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MATRIMONIAL PROPERTY LAW REFORM IN CANADA:
FROM SEPARATE PROPERTY TO COMMUNITY PROPERTY WITH JOINT MANAGEMENT

PRINCIPLE v. PRAGMATISM

By GINA QUIJANO*

A. INTRODUCTION

Since the Supreme Court of Canada released its decision in the case of Murdoch v. Murdoch¹ there has been, in Canada, a significant increase in public and political support for matrimonial property law reform.

The political response to the failure of the law to reflect the expectation of married couples with regard to their matrimonial property has been to create commissions whose mandate is to examine the existing law of matrimonial property and to make proposals for legislative reform. Studies of matrimonial property problems are currently underway in Alberta, Quebec, Saskatchewan and the Northwest Territories. Specific proposals for legislative reform of matrimonial property laws have now been completed and submitted to the government in Ontario² and British Columbia,³ and the Law Reform Commission of Canada has made public its suggestions for matrimonial property law reform.⁴

The purpose of this paper is two-fold: (1) to present an overview of existing matrimonial property systems and to present, in some detail, the mechanisms employed to effect joint management in the jurisdictions in which such management provisions now exist; and (2) to look generally at the Ontario and British Columbia proposals from the perspective of the role of such commissions and the implications of their responses to the tension between principle and pragmatism.

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B. AN OVERVIEW OF MATRIMONIAL PROPERTY SYSTEMS

Before presenting the five basic matrimonial property systems currently in existence in common law and civil law jurisdictions, it is necessary to note that within each general system one will find as many variations as there are jurisdictions in which that system is employed. These variations do not, however, alter the basic shape of the system with regard to management and sharing of matrimonial assets. And it is the management and sharing issues with which law reform must necessarily be concerned. The description and discussion of these systems will therefore focus on the ways in which each system provides for the management and sharing of matrimonial property during marriage and the ways in which that property is distributed on dissolution.

1. Separate Property

The notion of separate property is the product of the common law tradition. It is the system now found in all jurisdictions in Canada except Quebec.

Blackstone's fiction of the unity of spouses reflected the common law position that, upon marriage, the right to manage property brought into the relationship by the wife was transferred to the husband. The husband was seen to hold that property in trust for his wife and was free to deal with it in any way he chose. The enactment of Married Women's Property Acts throughout the common law jurisdictions during the nineteenth century gave back to married women the right to manage their own separate property as if they were unmarried. This is the management position of all separate property jurisdictions today: whether the parties are spouses or economic strangers, the right to manage property is an incident of title to the property.

In traditional separate property jurisdictions there is no special provision for determining the right of a spouse to a share of the matrimonial assets. The same basic rules are supposed to apply to a determination of a spouse's right to a share of the matrimonial assets as would apply to the right of an economic stranger. However, whereas in cases between strangers the Canadian courts have been able to find an interest in property accruing on the basis of a sizable contribution of work or money's worth to property held in the name of another, they have refused to find that a spouse's non-financial contribution

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6 On the basis of the presumption of resulting trust, that is, such contribution is, itself, proof of an intention to share in the benefit resulting from the contribution. See also Woolnough v. Woolnough (1972), 3 N.S.R. (2d) 521 (N.S.S.C.).
to property owned by the other gives rise to any right to a share of the value of that property.\(^6\)

Thus, in traditional separate property jurisdictions there is no statutory provision for the sharing of matrimonial assets between spouses, and the common law rules governing an equitable right to a share of the value of the property impose a heavier burden on spouses without legal title than they do on strangers without legal title.

Separate property jurisdictions have attempted to mitigate the inequitable result of the application of common law property rules to matrimonial property disputes by developing common law duties and by enacting numerous pieces of protective legislation. For example, such protective legislation creates a duty in the husband to provide necessaries for his wife and children.\(^7\) It provides for alimony or maintenance payments to be made to the dependent spouse when the marriage breaks down.\(^8\) It provides that a dependent spouse may assert, upon dissolution, a right to remain in the matrimonial home under certain circumstances.\(^9\) It provides that the dependent spouse is entitled to a certain share of the deceased spouse's estate if that spouse died intestate,\(^10\) as well as making it possible for a spouse to obtain support from an estate when a testator fails to adequately provide for the survivor.\(^11\)

In short, in separate property jurisdictions property brought into marriage by a spouse remains the separate property of that spouse. Property acquired during the marriage is the separate property of the spouse who acquired it or in whose name title is held, with the exception of the application of the presumption of resulting trust which arises when a wife transfers title in property to her husband. The right to manage all property is an incident of title to the property. And on dissolution of marriage each spouse has a right to his or her own separate property unless he or she can prove a financial contribution to the purchase price or improvement of the separate property of the other. Only then will the court find an equitable interest arising in the non-titled spouse.

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\(^6\) Murdoch v. Murdoch, supra, note 1.

\(^7\) For example, The Deserted Wives and Children's Maintenance Act, R.S.O. 1970, c. 128, s. 2(1).

\(^8\) The Divorce Act, R.S.C. 1970, c. D-8, s. 11; The Matrimonial Causes Act, R.S.O. 1970, c. 265, s. 1.


\(^10\) The Devolution of Estates Act, R.S.O. 1970, c. 129.

\(^11\) The Dependents' Relief Act, R.S.O. 1970, c. 126, s. 2.
2. Separate Property with Discretion

In British Columbia and the Northwest Territories recent statutory amendments have given judges discretionary power to redistribute matrimonial property upon dissolution of marriage regardless of the fact that title is held by one spouse alone. The British Columbia legislation appears to give very broad discretionary powers to the court to redistribute matrimonial property "where it appears that a spouse is entitled to any property". It would appear that the term "entitled" was not intended to be interpreted as a legal term of art. However the courts have tended either to ignore the provision entirely and proceed on the basis of the common law rules in dividing matrimonial property, or to establish an "entitlement" to specific property on the basis of

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12 Family Relations Act, S.B.C. 1972, c. 20, s. 8:
(1) Where the court makes an order for dissolution of marriage or judicial separation, or declaring a marriage to be null and void, and it appears that a spouse is entitled to any property, it may, not more than two years from the date of the order, make any order that, in its opinion, should be made to provide for the application of all or part of the property, including settled property, for the benefit of either or both spouses or a child of a spouse or of the marriage.

