



Winter 1973

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Recommended Citation

Willis H. Ellis, *Equal Rights and the Debt Provisions of New Mexico Community Property Law*, 3 N.M. L. Rev. 57 (1973).

Available at: <https://digitalrepository.unm.edu/nmlr/vol3/iss1/4>

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EQUAL RIGHTS AND THE DEBT PROVISIONS OF NEW MEXICO COMMUNITY PROPERTY LAW

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The debt provisions of New Mexico community property law can expect substantial revision upon passage of the Equal Rights Amendment. By "debt provisions" is meant rules governing the power of unsecured, judgment creditors to reduce their judgments to money by executing against property belonging to their debtors. Community property debt provisions must, *inter alia*, establish the respective accessibility of a married debtor's separate and community property. This comment is divided into two parts—a brief exposition of the present law, and a discussion of the changes required by the Equal Rights Amendment.

EXISTING LAW

To determine the debt exposure of specific property the attorney must engage in a three step process: (A) classify the property as separate or community; (B) classify the debt in like manner; and (C) identify the legal rule governing liability of that kind of property for that kind of debt. The classification of property was covered by Professor Bingaman,¹ and need not be repeated. We will discuss the classification of debts and the rules governing liability of each of the three kinds of property.

A. Classification of Debts

A debt is a community property debt if the person incurring it has power to obligate community property under the circumstances surrounding the transaction, and if the debt is incurred for the primary benefit of the community (family).

1. Power of the Person Incurring the Debt

The husband is the manager of the community and as such has the sole power to obligate community property by incurring community debts.² There are four exceptions to the foregoing general rule: (1) when the wife has been judicially declared

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1. Bingaman, *The Effects of the Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control*, 3 N.M. L. Rev. 11 (1972).

2. N.M. Stat. Ann. § 57-4-3 (Repl. 1962) makes the husband manager of the community except that both spouses must sign a deed or mortgage affecting real estate.

manager of the community;³ (2) when the husband has ratified the wife's purchase;⁴ (3) when the wife acts as agent for the husband;⁵ and (4), when the creditor furnishes necessaries to the wife or children.⁶

2. *Agency and Ratification*

In actual practice, wives probably obligate community credit more than husbands, and merchants are quite content to close the deal and deliver the goods notwithstanding the New Mexico statute which clearly says a wife cannot bind community property.⁷ Merchants assume little risk by this practice. As soon as the husband has knowingly used the item, he has ratified the purchase and the community is bound.⁸ Even before ratification occurs, there will often be grounds upon which a court can find that the wife was acting as agent for her husband when she signed the purchase agreement.⁹

3. *Incurred for the Benefit of the Community*

A community purpose is a family purpose. Incurring a debt benefits the community when it purchases community property,¹⁰ or pays another community debt, or satisfies a community obligation for maintenance and support, or benefits a person whose services are important to the community.¹¹ Debts incurred for these purposes are community debts since their ultimate purpose is to benefit the family unit.¹²

B. *Rules of Liability*

Figure 1 shows the nine possible relationships between debts

3. A wife becomes manager of the community only when she is so adjudged in a special, statutory court proceeding. N.M. Stat. Ann. § 57-4-5 (Repl. 1962). A general power of attorney from her husband gives her power over his separate estate but does not make her manager of the community. *Rutter v. Rutter*, 74 N.M. 737, 398 P.2d 259 (1964). A wife who is manager has exactly the same powers a husband-manager has. *Frkovich v. Petranovich*, 48 N.M. 382, 151 P.2d 337 (1944).

4. *Woods v. Van Wallis Trailer Sales Co.*, 77 N.M. 121, 419 P.2d 964 (1966).

5. *Id.* It has been held that a wife who signed her husband's name bound him and the community, but not her separate estates. *Ginn v. MacAluso*, 62 N.M. 375, 310 P.2d 1034 (1957).

6. The creditor who would recover from the husband's separate estate, or from the community, under this theory must prove that the husband had failed to furnish necessaries.

