creditor to reach the debtor’s half interest in community property. See also Snyder v. Stringer, 116 Wash. 131, 198 P. 733 (1921).
634. *Katz v. Judd*, 108 Wash. 557, 185 P. 613 (1919). An obligation, like an asset, will retain the character of its origin if it can be traced and there is nothing but renewals involved in the changes in form. Some of the reasoning in the out-of-state obligation cases, which formerly might involve only separate liability, could support abandonment of the rule of *Katz*, but in those cases the original debt was incurred during marriage and thus a change of the *Katz* rule is not inevitable (or perhaps even desirable). Contrast the reasoning of Escrow Serv. Co. v. Cressler, 59 Wn. 2d 38, 365 P.2d 760 (1961), and the later analysis of Household Finance Corp. v. Smith, 70 Wn. 2d 401, 423 P.2d 621 (1967).
636. 1 Wn. 2d 698, 97 P.2d 147 (1939).
court "had power to exercise its discretion in allocating the garnished funds according to the necessities of the parties concerned." 637

Subsequently, in Stafford v Stafford, 638 the court refused to recognize unpaid alimony as a basis for a lien against community real property, although apparently recognizing it as a lien upon community personal property, noting the difference in the husband's managing power at that time over personal and real property. This distinction had long been abandoned 639 and its revival in Stafford is unfortunate. The court, however, also noted that the question of the lien quality of an award of lump sum alimony was not before it; if, therefore, the Stafford case means merely that the particular antenuptial obligation in that case will not have normal lien quality against the community real property, it may be reasonable (but not for the reason stated), and the case does not necessarily put community real property beyond the equitable claims and considerations involved in the Fisch case. The 1983 amendments to section 26.16.200 of the Revised Code of Washington, discussed below in Part VI.A.2.c, 640 partially remove any insulation of real property.

The dissenting judge in Stafford suggested that the new wife merely had married an "encumbered husband"—encumbered with alimony and child support claims from his former marriage. Whether this is the position the legislature and courts have now reached is not entirely clear. In Dillon v Dillon 641 and Verde v Verde, 642 the court held that the alimony obligation fixed at a percentage of the former husband's income (as reported for federal income tax purposes) was to be calculated without regard to its community property character from the subsequent marriage; that is, the entire community interest, and not just the husband's one-half share, was subject to the claim. In Knittle v Knittle, 643 Division I of the court of appeals affirmed the husband's separate liability and community liability for past due child support resulting from a former marriage but modified the judgment in two ways:

It is limited to those community assets which are the result of appellant husband's earnings and accumulations. It is further subject, upon a showing of necessitous circumstances by his present wife, to such adjustment

637 Id. at 716, 97 P.2d at 155.
638. 10 Wn. 2d 649, 117 P.2d 753 (1941).
640. See infra notes 657–72 and accompanying text.
641. 34 Wn. 2d 12, 207 P.2d 752 (1949).
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and allocation of the appellant’s earnings and accumulations as may appear to the trial court to be just and equitable.644

In Van Dyke v. Thompson,645 the court affirmed the trial court’s determination that the Department of Social and Health Services had no authority to collect the wages of a noncustodial stepparent to satisfy the noncustodial parent’s obligation to support the child of a previous marriage. In other words, the antenuptial obligation of child support was individual and reached community property of the obligated person and the new spouse only if the obligated spouse had acquired it. The contrary view expressed in Hinson v. Hinson646 was disapproved as being too expansive a reading of Fisch v. Marler.

The Van Dyke decision was probably the motivating force for a 1983 amendment of section 26.16.200, which may have narrowed the possible effect of Fisch and eliminated the immunity of community real property under Stafford. The amendment is discussed below.

b. Federal Tax Liens

The antenuptial obligation based on federal tax assessments falls into its own category. Federal district court judges in Seattle have disagreed over whether the “marital bankruptcy” rule is an inherent substantive incident of community property ownership, to which Fisch v. Marler647 was a particular and narrow exception,648 or rather whether Fisch, on grounds of public policy, adopted an exception to the marital bankruptcy rule broad enough to include federal tax obligations.649 Both judges agreed, however, that the marital bankruptcy rule was not to be considered as a state-created exemption against which a federal lien would prevail. Subsequently, the reach of the federal tax lien was resolved by the federal court of appeals650 in favor of the federal government on two bases: (1) federal supremacy over state community property law; and (2) the interpretation that a spouse had sufficient “property” or “rights to property”651 so that the community property asset could be sold to enforce the federal tax lien and half the proceeds of the sale applied to the antenuptial obligation.

644. Id. at 214, 467 P.2d at 204.
647. 1 Wn. 2d 698, 97 P.2d 147 (1939).
650. United States v. Overman, 424 F.2d 1142 (9th Cir. 1970).
As a result of those holdings in *Draper v. United States*\(^{652}\) and *United States v. Overman*\(^{553}\) permitting the federal government to reach the debtor's half interest in community property, the problem of the character of ownership of the half not reached by the federal government will arise. The impossibility of fitting such an asset into the statutory definitions was largely the basis of the early case\(^ {654}\) frustrating a separate creditor's attempt to reach his debtor's half interest in the community property. While no case directly answers the question of how the federally enforced involuntary conversion will affect the spouses' ownership, courts may apply *deElche*,\(^ {655}\) where the court permitted enforcement of a separate tort judgment against the spouse's half interest in community personal property. In *deElche*\(^ {656}\) the court said that the half interest not reached by the creditor would continue to be community property, and the nondebtor spouse would have a right of reimbursement protected by an equitable lien through which the respective interests could be balanced at the termination of the community relationship.

c. **Statutory Vulnerability of Postnuptial Earnings and Accumulations**

Changes in 1969 and 1983 in section 26.16.200 of the Revised Code of Washington\(^ {657}\) have significantly affected the scope of the "marital bankruptcy" rule. In 1969 the legislature added two provisos to the statute, thereby permitting some antenuptial obligations to be enforced against subsequent community acquisitions of the debtor. The first proviso subjects

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653. 424 F.2d 1142 (9th Cir. 1970).

