Taxation of Community Income: It is Time for Congress to Override Poe v. Seaborn

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In February 1995, The House of Delegates of the American Bar Association adopted resolutions recommending, *inter alia*, the repeal of joint and several liability of a taxpayer who has signed a joint return under I.R.C. § 6013(d), and an amendment to I.R.C. § 66 that would override the holding of *Poe v. Seaborn* so that a married taxpayer who lives in a community property state will not be individually liable for income tax on any portion of the income earned by the other spouse. Both Congress and the Treasury Department have shown interest in the issues raised by the resolutions. Section 401 of the Taxpayer Bill of Rights 2 directs the Secretary of the Treasury, or his delegate, and the Comptroller General of the United States each to conduct separate studies concerning the effects of repealing joint and several liability of spouses for the tax on a joint return and some of the effects of treating community income as income of the earning spouse.

Before the Taxpayer Bill of Rights 2 was enacted, the Internal Revenue Service ("Service") and the Treasury Department had begun a study of the tax issues facing divorced and separated spouses who filed joint returns.3 The Service invited public comments for the study in Notice 96-19.4 Notice 96-19 provides a number of questions regarding the consequences of adopting a proportionate liability standard that "would hold each spouse liable for only that portion of the tax attributable to a joint return that relates to that spouse’s contribution to the aggregate joint return tax liability of both spouses."5 In other words, a proportionate liability standard generally would require each spouse who signed a joint return to pay deficiencies, interest, and additions to tax only with respect to that spouse’s income.6

Application of a proportionate liability standard could exacerbate the problems caused by the rule of *Poe v. Seaborn*. Under *Poe v. Seaborn*, each spouse in a community property state is individually liable for the tax on one-half of the community income, regardless of which spouse actually earns the


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6. The proposal would attribute a deficiency in tax to the spouse who is responsible for the deficiency.
One of the proposals for which the Service requested comments in Notice 96-19 was the proposal to further limit the income-splitting effect of Poe v. Seaborn in community property jurisdictions. The Domestic Relations Committee of the Tax Section of the American Bar Association responded to all of the specific questions set out in Notice 96-19, except the questions concerning the limitation of the income-splitting effect of Poe v. Seaborn. In the Domestic Relations Committee’s “Comments on Liability of Divorced Spouses for Tax Deficiencies on Previously Filed Joint Returns,” the Committee stated that it did not wish to comment on the proposal to limit the income-splitting effect of Poe v. Seaborn in community property jurisdictions.

The procedures that result from the rule of Poe v. Seaborn are well-documented and have been discussed in a number of law review articles. In the typical case, a married couple is living together in a community property state, and no income tax return is filed. The tax liability for the year of the nonfiling is attributable, in large part, to income earned by one of the spouses (the “earning spouse”). The other spouse (the “nonearning spouse”) has little or no income to report. Several years later, after the couple is divorced, the Internal Revenue Service asserts a tax deficiency against the nonearning spouse and may garnish the nonearning spouse’s wages earned after the divorce for the tax due on one-half of the other spouse’s income. Because the income tax on the entire community income is a debt incurred by one of the spouses during the marriage and on behalf of the community (sometimes referred to as a “community debt”), the Service also may seize former community assets that are held by the nonearning spouse to satisfy the other spouse’s tax liability for the remaining one-half of the community income.

11. Some states distinguish between debts that are incurred on behalf of the community and separate debts. For example, in Bank of Washington v. Hilltop Shakemill, Inc., 614 P.2d 1319 (Wash. Ct. App. 1980), the husband, without informing the wife, promised on behalf of himself and his marital community to guarantee payment of his son’s business obligations. The court held that the community did not expect to benefit economically as a result of the guarantee, that the bank to whom the guarantee was given knew that it was not executed for business purposes, and, therefore, the community was not liable for payment pursuant to the guarantee. Id. at 1322-23. In most jurisdictions, however, debts incurred by either spouse during the marriage are presumed to benefit the community unless it can be shown by clear and convincing evidence that there was no community benefit. W.S. McClanahan, Community Property Law in the United States § 10:4 (1982) and 1 Ann Oldfather et al., Valuation and Distribution of Marital Property § 20.07[1] (1997).
The rule of *Poe v. Seaborn* also can be particularly harsh with respect to a separated spouse who lives in a community property state and files a separate income tax return. In that case, the nonearning spouse is expected to report and pay tax on one-half of the income earned by the other spouse, regardless of whether the nonearning spouse receives any of the income and regardless of whether the nonearning spouse even knows the amount of income earned by the other spouse.  

13. I.R.C. § 66 (1995) alleviates this problem, at least if the spouses are separated during the entire calendar year and the nonearning spouse receives no amount of community income from the other spouse during the year. Under I.R.C. § 66(a), the nonearning spouse is not liable for community income earned by the other spouse (except for amounts derived from community property) if: (1) the spouses live apart at all times during the calendar year; (2) the spouses do not file a joint return for the taxable year; (3) one or both of the spouses has earned income for the calendar year which is community income; and (4) no portion of the earned income that is community income is transferred (directly or indirectly) between the spouses before the close of the calendar year. I.R.C. § 66(a), however, provides no protection from liability to a nonearning spouse during the first year of separation unless the spouses are separated before January 1. Under I.R.C. § 66(b) and (c), there seems to be some protection provided to a nonearning spouse even if the spouses live together during the taxable year. The protection provided under I.R.C. § 66(b) and (c), however, is difficult to obtain because of the stringent requirements that must be satisfied under those subsections. To qualify for relief from liability for the tax on one-half of the community income earned by the other spouse under § 66(c), the nonearning spouse must prove that: (1) the nonearning spouse did not know of, and had no reason to know of, the item of community income that the nonearning spouse did not report on a separate return; and (2) taking into account all of the facts and circumstances, it is inequitable to include the item of community income in the nonearning spouse’s gross income. In many cases, it is difficult for the nonearning spouse to prove that he or she did not know of, and had no reason to know of, the omitted item of community income. Under I.R.C. § 66(b), the Service may disallow the benefits of any community property law to the earning spouse with respect to any community income if the earning spouse acted as if he or she were solely entitled to the income and failed to notify the nonearning spouse before the due date for filing the income tax return of the nature and amount of the community income. The earning spouse can avoid application of § 66(b) by providing the proper notice to the nonearning spouse. The most significant problem under § 66(b), however, is that the provision merely authorizes the Service to collect the tax from the earning spouse; there is no requirement that the Service pursue the earner for the entire tax due on the community income. For a discussion of the inadequate protection afforded to a nonearning spouse in a community property state under I.R.C. § 66, see Stuart J. Filler, *Joint and Several Income Tax Liability and Community Property Income Attribution: Continuing Problems for the Unwary Spouse*, 9 Community Prop. J. 131 (1982); William J. Minick, *III, The Innocent Spouse Doctrine: The Need for Reform and Planning Alternatives in the State of Texas*, 66 Taxes 56 (1988); John Paul Parks, *Income Tax Relief for the Abandoned Spouse*, 12 Community Prop. J. 119 (1985);
The rule of *Poe v. Seaborn* imposes an inappropriate tax burden on the nonearning spouse. Under current law, the Service may seize separate property from the nonearning spouse to satisfy the tax liability for one-half of the community income, and in all community property states except California, the Service also may seize community property or former community property from the nonearning spouse to satisfy the remaining tax liability for all of the income earned by the other spouse. If Congress were to override *Poe v. Seaborn*, the

