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Disposition of Community Property

Senate Committee on Judiciary

CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON JUDICIARY

BARRY D. KEENE, CHAIRMAN

Interim Hearing on

DISPOSITION OF COMMUNITY PROPERTY

STATE CAPITOL, ROOM 4203
SACRAMENTO, CALIFORNIA

OCTOBER 2, 1984
9:30 a.m. - 12:00 p.m.

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SENATE COMMITTEE ON JUDICIARY

INTERIM HEARING

ON

DISPOSITION OF COMMUNITY PROPERTY

October 2, 1984
9:30 a.m. - 12:00 p.m.
State Capitol, Room 4203
Sacramento, California

CHAIRMAN: HONORABLE BARRY D. KEENE

Members:

Ed Davis, Vice Chairman
John Doolittle
Bill Lockyer
Milton Marks
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A G E N D A

Interim Hearing - Disposition of Community Property
SB 1392 (Lockyer)
October 2, 1984 9:30 a.m. - 12:00 p.m.
Room 4203, State Capitol

Senator Bill Lockyer - author of SB 1392

Nat Sterling
Assistant Executive Secretary
California Law Revision Commission

Barbara McCallum
California Federation of Business and Professional Women's Clubs
Michael Barber (Family Law Section State Bar)

Carol Bruch
Professor of Law, University of California, Davis

Dorothy Jonas
California Commission on the Status of Women

Closing remarks by Senator Lockyer

CHAIRMAN BARRY KEENE: I'm State Senator Barry Keene, the Chairman of the Judiciary Committee which is holding this interim hearing. Senator Bill Lockyer, who is the author of the bill which is the subject of this hearing, is also a member of the Judiciary Committee.

The purpose of interim hearings, for those members of the public who are not familiar with them and who happen to be here this morning, is somewhat different from that of the general policy committee hearings because what we attempt to do really is develop information. This time of the year members of the committee are scattered throughout the state, and occasionally our attendance is not too good. It does not necessarily reflect the quality of the hearing because what we are trying to do is put on the record information gathered from our witnesses and then that information can be evaluated in transcript form by both the members of the committee, some of whom may not be here, and the staff of the committee. From that analysis, recommendations often come forth. Sometimes legislation is introduced or reintroduced. And occasionally, the form of that legislation is affected by the information that has developed at these hearings.

This morning the hearing is on the issue of the disposition of community property with a more specific focus on SB 1392 by Senator Lockyer. The bill -- I'll remind you -- is sponsored by the Law Revision Commission after the current procedures for disposing of community property were studied by that commission. It decided that many of the requirements in the present system are archaic and unrefined. Senator Lockyer introduced the bill which contained the changes recommended by the commission. The bill met with some early opposition from a variety of women's groups, and Senator Lockyer wished to have an interim hearing to get the issues aired, to try to achieve a better understanding of what the basis for those issue differences are.

The witnesses today include the sponsors of the bill, the Law Revision Commission; a representative from the Family Law Section of the State Bar; a professor of family law at UC, Davis; representatives from both the Commission on the Status of Women and the California Federation of Business and Professional Women's Clubs.

Senator Lockyer, did you wish to open on the bill at this point?

SENATOR BILL LOCKYER: I think principally to indicate my satisfaction with your summary of where we are and how we got there, Mr. Chairman, and to additionally say that as one who in just the past few years was exposed to the academic course material in community property, I was somewhat surprised at how many ambiguities, archaic language, and so on, seemed to still clutter up our code; and it seemed to me that the efforts of the Law Revision Commission to clarify and revise in modest ways the current law were worthwhile efforts.

I also, of course, consider myself a feminist; and when the women's groups thought that some of these suggestions were dreadful, or what may be more the case, and it remains yet to be heard, those groups thought that maybe better or more far-reaching changes could be proposed, I thought it an appropriate course to wait until we can think these proposals through in a little more deliberative way. So thank you for the opportunity to do that. And I think, perhaps, that other than to frame the issue in that way I wouldn't want to say anything further. Thank you.

CHAIRMAN KEENE: OK. Before we hear from our first witness who is Nat Sterling -- why don't you come forward to the witness table. While you're doing that, to further set the tone of the hearing, we ought to begin with a poem. Marilyn Riley happens to have an Emily Dickinson poem for us.

MS. MARILYN RILEY: Which could also frame the issues for the hearing.

I never lost as much but twice and that was in the sod.
Twice have I stood a beggar before the door of God.
Angels twice descending reimbursed my store
Burglar, banker, father, I am poor once more.

CHAIRMAN KEENE: Well, that will join our catalog of poems which are soon to go to print, because this may be our last interim hearing. I'm not sure -- well, we have one this afternoon. We have a poem for that as well. Some people may wish to come back even though the subject matter is not of interest, the poetry may be.

OK, Mr. Sterling, you're Assistant Executive Secretary of the California Law Revision Commission. We're happy to have you with us. And in a somewhat informal atmosphere, please tell us what you can about the background of the issue and what your recommendations are.

MR. NAT STERLING: Sure. The Law Revision Commission was requested by the Legislature to study community property law; and as part of this, we have focused on the management and control aspects of that law. Professor Bruch, who is here today, acted as our consultant on that part; and she published her background study which is available, and I think your staff counsel has a copy if you want to take a look at it.

The commission reviewed Professor Bruch's suggestions and held meetings in which these were discussed and had input from the State Bar Family Law Section and, ultimately, developed a set of tentative proposals on this area of the law which it distributed fairly broadly to lawyers, judges, and interested people around the state for comment. After we reviewed the comments, we rethought some of the issues and came up with a final recommendation which is embodied in this bill.

Basically, the effort here is to look back at the 1975 legislation that instituted equal management and control between the spouses and to see how that was working and whether there were any improvements or problems in the law that needed to be fixed.

This particular bill focuses in on one aspect of that, and that is the limitations that are found in the law on disposing of community assets. As a general rule, either spouse has management and control of the community property; that is, either can deal with it quite fully. However, there are a number of limitations built in relating to their ability to dispose of those assets. For example, real property may not be disposed of without the written consent of both spouses and there are a number of other limitations. And this bill addresses the other limitations.

What I would like to do is speak to the---I think there are five specific changes or issues that the bill makes that your staff counsel has identified in the notice of this hearing. And I'll just explain---I'll address each one of those issues and explain, basically, what the problem was that we saw and how we attempt to deal with it in the bill.

The first problem that's raised is the bill allows a spouse to have his or her name added to title to property. Now that is not found in existing law, although probably it would be implied. There is no law on that point. However, the spouses do have an equal interest in the property -- a present, existing, and equal interest -- and they do have an equal right to manage and control it. So presumably that would include the right to have one's name on the title.

Now, the way this ties in with limitations on disposition is that if one person has their name on the title, it's much easier to deal with the property by themselves. If both spouses have their names on the title, then, obviously, both have to be involved because no one's going to take property from one person when there are clearly two owners indicated on the title.

So as an adjunct to the other limitations provisions, the bill says that either spouse can request the other to have their name added to the title; and if they refuse, well, obviously, there is a right given that could be enforced in court. But clearly, we don't anticipate spouses are going to be going and suing each other on this. This simply gives one spouse a legal right so that when he or she says, "I want my name added to the title," and the other says, "Well, I don't want to do it, " all they have to do is point their finger to the law that says you have to. Of course, sometimes you get into a sort of tricky area here. You're wondering, what are we doing setting up hostile camps between the spouses; and it's not our intent to do that. It's simply to facilitate their ability to deal with property problems because spouses do have property problems like everyone else.

OK, that's the first issue, and that's why the bill allows that. We don't imagine it'll amount to much litigation, but it is, we think, a useful right in some cases.

The next issue is the limitation on gifts. Most of these limitations in the law on disposing of community property were written in long before the days of equal

management and control. They were written in the law in the days when the husband was the sole manager and controller of the property. It was basically his property and the wife only had an expectancy. And so a lot of these limitations were built in to protect the wife who had no opportunity to assert any kind of influence on it. Those days are long gone and it's time to take another look at some of these limitations.