Neither husband or wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: *Provided*, That the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to marriage, and the earnings and accumulations of the wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section, neither the husband nor the wife shall be construed to have any interest in the earnings of the other: *Provided further*, That no separate debt, except a child support or maintenance obligation, may be the basis of a claim against the earnings and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties. The obligation of a parent or stepparent to support a child may be collected out of the parent's or stepparent's separate property, the parent's or stepparent's earnings and accumulations, and the parent's or stepparent's share of community personal and real property. Funds in a community bank account which can be identified as the earnings of the nonobligated spouse are exempt from satisfaction of the child support obligation of the debtor spouse.
Community Property

the earnings and accumulations of the husband or wife to their respective antenuptial debts. The varying phraseology in the proviso, however, poses problems. Difficulties attending the involuntary division of community property earnings, which can result from the federal tax lien cases discussed above, are avoided by the provision that the nondebtor spouse has no interest in the earnings of the debtor spouse (an “encumbered spouse,” in effect). But nothing is said in this respect about accumulations, although earnings and accumulations are made subject to antenuptial debts. Can there be an involuntary division of accumulations? In addition, the provisos do not cover “liabilities” but only “debts,” while the basic statute speaks in terms of “debts or liabilities,” which may mean that the tort victim receives no assistance under this proviso. As mentioned earlier, the distinction between debts and liabilities has been abandoned in some situations. Some of these questions have been answered as will be noted presently. Other complexities are detailed elsewhere.

The second proviso, requiring that the claim be reduced to judgment within three years of the marriage, will in some cases nullify the advantage supplied by the statute. An argument that the running of the three-year period should be tolled by payments on the obligation after the marriage was rejected in Watters v. Doud, since the provisos of the statute did not create a period of time within which an action had to be brought, but rather alleviated the harsh result of the marital bankruptcy rule merely by limiting the general terms of the statute. In addition, the court stated that the lack of knowledge of the debtor’s marriage was irrelevant; there was no basis to assert an estoppel nor duty to reveal, and failure to disclose the marriage was not concealment.

The three-year period within which judgment must be entered may precede the marriage. Although the three-year period to judgment may in light of court delays or congestion be a rather short period of time in which to protect against “marital bankruptcy,” a creditor whose judgment qualifies will have the normal ten-year period after judgment to avoid the usual immunity the marital bankruptcy concept affords. Thus, many acquisitions of the judgment debtor may be reachable, particularly through

658. See supra text accompanying notes 553–57.
tracing into the accumulations of the debtor spouse, which appears to be permissible. 663

The effect of the two provisos on tort liability has been answered in part by Caplan v. Sullivan 664 in which suit for the antenuptial tort was started before the marriage, but judgment was entered about ten months after the marriage. The defendant's motion to quash the garnishment of his wages was denied by the trial court. The court of appeals reversed, holding that the community property could not be reached under the provisos because only "debts" could be enforced under the proviso, and that "debt" normally referred to contractual but not other obligations, but sometimes included liquidated claims. Therefore, since at the time of the marriage the plaintiff's claim was neither contractual nor liquidated, plaintiff could not assert rights under section 26.16.200. The court expressly noted that the possibility of relief under deElche v. Jacobsen 665 was not before it. If judgment in the tort action had been entered before the marriage there would remain the question whether that creditor would be enforcing a "debt" or still be outside the scope of the proviso. It seems probable to the author that the tort judgment would merely be a "liability" and not enforceable under this section because there is a sort of artificiality in extending a "debt" concept in this way, and perhaps more importantly, deElche has reduced the pressure to do so by the extension of tort liability to the tortfeasor's half interest in community personal property. There are differences which are important, however. Under the statute the requirement to reach judgment within three years exists and otherwise only normal statutes of limitation apply; under the statute the creditor can reach the whole of the community property accumulated by the debtor spouse, whereas otherwise the creditor can reach only the half interest, although apparently in any community personal property.

The other major change in section 26.16.200 was made in 1983 when the legislature modified the second proviso by excepting child support and maintenance obligations from the requirement to reach judgment within three years and added:

The obligation of a parent or stepparent to support a child may be collected out of the parent's or stepparent's separate property, the parent's or stepparent's earnings and accumulations, and the parent's or stepparent's share of community personal and real property. Funds in a community bank account

663. In Casa del Rey v. Hart, 31 Wn. App. 532, 643 P.2d 900, review denied, 98 Wn. 2d 1006 (1982), there was remand to determine (among other things) whether certain real property was an accumulation of the debtor spouse against which the creditor could execute. See also West v. Stanfield, 48 Wn. 2d 55, 290 P.2d 704 (1955).


665. 95 Wn. 2d 237, 622 P.2d 835 (1980). See the next part of this article for discussion of deElche.
which can be identified as the earnings of the nonobligated spouse are exempt from satisfaction of the child support obligation of the debtor spouse.\footnote{WASH. REV. CODE § 26.16.200 (1983).}

The problems posed by these amendments involve the current applicability of the \textit{Fisch v. Marler} \footnote{1 Wn. 2d 698, 97 P.2d 147 (1939).} and \textit{Stafford v. Stafford} \footnote{10 Wn. 2d 649, 117 P.2d 753 (1941).} cases and their progeny. First, it is clear that the maintenance and child support antenuptial claims are not constrained by the judgment-within-three-years-of-marriage requirements. This provision of the statute really does no more than recognize that the previously identified exception to the marital bankruptcy rule was not affected by the statutory diminution of that immunity.

Next, the child support obligation is identified as collectible out of the separate property of the obligated spouse—this is obvious as there is nothing in community property law that immunizes a spouse’s separate property from that spouse’s obligations (however they may have arisen)—and out of earnings and accumulations of the obligated spouse. This latter source for collection may extend the \textit{Fisch} rule by eliminating the consideration given to the new spouse and family, but perhaps the stated equitable factors will mean that it does not necessarily do so. It probably does eliminate the \textit{Stafford} immunity of community real property that can be traced to the efforts of the obligated spouse.

