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I. INTRODUCTION

Statutory Pattern

Washington's present community property laws have, in basic pattern, remained unchanged since the enactment in territorial days of the Code of 1881. The statutes, in two separate sections, provide that each spouse owns, separately, all property owned at the time of marriage, any property thereafter acquired gratuitously, and the rents, issues and profits of separate property. Property acquired after marriage otherwise than as provided in the two separate property sections is community property.

The husband has management of all community property and inter vivos power to dispose of the community personal property but cannot directly convey or encumber community

* Statutory citations, for the most part, are to the Revised Code of Washington (1953 format) for convenience, even though there are changes in the code from the phraseology of the session laws. Most of the statutes material to community property problems are included in Chapter 26.16 of that code.

In the interests of brevity the writer has usually confined case citations to the recent or to older illustrative cases rather than tracing the development of any particular principle through the cases. It is believed that this will fairly demonstrate the current position of the Washington Supreme Court, and as one of the members of that court explained in suggesting citations in briefs only to the most recent case, it can be assumed that the reader has access to the digests and citators. Citations are further limited to Washington cases for two reasons: (1) this discussion is designed to present a summary picture of Washington's community property law, only; and (2) in many instances the Washington Supreme Court has limited its reported consideration to Washington cases, an approach frequently inevitable currently because a present problem may be the result of earlier developments peculiar to the Washington cases.

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1. The statutory pattern and its development are briefly summarized in Hill, Early Washington Marital Property Statutes, 14 Wash. L. Rev. 118 (1939).
3. Id. at 26.16.030.
4. Ibid.
real property without the wife's joinder in the appropriate instrument.\textsuperscript{5} Each spouse may devise or bequeath his or her half of the community property,\textsuperscript{6} and may deal in all respects with his or her separate property as if unmarried.\textsuperscript{7}

\textit{Man and Woman Unmarried}

If property is acquired while a man and woman are living together, it can be community property only if the acquirer and the other are husband and wife.\textsuperscript{8} The interests of the two if unmarried are necessarily separate property, but the resolution of the problems of ownership between the two can be affected by the meretricious or innocent character of the relationship.\textsuperscript{9} In the absence of evidence to the contrary the parties in a meretricious relationship will be presumed to have intended ownership to be where title is and no trust will be raised for the other.\textsuperscript{10} The presumption is not conclusive.\textsuperscript{11} If, however, it is the belief of one or both that they are validly married, the court will exercise an equity power to protect the innocent party or parties in determining the ownership,\textsuperscript{12} but there is no application of a putative wife doctrine. When both persons participate in the acquisition (in a business or earning sense, not merely in a community property, husband and wife sense), the existence of any meretricious relationship is disregarded and their rights are resolved under ordinary partnership or joint venture principles.\textsuperscript{13}

\textit{Time of Marriage}

In most situations, of course, the two persons are husband and wife and inherently there is a preliminary problem of proof that they were married at the time of acquisition of the assets involved in the controversy.\textsuperscript{14} It is not necessary, however, that there be direct testimony of the time of marriage.\textsuperscript{15}

\textsuperscript{5} Id. at 26.16.040.
\textsuperscript{6} Id. at 11.04.050.
\textsuperscript{7} Id. at 26.16.010, 26.16.020.
\textsuperscript{8} Poole v. Schrichte, 39 Wash.2d 558, 236 P.2d 1044 (1951).
\textsuperscript{9} Ibid.
\textsuperscript{11} Ibid.
\textsuperscript{12} Poole v. Schrichte, 39 Wash.2d 558, 236 P.2d 1044 (1951).
\textsuperscript{13} Poole v. Schrichte, 39 Wash.2d 558, 236 P.2d 1044 (1951); Hynes v. Hynes, 28 Wash.2d 660, 184 P.2d 68 (1947).
\textsuperscript{14} Chase v. Carney, 199 Wash. 99, 90 P.2d 286 (1939).
\textsuperscript{15} Proff v. Maley, 14 Wash.2d 287, 128 P.2d 330 (1942).
II. MANAGEMENT AND VOLUNTARY DISPOSITION

For problems of management or voluntary disposition of community real and personal property, the court has evolved uniform rules. The husband is the statutory agent to manage all community property and to dispose of community personal property. Despite the language as to personal property that the husband has “a like power of disposition as he has of his separate personal property, except that he shall not devise by will more than one-half thereof”16 the rule is settled that he must act for the community interests in a business sense.17 Consequently the husband cannot make effective gifts of the community personal property without the consent of the wife.18 The husband is not required to be a good manager; so long as he exercises his discretion in the community interest as he sees it, the wife is without power to frustrate his acts.19 While the husband's management power is the same over all community property, he cannot dispose of community real property unless the wife participates in the transaction.20 Basically the wife has neither a managing or disposing power over community property of any kind,21 but the court has recognized an “emergency power” in the wife22 and has recognized that the husband may either directly or through estoppel or ratification make her the agent to conduct community affairs or transactions.23

Two problems then arise as to any particular transaction: (1) whether the subject matter is real or personal property, and (2) whether the transaction is within the community “business” agency of the actor.24

Real or Personal Property

Determination of whether the interest is real or personal property is made in accordance with historical concepts, and

20. The statutory method of participation is joinder in the appropriate instrument, WASH. REV. CODE 26.16.040 (1953), but the case law recognizes her “participation” through estoppel or ratification.
24. Much of the discussion of this problem appears in Part V infra.
the court has held that the statute requires the wife's joinder in execution of term leases, grants of easements and profits, as well as conveyances of or contracts to convey the fee estate. On the other hand the leasehold interest is characterized as personal property and can be assigned or surrendered by the husband acting alone. The statute is construed, however, to be for the protection of the wife, and the third person cannot disaffirm merely because the wife has not joined. He must instead first request execution of the instrument by the wife. The husband, as manager, apparently can put a person in possession of community land as periodic tenant. If the wife has not joined in the conveyance or encumbrance the transaction can be nullified against the wishes of the transferee unless the wife has ratified the husband's acts or has estopped herself to deny their effectiveness.

The classification of the purchaser's interest under a real estate contract is not clear. Reasoning from the notorious statement in *Ashford v. Reese* that the purchaser in an executory forfeitable contract has no interest, legal or equitable, in the land, it can be concluded that whatever the relationship might be the purchaser's interest at least is not real property, and hence

29. Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910). But the husband's managing power may extend to modification of the provisions of a previously executed contract to sell. See *In re Horse Heaven Irrigation District*, 19 Wash.2d 89, 95, 141 P.2d 400, 402 (1943).
35. Campbell v. Webber, 29 Wash.2d 516, 188 P.2d 130 (1947); *In re Horse Heaven Irrigation District*, 19 Wash.2d 89, 141 P.2d 400 (1943).
36. 132 Wash. 649, 233 Pac. 29 (1925).
the husband can deal with it without the wife’s joinder. The court has, however, constantly retreated from this sweeping statement, and common practice is to require the wife’s joinder in any assignment of the purchaser's interest, whether the assignee is a third person or the vendor. The husband may, as manager, default in payment of installments, thereby putting the vendor in a position to declare a forfeiture of the purchaser's interest. In such a situation the husband’s act in releasing the purchaser's interest is valid, even though the wife does not join, under the reasoning that the “release” is not a conveyance within the spirit of the statute but rather only a recognition of the fact that the previous interest has been lost. That the substance rather than the form is important is suggested in two additional situations in which the court has construed transactions as not being conveyances within the meaning of the statute: (1) an assignment for the benefit of creditors; and (2) a declaration of abandonment of oyster lands.