(2) Where the court makes an order under subsection (1), it may order that the property be sold and direct the disposition of the proceeds. R.S. 1960, c. 118, s. 34;am.

13 Matrimonial Property Ordinances, Revised Ord. of the N.W.T. 1974, c. M-7, s. 28:
(1) In any question between a husband and wife as to the title to or possession, ownership or disposition of all property real and personal, the husband or wife or any person on whom conflicting claims are made by the husband and wife may apply in a summary way to a judge.

(2) Subject to any written agreement to the contrary, in an application under subsection (1) the judge is empowered to make such order with respect to the property in dispute as he considers fair and equitable including an order for one or more of the following:

(a) the sale of the property or any part thereof and the division or settlement of the proceeds;
(b) the partition or division of the property;
(c) the vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit;
(d) the conversion of joint ownership into ownership in common in such shares as he thinks fit;
(e) the transfer from one party to the other party or to a child of either or both parties of such property as he may specify;
and may direct any inquiry or issue touching the matters in question to be made in such manner as he thinks fit and may make such order as to the costs of and consequent on the application as he thinks fit.

(3) Subject to the provisions of subsection (4), the judge may make such order under this section, whether affecting the title to property or otherwise, as he considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and wife in the property is in any other way defined.

(4) In considering an application under this section the judge shall take into account the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family or in any other form whatsoever.

the common law rules and then make the order on the basis of the discretion granted in the statute. In only one case has the court actually applied the discretionary provision to redistribute proprietary rights in a piece of property. In that case the court stated that the common law cases no longer governed this area of the law and that it was empowered to exercise its discretion in making the order. However, the relevant facts of the case disclosed a substantial financial contribution on the part of the non-titled spouse which appear, in the reasons, to have been the main influence on the court's decision to exercise its discretion under the section. As a result of these cases, what appears to have been an attempt by the legislature to give relatively broad discretionary powers to the courts to redistribute matrimonial property has been severely narrowed through judicial intervention.

The Northwest Territories provision granting the court the power to redistribute matrimonial property is worded much more broadly than the B.C. statute. It refers specifically to "all property real and personal" and empowers the judge "to make such order . . . as he considers fair and equitable". It does not refer to "entitlement", unlike the B.C. statute. It would seem, therefore, that courts acting under this section will not find it as easy as have the British Columbia courts to continue to rely on the application of common law rules in settling matrimonial property disputes. There have not, as yet, been any reported cases dealing with this provision and as a result it is not possible at this time to know how the section will be judicially interpreted.

A recent piece of legislation proposed for Ontario contains a provision giving the court the power to grant an interest to the non-titled spouse in farm or business property owned by the other spouse where the non-titled spouse has made a contribution to the property by way of work, financial contribution or money's worth. This extremely limited discretion to alter proprietary rights as between spouses would have direct application to a situation such as arose in Murdoch v. Murdoch, but would have no application to the vast majority of matrimonial property disputes where no business or farm interest is involved.

In summary, what is meant by "separate property with discretion" is that the basic system of separate property is retained (as outlined in the preceding section) but the courts are given statutory authority to redistribute matrimonial property on dissolution of the marriage within the limits specified by the legislature in the enabling statute.

3. Deferred Sharing

"Deferred sharing" is the term used to describe the system of matrimonial property which has been in force in West Germany since 1958. It is

18 Supra, note 1.
basically the system proposed for Ontario by the Ontario Law Reform Commission. A system of deferred sharing combines features associated with both separate property systems and community property systems.

During marriage there is separation of property. As a result each spouse manages his or her separate property as is now done in separate property jurisdictions, but subject to some restrictions on the right to dispose of it. All assets acquired by either spouse become part of that spouse's separate estate.

Upon dissolution of the marriage or death of the spouse, there is a sharing of the overall "gains" made by the spouses during the marriage. This "sharing" does not alter proprietary rights, but comes as the result of a calculation of gains in terms of the overall increase in value of each spouse's separate estate, and an equal division of the amount by which one spouse's gains exceed those of the other.

4. Traditional Community of Property

Community of property is the product of the civil law tradition. It is the matrimonial property system found in Quebec and eight of the states in the United States whose legal historical roots are found in the civil law traditions of France or Spain. However, it should be noted that in five of the eight states there have been recent significant changes in the management provisions.

Whereas in separate property jurisdictions the presumption is that assets acquired during marriage belong to the spouse who acquired them, in community property jurisdictions the presumption is that there is co-ownership of all assets acquired during the marriage.

In the traditional community property systems, although the presumption is that all property acquired during marriage is co-owned, only the husband has the authority to deal with the assets of the marriage, including his wife's separate property acquired before marriage. The wife has no capacity to deal with her own separate property and no authority to pledge community credit, to encumber community assets, or to convey community property. Through legislative reform in the first half of the twentieth century many traditional community property jurisdictions began to diminish the management powers of the husband and increase the management powers of the wife. These reforms generally tended to secure to a married woman the right to manage property acquired by her as the result of her participation in a separate profession (biens réservés), but did not allow her to administer and enjoy the separate property which she had brought into the marriage. She retained only a reversionary interest in that property. This meant that the wife was given the capacity to deal with her biens réservés and the capacity to

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20 Supra, note 2.
21 Idaho, Washington, California, Nevada, Arizona, New Mexico, Texas, Louisiana.
22 See text, infra, Part C. for a discussion of the American situation. The regime in Quebec was altered by Stat. Que. 1969, c. 77 (in force January 1, 1970) so that the system is now one of "partnership of acquests", closely analogous to deferred sharing.
transfer or encumber only the reversionary interest in her separate property, not a very valuable commodity since her husband had the power to dispose of that property.

