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Note

Sharing Debts: Creditors and Debtors Under the Uniform Marital Property Act

Two car dealers go to the home of a married couple to attempt to sell them a truck.[1] They talk with both spouses. The wife objects to the purchase, saying, among other things, that she does not want to jeopardize their farm as a result of the added debt. She refuses to take part in the purchase and the dealers leave without making a sale. Later, however, the husband goes to the car dealership and eventually purchases the truck. The purchase is financed through promissory notes signed by the husband, who defaults as the notes become due. The corporation brings suit against the couple, and the court holds that both spouses' marital property is liable for the debt, despite the wife's objections to the purchase.[2] The Uniform Marital Property Act (UMPA) would make this result the law in the forty-two common law states.[3]

The UMPA, published in the fall of 1983 by the National Conference of Commissioners on Uniform State Laws, combines principles of community property law and common law to create a new marital property regime. The Act proposes several significant changes in the property relations between spouses in common law jurisdictions,[4] among the most note-

1. This scenario is based on Bellingham Motors Corp. v. Lindberg, 126 Wash. 684, 219 P. 19 (1923).

2. The Washington Supreme Court held that the wife's objections were insufficient to sustain the defense that the agreement between the husband and the corporation made the husband individually liable. *Id.* at 686, 219 P. at 20.

3. "In the eight community property states, [the] UMPA would mainly cause cosmetic changes in procedure." Quinn, *Shared Property Ownership Should Be Part of Marriage Law,* Wash. Post, Aug. 22, 1983, at 50, col. 1. The eight community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

4. Important changes proposed by the UMPA include §§ 12 and 13 (classifying life insurance policies and proceeds and deferred employment benefits as marital property), § 10 (recognizing enforceable marital property agreements), and §§ 2 and 15(a) (imposing a duty of "good faith" behavior with respect to property between spouses and providing a cause of action for breach of that duty). All references to the UMPA are to the 1983 draft.

worthy of which are those relating to debt and credit. For example, the Act enables one spouse to incur an obligation that creates liability for the property of the other spouse, without joining the other spouse in the creation of the obligation, without notice that the obligation is being incurred, and even despite the nondebtor spouse's express disapproval of the obligation.[5] Further, although a nondebtor spouse's property may be liable for obligations incurred by the other spouse, the nondebtor spouse may still be denied most incidents of ownership for those credit acquisitions, even though having an actual ownership interest.[6] These results mark a significant departure from existing property law in common law jurisdictions.

This Note examines the Act's provisions on debt and credit and the changes these provisions would cause in common law states. The Note first reviews the debt and credit provisions of the common law[7] and American community property law.[8] The Note then examines the UMPA sections on debt and credit,[9] particularly those providing for the forced sharing of liabilities,[10] the management and control of marital property,[11] and the protection of a spouse's marital property interests.[12] Finally, the Note evaluates these changes in light of the interests the Act was designed to promote,[13] and concludes with a modest proposal for maximizing the benefits of the Act while avoiding potentially undesirable results.[14]

The Act is deserving of this timely analysis. The Wisconsin legislature has recently enacted legislation very similar to the UMPA,[15] and other legislatures are likely to consider the Act in the near future.[16] Identification of the potential strengths and

5. *See* U.M.P.A. § 8. This section has no joinder or notice requirement. The conclusion that liability can be created despite the nondebtor spouse's express disapproval derives from judicial interpretations of nearly identical community property law provisions. *See infra* notes 46-57 and accompanying text.

6. *See* U.M.P.A. § 5; *infra* notes 99-102 and accompanying text.

7. *See infra* notes 17-36 and accompanying text.

8. *See infra* notes 37-67 and accompanying text.

9. *See infra* notes 68-84 and accompanying text.

10. *See infra* notes 85-96 and accompanying text.

11. *See infra* notes 97-102 and accompanying text.

12. *See infra* notes 103-08 and accompanying text.

13. *See infra* notes 109-20 and accompanying text.

14. *See infra* notes 121-29 and accompanying text.

15. *See* Marital Property Act, 1983 Wis. Laws 186.

16. The UMPA has been under consideration by the Commissioners on Uniform State Laws since 1977 and has been discussed at American Bar Association meetings, state bar association meetings, and a public hearing in Washington, D.C. in February, 1983. Wenig, *The Marital Property Act*, 69 WOMEN LAW. J. 9, 10 (1983). At the public hearing, only one organization, the Wisconsin

weaknesses of the Act's unique approach should aid legislative consideration of the proposed uniform law.

I. DEBT AND CREDIT OF SPOUSES UNDER COMMON LAW AND AMERICAN COMMUNITY PROPERTY LAW

Instead of proposing an entirely new approach to marital property law, the UMPA draws heavily on existing common law and American community property law concepts. An understanding of the principles underlying the common law and community property law regimes is therefore essential to an understanding of the Act and the inequities it sought to overcome.

A. DEBT AND CREDIT OF SPOUSES UNDER COMMON LAW

In common law jurisdictions, property rights, both for married and single persons, generally are based upon title.[17] Whoever holds title to an item of property has the right to the incidents of ownership of that property, to the exclusion of all others without title.[18] Acquiring title, other than in cases of gift

Bar Association, opposed the Act. At the 1983 annual meeting of the National Conference of Commissioners on Uniform State Laws, representatives from thirty-five states voted to adopt the Act. Personal correspondence from William Cantwell, Reporter for the UMPA (Aug. 26, 1983). The American Bar Association's House of Delegates approved the Act at their August, 1984 meeting "as an appropriate act for those states desiring to adopt the substantive law suggested therein." *American Bar Association OKs Uniform Marital Property Act*, 52 U.S.L.W. 1027 (Aug. 27, 1984). Legislation modeled after the UMPA is under consideration in Colorado, Illinois, Indiana, Michigan, and Missouri. Winter, *UMPA Fights for Recognition*, 70 A.B.A.J. 76, 76 (1984).

17. Title enables an owner of property to maintain or assert possession and enjoyment of the property. Robertson v. Van Cleave, 129 Ind. 217, 232, 29 N.E. 781, 782 (1892), *aff'g* 26 N.E. 899 (1891); Loy v. Home Ins. Co., 24 Minn. 315, 318 (1877); Chapman v. Dougherty, 87 Mo. 617, 620 (1885). Title has been held to be the "foundation of ownership" in common law states. Loy v. Home Ins. Co., 24 Minn. at 318; Springfield Fire & Marine Ins. Co. v. Allen, 43 N.Y. 389, 395 (1871); In re Morgan's Estate, 223 Pa. 228, 232, 72 A. 498, 500 (1909). Title has even been defined as ownership. Hawkins v. Stiles, 158 S.W. 1011, 1021 (Tex. Civ. App. 1913), *rev'd on other grounds*, 207 S.W. 89 (Tex. Comm'n App. 1918).

18. *See* Houston v. Farris, 71 Ala. 570, 571 (1882); Ganbaum v. Rockwood Realty Corp., 62 Misc. 2d 391, 395-96, 308 N.Y.S.2d 436, 440-41 (N.Y. Sup. Ct. 1970).

In most common law states, spouses' property rights largely depend upon their monetary contributions to the acquisitions of the marriage. Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 83 (1979). For example, in some jurisdictions, upon dissolution of the marriage a non-wage-earning spouse likely would retain very little of the accumulated property. *See, e.g.*, W. VA. CODE §§ 48-2-21, 48-3-16 (1980). In most

or devise, usually requires the exchange of capital, either money or property.[19]

The institution of marriage has little effect on the basic title approach.[20] The common law title system treats spouses like strangers with respect to property rights;[21] both spouses own

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other common law jurisdictions, state statutes provide for an "equitable division" of property. Cantwell, *Man + Woman + Property = ?*, 6 PROB. LAW 1, 44-45 (1980). An "equitable division," however, is not defined, leaving the court discretion to consider relevant factors including the contribution of each spouse to the acquisition of marital property. *See, e.g.*, COLO. REV. STAT. § 14-10-113(1)(a) (1974); KY. REV. STAT. § 403.190(1)(a) (Supp. 1982); MINN. STAT. § 518.58 (1982); MONT. CODE ANN. § 40-4-202(1) (1981).

19. *See* In re Gill's Estate, 79 Iowa 296, 299-300, 44 N.W. 553, 554 (1890); Stamm v. Bostwick, 122 N.Y. 48, 50-51, 25 N.E. 233, 233 (1890); Lynn v. Rainey, 400 P.2d 805, 811 (Okla. 1964).

20. A major aspect of the development of marital property law in the common law states has been the decreasing importance of the institution of marriage. At early common law, marriage critically affected the property rights of spouses, particularly wives, because the legal identity of the wife merged into that of her husband. *See* Cantwell, *supra* note 18, at 11. It often is remarked that "[t]he common law regarded the husband and wife as one and the husband as the one." J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 86 (1975). In marriage, the husband acquired absolute ownership, control, and management of the wife's tangible personal property. W. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 2:21 (1982); *see generally* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 526-27 (6th ed. 1938); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 404-06 (2d ed. 1968). If the wife owned any real property, the husband acquired an estate in the property with the right to use and enjoy the profits thereof. *See* 1 AMERICAN LAW OF PROPERTY § 5.52 (A. J. Casner ed. 1952); Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345, 345 (1949). For the purposes of property ownership and the ability to contract, the married woman ceased to have a legal identity. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 24 (1951). In return for this loss of legal identity, the wife received three rights: (1) the right to be supported by her husband; (2) the right to pass liability for antenuptial debts and postnuptial torts on to her husband; and (3) the right of dower in her husband's real property. Greene, *supra* note 18, at 77.