7. N.M. Stat. Ann. § 57-4-2 (Repl. 1962).

8. *Woods v. Van Wallis Trailer Sales Co.*, 77 N.M. 121, 419 P.2d 964 (1966).

9. *Id.*

10. *Malcolm v. Malcolm*, 75 N.M. 566, 408 P.2d 143 (1965).

11. *See Vail v. Sampinato*, 238 La. 259, 115 So.2d 343 (1959), where the court held that a trip taken by the wife alone as a vacation was for community purposes.

12. The New Mexico Court has held that all debts incurred by the husband are presumed to be community debts. *Brown v. Lockhart*, 12 N.M. 10, 71 P. 1086 (1903).

		Debts		
		Com.	W's Sep.	H's Sep.
Property	Com.	X	A	B
	W's Sep.	C	X	D
	H's Sep.	E	F	X

Figure 1.

and property. We will discuss each relationship under the letter used for it in figure 1: X, A, B, etc. Unless otherwise indicated, the discussion refers to contract obligations. Tort obligations are mentioned separately where they differ from the rules applicable to a contract debt.

1. *Square X.*

The three squares in figure 1, marked X, represent the three questions: is community property liable for community debts; is the wife's separate property liable for her separate debts; and is the husband's separate property liable for his separate debts? In each case, the answer is obviously, "yes," and no discussion seems needed. Discussion is needed, however, for the remaining six relationships.

2. *Square A.*

Square A presents the question whether, community property is liable for the wife's separate debts. A New Mexico statute specifically provides, "The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband."¹³ The Supreme Court of New Mexico has applied the same rule to the wife's separate debts incurred before marriage.¹⁴

The Supreme Court of New Mexico has held that the wife's half of community property is liable to satisfy a judgment for the wife's separate tort.¹⁵

13. N.M. Stat. Ann. § 57-4-2 (Repl. 1962).
 14. *Wiggins v. Rush*, 83 N.M. 133, 489 P.2d 641 (1971).
 15. *McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990 (1949).

3. *Square B.*

Is community property liable for the husband's separate debts? With two exceptions, the answer is almost certainly, "yes." Although the state courts have not spoken, the United States Court of Appeals for the Tenth Circuit has so held,¹⁶ and text writers have taken that position.¹⁷

The first exception is for antenuptial debts of the husband. Recent dicta in *Wiggins v. Rush*¹⁸ states that community property is not liable for the antenuptial debts of either spouse. The second exception is the result of a New Mexico statute providing that the wife's salary is not liable for the husband's debts.¹⁹ Her salary during marriage is community property, but it is nevertheless not liable for the husband's separate debts.

Is community property reachable to pay for the husband's separate tort liability? There are no New Mexico cases or statutes but presumably at least one-half, and perhaps all of community property bears this potential liability. The court would either analogize to the wife's separate tort (one-half of community property liable) or to the husband's separate contract liability (all community property liable).²⁰

4. *Square C.*

Is the wife's separate property liable for community debts? No.²¹ In *E. Rosenwald & Son v. Baca*,²² the Supreme Court held that grocery bills, which were community debts, could not be collected by executing on sheep which were the separate property of the wife. However, the wife may make a community debt her separate debt by signing the contract, endorsing the note or the like.²³ When both husband and wife sign, they are jointly and severally liable.²⁴

16. *Denton v. Fireman's Fund Insurance Co.*, 357 F.2d 747 (10th Cir. 1966); *Eaves v. United States*, 433 F.2d 1296 (10th Cir. 1970).

17. R. Clark, *Community of Property and the Family in New Mexico* 28-29 (1956); J. Wood, *The Community Property Law of New Mexico* 87-88 (1954).

18. 83 N.M. 133, 138, 489 P.2d 641, 646 (1971). *Contra*, *In Re Chavez*, 149 F. 73 (10th Cir. 1906).

19. N.M. Stat. Ann. § 57-3-6 (Repl. 1962).

20. A federal court has held that only one-half of the community property is liable for the husband's tort. *United States Fidelity & Guaranty Co. v. Chavez*, 126 F.Supp. 227 (D.N.M. 1954).