The concept of sharing of matrimonial assets is fundamental to the community property system. The separate property which each spouse brings into the marriage does not constitute part of the matrimonial assets so long as it has not been commingled with the property acquired during marriage to the extent that it is no longer identifiable. If it has been commingled to that extent, then the presumption of community overtakes it and it becomes a part of the community property.

In the community property system, on dissolution or death all the property acquired during the marriage (the community property) is divided equally between the spouses. Community property comprises, generally, all the assets and liabilities acquired during the marriage.

5. Community Property with Joint Management

Community property with joint management is the system currently in use in at least five American jurisdictions. It is the result of legislative reform in traditional community property jurisdictions, and it is intended to provide for greater equality during marriage while retaining the essential characteristic of sharing of matrimonial assets.

The sharing provisions are essentially unchanged from those found in the traditional community property systems. There is the same presumption that all property acquired during marriage is community property. And there is the same provision for sharing that property equally upon dissolution or death.

Under a system of community property with joint management the husband no longer has the absolute authority to deal with the property of the marriage. In general the management provisions provide that each spouse has absolute authority to deal with his or her separate property and that both spouses have equal authority to deal with all community property acquired during the marriage. There are certain specific transactions which require joinder of the spouses, such as transactions involving real property, but in day-to-day transactions either spouse has the capacity to deal independently with the community assets.

The first three systems presented (separate property, separate with discretion and deferred sharing) are all variations on the common law tradition of separate property. The application of the traditional common law rules of separate property to the rights of spouses in relation to property acquired during marriage does not take into account the fundamental difference between the economic relationship of persons doing business as strangers and

\[\text{23 Texas, Washington, California, Arizona, New Mexico.}\]

\[\text{24 A very detailed discussion of the proposed and existing joint management provisions is undertaken infra, Part C.}\]
the economic relationship of spouses. As a result it reinforces and magnifies the economic inequality arising out of the fact that there is no economic value accorded to the role of homemaker, nor economic reward given to the spouse who works in the home, keeping house and raising children, performing the "normal wife's role". It fosters economic dependency during marriage and promotes the continuation of that dependency when the marriage breaks down. Separate property with discretion and deferred sharing are legislative attempts to reform the law of separate property to provide for at least some sharing of the assets acquired by the couple during marriage.

Separate property with discretion is not a legislative statement supporting the rights of spouses to any particular share in the assets acquired during marriage. Rather it is a legislative recognition that at least in some cases a spouse's non-financial contribution may be such as to entitle that spouse to an equitable interest in some of the property acquired during marriage. The legislature has told the court that it may exercise its equitable jurisdiction and make a property award in favour of a non-titled spouse out of the separate property of the other if, in the circumstances of the case, the court decides that such an award would be just. This system of separate property with discretion is a very attractive one to legislators in separate property jurisdictions because it is conceptually quite simple and does not interfere with the rest of the separate property system. However, it raises serious problems with regard to policy considerations and in application to the individual case. An unhappy result of the introduction of discretion into the traditional separate property system is that it promotes litigation. This is a result of the lack of predictability inherent in any discretionary system.

It is significant that both of the separate property jurisdictions in Canada which have recently introduced discretion into their matrimonial property systems²⁶ are looking at further reform. And, in fact, the commission charged with proposing further reform of matrimonial property law in one of those jurisdictions (British Columbia) has recently presented to Cabinet its proposal for community property with joint management.

A deferred sharing system gives spouses a statutory right to share equally in the increase in value of the spouses' separate property occurring during marriage. It provides in this way a recognition of the value of the contribution of the spouse who works in the home, but it in no way alters the management provisions of the separate property system. Thus, in general, the spouse who works in the home remains economically dependent on the spouse who works outside while the marriage subsists, since the capacity to manage property is an incident of the title to it. It is not until the marriage is dissolved that the dependent spouse can realize his or her share of the matrimonial "profits".

Separate property provides for equal rights and equality of opportunity in the strictest sense, both during marriage and after. It does not provide, in any way, for economic sharing between spouses. Separate property with discretion merely allows for a limited redistribution of property on dissolution dependent on the facts of the instant case. Deferred sharing does nothing to

alter the economic relationship and capacities of the spouses during marriage, but it does provide for an equal sharing of the economic benefits accumulated during marriage.

The last two systems discussed (community property and community property with joint management) are based on the civil law tradition of community of property. Whereas the system of separate property is based on a belief that spouses should have equal capacity to deal with and benefit from their own separate property as if they were unmarried (with the dependent spouse provided for by protective legislation), the system of community property is based on the belief that the economic products of the marriage should be equally shared, and that the "community" has only one manager — the husband. While legislative reform in separate property jurisdictions has moved towards an increased emphasis on sharing, legislative reform in community property jurisdictions has moved towards an increased emphasis on equal rights of spouses to manage the community's assets. The furthest extension of this emphasis on equal rights is the system of community property with joint management.

While both deferred sharing and community property with joint management are attempts on the part of the legislators to move toward a recognition of the rights of spouses as individuals and the rights of individuals as spouses, the results are significantly different. There is no essential difference in the result of the sharing provisions on dissolution; either way the spouses share equally in the economic benefits of the marriage. What is different, and importantly so, is the provision for management of property during marriage. The deferred sharing provisions do not consider the spouses as equally entitled to the "matrimonial property" and therefore do nothing to alleviate the unequal positions of the spouses resulting from the fact that society provides no quantifiable economic reward for the spouse who works in the home. However, because of the presumption in community property jurisdictions that all property acquired during marriage is community property to which the spouses are jointly entitled from the date of acquisition, the joint management provisions in community property jurisdictions operate to give each spouse the capacity to deal with property acquired during the marriage, so long as the marriage subsists. It is submitted that this system comes much closer to providing for real equality between spouses than do any of the others.