This situation began to change significantly in the 1840's with the emergence of Married Women's Property Acts. *See generally* W. MCCLANAHAN, *supra*, at § 2:24; Hitchcock, *Modern Legislation Touching Marital Property Rights*, 6 So. L. REV. 633 (1880); Kirkwood, *Equality of Property Interests Between Husband and Wife*, 8 MINN. L. REV. 579, 580-83 (1924). These statutes returned a legal identity to married women. They granted married women equal rights to contract, own, use, and dispose of property, and to sue and be sued. W. MCCLANAHAN, *supra*, at § 2:24.

These statutes have been enacted in all the common law states and are the underpinnings of the modern common law approach to marital property rights. They essentially make the fact of marriage irrelevant to most issues of property by giving both spouses rights in property as if they were unmarried. *See, e.g.*, IND. CODE ANN. § 31-1-9-2 (Burns 1980); KY. REV. STAT. § 404.020(1) (Supp. 1982); MINN. STAT. § 519.02 (1982); MISS. CODE ANN. § 93-3-1 (1972); N.J. STAT. ANN. § 37:2-16 (West 1968).

21. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MOD. L. REV. 133, 135 (1952).

and control the property to which they have title.[22] Marriage does not affect the rules as to the acquisition of title. Only after termination of the marriage, either by death or dissolution, may a spouse be entitled to acquire title to part of the other spouse's property.[23]

The title approach to marital property rights can yield inequitable results when only one spouse earns money wages. Property acquired during the marriage often is titled solely in the wage-earning spouse. The spouse who does not earn money wages may be effectively precluded from acquiring property because of a lack of resources with which to obtain credit.[24] If that spouse contributes considerable time and labor to the maintenance of the home and care of the family, a clear inequity results. Thus, the title approach does not recognize the important contributions of the non-wage-earning spouse to the marriage.

Although most common law states have moved away from the traditional title approach in some areas of marital property law, such as probate and divorce,[25] they have continued to rely

22. *See, e.g.,* Fischer v. Wirth, 38 A.D.2d 611, 326 N.Y.S.2d 308 (1971); Rasmussen v. Oshkosh Savings & Loan Ass'n, 35 Wis. 2d 605, 151 N.W.2d 730 (1967). In *Fischer*, the couple held their home and savings in the husband's name with the wife's income going to household expenses. Upon divorce, after more than twenty years of marriage, the court denied the wife's request for a declaration that she owned half of the assets held in her husband's name. *Fischer*, 38 A.D.2d at 612, 326 N.Y.S.2d at 310.

23. At the termination of a marriage, statutes in most common law states give spouses interests in property acquired during the marriage regardless of the title to the property. *See infra* note 25. In cases of termination by the death of a spouse, all states except South Dakota give the surviving spouse an elective share in the estate of the deceased spouse. W. MCCLANAHAN, *supra* note 20, at § 2:25; *see, e.g.,* MINN. STAT. § 525.145 (1982). Since this acquisition essentially is by judicial or legislative decree, it may be perceived as a "mere gratuity" rather than property "earned." Greene, *supra* note 18, at 83.

24. Greene, *supra* note 18, at 83; *see also* W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 39-41 (1962); Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 16 MOD. L. REV. 34, 35 (1953) (married woman who lived with her husband was incapable of having money or property unless given to her for her separate use). Even if a wife were able to save money out of the household allowance given her by her husband, the savings likely would belong to the husband. Greene, *supra* note 18, at 83 n.65.

25. *See supra* note 23. Early common law gave a surviving spouse a life estate in some portion of the deceased spouse's real estate, "dower" if the wife survived and "curtesy" if the husband did. Haskins, *supra* note 20, at 345, 346. Dower was a life estate entitling the widow to one-third of all the property in which the husband was seized in fee at any time during coverture. Wilson v. Hilligoss, 278 Ill. App. 564, 572 (1935); In re Zweig's Will, 145 Misc. 839, 843, 261 N.Y.S. 400, 405 (1932); Griffin v. Griffin, 191 N.C. 227, 229, 131 S.E. 585, 586 (1926). Curtesy was a life estate to the husband in all the estates of inheritance in land that his wife possessed during their marriage. Haskins, *supra* note 20, at 345.

on title as a measure of creditworthiness.[26] A spouse who does

Most states have abolished the common law estates and replaced them with an "elective share" or similar interest in the deceased spouse's property. J. CRIBBET, *supra* note 20, at 86-89; 2 R. POWELL, REAL PROPERTY § 217 (1950); *see, e.g.*, ILL. REV. STAT. ch. 3, § 18 (1978). One state, South Dakota, provides no interest in the property of the other spouse. In 1889 South Dakota abolished common law dower and curtesy without creating any statutory interest in lieu thereof. *See* S.D. CODIFIED LAWS ANN. §§ 25-2-4, 29-1-3 (1976).

During the 1970's most common law states enacted statutes giving their courts "equitable jurisdiction" to distribute marital property during divorce proceedings. *See* Cantwell, *supra* note 18, at 44-45. Although the common law has traditionally circumscribed the title approach in determining property interests upon the death of a spouse, this approach is only a recent development with regard to marital dissolution. The stimulus for this development came from three sources. First, no-fault divorce, in separating notions of culpability from the marital dissolution, shifted the focus to a concern for just and equitable treatment of both parties, particularly with respect to property. Cantwell, *supra* note 18, at 40. California was the first state to institute no-fault divorce at the end of the 1960's. As of 1984, only two states, Pennsylvania and South Dakota, had not enacted no-fault divorce legislation. Second, the Uniform Marriage and Divorce Act's property settlement provision provided for a just and equitable division of marital property, taking into account a variety of factors. UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 142-43 (1973). Finally, an awareness that title to property often is not a reliable indicator of the relative contributions of spouses to the marriage, particularly when one spouse is not a wage earner, also strengthened the move away from the strict title approach. In 1963, the Report of the Committee on the Civil and Political Rights to the President's Commission on the Status of Women said:

> Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death. This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other.

REPORT OF THE COMMITTEE ON THE CIVIL AND POLITICAL RIGHTS TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 18 (Comm. Print 1963).

The statutes giving courts "equitable jurisdiction" to distribute marital property have created what has been termed a "deferred community," meaning that the statutes take a community property approach to determining property interests, but *defer* its effect until the termination of the marriage. In a deferred community, the rights to ownership and management during the marriage generally are determined by title. At the end of the marriage, however, the equitable powers of the courts may allow a finding of distinct property rights in a spouse as to the marital property, regardless of who initially acquired it. Cantwell, *supra* note 18, at 19.

26. As to tenancies in common, see Janes v. LeDeit, 228 Cal. App. 2d 474, 39 Cal. Rptr. 559 (1964); Caffroy v. Fremlin, 198 Cal. App. 2d 176, 17 Cal. Rptr. 668 (1962); Nodland v. Chirpich, 307 Minn. 360, 240 N.W.2d 513 (1976); Greiner-Maltz Co. v. Stevens, 66 Misc. 2d 79, 319 N.Y.S.2d 512 (N.Y. Sup. Ct. 1971); Schank v. North Am. Royalties, Inc., 201 N.W.2d 419 (N.D. 1972). As to joint tenancies, see

not own property cannot encumber it.[27] Moreover, whatever interest a spouse has in the other spouse's property remains inchoate until the termination of the marriage, whether by death or divorce.[28] The spouse has no right to create liability for the property until after the marriage has ended and *actual* title is granted by judicial decree.

The common law protects married persons against encumbrance of their concurrent ownership interests in marital property by a spouse.[29] When marital property is held in a tenancy in common or in a joint tenancy both spouses can subject only their individual interests in the property to liability.[30] Obligations created by one spouse do not allow creditors to attach the other spouse's property interests.[31] When marital property is held in a tenancy by the entirety, the only common law concurrent estate unique to marriage, the ability of spouses to encumber even their own individual interests is restricted.[32] In a number of states, creditors of one spouse cannot reach the in-

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Katsivalis v. Serrano Reconveyance Co., 70 Cal. App. 3d 200, 138 Cal. Rptr. 620 (1977); Carbine v. Meyer, 126 Cal. App. 2d 386, 272 P.2d 849 (1954); Martin v. Fritz, 194 Iowa 740, 190 N.W. 514 (1922); American Nat'l Bank & Trust Co. v. McGinnis, 571 P.2d 1198 (Okla. 1977).

27. *See supra* notes 18, 21-22 and accompanying text.

28. Greene, *supra* note 18, at 87.

29. In common law states, spouses may hold property individually, in a joint tenancy, in a tenancy in common, or in a tenancy by the entirety.

30. The principal incident of a joint tenancy is the right of survivorship. "When one joint tenant dies the other is the sole owner; if there are several joint tenants, the deceased's share is owned by the survivors jointly." J. CRIBBET, *supra* note 20, at 98. A joint tenancy does not require a marital relationship and can involve any number of individuals. A joint tenancy can be destroyed by a simple conveyance by one of the joint tenants. *Id.* at 101. The tenancy in common is the most common of all concurrent estates. It contains no special incidents, such as a right of survivorship. "[T]he share of each tenant is several and distinct from that of his cotenant, except that it is an undivided interest so that he cannot lay claim to any specific portion of the whole until there is a partition in kind." *Id.* at 103.