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In *Bagur v. Commissioner*, 603 F.2d 491 (5th Cir. 1979), *rev'g and rem'g*, 66 T.C. 817 (1976), the United States Court of Appeals for the Fifth Circuit attempted to fashion a remedy for a nonearning spouse in a community property state who is required to pay tax on one-half of the community income attributable to the other spouse's earnings. In *Bagur*, the court held that the nonearning spouse could deduct as a theft loss amounts of community income that the earner appropriated to his or her own use. *Id.* at 501. Unfortunately, none of the reported cases after *Bagur* have allowed a nonearning spouse to claim a theft loss deduction with respect to community income that was earned and spent by the other spouse. *See generally* Lucia v. Commissioner, 61 T.C.M. (CCH) 1982 (1991); Conner v. Commissioner, 44 T.C.M. (CCH) 6 (1982); Schmidt v. Commissioner, 41 T.C.M. (CCH) 793 (1981); Hall v. Commissioner, 40 T.C.M. (CCH) 1349 (1980).

The question of whether a theft loss has been sustained for federal income tax purposes is determined by reference to the criminal law of the jurisdiction where the loss occurred. *Packard v. Commissioner*, 85 T.C. 397, 435 (1985) and *Monteleone v. Commissioner*, 34 T.C. 688, 692 (1960). Most jurisdictions define the term theft to require an intent to deprive a person of the item that is misappropriated. *See, e.g.*, La. R.S. 14:67 (1986). Spouses claiming a theft loss deduction with respect to community income have had difficulty proving the requisite fraudulent intent of the earning spouse.

Even if a theft loss deduction were allowed to the nonearning spouse, the amount that could be deducted is significantly limited. A theft loss deduction can be claimed only for the year in which the theft is discovered. I.R.C. § 165(e) (1995). Thus, it is likely that any deduction allowable to the nonearning spouse will be taken in a different year from the year in which one-half of the community income is included in the spouse's income. The mismatching of the income and the deduction can be problematic because the nonearning spouse will owe interest and possibly penalties with respect to the year in which the community income was excluded from the nonearning spouse's return. It is likely that the deduction in the later year will not offset the tax liability, interest, and additions to tax for the year in which the community income was deducted. The theft loss deduction that could be available for a nonearning spouse under *Bagur* is not incurred in connection with a trade or business and, therefore, is subject to several limitations. First, a nonbusiness theft loss deduction is an itemized deduction and is advantageous to a taxpayer only to the extent that all of the taxpayer's itemized deductions exceed the taxpayer's standard deduction for the year. Second, the amount of the loss is reduced by $100. I.R.C. § 165(h)(1) (1995). If the taxpayer claiming a nonbusiness theft loss has no personal casualty gains for the year, the amount of the theft loss must be reduced further by ten percent of the taxpayer's adjusted gross income. I.R.C. § 165(h)(2) (1995). After application of the rules limiting a taxpayer's ability to deduct a nonbusiness theft loss, a nonearning spouse could have little advantage even if a theft loss were allowed with respect to the one-half of the community income required to be reported on the nonearning spouse's separate tax return.

14. Under California community property law, the Service would not be permitted to proceed against former community property held by the nonearning spouse unless the nonearning spouse had been assigned the liability for payment of the tax when the community property was divided. *See*
Service would be placed in the position of any other community creditor with respect to the nonearning spouse and limited in its collection efforts to seizing community property or former community property held by the nonearning spouse to satisfy the tax due on the community income. Overriding Poe v. Seaborn would protect the wages earned by the nonearning spouse after a divorce from garnishment to satisfy the tax liability for income earned by the other spouse during the marriage.

Overriding Poe v. Seaborn would not necessarily wreak havoc on the public fisc. If Congress were to override Poe v. Seaborn, the earning spouse would be individually liable for the tax on the community income earned by that spouse. In that case, the Service could seize separate property owned by the earner as well as any community property or former community property held by either of the spouses in satisfaction of the tax liability.

This article does not dwell on the inequities or the anomalies caused by the rule of Poe v. Seaborn. Instead, this article will argue the case for overriding Poe v. Seaborn by analyzing community property law. The rule of Poe v. Seaborn is contrary to three precepts of fundamental tax law: (1) that similarly situated taxpayers should be taxed similarly; (2) that income should be taxed to the person who earns it; and (3) that the incidence of the income tax should fall on the person who has the power to control the disposition of the income.

The rule of Poe v. Seaborn undermines the uniform application of the tax law because it requires the amount of a spouse's tax liability on income earned by the other spouse to depend on the state in which the spouses are domiciled when separate returns, or no returns, are filed. Unlike a spouse who resides in

Cal. Fam. Code § 916(a)(2) (West 1994) and In re Marriage of Braendle, 54 Cal. Rptr. 2d 397 (Cal. Ct. App. 1996). In Texas, the community property subject to a spouse's sole management, control, and disposition is not subject to any nontortious liabilities incurred by the other spouse during the marriage unless both spouses are personally liable for the debt. Tex. Fam. Code Ann. § 5.61(b)(2) (West 1993). Thus, it seems that a creditor may not seize from a nondebtor spouse any community property awarded to the nondebtor spouse after the divorce. A creditor, however, may seize former community property received by the nondebtor spouse pursuant to a divorce decree if the property was subject to the management and control of the spouse who incurred the debt or was subject to the management and control of both spouses during the marriage. Cf. Inwood Nat'l Bank of Dallas v. Hoppe, 596 S.W.2d 183 (Tex. Ct. App. 1980). For a discussion of the rights of creditors to seize former community property from a former spouse in Texas who did not incur a community obligation, see Thomas M. Featherston, Jr. & Lynda S. Still, Marital Liability in Texas . . . Till Death, Divorce, or Bankruptcy Do They Part, 44 Baylor L. Rev. 1, 27-28 (1992). Some courts, while recognizing the rule that a creditor may seize former community property held by a spouse to satisfy a community debt incurred by the other spouse, have held that a judgment creditor could not seize former community property held by the nonincurring spouse where a judgment was obtained after the divorce against only the spouse who incurred the debt. See, e.g., Stewart Title Co. v. Huddleston, 598 S.W.2d 321 (Tex. Ct. App. 1980) and Griggs v. Averbeck Realty, Inc., 599 P.2d 1289 (Wash. 1979). It is not certain whether the state law restrictions on the ability of a creditor to seize former community property from a spouse who did not incur a community obligation will apply against the Service. See, e.g., United States v. Mitchell, 403 U.S. 190, 91 S. Ct. 1763 (1971) (former La. Civ. Code art. 2410 permitting a wife to renounce the community, thereby retroactively absolving herself of all community debts, was not effective against the federal tax collector).
a community property state, a spouse who resides in a noncommunity property state is not liable for any of the tax on the earning spouse's income unless a joint return is filed.\^15 Admittedly, community property law gives a nonearning spouse important rights with respect to community property, including community income, that are not available to a spouse in a noncommunity property state. However, the differences in the rights of spouses under community property law and the rights of spouses under the law of the noncommunity property states do not warrant the differences in the allocation of the tax liability.