Finally, the statute appears to adopt a modified version of \textit{Hinson v. Hinson} \footnote{1 Wn. App. 348, 461 P.2d 560 (1969).} in that community personal and real property, apparently not traceable to the debtor spouse, can be reached as to the half interest of the debtor spouse, except for community funds in a bank account which can be identified as the earnings of the nonobligated spouse.\footnote{It seems to the author probable that garnishment of the wages of the nonobligated spouse is still not available. A contrary rule would tend to make pointless or silly the stated immunity of such funds in a community bank account.} This provision essentially adopts the rule applied for federal obligations under the supremacy clause, discussed above in Part VI.A.2.b,\footnote{See supra notes 647–56 and accompanying text.} with the exception only of wages (and the bank account traceable to them) of the nonobligated spouse, and leaves intact the narrow holding of \textit{Van Dyke} \footnote{95 Wn. 2d 726, 630 P.2d 420 (1981).} that the wages of a noncustodial stepparent cannot be reached.
B. Tort Liability—In General

In deElche v. Jacobsen673 the court abandoned the longstanding rule of indivisibility of community property and permitted enforcement of a separate tort judgment against the tortfeasor spouse’s half interest in community personal property.674 In part, the reasoning was that the trend toward finding community liability for a spouse’s tort, through a broad interpretation of community “benefit,” had yielded illogical, inconsistent and unjust results which, apparently, can be reduced by a sounder analysis in identifying the separate or community character of the tortious act. The holding obviously calls for drawing the line between community and separate torts in a new location to put more incidents on the separate side of the line. Since the new location is uncertain, however, and all real and personal community property must respond to a community tort, rather than only half of the community personal property to a separate tort under deElche, plaintiffs will still seek community liability even though the supporting argument may be tenuous. The previous cases in which community liability was found are therefore of continuing interest though deElche may have undermined the authority of some of them. Accordingly they will be discussed below after deElche’s implications are considered.

In deElche, defendant husband had forcibly raped plaintiff who secured a judgment against him separately. Since defendant and his wife had executed a three-pronged community property agreement,675 there was no separate property the plaintiff could reach. The evolution of the previous rule was summarized by the court, which noted that a distinction had been drawn between the availability to the husband’s separate creditor of community real and personal property on the basis of his limited or unrestricted management power, respectively, over the two kinds of property, but that the distinction had been terminated in Schramm v. Steele,676 which held no community property could be reached by the plaintiff who had a judgment for the husband’s separate tort. The early holding, which was that a separate

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674. In Milbradt v. Margaris, 103 Wn. 2d 337, 693 P.2d 78 (1985), the plaintiff in 1982 (after deElche) successfully sought garnishment against one-half of defendant’s wages on the judgment for assault and battery entered in 1979 (before deElche). The tort was intentional; the marital community was dismissed from the tort action after the plaintiff’s case in chief, and no appeal was taken from that dismissal. The trial court’s conclusion that deElche should be applied retroactively was affirmed by the supreme court.

675. For a discussion of such agreements, see supra notes 475–78 and accompanying text.

676. 97 Wash. 309, 166 P. 634 (1917).
creditor could not reach the debtor's half interest in community real property because the resulting property holding did not fit any established category, thereby became applicable to community personal property. Hence, until the deElche decision, the need for relief for tort victims resulted in a great expansion of the concept of community benefit so that a community liability could be found. Under deElche the separate tort creditor can reach the half interest in community personal property if the separate property of the tortfeasor spouse is insufficient. The court stated there was adequate community personal property so there was no need to decide whether there could be broader enforcement. Schramm was overruled, and any question as to separate debts was expressly not decided.\(^{677}\)

The court addressed the resulting problem of the character of ownership of the half interest not reached by the creditor and concluded it continued to be community property, adding:

The nontort-feasor spouse will be protected however. If community property is used to satisfy a separate judgment, there will arise a right to reimbursement protected by an equitable lien, the same as in other cases where community property is used to improve a separate estate. . . . Due to this equitable lien, upon termination of the community relationship the nontortfeasor spouse will hold as separate property the same amount as he or she would have received if the separate tort judgment had not been satisfied out of community property. 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.\(^{678}\)

The initial problem posed by the change in reasoning represented by deElche is whether separate debts or other nontortious liabilities can be enforced against the debtor’s half interest in community personal property. In Colorado National Bank v. Merlino,\(^{679}\) the court of appeals rejected the assertion by the separate creditor that the husband’s half interest in community property could be reached, declaring that deElche did not apply. The obligation involved purchase of real property for which the wife’s joinder was required which may, but should not, affect the applicability of the case in a transaction not involving real property. This certainly at least suggests that involuntary division or partition of community property will not be available for the ordinary separate creditor of a spouse, and the difference in the abilities of the tort victim and the contract obligee to guard against community property protections can justify the differences in result.\(^{680}\) It is interesting to note, however, that in arriving at the total

\(^{677}\) 95 Wn. 2d at 246 n.3, 622 P.2d at 840 n.3.

\(^{678}\) Id. at 246–47, 622 P.2d at 840.


\(^{680}\) See additional discussion supra text accompanying notes 560–67.
immunity of community property from separate obligations the court in Schramm (now overruled, as to result, at least) reasoned that a judgment for a tort should be as much a debt as the judgment on a contract.681

The deElche court carefully avoided the question of the availability of community real property to the separate tort creditor. The early cases, as indicated above, permitted the separate creditor to reach community personal property but not real property for the tort liability of the husband. The explanation as stated by Judge Dunbar in 1890 was:

The statute provides the ways in which this property can be alienated: First, the voluntary alienation by the husband and wife joining in the deed; second, by making it responsive to certain demands, constituted liens by the statute; and there is no other way contemplated. In fact, the very object of the law is to prevent its alienation in any other way. It expressly provides that the husband shall not sell, convey or encumber it, and he will not be allowed to do, by indirection or fraud, that which he is directly prohibited from doing. The practical result to the non-contracting spouse would be the same whether the law allowed the other spouse to directly convey the property, or allowed the title to pass through the medium of a sale on an execution flowing from a judgment to which he, or she, was not a party. It is the results the law regards; the modes are not important.682

There has been no significant change in the statute since it was held in Brotton v. Langert that the community real property could not be reached.683

Judge Dunbar's statement does not indicate there is to be a difference dependent upon the nature of the liability which resulted in a judgment, but rather appears to explain that community real property is insulated against all but the specified liens and community debts. It is possible to argue that despite Judge Dunbar's analysis the statute addresses only voluntary obligations directly or indirectly related to community real property and that there is no provision about noncontractual liability. On this reasoning, the

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682. Brotton v. Langert, 1 Wash. 73, 80, 23 P. 688, 689 (1890). It should be noted that the judgment sought to be enforced against community real property in Brotton was for a separate tort under the characterization then being made of "official capacity" torts.