No mention is made above of a statute enacted in 1891 purporting to empower the record title holder to convey to an actual bona fide purchaser without joinder of the spouse unless an inventory asserting a community claim has been filed by the other spouse. Qualification as an “actual bona fide purchaser” is so difficult to achieve under the cases that commonly the statute is ignored, and title examiners as a practical matter operate on the assumption, as an initial proposition, that any owner of a real property interest is married and that the interest is community property.

Neither spouse has testamentary power over more than his or her half of the community property. The statute expressly so
limits the husband's power over community personal property, and the descent statute makes it clear that the limitation extends to all community property.

A statutory provision, unique to Washington, establishes a form of dispositive instrument commonly called a community property agreement. By this statute the husband and wife can enter into an agreement in deed form upon the status and disposition of the whole or any part of the community property, which agreement takes effect upon the death of either. A common form of this agreement provides for survivorship whereby all community property is vested in the survivor, and in it also laymen, who prepare many of them, embody both the present and prospective change of character of assets mentioned in Part IV, infra. To distinguish the common three-pronged contract from the agreement authorized by statute, the latter is here termed the "statutory community property agreement." The effect of such an agreement is to eliminate the testamentary power of each spouse as to his or her half of community property covered by the agreement. The statutory community property agreement has no other inter vivos effect. The statute does not limit the parties to survivorship dispositions, nor in any other fashion (except for preserving the rights of creditors), and despite the lack of a definitive decision, this writer believes any conceivable disposition not otherwise proscribed could be made, even cutting off the survivor entirely or vesting only a life interest in the survivor with remainders over, etc. There is some support for this belief in In re Dunn's Estate, though the instrument therein met the requirements both of a statutory community property agreement and of a joint will, and the survivor by joint will reasoning could in effect be limited to a life interest (though perhaps not technically a life estate as to his half) in all community property, both his and his deceased wife's halves.

44. Id. at 11.04.050.
45. Id. at 26.16.120. See Buckley, The Community Property Agreement Statute, 25 WASH. L. REV. 165 (1950).
48. E.g., by the rule against perpetuities.
49. 31 Wash.2d 512, 197 P.2d 606 (1948). This view is not shared by the author of the Washington State Bar Association's pamphlet, "Have You Made a Will?" which states, "If the parties wish to provide for part of estate to go to children, it cannot be accomplished by such an agreement."
Life Insurance Policies

Cases involving management and voluntary disposition of life insurance policy rights need brief mention.50 The power of the insured in inter vivos transactions conforms to the usual rules applicable to personal property. The husband insured can surrender the policy for cash payment and pledge it as security.51 As pointed out in Part III, infra, to the extent that the policy is purchased with community funds, the policy and its proceeds are community property. With this as the starting point the court has developed a partially complete set of rules governing designation of the beneficiary of the policy. In the initial case, Occidental Life Ins. Co. v. Powers,52 the court struck down entirely the husband's change of the beneficiary from his wife to his mother and secretary, reasoning that the designation of the beneficiary was an attempt to make a gift without consent of the wife, and therefore ineffective. This extreme position was distinguished in In re Towey's Estate,53 in which the court upheld the payment of proceeds to the husband's executor who had been substituted for the wife as beneficiary. The husband's will was exclusively in favor of persons other than his wife, but the court said the wife's community interest was not affected by this change since half of the community assets administered by the executor would belong to the wife as her share. In other cases an original beneficiary designation of a third person (i.e., someone other than the wife of the insured) has been frustrated at the suit of the wife on the authority of the Powers case, and in these situations apparently the proceeds become assets of the community estate, subject to administration.54 Under this result the widow would at least secure half of the proceeds but not necessarily more. There is no case directly answering the problem of ownership of the proceeds where the change is from the wife to a third person as beneficiary: is the change of beneficiary nugatory entirely so that the wife is to be treated as owner as if

50. Discussions of the Washington cases can be found in Recent Cases, 28 WASH. L. REV. 236 (1953), 26 WASH. L. REV. 223 (1951), 20 WASH. L. REV. 167 (1945); Papers Presented at Legal Institute, Life Insurance as Community Property, 16 WASH. L. REV. 187 (1941); Comment, 13 WASH. L. REV. 321 (1938).


53. 22 Wash.2d 212, 155 P.2d 273 (1945).

there had been no attempt to change, or is the change effective at least to the extent of eliminating the wife as beneficiary, so that in effect there is no designated beneficiary and the proceeds are therefore community assets in the estate of the deceased insured? The latter appears to be the sounder view despite the apparent singleness of the act of designating a different beneficiary. This position finds some support in the effectiveness of a change to the insured's executor in In re Towey's Estate,55 and also in the approach in Wilson v. Wilson,56 in which the court, dealing with a policy owned in shares part separate and part community determined the designation of the beneficiary in the policy, that is, the contract, should control to the extent possible without infringing on the community property policy of protection of the wife.

While certain results on the basis of these cases can be predicted with some assurance, the whole area is open to question by the 4-to-4 split of the court in Aetna Life Ins. Co. v. Brock57 (with one judge not participating) on the advisability of continuing to follow the Powers case. If the Powers case principle is in the future rejected, then apparently the husband will be able to dispose of half of this asset by direct designation of a third person as beneficiary of his half of the community interest in the proceeds.

Joint Ownership

The court has not yet answered questions of ownership involving United States savings bonds purchased with community funds in which a stranger is named beneficiary or co-owner.58 A somewhat similar problem inheres in the several joint “bank account” statutes59 which provide that certain contracts with the financial institution can create survivorship rights. The only case60 involving use of community funds did not reach the survivorship problem because the account was closed prior to the

55. 22 Wash.2d 212, 155 P.2d 273 (1945).
56. 35 Wash.2d 364, 212 P.2d 1022 (1949). The wife was named beneficiary as to % of proceeds but the community interest was %. She took % as beneficiary; the other named beneficiary took % (separate interest) as beneficiary.
57. 41 Wash.2d 369, 249 P.2d 383 (1952).
59. It is recognized that these statutes are not limited to bank accounts, but for simplicity the term is used to include the several principal statutes: banks, id. at 30.20.015; mutual savings banks, id. at 32.12.030; savings and loan associations, id. at 33.20.030; credit unions, id. at 31.12.140.
death of the wife, who with community funds withdrawn had opened a new account with a stranger. The court held that the identification of the source of the account as community funds necessarily meant that the account was a community asset, in the absence of a clear showing of an intention to change the character of ownership into a joint tenancy. It being a community asset the wife had no power to give it away without the husband’s consent.  

