McGeorge Law Review

Volume 23 | Issue 1 Article 6

1-4-1991

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INTRODUCTION

After ten years of marriage, Harold and Wilma decided to separate. Wilma had been a housewife throughout the marriage, and had few funds of her own on the date of separation. She quickly obtained a part-time job paying minimum wage. Three months into the separation, and prior to final dissolution of her marriage to Harold, Wilma purchased a California Lottery ticket for $1.00. The ticket was purchased with Wilma's postseparation earnings. Two days later, she was notified that she had won $500,000.

Harold immediately brought suit against Wilma claiming that Wilma's lottery winnings constituted community property in which he had a one-half interest. Harold argued that since the marriage had not yet been finally dissolved, the lottery winnings were earned "during marriage" and were therefore community property. The court found to the contrary and awarded the proceeds of the ticket to Wilma as her separate property, reasoning that the ticket was purchased with funds earned by Wilma after separation.

After the conclusion of Harold's lawsuit, but still prior to dissolution, Wilma decided to take her lottery winnings to Las Vegas. This time, however, lady luck was not on her side. Not only

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did Wilma lose all the money she had won on the California Lottery, but she also incurred enormous gambling debts. Wilma's creditors sought to satisfy the gambling debts from Harold's community assets in addition to Wilma's meager assets. Surprisingly, the court ruled in favor of Wilma's creditors, allowing them to take *both* Wilma's *and* Harold's community property despite the fact that the debts were incurred solely by Wilma *after* she and Harold had separated.

The above hypothetical illustrates a potential inequity which existed under California law prior to the enactment of Civil Code section 5120.110(c) on January 1, 1990.[1] Prior to January 1, 1990, California law permitted a separated spouse, such as Wilma, to retain postseparation earnings and accumulations acquired as his or her separate property,[2] but rendered the property of *both* spouses liable for obligations incurred by either spouse during the same postseparation period.[3] Thus, prior to enactment of section 5120.110(c), California operated under a statutory system whereby the nondebtor spouse's (e.g. Harold's) community property was forced to bear the risks of the debtor spouse's postseparation

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1. CAL. CIV. CODE § 5120.110(c) (West Supp. 1991). Section 5120.110(c) states: "'[d]uring marriage' shall not include the period during which the spouses are living separate and apart prior to a judgment for dissolution of marriage or a judgment for legal separation." *Id.* Prior to the advent of section 5120.110(c) the laws in California pertaining to the separation period were inconsistent, despite the fact that "marriage" continues throughout separation. Under California law, marriage continues until the happening of either: (1) The death of one of the parties; (2) a court judgment decreeing a dissolution of the marriage; or (3) a judgment of nullity. CAL. CIV. CODE § 4350 (West 1983). Thus, in California, it is not sufficient for a dissolution of marriage that a couple merely separate and decide to live apart.

2. CAL. CIV. CODE § 5118 (West 1985). Section 5118 states: "[t]he 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." *Id.*

3. CAL. CIV. CODE § 5120.110(a) (West Supp. 1991). Civil Code section 5120.110 provides in pertinent part:

> (a) Except as otherwise expressly provided by statute, the community property is liable for a debt incurred by either spouse *before or during marriage*, regardless which spouse has the management and control of the property and regardless whether one or both spouses are parties to the debt or to a judgment for the debt.

Id. (Emphasis added). Subdivision (a) of section 5120.110 continues the substance of former section 5116 which stated: "[T]he property of the community is liable for the contracts of either spouse which are made after marriage prior to or on or after January 1, 1975." 1984 Cal. Stat. ch. 1671, sec. 7 at 6019 (repealing CAL. CIV. CODE § 5116).

liability, yet the nondebtor spouse was precluded from enjoying any benefits or profits derived from postseparation risks.

The unfairness inherent in the prior system was brought to the California Legislature's attention in July of 1988.[4] State Senator Phillip Isenberg introduced legislation addressing the above-illustrated inequities by clarifying Civil Code section 5120.110, which renders the community liable for debts incurred "during marriage." Senator Isenberg drafted section 5120.110 consistently with Civil Code section 5118, an interrelated law which characterizes the postseparation earnings and accumulations of a separated spouse as that spouse's separate property.[5] Without immediate legislative clarification, the prior law would have provided an opportunity for serious mischief by a spouse who, perhaps intentionally, incurred substantial postseparation debts chargeable against the community assets of both spouses.

Reacting quickly to the plea, the California Legislature determined that the best way to resolve the apparent inequities was to amend former Civil Code section 5120.110 so that the community is absolved of liability for the other spouse's postseparation debts.[6] The legislature did so in the form of

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4. A letter written by Attorney Edward Huntington of the San Diego County Bar Association in response to a 1988 Bankruptcy Court decision stressed the need for legislative clarification. *See* Letter from Edward B. Huntington to the Honorable Phillip Isenberg (July 22, 1988) (discussing the unfairness inherent in the Bankruptcy Court's decision) (copy on file at the Pacific Law Journal). *See also In re* McCoy, 90 Bankr. 448, 449-50 (Bankr. S.D. Cal. 1988) (discussing former Civil Code § 5120.110) (*reversed by* 111 Bankr. 276 (B.A.P. 1990)). The appellate panel held that the amended version of section 5120.110 was applicable to the case at the appellate level. *Id.* at 281.

5. CAL. CIV. CODE § 5118 (West 1983). Huntington charged the Bankruptcy Court with interpreting the term "during marriage" too literally, making all community property liable for debts incurred during separation. *See* Letter from Edward B. Huntington to the Honorable Phillip Isenberg, *supra* note 4. Huntington also argued that the Bankruptcy Court decision was contrary to the way in which family law is applied in state court. *Id.* According to Huntington, most state courts would not allow one party to pay for the debts of the other party incurred after separation nor would state court allow those debts to be a charge against the other person's property. *Id.* To avoid decisions such as that in *McCoy*, 90 Bankr. 448, Huntington proposed a legislative clarification stating that "[f]or purposes of this section [Section 5120.110] 'during marriage' shall not include the postseparation period prior to the entry of judgment." *Id.*

6. In 1989, the California Legislature enacted Assembly Bill 1907. The Bill, authorized by the Assembly Committee on Judiciary, sought to make three important changes to the Family Law Act, one of which was an amendment to California Civil Code § 5120.110. The Bill passed both houses unanimously and had no opposition. The Bill was signed into law by Governor George Deukmejian on October 1, 1989.

Assembly Bill 1907, which clarified that the term "during marriage," as used in section 5120.110(a),[7] does *not* include the period in which the spouses are living "separate and apart" prior to a judgment for dissolution of the marriage or a judgment for legal separation.[8] The apparent legislative intent of this amendment was to bring California's treatment of spousal debts during the postseparation period into symmetry with other laws pertaining to postseparation earnings and accumulations. However, the legislature may have failed to achieve this goal.