Now the first one that we addressed in the bill is the gift limitation; and that says, basically, one spouse alone may not make a gift of community funds without the written consent of the other spouse. Now the problem we see is that although this is generally, probably, a healthy kind of limitation when you're talking about large sums of money, because gifts unlike other kinds of community property dispositions have the potential and in fact do deplete the community when one person is giving away the funds of both. Then there's some question whether that should be allowed.

Now, today, people make small gifts all the time without even thinking about asking their spouses. They make United Fund donations. They tip waiters. They make contributions to churches. They pledge their membership in KQED. And they never have the written consent of their other spouse.

What this bill does is say, OK, we recognize the gift limitation is still an important one, but not for the small cases. It's important for the big dispositions. So the bill says you may make a gift of community funds without the written consent of your spouse if the gift is usual or moderate under the circumstances of the case. Now it's a flexible standard. It'll depend on a particular type of marriage. If it's a poor marriage, only quite a small gift would be acceptable under this. If it's quite a wealthy marriage where the spouses are used to making large gifts and it doesn't necessarily impair their assets, then a larger gift would be presented.

CHAIRMAN KEENE: Usual and moderate or usual or---?

MR. STERLING: Usual or moderate, yes.

CHAIRMAN KEENE: Usual or moderate.

MR. STERLING: I believe so.

SENATOR LOCKYER: Yes, that's what it says -- taking into account the circumstances of the case.

MR. STERLING: So it's a flexible standard.

SENATOR LOCKYER: It also may be described as ambiguous.

MR. STERLING: Yes. That's another possibility. One idea would have been to put a monetary limit in there, but monetary limit, you know, one size doesn't fit all. That's how we ended up with an ...

SENATOR LOCKYER: You could say an amount, a ceiling, some percentage of income or assets, I guess, if you wanted to try to be flexible but---

MR. STERLING: That would be a possibility too. We think this will work all right.

In any case, it is an attempt to loosen up the existing absolute prohibition.

The next limitation on disposition that is addressed in the bill is the disposition of clothing and household furnishings. The law says right now that neither spouse may dispose of clothing or household furnishings of the community without the written consent of the other spouse. Once again, this comes from the days when the husband was the sole owner in effect and could do what he wished with the property.

Those kinds of dispositions occur quite frequently as anyone who's got any kind of property knows. They give used clothes and used furniture to Goodwill. People hold garage sales. They give hand-me-downs to a neighbor or a relative. These kinds of dispositions are made all the time. No written consent is ever given or requested. And yet, if an issue comes up, which it does occasionally -- in divorce, usually -- someone says, "Well, you sold our couch," and these things do get litigated from time to time. Then it's a problem because there in fact is no written consent.

What this bill does is to say---well, the bill has been changed. When the commission's original recommendation was, and this has become known as the garage sale bill because of that, that you shouldn't have to have written consent to make a disposition of clothing or furnishings. You should just be able to dispose of them; that's it. That's the one thing where people know what's going on in the house. If they see a piece or item of furniture being carted out, they can say, "Hey, don't get rid of that." I mean, that's one area where there is usually nothing hidden going on.

The one case where there could be something hidden going on is where one spouse mortgages or encumbers the furnishings, a lien on personal property through Household Finance or one of these kinds of lenders. And for that reason, our original bill said, OK, you can dispose of these household goods and furnishings without written consent unless you're talking about an emcumbrance and there you have to have written consent.

Now, this particular area of the bill did receive comments from at least one other committee member, Senator Davis. We talked to him; he was not completely happy with that. We tried to work out some language we thought would take care of the case, would loosen it up without making it wide open. He was concerned about it being wide open. And so what we ended up doing is amending the bill to put in a special standard of care; that is, you can dispose of these particular types of assets without written consent but as long as it's in the best interest of the community. And so if someone wants to allege, well, you sold off that couch and you never should have, you basically gave it away, and you were just trying to get some money to pay your lawyer with and, you know, all these recriminations that go on. In that case you take a look -- was it in the best interests of the community? should the person be reimbursed for it? or something like that.

So, this particular thing, we were working on language and I would say we're still---this is obviously one that people have a lot of feelings about and we're still---I don't know that we have the perfect solution here.

The fourth item identified in the bill and in the consultant's digest is, what happens where a disposition is made in violation of one of these limitations? You know, what's the practical effect of that? There is a recent case where one spouse mortgaged the community home without the consent of the other spouse. Now, that's a violation of the limitation on real property disposition, which we're not loosening in this bill. In that case, well, traditionally, when some kind of disposition like that happens, what the courts say is well, there's a violation, you're entitled to avoid that gift---or avoid that disposition and cancel the mortgage and it's null and void.

Where it all comes about, after the marriage is terminated, on the other hand, the courts say, well, since either spouse really owns half the property and the marriage has been terminated, we will recognize the disposition as to the half -- let's say, in this particular case, the husband put the mortgage on -- we'll recognize the mortgage as to the husband's half and not as to the wife's half. And that's a reasonable solution because that's what would be done at divorce or at death anyway. Each gets half the property.

The recent case of Mitchell vs. American Reserve violates that principle. That says that this was---a husband put a mortgage on the house without her consent. The lender tried to foreclose---well, it was a bail. He put up the bail. It was a bail-bond company. They tried to foreclose when he failed to pay. And the wife said, "Well, you can't foreclose. You put a mortgage on this house without my consent and the law doesn't allow it." The court in that case says, "Well, the law doesn't allow it as to your half but it does as to his half." So, basically, I'm not sure how it went at the trial court. I presume the mortgage company foreclosed on the husband's half, then partitioned the property by sale and sold it -- I'm speculating what the ensuing ... But the problem is the case says that during marriage we're going to in effect sever that community property and effectuate one spouse's transfer. Now that, we believe, is an unacceptable solution. If these limitations are to have any effect, they've got to protect the community property from disposition.

So what this bill does is reaffirms the old case law principle that where one spouse makes a disposition in violation of the limitations, that during marriage the whole property is subject to recall and not half. OK.

SENATOR LOCKYER: Which circuit was that from?

MR. STERLING: Pardon?

SENATOR LOCKYER: Which circuit was that from?

MR. STERLING: I'm not sure what circuit that is. There have been a number of cases

that have come down after that one. One of them, the Androtti case, we see that case, we think it's wrong, we don't follow it. And there is another case -- I don't remember the name -- said we do follow it. So right now the law is pretty confused in that area and this overrules that line of cases that says you take back the whole thing.

SENATOR LOCKYER: Yeah.

MR. STERLING: During marriage, you take back the whole thing. After the marriage is terminated, and you're looking at whether you're going to validate it, then you effectuate the half gift.

The final point I want to address is what do you do about a person who buys a piece of property from a husband or wife not knowing that the person is married, is a good faith purchaser, paid full value in complete innocence of the limitations on disposition, walks off with it, and possibly makes---OK, this is the---

SENATOR LOCKYER: Co-counsel on the Mitchell opinion.

MR. STERLING: Yeah, this is the Mitchell case.

SENATOR LOCKYER: Thank you, Sergeant. [Laughter.] What court was it?

MR. STERLING: It does not---

SENATOR LOCKYER: It doesn't say.

MR. STERLING: It does not say. It does not say.

SENATOR LOCKYER: Who is the justice?

MR. STERLING: Roth.

SENATOR LOCKYER: Who is Roth? Do you remember? No. [Laughs.] Facts.

MR. STERLING: The problem---or a problem with these limitations on disposition is they do create a security of transaction problem. Now, what is---is a person ever certain that the property is really his? And this is particularly true in the case of the household furnishing thing, someone comes up to a garage sale and buys something, or someone goes to a pawn shop and buys something. Are they going to live in fear that somehow that property is going to get taken away from them? Well, that's probably not too realistic a situation. The more realistic situation is a real property transfer where a person may encumber, make subsequent encumbrances, make improvements on the property. If title is in the name of one spouse alone and there is no indication on the title that it's a married person or that it's community property, there is a real problem there. The existing law attempts to protect the bona fide purchaser in that situation by creating a presumption of validity of the transaction and giving the person one year to---giving the spouse one year to avoid such a transaction after it's recorded. The cases go a lot of different directions in trying to construe these things. The effect of the presumption is not clear, whether it's a conclusive or nonconclusive presumption.

