

COMMUNITY PROPERTY LAWS
IN LIGHT OF THE EQUAL RIGHTS AMENDMENT

Charlotte Mary Toulouse*

I. Equal Rights

The proposed Equal Rights Amendment:

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have the power, within their respective jurisdictions, to enforce this article by appropriate legislation.

Community Property Law, Corpus Juris Secundum:

The husband is the head and master of the community. As such he has the general management and control of all the property of the community. His right to management and control does not depend on delivery of the property to him and the right is not impaired by possession of the wife. The husband ordinarily may sell community personal property, and he may do this not only without her consent or knowledge, but against her objections when he reasonably believes that the community will benefit.¹

If the Equal Rights Amendment is ratified and becomes part of the United States Constitution, there is little doubt that the community property system will have to undergo a change. Although the changes that are foreseen will be far-reaching, they will not be revolutionary. Already two states, Washington and Texas, have voluntarily changed their laws, taking away from the husband his automatic right to be manager of the community.

Until recently community property law accepted as a basic premise the idea that the husband was manager of the community. The constitutionality of the concept has never been dealt with by the courts. Challenges attacking community property laws on the grounds that they invaded a personal right, i.e. equal protection, have been struck down because of the

*B.A., 1970, University of New Mexico; J.D., 1973, University of Notre Dame Law School. Judicial clerk for Judge Donald Lay of the Eighth Circuit Court of Appeals, 1973; Member, New Mexico bar.

long recognized axiom that "a community property law concerns property; it does not deal with the personal rights or conditions of the spouses."² The husband's superior statutory rights to manage and control the community property arose from the assumption that the community property had been acquired by the husband and the traditional notion that a man's place is providing support and a woman's place is in the home raising children and caring for the husband.³ The legislatures and the courts also felt that the community property laws served to protect, not violate, the wife's equal protection rights. The wife was given an equal, present, vested interest and even though the husband was made the administrator of the community, he did not thereby acquire a greater interest in the community property.⁴

The Supreme Court of the United States ruled in 1930 that the fact the husband had full control, power, and dominion over the community property did not negate the wife's present interest and stated, "the husband is the manager of the affairs of the marital relationship; if the husband proves an unfit manager, the wife should be allowed to bring about an immediate dissolution and liquidation of the community property."⁵ Thus the courts as well as the public have always taken for granted that the husband has an initially unquestionable right to manage the community.

However, recently people have begun to voice the opinion that the granting of more authority to one spouse than the other actually violates the basic partnership concept behind community property.⁶ The partnership relationship should be the same as the business partnership. In order that this may be accomplished, the law must be changed so that the husband and wife can decide for themselves how they wish to order their relationship.

II. General Changes

With the advent of joint or dual control over community property many changes will occur. The following changes are ones that are general in nature and will apply to all the community property states. The list is composed of powers which have been exclusively enjoyed by the husband. With joint control the wife will also be given these powers over the community

property:

1. general power to contract for the community;
2. delegate authority to collect money due the community;
3. enforce and protect community rights;
4. dispose of the income of his or her labor;
5. withdraw community funds;
6. buy or loan personally;
7. refinance an indebtedness;
8. pay taxes due on community property;
9. enter into an agreement fixing the boundary lines between community property and adjacent land;
10. release obligations owed to the community;
11. remit a portion of a judgment for taking of community property for a public use;
12. relinquish premises or abandon interests held under a lease;
13. surrender insurance policies for cash surrender value;
14. subordinate a vendor's lien to another lien;
15. surrender vendee's rights to land in return for cancellation of the purchase money notes.

The main problem arising as a result of the wife being given the above powers is that people dealing with a married person will have to make sure that both spouses agree to any transactions. In reality this will not be as troublesome as it seems. The present law can easily be expanded so that both husband and wife are acting in a representative capacity as the agent of the community or the other spouse. This agency can arise either from express authority or from the conduct of the parties. Thus the parties can provide by power of attorney or some other agreement in writing who is the managing partner. Or, a spouse can ratify the action of the other spouse simply by his or her conduct, and thus be estopped from questioning the validity of any action or agreement which affects the community. In the absence of such agreement, ratification or estoppel, the other spouse would not be bound by unauthorized or fraudulent acts of his or her partner.