The purpose of this Article is two-fold: (1) To inform separated spouses, their attorneys, and their creditors of their rights and obligations under California law; and (2) to analyze whether the amendment to Civil Code section 5120.110 goes too far in light of the intended results. In furtherance of these goals, Part I of this Article briefly examines events leading up to the legislative clarification, including a bankruptcy court decision without which legislative clarification in the area of spousal debts might not have occurred.[9] Part II of this Article analyzes the effect of the 1990 amendment on debts incurred both prior and subsequent to the amendment's effective date.[10] Specifically, inquiry will be made as to the potential retroactive application of the amendment and the due process issues created by such an application.[11] Part III of this Article restates the results intended by the legislative clarification and discusses why the legislature may have failed to bring about such intended results.[12] Finally, part IV of this Article proposes

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7. *See supra* note 3 and accompanying text.

8. CAL. CIV. CODE § 5120.110(c) (West Supp. 1991). Living "separate and apart" does not refer to the condition where spouses are temporarily living in different places because of travel or economic circumstances, but to the situation where they live separate and apart from each other with no present intention of reconciliation. *See In re* Marriage of Baragry, 73 Cal. App. 3d 444, 448, 140 Cal. Rptr. 779, 781 (1977) (stating that the phrase "living separate and apart" refers to the condition when spouses have come to a parting of the ways with no present intention of resuming marital relations"). The fact that a husband and wife may live in separate residences is not determinative of whether they are actually living separate and apart. *See also In re* Marriage of Marsden, 130 Cal. App. 3d 426, 434, 181 Cal. Rptr. 910, 914 (1982) (holding that a couple is "living separate and apart" if the parties' conduct evidences a complete and final break in the marital relationship).

9. *See infra* notes 14-36 and accompanying text.

10. *See infra* notes 37-101 and accompanying text.

11. *See infra* notes 43-101 and accompanying text.

12. *See infra* notes 102-128 and accompanying text.

a further amendment to the law -- one which would create the necessary symmetry to bring about equitable results in the area of postseparation obligations.[13]

I. THE IMPETUS FOR CALIFORNIA CIVIL CODE SECTION 5120.110(c): AN UNFAIR BANKRUPTCY COURT DECISION

California Civil Code section 5120.110(c) is primarily a response to *In re McCoy*,[14] a 1988 Bankruptcy Court decision. In *McCoy*, the debtor and his wife ("the McCoys"), separated after approximately sixteen years of marriage.[15] Soon thereafter, the McCoys filed a petition for dissolution of marriage in the San Diego County Superior Court.[16] Two years later, but prior to final dissolution of the marriage, the debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code.[17] As of the date of the filing of the Chapter 11 petition, the McCoys' community property assets, which included the McCoys' residence, had not been divided.[18]

Upon motion by the debtor, the Bankruptcy Court entered an order authorizing the private sale of the McCoys' residence.[19] The debtor, Mr. McCoy, requested that Mrs. McCoy receive, pursuant to the requirements imposed by the Bankruptcy Code, her community property share of the sale proceeds.[20] A dispute arose between the McCoy's regarding the treatment of several debts incurred by the debtor subsequent to separation from his wife but prior to dissolution of their marriage. Mrs. McCoy argued that a nondebtor spouse's community property may not be charged by the debtor spouse's obligation incurred after separation, but prior to

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13. *See infra* pages 131-132.
14. 90 Bankr. 448 (S.D. Cal. 1988).
15. *Id.* at 448.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

termination of the marriage.[21] According to Mrs. McCoy, creditors seeking to enforce postseparation debts should be limited to satisfaction from the debtor spouse's separate property.[22]

The Bankruptcy Court disagreed with Mrs. McCoy and held that former section 5120.110 of the California Civil Code permitted debts incurred by a separated spouse to be satisfied from the community estate.[23] The *McCoy* court reasoned that the statutory scheme created by the California Legislature recognizes four critical periods in determining the property rights of husband and wife: (1) Premarriage; (2) during marriage; (3) postseparation/predissolution (the "window-period"); and (4) postdissolution.[24] According to the *McCoy* court, since a husband and wife are legally married during the "window period," their community property is liable for all debts incurred by either spouse.[25]

The Court in *McCoy* distinguished *American Olean Tile Company v. Schultze*,[26] the only other case to date addressing former section 5120.110.[27] The defendants in *American Olean*, Mr. and Mrs. Schultze, separated on April 1, 1980.[28] On May 1, 1981, they executed a marital settlement agreement.[29] This

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21. *Id.* at 450. Mrs. McCoy relied primarily on *American Olean Tile Co. v. Schultze*, 169 Cal. App. 3d 359, 215 Cal. Rptr. 184 (1985), which held that "income earned and obligations incurred after separation in the operation of a business are not community property in nature." *McCoy*, 90 Bankr. at 450. (citing *American Olean*, 169 Cal. App. 3d 359, 365, 215 Cal. Rptr. 184, 187 (1985)).

22. *McCoy*, 90 Bankr. at 450.

23. *Id.* at 449. The court did point out, however, that former section 5120.110 provides an exception to the rule in cases where an exception is statutorily created. For instance, the court recognized that "[t]he earnings of a spouse before marriage . . . may not be held liable for a debt incurred by the other spouse." *Id.* (citing CAL. CIV. CODE § 5120.110(b)). The court also recognized that "separate property of the nondebtor spouse is exempt from liability for premarital debts and postseparation debts." *Id.* (citing CAL. CIV. CODE § 5120.130). The court, however, found these exceptions inapplicable to the facts of *McCoy*. *Id.*

24. *Id.* Since only death or a final dissolution or nullity terminates marriage, it was formerly held that neither an interlocutory judgment of dissolution, nor a legal separation will affect a party's status as a spouse. *See infra* note 35 (noting authority which states that marriage terminates at final dissolution).

25. *McCoy*, 90 Bankr. at 449.

26. 169 Cal. App. 3d 359, 215 Cal. Rptr. 184 (1985).

27. *McCoy*, 90 Bankr. at 450.

28. *American Olean*, 169 Cal. App. 3d at 363, 215 Cal. Rptr. at 186.

29. *Id.*

agreement provided that the Schultzes' community property business would be retained by Mr. Schultze as his separate property.[30] On May 6, 1981, prior to final dissolution of the marriage, Mr. Schultze executed a promissory note in favor of the plaintiff/creditor for unpaid invoices related to the business.[31] Subsequently, the plaintiff/creditor brought suit on the note and sought to recover from Mrs. Schultze's community property for her husband's postseparation debt.[32] The First District Court of Appeal rejected the creditor's argument and held that income earned and *obligations incurred* after separation in the operation of a separate property business do not constitute community property or community obligations.[33] The *McCoy* court distinguished *American Olean* as a case determining a creditor's rights subsequent to the execution of a marital settlement agreement.[34]

Although it may seem unfair to permit debts incurred by a separated spouse to be satisfied from the community estate, *McCoy* appears to be a literally correct application of former section 5120.110.[35] Former section 5120.110 provides that community

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 364, 215 Cal. Rptr. at 187.