What this bill does is say if you are a bona fide purchaser -- you know, for value

without knowledge of the marriage relationship -- your transaction is protected. You can do with the property what you will. Now, what safeguards do we have for the other spouse in that situation? Well, the other spouse can no longer go and avoid that transaction. The bona fide purchaser is protected, but the other spouse has two recourses: one, before the transaction ever occurs, they have the opportunity to put their name on the title -- the first point I mentioned; the other thing is the bill makes clear that just because you cannot get the property back does not mean you have no other remedies and you have any other remedy you might have for mismanagement to recoup the value of the property either by direct action or as an offset or credit in a dissolution proceeding. So those are the alternate remedies and the bona fide purchasers are protected.

That summarizes the main issues or main changes made by the bill. Basically, it keeps the existing scheme of management and control; it keeps much of the existing limitations; but it tries to loosen them up, liberalize them a little bit in key areas where it looks like there's a problem in practice.

CHAIRMAN KEENE: OK, any questions of Mr. Sterling? Thank you very much for giving us the background and reasons.

Our next witness is Barbara McCallum, California Federation of Business and Professional Women's Clubs.

MS. BARBARA MC CALLUM: May I use the ...?

CHAIRMAN KEENE: If you prefer. We're pleased to have you with us.

MS. MC CALLUM: While I'm here today officially as a representative of the California Federation of Business and Professional Women, I'm also here as an attorney whose primary practice is family law since 1967. I'm a former member of the State Bar Family Law Section Executive Committee, current member of the Family Law Legislation Committee, and a former consultant to the Continuing Education of the Bar for family law. In addition, I am a commissioner on the El Dorado County Commission on the Status of Women and I've been an advocate of women's rights -- an unpaid advocate of women's rights -- for various women's organizations for almost eighteen years.

I would like to propose to you a scenario which I believe illustrates my position here today. In order to put this scenario before you, I propose playing a game of let's pretend. Let's pretend we're talking about you and not some untold millions out in the counties and states. In my scenario, you are a successful corporate executive.

CHAIRMAN KEENE: No, no. That's the only unrealistic part of this whole thing. We're down in the lowest percentile of income, you understand.

SENATOR LOCKYER: The garage sale might matter to me; otherwise, ... [Laughter.] Sorry.

CHAIRMAN KEENE: Pardon the frivolous interruption. It's a serious matter we know.

MS. MC CALLUM: That's all right. Well, this is a somewhat frivolous scenario, but

I think it makes the point. You have a wealthy business associate named Joe Swellguy. The two of you decide to open your own business. He has the money and you have the management expertise in the field. You agree to be equal partners. You're going to split the profits 50-50. And he has the partnership agreement drawn up. This partnership agreement which is submitted to you for signature shows that the partnership name is Joe Swellguy and Associates. You are to devote full-time to the running of this business. You are both to have equal rights in the management of the partnership with the following provisions: He will decide how much you get as a monthly draw; you cannot sign any contracts without his cosignature, but he can -- he does not have to get your consent; you cannot sign any purchase orders over $500; and all furnishings purchased in the partnership name belongs to the partnership; and you are both liable for the partnership debts; the partnership checking account requires only one signature -- his; you get no paid vacation until the partnership shows a profit of $50,000, he is not so restricted; you are prohibited from working for anyone else without his consent, he is not so restricted; he will maintain the books of this partnership and will pay your share of the profits after reimbursement of his total capital contribution -- you are not entitled to an accounting, except on dissolution of the partnership; he may invest your share of the profits for your benefit rather than pay it out to you; he has the right of withdrawal in anticipation of profit, you do not. Would you sign that partnership agreement? For the sake of my scenario, let's say that you did because he's really a good and swell guy and, besides, you trust him.

So, a few months pass. He's furnished the offices with valuable---his office with valuable antiques and yours with the common metal desk variety. He buys electronic equipment and he's very generous, he puts a computer in your office too as well as the rest of the office. He has some annoying habits like walking into your office unannounced, looking into your desk drawers, picking papers up off your desk and reading them; but the business is building nicely and you're about to deliver a new addition to your product. After hours, while you're looking for a file you need, you discover by accident that Joe withdrew a sizable sum of money and purchased a yacht under the partnership name. You find out that this yacht is berthed at his house on the river. The title to this yacht, however, is in his name alone. You question him about that and he tells you, "Well, you weren't available to sign the papers and it was easier this way, but we'll straighten it out later. Of course, it belongs to both of us and you can ask whenever you want to use it." Of course, when you ask, he has other plans for it. He decides what company cars to buy. He has a Cadillac for himself; he gets a Honda Civic for you in a color you detest.

Work is going marvelously, however, to the point where you're working overtime. And when you go in the office on Saturday morning, you find the movers are taking your

computer and several electronic typewriters. You object, and they show you a bill of sale signed by Joe. Later, while you're in the shipping department looking for some heavy tape, you find a bill of lading and you find out that your partner has shipped a truckload of goods to his nephew -- no charge.

At the end of the year, your partner pays you $500 as your share of the profits. When you ask how he arrived at that figure, he gets red in the face, angry, and says, "What's the matter? Don't you trust me? Remember, this is all paid for by my money! And you're lucky to have this easy job while I worry about the bills." How long would you put up with that? And what would you say if I told you that the law requires that kind of partnership in California and that the name of this kind of partnership under the law in California is called marriage?

In the above scenario with very little change other than changing the party, you, the successful executive, in replacing it with housewife would almost be that partnership.

What we're here today to request is equal powers of management and control. You may or may not recall that the so-called equal management and control laws that we have today were passed in 1975, but we spent five years prior to that trying to get this issue before the Legislature and every year it was voted down.

I would like to read to you a portion of our original proposal from a bill, SB 45, carried by Senator Dymally, which is an April 10, 1972 version which was the one we were able to find. And it was very clear what we were requesting, and in my view it's what we should still be requesting. It said:

> Husband and wife have equal powers of management and control of the community property heretofore or hereafter acquired and may by agreement divide or otherwise provide for the exercise of these powers in any manner they desire, but neither spouse may make a gift of community property or dispose of the same without valuable consideration, without the written consent of the other. Both spouses shall join in transactions involving community real property.
>
> In the absence of written agreement or written power of attorney, husband and wife shall join together in the management and control of the community property except where authority is necessary to manage, control and dispose of community personal property to provide necessaries of life for the family.
>
> In dealing with this community property whether pursuant to the agreement between husband and wife or without agreement that each spouse acts as a trustee for the other subject to the rules governing fiduciary relationships. And if a spouse violates that fiduciary obligation, the other spouse may petition the superior court for an accounting or other equitable relief.

That is what we originally requested. That was what the women's groups all joined together to support prior to and in 1975. But we were told that we could never get that, that the Legislature did not truly believe in equal management and control, and that so long as the male legislators ran their offices without---with the ability of keeping that information from their spouses, they would never pass an equal control law.

CHAIRMAN KEENE: I'm interrupting you at this time not because of the content, but just because of the time. How much more time do you feel you need?

MS. MC CALLUM: I would say I'm very close to the end. I've got about, ...

CHAIRMAN KEENE: Great.

MS. MC CALLUM: ... maybe, five more minutes maybe.

CHAIRMAN KEENE: That's fine.

MS. MC CALLUM: The fact that we got here today which is twelve years after California ratified the first Equal Rights Amendment, to talk about such things as the fact that the law still gives absolute and sole control of the family business to one party without any method of the half-owner having to object to any transaction is appalling. To have a law that states that real property requires the consent of both parties and then be able to show that by making a few moves, either putting it in a family investment business or by treating it as a limited partnership, that vast sums of money can be transferred without the consent of the other party, all dealing with real property.

There's not enough time here today to go into all the problems of our current law. But instead of dealing with the real problems, the Law Revision Commission is dealing in areas where there are little or no problems. They worry about the illegality of garage sales when it is the whole family business and the spouse's entire livelihood that's at stake.