III. Specific State Changes

This section will deal with the current statutes in five states and will include decisions which control or explain, or which are now overruled by recent legislation.

California

California Code section 5125: ". . . the husband has the management and control of the community property, with like absolute power of disposition, other than testamentary, as he has of his separate estate. . . ."

California is one of the few states which has talked in terms of constitutional rights when deciding cases involving community property laws. An 1897 California Supreme Court decision makes it almost impossible for the legislature of California to adopt a dual control of community property. In order to change the present system this decision will have to be overruled by the court itself or by a constitutional amendment. The court stated that "to apply legislation decreasing the dominion and control of the husband over existing community property is to unconstitutionally deprive the husband of a vested property right." ⁷

The cases since this time have consistently held that "be decreasing the husband's control and thereby simultaneously increasing the wife's control over the existing community property, constitutes a taking of property without due process of law."⁸

The most recent California case in this area is Addison v. Addison.⁹ In this decision the court upheld Spreckels, but did so reluctantly. In the opinion by Judge Traynor, the court cited all of the reasons why Spreckels should be overruled, but instead of specifically overruling it they limited it by saying "existing statutes changing the rights of husband and wife in community property have no retroactive application but must be limited to prospective application."

If California law is changed to allow for dual control, a problem will arise as to payment of debts formally classified as the husbands, and therefore payable out of community funds. This is illustrated in a

California decision holding that the husband must pay alimony payments to his first wife out of the community funds of the second marriage because as "manager of the community property, 'with like absolute power of disposition, other than testamentary, as he has of his separate estate,' the husband may voluntarily discharge such obligations from community property."¹⁰

In other words, in California all debts which are not specifically made the obligation of the wife are grouped together as obligations of the husband and of the community property. With the advent of joint control, this will have to change so that all debts (of both husband and wife) are made the obligation of the community or so that the husband's debts will have to be treated in the same manner as the wife's debts currently are (i.e, as separate obligations, not payable out of community property).

New Mexico

N.M.S.A. §57-4-3. "The husband has the management and control of the personal property of the community, and during coverture the husband shall have the sole power of disposition of the personal property of the community, other than testamentary, as he has of his separate estate;"

New Mexico has long defended the concept of the husband as head of the community. In the leading case in this area the New Mexico Supreme Court stated, "As head of the community the husband acts in a representative capacity with respect to the wife's interest in community property, and that this power is found in the law of the family."¹¹ (emphasis added)

The main discrepancy which will be corrected with the adoption of the Equal Rights Amendment in New Mexico concerns two statutes. One gives the entire community property to the husband, without administration upon the wife's death. The other, dealing with the husband's death, gives the property to the wife, but makes it subject to the husband's power of testamentary disposition over one half and to all debts, funeral expenses and administration expenses.¹² The result is that the woman is denied the advantage of equal testamentary power, and the husband gets a tax break.

Since, upon the death of the wife, the husband is the absolute owner of the entire community, he does not have to pay any estate tax on the wife's one-half interest. To remedy this inequality, all that has to be done is to grant the wife the power of testamentary disposition over one-half of the community property.

Arizona

§25-211(B). "During coverture, personal property may be disposed of by the husband only."

§25-214. ". . . married women do not have the right to make contracts binding the common property of the husband and wife."

§25-216. "The community property of the husband and wife is liable for the community debts contracted by the husband during the marriage unless specially excepted by law."

Without the enactment of the Equal Rights Amendment, there is little hope that an Arizona court will rule that the husband's right to manage the community is unconstitutional. In the most recent decision in this area the court noted that "In Arizona, the husband is recognized as the head of the family and its agent in control, and management of the community estate."¹³ Thus, to correct the inequities of the above quoted statutes the Equal Rights Amendment must be ratified or the legislature must change the laws.