The rule of Poe v. Seaborn also is at odds with fundamental principles of federal tax law. In general, income is taxed to the person who earns it.\^16 Moreover, a taxpayer's dominion over income generally is a key factor in determining the taxpayer's liability for the tax on the income.\^17 Community property law does not give a nonearning spouse sufficient control over the disposition of community income earned by the other spouse to warrant imposing a tax liability on the nonearning spouse for any of the earner's income.

I. THE RATIONALE FOR THE RULE OF POE V. SEABORN—OWNERSHIP

The rule of Poe v. Seaborn prevents uniform application of the federal tax law. As explained above, a spouse who lives in a community property state is required to report and pay tax on one-half of the income earned by each of the spouses. Thus, if no joint return is filed or if the spouses file separate income tax returns, a nonearning spouse in a community property state is required to pay tax on one-half of the other spouse's income. In contrast, a spouse who lives in a noncommunity property state has no liability for the tax on income earned by the other spouse unless a joint return is filed.\^18

The rule of Poe v. Seaborn is not a matter of constitutional law. In Poe v. Seaborn, the Supreme Court was called upon to interpret the meaning of sections 210(a) and 211(a) of the Revenue Act of 1926 as they applied to the interests of spouses in community property states. These sections imposed a tax on the net income "of" every individual. The current provisions, section 1(a) through 1(e) of the Internal Revenue Code of 1986, also impose a tax on the income "of" every individual.


In Poe v. Seaborn, the Court determined that the word "of" denotes ownership. Under community property law, each spouse has an ownership interest in all community property. Community property generally is defined as all property, other than "separate property," which is acquired during the marriage by either spouse while the couple is domiciled in a community property state. Thus, community property includes income earned by either spouse during the marriage.

The statutes of several community property states provide that each spouse has a present, vested, one-half ownership interest in community property. On the termination of the community, each spouse is entitled to receive a share of the community property remaining after satisfaction of creditors' claims. Thus, if the spouses divorce, each spouse generally may receive a share of the community property. Likewise, on the death of either spouse, his or her share of the community property passes to the decedent spouse's heirs by that spouse's will or the law of intestate succession. The so-called "equal management" statutes give each spouse managerial rights over community property. A spouse may prevent the disposition of certain community assets by the other spouse. Either spouse may contract debts during the marriage that may be


24. See, e.g., Ariz. Rev. Stat. Ann. § 25-214(C) (joinder required for transactions for the acquisition, disposition, or encumbrance of an interest in real property and any transaction of guaranty, indemnity, or suretyship); Cal. Fam. Code §§ 1100(b), (c), 1102 (West 1994) (written
satisfied with community property. Thus, in Poe v. Seaborn, the Supreme Court determined that the ownership rights of spouses in community property are sufficient to justify the imposition of a tax liability on each spouse for one-half of the community income.

II. A COMPARISON OF THE RIGHTS OF SPOUSES IN COMMUNITY PROPERTY STATES AND NONCOMMUNITY PROPERTY STATES—DIVORCE AND DEATH

As a practical matter, however, the rights that each spouse has in community property are not sufficiently different from the rights that spouses have in marital property under common law property regimes to warrant the disparate taxation of spouses, depending on whether they reside in a community property state or a noncommunity property state. Under common law property regimes, spouses have interests in each other’s property that are similar to the interests of spouses in community property states.

A. Rights to Property on Divorce

The greatest similarity between the community property states and the noncommunity property states with respect to a spouse’s rights in property acquired after the marriage concerns the rights of a spouse to receive property on divorce. Like spouses in a community property state, each spouse in a noncommunity property state may be entitled to receive a portion of the property owned by either or both spouses upon divorce. A number of noncommunity property consent of a spouse required for gifts of community personal property; the sale, conveyance, or encumbrance of community personal property used as the family dwelling or household furnishings; and transactions involving community real estate); Idaho Code § 32-912 (1996) (joinder required for the sale, conveyance or encumbrance of community real estate); La. Civ. Code art. 2347 (1985) (concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, furniture, or furnishings while located in the family home, or all or substantially all of the assets of a community enterprise and movables issued or registered in the names of the spouses jointly); Nev. Rev. Stat. § 123.230(2), (3), (4), (5) (joinder required for gifts of community property; sale, conveyance, encumbrance, or purchase of community property; and sale or encumbrance of household goods); N.M. Stat. Ann. § 40-3-13 (Michie Supp. 1994) (joinder required for transactions concerning community real property); Wash. Rev. Code Ann. § 26.16.030(2), (3), (4) (5) (1997) (joinder required for gifts of community property; sale, conveyance, encumbrance, or purchase of community real estate; sale or encumbrance of household furnishings or a community mobile home); Wis. Stat. § 766.53 (1993) (joinder required for gifts aggregating more than either $1,000 or a larger amount, if reasonable, made to any one person during a calendar year).


26. See 2 Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 15.1 (2d ed. 1987) and 1 Oldfather et al, supra note 11, § 3.01[2].
states have statutes that classify the spouses' property as marital or separate property and authorize the divorce court to divide the marital property equally between the spouses. Most states, including community property states, have adopted equitable distribution statutes, which permit a divorce court to divide property that is subject to the statute "equitably" or "in just proportions" between the spouses. Thus, regardless of whether a couple resides in a community property state or a noncommunity property state, it is possible for one spouse to receive, upon divorce, more than one-half of the marital or community property and the other spouse to receive less than one-half of the property.

B. Death of a Spouse

Spouses in all noncommunity property states also have rights to marital property on the death of a spouse. Federal law provides rights to surviving spouses in retirement benefits of the decedent spouse. For example, the social security system pays retirement benefits to a worker and the worker's surviving spouse. The worker has no right to shift the survivor's benefit to a person other than the spouse.

Similarly, the federal Employee Retirement Income Security Act of 1974 ("ERISA") requires that a spouse of an employee must have survivorship rights if the employee predeceases the spouse. If an employee spouse survives to retirement age, the accrued benefit under a qualified plan must be provided in the form of a qualified joint and survivor annuity unless the nonemployee spouse consents to waive the joint and survivor form of the benefit. If the employee dies before retirement and the pension rights are vested, a preretirement survivor annuity must be provided to the surviving spouse. ERISA preempts state law with respect to the rights of a surviving spouse in a pension plan.