21. The one exception is created by N.M. Stat. Ann. § 57-2-5 (Repl. 1962) providing that the wife must care for her husband (a community obligation) with her own separate property, when he is unable to support himself and there is neither community nor husband's separate property.

22. 28 N.M. 276, 210 P. 1068 (1922).

23. *Cabot v. First Nat'l Bank*, 81 N.M. 793, 474 P.2d 476 (1970); *First Savings Bank & Trust Co. v. Flournoy*, 24 N.M. 256, 171 P. 793 (1917).

24. *Commerce Bank and Trust v. Jones*, 83 N.M. 236, 490 P.2d 678 (1971) holding the wife's

Is wife's separate property liable for community torts? This is really a question of tort law rather than property law. Community torts can only be committed by someone engaged in an activity that benefits the community. If that someone is the wife, then it is not just a community tort; it is her tort as well and her separate property is liable to satisfy a judgment. Indeed, it is probably the case that she is primarily liable (rather than being a joint tortfeasor with the community)²⁵ and the community will be indemnified to the plaintiff's rights against the wife to the extent that the community satisfies the judgment. However, if the wife is not a tort-feasor, then her separate property is not liable to satisfy a judgment based upon a community tort.

5. *Square D.*

Is the wife's separate property liable for the separate debts of the husband? No, neither in tort nor contract. A New Mexico statute provides that, "the separate property of the wife is not liable for the debts of her husband"²⁶

6. *Square E.*

Is the separate property of the husband liable for community debts? Although it is not certain, the best opinion seems to be that it is. Both Judge Wood and Professor Clark so argue.²⁷ The reason given is that the husband has sole power to incur community debts. Although neither authority finishes the argument, their point presumably is either that the creditor should be entitled to rely on property which a reasonable person would consider to belong to his credit customer without having to make fine distinctions between separate and community property and debts; or that the husband should not be able to limit his liability by use of a legal entity (the community) over which he has control.²⁸

For the liability of the husband's separate property for community torts, see the discussion of similar liability of the wife under square C above.

separate estate liable for the entire amount of a note signed by husband and wife. *Cabot v. First Nat'l Bank*, 81 N.M. 793, 474 P.2d 476 (1970) reaches the same result.

25. This conclusion is obtained by analogy to the law of master-servant and principle-agent. See Restatement (Second) of Agency §§ 401, 438 (1957).

26. N.M. Stat. Ann. § 57-3-9 (Repl. 1962).

27. R. Clark, *supra* note 17, at 30; J. Wood, *supra* note 17, at 86 and 87.

28. See discussion of liability of separate property for community debts, *infra*. The husband does not have complete power over community real estate, but this limitation has rightly never been thought to justify limited liability.

7. *Square F.*

Is the husband's separate property liable for the wife's separate debts? No, N.M. Stat. Ann. § 57-3-8 (Repl. 1962) provides that the husband's property is not liable for his wife's antenuptial debts and does not mention debts made during marriage. Common sense would seem to indicate that the same would be true of the wife's postnuptial, separate debts.

CHANGES

The law we are dealing with is a product of both classification rules, which define community and separate debts and property, and liability rules, which state the liability of property for debts once each is properly classified. Changes can be made by altering either the classification rules, the liability rules, or both. We recommend that, in so far as possible, all required changes be produced by altering only the liability rules. This will produce a straightforward statute, the effect of which can be easily understood. In addition, it will limit the changes to those required to bring about equal rights between the sexes.

Changes Required in Liability Rules

		<i>Debts</i>		
		Com.	W's Sep.	H's Sep.
<i>Property</i>	Com.	X	A 1	B 1
	W's Sep.	C 2	X	D 3
	H's Sep.	E 2	F 3	X

Figure 2.

Figure 1 is repeated above with the addition that each square contains the number 1, 2, or 3. The numbers show the comparisons that must be made in a search for sex-based discrimination. Number 1 compares the community's liability for separate debts of the husband with its liability for separate debts of the wife.