III. Character of Ownership as Separate or Community Property

"Time of Acquisition" Test

The basic statute provides that any property acquired during marriage and not within one of the statutory definitions of separate property is community property. The location of the record title in husband or wife or both is not controlling. The first step in identifying the original character of any asset, then, involves determination of the marital status of the acquirer at the time of the acquisition. If the acquirer was unmarried his or her ownership then was necessarily separate. (The present character of the ownership may not be the same as its original character, but this is reserved for later discussion.) The converse, however, cannot be so blandly asserted, that is, one cannot say that a particular asset acquired during marriage even if not a gift is necessarily community property, because the separate property definition encompasses rents, issues and profits of separate property; and the particular asset first acquired during marriage may, for instance, have been purchased with funds on hand at the time of the marriage—which funds necessarily are

61. Whether any arrangement short of the “separate property agreement” discussed in Part IV, infra, could supply the necessary intention to change the community character of the funds put into a joint account is not clear. The Munson case, ibid., may, however, eliminate any problem in reaching a result in favor of the surviving spouse against the stranger designated a joint depositor by the decedent spouse.

62. WASH. REV. CODE 26.16.030 (1953). "Under our somewhat perplexing statutes relating to the acquisition of property, title to real property taken in the name of one of the spouses may be the separate property of the spouse taking the title, the separate property of the other spouse, or the community property of both of the spouses, owing to the source from which the fund is derived which is used in paying the purchase price of the property. If the fund is derived from the separate property of one of the spouses, the property purchased is the separate property of that spouse; if it is derived from the community property of both the spouses, it is the community property of both of them." Merritt v. Newkirk, 155 Wash. 517, 520, 285 Pac. 442, 444 (1930).

63. See Part IV, infra.
separate property assets which remain separate property so long as they can be traced in their mutations to the particular asset now at hand. The usual statement is that the character, as separate or community property, of any asset is to be determined as of the time of its acquisition, but this must be understood to refer only to original assets whose source of acquisition cannot be traced (except perhaps to earnings of a spouse). So understood, the "time of acquisition" test will furnish the answer as to the character of the asset which was acquired by a single, total consideration paid by the acquirer, but when it is not clear that the total acquisition occurred at one time, the test has posed problems for the court. These latter situations include:

1. conveyance on partial payment with a balance still due under a purchase-money mortgage either to the vendor or a third person;
2. conveyance on partial payment and assumption of an existing mortgage for the balance;
3. conveyance on purchase of the vendor's interest subject to (without assuming) an existing mortgage;
4. conveyance on full payment to vendor, part of the funds having been secured by a mortgage on another asset (i.e., not a purchase-money mortgage);
5. purchase on an installment contract with balance due vendor in the future, conveyance to await payment of all installments.

In the cases involving mortgages a reasonably certain pattern has been established which involves the "source doctrine" in determining (1) the ownership of the funds used in initial part payment, and (2) the character of the credit pledged, i.e., the nature of the obligation underlying the mortgage, which is presumed to be community obligation.

The ownership of the funds used to make the partial payment will determine the ownership of that share of the asset, and the character of the credit pledged to pay the balance will determine the ownership of the remaining share, without regard to the ownership of the funds ultimately used to discharge the debt for the balance. Thus if separate credit is primarily pledged in the borrowing for the balance, the remainder will be separately owned even though community funds are used to pay the balance. If community credit is pledged, the remainder is

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66. These rules were applied in In re Dougherty's Estate, 27 Wash.2d 11, 176 P.2d 335 (1947).
67. In re Finn's Estate, 106 Wash. 137, 179 Pac. 103 (1919).
68. Ibid.
owned as community property—and this even though the security is by purchase-money mortgage on the property\(^69\) (and apparently even though the property is income-producing and in fact produces the income to discharge the obligation). The problems most commonly arise when the wife is the moving party and makes the initial payment from her separate funds. If the husband is the moving party, the presumption that an obligation he incurs is a community obligation\(^70\) will not, as a practical matter, ordinarily be overcome even though he has separate credit and assets, if the transaction does not specifically show that only his separate credit is pledged. If a mortgage balance is assumed, the reasoning is the same as if there is a purchase-money mortgage.

If the wife makes the initial payment from her separate funds and acquires the balance by borrowing on the security of a mortgage on other separately owned land, there is authority that this is a pledge of separate credit even though the husband also signs the note.\(^71\) That the debt is ultimately discharged by community funds is immaterial. The reasoning in the above situations apparently is that the time of acquisition is the time when there is created a binding obligation as to the balance of the price.

When the title is taken to the property upon the initial payment subject to an outstanding encumbrance, but no promise is made to pay that encumbrance, the share represented by the balance apparently is acquired when that encumbrance is discharged and not before, hence the funds used to pay the encumbrance will control the ownership of that share. Thus when the wife separately made the initial payment and community funds thereafter were used to discharge the non-assumed encumbrance, the initial share was the wife's separate property and the remainder was community property.\(^72\)

In the above cases the remainder of the total acquisition cost was due as a lump sum, but there is nothing to indicate a different result when the remainder is due in installments.

On the other hand, when the title is not secured as the immediate result of the transaction, but rather only upon completion of installment payments, as in the typical land-purchase

\(^{70}\) Bryant v. Stetson & Post Mill Co., 13 Wash. 692, 43 Pac. 931 (1896).
\(^{71}\) In re Finn's Estate, 106 Wash. 137, 179 Pac. 103 (1919).
\(^{72}\) Ibid.
contract, the result in terms of ownership remains confused. The court purports to apply the time of acquisition test, but has vacillated in its identification of the time of acquisition. The matter appeared to have been put at rest by the statement in In re Binge's Estate,\(^7\) that the ultimate acquisition is but the fruit of the original obligation and that the time of acquisition was the time at which the obligation became binding. This proposition is consistent with the solution in the mortgage acquisition cases, and no regard (in terms of ownership) need be had to funds used in ultimate discharge of the installments.\(^7\) However, in In re Dougherty's Estate,\(^7\) without indicating why, the court determined the ownership of personal property to be part separate and part community on the basis of the ownership of the funds used to discharge the installments. There has been no recent indication that the ownership relation of the spouses to property is affected in the slightest by the real or personal property character of the asset.

The result in the Dougherty case, though confusing, is not surprising in light of the court's treatment of proceeds of life insurance policies upon the death of the insured. In this latter type of case a clear pattern of pro rata ownership, part separate and part community, has been evolved,\(^7\) despite the apparent inconsistency with earlier results and the statement in the Binge case concerning land contracts. In the installment purchase cases, and even the mortgage cases, to assert unequivocally that there is a single time of acquisition challenges credulity, but at least the time of the original obligation and its character can be identified.\(^7\) There is a distinction which can be drawn between these two types of acquisitions and the life insurance proceeds: the installment purchase contract and the mortgage transactions do involve a fixed obligation that the obligee can

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73. 5 Wash.2d 446, 105 P.2d 689 (1940).
74. Previously, in In re Kuhn's Estate, 132 Wash. 678, 233 Pac. 293 (1925), the court held the surviving widower was owner, separately, when he completed payments on the contract, and that the heirs of the wife only had a right to be reimbursed for one-half of the amount paid with community funds prior to the wife's death.
75. 27 Wash.2d 11, 176 P.2d 335 (1947).
77. Establishing that the credit is other than community credit may pose difficulties. The husband's signature alone will raise a presumption of community obligation, the wife's joinder adds nothing to this presumption. The use made of funds acquired does not appear controlling, but cf. Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934); In re Finn's Estate, 106 Wash. 137, 179 Pac. 103 (1919) (as to the Drew tract); In re Binge's Estate, 5 Wash.2d 446, 498, 105 P.2d 688, 711 (1940).
require to be performed (even though alternative remedies
may be available), whereas in the typical life insurance contract
the insurer cannot compel the insured to keep the policy alive
so that there will be proceeds about which to argue. If, there-
fore, there were one clear rule for the mortgage and contract
cases, and a different rule for ownership of life insurance pro-
ceeds it would be understandable and defensible—the difficulty
in this rationalization, however, is that there is not the slightest
suggestion in the cases that this is the explanation for the differ-
eence in result; nor is there any other explanation.

Under the present state of case law, while the result in the
mortgage and life insurance proceeds cases is predictable, re-
spectable argument can be advanced in the installment contract
cases that the ownership of the asset is determined (1) at the
time of and by the character of the original obligation (the
mortgage rule); or (2) on a pro rata basis according to owner-
ship of funds used to pay installments (the life insurance rule);
or perhaps (3) only at the time of fulfillment of the contract
and acquisition of title, which apparently will be controlled by
marital status at that time.

Tracing and Commingling

In the area of commingled funds, or assets purchased there-
with, the court has perhaps most clearly demonstrated the favor
with which community property is viewed. The rule was well
stated by Judge Steinert as follows:

"Where separate funds have been so commingled with
community funds that it is no longer possible to distinguish
or apportion them, all of the commingled fund, or the prop-
erty acquired thereby, is community property."78

Counterbalancing the commingling doctrine and the pre-
sumption that any property acquired by purchase during mar-
riage is community property is the statutory provision that the
rents, issue and profits of separate property are separate prop-
erty. The particular problem frequently becomes one of tracing,
under the rule that "[s]eparate property continues to be sep-
are property through all of its changes and transitions so long
as it can be clearly traced and identified, and its rents, issues,
and profits likewise are and continue to be separate property."79

( Italics supplied.)

79. Ibid.
The statutory provision that rents, issues, and profits of separate property are also separate property not only simplifies the problem of ownership of assets secured by exchange or sale of a separately owned asset, but also underlies problems of tracing the changes in form of separate property, of applying presumptions of community character of spouses' property, and of commingling separate and community funds. Despite this statutory rule, the beginning point for analysis of the character of any asset held in the name of a spouse is the presumption of community ownership. It is clear under the cases that the burden rests on the person asserting the separate ownership to establish that claim by clear and satisfactory evidence. 80

Similarly, to establish the separate ownership of an asset now in hand as the present form of a previously held asset admittedly separate property, requires that the changes in form be clearly traced and identified. 81 The mere possibility that separate property has been changed to the present asset is not enough. In Berol v. Berol, 82 for example, the husband had, fourteen months after marriage, bought a single premium life insurance policy in which he designated his mother as beneficiary. This designation is an unauthorized "gift" if the premium was paid with community funds without the wife's consent and therefore ineffective. 83 The court held the requirement of clear and satisfactory evidence of the separate character of the funds was not met by the husband's bald statement that he paid the premium from his separate funds even though he also showed separate funds were available. In concluding that the value of the policy should be treated as community property in making the divorce division, the court stated the separate funds so used should be traced with some degree of particularity. 84

While mere continuous holding of a particular asset during marriage will not change its character from separate to community, nor will mere altering its form by exchanges, if the tracing burden is met, the income-producing asset inherently creates additional difficulties which are aggravated by the commingling doctrine. Although the court by the decision in In re Brown's Estate 85 was by local lawyer gossip said to have con-

80. Ibid.
81. Ibid.
82. 37 Wash. 2d 380, 223 P. 2d 1055 (1950).
83. See discussion in Part II supra.
84. See also duPont de Nemours & Co. v. Garrison, 13 Wash. 2d 170, 124 P. 2d 939 (1942).
85. 124 Wash. 273, 214 Pac. 10 (1923).
cluded that a husband (with a separate estate) did not have to work for the community but could work exclusively for himself, it has long since recognized that the talent or capacity of each spouse is itself a community asset which when exercised produces community property.\(^{86}\) Under this view it is theoretically impossible for a husband to work exclusively for himself in a separate property sense, and even though his entire toil and talent is engaged in managing or operating his separately owned property or enterprise there is at least a partial community property interest in any return.\(^{87}\)

If the acquisitions by the husband come in part from his own work and in part from the earnings of his invested separate property, whether there is pro rata ownership of the acquisitions or only total community ownership depends upon the applicability of the commingling doctrine. If the husband's business enterprise is in corporate form his ownership will be represented by shares of stock. Ordinarily increase in the value of the stock (reflecting increase in the corporate value) will be rents, issues and profits of the separate property,\(^{88}\) and no serious problem arises if the husband as operator of the corporate business is paid a reasonable salary for his toil and talent.\(^{89}\) Establishment of this circumstance depends upon the testimony presented on the reasonableness of the salary and the corporate records revealing the payment of the salary.\(^{90}\) The reasonable salary is held to be the measure of community property acquisition. In such a situation there is contemporaneous segregation of earnings and increment between the community and separate assets, hence no commingling problem arises. When the separately owned enterprise is not conducted in corporate form there is a practical probability of commingling of earnings from the investment and the husband's ability (separate and community, respectively),\(^{91}\) and if the rule is absolute that commingling makes everything community property there is not much that can be done. Physical commingling of separate and community funds should present

87. Of course the community income from the husband's endeavor may be entirely consumed by regular expenditures so that there is no community interest in a present accumulation. *See State ex rel. Van Moss v. Sailors*, 180 Wash. 269, 39 P.2d 397 (1934); *Toivonen v. Toivonen*, 196 Wash. 636, 84 P.2d 128 (1938).
91. Consider the situations in *In re Witte's Estate*, 21 Wash.2d 112, 150 P.2d 595 (1944); *Salisbury v. Meeker*, 152 Wash. 146, 277 Pac. 376 (1929).
no problem other than a "fungible goods" confusion problem,\textsuperscript{92} at least in situations where records contemporaneously kept clearly indicate the respective acquisitions to be credited to separate property and community endeavor. If contemporaneous records are not available, the problem would appear to be one of "tracing" to the sources of the present accumulation.

At this point a policy problem arises: Should a commingled fund be conclusively presumed to be community property in the absence of a clear showing of an affirmative intent of the spouses to the contrary, which intent can be demonstrated only by establishing contemporaneous segregation? This appears to be the proposition advanced in a dictum recently,\textsuperscript{93} and the result may be satisfactory in controversies between the spouses or a spouse and gratuitous successors of the other (heirs, devisees, donees), though at least one other recent case\textsuperscript{94} does not conform. As suggested elsewhere\textsuperscript{95} in many situations such a result would accord with the unexpressed intent of the spouses to throw all assets into the common pot for the benefit of the marriage. But a conclusive presumption in the absence of contemporaneous segregation could pose serious problems for third parties to whom a spouse was separately obligated, to say nothing of the problems under tax liabilities.\textsuperscript{96} The commingling doctrine is, in this writer's opinion, simply a form of the presumption of the community character of an asset on hand during the marriage, and the common conclusion that the commingled funds are community property results merely from the failure to carry the burden to establish by clear and satisfactory evidence the asserted separate character, in whole or part, of the funds or asset acquired thereby. "Tracing" in this framework is merely the process of carrying that burden of proof; and while the

\textsuperscript{92} The applicable rules are discussed in Brown, A TREATISE ON THE LAW OF PERSONAL PROPERTY §§ 30-36 (1936).

\textsuperscript{93} Hamlin v. Merlino, 44 Wash.2d 851, 858, 272 P.2d 125, 129 (1954).

\textsuperscript{94} Holm v. Holm, 27 Wash.2d 456, 178 P.2d 725 (1947). In a divorce the trial court concluded all community property should be divided equally and that the whole of the business property was community property by commingling. The Supreme Court modified the decree to preserve for the husband as his separate property the amount invested in the business at the time of marriage. Even though clearly there was commingling of the investment with later earnings, proof of the original amount was permitted. On the other hand no attempt was made by the court to apportion the later increment, but this may be of no particular significance since the court can award any property of the spouses as circumstances require.

\textsuperscript{95} Kizer, Community Interest in Commingled Income, Derived from Personal Service and Separate Capital—Another View, 23 WASH. L. REV. 8 (1948).

\textsuperscript{96} LeSourd, Community Property Status of Income from Business Involving Personal Services and Separate Capital, 22 WASH. L. REV. 19 (1947).
absence of a contemporaneous segregation may make the burden beyond carrying, it should not conclusively preclude the attempt. But it is conceded that the cases do not now answer the question of the significance of the absence of contemporaneous segregation.

Separate Property and "Community Relationship"

In addition to property owned by one spouse at marriage together with the rents, issues and profits thereof, the general statutes provide that separate property also includes that acquired by gift, devise or inheritance. There is no doubt that the facts of a particular acquisitive transaction rather than the form of the transaction will govern the character of the ownership—the court's position is clear that the statute speaks of donative acquisition. Another statute provides that the earnings of the wife and minor children living with her while living separate from her husband shall be her separate property. Beyond this point the statutes are silent, but the cases develop an additional requirement that there be a community relationship, not merely a marriage relationship, between the spouses in order that an asset be characterized as community property.

In addition to the statutory position of the wife as separate owner of her earnings while living apart from the husband, the court in Wampler v. Beinert some years ago held that the husband lost his power as manager of the community property when he deserted the wife. Subsequently in the case of Togliatti v. Robertson the court concluded that the husband's acquisition long after he and his wife had permanently separated was his separate property. It is not, from the Togliatti case, entirely clear whether the basis for the court's conclusion was a "separate property agreement" inferred from the long separation (discussed in Part IV, infra) or the lack of a community relationship between the spouses. In the most recent case, In re Armstrong's Estate, separation followed entry of an interlocutory decree

98. Andrews v. Andrews, 116 Wash. 513, 199 Pac. 981 (1921); Mechem, Progress of the Law in Washington: Community Property, 8 WASH. L. REV. 1, 4-7 (1933).
99. Even though the asset is acquired by gift it can be community property, apparently, if the gift is to both of them with that intent (rather than as tenants in common). See Schilling v. Schilling, 42 Wash.2d 105, 107, 253 P.2d 952, 953 (1953). The power to control the character of property owned, discussed in Part IV, supra, also suggests this possibility.
100. WASH. REV. CODE 26.16.140 (1953).
101. 125 Wash. 494, 216 Pac. 855 (1923).
102. 29 Wash.2d 844, 190 P.2d 575 (1948).
103. 33 Wash.2d 118, 204 P.2d 500 (1949).
of divorce and shortly thereafter the particular asset was acquired by the husband. The court concluded the asset was his separately on the basis of the Togliatti case, stating that the wife had made no contribution to the acquisition. This suggests, at least, that the Togliatti reasoning of the lack of a community relationship is controlling. There is some further support for this conclusion in the Wampler case wherein the husband was supplanted from his community agent’s position by his desertion of the wife, and in Yates v. Dohring, involving the family expense statute, where the court concluded the wife had not incurred a “family” expense when she had permanently separated from the husband and had refused to perform her ordinary marital duties. From this might be drawn the conclusion that only the “innocent” spouse can subsequently acquire separate property and that the “guilty” spouse’s acquisitions would be community property, but in fact in the Yates and the Togliatti cases the separation was mutually desired and probably there was no “guilty” spouse. It is this writer’s belief, therefore, that whenever there can be shown a permanent separation of the spouses, the subsequent acquisitions of either will be separate property even though there is no dissolution of the marriage. Proving that there has been a permanent separation may be troublesome, and can most easily be done by an action for divorce or separate maintenance, but even in the absence of such litigation there would appear to be no reason to deny possible adequacy of other proof. This would permit a separate acquisition by the “innocent” spouse who might be either, or both, if the separation was by mutual consent, and still permit the court to characterize the husband’s subsequent acquisition as community property if he deserted the wife.

IV. TRANSACTIONS AND AGREEMENTS BETWEEN SPOUSES

Separate and Community Property Agreements

The statute authorizes conveyance of the grantor’s community interest by either spouse to the other, with the result

106. Id. at 26.16.140, for the wife living separate from her husband, apparently would make the deserting wife’s subsequent acquisition separate regardless of her “guilt.”
107. Id. at 26.16.050.
108. Payment with community funds will result in community ownership even though the title is taken in the wife’s name, only, at the direction of the husband. An oral gift of real estate is ineffective. In re Parker’s Estate, 115 Wash. 57, 196 Pac. 632 (1921). However, the court has held under
that the subject matter of the conveyance becomes the separate property of the grantee.109 And of course the power of either spouse as to separate property is as complete as if he or she were unmarried,110 so that conveyance by one to the other would be treated similarly to conveyances between strangers. The effect of the first mentioned statute is to empower spouses to change community property into separate property, and the court in Volz v. Zang111 stated that if such a change was permissible, the reverse was also permissible (which is a non sequitur). In addition to this explanation the court in the Volz case reasoned that the favor with which community property is viewed and the fact that there is no express prohibition against the result, permitted the conclusion that separate property could be changed into community property by a document in deed form which clearly expressed the intention of the spouses to do so.112 But even beyond this point the court has given effect to agreements between the spouses that any property acquired after the effective date of the agreement should be community property, and this, if the intention is established, without regard to the manner of acquisition of the particular asset.113

The rather general freedom accorded the spouses in dealings between themselves has resulted in recognition of what can be called "separate property agreements" by which not only presently held property becomes the separate property of the respective spouses,114 but also any subsequently acquired property somewhat comparable facts that the conveyance by the grantor, at the husband's direction, to the wife "as her sole and separate property" will make the property hers separately. Goodfellow v. LeMay, 15 Wash. 684, 47 Pac. 25 (1896).

109. WASH. REV. CODE 26.16.210 (1953) in transactions between the spouse puts the burden of proof on the person asserting the good faith of the transaction.
110. Id. at 26.16.010, 26.16.020. See Scott v. Currie, 7 Wash.2d 301, 109 P.2d 526 (1941), in which the court applied a presumption of gift to the conveyance of land by the grantor to the wife at the direction of the husband who paid therefor with his separate funds.
111. 113 Wash. 378, 194 Pac. 409 (1920).
112. The mere conveyance by one spouse of a half interest in the grantor's separate property does not give the grantee a half interest as a community share, but rather makes the grantor and grantee tenants in common. Powers v. Munson, 74 Wash. 234, 133 Pac. 453 (1913).
113. These agreements are frequently called community property agreements but are not the statutory community property agreements referred to in Part II supra.
is separate property of one or the other, thereby preventing any acquisition of assets as community property. This appears to be the proposition although an early case\textsuperscript{115} suggested that the agreement amounted to a continuing offer to make a gift whereby community property upon its acquisition immediately was changed into separate property. As discussed in Part V, infra, the effect as to third parties can differ substantially under one interpretation of the effect of the separate property agreement rather than the other.

The court, as pointed out in Part III, supra, has developed a recognition of a marriage relationship distinct from both a family relationship and a community relationship. In this framework it can be said that the court has also recognized that there might be both a family and a marriage relationship without there being a community relationship. While it is true that many separate property agreements are a part of separation agreements made in connection with divorce or separation of the spouses, there are also those between spouses intending to continue normal marriage and family relationships. The court, in the divorce and other cases, upholds the finality of separate property agreements as between the spouses,\textsuperscript{116} if that is their intention, while at the same time reaffirming the power of the court in divorce and separate maintenance actions to adjust the property relationships of the parties without being bound by the character of particular assets before the court. In other words, although a factor to be considered is the character of the asset as separate or community property, the court in such actions may not only unequally divide the community property between the two but also award separate property of one to the other.\textsuperscript{117}

Written separate property agreements between spouses are not uncommon when they are separated or contemplate separation or divorce, but it is probable that oral agreements in other situations will be given effect if proved. Here the burden of clear and satisfactory evidence is required and may not be met.\textsuperscript{118}

Improvements

Besides these purposeful arrangements between the spouses, there is an additional area of transactions between them involv-

\textsuperscript{115} Yake v. Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17 (1895).
\textsuperscript{116} See cases cited note 114 supra.
\textsuperscript{117} Patrick v. Patrick, 43 Wash.2d 139, 260 P.2d 878 (1953), or almost any divorce case involving property division.
\textsuperscript{118} Aetna Life Ins. Co. v. Brock, 41 Wash.2d 369, 249 P.2d 383 (1952); State v. Miller, 32 Wash.2d 149, 201 P.2d 136 (1948); Piles v. Bovee, 168 Wash. 538, 12 P.2d 914 (1932).
ing improvement of land held in one character by the use of funds held in another character. Theoretically the asset improved can be held as separate property of the wife or of the husband or as community property, and the improvement made with funds held in either of the other two characters. This factual situation presents the problem of creation of an equitable lien in favor of the improver for reimbursement. The rule is clear that such investment does not create an ownership in the asset in favor of the improver, and further, it does not necessarily follow that there will be a lien for reimbursement. A common problem of this sort turns around an assertion of community lien for improvement of the husband's separate property. In some situations the basic fact of improvement with community funds cannot be established, for the court has concluded that if there are separate funds as well as community funds adequate to pay for the improvements, it will be presumed that the "proper" fund is the source of the improvement; hence separate funds made the improvement and the community has no lien. Of course if there is no showing of the existence of separate funds, the basic pattern for the lien is established. As a practical matter it may well be more difficult to establish a lien in favor of the husband or the community interests when the improvement is made at the husband's direction on the wife's separate property, because of an assumption (or perhaps ill-defined presumption) that the husband intends to make a gift of the improvement. It is not impossible to show the absence of such an intention, however.

119. Leroux v. Knoll, 28 Wash.2d 964, 184 P.2d 564 (1947); Legg v. Legg, 34 Wash. 132, 75 Pac. 130 (1904).
120. In re Hart's Estate, 149 Wash. 600, 271 Pac. 886 (1928). It may be that the improver, or advancer of funds, has received full value for the advance, hence has no right to reimbursement. See Merkel v. Merkel, 39 Wash.2d 102, 231 P.2d 857 (1951), where in divorce award the court considered mortgage interest, tax and upkeep payments as no more than reasonable rent for use of land.
121. Pekola v. Strand, 25 Wash.2d 98, 168 P.2d 407 (1946). In Legg v. Legg, 34 Wash. 132, 75 Pac. 130 (1904), the lien was allowed for "labor" as well as "money" improvements. The Pekola case indicates the amount of contribution must be shown, but there is doubt of the correctness of the statement therein that the lien is allowed only for funds advanced.
123. In re Hickman's Estate, 41 Wash.2d 519, 250 P.2d 524 (1952).
124. Ibid. In a 5 to 4 decision the court held the equitable lien of the community could be reached by the trustee in bankruptcy as an asset of the bankrupt community's estate. Conley v. Moe, 7 Wash.2d 355, 110 P.2d 172, 133 A.L.R. 1089 (1941). If the spouses could show gift or relinquishment of any potential lien and meet the burden of proving good faith required by WASH. REV. CODE 26.16.210 (1953), the result in this case might be avoided,
V. INVOLUNTARY DISPOSITION

While many of the problems of this part could be discussed under the management of the community’s affairs, controversy does not ordinarily arise unless there is disagreement on the extent of enforceability of the claim; thus these problems commonly are ones of involuntary disposition of community property. The genesis of many of the problems was the court’s interpretation that the statute insulates community property from all obligations separate in character, whether ante- or post-nuptial. Originally it was the position of the court that a distinction should be drawn between the availability of real property, on one hand, and personal property on the other, but the rule has now long been settled to the contrary. In addition to the unavailability of the whole of the community property, the court has held that a separate obligation cannot be enforced even against the debtor’s half interest in community property, but only against his or her separate property (if any). These propositions compel classification of obligations as separate or community.

Non-tort Obligations

In the ordinary course of affairs, any non-tortious act by a husband will presumptively be done as statutory manager and will create a community obligation. If his act is done in managing a community asset or conducting a community business, community liability will follow as well as a separate liability against him. Extraordinary acts will create community liability if the husband’s purpose was to benefit the community. The actual accrual of benefit is unnecessary, the lack of good

but otherwise a creditor may be in a stronger position to assert the lien than the improver.

On the other hand the court has given effect to the separate equitable lien over the claim of a community creditor to proceeds from the sale of a contract purchaser’s interest. Farrow v. Ostrom, 16 Wash.2d 547, 133 P.2d 974 (1943).

Schramm v. Steele, 97 Wash. 309, 166 Pac. 634 (1917).


Ibid.
judgment is immaterial, and the dissent of the wife is irrelevant.

Suretyship obligations executed by the husband furnish the common problem. Unless there was the intent to benefit the community, directly or indirectly, the argument will be that there has been an attempt to make a gift of the community credit which is no more effective, without the wife's consent, than is a similar donative transfer of title to community property. It was once held that the wife would be presumed to consent to the pledge of community credit to assist a child of the husband and wife, but this case was directly overruled on the basis that the husband's agency was for conduct of the business of the community, with the result that benefit to the community property or furtherance of a community purpose must be intended before liability will extend beyond separate responsibility of the husband. This rule is not as restrictive as might appear at first blush because (1) the burden of proof is on the one asserting the separate character of the transaction, and (2) the intended benefit may be indirect as well as direct. The community purpose has been found, for example, in going surety for a corporation in which there are community funds invested in reviving an obligation by payment on a note barred by time, in participating in financing the development of a golf club—in other words, apparently community liability will exist if a community asset is somehow (no matter if only remotely) connected with the particular transaction, or if personal activity of a spouse is furthered.

In many transactions funds or other assets are immediately acquired by entering into the obligation. It is not entirely clear whether the use made of the funds is significant in determining the character of the obligation. In support of the conclusion of community liability the court has recently pointed out that the

132. Note 131 supra.
134. See discussion in Part II supra.
funds were used for community purposes,\(^{141}\) which may be merely indicating that the burden of proving a separate obligation has not been carried, but in a case\(^ {142}\) in which the wife's separate property was mortgaged to secure the advance, the court clearly held that the use of the funds for non-community purposes, pursuant to the pre-existing intention of the spouses, was irrelevant—the funds when first received, said the court, were acquired by the husband's pledge of community credit and were available for any community purpose.

The unavailability of community property to separate creditors poses a practical problem to those extending credit to unmarried persons. The truth apparently is that this insulation is not asserted by most recently married persons, but credit managers are confronted with what is loosely called "marital bankruptcy" in a wide variety of situations. The supplier of goods may be able to reach the goods which retain their separate property character, but the supplier of services does not even have this small consolation—how (or why) would the dentist, for example, recapture the product of his labors?

Conflicting policies of the community property system and divorce-alimony rules have collided head-on under this principle. The court has only partly met the problem of continuing protection to the divorced wife and children—obviously a separate obligation of the husband since it arises prior to his later marriage. In one case\(^ {143}\) the court held real property owned as community property of the husband and his second wife cannot be reached to satisfy the divorce decree awards, even though it had previously held that garnishment of the husband's salary was permissible.\(^ {144}\) This may be a limited throw-back to an abandoned distinction\(^ {145}\) between the real and personal property rights and powers of the husband, but perhaps the dissenting judge had a better idea when he suggested that the second wife just took an "encumbered" husband.

Whether the husband or wife is the moving party there will probably always be separate liability, but no presumption of community liability arises from the wife's obligations. In two types of situations community liability may result from the

\(^{141}\) Fies v. Storey, 37 Wash.2d 105, 221 P.2d 1031 (1950). See also In re Binge's Estate, 5 Wash.2d 446, 455, 105 P.2d 699, 702 (1940).

\(^{142}\) Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934).

\(^{143}\) Stafford v. Stafford, 10 Wash.2d 649, 117 P.2d 753 (1941).

\(^{144}\) Fisch v. Marler, 1 Wash.2d 698, 97 P.2d 147 (1939).

\(^{145}\) Schramm v. Steele, 97 Wash. 309, 166 Pac. 634 (1917).
wife's obligations: (1) transactions falling within the "family expense" statute\textsuperscript{146} which create three-way liability (separate-husband, separate-wife, and community), and (2) transactions by the wife for a community purpose which the husband either has authorized or ratified, or the community character of which he has estopped himself to deny.\textsuperscript{147} To avoid community liability after he acquires sufficient knowledge of the transaction, the husband must act promptly, but this prerequisite provides substantial protection against community liability from many acts of the wife.\textsuperscript{148}

Clearly the husband may formally appoint the wife agent to conduct community affairs,\textsuperscript{149} but in addition the wife's agency may be established by a course of conduct so that her acts may create community liability. A peculiar offshoot, of undefined scope, appeared in \textit{Lucci v. Lucci}\textsuperscript{150} in which the wife's agency was found and a separate liability was imposed on the husband as well as the community liability. The wife's conduct of a grocery clearly benefitted the two of them in a community property sense and comparable liability for a loan used in ordinary community transactions follows, but there would appear to be nothing in the borrowing which benefited the husband in a separate property sense. The usual approach of the court in resolving problems of liability can be epitomized in referring to the husband-wife community as an "entity."\textsuperscript{151} Conceivably the unexpressed reasoning of the court is that all community contractual transactions necessarily and unavoidably involve the husband's action as managing "principal" with the result that "entity" reasoning is inappropriate. There is nothing, however, to delineate the significance of the case.

\textsuperscript{146} \textit{WASH. REV. CODE} 26.20.010 (1953).
\textsuperscript{149} \textit{WASH. REV. CODE} 26.16.060 (1953).
\textsuperscript{150} \textit{Lucci v. Lucci}, 2 Wash.2d 624, 99 P.2d 393 (1940).
\textsuperscript{151} Though of course the court does not uniformly reach results on the basis that this "entity" is the principal in the agency law sense. See Mechem, \textit{Progress of the Law in Washington: Community Property}, 7 \textit{WASH. L. REV.} 367-70 (1933). The clearest rejection of the "entity" reasoning was made in \textit{Bortle v. Osborne}, 155 Wash. 565, 285 Pac. 425, 67 A.L.R. 1152 (1930), in which the court held a tort cause of action did not survive against the community after the death of the tortfeasor spouse. This particular result has been changed by a 1953 statute, \textit{WASH. REV. CODE} 4.20.045 (1953), discussed in Richards, \textit{Washington Legislation—1953}, Torts, 28 \textit{WASH. L. REV.} 201-4 (1953).
Tort Obligations

In tort cases while there is no presumption to aid the plaintiff, community liability may be found by either of two routes: (1) when the act is one within the managing power of the actor for the community on a basis of respondeat superior, and (2) when the act is done for the benefit of the community. The latter test clearly applies when assets acquired by the tort (e.g., conversion) are community property under the statutory definitions. The former might be called "management" torts, and from recent decisions it is open to argument that, except for the "official capacity" torts, this category will include all tortious conduct, or at least all not within the "benefit" category. A willful, fatal beating gave rise to community liability in McHenry v. Short, in which the husband was either ejecting a trespasser from community land or was performing duties as watchman on the land. Community liability was found in LaFramboise v. Schmidt when the husband took indecent liberties with the small girl being cared for by him and his wife. Recreational activities, even though somewhat abnormal, have been held to be community activities resulting in community liability. And of course, torts committed in connection with the actor's business affairs either as entrepreneur or employee create community liability. There may yet be, however, an area in which the tortious conduct so clearly has no relationship to community affairs that only separate liability can be imposed. Here would fall the liability in an action against a husband for alienation of the affections of plaintiff's wife, and perhaps the purely personal altercation.

Official Capacity Tort

A peculiar rule exists covering the tort liability of a public official. Despite the fact that the salary earned is community

152. The cases are more extensively analyzed in Pruzan, Community Property and Tort Liability in Washington, 23 Wash. L. Rev. 259 (1948).
155. 29 Wash.2d 263, 186 P.2d 900 (1947).
156. 42 Wash.2d 198, 254 P.2d 485 (1953).
160. Newbury v. Remington, 184 Wash. 665, 52 P.2d 312 (1935). Though perhaps the wife rather than the plaintiff should carry the cost burden of her husband's pugnaciousness.
property' and hence it would seem that the spouse's acts as an official are "community" acts, the court has held that only a separate liability arises from torts committed in the officer's official capacity.\textsuperscript{161} It was once contended that if the tort of the husband in negligently driving a taxicab in his business caused community liability, the same should be true of the tort of a husband whose whole endeavor was devoted to duties as a public official. The purported explanation by the court was, "The distinction is as clear as any distinction can be. The community drives the automobile; the community does not make the levy. The one is a community tort; the other is an official or separate tort."\textsuperscript{162}

**Effect of Separate Property Agreement**

The effectiveness of a separate property agreement mentioned in Part IV, supra, is not limited to the ownership rights of the spouses, but in addition, the court has recognized that property, which would otherwise be community property and available to a creditor, will pursuant to such an agreement be separate property and thus, in the hands of the non-acting spouse, beyond the reach of the creditor.\textsuperscript{163} This can be phrased either that the contractual liability is only separate, or that the liability though community and separate does not reach this asset as separate property of the non-acting spouse. Such an agreement is effective against subsequent creditors even though they do not know of the agreement,\textsuperscript{164} but not against existing creditors.\textsuperscript{165} The existence of the agreement must be satisfactorily proved.\textsuperscript{166} The writer has found no cases considering the effect of an existing separate property agreement on the position of the tort judgment creditor.

**Out-of-State Creditors**

In view of the excellent discussion of the problems elsewhere,\textsuperscript{167} mention only need be made of the court's treatment of out-of-state creditors seeking to reach Washington assets. The court has reasoned that a claim arising in non-community property state is necessarily a separate claim, hence enforceable in Washington only against separate property of the actor. The

\begin{itemize}
\item \textsuperscript{161} Brotton v. Langert, 1 Wash. 73, 23 Pac. 688 (1890).
\item \textsuperscript{162} Day v. Henry, 81 Wash. 61, 64, 142 Pac. 439, 440 (1914).
\item \textsuperscript{163} Union Securities Co. v. Smith, 93 Wash. 115, 180 Pac. 304 (1916).
\item \textsuperscript{164} Piles v. Bovee, 165 Wash. 538, 12 P.2d 914 (1932).
\item \textsuperscript{165} Davison v. Hewitt, 6 Wash.2d 131, 106 P.2d 733 (1940); Marsh v. Fisher, 69 Wash. 570, 125 Pac. 951 (1912).
\item \textsuperscript{166} State v. Miller, 32 Wash.2d 149, 201 P.2d 126 (1948).
\item \textsuperscript{167} Marsh, Marital Property in Conflict of Laws 148-54 (1952).
\end{itemize}
position has been taken when after incurring the obligation the debtor and spouse moved to Washington,\(^{168}\) and also when a Washington domiciliary has incurred an obligation outside of the state, either tort\(^{169}\) or contract.\(^{170}\) This “bankruptcy” by moving to Washington is unwarranted enough, but this distinctive treatment of the out-of-state creditors of the Washington domiciliary not only is unfair but should boomerang on Washington residents in all dealings with out-of-state businesses.

With the knowledge and consent of the wife (to preclude the argument of unauthorized gift), the separate debt, whether out-of-state or otherwise, presumably could be changed into a community debt if a clear expression of the purpose to do so is shown,\(^{171}\) but unfortunately such a factual pattern is not common and the presumption usually controlling is that a debt, just as an asset, retains its character even though it may change its form.\(^{172}\)

VI. CONCLUSION

On the whole the community property law is apparently working to the satisfaction of Washington residents. There is no general sentiment expressed in favor of abandoning it even though particular complications are spasmodically deplored. Most persons who might be caught on technicalities which make transactions hazardous or cumbersome know (even if they do not understand) the “ground rules” which meet the problems, and immigrants from non-community property states quit “shaking their heads” as the “natives” reveal the ground rules.

Statutory codification of the rules developed by the court plus correction of some of the deficiencies would be desirable, but there is no group with a specialized interest in the problem. Piecemeal changes such as elimination of the “marital bankruptcy” rule have been informally proposed by certain legislators, but until there is established some form of law revision commission\(^{173}\) it appears probable no comprehensive corrective legislation will be proposed.


\(^{171}\) This was argued in Meng v. Security State Bank of Woodland, 16 Wash.2d 215, 133 P.2d 293 (1943).

\(^{172}\) Katz v. Judd, 108 Wash. 557, 185 Pac. 613 (1919).