31. *See* cases cited *supra* note 26.

32. *See* J. CRIBBET, *supra* note 20, at 95-106. In a tenancy by the entirety, property titled in the names of both spouses is viewed as belonging to neither spouse, but instead to the marital unit. Hutcherson v. United States, 92 F. Supp. 168, 170 (W.D. Mo. 1950), *aff'd*, 188 F.2d 326 (8th Cir. 1951). This view is so strong that a conveyance to a husband and wife in the entirety and to a third person results in a conveyance of a one-half interest to the spouses and a one-half interest to the third person. J. CRIBBET, *supra* note 20, at 95. Principal incidents of a tenancy by the entirety include: (1) the right of survivorship; (2) the inability to destroy the tenancy by unilateral action of a spouse; and (3) immunity from claims of creditors that would destroy the estate. Cantwell, *supra* note 18, at 27; *see also* Phipps, *supra* note 20, at 36-41.

The tenancy by the entirety is an estate of decreasing importance in modern property law. Only twenty-two states continue to recognize this estate. Cantwell, *supra* note 18, at 27.

terest of either spouse in the entirety property to satisfy obligations.[33] In other states, the only interests in entirety property available to creditors are half of the income from the property and the contingent survivorship right of the debtor spouse to the property.[34] Thus, the sole impact of marriage upon debt and credit in common law jurisdictions is to restrict the ability of an individual spouse to incur an obligation.[35]

The common law title approach protects spouses against involuntary liability for the other spouse's debts. Common law states do, however, recognize volitional sharing of liabilities. Persons are liable for their spouse's debt or obligation only if they joined in its creation.[36] Joinder serves two interrelated purposes. First, it establishes a moral basis for allocating loss. If a spouse has joined in the action that created the loss or potential for loss, it is more equitable to shift some of the actual loss to that spouse than if he or she had not joined. The spouse

33. These jurisdictions are Delaware, the District of Columbia, Florida, Indiana, Maryland, Missouri, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming. Phipps, *supra* note 20, at 39; *see* Citizens' Savings Bank, Inc. v. Astrin, 44 Del. 451, 455, 61 A.2d 419, 421 (1948); Held v. McNett, 154 A.2d 349, 350 (D.C. 1959); Meyer v. Faust, 83 So.2d 847, 848 (Fla. 1955); Pension Fund v. Gulley, 226 Ind. 415, 419, 81 N.E.2d 676, 678 (1948); Rue v. Haines, 229 Md. 268, 271, 182 A.2d 872, 873 (1962); Hanebrink v. Tower Grove Bank & Trust Co., 321 S.W.2d 524, 527 (Mo. App. 1959); Schweitzer v. Evans, 360 Pa. 552, 556, 63 A.2d 39, 41 (1949); Bloomfield v. Brown, 67 R.I. 452, 464-65, 25 A.2d 354, 360 (1942); Citizens' Savings Bank & Trust Co. v. Jenkins, 91 Vt. 13, 20, 99 A. 250, 252 (1916); Oliver v. Givens, 204 Va. 123, 126, 129 S.E.2d 661, 663 (1963); Amick v. Elwood, 77 Wyo. 269, 278, 314 P.2d 944, 947 (1957).

34. Such jurisdictions include Arkansas, New Jersey, New York, and Oregon. Phipps, *supra* note 20, at 39; *see* Ellis v. Ashby, 227 Ark. 479, 481-82, 299 S.W.2d 206, 207-08 (1957); Dvorken v. Barrett, 100 N.J. Super. 306, 308, 241 A.2d 841, 842 (1968), *aff'd*, 53 N.J. 20, 247 A.2d 674 (1968); Lover v. Fennell, 14 Misc. 2d 874, 879, 179 N.Y.S.2d 1017, 1022 (N.Y. Sup. Ct. 1958); Brownley v. Lincoln County, 218 Or. 7, 11, 343 P.2d 529, 531 (1959). In Massachusetts, only the husband's interest can be reached; the wife's interest in entirety property cannot be reached by her creditors. I. BAXTER, MARITAL PROPERTY § 3:4 (1973); Hale v. Hale, 332 Mass. 329, 331, 125 N.E.2d 142, 143 (1955); Pineo v. White, 320 Mass. 487, 490, 70 N.E.2d 294, 297 (1946). In Kentucky and Tennessee only the contingent right of survivorship is available to separate creditors. Phipps, *supra* note 20, at 39; *see* United States v. Ragsdale, 206 F. Supp. 613, 616 (W.D. Tenn. 1962); Francis v. Vastine, 229 Ky. 431, 434, 17 S.W.2d 419, 420 (1929).

35. Homestead protection statutes, which exist in many states, also restrict the ability of an individual spouse to incur any obligation to the detriment of the other spouse. These statutes prevent a spouse with sole title to the homestead property from conveying or encumbering the property without joinder by the other spouse. *See, e.g.*, MINN. STAT. § 507.02 (1982); MO. ANN. STAT. § 513.475 (Vernon 1952 & Supp. 1984).

36. *See, e.g.*, First Nat'l Bank v. Energy Fuels Corp., 200 Colo. 540, 544, 618 P.2d 1115, 1118 (1980); McLaughlin v. Cooper's Estate, 128 Conn. 557, 561, 24 A.2d 502, 504 (1942); Simkin v. New York Cent. R.R. Co., 138 Ind. App. 668, 672, 214 N.E.2d 661, 663 (1966); Martin v. Fritz, 194 Iowa 740, 747, 190 N.W. 514, 517 (1922); Adamsen Constr. Co. v. Altendorf, 152 N.W.2d 576, 579 (N.D. 1967).

incurred "risks" by entering into the bargain. Second, joinder ensures that any and all liable parties will have notice of the obligation at the time it is incurred. Thus, although the common law may yield inequitable results with regard to the creation of property rights, the common law does provide effective safeguards against the creation of interspousal liability.

B. Debt and Credit of Spouses Under American Community Property Law

Community property states provide spouses with present concurrent interests in most of the assets acquired by either spouse during the marriage.[37] Louisiana, for example, defines community property as:

> property acquired during the existence of the legal regime through the effort, skill or industry of either spouse; property acquired with community things or with community and separate things . . . ; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.[38]

By giving each spouse a vested, present, and equal interest in all of the economic rewards from the personal efforts of both spouses during the marriage, community property law attempts to avoid the inequities that arise under the common law title system.[39]

Along with the sharing of ownership, however, American community property law provides for the sharing of debts. In Louisiana, for example, "[a]n obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation."[40] Thus, the community property of both spouses may be liable for a debt incurred by only one spouse. Such liability is a fundamental part of community property law,[41] and although American community property jurisdictions vary greatly in their application of this principle, to some extent each recognizes this interspousal

37. W. Reppy & C. Samuel, Community Property in the United States 1 (1982); 2 H. Tiffany, The Law of Real Property § 438 (3d ed. 1939).

38. La. Civ. Code Ann. art. 2338 (West Supp. 1983).

39. *See supra* note 24 and accompanying text.

40. La. Civ. Code Ann. art. 2360 (West Supp. 1983); *see also* Cal. Civ. Code § 5116 (West 1983) ("property of the community is liable for the contracts of either spouse which are made after marriage").

41. W. de Funiak & M. Vaughn, Principles of Community Property § 159 (2d ed. 1971).

liability.[42]

Joinder requirements for shared liability generally are absent in American community property states.[43] There are some narrow exceptions to this rule. All community property states, for example, require joinder to convey or encumber the homestead,[44] and Washington prohibits the encumbrance of "community household goods, furnishings, or appliances" without joinder.[45] Beyond these limited exceptions, however, community property law does not require joinder.

American community property law provides a presumption of shared liability for debts incurred during the marriage. A Louisiana statute, for example, provides, with some exceptions, that "all obligations incurred by a spouse during the existence of a community property regime are presumed to be community obligations."[46] Similarly, courts in Arizona,[47] New Mexico,[48] Texas,[49] and Washington[50] have consistently declared that contractual debts incurred during marriage are presumptively community debts.[51] This presumption can only be over-

42. W. MCCLANAHAN, *supra* note 20, at § 10:8.

43. *See, e.g.*, Hofmann Co. v. Meisner, 17 Ariz. App. 263, 267, 497 P.2d 83, 87 (1972); Ellsworth v. Ellsworth, 5 Ariz. App. 89, 91, 423 P.2d 364, 366 (1967); Fies v. Storey, 37 Wash. 2d 105, 110, 221 P.2d 1031, 1033 (1950); Capital Nat'l Bank v. Johns, 170 Wash. 250, 258, 16 P.2d 452, 454 (1932).

44. *See* ARIZ. REV. STAT. ANN. § 25-214(c)(1) (1976); CAL. CIV. CODE § 5127 (West 1983); IDAHO CODE § 55-1006 (1979); LA. REV. STAT. ANN. § 20:1 (West 1979); NEV. REV. STAT. § 123.230(3) (1981); N.M. STAT. ANN. § 40-3-13 (1983); TEX. FAM. CODE ANN. § 5.81 (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (1982). These statutes do not, however, prevent a spouse from endangering the property. A spouse who obtains a loan and gives the creditor a mortgage to the homestead without joinder of the other spouse still creates a debt collectible from the community assets, although the mortgage is unenforceable. The homestead is protected from liability only to the extent provided in homestead exemption statutes, which might be a minimal monetary amount. *See, e.g.*, IND. CODE ANN. § 34-2-28-1 (Burns Supp. 1984) ($7,500); KY. REV. STAT. § 427.090 (1972) ($5,000).