683. Prior to the 1972 equal management changes, the statute on real property was WASH. REV. CODE § 26.16.040, which combined the management and joinder provisions with the proviso concerning susceptibility to identified liens. In 1972, the management and joinder provisions became WASH. REV. CODE § 26.16.030(3) (1983) and the lien language was preserved in WASH. REV. CODE § 26.16.040 (1983):

Community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.
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*deElche* result could also be reached in enforcement by the tort victim against the half interest of the tortfeasor spouse in the community real property. From the standpoint of the tort victim the need to reach an interest in real property may be just as great as to reach personal property, but such a result would be, perhaps, more surprising than was the holding in *deElche*. In *Schramm* the court reasoned there was no distinction to be drawn between a tort judgment and a contract judgment. With that case overruled by *deElche*, perhaps the court is prepared also to find that at least for tort victims a distinction does exist so that a separate tort "debt" (i.e., a tort liability reduced to judgment) can be enforced against the half interest in community real property even though a separate contract "debt" cannot be by reason of the statute.

The above-quoted reference in *deElche* to an equitable lien protection also poses interesting possibilities. As noted above in Part III.1.4, there is some authority for concluding that the right of reimbursement/equitable lien protection takes priority over an ordinary subsequent creditor. There are three possible kinds of subsequent judgment creditors: separate-husband, community, separate-wife. If we assume that the liability results from the act of one spouse, rather than both, apparently the subsequent creditor of the tortfeasor spouse could reach only assets, if any, not reached by the earlier creditor and thus might find none. The community creditor apparently will be able to reach any community asset even though it is only half its former size by reason of the execution on the half interest by the earlier separate tort creditor. The separate tort creditor of the other spouse apparently can reach the insulated half of assets previously partially reached by the earlier tort creditor of the initial tortfeasor spouse, and a half interest in other community property, if any. If the insulation of the half interest is to be preserved, it seems probable that some clear tracing or segregation will be required to avoid loss through commingling of the protection intended against successive separate tort liabilities.

A different approach, probably requiring legislation, might be less confusing: permit the victim of the separate tort to reach any asset acquired or owned by the tortfeasor. Such a rule would eliminate the happenstance that the victim's recovery depends upon the marital status of the tortfeasor and, at least in a sense, avoid *deElche*’s distortion of the item theory of ownership of community property. This is what section 26.16.200 of the

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684. "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." *deElche*, 95 Wn. 2d at 247, 622 P.2d at 840.

685. See *supra* notes 304–14 and accompanying text.

686. If both created the liability, enforcement probably would be possible against all property whether community or separate.
Revised Code of Washington does in part for the antenuptial creditor, that is, for the limited purpose of the creditor's protection, an asset is separate property, in effect, totally reachable by the separate creditor. The rules developed for the antenuptial liability for child support and maintenance operate similarly, although in giving consideration to the needs of the current spouse and family, not quite as drastically. The result in deElche may have an unreasonable quality as compared to the suggested solution if the reachable property was community by reason of conversion from the separate property of the nontortfeasor spouse through a three-pronged community property agreement. The reimbursement to the nontortfeasor spouse for the half interest devoted to a noncommunity purpose would be accomplished in the same manner under either approach. Of course when the separate and community "accounts" are settled at dissolution of the marriage or the death of one spouse there may not be enough property to accomplish the reimbursement, but that is just an unavoidable risk created by a rule which prefers the claim of the tort victim to the protection which the insulation of the community property gave. Judge Horowitz' dissent in deElche forcefully points out these concerns.

Establishing community liability in the tort area was considerably simplified by the gradual extension of community liability for the husband's torts and the 1972 amendments giving equal management power to the wife. These amendments make inappropriate earlier reasoning that community liability for the wife's tort depended upon the family expense statute power, the family car doctrine, or her position as agent for the husband. The deElche reasoning indicates that there will be a withdrawal from the extremes of that extension of community liability in some situations not yet clearly identified. The following discussion largely states the results expectable under the development prior to deElche with, in appropriate situations, a comment on the possible effect of that case.

The tortfeasor spouse is separately subject to liability for his or her tort and, as in the contractual obligation area, the usual question is whether there is also community liability. The rule was generally stated that there is community liability if the tortious act of the spouse is committed (1) in the course of managing community property or (2) for the benefit of the marital community. Some indication of the extension of this rule is shown by the statement of the test as involving "prosecution of the business of the

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687. Cf. Merriman v. Curl, 8 Wn. App. 894, 509 P.2d 765 (1973) (the wife's separate property judgment for alienation of affections became community property through a community property agreement, and lost its insulation from a community liability incurred by her husband).


689. See id. for an analysis of these basic propositions.
community" in *LaFramboise v. Schmidt*, in which the husband caused community liability by taking indecent liberties with a child in the care of him and his wife. There obviously would be some difficulty in saying that the husband was managing community property at the time or that the act was intended to benefit the marital community, although the employment to care for the child was so intended. In this area the concept of "business" is not narrow and the looseness of the test which the cases developed is better identified as requiring that the spouse be engaged in some community errand, affair, or business at the time of the tort to establish community liability.

The nonacting spouse ordinarily is not subject to separate liability unless there would be joint responsibility if the two were unmarried. The statute is explicit; it was changed in 1972 from the insulation only of the husband from liability for injuries committed by the wife to cross-insulation for both spouses.