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27. See 2 Clark, supra note 26, § 15.1 and 1 Oldfather et al., supra note 11, § 3.03[2].
29. 42 U.S.C. § 402(e), (f).
30. Social security benefits, however, may be paid to a deceased worker's dependents as well as to the worker's surviving spouse. See, e.g., 42 U.S.C. § 402(d) (benefits payable to a decedent worker's child).
33. 29 U.S.C. § 1055(a)(1), (c)(1)(A), (c)(2)(A). Spousal consent is not required, however, if it is established to the satisfaction of a plan representative that the spouse's consent cannot be obtained because the spouse cannot be located or because of other circumstances as the Secretary of the Treasury may prescribe by regulations. 29 U.S.C. § 1055(c)(2)(B).
35. See Boggs v. Boggs, 117 S. Ct. 1754 (1997) and Alabama v. Roper, 937 F.2d 1450 (9th
State law also provides significant rights to surviving spouses in noncommunity property states. Most noncommunity property states have laws to ensure support for a surviving spouse. For example, many states have homestead laws designed to give the surviving spouse the right to occupy the family home for his or her lifetime by protecting at least a portion of the value of the family home from the testamentary caprices of the deceased spouse and the demands of the deceased spouse’s creditors. There are also various statutory allowances of personal property for the benefit of a surviving spouse in a noncommunity property state. Such laws set aside to the surviving spouse items such as clothing, furniture, appliances, supplies, tools, books, domestic animals, and automobiles. Every state has a statute authorizing the probate court to award the surviving spouse (and often the surviving children) an allowance for support for a fixed period (typically one year) or during the administration of the estate. The homestead exemption, the personal property set-aside, and the surviving spouse’s right to support cannot be defeated by will.

In addition to the support rights discussed above, most noncommunity property states give the surviving spouse a right to an “elective share” (sometimes referred to as a “forced share”) in the decedent spouse’s property. Under the elective share provisions, a surviving spouse has a right to elect to receive one-third to one-half of the decedent spouse’s property in lieu of the amounts provided in the decedent’s will.

A few jurisdictions that have retained the common law rights to dower and curtesy provide that the surviving spouse has certain rights in the decedent spouse’s real property. Common law dower gave a widow a life estate in one-third of the lands of which her husband was seized; curtesy gave a husband a present right in all lands owned by his wife in fee-simple or fee-tail. These rights have been modified by statute to allow the surviving spouse, whether a...
wife or a husband, to one-third or one-half of the deceased spouse's lands in fee. 44 In states where dower and curtesy still exist, a surviving spouse also has a right to a forced share of the decedent spouse's property. 45 In such states, the surviving spouse must elect between dower or curtesy and an intestate share if the other spouse died intestate, or between dower or curtesy and a forced share if the other spouse died testate. 46

Admittedly, a nonearning spouse has a more significant interest in community property than a nonearning spouse has in the property of the other spouse under common law property regimes. Under community property law, a nonearning spouse is entitled to receive one-half of the community property on the death of the earner, as opposed to the one-third share that is available to surviving spouses in many noncommunity property states. Of greater importance, perhaps, is the rule that the nonearning spouse's one-half share of the community property passes to his or her heirs by will or intestate succession even if the nonearning spouse predeceases the earning spouse. Thus, community property law gives the nonearning spouse significant control over community assets, at least at death.

However, the rights of a predeceasing spouse with respect to the disposition of one-half of the community property are not absolute. The United States Supreme Court recently has undermined the ability of a predeceasing spouse to pass to the spouse's heirs an important community asset. In Boggs v. Boggs, 47 the Supreme Court held that ERISA preempts application of community property laws which would have allowed a predeceasing spouse to pass by testamentary instrument the spouse's interest in the other spouse's undistributed plan benefits. The holding in Boggs is broad enough to preclude a predeceasing spouse from passing an interest in the other spouse's undistributed plan benefits by the law of intestate succession. In many cases, pension rights will be a couple's most significant item of community property.

Moreover, the most significant rights that a nonearning spouse has with respect to the income earned by the other spouse may not be enjoyed until the community has terminated. In most cases, a nonearning spouse in a community property state may exercise control over community assets, including community income, only when those assets are distributed to the spouse as a result of a divorce or the death of a spouse or other event causing the community to terminate. In this respect, the nonearning spouse's interest in community property is like the inchoate rights of a nonearning spouse in the property accumulated by the other spouse in a noncommunity property state.

As explained below, the current statutes concerning the management of community property generally permit the earning spouse to determine how the

44. Id. § 2.14.
45. Id.
46. Id.
47. 117 S. Ct. 1754, 1760 (1997).
community income is to be spent during the existence of the community. Under these rules, it is possible for the earning spouse to consume a good portion of the community income before any of it is available to the nonearning spouse on termination of the community. It is inappropriate to tax the nonearning spouse currently on income over which the nonearning spouse has no current control.

III. MANAGEMENT AND CONTROL OVER COMMUNITY INCOME

Under community property law, each spouse owns an undivided one-half interest in all community property, including community income earned by either of the spouses. The rule of Poe v. Seaborn allocating the tax liability for one-half of the community income to each of the spouses, regardless of which spouse earned the income, is based on legal title. The rule ignores two fundamental principles of tax law, under which (1) income is taxed to the person who earns the income; and (2) the individual who has the power to dispose of income generally is the person who is liable for the tax on it. It is obvious that the rule of Poe v. Seaborn ignores the first principle. An analysis of the limitations on the rights of a nonearning spouse to dispose of community income reveals the impropriety of imposing an income tax liability on the nonearning spouse in a community property state.

A. Equal, or Separate-But-Equal, Management of Community Property

At the time that Poe v. Seaborn was decided, most of the community property statutes contained “head-and-master” provisions granting to the husband broad powers of administration and control over community property. Critics of the rule of Poe v. Seaborn argued that the head-and-master provisions deprived the wife of sufficient control over community income to justify the requirement that she pay tax on one-half of the community income. By 1981, all of the community property states had repealed their head-and-master provisions, replacing them with so-called “equal management” provisions. If the equal management provisions actually gave powers to a nonearning spouse over the administration or control of community income earned by the other spouse, it would be difficult to contend that the rule of Poe v. Seaborn is incorrect.

49. See supra cases cited at note 17.
50. For a discussion of the head-and-master provisions, see McClanahan, supra note 11, § 9:3.
52. For a discussion of the “equal management” statutes, see McClanahan, supra note 11, § 9:12.
However, using the term "equal management" to describe these statutes is inaccurate, at least with respect to the management of community income. The current statutes concerning the management of community income are more appropriately described as "separate management" statutes. In many respects, a nonearning spouse's ability to determine the disposition of community income is similar to the ability of a nonearning spouse in a noncommunity property state to determine how income earned by the other spouse will be utilized. The equal management statutes generally give management and control over community income to the spouse who earns it.

For example, the Texas management statute express expressly gives the sole management, control, and disposition over community income to the spouse who earns it. In fact, commentators have referred to the Texas management scheme as either "divided" management or "separate and equal" management. The Texas management statute divides community property into three funds: "his," "hers," and "theirs." Under the statute, each spouse has the sole management, control, and disposition of community property that the spouse would have owned if single. The property designated for separate management includes, but is not limited to: personal earnings, revenue from separate property, recoveries for personal injuries, and the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition.