It is for this reason that, in the following section, the joint management provisions currently in force in Texas, Arizona, California, and Washington State will be examined in some detail.

C. JOINT MANAGEMENT IN OPERATION

As was stated in the preceding section, matrimonial property law reform in community property jurisdictions has been motivated by a desire to provide for equality during marriage while retaining the presumption of co-ownership of all assets acquired during marriage. However, among the five community property jurisdictions which have implemented joint management provisions one finds three very different approaches. These approaches range from the Texas system of divided community, which very nearly approaches a system of deferred community (or sharing), to the equal management systems found in Arizona, California and Washington.
In this section it is proposed to examine four of these systems from the point of view of four major policy considerations affecting management provisions: (1) what property is community; (2) who manages what; (3) third party protection; and (4) liability for contractual obligations.

Before beginning the consideration of these systems it is important to note: (1) that all the jurisdictions presented were "traditional" community property jurisdictions prior to reform; (2) that only California requires an equal division of community property on dissolution, the other jurisdictions all empower the court to make such division of community property as seems just in the circumstances of the case (with the acceptable limits judicially set at a 1/3-2/3 division); (3) with the exception of Texas, there is very little case law arising out of the joint management provisions because of their recent implementation; and (4) that in all four jurisdictions the applicability of the joint management provisions depends on the characterization of the property as "community" through the application of the common law conflict of laws rule regarding vested rights.

1. Texas

Texas' joint management provisions were first enacted in 1967. Since then they have undergone a series of revisions, but these amendments were basically addressed to the administration of the scheme and the content of the provisions relevant to our inquiry is substantially the same today as it was in 1967. Where the system has been amended in substance since 1967, the change will be mentioned.

What Property is Community?

The Texas statute provides, generally, that separate property consists of all property owned prior to marriage and all gifts, devises or descents acquired during marriage. All other property acquired during marriage is community.

While the statute does not specifically include rents, issues and profits from separate property in the category of separate property, neither does it include them in community property. This is intentional. Prior to the 1969 amendments the definition of separate property included the "increase of [separate] property", a phrase which was interpreted by the courts to include increased value of both real property and personalty. This provision was first enacted in 1869, and although the removal of such "increases" from the

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27 Personal communications with Prof. H. Cross, University of Washington Law School.


Where there is no marriage contract or settlement, and where there is a subsequent change of domicile, the rights of the husband and wife to each other's moveables, both inter vivos and in respect of succession, are governed by the law of the new domicile, except in so far as vested rights have been acquired under the law of the former domicile.

See Tirado v. Tirado (1962), 357 S.W. 2d 468 (Texas); Myrland v. Myrland (1973), 19 Ariz. App. 498; Brookman v. Durkee (1907) 46 Wash. 578.

statutory definition of separate property might be seen as an attempt to include them in community property, this was not the intention. According to the draftsmen, the reference to "increase" was omitted from the 1969 revision because it was "thought to be misleading"; it was not intended as a substantive change in the definition of community property. It was intended to allow case law to establish the concept that increases in value of separate property from natural causes clearly remain part of the separate property without depending on statutory phraseology.\textsuperscript{31}

The question of where the rents or issues from separate property are to be included is now left to the court to determine, and through the application of "tracing" the benefits could be included with separate property. However, the inclusion of "revenue from separate property" in the definition of community property for management purposes\textsuperscript{32} is an indication that rents and issues are intended to be included in the community.

**Management Provisions**

In attempting to provide for more equality between spouses during marriage Texas has moved about as far in the direction of separate property management provisions as is possible without abandoning the community property presumption of co-ownership.

The management scheme in Texas\textsuperscript{33} is one which divides the community property into two units, each unit subject to the management of a certain spouse, and each unit defined as the property which "he or she would have owned if single". The provision for joint management only applies where the property of one spouse, either separate or community, has been mixed with property of the other such that it is no longer possible to determine which spouse is entitled to manage it.\textsuperscript{34}

As a result, what is provided in Texas is basically a separate property definition of the right to manage matrimonial property: each spouse manages the property that would have been his or her own property if he or she had

\textsuperscript{31} J. W. McKnight, *Draftsmen's Commentary to Title 1 of the Texas Family Code* (1973-74), 5 Texas Tech. L. R. 281 at 348-49.

\textsuperscript{32} Supra, note 30, § 5.22 (a) (2).

\textsuperscript{33} Supra, note 30, § 5.22.

\textsuperscript{34} For a much more detailed discussion of the Texas divided management scheme see McNight, *supra*, note 31 at 358-64.
remained single. It can also be seen as a codification of the civil law concept of a married woman's right to manage her "reserved community property" along with the removal from the husband of the right to manage his wife's separate property.\(^5\)

The major reform in the Texas scheme is the provision for joint management for "mixed property". Whereas in the past such mixed property would not have been definable as the "reserved property" of the wife and as a result could only be managed by the husband, now the wife is entitled to participate jointly in the management of all "mixed property", including that which may have been her husband's. To this extent the husband's absolute authority to manage the matrimonial property has been diminished by legislative reform. He is no longer entitled to manage his wife's separate property nor its products unless such property is no longer clearly definable, in which case he shares jointly with his wife the authority to manage it.

**Third Party Protection**

The *Texas Family Code* provides that where a third party is dealing with a married person in any property transaction, real or personal, he may rely on the name on the title to that property and where there is no written title he may rely on the fact of possession by the spouse with whom he is dealing.\(^6\) This right to rely on title or possession is subject to the restriction that the third party not be a party to fraud and that he or she does not have actual or constructive notice of the spouse's lack of authority.