The basis of the community liability is said to lie in the principle of respondeat superior, even though there is no principal or master in the ordinary sense. While there is greater difficulty in finding an intentional tort than a negligent tort within the ambit of the principle, the tort committed while managing or protecting a community property asset will result in community liability whether the act is negligent or intentional.

Except in a purely personal altercation, or alienation of affection/
criminal conversation conduct, community liability was found in most situations on the basis of either occurrence during a community activity or community benefit. Even though properly speaking there is no presumption that a tort creates community liability, the cases came close to establishing such a proposition. The next paragraph reflects the broad scope of community liability which developed.

Community liability has been imposed in a variety of factual situations. A continuing altercation initially related to community property interests will impose community liability. An assault on a minor child in the care of a husband and wife created community liability. Negligent injury occurring during a spouse's recreational activity similarly created community liability on the reasoning that the activity was beneficial and contributed to the welfare of the community relationship. If the tort, for example, conversion, could confer a direct property benefit on the community, the basic community property presumption would dictate that the asset acquired would be community property, and hence the liability incurred in acquiring (or attempting to acquire) it would be a community liability. Community liability attaches to tortious acts committed in connection with employment by which community funds are earned, whether or not the employment is as a public official.

There are as yet no cases which help to locate the new division line between separate and community torts, but perhaps there is a useful clue in


697. As was said in Werker v. Knox, 197 Wash. 453, 456, 85 P.2d 1041, 1042 (1938), "[T]he trend of the law has not been toward relieving the community from liability for the torts of its individual members, but has been quite definitely in the direction of finding ways and means of imposing such liabilities upon the community."


701. Furniture Workers Local 1007 v. United Brotherhood of Carpenters, 6 Wn. 2d 654, 108 P.2d 651 (1940) (union officers distributed funds on disbanding local which plaintiffs, disapproving, argued was tortious); Local 2618, Plywood Veneer Workers v. Taylor, 197 Wash. 515, 85 P.2d 1116 (1938); DePhillips v. Neslin, 139 Wash. 51, 245 P. 749 (1926); Henrickson v. Smith, 111 Wash. 82, 189 P. 550 (1920) (attorney kept funds received for client in settlement); McGregor v. Johnson, 58 Wash. 78, 107 P. 1049 (1910).

702. Kilcup v. McManus, 64 Wn. 2d 771, 394 P.2d 375 (1964) (false arrest by port commissioner/deputy sheriff, thereby abandoning former community immunity as to "official capacity" torts); Disque v. McCann, 58 Wn. 2d 65, 360 P.2d 583 (1961) (defalcation as guardian); Jacobson v. Lawrence, 9 Wn. App. 786, 514 P.2d 1396 (1973) (negligence of de facto executor in not securing fire insurance).
the statement by Judge Pearson for the court of appeals in *Edmonds v. Ashe*:

"[W]e do not believe that acts of wrongdoing which give rise to community liability on the benefit theory should include those which, from the perspective of a reasonable person, are unlikely to produce the desired consequences."\(^7\)

In *Federated American Insurance Co. v. Strong*,\(^7\) only separate liability was found for the wife’s purposeful ramming of other cars while driving the community car with the husband’s permission because the wife’s purposeful wrong is outside her agency authority.\(^7\) In addition only separate liability was found in *Farman v. Farman*\(^7\) for harrassing telephone calls by defendant to plaintiff (the husband’s first wife) which started before and continued after defendant married the husband.

In *Edmonds* or *deElche* a number of cases are mentioned as involving tenuous reasoning or analysis difficult to correlate with the reasoning in some other cases, including *Blais v. Phillips*, *Benson v. Bush*, *LaFramboise v. Schmidt*, *McHenry v. Short*, *Moffitt v. Krueger*, *King v. Williams*, and *Newbury v. Remington*.\(^7\) Of these earlier cases, *Newbury* involves voluntary acts having nothing to do directly with any community property or community activity. Only separate liability was found and probably will still be found. *Blais* and *Benson* were, in effect, continuations of activity which was community in purpose. While no reasonable person could expect a beneficial result to follow from the particular tortious acts, the initial character of the conduct might be enough to characterize the particular tortious acts as community; hence no change should result from applying a different standard. *LaFramboise* involved indecent liberties taken during the care of a minor child; the reasoning that there was a community enterprise being conducted during which the tort occurred probably leaves the community liability intact. *McHenry* involved tortious conduct either in ejecting a trespasser from community real property or as...

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\(^7\)03. 13 Wn. App. 690, 693, 537 P.2d 813, 814, review denied, 86 Wn. 2d 1001 (1975).

Plaintiff had filed a claim against the estate of Sam Ashe for injuries from multiple gunshot wounds. The claim was rejected on the basis that the estate included no separate property of the deceased tortfeasor which could be reached by the injured plaintiff. The conclusion that there was no community liability for the tort was affirmed. Defendant widow had filed for divorce from Ashe. He sought reconciliation and assisstance of plaintiff, at whose home Ashe had arrived with a pistol and rifle. Ashe called his wife and eventually announced he was going to hold the Edmondses hostage for his wife and her parents. During a scuffle the pistol was discharged, injuring plaintiff. Ashe was killed by a shot from someone outside.

\(^7\)04. 102 Wn. 2d 665, 689 P.2d 68 (1984).

\(^7\)05. It should be noted that the spouses were separated at the time so there should be no community liability under *MacKenzie v. Sellner*, 58 Wn. 2d 101, 361 P.2d 165 (1961), but no point is made of that in the *Strong* opinion.

\(^7\)06. 25 Wn. App. 896, 611 P.2d 1314 (1980).

\(^7\)07. These cases are cited *supra* notes 695, 698–700.
caretaker protecting the property of another person; the excessive force is probably not enough to nullify the community character of the tort.

In *King* and *Moffitt* the torts were negligent. In both cases, in substance, the community character was found from recreational activity of one spouse concluded to be beneficial to the community relationship. If it is accepted that recreational activity of a spouse is advantageous to the community relationship (which does not appear to be an unreasonable position) the author has some difficulty in finding that *deElche* will change the line of division between separate and community torts in any substantial degree.