You will hear later this morning about a proposed uniform law, that while not perfect certainly goes a lot further to reach the goal of women in California. You will hear about the inability of the homemaker to even discover what they own, much less be able to ask that her name be put on it. You will ask the question of whether or not the spouse's name should be put on the title. And certainly, the answer to that is a resounding yes. However, you are not going to get that by merely asking the other spouse to do it. There has to be some method of enforcing that, which I do not see in this bill today.

SENATOR LOCKYER: Do you have one to recommend?

MS. MC CALLUM: Excuse me?

SENATOR LOCKYER: Do you have a recommended method?

MS. MC CALLUM: Certainly. The provisions I believe in the uniform law are certainly much preferable to---

SENATOR LOCKYER: Could you tell me what that is? Or I'll wait---

MS. MC CALLUM: OK, I believe that there will be testimony on that, I believe, by Carol Bruch. I don't want to step on her testimony.

SENATOR LOCKYER: OK. Equal management and control of the testimony. [Laughter.]

MS. MC CALLUM: You also questioned the authorization of gift-giving in the guidelines of usual or moderate. And again, although we don't believe at the present time

that this is a major problem, however, just the vagueness of the usual and moderate language, certainly it is usual for many people to tithe to their church 10 percent of your wife's income, if she made $500,000, may not be considered moderate by you, it is certainly usual. Moderate, to a wealthy person, could be a year's income to a welfare recipient, but who is to decide what that amount is.

Giving something away depends on factors sometimes other than the value. Gifts of furniture could be an old antique that has patiently been restored by, perhaps, the wife and given away by the husband. You could talk to that husband and find out he thought that was the junk that came out of the attic. So what is junk in the attic to you may be a valuable antique to me. And if I own half, don't I have half a say?

Most importantly, give the married person a remedy to cure the breach. If I request that my name be added to community property and he refuses, what can I do under this bill? The testimony was that I could go to court. I can't go to court now for an accounting under the law which certainly it would appear that I have a right to, but the courts say no. If my spouse won't tell me what we own, how do I find out to be able to put my name on it? Without the ability to go to court and request an accounting, get a court order to enforce this law, I have no rights.

Legislators in the past, especially this past year with regard to the Katz bill, indicated that if your marriage was in such bad shape then you should just get a dissolution, that we should not try to have a remedy for enforcement within the marriage itself. But if the lawyers could tell their clients that the law requires joint management and control, we wouldn't have to go to court.

On behalf of the---

CHAIRMAN KEENE: Excuse me, what was the Katz bill? What was that about?

MS. MC CALLUM: The Katz bill would give the ability for a spouse to sue another spouse for an accounting or to determine what the community property laws were---

CHAIRMAN KEENE: Did it---?

MS. MC CALLUM: Excuse me. I just misspoke. To determine what the community property was.

CHAIRMAN KEENE: Yeah, did it die in what? Assembly Judiciary or something?

PROFESSOR CAROL BRUCH: It passed the Assembly committee, Barbara, and then it went to the floor and it was tabled.

CHAIRMAN KEENE: Oh, OK. Thank you.

MS. MC CALLUM: We have had many situations in which people have come to us as attorneys requesting some kind of access to the community funds, access to the property that they allegedly own. On behalf of these women, and I represent many of them who do not want a divorce, and especially the homemakers of California who are the most vulnerable of all of the people under our law, it's our request that the whole area of

community property management and control be rewritten as a statutory equal partnership, spelling out the rights, the responsibilities and, most importantly, a procedural method of enforcing those rights during the marriage. Thank you for your attention.

CHAIRMAN KEENE: Thank you very much for your testimony this morning. Any questions at this point?

SENATOR LOCKYER: I think I'll probably---no, but I'll probably say this a number of times, that I have some frustration with being the author of a bill that's meant to be basically technical cleanup and people want to raise very substantive proposals in the context of that bill, some of which sound to me to be quite good. But I'm hoping people will maybe help me improve the bill so that it's acceptable on its own terms separate from the larger issues that people would like to address, and maybe I can do some of that also, but probably not in the context of this particular measure or whatever it is next year. So at some point, I hope people will continue to talk---and you did in your testimony comment on the provisions of the bill that you liked or didn't like and how it might be improved. I appreciate that and I hope people will continue to do that. Thank you, Barbara.

CHAIRMAN KEENE: Mr. Michael Barber, representing the Family Law Section of the State Bar, I believe.

MR. MICHAEL BARBER: I'm Mike Barber. I am a member of the Executive Committee of the Family Law Section of the State Bar.

I will be rather brief in my remarks. The bill, as I'm sure Mr. Lockyer will recognize, went before the committee and then never progressed further; and as a consequence, in reviewing this, the review we took was some months ago and has not been updated. And because of our meeting schedule thing such as it is towards the transfer of our offices this last year, we've been unable to meet and discuss the bill in any significant detail. We will, however, prepare remarks on the bill at our meeting October 13 and add those to the record.

There are a couple of points that I think ought to be addressed; specifically, Item 2. In the discussion of the bill in the Executive Committee concerning gifts that would not require community concurrence and the language used -- usual or moderate -- it was generally the feeling of the Executive Committee and of the Legislative Committee, on which I also sit, that usual or moderate were entirely too vague, that they ought to be more carefully defined. They would invite litigation; they would invite confusion, and invite problems later on.

In relation to other broader issues relative to community property, the Executive Committee took a position in opposition to the Harris bill which went through, relative to child support and the availability of community property, therefore, under certain circumstances not only because the specific exemption of community earnings that was

created concerning a second spouse, but the broader language in that bill that distorted the perspective, we felt, of the effective date or the effective---or if the date in which child support installments should be considered effective. It's something that might well be addressed and cleaned up in this legislation; and secondly, an area that I think should be considered carefully, our oral transmutations or limitations on the existence or nonexistence of community.

A case came down recently, and I can't give you a cite other than the name -- Shoup -- which permitted a post-marital elimination of community which in effect---at least from my own personal perspective as a family law practitioner who works in child support, created a potential for some significant fraud on a very significant creditor to which the child of a prior marriage. And that area also is something that might well be something this bill would want to address or review.

I believe the McAlister bill, I don't have a cite on it, did attempt to address it, but I think it requires further work and further review for next year.

With those remarks, I think I would rather---if there are any committee questions, I'll be glad to take them back to the Executive Committee. However, in terms of the five questions that were posed previously, they will be addressed October 13 and so, perhaps, to save time you wouldn't want us to talk about them now. Anything that the committee would want me to take back to the Executive Committee?

CHAIRMAN KEENE: Well, if we could have the results of those deliberations in some written form that could be included ...

MR. BARBER: Yes, sir.

CHAIRMAN KEENE: ... in our record, we would hold the record open for that purpose ...

MR. BARBER: Yes, sir, we certainly will.

CHAIRMAN KEENE: Any questions of the witness?

SENATOR LOCKYER: I only want, Mr. Barber, to publicly thank you for all of your help in developing the child support legislation independent of this and thank you very much.

MR. BARBER: Thank you, Senator.

CHAIRMAN KEENE: Thank you very much. Carol Bruch, Professor of Law, University of California at Davis. Professor Bruch, it's nice to have you with us again.

MS. CAROL BRUCH: Thank you very much. Let's see if I can make order out of the chaos I have in front of me.

As Nat Sterling indicated, I did serve as consultant to the commission during its study of community property management control and disposition, and in that connection, wrote an article which is, I don't know, much too long, I'm sure -- something like seventy pages or so -- in Hastings Law Journal. I know that you have that. I don't know if Mr. Lockyer's office has it. I brought a few copies for people's use.

Approximately a year or so after completion of my consulting functions, I concluded that the commission and I had irreconcilable differences in terms of policy and decided that this would be the forum at which many of these policy issues concerning the family and creditors would be appropriately raised. So, for that reason, I am most grateful to Mr. Lockyer for his inquiries of me and to the invitation of the committee.

CHAIRMAN KEENE: Wait, it's time for a poem.

MS. BRUCH: Oh, do you have one?

SENATOR LOCKYER: Sure.

MS. BRUCH: OK.

SENATOR LOCKYER: Two poems in one day.

CHAIRMAN KEENE: Irreconcilable differences triggered one immediately. [Laughter.] Another short Emily Dickinson.

