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Anne K. Bingaman

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THE COMMUNITY PROPERTY ACT OF 1973:
A COMMENTARY AND
QUASI-LEGISLATIVE HISTORY
ANNE K. BINGAMAN*

In November 1972, the voters of New Mexico approved the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution.¹ That Amendment provides:

Equality or rights under law shall not be denied on account of the sex of any person.

The Amendment and the Community Property Act of 1973 which it mandated became effective on July 1, 1973. In late November of 1972, the New Mexico State Bar appointed a “Community Property Committee”² to aid the Equal Rights Committee of the New Mexico Legislature, whose task it was to draft the changes required in New Mexico law by the Equal Rights Amendment. In mid-January 1973, the State Bar Committee provided a proposed draft of a new community property act to the legislative committee. Many changes, of course, were made before that draft emerged as the “Community Property Act of 1973.” Much of it, however, remained unchanged.

In an attempt to fill a perceived need of the New Mexico Bar for an explanation of the considerations which led to adoption of the language and concepts in each section of the act, this article will describe the changes in New Mexico community property law made by the 1973 Legislature under the requirements of the Equal Rights Amendment.

57-4A-1. Short title.—This act may be cited as the “Community Property Act of 1973.”

The act was titled the “Community Property Act of 1973” to distinguish it as having been enacted pursuant to the mandate of the

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*Associate Professor of Law, University of New Mexico Law School.
1. The Amendment, Constitutional Amendment No. 1 on the November 1972 ballot, passed by a vote of 155,633 to 64,823, a margin of approximately 70%. It is fair to observe that no one could predict with any certainty the outcome of the election, and the size of the majority which carried the Amendment was a surprise to proponents and opponents alike. It was largely because of the uncertainty surrounding the Amendment’s fate that no organized work was done earlier to draft and circulate the changes in the community property law which passage of the Amendment would obviously necessitate.
2. The members of that Committee were, in alphabetical order, John R. Cooney, Lewis Cox, John Danfelser, Thomas J. Dunn, Irwin S. Moise, James E. Sperling, and the author of this article.
Equal Rights Amendment. The new sections were given a new Chapter number—57-4A—for similar reasons: the "4A" designation serves as convenient notice that any section so cited was adopted under the requirements of the Equal Rights Amendment, and are not part of our original community property statutes enacted in 1907, several sections of which were not repealed and remain law today.3

57-4A-1.1. PURPOSE OF ACT

The purpose of the Community Property Act of 1973 is to comply with the provisions of section 18 of article 2 of the Constitution of New Mexico, as it was amended in 1972 and as it will be effective on July 1, 1973, insofar as it affects the equal rights of persons regardless of sex. The purpose of the statutory presumption contained herein, that the husband shall be the sole manager of community personal property unless there is an agreement to the contrary, or unless the wife has exercised her option to assume her rights of management of the community personal property, is to provide temporary procedures by which the four hundred year tradition of husband-management can be maintained in those families where the desires of the wife are not made known by either an agreement or by filing a document claiming that right.

This section was added by the Senate Judiciary Committee in its Committee Substitute for Senate Bill 8, the bill number of the Community Property Act of 1973. It reflects that Committee's belief that completely equal management of all community property was a concept for which the people of the state were "not ready," the Equal Rights Amendment to the contrary notwithstanding. In another section of its Committee Substitute, the Senate Judiciary Committee added a "presumption of husband management," referred to in this section, for all community personal property. The presumption was to be effective until the wife filed a document with the County Clerk of the county in which she resides claiming her right to the management of the community personal property. The version of the bill passed by the Senate contained that provision.4 In the House Judiciary Committee, however, the "presumption of husband management" was narrowed to include only "commercial community personal property," not all the personal property of the com-

3. Not repealed, and still in effect today, are N.M. Stat. Ann. §§ 57-2-1; 57-2-6 through 57-2-12; 57-3-1 through 57-3-3 (1953); and 57-4-10 (1973 Supp.). Repealed were N.M. Stat. Ann. §§ 57-2-2 through 57-2-5; 57-3-4 through 57-3-9; and 57-4-1 through 57-4-9 (1953), repealed by Laws 1973, Chap. 320, § 14.

4. See Section 9 of the Senate Floor Substitute for the Committee Substitute for Senate Bill 8, carrying forward the committee's change in the original bill. Copies of the successive permutations of Senate Bill 8 may be requested from the Legislative Council Service in Santa Fe, New Mexico.
munity. The section containing the presumption, § 57-4A-7.1, and its constitutionality will be discussed below. It may be noted, however, that when the "husband management" provision was so narrowed, the House Judiciary Committee neglected to amend the "Purpose" section of the act to comport with the change. Thus, while this section omits all reference to "commercial" community personal property, the substantive section of the law provides a "presumption of husband management" for commercial property only, not for all community property as indicated here.

It may be noted also that reference is made in this section to "temporary" procedures for maintaining husband-management. However, the husband-management provision of the final act, § 57-4A-7.1, contains no time limit on its effectiveness, and will remain in effect until it is declared unconstitutional or is repealed by the New Mexico Legislature.

57-4A-2. CLASSES OF PROPERTY

A. "Separate property" means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to section 22-7-2 NMSA 1953 unless the decree provides otherwise;

(3) property designated as separate property by a judgment on decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent;

(5) property designated as separate property by a written agreement between the spouses; and

(6) each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in joint tenancy or as cotenants in tenancy or as cotenants in tenancy in common.

B. "Community property" means property acquired by either or both spouses during marriage which is not separate property.

C. "Property" includes the rents, issues and profits thereof.

D. The right to hold property as joint tenants or as tenants in common and the legal incidents of so holding, including but not limited to the incident of the right of survivorship of joint tenancy, are not altered by the Community Property Act of 1973, except as provided in sections 57-4A-4, 57-4A-5 and 57-4A-7 NMSA 1953.

This section replaces several separate sections of our former community property law and attempts to provide a comprehensive

5. The Senate concurred in the House Amendments on the 60th legislative day.

6. The sections replaced by this section are N.M. Stat. Ann. § § 57-3-4 and 57-3-5 (1953), and the first clause of § 57-4-1 (1953). All three sections were repealed by Laws 1973, Chapter 320, § 14.
definition of separate and community property. Most of it simply carries forward former law, and it is expected that all court decisions made under that law will remain as valid interpretations of the provisions of this section of the new act.\(^7\)

As is traditional in community property law, this section defines community property by exclusion as all property acquired by either spouse during marriage which is not the separate property of one of them. Under § 57-4A-6(A), as under present law, all property acquired during marriage by either or both spouses is presumed to be community property. Separate property status may be proved and the presumption of community property overcome by showing by a preponderance of the evidence that the property was acquired under one of the six subsections of § 57-4A-2(A).

As did the former law, this act defines as separate property all property brought to the marriage by a spouse, or acquired after marriage by gift, bequest or devise or descent. It retains the rule that rents, issues and profits of separate property remain the separate property of the owning spouse, while the increases in value of community property are community property which is shared equally by both spouses.\(^8\)

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7. Examples of decisions which will remain as authoritative interpretations of whether certain types of property are separate or community are Hollingsworth v. Hicks, 57 N.M. 336, 258 P.2d 724 (1953), holding that the “relation back” doctrine means that the status of property as separate or community is established at the time of its acquisition, and that a deed conveyed to a married man “related back” to the contract to purchase the land entered into when he was single; In re White’s Estate, 43 N.M. 202, 89 P.2d 36 (1939) and Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967), interpreting the status of insurance proceeds as community or separate property; LeClerc v. LeClerc, 80 N.M. 235, 453 P.2d 755 (1969), and Otto v. Otto, 80 N.M. 331, 455 P.2d 642 (1969), holding that rights to retirement pay accrued during the marriage, and that upon divorce the wife was entitled to a pro rata share of such rights, even though the husband’s right to the pay had not vested as of the date of divorce; Soto v. Vandeveer, 56 N.M. 483, 245 P.2d 826, 35 A.L.R. 1190 (1952), which defined the status of recoveries for personal injuries as community or separate property; and Richards v. Richards, 59 N.M. 308, 283 P.2d 881 (1955), holding that a workmen’s compensation award was the separate property of the injured workman, not community property. While the cases cited do not purport to be an exhaustive description of the New Mexico Supreme Court’s holdings as to the status of different kinds of property as separate or community, they do convey the scope of the large body of case law decided prior to passage of the 1973 Act which will be unaffected by it and will stand as authoritative interpretations of the status of property as community or separate under the new act, as well as under former law.

8. It is this rule which requires the difficult determination of what portion of a separate business brought to the marriage by one of the spouses and in which one or both spouses have labored for a number of years is the separate property of the owning spouse and what portion is the community property of both spouses. For examples of the New Mexico Supreme Court’s struggles with this question, see Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010 (1944); Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957); Jones v. Jones 67 N.M. 415, 356 P.2d 231 (1960); Gillespie v. Gillespie, 84 N.M. 618, 506 P.2d 775 (1973); and Hamilton v. Hamilton, 84 N.M. 617, 506 P.2d 774 (1973).
This section does contain four provisions which change present law to some extent. Each of them will be discussed below.

A. § 57-4A-2(A)(2)

"Separate property" means...property acquired after entry of a decree entered pursuant to section 22-7-2 NMSA 1953 unless the decree provides otherwise.

This subsection was added to protect spouses from possible oversights by attorneys in drafting separation agreements. It was thought more consistent with the probable intent of separated spouses than was the presumption of community property. Under former law, exactly the reverse was true. Unless the spouses explicitly included a provision in a separation agreement that all property acquired after the separation was separate, their property remained community property under the general presumption of community property contained in the old § 57-4-1.

B. § 57-4A-2(A)(3)

"Separate property" means...property designated as separate property by a judgment or decree of any court having jurisdiction.

This subsection was included to cover provisions in divorce and legal separation decrees which designated what had been the community property of the spouses as the separate property of each of them. However, because the subsection contains no language specifically referring to divorce or legal separation decrees, it is possible that it may be read to cover other undefined situations as well.

C. § 57-4A-2(A)(5)

"Separate property" means...property designated as separate property by a written agreement between the spouses.

Under §§ 57-2-6 and 57-2-12, which remain in effect, the spouses may agree at any time before or during marriage that property which would otherwise be community property is instead the separate property of one or both of them. Those sections are modified some-
what by this subsection, which specifies that such agreements between the spouses must be in writing, a requirement which was added to prevent misunderstandings and the possibility of fraud. If an agreement to transmute community property into the separate property of one or both spouses was not written at the time it was made, the spouses are free to reduce the agreement to writing at a later time. If they subsequently cannot agree either as to the existence of the agreement or to its terms, this subsection leaves the property in question as community property. Such a result seems fairer to both spouses than does placing on one of them the risk of losing all interest in the property in a later court test, the outcome of which could depend only upon testimony involving differing recollections of a past oral agreement.