Spouses in Texas have joint management of community property that is normally subject to the sole management of one of the spouses if it has been mixed with property subject to the sole management of the other spouse unless the spouses provide otherwise. Thus, the Texas statute provides management powers over community income to the spouse who earns it unless the earning spouse chooses to give some or all of it to the nonearner, for example, by depositing it into a joint bank account, thereby mixing it with property subject to the control of the nonearner. The Texas regime, in this respect, provides management rights with respect to community income that are similar to the rights of a spouse in a noncommunity property state with respect to the management, control, and disposition of income earned by the other spouse.

The statutes of the other community property states do not divide management of community property as distinctly as the Texas statute. In general, the other statutes recite that either spouse has management and control over

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57. Id.
community property. As a practical matter, however, the spouse who earns community income will have control over its disposition. Notwithstanding the equal management statutes, it often is necessary to vest control over community property in only one spouse in order to protect the rights of third parties.

For example, a spouse who manages a community business often will have the sole management of the community assets belonging to the business and of the income generated from the business. To prevent unwelcome interference by a spouse who does not participate in the community business and to protect third parties who deal with the managing spouse, several states have adopted statutes giving sole management of personal property used in the business to the spouse who alone manages the business. Such statutes give the spouse who manages


61. See, e.g., Cal. Fam. Code § 1100(d) (West 1994) (stating that a spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property generally may act alone in all transactions but must give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business); La. Civ. Code art. 2350 (stating that the spouse who is the sole manager of a community enterprise generally has the exclusive right to alienate, encumber, or lease its movables); Nev. Rev. Stat. Ann. § 123.230(6) (Michie 1995) (stating that if only one spouse participates in the management of a business, that spouse may, in the ordinary course of business acquire, purchase, sell, convey, or encumber the assets of the business without the consent of the nonparticipating spouse); Wash. Rev. Code Ann. § 26.16.030(6) (West 1997) (same as the Nevada statute).
the community business the sole authority to determine whether the community income earned by the managing spouse will be channeled back into the business or spent for some other purpose.

Even where there is no express statutory provision regarding the management of the community business, the spouse who manages the business also will control the income earned from the business.\(^6\) The managing spouse will make the decisions concerning the community business, including the decision concerning whether business profits will be reinvested in the business or applied to another use. Third parties who deal with the business generally will deal with the managing spouse, to the exclusion of the nonmanaging spouse.

It also is necessary to protect third parties who rely on documents of title. Accordingly, several community property states have statutes providing that a spouse has sole management and control of community property held in that spouse’s name.\(^6\) Under the authority of these statutes, a spouse may exercise exclusive control over his or her earnings by depositing the spouse’s community paycheck in a separate bank account or by investing the money in stocks, securities, or other property titled in the earning spouse’s name.\(^6\)

Even in states where the community property law does not expressly provide for separate management of titled property, the spouse whose name appears on the title to the property will be treated as the sole manager of that property.\(^6\) For example, motor vehicle registration statutes give sole management of the family vehicle to the spouse in whose name the car is titled by requiring the endorsement of the title certificate for conveyance of the car. Thus, where one spouse uses his or her earnings to purchase a car and the title is issued in the purchaser’s name only, the earner can prevent the nonearning spouse from selling it. Securities brokers generally will take instructions from the spouse who invested the funds in an account and whose name appears on the certificate of title, rather than from the other spouse.\(^6\) Thus, a spouse may obtain the exclusive control over his or her community wages by investing them in securities titled in the earning spouse’s name alone.

All of the community property states that do not have provisions authorizing the sole management of titled property have adopted the provisions of the Uniform Commercial Code (“UCC”) concerning commercial paper.\(^6\) Under these provisions, banks will honor withdrawals only by the person whose name appears on the account, and negotiable instruments can be transferred only by

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64. Bingaman, supra note 60, at 44.
65. Effland, supra note 60, at 15.
66. Effland, supra note 60, at 15.
authorized signature. Thus, even if community property law does not confer sole management over titled property to the spouse in whose name the property is titled, an earning spouse may exercise control over his or her community earnings by depositing the funds into a bank account over which the earning spouse has sole signatory authority or by purchasing a negotiable instrument titled solely in the earner’s name. Under general principles of income taxation, the earning spouse, who so easily can obtain control over his or her income, should be liable for the tax on that income.


Community property law requires the joinder of the spouses with respect to certain transactions concerning community property. The joinder provisions place some limitations on a spouse’s ability to alienate certain property titled in that spouse’s name, thereby giving a nonearning spouse a veto power over the disposition of certain assets that may be purchased with community income earned by the other spouse.\(^6\) However, the joinder statutes in some states offer no greater rights to a nonearning spouse than are afforded under the joinder provisions of noncommunity property states. Moreover, the joinder statutes of community property law often provide insufficient protection to a spouse with respect to property titled in the name of the other spouse. Furthermore, an earning spouse in many cases can exclude the nonearning spouse from management of community income by investing the income in assets that are not subject to the joinder requirements.

All of the community property states require the joint action of both spouses with respect to certain transactions involving real property.\(^6\) In all of the community property states, except Texas and Wisconsin, a spouse may not convey or encumber community real property without the consent of the other spouse.\(^7\) Arguably, a spouse who invests his or her community earnings in real

\(^6\) For a discussion of the joinder provisions, see McClanahan, supra note 11, § 9:12.

\(^7\) Id.

estate will lose the ability to control those earnings even if the property is titled
in the earning spouse's name alone. However, the earning spouse may avoid the
real estate joinder requirement and retain control over his or her earnings by
investing in assets other than real estate, such as securities, bank certificates of
deposit, or other assets over which the spouse may make unilateral decisions.

The real estate joinder provisions of community property law are similar to
the homestead statutes that have been enacted in all of the noncommunity
property states.\textsuperscript{71} Under the homestead statutes, both spouses must join in the
conveyance or encumbrance of the family residence. Unlike the provisions of
most of the community property states requiring joinder of the spouses for the
conveyance or encumbrance of all community real estate, the homestead statutes
limit the joinder requirement to alienation or encumbrance of the family
residence. As a practical matter, however, this distinction does not make much
of a difference. In most cases, the only real estate owned by either spouse will
be the family residence. The homestead statutes of the noncommunity property
states give meaningful control to the nonearning spouse over property owned
by the earning spouse by permitting the nonearning spouse to veto the conveyance
or encumbrance of the family residence.

In the few noncommunity property states that have retained the common law
rights to dower and curtesy,\textsuperscript{72} both spouses must join in the conveyance of all
real property, no matter which spouse holds title to the property. These rights
are similar to the rights of spouses in all of the community property states except
Texas and Wisconsin.