We outgrow love like other things
and put it in the drawer
Till it an antique fashion shows
like costumes grand sires wore.

MS. BRUCH: I have a drawer story for you in about a minute or two, so that's wonderful. It couldn't have been a better introduction. Thank you.

Before I get specific and I hope succinct responses to the five questions that were posed in Ms. Wynne's letter, I'd like to put this in some sort of a context for you, because I can understand Mr. Lockyer's frustration; but I think that this will help explain why those who are here feel somewhat frustrated as well.

The discussion of management and control issues before the commission was very broad-ranging. And the only product is this product.

SENATOR LOCKYER: It's not very much, you're right.

MS. BRUCH: So that impliedly what is left out of this product is material that the commission did not wish to bring forward to the Legislature. And I think that's part of the reason then for the stress and the anxiety on parts of people who want to pump some of that in here.

SENATOR LOCKYER: Have you noticed the most recent appointees to the Law Revision Commission?

MS. BRUCH: No, I haven't followed that. They must have been through almost two entire changes unless it's---these are recent ones again? At the time that I---

SENATOR LOCKYER: And you'll probably hear nothing very controversial coming out of the commission for some time. [Laughs.]

MS. BRUCH: Well, in any event, in some ways, I suppose, this is controversial. We have had management and control since 1975, but we have had nothing to define it. And in practice then, one spouse was often left in the dark and the availability of remedies, if they happened to find out what was going on, was really seriously inadequate.

I want to tell you about four real events that came to my attention during the time that I was working in this area, because I think that they will give you some sense of the kinds of actual cases that arise with people who want relief and may or may not be interested in courtroom relief. So these are four real cases that came to my attention, although I think there was not litigation in most of these.

One was a situation of a couple who had been married happily for about forty years. The wife was about to take their car to Mexico on a vacation to their summer home there, and her insurance agent said in order to get the appropriate policy, she had to bring in the pink slip. When she found the pink slip, she discovered that the title to the car was no longer in the name of herself and her husband---or of her husband, but rather in the name of their daughter. She thereupon became anxious and began to look to see what was happening in title with other assets. There was no problem in the marriage. However, the husband was involved at an appellate level dispute with the IRS concerning his tax liabilities. And what became evident to this woman was that in his anxiety that should the IRS win, there might be efforts to execute against their property. Major assets had been transferred, as best she could tell, some to a church that had been established in one of the Caribbean Islands. In any event, she loved her husband dearly. She did not want to file for divorce in order to discover what their assets were. But this couple had been married forty years. His health was not all that good and he was most anxious about his tax problems. She was a little concerned -- in fact, more than a little concerned -- that he might die, leaving her not knowing where any of these assets were, completely unable to recoup them from the third parties. Real case. The family talked to me wondering if there wasn't some way to persuade Dad that he had to tell Mom where the assets were.

The second is my drawer story. Another long married couple. The husband happened to be in the socks drawer. I haven't figured out why it took him so long to get into the socks drawer. But in any event, he was apparently looking for his socks and discovered a passbook. In the passbook, suddenly---he had been bringing home the paycheck to his wife all these years. And she had been putting an amount, so he believed, in savings. It turned out the savings were in the name of his wife in a totten trust for her niece. His name was not on the account at all. She was getting a little close to the point where maybe a guardian could be appointed for her; he did not want to call her senile in public. And it was a little difficult, but he would have liked to have insisted that his name be put on the title.

The third case involved an elderly woman who discovered that her husband, who was quite ill, in precarious health -- I believe heart difficulties -- had transferred the community property business to his son from a former marriage. She did not want to exacerbate their relationship, endanger his health; on the other hand, she wanted to

preserve her rights or know what her rights would be against the son who received this unauthorized gift of community property and wanted to know how to deal with it.

The fourth case -- there was a letter to the Status of Women Commission by a woman whose alcoholic husband had his paycheck deposited automatically into his credit union account every month so that she had no access to the monies at all. Although he could hold down his job, the creditors were all knocking on the door, and she was not able to get access to funds to pay the creditors to avoid the negative things that would happen.

My proposals then, in light of these kinds of setting were very, very broad-ranging, much moreso than what you find in the bill; and I quickly, to give you some sense of what they were, I did feel that it was appropriate that someone be asked to disclose the property. It seemed to me one of the most basic tenets of property ownership is that you ought to be able to ask someone where it is or what you own, and it was rather startling to think that you should have to file for divorce or legal separation in order to do that.

Next, if one spouse in fact controls community assets in a business which is part of this bill or through the bank account rules that are another problem, and they don't make assets or some reasonable portion available to them---of them, excuse me, to the other spouse for legitimate community purposes such as the payment of outstanding obligations, you should be able to have an action for access for good cause. If your name is not on title, you should be able to request that name be added. That speaks to one of the specific points that I'll come back to. On the other hand, if spousal consent is required by statute but is withheld without good reason or if a spouse is unable to consent due to physical or mental incapacity, there ought to be procedures to permit a court to dispense with consent requirements for that transaction or course of transactions.

I then went on far beyond what's in this bill and said if there was long-term mismanagement, that there might be circumstances under which spouses ought to be able to permit a severing of finances or even a separate property marriage, seeing those as alternatives to divorce in some situations, particularly with an alcoholic or gambling spouse, and that clarifying their obligations to third parties while still retaining spousal support obligations could be useful. Then I discussed some remedies.

Overall, there were two principles that guided what I suggested. I felt that remedies should be available during marriage. For the reasons that Mr. Sterling indicated, often if the remedy is very clearly expressed in the law, there was no reason to litigate. Why should you bother to spend the money to go say in court what needs to be done? And there are spouses who can get relief, and this bill in part gives some relief. On the other hand, I think that it's extremely important that spouses not be forced to litigate during marriage. For those who are ready to litigate or those who are ready to assert their rights during the marriage, I think that should be available. Divorce

courts should not be the only way to settle financial disputes. But I don't believe that through the imposition of statutes of limitations such as are found in this bill, the many proposals of the Law Revision Commission in the last year or so, I think those are wrongly conceived. If a spouse preferes, as with this elderly woman, to await the time after her husband's death to litigate the issue, I think that preservation of one's marriage first ought to be allowed, that the constraints on her ability to recover later ought to be implied through things like latches, through looking at what have been the reasonable reliance actions taken by her stepson, that there may well be equitable grounds to restrict what her recovery might be at that point, but a blanket cutoff at three years or a year after discovery is a very harsh thing that in fact for most people is going to mean there is no relief at all. We have in the past not had statutes of limitations in these areas, and I have not seen abuses. If you can prove it and if there are not equitable grounds to interfere, relief at the time of death or dissolution to me seems appropriate.

SENATOR LOCKYER: Pardon me. Currently, there is a year after discovery, is that ...?

MS. BRUCH: That's in the bill --- on the wrongs.

SENATOR LOCKYER: That's not the current law?

MS. BRUCH: That's not the current law.

SENATOR LOCKYER: OK.

MS. BRUCH: No, no. There is a specific thing with real property transfers that we can come back to. Overall, there are some things in the bill that I like. In fact, I said to Nat earlier, it's rather amusing that when they finally did some of the things I recommend, I've now changed my mind and don't like them anymore anyway. And so, I don't know if that's reason they ignored me most of the time or not. [Laughs.] But in any event, overall, I think what I've suggested to you is that I would like to see the movement towards greater requirements for joinder with an ability to be excused from joinder if it doesn't work. There are states that have requirements that you have joinder when you acquire or dispose of a business, although you've sold management with the ongoing affairs of the business. I think those are sound.

One of the most important recommendations I've seen was a suggestion that when you exercise an option on a pension plan that joinder should be required. Once the insurance agencies or pension companies know that's required, that would be actually honored and there are major consequences there.

So the problem overall with this bill is it actually narrows the joinder requirements rather than, I think, expands them.