Number 2 compares the liability of the husband's separate estate for community debts with the same liability of the wife's separate estate. Number 3 compares the liability of each spouse's separate estate for the separate debts of the other spouse. Numbers 1 and 2 entail sex-based discrimination; number 3 does not.

We shall follow the convention, established in the first part of the comment, of discussing each relationship under its heading in figure 2.

A. Number 1 (Squares A and B).

As the law stands today, the wife's interest in community property can be depleted to satisfy the husband's separate debts incurred during marriage, but the husband's interest in community property cannot be taken to satisfy the wife's separate debts. This difference will be unconstitutional under an Equal Rights Amendment.

Constitutionality of the existing law might be defended on two grounds: (1) If community property is used to satisfy the husband's separate debts, the community has a right of reimbursement from the husband's separate estate; and (2) The preference for the husband's separate estate which is embodied in these rules is balanced by the fact that the husband's separate estate is liable for community debts and the wife's is not. Neither of these arguments will withstand analysis.

(1) A cause of action for reimbursement will usually be of no practical value, and thus cannot justify the discrimination. The husband's separate creditor will usually not look to community property until the husband's separate estate is exhausted.²⁹ Whenever community property pays separate debts, there will be no separate estate from which to reimburse the community.

(2) The potential liability of the husband's separate estate for community debts balances this inequity only in the abstract. There will almost never be a situation in which the same family experiences both a separate creditor's attachment of community property and a community creditor's attachment of separate property.³⁰ An unconstitutional discrimination against the wife in

29. See W. de Funiak & M. Vaughn, *Principles of Community Property* § 170 (2d ed. 1971), arguing that when separate and community property are pledged for a community debt, community property must be exhausted before the separate property can be taken.

30. Assuming that the creditor will be required to exhaust property of the same classification as the debt before being allowed access to property of a different classification, it will be rare, indeed, that the economic fortunes of a single family progress in such a roller coaster fashion that

one family cannot be justified by an unconstitutional discrimination against the husband in another family.

An Equal Rights Amendment will clearly require that community property be equally liable, or not liable, for the separate debts of the spouses. There are three possibilities:

1. All community property liable for separate debts.
2. No community property liable for separate debts.
3. The debtor's one-half interest in the community property liable.

Alternatives one and two seem unsatisfactory. Number one would allow collection of a debt out of property vested in one who is not the debtor and who received no benefit from the creation of the debt. Number two would protect some otherwise non-exempt property that is vested in the debtor. Alternative three is a more accurate matching of benefit and burden. It has the disadvantage, however, of dividing the community estate between "his" and "hers." This might be seen as philosophically inconsistent with the basic concept of a community of property, but New Mexico has already opened this door by making the wife's half of the community property liable for her separate tort.³¹

Although each of these three possibilities satisfies the need for equal rights, we prefer to allow separate creditors access to the portion of community property vested in their debtor (number three). No solution is either all right or all wrong, but this one seems to be a reasonable compromise between the two extremes. It might, however, occasionally create one difficulty not yet mentioned.

When community property is taken to satisfy a separate debt, careful records should be kept. Otherwise, the resulting uneven ownership of the community estate may be forgotten. It will not always matter—as when one spouse dies intestate,³² or with a will leaving all community property to the surviving spouse. But when a spouse exercises testamentary power over community property, the probate court should have ready access to informa-

the husband's separate estate becomes rich while the community is bankrupt, and the community later prospers while the husband's estate collapses.

31. *McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990 (1949). In addition, a federal court sitting in New Mexico in a diversity case held that only the husband's one-half of community property was liable for his separate tort. *United States Fidelity & Guaranty Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

32. Existing intestacy statutes direct all community property to the surviving spouse. N.M. Stat. Ann. § 29-1-8 (1953); N.M. Stat. Ann. § 29-1-9 (Supp. 1971).

tion on how much community property was vested in the decedent.³³ The same problem is also presented by divorce.³⁴

The law should clearly require that all of the debtor's separate property be used to satisfy a separate debt before any community property can be used. This rule is necessary for the protection of both the community and the non-debtor spouse. Proper handling can prevent it from becoming a burden for the creditor. Ideally, both spouses should be present at supplementary proceedings.³⁵ If they fail to identify non-exempt separate property of the debtor sufficient to satisfy the debt, the debtor's share of non-exempt community property should be reachable without further evidence of exhaustion.³⁶

Whenever the community has been forced to relieve an obligation of the separate estate of one of the spouses, the community is entitled to reimbursement.³⁷ A remedy should be provided by which the non-debtor spouse could obtain reimbursement on behalf of the community from any assets later acquired by the separate estate of the debtor spouse.