It appears probable then, that *deElche* stands only for the proposition that a separate tort creditor can reach the tortfeasor spouse's half interest in community personal property and perhaps in community real property, in those situations involving purely personal wrongs having no conceivable connection with community property or affairs. If this is correct, the distortion of long-standing concepts in Washington community property law is likely to be more apparent than real—and to the author such extraordinary distortion is tolerable given the need for some chance of protection for the tort victim. Treating the tort defendant with only separate liability as a single person might for the tort victim provide a cleaner, simpler solution, although not necessarily protection as great.\(^{708}\) It would, in effect, make the tortfeasor's marriage neither a help nor a hindrance for either the tort plaintiff or defendant.

The other means by which community liability was found, as set forth below, continue to be important.

1. **Family Car Doctrine**

As noted in *Werker v. Knox*,\(^{709}\) the ability of the tort judgment creditor to reach community property has been enhanced by means of the family car (or family purpose) doctrine: the owner of the car is held liable on an agency theory for torts committed by the driver.\(^{710}\) Community liability does not flow directly from the doctrine, but rather from the practical circumstance that the family car usually is community property and the doctrine ordinarily imposes liability on the owner.\(^{711}\) Because the character of the liability resulting from application of the doctrine normally parallels the character of the ownership of the car,\(^{712}\) if neither spouse is the

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708. Property acquired by the nontortfeasor spouse would not be available.
711. Perhaps more accurately, the doctrine imposes liability on the supplier of the car for use for the family purpose. See id.; see also Coffman v. McFadden, 68 Wn. 2d 954, 416 P.2d 99 (1966).
712. See W. PROSSER & W. KEETON, supra note 710, at 524–27.
tortfeasor, for example, if their son is the tortfeasor, the liability will only be community in the ordinary case of community property ownership of the car.\textsuperscript{713} The family car doctrine may also result in three-way liability (separate-husband, community, and separate-wife). For example, the attendant vicarious liability can be separate, if the car is separately owned by one spouse,\textsuperscript{714} community, if the errand during which the injury occurred is community, and separate on the other spouse, if that spouse is the tortfeasor.

A permanent separation, however, should prevent the doctrine's application to impose community liability. In \textit{MacKenzie v. Sellner},\textsuperscript{715} the automobile involved in the accident had become the wife's separate property in the property settlement made at the time of the permanent separation, so a family car doctrine argument would not extend the liability to the community. The family car doctrine also ought not apply even if the community property ownership of the car continued, because the permanent separation would eliminate the possibility of there being a family purpose\textsuperscript{716} to be served by the use of the car.

An automobile purchased for a son, who reimbursed the parent for car payments, is \textit{not} a family car; hence, the family car doctrine will not apply to impose liability on the parents when there is no evidence the automobile was used for the general use, pleasure, or convenience of the family.\textsuperscript{717} Unauthorized use by a "grounded" son does not impose the vicarious liability of the doctrine.\textsuperscript{718}

2. \textit{Torts Related to Management of Property}

Liability imposed on a property owner, for example, liability flowing from a landowner's responsibility, will be community in character if the property responsible for the injury is community property, even if neither spouse has acted directly. Failure of the managing spouse to carry properly the responsibility of managing community property should impose individual, that is, separate, liability on the managing spouse.\textsuperscript{719} Prior to the

\begin{footnotes}
\item[713] Cf. Conley v. Moe, 7 Wn. 2d 355, 110 P.2d 172 (1941) (trustee in bankruptcy asserted a claim based on judgment in a wrongful death action against the son, and against the husband and wife in a community property sense only).
\item[716] Cf. Yates v. Dohring, 24 Wn. 2d 877, 168 P.2d 404 (1946), involving the family expense statute. But, conceivably, a community purpose might be invoked as suggested above.
\item[719] The respondeat superior reasoning inherently means the agent or servant is subject to liability for which the principal or master is also subject to liability. See W. PROSSER & W. KEETON, supra note 710, § 69.
\end{footnotes}
extension of managing power to the wife by the 1972 amendments, in *Graham v. Radford* the defendant wife was held not to be separately liable through landowner's responsibility when a child was injured upon coming in contact with a trash burner maintained on community real property. Since any liability against either the husband's separate property or the community property was barred by the plaintiff's failure to file a claim during administration of his estate following his death, the action could succeed only by establishing the wife's separate liability. The court held the wife was responsible only in a community property sense as landowner and affirmed the dismissal of the action. Because the wife had no managing power at that time, the court's refusal to find her separately liable was sound.

In this sort of situation, the effect of the 1972 amendments making each spouse equal manager may be to impose three-way liability, that is, liability on the community property and on the separate property of each spouse. The court in *Graham* stated, "The property was owned by the community, and the duty of maintenance was owed by the community." However, the "community" can only perform through the act of a spouse, and arguably the failure to act or exercise proper management imposes separate liability upon the manager and liability upon the community through respondeat superior. If neither spouse exercised proper management, there may be liability imposed on both individually, that is, separately. There are no cases indicating whether such separate liability of the spouses would be joint, or joint and several.

That a tort related to separately owned property will create only separate liability against the owner is reflected in *Freehe v. Freehe*. While *Freehe* involved an interspousal tort, a separate property-related tort against a third party plaintiff would impose separate liability on the spouse owning the property, and a persuasive argument can be made for community liability on two bases if a spouse has mismanaged property: (1) the potential community benefit derivable from the spouse's labor bestowed on the separately owned property, and (2) the proposition that tortious
conduct of community business or affairs creates community liability. 727

3. Criminal Responsibility

Criminal responsibility normally results only in separate liability, but monetary liability flowing from a crime ought to be community if the "business" of the spouses is criminal and leads to liability. The court has held that costs in a criminal proceeding against the husband for arson could not be enforced against community property, 728 but the extension of tort liability to situations in which there is only a purpose to benefit or in which there is no actual business benefit to the community 729 may portend community liability in some criminal situations. 730

4. Effect of Living Separate and Apart

If the spouses have permanently separated, under the analysis in Part III.C, 731 personal injury caused by one will create only separate liability 732 in the actor because neither "community" benefit nor a community property purpose connected with the tort can be found if the community relationship no longer exists. If, however, the tort was committed in connection with some continuing community property management responsibility, the reasoning in the debt cases 733 would support a conclusion of community tort liability.