Now, to your specific five questions, and I'll try to be very succinct. On the title point, indeed I would agree that a spouse should be able to insist that their name be added to title. I think it helps everybody when that occurs. Third parties are not

going to be prejudiced in any way. The provision that was referred to earlier in the proposed Uniform Marital Property Act, which can be found in the supplement to Volume 9A of the Uniform Laws as annotated, was just adopted a year ago, has a provision which is an improvement on the one in this bill only in that it says the court may order that the name be added to marital property. It also says a court may order an accounting, by the way. I use the term disclosure to distinquish it from a technical accounting in my proposal.

SENATOR LOCKYER: So how would that occur? Would the spouse petition to have it added?

MS. BRUCH: Precisely. I think it's simply --- I understand that's my fifteen minutes.

CHAIRMAN KEENE: No, it's just ten. Go ahead.

MS. BRUCH: OK. The problem only in the bill is a technical drafting problem. It says you can insist that the spouse add the name. I think that's fine, but as was suggested, it's even more fine when it gives the court the authority. You don't want to have to tell someone they're in contempt of court and send them to jail unless they execute the title. So that's a very technical point.

SENATOR LOCKYER: OK.

MS. BRUCH: I think the notion of adding one's name --- if you know the property exists and you want your name on it, that makes a lot of good sense. It can give you access to funds or stock accounts or various things, so that I would suggest you take a look at Section 15 of UMPA, Subsection C, I believe that it is. They have some exceptions to the title that I'm really not competent to discuss in detail. They have exceptions for if the property, for example, is that of a general partner in a partnership, they will allow you to add your name to a limited partner's interest, but not a general partnership. They have some other business type of exceptions, and I'm afraid that I'm not qualified---if the committee or Mr. Lockyer so wishes, I could consult with some of my colleagues as the business reasons why you might limit dual names. My impression as an uninformed outsider might be that if there are problems in terms of affecting how one might vote shares or who might have interest, that those problems be rectified by looking at the appropriate portions of the Corporations Code. But I'm out of my depth in that area.

The basic notion that title where those specific problems do not exist ought to be subject to reformation, I think, is a clear one, and I think the intent of the legislation proposed is excellent.

As to gifts, this is the area in which Nat and I were talking this morning and I said that I have shifted somewhat. I, in my discussion with the commission, suggested that the states that say consent, express or implied consent, is all that's required rather than written consent have what I think is a very viable approach to these problems. I also felt that the usual or moderate language was appropriate. And so I think

the usual or moderate language which is perhaps suitably ambiguous or perhaps not so suitably ambiguous is language that's been used in many states, and I believe it is the language that's incorporated together with a dollar limit in the UMPA Section 6.

The major concern that I have is that I think writing requirements are unrealistic. So the major thing that I would like to see removed from the current statute would be the requirement for writing. Consent, I think, can be found expressly if it's a garage sale, certainly. Perhaps impliedly, if it is a reasonable or usual contribution, the words were in the disjunctive -- usual or moderate. Moderate would have been appropriate to this life standard, but it may well be that this is a family that, for example, has been very religious and has tithed at a level higher than what other families would have done, but it was usual for this family. So that's the reason for that choice in the language. My sense at this time is that perhaps the best thing to do here would be go back to simply saying, "Consent is required." Remove the requirement of writing and leave it to the courts then perhaps with some legislative history to interpret that consent may be implied for appropriate levels of United Fund donations; certainly tips are never going to be a problem. Birthday presents to family members are more apt to be a problem. Presents to somebody's mother or nephew.

I was very persuaded by the correspondence that Barbara McCallum directed to the Law Revision Commission in which she said that the members of the committee she was working with on the State Bar said they really hadn't had problems with the kinds of things I'm talking about; the garage sales, the United Fund, the normal ongoing church contributions have not created problems. The things that do create problems are the sudden dissipation of assets at separation, where somebody does go out and sell the property or the clothing; and we do need to have protection against that. Certainly no implied consent would be ever found by a court in those cases. And there are the cases that Nat Sterling referred to, serious cases with people going down to a place like Household Finance and taking out liens against the furniture. Those are dreadful cases. The Androtti case that he mentioned is a very well reasoned and disagree sharply with Mitchell, the case that Mr. Sterling suggested needs to be overruled. I think we ought to take the opportunity to overrule Mitchell very explicitly in this legislation and make clear that although Household Finance may become a creditor of the community and may have access to then execute against community assets, they don't necessarily get this furniture or a portion of this furniture. They are in essence an unsecured creditor. These kinds of people know how to go about getting consent of both spouses. They don't--- they're not our more sympathetic creditors, and I think they can protect themselves.

Oh, I thought that the language suggested by Senator Davis or that was worked out in connection with Senator Davis was less auspicious than the original language in the bill. I would have broadened the original language in the bill. I think that the test

of saying was the disposition clearly contrary to the community interests is a very hard burden and it is not at all clear to me why we need that. I think the norm ought to be to protect these kinds of assets; let the creditor look elsewhere if they have entered into these kinds of transactions.

I think we've moved to the fourth question, which is asking whether one should be permitted to void an improper transfer. I'd say yes, ordinarily one ought to be able to void an improper transfer. The choice in these cases is generally between an innocent spouse who didn't know of the transfer, whose consent was not requested, although it should have been, and sometimes an innocent third party. And you've got two innocent parties. My policy choice in that case would be to restore the item -- it may be a family heirloom, it may be property that's important to the couple -- restore the item to the community; half the item if it were after death or divorce. But I do like the language in the bill that suggests the conditions on which such restoration might be made ought to be subject to the courts' powers. We saw a little bit in the case law where sometimes they just said it's not equitable, you sold this piece of real property, now you want the real property back; and in this case the husband took the money and he spent it somehow. Well, too bad that he spent it, but how can you ask that this person give it back. Well, if you don't have a BFP, and I'm slipping on into the fifth question, about BFP protections, there are an amazing number of mothers-in-law who appear in the appellate cases with spouses who have transferred their property, a house even, to the mother-in-law. And after the husband dies or at the dissolution, mom-in-law shows up and says, "Former daughter-in-law, goodbye, hon; I own the house." And that's when the daughter-in-law may discover that this has gone on.

It's tremendously important that someone who has knowledge of the marriage relationship be required and held to the joint consent of both spouses. Title companies in this state are very, very good at insisting that at least you get a quitclaim from the other spouse if they have no interest or requiring that people be joined. And because of the protections through the title company, I would prefer, in general, to permit a setting aside of an improper transfer whether a gift or a sale; but subject to such conditions as the court might impose, such as the restoration of any purchase price if that is equitable, if you've got a genuine BFP.

So there are some areas there where I think a little more fine tuning is needed. I was troubled that the ---

CHAIRMAN KEENE: The points that you're making about the necessity for affording protection against transfer to someone who is not genuinely a BFP I understand. But earlier you said that as between an innocent third-party purchaser ...

MS. BRUCH: And an innocent spouse.

CHAIRMAN KEENE: ... an innocent spouse, your policy preference is that the property

be returned to the innocent spouse. What's the reason for that? That's the tough case.

MS. BRUCH: That I would still make that subject to restoration of, say, purchase price to the BFP. It's really a question of specific performance in a sense. And in that case, I think that as between the two, probably the BFP through the title companies has the better chance to insure that all the necessary consents have been entered. They know a sale is going on, and that should well be the burden on them to find out if this person is married, and if so, and it's appropriate to get their consent. I would not say you've lost your shirt if you don't do that, but I would say the spouse who didn't know her house was being sold out from under her ought to be able to stay in her home and the other person should be relegated to money damages, in that case. I would not give specific performance of the property to the purchaser. In essence, that's what I'm doing by rescinding and bringing the property back simply as between the two parties. I think the person who knows that a sale is going on is better able to comply with all of the regularities. But I wouldn't do it without money damages.

CHAIRMAN KEENE: Would you require it of the courts in all cases, and what guidelines would you give them about conditions that they should impose?

MS. BRUCH: Well, the kinds of guidelines---I raised a lot of questions and was a bit of a professor and didn't give a lot of answers in this part of my discussion; and that's why I rather like the language that's been drafted here. I think that I felt that estoppel notions, for example, with a business that has been transferred to the stepson, my goodness, if he's been now conducting the business, gave up some other interest of his, put his whole life into it for five years before his dad dies, at that point, I don't say that it's up to stepmother now to get the business back and be able to sell it to somebody else. I think that would be very inequitable. But I think courts are capable of seeing estoppel notions or reliance interests and adjusting them. I really think this is one of the areas where maybe to be vague is to be fair and to say, the one thing I would have made clear is that absent estoppel that the return of a sale of goods or of gifts -- I guess, maybe I'm speaking against myself to a certain degree on the family business -- but the norm would be it should be returned.