B. Number 2 (Squares C and E).

Under the present rules, the husband's separate property can be taken to satisfy community debts while the wife's cannot. This difference will also fail the test of an Equal Rights Amendment.

The distinction in responsibility of the spouses under these rules manifests the equally discriminatory social policy behind them. Community debts are debts incurred for the benefit of the family. The husband is expected to support his family, using, if

33. The language of N.M. Stat. Ann. §29-1-9 (Supp. 1971) does not seem to contemplate exceptions to the 50/50 norm:

Upon the death of the husband, the entire community property goes to the surviving wife, subject to the husband's power of testamentary disposition over one-half [½] of the community property.

We trust, however, that New Mexico Courts will nevertheless give effect to their own holdings on the split liability of community property. Determining the facts may be a much more difficult problem, which is, unfortunately, beyond the scope of this comment.

34. The problem is probably least severe where the community is terminated by divorce. Here the time lag is likely to be less and the attention paid by the parties to such matters, greater.

35. See N.M. Stat. Ann. § 21-1-1(69) (Repl. 1970). Both spouses should be present, in person or by deposition, to prevent the debtor-spouse from falsely testifying that there is no more separate property so that community property—which the debtor has only a half interest in—will be forced to pay his debt.

It is even more important to give both spouses an opportunity to testify when exhausting community property to make separate property liable for a community debt. See footnote 39, *infra*.

36. An alternative formulation is to make failure to exhaust separate property an affirmative defense which the community must raise and prove.

37. See Armstrong, 1 California Family Law 703 (1953).

necessary, assets he acquired before marriage or inherited. The wife has had no such obligation at least so long as her husband is able to work.

At an earlier day, such discrimination might have been rationalized because the wife had to maintain a home and care for children, thereby foregoing the development of high income producing skills. She was thus more dependent upon separate property than was her husband. Such an argument would always have been weak, but today it is unsupportable.

Many wives have as great an earning capacity as their husbands, and even where this is not the case the equity powers of the divorce court can provide any needed adjustment of property rights.³⁸

The only express reason for the distinction in New Mexico is N.M. Stat. Ann. § 57-3-9 (Repl. 1962) which provides only that the wife's separate property is not liable for the debts of her husband. It says nothing about community property. Because the husband is manager of the community, it was apparently assumed that the category of his debts included community debts (which could only be incurred by him). In other words he was always deemed to be acting both in his individual capacity and as manager of the community. This was never an adequate explanation of the distinction.³⁹ But now that the Equal Rights Amendment will require equal managerial powers, even this ground will be gone.

The reasonable, constitutional choices seem limited to: (1) All separate property (both husband's and wife's) is liable for community debts, or (2) No separate property is liable for community debts. We feel that separate property should be available to satisfy community debts, and that number one is

38. In New Mexico, the divorce court's power to divide marital property according to each spouse's future needs appears to be limited by the requirement that community property be divided evenly. *Sands v. Sands*, 48 N.M. 458, 152 P.2d 399 (1944). However, the court was equal to the task, and the question is no longer *whether* an unequal division of community property can be made by the divorce court, but *how* it must be done. *Harper v. Harper*, 54 N.M. 194, 217 P.2d 857 (1950).

39. N.M. Stat. Ann. § 57-3-8 (Repl. 1962) states that the husband's separate property is not liable for the wife's debts made before marriage. The only material difference between this and the next section, protecting the *wife's* separate property, is that this section mentions pre-marital debts only, while the wife's section expressly gives protection from "debts of the husband," without limitation. (Nevertheless, the husband's separate property is not considered liable for *any* of the wife's separate debts. See discussion *supra*.)