45. *See* WASH. REV. CODE ANN. § 26.16.030(5) (1982).

46. LA. CIV. CODE ANN. art. 2361 (West Supp. 1984).

47. Donato v. Fishburn, 90 Ariz. 210, 213, 367 P.2d 245, 246 (1961); Morgan v. Bruce, 76 Ariz. 121, 124, 259 P.2d 558, 560 (1953); McFadden v. Watson, 51 Ariz. 110, 113, 74 P.2d 1181, 1182 (1938); Cosper v. Valley Bank, 28 Ariz. 373, 382, 237 P. 175, 178 (1925); Hofmann Co. v. Meisner, 17 Ariz. App. 263, 267, 497 P.2d 83, 87 (1972); Garrett v. Shannon, 13 Ariz. App. 332, 333, 476 P.2d 538, 539 (1970).

48. Davidson v. Click, 31 N.M. 543, 556, 249 P. 100, 105 (1926); Strong v. Eakin, 11 N.M. 107, 119-22, 66 P. 539, 542-43 (1901).

49. Foster v. Hackworth, 164 S.W.2d 796, 799 (Tex. Civ. App. 1942).

50. Beyers v. Moore, 45 Wash. 2d 68, 70, 272 P.2d 626, 627 (1954); Marquette v. National Bank, 132 Wash. 181, 183, 231 P. 788, 789 (1925); Bryant v. Stetson & Post Mill Co., 13 Wash. 692, 694, 43 P. 931, 931 (1896); Warren v. Washington Trust Bank, 19 Wash. App. 348, 360, 575 P.2d 1077, 1085 (1978), *aff'd*, 92 Wash. 2d 381, 598 P.2d 701 (1979).

51. *See* W. DE FUNIAK & M. VAUGHN, *supra* note 41, at § 159; W. MCCLANA-

come by "clear and convincing evidence" that the debt was not incurred in the interest of, or with the intention to benefit, the family.[52]

The family purpose restriction, moreover, may be more technical than practical. No actual benefit to the community is required;[53] at most, the activity must have been somehow, although not necessarily primarily, intended to benefit the community.[54] Only when there could be no conceivable benefit except to the individual spouse will an obligation incurred by a spouse during marriage not be held to be incurred in the interest of the community.[55] Furthermore, existing case law demonstrates that the notion of furthering community interests is so

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HAN, *supra* note 20, at § 4:15; *see also* W. REPPY & C. SAMUEL, *supra* note 37, at 53-55.

52. Hofmann Co. v. Meisner, 17 Ariz. App. 263, 267, 497 P.2d 83, 87 (1972); Beyers v. Moore, 45 Wash. 2d 68, 70, 272 P.2d 626, 627 (1954); Warren v. Washington Trust Bank, 19 Wash. App. 348, 361, 575 P.2d 1077, 1085 (1978). The community property may be liable for spouses' torts as well as their contractual debts. This extension of tort liability to the entire community property is not a product of historical community property law, but of American community property states' interpretation of community property law through common law principles. W. DE FUNIAK & M. VAUGHN, *supra* note 41, at §§ 181, 182. In some states, liability may extend to the community property regardless of the circumstances of the tortious conduct. In California, for example, tort liability is satisfied first out of community property and then out of the separate property of the tortfeasor spouse if the liability is based upon an act or omission that occurred while "performing an activity for the benefit of the community." CAL. CIV. CODE § 5122(b)(1) (West 1983). Texas also provides for this sort of broad liability. TEX. FAM. CODE ANN. § 5.61(d) (Vernon 1975). If such an activity is not involved, the community property may still be held liable for the tort. CAL. CIV. CODE § 5122(b)(2). Most states, however, recognize community liability for torts only if the torts are committed while furthering the interest of the community. *See, e.g.,* Mortensen v. Knight, 81 Ariz. 325, 334, 305 P.2d 463, 469 (1956); Simpson v. Shaw, 71 Ariz. 293, 296, 226 P.2d 557, 560 (1951); McFadden v. Watson, 51 Ariz. 110, 114, 74 P.2d 1181, 1182 (1938); Garret v. Shannon, 13 Ariz. App. 332, 333, 476 P.2d 538, 539 (1970); Howe v. Haught, 11 Ariz. App. 98, 100, 462 P.2d 395, 397 (1969); McHenry v. Short, 29 Wash. 2d 263, 273, 186 P.2d 900, 905 (1947); Benson v. Bush, 3 Wash. App. 777, 778, 477 P.2d 929, 929 (1970); Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 834-39 (1974); Pruzan, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259, 260 (1948).

53. *See, e.g.,* McFadden v. Watson, 51 Ariz. 110, 115, 74 P.2d 1181, 1183 (1938) (community property of both spouses liable for husband's libel and slander).

54. Hofmann Co. v. Meisner, 17 Ariz. App. 263, 268, 497 P.2d 83, 88 (1972); Oil Heat Co. v. Sweeney, 26 Wash. App. 351, 355, 613 P.2d 169, 172 (1980); *see also* DePinto v. Provident Sec. Life Ins. Co., 374 F.2d 50, 53-54 (9th Cir. 1967); Donato v. Fishburn, 90 Ariz. 210, 213, 367 P.2d 245, 247 (1961); Malotte v. Gorton, 75 Wash. 2d 306, 309, 450 P.2d 820, 822 (1969); Henning v. Anderson, 121 Wash. 53, 55-56, 207 P. 1048, 1049 (1922); Way v. Lyric Theater Co., 79 Wash. 275, 278, 140 P. 320, 321 (1914); Cross, *supra* note 52, at 824.

55. *See* J.I. Case Threshing Mach. Co. v. Wiley, 89 Wash. 301, 303, 154 P. 437, 437 (1916); Bank of Washington v. Hilltop Shakemill, Inc., 26 Wash. App. 943, 949, 614 P.2d 1319, 1322 (1980).

vague that it provides virtually no bar to liability.[56] Taken together, the expansive interpretation of family purpose and the presumption of shared liability for debts require a nondebtor spouse seeking to avoid liability to prove there was not "any expectation of benefit to the community . . . at the time the [obligation was incurred]."[57]

In most community property states, a spouse's power to manage and control the community property is the critical determinant of his or her individual ability to create community liability.[58] If a spouse has management and control power over the community property, community liability may be created without the knowledge and consent of the nondebtor spouse.[59] Some courts have justified this rule by treating the managing spouse as an "agent" of the community.[60] According to agency principles, principals are liable whenever their agents are acting within the scope of their actual or apparent authority, despite the principal's lack of actual notice.[61] Thus, if the debtor spouse has management and control powers and the obligation was intended to benefit the community or was incurred in the course of community business,[62] the community is liable, regardless of the nondebtor spouse's lack of notice.[63] In such a case, the nondebtor spouse's express disapproval of the debt prior to its incurrence would not avoid community liability. The absence of a notice requirement appears to be based on

56. *See, e.g.,* King v. Williams, 188 Wash. 350, 62 P.2d 710 (1936). In *King,* the court held that the community property was liable when a husband negligently injured a person in an automobile collision during a "night out with the boys," because recreational activities "promote and advance the general welfare of the community." 188 Wash. at 351, 62 P.2d at 710. Similarly, in Arizona the community property was liable when a husband negligently crashed the flight school's plane while taking flying lessons for pleasure. Reckart v. Arva Valley Air, Inc., 19 Ariz. App. 538, 509 P.2d 231 (1973); *see also* Reed v. Loncy, 22 Wash. 433, 61 P. 41 (1900) (community liable for husband's guarantee of his son's debt even though the contract brought no monetary benefit to the community because it discharged a moral obligation of the community to the son for uncompensated labor).

57. Beyers v. Moore, 45 Wash. 2d 68, 70, 272 P.2d 626, 627 (1954).

58. W. REPPY & C. SAMUEL, *supra* note 37, at 251; *see* Grolemund v. Cafferata, 17 Cal. 2d 679, 683-84, 111 P.2d 641, 643-44, *cert. denied,* 314 U.S. 612 (1941).

59. *See* Ellsworth v. Ellsworth, 5 Ariz. App. 89, 91-92, 423 P.2d 364, 366-67 (1967); *see also* Donato v. Fishburn, 90 Ariz. 210, 212-13, 367 P.2d 245, 246 (1961).

60. *See* McHenry v. Short, 29 Wash. 2d 263, 274, 186 P.2d 900, 906 (1947); Werker v. Knox, 197 Wash. 453, 457, 85 P.2d 1041, 1043 (1938); Milne v. Kane, 64 Wash. 254, 255-56, 116 P. 659, 659 (1911).

61. *See* RESTATEMENT (SECOND) OF AGENCY § 268 (1958) (notification given to an agent is imputed to the principal).

62. *See supra* note 56 and accompanying text.

63. *See* Donato v. Fishburn, 90 Ariz. 210, 213-14, 367 P.2d 245, 246-47 (1961); Fies v. Storey, 37 Wash. 2d 105, 112, 221 P.2d 1031, 1034-35 (1950).

the assumption that the debtor spouse will protect the community interest and give the other spouse whatever notice is needed.[64]

Although joint management and control of community property may be equitable, there is a significant problem of mismanagement because both spouses have the opportunity to mismanage.[65] Several community property states have attempted to solve the problem of mismanagement through the adoption of the common law concept of title.[66] Tying management and control to title, however, seriously disadvantages the non-wage-earning spouse even in community property states. Because property acquired during the marriage is often titled solely in the name of the wage-earning spouse, the wage-earning spouse can encumber virtually all of the marital property, even though the non-wage-earning spouse has an interest in one-half of the marital property.[67] Thus, both the common law and community property systems are torn between the inequities of the title approach to management and control and the problem of mismanagement inherent in allowing each spouse to encumber all of the marital property without notice and consent.

II. UNDERLYING PRINCIPLES OF THE UMPA

The UMPA rejects, in large part, the common law title ap-

64. *See* W. REPPY & C. SAMUEL, *supra* note 37, at 267.

65. W. MCCLANAHAN, *supra* note 20, § 9:12, at 468. Because of the management and control provisions, the community property states' sharing approach historically has provided only an illusion of equality. During the early nineteenth century, the community property states uniformly provided the husband with sole power to manage and control community property. *See* W. DE FUNIAK & M. VAUGHN, *supra* note 41, at § 113; W. MCCLANAHAN, *supra* note 20, at §§ 9:4-9:6. Slowly, through the nineteenth and twentieth centuries, states began to limit the husband's exclusive power, primarily with respect to real property, *see* W. MCCLANAHAN, *supra* note 20, at §§ 9:7-9:8. Only since 1970 have equal management rights for both husband and wife become the norm in community property states. *See id.* at §§ 9:11-9:12. Statutes generally require dual management or joinder for community real property and allow "separate and equal" management for community personality. TEX. FAM. CODE ANN. § 9:12, at 466-67.

66. *See id.* at § 9:14. In Louisiana and New Mexico reliance on title is limited in scope. Thus, in Louisiana title determines management only for titled movables, *see* LA. CIV. CODE ANN. art. 2351 (West Supp. 1984), whereas in New Mexico title controls only the management of community personal property, *see* N.M. STAT. ANN. § 40-3-14(B) (1978). In Texas, however, management and control rights to all community property are determined by title. *See* TEX. FAM. CODE ANN. § 5.24 (Vernon 1975). Both spouses have exclusive power over the community property they would own if unmarried. TEX. FAM. CODE ANN. § 5.22.

67. *See supra* notes 37-39 and accompanying text.

proach,[68] viewing title as an unreliable and inadequate indicator of the actual contributions of each spouse to the marriage. Instead, the Act embraces the "sharing ideal" of community property law. The drafters of the Act state:

> The fundamental principle that ownership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in vested, present, and equal interests is the heart of the community property system. It is also the heart of the Uniform Marital Property Act . . . . Sharing is seen as a system of elemental fairness and justice so that those who share in the many and diverse forms of work involved in establishing and maintaining a marriage will have a protected share in the material acquisitions of that marriage.[69]

With the important exception of the management and control of property, title under the Act, as under community property law, "operates almost as a simple convenience, [having little] to do with the establishment of underlying ownership rights."[70]

The UMPA forces spouses to share ownership of virtually all property acquired during the marriage. The Act accomplishes sharing by providing that "[e]ach spouse has a present undivided one-half interest in marital property."[71] Marital property includes all property of the spouses except that which is owned by a spouse at the time of marriage[72] or is acquired during the marriage under certain limited circumstances, such as by gift or devise.[73] This forced sharing is strengthened by a presumption that all property, whenever acquired, is marital property.[74] Such sharing can only be avoided by a voluntary gift, a marital agreement, or a court decree.[75] Thus, in recognition of their nonmonetary contributions to the marriage, the Act's sharing approach strengthens the ownership rights of economically disadvantaged spouses.

The UMPA similarly mandates the forced sharing of debts without joinder. It provides that "an obligation incurred by a spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of that spouse that is not marital property."[76] Thus, when an individual spouse incurs a debt, the other spouse is forced to share

68. *See* W. MCCLANAHAN, *supra* note 20, § 14:5, at 646.
69. U.M.P.A. prefatory note at 12.
70. *See* Cantwell, *supra* note 18, at 21.
71. U.M.P.A. § 4(c).
72. U.M.P.A. §§ 4(a), 4(f).
73. U.M.P.A. § 4(g).
74. U.M.P.A. § 4(b).
75. U.M.P.A. § 4(g)(4).
76. U.M.P.A. § 8(b)(ii).

the liability because "all marital property" is potentially liable. Only the individual property of the nondebtor spouse is protected. The extent of the forced sharing in this provision is significant. Although the Act only gives each spouse a one-half interest in the ownership of marital property, it permits a spouse to create liability for all of the marital property.

As in community property states, the minimal restrictions the Act does provide are further minimized by the presumption of shared liability. The Act provides that "[a]n obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family."[77] This provision places the burden on the spouse seeking to avoid liability for an obligation to show that the obligation was not incurred in the interest of the family.[78] Failing this, the entire marital property is liable for the obligation.

Although the UMPA adopts a sharing approach for ownership of marital property and for debt liability, the rules governing management and control of the marital property are based on the traditional title approach. Although the Act gives spouses equal ownership rights in the marital property, spouses are denied many of the benefits of that ownership when the property is held solely in one spouse's name.[79] The operative term is "held." The Act provides that:

> [p]roperty is "held" by a person only if a document of title to the property is registered, recorded, or filed in a public office in the name of the person or a writing that customarily operates as a document of title to the type of property is issued for the property in the person's name.[80]

Thus, under the UMPA, as under the common law, title determines management and control rights.

The Act's management and control provisions significantly limit the impact of the forced sharing of ownership. A spouse acting alone may manage and control "that spouse's property that is not marital property; . . . marital property held in that spouse's name alone or not held in the name of either

77. U.M.P.A. § 8(a).

78. The UMPA differs from community property law in that its family purpose presumption creates only a "burden of proving that the nonexistence of the presumed condition is more probable than its existence," U.M.P.A. § 1(14), whereas community property states generally require that the presumption be overcome by clear and convincing evidence, *see supra* note 52 and accompanying text. Given the UMPA's heavy reliance upon community property law in other aspects of its liability provisions, the practical implications of this distinction remain unclear.

79. *See* U.M.P.A. § 5.

80. U.M.P.A. § 1(9).

spouse; . . . [and] marital property held in the names of both spouses in the alternative . . . ."[81] Joinder is required to manage and control "marital property held in the name of both spouses other than in the alternative."[82] The Act defines management and control as "the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, . . . or otherwise deal with property as if it were property of an unmarried person."[83] This very broad definition encompasses essentially every incident of ownership without providing actual sole ownership.[84] Thus, despite the UMPA's forced sharing of ownership approach, the Act's management and control provi-

81. U.M.P.A. § 5(a).

82. U.M.P.A. § 5(b). The Act does not specifically address the ability of a spouse to manage and control marital property solely held in the name of the other spouse. Because § 5(a) appears to be exhaustive of the possible situations when a spouse acting alone can manage and control property, the reasonable implication is that a spouse cannot independently manage and control such property.

The drafters of the UMPA attempted to minimize joinder requirements for debts. Personal correspondence from William P. Cantwell, Reporter for the UMPA (Nov. 28, 1983). Because this joinder requirement is a management and control provision, it might apply only when the interests in a particular piece of property are at issue. In the case of an unsecured debt, it might not apply because an unsecured debt does not give the creditor an interest in any particular property. As long as the debtor spouse has the power to act alone with regard to sufficient assets, individual and marital, to establish creditworthiness for the amount of the loan, the joinder requirement of the management and control provision would not be applicable. Once the loan is made, however, all marital property probably would be available to satisfy the debt upon default.

83. U.M.P.A. § 1(11). Under a literal interpretation of the UMPA, a spouse "acting alone" cannot "sell," "assign," "encumber," or even "use" or "consume" marital property solely held in the name of the other spouse. Such an interpretation, however, would lead to untenable results by giving a nontitled spouse even fewer rights than under the common law system. More likely, courts would construe the management and control provisions and the comments thereto as applicable only to third parties and not between spouses. *See* U.M.P.A. § 5 comment. Even under this construction, however, a spouse could be denied significant rights in marital property.

84. The incidents of ownership of property include the right to possession, the right to use and enjoyment of the property, the right to exclude all others from possession or use, the right to change the property, and the right to sell or dispose of the property as the owner wishes. *See* Superior Bath House Co. v. McCarroll, 312 U.S. 176, 180-81 (1941); United States v. Lutz, 295 F.2d 736, 740 (5th Cir. 1961); Kraft Foods Co. v. Commodity Credit Corp., 164 F. Supp. 168, 182 (W.D. Wis. 1958), *aff'd in part, rev'd in part on other grounds,* 266 F.2d 254 (7th Cir.), *cert. denied,* 361 U.S. 832 (1959); Lushing v. Riviera Estates Ass'n, 196 Cal. App. 2d 687, 689, 16 Cal. Rptr. 763, 764 (1961); City of Chicago v. Rosser, 47 Ill. 2d 10, 17, 264 N.E.2d 158, 162 (1970); Johnson v. Marshall, 232 Iowa 299, 301, 4 N.W.2d 369, 370-71 (1942); John Wanamaker, Philadelphia v. School Dist. of Philadelphia, 441 Pa. 567, 572, 274 A.2d 524, 526 (1971).

sions allow one spouse to enjoy exclusively all the benefits of the marital property by holding it in his or her name.

III. THE UMPA AND EXISTING LAW: A COMPARISON

The UMPA blends the sharing of ownership and debt liability that characterizes community property law with the common law title approach to management and control. Unfortunately, although the drafters of the Act recognized the inequities of the common law approach to marital property rights, they failed to recognize the problems inherent in the forced sharing of liabilities. This section explores the inequities that will continue under the Act when spouses are forced to share liabilities without corresponding ownership rights and without adequate protections for the nondebtor spouse.

A. SHARING OF LIABILITIES

The ability of one spouse freely to prejudice the interest of the other in concurrently owned property under the UMPA creates several potentially undesirable results not present at common law. First, each spouse risks losing all of his or her interest in the marital property due to an obligation incurred by the other spouse. The limitation of liability to all marital property plus the individual property of the debtor spouse has no practical value when the nondebtor spouse has no individual property.[85] The nondebtor spouse could lose everything.

Moreover, because the Act does not require joinder, the nondebtor spouse's notice and consent become important. The Act does not specifically require notice or consent. It does require that "[e]ach spouse shall act in good faith with respect to the other spouse in matters involving marital property."[86] Neither that provision nor the comments, however, indicate whether good faith requires notice to the nondebtor spouse before a debt is incurred. In California and other community property states having a similar good faith provision,[87] lack of notice is unlikely to be a successful defense to a debt incurred individually by one's spouse.[88] Accordingly, lack of notice under the UMPA probably will not protect the nondebtor

85. *See* U.M.P.A. § 8(b)(ii).
86. U.M.P.A. § 2.
87. U.M.P.A. § 2 comment; *see, e.g.*, CAL. CIV. CODE § 5125(e) (West 1982).
88. *See* Cadwell v. Cadwell, 126 Ariz. 460, 463, 616 P.2d 920, 923 (1980); Lovetro v. Steers, 234 Cal. App. 2d 461, 473-74, 44 Cal. Rptr. 604, 611-12 (1965); Fies v. Storey, 37 Wash. 2d 105, 112, 221 P.2d 1031, 1034-35 (1950).

spouse's interest in the marital property from an obligation incurred by the other spouse.

Because the management and control rule allows a spouse with title to the marital property to encumber it without notice to or consent of the other spouse, Washington courts have held that due process does not forbid a community creditor from seizing the half interest of the nondebtor spouse under a judgment naming *only* the debtor spouse as a defendant.[89] In Washington, even the nondebtor spouse's express disapproval of the debt may not avoid community liability when the debtor spouse has management and control powers.[90] Consequently, if American community property law is an accurate guide, notice and consent requirements will not be implied under the UMPA when the debtor spouse has management and control powers. As in American community property law, the only restriction on the nondebtor spouse's liability is the toothless family purpose requirement.[91]

In conjunction with other UMPA provisions, the impact of the Act's presumption of shared liability is significant. For ex-

89. *See* Oil Heat Co. v. Sweeney, 26 Wash. App. 351, 356, 613 P.2d 169, 172 (1980); Komm v. Department of Social & Health Serv., 23 Wash. App. 593, 598-99, 597 P.2d 1372, 1375 (1979).

90. *See* Bellingham Motors Corp. v. Lindberg, 126 Wash. 684, 686-87, 219 P. 19, 20 (1923); *see also* Donato v. Fishburn, 90 Ariz. 210, 213, 367 P.2d 245, 246 (1961) (note signed by husband for use in his business is a comunity obligation even though the creditor requested the wife's signature and the husband refused to involve her); Ellsworth v. Ellsworth, 5 Ariz. App. 89, 91-92, 423 P.2d 364, 366-67 (1967) (wife's interest in community property liable for husband's default on promissory notes despite her affidavit stating she did not sign or acquiesce to the note).

91. *See supra* notes 52-56 and accompanying text. The presumption of a family purpose provided in the UMPA deviates from American community property law by including each spouse's tort liabilities. *See* U.M.P.A. § 8(a). The comments to section 8(a) suggest that this inclusion is consistent with community property law. U.M.P.A. § 8 comment. Community property authorities, however, state that no presumption of community obligation exists for tort liability. *See* W. REPPY & C. SAMUEL, *supra* note 37, at 266; Cross, *supra* note 52, at 836; *see also* Garrett v. Shannon, 13 Ariz. App. 332, 334, 476 P.2d 538, 540 (1970). The presumption with respect to contract obligations is often rationalized by a spouse's power to manage and control the community property, including the power to "contract for community debts." Garrett v. Shannon, 13 Ariz. App. 332, 333-34, 476 P.2d 538, 539-40 (1970). Neither the American community property statutes nor the UMPA, however, give a spouse the power to commit torts in the "interest of the family." Tort liability is distinguishable from a contract obligation in that a tort involves wrongful conduct on the part of the spouse. As a result, in American community property law there is a "disposition by the courts to treat differently the questions of tort and contractual liability insofar as concerns presumptions and burdens of proof." *Garrett*, 13 Ariz. App. at 334, 476 P.2d at 540. The drafters of the UMPA did not recognize this distinction, but instead enlarged the scope of shared liability.

ample, in order to protect particular assets from liability, the nondebtor spouse must rebut the initial presumption that all property is marital.[92] If the assets initially had been individual property but had since become mixed with marital property, the presumption applies "unless the component of the mixed property which is not marital property can be traced."[93] Furthermore, even rebutting the presumption of shared liability may not protect marital property from creditors because at least two provisions in the Act indicate that the interests of creditors and bona fide purchasers have priority over the claims of innocent spouses.[94] Thus, the creditor may still be able to recover from the entire marital property unless it was or should have been obvious to the creditor that the obligation was not incurred in the interest of the family. The rebuttal of the presumption of marital liability might only provide the nondebtor spouse with a cause of action against the debtor spouse.[95]

Moreover, the debtor spouse's individual property may remain secure if the obligation can be satisfied out of the marital property. The Act is silent as to whether the marital property or the debtor spouse's individual property should first be looked to to satisfy obligations. The general rule in community property jurisdictions, however, is that the marital property is exhausted before any of the debtor spouse's individual property is used.[96] Thus, the marital property of the nondebtor spouse may become liable for obligations before the individual property of the spouse who incurred the obligation. Such a result is inconsistent with the underlying goal of the shared ownership of property of recognizing and giving credit to each spouse's contribution to the marriage.

B. MANAGEMENT AND CONTROL

Leaving control dependent upon title seems to strike

92. *See* U.M.P.A. § 4(b).
93. U.M.P.A. § 14(a).
94. *See* U.M.P.A. §§ 8(e), 9.
95. U.M.P.A. § 15.
96. *See* W. DE FUNIAK & M. VAUGHN, *supra* note 41, at §§ 159, 170. For example, New Mexico's law provides that:

> [c]ommunity debts shall be satisfied first from all community property . . . excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied from the residence of the spouses . . . . Should such property be insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable for its satisfaction.

N.M. STAT. ANN. § 40-3-11 (1980).

against the Act's goal of promoting equity in marital property relations. The UMPA's title approach to management and control leaves a traditionally disadvantaged non-wage-earning spouse without meaningful ownership of marital property. The Act does envision that much of the marital property will not be held in either spouse's name,[97] allowing each spouse to manage it independently.[98] The ownership of the most important assets in terms of creditworthiness, however, such as bank accounts or valuable property, is likely to be evidenced by record title or other customary documents. A spouse without title to these assets is denied any right of management and control.

The UMPA's mix of community property and title principles raises the possibility of unusual and inconsistent results. The Act resembles the Texas system, in which the management and control of all community property is determined by title.[99] That system has produced some undesirable results. For example, the Act allows a spouse to incur an unsecured debt on the basis of ownership of half the marital property and section 8(a), which permits obligations to be satisfied from all the marital property and any individual property of the debtor spouse. Because the lender in an unsecured credit situation is seeking only an indication that the debt will be repaid and not an actual security interest, either spouse should be able to incur the debt if the family has adequate income and the debtor spouse has access to a joint bank account. The management and control provisions do not apply because the debtor spouse is not encumbering any particular piece of marital property.[100] Either spouse could force the other to share in the liability to the extent of the nondebtor spouse's interest in the marital property, without notice to or consent of the nondebtor spouse, subject only to the nebulous limitation that the debt be incurred in the family interest. If the proceeds from the unsecured obligation are then used by the debtor spouse to purchase an item that has a document of title, which conceivably could be merely a bill of sale,[101] the nondebtor spouse may

97. *See* U.M.P.A. §§ 1(9) comment, 5 comment.

98. U.M.P.A. § 5(a)(2).

99. *See* U.M.P.A. § 5; *supra* note 66.

100. *See* U.M.P.A. §§ 1(9), 5. The security interest, if created at all, would arise only upon default by the debtor and a judicial order creating such an interest.

101. Where title to personal property or the terms of a sale or mortgage of personal property are in issue, courts generally have held that a bill of sale or other similar instrument constitutes the "best evidence" of title. *See, e.g.*, People v. Poindexter, 18 Ill. App. 3d 436, 439, 305 N.E.2d 400, 402 (1973) (citing 32A

be denied any right in the purchased asset aside from a technical ownership interest. In such a case, a nondebtor spouse might question the equity of the Act's proposed changes.

The results are even more questionable in the case of a secured debt. If the creditor requires a particular asset as security, only the spouse with title to that property can incur an obligation without joinder of the other spouse. The spouse without title to major marital assets and without substantial individual assets will have no assets available to pledge as security. Thus, in a UMPA jurisdiction, as in Texas, a non-wage-earning spouse can effectively be denied the ability to acquire a secured loan because of the management and control provisions.[102] At the same time, that spouse's one-half ownership interest in the marital property can be subject to liability for the controlling spouse's obligations. Also, as in the case of an unsecured debt, the nondebtor spouse can be denied important property rights in any titled proceeds of the obligation. Thus, the Act may deny a spouse both the ability to incur secured obligations and the enjoyment of many benefits of ownership of property purchased by the debtor spouse, yet force the nondebtor spouse to share the liability for the obligation to the extent of the marital property.

C. Protections for Nondebtor Spouses

The Act does provide three remedies for a spouse's abuse of property rights: (1) a cause of action for damages for "breach of the duty of good faith,"[103] (2) a right to a judicial accounting of marital property to identify the marital property and the rights of the respective spouses therein,[104] and (3) a right to a court-ordered change in the title to marital prop-

C.J.S. *Evidence* § 799 (1964)); Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 526-27, 176 S.E.2d 854, 856 (1970); *cf.* Hall v. American Friends Service Comm., Inc., 79 Wash. 2d 230, 235, 484 P.2d 376 , 378-79 (1971) (en banc) (direct evidence that plaintiff was the original registered owner of stock certificates creates a presumption of ownership). Courts have held that extrinsic evidence cannot be used to contradict that which appears on the face of a bill of sale regarding the title or interest conveyed. *See, e.g.,* Allen v. Bryson, 67 Iowa 591, 594-95, 25 N.W. 820, 821-22 (1885).

102. *See* Bingaman, *Equal Management of Community Property and Equal Credit Opportunity*, 13 IDAHO L. REV. 161, 161-62 (1977); *see also* Bingaman, *The Impact of the Equal Rights Amendment on Married Women's Financial Individual Rights*, 3 PEPPERDINE L. REV. 26, 32 (1975) [hereinafter cited as Bingaman, *The Impact of the Equal Rights Amendment*].

103. U.M.P.A. § 15(a).

104. U.M.P.A. § 15(b).

erty.[105] The last two remedies are particularly valuable when a spouse has been denied beneficial rights in marital property. These remedies, however, have several weaknesses. First, they are not likely to be used. Most spouses probably would be reluctant to resort to court action against their partner unless the marriage is near its end. Second, the remedies are not preventive. They primarily are useful only after the damage, such as default on a debt, has occurred. At that point, because the creditor's interests are protected by the Act,[106] the injured spouse can proceed only against the remaining assets of the debtor spouse. In cases of default, such a cause of action may have little value.

The only way spouses can avoid operation of the presumptions regarding classification of property and shared liability is with a marital property agreement. The Act allows spouses to contract between themselves concerning their respective rights and obligations in any property.[107] The contract, however, will not prevent creditors without actual knowledge of the agreement from reaching all the marital property.[108] Consequently, the contract serves only to provide spouses with a cause of action against their partners.

IV. AN EVALUATION OF THE UMPA'S SHARING APPROACH: WEIGHING THE COSTS AND THE BENEFITS

The UMPA's sharing approach proposes some much needed changes in marital property law. Sharing property ownership gives both spouses credit for their contributions to the marriage and recognizes that each spouse benefits from the efforts of the other.[109] Some of the effects of the forced sharing of liabilities also would be desirable. In particular, the creditworthiness of non-wage-earning spouses would increase

105. U.M.P.A. § 15(c).

106. Protections for creditors provided by the UMPA include the freedom to rely on indicia of title in deciding whether to extend credit, the presumption that all marital property is available to satisfy a default judgment, the freedom from the terms of a marital property agreement unless given actual notice, and the protection from court-ordered changes in title to marital property as between spouses. *See* U.M.P.A. §§ 5 comment, 8(a), 8(b)(ii), 8(e), 15(c)(4).

107. *See* U.M.P.A. § 10.

108. U.M.P.A. § 8(e).

109. Because of its sharing approach, the UMPA has received support across the political spectrum. *See* Wenig, *supra* note 16, at 9. Supporters of the sharing approach include The National Organization for Women, William F. Buckley, Jr., Phyllis Schlafly, The League of Women Voters of Wisconsin, The Older Women's League, and the 1980 White House Conference on Families.

significantly[110] because they would be able to secure credit on the basis of their spouse's income. Thus, the Act would give a homemaker spouse the ability to acquire credit, limited only by the other spouse's management and control powers over marital property.[111]

Although the forced sharing of ownership clearly is desirable, the wisdom of the forced sharing of debts is less clear. The potential for abuse in the forced sharing of ownership of marital property is minimal and easily identifiable. Sharing ownership is inequitable only when one spouse decides to take advantage of the provision and get something for nothing by ceasing to contribute to the maintenance of the marriage. This generally would be readily apparent to the injured spouse, who could take steps to remedy the situation. When debt liability is shared, however, abuse by one spouse almost necessarily would involve third parties. The injured spouse may be unaware of the abuse until the obligation is incurred, when any available remedy against the offending spouse may be of little practical value, particularly if the offending spouse is in default on the obligations.[112] Moreover, the rights of third parties may take precedence over any rights the nondebtor spouse might have. Consequently, even in harmonious marriages, spouses might feel the need to be constantly wary, even suspicious, of the activities of their marital partners.

The UMPA does not provide adequate protections when marriages do encounter the problems identified in this Note. The Act's sharing approach to debt liability is justified only if the interests promoted by the change and the costs of preventing abuses outweigh the potential risks of abuse. A sharing approach for marital debts promotes two basic sets of interests: (1) the reasonable expectations of marital partners, and (2) commercial practicality and the interests of creditors. Neither set of interests, however, is sufficiently enhanced by forced sharing of liability to justify the risks to spouses.

First, it is not clear that the reasonable expectations of spouses are met by a system that subjects a spouse's property interest to debt liability without notice and consent. Proponents of the sharing approach, however, argue that it better approximates the real expectations of spouses than the common

110. *Cf.* Bingaman, *The Impact of the Equal Rights Amendment*, *supra* note 102, at 31-32 (equal management provisions in some community property states allow a spouse to acquire credit on the basis of the other spouse's income).

111. *See supra* notes 79-84 and accompanying text.

112. *See supra* notes 103-08 and accompanying text.

law title approach.[113] These commentators believe that spouses typically perceive that all marital assets are part of a common pool to which each spouse can gain complete and equal access, even when one spouse is delegated the responsibility of managing the assets. The sharing approach thus conforms more closely to this perception than does the common law.[114]

This perception is questionable at best. The modern institution of marriage has been changing so drastically in recent years that it is debatable whether any typical marital situation or set of expectations can be identified.[115] The traditional marital property scheme has been supplanted in many instances by separate bank accounts, marital contracts, and dual career families. These developments undoubtedly have increased the variety of expectations spouses hold about their marital property rights.

Even in the "traditional" marriage it is not clear that the forced sharing of liabilities conforms to the spouses' reasonable expectations. Although spouses might expect to share property and income and to be able freely to use all joint property, it is also likely that spouses expect their partners to consult with them before incurring debts. Spouses probably do not anticipate that their partners are able to incur major obligations without their knowledge or consent. It is even less likely that spouses expect to be forced to give up their marital property to satisfy such obligations. People expect the law to protect them from the misconduct of others, including their spouses. A

113. *See* Greene, *supra* note 18, at 91; Kahn-Freund, *supra* note 21, at 135-36; Quinn, *supra* note 3, at 50, col. 1.

114. *See* Quinn, *supra* note 3, at 50, col. 1.

115. There are numerous indicators of this change. In 1930, one in every six marriages ended in divorce. Today, the figure is one in two. Cantwell, *supra* note 18, at 4, *citing* 5 MARRIAGE & DIVORCE TODAY 34 (Apr. 7, 1980). In 1963 the median marriage duration was 7.5 years; now it is 6.6 years. *Cantwell, supra* note 18, at 4-5, *citing* 4 MARRIAGE & DIVORCE TODAY 44 (June 18, 1979). The median age of individuals at their first marriage is rising. Libby, *Creative Singlehood as a Sexual Life-Style: Beyond Marriage as a Rite of Passage*, in MARRIAGE AND ALTERNATIVES: EXPLORING INTIMATE RELATIONSHIPS 42 (Libby & Whitehurst eds. 1977). The size of families is shrinking; the birth rate has dropped below that required for population maintenance. C. BIRD, THE TWO-PAYCHECK MARRIAGE 12 (1979). In addition to demographic changes, the economics of marriage are changing. Only seventeen percent of American marriages fit the traditional pattern of the husband as breadwinner and the wife as homemaker. Friedan, *Feminism Takes a New Turn*, N.Y. Times, Nov. 18, 1979, § 6 (Magazine), at 92. Over fifty percent of all married women work outside the home. Norwood, *New Approaches to Statistics on the Family*, 100 MONTHLY LAB. REV. 31, 34 (July 1977).

cause of action against a bankrupt spouse is not the protection they expect. Because this remedy is all the Act may provide in many situations, it is not clear that forced sharing of debt liability effectively fulfills the expectations of spouses.