C. Effect of a Tort or Contract Judgment Against One Spouse

Prior to the 1972 amendments, if the plaintiff sought to assert community liability for the tort of the wife, it was necessary to join the husband in the action; a judgment against the wife alone would not support enforcement against community property. 734 A judgment against the husband

727. Reflected, for example, in cases cited supra notes 690, 702.
729. Cf. the recreational benefit cases cited supra note 700.
730. Thus, in Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936), the crime was committed in pursuance of a purpose to secure insurance proceeds. Although the court refused community liability because the crime was outside the scope of management, the respondeat superior principle may not be that restrictive anymore, as later cases seem to establish. But cf. supra notes 703–06 and accompanying text, and cases cited therein.
731. See supra notes 98–117 and accompanying text.
alone, whether based on his contract or tort, was held to be presumptively a community liability on the basis that the cause of action arose from his act done presumptively as manager of community property. The 1972 amendments giving the wife equal managing power should mean that a judgment against her alone for her contract or tort liability is likewise presumptively a community liability.

If one spouse is not joined in the action establishing the basic liability, that spouse (as the wife could under earlier law) should be able to challenge the asserted community character of the liability when enforcement is attempted or by bringing a quiet title action against an execution sale. Properly speaking, there is no presumption that tort liability against only one spouse is more than separate, and a showing that a subsequent judgment was based only on the tort of one spouse should theoretically put the burden on the creditor to prove the community character of the judgment. However, the ease with which community tort liability is now established and the general presumption of the community character of a judgment against either spouse may put the burden on the spouse challenging the community character of the judgment. The question of the character of the liability in both tort and contract actions can be settled initially if both spouses are joined or if the other spouse intervenes.

D. Effect of Death or Divorce on Previously Existing Tort or Contract Liabilities

If the spouses divorce after a community tort or contract liability is incurred, enforcement can be had against property held by either former spouse which had been community property before the divorce, whether or not separate liability was incurred by the spouse now holding the asset. If the nonobligated former spouse becomes the owner, any increase in value of the former community property is, apparently, beyond the reach of the community creditor, just as improvements or later separate payments

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738. See, e.g., Anderson v. Burgoyne, 60 Wash. 511, 111 P. 777 (1910); McDonough v. Craig, 10 Wash. 239, 38 P. 1034 (1894).
739. E.g., Gund v. Parke, 15 Wash. 393, 46 P. 408 (1895).
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would not inure to the benefit of the creditor. The creditor is limited to the net community equity at the time of dissolution of the marriage.\textsuperscript{741} The result is appealing but the reasoning is not particularly persuasive. If the asset merely appreciated, why should the creditor's protection not also appreciate? In other words, as to the creditor, is not the asset still "community" property? Fixing the liability as between the spouses in the divorce decree or the property settlement agreement does not have any binding effect on the creditor.\textsuperscript{742} It is preferable, though perhaps not necessary, that the creditor or injured party join both divorced spouses in any action if it is based upon community liability.\textsuperscript{743} Any community managing power obviously ceases at the divorce, so neither spouse thereafter can create rights against the other.\textsuperscript{744}

It is convenient to talk in terms of the community as if it were an entity\textsuperscript{745} and of "community property" in the estate of the decedent spouse. (Upon the death of one of the spouses, however, the "entity" and the community property relationship necessarily ends.) All of the former community property is administered in the estate of the decedent,\textsuperscript{746} and after adjustment for obligations or causes of action then enforceable against community properties and adjustment for the respective positions the spouses may have had through the "equitable lien" claim or otherwise, the net community estate to be assigned to the decedent's and the survivor's respective shares can be ascertained. If the surviving spouse succeeds to the decedent's share, rather than becoming tenant in common with other persons,\textsuperscript{747} an accounting for the respective shares is not needed.

The immunity of community property to separate obligations disappears

\textsuperscript{742} Farrow v. Ostrom, 16 Wn. 2d 547, 133 P.2d 974 (1943).
\textsuperscript{744} Such reasoning was set forth in Britt v. Damson, 334 F.2d 896 (9th Cir. 1964). Cf. Griggs v. Averbeck Realty, 92 Wn. 2d 576, 599 P.2d 1289 (1979) (default judgment against husband after the divorce ineffective to reach former community property in wife's hands; she had had default judgment set aside and prevailed on the merits, eliminating her liability and removing her "community property" from the creditor's reach).
\textsuperscript{745} In Botle v. Osborne, 155 Wash. 585, 285 P. 425 (1930), plaintiff argued that the tort cause of action survived the death of the tortfeasor spouse because the "community" still existed, as reflected in the administration of all community property interests upon the death of the tortfeasor; the court rejected the argument, holding essentially there was no entity established by the community property statutes, but even accepting the argument that there was, it ceased to exist when there no longer existed both husband and wife. The survival of the cause of action has been accomplished by WASH. REV. CODE §§ 4.20.045, .046 (1983). In re Estate of Schoenfeld, 56 Wn. 2d 197, 351 P.2d 935 (1960), clearly involved "entity" reasoning but it is not essential to the result that community property must be devoted to settlement of community debts before separate property is.
\textsuperscript{746} Ryan v. Ferguson, 3 Wash. 356, 28 P. 910 (1891); WASH. REV. CODE § 11.02.070 (1983).
\textsuperscript{747} See Schlarb v. Castaing, 50 Wash. 331, 97 P. 289 (1908).
at the death of a spouse, permitting separate obligations of the decedent or surviving spouse to be enforced against their respective shares of the former community property. If the decedent is separately liable on a claim, such a claim may be barred, as may a community liability, by failure to timely file within the probate nonclaim statute. If the claims are properly asserted, the separate liabilities will not take precedence over community liabilities, but will be effective against any remaining part of the decedent's net half of the former community property. If the obligation of the decedent was both separate and community, the creditor's claim is to be charged first against the community property being administered, without a prorating on the basis of the size of the respective estates.

