

The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change

Carol S. Bruch[†]

Under current California law, the legal rights and obligations of a married person are significantly affected if spouses separate informally. In this Article, Professor Bruch discusses the many areas in which rights are altered by informal separation and proposes that the law should be changed to conform more closely to the expectations of separated couples.

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[†] A.B. 1960, Shimer College; J.D. 1972, Boalt Hall School of Law, University of California, Berkeley; Acting Professor of Law, King Hall, University of California, Davis. Copyright © 1977 by Carol S. Bruch.

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INTRODUCTION

Over the lifetime of a marriage, there is a sixty to eighty percent chance that discord will lead to some form of marital separation.¹ Pro-

1. Letter from Professor Lenore J. Weitzman, Principal Investigator and Director, California Divorce Law Research Project, Law and Society Center, University of California, Berkeley, to the author (July 14, 1977) (on file at the *California Law Review*) [hereinafter cited as Weitzman Letter]:

This is in response to your question about how many married couples separate. [One of] two . . . ways to approach your question . . . would be to estimate the proportion of all married couples who *will separate at some point over the lifetime* of their marriage. This can best be done by extrapolating from divorce statistics.

Both Professors Robert S. Weiss [MARITAL SEPARATION 11 (1975)] and William J. Goode [AFTER DIVORCE 174 (1956)] have observed that many more couples separate than actually go on to divorce. Weiss's estimate is that *twice* as many couples separate as actually divorce If we use the *current* divorce rate as a basis for our calculations, then we would calculate on the basis of 30% of all married couples who currently divorce at some point in their marriage. We would then estimate that twice as many, or 60% of all married couples can be expected to separate at some point in their marriage. Approximately half of these, or 30% of all married couples, would then proceed to obtain a legal divorce.

If, however, we use the divorce rate *projected* for those now entering marriage, we would estimate that 80% of all presently married couples would separate at some point in their marital lives, with 40% of all married couples proceeding to obtain a legal divorce. Thus over the lifetime of a marriage one can reasonably expect that between 60% and 80% of all married couples will separate, with half of them, between 30% and 40%, going on to obtain a legal divorce.

Of the 30% to 40% who do not go on to obtain a legal divorce some will reconcile, while others will remain separated. (Of course, some of those who remain separated may later obtain a legal separation, but many will not.)

As this estimate of the proportion of couples who separate is based on

fessor Weitzman, Director of the California Divorce Law Research Project, reports that every year in the United States, 1,000,000 couples separate who will later divorce and an estimated additional 300,000 couples separate who will later reconcile.² California alone accounts

the lifetime of a marriage, it may sound very high. However, I believe it is quite realistic and it surprises us only because we haven't before confronted the magnitude of the problem. Separation is, after all, typically a "private" event and is rarely broadcasted or publicized. Further, as a much smaller percentage of couples separate in any one year, it is only when viewing the proportion cumulatively that we realize how large it is. On a yearly basis the average annual probability of separation is about five in a hundred [R. WEISS, *supra*, at 12].

As many separated people later divorce or reconcile the number of currently separated people provides us with an index which is only the tip of the iceberg. Nevertheless, it may be useful to know that there are now 2,898,452 people in the U.S. (in the last census) who define their marital status as separated. [U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF THE POPULATION, U.S. Summary, section 1, at 278.]

These figures reveal that more than twice as many Americans are separated although married as are cohabiting although unmarried. The Census Bureau reports that 1,300,000 individuals were living in a two-person household with an unrelated member of the opposite sex in March 1976. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, No. 307, *Population Profile of the U.S.: 1976* 10 (April 1977). The alternative basis for an estimate is set forth in note 2 *infra*.

2. Weitzman Letter, *supra* note 1:

The second [way to estimate the number of married couples who separated] would be to calculate the number of separations from the number of people who file for a divorce but who do not continue with the legal proceedings. In California, approximately 30% of the divorce actions filed in 1966 had not resulted in a California divorce by the end of 1974. [Schoen, Greenblatt & Mielke, *California's Experience with Nonadversary Divorce*, 12 DEMOGRAPHY 223, 233 (1975).] Figures ranging from 20% to 37% have been reported elsewhere. [R. WEISS, *supra* note 1, at 11 n.10; Kitson, Holmes & Sussman, Predicting Reconciliations: A Test of the Exchange Model of Divorce, paper presented at the American Sociological Association Meetings, Chicago (August, 1977).] As there are now over one million divorces granted in the U.S. each year [NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEPT OF HEALTH, EDUCATION & WELFARE, *Births, Marriages, Divorces and Deaths for November 1976*, in MONTHLY VITAL STATISTICS REPORT, VOL. 25, Jan. 27, 1977, at 2], these base estimates would lead us to assume that between 200,000 and 400,000 other couples file but do not proceed to obtain a divorce. One may suspect that these figures over-estimate the number of yearly separations because some of these couples undoubtedly file for a divorce in another state or country, and others may reconcile now but then later decide to divorce. However, any over-estimate would surely be offset by the large number of couples who separate and reconcile informally without ever filing for a legal divorce. Thus I think it is reasonable to estimate that 300,000 couples separate in the U.S. each year.

See also Rankin, California Vital Statistics and Divorce Research: An Overview, paper presented at the Pacific Sociological Association Meetings, Portland (Spring 1972) (on file at the *California Law Review*):

In California during the past few years, about 30 per cent of the filings are carried over year after year without a Dismissal or a Final Decree. . . . We found that from a total of 68 cases, only 19.2 per cent were found to be known or presumed reconciliations. Final Decrees had been granted in other divorce actions in 23.5 per cent of the cases, thus leaving the original filing still on record as unresolved. More than forty-five per cent fell in the category: *Status not determined*, attorney has lost contact with client.

(Emphasis in original.) "Roger Smith [of the State] Bureau of Vital Statistics . . .

for approximately one in seven of these separations: 130,000 California couples separate each year who will later divorce and approximately 44,000 more couples separate who will later reconcile.⁸

For the great majority of these couples, there will be a period of separation when the legal incidents of their marriage will be governed by statutes and case law rather than by a written separation agreement or court order.⁴ For most of them, part of this time will consist of a trial separation—that is, a time when they have ceased sharing a household but are still uncertain about the future of their marriage.⁵ This step may be taken for any number of reasons: to give each party time to reflect upon the marriage; to permit experimentation with life alone as a tentative prelude to divorce; to provide a respite from marital strains while the parties attempt changes in themselves and their relationship that will promote an effective reconciliation. The primary legal concerns of couples who undertake tentative separations relate to meeting current support needs and allocating responsibility for the payment of preexisting and postseparation debts. To a lesser degree, they may include the preservation of assets and contingent plans for a divorce or legal separation should the couple's reconciliation efforts fail. For those additional couples who have already decided upon divorce at the time of separation, but have not yet formalized their decision with a separation agreement or court order, all of these interim goals are important.

This Article discusses the legal impact of such informal separations, in which the spouses have instituted no legal proceedings to alter their relationship and have entered into no written separation agreement that specifies their mutual obligations. The discussion rests upon two assumptions. First, it assumes that couples expect their legal obligations to remain unchanged during such informal changes in their family structure. Second, it assumes that couples who concentrate on mutual goals during periods of marital stress are more likely to achieve reconciliation than are those who are caught up in the self-centered maneuvering that invariably accompanies interspousal litigation.

The law defining the legal status of informally separated couples is unclear, both because the substantive law has failed to focus on the

reports that since my study in 1971, the number of cases not proceeding to Final Decrees has tapered off some from about 30% to about 25%. He thinks it is due to the no-fault divorce and shorter waiting period." Letter from Professor Robert P. Rankin, Department of Sociology, California State University, Chico, to the author (Jan. 1, 1977) (on file at the *California Law Review*).

3. Weitzman Letter, *supra* note 1.

4. See generally W. GOODE, *supra* note 1, at 173-82.

5. Even for those couples whose separations lead to divorce, Professor Goode's study indicates that thirty-nine percent separate before a final decision to divorce is reached. *Id.* at 179.

needs of these couples and because commentators have ignored the problem. As a result, the attorney who is consulted by a separated spouse or couple will find relevant legal tools only in the Civil Code provisions that regulate the dissolution of marriage. Under these statutes, temporary orders and written separation agreements are available to clarify the couple's obligations.⁶ Redefining the parties' legal relationship in this manner, however, inevitably escalates the couple's situation from tentative separation towards dissolution.⁷ If reconciliation was originally contemplated, advice of counsel may thus do more harm than good.

Ideally, the law governing informal separations should preserve the status quo to the extent that policy allows, reflecting the reasonable expectations of separated couples. Tactical and litigational concerns would then be reduced; negotiation and litigation would no longer be required merely to preserve property or support rights. Perhaps even more importantly, those who do not seek counsel, whether by choice or because they cannot afford it,⁸ would be spared unforeseen complications.

Unfortunately, the goals of fulfilling the spouses' expectations and avoiding precipitous litigation are ill served by current law. In many areas, physical separation of the spouses alone may bring about results that the parties little contemplated. Code provisions dealing with property accumulations and spousal support give legal effect to the parties' separation. A spouse who cares for children of the marriage following separation will probably both bear the financial burden of their support and secure an enhanced chance at sole legal custody should a contest over the children eventuate. Creditors, too, may be affected by the parties' decision to separate. And questions of insurance, taxes, probate, and public benefits turn on the existence and nature of family relationships. To the extent that more or less formal separations are given operative legal effect, the parties' expectations may be well or ill served.

6. CAL. CIV. CODE §§ 4357, 4359 (West Supp. 1977), 4802 (West 1970).

7. Legal advice may be especially disruptive at such times, given most attorneys' greater expertise at litigation than conciliation. For two startling examples, see Carsola, *First Steps in Divorce—Initial Client Contact, Litigation Financing, Investigation, and Self-Help*, 3 FAM. L. REP. (BNA) 4019 (Feb. 1, 1977); Kerr, *How to Conduct the Initial Divorce Interview*, BARRISTER, vol. 3, Winter 1976, at 29. But see Athearn, *Practical and Ethical Considerations in Divorce Cases*, in 2 CALIFORNIA FAMILY LAWYER § 21.1, at 881 (C.E.B. 1961) [hereinafter cited as 2 CAL. FAMILY LAWYER]; Diamond, *The Lawyer and Family Law, A Point of View*, in 1 CALIFORNIA FAMILY LAWYER § 2.1, at 43 (C.E.B. 1961) [hereinafter cited as 1 CAL. FAMILY LAWYER].

8. For a general discussion of the barriers to adequate legal counsel, see Meyers, *Consumerism and the Delivery of Legal Services*, 49 CAL. ST. B.J. 256 (1974).

The following discussion surveys these areas of typical concern within the current network of laws that alter the parties' rights by virtue of their physical separation alone. With the exception of the tax material, it focuses on California law. Judicial or legislative changes in current doctrine are proposed where current provisions unnecessarily prejudice one spouse or both during an informal separation.

I

THE IMPACT OF SEPARATION ON THE FAMILY

A. Marital Property

1. Postseparation Earnings

Informal separations may affect California's normal rule that, absent contrary agreement, earnings during marriage and property acquired with those earnings are community property.⁹ Prior to 1971, the law provided that a man's earnings following marriage were community property unless the parties agreed otherwise or obtained a decree of legal separation or an interlocutory decree of dissolution.¹⁰ A woman's earnings were treated differently: although her earnings during marriage were also community property absent a contrary agreement, no court order was required to restore their nature as separate property once she and her husband were living separate and apart.¹¹ Because few working women received significant pay for their labors while these statutes were in force, little litigation to challenge a woman's title to acquisitions following physical separation occurred that

9. Under California's tracing principle, property derived from earnings maintains the ownership characteristics of the funds with which it is purchased. *See Boyd v. Oser*, 23 Cal. 2d 613, 145 P.2d 312 (1944). The rules discussed in the text as to earnings apply as well to postseparation acquisitions. *In re Marriage of Wall*, 29 Cal. App. 3d 76, 105 Cal. Rptr. 201 (2d Dist. 1972); *Christiana v. Rose*, 100 Cal. App. 2d 46, 222 P.2d 891 (1st Dist. 1950); CAL. CIV. CODE § 5118 (West Supp. 1977).

10. Former Civil Code § 5119, ch. 1608, § 8, 1969 Cal. Stats. 3340. The text of this section is set out in note 21 *infra*. The rule was originally enacted as Civil Code §§ 169.1 & 169.2, ch. 1700, § 12, 1951 Cal. Stats. 3913.

11. An act to protect the rights of married women in certain cases, ch. 161, § 2, 1869-70 Cal. Stats. 226; former Civil Code § 169, ch. 3, § 169, AN ACT TO ESTABLISH A CIVIL CODE 57 (1872); former Civil Code § 5118, ch. 1608, § 8, 1969 Cal. Stats. 3340. The 1869 statute used the phrase "living separate and apart from her husband"; the 1872 and 1969 enactments used the phrase "living separate from her husband." The 1971 amendment to section 5118, set out in the text accompanying note 15 *infra*, restored the phrase "separate and apart." No court opinion has attached any significance to the difference between "separate and apart" and merely "separate." *Makeig v. United Security Bank & Trust Co.*, 112 Cal. App. 138, 296 P. 673 (1st Dist. 1931) and *Kerr v. Kerr*, 182 Cal. App. 2d 12, 5 Cal. Rptr. 630 (3d Dist. 1960), both refer to "separate and apart" although the statutory language at the time was "separate."

might clarify the definition of "separate and apart."¹² Although separations prompted by logistical concerns, however attenuated, probably did not affect the nature of a wife's earnings, case law did not permit a confident prediction of the impact of a separation prompted by marital discord.¹³ The rule's traditional formulation nonetheless stated

12. Only four reported cases discuss the meaning of "separate and apart" for purposes of the current version of section 5118 and its predecessors. They are discussed in note 13 *infra* and accompanying text.

13. *Tobin v. Galvan*, 49 Cal. 34 (1874) (husband sent wife to another city to improve a tract of land he owned); *Kerr v. Kerr*, 182 Cal. App. 2d 12, 5 Cal. Rptr. 630 (3d Dist. 1960) (husband escaped from a mental institution and fled the state); *Makeig v. United Security Bank & Trust Co.*, 112 Cal. App. 138, 143, 296 P.2d 673, 675 (1st Dist. 1931) (spouses held jobs in different cities). In all three cases, the court concluded that the parties were not living "separate and apart" so that earnings were the wife's separate property.

Despite a 14 year separation that followed 6 weeks of cohabitation, the *Makeig* court refused to apply the statute because it found no "marital rupture" that indicated the parties had separated with no intention of eventually reconciling. 112 Cal. App. at 143, 296 P. at 675. A less stringent standard would not have sustained Mr. Makeig's claim to community property rights in \$10,000 that Mrs. Makeig saved without his knowledge prior to her death. (She left him \$10 by will.) Evidence suggested that the savings came in part from funds sent by him to his wife over the years. In holding that the couple intended ultimately to establish a common home, the court virtually ignored the fact that Mrs. Makeig concealed from her husband the savings that would have permitted them to resume cohabitation.

Although *Makeig* is generally accepted as articulating the rule that only a final rupture of the marital relationship will affect community property rights in subsequent earnings, it cites with approval *Loring v. Stuart*, 79 Cal. 200, 21 P. 651 (1889), a case in which a much briefer and equally ambiguous separation was held to terminate the community. 112 Cal. App. at 143, 296 P. at 675.

In *Loring* "domestic infelicity" prompted the husband to leave his wife. Although he claimed that he hoped for a reconciliation at the time, he did not inform his wife as to when or whether he would return. Two years later, he abandoned any hope of reconciliation, but the court held that even prior to that time the parties were living separately for purposes of the statute. The decision was not motivated by sympathy for a wife who had been deserted by her husband; the result of the case was that sole liability was impressed upon the wife for a mortgage she had given during her husband's absence. As the only California case in which the parties were admittedly dissatisfied with their relationship, although not yet ready to rule out reconciliation, *Loring* suggests that even a trial separation may terminate the community.

So long as both *Makeig* and *Loring* remain good law, however, the current paucity of precedents will not permit an acceptably precise definition of "separate and apart." If the cases are reconciled by explaining *Makeig* as an attempt to do equity rather than as a reasoned effort to articulate an appropriate definition of "separate and apart," the *Loring* rule controls. This approach would accelerate the financial consequences of separation, creating greater frustration of the parties' reasonable expectations and necessitating earlier recourse to legal channels. Of the two, the *Makeig* rule is preferable as it arguably maintains the community until hopes for reconciliation are abandoned. This test approximates the one established by the Washington courts under a similar statute. See *Togliatti v. Robertson*, 29 Wash. 2d 844, 190 P.2d 575 (1948); 1879 Laws of Wash. Terr., § 15, 79 (codified in REM. REV. STAT. § 6896 [1932]) (current version at WASH. REV. CODE ANN. § 26.16.140 (Supp. 1975)); Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 750-53 (1974) [hereinafter cited as Cross 1].

Togliatti provides a solution for the problem posed by lengthy separations during

that a couple was living separate and apart when there had been a "marital rupture" indicating that the couple has "come to a parting of the ways [with] no present intention of resuming the marital relations and taking up life together under the same roof."¹⁴

This ambiguous statutory language is now very important. A 1971 effort to equalize the treatment of the spouses changed the treatment of a husband's acquisitions following separation to that already prescribed for his wife. Section 5118 now reads:

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse are the separate property of the spouse.¹⁵

Although equality has been achieved, this well-intended effort has created serious problems. First, the parties' probable assumption that their marital rights can be altered only by agreement or legal action is ignored. More importantly, because the reach of the unclear statutory language has been extended, litigation will increase in an effort to delineate the kind of a separation that will preclude community

which the parties never articulate their intentions but establish clearly separate lives by use of an implied agreement to transmute acquisitions from community to separate property once the marital relationship is defunct. On transmutation agreements under California law, see notes 25-31 *infra* and accompanying text. See also Cross 1, *supra*, at 806-07. Whether the contract is considered implied in fact or implied in law, it provides a sensible safety valve when time or circumstances demonstrate that the one-time partners have long since gone their separate ways. While these doctrines permit equitable results in appropriate cases, the basic rule remains that earnings belong to the community unless expressed intent or legal action alters the situation. See note 23 *infra*. Policy supports the same interpretation for section 5118.

Similar problems theoretically can arise under the 1973 version of the Uniform Marriage and Divorce Act, but only because the Act incorporates state law definitions. Section 307(b) of the 1971 version defines marital property as all earnings prior to a decree of legal separation or divorce, and so gives no effect to less formal separations. Alternative B of the 1973 version of the Act, however, refers to community and separate property without supplying definitions and so necessarily incorporates state law concepts. (The Uniform Marriage and Divorce Act, and other Uniform Laws relating to marriage and the family, are found in 9 UNIFORM LAWS ANNOTATED (West 1973 & Supp. 1974-1976).)

14. *Makeig v. United Security Bank & Trust Co.*, 112 Cal. App. 138, 143, 296 P. 673, 675 (1st Dist. 1931). See note 13 *supra* for a discussion of *Makeig*.

15. CAL. CIV. CODE § 5118 (West Supp. 1977). Confronted by statutes similar to California's former version of section 5118, the Idaho Supreme Court held the distinction between husbands and wives to be unconstitutional sex discrimination. It refused to recognize separate property acquisitions by the husband following separation, however, stating instead that community property acquisitions continue until divorce for both husband and wife. *Suter v. Suter*, 97 Idaho 461, 466, 546 P.2d 1169, 1174-75 (1976). The degree to which this result was facilitated by the Idaho rule that community property may be divided as is equitable, rather than equally as in California, is a matter of speculation. Compare IDAHO CODE § 32-712 (Supp. 1976) with CAL. CIV. CODE § 4800(a) (West Supp. 1977).

ownership of the parties' subsequent earnings. Third, the rule as traditionally formulated defies predictability and certainty. Any test for the moment of "marital breakdown" invites error: because separations are frequently unpredictable, hindsight will probably dictate its result. What was intended as a temporary arrangement may solidify, and parties who wished never to see one another again may later reconcile. Yet weeks, months, or years later, when a court is asked to determine the parties' interests in assets produced by their earnings during separation, a separation that was only tentatively begun may well appear to have been a definitive break, especially if an anticipated reconciliation never took place.¹⁶ The California Supreme Court's decision in *In re Marriage of Bouquet*¹⁷ that the 1971 equalization of section 5118 has

16. Thus far litigation under both the current version of section 5118 and its predecessors has frequently assumed that an operative separation occurred at the moment of physical separation without focusing on the nature of the parting. See, e.g., *Dawe v. Dawe*, 17 Ariz. App. 237, 496 P.2d 880 (1972) (applying California law); *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976); *In re Marriage of Ward*, 50 Cal. App. 3d 150, 123 Cal. Rptr. 234 (1st Dist. 1975); *In re Marriage of Wall*, 29 Cal. App. 3d 76, 105 Cal. Rptr. 201 (2d Dist. 1972); *Garfein v. Garfein*, 16 Cal. App. 3d 155, 93 Cal. Rptr. 714 (2d Dist. 1971); *Romanchek v. Romanchek*, 248 Cal. App. 2d 337, 56 Cal. Rptr. 360 (2d Dist. 1967). In some cases this is probably due to an assumption that separation alone brings section 5118 into play, while in others the effect of hindsight no doubt prevents counsel from questioning whether what has proved to be a final separation was indeed intended to be such at the time it began.

The *Patillo* case highlights the confusion produced by the present version of section 5118. Despite the comings and goings of the legal spouse of the deceased, the court did not discuss whether any of the couple's partings were sufficiently permanent to properly invoke section 5118. From the facts as described in the opinion, it appears that the couple's separation in 1949, which lasted until 1969, constituted such a separation under the retroactive application of the current version of section 5118. The wife's more recent departures (a total of three times during 1970 and 1971) may well not have met the *Makeig* test discussed in note 13 *supra*. *Patillo* is complicated by the added presence of a putative spouse of the deceased whose departure also raised section 5118 issues. Once again the opinion does not adequately consider the problem of characterizing the separation. This failure apparently stems from the court's literalistic reading of the statute's "separate and apart" language. In rejecting the putative spouse's argument that her departure from the deceased's home did not implicate section 5118 because it was under duress at gunpoint, the court commented that "section 5118 makes no reference to the cause of the separation." 65 Cal. App. 3d at 218 n.5, 135 Cal. Rptr. at 216 n.5.

When instead the parties' subjective intentions are tested under *Makeig's* marital breakdown test, hindsight will frequently obscure the facts. In Indiana a modification of section 307 of the Uniform Act defines the property subject to division by the court in a dissolution action to include all property acquired by either spouse "prior to final separation of the parties." IND. CODE ANN. § 31-1-11.5-11 (Burns Supp. 1976). This language solves the problem of ascertaining intent but replaces it with a requirement of finality which can only be determined by hindsight. As a result, at the time of a separation parties can predict its effect on property rights only if they are equipped with a crystal ball or inflexible wills.

17. 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

retroactive effect compounds these problems since separations that occurred many years ago must now be evaluated.¹⁸

Finally, so long as 5118 is interpreted to change existing property rights before the couple has acted to change their marital status, those who do obtain professional advice will find themselves engaged in potentially selfish or defensive maneuvering.¹⁹ An already strained relationship may be exacerbated and property rights may be jeopardized. Frequently, for example, an earning spouse will suggest to a nonearner that the nonearner's expenses be met out of the couple's savings and that the earner use current income for self-support. This will produce a dissipation of the community property, including the one-half interest that belongs to the nonearning spouse, rather than payment of current living expenses out of current income, as would be the case if a support order were sought.²⁰ Relieved of such responsibilities, the wage earner will acquire as separate property whatever current earnings are not consumed.

An adequate judicial remedy for this confusion seems unlikely. A court is not apt to postpone the point at which earnings become separate property by reading "separate and apart" to refer only to situations in which a legal decree has been obtained.²¹ Although this is the most

18. The court recognized that its ex post facto adjustment of ownership rights raised constitutional questions, and adopted much of Professor Reppy's analysis concerning the permissibility of property takings. Its conclusion that section 5118 could constitutionally be applied retroactively is, however, directly contrary to that of Professor Reppy. Compare 16 Cal. 3d at 591-94, 546 P.2d at 1376-78, 128 Cal. Rptr. at 432-34, with Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977, 1080 n.335 (1975) [hereinafter cited as Reppy].

19. A member of the California State Bar Family Law Section subcommittee that is considering possible revisions to section 5118 has noted the extent of such maneuvering under the current law:

After more thinking, a return to the old rule [that maintained earnings as community property until an interlocutory judgment of dissolution, but extended to include the wife's postseparation earnings] is preferable . . . [I]t avoids game playing during the period of litigation, which I now face in most large earnings cases. To avoid the games you [must obtain] preliminary orders or rely on the good faith of the other party. There is [a great deal] of room for malpractice in failure to get the preliminary orders, although . . . most of us don't do it as a matter of course. The only hardship is when there is an extremely long time between filing and trial and [a bifurcated trial of the interlocutory dissolution and remaining property, support and custody matters] may be the solution to this problem.

Letter from George Norton to John Fitch, another member of the subcommittee (Feb. 24, 1977) (copy on file at the *California Law Review*).

20. Civil Code section 4805, set out in note 40 *infra*, provides an order of execution for support orders that resorts first to a spouse's current income.