34. *McCoy*, 90 Bankr. at 450. The court in *American Olean* held that the wife's interest in former community property was not liable for a debt incurred after separation and after the division of community property by an interlocutory judgment of dissolution. *American Olean*, 169 Cal. App. 3d at 365, 215 Cal. Rptr. at 188. *American Olean*, therefore, was not decided on the basis of California Civil Code section 5120.110, subdivision (c), but rather on the basis of Civil Code section 5120.160, subdivision (a) which renders separate and community property held by the nondebtor spouse not subject to enforcement of debts incurred by the other spouse *unless the nondebtor spouse was assigned the debt in the division of the property. See id.* Thus, section 5120.160, which was at issue in *American Olean*, applies after the division of community property, not after separation. CAL. CIV. CODE § 5120.160(a)(1)-(3) (West Supp. 1991).

35. A leading treatise on California family law observes that "marriage continues until the date that the marital status is terminated, not the date that spouses separate." 1 MARKEY, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 5-104 (1989). *See* Head v. Crawford, 156 Cal. App. 3d 11, 17-18, 202 Cal. Rptr. 534, 538 (1984). The court in *Head* stated:

> Juda reminds us that she and Tracy were separated when Tracy encumbered the property. She would have this court read Civil Code section 5127 as narrowly as possible so as to preclude encumbrances of *any* interest of community real property made without mutual knowledge and consent of the spouses when they are separated at the time the subject property is encumbered. This, however, is not the rule. Final dissolution of the marriage is the relevant date, not the time of separation: A marriage exists until final dissolution.

property is liable for a debt incurred by either spouse "during marriage." Thus, so long as two people were legally married in California, it was appropriate for the court, pursuant to former section 5120.110, to render the community liable for obligations incurred by either spouse during separation.[36]

II. LEGAL IMPLICATIONS OF CALIFORNIA CIVIL CODE SECTION 5120.110(C).

A. Community Liability for Debts Incurred After January 1, 1990

Although newly enacted Civil Code section 5120.110(c) does not specify an effective date for the amendment, California Government Code section 9600(a) provides that a statute enacted at a regular session of the legislature, as this one was, shall go into effect January 1, following a 90 day period from the date of enactment.[37] Thus, the effective date for section 5120.110(c) is January 1, 1990.

Section 5120.110(c) defines "during marriage" as not including a period of spousal separation.[38] Assuming, therefore, that Wife's Las Vegas debts, as described in the introductory hypothetical, were incurred *after* January 1, 1990, the court in the hypothetical erred by holding the entire community liable for Wife's postseparation debts. Subdivision (c) of section 5120.110 makes it

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> Since the community is liable for debts arising during the marriage, the community property may still be liable for debts occurring after separation. [Citations omitted]. Although the non-consenting spouse may clear one-half of the community real property from the lien, the community property of each may still be liable for community debts if the creditor seeks to pursue the usual creditor's remedies. [Citation omitted].

Id. (emphasis in original).

36. As discussed below, however, the case law in California appears to create an exception to the rule that community property is liable for debts incurred by either spouse "during marriage" in situations where the debts in question involve loans received after separation. *See infra* notes 101-107 and accompanying text.

37. CAL. GOV'T CODE § 9600(a) (West 1980).

38. CAL. CIV. CODE § 5120.110(a) and (c) (West Supp. 1991). For the complete text of former section 5120.110 *see supra* note 3.

clear that "during marriage" does not include the time between separation and dissolution.[39]

Section 5120.110(c) limits creditors to satisfaction from the separate property of the debtor spouse.[40] In the absence of disposition of the property by contract between the parties, some creditors are prohibited from collecting upon the entire community property as a means of satisfying the postseparation debts of either spouse. Attorneys representing creditors should be mindful of this legislative clarification in the area of spousal debts and advise their clients accordingly. For instance, attorneys with creditor-clients who insist on having the debtor's entire community estate available for execution on the postseparation debt should advise their client to refrain from entering into any future contractual arrangements with a husband or wife without first obtaining the signature of both spouses. By obtaining both spouse's signatures on the contract, the creditor will avoid the risk of not having the community estate available for execution upon the postseparation debts.[41]

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39. *See supra* note 1 and accompanying text (discussing section 5120.110(c) of the Civil Code). *See also In re* McCoy, 111 Bankr. 276 (Bankr. 9th Cir. 1990) (stating that "by amending [section] 5120.110 the State Legislature has clearly mandated that a separated spouse's share of the community property will not be reachable to satisfy the other spouse's postseparation debts"). It is important to note, however, that this discussion is limited to postseparation *debts*. The treatment of postseparation *loans* is discussed in a subsequent section of this Article. *See infra* notes 101-107 and accompanying text.

40. CAL. CIV. CODE § 5120.110(c) (West Supp. 1991). As examined below, however, there is an exception to this rule in debt situations where a loan obtained is "related to the community" or when a loan "benefits" the community estate. *See In re* Marriage of Stephenson, 162 Cal. App. 3d 1057, 1085, 209 Cal. Rptr. 383, 401 (1984). *See, e.g., In re* Marriage of Hopkins, 74 Cal. App. 3d 591, 600, 141 Cal. Rptr. 597, 602 (1977); *In re* Marriage of Munguia, 146 Cal. App. 3d 853, 862, 195 Cal. Rptr. 199, 203 (1983); *In re* Marriage of Lister, 152 Cal. App. 3d 411, 419, 199 Cal. Rptr. 321, 326 (1984) (discussing the loan exception). *See also infra* notes 103-124 and accompanying text.

41. *See* Kennedy v. Taylor, 155 Cal. App. 3d 126, 130, 201 Cal. Rptr. 779, 781 (1984) (holding in a related situation that "third party creditors can easily avoid the risk . . . by obtaining both spouses' signatures on notes."). According to the court: "[O]btaining both spouses' signatures is a reasonable burden to place on creditors who later attempt to recover against former community assets." *Id.*

B. Community Liability for Debts Incurred Prior to January 1, 1990

Assume for purposes of this section that Wife's Las Vegas debts, as described in the introductory hypothetical, were incurred prior to the effective date of section 5120.110(c), and that Wife's creditors, relying upon former section 5120.110, sought enforcement of the debts from Husband's community assets. Assume further, however, that unlike the result in the introductory hypothetical, the court in this case held that the community estate was not liable for Wife's postseparation debts based upon section 5120.110(c). Since such a ruling involves the retroactive application of Civil Code section 5120.110(c), two questions arise: (1) Whether section 5120.110(c) requires retroactive application; and (2) whether such retroactive application constitutes an unconstitutional deprivation of Husband's property.[42] It is to the merit of the hypothetical court's decision that this Article now turns.