Neither section mentions community property. The only justification for reading it into § 57-3-9 and not § 57-3-8 (or 10) must be an inference drawn by the courts that "husband's debts" and "community debts" are synonymous in these two sections, since the husband has the sole power to bind the community.

thus the better choice. There are several reasons for this preference.

When one spouse has a large separate estate, the income which it produces (and sometimes the corpus as well) is almost always used to raise the family's standard of living above what could be supported by community income alone. This means that some community debts will be incurred because there is substantial separate property. The creditor may know that the family appears to be economically responsible without knowing whether its assets are separate or community property. If we are right in assuming that the existence of separate property normally influences the amount of community debts incurred, then it seems only fair to allow community creditors access to that separate property.

If we insulate separate property from community debts, we treat the family as analagous, in one way, to a corporation. We allow married people to limit their liability by acting within the family, and we do so without any of the traditional reasons for limited liability. In other areas of the law, limited liability coincides with limited powers of management. If both spouses are given equal and complete management powers over community property, then they should be required to commit their separate estates as well.

To satisfy a community debt, non-exempt community property should be exhausted first. Only after community property is exhausted, should separate property of either or both spouses be reachable by the creditor.

A community creditor should not have to garnish community wages as a part of the exhaustion of community property in order to have access to separate property. Otherwise access to separate property could be delayed indefinitely, and garnishment—with its attendant risks to job security—over-emphasized as a debt collection device.

These rules have been designed to make both spouses equally responsible for the community just as they presumably will be equally empowered to manage it. The legislature could give community creditors equal access to community or separate property of both spouses and then provide for the reimbursement of a separate estate that was forced to pay a community debt. (This would be the reciprocal to the community's right of reimbursement discussed *supra*.) Otherwise, it might be feared that the creditor would have a difficult burden of proving that all

community property was exhausted when the spouses would seem to have much better access to the relevant facts. Furthermore fraud between the spouses may prove an even greater danger than the imposition of a burden on the creditor.

We feel that the procedures discussed *supra* with regard to the exhaustion of separate property should also be adopted here.

Where separate property has been forced in this way to satisfy a community debt (as distinguished from a voluntary expenditure by one spouse for the benefit of the community)⁴⁰ the separate estate should be entitled to either total reimbursement from the community when it is able, or one-half reimbursement from the separate estate of the other spouse.

At the present time, neither spouse's separate estate is liable for the separate debts of the other. We find no discrimination in this and see no reason to change the rule.

CONCLUSION

Most lawyers will, no doubt, be surprised, as we were, by the number of changes the Equal Rights Amendment will require. In the brief time available, we have tried to write a general comment useful to both courts and the Legislature. There are many agencies through which the objectives of the amendment can be effected. However, the goal of certainty would be more nearly achieved by legislation conforming the State's community property law to the new constitutional requirement.

The amendment provides that it will become effective July 1, 1973, leaving the Legislature but a short time to make the necessary changes in the statutes. Given the heavy reliance of our mercantile society on property law, and particularly its debt provisions, it becomes crucial that these changes nevertheless reflect careful, detailed planning and consideration. A dedicated effort by the New Mexico Legislature is essential.

40. It is important to make this distinction between voluntary and involuntary payment of community expenses because of the problems created by the so-called family expenditure presumption. When the community is terminated by divorce, the court must determine how much property is community and how much separate. In making the finding, the courts presume that all community expenses are paid out of community property. Therefore, where there is any substantial amount of separate property contributing to the standard of living, all savings are automatically classified as separate property. This is unfair to the spouse who does not own a separate estate. If the family had lived on community income alone, there would usually have been some savings, which would have been community property. See Comment, *Never Marry a Rich Man: The Lesson of Beam v. Bank of America, A California Apportionment Case*, 13 Santa Clara Lawyer 121 (1972). The simplest way to prevent this unfairness is to provide by statute that the income from separate property during marriage is community property. This is the rule in Texas and several other community property states.