New Mexico Community Property Law: The Senate Interim Committee Report

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A 1953 New Mexico Senate Resolution1 called for a study of the community property laws of the state. The Senate Judiciary Committee was constituted an Interim Committee "to study, and to recommend to the Twenty-Second Legislature (1955), legislation which will equalize the rights and obligations of women under the community property law. . . ." Also to be examined were "the problems of taxation, probate procedure, disposing of community property by will, the economic effect upon family businesses and other related problems involved in any change of the community property laws."

As indicated in a Report2 to the Committee, the terms "equalize" and "equal rights" are not accurate or fortunate expressions in this context. If the words were accepted literally with respect to the economic status of women, the result would be the impairment of important rights and advantages. It is believed that the actual point of focus of the resolution is the problem of concurrent ownership, between husband and wife, of the family resources. It is also believed that suggestions are desired for improved legal techniques which will facilitate this type of ownership while at the same time respecting the spouses' rights of individual ownership.

The purpose of, as distinguished from the motive for,3 the study was to review the community property method in New

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3. The motive for this study is found in a legislative compromise. Senate Bill 6 which would have granted the wife testamentary power over her interest in the community property was introduced but its future was uncertain. The resolution authorizing a study was proposed, then the bill was withdrawn. The resolution passed unanimously.
Mexico with the intention of determining what specific inadequacies have developed since the present statutes were enacted in 1907. That some complexities have arisen in nearly half a century is not surprising. Nor is that fact in itself an unfavorable comment on this form of marital property ownership. Although it cannot be attempted here, it would be worthwhile, perhaps, to compare the changes made in systems prevailing in other states during the same period. It may be that the absence of substantial changes in the New Mexico system since 1907 is some evidence of its soundness and its adaptability. However, complexities have developed. They parallel those in other areas of law. And they are largely the result of economic expansion and its accompanying changes in attitudes toward family security. The marked transition from a rural, individual-conscious society to an urban, group-conscious social order probably accounts for much general dissatisfaction in the United States with marital property laws. The movement of populations, inspired in part by cheap transportation and communication, is another factor. New incentives for easy acquisition and quick transfers of property augmented marital property problems. Wage and salary schedules and employment opportunities have been drastically altered. The whole taxation system has been changed in the last generation. Divorce and mortality statistics cannot be discounted. Life, liability and other forms of public and private insurance are now standard security equipment of perhaps a majority of families. These factors should not be overlooked.

Dissatisfaction with existing forms of marital property ownership is not confined to the community states. The inadequacies of separation of property regimes in the so-called common law states are receiving attention. This is not strange when it is remembered that the origins of those systems are mainly feudal and, in spite of the Married Women's Acts, are essentially unrealistic in modern times. No philosophy of family economic unity underlies those systems. No legal co-ownership of family


5. The expression Married Women's Acts is used to cover the emancipatory legislation, passed in the nineteenth and early twentieth centuries, which granted women the right to appear in court, make contracts, conveys and manage their own property. See 3 Vernier, American Family Laws § 167 et seq. (1935). New Mexico's principal acts were passed in 1897. See N.M. Stat. Ann. § 21-6-6(1963).
resources exists although there apparently always have been attitudes and actual practices of co-ownership between husband and wife. Nevertheless, in law the family wherewithal was or is either "his" or "hers" except where the parties—usually only those with enough property to warrant seeking legal advice—have arranged otherwise. In contrast, the community property method is based on the philosophy that all marital gains are "theirs."

The stated scope of the Report is the New Mexico law as it exists today. No attention is given to departures from traditional community property principles. Nor is comment made on the merit of such departures. The author of the Report quite honestly does not attempt to cover the entire field of community property law. "Rights and obligations arising from the family relationship irrespective of ownership of property" are not discussed.

Conflict of laws problems, few of which appear in the reported New Mexico cases, are omitted. References to decisions in other states and to legal commentators are held to a minimum.

Despite the author's modest claim that the Report does not cover Family Law, it is submitted that the Report might be appropriately described as a review of one of the most important areas of Family Law, the economic basis and solidarity of the family.

Space limitations prevent a complete description of the New Mexico system. It is sufficient to state that the community property method has existed continuously in this region under Spanish, Mexican and American rule. As part of the civil law not "repugnant to or inconsistent with" the United States Constitution and laws passed under its authority, the community system was protected by the Kearny Code. The Organic Act did not alter it. Except for a few statutes on inheritances and conveyancing which, because they introduced the common law theory of merger of husband and wife, caused some confusion in the nineteenth century, the law of marital property, it was believed until 1919, continued for over half a century after

6. REPORT, p. 11.
7. Id. at 12.
8. Ibid.
10. See Beals v. Ares, 25 N.M. 459, 185 Pac. 780 (1919), wherein the Supreme Court decided that a statute of 1876 that declares: "In all the courts in this territory the common law as recognized in the United States of America shall be the rule of practice and decision. . ." had abrogated the civil law, including the community property system, except to the extent that it was preserved by statute. N.M. Laws 1876, c. 2, § 2; N.M. Stat. Ann. § 21-3-3 (1953).
the American conquest to be the civil law of Spain and Mexico as it existed at the time of the Treaty of Guadalupe.\textsuperscript{11} In 1901 a comprehensive community property law was enacted.\textsuperscript{12} It was repealed and replaced by the statutes of 1907,\textsuperscript{13} which were affirmed upon statehood in 1912.\textsuperscript{14} Except for a few changes\textsuperscript{15} the 1907 statutes are the present community property law.

These statutes were patterned after California's.\textsuperscript{16} They contain the essentials of community property policy as found in the other community states; for example, separate property is recognized and defined as property owned by either spouse before marriage and acquired afterward by gift or inheritance together with "the rents, issues and profits thereof."\textsuperscript{17} All other property acquired by either or both spouses after marriage is presumed to be community.\textsuperscript{18} The husband is charged with the management and control of the marital property,\textsuperscript{19} except where he is incapacitated and the wife has been judicially appointed head of the community.\textsuperscript{20} With respect to the community realty, the husband's powers are limited.\textsuperscript{21} Upon dissolution of the community by divorce or separation\textsuperscript{22} there must be an equal division of the marital gains.\textsuperscript{23} The husband has testamentary

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\item See 1 \textsc{De Funiak}, \textit{Principles of Community Property} § 53 (1943); Laughlin v. Laughlin, 49 N.M. 20, 26, 155 P.2d 1010 (1944): "Our community property system is statutory, and with some exceptions, was adopted from the laws of Mexico and Spain as it existed at the time of the signing of the treaty of Guadalupe Hidalgo."
\item N.M. Laws 1901, c. 62, p. 112.
\item N.M. Laws 1907, c. 37, p. 46.
\item N.M. Const. Art. 22, § 4.
\item See, e.g., N.M. Laws 1915, c. 84, § 1, p. 123, doing away with the requirement of the wife's written consent for the disposal of community personalty by the husband; N.M. Laws 1927, c. 84, § 1, p. 259, providing for direct conveyances between husband and wife; N.M. Laws 1947, c. 191, p. 393, providing that a conveyance to husband and wife described as such in the instrument is presumed to be community property and changing part of the effect of August v. Tillian, 51 N.M. 74, 178 P.2d 590 (1947).
\item See McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250 (1938), overruled in Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236 (1952).
\item N.M. Stat. Ann. §§ 57-3-4, 57-3-5 (1953).
\item Id. § 57-4-1.
\item Id. §§ 57-4-5-57-4-8; Frkovich v. Petranovich, 48 N.M. 382, 151 P.2d 337, 155 A.L.R. 395 (1944).
\item See Frkovich v. Petranovich, 48 N.M. 382, 389, 151 P.2d 337, 342, 155 A.L.R. 286, 301 (1944): "W\textsuperscript{h}ether the husband has, notwithstanding the 1915 amendment, some power of \textit{management} of the community real property superior to the power of the wife we do not consider nor decide. . . ."
\item Sands v. Sands, 48 N.M. 458, 152 P.2d 399 (1944); Beals v. Ares, 25 N.M. 458, 185 Pac. 780 (1919).\end{enumerate}
power over one-half of the community estate, but the wife has none.\textsuperscript{24} If she predeceases her husband all the community property "belongs to" him without administration.\textsuperscript{25} Nevada is the only other state with the same limitation on the wife's testamentary power.\textsuperscript{26} As to their separate property, the New Mexico spouses have full and exclusive powers of control and disposition.\textsuperscript{27}

This is an outline of the New Mexico system. Although the system is entirely statutory, the courts still look to the civil law of Spain and Mexico for interpretations.\textsuperscript{28}

The Report to the Committee reviews carefully and then summarizes the "inequalities" in the system.\textsuperscript{29} Suggestions are made for improving it. However, the Committee expressly reserves authority\textsuperscript{30} to draw its own conclusions and make its own recommendations.