This subsection will also allow, as present law does, for the conclusive establishment of the separate property status of property acquired by one spouse after marriage in his or her name alone. For instance, if a husband takes title to a piece of real property acquired after marriage in the name of “John Doe, as his sole and separate estate,” most title companies will, as routine practice, require the joinder of his wife before he can effect a valid conveyance of the property. This subsection will allow John Doe’s wife to sign a

Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968) required that a husband who had transmuted community property to his separate property by virtue of an agreement with his wife prove by strong, clear and convincing evidence that the agreement was not procured by fraud. These decisions were explicitly predicated on the theory that the wife, less experienced in business affairs, needed the protection of such a stringent court requirement. It seems clear that, after passage of the Equal Rights Amendment, such cases no longer represent the law in New Mexico. However, if one party to the marriage agrees to give the other his or her entire half interest in the community, even if the agreement is in writing, the spouse who gives up such an interest should be able to have the agreement set aside at a later date if it can be shown that fraud was used by the other party to procure the agreement. This result follows from the explicit provisions of N.M. Stat. Ann. § 57-2-6 (1953), which remains in effect. That section provides that, while the spouses may enter into any agreements with each other regarding their property rights that they could with other persons, they are “subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.” Neither sex, however, can have the benefit of a higher burden of proof imposed upon the other after passage of the Equal Rights Amendment.

Although this problem is not explicitly dealt with in the new act, it is mentioned here because it is intrinsically related to the question of transmutation of community property to the separate property of one or both spouses where transmutation occurs by explicit agreement between the spouses.

10. This practice is and traditionally has been followed in New Mexico because of the provisions of the former N.M. Stat. Ann. § 57-4-1 (1953), repealed by Laws 1973, Chap. 320, § 14, but carried forward in the present § 57-4A-6(A). Both sections provide that all property acquired during marriage by either spouse is community property in which the other spouse has a one-half interest. When coupled with the provisions of the former N.M. Stat. Ann. § 57-3-4 (1953) repealed by Laws 1973, Chapter 320, Section 14, but carried forward in the new § 57-4A-7, requiring joinder of the other spouse to convey community
document declaring that the property is the separate property of her husband in which she has no right, title or interest. When recorded, such a document should enable John Doe to convey his separate property without joinder of his wife.

D. § 57-4A-2(A)(6)

"Separate property" means . . . each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in joint tenancy or as cotenants in tenancy in common.

This subsection reflects the basic conceptualization of the community property system: property in which each of the spouses owns an interest can be held by them only as community property or as the separate property of each of them. Under § 57-3-2, which remains in effect, the spouses are accorded the right to hold property between them as community property, as joint tenants or as tenants in common. This subsection merely states that the common law property estates of joint tenancy and tenancy in common are, in a community property system, a separate property interest of each spouse, not community property in which the other spouse has a one-half interest.

It should be noted that the subsection reverses the New Mexico Supreme Court's decision in August v. Tillian. In that case, the Court held that where a husband and wife owned property in equal shares as tenants in common, the husband's interest was community property in which the wife had a one-half interest, while her interest was, under the unequal presumptions contained in the former § 57-4-1 (1953), now repealed, separate property in which the husband had no interest. The August v. Tillian decision would not have been possible had the Court not tacitly held that the presumption of community property formerly contained in old § 57-4-1, applied to property held by the husband as a tenant in common. Thus this subsection effectively reverses a major portion of the August v. Tillian holding.

The subsection is also useful in guaranteeing that the interests of spouses who hold unequal interests in property as co-tenants in a tenancy in common will not be declared community property in

real property, the necessary effect is to induce title companies to require joinder even where the title on a deed states that the property is the separate property of the named owner, because the title company has no way of knowing that such a statement is, in fact, true. Thus, to be entirely safe, joinder of the other spouse traditionally has been required even where the face of a deed indicates that the property is separate property. Recordation of a renunciation of the other spouse's interest should be one means of avoiding this problem.

11. 51 N.M. 74, 178 P.2d 590 (1947).
12. The section was repealed by Laws 1973, ch. 320, § 14.
which the other spouse has a one-half interest. Thus, if a husband holds a 4/5's interest in property as a tenant in common, and the wife is a co-tenant who holds a 1/5 interest in the same property, this section, by declaring that their interests are separate, not community, property, will prevent the wife from obtaining a one-half interest in the husband's 4/5's interest.

The subsection should prove useful also in defining the meaning of the term "separate property" in the sections setting forth the order of satisfaction of separate and community debts: §§ 57-4A-4 and 5 of the new act. By stating clearly that the spouses' interests in the common law estates of joint tenancy and tenancy in common are separate property interests, the subsection should prevent future litigation between creditors and debtors concerning what property may be reached to satisfy which debts, an area that has generated many problems and much litigation for New Mexico creditors in the past.

Finally, this subsection makes it clear that an intestate decedent's interest in a tenancy in common descends, in most instances, as separate property under §§ 29-1-10 et. seq., rather than as community property, which goes to the surviving spouse under § 29-1-9, as amended in 1973. The exception to this is where the decedent used community funds to purchase an interest in a tenancy held with a person other than the spouse. A decedent's interest in a joint tenancy goes, of course, by right of survivorship to the surviving joint tenant.

It should be carefully noted that this subsection applies by its terms only where the spouses are co-tenants in a joint tenancy or tenancy in common. Thus, where John Doe and Jane Doe both hold an interest in the same joint tenancy, their property interests are the separate property of each of them. If, however, John Doe is a co-tenant in a joint tenancy with Jim Roe, both married men who purchased their interests with community funds, it is probable that the interests of both in the joint tenancy are community property in which their wives hold a one-half interest, not the separate property of each husband. This result is implied by the New Mexico Supreme Court's decision in Thaxton v. Thaxton and appears to be the correct approach. If the husbands' interests were their separate property, the wives would have only a claim for the value of their

13. That amendment extended to wives in New Mexico a right previously enjoyed only by husbands, the ability to will their one-half interest in the community property. In the absence of a will, the property of either spouse goes to the surviving spouse. The amendment was made by Laws 1973, ch. 276, § 2.

14. 75 N.M. 450, 405 P.2d 932 (1965). For a comment on the Thaxton case suggesting this result, see Comment, Community Property—Husband's Use of Community Funds to Enter Joint Tenancy with Third Party, 6 Natural Resources J. 298 (1966).
one-half interest in the community funds which were used to purchase the husbands' interests. They would not share in any increase in value of the joint tenancy property. Thus, under this act, it is believed that one spouse's interest in a joint tenancy which was purchased with community funds should be held to be community property in which the spouse of the joint tenant has a one-half interest. Such an analysis in effect makes Jane Doe in our example a sharer of the risk that her husband will predecease Jim Roe, the other joint tenant. Should that risk become reality, Jane Doe will be left with no interest whatsoever in the joint tenancy and with no claim against the estate of her husband for one-half of the community funds used to purchase the interest of the tenancy. Similarly, a spouse's interest in a tenancy in common purchased with community funds and held with a person other than a spouse would descend or pass under the will of the decedent tenant in common as community, not separate, property.

E. § 57-4A-2(D)

The right to hold property as joint tenants or as tenants in common and the legal incidents of so holding, including but not limited to the incident of the right of survivorship of joint tenancy, are not altered by the Community Property Act of 1973, except as provided in sections 57-4A-4, 57-4A-5, and 57-4A-7 NMSA 1953.

Subsection (D) of § 57-4A-2 was added as a precautionary measure to insure that no New Mexico court would ever hold that, by defining each spouse's interest as co-tenants in a joint tenancy or a tenancy in common, the Legislature had destroyed the right of survivorship incident of the joint tenancy estate. However, as noted in Subsection (D), other incidents of the common law estates of joint tenancy and tenancy in common are changed by the act. Those changes will be briefly described here.

15. Were the transaction to be analyzed differently, Jane Doe would not share in any increase in the value of the entire property should her husband take it as the surviving joint tenant; she would have only a claim against the property of her husband for her share of the community funds used to purchase the joint tenancy interest. Under this analysis, however, should her husband predecease Jim Roe, Jane Doe would have a claim against her husband's estate for her one-half interest in the community funds used to purchase the joint tenancy interest, a claim she would logically forfeit were she given the chance to share in the property as an owner.

It should be noted that under the interpretation set forth in the text, where one spouse's interest in a co-tenancy is community property, the explicit provisions of § 57-4A-7 will require joinder of both spouses, including the spouse not named as a co-tenant, to convey a valid interest in any co-tenancy in real property. See the more complete discussion of this point at note 58 below.
1. Ability of a Creditor to Levy on the Interest of a Debtor Joint Tenant or Tenant in Common

Section 57-4A-4 treats joint tenancies and tenancies in common in which each spouse has an equal interest as community property is treated for debt satisfaction purposes, not as separate property is treated. Similarly, but not identically, § 57-4A-5 treats joint tenancies and tenancies in common in which each spouse has a one-half interest as community property is treated for purposes of satisfying community debts.16 The thought here was that community funds are probably used to purchase property in which each spouse holds either an equal or a one-half interest and that such property should be treated as community property is treated insofar as debt collection is concerned.

These sections change a legal incident of the common law estates of joint tenancy and tenancy in common: the traditional unhindered ability of a creditor to levy on the interest of a debtor joint tenant or tenant in common to satisfy a debt.17 Under the Community Property Act of 1973, such interests may be levied on only as specifically provided for in §§ 57-4A-4 and 5.

2. Ability of a Joint Tenant or Tenant in Common to Convey his Interest in the Tenancy without Joinder of the Other Tenant or Tenants.

Under § 57-4A-7, neither husband nor wife can convey an interest in a tenancy in real property in which the other spouse holds an interest without obtaining the joinder of the other spouse, regardless of whether the spouses are the only parties to the tenancy or whether other parties also own interests in it. This represents a change both from present New Mexico law where persons not spouses are co-tenants, and from the common law rule that a tenant in either a joint tenancy or a tenancy in common may convey his interest without joinder of the other tenants.18 Once the decision was made to retain the present requirement that the spouses join in any conveyance of community real property held in some other form of joint ownership, it seemed inconsistent not to extend the joinder

16. The difference in treatment between §§ 57-4A-4 and 57-4A-5 regarding the “equal” interest in tenancies in the first section, versus the “one-half” interest required in the next, appears to be a drafting error overlooked when the bill was amended in the House Judiciary Committee. The original Senate Bill 8 as introduced and passed by the Senate contained the word “one-half” in both sections. The House Judiciary Committee amended the word “one-half” in § 57-4A-4 to read “equal” but neglected to make a similar change in § 57-4A-5. Perhaps this small oversight will be corrected in a subsequent legislative session.
18. Id.
requirement to situations where the spouses held real property as joint tenants or tenants in common, especially in an era when the joint tenancy form of ownership is so preferred by lay persons, title companies and real estate brokers. Thus, under the new act, neither spouse can convey his or her interest in a tenancy in real property where the other spouse is a co-tenant, just as neither can convey community real property without the other’s joinder.

57-4A-3. DEFINITION OF SEPARATE AND COMMUNITY DEBTS

A. “Separate debt” means:

1. a debt contracted or incurred by a spouse before marriage or after entry of a decree of dissolution of marriage;
2. a debt contracted or incurred by a spouse after entry of a decree entered pursuant to section 22-7-2 NMSA 1953 unless the decree provides otherwise;
3. a debt designated as a separate debt of a spouse by a judgment or decree of any court having jurisdiction;
4. a debt contracted by a spouse during marriage which is identified by a spouse to the creditor in writing at the time of its creation as the separate debt of the contracting spouse; or
5. a debt which arises from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage.