The community property law of some states also requires joinder of the
spouses for the conveyance or encumbrance of certain personal property.\textsuperscript{73}

\begin{footnotes}
\item 71. For a discussion of the joinder requirement under the homestead statutes, see 1 Thomas E.
Atkinson et al., American Law of Property § 5.101 (1952); John E. Cribbet & Corwin W. Johnson,
Principles of the Law of Property 94-95 (3d ed. 1989); 1 Richard Powell & Patrick J. Rohan, Powell
\item 72. For a discussion of the common law rights to dower and curtesy, see authorities cited at
\textit{supra} note 42.
\item 73. California, Louisiana, Nevada, and Washington require joinder to convey or create a
security interest in community household goods, furniture, or appliances. Cal. Fam. Code § 1100(c)
Code § 26.16.030(5) (West 1997). Louisiana also requires joinder for the alienation, encumbrance,
or lease of all or substantially all of the assets of a community business. La. Civ. Code art. 2347.
While joinder is not required to convey or encumber the assets of a community business in
California, the managing spouse must give prior written notice to the other spouse of any sale, lease,
exchange, or encumbrance of all or substantially all of the personal property used in the operations
of the business unless written notice is prohibited by the law otherwise applicable to the transaction.
Cal. Fam. Code § 1100(d) (West 1994). In Nevada and Washington, joinder is required to convey
or encumber business assets only if the spouses both participate in the community business;
otherwise, the managing spouse may, in the ordinary course of business, alienate or encumber
business assets, including real estate, without the consent of the nonparticipating spouse in the
\end{footnotes}
Some community property states place restrictions on the ability of a spouse to make unilateral gifts of community property.\textsuperscript{74}

The joinder provisions of community property law, whether in respect to the alienation or encumbrance of real or personal property, provide inadequate protection for the nonconsenting spouse. Because of their inadequacies, the joinder provisions fail to give a nonearning spouse sufficient control over property that is controlled by the earning spouse.\textsuperscript{75}

The traditional relief accorded by the joinder provisions permits the nonconsenting spouse to recapture community property that was transferred unilaterally to a third party.\textsuperscript{76} In California, the nonconsenting spouse cannot void a transfer of community property without paying the vendee.\textsuperscript{77} A spouse in California may not commence an action to void a unilateral conveyance or encumbrance of community real estate after the expiration of one year from the date that the deed or mortgage has been filed.\textsuperscript{78} Once a nonconsenting spouse discovers the transfer, there may be no remedy under California law if there are insufficient funds to pay the vendee or if the statute of limitations has run. Even if a transfer can be avoided, the transferee may have damaged, wasted, consumed, or destroyed the property. If the nonconsenting spouse does not discover the transfer until after the community is dissolved, the spouse's remedy is limited to recapture of one-half of the wrongfully-transferred property.\textsuperscript{79} In such a case, problems arise where the property is indivisible.

\textsuperscript{74} See Cal. Fam. Code § 1100(b) (West 1994) (prohibiting a spouse from making a gift of community personal property without the written consent of the other spouse unless the gift is a mutual gift or a gift from one spouse to the other); La. Civ. Code art. 2349 (requiring concurrence of the spouses for a gift of community property unless the gift is usual or customary and of a value commensurate with the economic position of the spouses at the time of the donation); Nev. Rev. Stat. Ann. § 123.230(2) (Michie 1995) (prohibiting a spouse from making a gift of community property without the express or implied consent of the other spouse); Wis. Stat. Ann. § 766.53 (West 1993) (permitting a gift by a spouse of community property subject to the spouse's management and control if the value of the marital property given to the third person does not aggregate more than either $1,000 in a calendar year or a larger amount, if when it is made, the gift is reasonable in amount considering the spouses' economic position); Anderson v. Idaho Mut. Benefit Ass'n, 292 P.2d 760, 762-63 (Idaho 1956) (gifts other than occasional small gifts of community property are voidable by the nonconsenting spouse).

\textsuperscript{75} For a discussion of the inadequate protection accorded under the joinder provisions, see Epp & Samuel, supra, note 22, at 215-28 and Bruch, supra note 60, at 279.

\textsuperscript{76} See, e.g., Droeger v. Friedman, Sloan & Roas, 812 P.2d 931, 944 (Cal. 1991) and Britton v. Hammell, 52 P.2d 221, 222 (Cal. 1935).

\textsuperscript{77} Mark. v. Title Guar. & Trust Co., 9 P.2d 839, 844 (Cal. 1932).

\textsuperscript{78} Cal. Fam. Code § 1102(d) (West 1994).

\textsuperscript{79} See, e.g., Harris v. Harris, 369 P.2d 481, 482 (Cal. 1962); Trimble v. Trimble, 26 P.2d 477, 480 (Cal. 1933); Pretzer v. Pretzer, 12 P.2d 429, 430 (Cal. 1932).
A nonconsenting spouse can lose the right to void a unilateral transfer if the nonconsenting spouse is deemed to have acquiesced in the transfer or to have ratified it. Some courts have applied principles of estoppel to prevent a nonconsenting spouse from voiding a transfer when the nonconsenting spouse was aware of the transfer and did not object.

Some jurisdictions that otherwise require joinder of the spouses permit unilateral gifts of community property if they are "reasonable." Factors in determining the reasonableness of a gift include the size of the gift in relation to the total size of the community estate, the adequacy of the remaining estate to support the nonconsenting spouse in spite of the gift, and the relationship of the donor to the donee. In such jurisdictions, a nonearning spouse may not be able to recover a gift of community income by the earner if it is determined that the gift was reasonable. Under the "reasonable gifts" exception, the earning spouse could transfer a substantial amount of community income simply by making a large number of small gifts. Thus, the joinder provisions provide inadequate control of community income to the nonearning spouse to justify imposing a tax on the nonearning spouse for any of the income earned by the other spouse.

C. Good-Faith Requirement and Fiduciary Duties

Several community property states limit the ability of the earning spouse to manage and control the community income by imposing a good-faith requirement or a fiduciary duty on the spouses with respect to the management of community property. Only three community property states provide such duties by statute. Wisconsin imposes a statutory duty of good faith with respect to the management of community property. Wisconsin law permits unilateral gifts if they are reasonable and provides a safe harbor of $1,000 per donee per year. The California statute imposes fiduciary duties upon spouses, much like the duties of trustees and

80. See e.g., Treadwell v. Henderson, 269 P.2d 1108, 1111 (N.M. 1954); Whiting v. Johnson, 390 P.2d 995, 988 (Wash. 1964); In re Horse Heaven Irrigation Dist., 141 P.2d 400, 403 (Wash. 1943); Spreckels v. Spreckels, 158 P. 537, 541-42 (Cal. 1916).
83. See, e.g., Horlock, 533 S.W.2d at 55; Quilliam, supra note 60, at 41-44; Weisberger, supra note 60, at 32. Wisconsin law permits unilateral gifts if they are reasonable and provides a safe harbor of $1,000 per donee per year. Wis. Stat. § 766.53 (1993).
84. Williams, supra note 54, at 850.
85. See Wis. Stat. § 766.15 (1993) (requiring each spouse to act in good faith with respect to the other spouse in matters involving marital property or other property of the spouse).
business partners. The fiduciary duties of a spouse in California include the duty to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and the debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of the community assets and debts. A spouse’s right to information under California law is available on request.