It is also unclear whether the interests of creditors are promoted by forced sharing of liability and, if so, whether those interests outweigh the substantial risks to unknowing spouses. The presumption of a family purpose and the management and control system may reduce the burdens of inquiry and the risk to creditors. The presumption maximizes the amount of assets available to satisfy debt liability. The title-based management and control system allows creditors generally to ignore the ownership changes proposed by the Act and to carry on business as usual.[116] In many situations, then, these provisions do protect the interests of creditors in dealings with married persons.

These provisions do not protect the creditor, and may even hinder the creditor's attempts at self-protection, however, when all or most of the marital property is held in a manner that permits both spouses independently to manage and control it. In that situation, when a marital debt is incurred by one spouse without the knowledge or consent of the other, the creditor can rely on the entire marital property and on the Act's presumption of a family purpose in extending credit. Nothing prevents the nondebtor spouse, however, from consuming or disposing of large portions of the marital property to the detriment of the creditor's interests.

A prudent creditor in this situation would seek protection from that risk by requiring joinder. In a UMPA jurisdiction, however, such a requirement might violate federal law. Regulations promulgated under the Equal Credit Opportunity Act[117] prohibit a creditor in a community property state from requiring the signature of the noncontracting spouse, unless the spouse seeking credit, under state law, does not control enough community property and does not own enough separate property to qualify for the amount of credit sought.[118] If the spouse

116. *See* Vaughn, *The Policy of Community Property and Inter-spousal Transactions*, 19 BAYLOR L. REV. 20, 45-47 (1967). Vaughn argues that a restrictive management and control system saves the community property approach from being inconvenient for business transactions.

117. 15 U.S.C. §§ 1691-1691f (1983).

118. Equal Credit Opportunity Act, 12 C.F.R. § 202.7(d)(3) (1980); *see also* Crapo, *Equal Management of Community Property: Creditors' Rights*, 13 IDAHO L. REV. 177 (1977); Johnson, *Limitations on Creditors' Rights to Require Spouses' Signatures Under the ECOA and Washington Community Property*

seeking credit has power over enough marital property, the lender cannot require joinder. Since the Act parallels the management and control provisions of community property law, this prohibition probably would apply in any UMPA jurisdiction. Thus, under the UMPA, the ability of cautious creditors to protect their security interests might be severely limited.

Even if the Act's shared liability provisions protect creditors' interests, it is not clear that those interests outweigh the substantial interest in protecting the nondebtor spouse. The unknowing spouse often will be the person least able to prevent harm, whereas the creditor will be the most able. Placing the burden of preventing imprudent debts on the nondebtor spouse imposes a duty on that spouse of constant oversight of the potential debtor spouse's actions. On the other hand, creditors can protect both their own interests and those of the nondebtor spouse. Creditors generally will have greater resources and business knowledge than the nondebtor spouse. Furthermore, creditors need make an inquiry only at the time the debt is sought; constant oversight is not necessary. More importantly, because creditors are the ultimate source of the liability, they can prevent injury and abuse by requiring joinder, or by limiting or even denying credit in questionable cases.

Oddly enough, the one person with no right to notice or consent is the only person to have property affected by the UMPA's characterization of a debt. Under both the Act and the common law, if a spouse incurs an obligation individually both the individual property and the debtor spouse's interest in concurrently held property[119] are liable. The only effect of the Act's forced sharing provisions is to subject the *nondebtor* spouse's concurrently held property interest to liability.[120] Yet the nondebtor spouse has no right to notice or consent regarding the characterization of the transaction and must overcome a presumption to avoid liability. Since debtor spouses are free to obligate all their interests in property, both individual and marital, it would be a better policy to give nondebtor spouses a right to notice, probably through a joinder requirement, when

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Law, 4 U. PUGET SOUND L. REV. 333 (1981); Taylor, *The Equal Credit Opportunity Act's Spousal Cosignature Rules and Community Property States: Regulatory Haywire*, 37 SW. L.J. 1039 (1984).

119. Concurrently held property at common law could be property held in a joint tenancy, a tenancy in common, or a tenancy by the entirety. *See supra* notes 29-35 and accompanying text. According to the UMPA, concurrently held property is marital property.

120. *See* U.M.P.A. § 8(b)(IV).

the characterization of the obligation adversely affects their property.

V. TOWARD A MORE EQUITABLE MARITAL PROPERTY LAW

The interests promoted by the UMPA's liability sharing provision do not justify its enactment. Not only is forced sharing of debts by spouses not in itself a positive change, it negates the potential value of other UMPA provisions. A better approach for legislatures considering adoption of the Act would be to accept the Act's forced sharing approach only for ownership of marital property. The common law treatment of debts is preferable. Individual spouses should be able to obligate only their individual property and their one-half interest in marital property without joinder of the other spouse.

This suggested approach has several implications. It effectively eliminates the Act's family purpose doctrine.[121] The forced sharing of debts provision[122] would also have to be replaced by a provision creating liability for all marital property *only* if both spouses join in the obligation. As broadly as the family purpose doctrine has been construed in community property states,[123] its elimination does not erode protections for the nondebtor spouse, and the joinder requirement adds a truly concrete protection.[124] This approach would require spouses seeking to obligate marital property either to join their spouse in the obligation or demonstrate to creditors that the requested debt does not exceed half the marital assets plus the debtor spouse's individual assets. This burden, however, is not unduly onerous, since it is required now in common law states,[125] and therefore is unlikely to disrupt the normal functioning of the family. The suggested approach also diminishes the need for the Act's management and control provisions. Title to marital property would not give a spouse the power individually to encumber the property when it composes more than half of the total marital assets. Creditors thus could not rely on title in extending credit. Consequently, the title-based management and control provisions could be eliminated altogether, since the chief remaining purpose they would serve would be to deprive

121. U.M.P.A. § 8; *see supra* notes 52-57 and accompanying text.
122. U.M.P.A. § 8(b)(ii).
123. *See supra* note 56 and accompanying text.
124. *See supra* note 36 and accompanying text.
125. *See supra* notes 17-36 and accompanying text.

nontitled spouses of many of the benefits of ownership of the marital property.[126] This would better fulfill the Act's primary purpose of providing both spouses with a meaningful present interest in the marital assets, a purpose that largely is contravened by the Act's approach to management and control.

The changes suggested by this Note present several advantages over current UMPA provisions. First, these changes sever the unnecessary link between forced sharing of marital property and forced sharing of debts.[127] The equity promoted by forced sharing of ownership in marital property does not justify forced debt sharing. The unfairness of the common law property system lies not in its failure to force spouses to share in the debts incurred by their partners, but in its failure to recognize the nonmonetary contributions of spouses to marital acquisitions.[128] Forced debt sharing and forced income sharing proceed from separate and distinct policy considerations. The proposed changes make this separation clear; the right to ownership in marital property is treated apart from debt liability.

These changes also better promote the interests of creditors. The proposed changes essentially impose the common law approach to debt and credit, with the important distinction that creditors will be unable to rely solely on documents of title to establish creditworthiness. Instead, they will have to require other safeguards to ensure that spouses are not trying to encumber more than half of the marital property. Creditors probably will require joinder. Importantly, though, with these changes creditors will be able to require joinder without violating the Equal Credit Opportunity Act. Under ECOA regulations, state law determines whether a lender can require joinder.[129] Since state law, with the changes proposed here, would require joinder to attach liability to all the marital assets, the lender would be protected. Moreoever, when one spouse does obtain a debt on the security of marital property,

126. *Id.*

127. Forced income sharing rests on beliefs that nonmonetary contributions of spouses to the marriage deserve recognition, and that each spouse contributes equally to the marriage. Acceptance of these propositions does not necessarily require accepting the proposition that spouses should share responsibility for debts incurred by their partners despite the lack of opportunity effectively to object to the debts. The latter proposition primarily rests on considerations of ease to the parties to the debt transaction, not on the protection of the interests of both spouses.

128. *See* Greene, *supra* note 18, at 83; *see generally* W. DE FUNIAK & M. VAUGHN, *supra* note 41, at §§ 2, 11.1; Kahn-Freund, *supra* note 21, at 133-36.

129. Equal Credit Opportunity Act, 12 C.F.R. § 202.7(d)(3) (1980).

the creditor's interest is more secure from disposition of the assets by the nondebtor spouse because the creditor may rely only upon the debtor spouse's interest.

The final and most important advantage of the changes to the Act proposed in this Note is that they better fulfill spouses' expectations of safeguards from abuses and mismanagement of marital property. These changes make it more difficult for spouses to encumber marital property without the knowledge of their partners. With notice prior to the debt and the power to limit liability to the debtor spouse's marital property, nondebtor spouses are in a better position to avoid injury and presumably will have a more meaningful remedy after an injury occurs. This is a much more valuable protection than an after-the-fact court action against one's spouse.

VI. CONCLUSION

This Note has presented a critical analysis of the UMPA and a number of the significant changes it proposes for common law states. Although recognizing the strengths of the Act, this Note has attempted to identify potential problems with its approach to the property relations between spouses. The problems arise primarily in the Act's forced debt sharing provision and its lack of safeguards from abuse. The Note proposes that legislatures considering the UMPA adopt the forced sharing of ownership approach but reject the forced debt sharing provisions in favor of a limited liability approach. The Act offers much in the way of increased equality of property rights between spouses, and with the suggested changes these rights can be protected.

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