This article is an effort to discuss several questions raised by

\textsuperscript{25} Id. § 29-1-9.
\textsuperscript{26} Nev. Comp. Laws §§ 3395.01, 3395.02 (Supp. 1931-41).
\textsuperscript{27} N.M. Stat. Ann. §§ 30-1-1, 57-3-3(1953).
\textsuperscript{28} McDonald v. Senn, 53 N.M. 198, 201, 204 P.2d 990, 991 (1949): "The law in this state regarding the property rights of husband and wife is statutory, but was modeled after the civil law of Spain and Mexico and those laws will be looked to for definitions and interpretations. . . ."
\textsuperscript{29} Report, c. XII, p. 137.
\textsuperscript{30} Id. Foreword, p. 3. The Senate Committee filed its own separate two page report in January, 1955. After reciting the authority for the study and the nature of the Committee's composition and work, the following Findings and Recommendations were stated:

"The Community Property Law of New Mexico is a complicated, interrelated structure of law based on our present statutes and on court decisions. The committee finds that in its operation it is basically fair in its application to all who in their daily lives come within its operation. The committee doubts its ability to improve on a system derived from human experience dating back to early Spanish history and therefore recommends no change in the basic structure of our existing law."

"The committee, however, finds that recent court decisions have caused uncertainty in two aspects of the law and therefore recommends legislation for the purpose of clarifying these two aspects. . . ."

Here the Committee expressed its concern over In re Trimble's Estate, 57 N.M. 51 (1953) and Chavez v. Chavez, 56 N.M. 393 (1952) and submitted proposed legislation, introduced in the 22d Legislature (1955) as Senate Bills 291 and 296, which declared that a joint tenancy may be proved by a preponderance of the evidence and requiring an instrument in writing to effect a transmutation or change of status of real property. These bills were passed but only that on proof of joint tenancy was signed into law.

This is the total result of two years of work, a long Report which cost a good deal of money and which had for its stated goal: "Recommendations toward equalizing the rights and obligations of women under the community property system. . . ." and was prompted by proposed legislation which would have granted the wife testamentary power over her interest in the community property, a right which existed under Spanish law and exists in all of the community states except New Mexico and Nevada. See note 3 supra.
the Report. In addition, others will be asked. Proposed changes will be suggested.

It was agreed at a meeting of the Committee that a rough and ready distinction could be made between technical matters and the broader policy considerations suggested by the Resolution. The distinction is preserved in the Report31 and is followed here although with complete awareness of the Committee's privilege to view the distinction as no more than an approximate, and at times overlapping, one.

POLICY QUESTIONS

The "Legal" Community

Antenuptial Agreements. Assuming that the community property method is not to be abolished as has been suggested,32 an initial question is presented by a statute which reads:

Section 57-3-1 "Law applicable to property rights. . . .
The property rights of husband and wife are governed by this chapter unless there is a marriage settlement containing stipulations contrary thereto."33

On the face of it this statute permits a prospective husband and wife to employ methods other than the community for property ownership. Shall this be continued? Another statute34 allowing husband and wife "to hold property as joint tenants, tenants in common, or as community property" refers to postnuptial agreements but supports the same policy of free choice of the form of ownership. The statute above referring to marriage settlements contemplates antenuptial property arrangements although the expression is often loosely applied to postnuptial agreements also. Postnuptial agreements are separately and expressly provided for in the statutes.35

In New Mexico should the parties before marriage be permitted to contract to hold property out of community? What effect should be given to such an agreement made in another state by persons who become domiciled in New Mexico? Shall such agreements apply only to property in esse, or also to after-acquired property?36

31. Id. c. XIII, p. 153.
32. Ibid.
33. N.M. STAT. ANN. § 57-3-1(1953).
34. Id. § 57-3-2.
35. Id. § 57-2-6 et seq.
No questions are intended to be raised here concerning optional or contract community systems which obtained for short times in Oklahoma and Oregon.\(^{37}\)

**Postnuptial agreements.** Since the decision in *Chavez v. Chavez*\(^{38}\) it is clear that postnuptial agreements are valid, even when they involve a transformation in character of separate or community property. That case overruled *McDonald v. Lambert*\(^{39}\) which actually involved an antenuptial verbal agreement and was so understood by the district court, but which was decided in the Supreme Court as if it were a postnuptial agreement. The *McDonald* case temporarily voided the effect of statutes\(^{40}\) which expressly provide for postnuptial agreements.

As a matter of policy should husband and wife be permitted to contract to hold property out of community?\(^{41}\) Suppose they are business partners. How will the Uniform Partnership Act affect them?\(^{42}\) At one point the Report concludes, “Thus, either a married man or woman may enter a partnership.”\(^{43}\) Does this include a husband and wife partnership? Before the Uniform Act was adopted either husband or wife could be the partner of a third person.\(^{44}\) If husband and wife commercial partnerships or postnuptial agreements are permitted will they apply to after-acquired property and wages?

The repealed community property law of Oregon and Pennsylvania\(^{45}\) provided for easy property transactions between husband and wife involving community property in esse. No provision was made for postnuptial agreements transforming community property into separate property.

**Transmutations.** The existence and free use of other forms of concurrent and separate ownership between husband and wife other than community property raise the question of how far transmutations from community to separate and vice versa

\(^{37}\) See Oregon Laws 1943, c. 440, p. 656. The Oregon system was patterned after Oklahoma's and was repealed in 1945. In 1947 another community property law was enacted which was subsequently repealed. See also Commissioner of Int. Rev. v. Harmon, 323 U.S. 44 (1944).

\(^{38}\) 56 N.M. 393, 244 P.2d 781 (1952).

\(^{39}\) 43 N.M. 27, 85 P.2d 78 (1939).

\(^{40}\) N.M. STAT. ANN. § 57-2-6(1953).

\(^{41}\) See Turley v. Turley, 44 N.M. 382, 103 P.2d 113 (1940) for dicta relevant to this question.

\(^{42}\) N.M. STAT. ANN. § 66-1-1(1953).

\(^{43}\) REPORT, c. VIII, p. 104.

\(^{44}\) See Adams v. Blumenshine, 27 N.M. 643, 204 Pac. 66, 20 A.L.R. 369 (1922).

should be permitted. Gifts back and forth are not unusual. "Joint bank accounts," which are probably the most common method for transmuting the wages and salaries of husband or wife, or both, into a form of separate but undivided interests possessing the sought after incident of survivorship, are widely used in New Mexico. The question of the quantum of proof in the joint bank account situations necessary to show intent has not been raised as it has in the joint deed cases where the rule is that the evidence must be "clear, strong and convincing." The explanation for this may be found among the following:

1. The holding in an earlier case which did not involve community property or a transmutation but a deposit of the husband’s separate property in a joint account with his wife. After the husband’s death the court declared that the intent to create survivorship rights in a joint bank account is more easily found where the deposit is made in the name of the husband "or" wife.

2. The effect given to the depositor’s agreement with the bank usually found on the application and signature card. Moreover, a statute protects the bank against double payment.