B. “Community debt” means a debt contracted or incurred by either or both spouses during marriage which is not a separate debt.

This section and the two which follow it represent a radical departure from former New Mexico community property law by offering a comprehensive statutory definition of “separate” and “community” debts, and a statutory procedure specifying the property of

19. The only known study in New Mexico of the popularity of the joint tenancy form of ownership for real property was done by Joe W. Wood, now a judge on the New Mexico Court of Appeals, in his book The Community Property Law of New Mexico (1954). He states at 20 that in 1954, 70% of the deeds to real property held by husbands and wives in Bernalillo County were joint tenancy deeds. (Whether such deeds effectively created joint tenancies is another problem; see note 35, infra for a brief discussion of the transmutation problem in New Mexico.) There is no reason to believe that the popularity of the joint tenancy form of ownership has decreased since then, which seemed to the Bar Committee to bolster the need for paralleling the joinder requirement where the spouses held title to property in a form of joint ownership other than community property.

It might be wondered when a purchaser would buy the interest of only one of the tenants holding real estate. While undoubtedly improved land would not be so purchased, it is conceivable that a purchaser would be willing to buy only one tenant’s interest in raw land and then bring suit for partition of the property in order to gain sole ownership of a portion of it.

See text at note 57 below for a more complete discussion of the considerations which led to retaining the joinder requirement in any form.
the spouses, community and separate, from which each type of debt may be collected. The lack of such provisions in the law prior to July 1, 1973, generated much confusion and unfairness to creditors, who could only litigate after the fact whether the purchase in question had “benefited the community,” the test under former law. While certainly not perfect, it is hoped that these sections will clarify ambiguities and aid both creditors and would-be debtors in New Mexico by clearly establishing the rules for defining debts as separate or community.

As does the section defining separate and community property, § 57-4A-3(B) defines community debts by exclusion as all debts which are not separate debts. When the section is analyzed, it will be seen that separate debts are created in three principal circumstances: 1) those created by a single person who subsequently marries; 2) debts designated by a court as the separate debt of a divorced or legally separated person; and 3) debts which arise from separate torts committed by a married person. A fourth method of creating separate debts is established in § 57-4A-3(A)(4) of the statute, but for reasons set forth below, it is not expected to be used frequently.

The three principal methods of creating separate debts under the new act all parallel former law. Any debt contracted by a single person, whether before marriage or after divorce, was and is that person’s separate obligation. It cannot be collected from any portion of property owned by the spouse whom the debtor subsequently marries. Similarly, any debt which a court designates as the separate debt of a divorced or legally separated person was, under former law, a separate debt of that person which could not and cannot now be collected from any property of a person the debtor subsequently marries.

This section leaves to the courts the problem of determining whether a tort committed by a spouse during marriage is a “community” or a “separate” tort. Under the rule followed in most community property states, the test to be applied in such cases is

20. See de Funiak & Vaughn, supra note 8, at §§159, 161 and 162, and cases cited therein from other jurisdictions. No New Mexico case has explicitly dealt with this question.

21. Id. §§156 through 158.

22. Such a debt may, however, be collected from property of the former spouse of a debtor who has subsequently declared bankruptcy, even though the debt had been declared a “separate” debt of the bankrupt spouse in the divorce decree. Presumably, however, the spouse from whom the debt is collected has a claim against the bankrupt spouse for the amount so collected. See the recent case of Moucka v. Windham, 483 F.2d 914 (10th Cir. 1973), holding that the property of the former wife of a bankrupt debtor could be reached to satisfy a community debt contracted during the marriage, although the divorce decree assigned all community debts to the husband.

23. See de Funiak and Vaughn, supra note 8, at §182.
an after-the-fact determination of whether the act in which the spouse was engaged at the time of the tort was one which was of actual or potential benefit to the community. If it was of benefit, the tort is a "community" tort, and thus a community debt, to be collected under the provisions of § 57-4A-5, explained below. If the activity in which the tortfeasor spouse was engaged was of no benefit to the community, the tort is a "separate" tort, collectible only as a separate debt under § 57-4A-4. It should be noted, however, that the possible harshness of this rule to an injured party where a spouse commits a "separate" tort but carries insufficient insurance is mitigated substantially by the provision in § 57-4A-4 that a spouse's separate debt may now be satisfied from his or her half interest in the community property. This latter section applies where the spouse's separate property is insufficient to satisfy the obligation.\textsuperscript{24}

Because there have been no appellate court decisions on this question in New Mexico, it is not possible to state precisely which acts will be held to benefit the community and which will not. The Supreme Court of Washington has adopted a very liberal view of "benefit to the community." In that state, recreational activities and errands to buy personal articles of clothing are held to create community debts if a tort is committed by one spouse during such activities.\textsuperscript{25} Other states, however, have been more restrictive, and two leading commentators have criticized the Washington rule.\textsuperscript{26} It remains to be seen what course the New Mexico appellate courts will ultimately take in this area.

Finally, § 57-4A-3(A)(4) provides for the creation of a separate debt where the creditor is notified in writing at the time the debt is created that the debt is separate. Although not expected to be of frequent use, this provision was included to allow a married person to contract a separate debt which would not encumber or obligate the property of the other spouse where the creditor was given adequate notice of that fact and extended credit knowing that the debt could be collected only as a separate debt. The requirement of a writing was added to prevent later litigation over whether the cred-

\textsuperscript{24} This provision of § 57-4A-4 reverses the rule as to the collection of separate debts of wives announced by the New Mexico Supreme Court in Wiggins v. Rush, 83 N.M. 133, 489 P.2d 641 (1971). In that case, the court held that no portion of the community property could be subjected to liability for a wife's separate pre-nuptial debt, on the theory that the community needed to be "cushioned" from the claims of creditors. See the more extensive discussion of the considerations which led to reversal of this case in the text at note 36 below.


\textsuperscript{26} See de Funiak & Vaughn, supra note 8, at § 182 and cases cited therein which are more restrictive than the Washington rule.
itor had in fact been given adequate notice, as well as to prevent debtors from seeking to insulate half the community or other property from a creditor's levy by claiming that the debt when contracted was a separate, not community, debt. It is obvious that this subsection will not be used frequently. It is to no advantage to creditors to request such a statement, because it only limits the classes of property which can be reached should the debt not be paid voluntarily. Similarly, it is a rare spouse who will stop to consider the type of debt created, or who will risk limiting the amount, or losing altogether, the credit sought by stating to the creditor that the debt is a separate one. In short, there is no incentive for either a creditor or a spouse seeking credit to use this subsection.

A provision omitted, after long debate, from the section defining the status of debts was a subsection which would have declared that a separate debt was created when the creditor "relied," "wholly" or "primarily," upon collateral which was the separate property of one spouse. One consideration which led to its omission was the problem of proof of the motives which induced the creditor to lend. Even if separate property were taken as collateral, it seemed possible that the creditor may have, in fact, "relied" also on the spouses' community credit rating, not solely on the particular collateral taken for the loan. Conversely, it seemed possible also that in some situations spouses would borrow money and put up as collateral property which was the separate property of only one of them, when in fact the debt was intended to and did benefit the community. In such a case, it seemed unfair to define the debt as "separate" and thereby insulate the other spouse's property from its collection. Because of these problems, it was ultimately decided that the easiest and least litigious course was to omit the proposed provision altogether.

As between the spouses, however, it is clear that the possibility is open for one of them to claim a set-off against the other where the proceeds of a community debt are used to improve only the separate property of one of them. In such a situation, case law, as well as the specific language of § 57-4A-3(A)(3), leave the other spouse free

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27. It should be noted, however, that the subsection is not limited by its terms to notification of the creditor only by the spouse seeking credit. It is entirely possible for the creditor to receive notification in writing from the non-debtor spouse that the debt may be considered only as the separate debt of the contracting spouse, not a community debt for which the notifying spouse's property will be liable. If a creditor receives such notice prior to or at the time the debtor spouse contracts the debt and proceeds to extend credit under such circumstances, the other spouse's property will be protected from liability for the debt. While such a procedure will undoubtedly be used rarely, it does provide a means whereby one spouse can protect himself or herself against the other's feared improvidence.

to seek compensation for his or her portion of community funds which were used to pay a community debt benefitting only the other's property.

The broad language of § 57-4A-3(A)(3), which allows a court of "competent jurisdiction" to establish the status of debts as separate or community, may be useful in a variety of situations. According to the leading commentators in this area, for hundreds of years Spanish community property law has allowed the spouses to maintain actions against each other. Although the question has never arisen in New Mexico, were such suits to be allowed, either spouse could sue the other for set-off by establishing that a debt which was a community debt as to creditors of the community was, between the spouses, a separate debt of one of them. In situations where fraud is involved, or where one spouse used community property to benefit separate property, or wasted community property through gambling, the broad language of § 57-4A-3(A)(3) might prove useful.

It perhaps bears reiteration that the Bar Committee and the Legislature recognized that under this section, most debts created by either spouse during marriage will necessarily be community debts which may be collected as such under the explicit and broad provisions of § 57-4A-5. Such a result provides the maximum degree of protection to creditors who can collect such debts from all property held by either spouse, and reduces litigation over the classification of debts to a minimum. Fairness to a spouse whose funds have been used unjustly by the other spouse is provided by allowing the victimized spouse the right of set-off in divorce or legal separation proceedings, or upon probate of the estate of the spouse against whom a claim is made.

57-4A-4. SATISFACTION OF SEPARATE DEBT

A. The separate debt of a spouse shall be satisfied first from the debtor spouse's separate property, excluding that spouse's interest in property in which each of the spouses owns an individual equal interest as a joint tenant or tenant in common. Should such property be insufficient, then the debt shall be satisfied from the debtor

29. de Funiak & Vaughn, supra note 8, at § 151.
30. Id. at § 119.
32. In Novo v. Del Rio Hotel 141 Cal. App. 2d 204, 295 P.2d 576 (1956), a California court allowed the wife to recover her half interest in community funds lost by the husband in gambling; the case is commented on in 9 Stan. L. Rev. 400 (1957) and 30 So. Cal. L. Rev. 95 (1956). See also de Funiak & Vaughn, supra note 8, at § 120, wherein the authors approve the result of the Novo case, stating that under Spanish law, recovery was allowed where "debauchery and dissolute living" were financed from community funds to such an extent as to constitute a fraud on the other spouse's interest.
spouses's one-half interest in the community property or in property
in which each spouse owns an individed equal interest as a joint
tenant or tenant in common, excluding the residence of the spouses.
Should such property be insufficient, then the debt shall be satisfied
from the debtor spouse's interest in the residence of the spouses,
ext unless as provided in § 24-6-1 NMSA 1953. Neither spouses's in-
terest in community property or separate property shall be liable for
the separate debt of the other spouse.

B. This section shall apply only while both spouses are living, and
shall not apply to the satisfaction of debts after the death of one or
both spouses.

This section, like the preceding and following sections, represents
a drastic change from prior New Mexico law concerning the collect-
ton of debts. It clearly establishes, as former law did not, which
property is liable for the separate debts of a spouse.