C. Retroactive Application of California Civil Code Section 5120.110(c)

1. Intent of retroactive application

A retroactive law is one which attaches a different legal effect to preenactment conduct than that which would apply without the passage of the statute.[43] Such retroactive operation of a statute,

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42. *See In re* Marriage of Bouquet, 16 Cal. 3d 583, 586, 546 P.2d 1371, 1372, 128 Cal. Rptr. 427, 428 (1976) (holding that when faced with the question of whether amended Civil Code section 5118 governs property acquired prior to the effective date of the amendment, the court must determine whether "the amendment, properly construed, requires retroactive application and [whether] such application does not constitute an unconstitutional deprivation of the Wife's property"). *See also* Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1225, 753 P.2d 585, 609-610, 246 Cal. Rptr. 629, 653-54 (1988) (declining to apply the Fair Responsibility Act of 1986 ("Proposition 51") retroactively).

43. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) (exploring the Supreme Court's approach to constitutional issues inherent in legislation affecting existing rights). *See Aetna Cas. & Surety Co. v. Indus. Accident Comm'n*, 30 Cal. 2d 388, 391, 182 P.2d 159, 160 (1947), stating that "[a] retrospective law is one

however, is presumed to take effect only if it is clear that such was the intent of the legislature.[44] This presumption is embodied in section 3 of the California Civil Code which declares that "[n]o part of [this Code] is retroactive, unless expressly so declared."[45] Section 3, however, does not limit the search for an express declaration of legislative intent solely to the statutory language.[46] Rather, in the absence of express language, the presumption is applied only if "after considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent."[47] Factors pertinent to a showing that the legislature intended the statute to operate retroactively include the "context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction."[48]

For instance, in *In re Marriage of Bouquet*,[49] the California Supreme Court faced the issue of whether amended Civil Code section 5118 governs property rights acquired prior to the effective

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which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute") (quoting American States Water Serv. Co. v. Johnson, 31 Cal. App. 2d 606, 613, 88 P.2d 770, 774 (1939)).

44. Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1207, 753 P.2d 585, 596-97, 246 Cal. Rptr. 629, 640 (1988) (citing Aetna Casualty & Surety Co. v. Indus. Accident Comm'n, 30 Cal. 2d 388, 393, 182 P.2d 159, 161 (1947)). *See generally*, 7 WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 495 (9th ed. 1988).

45. CAL. CIV. CODE § 3 (West 1982). *See In re* Marriage of Bouquet, 16 Cal. 3d 583, 587 n.3, 546 P.2d 1371, 1372 n.3, 128 Cal. Rptr. 427, 428 n.3 (1976) (recognizing that "[s]ection 3 of the Civil Code embodies the common law presumption against retroactivity").

46. *See, e.g.*, United States v. Industrial Bank, 459 U.S. 70, 79-80 (1982); Aetna Cas. & Surety Co. v. Industrial Acc. Co., 30 Cal. 2d 388, 182 P.2d 159 (1947); White v. Western Title Ins. Co., 40 Cal. 3d 870, 884, 710 P.2d 309, 221 Cal. Rptr. 509, (1985); Glavinich v. Commonwealth Land Title Ins. Co., 163 Cal. App. 3d 263, 272, 209 Cal. Rptr. 266, (1984) (holding that the court may look beyond the express statutory language to determine legislative intent, but that it must be clear that it was the legislative intent for the statute to be given retrospective application).

47. *Bouquet*, 16 Cal. 3d at 587, 546 P.2d at 1372-73, 128 Cal. Rptr. at 428 (citing *In re* Estrada, 63 Cal. 2d 740, 746, 408 P.2d 948, 952, 48 Cal. Rptr. 172, 176 (1965)). The court in *Bouquet* explained that "[t]he rule of construction . . . is not a straightjacket. Where the legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent." *Id.*

48. Fox v. Alexis, 38 Cal. 3d 621, 629, 699 P.2d 309, 313-14, 214 Cal. Rptr. 132, 136-37 (1985). *See Bouquet*, 16 Cal. 3d at 587, 546 P.2d at 1372-73, 128 Cal. Rptr. at 428-29 (1976).

49. 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

date of the amendment.[50] Finding the amendment silent as to retroactivity, the court engaged an analysis of "pertinent factors" supporting the inference that amended section 5118 was intended by the legislature to apply retroactively.[51] One factor principally relied upon by the court was the "patent unconstitutionality" of the former statute.[52] For instance, prior to the amendment, section 5118 discriminated against the husband during separation by providing that the earnings of the wife were her separate property, yet those of the husband belonged to the community.[53] Further, the court largely relied upon a letter from the author of the amendment indicating an intent that the amended statute be applied retroactively.[54]

The pertinent factors relevant to a determination of legislative intent mandate retroactive application of section 5120.110(c). It must be assumed that the California Legislature, in enacting section 5120.110(c), was aware of the existing laws.[55] Thus, it may

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50. *Id.* at 587, 546 P.2d at 1372, 128 Cal. Rptr. at 428.

51. *Id.* at 587-91, 546 P.2d at 1372-76, 128 Cal. Rptr. at 428-31.

52. *Id.* at 588, 546 P.2d at 1373-74, 128 Cal. Rptr. at 429-30. The unconstitutionality of the former law indicates, according to the court in *Bouquet*, that the legislature intended the amendment to have retroactive effect. *Id.* The court qualified its holding in this regard, however, by stating that the inference that a constitutionally infirm law indicates the legislature's intent to apply it retroactively is "hardly conclusive." *Id.*

53. *Id.*

54. *Id.* In the letter, Assemblyman Hayes expressed his opinion that section 5118 was intended to operate retroactively. *Id.* at 588-89, 546 P.2d at 1374-75, 128 Cal. Rptr. at 430-31. In pertinent part the letter read:

> It was my intention as the author of AB 1549, and the argument I used in obtaining passage of the measure by the Assembly and Senate of the California Legislature, that this amendment to Section 5118 of the Civil Code . . . would govern the determination of the property rights of the parties under the same rules applied by the California Supreme Court case of *Addison v. Addison* . . . . The intention was to supersede the prior law and to have the new law retroactively apply to all cases decided on and after March 4, 1972.

Id. The court construed the letter as indicative of legislative intent. *Id.* at 590, 546 P.2d at 1374-75, 128 Cal. Rptr. at 430-31. No such letters of legislative intent exist in relation to section 5120.110(c).

55. *See In re* Misener, 38 Cal. 3d 543, 552, 698 P.2d 637, 643, 213 Cal. Rptr. 569, 575 (1985); Harris v. Alcoholic Beverage Control Appeals Bd., 197 Cal. App. 2d 759, 767, 18 Cal. Rptr. 151, 156 (1961) (stating that courts may assume that the legislature in enacting a statute knew the existing law).

further be assumed that the legislature intended section 5120.110(c) to be subject to Civil Code sections 5120.310 and 5120.320, which together provide that:

> the provisions of [chapter 3 of title 8 of the Civil Code, of which section 5120.110 and sections 5120.310 and 5120.320 are a part] govern the liability of separate and community property and the personal liability of a married person for a debt enforced on or after . . . [January 1, 1985], regardless whether the debt was incurred before, on, or after [January 1, 1985].[56]

Since the legislature did not amend sections 5120.310 and 5120.320 when it enacted section 5120.110(c), the legislature likely intended new section 5120.110(c) to apply to all debts enforced on or after January 1, 1985. Quite simply, the legislature's failure to indicate that section 5120.110(c) would not be subject to the provisions of section 5120.320, takes the place of express language of legislative intent and is at least as effective as such language in evidencing an intent to give the amendment to section 5120.110 retroactive effect. Significantly, the United States Bankruptcy Appellate Panel for the Ninth Circuit reached the same conclusion on February 26, 1990, when it *reversed* the lower Bankruptcy Court's decision in *In re McCoy*.[57]

A finding that the legislature intended Civil Code section 5120.110(c) to apply retroactively, however, is merely one prerequisite to retroactive application of a statute. After identifying such an intent, the court must determine that retroactive application of the statute is not barred by constitutional constraints.[58]

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56. CAL. CIV. CODE §§ 5120.310, 5120.320 (West Supp. 1991).