In a case with stepmother, unless she has been involved or wants to conduct the business herself, there would be no reason to return the business to her, but she ought to get financial recompense, assuming that that's appropriate however many years later the husband dies.

CHAIRMAN KEENE: Would it be in the form of a statutory preference, policy preference, or would it be in the form of an actual presumption settled in the statute?

MS. BRUCH: I'd be willing to go to a presumption or even to make it an absolute right subject to estoppel principles, which in a way is a preference or a presumption, but it's a stronger one. It really says the norm is restoration of the property if the

person wants it, but subject to equitable conditions.

CHAIRMAN KEENE: What if you have a not-so-innocent spouse in the sense that the spouse could have/should have been aware of what was going on and through carelessness failed to do anything about it, and time passed and nothing was done?

MS. BRUCH: At that point, and I think there have been a couple of cases along this line where someone essentially knew that---a wife knew that the husband was going out to show the property, the property was being sold. She didn't consent to the passage of title, but she knew it was being sold. At that point, I simply think the courts ought to use estoppel or latches.

CHAIRMAN KEENE: What if---let's take a she, what if she typically in the course of their relationship allowed her rights to be overridden and refused to assert herself within the entitlements of all of the other protections that are proposed to be provided and the sale takes place under those circumstances? Who wins that one?

MS. BRUCH: I think that I'd go back to my initial statement on that one, and I would allow her to raise that complaint for all of the reasons that I think Ms. McCallum's discussion with you suggested how difficult it is when the partnership is going on and it's going well and they say, "Don't you trust her, I'll take care of you." I'd let her raise the issue but once again, I would use latches and estoppel and assume that where it was inequitable or other conditions could be imposed, financial obligations to the third parties.

One of the difficulties that I haven't addressed directly that is tremendously important, when you look at the question of whether you get the property back or not, is the question of who becomes the creditor. If the property stays with a third person whether it's a donee or a purchaser, bona fide or not, and the spouse is left with the money remedy, that may mean nothing because the other spouse may be bankrupt. If the property comes back to the spouse, it is the third party whether it's Household Finance, the mother or the girlfriend or an innocent purchaser who was left with a damages remedy. The advantage for the third-party purchaser is at least that property has gone back into the family unit and there are some assets there. It may be a circular way to get there, but---I mean, that's the really tough problem -- where you've got two innocent parties and who's going to be left with a claim that they're going to have to bring to court. I mean, I think that's a policy decision you all have to make.

My prejudices or inclinations are in favor of the spouse so long as there is not knowledge. But I am nervous about allowing people, BFPs, to simply fall into these situations; and for that reason, I have supported the statute of limitations, or I would support if you asked me, the statute of limitations that's currently in Section 5127 on transfer of community real property. It is not the most clearly written statute of limitations; however, there have been appellate cases that have interpreted it. And it

basically says that if there is someone who is a BFP and did not know that the transferor was married, with title standing alone in the name of the transferor, after one year from the time of transfer---or recording of the transfer, if no action has happened, they've got good title. And I think because of the approach we have in California to clarity of land title records, that makes good sense. The courts have said that we'll not protect someone like the mother-in-law who knew of the marriage. I mean it was not designed to protect fraud. And for that reason I am concerned in two ways about the proposal that you've introduced. I think that the language is less than clear in the portion where it discusses BFPs. I really think it needs to be cleaned up a little bit to make sure what's mean, that what is meant is both good faith and no knowledge of the marriage.

And I also, as I've suggested, have a great deal of difficulty with a three-year cutoff even if this was a non-BFP. I don't think, and there's some interesting case language by the appellate courts that says that the current language in 5127 was never meant to perpetrate a fraud where you had a husband and his mother arranging something.

CHAIRMAN KEENE: It seems to me that if you provide an ability to know about the financial affairs within the marriage and the extent of the property and the right to have your name on things and all of that, that implicit in that is some sort of responsibility or duty to exercise reasonable care to be informed about transactions of the type for which we are providing that the property can come back. And unless there's reference to that responsibility, it seems to me that we're not structuring the whole thing quite right. And I don't know exactly how to do it, but that's my gut feeling that you should not allow a situation---you should not allow dependency on this ultimate drawback from the marketplace in situations where you do have a BFP without knowledge of the marriage.

MS. BRUCH: I think that if we were to give one a right to disclosure, which I think that we ought to do, that those kinds of concerns become more real. What I feel on the wrongful transfers or the transfers whether they're to as gifts, any unconsented to transfer in which consent was required by the code, that we really are left cleaning up after parties who didn't know what the law was at the time. I mean for those who are knowledgeable and there's a right to disclosure and they're willing to risk the disruption that it might promote in their marriage to ask for disclosure, I certainly think you can hold those people to a very high standard. Whether by permitting one to ask for disclosure, which I see as a very important normative statement, that we think parties ought to be able to know where their property is, whether we're then going to say to dependent spouses who in our society have not been told "put starch in your backbone" and go out and ask, we've just said you can ask; we haven't said you have to ask. To then turn around and say, well, now, you had the right to ask, we're going to zap you for not asking, that puts a very different stress on things. I do think that your

concerns about the person who stands idly by and allows a third party to be injured are the kinds of concerns I've been concerned about when I talk about estoppel or placing conditions. And that ...

CHAIRMAN KEENE: I don't know where the line is. I don't know where the line is and there ought to be some ...

MS. BRUCH: Yeah, it's somewhere in there. And I think so long as we don't have disclosure we don't reach that issue. As tough as the issue is, I'd rather reach it. I'd rather have a right to disclosure and then have us make these tough decisions. I think you've suggested several different ways you can cut it. You can do it with presumptions. You can do it with one thing or another. I think that the kind of language in here that permits the court to apply equitable principles and conditions is a good way to start on this. I don't like an absolute statute of limitations. I don't see any need to clearing up land titles to benefit a fraudulent person. I do think for the BFP that is a sound solution.

CHAIRMAN KEENE: Mr. Wong had a question.

MR. GENE WONG: Earlier you stated that as between an innocent spouse and a BFP purchaser you would favor that the property be returned to the innocent spouse but that BFP be given back his purchase price.

MS. BRUCH: Or money---a money claim.

MR. WONG: Do you think that the BFP might be able to obtain an expectancy interest as well in that he may have purchased this property in lieu of some other property and the return of the property to the marriage constitutes perhaps a breach of his contract or some other ...?

MS. BRUCH: Oh, I certainly, I certainly think there is breach; and for that reason, I was perhaps a little sloppy in how I described this, because not only would purchase price, but it seems to me he becomes our third party, becomes a contract creditor. And I think at that point if you've lost your expectancy interests, you ought to be able to claim. The language that's in this proposed statute right now is fairly broad, and I think I like that because there are different variations on a theme. But basically, I think that if someone loses the property, they ought to be left then with their full rights as a disappointed transferree.

MR. WONG: OK, thank you.

MS. BRUCH: I had some other specific points. Those are the five points ... be very, very quick about those. The Katz bill I had wanted to mention. I'm very hopeful that if that bill started on this side and had a little bit of a running head start, it would make it by Willie Brown, who was the specific person who sent that bill back to committee, or tabled it.

SENATOR LOCKYER: Maybe we ought to give it a try.

MS. BRUCH: I think it --- I've mentioned sole management and control of the business only briefly. I think that's a very tough issue, and I think Dorothy Jonas intends to discuss some of that later. I've mentioned that the uniform act has some language protecting title in those circumstances. I'm concerned that one needs to think through some of that. An active ongoing business is one thing; a passive investment that is cloaked as a partnership is something else. And I don't know quite how we deal with that, but I think those who are more knowledgeable than I ought to address themselves to it.