3. No situation has arisen since In re Trimble’s Estate that has been significant enough to carry to the Supreme Court.

Perhaps the only limitation on transmutations should be the rules against fraudulent transfers and other remedies open to creditors. It would seem that in family ownership matters

46. See Clark, Transmutations in New Mexico Community Property Law, 24 Rocky Mt. L. Rev. 273 (1952).
47. This phrase is susceptible of different interpretations in different jurisdictions. See Kepner, The Joint and Survivorship Bank Account—A Concept Without a Name, 41 Calif. L. Rev. 596 (1954); Townsend, Creation of Joint Rights Between Husband and Wife in Personal Property, 52 Mich. L. Rev. 779, 957 (1954). Some states call it a joint tenancy. New Mexico frankly recognizes it as something sui generis. Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940).
49. Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940).
50. The following form is used by the largest New Mexico bank: "The undersigned joint depositors hereby agree each with the Albuquerque National Bank, all of Albuquerque, New Mexico, that all the sums heretofore or hereafter deposited by said joint depositors, or either of them, with said bank to their credit as such joint depositors shall be owned by them jointly with right of survivorship and be subject to the check or order or receipt of either of them or survivor of either of them, and payment thereof shall discharge said bank from liability to either or to their heirs, executors, administrators or assigns of either. This agreement shall not be changed or terminated except by written notice to said bank, and such notice shall not affect the right of the bank or said depositors hereunder with relation to deposits heretofore made."
52. 57 N.M. 51, 253 P.2d 805 (1953).
flexibility should not be discouraged. The Report discusses several aspects of transmutation.\(^{53}\)

**Community Property and Common Law Estates**

In community property states should joint tenancies and tenancies in common be permitted between husband and wife? The present law\(^{54}\) expressly provides for them. There are sound arguments pro and con.\(^{55}\)

It appears that joint tenancy deeds are widely used in New Mexico's most populous county. This probability was discussed in a recent case\(^{56}\) which has been strongly criticized. The case held that a deed to husband and wife in the form of joint tenancy did not transmute the property from community to separate property. The property was purchased with community funds. When the husband died the wife petitioned for letters of administration alleging that the property was community. Later it was discovered that the deed was in the form of joint tenancy. The wife then claimed all the property by right of survivorship as against a creditor, the hospital that had cared for the husband in his last illness. The only evidence of any intent to transmute community into separate property was the form of the deed. The court said: "Stripping aside the technicalities of evidentiary force, the root spirit of all of these decisions is intention, and rightly so. Ultimately, if the dual estates of the common and civil law can exist together compatibly, the amalgam must be the true intention of the parties...." The court then decided that the general presumption of community property was not overcome because the intent to transmute was not "clear, strong and convincing" as shown by more than a mere preponderance of evidence. The community property statute does not expressly cover joint tenancies.

Special attention is given in the Report\(^{57}\) to the *Trimble* case and the problems of joint tenancy. The Report contains a careful sampling from real estate records of nine counties "chosen on the basis of geographical location and diversity of economic interests." The Report's conclusion is that joint tenancy deeds are "fairly extensively used" in New Mexico.

\(^{53}\) Report, c. V, p. 27, c. VI, p. 57.


\(^{55}\) Report, c. III, p. 19, c. XII, p. 151.

\(^{56}\) In re *Trimble's Estate*, 57 N.M. 51, 253 P.2d 805 (1953).

The Report\textsuperscript{58} sets out in full the suggestions made to the Committee for "correcting" the Trimble decision. There are a number and they vary from the desire to abolish joint tenancies between husband and wife to proposals for reducing the extraordinary burden of proof to show a joint tenancy. The Report's summary of these problems is particularly good.

In this same connection the question might be raised, why not allow tenancies by the entirety in New Mexico? The arguments against them given in Hernandez v. Becker\textsuperscript{59} are not entirely convincing. At the present time many people taking property, particularly their homes, in joint tenancy do not realize that either party has the power to break up that tenancy. The argument that no one will purchase such an interest is irrelevant. When creditors are in pursuit the question is: May the creditor reach this particular interest on the ground that the debtor has a power over it which the creditor now would like to exercise (or have the bankruptcy trustee exercise)? The origin of tenancy by the entirety is obscure\textsuperscript{60} but it seems to have been designed to meet this very problem. For all practical purposes a tenancy by the entirety is little more than a special kind of joint tenancy between husband and wife which neither has the right nor the power to break up. This seems to be the one notable example, along with the trust theory, of the common law developing an attitude toward the family as an economic unit of at least two persons.

The question has already been raised as to the existence of a commercial partnership between husband and wife.\textsuperscript{61} Some community states declare that the business and marital partnerships are incompatible.\textsuperscript{62}

Assume that a husband and wife, using all the community property they own, enter a business partnership. The New Mexico Uniform Act\textsuperscript{63} declares:

Section 66-1-25 "A partner's right in specific partnership property is not subject to dower, curtesy or allowances to widows, or next of kin, and is not community property."

\textsuperscript{58} Id. c. XIII, p. 155.
\textsuperscript{59} 54 F.2d 542 (10th Cir. 1931). See also McDonald v. Senn, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949).
\textsuperscript{60} See 3 Holdsworth, History of English Law 126 (1927).
\textsuperscript{61} See supra page 577.
\textsuperscript{62} See 1 De Funik, Principles of Community Property § 148 (1953).
Does this mean that a transmutation has taken place? Are the spouses now "tenants in partnership?" What kind of property is the income from the business, separate or community? The Report does not go into these questions.

Whether or not commercial partnerships are allowed between husband and wife, some thought should be given to the advisability of following partnership analogies in dealing with the marital community. The resemblances are superficial and the differences vital. There is a strong trend to regard the business partnership as an "entity" for certain purposes. Arizona and Washington regard the community as an entity and have involved themselves in considerable practical difficulty not to mention specious legal reasoning. It is clear that the courts do not generally regard the community as an entity in bankruptcy although a commercial partnership and its individual members enjoy the benefits of that attitude.

This discussion raises the elementary question of whether the family as a basic unit of society is to be given certain considerations or priorities that individual members do not have but which are enjoyed by other social institutions or legal organizations. This is essentially the problem raised in tort cases and cases involving the rights of creditors.

Presumptions

Presumptions are an integral part of the New Mexico community property system. Their significance generally in community property law is explained by one writer as follows:

"In every one of the old community property states there is a presumption that all property acquired by either

64. See CAL. CORPORATIONS CODE § 15025(2)(e) (Deering, Supp. 1953); 1 DE FUNIAC, PRINCIPLES OF COMMUNITY PROPERTY § 80 (1943).
67. See Moore, The Community Property System and the Economic Reconstruction of the Family Unit: Insolvency and Bankruptcy, 11 Wash. L. Rev. 61 (1936). In Washington the community entity may go through bankruptcy but a discharge apparently does not release the individual spouses entirely. See 1 DE FUNIAC, PRINCIPLES OF COMMUNITY PROPERTY § 180 (1943). What the law is in New Mexico is far from clear. See REPORT, c. VIII, p. 92.
spouse during the marriage is community property. It is a fundamental part of a true community system. It existed under the Spanish law. . . . Such a presumption represents the social policy of a true community state. It is also supported by the probability that property acquired during marriage is more likely to be community than separate, and it provides a uniform rule in cases where satisfactory evidence is lacking, which are not infrequent. . . ."  

The subject is an extremely technical one and will be given only general consideration here. The Report\textsuperscript{69} devotes special attention to the nature of presumptions and also to the amount of evidence necessary to overcome or displace them.  

The present New Mexico community property statute\textsuperscript{70} creates the following presumptions:  

1. That all property acquired after marriage is community.  

2. That property acquired by a married woman alone or with a third person, by an instrument in writing, is separate property (in the latter case, the interest of a "tenant in common").  

3. That property acquired by a married woman and her husband described as such in the instrument is community.  

The statute does not expressly cover joint tenancies. It has been suggested\textsuperscript{71} that in the following sentence the italicized phrase "the presumption is that the married woman takes the part conveyed to her, as tenant in common unless a different intention is expressed in the instrument" encompasses a joint tenancy deed.  