If the surviving spouse is separately liable on a claim, the creditor does not have a claim recognizable in the administration of the community estate, and therefore need not file any probate claim. The creditor subsequently may reach any assets formerly community property which become the separate property of the debtor-survivor. This last proposition has also been applied even though the creditor's claim was one which could have been enforced against either the survivor's separate property or the community property, but was not asserted in the administration of the community estate occasioned by the death of the other spouse.

Individual liability for federal income taxes on community income continues despite dissolution of the community relationship by death or divorce. If a joint return is filed, each spouse is responsible for the whole tax liability, and if no return is filed, each spouse is subject to liability for one-half of the taxes owing.

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751. See cases cited supra note 748.

752. See In re Estate of Schoenfeld, 56 Wn. 2d 197, 351 P.2d 935 (1960).

753. Roberts v. Warness, 165 Wash. 266, 5 P.2d 495 (1931); Rea v. Eslick, 87 Wash. 125, 151 P. 256 (1915). In Rea, the court pointed out there is no relationship of principal and surety between the community estate and the separate estate. The proposition appears to be denied in Graham v. Radford, 71 Wn. 2d 752, 431 P.2d 193 (1967), holding that failure to file a claim against the community estate, on which fell liability for unsafe premises owned as community property, precluded assertion thereafter against the survivor (the wife) on whom there was no liability in the separate property sense. The case relied upon, Hennessey Funeral Home v. Dean, 64 Wn. 2d 985, 395 P.2d 493 (1964), concerns a primary-secondary quality of liability of the estate and the survivor for funeral expenses. The court's assertion in Graham that barring of the community claim precluded enforcement of a separate obligation, "assuming there is . . . separate liability on her part," 71 Wn. 2d at 756, 431 P.2d at 195, is an unfortunate dictum.

754 United States v. Mitchell, 403 U.S. 190 (1971). The result in Washington should be the same.
E. Out-of-State Creditors

The Washington court has reversed the long-standing inequitable rules affecting obligations incurred in a noncommunity property state. Under prior reasoning, an obligation incurred in a noncommunity property state was necessarily separate, because no law recognizing community property existed in that state. Therefore, when the obligation was brought to Washington for enforcement, it retained its “separate” character and could not be enforced against community property. This rule was rejected in *Pacific States Cut Stone Co. v. Goble*. Washington law now provides protection of the out-of-state creditor as nearly equivalent as possible to that which the creditor would have under the applicable law of the other state.

In *Pacific States Cut Stone*, the husband’s Oregon contract obligation was enforced in Washington against all of the husband’s acquisitions, community as well as separate, but it could not be enforced against the wife’s acquisitions. Note that the wife’s ordinary acquisitions in Oregon, a common law state, would be her separate property and beyond the husband’s creditor’s reach; but in Washington, her ordinary acquisitions would be community property, and the husband’s obligation would be enforceable against the community property without regard to which spouse was the acquirer. Thus, the results obtained under the rule of *Pacific States Cut Stone* often will not be the same as those reached under exclusive Washington facts. Even if the applicable law comes from another community property state, the result under Washington law will not necessarily be the same as in a “local” transaction. For example, the husband’s antenuptial obligation in California can generally be enforced against community property, whereas in Washington it may not. Thus, under the *Pacific States Cut Stone* rule such a California obligation would be enforced in Washington differently than would a Washington obligation. The conflict of laws rules might bring still other unanticipated results.

These matters are discussed in DESKBOOK, supra note 142. See also supra notes 647–56 and accompanying text (Part VI.A.2.b).

756. *Id.*
757. No attempt is made here to discuss the conflict of laws rules to determine which state’s law is to be applied.
In two recent cases the new rule came into play. *Pacific Gamble Robinson Co. v. Lapp*\(^{760}\) involved the husband’s personal obligation, incurred while domiciled in Colorado, for a wholly owned corporation (owned before marriage). On enforcement in Washington the court held the husband’s wages could be reached but the wife’s, which were protected by Colorado law, could not. In *Colorado National Bank v. Merlino*,\(^ {761}\) the court held the husband’s obligation through contracting to buy real estate in Colorado without the wife’s participation created only his separate liability which could not be enforced against the community property or the husband’s interest in it. The husband and the wife were at all times Washington domiciliaries.

It may be that the Washington rule adopted in *Pacific States Cut Stone*, a contract obligation case, will not be applied to out-of-state tort liabilities, although the abandoned rule was applied to both kinds of obligations and there is no sufficient reason to restrict the newly adopted rule solely to contract problems.

VII. CONCLUSION

Except for the federal statutes essentially disapproving both the state and federal courts’ finding of preemption in the retirement rights area (which might suggest to the courts that a more restricted reading of the supremacy clause is desirable), statutory changes in the last dozen or so years have not yet much surfaced in the appellate decisions. Rather, the substantial shifts or modifications of the rules have been adopted by the judiciary without the compulsion of legislation. The “source” doctrine, by which the character of an asset is established by tracing to its source, has had refined application in the cases concerning pension/retirement rights, term life insurance, and personal injury recovery. What is “property” which must be considered (and how it is to be considered) has had additional attention in the goodwill and earning capacity cases. The relationship between ownership and other rights of the spouses in the reimbursement/equitable lien area has been before the courts with, in the author’s opinion, some unfortunate and confusing results. The immunity of community property to noncommunity obligations and the indivisibility of community property have been diminished by statute and court decision.

\(^{760}\) 95 Wn. 2d 341, 622 P.2d 850 (1980).

\(^{761}\) 35 Wn. App. 610, 668 P.2d 1304, review denied, 100 Wn. 2d 1032 (1983).
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It has been a busy period, and many of the new positions also pose unanswered problems. The question can fairly be raised whether the time has come for a careful, total evaluation of the Washington community property system leading, perhaps, to comprehensive statutes rather than the skeletal, piecemeal coverage we now have. A further question is whether the Uniform Marital Property Act, which provides, inter alia, for quasi-community property and classifies all income during marriage as community, would supply the pattern for worthwhile answers for Washington's future.