Under the old head-and-master statutes, courts imposed liability on the husband (or the wife if she managed the community property) for fraudulent mismanagement of community property. In a number of the cases decided under the old head-and-master statutes, the courts refused to impose the fiduciary duties of a trustee upon the manager. In more recent cases, however, courts have stated that the spouses are fiduciaries with respect to the management of community property.

The standard of care required under the current statutes or case law is not entirely clear. In all of the cases in which the court imposed liability for mismanagement of community property, the courts found actual or constructive fraud. While not requiring the complainant to show actual fraud, courts have required a showing that the breaching spouse’s actions indicated an intent to deprive the complaining spouse of his or her rightful share of the community property.

Notwithstanding the fiduciary duties imposed by community property law, the earning spouse in all of the community property states has primary control over the disposition of the spouse’s earnings. Whenever community income is paid in the form of a negotiable instrument such as a check, the earner will make the initial decision as to whether the income will be shared with the nonearning spouse or deposited into an account giving sole signatory power to the earner. Under general principles of income taxation, the nonearning spouse should not be personally liable for the tax on any portion of the community income earned by the other spouse.

In similar settings, taxpayers who have control over the disposition of income are taxed on the income, notwithstanding their fiduciary duties to the persons who actually receive the income. For example, the grantor trust rules provide that the

88. Id.
89. See William Q. DeFuniak & Michael J. Vaughn, Principles of Community Property §§ 119-120.1 (2d ed. 1971).
90. See, e.g., Williams v. Williams, 92 Cal. Rptr. 385 (Cal. 1971) and Hanley v. Most, 115 P.2d 933 (Wash. 1941).
person who transfers income-producing property to a trust (the "grantor") is liable for the tax on the income generated by the property if the grantor has the power to dispose of the corpus or income of the trust without the consent of the beneficiaries, regardless of whether the grantor also is the trustee who has fiduciary duties to the beneficiaries under state law.\(^\text{92}\)

Moreover, community property law may not provide sufficient remedies for breach of the earner's fiduciary duties with respect to management of the community income to justify imposing a tax liability on the nonearning spouse for income over which the nonearning spouse has no direct control. Even if a nonearning spouse has a cause of action against the earner for mismanagement of community property, the injured spouse may not be able to obtain a remedy during the existence of the community. Traditionally, courts provided interspousal remedies during the existence of the marriage only in extreme cases.\(^\text{93}\) The current equal management statutes in most community property states do not clarify the extent to which legal remedies are available to the spouses during the marriage or the nature of possible remedies.\(^\text{94}\)

Only three of the community property states provide statutory remedies that are available during the existence of the community to a spouse complaining of mismanagement. Under Louisiana community property law, a spouse can sue the other spouse for damages caused by fraud or bad faith in the management of community property.\(^\text{95}\) The California and Wisconsin statutes provide substantial remedies to injured spouses. These remedies include the right to an accounting of community property and debts to determine each spouse's rights of ownership in and access to community property\(^\text{96}\) and the right to add the spouse's name to the title of certain community property already titled in the other spouse's name.\(^\text{97}\) Under Wisconsin law, a spouse can obtain limitation or termination of any of the other spouse's management and control rights upon a showing that marital property has been or is likely to be substantially injured by the other spouse's gross mismanagement or waste.\(^\text{98}\)

The existence of these remedies seems to reinforce the present interest of a nonearning spouse in community income.\(^\text{99}\) However, a spouse cannot actually

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93. See DeFuniak & Vaughn, supra note 89, §§ 151-152 (discussing the extraordinary cases in which one spouse could sue the other under former law).
99. Effland, supra note 60, at 19. Some community property states permit the non-managing spouse to obtain a court order granting the spouse control over community property under the management of the other spouse on a showing that the managing spouse is incompetent or cannot be located. Cal. Fam. Code § 1103 (West 1994) and Tex. Fam. Code Ann. §§ 5.25, 5.26 (West 1993). These statutes, however, do not give a nonearning spouse any greater control over community
enforce these remedies without a court order, even in California, where the managing spouse is required to provide information to the nonmanaging spouse "on request." Furthermore, the initial control over community property resides in the managing spouse. A remedy is available only if the nonmanaging spouse disputes the manager's right to manage the community property alone. Because the nonearner's right to control community income earned by the other spouse is contingent on the earner's mismanagement, the nonearner's interest in community income is inchoate. Accordingly, the nonearning spouse should not be liable for the tax on any of the community income unless and until a court awards the nonearner control over that income.101

D. The Ability to Incur Debts

The only effective control a nonearning spouse has over community income earned by the other spouse during the existence of the community stems from the nonearning spouse's ability to incur debts. Under community property law, a nonearning spouse may incur debts that will be satisfied with community property, including the income that is earned by the other spouse. If a nonearning spouse can find someone who is willing to extend credit and the nonearning spouse has no assets with which to pay the debt, the creditor can seek payment for the debt from community property. In many noncommunity property states, a nonearning spouse also may incur debts for which the earning spouse is liable. Under the doctrine of necessaries, the earning spouse is responsible for payment of expenses incurred by the nonearning spouse for those things that are necessary for the family.102 The liability of the earning spouse under the doctrine of necessaries extends beyond the obligation to pay for items that are necessary to preserve life.103 What constitutes a "necessary" is determined by examining factors such as the means, social position, and circumstances of both spouses.104 Thus,
necessaries include items and services that are appropriate for the nonearning spouse's needs, the nonearning spouse's support, and the earning spouse's means.\textsuperscript{105} Courts have held that under the doctrine of necessaries, the term "support" includes not only food, clothing, and shelter, but also includes medical and dental care, legal services, furniture and household goods, and even a mink coat.\textsuperscript{106}

A number of noncommunity property states have family expense statutes generally providing that the expenses of the family are chargeable against the property of both the husband and the wife.\textsuperscript{107} Under these statutes, a nonearning spouse may incur debts for family expenses for which the earning spouse is liable.\textsuperscript{108} In some states, the liability extends to any article which in fact is used by the family, whether or not it is considered a necessary.\textsuperscript{109}

Admittedly, a spouse in a community property state has broader powers to incur debts that can be satisfied from community income earned by the other spouse than are afforded to a spouse in a noncommunity property state under the doctrine of necessaries or under the family expense statutes. An earning spouse generally is not liable under the doctrine of necessaries for debts incurred by the other spouse if the couple is living apart through no fault of the earning spouse.\textsuperscript{110} Some courts have held that the doctrine of necessaries does not impose liability on the earning spouse for debts incurred by the nonearning spouse unless credit was extended to the earning spouse rather than to the nonearning spouse.\textsuperscript{111}

The family expense statutes reach only debts that are incurred in connection with expenses of the family and for the education of children. A number of debts that could be satisfied with community property are not chargeable under the family expense statutes against the property of the spouse who did not incur the debt. For example, it has been held that debts incurred by a husband in connection with the operation of his business were not chargeable against the wife's property.\textsuperscript{112} In contrast, there are no legal restrictions on the ability of a nonearning spouse in a community property state to incur debts that may be satisfied with community assets.