Unlike other jurisdictions, Texas has no statutory restriction imposing joinder\(^7\) requirements for any property transactions. As a result there is very little protection provided for the community's interest in matrimonial property. Third party interests are protected and the joint management system does not require third parties to do any more to protect their interests than they were required to do before the joint management scheme came into being.

**Liability for Contractual Obligations**

The statutory liability section provides that, in general, a spouse's separate property and his or her sole management portion of the community

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\(^5\) See discussion of "biens réservés", *supra*, Part B(4).

\(^6\) *Supra*, note 30, § 5.24:

**Protection of Third Persons**

(a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in his or her name, as shown in muni ment contract, deposit of funds, or other evidence of ownership, or if it is in his or her possession and is not subject to such evidence of ownership.

(b) A third person dealing with a spouse is entitled to rely (as against the other spouse or anyone claiming from that spouse) on that spouse's authority to deal with the property if:

(1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and

(2) the person dealing with the spouse:

(A) is not a party to a fraud upon the other spouse or another person; and

(B) does not have actual or constructive notice of the spouse's lack of authority.

\(^7\) That is, a requirement that both spouses participate in transactions involving community.
property is liable for any contractual obligation of that spouse, whenever incurred, but is not liable for any contractual obligations of the other spouse whether incurred prior to or during marriage.  

These liability provisions are quite different from those in the other joint management jurisdictions. Their effect is to provide absolute protection for the assets which each spouse would have owned if unmarried from liability for contractual obligations entered into by the other. The primary concern is for protection of the individual's assets, rather than protection for the community assets.

In sum, the Texas joint management scheme is based on the desire to provide some form of equality of management during marriage for the wife without allowing the wife management power which would interfere with or render liable any property which would have been the husband's property if he had remained single. While in the abstract it may be argued that the scheme provides the same protection and management powers for both spouses, in reality the spouse who stays in the home is going to remain economically dependent upon the spouse who receives financial reward for working outside the home. Thus, while Texas did not abandon altogether the community property presumption that all property acquired during marriage is presumed to be community property, the legislators did abandon it for management purposes in favour of the notion of separate property. They opted for equality in the strict sense during marriage and sharing on dissolution, rather than for equal sharing both during marriage and after.

2. New Mexico

The New Mexico joint management provisions also reflect a concern to protect, as far as possible, the husband's interest in "his own" property (no matter how antithetical that might seem to the overall notion of community property) while affording some management rights to the wife.

The purposes of the New Mexico provisions, as explicitly set out in the Act, are compliance with the equal rights requirements of the New Mexico Constitution while maintaining the four hundred year old tradition of husband management. The result is a system with a very narrow category of community property to which the joint management provisions may apply if they are not defeated by written agreement between one spouse and a third party.

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38 Supra, note 30, Rules of Marital Property Liability
(a) A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.
(b) Unless both spouses are liable by other rules of law, the community property subject to a spouse's sole management, control, and disposition is not subject to:
(1) any liabilities that the other spouse incurred before marriage; or
(2) any nontortious liabilities that the other spouse incurs during marriage.
(c) The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by him or her before or during marriage.
(d) All the community property is subject to tortious liability of either spouse incurred during marriage.

The stated purpose of the reform was to avoid, in so far as possible, any interference with the traditional right of the husband to manage the community's property.\textsuperscript{40}

3. \textit{Arizona, California, Washington}

The matrimonial property law reform in these three jurisdictions has one fundamental element in common: in all three the reform was the result of an attempt to provide equal sharing throughout the marriage relationship. The concern in all these jurisdictions was to provide for equality of management within the marriage without abandoning or restricting the principle that all property acquired during marriage is community property. The result is, in the opinion of this author, the farthest reaching matrimonial property law reform yet achieved.

Because these systems have many common elements they will be presented together, with distinctions made where necessary.

\textit{What Property is Community?}

All three systems provide that all property owned prior to marriage, acquired through gift or bequest, and the rents, issues and profits on that property are separate property. All other property is community property.\textsuperscript{41}

\textit{Management Provisions}

All three systems provide each spouse with complete management authority over all community property,\textsuperscript{42} subject to the requirement of joinder for certain classes of transactions.

\textit{Arizona}\textsuperscript{43} requires that both spouses must join in writing in the execution of any community real property transaction (including purchase) and in any

\textsuperscript{40} Since the purpose of this paper is to explore ways in which spousal equality can be encouraged, the New Mexico Scheme will not be discussed further. Readers interested in the scheme should refer to the Act (\textit{Community Property Act of 1973, supra, note 39}) and article, \textit{The Effect of an Equal Rights Amendment on the New Mexico Systems of Community Property: Problems of Characterization, Management and Control} (1973), 3 New Mexico L. Rev. 10.


\textsuperscript{43} Supra, note 41, § 25-214;

\textit{Management and control}

(a) Each spouse has the sole management, control and disposition rights of his or her separate property.

(b) The spouses have equal management, control and disposition rights over their community property, and have equal power to bind the community.

(c) Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except that joinder of both spouses is required in any of the following cases:

(1) Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.

(2) Any transaction of guaranty, indemnity or suretyship. \textit{Added Laws} 1973, Ch. 172, § 61.
transaction giving a guaranty, indemnity or surety on community property. The Arizona scheme makes no special provision for community commercial property.

California\textsuperscript{44} requires that both spouses must join in writing in the execution of any community real property transaction (except purchase), in the gift of any community property, and in the sale, conveyance or encumbrance of any household goods.

The California legislation also provides that where both spouses are active in the management of the business, the normal management provisions apply as set out for other community property. The requirements of joinder are waived, however, in any commercial community property transaction where only one spouse is active in the management of the business.