It should be carefully noted, however, that the section does not
specify which property a creditor may levy upon to satisfy a spouse's
separate debt. Rather, it is written in terms of property from which a
debt may be "satisfied." Under this language a creditor may attempt,
whether in good faith or otherwise, to levy upon the entire commu-
nity property even though one-half of it is specifically excluded from
liability for a spouse's separate debt. The other spouse may either
oppose the levy at the time it is made or claim a set-off against the
funds of the debtor spouse for his or her share of property taken in
satisfaction of the debt.

Although the statute does not specifically state that this is the
necessary result of its language, it is the only workable interpretation
of it. To read the section as requiring creditors to determine the
precise status of each piece of property levied upon prior to making a
levy would impose an impossibly heavy and expensive burden upon
creditors in New Mexico. The section should not be so construed.
The obvious reason for not placing upon creditors the burden of
establishing the status of property prior to each levy is the presump-
tion of community property contained in § 57-4A-6; under it, all
property held in either spouse's name alone acquired during marriage
is presumed to be community property.

The problems this presumption creates for creditors are several.
First, unless the property is real property the deed to which is dated,
how is a creditor to determine when any particular property was
acquired? Second, even if the date of acquisition is known, how is a

33. For an explanation of the former New Mexico law concerning the classification of
debts and their collection, see Ellis, Equal Rights and the Debt Provisions of New Mexico
Community Property Law, 3 N.M. L. Rev. 57 (1972) (hereinafter cited as Ellis).
creditor to know the date upon which the spouses were married? Third, it is not common practice, although perhaps it should be, to title what actually is the separate property of one spouse as "separate property" in a deed, document or other instrument of title. In the absence of such signification, community status must be presumed, even though the property may in fact be separate property.

However, a creditor can protect himself against the expense and delay involved in defending against an improper levy by the simple and common device of using a supplementary proceeding after judgment has been obtained. In that proceeding, a creditor's attorney should carefully inquire not only as to what property exists which is available for levy, but also as to the precise status of such property, whether separate or community. Thus, by simply enlarging the scope of questioning at supplementary proceedings, New Mexico creditors and their attorneys can easily comply with the provisions of the new act and can also protect themselves against a wrong guess made under the general presumption of community property contained in § 57-4A-6.

In the absence of such inquiries at a supplementary proceeding, the section's limitations will probably be applied in practice by allowing creditors to levy first on all property held in the name of the debtor spouse alone, subject, of course, to opposition from the other spouse and a subsequent showing that the property is community property, not the separate property of the debtor spouse. If such property is insufficient to satisfy the debt, a creditor would then levy upon one-half of all property held in the name of the non-debtor spouse or in the names of both spouses, on the theory that such property was community or other jointly-held property in which the debtor-spouse had a one-half interest. Again, the other spouse would have the right to oppose the levy on the ground that the property levied upon was separate property of the non-debtor spouse, not community property. If no such objection were interposed at the time of levy, the non-debtor spouse's remedy would be by right of set-off against the debtor under the provisions of the statute, not against the creditor whose levy and collection are complete.

Under this reading of the statute, the only way a non-debtor spouse can be assured of protection from the expense of defending against an improper levy is to clearly title all separate property as such—that is, to hold title to a separate stock, bank or savings

account not merely as “Jane Doe” but as “Jane Doe, as her sole and separate property.” When property is so titled, a creditor will be put on notice that the property is not community property and is therefore not subject to levy for the other spouse’s separate debt.

Under this section then, the creditor to whom one spouse owed a separate debt would levy first upon all property held in the name of the debtor spouse alone or with a person not the other spouse. Although a spouse’s interest in a joint tenancy is separate property under the definition contained in § 57-4A-2(A)(4), the creditor may not, under this section, reach property in which the spouses hold equal interests as joint tenants or tenants in common. Such property was excluded from the first stage of debt satisfaction because of the preference for the joint tenancy form of property ownership which banks, savings and loans, brokerage houses, realtors and title companies seem to have. Many married persons, because of the common use of joint tenancy forms by such institutions, have arguably transmuted what was community property to the separate property interest of each of them by opening joint checking accounts, stock accounts or the like on joint tenancy forms provided by these institutions.35 Because of this common occurrence, it was thought desirable, for purposes of debt satisfaction, to equate property in which each spouse had one-half interest in the form of community property, and property in which each had an equal interest as joint tenants or tenants in common. Such property, therefore, although defined as “separate property” by the new act, is excluded from the first stage of satisfaction of separate debts.

If separate property is insufficient to satisfy the separate debt, a creditor will then levy upon one-half of the debtor’s interest in community property or in any other property held jointly by the spouses, excluding their residence. In practical terms, this would mean that a creditor would now reach one-half of all property held in the name of the other spouse alone, or held in the names of both.

Although under the law prior to July 1, 1973, joint tenancy property was liable for satisfaction of separate debts, the New Mexico Supreme Court held in 1971 in Wiggins v. Rush,36 that the debtor’s

35. It is said that the spouses have “arguably” transmuted community property to the separate property of each of them by placing property in joint tenancy form because of the New Mexico Supreme Court’s requirement that evidence of such a transmutation must be “clear, strong and convincing.” See In re Trimble’s Estate, 57 N.M. 51, 253 P.2d 805 (1953). Although the Trimble case was specifically overruled by statute in 1955 (N.M. Stat. Ann. § 70-1-14.1 (Repl. 1961) enacted by Laws 1955, ch. 174, § 1), the Court gave the statute no real effect and cited Trimble approvingly as recently as 1971. See Wiggins v. Rush, 83 N.M. 133, 489 P.2d 641 (1971).
one-half interest in the community property could not be reached to satisfy such a debt.\textsuperscript{37} That property, the Court held, should be insulated to give the community a cushion and protect it from creditors whose claims antedated the marriage. This section thus reverses \textit{Wiggins} by allowing creditors to reach a spouse's one-half interest in community property to satisfy the separate debt of that spouse.

It should be noted that, under the \textit{Wiggins} decision, marriage acted as a sort of instant bankruptcy which remained in effect as long as the debtor remained married. If a woman contracted debts extended to her by a creditor in reliance on her earning power—a separate asset before marriage—and then married, the woman's principal asset, her earning power, was converted to a community asset, which under the \textit{Wiggins} rule was not reachable to satisfy a separate debt. The new act puts an end to the use of marriage as a form of bankruptcy in New Mexico.

The new act also has some interesting possible applications. For instance, a husband who marries a woman with substantial unsecured debts may find a portion of his paycheck—community property in which his wife has a one-half interest—garnished to satisfy the wife's antenuptial separate debt.\textsuperscript{38} Similarly, a wife who marries a divorced man who is liable for payment of $200 per month in child support, his separate debt, may find a portion of her paycheck garnished in order to satisfy her new husband's child support obligations. However, when forced to choose between the claims of antenuptial creditors and the interest of the non-debtor spouse, it seemed fairer to subject one-half of the community property to payment of such claims rather than leave a creditor with no remedy unless and until the debtor divorced.

Finally, if all other property is insufficient to satisfy a separate debt, the debtor spouse's interest in the residence of the spouses,

\textsuperscript{37} Although the Court in \textit{Wiggins} seemed to assume that the rule it announced applied equally to the separate antenuptial debts of both husbands and wives, it may have overlooked a possible implication of N.M. Stat. Ann. § 57-3-6 (1953), repealed by Laws 1973, ch. 320, § 14. That section provided that "the earnings of the wife are not liable for the debts of the husband." By negative implication, it may have meant that the earnings of the husband, which of course were community property, could be subjected to liability for his own separate debts. Because of this provision, the Bar Committee felt that a possible inequality of treatment between husbands and wives was present under that statute and the \textit{Wiggins} v. \textit{Rush} decision, and chose to overrule the \textit{Wiggins} decision rather than extend it to husbands.

\textsuperscript{38} N.M. Stat. Ann. § 36-14-7 (2nd Repl. 1972) provides an exemption from garnishment of wages of 75% of "disposable earnings," or an amount each week that is forty times the federal minimum hourly wage, whichever is greater. Any garnishment of wages would of course be subject to this statutory exemption.

\textsuperscript{39} See note 38 concerning the exemption of wages from garnishment.
above the $10,000 homestead exemption provided for in the recently amended § 24-6-1 may be reached to satisfy the debt.\(^{40}\)

As under former law, the non-debtor spouse’s property, whether community or separate, may not be reached to satisfy a separate debt of the other spouse. If it is in fact reached by levy of a creditor, that spouse should either oppose the levy or claim a set-off from the property of the debtor spouse in a subsequent proceeding. Subsection 57-4A-4(B) provides that Subsection (A) applies only while both spouses are living. This parallels the amendment to § 29-1-9\(^{41}\) providing rules for the satisfaction of debts after the death of a spouse. Further, it preserves the common law rule, reflected in the holding of In Re Trimble’s Estate,\(^{42}\) that neither a decedent’s separate debts nor the decedent’s one-half share of the community debts may be collected from an interest in a joint tenancy which has vested in the surviving joint tenant. It is in part this debt-immunity feature of joint tenancy which makes waiver of administration and avoidance of probate possible. In order to preserve those features, it was necessary to make the present section, which specifically allows debts to be collected from a debtor’s interest in a joint tenancy, apply only to debts satisfied while both spouses are still living. A similar provision is also found in § 57-4A-5.

One question left unanswered in the new act is the applicability of its debt collection features to debts created prior to its passage. The

\(^{40}\) The homestead exemption was raised in New Mexico from $1,000 to $10,000 by Laws 1971, ch. 215, § 6. Generally, the usual practice is to sell the homestead and apply the excess value above the dollar amount provided by the homestead exemption to satisfy a creditor’s claims. It might be noted that this procedure is available to creditors to satisfy the separate debt of only one of the spouses, a procedure which seems inconsistent with the joinder requirement imposed by § 57-4A-7 for the sale of all real property owned jointly by the spouses. Similarly, under the explicit provisions of § 57-4A-5, the homestead may be reached to satisfy a community debt created by only one of the spouses. See text at note 46, infra. In fact, subjection of the homestead to levy is common in many states which also require the spouses’ joinder for sale of the homestead. See generally on this point, Berger, Land Ownership and Use (1968) 286-289, and Haskins, Homestead Rights of a Surviving Spouse, 37 Iowa L. Rev. 36, 37-38 (1951).

\(^{41}\) That section, as amended by Laws 1973, ch. 276 § 2, now provides:

29-1-9. Death of spouse—Community property.—Upon the death of a spouse, the entire community property goes to the surviving spouse, subject to the deceased’s power of testamentary disposition over one-half of the community property. In the case of the dissolution of the community by the death of a spouse, the entire community property is subject to the community debts, and the family allowance. The deceased spouse’s separate debts, and the family allowance. The deceased spouse’s separate debts and funeral expenses and the charge and expenses of administration are to be satisfied first from his separate property, excluding property held in joint tenancy. Should such property be insufficient, then the deceased spouse’s undivided one-half interest in the community property shall be liable.

\(^{42}\) 57 N.M. 51, 253 P.2d 805 (1953).
question is only relevant, of course, where the new act differs from the provisions of former law, most notably in the subjection of a debtor’s one-half interest in community property to satisfaction of his or her separate debts. The situation in Wiggins v. Rush\(^4\) illustrates the question nicely. There, a wife had contracted a $35,000 unsecured debt prior to marriage. After marriage, and upon the creditor's efforts to levy, the Court held that her one-half interest in community property was not subject to execution for the debt. Under the express provisions of this section, however, her interest in the property of the community is made subject to an antenuptial creditor’s levy. The question emerges clearly: may a creditor whose separate debt was created prior to July 1, 1973, at a time when levy on the debtor's one-half interest in the community property was not permitted, now make such a levy under the changed provisions of the new act?