A fourth presumption must also be considered: the presumption of gift to the wife of one-half where property stands in the name of a man and woman who are husband and wife but who are not described as such in the instrument.\textsuperscript{72} This presumption, although it may not have been decisive, appears in a case which is discussed elsewhere\textsuperscript{73} and is further analyzed in the Report.\textsuperscript{74} The case prompted the legislature to add the third presumption

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\textsuperscript{69} \textit{Report}, c. V, p. 27.  
\textsuperscript{70} N.M. Stat. Ann. § 57-4-1 (1953).  
\textsuperscript{71} \textit{Report}, c. V, p. 51.  
\textsuperscript{72} August v. Tillian, 51 N.M. 74, 178 P.2d 590 (1947).  
\textsuperscript{74} \textit{Report}, c. V, p. 27, c. XIII, p. 157.
\end{flushleft}
listed above in 1947. It is believed that that amendment is no more than a clarification of the first general presumption in favor of community.

All of these presumptions are rebuttable except with respect to bona fide encumbrancers or purchasers, in which cases the presumptions are conclusive. The statute does not, however, prescribe the degree of proof or nature of evidence which will overcome the presumptions. These questions have become particularly troublesome since the decision of In re Trimble's Estate because (1) it required the quantum of proof to overcome the general presumption of community property to be extraordinary ("clear, strong and convincing" and more than a mere preponderance of the evidence) and (2) it leaves in doubt the degree of proof and the nature of the evidence necessary to overcome the other presumptions.

Apart from the problems involved in distinguishing presumptions from inferences, and the difficulties in applying presumptions, it must be stated that the purpose of the general presumption is clear: (1) It states the social policy behind community-of-property thinking and (2) it has the practical effect of resolving doubts in favor of co-ownership between the spouses as against claims of separate ownership. The commingling cases are examples.

It has already been stated that the community property statutes do not refer specifically to joint tenancies which are permitted in New Mexico but must be expressly created. If the problems augured in the Trimble case are to be met, special attention must be given to joint tenancies. It is believed that the New Mexico community property statutes should be re-drafted with the following policy considerations uppermost in mind:

1. This is a community state which has established the principle of co-ownership of family property by husband and wife.

2. Attacks on titles and uncertainty connected with the form of ownership should be reduced to a minimum.

75. N.M. Laws 1947, c. 191, p. 393.
77. 57 N.M. 51, 253 P.2d 805 (1953).
78. REPORT, c. XIII, p. 156.
3. The form of a deed should be controlling (i.e., the form should be taken as evidence of the state of mind of the grantees that they intended the deed to be in a particular form) except in unusual circumstances such as fraud, duress, etc.

The discussion in the Report\textsuperscript{80} concerning the effect of presumptions as rules of evidence or rules of property points out that the real problem in both cases is to determine the amount of evidence to overcome or displace a presumption. Any new legislation must not ignore that problem.

In addition to the suggestions for corrective legislation contained in the Report\textsuperscript{81} another idea is advanced herein for the Committee's consideration. A simple statute could be drafted which would follow the theory contained in the Model Code of Evidence, Rule 703 on Legitimacy,\textsuperscript{82} and would read something like this:

Whenever it is established that any property was acquired during the marriage by husband and wife, the property shall have the status of community property and the party asserting that it is separate property has the burden of producing evidence and the burden of persuading the trier of fact beyond a reasonable doubt that the property is separate property.

This would comport with the rule established in Chavez v. Chavez\textsuperscript{83} and In re Trimble's Estate.\textsuperscript{84}

Another statute could be drafted which would refer specifically to joint tenancies and tenancies in common and make it necessary to prove beyond a reasonable doubt that property held in this form is not separate property. It is believed that this type of statute should be applicable to both husband and wife. The present statute establishing presumptions in favor of married women only should be repealed. Still another statute might be enacted for the benefit of abstractors and title examiners which would create the beyond a reasonable doubt test where the words 'sole and separate'\textsuperscript{85} appear in a deed either to a man or woman. The conclusive presumption for the

\textsuperscript{80} Report, c. V, p. 27.
\textsuperscript{81} Id. c. XIII, p. 153.
\textsuperscript{82} A.L.I., Model Code of Evidence (1942).
\textsuperscript{83} 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236 (1952).
\textsuperscript{84} 57 N.M. 51, 253 P.2d 805 (1955).
\textsuperscript{85} The phrase "sole and separate" would seem to raise a rebuttal presumption under the present statute, N.M. Stat. Ann. § 57-4-1(1953) of separate property since an "intention is expressed in the instrument."
benefit of the same class of persons now protected by the statute should be retained.

The above suggestions are made with full recognition of their common law influence. For under the civil law the actual ownership was more important than the form of the title. However, it would seem that the experience of the code countries and the history of titles in this country demonstrate the soundness of these proposals. Moreover, it is believed that the aggravated ills of *Chavez v. Chavez* and *In re Trimble's Estate* would be arrested if not cured.

**Creditors' Rights and Liability to Third Persons**

Great confusion prevails in this area, and not just in New Mexico. No attempt will be made to resolve it in this summary. However, the main outlines of the difficulty can be pointed out.

A clear policy must be adopted with respect to:

1. Liability for the husband's antenuptial and postnuptial debts.
2. Liability for the wife's antenuptial torts.
3. Liability of the community property for torts, "community" and separate, of either spouse.

Answers to these problems are hinted at in some of the cases. They are not entirely clear in the statutes. One case lays down the rule that the community property may be taken on execution for the wife's separate postnuptial tort. The case held that her half of the community was liable. Suppose her half were not enough to satisfy the judgment? Is the rule of *McDonald v. Senn* applicable to the husband's torts also? What is a "community tort," if there is such a wrong?

The above is no more than a sketch of some of the substantive problems. If certain creditors' rights are recognized, then procedural methods must be improved for enforcing them by (1) establishing the order of liability of community and separate property and (2) clarifying the priorities among com-

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86. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 60 (1943).
87. 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236 (1952).
88. 57 N.M. 51, 253 P.2d 805 (1953).
89. See Daggett, Policy Questions on Marital Property Law in Louisiana, 14 LOUISIANA LAW REVIEW 328 (1954); 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY §§ 167-70, 178-80 (1943).
91. Ibid.
munity creditors and individual antenuptial and postnuptial creditors of the spouses.

The Arizona statute\textsuperscript{92} may be a guide in this matter. Any new legislation should not overlook bankruptcy problems and the vast penumbra in this area.\textsuperscript{93}

Before remedies for the above problems are proposed there should be a re-examination of the conflict of interests between the family and those outside of it, for example, creditors. Therein lies the basis of any determination of policy. This means, of course, that exemption statutes, insolvency procedures and family support and expense statutes should be studied and reappraised. Obviously community property principles would play only a part in such a project.

\textit{Income, Increases and Profits from Separate Property}

A controversial issue is purposely raised by this question: Should the present New Mexico statutes be changed to make the income and profits of separate property community property? This is the law of Louisiana, Texas and Idaho.\textsuperscript{94} This was the original Spanish law. Why was it changed and is it advantageous to the family unit?

The present statutes are stepchildren of the Married Women’s Acts. These acts were followed, blindly many times, in the late nineteenth century. They were promoted by the commendable desire to allow married women in the common law states to own and control their own property. They were inspired by equity’s realistic treatment of the woman of property. However, under the community property system a married woman always owned her separate property. The corpus of such property always remained separate. But the income and fruits belonged to the marital partnership which presumably made maximum use of the corpus. The basis for this practice and the changes that have developed have been explained as follows:

“One of the principal aims of the Spanish law was protection of the family, and toward that end property was kept in a family as much as possible. Community of property was one of the methods for achieving this goal. The limitation on succession was another. The ownership of separate property by either or both spouses was an inextricable but

\begin{footnotes}
\item[92.] \textsc{Ariz. Code Ann.} § 63-305 (1939).
\item[93.] \textsc{Report}, c. VIII, p. 157.
\item[94.] \textsc{I de FuniaK, Principles of Community Property} § 71 (1943).
\end{footnotes}
entirely subordinate element in the Spanish system. Under modern community property statutes decided emphasis is placed on separate property. Thus in five community States the 'rents, issues and profits' of separate property remain separate instead of becoming 'acquests and gains' of the marriage.

"The Spanish law's recognition of separate property seems to have been mainly for the purpose of returning such property to the family line of the particular spouse, who, during his or her lifetime or marriage had the right to its use and enjoyment. There were express limitations on the testamentary right of a spouse to dispose of separate property beyond the spouse's immediate family.

"At least in this area of old Spanish law, the emphasis was on *use* rather than 'ownership'. Hence the recognition of usufructuary and other rights in the marital partnership, and the rule that the increase and income from separate property was community property."^95

The Married Women's Acts were not designed to correct any injustices in a system of this nature. But they were not fully understood by the New Mexico settlers who brought this legislation with them. The confusion created by these acts is a matter of record:

"The personal and property rights of married women are in a sadly muddled condition. The confusion which existed under the Compiled Laws, of 1884, was worse confounded by the acts of 1887, and in order to harmonize the two or make either one intelligible, further legislation is necessary. This is one of the most important changes necessary in our laws to bring them in harmony with the legislation in other parts of the Union . . . ."^96

The legislation making the income and profits of separate property separate property has probably engendered the greatest confusion and inequities to be found in the system.

"The right of husband or wife to own separate property was an integral part of Spanish community property law and is an even more important, and at times a distorted, }


^96. NEW MEXICO STATE BAR PROCEEDINGS 26 (1888).
feature of the community systems in the United States where the category of separate property has been greatly enlarged by statute. Under Spanish law separate property remained separate property. This is still the settled rule in all the community states. However, under Spanish law, and under the present law of Idaho and Texas, the *income and fruits* of separate property become community property. Today by statute in the other community States such *increases and profits* remain separate property. The proposition that 'the rents, issues and profits' of separate property are separate property is being re-examined these days for several reasons. First, the application of such a rule is very difficult, no matter how clearly it is stated in the statute, because of the general presumption in favour of community property and the problems involved in tracing funds. Second, such a rule theoretically requires that the average middle class family keep three sets of books of account, one for each spouse's separate income or profits and one for the community gains. Third, it has the effect of further enlargement of lien and equity theories which are already amorphous and unwieldy. The idea of preserving the separate identity of the *income and fruits* of separate property betrays the influence of English common law separation of property theories which Professor Kahn-Freund and others have shown to be inadequate in modern family life.

"In a few of the community States, as previously explained, the wife has also been given complete ownership of her wages and earnings which, of course, is a statutory contradiction of community property principles." 97

It is suggested that further study be given to the community property statutes of the so-called "new community states," especially Pennsylvania, Oklahoma and Oregon, which took notice of this difficult problem. 98 Those states repealed their systems, but that is no criticism of this particular point.

The Report analyzes this general problem and offers suggestions for alleviating it. 99

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97. See note 95 supra.
98. See 1 De Funiak, Principles of Community Property § 71 (1943); Daggett, Louisiana Legislation of 1944—Matters Pertaining to the Civil Code 6 Louisiana Law Review 1 (1944).
Conflict of Laws and Problems of Descent and Distribution

One area which the Report admittedly does not attempt to cover is Conflicts. Yet the subject is relevant to any study of marital property law and particularly community property.

New Mexico's population has greatly increased in the past decade. The new residents, many of them presumably from non-community states, have brought property and funds with them. Many of these new residents will, in a short time, become indistinguishable from the older residents; they will raise families, retire and leave property to their heirs. Many others, however, live on or near military and atomic energy installations and within an area of federal jurisdiction which is not always clearly or realistically defined. These people "reside" in New Mexico for some purposes and yet for other purposes they are treated by the law as outsiders. These circumstances create doubt and uncertainty in property, inheritance and other marital matters. The legislatures of the individual states and the Congress of the United States cannot ignore this. It is believed that the New Mexico legislature should anticipate some of the problems.

Two recent New Mexico decisions involving a 1951 amend-

100. Id. c. I, p. 12.
102. The New Mexico population in 1940 was 531,818. In 1950 it was 681,187, an increase of 28.1%. In the continental United States during the same period the increase was 14.5%. 1950 Census of Population—Number of Inhabitants.
103. See Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948); Chaney v. Chaney, 53 N.M. 66, 201 P.2d 782 (1949), holding that persons living at Los Alamos had no right to vote or obtain a divorce because land acquired in New Mexico by the United States through condemnation was not "in New Mexico" within meaning of constitutional provisions dealing with rights of electors, and persons at Los Alamos are not "residents of the state" within meaning of the divorce statute. See subsequent legislation creating Los Alamos county and correcting these conditions: N.M. Stat. Ann. § 15-15-1 (1953).
104. 68 Stat. 961 (1954) (Atomic Energy Act). "There is hereby retroceded to the State of New Mexico the exclusive jurisdiction heretofore acquired from the State of New Mexico by the United States of America over the following land of the United States Atomic Energy Commission in Bernalillo County and within the boundaries of the Sandia Base, Albuquerque, New Mexico. [There follows the legal description of the area.] This retrocession of jurisdiction shall take effect upon acceptance by the State of New Mexico. Approved August 30, 1954." Id. c. 19, § 3.
Governor E. L. Mechem accepted state jurisdiction on September 20, 1954. Senator Anderson's amendment, however, does not cover other areas in New Mexico where questions of "exclusive jurisdiction" are equally relevant.
ment to the New Mexico statute on the residence requirement in divorce actions, which amendment reads:

"... and provided further, persons serving in any Military branch of the United States Government who have been continuously stationed in any Military Base or installation in the State of New Mexico for such period of one (1) year, shall for the purposes hereof, be deemed residents in good faith of the State and County where such military base or installation is located."

exemplify one aspect of the general problem. The New Mexico Supreme Court has in effect through its interpretation of the provision decided that the New Mexico legislature has the power to define "residence" or physical presence, as being equal to "domicile" for the purpose of divorce. This seems to ignore the Full Faith and Credit Clause of the United States Constitution and the cases discussing the traditional concept of domicile as the basis of jurisdiction in divorce. In any event, the cases call attention to Conflicts problems. The divorce problem is not a direct part of the Committee's community property study, but the property consequences of divorce certainly are.

The property rights of married persons employed at or residing on atomic energy installations, military posts and other quasi-federal reservations in New Mexico should be made clearer. As these people become older and accumulate more property rights, with the same or a new spouse, their problems will multiply. Many of the homes and other tangible property owned by these people were purchased with funds brought to this state, which funds were legally the property of one or the other individual spouse. So long as there is no divorce and neither spouse dies, practical arrangements concerning ownership are possible between the spouses. However, dissolution of the marriage by divorce or death demands that the law find an answer to problems of ownership and inheritance. If the "source theory" is followed logically in these situations it is apparent that much property now believed to be community property clearly is not.

This general problem requires attention in two areas. One is concerned with property owned by living persons who may

106. N.M. Laws 1951, c. 107, § 1, p. 166.
wish to sell, transmute, or encumber it, and the other concerns the estates of deceased persons.

Living persons.

It is suggested that a statute be considered which would set forth the community property policy of this jurisdiction in clear language. Arizona has the following statute:\textsuperscript{108}

"The marital rights of persons married out of this state, who may move to this state, shall in regard to property acquired in this state during the marriage be regulated by the laws of this state."

Notice that the Arizona statute does not employ the phrase "real and personal property." Nor does it refer to persons who "reside" in the state or are "domiciled" there. Any proposed New Mexico legislation should consider the implications of all of these terms. The distinction between residence and domicile must be recognized in view of the recent divorce cases. Another aspect of the general problem can be illustrated by referring specifically to the married persons employed by the Sandia Corporation or at Los Alamos and the service man attached to a military base in New Mexico who "resides" with his or her family in the state, who may vote and even get a divorce, but who may consciously possess a definite intention to return to Iowa or New Jersey, thus barring him or her from acquiring "domicile" in the traditional sense. Are the man's wages or salary community property? May his wife's wages be garnished by a community creditor? Is the family home which is held by a deed to husband and wife, who are so described in the instrument, community property? Is the family car held in the husband's name community property? The husband and wife have a right to know with some degree of certainty, the burdens and benefits of various forms of ownership of marital property. It is obvious from these elementary questions that the "source" or time of acquisition theory in these situations could lead to interminable and expensive litigation which would undermine the family.

Deceased persons.