21. Prior to the 1971 amendments, when only the wife's earnings were separate property while the parties were living separate and apart, section 5119 provided that:

(a) After the rendition of a judgment decreeing legal separation of the parties, the earnings or accumulations of each party are the separate property

desirable construction, it would render superfluous section 5119 of the Civil Code, which already provides that earnings are separate property following a judgment of legal separation. Preserving a distinct operation for 5118, yet clarifying the moment at which it takes effect, may lead instead to a reading that any physical separation resulting from marital difficulties, rather than the moment of marital breakdown, will bring the section into play. Unfortunate language in recent case law and the practice books suggests that this deceptively simple interpretation of 5118 sometimes occurs.²² This reading exacerbates the shortcomings of 5118 by imposing unforeseen consequences and the disadvantages of immediate legal intervention on every separating couple. Despite the proof problems created by the marital breakdown test, it is nevertheless preferable to a test based on the parties' initial separation.

It is time for section 5118 to be repealed and a reference to interlocutory decrees of dissolution to be restored to section 5119 so that the earnings of both spouses will retain their community property nature unless mutual agreement²³ or a court

of the party acquiring such earnings or accumulations.

(b) After the rendition of an interlocutory judgment of dissolution of a marriage and while the parties are living separate and apart, the earnings and accumulations of the husband are the separate property of the husband.

Former Civil Code § 5119, ch. 1608, § 8, 1969 Cal. Stats. 3340. The same 1971 act that made the change in section 5118 repealed section 5119(b). Act of Dec. 10, 1971, ch. 1699, §§ 1, 2, 1971 Cal. Stats. 3640. No change was made in section 5119(a). Thus when the present versions of sections 5118 and 5119 are read together, they suggest that either living "separate and apart," however defined, or a judgment of legal separation makes future earnings separate property. To conclude otherwise by reading "separate and apart" as referring only to a judgment of legal separation is to render superfluous the portion of section 5119 that was retained in 1971.

22. See, e.g., *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. (1976) (discussed in note 16 *supra*); M. FREEMAN, W. HOGOBLOOM, W. MACFADEN & L. OLSEN, *ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE* §§ 5.1-5.2, at 246-47 (2d ed. 1972) [hereinafter cited as *ATTORNEY'S GUIDE*], which states that "actual separation" brings section 5118 into effect; S. WALZER, *CALIFORNIA MARITAL TERMINATION SETTLEMENTS* § 4.105, at 135 (C.E.B. 1971) [hereinafter cited as *WALZER*], which states that section 5118 operates "[f]rom the time the parties first separate"; and Walzer & Weinstock, *Marital Settlement Agreements*, in 2 CAL. FAMILY LAWYER, *supra* note 7, § 26.40, at 1208, which says that "[w]hen the parties are separated," the predecessor of section 5118 applies to their earnings. The chapter of CALIFORNIA FAMILY LAWYER on general community property principles notes the judicial interpretations of "separate and apart" discussed in note 13 *supra*, but there is no cross-reference to that section from section 26.40 in the chapter on separation agreements. Marsh, *Property Ownership During Marriage*, in 1 CAL. FAMILY LAWYER, *supra* note 7, § 4.31, at 124.

23. These agreements may be either express or implied. They may be entered into at any time before or during marriage. CAL. CIV. CODE §§ 4802, 5103, 5133 (West 1970). Where a third party's rights are involved, an estoppel may be applied to prevent inequitable results. Such equitable principles have long been applied by California courts to allocate property rights between abandoned spouses and later putative spouses. Under these cases, a spouse who takes no action for a long period knowing that the other spouse is engaged in a putative or meretricious relationship with a third party

order²⁴ terminates the community. This change would preserve the status quo and prevent many of the inequities now possible when there is an informal separation. At the same time, California's present law on transmutation agreements can accommodate couples whose expectations differ from those that this discussion assumes to be most common.

2. *Transmutation Agreements*

California law permits spouses to alter their property rights by agreement both before and during marriage.²⁵ Because this rule is independent of the Code provisions that govern separation agreements,²⁶ parties who have not entered into a written separation agreement may nonetheless transmute community property to separate property at the time of separation. Such agreements to alter the nature of spousal ownership interests may be implied as well as express.²⁷ Accordingly, parties who allocate various items between themselves and their households, alter their banking habits, or change documents of title may thereby transmute one form of property to another;²⁸ their intention controls.²⁹ The transmutation cases provide a realistic recognition of the informality that normally attends interspousal dealings and permit equitable results when one party later seeks to disavow the clear import of the parties' informal conduct.³⁰ For example, under current law a court should refuse a wage earner's claim that postseparation earnings

is estopped to deny the third party's rights in the bigamous spouse's property; the spouse who purports to remarry similarly may not deny the validity of property rights flowing from the new relationship. *Spellens v. Spellens*, 49 Cal. 2d 210, 217-22, 317 P.2d 613, 617-20 (1957); *Brown v. Brown*, 274 Cal. App. 2d 178, 188-90, 79 Cal. Rptr. 257, 263-64 (5th Dist. 1969); *accord*, *Estate of Atherley*, 44 Cal. App. 3d 758, 764-65, 119 Cal. Rptr. 41, 44-45 (1975) (no estoppel found). See generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 115, at 5208 (8th ed. 1974) [hereinafter cited as WITKIN SUMMARY]. See the discussion of *Togliatti* in note 13 *supra*.

24. That is, an interlocutory judgment of dissolution or a judgment of legal separation.

25. CAL. CIV. CODE §§ 5103, 5133 (West 1970).

26. CAL. CIV. CODE §§ 4802 (West 1970), 4811 (West Supp. 1977).

27. *E.g.*, *Estate of Nelson*, 224 Cal. App. 2d 138, 143, 36 Cal. Rptr. 352, 355 (1st Dist. 1964).

28. See *Durker v. Zimmerman*, 229 Cal. App. 2d 203, 40 Cal. Rptr. 227 (1st Dist. 1964).

29. *E.g.*, *Estate of Nelson*, 224 Cal. App. 2d 138, 143, 36 Cal. Rptr. 352, 355 (1st Dist. 1964): "No express or formal agreement is required if it may be fairly inferred from all the circumstances and evidence that a community interest was intended by the parties."

30. See, *e.g.*, *Nevins v. Nevins*, 129 Cal. App. 2d 150, 276 P.2d 655 (2d Dist. 1954). Some commentators have criticized the ease with which implied transmutation agreements can be established in California. W. REPPY & W. DE FUNIAK, *COMMUNITY PROPERTY IN THE UNITED STATES* 421 (1975) [hereinafter cited as REPPY & DE FUNIAK]; Marsh, Book Review, 42 CALIF. L. REV. 368, 371-73 (1954) (reviewing B. ARMSTRONG, *CALIFORNIA FAMILY LAW*).

are the earner's separate property if paychecks continued to be deposited in a joint checking account and used for the family's expenses precisely as before separation. Instead it should find that the parties' conduct transmuted the separate earnings to community property. Similarly, the repeal of section 5118 would not preclude courts from finding that community funds were transmuted to separate property by parties who closed their joint accounts, established separate accounts, and segregated their earnings and expenses after separation.³¹

Transmutation agreements thus permit parties to modify the usual rule during separation when they have clearly expressed that desire. These agreements are not, however, a substitute for a sound general rule of ownership during separation. The repeal of section 5118 would provide a baseline upon which contrary agreements could be established without prejudicing the rights of those many couples who reasonably assume that a written agreement or legal action is required to alter the legal incidents of their marriage.

B. Spousal Support

The Civil Code sections that impose mutual support obligations upon husbands and wives³² are qualified during separation. Section 5131 of the Civil Code, for example, terminates the obligation upon the parties' separation "by agreement" unless the parties have expressly provided for support.³³ Although the case law that discusses the kind of consensual separation that will terminate support rights is murky,³⁴

31. See *Durker v. Zimmerman*, 229 Cal. App. 2d 203, 40 Cal. Rptr. 227 (1st Dist. 1964).

32. CAL. CIV. CODE §§ 242 (West Supp. 1977), 5100 (West 1970).

33. A spouse is not liable for the support of the other spouse when the other spouse is living separate from the spouse by agreement unless such support is stipulated in the agreement.

CAL. CIV. CODE § 5131 (West Supp. 1977). The section apparently does not apply to separations not prompted by marital discord. See *Cannon v. Kemper*, 23 Cal. App. 2d 239, 73 P.2d 268 (3d Dist. 1937) (wife permitted wrongful death recovery following husband's death for amounts she would have been entitled to receive as support although the couple had not lived together for three or four years, the wife residing with her family while the husband was unemployed.) Section 5118, which regulates separations and marital property rights, has been given a similar interpretation. See note 13 *supra* and accompanying text.

The parties' ability to establish or waive spousal support by agreement is enhanced at the time of separation. Compare CAL. CIV. CODE §§ 4802 (West 1970), 4811 (West Supp. 1977) with *In re Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) and *In re Marriage of Higgason*, 10 Cal. 3d 576, 516 P.2d 289, 110 Cal. Rptr. 897 (1973) (concerning antenuptial agreements).

34. See, e.g., *In re Fallon's Estate*, 49 Cal. 2d 402, 317 P.2d 963 (1957); *In re Fawcett's Estate*, 232 Cal. App. 2d 770, 43 Cal. Rptr. 160 (1st Dist. 1965); *In re Coon's Estate*, 107 Cal. App. 2d 531, 237 P.2d 291 (3d Dist. 1951); *In re Cooper's Estate*, 97 Cal. App. 2d 186, 217 P.2d 499 (2d Dist. 1950). These are probate cases. The issue arises in a probate setting because a surviving spouse is entitled to certain

a written agreement to live apart is apparently not required.³⁵ As a result, a dependent spouse who assumes that support rights will continue in the absence of formal action may be prejudiced.

Additional effect is given to informal separations, indeed perhaps to mere physical separation, by section 5132, which holds a spouse's separate property accountable for the other spouse's support only "while they are living together."³⁶ Originally designed to protect a woman from the support claims of a husband who had deserted her, its benefits were later extended to men at a time when the requirement of "living together" might better have been deleted.³⁷ Section 5132 appears

statutory benefits during the administration of the estate only if the survivor was actually receiving support or was entitled to support from the decedent at the time of the decedent's death. See notes 246-257 *infra* and accompanying text.

35. Section 5131 does not itself speak to the need for a writing, but related provisions indicate that written agreements are not required. Civil Code section 4811 specifies the permissible content of separation agreements and expressly contemplates agreements other than written ones and oral stipulations made in open court. CAL. CIV. CODE § 4811(b) (West Supp. 1977). This conclusion is buttressed by section 4802, which establishes a writing requirement for separation agreements, but excepts agreements under section 4811 from its coverage. *Id.* § 4802 (West 1970). This argument is consistent with the holding of *In re Bose's Estate*, 158 Cal. 428, 111 P. 258 (1910). The *Bose* court found that a couple was living separate by agreement under the predecessor of section 5131 when the wife left after a week of marriage, and "nothing was said about property rights and . . . she 'just went her way'" *Id.* at 429, 111 P. at 258.

The result is that dependent spouses who consult counsel are typically advised to avoid an unintentional forfeiting of support rights by insisting upon a written agreement for support during any kind of marital separation. See, e.g., Walzer & Weinstock, *Marital Settlement Agreements*, in 2 CAL. FAMILY LAWYER, *supra* note 7, § 26.34(c), at 1196-97. Upon filing an action for dissolution or legal separation, court-ordered support becomes available. CAL. CIV. CODE § 4357 (West Supp. 1977). Some states grant similar relief by way of separate maintenance on the basis of the court's inherent equitable powers without regard to specific statutory provisions. H. CLARK, LAW OF DOMESTIC RELATIONS 194 (1968) [hereinafter cited as CLARK].

36. A spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property.

CAL. CIV. CODE § 5132 (West Supp. 1977). No case law defines "living together." It is therefore possible to read the section as governing any period when the spouses are not living "separate and apart" under section 5118 or "separate . . . by agreement" under section 5131, thereby including some informal separations within its scope. Separate property under California law consists of property owned by a spouse before marriage as well as property acquired after marriage "by gift, bequest, devise, or descent, with the rents, issues, and profits thereof." *Id.* §§ 5107, 5108 (West 1970). Separate property does not include quasi-community property—that is, property acquired while a spouse was domiciled outside California that would have been characterized as community property had that spouse been domiciled in California at the time of its acquisition. *Id.* §§ 4803 (West Supp. 1977), 4804 (West 1970).

37. As enacted in 1872, 5132's predecessor, Civil Code section 176, imposed a support obligation against a wife's separate property when her husband was unable to support himself and there was no community property or separate property in his name. The obligation was later qualified so that such support was due only "when he has

to absolve a separated spouse whose only source of wealth is separate property from any support obligation during separation. Taken alone the statute leaves a dependent spouse without a right to support during an informal separation in either of two cases: if a couple has derived its support from the independent wealth of one spouse,³⁸ or if a couple has no community property savings and depends for support upon current earnings that are deemed separate property under section 5118.

Between the spouses, this impact of section 5132 may be avoided, however, if a support order is secured.³⁹ Section 4805 of the Civil Code now provides that such orders may be satisfied out of all separate and community sources, and prescribes an order of execution that resorts initially to postseparation separate property earnings.⁴⁰ Where neither earnings nor community property is present, existing separate property is liable for support. Only the wealthy spouse without current

not deserted her." Ch. 612, § 41, 1873-74 Cal. Stats. 194. The requirement that the husband not be able to support himself and not have abandoned his wife was replaced by the current "living together" language when the section was renumbered in the passage of California's Family Law Act, which removed fault grounds for divorce. Ch. 1608, § 8, 1969 Cal. Stats. 3343. Finally, section 5132 was made gender-neutral as part of a major effort at "de-sexing" the Code. See ch. 987, § 10, 1973 Cal. Stats. 1900. The section has suffered from cosmetic efforts over the years that failed to re-evaluate the need for a separate property exemption.

38. For a discussion of the property implications of such marriages, see Bodenheimer, *The Community Without Community Property: The Need for Legislative Attention to Separate-Property Marriages Under Community Property Laws*, 8 CAL. W.L. REV. 381 (1972).

39. Only prospective support, however, not reimbursement may be available under current law. See CAL. CIV. CODE §§ 4359, 4801 (West Supp. 1977). Cf. *id.* § 4370 (expressly authorizing award of attorney's fees for services rendered prior to suit); 6 WITKIN SUMMARY, *supra* note 23, *Husband and Wife* § 145, at 5012 (discussing section 4370). But cf. *Dimon v. Dimon*, 40 Cal. 2d at 530, 254 P.2d at 535-36 (1953) (Traynor, J., concurring and dissenting, discussing the change in statutory language that had previously precluded reimbursement of child support). The current code sections do not appear to bar retroactive support except as to changes subsequent to the entry of an initial support order. See CAL. CIV. CODE §§ 4359, 4801 (West Supp. 1977). It has been suggested, however, that no retroactive support is "necessary" if the dependent spouse was able to meet expenses before the support order was secured. See 6 WITKIN SUMMARY, *supra* note 23, *Husband and Wife*, §§ 139, 145. This reasoning may be questioned on the same basis as is the concept of "voluntariness" in the child support area. See text accompanying notes 61-63 *infra*.

40. In the enforcement of any decree, judgment or order of support rendered pursuant to the provisions of this part, the court shall resort:

(a) To the earnings, income, or accumulations of either spouse, while living separate and apart from the other spouse, which would have been community property if the spouse had not been living separate and apart from the other spouse; then,

(b) To the community property; then,

(c) To the quasi-community property; then,

(d) To the other separate property of the party required to make such payments.

CAL. CIV. CODE § 4805 (West Supp. 1977).

income, but with community property resources, is improperly protected as to future support by the combined impact of sections 5132 and 4805: existing separate property is reached only after the community property is exhausted, even if the spouses' standard of living during marriage and their continuing expenses reflect that separate property wealth.⁴¹

This possibility for prospective support does not alleviate the collateral impacts of section 5132, however. First, section 4805 cannot help creditors who have provided necessities to a dependent spouse during separation but are denied recovery by section 5132.⁴² Second, should the spouse from whom support might have been sought die prior to the entry of a support award, the dependent spouse will be precluded from obtaining benefits under the wrongful death statute or probate code provisions that depend upon an existing right to support at the time of the decedent's death.⁴³

A new rule is needed concerning the termination of spousal support that reflects the needs and probable expectations of separating couples. This reform can be accomplished by repealing Civil Code section 5131⁴⁴ and amending section 5132 to impose an obligation to support out of all property sources,⁴⁵ restoring the common law rule that continues spousal support obligations during separation.⁴⁶ If the legislature wishes, the parties' ability to terminate spousal support obligations can be preserved by amending section 4802 of the Civil Code to permit

41. The inequity that may result when living expenses are first charged against community property is demonstrated by *Beam v. Bank of America*, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

42. See CAL. CIV. CODE § 5121 (West Supp. 1977) ("[T]he separate property of the spouse is liable for the payment of debts contracted by either spouse for the necessities of life pursuant to Section 5132.")

43. See text accompanying notes 206-215 *infra* (wrongful death) and 246-257 *infra* (benefits available under the Probate Code).

44. If section 5131 is repealed, reference to it should be removed from Civil Code section 242, where it qualifies mutual spousal support obligations. See CAL. CIV. CODE § 242 (West Supp. 1977).

45. If section 5118 is repealed, as recommended, section 5132 should be amended to read:

A spouse must support the other spouse while they are living together *and during separation*.

(New language in italics; remainder of current section to be deleted.) If section 5118 is not repealed, "except as provided by Section 5118" should be added to the proposed version of section 5132; the recommended deletions remain the same.

46. 7 S. CAL. L. REV. 342 (1934), 3 STAN. L. REV. 536, 537 (1951). The Uniform Marriage and Divorce Act adopts the common law rule. Although written separation agreements are encouraged, the court retains the right to determine "maintenance" (the Act's term for spousal support) in the event that a written agreement's terms are found to be unconscionable. UNIFORM MARRIAGE AND DIVORCE ACT § 306 and Comment.

the termination or waiver of spousal support by written agreement.⁴⁷ This scheme improves current law by relieving a dependent spouse from the necessity of immediate contractual or legal action to protect support rights. Instead it maintains the status quo until affirmative steps are taken that put a dependent spouse on notice that legal rights are at issue. By preserving support rights these changes will also improve those aspects of wrongful death and probate law that condition recovery for a surviving spouse upon a right to support, and will insure creditor access for a dependent spouse's necessary living expenses during separation. Termination of support nonetheless remains possible and a supporting spouse may still obtain favorable tax treatment for support that is paid by establishing the amount and frequency of the payments under a written separation contract.⁴⁸

C. The Parent-Child Relationship

1. Child Custody

Parents have equal rights to the custody of their children in the absence of a court order to the contrary.⁴⁹ Both parents thus retain joint custody rights when the family is divided by an informal separation. At the same time, the law properly aims to promote childhood stability: should custody later be litigated during separation⁵⁰ or in dis-

47. The amended section would read:

Except as provided in Section 4811 or subdivision (b) of Section 4801, a husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, [and] may make provision for the support of either of them and of their children during such separation or upon the dissolution of their marriage, *and may provide for the termination or waiver of spousal support*. The mutual consent of the parties is a sufficient consideration for such an agreement.

(New language in italics; bracketed language to be deleted.) See CAL. CIV. CODE § 4802 (West 1970).

48. I.R.C. §§ 71, 215. See notes 114-120 *infra* and accompanying text.

49. CAL. CIV. CODE § 197 (West Supp. 1977). Discussion of the custody rights of unmarried fathers under California's version of the Uniform Parentage Act, CAL. CIV. CODE §§ 7000-7018 (West Supp. 1977), is beyond the scope of this Article. The California Supreme Court recently discussed the constitutional dimensions of the question under prior California law. *In re Richard M.*, 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975); *In re Lisa R.*, 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475, *cert. denied*, 421 U.S. 1014 (1975).

50. Either parent may bring an action for exclusive custody without filing a petition regarding marital status. CAL. CIV. CODE § 4603 (West 1970); *accord*, UNIFORM MARRIAGE AND DIVORCE ACT § 401(d)(1)(ii). This provision was incorporated in the Family Law Act without substantial change against the recommendation of the Governor's Commission on the Family, which, without stating its reasons, called it "unnecessary and ill-advised." GOVERNOR'S COMMISSION ON THE FAMILY, STATE OF CALIFORNIA, REPORT 100 (1966) [hereinafter cited as COMMISSION REPORT]. See generally ATTORNEY'S GUIDE, *supra* note 22, § 6.15, at 296. To the contrary, the section soundly permits separated parents to resolve a matter of immediate importance without prematurely

solution proceedings,⁵¹ courts often tend to favor the parent with whom a child has been living. The Civil Code requires that preference be given to custody by either parent "according to the best interests of the child" with secondary preference to "the person or persons in whose home the child has been living in a wholesome and stable environment."⁵² Although the statute does not expressly apply the stability standard to a contest between parents, courts and commentators have appropriately deemed continuity an important factor in determining a child's best interests.⁵³

Continuity is not adequately protected, however, if one parent, relying on the equal right to custody during separation, wishes to leave the area with the child.⁵⁴ Here the law should recognize the *de facto*

instigating dissolution proceedings. Ex parte orders are authorized and temporary orders are given accelerated treatment in these cases. CAL. CIV. CODE § 4600.1 (West Supp. 1977). For unmarried parents, custody may be determined in conjunction with a paternity suit. CAL. CIV. CODE § 7010(c) (West Supp. 1977).

51. Should the separation become more formal, the filing of a petition for dissolution, legal separation, or annulment of marriage gives the court jurisdiction "to inquire into and render such judgments and make such orders as are appropriate concerning the . . . custody . . . of minor children of the marriage." CAL. CIV. CODE § 4351 (West Supp. 1977). *Accord*, UNIFORM MARRIAGE AND DIVORCE ACT § 401, Comment. Ex parte orders are authorized and accelerated treatment is given temporary custody orders in these cases. CAL. CIV. CODE § 4600.1 (West Supp. 1977). Child custody may also come before the court in several ways that involve the state or another party in addition to the parents and the child. *See generally* Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703 (1971).

52. CAL. CIV. CODE § 4600 (West Supp. 1977); *cf.* UNIFORM MARRIAGE AND DIVORCE ACT § 402 (child's best interest). The section 4600 standards apply "[i]n any proceeding" where child custody is at issue. CAL. CIV. CODE § 4600 (West Supp. 1977); *accord*, *In re B.G.*, 11 Cal. 3d 679, 695-96, 523 P.2d 244, 255-56, 114 Cal. Rptr. 444, 455-56 (1974) (juvenile court proceedings); *In re Guardianship of Marino*, 30 Cal. App. 3d 950, 106 Cal. Rptr. 655 (2d Dist. 1973) (guardianship). *See generally* Bodenheimer, *supra* note 51, *passim*.

53. *See, e.g., In re Marriage of Russo*, 21 Cal. App. 3d 72, 85, 98 Cal. Rptr. 501, 510 (1st Dist. 1971); *Frazier v. Frazier*, 115 Cal. App. 2d 551, 558, 252 P.2d 693, 697 (1st Dist. 1953); *Norton v. Norton*, 112 Cal. App. 2d 358, 359, 245 P.2d 1108, 1109 (2d Dist. 1952); *Washburn v. Washburn*, 49 Cal. App. 2d 581, 587-88, 122 P.2d 96, 100 (2d Dist. 1942); UNIFORM MARRIAGE AND DIVORCE ACT § 402, Comment; L. DESPERT, *CHILDREN OF DIVORCE* 202-13 (1953); A. WATSON, *PSYCHIATRY FOR LAWYERS* 197 (1968). *Cf.* UNIFORM CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note ("Generally speaking, there has been a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made.").

54. Absent a court order placing custody in one of the parents, a parent cannot invoke the aid of the police or seek a writ of habeas corpus to remove the child from the physical control of the other parent. *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 2 N.E.2d 660 (1936). *Cf.* Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 271-74 (1971) (aid of police claimed to be ineffectual). California's recently enacted Parent Locator Act, however, has markedly increased the rene-

custodial parent's right to temporarily prevent the child's removal by the other parent so that custody may be litigated locally and the child will be moved only if the court concludes that custody should be awarded to the other parent.⁵⁵ This limited ability to prevent removal should be combined with expeditious custody hearings to minimize interference with the departing parent's travel plans and to prevent delaying tactics by the de facto custodial parent.⁵⁶

2. Child Support

As with temporary arrangements for child care, *ad hoc* provisions for child support often entail irreversible consequences under present law. No countervailing benefit to the child, however, supports the changes current law decrees in child support obligations during informal separations. Unless a child support order is secured,⁵⁷ both the

dies for a parent whose child has been or is in danger of being stolen by the other parent. See ch. 1399, §§ 1-13, 1976 Cal. Stats. 5862. The Act provides that ex parte and temporary custody orders must be given accelerated treatment. CAL. CIV. CODE § 4600.1 (West Supp. 1977). It mandates parent locator and return services by law enforcement officials both before and after custody determinations. CAL. CIV. CODE § 4604 (West Supp. 1977); CAL. WELF. & INST. CODE §§ 11478, 11478.5 (West Supp. 1977). Criminal sanctions are prescribed for a parent who "detains or conceals [his or her] child with the intent to deprive the other [parent] of . . . custody or visitation." CAL. PENAL CODE § 278.5 (West Supp. 1977).