I've already spoken to the question of statute of limitations in general. I much prefer latches in most circumstances. My one specific exception is land titles where there has been a transfer to a BFP.

Oh, I really think that's it, as a matter of fact. If there are any questions beyond those you've already asked, I'd be happy to take them. Otherwise I have said at length what I said already rather lengthily here in my written paper, which I'll make available to all of you. That's it, unless you want to ask anything.

CHAIRMAN KEENE: Anything further?

SENATOR LOCKYER: Very helpful, thank you.

CHAIRMAN KEENE: As always. Thank you very much.

MS. BRUCH: My pleasure.

CHAIRMAN KEENE: Dorothy Jonas, California Commission on the Status of Women. Is there any objection to having a photographer present?

MS. DOROTHY JONAS: I'm Dorothy Jonas, a member of the California Commission on the Status of Women. We very much appreciate this opportunity, Senator Keene, to be here today. Personally, we want to thank Senator Lockyer for this opportunity. Senator Lockyer has been a leader -- he's been a leader in every issue which affects women; and we appreciate this opportunity to thank you for all the help that you've given.

SENATOR LOCKYER: You're welcome. Thank you.

MS. JONAS: In this particular bill, it came as our---our objections came as a result of the studies which the California Commission on the Status of Women has been conducting this year on our community property laws. And this in turn grew out of two years of research by my daughter and myself into this very same subject which in itself grew out of speeches my daughter and I were making before women's groups during the Equal Rights Amendment---the fight for the Equal Rights Amendment, in which we came across puzzles which we just didn't have the answers for. It would boil down to something like this: After we would make our speeches, the women from the church groups or just ordinary women's groups would surround us and say, "Well, look, you haven't dealt with the problems of the married women. We have these equal control and management laws in our land; all right, then how is it that my husband can keep me from finding out what

he's doing. We've been married for 25 years, and I want to tell you I still don't even know what he's drawing as a paycheck." So we knew there was some lack.

We went into this study and then hoping that this bill would take us a little bit past the puzzle that we found ourselves, but instead of that, we developed some new worries. We were very much afraid that because of the wording of the bill, people are going to assume they have rights which they don't have. Women are going to find that the bill seems to give rights which it doesn't, and I'll get right to those problems if I may.

See, there's what---our own management codes which were revised in 1975, no matter how many times we keep repeating it, they simply don't provide equal control and management for one spouse in the marriage, and that's the spouse who is the caretaker of the home and children. She can be a full-time homemaker, or she can be the married woman who takes care of the home in the morning, goes out and works part-time and comes back and picks up the children and takes care of them throughout the evening. But the point is she is prevented by our laws from equal access to the powers to manage and control the community property. She's also prevented from, as Carol pointed out, many times, from evening gaining knowledge.

Now, if you'll refer to the section which is 5125.170, it would appear that we're going to have a new protection for the nonmanager spouse as homemaker spouse, because here it says, "A married person in whose name record title or other documentary evidence of title to community property stands shall, upon request of the person's spouse, add the spouse's name to the title." Now this is something she doesn't have under our present laws. But if you look at 5125.170(b) it says, "This section does not apply to community property that is subject to the sole management and control of the married person pursuant to Section 5125.140." And if you look at that particular section, then you find out that it's the same requirement that we have under our present laws which allows the homemaker wife who isn't running the family business to have no say-so to be prevented from finding anything that's going on.

Well, now, under this new bill, she's not going to have any more new legal rights to have her names added to stocks or bonds or securities or ownerships and partnerships, incorporations or even real estate purchases other than the family home. So long as the manager spouse is involved in the operation of a community-property business as designated by that section, 5125.140, he would retain full management and control and sole right of title in all these transactions.

Now, a later portion of this bill, 1392, it's 5125.230, does require that both spouses join in disposition or sale of community real property. Yet this apparent protection will be circumvented under this bill just as it is in our present day by a very common, everyday, legal business practice. It goes like this now: The manager spouse

purchases a parcel of land or a building. Now, of course, that's real estate. And then with co-investors, he opens escrow. While the parcel is still in escrow, the purchasers form a partnership. The partnership becomes the purchaser of a record, and when the escrow closes, the manager spouse is no longer the buyer of a piece of real property, rather he has become a member of a partnership which owns the property now. The manager spouse's participation in the partnership enterprise becomes a part of the community property business over which now he retains sole control and he will under SB 1392. And of course, that sole control includes disposition or sale of the partnership interest.

And I think Carol dealt very fully in the worrisome problem of garage sales and United Way contributions, but I do want to remind us all that this is one of the few protections right now under our present law that women in the lower income strata has. At least she knows that the furnishings of her house and the clothes and the things that's she's used to are at least---there's a standard of law which says, "This belongs to you as well. This may not be sold from out from underneath you. This may not be given away." It's a standard that's there. And I think that a standard sometimes keeps people from acting in a hasty manner, and it has been a protection for her.

I guess I did want to bring to your attention one more thing and that is that under our present laws, and it will be true under this also, that it's only sometimes when the marriage is over that the wife finds out how the law itself has made it possible for her to be excluded from any kind of participation in her own community property or her assets or to know what the liabilities are. And when she gets into a divorce, then she finds out very, very clearly and very fast how the law hasn't provided any kind of fiduciary duty for that manager spouse who is in charge of her property even though the law gave him or gave that spouse the exclusive rights. And she also finds that no fiduciary duty suddenly springs into being while the divorce is ongoing either. They are certainly at arm's length then, and anything that she has to find out, if she believes that the full story hasn't been told to the court, she has to rake up the money and find it herself.

The thing is we really feel that this has a great deal to do with the discrepancies in the standards of living between the divorced men and the divorced women. And as you know, that after divorces, we find that in California the average divorced man---his standard of living goes up 42 percent and the standard of living of divorced women and her dependent children fall 72 percent.

In the analysis which we received from your office, Senator Keene, the question was posed: Should a married person be allowed to have his or her name added to the title of community property? And of course, my answer is absolutely yes. Both spouses names should be jointly on property, and no one should have to ask for it. It should be required. It should be automatic. And that's entirely in the spirit and it's the concept

of community property law which provides for an equal partnership in marriage. And I think that it's one of the things which probably all people felt that we were helping to bring about by the changes in the 1975 laws. And since we didn't quite make it, I would like to suggest that I would love to see that this be the time that we give some thought to the problems that women have experienced because of the inequities in the law; and therefore, our women's commission would like to propose that we continue on a course which will help us establish a system which does provide equal protection of the law to both spouses in every marriage.

CHAIRMAN KEENE: Could you give me the basis for the post-dissolution statistics of 70 percent up---or 40 percent up and 70 percent down?

MS. JONAS: It's Lenore Weitzmen and Carol Bruch ...

MS. BRUCH: [Inaudible.]

CHAIRMAN KEENE: 28 UCLA Law Review. Around page 1215. OK.

SENATOR LOCKYER: It's always nice to have a computer in the audience. [Laughter.]

MS. BRUCH: Thank you. [Inaudible.]

CHAIRMAN KEENE: Any further questions?

SENATOR LOCKYER: No, other than to return the comment which is to express some appreciation for all the work that you continue to do for women. Thank you.

MS. JONAS: Thank you, Senator.

CHAIRMAN KEENE: Yes, and I'd just like to comment very favorably on the clarity of your presentation. It was very much to the point and very clear. I appreciate it.

MS. JONAS: Thank you. That's very kind of you.

CHAIRMAN KEENE: Thank you. Are there others wishing to testify on the issue that's before us? If not, Senator Lockyer, do you wish to make any closing comments on your bill?

SENATOR LOCKYER: Only to thank the people who have participated and indicate that they've helped me understand some of the provisions of the proposal better than I did as the initial author and some very interesting questions have been raised with respect to the entire issue that I think requires some thought. And I hope that we'll do that during this interim period so that we might move forward in some constructive way during the next legislative session. Thank you, Mr. Chairman.

CHAIRMAN KEENE: I would certainly concur in those comments. And with those comments, the meeting is adjourned. We'll hopefully have a transcript for you within a reasonable time, subject to the constraints of the Gann Initiative and shortages of personnel. That's the commercial for today. Thank you very much.

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