Although there are competing considerations involved, it is thought that when the question is adjudicated, the provisions of the new law should be held to apply to any debt collected, though not necessarily created, after July 1, 1973. To hold otherwise would mean that the State would go forward indefinitely with two parallel systems of debt collection provisions, one applicable to debts created prior to July 1, 1973, and one to debts created after that date. Because the provisions of the former law are so unclear and unfair to creditors, their perpetuation seems ill-advised unless absolutely necessary.

The contrary argument is simply that, as to debts created prior to July 1, 1973, creditors relied only on the debt collection features of prior law and there is no reason to give them the windfall of the more generous provisions of the new act simply because they had not collected their debts by July 1, 1973. Another argument which may be pressed is that it is unfair to the non-debtor spouse to now subject one-half of the community to the satisfaction of a debt created at a time when the property of the community was not liable for the other’s separate debts. Although opinions may legitimately differ on this point, a single, unified system of debt collection which applies to all debts collected after July 1, 1973, seems preferable to a dual set of debt collection rules. It is an issue, however, which only the Courts can finally settle.

57-4A-5. SATISFACTION OF COMMUNITY DEBTS

A. Community debts shall be satisfied first from all community property and all property in which each spouse owns an undivided

\(^4\) 83 N.M. 133, 489 P.2d 641 (1971).
one-half interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied from the residence of the spouses except as provided in section 24-6-1 NMSA 1953. Should such property be insufficient, the separate property of the spouses is jointly and severely liable for the satisfaction of community debts.

B. This section shall apply only while both spouses are living, and shall not apply to the satisfaction of debts after the death of one or both spouses.

This section, to be applied where a community debt has been created by one or both spouses, applies in reverse the theory underlying § 57-4A-4 regarding the satisfaction of separate debts. As noted earlier the provisions of § 57-4A-3 defining “separate” and “community” debts make it likely that most debts created by either spouse during marriage will be, as to creditors at least, community debts which will be collected under this section. Thus, this section will be used far more frequently than will the preceding section setting forth the rules for satisfying separate debts.

As would logically be expected, this section requires that community debts be satisfied first from all community property and property in which the spouses hold a one-half interest, excluding the spouses’ residence. As mentioned above a creditor may now assume that all property held in the name of either spouse alone which is not specifically identified as separate property or which is held in the name of both spouses, is community property which is subject to levy under this section. If the creditor’s assumption is incorrect, a spouse whose separate property has been improperly levied upon must come forward and oppose the levy, or claim a set-off against the property of the other spouse at some later date.

As in the preceding section, because of the common use of joint tenancy forms by banks, stock brokers and title companies, all property in which the spouses jointly own one-half interests is treated as community property for debt satisfaction purposes.

If community property and property in which each spouse owns a

44. See text at notes 28-32, supra, for an explanation of situations in which a debt which was a community debt as to the creditors, and therefore collectible under this section, might be held, as between the spouses, to be the separate debt of one of them, and thus entitle one to a right of set-off for his or her portion of property improperly used to satisfy the debt.

45. As commented upon in note 16 supra, the difference in the provisions of this section and § 57-4A-4, the latter of which equates separate property in which the spouses hold “equal” interest with community property and this section, which equates only property in which the spouses have “one-half” interests with community property for debt collection purposes, appears to be a simple oversight which occurred when amendments were made in § 57-4A-4 by the House Judiciary Committee.
one-half interest is insufficient to satisfy a community debt, the residence of the spouses above the value of the $10,000 homestead exemption provided for in § 24-6-1 is subject to levy next. The residence is subject to levy at this point even if it is the separate property of one of the spouses. However, because all community and jointly-held property should have been exhausted at this stage, and because the separate property of either spouse may be reached to satisfy a community debt, the possibility that the residence is one spouse's separate property should not have any practical effect.

Finally, if the residence value above the homestead exemption is insufficient to satisfy the community debt, the separate property of either spouse may be reached to satisfy the entire community debt, regardless of which spouse created the debt. This provision represents an important change from the law prior to July 1, 1973, under which a husband's separate property could be reached to satisfy community debts, but a wife's could not be.

The Bar Committee chose to make the conflicting rules for debt collection from property of the husband and wife conform to the Equal Rights Amendment by subjecting all the separate property of either spouse to the collection of community debts. This choice was made for two reasons. First, § 57-2-1, which remains in effect, provides that "husband and wife contract toward each other obligations of mutual respect, fidelity and support." It was in part the husband's duty to support the family which buttressed several commentators' belief that the husband's separate property was liable for community debts. Where both spouses are obligated by law to support the other, that obligation can hardly be fulfilled without making the separate property of each liable for the support of the community through payment of community debts when all other property is exhausted.

Second, where a spouse has substantial separate property, it is likely that it will be used to support the family and raise its standard of living to some extent. It would be difficult for a creditor to know precisely which property and what portion of a community's credit rating were dependent on the existence of one spouse's separate

46. See note 40, supra, for a discussion of the operation of the homestead exemption and its co-existence with the joinder requirements for the sale of real property owned by the spouses.

47. As to the liability of the husband's separate property for community debts, see R. Clark, Community of Property and the Family in New Mexico 28-29 (1956); and J. Wood, The Community Property Law of New Mexico 87-88 (1954).

The New Mexico Supreme Court held in E. Rosenwald & Son v. Baca, 28 N.M. 276, 210 P. 1968 (1922), that the wife's separate property could not be reached to satisfy a community debt. On the entire question of debt satisfaction, see generally, Ellis, supra note 33, at 60-61.
property in such a situation. Thus, to be fair to creditors who might have extended credit to the community in reliance on what was in face one spouse’s separate property, it seemed reasonable to make the separate property of both spouses liable for community debts when all other property is exhausted.\(^8\)

It should be noted that the same problem arises here as arises under the change made in § 57-4A-4. Here, the question is whether a community debt created prior to July 1, 1973, may be collected from a wife’s separate property under the provisions of the new act. For the reasons discussed earlier,\(^4\)\(^9\) it is believed that the better answer would be to hold that the new act applies to the collection of all debts, regardless of the date of their creation. However, this also is a question which will ultimately have to be litigated.

57-4A-6. PRESUMPTION OF COMMUNITY PROPERTY–PRESUMPTION OF SEPARATE PROPERTY WHERE PROPERTY ACQUIRED BY MARRIED WOMAN PRIOR TO JULY 1, 1973

A. Property acquired during marriage by either husband or wife, or both, is presumed to be community property.

B. Property or any interest therein acquired during marriage by a woman by an instrument in writing, in her name alone, or in her name and the name of another person not her husband, is presumed to be the separate property of the married woman if the instrument in writing was delivered and accepted prior to July 1, 1973. The date of execution or, in the absence of a date of execution, the date of acknowledgment, is presumed to be the date upon which delivery and acceptance occurred.

C. The presumptions contained in subsection B of this section are conclusive in favor of any person dealing in good faith and for valuable consideration with a married woman or her legal representative or successor in interest.

Subsection (A) of this section provides the presumption basic to all community property systems, and found also under prior law: that all property acquired by either spouse after marriage is presumed to be community, not separate, property. The presumption of community property, under former law and under the new act, may be rebutted by a preponderance of evidence to the contrary establishing the character of the property as separate property under the definitions contained in § 57-4A-2(A).\(^5\)\(^0\)

\(^{48}\) See on this point, Ellis, supra note 33, at 67.

\(^{49}\) See text accompanying note 34, supra.

\(^{50}\) Not affected by the new act is the question of the quantum of evidence necessary to establish that property which was held by the spouses as community property has been transmuted by them to a joint tenancy, a separate property interest of each under
This subsection does not change present law as to property acquired by husbands after marriage. That was, and still is, presumed to be community property.

The subsection does change the provisions of the former § 57-4-1, as it applied to wives. That section provided that property acquired during marriage by a woman by an interest in writing was presumed to be her separate property, not community property. Under the Equal Rights Amendment, § 57-4-1 was clearly unconstitutional. Providing for a presumption of community property for property acquired by either spouse after marriage was the only choice consonant with the basic tenets of a community property system.

The necessity for change, however, presented a difficult problem—whether the new amendment, in the absence of the qualifying provisions now found in subsection (B), could constitutionally be applied to property acquired prior to July 1, 1973. The problem, simply stated, was whether the presumption found in the prior law was a “rule of evidence” or a “rule of property.” If the presumption were found by the New Mexico Supreme Court to be a rule of evidence, an amendment to the section could be applied constitutionally to determine the character of property acquired prior to the effective date of the amendment. If, however, the presumption was a rule of property, rights under the section had vested, and an amendment in its provisions could not be applied to determine the status of property acquired prior to the effective date of the amendment.

No case has ever been decided on this question in New Mexico. To determine whether the former presumption was a rule of evidence or a rule of property, the question would have had to be taken to the New Mexico Supreme Court for decision, a potentially long proceeding. In the meantime, title examiners and purchasers of property would have been thrown into a state of uncertainty as to whether property held in the name of a married woman alone and acquired prior to July 1, 1973, was her separate property, which she could convey without the joinder of her husband, or community property, for which joinder of her husband was required. It was to avoid this period of uncertainty in the state of property titles in New Mexico that Subsection (B) was adopted.51

§ 57-4A-2(A)(6). See the discussion in note 35, supra, of the difficulties in present case law; see also Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963), which held that “clear and convincing” evidence, not a “mere preponderance,” was necessary to establish that a wife’s separate property had been transmuted to community property.

The difficult questions presented by these decisions are not dealt with in the new act. Whatever quantum of proof was necessary under former case law to establish transmutation will also be necessary under the new act.

51. For a more complete discussion of the problems of determining whether a presump-
Subsection 57-4A-6(B) adopts, in essence, the "rule of property" approach to the question of the nature of the former § 57-4-1. It "grandfathers" in the former provisions of that section by providing that property acquired by a married woman and evidenced by a document of title delivered and accepted prior to July 1, 1973, is presumed to be her separate property. Under this provision, title insurers and purchasers can be certain of the law immediately, and there will be no period of years during which the validity of titles conveyed by married women alone without joinder of their husbands is thrown into doubt.

Subsection (C) is also a continuation of the present conclusive presumption contained in the former § 57-4-1, which makes the presumption of separate property binding in favor of third parties dealing in good faith and for valuable consideration with a married woman or her successor in interest.

Thus, as adopted, § 57-4A-6 will carry forward the presumption of separate property where property is acquired by a married woman alone or with a person not her husband. In so doing, it commits the state to a dual system of property law where property is held in the name of wives. One of the consequences of such a system is that it will be necessary, in probating married women's estates, to determine whether property was acquired before or after July 1, 1973, in order to determine whether it descends or passes as separate or community property. Similarly, attorneys representing wives in divorce pro-

52 It is very possible that curing the uncertainty as to the joinder requirement did not justify incurring the other consequences set forth here, particularly that of going forward indefinitely under two separate provisions of property law where property is held in the wife's name alone. The provision adopted, when combined with the rule that the proceeds of separate property remain separate property, may mean that some forty years from now, New Mexico attorneys will be litigating difficult "tracing" questions where property held in the name of a wife alone which was acquired prior to July 1, 1973 was sold and the proceeds re-invested. Upon probate of the woman's estate, complicated fights between the heirs of her separate property and the heirs of community property can well be imagined.