55. A motion for this purpose falls within the scope of CAL. CIV. CODE § 213 (West 1970):

A parent entitled to the custody of a child has a right to change his residence subject to the power of the proper court to restrain a removal which would prejudice the rights or welfare of the child.

56. Cf. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 1009 n.179 (1977).

57. In California child support is authorized by numerous Code provisions, most of which are available without regard to pending litigation concerning the parents' marital status. See CAL. CIV. CODE §§ 196 and 196a (general parental duties of support), 207 (liability for necessities as qualified by section 208) (West 1954); §§ 242 (Uniform Civil Liability for Support Act), 4351 (Family Law Act jurisdictional grant), 4357 (temporary orders in Family Law Act cases), 4700 (any proceeding in which support of child is at issue), 4811 (per separation agreement), 7010 (paternity suit) (West Supp. 1977); §§ 4603 (action for exclusive custody by one parent), 4703 (where parent willfully fails to support), 4802 (per separation agreement) (West 1970). In addition, support may be ordered under the Revised Uniform Reciprocal Enforcement of Support Act of 1968, CAL. CIV. PROC. CODE §§ 1650-1656 (West 1972) (pre- and post-judgment actions, intercounty and interstate), or in conjunction with criminal nonsupport prosecutions, CAL. PENAL CODE §§ 270-270h (West 1970 & Supp. 1977). See also UNIFORM MARRIAGE AND DIVORCE ACT §§ 304 (temporary orders), 306 (separation agreements), 307, Alternative A (by court-established trust out of parents' property), 309 (dissolution, legal separation, maintenance, and child support actions), 316 (modification and termination). The Uniform Act does not specify the conditions under which parental support duties exist. *Id.* § 309, Comment. Sections 2, 3, and 6 of the Uniform Civil Liability for Support Act contain these provisions. No state has enacted both Uniform Acts, however.

child and the custodial parent's rights may be seriously prejudiced. Because the obligation to support falls upon a parent entitled to the custody of a child,⁵⁸ both parents theoretically share the burden of child support during an informal separation.⁵⁹ Section 208 of the Civil Code, however, relieves a parent of any obligation for expenditures voluntarily made in the child's behalf by the other parent or by relatives.⁶⁰ The courts have broadly interpreted "voluntary support" under this section, creating the danger that any support rendered by a custodial parent in the absence of a support order against the other parent may be deemed to have been voluntary, and thus not recompensable.⁶¹ No such reading is justified. Expenses borne by a parent who is left without any provision for a child's support ought not to be confused with the luxuries donated by relatives that are properly denied reimbursement under section 208. Policy suggests that a separated spouse should not be sanctioned for responding to the physical needs of children in his or her care.⁶² The current rule both condones parental irresponsibility and forces separated spouses to litigate simply to preserve the status quo. It should be changed by amending section 208 to

58. CAL. CIV. CODE § 196 (West Supp. 1977).

59. However, section 196 also makes the mother's obligation secondary. *Id.* § 196: "If the support and education which the father of a child is able to give are inadequate, the mother must assist him to the extent of her ability." Whether this section is constitutional under either the state or the federal equal protection clauses is open to question. See generally *Stanton v. Stanton*, 421 U.S. 7 (1975), 97 S. Ct. 717 (1977); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

60. A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause.

CAL. CIV. CODE § 208 (West 1970) (unchanged since 1872).

61. In the seminal case of *McKay v. McKay*, 125 Cal. 65, 57 P. 677 (1899), the California Supreme Court concluded that a father whose children had been in the custody of his former wife and her second husband need not reimburse any of the costs incurred for his children's support during the 13-year period between the parental divorce and the support suit. The court did not rely on section 196, which places support obligations upon the custodial parent. Rather, it concluded that support provided by the stepfather (for which the children were not liable under section 209 of the Code) was support voluntarily given and thus could not be recovered from their father. Although the mother testified that all amounts had been paid by the stepfather, the court in dictum stated that she, too, would have been unable to seek reimbursement had the children been supported by her funds, characterizing such expenditures as "voluntary" under section 208. *Id.* at 72, 57 P. at 679. The court thus apparently equated support provided prior to litigation with voluntary support. See also note 70 *infra*.

62. Expenditures for these necessities may well be incurred at a time when additional financial constraints are imposed by the absence of spousal support rights or community property rights in the absent parent's earnings. See text accompanying notes 9-24, 32-48 *supra*.

insure that support rendered by one parent prior to a support award will not relieve the other parent of appropriate responsibility.⁶³

Financial harm to one spouse and unjustified relief to the other, however, results from a similar interpretation of Civil Code section 196. This statute imposes support obligations upon "the parent entitled to the custody of a child."⁶⁴ Seemingly innocuous, the section in fact operates to relieve a parent of current support responsibilities when a custody order is rendered that is not accompanied by a support order. Although recent cases have concluded that the criminal nonsupport provisions of the Penal Code⁶⁵ impose a continuing civil support obligation upon the noncustodial parent,⁶⁶ some courts have held that only pro-

63. This could be accomplished by amendments to sections 208 and 209, adding the following language to each section:

Nothing in this section shall excuse a parent from the obligation to contribute to the support of his or her child as set forth in Section[s] 196 and] 242 of this Code, and the court may order just and reasonable payment or reimbursement of child support expenses incurred prior to the entry of an initial support order, or for medical, dental, or burial expenses incurred following the entry of a child support order but not provided for therein.

The bracketed language should be included only if section 196 is amended as suggested in note 73 *infra* and accompanying text. The proposed authority for postjudgment reimbursement of unanticipated expenses is needed. See *Dougal v. Dougal*, 143 Cal. App. 2d 272, 299 P.2d 404 (2d Dist. 1956) (paid medical bills deemed "voluntarily made" and not reimbursed). But see *In re Marriage of Ford*, 24 Cal. App. 3d 62, 100 Cal. Rptr. 817 (4th Dist. 1972) (prior case law distinguished and recovery for appendectomy expenses permitted because bills were still outstanding when the action to amend the prior support order was filed).

At the same time, Civil Code section 4700 should be amended as follows to insure that the normal rule barring retroactive changes in child support orders is unaffected:

(a) In any proceeding where there is at issue the support of a minor child, the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child. . . . Any order for child support may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. The order of modification or revocation may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto. . . .

(b) *The support ordered under this section shall not, however, be deemed to preclude an independent action pursuant to Section 208 or 209 for reimbursement of medical, dental, or burial expenses unless the order expressly allocates the responsibility for such costs.*

[(b)] (c)

[(c)] (d)

(New language in italics; bracketed language to be deleted.)

64. CAL. CIV. CODE § 196 (West Supp. 1977).

65. CAL. PENAL CODE § 270 (West Supp. 1977): "This statute shall not be construed so as to relieve [a] parent from the criminal liability defined herein for such omission merely because the other parent . . . is legally entitled to the custody of [the dependent] child"

66. *Kresteller v. Superior Court*, 248 Cal. App. 2d 545, 549, 56 Cal. Rptr. 771, 773 (1st Dist. 1967); *Smith v. Workmen's Comp. Appeals Bd.*, 245 Cal. App. 2d 292, 53 Cal. Rptr. 816 (4th Dist. 1966). *Kresteller* traces the history of Civil Code section 196 and Penal Code section 270, the criminal nonsupport provision, reasoning that a

spective support may be granted in litigation between the parents.⁶⁷ Thus, although the divorce court retains jurisdiction to make an award for future support, reimbursement of previously incurred child support expenses is not ordered. The courts' reasoning is not based on statutes of limitation, estoppel, or waiver doctrine. Rather, even if there is no enforceable support order only because the custody court was without the requisite personal jurisdiction over the defendant,⁶⁸ reimbursement is denied for child support expenses that were incurred following the custody order but prior to an appropriate support action.⁶⁹ Unfortunate language in some opinions suggests that support provided prior to a custody order may be subject to the same rule.⁷⁰ Stale claims are more properly barred by statutes of limitation⁷¹ or, in extreme cases, by

1923 amendment to section 270 requires that section 196 be read to impose a continuing support obligation upon a noncustodial parent. 248 Cal. App. 2d at 546-49, 56 Cal. Rptr. at 772-73. No such obligation had been found before the amendment. *In re McMullin*, 164 Cal. 504, 129 P. 773 (1913); *People v. Hartman*, 23 Cal. App. 72, 78-82, 137 P. 611, 614-15 (3d Dist. 1913).

67. *Dimon v. Dimon*, 40 Cal. 2d 516, 523-25, 254 P.2d 528, 531-32 (1953) (over strong dissent by Traynor, J.) (overruled on another point in *Hudson v. Hudson*, 52 Cal. 2d 735, 344 P.2d 295 (1959)); *accord*, *Dougal v. Dougal*, 143 Cal. App. 2d 272, 276, 299 P.2d 404, 407 (2d Dist. 1956) (dictum).

68. California has adopted the Uniform Child Custody Jurisdiction Act, which grants jurisdiction to determine child custody without regard to personal jurisdiction over the defendant parent. *See* CAL. CIV. CODE § 5152 (West Supp. 1977); UNIFORM CHILD CUSTODY JURISDICTION ACT § 3. In contrast, a child support order entered by a court that does not have personal jurisdiction over the defendant is not entitled to full faith and credit. *Perry v. Perry*, 119 Cal. App. 2d 461, 259 P.2d 953 (2d Dist. 1953). *See* *Southern Pac. Co. v. Zehnle*, 163 F.2d 453 (9th Cir. 1947); *Comfort v. Comfort*, 17 Cal. 2d 736, 112 P.2d 259 (1941); *King v. Superior Court*, 99 Cal. App. 2d 91, 221 P.2d 120 (1st Dist. 1950). *Cf.* *Estin v. Estin*, 334 U.S. 541 (1948) (spousal support); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 77 (1971) (spousal support).

69. *See* the cases cited in note 67 *supra*.

70. *Dougal v. Dougal*, 143 Cal. App. 2d 272, 276, 299 P.2d 404, 407 (2d Dist. 1956):

There is no statutory authority for requiring a husband to pay bills that have already been paid by the wife for the care of their minor children, except by way of enforcing an order previously made The jurisdiction [of the court] is to modify its judgment . . . or to make a new order But [it] "is not for the purpose of reimbursing her for any expenditures she may have voluntarily made in that behalf."

(Emphasis added; quoting *Dimon v. Dimon*, 40 Cal. 2d 516, 524, 254 P.2d 528, 532 (1953).) Although section 196 does not apply to this situation, the *McKay* concept of voluntariness under section 208 may, and the court imports it to fill whatever gap is left by the fact that custody has not yet been determined. *See* note 61 *supra* and accompanying text. Justice Tobriner has criticized the *Dimon* court's reliance on *McKay*. *Davis v. Davis*, 68 Cal. 2d 290, 295, 437 P.2d 502, 505, 66 Cal. Rptr. 14, 17 (1968) (Tobriner, J., concurring).

71. The present statutes are very expansive. Even if the ten year limitation for suits on judgments applies to defaults on payments under a support order, it is qualified by sections that toll the statute during the defendant's absence from the state and during the plaintiff's minority. CAL. CIV. PROC. CODE §§ 337.5, 351 (West 1967), 352

waiver doctrine⁷² than by an absolute prohibition. An amendment to section 196 similar to that suggested for section 208⁷³ would both avoid premature litigation and prevent a forfeiture of child support rights when there is a custody order but no support order.⁷⁴

The final area of child support law that requires attention in the context of family breakdown involves creditors who are not family members. Civil Code section 207 gives these parties recourse against a parent for necessities provided for a child "under his charge."⁷⁵ The meager case law suggests that a child remains under a parent's "charge" after that parent's departure from the family home, but only until custody of the child is awarded to another.⁷⁶ As with section 196,

(West Supp. 1977). Cf. *Van Buskirk v. Todd*, 269 Cal. App. 2d 680, 75 Cal. Rptr. 280 (2d Dist. 1969) (treating child as real party in interest in paternity suit and tolling statute of limitations during child's minority). A child is expressly given standing to sue in willful nonsupport cases. CAL. CIV. CODE § 4703 (West 1970).

72. Cf. *Szamocki v. Szamocki*, 47 Cal. App. 3d 812, 121 Cal. Rptr. 231 (2d Dist. 1975) (postjudgment support waived by custodial parent's concealment of self and child). In usual cases, California courts are properly most reluctant to permit parental agreements or acts to interfere with a child's support rights. *Hunter v. Hunter*, 170 Cal. App. 2d 576, 583, 339 P.2d 247, 250 (2d Dist. 1959).

73. Section 196 should not be repealed, because it establishes the level of support and education parents must provide. Rather, the problems dealt with in the text and in notes 59 and 63 *supra* can be alleviated if section 196 is amended to read as follows:

The parents [entitled to the custody] of a child must give him support and education suitable to [his] *their* circumstances. [If the support and education which the father of a child is able to give are inadequate, the mother must assist him to the extent of her ability.] *The court may order just and reasonable payment or reimbursement of child support expenses incurred prior to the entry of an initial support order, or for medical, dental, or burial expenses incurred following the entry of a child support order but not provided for therein.*

(New language in italics; bracketed language to be deleted.)

74. A custody order without a support order often may be secured to prevent child stealing or because the custody court is without jurisdiction to enter a support order. See notes 54 and 68 *supra*. Given the need for prompt resolution of custody matters, the proceedings should, when possible, remain free of collateral matters. See note 50 *supra*. This also avoids forcing the spouses into litigation not needed to resolve their immediate needs.

75. CAL. CIV. CODE § 207 (West 1954).

76. See *Lewis v. Lewis*, 174 Cal. 336, 339-40, 163 P. 42, 44 (1917); *Selfridge v. Paxton*, 145 Cal. 713, 79 P. 425 (1905); *Blair v. Williams*, 86 Cal. App. 676, 261 P. 539 (2d Dist. 1927). Custody may be awarded to either parent or to a third party. See text accompanying notes 52-53 *supra*. The *Kresteller* reading of section 196, described in note 66 *supra*, could be extended to impose a continuing liability upon a noncustodial parent for necessities under section 207. The early cases cited above equate the periods of liability under the two sections. There are no recently reported cases on point, but the amended version of Penal Code section 270 that prompted a new interpretation of Civil Code section 196 contains language that supports a similar broadening of Civil Code section 207:

This statute shall not be construed so as to relieve such parent from the criminal liability defined herein . . . merely because . . . the other parent . . . or any other person or organization voluntarily or involuntarily furnishes such

a rule that terminates child support liability in the absence of a support agreement or support litigation is unsound. The current scheme that directs all creditors to the custodial parent has yet a second failing: it requires that the custodial parent rather than the creditor always bear the burden of litigation in seeking payments from the noncustodial parent. The easiest way to eliminate these inadequacies is to amend section 207 to sanction suit by the creditor against either parent or both. Where the noncustodial parent's child support obligations have been established by a valid written agreement or court order, however, and the obligation has been fulfilled, these facts should serve as a defense to the creditor's suit.⁷⁷

With these revisions child support will continue to be a shared responsibility of the parents until they have entered into a binding child support agreement or until litigation dealing directly with that issue takes place between them. Until then either parent or both may support the children without forfeiting later reimbursement from the other, if appropriate, for a share of the cost. By maintaining dual responsibility this proposal provides maximum protection for the child while permitting parents to attend to interpersonal difficulties rather than forcing them to become enmeshed in financial negotiations or litigation.

D. Personal Income Tax

Taxation, too, may reflect informal changes in family structure. Although marital status plays a major role in the field of individual income taxation, the Internal Revenue Code establishes special rules for informally separated families.⁷⁸ Accordingly, it is sometimes possible and frequently advantageous for separated spouses to be treated as unmarried taxpayers within the meaning of the Code. At stake are such

necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.

CAL. PENAL CODE § 270 (West Supp. 1977).

77. Should Civil Code sections 196, 208, 209, and 4700 be amended as suggested in notes 63 and 73 *supra* to authorize collateral awards for reimbursement of medical, dental, or burial expenses incurred after the entry of a support order, the share of such expenses to be borne by each parent would best be determined in litigation between them. Thus, compliance with the prior support order should defeat the creditor's action against a noncustodial parent in these cases as well. Under collateral estoppel rules, of course, determination of the litigation between the creditor and the noncustodial parent would not resolve that parent's liability to reimburse the custodial parent for any amounts paid to the creditor for such expenses. Nor would it prevent a court in litigation between the parents from ordering payment by the noncustodial parent of outstanding amounts directly to the creditor.

78. Although the text focuses primarily on the Internal Revenue Code of 1954, comparable provisions of the California Revenue and Taxation Code are noted in the footnotes, and salient differences between the two systems are emphasized.

basic matters as the percentage rates used to compute income tax,⁷⁹ the zero bracket amount,⁸⁰ and the availability of certain exemptions, deductions and tax credits.⁸¹

1. *Defining Marital Status for Separated Couples*

The basic statute that defines marital status for federal taxation purposes is section 143 of the Internal Revenue Code. Viewed alone it refers only to the ability of a taxpayer to qualify for certain personal exemptions. The tests it establishes, however, have been incorporated by reference into other sections of the Code. Whether a taxpayer who files separately qualifies as not married within the meaning of section 143 determines whether that individual will be taxed as a single person or at the higher rates applicable to a married individual filing a separate return.⁸² Head of household benefits, too, are available only to an individual who is characterized as unmarried under section 143.⁸³ Finally, since married individuals filing separate federal returns must act consistently in itemizing deductions, they must satisfy the section 143 definition of unmarried taxpayers in order to act independently of one another in computing this aspect of their returns.⁸⁴

A taxpayer who is informally separated will qualify for treatment as an unmarried taxpayer under section 143 if (1) the taxpayer files a separate return; (2) for more than one-half of the taxable year the taxpayer's household serves as the principal place of abode of a dependent for whom the taxpayer may take a dependency exemption; (3)

79. I.R.C. § 1; CAL. REV. & TAX. CODE §§ 17041, 17045 (West Supp. 1977).

80. I.R.C. § 1. In California, a similar impact is found as to the size of the taxpayer's personal exemption. See CAL. REV. & TAX. CODE § 17054 (West Supp. 1977).

81. I.R.C. § 71; CAL. REV. & TAX. CODE § 17263 (West Supp. 1977) (alimony); I.R.C. §§ 151, 152; CAL. REV. & TAX. CODE § 17054 (West Supp. 1977) (dependents' exemptions); I.R.C. § 44A; CAL. REV. & TAX. CODE § 17262 (West Supp. 1977) (credit or deduction for employment-related expenses for child care and household maintenance).

82. Married persons filing jointly are taxed at the lowest rate. I.R.C. § 1. CAL. REV. & TAX. CODE § 17041 (West Supp. 1977) does not distinguish between single and married taxpayers, except to aggregate the tax liability of married persons who file jointly. *Id.* § 17045. Under the California scheme, therefore, a married individual filing separately ordinarily is treated the same as a single taxpayer. Preferential treatment is extended, however, to unmarried heads of household. CAL. REV. & TAX. CODE § 17041(b) (West Supp. 1977).

83. I.R.C. § 1(b); CAL. REV. & TAX. CODE § 17041(b) (West Supp. 1977). See note 87 *infra* and accompanying text.

84. Tax Reduction & Simplification Act of 1977, Pub. L. No. 95-30, § 101, 91 Stat. 126 (1977) (to be codified as I.R.C. § 63(e)(1)(A), (h)); *accord*, CAL. REV. & TAX. CODE § 17172 (West 1970). The wisdom of this mutuality requirement in the context of marital separations has been questioned. Gutman & Sander, *Divorce and Separation*, 95-3d TAX MNGM'T (BNA) A-19 n.152 (1975) [hereinafter cited as Gutman & Sander].

the taxpayer provides over one-half of the cost of maintaining the household; and (4) the taxpayer's spouse was not a member of the household *during the entire taxable year*.⁸⁵ Unless each spouse has custody of at least one child, at best only one parent will be permitted to file as an unmarried taxpayer under this provision. If only one qualifies, the other must file as a married person filing separately unless the parties exercise their option to file jointly.⁸⁶

2. Head of Household Status

The head of household provisions found in section 2(b) of the Code incorporate by reference the section 143 test for unmarried treatment of informally separated parties. As a result, the dependency, length of separation, and financial contribution rules discussed above govern the ability of separated custodial parents to benefit from the preferential rates available to those who satisfy the head of household requirements.⁸⁷ Here, as under section 143, many separated families

85. I.R.C. § 143(b); *accord*, CAL. REV. & TAX. CODE § 17173(c) (West Supp. 1977). See generally Gutman & Sander, *supra* note 84, at A-19 to A-21. An individual who is "legally separated from his spouse under a decree of divorce or of separate maintenance" at the close of the taxable year will also be treated as a single person. I.R.C. § 143(a)(2). There have been difficulties in defining operative separate maintenance decrees under identical language in section 71 of the Code; however, a decree of legal separation such as that available in California under Civil Code section 4508 appears to meet the test. Treas. Reg. § 1.71-1(b) (1957), § 1.143-1(a) (1971); J. TAGGART, SOME TAX ASPECTS OF SEPARATION AND DIVORCE 6-7 (2d ed. 1975) [hereinafter cited as TAGGART]; ATTORNEY'S GUIDE, *supra* note 22, at § 3.35. Although the Code makes no reference to the finality of the decree, the case law has achieved rare unanimity in holding that interlocutory decrees or written agreements between the parties fail to satisfy this branch of the test. See *United States v. Holcomb*, 237 F.2d 502 (9th Cir. 1956); *Commissioner v. Ostler*, 237 F.2d 501 (9th Cir. 1956); *Palmquist v. United States*, 284 F. Supp. 577 (N.D. Cal. 1967); *Hedberg v. Commissioner*, 31 Tax Ct. Mem. Dec. (CCH) (Dec. 31, 308(M), T.C. Memo 1972-69); *Brown v. Commissioner*, 31 Tax Ct. Mem. Dec. (CCH) (Dec. 31, 266(M), T.C. Memo 1972-47). The California Revenue and Taxation Code is even more explicit in defining the alternative test. Section 17173(b) (concerning standard deductions), which is incorporated by reference in section 17042 (defining head of household), expressly provides that a person shall be considered married unless "legally separated from his spouse under a final decree of divorce or of separate maintenance." CAL. REV. & TAX. CODE §§ 17042, 17173(b) (West Supp. 1977) (emphasis added).

86. Joint filing is authorized so long as no judgment of legal separation or final judgment of divorce has been entered. I.R.C. §§ 6013(a), (d)(2); see CAL. CIV. CODE § 4350 (West Supp. 1977); CAL. REV. & TAX. CODE § 18402 (West 1970). The parties' marital status for this purpose is determined as of the last day of the taxable year. I.R.C. § 6013(d)(1)(A); CAL. REV. & TAX. CODE § 18402.5 (West 1970). Depending on the circumstances, joint filing may or may not remain the best alternative for separated families. See note 121 *infra* and accompanying text.

87. I.R.C. § 2(b)(1), (c) reads:

(b) Definition of head of household.—

(1) In general.—For purposes of this subtitle, an individual shall be considered a head of a household if, and only if, such individual is not

will fail to qualify although it is quite clear that they are bearing the financial burdens that sections 143 and 2(b) were designed to lighten. Most notably, this occurs when a noncustodial parent who provides support cannot fulfill the sections' requirement for residential care of the children during most of the year, and the custodial parent cannot qualify because that parent is not entitled to claim any of the children as a dependent.

married at the close of his taxable year, is not a surviving spouse (as defined in subsection (a)), and either—

(A) maintains as his home a household which constitutes for such taxable year the principal place of abode, as a member of such household, of—

(i) a son, stepson, daughter, or stepdaughter of the taxpayer, or a descendant of a son or daughter of the taxpayer, but if such son, stepson, daughter, stepdaughter, or descendant is married at the close of the taxpayer's taxable year, only if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or

(ii) any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or

(B) maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151.

For purposes of this paragraph, an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual.

. . . .

(c) Certain married individuals living apart.—For purposes of this part, an individual who, under section 143(b), is not to be considered as married shall not be considered as married.

Accord, CAL. REV. & TAX. CODE § 17042 (West Supp. 1977). The federal provisions are discussed in Higgins & Horvitz, *Tax Considerations for Married Couples*, 53 TAXES 154 (1975). The computation of household expenses includes somewhat different concepts than the computation of expenses for dependency exemptions. Gutman and Sander, *supra* note 84, at A-20 to A-21. Neither computation, however, takes into account the nonmonetary expenditures of parental time and effort in child care or household chores. See *Markarian v. Commissioner*, 352 F.2d 870 (7th Cir. 1965), *cert. denied*, 384 U.S. 988 (1966) (dependency); Treas. Reg. 1.2-2(d) (1971) (head of household). The use of imputed expenditures would rectify some of the inequity reflected in both the total household contribution requirement of I.R.C. § 2(b)(1) and CAL. REV. & TAX. CODE § 17042 (West Supp. 1977) and the relative parental contribution test for dependency exemptions under I.R.C. § 152(e), Treas. Reg. § 1.152-4(d) (1971), and CAL. REV. & TAX. CODE § 17056 (West 1970). See notes 97-98 *infra* and accompanying text. See generally Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 110-13 (1976), *reprinted in* 3 COMMUNITY PROP. J. 211, 216-18 (1976). The result would be a reallocation of dependency exemptions for some parents and increased access to head of household status. Because there would be no direct change in reportable income, this approach departs less from the Code's traditional avoidance of imputed income and expenditures than does its current treatment of student parents. To permit student taxpayers to deduct household and child care costs, the Code provides a formula that assigns fictitious income to the efforts of these students. See note 101 *infra*. Similar use of a statutory formula could value imputed expenditures in the context of dependency exemptions and head of household eligibility while avoiding difficult questions of proof.

3. Exemptions for Children

The Code's treatment of dependency exemptions for children causes this situation to arise far too frequently. So long as between them the parents support and shelter their children for at least half of the taxable year, it is clear that one or the other will be entitled to the dependency exemptions.⁸⁸ The issue thus is not one of determining the availability of preferential tax treatment, but of determining which parent is entitled to receive it.

Although the Code provides a series of rules to allocate dependency exemptions between those who live apart under a written agreement or a court order, it does not address the question in the context of informal separations.⁸⁹ Seemingly, then, the parties to an informal separation will have dependency tested by the facts, and the parent who contributes over one-half of the support of the child during the taxable year will be entitled to the dependency exemption. Unless the parties moot the question by filing jointly, however, difficulties in proof will arise if, as is likely, the noncustodial parent contributes to the family's support without allocating the funds between child and spousal support.⁹⁰

If neither parent alone can establish a contribution of more than one-half of the child support, but together the parents meet that requirement, they nonetheless may be able to decide between themselves which parent shall receive the exemption under the Code's provision on multiple support agreements.⁹¹ A written separation agreement or separation under an appropriate court order will alter these rules, however, even if the agreement or order does not deal with child sup-

88. I.R.C. §§ 151, 152; compare CAL. REV. & TAX. CODE § 17054 (West Supp. 1977). For a summary of asserted items of expense and the reception given them by the courts, see Gutman & Sander, *supra* note 84, at A-29 to A-30.

89. See I.R.C. § 152(e); Treas. Reg. § 1.152-4(b) to -4(d) (1971).

90. A related but clearly distinguishable question arises as to support payments made pursuant to a written separation agreement or court order. See the discussion of *Commissioner v. Lester* in notes 116-120 *infra* and accompanying text. The *Lester* rule, which treats undifferentiated payments as spousal support, was prompted by a need to ascertain the deductibility of spousal support amounts by the payor under section 71. That question does not arise if there is an informal support agreement because section 71 does not apply and all income taxes are assessed to the payor. Extension of the *Lester* rule to informal separations would produce the anomalous result that a noncustodial parent who makes undifferentiated support payments prior to the entry of a support order or a written agreement between the spouses would neither be credited with a contribution toward the children's support for dependency purposes nor be entitled to deduct any part of the payments as alimony. Instead a factual inquiry into the actual use of the funds seems both permissible and desirable in this context.

91. I.R.C. § 152(c); CAL. REV. & TAX. CODE § 17058 (West 1970). The taxpayer who claims the dependency exemption must in any event have contributed over 10% of the support. No exemption is allowed in the absence of a written declaration

port.⁹² In such cases the Code provides a series of highly arbitrary rules that bear little relationship to economic reality and usually result in allocating dependency exemptions to support-paying noncustodial parents.⁹³ Because most custodial parents are women, it is they who

by every other person who contributed over 10% of the dependent's support disclaiming a dependency exemption for that year.

92. I.R.C. § 152(e)(1); Treas. Reg. § 1.152-4(b) (1971).

93. Between such parents the Code initially creates a presumption that the parent who has custody provides the majority of the support. Unless displaced the presumption provides that where custody has not been assigned to one of the parents by decree or written agreement, the parent with whom the child spends the greater portion of the taxable year after the parties' separation will be deemed to have custody and thus be entitled to the exemption. I.R.C. § 152(e)(1)(B); Treas. Reg. § 1.152-4(b) (1971). This presumption that support flows from custody can be rebutted, however, in either of two ways. First, if the noncustodial parent contributes at least \$600 (but less than \$1200) per year toward the support of each child, a qualifying court order or written agreement may provide that the noncustodial parent is entitled to the exemptions. Second, a noncustodial parent who contributes \$1200 or more per year to the support of a child will be presumed to provide over one-half the child's support and will automatically be entitled to the exemption, regardless of any contrary agreement between the parents, unless the custodial parent can establish a larger support contribution by a "clear preponderance" of the evidence. I.R.C. § 152(e)(2). See generally Treas. Reg. § 1.152-4(d)(2)-(3) (1971), which has not yet been amended to reflect the current language of § 152(e)(2).

Given the current costs of child rearing, these figures are artificially low, reflecting a sharp bias in favor of noncustodial parents. In 1974, the Fresno County Superior Court, the Fresno County Bar Association's Domestic Relations Committee, and Dr. Paul D. Bush, Professor of Economics at California State University, Fresno, developed a child support schedule, based upon data supplied by the Bureau of Labor Statistics. Costs per child in intact families were established, based upon the age of the eldest child and the number of children in the family. (No figures were available to establish the costs in divided households.) A support payment of \$100 per month (which shifts the burden of proof to establish a greater contribution to the custodial parent) supplies over one-half of a child's support costs only where those costs total less than \$200 per month. According to the Fresno study, for an intact family with one child, net family income of but \$800 to \$1300 per month produces child support costs of greater than \$200 per month, depending upon the age of the child (the older the child, the greater the cost). Note that total family income is measured, not only the earnings of the primary wage earner. For families with more than one child, the cost per child at any given income and age level declines somewhat, reflecting the decreased availability of funds to meet the children's needs. However, even in a family with three children, if the eldest child is from 13 to 18 years of age, a family with a net monthly income of \$1200 a month or more will spend slightly over \$200 per child each month for their support. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, REPRESENTING CLIENTS IN SPOUSAL AND CHILD SUPPORT PROCEEDINGS, SELECTED RESOURCE MATERIALS 76-80 (Program Material June-July 1975). Obviously, the Code's presumptions were not realistic for most taxpaying American families at the time of the Fresno study in 1974 and become progressively less realistic as inflation persists. They may be justly criticized for their impetus to assign dependents to the noncustodial parent where support payments exceed \$600 per child per year and for their frequently unrealistic shift in the burden of proof to custodial parents, thereby hampering access by these taxpayers to head of household status, child care tax credits, and deductions for medical expenses incurred by the custodian on behalf of the children. See notes 94-96 *infra* and accompanying text. As to nonmonetary support contributions, see note 87 *supra*.

are disadvantaged when the Code disfavors dependency exemptions to custodians.⁹⁴

More than the \$750 exemption per child is at stake.⁹⁵ A custodial parent who files separately must be entitled to a dependency exemption for a qualifying child in order to claim head of household status and deductions for medical expenses incurred by that parent on behalf of the child.⁹⁶ Absent a written separation agreement or appropriate court order, the same prerequisite applies to household and child care tax credits.⁹⁷

4. *Household and Dependent Care Expenses*

The Code grants special relief to those who must incur expenditures to provide care for their qualifying dependents while they are away from home at work or school. Section 44A provides a credit for such costs against a person's annual tax liability.⁹⁸ If even one of the children who reside with the taxpayer qualifies as that parent's dependent and is under age fifteen, household and child care expenses may be declared so long as they have enabled the taxpayer to attend school or work outside the home, apparently even to the extent that they have incidentally benefited nonqualifying household members.⁹⁹

94. See Hall, *The Working Woman and the Federal Income Tax*, 61 A.B.A.J. 716, 719 (1975); Women's Legal Defense Fund, *Women and the Federal Income Tax*, 1 WOMEN L. REP. 1.144, 1.145 (1975).

95. The exemption's direct value is established by I.R.C. § 151(e)(1)(B).

96. See notes 87 *supra* and 98-99 *infra*, and accompanying text; Walzer, *Federal Income Tax—The Importance of the Dependency Exemption in Negotiating a Marital Settlement*, 16 Fam. L. Newsletter 1 (Winter 1975) [hereinafter cited as Walzer]; I.R.C. § 213(a) (permitting deduction of allowable medical expenses only by a taxpayer who is entitled to a dependency exemption for the person receiving treatment); CAL. REV. & TAX. CODE § 17253 (West 1970). See generally Gutman & Sander, *supra* note 84, at A-47.

97. An exception to the usual dependency requirement applies where separation is pursuant to a written separation agreement or under a decree of divorce or separate maintenance: if the parents together provide over half of the eligible child's support, and the section's requirements for support of the household are met, the parent who has custody longest during the calendar year may claim the credit. I.R.C. § 44A(a), (f)(5).

98. I.R.C. § 44A. Section 44A replaces earlier provisions permitting partial deduction of such expenditures. See Int. Rev. Code of 1954, ch. 736, § 214, 68A Stat. 70 (1954) (repealed by Tax Reform Act of 1976, Pub. L. No. 94-455, § 504(b)(1), 90 Stat. 1565). In California, this dispensation is still treated as a deduction. CAL. REV. & TAX. CODE § 17262 (West Supp. 1977). Since many of the distinctions drawn in former section 214 are retained in the new credit provisions of the Internal Revenue Code, the literature discussing the earlier section remains helpful. See Simkin, *Child Care and Household Expense Tax Deduction Under The New Section 214: Is This Really the Reform We Were Waiting For?*, WOMEN'S RIGHTS L. REP., Vol. 1, Fall/Winter 1972-73, at 15.

99. The age requirement is imposed by I.R.C. § 44A(c)(1)(A). The regulations for former section 214 made the collateral benefit result clear. Treas. Reg. 1.214A-1

Although the taxpayer's marital status ordinarily does not determine the availability of the credit, it does figure in section 44A in two important ways. First, those who are deemed married under the section must file jointly in order to claim the credit.¹⁰⁰ Second, the taxpayer's marital status under the section will in some instances determine the amount of the credit.¹⁰¹

Section 44A contains its own definition of marital status, however, and permits a taxpayer to claim the credit as a single person more easily than would section 143. Under section 44A a separation covering the last six months of the taxable year, rather than the whole year, is sufficient¹⁰² and, if the separation is under a written agreement, the custodial parent need not be the one who may claim the qualifying child as a dependent.¹⁰³ These concessions extend the credit to some custodial parents who provide over half the support of households with children under fifteen, yet who may not file returns as unmarried taxpayers

(c)(5) (example 3) (1976). Although the regulations for section 44A have not yet been promulgated, the same result may be implied from the language of section 44A(c)(2) and the legislative history. See S. REP. NO. 938, 94th Cong., 2d Sess. (Parts I & II) 134, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3439, 3567: "Although the amendment changes the nature of a claim for child care expenses to a credit, it retains the basic rules for determining qualified expenses"

100. I.R.C. § 44A(f)(2).

101. The credit provided in section 44A is for an amount equal to 20% of the total employment-related household and child care costs that the taxpayer claims to have incurred. I.R.C. § 44A(a). The section places a ceiling, however, on the expenses a taxpayer can claim: if the individual is unmarried at the close of the taxable year, the ceiling will be determined solely with regard to that person's earned income for the year; in the case of a married person, expenses in excess of *either* spouse's earned income for that year, considered separately, will be disallowed. *Id.* § 44A(e)(1). To extend the credit to married couples where one spouse is a qualifying dependent or a full-time student, the section assigns an imputed income to the student spouse. *Id.* § 44A(e)(2). See note 87 *supra*. Practically, it is unlikely that these limitations will often make a difference. The total amount that an individual may claim is subject to a limitation of \$2,000 if there is but one dependent or \$4,000 if two or more qualifying dependents are involved. *Id.* § 44A(d). Although section 44A(f)(6) authorizes credit for payments made to certain relatives (section 214 did not), it does not include payments to dependent relatives. Refusal to recognize the work of grandparents, for example, when payments are in fact made seems unwarranted and serves to discourage child care by those who could be expected to give the most loving attention to the children. Establishing financial incentives for placing children with strangers for care is doubtful social engineering at best.

102. I.R.C. § 44A(f)(4)(B). If a couple has been informally separated for more than 6 months but less than 12 months before the end of the taxable year, the spouse who must support dependents will qualify as a single taxpayer for the purposes of section 44A, but for all other purposes, section 143 will govern and require tax treatment as a married individual. If the taxpayer cannot meet the test of subsection (f)(4), unmarried status is available only under subsection (e)(3), which defines marital status as does section 143 under the first of its alternative tests: a person who is legally separated under a decree of divorce or separate maintenance is not considered married. See note 85 *supra*.

103. *Id.* § 44A(f)(5).

under section 143. In the absence of a written separation agreement, however, only joint filing will make the credit available to a family in which only the noncustodial parent may take dependency exemptions for the couple's qualifying children.¹⁰⁴

Under current law, the six month noncohabitation requirement and the effect given separation agreements provide welcome, but limited, relief from section 143. These tests penalize informal separations and their interruption by attempts, however brief, at reconciliation. Congressional concern for the family and for the burden of separate households would be better served by a rule that measures the total number of days of separation within the taxable year.

5. *Earned Income Credit*

The earned income credit, which benefits low income wage-earning households, is available to some separated families.¹⁰⁵ Because the credit is figured upon a basis that is not adjusted when a joint return is filed, it is most likely to apply to a return that reports the income of only one wage-earner.¹⁰⁶ The Code permits individuals who meet section 143's requirements for unmarried status to claim the credit while filing separately, displacing the usual rule that requires married couples to file jointly to qualify.¹⁰⁷ Although the section requires that the taxpayer contribute more than one-half of the cost of maintaining a household for a qualifying person, the credit is more readily available than head of household status since the qualifying individual need not be a person for whom the taxpayer may claim a dependency exemption.¹⁰⁸

6. *Spousal Support and Unspecified Support Payments*

The Code contains no true concept of spousal support that applies during an informal separation, even if payments are made pursuant to

104. Joint filing remains possible. See note 86 *supra*. Whether or not it is advantageous depends upon the circumstances. See note 121 *infra* and accompanying text.

105. I.R.C. § 43. For California's provisions, see note 107 *infra*.

106. In California, there is an adjustment for joint returns. CAL. REV. & TAX. CODE § 17069(b), (c), (e) (West Supp. 1977).

107. I.R.C. § 43(d). California permits the credit with any form of filing: individual, joint, or married filing separately. CAL. REV. & TAX. CODE § 17069 (West Supp. 1977).

108. Section 43(c)(1)(A) was amended by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1557, to delete the dependency requirement. The change in statutory language is less clear than it might be. However, legislative history clarifies the intent: the SENATE COMM. ON FINANCE, 94th CONG., 2d SESS., REPORT ON TAX REFORM ACT OF 1976, § 401 (Comm. Print 1976) states that "[T]he amendment eliminates the requirement that a parent must be entitled to a personal exemption for at least one child Instead, there is a requirement that the parent simply maintain a household for a child who is either under 19 or a student." As to the dependency requirement for head of household status see the text accompanying note 87 *supra*.

an oral support agreement that is effective under California's Civil Code section 5131.¹⁰⁹ Such sums remain part of the payor's taxable income and therefore are not taxable to the recipient.¹¹⁰ If the couple does not file a joint return, a spouse who pays support during an informal separation may take a dependency exemption for the other spouse only if the spouse receiving support has no gross reportable income and is not the dependent of another taxpayer.¹¹¹ Should these requirements be satisfied, the taxpayer will, of course, also be permitted to deduct allowable medical expenses for the dependent spouse.¹¹² Where they are not met and a spousal dependency exemption cannot be claimed, these support payments have income tax consequences only when an allocation must be made to differentiate between child and spousal support to determine which parent may claim the children as dependents.¹¹³

The parties may, however, significantly alter and perhaps enhance their income tax options by entering into a written agreement. Interspousal litigation is not required. Rather, section 71 of the Internal Revenue Code permits the payor to deduct certain spousal support payments that are made under such an agreement; the payments are taxed instead as income to the recipient spouse.¹¹⁴ For predivorce

109. The Code does, however, contain a concept of spousal support that applies to more formal separations. See I.R.C. §§ 71, 215; CAL. REV. & TAX. CODE § 17081 (West Supp. 1977). Oral agreements are discussed at notes 34-35 *supra* and accompanying text. Exclusive reliance upon formal separations is unsound; the Code should also recognize regular payments that are made in the absence of a written agreement or court order. See note 123 *infra*.

110. See I.R.C. §§ 71, 215; CAL. REV. & TAX. CODE § 17081 (West Supp. 1977).

111. I.R.C. § 151(b). This is not the California scheme; California has instead a system of tax credits that are allowed in lieu of deductions for personal exemptions. A person who files separately may not obtain the \$25 individual credit for a spouse under any circumstances. CAL. REV. & TAX. CODE § 17054 (West Supp. 1977). If the spouse is blind, however, an \$8 credit is nonetheless available if that spouse has no gross income and was not the dependent of another taxpayer during the taxable year. *Id.* § 17054(e).

112. I.R.C. § 213(a); CAL. REV. & TAX. CODE § 17253 (West 1970).

113. See notes 89-90 *supra* and accompanying text. Gift tax questions that are raised by amounts "voluntarily" given in the absence of a recognized support obligation are beyond the scope of this Article. See generally Gutman & Sander, *supra* note 84, at A-51 to A-52 (discussing the rules and noting that the absence of a written agreement or court order is not dispositive).

114. I.R.C. §§ 71(a)(2), 215; CAL. REV. & TAX. CODE §§ 17081(b), 17263 (West Supp. 1977). See Treas. Reg. 1.71-1(b) (1960). See generally TAGGART, *supra* note 85, at 29-32; Barnett, *Tax Aspects of Domestic Relations*, BARRISTER, Vol. 3, Spring 1976, at 57; Gutman & Sander, *supra* note 84, at A-1 to A-21. See also note 120 *infra*. The Codes use the term "alimony" and refer to payments made by a husband to his wife. I.R.C. §§ 71, 215; CAL. REV. & TAX. CODE § 17081(b) (West 1970). The provisions are, however, equally applicable to payments made by a wife to her husband. I.R.C. §§ 71(e), 215(b) referring to § 7701(a)(17); CAL. REV. & TAX. CODE § 17021 (West 1970). "Spousal support" will be used to denote such payments in this discussion and to distinguish them from child support payments. A discussion of

separations, the potential advantage in having support monies taxed at the normally lower rate of the recipient is frequently offset by the percentage rate disadvantage of separate rather than joint returns.¹¹⁵ After divorce, however, when only separate returns are possible, section 71 becomes increasingly important to payor spouses who wish to reduce their tax liabilities. The payor's tax situation will be further enhanced if the taxpayer makes an undifferentiated payment for the support of both the custodial parent and the couple's children. In *Commissioner v. Lester*¹¹⁶ the Supreme Court held that the entire amount paid in such cases is deemed spousal support and therefore is taxable to the recipient rather than the payor. As a result, counsel for the custodial parent have often carefully specified the amounts intended as child support in order to avoid this result, since those payments are not taxable to the recipient.¹¹⁷

These generalizations about the advantages of joint filing and the dangers to recipients of *Lester* payments require qualification now that significant tax benefits are available to heads of household. Stuart Walzer has noted that such undifferentiated payments enable the custodial parent, who must pay tax on the total amount, to take dependency exemptions for the children who are supported with these funds.¹¹⁸ This in turn will permit deductions for the children's medical expenses that are paid out of the amounts received.¹¹⁹ Whether the household support requirements for head of household status and the household and child care credit can also be met with *Lester* monies is less clear. The same reasoning that permits child care expenditures made from the custodian's after-tax dollars to be claimed as those of the custodial parent also supports allocating household expenses to that taxpayer.¹²⁰

the multiple factors that dictate whether payments fall within the meaning of section 71 is beyond the scope of this Article. It is, however, relevant to note that a separation need not be undertaken in contemplation of divorce to qualify, so long as the parties are physically "separated and living apart." Treas. Reg. § 1.71-1(b)(2), (3), and (6), example 3 (1957); TAGGART, *supra* note 85, at 12; Gutman & Sander, *supra* note 84, at A-3 to A-4. Compare the results when undifferentiated payments are made in the absence of an agreement or court order that would trigger section 71. See note 90 *supra* and accompanying text.

115. Gutman & Sander, *supra* note 84, at A-19. Accordingly, the party most affected may wish to insert a clause in any separation agreement insuring that joint filing will occur if it will result in a lower total tax. *Id.*

116. 366 U.S. 299 (1961), *affirming* 279 F.2d 354 (2d Cir. 1960).

117. For a discussion of the cases that delineate *Lester's* impact, see TAGGART, *supra* note 85, at 39-40; Gutman & Sander, *supra* note 84, at A-21.

118. Walzer, *supra* note 96, at 33-34.

119. See note 96 *supra* and accompanying text.

120. The regulations do not state whether *Lester* payments that are received by the custodial parent and taxed as income to that party may constitute a contribution by that party to household expenditures to the extent that they are devoted to that purpose. The question is important since a taxpayer must contribute over one-half of

7. Summary

Taxation of separated families is regulated by a number of interlocking, sometimes inconsistent, provisions. Whether joint or separate filing will most benefit the spouses either individually or in terms of their total tax liability must be determined on the facts of each case.¹²¹ The income levels of the spouses; the presence of or possibility of obtaining a written separation agreement; and access by one or both to unmarried status under section 143, head of household status, the earned income credit, and the household and dependent care credit are all relevant.

The distinctions the Code draws between "single" and "married" taxpayers with respect to these issues were designed to equalize the tax treatment of the two groups.¹²² The current provisions, however, fall short of this aim as to married taxpayers who have informally separated from their spouses. These parties, too, lose the economies of shared living and bear the added expense of maintaining separate households.

the relevant household expenses in order to qualify for a household and child care credit or the preferential head of household tax rate. I.R.C. §§ 2(b), 44A(a), (f)(1) (the contribution test is imposed on section 2(b) by the requirement that the taxpayer be unmarried under section 143). See note 87 *supra* and text accompanying note 85 *supra*. Whether child support or household expense is at issue, *Lester* monies become the recipient's after-tax dollars and should be accorded identical treatment. See also note 90 *supra*. The allocation of dependency exemptions is irrelevant to the household and child care credit in *Lester* cases, since there is a written separation agreement. *Id.* §§ 44A(a), (c)(1), (f)(5). See text accompanying note 103 *supra*.

121. For example, couples who file jointly may not utilize I.R.C. section 71, which permits deduction by the payor of certain kinds of spousal support that are paid pursuant to a written agreement or support order. See generally Gutman & Sander, *supra* note 84, at A-19; Walzer, *supra* note 96, *passim*.

122. See STAFF OF THE JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, 91st CONG., 2d SESS., *General Explanation of Tax Reform Act of 1969*, at 222-24 (1970):

Since the Revenue Act of 1948, married couples filing joint returns have had the option of being taxed under the split-income provisions. This, in effect, taxed a married couple as if it were composed of two single individuals each with one-half of the couple's combined income. This 50-50 split of income between the spouses for tax purposes generally produced a lower tax than any other division of income since the application of the graduated tax rates separately to each of the two equal parts comprising the couples' income kept the total income in lower tax brackets.

. . . With the new rate schedule for single persons, married couples filing a joint return will pay more tax than two single persons with the same total income. This is a necessary result of changing the income-splitting relationship between joint and single returns. Moreover, it is justified on the grounds that although a married couple has greater living expenses than a single person and hence should pay less tax, the couple's living expenses are likely to be less than those of two single persons and therefore the couple's tax should be higher than that of two single persons.

See generally *Hearings on Tax Reform Before the House Ways and Means Comm.*, 91st Cong., 1st Sess., at 1976-96 (1969); Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097 (1948).

Where the Code treats informal and formal separations alike, it reflects a realistic assessment of the economic situation of all separated families. This recognition is not uniform, however, and some provisions unnecessarily deny tax advantages to informally separated couples. The requirement that section 71 spousal support payments be made under written agreements or court orders is a prime example.¹²³ Another is the extensive use of stringent tests of marital status; frequently only a taxpayer who can qualify as "unmarried" under the Code can take advantage of the important tax advantages that are offered to a taxpayer who lives alone and is responsible for a family unit that includes children. Less reliance on formalities and on statutory and regulatory formulas together with greater attention to proven expenditures is needed. Despite this criticism, tax law in fact creates fewer problems for parties to informal separations than do many other areas of the law surveyed in this Article. Here, as in many of those areas, written agreements or interspousal litigation can rectify many of the legal insufficiencies that otherwise attend separation. In contrast, however, in taxation those who do not move to formalize their separation are more likely to be alerted to the implications of their actions. Within a relatively short period following separation they or those they consult for tax assistance will be faced with the issues that arise as they file their annual returns. Thus, problems can be promptly confronted and, hopefully, alleviated.

II

THE SEPARATED SPOUSES' RELATIONSHIPS TO THIRD PARTIES

A. *Contract Creditors*

The contract creditors discussed in this section acquire their status *vis-a-vis* the separated couple in one of three ways: both spouses may directly assume contractual liability, one spouse may contract as an agent of the other, or community property laws may independently im-

123. To the extent that the requirement of a writing or a court order is imposed to prevent manipulation by uneven payments that are designed more for their tax impact than for genuine support motives, appropriate regulations could be written that would honor amounts regularly paid yet disallow wildly fluctuating amounts. There appears to be no other policy reason to distinguish amounts "voluntarily" given to one for whom a support order might be secured. The current distinction rewards only the litigious and those sophisticated or monied enough to secure tax counsel to draft written agreements. Surely the economic reality of divided households is the underlying basis for the special treatment given some separated and divorced families; policy favors extension of this treatment to additional families who suffer the same costs so far as is consistent with requirements for factual reporting. See generally TAGGART, *supra* note 85, *passim*; Gutman & Sander, *supra* note 84, at A-1 to A-21.

pose liability for the debts incurred by one of them. The following discussion outlines and evaluates these three bases of liability in the context of informal separations.¹²⁴

1. Credit Cards and Other Open Accounts

If spouses act as cosigners for an obligation incurred following separation, there is relatively little danger of unexpected consequences. Because each signer becomes liable out of separate as well as community property,¹²⁵ the creditor may enforce the obligation without regard to questions of title as between the spouses.¹²⁶ Thus, whether earnings following separation are denominated separate or community is of no concern to the creditor. Similarly, the spouses are likely to realize that either of them may be held solely responsible for the obligation.

It is more probable, however, that together the spouses will enter no new contracts with third parties following separation, but will face joint and several contractual liability only on the basis of additions to continuing obligations they assumed during cohabitation. Credit cards, charge accounts and rental agreements are notable examples. These contracts may endanger a spouse's separate property by a long-forgotten signature and new debts that are incurred after separation by

124. Unless otherwise indicated, the discussion concerns only obligations incurred after January 1, 1975, when equal management and control of community property by both spouses became effective, CAL. CIV. CODE § 5125 (West Supp. 1977), and assumes that all community assets may be implicated by the signature of either party "without regard to whether the particular debt is a community or separate debt." Reppy, *supra* note 18, at 982; *accord*, Legislative comment, ch. 1206, § 1, 1974 Cal. Stats. 2609; H. VERRALL, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 396-97 (3d ed. 1977) [hereinafter cited as VERRALL]. California's general approach is to be distinguished from "joint" or "dual" management schemes, in which consent of both spouses is required for specified community property transactions. Reppy, *supra* note 18, at 980 (discussing the Texas model). A thorough discussion of California's 1975 reforms can be found in Reppy, *supra* note 18, *passim*.

125. CAL. CIV. CODE §§ 5116 (community property), 5121 (separate property) (West Supp. 1977).

126. Although the general rule is that property retains the character of the funds used to purchase it, VERRALL, *supra* note 124, at 31-32, where credit is used, the issue becomes more complex. Whether ownership as between the spouses is ascribed to the community or to one of the spouses depends on what credit was relied upon by the lender. Thus, in *Dymnt v. Nelson*, 166 Cal. 38, 134 P. 988 (1913), a yacht purchased with borrowed funds and placed in the name of the husband was held to be the separate property of the wife although both parties had signed for the loan. The wife was independently wealthy while the husband had no funds; the court concluded that the loan was given on the basis of "her sole credit and upon the faith of her separate property only." *Id.* at 39, 134 P. at 988. Although the yacht was held to be the wife's separate property, the bank would have been free to enforce repayment of the loan against the community property or the separate property of either spouse. CAL. CIV. CODE §§ 5116, 5121 (West Supp. 1977). When payment is in fact made from more than one source, ownership rights are apportioned. *Garten v. Garten*, 140 Cal. App. 2d 489, 493, 295 P.2d 23, 26 (2d Dist. 1956).

the other spouse. Because the creditor chooses the target for enforcement if litigation becomes necessary, these postseparation expenditures may not be borne by the spouse who makes them.¹²⁷ The results are especially unfair if either spouse has made extravagant expenditures, or if charges that were made by an employed spouse jeopardize separate or community property in the possession of the dependent spouse.

Reform is needed to correct the current law's potential for inequity. Precisely tailored relief for postseparation debts should be instituted using the model of a Texas statute that looks both to the parties' expectations and to creditors' rights. The Texas Family Code permits a judge to "determine, as he deems just and equitable, the order in which particular separate or community property [subject to liability] will be subject to execution and sale to satisfy a judgment."¹²⁸ Similar in philosophy to the California provision that directs the priority of property against which support liability may be enforced,¹²⁹ the Texas creditor provision is somewhat more flexible, since the exact priority in a given case is to be determined by the court in light of "the facts surrounding the transaction or occurrence upon which the suit is based"¹³⁰ rather than by a statutorily prescribed order. This solution would be nominally incompatible with California's supposed rule that community debts and community assets alike are to be divided equally upon dissolution.¹³¹ Special measures are appropriate, however, since the problems that the statute addresses arise because both community and separate property continue to be implicated by contract even after earnings are no longer community property.¹³² Permitting a somewhat

127. The parties may, of course, enter into an indemnification agreement to apportion the liability between themselves.

128. TEX. FAM. CODE ANN. tit. 1, § 5.62(a) (Vernon 1975).

129. CAL. CIV. CODE § 4805 (West Supp. 1977), set forth at note 40 *supra*.

130. TEX. FAM. CODE ANN. tit. 1, § 5.62(b) (Vernon 1975).

131. CAL. RULES OF COURT 1201(d); WALZER, *supra* note 22, at 67. *But cf. In re Marriage of Eastis*, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (4th Dist. 1975). The *Eastis* court held that, in the division of community property, where there are only obligations or obligations in excess of community assets, the court may order a "just and equitable" division, looking to the earning capacity of each spouse "and other relevant factors." *Id.* at 464, 120 Cal. Rptr. at 864. The court rejected the argument that rule 1201(d), defining property as "assets and obligations," and Civil Code section 4800, providing that the court shall divide community property equally, compelled an equal division of both assets and obligations. The court reasoned that "[o]bligations, standing by themselves, are not property" and that nothing in the Family Law Act proper requires regarding them as such. 47 Cal. App. 3d at 464, 120 Cal. Rptr. at 863-64.

132. The Texas provision is not restricted to debts incurred following separation. Although the special problems following separation justify a distinctive remedy, the Texas model could also ease inequities that result from California's equal division of obligations incurred prior to separation. Because the parties after divorce may have highly disparate earning power, and because the benefits that produced obligations are

flexible allocation of responsibility for debts that are incurred after physical separation but prior to termination of the community would protect both the uninformed and those who are informed but cannot afford to cut off their access to credit. Neither does this solution jeopardize creditors' rights since only an order of execution and not an exemption of property from execution is authorized.

2. *Liability Based on Agency*

Like contract, agency principles can produce liability quite independently of matrimonial factors: the acts of either an actual or ostensible agent will implicate the principal's separate property.¹³³ California case law on recovery for debts incurred by one spouse while acting as the other's agent arose primarily under the pre-1975 law on management and control of community assets. Under that rule, one spouse's creditors ordinarily could not reach community assets that were under the exclusive management and control of the other spouse. Because management and control were vested primarily in the husband,¹³⁴ a wife's creditors sometimes attempted to show that she was operating as her husband's agent in order to fix liability upon him and, derivatively, the community.¹³⁵ Now that the spouses enjoy equal rights to manage and control community property, so that most obligations incurred by either automatically implicate community property, fewer agency cases are likely to be litigated in this setting.¹³⁶

The ability of agency theory to reach the principal's separate property takes on new importance, however, since the amendment of section 5118 that frequently converts postseparation earnings to separate property.¹³⁷ While an ostensible agency that may be implied from

sometimes largely personal—for example, travel or education—the Texas model should be adopted in full. For a case illustrating the need for discretion, see *In re Marriage of Eastis*, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (4th Dist. 1975); see also *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969) (value of education held not property subject to division at divorce).

133. CAL. CIV. CODE §§ 2298-2300 (West 1970). For the common law's rules concerning a wife's agency, see J. MADDEN, *PERSONS AND DOMESTIC RELATIONS*, §§ 59-60, at 183-98 (1931) [hereinafter cited as MADDEN]. As to general principles of agency, see 2 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 277B-279 (3d ed. 1959).

134. Reppy, *supra* note 18, at 979-80 (discussing pre-1975 versions of Civil Code sections 5124, 5125, 5127).

135. See, e.g., *Hulsman v. Ireland*, 205 Cal. 345, 270 P. 948 (1928) (husband's separate property and the community property liable for wife's acts as husband's agent).

136. CAL. CIV. CODE § 5125(d) (West Supp. 1977), however, preserves sole management and control to a spouse who is managing or operating a community personal property business, or such an interest in a business. Accordingly, agency principles remain important here for access to community funds when the nonmanaging spouse contracts. Reppy, *supra* note 18, at 1015-16.

137. See text accompanying notes 10-15 *supra*.

marital cohabitation¹³⁸ does not aid a creditor who first appears after a couple has separated, the situation is less clear if additional debts are incurred with a creditor who first dealt with the spouse while the family unit was intact. Unless this creditor is put on notice that no agency exists, or at least that cohabitation has ceased, the other spouse may be exposed to continuing liability as a principal.¹³⁹

The common use of advertisements asserting that one spouse "will not be responsible" for the debts incurred by the other spouse after a given date may assume greater importance under these circumstances. An intriguing example of self-help tactics, these ads have no statutory basis,¹⁴⁰ and have legal impact only by destroying an ostensible agency relationship as to third parties who receive actual notice. They have the practical effect, however, of drying up credit sources for the other spouse since credit agencies that become aware of marital discord prefer not to extend further credit.¹⁴¹ Thus a spouse who undertakes

138. MADDEN, *supra* note 133, §§ 58-60, at 187-89 (rebuttable presumption of agency to purchase articles suitable to the parties' station in life). See *Lovetro v. Steers*, 234 Cal. App. 2d 461, 475, 44 Cal. Rptr. 604, 612 (1st Dist. 1965): "[A]n agency cannot be implied from the marriage relation alone. . . . [but] much less evidence is required to establish a principal and agent relationship between husband and wife than between nonspouses." (Citations omitted.) The same rebuttable presumption has been applied even though the woman was not the defendant's wife where he held her out as such. *Jordan Marsh Co. v. Hedtler*, 238 Mass. 43, 130 N.E. 78 (1921).

139. MADDEN, *supra* note 133, §§ 58-60, at 189-90. Once the couple has separated, one spouse's ability to bind the other is a result of property law or support law rather than agency doctrine, although authority to purchase postseparation necessities has been referred to as an implied-in-law agency. See *id.*, §§ 58-60, at 190. In California both parties remain competent to implicate the community property through continued management following separation. Reppy, *supra* note 18, at 1017 n.134 (calling for remedial legislation); cf. Cross, *Equality for Spouses in Washington Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527, 543-44 (1973) [hereinafter cited as Cross 2] (discussing problems in such equal management under Washington's law). See text accompanying notes 142-154 *infra*. California law does not, however, imply an agency as to postseparation necessities. CAL. CIV. CODE §§ 5121, 5132 (West Supp. 1977). See notes 36-46 *supra* and accompanying text.

140. Brown, "Legal Notices" in the *Classified Ads Section*, 36 S. CAL. L. REV. 604 (1963). Certain limited effect is given such notices under Georgia statutory law. GA. CODE ANN. § 53-508 (1974). A sense that some formal action must be taken to alter the parties' obligations may partially explain the public penchant for such advertisements, despite the fact that "[l]awyers for years have been discouraging clients from publishing notice in the newspapers that they will not be responsible for the debts of other spouse [sic], such notices having no legal effect." Foster, *Changes in the Lawyer's Practice Under the New Dissolution of Marriage Act*, in WASH. STATE BAR ASS'N, CONVENTION 1973: LEGAL INSTITUTES 42, 50.

141. One practitioner has offered the following advice:

Place a "notice of non-responsibility" in a newspaper of general circulation regarding the non-responsibility of your client for debts thereafter incurred by the adversary spouse and get "reprints" of the notice which can be mailed to selected creditors, and keep a list of such addresses to whom these reprints are mailed. *Caveat*—such "notice" and mailing . . . may result in your loss of the use of credit cards and other credit sources, so this tactic should be

no direct termination of contractual liability but uses such advertisements may in fact both end contractual exposure and curtail the other spouse's credit in a dramatic and embarrassing fashion.

3. Community Property Liability

Finally, exposure to contract creditors may occur under community property laws. In California, management and control of the community property may be exercised by either spouse, subject to certain limitations;¹⁴² creditors may resort to any community property within the debtor spouse's management and control.¹⁴³ Accordingly, virtually all nonbusiness community property¹⁴⁴ is liable for the postnuptial debts of either spouse.¹⁴⁵ Barring a contract between the parties that alters the incidents of community property law,¹⁴⁶ equal management and its derivative liability continues so long as the property maintains its community nature.¹⁴⁷ While the Code imposes a requirement that each

carefully weighed, especially if your client is the wife, who may have very little credit in the community independent of the credit she has acquired by the mere fact of her status as the spouse of the other party, who is the primary source of the line of credit to be affected by this "notice" and proposed mailing.

Carsola, *supra* note 7, at 4020 (emphasis in original). The author apparently recognizes that publication is legally irrelevant unless it produces actual notice. Mailings without publication are therefore equally effective as to known creditors. Emotional reasons undoubtedly explain the resort to publication.

142. The Civil Code requires that the parties must agree to dispose of certain household and personal effects or to make a gift of community property. CAL. CIV. CODE § 5125 (West Supp. 1977). Operation of a business entails special rules. *Id.* § 5125(d). Finally, the parties must both join in certain transfers of interests in community property realty. *Id.* § 5127.

143. See note 124 *supra*.

144. Business property is excepted from equal management and hence from this result under CAL. CIV. CODE § 5125(d) (West Supp. 1977). See note 136 *supra*, and accompanying text.

145. CAL. CIV. CODE § 5116 (West Supp. 1977) governs community contract liability; see notes 124 and 136 *supra*. But see CAL. CIV. CODE § 5122(b) (West Supp. 1977) (imposing only secondary community property liability for certain torts).

146. Such contracts are authorized by CAL. CIV. CODE §§ 4802 (separation agreements), 5103 (agreements between spouses), 5133 (antenuptial agreements) (West 1970). Powers of attorney and funded revocable trusts have been suggested as means of restoring sole control without transmuting community property to separate property. Kahn and Frimmer, *Management, Probate and Estate Planning Under California's New Community Property Laws*, 49 CAL. ST. B.J. 516, 521 (1974).

147. In the absence of disposition of the property by contract between the parties, the community is dissolved upon the death of a spouse, or through a property division upon legal separation or interlocutory judgment of dissolution. CAL. CIV. CODE §§ 4800, 5103 (West Supp. 1977); CAL. PROB. CODE § 201 (West 1957). Where there is no property division at the time that a judgment of legal separation or interlocutory dissolution is entered, either because the court is without jurisdiction to consider property matters or because the matter was reserved for later resolution, as authorized by CAL. CIV. CODE § 4800 (West Supp. 1977), the property retains its community character until the entry of a final judgment of dissolution, when it becomes property that the

spouse "act in good faith with respect to the other spouse in the management and control of the community property,"¹⁴⁸ this section has as yet no judicial interpretation. At best it seems to permit the wronged spouse to request full restitution to the community or indemnification of that spouse's share at termination of the community if community property is dissipated in bad faith by the other spouse.¹⁴⁹ It does not curtail access to the community property by creditors of the offending spouse.

The danger of exposure to a spouse's wasteful conduct that results from equal management and control is exacerbated following separation. Indeed, the only apparent virtue of a system that permits unilateral management after separation is that it provides a self-help mechanism for a spouse whose current income will not sustain an adequate standard of living: the spouse can derive support from existing community property. This remedy entails a cost that would probably not be incurred if a support order were secured, however, since a dependent spouse's one-half ownership interest is also consumed when property is used for support.¹⁵⁰

former spouses hold as tenants in common. B. ARMSTRONG, 1 CALIFORNIA FAMILY LAW 843-44 (1953) [hereinafter cited as ARMSTRONG]; REPPY & DE FUNIAK, *supra* note 30, at 464; 7 WITKIN SUMMARY, *supra* note 23, *Community Property* § 107. Management powers apparently are governed by the law of tenancy in common, arguably subject to the additional obligation of good faith that is imposed by Civil Code section 5125(e). CAL. CIV. CODE § 5125(e) (West Supp. 1977). In a common law property system, Hawaiian law expressly provides that management of property that is not divided at the time of divorce continues as though the parties remained married until division occurs. HAW. REV. STAT. § 580-56 (a codification of this rule which includes innovative related provisions that clarify the treatment of claims during the postdivorce period in such cases). Where the court has proceeded with an adjudication of property rights, it is the interlocutory and not the final judgment of dissolution that terminates community ownership. *McClenny v. Superior Court*, 62 Cal. 2d 140, 396 P.2d 916, 41 Cal. Rptr. 460 (1964) (defendant unsuccessfully requested that interlocutory judgment's property division be set aside when wife died before entry of final judgment of dissolution).

148. CAL. CIV. CODE § 5125(e) (West Supp. 1977).

149. The remedy during marriage should be restoration to the community of the amount wrongfully dissipated. This is the permitted recovery when improper gifts of community property or sales of household furniture are set aside by the nonconsenting spouse during the other spouse's lifetime. *Britton v. Hammell*, 4 Cal. 2d 690, 52 P.2d 221 (1935); *Lynn v. Herman*, 72 Cal. App. 2d 614, 165 P.2d 54 (4th Dist. 1946); *Matthews v. Hamburger*, 36 Cal. App. 2d 182, 97 P.2d 465 (2d Dist. 1939). Recovery when a court order or death terminates the community restores only a one-half interest to the wronged spouse; the spouse who made the transfer is deemed the owner and therefore capable of alienating the other one-half interest in the community at that point. *Ballinger v. Ballinger*, 9 Cal. 2d 330, 70 P.2d 629 (1937); *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933). This is consistent with the general rule that a spouse cannot unilaterally sever a one-half interest in the community during the life of the community. VERRALL, *supra* note 124, at 423. If recovery is sought from the spouse who dissipated the community rather than the recipient of the alienated property, CAL. CIV. CODE § 4800(b)(2) (West Supp. 1977) permits the court to make an unequal

A possible reform is to expand the degree of joint management of community property after separation.¹⁵¹ This approach both gives enhanced protection against dissipation and unexpected creditor exposure¹⁵² and, by decreasing opportunities for self-help support, encourages legal recourse for support—a more beneficial route than self-help for a dependent spouse under current law. The benefits of joint management, however, are not restricted to periods in which there is no cohabitation. Although an overall replacement of equal management by joint management may be desirable,¹⁵³ there would be little

division of community property in conjunction with a dissolution or legal separation. Recovery during marriage is theoretically possible (through restoration to the community of the entire amount) and is more likely now that section 5125(e) articulates an obligation of good faith management. Management in bad faith, rather than merely foolish squandering, may be the only error, however, for which section 5125(e) will give relief. REPPY & DE FUNIAK, *supra* note 30, at 354-58; see Grant, *How Much of a Partnership is Marriage?*, 23 HASTINGS L.J. 249, 249, 252-55 (1971); Comment, *California's New Community Property Law—Its Effect on Interspousal Mismanagement Litigation*, 5 PAC. L.J. 723, 729-36 (1974). Although the section refers to the management of community property, its purposes will be fully served only if it is interpreted to include community property that becomes property held by the spouses as tenants in common when divorce precedes a division of the community, or community property personal injury damages are received after divorce (should section 5126 be repealed, as is recommended). See notes 147 *supra*, 204 *infra*.

150. See text accompanying note 20 *supra*.

151. Texas law provides an example of joint control: it gives sole control over earnings to the spouse who earned them, but provides joint control for "mixed" community property. TEX. FAM. CODE ANN. tit. 1, § 5.22 (Vernon 1973). For Professor McKnight's commentary on the Texas approach, see 5 TEX. TECH. L. REV. 281, 358 (1974). The dual management features of the Texas model are tellingly criticized in Comment, *Management and Control of Community Property: Sex Discrimination in California Law*, 6 U.C.D.L. REV. 383, 400-01 (1973) [hereinafter cited as Comment, *Sex Discrimination*]. Only a limited degree of joint control is imposed by California law. See note 142 *supra*.

152. See generally Reppy, *supra* note 18, at 1017 n.134; Cross 2, *supra* note 139, at 543-44; Comment, *California's New Community Property Law—Its Effect on Interspousal Mismanagement Litigation*, 5 PAC. L.J. 723, 737 (1974); 5 PAC. L.J. 352, 357-58 (1974).

153. Comment, *Community Property: Male Management & Women's Rights*, 1972 LAW & SOC. ORD. 163, 173-75; Comment, *Equal Rights and Equal Protection: Who Has Management and Control?*, 46 S. CAL. L. REV. 892, 915-21 (1973). See also 14 STAN. L. REV. 587, 589-90 (1962); Comment, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837, 839-40 (1973); authorities cited in note 152 *supra*. But see Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M.L. REV. 1, 29-30 (1974).

In 1973 the California legislature rejected a bill that would have provided for joint management of community property when transactions involved more than \$1000. S.B. 569, § 12(b) as amended June 11, 1973, 2 JOURNAL OF THE SENATE, 1973-1974 Regular Session 2922, 2926. A \$500 cutoff was proposed for Arizona in Comment, *Community Property: Male Management and Women's Rights*, 1972 LAW & SOC. ORD. 163, 173. To facilitate business in a joint ownership system, it should be possible for one spouse to give the other a power of attorney for a designated range of transactions. Texas law so provides. TEX. FAM. CODE ANN. tit. 1, § 5.22(b)-(c) (Vernon 1975) (written

virtue in reforming management law solely as to separations. Any advantage to be gained in the more conservative disposition of a couple's assets¹⁵⁴ would be offset by the complexity caused by the addition of yet another provision that produces unanticipated legal consequences upon separation. Instead, the reforms already suggested can bring equitable results and decrease premature interspousal litigation: unless other provisions are made by the parties, support rights and community property interests in acquisitions of the parties should remain during separation as they were during cohabitation and creditors should receive payment from community or separate property as is equitable under the circumstances.

4. Access to Credit

A dependent spouse especially may need new or continuing credit following separation. Recent state¹⁵⁵ and federal¹⁵⁶ legislation requires that credit be made available without regard to marital status.

power of attorney or "other agreement" may alter joint management requirement). Cf. Kahn and Frimmer, *supra* note 146 (suggesting powers of attorney and funded revocable trusts in a dual management system). It is not clear that such an authorization could be drafted to avoid the imposition of liability on the signer's separate property for management activities undertaken thereafter by the other spouse as an agent in the exercise of joint management. A spouse who unilaterally attempts to avoid joint management by purporting to be unmarried should be held individually liable under tort rather than contract principles, triggering the order of execution provisions of section 5125(b)(2), discussed in the text accompanying notes 187-190 *infra*. In this case, it has been suggested that any creditor recovery that is satisfied out of community property should give rise to a later claim for reimbursement by the community from the tortfeasor's separate property. Comment, *Sex Discrimination*, *supra* note 151, at 402-03. See also CAL. CIV. CODE § 4800(b)(2) (West Supp. 1977); notes 128-131 *supra* and accompanying text. Whether an improved system would also incorporate California's equal management system in some areas is open to question. See Comment, *Sex Discrimination*, *supra* note 151, at 400-01.

154. Professor Cross has suggested that the management powers of either spouse over the community property after separation be restricted "to the reasonable necessities of the situation." Cross 1, *supra* note 13, at 797; *accord*, Cross 2, *supra* note 139, at 543-44.

155. CAL. CIV. CODE § 1812.30-.35 (West Supp. 1977). For a discussion of California's credit legislation, see Comment, *Credit for Women in California*, 22 U.C.L.A. L. REV. 873 (1975); Comment, *Credit Equality for the California Woman?* 3 U. SAN FERN. V.L. REV. 125 (1974). The 1976 amendments to section 1812.30, ch. 1361, § 1, 1976 Cal. Adv. Legis. Serv. 131-34, satisfy some of the objections raised by these Comments. See 22 U.C.L.A.L. REV. at 890, 893, 897; 3 U. SAN. FERN. V.L. REV., at 131-36, 140.

156. Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-1691c (Supp. V 1976). See Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960 (1976), reprinted in 3 COMMUNITY PROP. J. 163 (1976) [hereinafter cited as Comment, *Credit Equality*], for a detailed analysis of the Act, and Geary, *Equal Credit Opportunity—An Analysis of Regulation B*, 31 BUS. LAW. 1641 (1976), for an analysis of the Federal Reserve Board's Regulation B implementing the Act.

Although a newly separated person is not required to notify creditors of a change in living arrangements, separated women whose husbands have closed joint accounts or who are otherwise in need of separate credit have often been subjected to discriminatory credit practices.¹⁵⁷ The discrimination resulted from many creditors' practice of including all credit transactions involving a married couple in the husband's credit file but not in the wife's, preventing the wife from building or maintaining her own credit record.¹⁵⁸ Under the new federal legislation, a wife may now retain her separate credit standing after marriage if she wishes and, in any event, may rely upon her credit history prior to marriage when later seeking credit.¹⁵⁹ Unfortunately, creditors may still take into account the likelihood that support payments will be "consistently made" in determining whether to extend credit to a person whose income de-

157. Comment, *Credit Equality*, *supra* note 156, 13 SAN DIEGO L. REV. at 972, 3 COMMUNITY PROP. J. at 166. Creditors may, however, require a reapplication for open-end credit if there is a change in the parties' marital status, accompanied by evidence of inability or unwillingness to repay, or if the credit was based on income earned solely by the applicant's spouse. 12 C.F.R. § 202.5(i) (1977). "Marital status" is defined as "the state of being unmarried, married, or separated, as defined by applicable State law." 12 C.F.R. § 202.3(n) (1977) (emphasis added). This reference to separation should be read as denoting a legal separation under California law, since informal separations do not affect marital status even when they affect interspousal financial obligations.

Discussing the importance of the new laws to women, Sylvia Porter reports:

Of 100 typical American women now 21 years of age, six will never marry; of the 94 who will, 33 will see their first marriage end in divorce; of the remaining 61 who stay married, 46 will outlive their husbands. Thus, 85 out of the 100 women will be on their own at some time during their lives.

Porter, *Your money's worth: Women must establish their credit histories*, S.F. Chronicle, May 4, 1977, at 60, col. 5.

158. Comment, *Credit Equality*, *supra* note 156, 13 SAN DIEGO L. REV. at 968-69, 3 COMMUNITY PROP. J. at 164-65. New California and federal legislation, however, requires that credit reporting be done in both the name of the wife and of the husband in the case of jointly held accounts on which information is received after January 1, 1977, if the accounts were existing on that date or were thereafter established. CAL. CIV. CODE § 1812.30(e) (West Supp. 1977). Upon the written request of a person who is or has been married, similar treatment is mandated for all accounts established prior to January 1, 1977. *Id.* § 1812.30(f). The federal regulations require that accounts which are used by both spouses and upon which both spouses are contractually liable must be designated to show the participation of both spouses. Credit reporting agencies must furnish information about such accounts in the names of both spouses. 12 C.F.R. § 202.6(a), (b) (1976).

159. Under the federal legislation, as to accounts opened on or after November 1, 1976, 12 C.F.R. §§ 202.4(b) & 202.5(i)(1) (1977) provide that any spouse may retain or acquire a separate credit standing after marriage unless that person is unable or unwilling to repay. The state statute, CAL. CIV. CODE § 1812.30(a) (West Supp. 1977), provides that a spouse may retain a separate credit standing after marriage, if the earnings and other property over which that spouse has management and control are such that a person of the opposite sex managing and controlling the same amount of earnings would receive credit. Given California's provisions for the equal management and control of community property, both statutory schemes appear to authorize

pendes in part upon the receipt of support.¹⁶⁰ This continues to disadvantage the newly separated. Until there is a history of prompt support payments by the payor, the recipient can only assert that support obligations are as likely to be honored as have been the past financial obligations of the payor, and argue that the availability of support enforcement mechanisms and the payor's general creditworthiness must be taken into account.¹⁶¹ Until it is customary for married people to main-

the retention of separate credit after marriage even for a spouse who is not gainfully employed.

Although the California statute permits rather than mandates attention to an applicant's premarital credit rating, attention is required in effect by section 1812.30's proviso that sex and marital status are not permissible grounds for giving distinctive treatment to credit records. Under the federal statute, regulations provide that a creditor, on an applicant's request, shall consider the credit history of any account "in the name of the applicant's spouse or former spouse which an applicant can demonstrate reflects accurately the applicant's *willingness* or ability to repay," and shall also consider any account in effect on June 1, 1977, in which a spouse has had contractual liability or use, in determining whether an applicant shall receive credit. 12 C.F.R. § 202.5(j) (1977) (emphasis added). While there is no specific provision that a credit rating accrued while the applicant was single must be taken into account, for many formerly independent spouses the rating clearly bears on "willingness or ability to pay" and should be included.

160. 12 C.F.R. § 202.5(b)(1)(iv) (1976) (allowing creditors to request and consider information regarding a party obligated to pay support if the application indicates that such support will be relied upon by the applicant to repay the credit requested). "Reliability" of payments is relevant under the state statute, but the credit history of the obligor is not specifically listed among the factors that may be considered. CAL. CIV. CODE § 1812.30(h) (West Supp. 1977).

161. 12 C.F.R. § 202.5(d)(2) (1976) provides, in precatory language:

Factors which a creditor may consider in determining the likelihood of consistent payment include, but are not limited to, whether the payments are received pursuant to a written agreement or court decree; the length of time the payments have been received; the regularity of receipt; the availability of procedures to compel payment; and the creditworthiness of the payor, including the credit history of the payor, where available to the creditor under the Fair Credit Reporting Act or other applicable laws.

The California statute provides that:

Spousal and child support payments shall be considered in the same manner as earnings . . . where the payments are received pursuant to a written agreement or court decree to the extent that the reliability of such payments is established. The factors which a creditor may consider in evaluating the reliability of such payments are the length of time payments have been received; the regularity of receipt; and whether full or partial payments have been made.

CAL. CIV. CODE § 1812.30(h) (West Supp. 1977). Since both the California and the federal statutes provide for an individualized method of determining whether alimony and support payments shall be considered as earnings upon which credit may be extended, general statistics indicating the probability of payment of alimony and support should not be taken into consideration in the lender's decision to extend credit. The federal regulation's mention of enforcement procedures is important given California's law that *mandates* an assignment of the obligor's wages upon a showing by the petitioner that arrearages in an amount equivalent to two months' child support have accrued within a two year period. CAL. CIV. CODE § 4701 (West Supp. 1977). There is, unfortunately, no comparable assignment mechanism to assure payment of spousal support as it falls due. Despite the clear relevance of this remedy when the child support obligor is a

tain separate credit records, credit access for the newly separated dependent spouse will continue to be a problem.¹⁶²

B. Insurance and Retirement Plans

Special problems arise during separation as to the parties' health and life insurance policies and pension or retirement plans. Ownership rights are still controlled by contract and community property principles, but certain characteristics of insurance policies complicate the application of these principles.

1. Coverage

The scope of private insurance and retirement agreements is a matter of contract law. The spouse and children of the policyholder are commonly covered under such life and health insurance policies,¹⁶³ and often receive benefits under public and private retirement programs.¹⁶⁴ California statutes regulating group health, group life, and family expense disability insurance also speak of coverage for the spouse of the group member,¹⁶⁵ although no definition of "spouse" is given. As a matter of contract or statutory interpretation, coverage under such plans is apparently authorized without regard to the couple's separation in the absence of a final judgment of dissolution.¹⁶⁶ Parties

California wage earner, the state statute does not direct, and indeed appears not to permit, the lender to take into account the virtual certainty of future collectability, regardless of the time interval since judgment. To the extent that the federal and state statutes direct inconsistent lender behavior, however, the federal statute will control under the supremacy clause.

162. Increased access to credit during separation will, however, exacerbate the problems that arise when a spouse may unilaterally create community property liability for transactions during separation. See notes 142-154 *supra* and accompanying text.

163. W. MEYER, LIFE & HEALTH INSURANCE LAW, A SUMMARY §§ 9:1, 18:1 (1976) [hereinafter cited as MEYER].

164. Calof, *Community Property Rights in Pensions—Some Legal and Procedural Considerations*, 51 CAL. ST. B.J. 206, 206 (1976). For community property purposes, pensions and retirement programs have been equated. See note 167 *infra*. Accordingly, the terms will be used interchangeably in this discussion.

165. CAL. INS. CODE §§ 10203.4 (group life insurance), 10270.5(a)(1) (profit-making group health insurance), 10270.7 (family expense disability insurance), 11512.2 (a)(1) (nonprofit group health insurance) (West 1972 & Supp. 1977).

166. Only death or a final judgment of dissolution or nullity terminates marriage. CAL. CIV. CODE § 4350 (West Supp. 1977). Accordingly, an informal separation, an interlocutory judgment of dissolution or a decree of legal separation does not affect a party's status as a spouse. See *In re Estate of Dargie*, 162 Cal. 51, 121 P. 320 (1912) (woman held entitled to family allowance from a decedent's estate as his widow despite earlier entry of an interlocutory decree of divorce).

Even a spouse who may no longer be covered by a policy will remain a beneficiary under it if there is a beneficiary designation that refers to the policyholder's "spouse." This is so even following a final judgment of dissolution if the term is interpreted to describe the particular individual who was the insured's spouse at the time of the desig-

caught up in marital discord, however, frequently request that a spouse be removed from insurance policy coverage, even if no financial saving is achieved by reducing the scope of protection.

2. Policy Ownership and Control

If policy premiums have been paid with the earnings of either spouse, community property law controls the degree to which the spouse whose name has been removed retains any rights under the policy. The same principles define the spouses' respective ownership of insurance, retirement, or pension rights that are purchased in any part by community funds.¹⁶⁷ In California, ownership of these assets, like any other property, reflects pro rata the funds used in their purchase.¹⁶⁸ According to this tracing principle, in the common situation where a policy is first acquired during the couple's marriage and payments are made exclusively from the earnings of one spouse and the contributions of that spouse's employer, the spouses have equal community property ownership interests in the policy.¹⁶⁹ Separation of the

nation. MEYER, *supra* note 163, § 17:19, at 364. Because contract law controls, divorce alone will not cut off the rights of a former spouse to claim as a named beneficiary; so long as no valid change of beneficiary is entered, a previous designation remains effective. *Cook v. Cook*, 17 Cal. 2d 639, 111 P.2d 322 (1941) (subsequent will cannot displace policy designation). See note 259 *infra* for the similar California rule on the validity following divorce of an earlier bequest to a spouse.

167. The recent cases that have gradually extended the reasoning of life insurance proceeds cases to the retirement and pension field are discussed in Calof, *supra* note 164, *passim*. See, e.g., *In re Marriage of Fithian*, 10 Cal. 3d 592, 602, 517 P.2d 449, 455, 111 Cal. Rptr. 369, 375 (1974).

168. S. SCOVILLE, COMMUNITY PROPERTY INTERESTS IN LIFE INSURANCE 34-36 (1969) (citing cases dealing with life insurance proceeds, employee death benefits, and group life insurance) [hereinafter cited as SCOVILLE]. Scoville points out that the life insurance apportionment cases deal with apportionment of proceeds, rather than apportionment of the policy itself, and questions whether a reimbursement rule might not be applied if the policy itself were at issue. He declines to speculate on the valuation question that is posed if apportionment of the policy value is attempted instead. *Id.* at 25-26. Apportionment of pension rights, whether or not vested at the time of the parties' divorce, is required by *In re Marriage of Brown*, 15 Cal. 3d 538, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). For a general discussion of *Brown*, see Calof, *supra* note 167, *passim*. For a discussion of *Brown's* implications for disability payments elected in lieu of retirement benefits, see *id.* at 211, 242; the California Supreme Court is currently considering this issue. *In re Marriage of Stenquist*, No. L.A. 30718, hearing granted Jan. 5, 1977, argued June 14, 1977.

California's creative application of these rules to federal life insurance and retirement pay in the face of threatened supremacy clause problems is found in *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974) (federal military retirement pay) and *In re Marriage of Milhan*, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), *cert. denied*, 421 U.S. 976 (1975) (National Service Life Insurance).

169. The employer's contributions are community property since they constitute compensation to the employee for efforts attributable to the community. *In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371

parties frequently leads to separate ownership claims, in part or in full, to such insurance or retirement plans. So long as Civil Code section 5118 remains, making earnings separate property while the parties live "separate and apart," a parting that triggers its provisions will produce a partial separate property interest in the policy or pension to the extent that such earnings purchase the coverage.¹⁷⁰

The spouses' respective ownership rights in turn dictate their abilities to control their policies during separation. Either spouse has the power to manage and control the community property in the absence of an agreement that provides otherwise.¹⁷¹ The policyholder of a community property policy may, therefore, surrender it or obtain a loan against any cash value, subject to an obligation of good faith with respect to the other spouse¹⁷² and subject to the other spouse's shared ownership of the proceeds. A spouse is not free, however, to make a gift of community property without the consent of the other spouse.¹⁷³ These restrictions have been recognized in litigation concerning whole life insurance policies¹⁷⁴ and pension death benefits.¹⁷⁵ Their applicability to the most common policies, term insurance covering life and health, is less clearly established. Because term policies are arguably purchased anew with each premium, one line of reasoning concludes that the entire policy's ownership is determined by the source of the most recent payment. As a result, once postseparation funds that are separate property are used for premiums, the policy

(1974) (retirement benefits). That community ownership may exist in a life insurance policy itself, as distinct from its proceeds, has been decided in several inheritance tax cases. See SCOVILLE, *supra* note 168, at 18, 20-22, 40-41.

170. CAL. CIV. CODE § 5118 (West Supp. 1977), discussed in text accompanying notes 10-24 *supra*. The difficulties created by section 5118's impact on insurance and retirement plans are seen in *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976) (employee group life insurance and pension death benefits), discussed in note 16 *supra*. Apportionment will also be required if separate property payments are made before marriage and community payments are made thereafter. *Modern Woodmen of America v. Gray*, 113 Cal. App. 729, 299 P. 754 (1st Dist. 1931).

171. CAL. CIV. CODE § 5125 (West Supp. 1977). The implications of postseparation equal management are discussed in notes 139 and 149 *supra*.

172. CAL. CIV. CODE § 5125(e) (West Supp. 1977). The scope of the obligation of good faith is discussed in note 149 *supra* and accompanying text.

173. CAL. CIV. CODE §§ 5125(b) (personalty), 5127 (realty) (West Supp. 1977). See note 149 *supra*. See generally Schwartz, *Gifts of Community Property: Need for Wife's Consent*, 11 U.C.L.A.L. Rev. 26 (1963) [hereinafter cited as Schwartz].

174. *E.g.*, *Sieroty v. Silver*, 58 Cal. 2d 799, 376 P.2d 563, 26 Cal. Rptr. 635 (1962) (wife's one-half interest in policy proceeds recognized as against named beneficiaries although subject to administration in husband's estate under then-existing Probate Code provisions); *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976); *New York Life Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 214 P. 61 (1st Dist. 1923). See Schwartz, *supra* note 173, at 31-32.

175. *E.g.*, *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976). See Schwartz, *supra* note 173, at 32.

becomes separate property and free of the constraints imposed by community ownership. This argument was rejected in *Modern Woodmen of America v. Gray*.¹⁷⁶ Instead, the court apportioned the proceeds of a life insurance policy that was originally purchased with separate funds and later maintained with community funds according to the source of all past premiums, despite the fact that the policy was of the renewable, lapsable type that had no cash value. It concluded that any other result would be unreasonable because the insured "had acquired the right to have the contract of insurance continued in force by virtue of the payment of premiums from [the original date of] its issuance . . . until the date of his marriage."¹⁷⁷ In principle, the case should apply equally to a term policy that is maintained by separate property payments following a period of community ownership—for example, during a separation where the separate earnings provision of section 5118 applies. It is possible that the ownership rights recognized by *Modern Woodmen* could be extended to require that a policyholder, as a good faith manager of the community property, maintain an existing term life or health insurance policy to protect the family. Unless this occurs, there is no obligation upon the policyholder to maintain coverage absent a duty to do so that is imposed by an agreement between the parties or a court order awarded in support or property litigation.

3. Remedies and Alternatives

Should the holder of a community property policy unilaterally and gratuitously designate a third party as a beneficiary or assign the policy's ownership to a third party, the spouse whose consent was not secured may set aside the gift in full during the spouses' marriage.¹⁷⁸ If the marriage should later be dissolved by divorce or death, the conveyance may be set aside as to the wronged spouse's ownership interest.¹⁷⁹ Although avoidance of such gifts ordinarily occurs in litigation between the donee and the nondonor spouse,¹⁸⁰ an insurance company may be

176. 113 Cal. App. 729, 299 P. 754 (1st Dist. 1931).

177. *Id.* at 732, 299 P. at 755.

178. See *Lynn v. Herman*, 72 Cal. App. 2d 614, 165 P.2d 54 (4th Dist. 1946) (automobile); *Gallagher v. Gallagher*, 98 Cal. App. 180, 276 P. 634 (3d Dist. 1929) (realty); see also *Britton v. Hammell*, 4 Cal. 2d 690, 52 P.2d 221 (1935) (dictum); *Johnson v. National Sur. Co.*, 118 Cal. App. 227, 5 P.2d 39 (1st Dist. 1931) (dictum).

179. *Scoville*, *supra* note 168, at 28-29; *Schwartz*, *supra* note 173, at 30-32. See, e.g., *Heuer v. Heuer*, 33 Cal. 2d 268, 201 P.2d 385 (1949) (recovery of real and personal property upon divorce); *McBride v. McBride*, 11 Cal. App. 2d 521, 54 P.2d 480 (2d Dist. 1936) (recovery of one-half of the proceeds attributable to community funds upon insured's death). In actions brought after division of the community under a court order or property agreement, recovery is permitted in accord with the division. *Schwartz*, *supra* note 173, at 31. See note 149 *supra*.

180. Virtually all of the cases cited in notes 149, 178, and 179 *supra* and by Sco-

the defendant. This may occur if a spouse notifies the company of an asserted ownership interest that is incompatible with the policyholder's directions. If the company thereafter makes a payment that fails to honor a valid ownership claim, its liability to the true owner is not discharged.¹⁸¹ If the insurer does not receive notice of a spouse's inconsistent claim before a payment that conforms to the directions of the policyholder has been made, however, the company is discharged from further liability on the policy.¹⁸² The wronged party must instead assert any claims against the payee, the policyholder, or the estate of a deceased policyholder.¹⁸³

The parties can avoid some of these problems by acting to alter their rights to insurance policies; two methods are commonly used to

ville and Schwartz are between the nondonor spouse and the third party donee. Suit by an executor or administrator is also possible, since the right to set aside a wrongful gift of community property survives the nondonor spouse's death. CAL. CIV. CODE § 954 (West 1970); *Harris v. Harris*, 57 Cal. 2d 367, 369 P.2d 481, 19 Cal. Rptr. 793 (1962). SCOVILLE, *supra* note 168, at 30, notes the rarity with which insurers are held liable for community property claims.

181. See CAL. CIV. CODE § 5106 (West Supp. 1977); CAL. INS. CODE §§ 10172-10174 (West 1972 & Supp. 1977). MEYER, *supra* note 163, § 17:22; SCOVILLE, *supra* note 168, at 30-32. Similarly, an insurer that makes a loan on a policy contrary to a court order of which it has notice may be relegated to the status of an unsecured creditor as to the amount owed. MEYER, *supra* note 163, § 16:17, at 330. Considerable assurance that the insurer actually knew of the claim is required before the insurer is held to have notice. See note 182 *infra*. The insurer may, however, become directly responsible for its actions concerning a policy if it is joined in litigation between the spouses that determines such matters. Calof, *supra* note 164, at 243-44 (discussing joinder of retirement plans). See also *Pension Joinder—ERISA Preemption*, 1 PRAC. FAM. LAW. 6 (Spring 1977).

182. In a case applying New York law, a California court held that the wife's payment of premiums on a policy insuring her husband's life was not enough to put the insurer on notice as to her ownership; the company was permitted to discharge its obligation by payment to the husband of the cash surrender value. *Morrison v. Mutual Life Ins. Co.*, 15 Cal. 2d 579, 103 P.2d 963 (1940). Similarly, the fact that an insurance company had made a payment under one policy to the widow of the insured did not require that, knowing of her existence, it ask whether she claimed a community property interest in a second policy on the insured's life prior to making payment to another under that policy's terms. *Leonard v. Occidental Life Ins. Co.*, 31 Cal. App. 3d 117, 106 Cal. Rptr. 899 (1st Dist. 1973).

183. Discharge of an insurer does not affect claims against persons other than the insurance company and, in the case of employee plans, the employer. CAL. CIV. CODE § 5106 (West Supp. 1977); CAL. INS. CODE § 10175 (West 1972). Suits against donees are most common. See note 180 *supra*. Suit against the donor spouse was permitted in *Britton v. Hammell*, 4 Cal. 2d 690, 52 P.2d 221 (1935) (husband died during pendency of suit, but total recapture of gift was permitted rather than recapture of one-half, as would have occurred had suit been instituted following his death). Recovery against the estate of a deceased policyholder who had not retained the beneficiary designation required by a separation agreement was upheld in *Wright v. Wright*, 276 Cal. App. 2d 56, 80 Cal. Rptr. 741 (2d Dist. 1969).

do so during relatively permanent separations. First, if the policy is assignable, the insured spouse may assign it to the beneficiary spouse. This enables the spouse who is intended to benefit from the policy to prevent changes in the beneficiary designation and to insure that the policy is maintained in good standing.¹⁸⁴ While a written assignment is preferable, courts have upheld informal assignments or gifts between separated spouses.¹⁸⁵ Second, the parties may agree or a court order may direct that the policyholder is to maintain coverage for the benefit of the other spouse. Because the party who is most interested in the eventual benefits does not have sole ownership and control over the policy, however, this method is more complex and may give less protection than an outright assignment; it is, however, the only method available when the policy is nonassignable.¹⁸⁶

Whatever protection is given to an insured's spouse results from two doctrines: community property rules concerning policies that are purchased at least in part with community assets and any obligations that are imposed by a separation agreement or court order. Even with such protection, however, if a policy is not maintained, recourse against the former policy holder (in the case of health insurance) or the policyholder's estate (as to a policy on that party's life) may well produce a judgment that cannot be satisfied. So long as private insurance is needed, therefore, marital disruption produces great vulnerability for parties who are named as dependents on family insurance coverage.

184. See MEYER, *supra* note 163, §§ 17:15-16. When no consideration is received, the assignment constitutes a gift of community property; in such cases the courts may imply the consent of the donee spouse and consider the policy the separate property of the donee. This is the usual result as to proceeds of a community policy that go to a spouse as beneficiary. See SCOVILLE, *supra* note 168, at 24-25, 26-27, and the supposed qualification of the rule discussed at 32-34. Such assignments may produce gift tax liability in the absence of adequate consideration, but have potentially favorable estate tax consequences. MEYER, *supra* note 163, §§ 32:11-14, 32:16. But see I.R.C. § 2001(b). Under California law, there is no requirement that an assignee of a life or disability policy have an "insurable interest" in the insured's life. CAL. INS. CODE § 10130 (West 1972). See generally MEYER, *supra* note 163, §§ 10:1, 10:3.

185. MEYER, *supra* note 163, §§ 17:15, at 374, 17:16. In *Chilwell v. Chilwell*, 40 Cal. App. 2d 550, 105 P.2d 122 (4th Dist. 1940), a couple's property settlement that had been incorporated into their divorce decree required that the husband reinstate and maintain a life insurance policy and name the couple's children as its beneficiaries; the agreement was held to constitute an equitable assignment to the children so that they were entitled to the proceeds although they were not named as beneficiaries.

186. Even though rights granted pursuant to pensions or retirement plans are not usually assignable, assignment to a spouse of that spouse's community property interests in such plans may occur in conjunction with marriage dissolution proceedings. *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); Calof, *supra* note 164, at 243-44 (discussing joinder of the insurer). In contrast, interests in group life insurance policies are freely assignable unless the policy or an appropriate agreement provides otherwise. CAL. INS. CODE § 10209.3 (West 1972).

They will be protected only in the unlikely event that during their separation, however tentative, they are individually responsible for health insurance coverage, they give prompt notice to life insurance companies of policy ownership claims, and they assign their policies to each other so that the beneficiary of each can maintain and control it.

C. Torts

1. Liability of the Separated Spouses

A spouse is liable for torts committed by the other spouse only if liability would exist in the absence of a marriage between the two.¹⁸⁷ Cohabitation or separation of the parties is therefore irrelevant to the question of a nonacting spouse's personal liability. Damages awarded against one spouse may be satisfied out of community property under certain circumstances, however. Although California has traditionally not employed the concept of "community debts" that is used in other community property states,¹⁸⁸ the Civil Code now specifies an order of execution for the enforcement of tort liabilities that turns upon the nature of the tortfeasor's activities. If a spouse commits a tort while acting "for the benefit of the community," the community property must be exhausted before the acting spouse's separate property is liable for the payment of any damage claim.¹⁸⁹ But if the spouse was not acting for the community, the claim may be satisfied out of community assets only after the separate assets of the tortfeasor are exhausted.¹⁹⁰ In neither event is the separate property of the nonacting spouse implicated by the fact of marriage alone.

Because the same rule governs liability for torts committed during separation, community property funds will be the primary source of recovery for torts committed following separation only if the tortious activity was undertaken for the community's benefit. No California cases elucidate the dimensions of this liability. For example, during marital cohabitation the driving of one's children to school would seem to be an action for the benefit of the community, and a tort committed by the driver while running this errand would implicate the community

187. CAL. CIV. CODE § 5122(a) (West Supp. 1977); see 3 C. VERNIER, *AMERICAN FAMILY LAWS* § 157, at 74-76 (1935) (discussing the laws of several states).

188. *Grolemund v. Cafferata*, 17 Cal. 2d 679, 688, 111 P.2d 641, 645-46 (1941) (contrasting the Washington system). As to the Washington system, see generally Cross 1, *supra* note 13, at 834-40; Comment, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948). Arizona also has a doctrine of community benefit; while the doctrine's relation to that of Washington has been acknowledged, it is distinctive in some respects. *Shaw v. Greer*, 67 Ariz. 223, 194 P.2d 430 (1948); Annot., 10 A.L.R.2d 988 (1950).

189. CAL. CIV. CODE § 5122(b)(1) (West Supp. 1977).

190. CAL. CIV. CODE § 5122(b)(2) (West Supp. 1977).

property before the driver's separate property. The result should not differ if a tort is committed while driving the children to school during an informal separation. A tort committed during a spouse's golf lesson, whether during cohabitation or after separation, poses a more difficult question. Case law under a similar Washington statute indicates that either of these situations could meet the test of "community benefit" during spousal cohabitation.¹⁹¹ There are no relevant Washington precedents, however, to aid California courts in determining which acts are of "community benefit" during separation.¹⁹² This difficulty can be mooted by adopting the proposed scheme that permits an equitable allocation of postseparation debts between community and separate property.¹⁹³ Absent this reform, California courts should emphasize the spouses' reasonable expectations as to whether an activity during separation furthers the family's or an individual spouse's interests.

2. *Ownership of Damage Recoveries*

Damages collected for injury to property reflect the ownership of the damaged property.¹⁹⁴ Under tracing principles, therefore, marital separation does not affect their character. The ownership of personal injury damages is, however, governed by different, more intricate, rules.¹⁹⁵ Personal injury damages that are received during marriage

191. Cross 1, *supra* note 13, at 835-37. General discussions of the Washington system can be found in Cross 1, *supra* note 13, at 834-44 and Comment, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948).

192. Washington's law on liability following separation reflects a doctrine of "community relationship" that has no counterpart under California law. It is unpersuasive in its broad rejection of community liability during separation. The doctrine appears to have grown out of the courts' definition of the kind of separation that terminates community ownership of postseparation acquisitions where the marriage is "defunct." Cross 1, *supra* note 13, at 751. Professor Cross postulates that separations of this nature will also preclude one spouse's liability for the other spouse's torts except, perhaps, in the narrow area of torts committed during the continuing management of community property that was acquired earlier during the "community relationship." *Id.* at 839. Under this rule the result might differ if the car being driven in the stated hypothetical is such community property. Permitting the result to turn upon this fact, rather than the nature of the errand, is unsound. See also the discussion of reimbursement to the community for torts that implicate the community in Comment, *Sex Discrimination*, *supra* note 151, at 402-03, and note 153 *supra*.

193. See notes 128-131 *supra* and accompanying text.

194. See note 9 *supra*.

195. Professor Verrall notes that California courts have "rather weakly concluded that [a] cause of action [for personal injury] is a property right," citing *Zaragosa v. Craven*, 33 Cal. 2d 315, 202 P.2d 73 (1949) ("to whatever extent such cause of action may constitute property"). VERRALL, *supra* note 124, at 301 & n.77. Professor Verrall points out that the classification of personal injury damages as separate or community property need not turn upon whether the cause of action is characterized as property. California's law first characterizes the recovery as community property, then recognizes its personal elements by restoring separate property interests in some circumstances. See

are usually community property,¹⁹⁶ although subject to special treatment should there later be a divorce.¹⁹⁷ One clause of Civil Code section 5126 makes the recovery separate property, however, if, at the time damages are collected, the "injured person is living separate from the other spouse."¹⁹⁸ No case law defines this use of "separate."

An analysis of the purposes of section 5126, however, supports a reading that would apply this provision of the section only if the parties have entered into a relatively permanent separation of the kind that is described by the term "separate and apart" elsewhere in the Code.¹⁹⁹ Personal injury damages typically compensate for several forms of loss—for example, lost earnings, medical expenses, and personal elements of damage such as pain and suffering. To the extent that they compensate for lost earnings, their treatment should be equated to that given to earnings that would otherwise have been received during the period following the injury. This reasoning is implicit, although imperfectly expressed, in Civil Code section 4800(c), which governs the distribution at divorce of uncommingled *community property* personal in-

CAL. CIV. CODE §§ 4800(c), 5126 (West Supp. 1977). In common law property states, recovery for injuries suffered during marriage is the separate property of the injured spouse. G. MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY § 378 (2d ed. 1925).

196. The status of personal injury damages recovered during marriage from third parties is derived from the general presumption that property acquired during marriage is community property. VERRALL, *supra* note 124, at 304. It also arises by negative inference from the Code section that makes postseparation recoveries for personal injury separate property. See CAL. CIV. CODE § 5126 (West Supp. 1977).

If the personal injury was caused by the other spouse, however, the injured spouse's recovery is separate property. CAL. CIV. CODE § 5109 (West 1970). When California adopted the rule of equal management and control, the injured spouse's exclusive management and control of damages received from a third party was abolished, ch. 987, § 13, 1973 Cal. Stats. 1901. In four community property states (Louisiana, Nevada, New Mexico and Texas) tort damages are the separate property of the injured party, except for loss of services, loss of earnings, and reimbursement of medical expenses provided out of community funds. See the materials gathered at REPPY & DE FUNIAK, *supra* note 25, at 170-99. The other community property states treat these damages as community property. See generally I. BAXTER, MARITAL PROPERTY §§ 13:2-:18 (1973).

197. See CAL. CIV. CODE § 4800(c) (West Supp. 1977).

198. CAL. CIV. CODE § 5126(a)(2) (West Supp. 1977) (including damages pursuant to judgment, settlement, or compromise). Damages received after a decree of legal separation or an interlocutory or final decree of dissolution are also separate property. *Id.* § 5126(a)(1), (3). Subsection (b) authorizes reimbursement to the appropriate source for expenses caused by the injury that are paid out of the community property that is subject to the other spouse's management and control or out of the other spouse's separate property. *Id.* § 5126(b). This inadequately compensates the community for payments made because of the injury out of business community property under the injured spouse's sole management and control. See *id.* § 5125(d).

199. See CAL. CIV. CODE § 5118, discussed in text accompanying notes 10-24 *supra*; VERRALL, *supra* note 124, at 304.

jury damages.²⁰⁰ Section 4800(c) directs a divorce court to award all such community property personal injury damages to the injured spouse unless justice requires that a portion, not to exceed one-half, be given to the other spouse. Although the section operates according to the date of recovery rather than the date of injury, and contains no specific reference to lost community property earnings, one factor to be considered in dividing the award is the time that has elapsed since the damage recovery. This reference to time implicitly directs the court's attention to the impact of the loss upon the community.

In contrast, section 5126 awards a recovery that is received after "separation" totally to the injured spouse as *separate property*; it makes no allowance for an allocation to the other spouse, even if the injury for which the damages compensate occurred when earnings would have belonged to the community.²⁰¹ Professor Reppy has pointed out that section 5126 encourages an injured spouse whose marriage is faltering to postpone personal injury litigation or settlement efforts and to separate from the healthy spouse; later recovery will thereby be free of community property claims except for reimbursement of injury-related expenditures.²⁰² Given the strains that already exist following the injury of one spouse,²⁰³ California's current rule that recovery of damages after separation produces separate property further exacerbates a troubled situation.

The law should be changed to give appropriate effect to tracing principles. At the least, section 5126 should govern only recoveries that are received once earnings become separate property; this can be accomplished by reading "separate" under section 5126 as the equivalent of "separate and apart" under section 5118. Far better would be the repeal of section 5126 and an amendment to section 4800(c) so that all damage recoveries for losses occurring during marriage will be community property, subject to apportionment under section 4800(c) in the event of a divorce.²⁰⁴ Any allocation of the remaining funds should

200. Section 4800(c) refers to the date of receipt rather than the date of injury. Because the section controls only those damages that are received as community property, however, damages for an injury that occurred prior to marriage, even if recovered during marriage, remain separate property under normal tracing principles. See *In re Estate of Clark*, 94 Cal. App. 453, 271 P. 542 (2d Dist. 1928).

201. *In re Marriage of Pinto*, 28 Cal. App. 3d 86, 104 Cal. Rptr. 371 (1st Dist. 1972).

202. REPPY & DE FUNIAK, *supra* note 30, at 180-82.

203. See generally Holmes & Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RESEARCH 213 (1967) (rating personal injury or illness sixth and change in health of a family member eleventh in magnitude of 43 stress-producing life events). See also El Ghatit & Hanson, *Outcome of Marriages Existing at the Time of a Male's Spinal Cord Injury*, 28 J. CHRONIC DISEASES 383 (1975).

204. Technically, amounts "received as community property" after divorce would be held by the former spouses as tenants in common. See note 147 *supra*. For the

reflect, on the one hand, the extent to which the community has borne expenses or lost earnings because of the injury and, on the other, the extent of the injured spouse's pain and suffering, and any outstanding or continuing expenses, disabilities, or loss of earnings.²⁰⁵ This treatment is especially important for a recovery received during a separation that was followed by a lengthy reconciliation. Indeed, even as to injuries for which recovery is not received until after legal separation or divorce, the proposed amendment to section 4800(c) has the advantage of focusing on the date of injury and its impact on the community, while preserving the judicial sensitivity that now exists under that section to the injured spouse's valid personal claims to the recovery. There is, of course, no precise way to insure that allocation at divorce accurately reflects the elements of a damage recovery unless special verdicts or explicitly allocated settlements are required whenever a married person is compensated for personal injuries. Nevertheless, the repeal of section 5126 and a listing in section 4800(c) of the factors discussed above would produce a far more exact result than is dictated by current law.

3. *The Wrongful Death of a Separated Spouse*²⁰⁶

In California surviving spouses, as heirs, are given standing to sue under the wrongful death statute.²⁰⁷ Because a spouse remains an heir until entry of a final judgment of dissolution, prior separation of the parties does not affect either spouse's standing to sue upon the other's death.²⁰⁸ The degree of recovery may be affected, however. Al-

purposes of section 4800(c), however, this point is irrelevant. See also 1 ARMSTRONG, *supra* note 147, at 776-79.

205. This allocation cannot be determined by the original ratio of community loss to personal loss, unless none of the damages received were used to absorb injury-related costs in the period between recovery and divorce. The difficulty of allocation should not be underestimated. No rule can adequately distinguish the personal from the property elements of many items of recovery—for example, punitive damages, damages for loss of consortium or invasion of privacy, or an award for pain and suffering (which may serve as a disguised award of attorneys' fees).

206. Related provisions for survival of the decedent's action for damages prior to death are found in CAL. PROB. CODE § 573 (West 1956 & Supp. 1977) and CAL. CIV. PROC. CODE § 385 (West 1973). Their relationship to California's provisions on wrongful death is discussed in L. JOHNS, CALIFORNIA DAMAGES LAW AND PROOF ch. 4, §§ 5-13, 34 (1969) [hereinafter cited as JOHNS].

207. CAL. CIV. PROC. CODE § 377 (West Supp. 1977) provides that the decedent's heirs or the decedent's personal representatives on behalf of the heirs may sue. One spouse is an heir of the other under CAL. PROB. CODE § 201 (West 1957). Other states' schemes vary: some allow spouses to bring the action; others give standing only to personal representatives to sue on behalf of the statute's beneficiaries. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 903-04 (4th ed. 1971). In the latter cases the surviving spouse is generally regarded as a primary beneficiary. *Id.* See also 22 AM. JUR. 2d *Death* §§ 48-49 (1965).

208. *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487, 213 P. 494 (1923) (sep-

though a spouse need not show actual dependency as a prerequisite to standing,²⁰⁹ compensation is measured by the pecuniary loss that the plaintiff will suffer due to the wrongful death.²¹⁰ The extent of this loss may, in turn, be affected by a rupture in the marital relationship if the parties' actions or court orders have terminated legal support obligations,²¹¹ since recovery may be based on either the decedent's legal support obligations or actual support payments.

A recovery predicated on the parties' legal relationship may reflect the loss of a spousal support right that actually existed at the time of the victim's death²¹² or, if there was none, the surviving spouse's loss of the possibility for later reinstatement of support rights.²¹³ Accordingly, recovery has been allowed for such potential support even where the right was dependent upon a marital reconciliation that, although contemplated, had not taken place prior to the victim's death.²¹⁴ This compensation for "possible future benefits"²¹⁵ distinguishes wrongful death recovery from family allowances in probate, where only those support obligations of the decedent that actually existed at the time of

aration of 13 years); *Luis v. Cavin*, 88 Cal. App. 2d 107, 117, 198 P.2d 563, 570 (3d Dist. 1948). This is the general rule. 22 AM. JUR. 2d *Death* § 68 (1965).

209. *Steed v. Imperial Airlines*, 12 Cal. 3d 115, 121, 524 P.2d 801, 805, 115 Cal. Rptr. 329, 333 (1974) (dictum); *Taylor v. Albion Lumber Co.*, 176 Cal. 347, 351-52, 168 P. 348, 350 (1917); see *Syah v. Johnson*, 247 Cal. App. 2d 534, 55 Cal. Rptr. 741 (4th Dist. 1966).

Following the California Supreme Court's decision in *Steed* that an unadopted, dependent stepchild did not have standing to sue, the legislature amended the Code, giving standing to "the putative spouse, children of the putative spouse, stepchildren and parents," whether or not they are heirs, if they were dependent on the decedent. CAL. CIV. PROC. CODE § 377(b)(2) (West Supp. 1977).

210. *In re Estate of Riccomi*, 185 Cal. 458, 197 P. 97 (1921); *Sneed v. Marysville Gas and Elec. Co.*, 149 Cal. 704, 710, 87 P. 376, 379 (1906) ("either a loss arising from the deprivation of something to which such heirs would have been legally entitled . . . or . . . of benefits which . . . it could be reasonably expected such heirs would have received from the deceased . . . although . . . [from] a moral obligation only"). See generally 4 WITKIN SUMMARY, *supra* note 23, *Torts* § 790, at 3087-89. Pecuniary loss includes loss of comfort, society, and protection. *JOHNS*, *supra* note 206, ch. 4, §§ 45, 53.

211. See generally S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* §§ 6:4-6 (2d ed. 1975). Such actions or orders may also prevent the survivor's claim for loss of society, comfort, and protection. *JOHNS*, *supra* note 206, ch. 4, §§ 45-47, 53-55.

212. This recovery is possible following a separation of the parties even if the survivor took no action to enforce the right prior to the victim's death. *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487, 213 P. 494 (1923).

213. *Id.*; Comment, *The Deserted Wife's Loss from the Death of Her Husband*, 7 STAN. L. REV. 409, 410 & n.7 (1955).

214. *Luis v. Cavin*, 88 Cal. App. 2d 107, 198 P.2d 563 (3d Dist. 1948), noted at 22 S. CAL. L. REV. 478 (1949); *Rickards v. Noonan*, 40 Cal. App. 2d 266, 104 P.2d 839 (4th Dist. 1940). In each case the court held that evidence was admissible to show that the spouses had contemplated a reconciliation that would have reinstated support rights; a prior interlocutory divorce decree had suspended such rights in each case by making no spousal support award.

215. *Luis v. Cavin*, 88 Cal. App. 2d 107, 118, 198 P.2d 563, 570 (3d Dist. 1948).

death may be considered.²¹⁶ Alternatively, a survivor who was actually receiving support at the time of death may recover without regard to the decedent's legal obligations, if the survivor falls within the class given standing to sue.²¹⁷ Thus, even separation agreements or court orders short of dissolution that terminate support obligations are not necessarily dispositive. The test is two-fold: Was the decedent in fact supporting the plaintiff? If not, was the decedent legally obligated to support the plaintiff so that the obligation might have been enforced but for the wrongful death?

The current law that permits recovery for wrongful death during informal separations is sound and should be maintained. If Civil Code section 5131, which deals with separations under agreements that have no provision for support, is repealed as suggested above,²¹⁸ the wrongful death cases that vindicate support rights in the absence of interspousal litigation will clearly control. Even if no such revision is made, the wrongful death statute should continue to permit a surviving spouse's recovery against a tortfeasor for amounts that might reasonably have been awarded had interspousal support litigation taken place during the victim's lifetime.²¹⁹

D. Public Benefits

1. Social Security, Worker's Compensation, and General Assistance

Although an informal separation is often legally irrelevant to claims for public benefits, it may have a significant practical impact on the claimant's eligibility. This discussion highlights the varying impact benefit programs give to changes in marital status and financial resources. Although incomplete, it serves as a reminder that public programs may well be relevant in the period following separation.

The Social Security Act provides certain benefits for the parent of an insured's surviving dependent children without regard to the

216. 22 S. CAL. L. REV. 478-79 (1949). See text accompanying notes 248-250 *infra*.

217. *Wilson v. City & County of San Francisco*, 106 Cal. App. 2d 440, 444, 235 P.2d 81, 83 (1st Dist. 1951). Certain classes of actual dependents are given standing although they would not otherwise qualify as the decedent's heirs. See note 209 *supra*.

218. See text accompanying notes 33-48 *supra*.

219. Criticism of recovery in the frustrated reconciliation cases has been based upon contract law relating to speculative damages; the reasoning seems inappropriate given the fact that tort recovery is based not upon facilitation of commerce but upon private recompense for tortious activity in order to alleviate burdens on the decedent's family and, potentially, the public purse. Compare 22 S. CAL. L. REV. 478, 479-80 (1949) (criticizing recovery in cases where reconciliation was not effectuated prior to the death) with D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.3 (1973) (discussing causation, certainty and remoteness in damages).

parents' continuing marital status.²²⁰ Marital status is, however, relevant to claims for a dependent spouse; here the parties' marriage is tested by the law of the state in which the insured individual is domiciled.²²¹ Since only a final judgment of dissolution alters marital status in California,²²² an informal or legal separation or an interlocutory judgment of dissolution will not affect eligibility.

Until recently, California's worker's compensation law predicated both standing and, in some cases, the amount of recovery for death benefits by a surviving spouse upon the couple's legal relationship at the time of the worker's injury.²²³ In May 1977, however, the California Supreme Court struck down on gender-discrimination grounds the statute's conclusive presumption of dependency that had benefited some surviving widows.²²⁴ As a result, the ambiguous case law that had required a legal support obligation during an informal separation as a prerequisite to the conclusive presumption is now moot.²²⁵ Only the automatic statutory benefit for the remaining parent of the worker's dependent children²²⁶ and cases that discuss the requirements for proof

220. 42 U.S.C. § 402(g)(1) (Supp. V 1975) (mothers' benefits available to surviving divorced mothers without requirement of a 20-year marriage); *see also* Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (extending mothers' benefits to surviving fathers on equal protection grounds).

221. Parties remain married for Social Security eligibility purposes if they would be considered married by the law of the state in which the insured individual is domiciled, or if that state would treat them as spouses for purposes of its intestate succession laws. (If the individual is not domiciled in any state, the law of the District of Columbia is applied.) 42 U.S.C. § 416(h)(1)(A) (1970). *See also* 42 U.S.C. §§ 402(b), (e), 416(d)(1), (2) (1970 & Supp. V 1976) (20 years of marriage prior to final divorce decree required for wives' or widows' benefits).

222. *See* CAL. CIV. CODE § 4350 (West Supp. 1977); *Estate of Seiler*, 164 Cal. 181, 128 P. 488 (1912); *In re Estate of Dargie*, 162 Cal. 51, 121 P. 320 (1912).

223. CAL. LABOR CODE §§ 3501(a), 3502 (West 1970).

224. *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977).

225. *E.g.*, *London Guar. & Acc. Co. v. Industrial Acc. Comm'n*, 181 Cal. 460, 184 P. 864 (1919); *Continental Casualty Co. v. Pillsbury*, 181 Cal. 389, 184 P. 658 (1919); *Benbow v. Workmen's Comp. Appeals Bd.*, 36 Cal. Comp. Cases 718 (1971); *Law v. Bethlehem Steel Co.*, 7 Cal. Comp. Cases 217 (1942); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 7 Cal. Comp. Cases 91 (1942); *Zurich Gen. Acc. & Liab. Ins. Co. v. Delgado*, 4 Cal. Comp. Cases 11 (1939). These cases were decided while a predecessor to Civil Code section 5131 was in effect.

226. CAL. LABOR CODE § 4702 (West Supp. 1977) provides that a death benefit of \$50,000 is available "in cases of total dependency . . . except in the case of a *surviving widow and one or more dependent minor children*, in which case the death benefit shall be fifty-five thousand dollars." (Emphasis added.) A nondependent widow recovered under an earlier version of this statute (which differed only as to the authorized amount of a benefit) because the couple's children, who had been in the decedent's care, had been dependent upon him. *State Comp. Ins. Fund v. Industrial Acc. Comm'n*, 95 Cal. App. 2d 671, 213 P.2d 518 (1st Dist. 1950). If section 4702 is not invoked, actual spousal dependency must be established. *See* CAL. LABOR CODE § 3502 (West 1970). The *Arp* opinion notes that this section continues to grant widows and widowers with

of partial or total dependency²²⁷ remain relevant to informally separated families.

The dramatic changes in family finances that often accompany informal separation may make several other forms of assistance relevant. These range from food stamps²²⁸ and displaced homemaker training courses²²⁹ to medical benefits,²³⁰ supplemental security income,²³¹ and general assistance programs.²³² These programs and others are in fact relied upon by many divided households. The profound economic impact of separation and divorce upon the parent who cares for the couple's children is indicated by recent statistics: approximately sixty percent of California's single-parent families receive Aid to Families with Dependent Children (A.F.D.C.).²³³ These families, some of whose intrafamilial economic rights are severely prejudiced by the current laws that govern informal separations, bear a sharply disproportionate share of the burdens that accompany family breakdown.

2. *Aid to Families with Dependent Children*

The primary purpose of A.F.D.C. is to encourage the maintenance of family ties during times of economic hardship by providing financial assistance to qualifying families.²³⁴ By subsidizing parental care, this

children the same benefits that the unconstitutional conclusive presumption of dependency had also afforded to "childless, financially self-sufficient wives." *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d 395, 410, 563 P.2d 849, 858, 138 Cal. Rptr. 293, 302 (1977).

227. See 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1502[5] (2d ed. 1976). The benefits that are available to dependents (surviving children as well as a surviving spouse) are discussed in O'Connell, *Benefits, Costs, and Penalties*, in CALIFORNIA WORKMEN'S COMPENSATION PRACTICE §§ 14.52-.61 (C.E.B. 1973 & Supp. 1976).

228. CAL. WELF. & INST. CODE §§ 18900-18919 (West 1972 & Supp. 1977).

229. CAL. GOV'T CODE § 7300 (West Supp. 1977) (authorizing a pilot job training program for homemakers who through "divorce, death of spouse, or other loss of family income" are in need of assistance (emphasis added)).

230. CAL. WELF. & INST. CODE §§ 14000-14501 (West 1972 & Supp. 1977).

231. 42 U.S.C. §§ 1381-1385 (Supp. V 1976).

232. CAL. WELF. & INST. CODE §§ 17000-17410 (West 1972 & Supp. 1977).

233. Letter from Robert A. Horel, Chief of the Estimates Bureau, California State Department of Benefit Payments, to the author (July 22, 1977) (copy on file at the *California Law Review*): "A January 1977 study prepared for the [Department] . . . found that approximately 60 percent of all single parent families in California with children under 18 years of age received payments under the Aid to Families with Dependent Children (AFDC) program in 1975." (Citing Abrahamse, DeFerranti, Fleischauer & Lipson, AFDC CASELOAD AND THE JOB MARKET IN CALIFORNIA: SELECTED ISSUES 119 (#R-2115-CDOBP, RAND Corporation, Santa Monica, Ca., 1977).

234. 42 U.S.C. § 602(a) (Supp. V 1975). The program is administered in California by the Department of Benefit Payments of the State Health and Welfare Agency. CAL. WELF. & INST. CODE §§ 11200-11489 (West 1972 & Supp. 1977). By subsidizing parental care, the program seeks to avoid institutionalization of needy, dependent children. 42 U.S.C. § 601 (1970); CAL. WELF. & INST. CODE § 11205 (West Supp. 1977).

program seeks to avoid institutionalization of needy, dependent children. Federal regulations stipulate that the "continued absence from the home" of either parent will qualify children for federal benefits under the program.²³⁵ There is no requirement that the spouses intend the separation to be permanent, and the California regulations defining "continued absence" require only "dissociation; that is, a substantial severance of marital and family ties."²³⁶ During informal separations, the absence requirement generally can be met either by one spouse's signed statement declaring that the other parent has left the family and that "dissociation within the definition of 'continued absence' exists,"²³⁷ or by either parent's filing or retaining counsel "for the purpose of filing an action for dissolution of marriage, for a judgment of nullity, or for legal separation."²³⁸ There is no waiting period; although section 11254 of the California Welfare and Institutions Code states that no aid shall be granted "to or in behalf of persons whose need and deprivation are due to parental separation or desertion which has endured for less than three months," the statutory waiting period is no longer enforced.²³⁹ Separation, of course, does not terminate the absent parent's child support obligations.²⁴⁰ When a family receives

235. 45 C.F.R. § 233.10(b)(2)(ii)(a)(2) (1976).

236. CAL. DEP'T OF BENEFIT PAYMENTS, MANUAL OF POLICIES AND PROCEDURES—ELIGIBILITY AND ASSISTANCE STANDARDS § 41-450.1, .11, effective date Oct. 26, 1974 [hereinafter cited as BENEFIT PAYMENTS MANUAL]:

1. *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation; that is, a substantial severance of marital and family ties which deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities compared to previously existing conditions.

"Continued absence" does not exist:

- .11 When one parent is physically absent from the home on a temporary basis. Examples are visits, trips or temporary assignments undertaken in connection with current or prospective employment.

These regulations implement CAL. WELF. & INST. CODE § 11250(b) (West Supp. 1977).

237. BENEFIT PAYMENTS MANUAL, *supra* note 236, at § 41-450.25, .5. Some California counties have promulgated regulations that establish specified time periods as prima facie evidence of continued absence. Conversation with Janet Damesyn, Legal Counsel, California Department of Benefit Payments, in Sacramento (February 17, 1977).

238. BENEFIT PAYMENTS MANUAL, *supra* note 236, at § 41-450.23.

239. Conversation with Janet Damesyn, Legal Counsel, California Department of Benefit Payments, Sacramento (February 17, 1977). The waiting period was successfully challenged in *Damico v. California*, No. 46538 (N.D. Cal. Sept. 12, 1969) (not certified for publication). The *Damico* ruling was later made retroactive in *McGonigle v. California*, No. 969912 (L.A. Co. Superior Ct. May 20, 1970) (not certified for publication).