Washington

The 1972 Washington state legislature changed the laws of its state to provide for joint or dual control. Chapter 108 - Washington Laws, 1972 1st Ex. Sess. "Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property. . . ."

The above modification of the law of Washington probably will change the results reached in National Bank of Commerce of Seattle v. Green.¹⁴ Here the court upheld the idea that a note executed or endorsed by the husband for the benefit of the community is a community obligation, while a wife's note constitutes her separate obligation. This reasoning was justified because "the husband as manager of the community personal property is empowered to subject the community debts by his sole act or

signature."

Texas

F.C. §5.22. "During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single."

F.C. §5.22(c). "The community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney of other agreement in writing."

F.C. §5.24(b). "A third person dealing with a spouse is entitled to rely (as against the other spouse or anyone claiming from that spouse) on that spouse's authority to deal with the property. . . ."

The Texas law, while allowing for dual control as in Washington, is clearer and better defined than that of Washington. The Texas law specifically allows the husband to continue as head of the community, if the parties so stipulate, and it protects a third person dealing with only one of the members of the community. These are matters which are not provided for by Washington. The Texas law seems to be a good one, for it has taken into account the changing status of women and the family in America and it has tried to reflect these changes in a fair and equitable statute. Thus, the Texas statute would serve as a good model for states to follow in the future.

One interesting result of the Texas statute is that it has the effect of changing federal jurisdictional amount qualification. Before passage of the present law, Texas had allowed only the husband to bring a suit for damage to community property because as head and master of the community he was its only legal representative. Thus, in a 1962 case the Court of Appeals held that "damage to an automobile which was owned by the community, and the wife's lost wages, which belonged to the community, could not be combined with the wife's personal injury claim (which constituted her separate property) in order to reach the jurisdictional amount." 15

Community property laws for years have been rigid and unchanging. The principles find their root in Spain and were spread to the New World

during the conquests of the sixteenth century. It has only been in the last few years that the concept has undergone some re-defining, that, in order for marriage partners to be equals, both have been allowed control of the community property. I hope that when Corpus Juris Secundum puts out a replacement for its Volume 41 that it can no longer unequivocally and without noting any exceptions write:

"The wife has no power or control or management of community property; she cannot sell or mortgage it, or give it away, or contract community debts."¹⁶

FOOTNOTES

1. 41 C.J.S., Husband and Wife §506 and §532 (1944).
2. 15 Am. Jur. 2d Community Property § 2 (1964).
3. Kanowitz, Women and the Law, Unfinished Revolution (New Mexico Law Journal, 1969), p. 64.
4. "Inequality Between Spouses," 7 Nat. Res. J. 645 (1967).
5. Bender v. Pfaff, 282 U.S. 127, 51 S. Ct. 64, 75 L. Ed. 252 (1930).
6. Albuquerque Journal, "Group Pinpoints Law, 'Rights' Amendment Will Affect," April 16, 1972, P. D-1.
7. Spreckels v. Spreckels, 116 Cal. 339, 349, 49 P. 228, 231 (1897).
8. Comment, "Marital Property and the Conflict of Laws: The Constitutionality of the 'Quasi-Community Property' Legislation," 54 Calif. L. Rev. 252, 268 (1966).
9. 43 Cal. Rptr. 97, 339 P. 2d 897 (1965).
10. Weinberg v. Weinberg, 63 Cal. Rptr. 13, 432 P. 2d 709 (1967).
11. Baca v. Village of Belen, 30 N.M. 541, 240 P. 803 (1925).
12. N.M.S.A. §§ 29-1-8, 29-1-9.
13. Armer v. Armer, 105 Ariz. 284, 463 P. 2d 818 (1970).
14. 1 Wash. App. 713, 463 P. 2d 187 (1969).