For a description of the problems California has faced with similar "tracing" problems in a slightly different context, see Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 So. Cal. L. Rev. 240, 266-73 (1966). The author concludes that there is no substantial constitutional objection today to retroactive amendment of presumptions in community property law, a view which, if correct, means that the presumption contained in the former § 57-4-1 is a mere "rule of evidence," not a "rule of property."

Because of these problems, which were brought to the Bar Committee's attention only after the act had been passed in its present form, it is advisable that the repeal of subsections
ceedings should be careful to inquire whether property acquired prior to July 1, 1973, is held in the wife’s name alone or with a person not the husband. If it is, it is probably the wife’s separate property to which the husband has no claim.

Finally, New Mexico attorneys should note that the provisions of this section make the marital deduction under the federal estate tax available where property acquired in the name of a married woman alone or with a person not her husband prior to July 1, 1973, is willed to her surviving spouse. Estate planners should take this feature of the new act into account by asking clients to list all property acquired under such conditions to accomplish proper planning.

57-4A-7. TRANSFERS, CONVEYANCES, MORTGAGES, LEASES AND MANAGEMENT OF REAL PROPERTY—WHEN JOINDER REQUIRED

A. Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property and separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common. The spouses must join in all leases and in the management of community real property or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common.

Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lease any interest in the community real property or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, attempted to be made by either spouse alone shall be void and of no effect, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein.

Except as provided above, either spouse may transfer, convey, (B) and (C) of this section be seriously considered. Such a repeal would leave the question as to the nature of the former presumption to be litigated and determined by the courts.

53. This, of course, represents no change from former law, under which careful attorneys representing wives so inquired. Under the express provisions of § 57-4A-6, however, attorneys should note that their practice in that regard should not change.

One problem which has never been litigated, and which the present section carries forward, is the precise meaning of the phrase “instrument in writing” contained both in former and in present law. Because the former N.M. Stat. Ann. § 57-4-1 (1953) contained a reference to real “and personal” property, it seems clear that the term “instrument in writing” refers to more than simply deeds and conveyances, and may well include at least such items as car titles and stock certificates. Whether it would also include bank or stock accounts is a question that has never been litigated. If the present Subsections (B) and (C) of § 57-4A-6 are not repealed, the question may eventually reach the courts. For a brief discussion of the question as to what the phrase “instrument in writing” may include see Wood, The Community Property Law of New Mexico (1954), § 90(d).

54. See Int. Rev. Code of 1954, § 2056, which provides for a 50% “marital deduction” from the taxable estate where a decedent wills separate property to a surviving spouse.
mortgage or lease separate real property without the other's joinder.

B. Nothing in this section shall affect the right of one of the
spouses to transfer, convey, mortgage, lease or manage, or contract
to transfer, convey, mortgage or lease, any community real property,
or separate real property owned by the spouses as cotenants in joint
tenancy or tenancy in common, without the joinder of the other
spouse, pursuant to a validly executed and recorded power of attor-
ney as provided in section 70-1-6 NMSA 1953.

This section, and the two which follow it, deal with the difficult
problem of apportioning management powers over community prop-
erty in a fashion that comports with the Equal Rights Amendment.
As will be seen, the new act is not entirely successful in that regard,
but a beginning has been made in New Mexico toward achieving a
truly equal management system. Since prior law accorded the hus-
band sole management rights over community personal property, the
changes made by the new act are pervasive and significant.

There are three possible community property management sys-
tems which would satisfy the requirements of an Equal Rights
Amendment. These are: a joint management system; a separate man-
agement system; and a joint and several management system. The
new act utilizes all three approaches.

In this section, a joint system is retained for the disposition and
management of community or other jointly-owned real property. In
the following section, § 57-4A-7.1, a system of separate manage-
ment, managed by the husband, is presumed for "commercial com-
munity personal property." In § 57-4A-8, all three possible systems
are employed to apportion management powers between the spouses
for "other," non-commercial, community personal property; the
specific provisions of the last two sections will be discussed shortly.

This section, 57-4A-7, sets forth the rules for management of com-
munity and other real property owned jointly by the spouses. It
retains and broadens the basic concepts of our former real property
joinder requirement, as set out in § 57-4-3.\(^5\)

Several legitimate questions may be asked concerning the decision
to retain an essentially unchanged joinder requirement for the sale or
mortgage of real property. The Bar Committee's views on the three
most obvious questions are set forth below.

A. Why Is Any Joinder Requirement Necessary for Any Trans-
action?

It is possible to take the view that any joinder requirement pre-
sumes a lack of trust which is inconsistent with the assumption of

\(^{5}\) The section was repealed by Laws 1973, ch. 320, § 14.
mutual trust and respect upon which the institution of marriage is based. However, after much debate, the Committee decided that it was probable that most spouses assumed that while the other was free to act as he or she wished on minor matters, where major financial transactions were concerned, each wished to take part in the decision. Thus, requiring joinder only for certain major transactions seemed consistent with the practice followed in fact in most marriages. The decision was made to retain some form of joinder requirement for certain major transactions.

B. Why Should a Joinder Requirement Be Limited to Transactions Involving Real Estate?

In today's urban society, real property is undoubtedly less important as a form of family wealth than it was sixty years ago when our former joinder requirement was enacted. However, while recognizing that wealth today is held in many forms other than real property, the Committee also recognized that property transactions are by nature slow, whereas other important commercial decisions, such as stock transactions, must take place quickly. When the inconvenience of a joinder requirement was weighed against the need for it, it was felt that requiring joinder of the spouses in all financially important decisions, however defined, would prove a cumbersome requirement impossible to comply with, and would result only in avoidance of its provisions by appointment of one of the spouses as the agent of the other for commercial purposes.

Further, while recognizing the theoretical parallel between real property and other property of similar value, drafting a workable joinder requirement which reflects that parallel is an impossible task. A percentage of income approach has the obvious difficulty of forcing a merchant to ask to see every customer's tax return or other proof of income in order to determine whether joinder is required for a particular transaction. An absolute dollar amount, such as $500, would automatically exempt many couples who never spent such sums, while catching the rich often, again probably prompting avoidance of the requirement altogether by appointment of one spouse as agent of the other. Finally, of course, even were the severe drafting difficulties overcome, how could one spouse be prevented

56. The former joinder requirement, codified as N.M. Stat. Ann. § 57-4-3 (1953), was enacted in 1915 by Laws 1915, ch. 84, § 1. Prior to that amendment, joinder was required only for sale of the homestead of the spouses, not for all real property owned by the community.

57. The sum of $500 as a bottom limit for a joinder requirement was seriously suggested by one author; see Community Property: Male Management and Women's Rights, 1972 Law and the Social Order 163, 173.
from simply charging or spending to the lower limit of the joinder requirement each day and thus avoiding the requirement?

Such problems were too complex to resolve satisfactorily. The Committee therefore decided that because of widespread acceptance of the present joinder requirement for the sale and mortgage of real property, and the relative ease of compliance with it, that requirement alone should be retained in the new act.

C. Why Limit a Real Property Joinder Requirement to Only Sales and Mortgages, While Excluding Purchases of Real Property From Its Provisions?

Again, a sensible question: if real property sales are important enough to the community for the State to coerce married couples to agree upon before they may be carried out, why are not purchases of real property equally important?

Here, the Committee was simply reluctant to include purchases of real property made by one spouse alone in the restrictive "void and of no effect" language to which sales and mortgages of real property are subjected. That reluctance stemmed from a desire to avoid making all sellers, as well as all buyers, of real property in New Mexico determine first if the person to whom they were selling was married, and then whether or not he or she was purchasing the property as separate or community property.

If the "void and of no effect" language were omitted as to real property purchases, a spouse who contracted to purchase real property without obtaining the other's joinder would have made the purchase as his or her separate property, while creating a community debt. As we have seen, community debts of a spouse may be collected from the entire community property. Thus, community property could be levied upon to pay the debt of a spouse who had purchased property which benefited only one member of the community, a result which the other spouse could remedy only by claiming a set-off in some legal action. Where community property is used to pay for real property purchased, it was felt fairer to have title to the property stand as community property so that both spouses would share in any increase in the property's value.

It was these considerations, as well as a belief that the present joinder requirements are widely understood and accepted by both the lay public and the New Mexico Bar, which led the Committee to recommend leaving the requirements for the joinder for the sale or mortgage of real property in a form very similar to the requirements of prior law. That decision having been made, this section was pur-
posely drafted in the language of the former section in order to preserve the holdings of several litigated cases concerning the meaning of the terms “deeds and mortgages,”58 and “void and of no effect.”59

D. New Phrases

In addition to those terms found in prior law, the significance of several new phrases should be commented upon. Each will be discussed in the order in which it appears in § 57-4A-7.

1. “Except for Purchase-Money Mortgages”

This phrase retains and incorporates into the statute the holding of Davidson v. Click,60 in which the New Mexico Supreme Court decided that a mortgage executed simultaneously with a purchase of real property and given either to a seller or to a third party61 in order to finance the purchase, was not the type of “mortgage” referred to in the statute and was therefore valid when signed by the husband alone. Several factors pointed to a need to retain the holding. First, the community is benefited in the amount of the mortgage, because it receives title to property at the same time the purchase-money mortgage is executed. Where a mortgage is given on real property some time after the purchase as security for a loan, this is probably not the case. Second, if the rule were not as announced in Davidson v. Click, the seller who took one spouse’s signature alone on a purchase-money mortgage would have conveyed fee simple title to the property, having taken in return an invalid mortgage to secure his interest. Such a rule invites litigation for rescission of the conveyance. Finally, to require joinder for purchase-money mortgages is in effect to extend the joinder requirement to many, if not most, pur-

58. The term “deeds and mortgages” had been interpreted by the New Mexico Supreme Court as not including leases for terms of up to eight years; see Fidel v. Venner, 35 N.M. 45, 289 P. 803 (1930). In the original draft of the act prepared by the Bar Committee, the eight year period was extended to ten years, and all leases of real property for a period of up to ten years were expressly excluded from the joinder requirements of § 57-4A-7. However, the Senate Judiciary Committee struck the ten-year lease exception in its Committee Substitute for Senate Bill 8, and the new act requires the joinder of both spouses for all leases. See the more complete discussion of the lease provision in § 57-4A-7 in text accompanying note 62, infra.

59. The phrase “void and of no effect” has been interpreted in several New Mexico cases decided under prior law. In McGrail v. Fields, 53 N.M. 158, 203 P.2d 1000 (1949) and Jenkins v. Huntsinger, 46 N.M. 168, 125 P.2d 327 (1942), the court held that a deed by the husband was ineffective not only to convey his portion of the community property, but also ineffective to convey title to property which was community property at the time the deed was executed, but of which the husband later acquired sole fee simple ownership. These decisions will remain under the language of the new act.