240. See notes 57-59 *supra* and accompanying text. *But see* notes 60-77 *supra* and accompanying text.

aid because of the absence of one parent, the absent parent is obligated, according to that parent's ability during the absence, to reimburse the county for amounts paid to the family.²⁴¹ Amounts actually paid to the family during separation by the absent parent are deducted from any reimbursement due the county.²⁴²

These provisions for aid to separated families alleviate hardship in cases of genuine matrimonial difficulty. They nevertheless have been properly criticized as encouraging family break-up in states where no additional provision is made for A.F.D.C. to needy families in which there are no marital problems.²⁴³ Fortunately, by providing A.F.D.C. to intact but unemployed couples the California scheme provides access to benefits without encouraging inmarital separations.²⁴⁴ If separation has occurred, however, reconciliation may be discouraged even by California's law. First, payments will be terminated if the absent parent returns and the family does not otherwise qualify for benefits. Second, public support enforcement efforts that are aided by the custodial parent, albeit under compulsion, may alienate the spouses.²⁴⁵ So long as enforcement efforts are moderated by a realistic appraisal of the absent party's ability to pay, separations flowing from either of these factors are more appropriately understood as casualties of parental deficiencies rather than defects in the structure of A.F.D.C. Overzealous enforcement, however, will jeopardize family reunification with far greater long-term societal costs than the meager recovery to the state treasury can justify.

III

PROBATE IMPLICATIONS

A. Family Support Allowance and Related Benefits

Surviving spouses are eligible for various benefits under California's Probate Code. The statutes controlling family allowances²⁴⁶ and possession of homestead property²⁴⁷ appear to grant benefits to any surviving spouse. Because these benefits are designed to compensate for the immediate impact of a loss of support, however, the California Su-

241. CAL. WELF. & INST. CODE § 11350(b) (West Supp. 1977).

242. *Id.* § 11350(c).

243. THE PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, BACKGROUND PAPERS 272-73, 276 (1970) [hereinafter cited as BACKGROUND PAPERS].

244. *See* CAL. WELF. & INST. CODE § 11250 (West Supp. 1977).

245. BACKGROUND PAPERS, *supra* note 243, at 276; *see* 42 U.S.C.A. § 602(a)(26) (B) (Supp. 1977) (requiring that an applicant or recipient "cooperate with the State . . . (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed").

246. CAL. PROB. CODE § 680 (West Supp. 1977).

247. *Id.* §§ 660-666, 668 (West Supp. 1977).

preme Court in *Estate of Brooks*²⁴⁸ imposed an additional requirement: the surviving spouse must have been receiving support or have been entitled to support from the decedent at the time of death.²⁴⁹ As a result, an informal separation by agreement without provision for support under the Civil Code will preclude access to these support substitutes under the Probate Code unless the survivor was actually receiving support.²⁵⁰ *Brooks* has been aptly criticized for precluding benefits during administration where the survivor was not entitled to support.²⁵¹ To correct this inequity, Civil Code section 5131 should be repealed and *Brooks* should be narrowed by statute or judicial interpretation. Under both the Civil and the Probate Code, informal separations should not be permitted to jeopardize important intrafamilial rights when there is no evidence that the parties foresaw or intended any such impact.

In dicta the *Brooks* court extended this support-entitlement rule to the Probate Code's provisions for exemptions from creditors and the setting aside of small estates to surviving family members.²⁵² The right to claim exempt property probably cannot be distinguished from other support substitutes.²⁵³ Set-aside provisions, however, should no longer be

248. 28 Cal. 2d 748, 171 P.2d 724 (1946).

249. The *Brooks* opinion resolved conflicting lines of precedent by rejecting earlier case law that had focused on whether the couple resided in a "family" unit and held that the couple's relationship is relevant only in so far as it determines whether support rights existed at the time of death. The court reasoned that the Probate Code's "Support of the Family" provisions were designed "to continue, during the settlement of the estate, the support that the wife was previously receiving or was at least entitled to receive." 28 Cal. 2d at 755, 171 P.2d at 727. In doing so, the court recognized the rule that support rights are terminated by an interlocutory divorce decree that makes no provision for support. 28 Cal. 2d at 755, 171 P.2d at 728.

250. See, e.g., *Estate of Fallon*, 49 Cal. 2d 402, 317 P.2d 963 (1957); *Estate of Fawcett*, 232 Cal. App. 2d 770, 43 Cal. Rptr. 160 (1st Dist. 1965); *Estate of Coon*, 107 Cal. App. 2d 531, 237 P.2d 291 (3d Dist. 1951); *Estate of Cooper*, 97 Cal. App. 2d 186, 217 P.2d 499 (2d Dist. 1950). See 7 WITKIN SUMMARY, *supra* note 23, *Wills & Prob.* § 530, at 5944-46.

251. 35 CALIF. L. REV. 303, 306 (1947). The legal position of a spouse who is without support rights following an interlocutory judgment of dissolution that makes no provision for support because the court was without the requisite personal jurisdiction is the same as that of a spouse who has no support rights during an informal separation by agreement without provision for support. In either case, support will become available if a court with proper jurisdiction later considers the matter. *Hudson v. Hudson*, 52 Cal. 2d 735, 744-45, 344 P.2d 295, 300 (1959); CAL. CIV. CODE §§ 4357, 4801 (West Supp. 1977). Thus, in either case *Brooks* is properly criticized for considering support rights only at the moment of death and not recognizing the continuing legal basis for requesting future support.

252. 28 Cal. 2d at 755, 171 P.2d at 727. (The opinion's reference to a restriction of "the decedent's absolute testamentary freedom" appears to be a reference to the Probate Code's provisions on the setting aside of small estates.) See CAL. PROB. CODE §§ 640-646 (West 1969 & Supp. 1977).

253. Chapter 11 of division 3 of the Probate Code, entitled "Support of the Family," includes three topics: article 1 governs the possession and setting aside of homestead and exempt property; article 2 authorizes family allowances. CAL. PROB. CODE

controlled by *Brooks*. The Code formerly permitted a court to assign small estates to a surviving spouse with limited means, regardless of a contrary testate disposition and free of the claims of general creditors.²⁵⁴ A 1972 amendment, however, deleted the means test,²⁵⁵ and a 1976 statute narrowed the protection from the decedent's creditors.²⁵⁶ Now that even wealthy survivors may demand that estates valued at no more than \$20,000 be set aside, the procedure is more properly viewed as a forced disposition than as support.²⁵⁷ Eligibility should therefore no longer be conditioned by the support-entitlement test, but should rather be governed exclusively by the claimant's standing to take property as a surviving spouse under the other Code provisions governing devolution of property.

B. Devolution of Property

Informal separations, even those affecting support obligations, are irrelevant under other provisions of the Probate Code. Accordingly, if a separated spouse dies intestate, the surviving spouse's portion of the estate is unaffected by the separation or marital litigation so long as no final judgment of dissolution had been entered before death.²⁵⁸ Similarly, should the decedent have provided for the survivor by will, the spouse will take according to its terms.²⁵⁹

The amount or nature of the property that remains in the decedent's estate may well be affected, however, by actions that the parties

§§ 660-668 (homestead and exempt property); 680-684 (family allowance) (West 1956 & Supp. 1977). Exempt property is thus both expressly within the section of the Code that purports to provide support mechanisms, and closely interwoven with the specific sections that govern possession and set-aside of homestead property. In any event, exemptions from creditors are designed to protect items that the legislature deems basic to the continuing welfare of the debtor's family and are, therefore, properly classified as a form of family support.

254. Former Probate Code section 645, ch. 1270, § 1, 1967 Cal. Stats. 3075.

255. Act of August 4, 1972, ch. 555, § 2, 1972 Cal. Stats. 957.

256. Act of Sept. 20, 1976, ch. 1028, § 4, 1976 Cal. Legis. Serv. 4329 (codified in CAL. PROB. CODE § 645.3 (West Supp. 1977)) (imposing personal responsibility on the person receiving the set-aside for the unsecured debts of the decedent, subject to a specific statute of limitations).

257. See CAL. PROB. CODE §§ 640-646 (West Supp. 1977). The set-aside provisions are included in chapter 10 of division 3 of the Code, entitled "Disposition of Estates Without Administration," not in the "Support of the Family" section. See note 253 *supra*.

258. *In re Estate of Seiler*, 164 Cal. 181, 128 P. 334 (1912); *In re Estate of Dargie*, 162 Cal. 51, 121 P. 320 (1912).

259. In California not even a final judgment of dissolution will prevent distribution according to the terms of a will that was written prior to the divorce and names a subsequently divorced spouse as a beneficiary. *Estate of Patterson*, 64 Cal. App. 643, 222 P. 374 (2d Dist. 1923), *appeal dismissed*, 266 U.S. 594 (1925). See generally Comment, *The Effect of Divorce on Wills*, 40 S. CAL. L. REV. 708 (1967) (surveying the varying state rules).

took in conjunction with their separation. If express or implied transmutation agreements have altered the interests held by the decedent prior to death, the resulting interests of the surviving spouse may be affected as a practical matter. The survivor remains an heir as before but may receive a smaller portion of the estate since separate property passes under different intestacy statutes than does community property.²⁶⁰ Where there is a will, the result will turn instead upon the testator's choice of language: if a specified portion of the estate is devised to the surviving spouse, no great difference may result; but if the will assigns the testator's community property interests to the spouse and devises separate property to others, an estate devoid of community property will functionally disinherit the surviving spouse.

Parties who intend to alter estate consequences by a property division are free to make adjustments in their testamentary documents or to obtain waivers of potential spousal claims to the estate. Where they have not done so, devolution of property under the Probate Code follows the rule recommended above: normal principles apply to intra-familial relationships during informal separations unless the parties have specifically indicated their contrary desires.

IV

THE EFFECT OF RECONCILIATION

Should the parties reconcile following an informal separation, much of the legal impact of their separation will be nullified prospectively. Earnings following the reconciliation will be community property and the usual rules of community property liability will apply to subsequently incurred contractual debts. Personal injury damage recoveries received thereafter will again be treated as a form of community property subject to special rules; and, for tort creditors, the problem of ascertaining whether an activity was undertaken for the benefit of the community is greatly simplified. Reconciliation will also restore a basis for proving damage through the loss of existing support rights under the wrongful death statute. Insurance and credit access problems may well be resolved as a practical matter. Only in the areas of public assistance and taxation may certain benefits be lost, but any loss is apt to be accompanied by overall financial gain as the family once again enjoys the economies of a single household. Finally, although succession laws will not be affected by reconciliation, the related pro-

260. Compare CAL. PROB. CODE § 201 (West 1956) (community property of an intestate descends to surviving spouse) with CAL. PROB. CODE §§ 221, 224 (West 1956) (if there are surviving children, parents, or specified collateral relatives of the deceased, separate property descends only in part to surviving spouse).

bate provisions that treat support rights as a prerequisite for benefits will again clearly protect the entire family. In each of these areas, reconciliation will restore the full range of duties and benefits of married life. Although this usually will occur upon the resumption of cohabitation, a decision to reconcile may be sufficient.²⁶¹

The result is less easily predicted in other areas. The continuing effect of implied transmutation agreements, informal spousal support agreements, and agreements or decrees that regulate child custody or child support is unclear. The difficulty is twofold: there is no case law directly on point, and the analogous cases on reconciliation following a separation that is accompanied by a written separation agreement or marital litigation are occasionally difficult to rationalize. The cases on reconciliation following formal separations are best understood, however, as examples of the California courts' willingness to give effect to the clear import of parties' actions in the absence of express agreements.

Courts have held that a good faith reconciliation abrogates a written separation agreement that contains spousal support provisions and revives normal interspousal support obligations.²⁶² One approach reaches this result by reasoning that Civil Code section 4802 only authorizes spousal or child support agreements "during [the] separation."²⁶³ Another argues that support agreements terminate upon reconciliation due to a failure of consideration.²⁶⁴ Neither of these approaches is necessary. Rather, a third rationale that is found in the cases and is readily transferable to reconciliations following informal separations asks instead whether the parties have entered into a new oral or implied agreement to reinstate interspousal obligations.²⁶⁵

261. *Walsh v. Walsh*, 108 Cal. App. 2d 575, 299 P.2d 472 (1st Dist. 1952) (dictum); *Rickards v. Noonan*, 40 Cal. App. 2d 266, 104 P.2d 839 (4th Dist. 1940).

262. The cases require a mutual intention, *Dean v. Dean*, 77 Cal. App. 2d 98, 174 P.2d 705 (3d Dist. 1946), formed in good faith, *Helbush v. Helbush*, 209 Cal. 758, 290 P. 18 (1930), to reunite permanently, *Estate of Abila*, 32 Cal. 2d 559, 561, 197 P.2d 10, 12 (1948); *Tompkins v. Tompkins*, 202 Cal. App. 2d 55, 20 Cal. Rptr. 530 (2d Dist. 1962).

263. *Dinkelspiel*, *Legal Problems of Reconciliation*, in 2 CAL. FAMILY LAWYER, *supra* note 7, § 29.29; see CAL. CIV. CODE § 4802 (West 1970); *Lloyd Corp. v. Industrial Acc. Comm'n*, 61 Cal. App. 2d 275, 142 P.2d 754 (2d Dist. 1943) (under predecessor section).

264. *Sargent v. Sargent*, 106 Cal. 541, 546, 39 P. 931, 932 (1895); *Morgan v. Morgan*, 106 Cal. App. 2d 189, 193, 234 P.2d 782, 785 (2d Dist. 1951). They must, however, have intended to reunite as husband and wife. *Sargent v. Sargent*, 106 Cal. at 544, 39 P. at 932; *Wells v. Stout*, 9 Cal. 479 (1858).

265. *Brown v. Brown*, 170 Cal. 1, 147 P. 1168 (1915) (oral); *Tompkins v. Tompkins*, 202 Cal. App. 2d 55, 20 Cal. Rptr. 530 (2d Dist. 1962) (implied); *Mundt v. Connecticut Gen. Life Ins. Co.*, 35 Cal. App. 2d 416, 95 P.2d 966 (1st Dist. 1939) (oral); *ARMSTRONG*, *supra* note 147, at 582-84.

Similarly, transmutation agreements that restore separate property to the community or preserve the separate property character of earnings following reconciliation may be established by inferences arising from the fact of reconciliation,²⁶⁶ the manner in which the parties have conducted their affairs after reconciliation,²⁶⁷ or by proof of a controlling oral agreement.²⁶⁸ Unless such an implied or express agreement can be shown or unless commingling occurs following reconciliation so that property can no longer be traced to a separate source,²⁶⁹ property that is separate by virtue of an earlier transmutation agreement or because it was acquired with separate property earnings during separation will remain separate. As always, the parties' mutual intention controls.²⁷⁰ These rules have developed in case law concerning reconciliation following written separation agreements or interspousal divorce litigation. Because they focus on the agreement that accompanies reconciliation rather than on the nature of the prior agreement that is thereby rescinded or modified, however, they are equally applicable to reconciliations following informal separation and property agreements.

The reasoning that supports them can profitably be extended to two final areas of concern: child custody and child support. Informal separations do not automatically alter the parents' equal rights to the custody of their children, or their joint responsibilities for child support. Accordingly, separation or reconciliation will not necessarily affect either matter. Support and custody litigation is frequently pursued,

266. *Tompkins v. Tompkins*, 202 Cal. App. 2d 55, 59, 20 Cal. Rptr. 530, 532 (2d Dist. 1962); *Morgan v. Morgan*, 106 Cal. App. 2d 189, 234 P.2d 782 (2d Dist. 1951). While the fact of reconciliation is thus material, it is not conclusive. *Bluhm v. Bluhm*, 129 Cal. App. 2d 546, 277 P.2d 421 (4th Dist. 1954); *Margolis v. Margolis*, 115 Cal. App. 2d 131, 251 P.2d 396 (2d Dist. 1952); *De Vault v. De Vault*, 90 Cal. App. 2d 15, 202 P.2d 375 (2d Dist. 1949). The question is one of fact, to be determined at trial. *Estate of Valentine*, 123 Cal. App. 2d 418, 266 P.2d 880 (2d Dist. 1954); *Margolis v. Margolis*, 115 Cal. App. 2d at 137, 251 P.2d at 400; *Morgan v. Morgan*, 106 Cal. App. 2d at 192, 234 P.2d at 784; *De Vault v. De Vault*, 90 Cal. App. 2d at 16-17, 202 P.2d at 376.

267. *Lamb v. Lamb*, 131 Cal. App. 2d 489, 280 P.2d 793 (1st Dist. 1955). See also *Morgan v. Morgan*, 106 Cal. App. 2d 189, 234 P.2d 782 (2d Dist. 1951) (failure to request reimbursement of property that passed under an agreement that was cancelled by mutual consent upon reconciliation constitutes waiver). But where the parties have conducted themselves in accord with an earlier agreement, they will be held to its terms. *Crossley v. Crossley*, 97 Cal. App. 2d 627, 218 P.2d 132 (2d Dist. 1950); *Plante v. Gray*, 68 Cal. App. 2d 582, 157 P.2d 421 (2d Dist. 1945) (reconciliation agreement).

268. *Estate of Boeson*, 201 Cal. 36, 255 P. 800 (1927); *Brown v. Brown*, 170 Cal. 1, 147 P. 1168 (1915); *Schwab v. Schwab*, 168 Cal. App. 2d 20, 335 P.2d 174 (1st Dist. 1959).

269. See *See v. See*, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966) (commingling); *Miller v. Brode*, 186 Cal. 409, 199 P. 531 (1921) (tracing).

270. *Morgan v. Morgan*, 106 Cal. App. 2d 189, 234 P.2d 782 (2d Dist. 1951); *De Vault v. De Vault*, 90 Cal. App. 2d 15, 202 P.2d 375 (2d Dist. 1949).

however, even in the absence of interspousal litigation concerning the marital relationship itself.²⁷¹ Should child support or custody orders be entered, or should child support be established under a written separation agreement,²⁷² a parental reconciliation should impliedly suspend their provisions only so long as the parents' actions indicate that they are not regulating their intrafamilial relationships by the terms of such decrees or agreements. Except for child support provisions in written separation agreements, neither child custody nor child support may be conclusively determined by parental agreement.²⁷³ Thus, the implied contract rationale that permits other applications of transmutation theory to reconciliations is not directly applicable. However, the same conduct that establishes consensus between spouses as to matters within their contractual control may appropriately be used to establish an estoppel or waiver if a parent later attempts to enforce orders that were ignored during the reconciliation.

It is neither desirable nor necessary to go as far as the holding and dictum of the California Supreme Court in *Davis v. Davis*.²⁷⁴ The custodial parent in *Davis* was denied recovery under a child support order that had been entered at the time the parents' first divorce when she sued upon it following the couple's subsequent remarriage and second divorce. The court enunciated a rule, based upon sources from other states, that both child support and child custody orders are nullified by parental remarriage.²⁷⁵ Should the question arise, there seems to be no adequate basis for distinguishing the treatment of such orders where reconciliation rather than remarriage reestablishes the family unit. A resulting abrogation of child custody orders is not apt to be troublesome. This rule would, in fact, best serve the interests of creditors, who otherwise might be precluded from recovery from the resident, technically "noncustodial," parent for items of support that were furnished to the child.²⁷⁶ At the same time, it candidly recognizes that reconciliation will in any event provide a basis for a renewed inquiry into custody matters should they later arise.²⁷⁷ A nullification of child

271. See notes 57 and 74 *supra*.

272. CAL. CIV. CODE § 4802 (West 1970); see note 47 *supra*.

273. CAL. CIV. CODE §§ 4600, 4700, 4811(a) (West Supp. 1977); 6 WITKIN SUMMARY, *supra* note 23, *Husband and Wife* § 189, *Parent and Child* §§ 71, 124.

274. 68 Cal. 2d 290, 437 P.2d 502, 66 Cal. Rptr. 14 (1968).

275. *Id.* at 292, 437 P.2d at 503, 66 Cal. Rptr. at 15.

276. See text accompanying notes 75-77 *supra*.

277. Modification of a prior custody award is proper upon a showing of changed circumstances that alter the court's determination of the child's best interests. CAL. CIV. CODE § 4600 (West Supp. 1977); 6 WITKIN SUMMARY, *supra* note 23, *Parent and Child* §§ 85-86. Resumed cohabitation would undoubtedly constitute a changed circumstance sufficient to authorize a renewed inquiry into the child's best interests. Only in highly unusual circumstances would a court decline to restore to the parents the joint custody rights that ordinarily exist during parental cohabitation.

support orders, on the other hand, exacerbates the potential prejudice to a custodial parent if the parties, as in *Davis*, separate for a second time. Unless the rule that precludes reimbursement for a parent's "voluntary" postseparation child support expenditures is amended or reinterpreted, the parent who earlier received a child support award may well be lulled into expending sums that cannot be recovered, even in part, by the mistaken but reasonable assumption that an outstanding support order establishes a child support obligation that may be enforced against the other spouse. In a strongly-worded concurrence in *Davis*, Justice Tobriner emphasized that recovery should have been allowed if reimbursement rather than enforcement of the previous order had been sought and asserted that the majority improperly relied upon the case that established the rule that prelitigation support expenditures are not reimbursable.²⁷⁸ It is disquieting that the majority did not narrow its language in the face of this claim, but instead retained an ambiguous citation to the case.²⁷⁹ So long as the nonreimbursement doctrine remains, the *Davis* opinion should not be extended. Rather, in cases of either remarriage or reconciliation, it should be restricted to its facts or distinguished as a waiver case.²⁸⁰

In sum, where statutes do not clearly define the rights and obligations of reconciled spouses, courts must remain alert to the parties'

278. 68 Cal. 2d at 293-94, 298-99, 437 P.2d at 504, 507, 66 Cal. Rptr. at 16, 19. Justice Tobriner reached only the question of reimbursement following a divorce or custody order granted by a court without personal jurisdiction over the defendant. Reimbursement should also be allowed in other cases where a custody order is unaccompanied by support litigation. See note 74 *supra*.

279. 68 Cal. 2d at 291, 437 P.2d at 503, 66 Cal. Rptr. at 15, citing *Dimon v. Dimon*, 40 Cal. 2d 516, 254 P.2d 528 (1953). See notes 64-74 *supra* and accompanying text. The ambiguity arises because the citation is included in a list of the cases argued by the plaintiff to establish a continuing parental support obligation during separation. Nonetheless, retention of the citation in a list that might easily have been shortened in light of the Tobriner concurrence suggests that the court relied upon the restraints as well as the extensions of postseparation responsibility that are articulated in the *Dimon* opinion. Given Chief Justice Traynor's earlier disapproval of the nonreimbursement rule, however, it is difficult to understand why he joined in the majority opinion in *Davis* rather than in the Tobriner concurrence, unless he viewed *Davis* as not properly reaching the reimbursement issue, since reimbursement was not pleaded below. See *Dimon v. Dimon*, 40 Cal. 2d at 526, 529-31, 254 P.2d at 533, 534-36 (Traynor, J., concurring and dissenting).

280. See 68 Cal. 2d at 290-91, 437 P.2d at 502-03, 66 Cal. Rptr. at 14-15. The mother did not seek to enforce the prior support order until the couple stipulated to a new child support order one and one-half years after she learned of the father's return to California. Although Justice Tobriner was uncomfortable with this fact, it is possible that the costs of litigating a relatively small claim rather than a true waiver may have delayed enforcement efforts. See *id.* at 293, 437 P.2d at 504, 66 Cal. Rptr. at 16. At the time of the *Davis* case, California had not yet adopted its simplified procedures for securing an assignment of wages where there is a history of nonpayment of child support. See CAL. CIV. CODE § 4701(b) (West Supp. 1977).

express or properly implied understandings. Although such reconciliation agreements will be binding only in matters that are amenable to spousal agreement under Civil Code section 5103,²⁸¹ they are of direct relevance and should be accorded respect when custody and child or spousal support matters are at stake. Nullification of orders that were entered in related interspousal litigation should be approached with great caution, and imposed only where the spouses' conduct after reconciliation demonstrates that they no longer reasonably relied upon such orders.²⁸²

CONCLUSION

The current California law governing informal marital separations dictates results that are clearly beyond the expectations of most couples and that frequently conflict with reasonable policy. These rules provide a trap for the unwary that, when discovered, may embitter or frustrate those thousands of couples whose separations were understandably predicated upon emotional needs and were not accompanied by legal planning. If these laws are revised so that intrafamilial obligations will remain constant during informal changes in family structure, spouses whose immediate concerns are with interpersonal problems will be free to focus on them without danger of legal prejudice. A similar benefit will extend to those who seek legal advice. For, to the extent that counsel may accurately reassure parties who plan a tentative separation that no major legal issues need to be resolved and that legal rights will not be jeopardized by separation, couples will be spared the emotionally exhausting, invariably divisive task of interspousal financial negotiations.

Most of the specific proposals advanced in this Article can be implemented by two basic reforms: retaining community property rights in earnings and maintaining child and spousal support obligations during separation unless the parties signal their contrary intention by a property agreement, a written support agreement, or interspousal litigation. Such reasonable rules would minimize both unfair surprise and the need for immediate legal action. To the extent that they do so, parties will be able to resolve their interpersonal difficulties, whether by reconciliation or by dissolution of their marriage, in a legal setting that facilitates rather than impedes unhurried self-determination.

281. CAL. CIV. CODE § 5103 (West 1970) (authorizing property agreements). Provisions based solely upon CAL. CIV. CODE § 4802 (West 1970) (separation agreements) are effective only during a spousal separation or following divorce.

282. This approach would be consistent with the philosophy expressed in CAL. CIV. CODE § 4381 (West Supp. 1977).