\textsuperscript{44} Supra, note 41:

\textit{§5125 [(Operative beginning January 1, 1975) Management and control of community personal property by either spouse: Limitation: Consent: Sole control of business operation]}

(a) Except as provided in subdivisions (b) and (c) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse; provided, however, that the spouse cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children that is community, without the written consent of the other spouse.

(b) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

\textit{§5127. [(Operative beginning January 1, 1975) Management and control of community real property: Joinder in conveyance or encumbrance: Presumption of validity: Limitation on actions to avoid instruments]}

Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife: and the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.
Washington\textsuperscript{45} requires that both spouses must join, in writing, in the execution of any community real property transaction (including purchase), and in any sale, conveyance or encumbrance (other than purchase money mortgage) of household goods. Unlike California, Washington requires only "implied" consent to make good a gift of community property.

Washington's special provision for community business property\textsuperscript{46} creates two exceptions to the general rule that either spouse may manage and convey community personalty: (1) where both spouses participate in the business their joint action is required for all transactions involving transfer of property, and (2) where only one spouse participates in the business that spouse may, acting alone, transfer all the community business property including realty.

In all three jurisdictions spouses have sole management authority over their own separate property.

In Washington and California a spouse may have sole management authority over community business property (personalty \textit{and} realty), if the other spouse does not normally participate in the business. Arizona has made no exception for community business property; it is to be jointly managed.

The joinder requirements under the joint management provisions reflect a desire to protect the community's interest in major assets by preventing alienation of them by one spouse acting alone. It is important to bear in mind, however, that there are third party interests to be protected in transactions

\textsuperscript{45} Supra, note 41:

Community property defined — Management and control

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

(1) Neither spouse shall devise or bequeath by will more than one-half of the community property.

(2) Neither spouse shall give community property without the express or implied consent of the other.

(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.

(4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.

(5) Neither spouse shall create a security interest other than a purchase money security interest as defined in RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances unless the other spouse joins in executing the security agreement or bill of sale, if any.

(6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: \textit{Provided}, That where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse. [Amended by Laws 1st Ex. Sess. 1972 ch. 108 § 3.]

\textsuperscript{46} Id., § 26.16.030 (6).
involving community property, and the balance that is struck between protection of the community and protection of third parties is important to the viability of the management scheme.

**Third Party Protection and Community Liability**

The protection of third party interests in real property dealings with married persons is specifically provided for in the community property statutes in Washington and California but only impliedly provided for in Arizona. The protection of third party interests in personal property dealings is not provided for in any of the jurisdictions but there is some case law in this area. The liability provisions in each of the jurisdictions are important to the protection of third party interests, because they set out the extent to which the third party is allowed to look to community assets to satisfy obligations when dealing with a married person.

**Real Property Transactions:** The Washington scheme provides that a third party purchaser may rely on the name registered on the legal title. The protection for the community interest is provided by allowing a spouse to file a claim of community interest against property held in the name of the other spouse alone, and the filing of such a claim constitutes notice to third parties of the requirement of joinder to make good the transaction. Although the Washington scheme requires joinder for purchases as well, there is no provision in the Act dealing with protection of vendors. Presumably if it can be proved that the vendor was aware that the prospective purchaser was married, the transaction could be successfully challenged. However, by the wording of the proscriptive section it is only required that the spouses "join in the transaction of purchase or in the execution of the contract to purchase"; therefore, the simple participation of a spouse in some part of the transaction should be sufficient to make good the execution of purchase by the other.

The California scheme requires that both spouses must join in the execution of any sale, conveyance or encumbrance of community real property, but makes no requirement for any joinder in purchase of community real property. As a result, sales of real property to married persons involve no uncertainty to a third party as they are not voidable upon challenge of a non-participating spouse. For all other real property transactions the statute provides that the third party may rely on the name on the registered title. The community interest is protected in two ways. There is a requirement that the third party must be acting in good faith and without knowledge of the marriage relationship in order to obtain good title. The Act also provides a one year period following the filing of any instrument transferring or encumbering a piece of community property held in the name of one spouse alone, within which an action may be commenced by the non-titled spouse to avoid the instrument on the basis of lack of bona fides. This provision does

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48 Id., § 26.16.100.
49 Id., § 26.16.030(4).
50 Supra, note 41, § 5127 (see note 17).
provide substantial protection for the community interest, but the potential impact on the real estate market of a one year period of uncertainty would seem to be significant.

Arizona makes no specific statutory provisions for the protection of third party interests. Although it is possible to infer from the requirement of joinder for the acquisition of community real property that third parties would be entitled to rely on the name on the title, there is no suggestion in the statute that such is in fact the case. It seems that the protection of third party interests has been left to the courts.

**Personal Property Transactions:** In all three jurisdictions, in dealings with personal community property for which there are no joinder requirements, the third party is entitled to rely on the fact of possession, and the only challenge to the transaction is that it was undertaken in bad faith or not in the community's interest.5

California and Washington both require joinder for transactions involving household goods. There is no provision in either Act to indicate what is expected of a third party in dealing with what might be community household goods in order to protect his interest in the transaction and avoid uncertainty. It is to be hoped that if the third party is acting in good faith and has satisfied himself that no joinder is required the transaction will be unassailable. However, until there is some case law on this point it remains a matter of concern and conjecture.

**Liability for Spouses' Contractual Obligations**

The liability provisions found in the three jurisdictions are all indications of the concern with the balance between protection of third party interests, protection of community interests, and protection of the interests of the non-contracting spouse.

Arizona, which provides the broadest individual management opportunities by requiring joinder for only two types of transactions,63 provides that the separate property of one spouse is not liable for the separate debts of the other and that the community assets bear primary liability for contractual obligations of a spouse acting for the community and the separate property of the contracting spouse bears secondary liability.64 There is nothing in the Arizona legislation to indicate the chain of liability to be followed if, for example, a spouse enters into a contractual obligation which is not for the benefit of the community. Common sense indicates that an innocent third party's interest should be protected in such a case, but should the community bear primary liability for the debt or should the separate property of the

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52 *Supra*, note 41 § 25-215 (D) [dealing with liability].
53 See footnote 43, *supra*.
54 *Supra*, note 41, § 25-215 (A), (D).
contracting spouse bear primary liability? In fact, one could ask whether, in
fact, the community should bear any liability for the debt. The Act does not
say, and the result is a possible loss of protection for the community interest.