60. 31 N.M. 543, 249 P. 100 (1926).

chases of real property by married persons because so many purchases of real property are financed by purchase-money mortgages. As discussed above, the Committee felt such a change in the law would make real property transactions with married persons much more cumbersome than they were under prior law with no attendant policy benefit.

For these reasons, the holding in Davidson v. Click was retained. To avoid possible confusion and to educate those who read the statute as to its requirements, the decision was expressly incorporated into the language of the new act.

2. "The Spouses must Join in all Transfers, Conveyances, Leases and Mortgages Affecting . . . Separate Real Property Owned by the Spouses as Co-Tenants in Joint Tenancy or Tenancy in Common . . ."

As discussed more fully above, at common law and under present New Mexico law, where the spouses are not co-tenants, a joint tenant or tenant in common is free to convey his interest without joinder of any of the other tenants. While this rule is acceptable for joint tenants and tenants in common who are not spouses, it is inconsistent to require joinder of the spouses for conveyance of community real property, yet allow one spouse to convey his or her interest in real property held in a joint tenancy without the other’s consent. For this reason, joinder of both spouses is required by the new act to convey an interest in a joint tenancy or tenancy in common where the spouses are co-tenants.

It should also be noted that if the interpretation given the New Mexico Supreme Court’s decision in Thaxton v. Thaxton and of the definition of “separate property” set forth above in the discussion of § 57-4A-2(A)(6) is correct, a spouse’s interest in a co-tenancy which he or she holds with persons not the other spouse is community, not separate property. Under the explicit terms of this section requiring joinder of the spouses to convey “any interest in community real property,” joinder of both spouses is required also where only one spouse is a tenant in a co-tenancy in real property unless it can be shown that the interest was purchased with separate property.

3. "The Spouses must Join . . . in All Contracts to Transfer, Convey, or Mortgage . . ."

This language reverses the holding of Viramontes v. Fox by

62. See text accompanying notes 18 and 19, supra.
63. 75 N.M. 450, 405 P.2d 932 (1965).
64. 65 N.M. 275, 335 P.2d 1071 (1959).
making the joinder requirement apply to a contract to convey as well as to an actual conveyance. *Viramontes* presents a strange anomaly: under *Adams v. Blumenshine*, the husband who signs a contract to sell real estate may not be sued for specific performance of his contract made without the wife's joinder. However, the buyer may obtain a judgment for money damages for breach of such a contract under the decision in *Viramontes*. Then, because the debt in question is a community debt, the buyer may levy on the very property which the husband could not convey alone in order to satisfy his judgment for money damages.

Such a result seems incorrect. If the joinder requirement is to work at all, it should apply to contracts to do those acts for which joinder is required, as well as to the acts themselves. The new act, by expressly including the word "contract," and making any contract executed by only one spouse to do an act for which joinder is required "void and of no effect," achieves this result.

### 4. "The Spouses must Join in All Leases . . ."

Under former law, leases for periods of up to eight years were held not to be "deeds" and thus could be entered into by the husband alone. Leases for an indefinite term, however, were held to be "deeds affecting real property" and were required to be signed by both spouses. In order to exempt most commercial leases from the joinder requirement, as well as residential leases of houses and apartments, the Bar Committee's original draft and Senate Bill 8 as introduced contained an exemption from the joinder requirement for all leases of real property for terms of up to ten years, thus substantially incorporating prior law into the express provisions of the new act. Members of the Senate Judiciary Committee, however, expressed a fear that wives, given the same power by the new act which New Mexico husbands had enjoyed for many years, would execute improvident leases which would harm the community. The Committee therefore struck the proposed ten-year lease exemption, and required in its Committee Substitute that all leases of community or other jointly-owned real property be signed by both spouses. In so

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65. 27 N.M. 643, 204 P. 66 (1922).
66. The new act does not change present law as to contracts to mortgage real property, however. Under *El Paso Cattle Loan Co. v. Stephens and Gardner*, 30 N.M. 154, 228 P. 1076 (1924) a contract to mortgage community real property signed by the husband alone was held to be void, since the husband alone could execute a valid mortgage to the property. The result here seems inconsistent with the holding in *Viramontes v. Fox*, 65 N.M. 275, 335 P.2d 1071 (1959).
doing, the Committee substantially reduced the freedom which New Mexico husbands enjoyed under prior law to lease real property.

When the Senate Judiciary Committee made this change, the present subsection (B) of § 57-4A-7 was added to remind attorneys and others that by reading the existing provisions of § 57-2-1, allowing the spouses to contract with each other, and § 70-1-6, together, a power of attorney may be used to avoid the more stringent joinder requirements imposed by the new act. Where the spouses own commercial real property, cross powers of attorney to each other should be considered in order to enable either of them to execute a valid lease of the property. If this is not done, it is likely that under the "void and of no effect" language carried forward in the new act, lessees of real property can void at their option leases made by only one spouse.

5. "The Spouses must Join in Any Transfer of Any Interest in (Jointly-Owned Real Property) . . ."

The phrase "any interest in" replaces the word "affecting" real property in prior law. It was not intended to change the effect of former law, but simply to make it clearer to those unfamiliar with case law that leases or conveyances of all interests in real property must be joined in by the spouses. Thus, as under prior law, any oil, gas or mineral lease must be signed by both spouses unless a validly executed power of attorney was previously recorded.


Under former law, although the wife's signature was required to convey or mortgage community real property, several New Mexico decisions intimated that the husband had the sole power to manage community real property, similar to his power to manage community personal property. While such a law would be clearly unconstitutional under the Equal Rights Amendment, and was probably often ignored in fact before the Amendment's passage, it did have the virtue of theoretical legal simplicity.

69. Id. Terry v. Humphreys is commonly interpreted as requiring the spouses to join in all oil and gas leases, and most oil and gas lawyers in the state so advise lessees who lease from married couples.

70. See Davidson v. Click, 31 N.M. 543, 249 P. 100 (1926); El Paso Cattle Loan Co. v. Stephens and Gardner, 30 N.M. 154, 228 P. 1076 (1924); Fidel v. Venner, 35 N.M. 45, 289 P. 803 (1930). See also on this point, to the effect that the husband had the sole power of management, as opposed to disposition, of community real property, de Funiak & Vaughn, supra note 8, at § 115.1.
The new act purports to require the joinder of the spouses for all "management" of real property owned by them. Does this provision mean, then, that one spouse alone cannot order repairs or improvements on jointly-owned real property, and cannot collect rents or settle minor disputes with tenants of a jointly-owned apartment house? Although on its face the provision seems to require the consent of both for all such acts, should the question arise in a dispute with a third party who had relied on one spouse's power to "manage" jointly-held property, a court should find the management authorized under an agency or a ratification theory. Thus, while the provision appears to be dangerous to third parties dealing with only one spouse, in practice it probably will not cause problems.

It might be added that the provision emerged from the act's successive permutations in the last days of the Legislature, when both political and drafting problems made insertion of a separate management section for jointly-owned real property a practical impossibility. However, individual legislators and the Bar Committee were well aware of the provision's theoretical difficulties.

57-4A-7.1 PRESUMPTION OF MANAGEMENT AND CONTROL OF COMMERCIAL COMMUNITY PERSONAL PROPERTY

A. It is presumed that the husband shall have the sole power to manage, control, dispose of or encumber any commercial community personal property, personal property which is part of a community business enterprise or community personal property used in a business, the proceeds of which support the family in whole or in part, unless the wife has assumed her rights of management of such property, as provided in section 57-4A-8 NMSA 1953, by filing a written statement with the county clerk of the county in which she resides.

B. Any person dealing in good faith with a wife in reliance upon such written statement, shall incur no liability to the husband for so dealing, and shall be under no obligation to recognize the sole authority of the husband to manage, control, dispose of or encumber the property covered by the statement, until such statement has been revoked.

C. As to any third person, such statement may be revoked only by an instrument in writing signed by the wife or by an order of any court having jurisdiction to enter such an order. The revocation shall not be effective as to any third person until such person has been

71. In Woods v. Van Wallis Trailer Sales Co., 77 N.M. 121, 419 P.2d 964 (1966), the Supreme Court upheld the wife's management of community personal property on alternative theories of agency and ratification of her actions by the husband. This case thus provides precedent for the holding suggested in the text.
furnished with a copy of the written instrument or order of revocation.

As noted earlier,\textsuperscript{72} this provision resulted from the Senate Judiciary Committee's problems with the notion of completely equal management powers between the spouses. Specifically, members of that Committee feared that after July 1, 1973, New Mexico wives not only could, but would interfere in the operation of their husbands' unincorporated community businesses. In the first Committee hearing on Senate Bill 8, problems of a wife selling cattle from a ranch without her husband's approval and of interference in a husband's law practice were raised by members of the Committee. While such concerns seemed farfetched to the Bar Committee, they were considered serious enough by the Senate to justify inclusion in the bill passed by it of a provision which presumed that the husband was the sole manager of \textit{all} community personal property, not just commercial property, unless the wife had filed a statement with the County Clerk asserting her own management rights. In the House Judiciary Committee, this presumption of husband-management was narrowed to include only "commercial" community personal property and the Senate concurred in the amendment. By this narrowing of the presumption, thousands of wage-earners in New Mexico who do not conduct businesses of their own were excluded from the scope of the husband-management presumption. Also, where the management of community personal property is unconnected with the operation of a commercial enterprise, such as in the exercise of the general credit of the community to borrow money or purchase consumer goods, the husband-management provision as amended in the House has no effect. Thus, New Mexico retail merchants in most situations are free to extend credit to wives without their husbands' consent, since the wives exercising such credit are creating community debts ultimately collectible from all property of either spouse. The narrowing of the provision in the House was of potentially crucial importance to New Mexico merchants and wives in the areas of credit and borrowing. When the new act and its broad community debt collection provisions become more widely understood among New Mexico merchants and their lawyers, the House Judiciary Committee's action will assume increasing importance.

Although there is some question as to the scope of the term "commercial," it was very definitely the intention of those who drafted the phrase to include only business enterprises in its scope, not all money-making activities conducted for the community, such as stock

\textsuperscript{72} See text at notes 4 and 5 above.
transactions and other passive investing. As a question of statutory construction, the two phrases following the words "commercial community personal property" should be helpful since they can be read as further defining the meaning of "commercial" in the first phrase. The second and third phrases state that the husband is presumed to have sole management powers over "personal property which is part of a community business enterprise" or "community personal property used in a business, the proceeds of which support the family in whole or in part." When these two phrases are considered, it seems clear that the dominant concern of the Legislature was one of wives' interference in husbands' business enterprises. Thus, the provision should be construed to require the wife to file her "statement" assuming management rights with the County Clerk only where she wishes to share in the management of an unincorporated business enterprise.

It should be noted that by its terms the section requires a wife who herself operates a community business, no matter how small, to file such a statement. By law the husband, not she, is presumed to have sole management powers over that business until the statement is filed. Thus, a wife who operates a beauty shop, a door-to-door cosmetic business or any other unincorporated venture, including one operated as a partnership with persons not her husband, must, under the requirements of this section, file a statement of her intention to assume management rights over the business with the County Clerk of the county in which she resides.

When such a statement has been filed, the presumption of husband-management is overcome, and management of the property in question is governed by the provisions of § 57-4A-8.