Testamentary power. Most of the people now moving into the state probably have normal life expectancies. However, clarification is needed at once with respect to their property

rights. California has pioneered the problem. Statutes have been passed providing for the descent of separate property in the same manner as community property if, at the time it was acquired, it would have been community property under California law.

It has been suggested that the California statutes be amended to include real property. If new legislation is proposed in New Mexico serious consideration should be given to the provisions of the California Probate Code and the suggestions that have been made for improving them. It is believed that careful draftsmanship will recognize the general rule that the situs of land ordinarily governs its devolution and yet appropriate language can be used in order to follow community property principles.

This type of legislation would, of course, require further study of the very problem which prompted the New Mexico Report: the granting of testamentary power to the wife over her share of the community estate. There has been no objective showing that the community property states, and there are six, which permit the wife this power have had unusual or insuperable problems as a consequence. It would be absurd to conclude that New Mexico and Nevada, which do not grant the wife this power, have had a unique problem with wives predeceasing husbands. Statistics and mortality and longevity tables are all to the contrary. It should be recalled, also, that the New Mexico statutes were patterned after California's at a time when the married woman in that state had no more than an expectant interest in the community property. Not to allow her to dispose by will of property she did not own or control was entirely logical and understandable. However, since 1927 the California wife has had a "present, existing and equal" interest

109. See CAL. PROB. CODE § 201.5 (Deering, 1949); In re Way's Estate, 157 P.2d 48 (Cal. App. 1945); Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934).
110. CAL. PROB. CODE §§ 201.5, 202, 203 (Deering, 1949).
112. See note 3 supra.
113. See Report, c. XII, pp. 148, 151, for reasons against allowing wife testamentary power.
114. Id. c. II, p. 15.
115. See McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78 (1938), overruled In Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952). Until 1923 the California statute gave all the community property to the husband upon the wife's death.
117. CAL. CIV. CODE § 161a (Deering, 1949).
in the community property and testamentary power over it has been granted to her.\textsuperscript{118} In New Mexico the wife is in the position of owning a "vested" interest in the community property which will inure to the benefit of her separate judgment creditor,\textsuperscript{119} but upon her death she is denied the power and the privilege of leaving the same property to the man who was largely responsible for accumulating it because "No other course would be logical unless the lawmakers desire to add to the sorrows of a bereaved husband the further burden of the enforced liquidating of his business affairs upon the death of the wife."\textsuperscript{120}

The rationale of In re Chavez's Estate is not as solid as the tax savings it has engendered. At the present time the latter are the principal justification for reliance on the case. The decision is based on an attitude toward marriage and the family which has little sociological support today. It is a summary of tax theories which have been outmoded for two decades, and it is an example of statutory interpretation which sees a clean line between tax matters and other property ownership concepts. The prophetic phrases of the case have been greatly overvalued and they have little support in statistics or experience.

\textit{Intestate succession.}

The New Mexico statute\textsuperscript{121} which provides that in cases of intestacy of the husband, three-eighths of the community property shall go to the surviving children in equal shares is a vestige of the early civil law. It no longer serves the purpose originally intended which in an agricultural society was to keep land in the family line. Such a method of disposition is impractical and expensive in a money and personal property-owning society. The statute needs re-examination. Where the surviving children are minors the provision is particularly unworkable.\textsuperscript{122} The California statutes are offered as examples of the type of statute needed in New Mexico.

\textit{Methods of Changing the Law}

The Report\textsuperscript{123} emphasizes the policy matter involved in choosing the method by which the community law may be im-

\textsuperscript{118} CAL. PROB. CODE § 201 (Deering, 1949). The wife's testamentary power has existed since 1923 and relates only to property acquired since that date. Boyd v. Oser, 23 Cal.2d 613, 145 P.2d 312 (1944).
\textsuperscript{119} McDonald v. Senn, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949).
\textsuperscript{120} In re Chavez's Estate, 34 N.M. 258, 260 Pac. 241, 69 A.L.R. 769 (1929).
\textsuperscript{121} N.M. STAT. ANN. § 29-1-9(1953).
\textsuperscript{122} See Report, c. XII, p. 148.
\textsuperscript{123} Id. c. XIII, p. 153.
proved. If, as a result of the Committee's study and recommendations, changes in the present law are proposed the decision as to the method selected for accomplishing the changes should be the product of careful thought.

Codification has not proved to be a cure-all in many fields of law. Piecemeal legislation has not always brought about the desired changes without also, in many cases, creating complications larger than those it attempts to correct. The Married Women's Acts may be cited in support of this statement.

Some of the legislation needed will be primarily curative or clarificatory in nature. In this area the Report wisely cautions against collision with constitutional principles which, if not thoroughly understood by legislative draftsmen, may result in legislation that will be given prospective effect only by the courts. The unfortunate and confused experience of California in the realm of legislative draftsmanship and judicial interpretation should be a clear warning to the New Mexico Legislature.

TECHNICAL CHANGES

Several topics discussed in the preceding pages illustrate the interrelationship of policy and technical matters. The following summary may be viewed either as an extension of policy considerations, or as a distinct category of problems which can be largely eliminated by changes in the present law.

Contracts and Conveyances

In view of a recent decision the statute delegating certain powers of management and control to the husband is in need of clarification. Henderson v. Treadwell involved a real estate contract for the sale of community property signed by a married man posing as single. The purchaser moved on the premises and made payments and improvements. Later, as a part of a divorce decree, the contract was set over to the wife of the seller. The case decided that the purchaser under the contract acquired rights that would be protected; that the purchaser had a right to a deed to the property. The court held that the mar-

124. Id. c. XIII, p. 158.
127. N.M. STAT. ANN. § 57-4-3(1953).
ried woman, who had made various promises to the purchasers that they would get a deed, was estopped by her conduct and could not rely on the fact that her husband alone had signed the contract.

The present statute does not expressly cover real estate contracts which are widely used in New Mexico. However, the husband has authority to make all ordinary contracts for the community. But an earlier case\(^{129}\) held that a contract for the sale of community realty was unenforceable unless jointly executed by both spouses. Another case\(^{130}\) held that a deed by a husband as sole grantor was absolutely void and did not convey even his interest in the community property. The theory of that case was relied on by the two dissenting justices in the real estate contract case.\(^{131}\)

An amendment to the statute should clarify the rules applicable in these circumstances. Perhaps the rule of *Jenkins v. Huntsinger*\(^{132}\) should be changed to make a deed by one spouse voidable merely and not absolutely void as is the present rule.

**Presumptions and the Retroactive Effect of Changes**

It is believed that the part of the decision in *August v. Tilllian*\(^{133}\) which was not abrogated by the amendment of 1947\(^{134}\) should be changed so that property now standing in the names of husband and wife who are not described as such in the instrument will be held to be community property, or separate property in which each has an equal although undivided interest. At the present time the rule is that one-half of such property is the separate property of the wife and the other half is community property, thus allowing the wife a three-fourths interest.

The unwelcome ramifications of *In re Trimble's Estate*\(^{135}\) have already been discussed. Technical methods for handling presumptions of community property or joint tenancy in a clear manner can be devised.

It is believed that the decisions in the above cases are not "rules of property"\(^{136}\) which if altered would disturb "vested


\(^{130}\) Jenkins v. Huntsinger, 46 N.M. 168, 125 P.2d 327 (1942).


\(^{132}\) 46 N.M. 168, 125 P.2d 327 (1942).

\(^{133}\) 51 N.M. 74, 178 Pac. 590 (1947).

\(^{134}\) N.M. Laws 1947, c. 191, § 1, p. 393.

\(^{135}\) 57 N.M. 51, 253 P.2d 805 (1953). See pages 583-585 *supra*.

rights." Legislation can be drafted which will have retroactive effect\textsuperscript{137} and thereby clear away much uncertainty concerning titles and the quantum of proof necessary to show a particular form of ownership, or the status of specific property as separate or community.

**Agency Problems**

The Report\textsuperscript{138} recommends that general agency problems be kept out of problems of control and management. However, it might be possible to clarify the managerial powers of the husband by a minor statutory change. \textit{Frkovich v. Petranovich}\textsuperscript{139} indicates that there is no "head" of the community realty. This statement is to be doubted except where it is applicable to the power to convey or encumber community realty. Some one certainly has the power to make decisions concerning the use of community realty.

The powers of attorney between spouses, including those of minor spouses, need statutory integration and clarification. The Report contains suggestions on this matter.\textsuperscript{140}

**Rights and Priorities of Creditors**

A statute is needed which will take care of both tort and contract creditor situations, clarify insolvency and bankruptcy remedies, and determine what kind of property, community or separate, and in what order, a creditor may seek satisfaction.\textsuperscript{141}

"\textit{Instrument in Writing}"

If the present statute on presumptions is altered or improved, some thought should be given to a definition of the phrase "instrument in writing" contained in the statute.\textsuperscript{142} In some states the phrase has been limited in interpretation to include titles to real property only.\textsuperscript{143}

**Insurance**

Provision should be made for situations, not at all rare, in which life insurance premiums have been paid out of commu-

\textsuperscript{137} See Clark, \textit{Management and Control of Community Property in New Mexico}, 26 \textit{Tulane L. Rev.} 324 (1952).
\textsuperscript{138} REPORT, c. XII, p. 144.
\textsuperscript{139} 48 N.M. 382, 151 P.2d 337 (1944).
\textsuperscript{140} REPORT, c. VII, p. 75.
\textsuperscript{141} See page 585 supra.
\textsuperscript{142} N.M. STAT. ANN. § 57-4-1(1953); see REPORT, c. XIII, p. 17.
nity funds for long periods of time although the policy, having been purchased before marriage, is separate property. Either the proceeds of the policy should be prorated on the basis of the percentage of the premiums paid in from community or separate funds, or one-half of the premiums paid out of community funds, plus interest, should be returned to the spouse who does not share in the proceeds. The urgency of this problem can be gleaned from the Report's discussion of Wissner v. Wissner which has established a rule with respect to National Service Life Insurance which is contrary to community property principles but is not binding in commercial insurance cases. The practical necessity for a clear way to determine the respective spouses' interest in life insurance proceeds or policies is illustrated graphically in both death cases and divorce-property settlement cases.

Community Property Ownership v. Duty of Support

The Report points out the confusion in the understanding of the two concepts and states that the distinction is fundamental. Clarification of the statutes on divorce, separation, and property settlement procedures would help dispel much of this confusion.

It is believed that a "family expense" statute should be enacted. This type of statute deals with the obligations of marriage and is not concerned with whether property is separate or community. The Report does not look favorably on this type of legislation. However, it is believed that such legislation would be entirely appropriate in community states where the wife actually owns part of the family resources and not merely her pin money. Such a statute should (a) cover more than "necessaries" which are all that most support statutes include, (b) make both spouses personally liable, but the wife only secondarily liable after the husband. It appears that most statutes intended this effect, but the courts in giving them a literal reading extended personal liability to the husband only.

146. 338 U.S. 655 (1950).
148. N.M. STAT. ANN. § 22-7-1 (1953).
149. Id. §§ 57-2-6—57-2-13.
150. See 3 VERNIER, *AMERICAN FAMILY LAWS* § 160 (1935).
152. See 3 VERNIER, *AMERICAN FAMILY LAWS* § 160 (1935).
An amendment to the California statute\textsuperscript{153} makes the wife's wages liable for necessaries furnished the community. The amendment is evidence of the existing confusion over support and community property ownership principles. The New Mexico statute\textsuperscript{154} exempting a wife's wages from liability for her husband's debts was copied from California. It is made apparent by the California amendment\textsuperscript{155} that California failed to understand that the statute did not exempt the wife's wages from community debts, at least for necessaries. In New Mexico the wife's wages, being community property, are liable for community debts and are not merely liable for community debts arising out of the purchase of necessaries. As the Report\textsuperscript{156} seems to indicate, it is the husband's separate debts for which the wife's wages cannot be taken. However, statutory clarification of the point would be helpful.

\textit{Descent and Distribution}

Clarification is needed of the meaning of "decedent's estates" used in the statutes,\textsuperscript{157} particularly for tax purposes and for the purpose of determining the source of payment for funeral expenses, gravestones, expenses of administration and, perhaps most importantly, executors' and attorneys' fees. When a married man predeceases his wife, and the Report\textsuperscript{158} carefully marshals the evidence for this probability, should the base for attorneys' fees be the entire community estate or only half of it? In re \textit{Stutzman's Estate}\textsuperscript{159} foreshadows these problems. It is believed that the practice is by no means uniform in the state or even in the same law office.

\textit{Testamentary power.} (1) It has not been demonstrated by the experience of the other community states that allowing the wife testamentary power over her interest in the community property has resulted in excessive hardship, difficult legal problems or a decline in economic enterprise\textsuperscript{160} Two of the least populous and least wealthy states, Nevada and New Mexico, do not grant the wife this power. It would not be reasonable to assume that only these two states possess a proper understand-

\begin{tabular}{l}
153. \textit{CAL. CIV. CODE} § 168 (Deering, 1949). \\
154. \textit{N.M. STAT. ANN.} § 57-3-6(1953). \\
155. \textit{CAL. STAT. & CODE AMEND.} 1497 (1937). \\
156. \textit{REPORT, C. VIII}, p. 89. \\
157. See \textit{In re Stutzman's Estate}, 57 N.M. 710, 262 P.2d 990 (1953); \textit{N.M. STAT. ANN.} §§ 29-1-9, 31-16-3(1953). \\
158. \textit{REPORT, C. II}, p. 15. \\
159. 57 N.M. 710, 262 P.2d 990 (1953). \\
160. \textit{REPORT, C. XII}, pp. 150-151, raises these questions.
\end{tabular}
ing of the problem. The justification for the denial in New Mexico is tax savings.\textsuperscript{161} The possibilities expressed in In re Chavez's Estate\textsuperscript{162} remain, but the probabilities, which are far more relevant, that wives will predecease husbands,\textsuperscript{163} are not great. As a caveat to the Chavez case it should be emphasized that:

(a) the case was a tax decision

(b) the case was decided before the new era of taxation which is based on dominion and control theories and not on formal ownership or title

(c) the case contradicts the idea that the wife owns one-half of the community estate.

(2) Changes in the statutes. Before changes in testamentary provisions are made, if any are contemplated, consideration should be given to the statutes of Idaho and Louisiana,\textsuperscript{164} which limit the extent to which a spouse may leave his or her share of the community property by will. For comparative purposes the Idaho statute is quoted:

Section 14-113, Idaho Code 1948 reads:

"Devolution of Community Property—Upon the death of either husband or wife, one-half of all of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, in favor only of the survivor, the children, the grandchildren or parents of either spouse, or one or more of such persons, subject also to the community debts; provided, that not more than one-half of the decedent’s half of the community property may be left by will to a parent or parents, unless limited to an estate for life or less . . . . [other provisions unimportant]"

One criticism of the statute is made. There should be a provision for leaving a portion of the decedent’s property, to be determined by the legislature, to charitable institutions or for

\textsuperscript{161} In New Mexico when the wife predeceases the husband, “the entire community, without administration, belongs to the surviving husband.” N.M. Stat. Ann. § 29-1-8(1963). This statute has been interpreted to mean that no state succession tax is collectible when the wife dies, In re Chavez’s Estate, 34 N.M. 258, 280 P.2d 241, 69 A.L.R. 769 (1929). The same rule was followed in a federal estate tax case, Hernandez v. Becker, 54 F.2d 542 (10th Cir. 1931).

\textsuperscript{162} 34 N.M. 258, 280 P.2d 241, 69 A.L.R. 769 (1929).

\textsuperscript{163} Report, c. II, p. 15.

\textsuperscript{164} Arts. 1493, 1494, La. Civil Code of 1870.
similar purposes. The tax savings aspects of donations and the public benefit therefrom should not be overlooked.

Intestate succession. The California and Idaho statutes do not provide that upon intestacy a portion of the decedent's interest should go to the children. New Mexico has such a provision which should be abolished. Reasons for such a change are stated at page 593 supra. It is also suggested that a summary probate procedure statute for small estates be enacted in New Mexico. The present statute is so limited as to be worthless for the purposes discussed herein.