Washington legislation provides that the separate property of one spouse
is not liable for the separate debts of the other.\textsuperscript{55} It also provides that com-

munity real property is subject to liability for community debts.\textsuperscript{66} The legisla-
tion makes no statement with regard to the liability of community personal
property, which includes wages, but Cross indicates that case law has
created a presumption of community liability for a spouse's contractual
obligations which extends to the "community property"\textsuperscript{57} first and to the
separate property of the contracting spouse second. The separate property of
the non-contracting spouse is not liable, but if both spouses join in the
contract both will be separately liable, and usually the community will be
liable as well.\textsuperscript{68} This presumption of community liability for the contractual
obligations of a spouse can only be rebutted by clear and convincing evidence
of the separate character of the transaction.\textsuperscript{69}

The Washington courts have held that the separate debt of a spouse is
not enforceable against the spouse's interest in the community property. As a
result, where the presumption of the community character of a debt has been
rebutted, only the contracting spouse's separate property is available to satisfy
the obligation. This protects the community at the expense of the third party.

The liability provisions in the California scheme are set out in some
detail in the statute. The scheme provides that the separate property of a
spouse is liable for all debts incurred by that spouse but not for any debts
of the other spouse nor for any debts secured by mortgage of community real
property.\textsuperscript{69} Unlike the Washington and Arizona statutes, the California legisla-
tion specifically provides that the property of the community is liable for the
contracts of either spouse made after the marriage.\textsuperscript{61} What is unclear is the
priority of liability. While it is clearly stated that a spouse's separate property
is liable for debts incurred by him or her during marriage, there is no indica-
tion in the Act that if such debts are community debts they shall be satisfied
first from community property and second from the separate property of the
contracting spouse. Such a provision would have avoided the slightly ambigu-
ous situation resulting from its omission, and this is most likely the direction
which the courts will take. Recourse to the courts might have been avoided
by specific reference to priorities in the Act.

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Matrimonial property law reform in these three jurisdictions is based on
the commitment to an integration of the principle of equality of economic

\textsuperscript{55} Supra, note 41 § 26.16.010, 020.
\textsuperscript{66} Id., § 26.16.040.
\textsuperscript{57} Cross, supra, note 51 at 820.
\textsuperscript{68} Id., at 820.
\textsuperscript{69} Id., at 821.
\textsuperscript{60} Supra, note 41, § 5121, 5123.
\textsuperscript{61} Id., § 5116(c).
opportunity and responsibility during marriage with the notion of sharing of the community assets. The result is that all three jurisdictions have provided for joint management of community property during marriage.

The differences found in these systems can be seen as resulting from two main concerns: (1) the need to decide to what extent the community's interest must be subordinated to the interests of third parties doing business with spouses; and (2) the practical difficulties involved in providing protection for these competing interests within the existing structure of the marketplace. California and Washington, by requiring joinder for a number of transactions involving assets of importance to the community, have opted to provide much more protection for the community than has Arizona, which only protects the community's interest in real property.

Because joinder requirements put a burden on third parties to assure themselves that the transaction is good, the more joinder requirements there are in a joint management scheme, the more practical difficulties are created in operating the system. The fact that all three jurisdictions require joinder for real property transactions is not just a reflection of the importance of real property assets to the community. It is a result of the ease with which the interests of third parties can be protected by reliance on the title register. Similarly, the fact that Arizona does not require joinder for contractual transactions regarding "household goods" can be seen not as a rejection of the importance of household goods to the community, but as a response to the practical problems involved in enforcement of such joinder requirements as against third parties. While the failure to require joinder for gifts of community property in Arizona might also be seen as a response to the practical problems involved in enforcement as against third parties, the weight to be given such difficulties should be determined by an assessment of the third party interest being affected. In the case of gifts, the third party has no real interest to be protected and as a result, enforcement of the joinder requirement would not harm him and yet it would prevent a unilateral disposition of community property for which the community receives no benefit.

The success of any joint management system depends upon the extent to which third party interests are protected. While ideally a balance should be achieved between protection of community interests and protection of third party interests, the interests of the community will often have to be given less emphasis in the interest of the practicality of the overall scheme. The fact that Washington's joint management scheme has been in effect since mid-1972 without causing any noticeable disruption of the marketplace is a clear indication that a successful integration of systems has been achieved there and can be achieved elsewhere.

D. LEGISLATIVE REFORM OF MATRIMONIAL PROPERTY LAWS IN CANADA

The significance to Canada of the success of community property with joint management should not be underestimated. While it is true that all jurisdictions in Canada, with the exception of Quebec, are separate property jurisdictions, that fact should not preclude the consideration of community
property as a viable matrimonial property system. Indeed, community of property with joint management was considered by the Ontario Law Reform Commission and is the proposal of the British Columbia Royal Commission on Family and Children's Law.

The law reform commissions in both Ontario and British Columbia started from the same principle: marriage is a social and economic partnership. But they came forward with very different proposals for legislative reform.

1. Ontario

The Ontario Law Reform Commission has proposed a system of deferred sharing which would apply to all married couples “habitually resident” in Ontario. In its report the Commission was cognizant of the fact that wives, generally, do not have equal contractual capacity with their husbands as a result of the lack of economic reward for work done as a homemaker. However, the proposal for deferred sharing does nothing to render the positions of the spouses economically equal during marriage.