One might wonder how a merchant dealing with a wife is to know whether she has in fact filed her "statement" assuming rights of management of a commercial community business enterprise. Is he to search the records in the county courthouse, and if so, how are such statements indexed? When such questions are considered, it is obvious that there is no practical way for a merchant to satisfy

73. N.M. Stat. Ann. § 66-1-25(e) (2nd Repl. 1972) provides that either spouse's interest in a partnership is community property, although interest in "specific property" held by the partnership is not. Under this section, a wife's interest as a partner in a partnership with persons other than her husband would be "commercial community personal property" over which the husband would be presumed to have sole management powers until she filed her statement with the County Clerk.

In fact, the Senate Judiciary Committee was concerned only with the husband's interest in a law or other partnership and the problem of a wife's interference in that enterprise. The possibility of a husband's interference in a wife's unincorporated business, or the effects which the husband-management provision has on a business run by the wife alone, were questions which were simply not raised or considered in the Senate hearings.
himself on this question unless the wife carries with her a certified copy of the filed statement. Such an answer demonstrates both the practical difficulties and commercial unreality of the section. It is a rare wife who will carry a certified copy of her filed statement on her person at all times to pull out to show to third parties, and an even rarer merchant or third party who will request to see such a document. This section, then, like the former N.M. Stat. Ann. § 57-4-3 (1953), which vested sole management powers in the husband, seems unquestionably doomed to being ignored by everyone whose actions it purports to govern.

Finally, of course, there is the question of this provision's constitutionality under an Equal Rights Amendment. It does not take great legal insight to realize that an amendment which states that “equality of rights under law shall not be denied on account of the sex of any person” will invalidate a state law which puts a burden on one sex, as a sex, which it does not place on the other. Here, New Mexico wives are required by law to file with the County Clerk in order to obtain what the same law by its terms gives as a legal right to their husbands.\footnote{See generally on the interpretation to be given an Equal Rights Amendment, Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L. J. 871 (1971) (hereinafter cited as Brown, et al.).}

This point, which is patently obvious to lawyers and lay people alike, was missed by the New Mexico Attorney General's Office when Senator Tibo Chavez requested an opinion on the legality of the husband-management presumption under the Equal Rights Amendment. In an informal letter opinion issued by that office on February 7, 1973,\footnote{A copy of that letter may be requested by writing to the New Mexico Attorney General citing the date and addressee of the letter.} the 1971 Supreme Court opinion in Reed v. Reed\footnote{404 U.S. 71 (1971).} was used to support the statement that laws which discriminated solely on the basis of sex were to be upheld under an Equal Rights Amendment if a “minimum rational basis” for the Legislature's sex-based classification could be ascertained. Applying that test, the Attorney General's Office concluded that the need for a provision to span the vast transition from a complete husband-management system to an equal management system supplied the minimum rationality required by Reed v. Reed if certain provisions were added. It was largely upon the basis of the Attorney General's letter that proponents of the husband-management provision in the Senate rested their arguments when the section's obvious constitutional problems were raised.
What the author of the Attorney General’s letter failed to consider was that the entire Equal Rights movement in the United States Congress, as well as in the states, had gained momentum only after the disappointing decision in *Reed v. Reed*. Indeed, the Amendment was aimed, specifically and solely, at overturning the “minimal rational basis” standard announced in that decision. Prior to *Reed v. Reed*, proponents of Equal Rights had rested their hopes largely on action by the Court; after *Reed v. Reed*, that avenue was closed, and legislative action on the Amendment began in earnest for the first time in its fifty-year history.\(^7\) Thus, *Reed v. Reed*, the case relied on by the Attorney General’s office and the Senate supporters of the husband-management provision, cannot be used to test the constitutionality of any act after the passage of an Equal Rights Amendment. The Amendment’s prime purpose is to require legislation to be judged by the far more strict “compelling state interest” test presently applied by the United States Supreme Court only to classifications based solely on race, religion or national origin. In other words, the overriding purpose of the Amendment was, and is, to overturn use of the “minimum rational basis” test as applied to sex-based distinctions, and to make sex, like race, a “suspect” classification.\(^8\) Under the latter test, the husband-management provision is unquestionably unconstitutional in any form, and should be so held by any New Mexico court faced with the question.

57-4A-8. MANAGEMENT AND CONTROL OF OTHER COMMUNITY PERSONAL PROPERTY

A. Except as provided in section 57-4A-7.1 NMSA 1953 and except as provided in subsections B and C of this section, either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property.

B. Where only one [1] spouse is:
   (1) named in a document of title to community personal property; or
   (2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in the agreement, whether the agreement was executed prior to or after July 1, 1973;

only the spouse so named may manage, control, dispose of or encumber the community personal property evidenced by a document.

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\(^7\) See the statement of Professor Thomas I. Emerson of the Yale Law School before the Senate Judiciary Committee’s hearings on the Equal Rights Amendment in Kanowitz, *Sex Roles in Law and Society* (1973), at 547.

\(^8\) See *Brown et al.*, supra note 74, at 879-881, for a description and full explanation of the “suspect classification” test to be used after passage of an Equal Rights Amendment.
or certificate in the name of that spouse alone or described in a written agreement to which only that spouse is a party.

C. Both spouses must join to manage, control, dispose of or encumber community personal property which is evidenced by a document of title in the name of both spouses where the names of the spouses are joined by the word "and."

As noted earlier, this section, which provides the rules for management of non-commercial community personal property, utilizes all three management systems which are constitutional under an Equal Rights Amendment: joint and several management by either spouse alone or both together; separate management by one spouse; and joint management by both spouses. Because it is easier to conceptualize the statute's requirements if they are considered in this light, the provisions of this section will be discussed under these three classifications.

A. Joint and Several Management By Either or Both Spouses

The basic principle from which drafting of this section began was that, by analogy of the marriage partnership to commercial partnerships, community personal property should be subject to the management of either spouse alone.\(^7\)\(^9\) Thus, Subsection (A) of this section provides that, except as otherwise provided in separate sections of the new act, either spouse alone has full power to manage, control, dispose of or encumber community personal property. Under this subsection, either spouse is free to exercise the general, unsecured credit of the community, and when he or she does so, a community debt collectible under the provisions of § 57-4A-5, discussed above, will have been created. Thus, either spouse alone should be accorded full rights to open and use charge accounts and borrow money where no security is given for the debt. Because of the broad collection provisions applicable to community debts, including the creditor's right to reach eventually all separate property of either spouse, regardless of which spouse actually created the debt,\(^8\)\(^0\) there is no longer any legal reason for creditors to require the signature of both spouses on bank loans, small loans or credit purchases from retail merchants. When the full implications of the debt creation and

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\(^7\) N.M. Stat. Ann. § 66-1-18(e) (2d Repl. 1972) provides that "all partners have equal rights in the conduct of the partnership business." Every partner is thus an agent of the partnership and may bind the partnership for all acts within his apparent authority unless the partner in fact has no authority to do a certain act and the third party with whom he is dealing knows of his lack of authority. See in regard to the latter provision, N.M. Stat. Ann. § 66-1-9(1) (2d Repl. 1972).

\(^8\) See the fuller discussion of the community debt collection provision in the text accompanying notes 44-48, supra.
collection provisions of the new law are understood by New Mexico creditors and their lawyers, credit should be readily extended to either spouse alone where the community's credit rating justifies it. Beyond exercising the general unsecured credit of the community, Subsection (A) allows either spouse alone to sell untitled personal property of the community, with the exception of "commercial" community personal property which is covered by the husband-management presumption of § 57-4A-7.1. Thus, either alone may convey good title to furniture, clothes and any other untitled personal property not used in a business enterprise.

Finally, it should be noted that under the combined provisions of this subsection and Subsection (C), discussed below, either spouse alone clearly has full power to manage any property held in the name of both spouses if the names are joined by the word "or". Thus, under the new act, a stock account held in the names of "John Doe or Mary Doe" may be managed by either spouse alone, and a broker who accepts the order of either cannot be held liable for so acting. Possibly the same is true if the account is titled "John Doe and Mary Doe," due to a drafting error late in the session. (See the fuller discussion of this possibility under the explanation of Subsection (C), below.) However, the importance of the use of the word "or" to insure that joint and several management powers are accorded where the spouses desire it in the management of accounts or of titled personal property, should be stressed. If title is taken in only one spouse's name, management of the property will be governed by the provisions of the next subsection, (B).

B. Separate Management By One Spouse

Subsection (B) is unique among the newly enacted "equal" management provisions of community property states. In Arizona, California and Washington, all of which provided in 1973 for "equal" management of community personal property, the new management laws are one sentence long and very similar to the provisions of Subsection (A) of this section, but provide for no exceptions to their grants of "equal managements" rights to both spouses. The Bar Committee in New Mexico itself started with such a section. But, in the drafting and revision process, the Committee began to question how such a simple provision would operate in the realities of the commercial world. The problems which prompted the Bar Committee to include Subsections (B) and (C) in the management section included the following:

1. A husband's name alone is on the title to the family automobile, which is unquestionably community property. Would the wife, under a provision which gave each spouse "equal management powers" over community property, have power to convey title to the car?

2. A bank account is held in the wife's name alone, into which she deposits her weekly paycheck. The husband presents himself at the bank and demands that, since the money in the account is clearly community property which he has an "equal" right to manage under the new law, he be allowed to draw checks on the account also. Is the bank liable to the husband if it refuses his request?

3. A life insurance policy is owned by the husband alone. Premium payments are sent to the company on checks drawn on a bank account held in the husband's name alone. The named beneficiary of the policy is the couple's only child. The wife writes to the insurance company asking that it change the named beneficiary to herself, stating that the policy is in fact community property and that, under the 1973 act, she has the express right to "equal" management power over the policy. Is the insurance company liable to the wife upon the husband's death and payment of the policy proceeds to the only child for its failure to make the wife the named beneficiary of the policy?

4. A stock account opened after July 1, 1973, is community property, but held in the wife's name alone. While she is on an extended out-of-town trip and unreachable by telephone, the IBM stock in the account drops 22 points in one day. The husband calls the broker ordering him to sell the stock immediately; the broker refuses, saying he can only take orders from the wife. The stock drops another 60 points in the next two days. Under an "equal management" provision, is the broker liable for failing to take the husband's instructions as to the management of community property?

In each of these situations, and countless others which could be imagined, a third party—whether the would-be purchaser of an automobile, a bank, an insurance company, or a stock broker—is being asked to judge whether the property held in the name of only one of the spouses is in fact community property, over which arguably a one sentence "equal management" provision would give the other spouse management rights, or whether it is the separate property of the named owner, over which only the owner has management power. Although in all probability, both basic contract law and the law of negotiable instruments, where applicable, would give third parties the right to deal only with the spouse named on the title, the existence of these problems and the dangers they posed for third parties caught between conflicting instructions from spouses made
enactment of a special provision which attempted to delineate management powers in such situations advisable. Thus, Subsection (B) was drafted during the opening week of the 1973 session in the attempt to cover such problems. The provision incorporates what was believed to be the simplest, although perhaps not the most equitable, solution to the problem: it gives management powers, as distinguished from ownership rights, over property held in the name of only one spouse to that spouse alone. Third parties are thus protected in their dealings with only one spouse from the possibility that the other will claim management powers over the property on the ground that it is community property subject to the spouses' "equal" management. