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COMMUNITY PROPERTY: A COMPARISON OF THE SYSTEMS IN WASHINGTON AND LOUISIANA

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It was intended that this discussion would compare statutory changes of management of community property in Washington with those in Louisiana, and analyze the effect of those changes as reflected in the experience in Washington. Although six years have elapsed since the Washington legislature generally substituted management by either spouse for the sole management by the husband and expanded the joint management area beyond the previous real property transfer limits, there have been only a few reported appellate decisions involving the 1972 amendments. Hence, this author can only indicate what appears to be the developing effect of the changes and speculate about future rulings in Washington, and compare the refinements of the Louisiana legislation with the Washington changes, adding a few personal comments.

THE PRINCIPAL WASHINGTON RULES WITHOUT THE CHANGES

Preliminarily, a brief summary of the Washington law prior to the 1972 changes should be helpful.[1] Property acquired by a spouse before marriage, or during the marriage by gift, devise or inheritance was separate property. Rents, issues and profits of separate property were also separate.[2] All other property was community property.[3] The husband was the sole manager under the statutes and, except for voluntary real property transactions in which joinder of both spouses was required,[4]

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1. A more extensive discussion of Washington law and a particular analysis of the 1972 changes are in Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729 (1974), and Cross, *Equality for Spouses in Washington Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527 (1973). While this summary is stated in the past tense, most of the propositions both were and continue to be the law in Washington. The principle changes are outlined in this summary of the 1972 changes.

2. WASH. REV. CODE §§ 26.16.010, 26.16.020 (1963).

3. WASH. REV. CODE § 26.16.030 (1963).

4. WASH. REV. CODE § 26.16.040 (1963). The joinder requirement for voluntary

could dispose of community property for community purposes without the wife's concurrence. Although the statutory language indicated that the husband had plenary power over personal property but not real property, the court long ago held that the equal ownership of each necessarily limited the husband's power to management or administration for community purposes.[5] He could not give community property and his testamentary power reached only his half interest.

The statute provided that community real estate was subject to mechanic's or materialman's lien (which could result from the husband's act alone) and subject to judgment liens recovered for community debts. This necessitated classification of debts (and liabilities) as either community or separate and immunized community property from separate creditors, both ante- and post-nuptial.[6] Even the debtor's half interest in community property was insulated;[7] however, the immunity dissolved upon divorce or the death of either spouse.[8]

A debt incurred by a spouse created a separate obligation, and in the case of the husband, also presumptively a community obligation;[9] if the wife was the acting party there would be no community obligation unless she was, in effect, agent for the husband.[10] Tort liabilities were separate, but they were also community, as it developed, if some community activity was in progress when the tort was committed.[11] The availability to a creditor of separate property of the acting spouse, accompanying availability of community property did not make available separate property of the non-acting spouse,[12] unless the

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disposition led also to the necessity to join both spouses in litigation affecting community real property. *See, e.g.*, Lownsdale v. Gray's Harbor Boom Co., 21 Wash. 542, 59 P.663 (1899).

5. *See, e.g.*, Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933); Schramm v. Steele, 97 Wash. 309, 166 P.634 (1917); Marston v. Rue, 92 Wash. 129, 159 P. 111 (1916).

6. *See, e.g.*, Snyder v. Stringer, 116 Wash. 131, 198 P. 733 (1921); Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917).

7. Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892).

8. *See, e.g.*, Edmonds v. Ashe, 13 Wash. App. 789, 537 P.2d 812 (1975); Crawford v. Morris, 92 Wash. 288, 158 P. 957 (1916).

9. Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892).

10. Wallace v. Thomas, 193 Wash. 582, 76 P.2d 1032 (1938); Streck v. Taylor, 173 Wash. 367, 23 P.2d 415 (1933).

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

12. WASH. REV. CODE §§ 26.16.190, 26.16.200 (1963).

underlying obligation or liability could be tied to the family expense statute, which provided for three-way responsibility for expenses of the family and for education of the children (and stepchildren).[13]

The ante-nuptial creditor's position was alleviated by decisions providing that community property was available to satisfy alimony or child support obligations from a previous marriage,[14] and by a 1969 amendment providing that earnings and accumulations of the debtor spouse could be reached by the ante-nuptial creditor who reduced the obligation to judgment within three years of the marriage.[15] Separate property of one spouse was not subject to the debts or liabilities of the other.[16]

Spouses had full right to contract with each other and could change community property of both to separate property of either, or vice versa, or agree that subsequent acquisitions would be all community property or separate property.[17] Such transactions did not depend upon change in the marital relationship, although some property settlement agreements, normally involving changing community property into separate property of each, would be made in connection with dissolution of the marriage. The court, in the absence of agreement, could allocate any assets to either spouse in its dissolution decree, according to the equities of the situation and the needs of the parties.[18]

At death the survivor's half continued in the survivor, and the decedent's half was inherited by the survivor in the absence of a will.[19] (Earlier statutes had provided for succession to descendants or parents of the decedent.) Each spouse had testamentary power over his/her half of the community property.[20]

13. WASH. REV. CODE § 26.16.205 (1963).

14. Fisch v. Marler, 1 Wash. 2d 698, 97 P.2d 1947 (1939). *See also* Smith v. Smith, 13 Wash. App. 381, 534 P.2d 1033 (1975); Hinson v. Hinson, 1 Wash. App. 348, 461 P.2d 560 (1969). Community real property was held to be insulated in *Stafford v. Stafford* 10 Wash. 2d 649, 117 P.2d 753 (1941).

15. See WASH. REV. CODE § 26.16.200 (1976).

16. WASH. REV. CODE §§ 26.16.190, 26.16.200 (1963).

17. Wash. Rev. Code § 26.16.050 (1976); *In re* Garrity's Estate, 22 Wash. 2d 391, 156 P.2d 217 (1945); Volz v. Zang. 113 Wash. 378, 194 P. 409 (1920).

18. WASH. REV. CODE § 26.09.080 (1976).

19. WASH. REV. CODE § 11.04.015 (1976).

20. WASH. REV. CODE § 11.02.070 (1976).

There was a special statutory agreement by which the spouses could dispose of all or any part of the community property with the disposition taking effect at death.[21] The typical agreement provided for survivorship, and many also included provisions changing existing separate property to community property and fixing all subsequent acquisitions as community property, so that the agreement covered all property the decedent owned at death.

THE 1972 WASHINGTON CHANGES

The Washington statutes on spouses' rights are not much more than skeletal; much of the law summarized above was established by court decisions without any clear reference to any statutes. The 1972 changes are similar and, in large part, provide in essence that if the husband, alone, could do it before, now the wife, alone, also can. This was accomplished by amending the principal community property section, section 26.16.030 of the Revised Code of Washington, so that either spouse, acting alone, may manage. The amendment codifies some of the earlier law, continues the joinder requirement for real property transfers, and adds acquisition of community real property and transfer of community household goods, furnishing, or appliances to the "joinder" list. A special provision of some ambiguity was added with reference to community businesses.[22]

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21. WASH. REV. CODE § 26.16.120 (1976).

22. WASH. REV. CODE § 26.16.030 (1976) provides:

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

(1) Neither spouse shall devise or bequeath by will more than one-half of the community property.

(2) Neither spouse shall give community property without the express or implied consent of the other.

(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.

(4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in

The only other major change in the law concerns litigation. Although in general either spouse, as manager, may sue, as the husband alone could before, now the injured spouse is a necessary party in an action for personal injuries and the employed spouse is a necessary party in an action for compensation for services rendered.[23]

The amendments make statutory the rule that earnings and accumulations of the spouses living separate and apart are the separate property of the acquirer;[24] previously the statute included only the wife but case law developed a comparable rule for the husband. Similarly, the statute insulating the husband from liabilty for injury committed by the wife, unless there was a joint responsibility without regard to the marital relationship, was expressly extended to insulate the separate property of each from injuries committed by the other.[25] Neither the old nor new provision controls the possibility of community liabilty. Assignment of future wages requires written consent of the non-employed spouse now; formerly that proposition applied to the husband's wages and the wife's consent.[26]

COMPARISON OF THE NEW LOUISIANA AND WASHINGTON RULES

Act 627 of the 1978 Louisiana legislature added a new chapter, entitled Matrimonial Regimes, comprising sections 2831 through 2856 of title 9 of the Louisiana Revised Statutes. By the general provisions of the act the spouses have the regime

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the execution of the contract to purchase.

(5) Neither spouse shall create a security interest other than a purchase money security interest as defined in RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances unless the other spouse joins in executing the security agreement or bill of sale, if any.

(6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate or the good will of a business where both spouses participate in its management without the consent of the other: *Provided*, That where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.

23. WASH. REV. CODE § 4.08.030 (1976).

24. WASH. REV. CODE § 26.16.140 (1976). *Togliatti v. Robertson*, 29 Wash. 2d 844, 190 P.2d 575 (1948), is the principal and initial case holding the husband's acquisition to be separate.

25. WASH. REV. CODE § 26.16.190 (1976).

26. WASH. REV. CODE § 49.48.100 (1976).

delineated by the statutes unless they contract for a modified or limited community regime or for complete separation of property. A desirable certainty as to the spouses' regime is assured by the requirement of section 2834 that any contract must be by "an act passed before a notary public and two witnesses," and the further requirement for effectiveness against third persons of registry in the mortgage records of domicile and of an immovable's situs. The Washington law, without assistance from comprehensive statutes, permits comparable flexibility for the spouses in fixing or altering the community property relationships, otherwise prevailing, by agreement either before or after marriage. A "separate property agreement" in Washington may be either written or oral, which can pose problems of proof of its existence and of its continuing operative effect,[27] and the agreement can be effective against subsequent creditors even though they do not know of it.[28] As to these circumstances, the Louisiana approach has much to be said for it. Requiring formality of execution may reduce the number of instances in which the spouses' expectations will be realized, because some spouses may incorrectly consider themselves bound by an informal agreement. However, the writing should be advantageous to the spouses' relationship since it increases the likelihood that the departure from the usual regime was purposeful and results in certainty within those areas covered by their property arrangement. In addition, complications with third persons should be largely eliminated by the requirement of registry.[29]

The general provisions of the legal matrimonial regime are set forth in sections 2836 through 2841. The Washington law is generally similar except that rents, issues and profits of separate property are separate, not community property, in Washington. There is no Washington statute or rule by which a

27. Mumm v. Mumm, 63 Wash. 2d 349, 387 P.2d 547 (1963); Kolmorgan v. Schaller, 51 Wash. 2d 94, 316 P.2d 111 (1957); State v. Miller, 32 Wash. 2d 149, 201 P.2d 136 (1949).

28. Piles v. Bovee, 168 Wash. 538, 12 P.2d 914 (1932).

29. The Louisiana statute provides that registry is necessary for the contract to be effective against third persons. Washington's rule protects the existing community creditor from the change a separate property agreement makes between the spouses. *See* Marsh v. Fisher, 69 Wash. 570, 125 P. 951 (1912) (an agreement between the spouses changing their property regime will not affect an existing community creditor).

mixed acquisition, that is, something acquired with separate and community assets, would be characterized as either community or separate property. Paragraph (3) of section 2839 establishes the community character of such an acquisition in Louisiana (with reimbursement for the separate investment), unless the community contribution is "inconsequential," which reverses the conclusion. In Washington the ownership would be apportioned according to the respective contributions, except that an inconsequential contribution might be ignored or disappear under commingling analysis.[30]

Section 2840 separates recovery for injury of a spouse so that an award for pain and suffering is separate property, expenses attendant upon the injury and loss of community earnings are community property, and upon dissolution of the community regime that portion representing subsequent lost earnings shall be treated as separate property. There is the possibility in Washington that such a rule will develop although general case law now characterizes all elements as community property.[31]

The major changes in the law in both states establish equal management of community property by either spouse and expand the area of joint management. As the comment to the basic new section, section 2842, indicates, each spouse has equal power to manage community property without the consent or concurrence of the other, except in instances particularly important to the well-being of the family, when concur-

30. In Washington an acquisition by down payment and credit for the balance of the price will be apportioned if the two factors vary in kind, *e.g.*, separate funds for the down payment gives a separate fractional ownership, community obligation or credit creates a community fraction. See Cross, *supra* note 1, at 755-64. Increase in value by additions to an asset or use of the asset may give rise to a right of reimbursement or may, through commingling, result in a community characterization. *See, e.g.*, Holm v. Holm, 27 Wash. 2d 456, 178 P.2d 725 (1947); Salisbury v. Meeker, 152 Wash. 146, 277 P. 376 (1929); *In re* Buchanan's Estate, 89 Wash. 172, 154 P. 129 (1916).