\textsuperscript{105} 1 Clark, supra note 26, § 6.3.

\textsuperscript{106} See id. and the cases cited therein.


\textsuperscript{108} For a discussion of the family expense statutes, see 1 Clark, supra note 26, § 7.1.

\textsuperscript{109} See cases cited in 1 Clark, supra note 26, § 6.1 n.71.

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} See, e.g., Dubow v. Gottinello, 149 A. 768 (Conn. 1930) and Russel v. Long, 3 N.W. 75 (Iowa 1879).
Nevertheless, the doctrine of necessaries and the family expense statutes give a nonearning spouse in a noncommunity property state an interest in property of the earning spouse, for which the nonearning spouse incurs no income tax liability. The broader powers of a nonearning spouse to reach community assets by such an indirect means as incurring debts should not be considered sufficiently significant to warrant the disparate taxation of nonearning spouses in community property and noncommunity property states.

Moreover, as a practical matter, it may be difficult for a nonearning spouse in a community property state to obtain credit without obtaining the consent of the earning spouse. In determining the creditworthiness of a spouse who applies for credit, financial institutions in Wisconsin have ignored the marital property held or generated by the nonapplicant spouse or have required both spouses to sign the credit documents, notwithstanding state law providing that a creditor must consider a couple’s marital property (along with the applicant’s nonmarital property) as available for debt satisfaction.

Under the federal Equal Credit Opportunity Act (“ECOA”), creditors may not discriminate against a loan applicant on the basis of sex or marital status. Regulation B was promulgated by the Board of Governors of the Federal Reserve System pursuant to congressional delegation of authority to carry out the purposes of the ECOA. Regulation B provides, in part:

If a married applicant requests unsecured credit and resides in a community property state, or if the property upon which the applicant is relying is located in such state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor’s standards of creditworthiness; and
(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

In many cases, creditors base their decisions in extending credit on the future earnings of the applicant. In Texas, where each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including the spouse's earnings, it could be extremely difficult for a nonearning spouse to obtain unsecured credit based on community assets. In fact, Texas community property law provides that community property subject to a spouse's sole management is not subject to any nontortious liabilities incurred by the other spouse during the marriage unless both spouses are personally liable for the debt. Thus, in Texas, a nonearning spouse may not rely on the earnings of the other spouse to satisfy any nontortious debt.

In the other community property states, where spouses have equal management of community property, it would seem that Regulation B should permit a nonearning spouse to rely on the future earnings of the other spouse without obtaining the earner's signature. However, Regulation B has been interpreted to permit a creditor of a nonearning spouse in a community property state to require the signature of the spouse upon whose future earnings the credit application is based.

124. United States v. ITT Consumer Fin. Corp., 816 F.2d 487 (9th Cir. 1987). See also Official Staff Interpretations to Regulation B, 12 C.F.R. Pt. 202, Supp. 1 (1977), interpreting 12 C.F.R. § 202.7(d)(3) (stating that if an applicant relies on the spouse's future earnings that as a matter of state law cannot be characterized as community property until earned, the creditor may require the spouse's signature). The Ninth Circuit's holding in ITT applies to creditors in Arizona, California, Idaho, Nevada, and Washington. It is uncertain whether a court in a different circuit would agree. Before the ITT case was decided, the Federal Reserve Board determined that regulation B precluded a creditor from requiring the signature of the nonapplicant spouse in a community property state that allows each spouse to share equally in the management of community property and the applicant spouse applies for individual credit relying on the income of the nonapplicant spouse to pay the debt. Fed. Reserve Bd. Interpretative Letter No. 73 (May 28, 1982). After ITT was decided, creditors in community property states were concerned that if they failed to follow the ITT procedures, they could risk claims that they violated ECOA and regulation B by treating married persons more favorably than unmarried persons. For a discussion of this issue, see Laura L. Regoers & John L. Culhane, Jr., Survey: Consumer Financial Services Survey: Part II—Developments Under the Equal Credit Opportunity Act and Regulation B, 43 Bus. Law. 1571, 1576 & n.31 (1988). The Federal Reserve Board staff responded to the creditors' concerns by revising the staff commentary to Regulation B and permitting creditors to either adopt the ITT procedures or not. The commentary now provides in part:
In *United States v. ITT Consumer Financial Corporation*, the United States Court of Appeals for the Ninth Circuit held that creditors did not violate the ECOA by requiring a married applicant's spouse to cosign a note as a prerequisite to considering future earnings of a married applicant’s spouse in assessing the creditworthiness of the applicant for unsecured credit. The creditors in the *ITT* case were concerned that, without the signature of the earning spouse, the earner’s future earnings would not be available to pay a debt incurred by the nonearning spouse if the earnings became separate rather than community property. A spouse’s future earnings easily could become separate, for example, because the couple divorced, one of the spouses died, the couple moved to a noncommunity property state, or the spouses entered into a separation of property agreement. The Ninth Circuit determined that while a nonearning spouse in a community property state other than Texas has management and control and may bind all of the community property, including the earnings of the other spouse, the earning spouse’s future earnings do not become community property until they are earned. Accordingly, a married applicant’s equal management power over community property does not extend to the other spouse’s future earnings, and the applicant cannot commit his or her spouse’s future earnings to repay the loan unless the spouse signs a promissory note or some other document to accomplish that result.

With respect to secured credit, Regulation B permits a creditor to require the signature of the applicant’s spouse on any instrument necessary under applicable state law to make the property being offered as security available to satisfy the debt in the event of default. The types of instruments for which a spouse’s signature may be required include an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings. Under *ITT*, it will be necessary for a nonearning spouse in a community property state to obtain the signature of the earning spouse where it is necessary to commit future earnings in order to obtain credit. The joinder requirements of community property law also may require the signature of the other spouse when a nonearning spouse applies for secured credit.

In community property states, the signature of a spouse may be required if the applicant relies on the spouse’s separate income. If the applicant relies on the spouse’s future earnings that as a matter of state law cannot be characterized as community property until earned, the creditor may require the [spouse’s] signature, but need not do so—even if it is the creditor’s practice to require the signature when an applicant relies on the future earnings of a person other than a spouse.

125. 816 F.2d 487 (9th Cir. 1987).
126. 816 F.2d at 490-91.
127. Id. at 491.
129. Id.
IV. CONCLUSION

A nonearning spouse in a community property state should not be personally liable for the tax on any of the community income earned by the other spouse. Community property law does not give a nonearning spouse sufficient management and control over the disposition of community income to justify imposing personal liability on the nonearning spouse for any of the income earned by the other spouse. Under community property law, the most significant rights of a nonearning spouse to dispose of community income do not vest until the community terminates. The right to dispose of community income as it is earned resides primarily with the earner. In many respects, the rights of a nonearning spouse with respect to community income in the year in which it is earned are no greater than the rights of a nonearning spouse with respect to income earned by the other spouse in a noncommunity property state. The liability for tax on income earned by spouses should be uniform, regardless of whether a couple is domiciled in a community property state or a noncommunity property state.