Although in its report the O.L.R.C. does not refer to community property with joint management, the Commission did consider the system, but rejected it as too cumbersome. The members chose instead to propose a system of deferred sharing. While such a system does provide for equal sharing of the economic gains realized by both spouses while the marriage subsisted, the actual sharing does not occur until the marriage breaks down or one spouse dies. It is a system which retains the basic presumption of separate property with the result that, during marriage, the wife is left in the same economically disadvantaged position that she currently enjoys. The proposal of a system of deferred sharing and the rejection of community property with joint management as being too cumbersome can be seen as the result of the conflict between principle and pragmatism.

2. British Columbia

In British Columbia the Royal Commission on Family and Children's Law considered “deferred sharing” as a possible matrimonial property regime but rejected it because it did not completely satisfy the fundamental principle upon which their proposals were to be based: that marriage is a social and economic partnership. They felt that community property with joint management not only provided for sharing at the end of a marriage, but during the

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63 Ontario Law Reform Commission, supra, note 2 at 4; B.C. Royal Commission on Family and Children's Law, supra, note 3 at 3.
63 See description supra, Part B(3).
64 Id., at 239-50.
65 Supra, note 2 at 13.
66 Personal Communication with members of the Ontario Attorney-General's department, 1974.
The proposal is particularly interesting because it is an attempt to introduce a community property system with joint management into a separate property jurisdiction.

The British Columbia proposal is for a system similar to those found in Washington and California. It provides for a presumption that property acquired during marriage is co-owned (community). And it provides that each spouse has the capacity to deal independently with the property of the marriage subject to certain restrictions. However, rather than adopt the common law rule with regard to the applicability of the system to couples coming into the jurisdiction, as do the jurisdictions discussed earlier, the British Columbia proposal suggests that the system only apply when the couple is domiciled and both spouses resident in the jurisdiction.

Restrictions are imposed in this system, as in those previously presented, in order to protect the interest of the community in its assets. The restrictions include written joinder of the spouses in all transactions involving community real property (with the exception of leasehold interests of less than one year) and community personal property worth more than $2,000. Implied consent is required for gifts of community personal property. Special provision is made to enable one spouse to have sole management authority over personal community business assets where that spouse is the only one who participates in the management of business. Joinder is required in any transaction which disposes of substantially the whole of the undertaking and for real property business transactions, except where real property is the commodity of the business.

The protection of third party interests is provided for through the notion of a bona fide third party purchaser for value without notice. This protection is only necessary in situations where joinder is required, since innocent third parties may rely on possession in other transactions. In transactions requiring joinder the proposal suggests what should constitute adequate notice. In no case is the notice requirement difficult for the third party to satisfy. It amounts to a title search or a declaration of marital status for real property

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68 Supra, note 3 at 7-11.
69 See description of the Washington system, Part C(3).
70 See description of the California system, supra, Part C(3).
71 Supra, note 3 at 7-11.
72 Id. at 12-22.
73 See note 29, supra.
74 Supra, note 3 at 6.
75 Id. at 13-14.
76 Id. at 17-18. Bank transactions are excluded from the joinder requirements (at 18).
77 Id. at 19.
78 Id. at 20-22.
79 Id. at 26-27.
80 Id. at 26-27.
81 Id. at 25.
transactions,\textsuperscript{82} and for personal property transactions over $2,000 the third party need only request a declaration of marital status.\textsuperscript{83} If a spouse acts fraudulently and the third party is not a party to the fraud, the community suffers the liability.\textsuperscript{84} Thus the balance struck between protection of the community's interest and the interests of third parties seems definitely to favour third parties acting in good faith.\textsuperscript{86}

Whereas the California and Washington systems rely to a certain extent on judicially created protection for third parties, the British Columbia proposal seems to be a conscious attempt to create a system with specific mechanisms for protecting third party interests in order to facilitate the integration of the scheme into an existing separate property system.

3. Conclusion

There is no doubt that Ontario's proposal for deferred sharing can be much more easily implemented than can B.C.'s proposal for community property with joint management. Whereas in Ontario the notion of separate property is retained, with the result that the new system has little effect on third party interests, in British Columbia a change is being proposed in the basic presumption of spouses' entitlement to property from separate to co-owned with the right to manage arising out of the co-ownership. This provision will have a substantial impact on the way third parties do business with married persons. It is the requirement of adequate mechanisms to protect third parties which necessitates a more complex legislative structure than is necessary in a system of deferred sharing.

It seems fair to say that the Ontario commission, in balancing its concern for principle against the practicalities of the situation, has sacrificed half the principle and avoided virtually all of the practical difficulties by choosing to propose a system of deferred sharing. British Columbia, on the other hand, has sacrificed virtually none of the principle and avoided few of the practical difficulties by choosing to propose a system of community property with joint management.

It will be fascinating to follow the progress of these proposals and to see what form new proposals in other jurisdictions take as a result of the efforts made in Ontario and British Columbia.

\textsuperscript{82} Id. at 24-25.
\textsuperscript{83} Id. at 25-26.
\textsuperscript{84} Id. at 25, 26, 27.
\textsuperscript{85} Id. at 28, and see Appendix, "Chain of Liability in B.C. Proposal" text, infra, at 40.
APPENDIX

CHAIN OF LIABILITY IN BRITISH COLUMBIA
MATRIMONIAL PROPERTY PROPOSAL

The following diagrams illustrate the chains of liability which have been proposed for transactions where joinder is required and where joinder is not required.

1. Joinder Required
2. Joinder Not Required

No Joinder Required

- Spouse Contracts in bad faith
  - Third Party has knowledge
    - Contracting Spouse's Separate Property

- Spouse Contracts in bad faith
  - Third Party innocent
    - Contracting Spouse's Separate Property

- Spouse Contracts in good faith
  - (for community)
    - Community Property
      - Separate Property of Contracting Spouse

- Non-Contracting Spouse's Share of Community