31. In the interspousal tort case of *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972), the court separated the pain and suffering award as separate property and left the other two elements as community property. The injured spouse recovered only half of the loss of future earnings (as separate property) to avoid benefit to the tortfeasor. *See* Cross, *supra* note 1, at 773-75, in which the usual community characterization of the cause of action when a third person is tortfeasor is criticized. In *Perez v. Perez*, 11 Wash. App. 429, 523 P.2d 455 (1974), the usual rule was applied, and the supreme court denied review.

rence is required, or instances important to facilitation of commerce with third persons, when the power is limited to one spouse.

The joinder area is identified in section 2842 and includes community immovables, community furniture or furnishings in use in the family home, a community business or all or substantially all of its assets (but a spouse may confer on the other the right to act alone), movables held in joint names, and donation of community assets not of usual or customary magnitude. Washington's law is somewhat similar but, unfortunately, not as refined. Real property transfers require concurrence as do "community household goods, furniture or appliances"—apparently without regard to where they may be used. Washington's peculiar provision[32] about community business appears, to this writer, to permit the result neatly stated in the Louisiana statute: concurrence is required unless the act of a spouse who is sole manager is in the ordinary course of the business (which could hardly include sale of the business or substantially all of the assets), and if both "manage" probably an implied consent by one to the ordinary acts of the other can be shown. If both manage under the Washington provision, concurrence will be necessary to effectuate unusual transactions—which may essentially be the result also under the Louisiana statutes. To avoid the potential complication of determining whether both or only one spouse is participating in management of the Washington community business, a practice appears to be developing to seek an affidavit of "nonparticipation" in appropriate situations. Such awkwardness is avoided in Louisiana by section 2844 because each "participating" spouse has full authority to act.[33] In a transaction involving all or substantially all of the business assets, the concurrence of each spouse is required regardless of whether both or only one participates in management.[34]

Washington has two additional constraints on the power of either spouse to act alone. Neither spouse may give community property without the consent of the other, and neither spouse

32. WASH. REV. STAT. § 26.16.030(6) (1976). For the text of this statute, see note 22, *supra*.

33. *See* LA. R.S. 9:2844, comment (Supp. 1978).

34. *Id.*

may purchase or contract to purchase community real property without the concurrence of the other.[35] The Washington sections as to real property transactions speak in terms of joining in the instrument, but concurrence of the other spouse may be established without that formality.[36]

Except for the ill-defined community business area Washington has no provisions which preclude either spouse from management. In Louisiana, the last sentence of section 2844 states, "A spouse who is a partner has the sole right to alienate, encumber or lease the accompanying partnership interest." In Washington it is unclear whether a partner's spouse must or should be a party to partnership agreements or other partnership decisions, and there does not appear to be uniform practices followed. Similarly Louisiana's provision in section 2845 establishing sole manipulative control of titled movables in the spouse who has title should avoid some problems Washington may have. Ordinary transactions involving such assets as bank accounts or shares of stock are unlikely to present problems for the person with whom a spouse deals, but the non-titled spouse in Washington may have a right to require a registration or issuance in both names to acquire a practical management equal to the general statutory power.

In both states the improper transfer of community property by one spouse is avoidable by the other.[37] In Louisiana section 2846 states that the "spouses are liable to each other for losses or damages caused by fraud or bad faith in the management of the community." There is no comparable provision in Washington, and while the spouse may be able to challenge such an act it is difficult to determine what would result, there being no provision that a successful challenge will produce a separate property recovery.[38] Washington also has no statute,

35. WASH. REV. STAT. § 26.16.030(2), 26.16.030(4) (1976).

36. The author uses the label "participation" for the informal concurrence which meets the joinder requirement. *See* Cross, *supra* note 1, at 785-86, citing cases of transfer of community real property. The idea has been applied to the new purchase requirement. Daily v. Warren, 16 Wash. App. 726, 558 P.2d 1374 (1977).

37. LA. R.S. 9:2846 (Supp. 1978) and Colcord v. Leddy, 4 Wash. 791, 31 P. 320 (1892).

38. Compare with this the provision of LA. R.S. 9:2839(6) (Supp. 1978) which denotes as separate property "[d]amages awarded to the spouse for the loss sustained

or clear rule, like the related provision in section 2847 for court authorization of either spouse to act without the other's consent, when such consent is arbitrarily refused or unavailable in emergency situations. A modification of power in "emergency" is, however, recognized in Washington and may avoid the necessity of joinder.[39]

In sections 2848 through 2854 the Louisiana statutes fix the rules settling property matters in dissolution. Except for the concept of acceptance of the community, the rules are similar to those worked out in the Washington cases largely without the aid of particular statutes; they do not need elaboration in this discussion.[40] Conventional separation of property, under section 2856, is matched by the full power to change property relationships by contract, long existing in Washington, without any specific statute. The Louisiana statute, section 2856, now permits judicial separation of property to protect a spouse's interest in an existing regime when the other spouse's acts threaten the petitioning spouse's position. Washington provides no comparable relief; rather, decrees of separate maintenance (in effect, separation from bed and board, perhaps) or dissolution of marriage (divorce) are the only means for judicial protection.

WILL THE NEW SCHEME WORK?

This writer believes the new scheme will work without major difficulties. Certainly some of the problems which may arise in Washington have been anticipated and adequately met in the Louisiana changes, as the discussion above suggests. While it may be too soon to have any real measure of complications brought about by the changes in Washington, there appears to have been no serious ones which have caused any general difficulties to surface. Ordinary transactions and decisions are apparently being made much as they were before, perhaps because there has been the power of the wife to incur

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as a result of fraud or bad faith in the administration of the community by the other spouse."

39. Marston v. Rue, 92 Wash. 129, 159 P. 111 (1916); Foster v. Williams, 4 Wash. App. 659, 484 P.2d 438 (1971).

40. *See* Cross, *supra* note 1, at 841-43.

three-way liability in typical family transactions under the family expense statute.

The new power of the wife to obligate community assets can have the desirable result of increasing joint decision making, or at least, of increasing the exchange of information between the spouses about the situation as regards *their* property. There has been a minor complication for creditors, who may wish for the broadest possible commitments from limitations on inquiry into the economic situation of the applicant's spouse,[41] but a reasonable application of the test of creditworthiness of the applicant apparently, in Washington, has made available any really needed information, and in appropriate situations permitted insistence that both spouses become obligated.

The power of each to act can be abused. In an abnormal situation in which abuse occurs, Washington spouses may have a difficulty which is unlikely, or at least minimized, in Louisiana by reason of the possibility of judical separation of property,[42] judicial authorization for one spouse to act without consent of the other,[43] and the power of each to sue the other to protect against fraud or bad faith or assert the rights under the new statutes.[44]

Whether the property rights of the spouses will be under greater jeopardy by reason of the new rules may depend upon whether women have a greater capacity or propensity to be foolish, stupid or venal, than men have. The writer knows of no statistics which give an answer to such a question. "Hunch" would suggest that the contrary may be true.

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41. *See* Regulation B, 12 C.F.R. § 202 (effective March 23, 1977), Board of Governors of the Federal Reserve System, under the Equal Credit Opportunity Act, 15 U.S.C. § 1601 *et seq* (1976). Washington has regulations of similar nature under its law against discrimination, WASH. REV. CODE chap. 49.60 (1977), promulgated in WASH. ADMIN. CODE chapter 162-40 (1977). They are coordinated with Regulation B.

42. LA. R.S. 9:2856 (Supp. 1978).

43. LA. R.S. 9:2847 (Supp. 1978).

44. 1978 La. Acts, No. 627, § 4, *amending* LA. R.S. 9:291 (Supp. 1960).