Jurisdiction in Probate

The lawyer handling a probate matter should know with more than reasonable certainty whether a particular question should be raised in the probate or the district court. A recent case draws attention to the lawyer's uncertainty in New Mexico.

It seems clear that the probate court, which in New Mexico is a separate county court usually presided over by a layman, has always exercised both judicial and administrative functions. But serious questions have been raised as to its jurisdiction to try titles to realty or determine the status of specific property as separate or community. Recent legislation attempted to clarify the first matter. With respect to the second question legislative clarification is needed because of:

(1) The present constitutional problem of probate jurisdiction

165. N.M. Stat. Ann. § 29-1-9(1953). The statute declares that in the absence of testamentary disposition by the husband of his one-half of the community estate, such property "goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law. . . ." One-fourth of the husband's one-half means the surviving wife then has a total of % of the entire community estate and the children receive % of % or %. See Weinmann, Surviving Spouse's Inheritance of the Decedent Spouse's Interest in the Community in an Intestate Succession: A Comparative Study of the Law of Mexico, Quebec and Louisiana, 28 Tulane L. Rev. 480 (1954).

166. See page 593 et seq. supra.

167. N.M. Stat. Ann. §§ 31-1-30—31-1-32(1953) (summary administration limited to personal property the cash value of which is not more than $1000).


171. See note 168 supra.

172. N.M. Const. Art. 6, § 23 (1949 amendment), granting probate courts jurisdiction to determine heirship with respect to real property.

(2) The possible right to jury trial in disputes over the nature or status of property as separate or community.

Taxes

Taxes are, of course, not merely a technical subject. They epitomize the inseparable connection between the determination of a purpose and the methods for attaining it. It is impossible therefore to summarize the New Mexico and federal tax structure in the family law area, or make suggestions to clarify or strengthen it. However, a few situations which exist by virtue of statute or case law and which may create future problems can be outlined. These and others are pointed out in the Report.\textsuperscript{174}

(1) The different tax consequences, state and federal, of joint tenancy and community property ownership are significant\textsuperscript{175} but are not clearly understood.

(2) The New Mexico succession tax\textsuperscript{176} is not chargeable against the entire community estate when the husband dies first. Only half of the estate is includible in the gross estate.\textsuperscript{177} However, if the husband is the surviving spouse, none of the community estate is subject to the succession tax.\textsuperscript{178}

(3) Since 1948\textsuperscript{179} the above rule has been applicable with respect to the federal estate tax when the wife survives. An earlier federal case, Hernandez v. Becker,\textsuperscript{180} following the New Mexico succession tax rule decided that where the husband survives, none of the community estate is includible in the decedent wife's gross estate for federal estate tax purposes.

At the present time the above rules affect the valuation of community property for purposes of computing capital gains and losses. If the wife survives the husband a new basis for valuation is acquired at the husband's death. But since the entire community property "belongs to" the New Mexico hus-

\textsuperscript{174} REPORT, c. XI, p. 127.
\textsuperscript{175} See Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Calif. L. Rev. 501 (1952).
\textsuperscript{176} N.M. Stat. Ann. § 31-16-1 et seq. (1953).
\textsuperscript{177} REPORT, c. XI, pp. 132-133.
\textsuperscript{178} In re Chavez's Estate, 34 N.M. 258, 280 P.2d 241, 69 A.L.R. 769 (1929).
\textsuperscript{179} 26 Fed. Code Ann. §§ 800 et seq., 811(e) (2) was replaced in 1948. This restored the community property law as it existed before 1942. See Int. Rev. Code § 2040 (joint interests), § 2506(c)(2)(B)(C) (community property rules) (1954).
\textsuperscript{180} 54 F.2d 542 (10th Cir. 1931).
band who survives his wife, he does not receive the benefit of the federal law\textsuperscript{181} authorizing the new valuation.

(4) A New Mexico case\textsuperscript{182} decided under the Federal Revenue Act of 1942 raised the question of the ultimate liability for payment of federal estate taxes. The case declared that this was a local law matter. The Report\textsuperscript{183} to the Committee in the analysis of the case, states: “No New Mexico decision was found that determined the question of ultimate liability . . . as between distributive interests of the state.” However, in applying apportionment in the \textit{Gallagher} case,\textsuperscript{184} the court commented:

“We have not tallied the jurisdictions on each side, but although the earlier rule (ultimate liability borne by the residue) may still represent the majority opinion of jurisdictions passing on the question, we feel no compunction to adhere inelastically to a rule which in view of this Court is not productive of substantial justice. Certainly the vitality of our legal system derives in large part from the function of our courts in applying its root concepts, among them that of equal treatment, to ever new and diversified problems. . . .”

(5) Transfers of property between spouses and transmutations of separate into community property, and vice versa, with all their attendant complications, take place against the background of state and federal gift and estate taxes\textsuperscript{185} where further technicalities are to be expected.

CONCLUSION

Society is confronted, more seriously than ever before, with the disintegration of the family. The Married Women’s Acts and the “equal rights”\textsuperscript{186} statutes for women do not seem to have discouraged the trend and they may have heightened it. Much of the difficulty in this area obviously lies outside the scope of a marital property study. However, the family, like other social institutions, has an economic as well as cultural framework. This was true under all earlier systems and remains true today. But the legal protections erected by the common law to sustain the family unit, although many of them are still with us, became

\textsuperscript{182} \textit{In re Gallagher’s Will}, 57 N.M. 112, 255 P.2d 317 (1953).
\textsuperscript{183} \textit{Report}, c. XI, p. 122.
\textsuperscript{184} \textit{In re Gallagher’s Will}, 57 N.M. 112, 130, 255 P.2d 317, 328 (1953).
\textsuperscript{185} \textit{Report}, c. XI, p. 127.
\textsuperscript{186} See \textit{Wis. Stat.} § 6.015 (1935); \textit{3 Vernier, American Family Laws} § 150 (1935).
outmoded during the Industrial Revolution and the rise of political democracy. Beginning a century ago, the Married Women's Acts obtained legal recognition for these historical developments.

These acts were efforts to carry by law to middle class married women the property rights already established in equity for the wealthier classes. In large measure they accomplished their purpose, yet at the same time the economic interests of the spouses were in law pulled apart rather than together. This did not in fact always happen largely because of the functional and realistic attitudes of most married persons with respect to the family resources. This general outlook is now a major part of federal tax law.

An important problem for the law is to find ways to accommodate, with proper legal procedures and safeguards, the co-ownership practices of married persons. The persons most concerned are those who, either because of lack of funds, or the mistaken belief that his services are superfluous, never consult a lawyer, even about the matter of taking title to the family home. Improvements in family law are not urgently needed for those who can afford legal services. These persons may receive some tax or other benefits as a consequence of improvement or clarifications in the law, but in most cases they probably have legal counsel to advise them.

The utility and convenience of a marital property system should not be judged merely by the facility with which a division of property can be had upon divorce, or tax matters handled upon divorce or death, or even because there are certain tax advantages to be had as a result of alimony, support or separation decrees or agreements. The system should be judged by the manner in which it fulfills the needs of the individual and the group, in this case the family and society.

Many husbands and wives are employed; the per capita income and with it the average family income is rising steadily in the United States. In the use and expenditure of this income

187. See Kragen, Stoke, Oliver, & Buckley, The Marriage Undone: Taxwise, 42 CALIF. L. REV. 408 (1954), for a California example of the type of study needed in all states.

188. See Tenbrock, The Impact of Welfare Law upon Family Law, 42 CALIF. L. REV. 458 (1954). This article appears in an issue devoted entirely to family law which contains several original and much-needed studies in the field.

and property for the benefit of the family, concurrent ownership ideas are advantageous and adaptable. It is believed that community of property principles, despite all the accumulated difficulties delineated and alluded to here, furnish the "only significant analogy"\(^{190}\) in which a solution to problems of joint ownership and control may be found.

The community states, therefore, as leaders in this field, must take steps to clarify their own systems. The New Mexico experience and the Committee Report may provide some helpful suggestions with which to begin.