57. *In re* McCoy, 111 Bankr. 276, 281 (Bankr. 9th Cir. 1990). Additionally, in at least one superior court case the court also applied section 5120.110(c) retroactively pursuant to section 5120.320. Afaah Investment Co. v. Beverly Newport Aviation, L.A. Superior Court Case No. C 683291. In fact, one of the authors of this article, S. Brett Sutton, was involved in the representation of the defendant in that case.

58. *In re* Marriage of Buol, 39 Cal. 3d 751, 756, 705 P.2d 354, 356, 218 Cal. Rptr. 31, 34 (1985).

2. *Constitutionality of retroactive application*

California case law has long held that the retroactive application of a statute may be unconstitutional if it deprives a person of a vested[59] property right without due process of law.[60] In fact, excluding decisions rendered during the last twenty-five years, the California Supreme Court has consistently held that community property legislation which impairs vested rights is *per se* unconstitutional if applied retroactively.[61] Once a vested right was found, these courts proceeded directly to the conclusion that the statute would be unconstitutional if applied retroactively.

A new standard for determining retroactive application was announced in 1965. Largely motivated by academics commenting on the topic, the California Supreme Court in *Addison v. Addison*[62] adopted a constitutional doctrine which permits vested rights to be impaired when there is a sufficiently important state purpose for doing so.[63] The constitutional question, according to the court in *Addison*, is not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the

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59. The word "vested" is used here to describe property rights that are not subject to a condition precedent. *See In re* Marriage of Bouquet, 16 Cal. 3d 583, 591 n.7, 546 P.2d 1371, 1376 n.7, 128 Cal. Rptr. 427, 432 n.7 (1976).

60. *See In re* Marriage of Buol, 39 Cal. 3d 751, 756, 705 P.2d 354, 357, 218 Cal. Rptr. 31, 34 (1985) (citing Rosefield Packing Co. v. Superior Court, 4 Cal. 2d 120, 122, 47 P.2d 716, 717 (1935); San Bernardino County v. Indus. Acc. Com., 217 Cal. 618, 628, 20 P.2d 673, 677 (1933); *In re* Marriage of Bouquet, 16 Cal. 3d 583, 592, 128 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976); Robertson v. Willis, 77 Cal. App. 3d 358, 365, 143 Cal. Rptr. 523, 527-28 (1978)).

61. Spreckels v. Spreckels, 116 Cal. 339, 349, 48 P. 228, 231 (1897). The line of cases following *Spreckels* looked solely at the question of whether the right that would be impaired by the proposed legislation was "vested." *See, e.g.*, Boyd v. Oser, 23 Cal. 2d 613, 619-21, 145 P.2d 312, 316-17 (1944); Trimble v. Trimble, 219 Cal. 340, 346, 26 P.2d 477, 480 (1933); Stewart v. Stewart (I), 199 Cal. 318, 340-41, 249 P. 197, 206-07 (1926); McKay v. Lauriston, 204 Cal. 557, 565, 269 P. 519, 522 (1928); Roberts v. Wehmeyer, 191 Cal. 601, 612, 218 P. 22, 26 (1923); Duncan v. Duncan, 6 Cal. App. 404, 407, 92 P. 310, 311-12 (1907). *See also* Flagg, *Respecting Reliance: A Standard for Due Process Review of California's Retroactive Community Property Legislation*, COMMUNITY PROP. J., January 1988, at 14, 21-22 (arguing against following the California retroactivity doctrine adopted in *In Re Buol*, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985), and *In re* Fabian, 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986)).

62. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

63. *Id.* at 566, 399 P.2d at 902, 43 Cal. Rptr. at 102.

public welfare as to justify the impairment.[64] If such language is deemed sufficiently necessary, then the statute will have retroactive effect.

The first case to apply the *Addison* due process analysis of retroactivity was *In re Marriage of Bouquet.*[65] The issue faced by the California Supreme Court in *Bouquet* was whether amended Civil Code section 5118,[66] could be applied retroactively so as to govern property rights acquired prior to the effective date of the amendment.[67] Under the former law, the earnings and accumulations of the wife during separation constituted separate property, but those of the husband were the property of the community.[68] Utilizing the *Addison* analysis, the court had little trouble approving the retroactive application of the statute. The *Bouquet* court reasoned that remedying past discrimination against the husband during periods of separation justified the impairment of the wife's vested property rights.[69]

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64. *Id.* (quoting Armstrong, *"Prospective" Application of Changes in Community Property Control - Rule of Property or Constitutional Necessity?*, 33 CAL. L. REV. 476, 495-96 (1945). The court stated that vested rights may be impaired 'with due process of law' under many circumstances. *Id.* The state's inherent sovereign power includes the so-called 'police power' right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people. *Id.*

65. 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

66. Section 5118, as amended in 1971, provides: "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." CAL. CIV. CODE § 5118 (West 1983).

67. *Bouquet*, 16 Cal. 3d at 587, 546 P.2d at 1372, 128 Cal. Rptr. at 428.

68. Prior to the 1971 amendment, section 5118 read: "The earnings and accumulations of the wife and her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." 1969 Cal. Stat. ch. 1608, sec. 8, at 3340 (enacting CAL. CIV. CODE § 5118). Civil Code sections 5110 and 5119 rendered the husband's earnings community property. *Bouquet*, 16 Cal. 3d at 586 n.2, 546 P.2d at 1372 n.2, 128 Cal. Rptr. at 428 n.2.

69. *Bouquet*, 16 Cal. 3d at 594, 546 P.2d at 1377-78, 128 Cal. Rptr. at 433-34. In particular, the court pointed to the "patent unfairness" of the former law. According to the court, "[t]he patent unfairness of former section 5118 surely makes this an appropriate case for the use of the police power to redress retroactively inequitable property rules. Besides augmenting the state interest in giving the new law effect as quickly as possible, the unfairness of the former law also casts doubt upon the legitimacy of reliance upon it." *Id.* at 594 n.11, 546 P.2d at 1377 n.11, 128 Cal. Rptr. at 433 n.11.

The *Bouquet* court delineated a set of factors to be considered in determining the constitutionality of legislation that infringes upon vested rights.[70] These factors include:

> [T]he significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.[71]

Unfortunately, the *Bouquet* court sustained the retroactive application of amended section 5118 without a substantial discussion of the newly enunciated factors. The court simply concluded that the "state's interest in the equitable dissolution of the marital relationship supports [the] use of the police power to abrogate rights in marital property that derived from the patently unfair prior law."[72] Thus, although the court in *Bouquet* seems to advocate a new test for determining the constitutionality of legislation that impairs vested rights, it actually provides future courts with little guidance in applying the *Bouquet* factors.

The California Supreme Court has virtually ignored the balance of factors set forth in *Bouquet* and instead created a rule which suggests that "only a state interest in rectifying a former injustice would justify retroactive application of community property law."[73] Leading the way for such a rule is the supreme court's

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70. *Id.* at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432.

71. *Id.*

72. *Id.* at 594, 546 P.2d at 1378, 128 Cal. Rptr. at 434.

73. *See* Flagg, *supra* note 61, at 14, 15. William A. Reepy, in an article written only months after Flagg's article, describes as "alarmists" Flagg and the court decisions that also interpret the law surrounding the retroactive application of community property legislation as constitutional only if the law to be superseded was causing some form of "rank injustice." Reepy, *Applying New Law At Divorce To Preenactment Acquisitions: Must Prior Law Be "Rankly Unjust"?*, COMMUNITY PROP. J., Oct. 1988, at 1. According to Reepy, "to the extent such a rule emerges from these opinions, it is dictum." *Id.*

1985 decision, *In re Marriage of Buol*,[74] and its 1986 ruling in *In re Marriage of Fabian*.[75]

In *Buol*, the husband and wife married in 1943 and separated in 1977.[76] The Wife began working in 1954 as a housekeeper, babysitter, and an attendant to an elderly woman.[77] In 1959, she began working as a nursing attendant at a local hospital.[78] Wife purchased the family residence with earnings from her employment which she kept in a separate bank account.[79] Title to the property was taken in joint tenancy with the husband.[80]

The sole issue in *Buol* was the status of the home as separate or community property.[81] The court awarded the home to the wife, holding that the parties had an enforceable oral agreement that the earnings and the home were the wife's separate property.[82] The Husband appealed this decision.

During the pendency of the appeal, Civil Code section 4800.1 was enacted.[83] Section 4800.1 provides that the only means of

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74. 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985) *superseded by* CAL. CIV. CODE §§ 4800.1, 4800.2 (West Supp. 1991).

75. 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986) *superseded by* CAL. CIV. CODE § 4800.2 (West Supp. 1991).

76. *Buol*, 39 Cal. 3d at 754, 705 P.2d at 355, 218 Cal. Rptr. at 32.

77. *Id.*

78. *Id.*

79. *Id.* at 754-55, 705 P.2d at 355-56, 218 Cal. Rptr. at 32. The separate account was established with husband's knowledge and consent. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 755, 705 P.2d at 356, 218 Cal. Rptr. at 33. Prior to the enactment of California Civil Code section 4800.1, property acquired during marriage in joint tenancy was presumed to be community property. 1979 Cal. Stat. ch. 373, sec. 48, at 1264 (amending CAL. CIV. CODE § 5110). This presumption, however, could be rebutted by oral agreement that the property was the separate property of one spouse. *See In re* Marriage of Lucas, 27 Cal. 3d 808, 814-15, 614 P.2d 285, 288-89, 166 Cal. Rptr. 853, 857 (1980) (asserting that this presumption could be rebuffed by oral agreement that the property was the separate property of one spouse).

83. Section 4800.1(b) provides:

> For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form . . . is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> (1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

rebutting the presumption that property acquired in joint tenancy during marriage is community property is by providing evidence of a *written* agreement that the property is the separate property of one spouse.[84] No such writing existed in the *Buol* case.[85]

The California Supreme Court affirmed, holding that section 4800.1 may not constitutionally be applied retroactively since doing so would impair vested property rights of the husband without due process of law.[86] According to the court, the state's interest in the equitable dissolution of marital property upon dissolution of marriage was insufficient to deprive a spouse of a vested property interest which prior to the passage of the new law had been considered separate property.[87] The court distinguished *Bouquet* as a case where retroactive application was necessary to subserve the sufficiently important state interest of correcting an injustice created by the former law.[88] Finding no such compelling reason present, the *Buol* court denied retroactive application of section 4800.1.[89]

The California Supreme Court also denied retroactive application of Civil Code section 4800.2 in *In re Marriage of Fabian.*[90] The Fabians married in 1972 and separated in 1979.[91] In 1982, an interlocutory judgment of dissolution was entered.[92] In its findings of fact and conclusions of law, the court found that a motel and its income constituted community property of the marriage.[93] The court also found that Mr. Fabian had contributed

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(2) Proof that the parties have made a written agreement that the property is separate property.

CAL. CIV. CODE § 4800.1(b) (West Supp. 1991).

84. *Id.*

85. *See Buol*, 39 Cal. 3d at 755, 705 P.2d at 356, 218 Cal. Rptr. at 33.

86. *Id.* at 763-65, 705 P.2d at 362, 218 Cal. Rptr. at 39. At the time of trial, wife had a vested property interest in the residence as her separate property. *Id.*

87. *Id.*

88. *Id.* at 761, 705 P.2d at 360, 218 Cal. Rptr. at 37 (citing *In re* Marriage of Bouquet, 16 Cal. 3d, 583, 593, 546 P.2d, 1371, 128 Cal. Rptr. 427, 247 (1976)).

89. *Id.* at 761, 705 P.2d at 360, 218 Cal. Rptr. at 37.

90. 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986).

91. *Id.* at 443, 715 P.2d at 254, 224 Cal. Rptr. at 334.

92. *Id.*

93. *Id.*

$275,000 received from his separate property into the motel prior to separation, but that there was no promise or agreement providing that Mr. Fabian should receive reimbursement or repayment of any of the contributed money.[94] According to the trial court, Mr. Fabian made a gift of separate funds to the community asset.[95] The court's judgment in favor of Mrs. Fabian reflected this finding.[96]

During the pendency of Mr. Fabian's appeal, Civil Code section 4800.2 was enacted, providing that separate property contributions to community assets are to be reimbursed on dissolution, unless the spouse making the contribution has expressly waived the right to reimbursement in writing.[97] This section is in direct contravention of prior statutory law which deemed separate property contributions to community assets as gifts to the community. Thus, had the Supreme Court applied section 4800.2 retroactively, Mrs. Fabian's share in the motel would have been decreased by the amount Mr. Fabian would be entitled to in reimbursement for his $275,000 separate property contribution. Such a ruling, therefore, would operate to impair Mrs. Fabian's vested property interest.

In denying retroactive application of section 4800.2, the court in *Fabian* employed similar reasoning as was used by the court in *Buol.* After determining that the trial court was correct in its characterization of the motel and Mr. Fabian's separate property contribution as community property, the court held that there is not a sufficiently significant state interest to mandate retroactive

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94. *Id.*
95. *Id.*
96. *Id.*
97. CAL. CIV. CODE § 4800.2 (West Supp. 1987). Section 4800.2 provides:
In the division of property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contribution to the acquisition of the property to the extent the party traces the contribution to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division. As used in this section, contributions to the acquisition of the property include down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.
Id.

application of section 4800.2.[98] According to the court, the state's interest in creating a law which aids in the division of marital property does not rise to the same level as the prevention of the "rank injustice" identified in *Bouquet*.[99]

In re Marriage of Buol, and its 1986 companion case, *In re Marriage of Fabian*, create a standard whereby retroactive application of community property legislation is constitutional only where a state interest in remedying an injustice in the former law is present. Accordingly, only if amended section 5120.110(c) operates to remedy a prior injustice, such as that found by the *Bouquet* court to exist in former Civil Code section 5118, will retroactive application be deemed constitutional.[100]

Amended section 5120.110(c) of the California Civil Code provides the courts with an easy and clear method of distributing marital property upon dissolution of marriage.[101] Thus, like Civil Code sections 4800.1 and 4800.2 as discussed in *Buol* and *Fabian*, amended section 5120.110(c) also serves the state's generalized interest in the equitable dissolution of the marital relationship. Unlike sections 4800.1 and 4800.2, however, amended section 5120.110(c) also serves the state's interest in remedying an injustice in the former law which makes one spouse's community property interest liable for the postseparation debts of the other spouse, when the one spouse has no control over the other spouse's incurring of debts and the debts are not incurred for the benefit of

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98. *Fabian*, 41 Cal. 3d at 449, 715 P.2d at 258-59, 224 Cal. Rptr. at 338-39 (1986).

99. *Id.* According to the court, "[a]bsent patent unfairness in the former law, retroactivity of section 4800.2 is wholly unnecessary." *Id.*

100. This new standard for due process review of retroactive legislation has been applied in several appellate courts since *Buol* and *Fabian*. *See, e.g., In re* Marriage of Taylor, 189 Cal. App. 3d 435, 442, 234 Cal. Rptr. 486, 490-91 (1987); *In re* Marriage of Slivka, 183 Cal. App. 3d 159, 164-68, 228 Cal. Rptr. 76, 78-81 (1986); *In re* Marriage of Howard, 184 Cal. App. 3d 1, 6-9, 228 Cal. Rptr. 813, 815-17 (1986). *See also* Reepy, *supra* note 61, at 14 (arguing that *Buol* and *Fabian*, and cases construing *Buol* and *Fabian*, holding that retroactive application of new community property legislation are constitutional only if the prior law is "rankly unjust", is mere dictum). *But see* Flagg, *supra* note 73, at 14 (arguing against following the California retroactivity doctrine adopted in *Buol* and *Fabian*).

101. *See* CAL. CIV. CODE § 5120.110(c) (West Supp. 1991) (providing that the period during which spouses are living separate and apart prior to dissolution of marriage or legal separation is not considered to be "during marriage").

the community. Precisely as in *Bouquet*, therefore, retroactive application of amended section 5120.110(c) is constitutional not only because it serves the state's interest in supervising marital property and dissolutions, but also because the amendment serves the states interest in rectifying the injustice created by former section 5120.110.

III. THE FAILED SYMMETRY: A DISREGARD FOR CALIFORNIA PRECEDENT AND THE "RELATEDNESS" TEST

Prior to 1990, the laws in California pertaining to postseparation debts and postseparation earnings and accumulations were inconsistent. Although Civil Code section 5118 permitted a separated spouse to retain those earnings and accumulations acquired during separation as his or her separate property, Civil Code section 5120.110 rendered the community liable for obligations incurred by either spouse during the same period. The legislature, therefore, enacted section 5120.110(c) with one objective in mind: to eliminate the inequity inherent in a system which makes a spouse's community property liable for the other spouse's postseparation debts,[102] yet denies the nondebtor spouse any interest in the other spouse's postseparation earnings and accumulations.[103] The legislature was convinced that this goal could only be realized by legislation which would bring former Civil Code section 5120.110 into symmetry with Civil Code section 5118. Unfortunately, the legislature may have failed to achieve this intended result.

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102. *See supra* note 3 and accompanying text.
103. *See supra* note 2 and accompanying text.

A. Postseparation Loans: An Exception to Civil Code Section 5118

California Civil Code section 5118, which renders the earnings and accumulations of a separated spouse as the separate property of the spouse, has been interpreted broadly to include virtually any earning[104] or accumulation[105] acquired by a spouse after separation. The proceeds of a postseparation loan, however, are *not* the separate property of the acquiring spouse. An exception to section 5118 exists where proceeds are deemed *related* to the community, and therefore outside the scope of Civil Code section 5118.[106]

California's Second District Court of Appeal applied this "relatedness" exception to Civil Code section 5118 in *In re Marriage of Stephenson.*[107] In *Stephenson,* Husband, two years after separation, purchased land with loan funds obtained by borrowing from his pension plan.[108] Reasoning that the pension plan was comprised largely of community property, the court deemed the loan proceeds sufficiently *related* to the community so as not to be a postseparation accumulation within the meaning of section 5118.[109] According to the court, the proceeds of a postseparation loan will be deemed the separate property of the borrowing spouse only if it is not obtained in exchange for

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104. *See In re* Marriage of Imperato, 45 Cal. App. 3d 432, 438, 119 Cal. Rptr. 590, 594 (1975) (stating that earnings are broader in scope than wages and salary). Earnings can encompass income derived from carrying on a business as a sole proprietor where the earnings are the fruit or award for labor and services without the aid of capital. *Id.*

105. *See* Union Oil Co. v. Stewart, 158 Cal. 149, 156, 110 P. 313, 316 (1910). Accumulations have been interpreted by the California Supreme Court as "any property which a person acquires and retains . . . [except if the property is] . . . acquired by . . . [a] purchase with community funds, or in exchange for other community property." *Id. See also* Richardson v. Superior Court, 101 Cal. App. 638, 644, 281 P. 1077, 1080 (1929), *In re* Marriage of Wall, 29 Cal. App. 3d 76, 79, 105 Cal. Rptr. 201, 202-03 (1972) (interpreting the definition of accumulations).

106. *See In re* Marriage of Stephenson, 162 Cal. App. 3d 1057, 1085, 209 Cal. Rptr. 383, 401 (1984) (providing that the proceeds of a postseparation loan will be the separate property of the borrowing spouse if it is not obtained in exchange for community property and is, therefore, unrelated to the community).

107. *Id.* at 1085, 209 Cal. Rptr. at 401.

108. *Id.* at 1084, 209 Cal. Rptr. at 401.

109. *Id.* at 1085, 209 Cal. Rptr. at 401.

community property and is, therefore, unrelated to the community.[110] Although property purchased by a spouse while living separate and apart from the other spouse may be regarded as an accumulation, the source of the funds used in making the purchase, rather than the fact that the property is acquired during separation, is the controlling factor in determining the characterization of property as separate or community.

