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The Equal Rights Amendment and Inequality between Spouses under the California Community Property System

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THE EQUAL RIGHTS AMENDMENT AND INEQUALITY BETWEEN SPOUSES UNDER THE CALIFORNIA COMMUNITY PROPERTY SYSTEM

Since 1923 a constitutional amendment guaranteeing equal rights for men and women has been proposed in almost every Congress.\(^1\) The first proposal to successfully pass both legislative Houses\(^2\) is currently awaiting ratification by the states.\(^8\) It provides, *inter alia*, that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."\(^4\) Whether this language will be incorporated into the Constitution is still uncertain. It is, nevertheless, worthwhile to explore its possible ramifications because debate over the amendment has focused attention upon certain unsatisfactory areas of the law and caused legislators to begin considering possible remedies in such areas.

The legislative intent of the proposed Equal Rights Amendment indicates it is not merely a women's rights amendment but will apply to

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4. H.R.J. Res. 208, 92d Cong., 2d Sess. (1972). The proposed Equal Rights Amendment reads as follows:

   Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

   Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

   Section 3. This amendment shall take effect two years after the date of ratification. *Id.*

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protect both sexes. It will make sex a non-determinative factor in the legal treatment of men and women, thus guaranteeing that all persons will be treated as individuals. Rather than requiring identical treatment of men and women in all situations, it will allow for classifications based on unique physical characteristics of each sex. Such classifications will have to focus on actual differences and cannot be based merely on sexual stereotypes. Ratification of the amendment would clearly have wide impact and would markedly affect California's unique community property system, which at present contains various sex-discriminatory aspects.

In November 1972 the California legislature ratified the proposed amendment, becoming the twenty-second state to do so. California State Senator James R. Mills, Chairman of the Senate Rules Committee, finally ended his opposition to ratification because he became convinced that "passage of the amendment 'would not materially affect the legal rights of California men and women and could do no harm . . .'" and that "'the only real effect [of the Equal Rights Amendment] on California would be to require Congress to alter federal laws and government practices which discriminate against women.'" It appears, however, that Senator Mills is wrong. Indeed, as noted by Representative Don Edwards of California, chairman of the congressional subcommittee which initially considered the proposed amendment, it has been established beyond dispute that women are the victims of discrimination in a number of substantial ways. For example, . . . .

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7. 1972 Senate Report, supra note 1, at 23. One standard of treatment for all persons would not necessarily require identical treatment of men and women (id. at 12), although some legislators expressed a contrary opinion. For a discussion of this point see note 19 infra.
8. See note 26 infra for a discussion of permissible classifications.
9. Id.

The character and extent of the statutes defining the system and a course of decisional law peculiar to California, have resulted in a community property system substantially different from that of the Mexican-Spanish parent system and substantially different from that of any of the seven other community property states. It has become sui generis. (Footnotes omitted).
12. See note 3 supra.
many states, a woman cannot manage or own separate property in the
same manner as her husband. . . . Some community-property states
do not vest in the wife the property rights that her husband enjoys.

All of these various forms of discrimination undermine the confi-
dence of many Americans in our institutions and have an adverse effect
on our national morale. Even if these injustices injured only a small
number of our female citizens, they constitute wrongs that ought not to
go unremedied. 14

Representative Edwards thus concluded that "[u]nder the circumstances,
an amendment to our Constitution is not merely appropriate, but it is
imperative." 15 As to the scope of the amendment Representative Ed-
wards expressly noted that:

In the area of domestic relations the amendment would promote a
full economic equality between men and women. Special restrictions
on property rights of married women would be invalidated. 16

In his minority view on the proposed amendment, Senator Sam J.
Ervin, Jr. stated that he agreed with the amendment's proponents that
it would require various changes in the area of domestic relations. 17
Concerning marital property, he specifically noted that:

Two different systems have been adopted in the United States for dis-
tributing property rights within a family—the community property
system and the common law system. . . . As both systems currently
operate, they contain sex discriminatory aspects which would be
changed under the Equal Rights Amendment. 18

It is thus clear that the amendment is in fact intended to affect state
marital property systems 19 and will definitely include community prop-

15. Id.
16. Id.
17. 1972 SENATE REPORT, supra note 1, at 41-42.
18. Id. citing Brown, Emerson, Falk, and Freedman, The Equal Rights Amend-
ment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871,
946 (1971) (hereinafter cited as Equal Rights for Women).
Edwards); 117 CONG. REC. H. 9366 (daily ed. Oct. 12, 1971) (remarks of Representa-
tive Celler). Evidence considered by the legislators which suggested that marital prop-
erty laws would be affected by the amendment is found in 1971 House Hearings, supra
note 3, at 156 (statement of Lucille Shriver, Federation Director of the National Fed-
eration of Business and Professional Women's Clubs, Inc.); id. at 432 (statement of
Rollene S. Wells on behalf of the Unitarian Universalist Women's Federation); id. at
513 (statement of Representative Robert Kastenmeier); id. at 556 (statement in a
memorandum to the Citizens' Advisory Council on the Status of Women by its study
group on equal legal rights); Hearings on S.J. Res. 61 and S.J. Res. 231 Before the
When property is acquired by a husband or wife during marriage, but not as the separate property of either, it is community property of both spouses.

Ideally, the system is designed to equalize the shares of the spouses in property acquired during marriage, but in fact it operates in a manner which discriminates between spouses in many areas. This Comment will analyze three such areas of California's community property system: (1) the method utilized to classify marital property as separate or community, (2) the extent to which marital property is liable for support rights between spouses, and (3) the allocation of management and control of the community property. Each of these areas will be analyzed in terms of the following questions: What differences in treatment between spouses under California's community property laws are a result of sexual classifications? What effect will the proposed Equal Rights Amendment most likely have on such laws? Should the laws (a) remain unchanged on the ground that a reasonable classification on the basis of sex has been made, (b) be ex-

25. This Comment will deal only with discrimination between spouses. It is not the purpose of this Comment to discuss inequalities in the spouses' capacities to deal with third parties regarding community property, except to the extent that such transactions by one spouse are directly related to the creation or destruction of some right in the other spouse. See text accompanying notes 60-65, 117-23, and 143-44 infra. Thus, issues such as the difficulty encountered by wives in obtaining credit because of their marital status will not be discussed herein.
26. Objections have been made to the proposed Equal Rights Amendment on the ground that it could require absolutely identical treatment of men and women, thus allowing no differentiation on the basis of sex at all. 1971 House Hearings, supra note 3, at 77 (testimony of Senator Ervin); id. at 623 (statement in the Comm. Report by the Comm. on Federal Legislation on the topic of Amending the Constitution to Prohibit State Discrimination Based on Sex); 117 CONG. REC. H. 9240 (daily ed. Oct. 6, 1971) (remarks by Representative Wiggins); 118 CONG. REC. S. 4250 (daily ed. Mar. 20, 1972) (remarks by Senator Ervin). However, Representative Griffiths, the Congresswoman who introduced the proposed amendment, believed reasonable classifications on the basis of sex would be permitted under the amendment (1971 House Hearings, supra note 3, at 51), and other proponents of the amendment agreed with her. 1972 SENATE REPORT, supra note 1, at 12. It is clear, though, that classifications allowed by the amendment would be circumscribed indeed. Evidence before the legislators suggested that reasonable classifications would be most appropriate in legislation relating to a physical characteristic unique to one sex, such as laws dealing with childbirth, wet nurses, sperm donation, and criminal acts capable of being committed by only one sex (e.g., forcible rape). 1971 House Hearings, supra note 3, at 402 (remarks by Professor Thomas I. Emerson, Yale Law School); id. at 558 (a memorandum to the Citizens' Advisory Council on the Status of Women by its study group on equal legal rights). See also id. at 250 (exchange between Representative Keating and Margery Leonard,
The basic premise of California's community property system is that all property acquired through the expenditure of personal skill and effort during marriage should be shared by both the husband and the wife. The community property system, therefore, differentiates between shared, or community, property and all other, or separate, property. All property of married persons in California falls within one of these two classifications. Separate property is that property owned by either the husband or the wife before marriage, or acquired by either of them after


20. 117 CONG. REC. H. 9369 (daily ed. Oct. 12, 1971) (separate view of Congressmen opposed to changing the wording of House Joint Resolution 208); 1972 SENATE REPORT, supra note 1, at 41-42, citing Equal Rights for Women, supra note 18, at 946 (discussing state community property systems). Evidence before the federal legislators suggested that the community property systems in existence contain sex discriminatory features which would require changes once the amendment is ratified. 118 CONG. REC. S. 4264 (daily ed. Mar. 20, 1972); see 1971 House Hearings, supra note 3, at 295 (remarks of Adele T. Weaver, then President of the National Association of Women Lawyers); Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 501 (1970) [hereinafter cited as May 1970 Senate Hearings]. It was not suggested, however, that the community property system be abolished. 1971 House Hearings, supra note 3, at 295 (remarks of Adele Weaver, then President of the National Association of Women Lawyers). In fact, it was noted that "if in community property states there would appear to be no problem that cannot be solved by some form of the community system of property, assuming that there is no discrimination as to sex." Id.

21. See generally VERRALL & SAMMIS, supra note 10, at 3.

22. Property acquired by a spouse while domiciled elsewhere, which would have been community property if acquired while domiciled in California, is termed "quasi-community property" and is treated as community property for purposes of dissolution, although it does not fall within the definition of community property, if the parties are domiciled in California when the action is filed. CAL. CIV. CODE § 4803 (West Supp. 1972); Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

Spouses may hold property as joint tenants, tenants in common, or as community property. CAL. CIV. CODE § 5104 (West 1970). Nevertheless, the respective interests of the spouses in a joint tenancy or tenancy in common will be classified for purposes of division upon termination of the marriage as either community or separate. Spouses holding property as joint tenants each hold their share as separate property. Lovetro v. Steers, 234 Cal. App. 2d 461, 468, 44 Cal. Rptr. 604, 608 (1965); In re Jameson's Estate, 93 Cal. App. 2d 35, 41-2, 208 P.2d 54, 58 (1949); Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003, 1005 (1932). Spouses holding property as tenants in common have the nature of their respective interests classified according to procedures described in the text accompanying notes 31-32 infra. If the actual nature of the property cannot be traced but the property is held by an instrument in writing in which they are described as husband and wife each spouse's share is community property, absent a contrary intention expressed in the instrument. CAL. CIV. CODE § 5110 (West Supp. 1972). If they are not so described, the husband holds his share as community property and the wife holds hers as separate. Dunn v. Mullan, 211 Cal. 583, 587, 296 P. 278 (1931).
ities of California husbands and wives be altered as a result of the amendment’s application to the California community property system?

I. THE CLASSIFICATION OF PROPERTY OWNED BY MARRIED PERSONS

Classification of property owned by married persons does not occur until termination of the marriage. By then the original time and mode of acquisition of the property, which are important factors in the determination of its status, are not always clear. Thus a procedure has developed by which property is initially classified according to statutory presumption as either separate or community. The presumptive status of the property can then be rebutted by proof that the time and mode of acquisition were such as to actually make the property separate or community.

The general presumption in the classification process is that all real property situated in California and all personal property wherever situated, acquired during marriage by a person while domiciled in California, is community property. This general presumption is not sex discriminatory since whether property is acquired by a husband or a wife is not determinative of its status. In limited circumstances, however, the general presumption is inoperative and is replaced by one of four special presumptions. Two of these special presumptions are

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House Hearings, supra note 3, at 557-58 (a memorandum to Citizens' Advisory Council on the Status of Women by its study group on equal legal rights).


30. See text accompanying notes 22-23 supra.

31. Courts sometimes will not even discuss the presumptions if proof of the nature of property is sufficient to establish its true nature. When such proof is not forthcoming, however, the presumptions are necessarily utilized, and the issue of whether they have been rebutted will be examined. See text accompanying note 32 infra.

32. Estate of Bryant, 3 Cal. 2d 58, 68, 43 P.2d 529, 532 (1935); Estate of Niccolls, 164 Cal. 368, 371, 129 P. 278, 279 (1912); Mason v. Mason, 186 Cal. App. 2d 209, 211, 8 Cal. Rptr. 784, 786 (1960).


34. These four special presumptions are set forth in Cal. Civ. Code § 5110 (West Supp. 1972) which provides, in part:

... [1] whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and [2] if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that [3] when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife and that
tended to treat both sexes equally, or (c) be eliminated as being unconstitutional? Finally, in what manner will the rights and responsibl-

Chairman of the Legal Research Committee of the National Woman's Party, suggesting that certain classifications between male and female, e.g., for life insurance premiums, could be made on the basis of life expectancy differentials between the sexes. It is doubtful however that many other classifications will be permitted. For example, although one Senator argued that traditional role characteristics of men and women should be reflected in legislation (1971 House Hearings, supra note 3, at 65 (remarks of Senator Ervin)), it is clear that the basic intent of the amendment is to prevent classification based on such sexual stereotypes. 1971 House Hearings, supra note 3, at 93 (statement of Representative Mikva); 1972 Senate Report, supra note 1, at 12. There are two areas to which the amendment will not apply, thus allowing for classifications. First, the amendment will not apply to private action. 1971 House Hearings, supra note 3, at 40 (explanation of Representative Martha Griffiths). Thus social customs and behavior, not a result of statutory requirements, would be a matter of individual preference. 118 Cong. Rec. S. 4138 (daily ed. March 17, 1972) (remarks of Senator Bayh); id. at S. 4142 (remarks of Senator Cook). The amendment also may not apply when it conflicts with another constitutional right, such as the right to privacy. 1971 House Hearings, supra note 3, at 402. Thus, the right to segregate bathrooms and prisons would not be denied. Id. Contra, id. at 73 (remarks of Senator Ervin) (note however that Senator Ervin does not refute the explanation of Representative Griffiths).

27. The amendment will require that laws which unreasonably discriminate on the basis of sex either be extended to apply to both sexes or be declared unconstitutional and void. 1971 House Hearings, supra note 3, at 113 (remarks of Representative Abzug); 1972 Senate Report, supra note 1, at 15; 1971 House Hearings, supra note 3, at 40 (statement of Representative Griffiths); id. at 162 (remarks of Representative Waldie). The state legislatures and courts will have to decide which course to follow. "[I]t is expected that those laws which provide a meaningful protection [to one of the sexes] would be expanded to include both men and women, as for example minimum wage laws . . . or laws requiring rest periods . . ." 1972 Senate Report, supra note 1, at 15. Evidence before the federal legislators suggested a similar characterization of laws which should be extended:

Where the law confers a benefit, privilege or obligation of citizenship, such would be extended to the other sex . . . . Examples of such laws include: laws which permit alimony to be awarded under certain circumstances to wives but not to husbands; . . . social benefits legislation which give greater benefits to one sex than the other; exclusion of women from the requirements of the Military Selective Service Act of 1967 . . . . 1971 House Hearings, supra note 3, at 557 (a memorandum to the Citizen's Advisory Council on the Status of Women by its study group on equal legal rights).

Judicial extension of laws to include both sexes has already been demonstrated in litigation under the Civil Rights Act of 1964. Id. at 162 (remarks of Professor Norman Dorsen on behalf of the American Civil Liberties Union).

28. The amendment is intended to achieve nullification of laws which are "discriminatory and restrictive . . . [such as] a law banning women from a certain occupation." 1972 Senate Report, supra note 1, at 15. This concept was also expressed in evidence before the legislators:

Where a law restricts or denies opportunities of women or men . . . the effect of the equal rights amendment would be to render such laws unconstitutional. Examples are: the exclusion of women from State universities . . . ; State laws placing special restriction on the hours of work for women or the weights women may lift on the job; . . . laws placing special restrictions on the legal capacity of married women, such as making contracts or establishing a legal domicile. 1971
neutral in effect and provide that (1) if spouses acquire a single family residence during marriage as joint tenants, for purposes of division of property on dissolution of the marriage the single family residence is presumed to be community property, and (2) if property is acquired by the spouses in an instrument in which they are described as husband and wife, the property is presumed to be community property.

The result of the application of the remaining two special presumptions, however, is favorable to the wife. Under the first of these presumptions a wife holding real or personal property in her name alone, acquired during marriage by an instrument in writing, holds it presumptively as her separate property. A husband, holding the same property, acquired under the same circumstances, is presumed to hold it as community property. Thus real property, promissory notes, securities, automobiles, and bank accounts in the name of one spouse

[4] when a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single family residence is the community property of said husband and wife.

35. Id.

36. Id. This presumption does not apply where a different intent is expressed in the instrument. Id.

This presumption has only been in effect since 1935. Prior to 1935 the husband and wife held the property as tenants in common whether or not they were described as husband and wife. See ch. 707, § 1, [1935] Cal. Stat. 1912, amending Cal. Civ. Code § 164 (1872) (codified at Cal. Civ. Code § 5110 (West Supp. 1972)). Today this same result will be reached only where the husband and wife are not described as such in the instrument. The result of this presumption is favorable to the wife. See text accompanying notes 44-48 infra.

37. Cal. Civ. Code § 5110 (West Supp. 1972). This presumption does not apply where a different intent is expressed in the instrument. Id.

38. Since there is no special presumption applicable to the husband in this situation, his interest in property is classified under the general presumption as community property as long as it was acquired during marriage by the husband while domiciled in California. Cal. Civ. Code § 5110 (West Supp. 1972).

39. Stafford v. Martinoni, 192 Cal. 724, 728, 221 P. 919, 921 (1923) (land conveyed to wife presumed to be her separate property); Hovevoll v. Hovevoll, 59 Cal. App. 2d 188, 192, 138 P.2d 693, 696 (1943) (a deed to the wife alone raised the presumption that the property was separate and the husband failed to present sufficient evidence to rebut the presumption). See also Russ v. Russ, 144 Cal. App. 2d 723, 726-727, 301 P.2d 600, 601-02 (1956) (remanded to trial court for determination whether the presumption had been overcome by evidence of an agreement that the property was community).

40. In re Estate of Lissner, 27 Cal. App. 2d 570, 577-78, 81 P.2d 448, 451-52 (1938) (a promissory note from the husband to the wife was held to be separate property by presumption).

41. See In re Estate of Baer, 81 Cal. App. 2d 830, 835, 185 P.2d 412, 415-16 (1947) (a presumption that securities in the wife's name alone were her separate property was successfully rebutted by tracing them to a community property source (wife's earnings) and showing that no change in the community property status was intended).
alone, are classified differently depending solely on whether they were acquired by the husband or the wife. A wife holds such assets presumptively as separate property while a husband holds them presumptively as community property.

The second special presumption which differentiates the status of property on the basis of sex favors the wife when utilized in conjunction with the first. Under the second presumption, if a wife acquires real or personal property by a written instrument and holds such property jointly with a person not described as her husband in the instrument, she is presumed to hold her share as a tenant in common. Moreover, since the first special presumption will apply to her share of the tenancy in common, she is presumed to hold it as separate property. This gives the wife an advantage since a husband who similarly holds property jointly with a person not described as his spouse holds his share presumptively as community property. If the husband and wife are in fact co-tenants, but are not described as husband and wife in the instrument of title, the wife's half of the tenancy in common is presumptively separate property while the husband's half is presumptively community. Thus by presumption the wife will receive three-fourths of the property held as a tenant in common with her husband.

42. Swart v. Swart, 49 Cal. App. 2d 48, 51, 120 P.2d 942, 943 (1942) (an automobile was classified as separate property of deceased wife by presumption since her name alone was on certificate of ownership of vehicle); People v. One 1939 LaSalle 8 Touring Sedan, 45 Cal. App. 2d 709, 714, 115 P.2d 39, 42 (1941) (a car was held to be the separate property of a wife when registered in her name alone, since evidence produced by the state failed to rebut the presumption that property acquired by a married woman by an instrument in writing is her separate property). See Dorsey v. Barba, 38 Cal. 2d 350, 354-55, 240 P.2d 604, 606 (1952) (wife who was registered owner of car and agreed to allow her husband to drive it and keep it after their separation could not claim the car was community property, and therefore she could not claim she did not have power to consent to her husband's use and operation of the car).

43. See Sperry v. Tammany, 106 Cal. App. 2d 694, 697, 235 P.2d 847, 849 (1951) (the balance in a wife's separate account was held to be community property only after proof that it could be traced to a joint account in which community property was kept). 44. CAL. CIV. CODE § 5110 (West Supp. 1972). This presumption does not apply where a different intent is expressed in the instrument. Id.

45. CAL. CIV. CODE § 5110 (West Supp. 1972) applies to "any real or personal property, or any interest therein or encumbrance thereon. . . ." (emphasis added).

46. See explanation in note 38 supra.

47. See note 45 and text accompanying supra.

48. Dunn v. Mullan, 211 Cal. 583, 588, 296 P. 604, 606 (1931), reached the result indicated in the text before the statutory presumptions were amended in 1935 making property acquired by spouses by a written instrument in which they are described as husband and wife presumptively community property. CAL. CIV. CODE § 5110 (West Supp. 1972). However, the same result will still be reached in cases where the spouses hold title to property by a written instrument in which they are not so described. Speer
If the general and special presumptions are used to classify all marital property on termination of a marriage, and are not successfully rebutted, the distribution of property would be as follows: The wife would be able to claim (1) 50% of all property acquired during marriage without a written instrument, (2) 50% of any single family residence acquired by the spouses as joint tenants, (3) 50% of all property acquired by the husband and wife by a written instrument in which they are described as husband and wife, (4) 75% of all property acquired by the husband and wife by a written instrument in which they are not described as husband and wife, (5) 100% of her share of any co-tenancy property acquired by a written instrument with anyone but her husband, and (6) 100% of all property acquired

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49. Whenever the actual time and mode of acquisition of any portion of the marital property cannot be proved, or whenever the terminated marriage was of long duration so that the presumptions are deemed to have great weight thus making rebuttal more difficult (Haldeman v. Haldeman, 202 Cal. App. 2d 498, 501, 21 Cal. Rptr. 75, 78 (1962) ), an inequitable distribution of property based on the presumptions is possible. Even if the presumptions regarding the status of all marital property are successfully rebutted, however, the property which is determined to be community, and in which the spouses are supposed to share equally, is not necessarily divided in half because of an exception to the general definition of community property which provides that a wife's personal injury damages received while living separate and apart from her husband are her separate property. Cal. Civ. Code § 5126 (West Supp. 1972) (In order to be considered to be living separate and apart spouses must be living in different places without the present intention of resuming marital relations. Makeig v. United Security Bank & Trust Co., 112 Cal. App. 138, 143, 296 P. 673, 675 (1931) ). There is no such exception for the husband (see Cal. Civ. Code § 5126 (West 1970) ) and personal injury damages received by him even while living separate and apart from his wife are community property. California Senator Holmdahl has already noted this inequality of treatment of spouses and proposed Cal. S.B. 1412 (1972) to make personal injury damages received by either spouse while living separate and apart from the other spouse the separate property of the spouse receiving the damages.

50. The general presumption of community property applies with respect to property which is not acquired through an instrument in writing and thus the property is divided equally between the spouses on termination of the marriage. See Estate of Walsh, 66 Cal. App. 2d 704, 708, 152 P.2d 750, 752 (1944).

51. A single family residence acquired by spouses as joint tenants is presumed to be community property and thus is equally divided on termination of the marriage. See text accompanying note 35 supra.

52. Property acquired by spouses through an instrument in which they are described as husband and wife is presumed to be community property and thus is equally divided on termination of the marriage. See text accompanying note 36 supra.

53. See text accompanying note 48 supra.

54. By virtue of Cal. Civ. Code § 5110 (West Supp. 1972), any interest in property held by a wife through an instrument in writing is presumed to be her separate property and fully owned by her.
in her name alone by an instrument in writing. By contrast, the husband, while claiming the same amount of property as the wife in situations 1-3, would receive only 25% of the property described in situation 4, 50% of the property described in situation 5, and 50% of the property described in situation 6.

Although the actual classification of property according to the above presumptions does not occur until termination of the marriage, inequities resulting from such presumptions may arise during the existence of a marriage since they are made conclusive in favor of persons dealing in good faith and for a valuable consideration with a married woman. Thus, a husband during marriage cannot claim against a bona fide purchaser from his wife any interest in the property purchased if under one of the classification presumptions the property is presumed to be the separate property of the wife. There is no similar conclusive presumption in favor of a bona fide purchaser of property from the husband, however, and even if he holds property in his name alone, an improper transfer of the property by him is voidable by his wife as to her one-half interest. There is one limited exception which provides that a purchase of real property from the husband is presumed valid provided the purchaser lacks knowledge of the marriage relationship. This presumption, however, is not conclusive and the wife can institute an action to avoid the instrument conveying title within a year from the date of record of the transfer, and such ac-

55. Id.
56. He receives half the property held as community property. See notes 50-52 supra.
57. See text accompanying note 48 supra.
58. A husband's share of co-tenancy property held with a third party is classified under the general presumption as community since there is no special presumption applicable to him; therefore his share is divided between himself and his wife and he receives only fifty per cent of his interest in such co-tenancy.
59. Even if a husband acquires property through an instrument in writing in his name alone, there is no presumption that it is his separate property and he holds it under the general community property presumption and must share it on division with his wife unless such presumption is rebutted.
61. See Gilmour v. North Pasadena Land & Water Co., 178 Cal. 6, 8, 171 P. 1066, 1067 (1918) (presumption that wife's share of real property owned jointly with her husband was separate was not conclusive and could be attacked because defendant was not alleged to be a bona fide purchaser for value).
62. See Strong v. Strong, 22 Cal. 2d 540, 140 P.2d 386 (1943) (wherein the wife sought to avoid a transfer of property in the name of her husband but was unsuccessful due to her untimely claim and her failure to prove her signature to the deed was gained by fraud).
63. CAL. CIV. CODE § 5127 (West 1970).
64. Id.
tion will succeed if she can show that the instrument attempted the conveyance of community property without her consent.\textsuperscript{65}

It is thus clear that California's community property system makes sex a determinative factor in classifying property as separate or community. In order to comply with the provisions of the Equal Rights Amendment, therefore, the presumptive system of classification will have to be changed. The most likely approach would be to extend application of the classification rules to include both sexes. This appears most likely for three reasons. First, evidence presented before the House subcommittee suggested that laws pertaining to general marital rights should utilize the word "spouse" throughout.\textsuperscript{66} If the California statutes used the word "spouse," it would be possible to continue the use of the classification procedures since classifications of property based on sex would be impossible. Second, and more specifically, evidence presented at committee hearings contemplated the continuance of laws which define the interests of spouses in property and provide for its division on termination of the marriage, but indicated that guidelines for such laws would require that each spouse have substantial rights\textsuperscript{67} to equivalent amounts\textsuperscript{68} of all marital property not acquired as a gift or through inheritance by only one of the spouses. Finally, the classification rules should be extended rather than nullified because they do not restrict the husband from ownership of property; rather they undertake the classification of property for both spouses, merely expressing a preference for the wife.\textsuperscript{69}

If classification rules were extended to apply to both spouses, the


\textsuperscript{66} 1971 House Hearings, supra note 3, at 276 (Dr. Bernice Sandler of the Women's Equity Action League citing the National Conference of Commissioners on Uniform State Laws).

\textsuperscript{67} The Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women (1963), cited in May 1970 Senate Hearings, supra note 20, at 238, concluded that:

[D]uring marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings. . . . Such right should survive the marriage. . . . See 1971 House Hearings, supra note 3, at 295 (remarks of Adele T. Weaver, then President of the National Association of Women Lawyers): "Generally, the effect of the proposed equal rights amendment would be to eliminate any discrimination whatsoever in the area of the right to . . . community property . . . between the spouses."

\textsuperscript{68} May 1970 Senate Hearings, supra note 20, at 116 (remarks of Marguerite Rawalt): "[T]he proposed constitutional amendment would crystallize a 50-50 marital partnership principle. . . ."; 118 CONG. REC. S. 4142 (daily ed. Mar. 17, 1972) (remarks of Senator Cook) (Property owned by married persons, other than separate property, would be divided on a "50-50 basis" by use of the Equal Rights Amendment).

\textsuperscript{69} See notes 27 and 28 supra.
following changes in presumptive classification of property would occur. Any interest in property acquired by a husband through an instrument in writing and held (1) jointly with his wife when they are not described as husband and wife in the instrument, (2) jointly with someone other than his wife, or (3) solely by him, would be presumed to be his separate property, unlike its classification under the present law. The proposed Equal Rights Amendment would not prevent the legislature from continuing its conclusiveness of presumption rule.

Possibly an argument could be made that the distinctions drawn between the sexes by the classification rules are reasonable and that such rules should remain unchanged. This argument, which was actually made in reference to support laws between husbands and wives, maintains that laws providing for the division of property at the end of a marriage should give wives an advantage since they were prevented during marriage, because of their childbearing function, from developing a career which would allow them to provide for themselves in later years. This argument, however, ignores the clear intent expressed by legislative proponents of the amendment that state domestic relations laws should not be based on sexual stereotypes, but should treat both sexes equally, thus denying either spouse any built-in advantages in community property of the marriage.

II. SUPPORT RIGHTS BETWEEN SPOUSES

Although spouses in California have an obligation during marriage to support each other, the community property system places a heavy

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70. An exchange between Adele Weaver, then President of the National Association of Women Lawyers, and Representative Edwards involved a discussion of the effects of the conclusive presumptions in favor of a wife in California and indicated that although the discrimination against men would have to be eliminated, it could be done by applying the same law to both spouses. 1971 House Hearings, supra note 3, at 294.

71. See text accompanying note 88 infra.

72. 1971 House Hearings, supra note 3, at 74 (remarks of Senator Ervin).


ier burden of support upon the husband than it does upon the wife because the wife has to meet fewer qualifications before being able to demand support, and because the property of the wife which is liable for support is less extensive than that from which a husband can be forced to furnish support.

A husband generally can demand support from his wife's separate estate only if he has exhausted all community property, all his separate property, all quasi-community property, is unable to support himself due to infirmity, and is living with his wife. In only one situation can a husband demand support without meeting these requirements. This occurs when the husband contracts for a necessity furnished to either spouse while they are living together. In such a case the wife may become liable to the contract creditor to the extent of her earnings, her personal injury damages, and her separate property acquired as a gift from her husband.

In order for a wife to demand support the only requirement is that she must not be separated from her husband by agreement, unless such agreement expressly requires support. The property from which the husband owes support is not limited in any way—his entire estate is liable. Further, if the husband fails to provide such support, his entire estate can be reached by a third party who furnishes

regarding support duties do not specifically discuss contracts by one of the spouses for necessities, it is clear that requests for support involve a consideration of whether a spouse requires some necessity of life. Cal. Civ. Code § 246 (West 1970). Thus the provisions establishing the liability of marital property for necessities contracts (Cal. Civ. Code §§ 5117, 5121 (West 1970)) will be discussed in this Comment as well as the general duty of support which does not depend on the establishment of such a contract debt. See text accompanying notes 78-79 infra for a discussion of Cal. Civ. Code §§ 5117, 5121 (West 1970).

76. See note 22 supra for definition of quasi-community property.
78. Id. §§ 5117 (making earnings and community property personal injury damages of the wife liable), 5121 (making separate property of the wife acquired as a gift from her husband liable). What is deemed a necessity is dependent on the social position and standard of living of a couple. See Wisnom v. McCarthy, 48 Cal. App. 697, 701 192 P. 337, 339 (1920).
80. Id.
81. Id. § 5121.
82. Id. § 5131. Note that it is the duty of the husband to support his wife even though she has an estate of her own. See In re Ferrall's Estate, 41 Cal. 2d 166, 175, 258 P.2d 1009, 1013 (1953).
support to the wife in good faith.  

Since sex is a factor in determining the extent of a married person's obligation to support a spouse it is clear that the proposed amendment would require changes in the support laws. Probably such laws would be extended to require the same degree of support from both spouses. It was argued by Senator Ervin that support laws could be nullified by the amendment, thus depriving wives of support they are legally entitled to receive, but this argument overlooks the Senator's own position that support laws are not intended to discriminate against husbands by depriving them of property rights, but rather are primarily intended to provide meaningful protection for wives. In fact, the support laws provide meaningful protection for both spouses since they give a married person a statutory right to aid which is not available to a single person. Such laws will not be nullified but will be extended.

Senator Ervin alternatively suggested that if the Equal Rights Amendment is enacted the primary duty of support placed on the husband should be continued as a reasonable distinction on the basis of sex because it is a reflection of the reality that women are predominantly homemakers, further the existence of the race, and are unable to pursue a career during their marriage which could provide for their support in later years. Men, therefore, must provide such support. This argument, however, ignores the intent of the amendment which is to base laws on individual circumstances and needs and not on sexual stereotypes of the functions of a husband and wife. Furthermore, much of the testimony regarding support rights was directed toward establishing a proper equalization of the responsibilities of support between

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84. Id. § 5130.
85. 1971 House Hearings, supra note 3, at 74 (remarks of Senator Ervin). This position was also taken by Representative Celler. 117 Cong. Rec. H. 9245 (daily ed. Oct. 6, 1971).
86. 1971 House Hearings, supra note 3, at 74 (remarks of Senator Ervin):

To enable women to do these things [raise children and make homes for their families] and thereby make the existence and development of the race possible, these State laws impose upon husbands the primary responsibility to provide homes and livelihoods for their wives and children. . . .

87. See note 27 supra.
89. See id. at 93 (statement of Representative Mikva). In 1972 Senate Report, supra note 1, at 17 (quoting a report of the Association of the Bar of the City of New York) it was made clear that the deletion of sexual stereotypes from support laws “would not require both a husband and a wife to contribute identical amounts of money to a marriage.” Rather each spouse would be considered as contributing to a marriage whether in a monetary or nonmonetary fashion, and whichever spouse is the primary wage earner would be required to provide support in compensation for the homemaker spouse's duties. Id.
spouses and not toward continuing discriminatory support laws.\footnote{90}{1971 House Hearings, supra note 3, at 173 (remarks of Norman Dorsen on behalf of the American Civil Liberties Union); \textit{id.} at 330 (remarks of William Rehnquist, then Assistant Attorney General); 117 CONG. REC. H. 9248 (daily ed. Oct. 6, 1971) (remarks of Representative McClory). This is also the approach taken in \textit{Equal Rights for Women}, supra note 18, at 945, which was approved by many legislators. 118 CONG. REC. S. 4250 (daily ed. Mar. 20, 1972). \textit{But see} Recommendation 17 in the Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women (Oct. 1963), \textit{cited in May 1970 Senate Hearings, supra note 20, at 242-43.}}

The question becomes, therefore, whether the support laws should be equalized by requiring the same degree of support from each spouse as is already owed by the husband, or by requiring the degree of support from each spouse that is now owed by the wife. There appears to be no reason why support rights between spouses should be more limited than they are at present. In fact, the legislative intent appears to be in favor of placing additional burdens of support upon the spouses.\footnote{91}{117 CONG. REC. H. 9248 (daily ed. Oct. 6, 1971) (remarks of Representative McClory). Even recommendations that spouses not be completely equalized in regard to support rights indicated a tendency to increase existing support rights. \textit{May 1970 Senate Hearings, supra note 20, at 242-43.}} One opponent of the amendment has argued that it would make support more difficult to obtain for the many women who have a heavier work burden than their husbands due to their participation in traditional family roles as well as in other employment.\footnote{92}{117 CONG. REC. H. 9245 (daily ed. Oct. 6, 1971) (remarks of Senator Celler).} To the extent that this argument is true, it can be avoided by requiring the same degree of support from a wife as is presently required from the husband. Such an approach would not eliminate any of the circumstances under which a wife is currently able to claim support.\footnote{93}{Furthermore, the additional duties of support required of the wife under this approach would not place her in a position any worse than that occupied by a husband having similar difficulty supporting a spouse. 118 CONG. REC. S. 4142 (daily ed. Mar. 17, 1972) (remarks of Senator Cook).}

If the support laws were thus extended to require the same support obligation from the wife as is currently required from the husband, the wife would be entitled to receive support under the same circumstances as she is now, but she would be obligated to provide support out of her entire separate estate without any limitation regarding contracts for necessities. A husband would be entitled to support under the same circumstances that a wife is now entitled to support and would be obligated to provide support from the same property as he does presently. These changes in the support laws would not necessarily have a direct effect in the marriage because the community property system is not currently used to
impose and enforce a particular economic standard on spouses in their day to day affairs.\textsuperscript{94} However, the amendment would at least require that any statutes governing marital relationships indicate that marriage involves equal responsibilities for both spouses, and that financial risks in marriage are to be borne by the couple, and not primarily by the husband.

III. MANAGEMENT AND CONTROL OF COMMUNITY PROPERTY

In California the husband has always been considered the manager of community property.\textsuperscript{95} For most of the history of the community property system in California, moreover, the wife not only lacked managerial powers over community property, but also did not possess either a legal or an equitable estate in the community property.\textsuperscript{96} Her interest in such property was a mere expectancy, like the interest which an heir has in the property of an ancestor.\textsuperscript{97} Only upon termination of the marriage other than by her own death did she receive any of the community property.\textsuperscript{98}

Although it was argued that statutory changes in 1891 and 1917, placing restrictions on the husband's management and control by requiring the wife's consent to certain transactions,\textsuperscript{99} vested one-half ownership of the community property in the wife,\textsuperscript{100} the California courts soon ruled that the nature of the wife's interest had not changed but that the husband's management and control had merely been limited to safeguard the wife against inconsiderate acts of the husband in dealing with the community property.\textsuperscript{101} Even when in 1923 the wife was given testamentary disposition over one-half of the community

\textsuperscript{94} Id. at S. 4144. See Equal Rights for Women, supra note 18, at 945 (discussing the reluctance of courts to interfere with an on-going marriage).
\textsuperscript{95} See text accompanying notes 120-22 infra for a discussion of the husband's broad powers as the manager of the community property.
\textsuperscript{96} Packard v. Arellanes, 17 Cal. 525, 541 (1861).
\textsuperscript{97} Van Maren v. Johnson, 15 Cal. 308, 311 (1860).
\textsuperscript{98} In re Estate of Burdick, 112 Cal. 387, 393, 44 P. 734, 735 (1896).
\textsuperscript{99} See generally Stewart v. Stewart, 199 Cal. 318, 335-39, 249 P. 197, 204-06 (1926), subsequently approved in Stewart v. Stewart, 204 Cal. 546, 269 P. 439 (1928), for an excellent discussion of the 1891 and 1917 amendments and their effect on early California community property law.
\textsuperscript{100} Id. at 338-39, 249 P. at 205-06; Spreckels v. Spreckels, 116 Cal. 339, 343-44, 48 P. 228, 229 (1897).
property, it was held that no title to the community property vested in the wife during her lifetime. Finally in 1927 the California legislature defined the respective interests of the husband and wife in community property during the marriage as "present, existing and equal interests under the management and control of the husband. . . ." This phrase was interpreted by the courts to mean that each spouse had a vested interest in the community property.

Even though the wife's interest in the community property is now considered to be vested, the wife's privileges with respect to community property have not been greatly altered. This is true primarily because of the manner in which the courts have correlated the definition of spouse's interests as "equal" with the husband's power of management and control. The courts have treated the wife's equal interest as merely an interest in a quantitatively equivalent amount of community property as that possessed by the husband. The wife's ability to influence the use of community property has continued to be completely indirect through the operation of several limitations on the husband's management and control which were already in existence before 1927. In 1951 and 1971 the enactment of two stat-

106. The concept of a present interest in property has affected the wife in at least two ways, neither of which have a substantial impact upon the use by her of community property during her lifetime. First, because of her present interest, statutory actions with respect to community property which accrue to her during her lifetime are not forfeited at her death, but pass to her personal representative. Harris v. Harris, 57 Cal. 2d 367, 369 P.2d 481, 19 Cal. Rptr. 793 (1962); Estate of Kelley, 122 Cal. App. 2d 42, 264 P.2d 210 (1953). Second, a wife is able to file her own income tax return indicating community property as income. See Grolemund v. Cafferata, 17 Cal. 2d 679, 688-89, 111 P.2d 641, 646 (1941) (wherein the court stated that federal tax cases holding that a wife in California has such a present vested interest in the community property that she may file a separate tax return have no bearing on the question of whether the husband retained full management and control of community property).
107. See Estate of Gansner, 222 Cal. App. 2d 390, 393, 35 Cal. Rptr. 213, 214 (1963) (wherein the court discussed a wife's one-half undivided interest in community property while describing the meaning of the word "equal"). Note, however, that when the community property is actually divided on termination of a marriage, the spouses do not necessarily receive quantitatively equivalent amounts of community property. See text accompanying notes 29-65 supra.
108. These limitations are discussed in the text accompanying notes 110-138 infra. The fiduciary duty of the husband had already been discussed as early as 1910. Lynam v. Vorwerk, 13 Cal. App. 507, 509, 110 P. 355 (1910) (analogizing to a partnership).
utes did give the wife direct powers of management and control over certain portions of the community property. However, neither the limitations on the husband's power, nor the divestment of his power with respect to certain community property, can be considered to have increased the wife's rights to such an extent that sex has been eliminated as a determinative factor in deciding the nature and extent of management rights between the spouses.

The wife can indirectly affect the husband's management and control by (1) asserting the fiduciary duty which the husband owes to the wife, (2) withholding consent to certain transactions involving community property, (3) exercising testamentary control over one-half of the community property, and (4) entering into an agreement with the husband whereby the status of marital property is changed.

Because of his power of management and control, the law has placed a fiduciary duty upon the husband to act in good faith toward his wife while dealing with community property. This duty, analogous to that of a partner or trustee, prevents a husband from gaining an unfair advantage over his wife with respect to the community property by manipulating it so as to maximize his share upon divorce. The fiduciary duty, however, is apparently a very weak one and has rarely been applied during the existence of a marriage. Unlike a


113. In Fields v. Michael, 91 Cal. App. 2d 443, 205 P.2d 402 (1949), the court held the estate of the decedent husband (W.C. Fields) liable for his mismanagement during the marriage which involved making a gift of community property without the consent of the wife. Since the usual remedy of allowing a wife to avoid such transactions was deemed to be ineffective in this particular case, the wife was allowed to col-
trustee, a husband is absolved from responsibility for a loss sustained by virtue of an improvident investment,\textsuperscript{114} he is not required to keep complete and accurate records of income received and disbursed,\textsuperscript{115} and the only penalty placed upon his failure to sufficiently disentangle the community property from his separate property is that if he is unable to trace his own separate property it might be treated as community property upon dissolution.\textsuperscript{116}

The wife can also affect the husband's power of management and control by withholding consent to certain transactions involving community property. California requires the wife's consent in three situations. First, the husband cannot make a gift of community personal property without the wife's written consent.\textsuperscript{117} Second, the husband cannot transfer or encumber as a gift or for value any household items (furniture, furnishings, or fittings of the home) or any of his wife's or minor children's clothing or wearing apparel which are held as community property without the written consent of the wife.\textsuperscript{118} Third, the husband cannot transfer any community real property without the wife's written consent.\textsuperscript{119} To understand the extent to which the consent requirements fail to equalize effectively the rights of the husband and wife, one need only note what the husband may do in spite of these consent requirements. With respect to the community personal property over which he has management and control, the husband has the same "absolute power of disposition, other than testamentary, as he has of his separate estate. . . ."\textsuperscript{120} Thus, as long as he does not violate the express consent provisions indicated above, the wife has no control over his treatment of the community personal prop-

\begin{footnotes}
\item[114] Williams v. Williams, 14 Cal. App. 3d 560, 566-68, 92 Cal. Rptr. 385, 388-89 (1971). Note that the cases wherein the husband has been held to account for community property have involved clear violations of statutory rights of the wife. See, e.g., Horton v. Horton, 115 Cal. App. 2d 360, 364, 252 P.2d 397, 399-400 (1953); Fields v. Michael, 91 Cal. App. 2d 443, 448, 205 P.2d 402, 406 (1949) (the wife was allowed to recover the value of her community interest in gifts made by her decedent husband without her consent).
\item[116] The wife, however, could also be penalized, through no fault of her own, for a husband's failure to keep accurate records because she might be unable to prove that certain property was in fact acquired during marriage.
\item[117] CAL. CIV. CODE § 5125 (West 1970).
\item[118] Id.
\item[119] Id. § 5127.
\item[120] Id. § 5125; Williams v. Williams, 14 Cal. App. 3d 560, 566, 92 Cal. Rptr. 385, 388 (1971).
\end{footnotes}
erty. He is not required to follow any of his wife's wishes with respect to its management, and there is nothing to prevent him from hoarding, squandering, or even destroying most community personal property.\(^{121}\) The same appears to be true with respect to community real property although there is no special statutory provision to that effect. So long as the husband does not transfer it without the wife's consent she has no legal influence over any purpose for which it is used.\(^{122}\) Finally, none of the consent requirements imposed on the husband make a transfer by him without his wife's consent void. Such transactions are merely voidable and the wife must affirmatively initiate a legal action in order to invalidate a transfer.\(^{123}\)

A third way in which the wife can affect the husband's power of management and control arises because of a statute providing that upon the death of either spouse one half of the community property belongs to the surviving spouse and the other half is subject to the testamentary control of the decedent.\(^{124}\) Under this provision, if a husband dies his management and control is immediately limited to testamentary management and control of his one-half of the community property. If a wife dies she immediately gains management and control, albeit testamentary, of her one-half of the community property. It appears, therefore, that the spouses possess equal rights to exercise testamentary control over one-half of the community property. An analysis from the viewpoint of the surviving spouse, however, indicates an important discrimination. Whether a husband dies testate or intestate, a surviving wife must wait until the completion of the administration of her husband's estate (the time during which a probate court decides the nature of a decedent's property and how it should be distributed)\(^{125}\) before she gains

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121. *Verrall & Sammis, supra* note 10, at 227-28:

The general language of Civil Code § 5125 gives to the husband the right to possession, to physical exploitation, and to exchange, mortgage, or sell community property. In other words it gives to him the incidents of ownership except insofar as they are limited by specific statutory provision or by equitable doctrines because of his fiduciary character. (Footnotes omitted).

The fiduciary duty is discussed primarily in cases involving transfers of community property (*see id.*) although it has also been discussed in a case involving a failure to disclose the extent of community property on divorce. Baker v. Baker, 260 Cal. App. 2d 583, 585, 67 Cal. Rptr. 523, 524 (1968).

122. See note 121 supra.


125. Rosenberg v. Commissioner, 115 F.2d 910, 912 (9th Cir. 1940).
management and control over any community property formerly under his management and control.\textsuperscript{128} If there are any problems in administration of his estate, there may be a substantial delay before she receives full possession and use of such community property. When the wife dies intestate, however, there is no administration and the husband receives all of the community property outright.\textsuperscript{127} When the wife dies testate, the property passing under her will is subject to administration.\textsuperscript{128} The husband, however, during administration of his wife's estate, retains the same power of management and control over all the community personal property passing under her will as he had during her lifetime,\textsuperscript{129} and only has a forty day restriction on his power to transfer community real property passing under her will.\textsuperscript{130} He is only required to transfer community property to her personal representative to the extent necessary to carry her will into effect.\textsuperscript{131} Furthermore, the community property passing to the wife through the administration of the husband's estate is subject to his debts,\textsuperscript{132} while the probate court administering the wife's estate does not subject community property to the debts of the wife.\textsuperscript{133} She thus may receive less community property than a husband would under the same circumstances.

Finally, the wife can indirectly influence a husband's power of management and control by entering into a voluntary agreement with the husband.\textsuperscript{134} There are two possible types of voluntary arrangements:\textsuperscript{135} (1) an antenuptial agreement,\textsuperscript{136} and (2) a postnuptial agreement.

\textsuperscript{129} Id. § 202.
\textsuperscript{130} Id. § 203. Note that he may be subject to a longer restriction if an interest in the real property is claimed by another under his wife's will.
\textsuperscript{131} Id. § 202.
\textsuperscript{135} It is also possible to establish an agency relationship between spouses. Hulman v. Ireland, 205 Cal. 345, 348-49, 270 P. 948, 950 (1928); Stegeman v. Vandeventer, 57 Cal. App. 2d 753, 759, 135 P.2d 186, 190 (1943). This situation differs from the postnuptial or antenuptial agreement in that it does not change the nature of property. Instead, the agency theory serves mainly to benefit creditors of the wife in situations where a husband has participated with her in transactions which have resulted in liabilities to third parties. The husband is considered to have ratified the acts of his wife by his participation (Tinsley v. Bauer, 125 Cal. App. 2d 724, 728, 271 P.2d 116, 118 (1954)) and is liable for her actions to the extent of the community property and his separate property. Meyer v. Thomas, 37 Cal. App. 2d 720, 726, 100 P.2d 360, 363 (1940). Under this theory it can thus be said that the wife has to some
agreement. By virtue of the statutes providing for these agreements spouses may change community property to separate property of one spouse or vice versa. In this manner a wife could gain control over property which was once community property. The difficulty, however, is that such arrangements require the cooperation of the husband and are totally unavailable to the wife of an unwilling spouse.

In 1951 a statute was enacted giving the wife management and control over her own earnings and personal injury recoveries. This statute, however, did not eliminate sex as a determinative factor in the management and control provisions of the community property system. Although it follows the same general outline as those statutes granting the husband management and control insofar as it provides that the wife cannot make a gift of the community property under her management and control without the written consent of her husband, three differences exist among the statutes giving the husband and the wife management and control which disfavor the wife: (1) the wife is given management and control over a very limited portion of the community property; (2) the wife's management and control is subject to divestment unlike her husband's power; and (3) the statute giving the wife management and control does not describe her power as liberally as do the provisions describing the husband's power and could easily be construed against her.

First, by virtue of the statute, the wife's management and control extends only to her earnings and to personal injury damages received by her. Not only is it impossible for her to manage and control any items not falling within these two types of property, it also appears that items acquired with her personal injury damages and earnings are not subject to her management and control. The Law Revision Commission Comments following Civil Code section 5124, for instance,
suggest that it is impossible for the wife to manage community real property.\textsuperscript{142} Furthermore, although the statute expressly provides that the wife cannot give away community property under her management and control without her husband's consent,\textsuperscript{143} the legislators did not find it necessary to expressly prevent the wife from selling household furnishings or her spouse's clothing without her husband's consent, as they expressly limit the husband;\textsuperscript{144} it follows, although no case has discussed the issue, that they did not intend for her to have management and control over such property even if purchased with her earnings.

Second, the wife loses the right to manage and control her earnings and personal injury recoveries acquired by her during marriage if she commingles such property with property under the management and control of the husband.\textsuperscript{145} The husband, on the other hand, does not lose his management and control in a similar fashion.

Third, the statute which gives the husband management and control over community personal property describes his power as an "absolute power of disposition" such as he has over the separate estate.\textsuperscript{146} This type of language is noticeably absent from the provision giving the wife management and control.\textsuperscript{147} Since the effect of such absence is as yet undecided by case law, the statute is certainly subject to the interpretation that the legislators did not intend to give the wife a power as broad as that given the husband.

The only other statute providing for the wife's management and control was enacted in 1971 and provides that the wife shall have management and control of her share of the community property to the extent that it is necessary to support her children.\textsuperscript{148} However, the wife must bring a legal proceeding in order to gain such management and control.\textsuperscript{149}

\textsuperscript{142} The Law Revision Commission Comment following \textsc{Cal. Civ. Code Ann.} § 5124 (Deering 1972) states that: "The husband, of course, retains the right to manage and control the community real property. . . ."

\textsuperscript{143} \textsc{Cal. Civ. Code} § 5124 (West 1970).


\textsuperscript{145} \textsc{Cal. Civ. Code} § 5124 (West 1970).

\textsuperscript{146} \textit{Id.} § 5125.

\textsuperscript{147} \textit{Id.} § 5124.

\textsuperscript{148} \textit{Id.} § 5127.5 (West Supp. 1972).

\textsuperscript{149} \textit{Id.} Furthermore, in determining the wife's interest the court will first exclude support liability of the husband for prior marriages and $300 gross monthly income. \textit{Id.} Thus her interest may be severely limited.
While classification on the basis of sex has been argued to be reasonable in the area of support rights, the same argument has not been expressly advanced with respect to management and control.\footnote{For a summary of this argument regarding support rights see text accompanying note 88 supra.} Nevertheless, it could be argued that as a corollary to the husband's position as the traditional provider of the family, he should also be the natural manager of the community property.\footnote{Senator Ervin did make a general statement that no nation's laws should ignore the functional differences between men and women, without referring specifically to support laws. 1971 House Hearings, supra note 3, at 65. Furthermore, there seems to be a prevalent attitude that since the husband is required to support the family, and is thus the spouse drawing the paycheck, he should have the right to decide its usage. L. Kanowitz, Women and the Law: The Unfinished Revolution 70 (1969) (“the law often seems to be applying on a grand scale the modest principle that ‘he who pays the piper calls the tune.’”)} This argument, however, totally ignores the intent of the proposed Equal Rights Amendment which deems sexual stereotypes as inadmissible factors in a law.\footnote{Discussion of the proposed amendment did not produce any suggestions that management of property rules would be completely nullified. Rather, much of the evidence before the federal legislators involved discussion of the methods of bringing the sexes into some sort of parity with regard to property management. May 1970 Senate Hearings, supra note 20, at 147, 150-51 (The Report of the Task Force on Family Law and Policy to the Citizen's Advisory Council on the Status of Women (April 1968) discussing the Texas method of giving the wife some management in marital property); id. at 236-38 (The Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women (Oct. 1963) discussing several foreign nations' methods of giving both spouses management powers over marital property and recommending that “each spouse should have a legally defined and substantial right in . . . the management of such . . . property [the other spouse's earnings and property acquired through those earnings] . . .” during marriage); 1971 House Hearings, supra note 3, at 200-201 (remarks of Marguerite Rawalt, then Vice Chairwoman and Counsel of Women United).} Neither sex should be considered as the obvious manager; rather, individual circumstances and capabilities should be taken into account.\footnote{1972 Senate Report, supra note 1, at 17; see 1971 House Hearings, supra note 3, at 93.} Thus the amendment would not allow the management and control laws to remain unchanged.

It is obvious that a property system which fails to provide a person capable of dealing with the property would be unworkable. It thus appears that nullification of the management and control laws is not contemplated by the amendment,\footnote{1972 Senate Report, supra note 1, at 12.} and that the California community property laws dealing with management and control would be ex-
The management and control laws bestow benefits on one sex and not the other since the provisions making the husband or wife the manager of property bestow on him or her the primary incidents of ownership of that property—possession and use. The provisions limiting that control merely bestow on the opposite spouse protections against its improper use.

There is more than one possible course available in extending application of the management and control laws to include both spouses. First, there seems to be no reason a statute could not be enacted providing that each couple could decide whether one or both of them would manage and control their community property. Second, it has been suggested that the state legislature provide that:

"[E]ach spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person," and if community property subject to the management of one spouse is mixed or combined with that of the other spouse, it is subject to joint management unless the spouses agree otherwise.156

The third possible solution would be to give the spouses joint management and control over all of the community property. Since the last approach is the one that has been taken by several legislative proposals in California157 and since it appears that the first two possibilities could result in a multitude of creditor problems, with creditors trying to determine which of the spouses could properly create liabilities on the community property, the effect of the last approach on the California community property system will be discussed here.

If California law provided that a husband and wife should have joint management and control of the community property it would be clear that the wife's "present, existing, and equal" interest would include the right to possess and use the community property to the same extent as her husband. Furthermore, the limitations on the husband's management and control would expectedly be affected. First, there is no reason each spouse should not owe a fiduciary duty to the other regarding the community property. Although neither spouse would necessarily be

155. See note 27 supra.
required to keep a strict accounting of community property, each spouse could be expected to have the right to be informed of the use of the community property because of the joint management and control. On dissolution of a marriage the wife’s burden of tracing would then be no greater than that of the husband. Second, the statutes requiring a husband’s or a wife’s consent to certain transfers of community property exist only because management and control is vested in one person. With joint management and control such statutes would not be necessary. However, there would be nothing to prevent the legislature from requiring that certain transactions (for example, those over a prescribed amount of money) have the consent of both spouses, as long as sex is not a determinative factor in the requirement. Third, statutes regarding administration of a deceased spouse’s estate would have to be brought into parity. Insofar as the husband currently has management and control of the community property during the administration of the wife’s estate while she has no management and control of community property during administration of his estate, and insofar as the community property is subject to his debts but not hers on the death of the respective spouses, the statutes are inconsistent with the idea of joint management and control. This view is already reflected in proposed statutory changes to the California community property system. Fourth, voluntary agreements between the husband and wife regarding management and control of the community property would be unaffected since sex is not a determinative factor in their operation. Obviously, the statutes which give the wife management and control of certain portions of the community property could be eliminated as unnecessary—she would, without these statutes, have management and control, although jointly, over all the community property.

158. In fact, such an approach was suggested in the Report of the Task Force on Family Law and Policy to the Citizen’s Advisory Council on the Status of Women (April 1968). *May 1970 Senate Hearings, supra* note 20, at 150-51: “[S]ome legal control of disposing of property during the lifetime of the spouses would be necessary so the husband (or wife) could not defeat the rights of the other by selling or giving away all his [joint] property while living.” The Task Force, advocating a minimum of legal restrictions on the use of property, suggested that consent of the other spouse be required at least for any sale of the home and for excessive gifts of the joint property.

Arguments Against the Proposed Amendment and Its Application to the California Community Property System

There are two arguments against applying the proposed Equal Rights Amendment to the California community property system. First, it might be argued that because the community property system balances its sexually discriminatory aspects between the sexes, overall the spouses are equally disadvantaged, and consequently there would be no need to change the system after adoption of the amendment. Second, it has been argued that if the amendment were applied to family relations laws it would have a tendency to create social disorder; in particular, it would cause the break-up of marriages. Another argument opposes ratification of the amendment, maintaining that it is unnecessary because of the Fourteenth Amendment Equal Protection Clause.

With respect to the first argument, there is no indication that balancing inequalities created by sexual discrimination between spouses within a group of laws would satisfy the amendment's requirement that sex be a non-determinative factor in all laws. Furthermore, even if such a balanced system did not violate the Equal Rights Amendment, the California community property system is not so balanced as to prevent unequal treatment of one of the spouses. The disadvantages of the wife in the California community property system are more substantial than those of the husband. She is disfavored by the management and control provisions, which regulate the daily use of the property. The husband is disfavored by the presumptions classifying property acquired during marriage, which are almost exclusively intended to affect spouses only on termination of a marriage, and by the support laws, which are generally not invoked except in the case of separated spouses.

The second criticism, which is concerned with familial disruptions, clearly is not applicable regarding classification presumptions and support

162. Cal. Civ. Code § 5110 (West Supp. 1972), making the presumptions conclusive in favor of a third party bona fide purchaser dealing with the wife, is an exception so far as it affects the spouses during their lifetimes.
rights between spouses, since such laws do not have an effect upon spouses while they are living together. With respect to the management and control rules, which do affect an on-going relationship, it is arguable that a system of joint management and control could actually add to the solidarity of the family unit because of its explicit recognition of marriage as a partnership in which cooperation and agreement is necessary. Further, any disruptive influence that might exist could be due to incompleteness in the change in women's status, and stabilization could occur when discrimination on the basis of sex is completely curbed.  

Finally, ratification of the proposed Equal Rights Amendment has been denounced as unnecessary by those who maintain that the Fourteenth Amendment Equal Protection Clause could be used to eliminate all discrimination on the basis of sex.  

There are some indications, however, that the Equal Protection Clause would be ineffective with regard to community property laws. There is evidence that the Equal Protection Clause was not originally intended to apply to women, and it has certainly not been so applied in the past. Recently, however, the Supreme Court in Reed v. Reed used the Fourteenth Amendment Equal Protection Clause to invalidate a statute which gave men preference over women as administrators of decedents' estates. In Reed the issue, as characterized by the Court, was whether or not the classification on the basis of sex had a "rational relationship to a state objective . . . sought to be advanced by the operation . . ." of the statute. Reed did not treat the classification as being so inherently suspect as to require the state to prove a compelling justification for the
classification,\textsuperscript{171} as must be done in cases of classification by race.\textsuperscript{172} Therefore, under the Fourteenth Amendment's Equal Protection Clause, the issue regarding the California community property system would be whether classifications on the basis of sex have a rational relationship to the permissible objectives of the community property laws. Some statements by the \textit{Reed} Court and by certain opponents of the Equal Rights Amendment suggest that a rational relationship might be found to exist.\textsuperscript{172} Thus, a more specific law is needed to eliminate classifications that, while admittedly discriminatory, might nevertheless be upheld under the "rational relationship" test of the Equal Protection Clause. The Equal Rights Amendment will allow for some classifications, but will demand a test much stricter than that being used under the Equal Protection Clause.\textsuperscript{174} Furthermore, regardless of the manner in which the Equal Protection Clause might eventually be interpreted with respect to sexual discriminations found in California's community property laws, if the Equal Rights Amendment is ratified it would apply to such discriminations in lieu of the Equal Protection Clause because of its greater specificity regarding sexual classifications.\textsuperscript{175}

\textsuperscript{171} Others have also interpreted \textit{Reed} as having adopted the lenient rational relationship test where sexual discrimination is concerned. Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972); 118 Cong. Rec. S. 4137 (daily ed. Mar. 17, 1972); \textit{id.} at S. 4141. \textit{But see} Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (holding that a classification on the basis of sex is a suspect classification which violates the Fourteenth Amendment Equal Protection Clause unless a compelling state interest can be shown for its existence).

It should be noted that the California community property system has never been attacked on the basis of the Equal Protection Clause. Furthermore, even if sexual differentiation in the community property laws were held to be in violation of the Equal Protection Clause by the California Supreme Court, there is no certainty that the United States Supreme Court would uphold that view if the issue were presented to it.\textsuperscript{172} Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (listing cases holding certain classifications to be suspect).

\textsuperscript{173} \textit{Reed} indirectly suggested that there may be some merit in statutes preferring one spouse in order to avoid family conflict by noting that "whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context [a mandatory preference for males with the objective of eliminating the necessity for a hearing in choosing the administrator of an estate] may not lawfully be mandated solely on the basis of sex." 404 U.S. at 76-77 (emphasis added). Prominent legislative opponents of the amendment have insisted that there are unalterable role differences between men and women which rationally require sexual distinctions in state property systems. \textit{1971 House Hearings, supra} note 3, at 65.

\textsuperscript{174} See notes 7 & 26 and text accompanying notes 6-9 \textit{supra}, for a discussion of permissible classifications under the proposed Equal Rights Amendment.

\textsuperscript{175} \textit{See 1971 House Hearings, supra} note 3, at 83, wherein Senator Ervin noted that the Supreme Court is not likely to say that Congress passed an amendment to accomplish a purpose which could already be accomplished by the Fourteenth Amendment.
CONCLUSION

As a result of the ratification of the Equal Rights Amendment several basic changes would probably be made in California law. First, although California would be able to retain its rules regarding classification of property, such rules would have to be made equally applicable to all persons and could not distinguish between spouses. Second, support rights and liabilities during marriage would have to be equalized between spouses. Third, the right to manage and control community property during marriage would have to be given to both spouses. With respect to these areas of California's community property system there appears to be no basis upon which current sexual classifications could be upheld under the Equal Rights Amendment.

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