B. The Relatedness Test and Similar Treatment Under Civil Code Section 5120.110

A creditor's ability to satisfy outstanding debts from the community has also been limited in loan situations. In fact, prior to the enactment of section 5120.110(c), the courts in California uniformly held the borrowing spouse solely liable for postseparation loans unrelated to the community.

For instance, in *In re Marriage of Hopkins*,[111] Husband and Wife separated after 34 years of marriage.[112] Wife incurred various obligations after separation, mainly constituting miscellaneous department store charges.[113] Although Civil Code section 5116, the then existing statute applicable to postseparation debts of a spouse, rendered the community liable for debts incurred during marriage, the *Hopkins* court limited the reach of the statute such that the community is absolved of any liability for postseparation *unrelated* to the community.[114] According to the court, because earnings and accumulations of each spouse after separation are deemed the separate property of that spouse there is no reason to hold that postseparation debts which are unrelated to the community should not be characterized as separate.[115] Finding

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110. *Id.*
111. 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977).
112. *Id.* at 595-96, 141 Cal. Rptr. at 599.
113. *Id.* at 600, 141 Cal. Rptr. at 602.
114. *Id.*
115. *Id.*

the department store charges unrelated to the community, the court therefore required the wife to pay her own postseparation bills.[116]

The "relatedness" standard was also applied in *In re Marriage of Munguia.*[117] In *Munguia*, the First District Court of Appeal reversed the trial court's holding that a debt for private investigator services was a community debt, where after the parties separated, Husband hired an investigator to locate his wife and two children and return them to the United States.[118] The court held that since the postseparation debt was unrelated to the community, it should properly be considered a separate liability.[119]

In re Marriage of Lister[120] was the next in the line of cases applying the "relatedness" standard. *Lister* can be distinguished in that it does not involve a creditor's ability to reach the community for satisfaction, but rather deals with the debtor's ability to use funds from a loan on community property to repay his separate obligation.[121] Nevertheless, the court's reasoning in *Lister* is sound and instructive. Citing *Hopkins*,[122] the court in *Lister* affirmed the trial court's decision ordering the husband to reimburse the community for property used to satisfy his postseparation debts.[123] According to the court, just as a husband's earnings while separate are his separate property, so too are debts he incurred after separation which were not related to the community.[124]

The most recent postseparation loan case is *American Olean Tile Co. v. Schultze.*[125] The plaintiff/creditor in *American Olean* was not permitted to use the nondebtor spouse's community property to satisfy obligations incurred by the other spouse in the

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116. *Id.*

117. 146 Cal. App. 3d 853, 195 Cal. Rptr. 199 (1983).

118. *Id.* at 861-62, 195 Cal. Rptr. at 203.

119. *Id.* at 862, 195 Cal. Rptr. at 203.

120. 152 Cal. App. 3d 411, 199 Cal. Rptr. 321 (1984).

121. *Id.* at 415-16, 199 Cal. Rptr. at 323-24. *See supra and infra* notes 111-127 and accompanying text (discussing the apparent exception to 5120.110 in loan situations.)

122. *See supra* notes 111-116 and accompanying text (discussing *In re* Marriage of Hopkins).

123. *Lister*, 152 Cal. App. 3d at 419, 199 Cal. Rptr. at 326.

124. *Id.*

125. 169 Cal App. 3d 359, 215 Cal. Rptr. 184 (1985).

operation of a separate property business.[126] The court reasoned that because postseparation earnings and accumulations are the separate property of the acquiring spouse, debts incurred after separation should also be so construed because such debts are unrelated to the community.[127]

Based upon the foregoing case law, it is clear that the California Legislature has gone further than necessary in its attempt to bring the laws pertaining to postseparation debts into symmetry with the laws pertaining to postseparation earnings and accumulations. California has created an exception to the general rules governing postseparation debts and accumulations where a loan is concerned,[128] however the legislature could have created the intended symmetry without absolving the entire community from liability for postseparation debts. The case law clearly illustrates that this symmetry could have been achieved through a less encompassing amendment which excepts from liability only those postseparation debts which are unrelated to the community. By doing so, section 5120.110 would conform not only with section 5118, but also with the judicial interpretation of both statutes in loan situations.

IV. PROPOSAL

The following proposal calls for an amendment to both Civil Code section 5120.110(c) and Civil Code section 5118. The intent of the proposal is (1) to create the symmetry intended by the legislature when it enacted section 5120.110(c), and (2) to clarify Civil Code section 5120.110 and 5118 so that spouse's and their creditors can easily understand their rights and obligations.

126. *Id.* at 364, 215 Cal. Rptr. at 187 (citing CAL. CIV. CODE § 5118 (West 1983)).
127. *Id.*
128. *See supra* notes 111-127 and accompanying text.

A. Civil Code Section 5118

Section 5118 should remain in its present form except for the addition of a provision defining the term "accumulation." The amendment should read:

> (b) An "accumulation" within this section includes any property which a person acquires and retains except where the property is acquired by a purchase with community funds, or in exchange for other community property.

The addition of subdivision (b) to section 5118 clarifies that postseparation accumulations are not always *per se* separate property of the acquiring spouse. Rather, if the property is either (1) acquired by a purchase with community funds, or (2) acquired in exchange for other community property, it will be deemed by the court to be community property. This amendment not only brings the statute into accord with California case law applying the "relatedness" standard, but it clarifies the rights of each spouse in relation to property acquired in a postseparation setting.

B. Civil Code Section 5120.110(c)

Section 5120.110(c) should be amended so that it creates the symmetry intended by its authors. The proposed amendment should read:

> (c) For debts incurred during separation, community property is only liable for those debts which are *related* to the community. Debts incurred during this period which do not *relate* to the community are the separate debt of the debtor spouse.

This proposed amendment leaves Civil Code section 5120.110(c) virtually unchanged, except the community will remain liable for postseparation loans related to the community. Such an amendment is not only consistent with Civil Code section 5118, but gives effect to the courts' treatment of the Civil Code provisions in California.

CONCLUSION

The laws in California, prior to January 1, 1990, failed to distinguish between spousal liability for debts incurred prior to and subsequent to separation. The result was a statutory system which permitted the community to suffer the risks of liability without the corresponding benefits derived from such risks. Cognizant that the inequities inherent in such a system could only be remedied by legislation which creates symmetry among those laws pertaining to the division of marital property, the Legislature in California enacted Civil Code section 5120.110(c). The legislature believed that section 5120.110(c), which absolves a nondebtor spouse's share in the community from liability for the postseparation obligation incurred by the spouse, would create the symmetry necessary to bring about equitable results.

Unfortunately, the legislature's efforts in this regard may have gone too far. California has consistently considered proceeds of a spouse's postseparation loan to be community in nature if it relates to the community. Thus, in order to create complete symmetry between section 5118 and section 5120.110, California simply had to enact legislation which renders the community liable only if (1) the debt incurred stems from the existence of unsatisfied loan, and (2) if the unsatisfied loan relates to the community. Doing so would, at last, create the complete symmetry necessary to bring about equitable results under all circumstances.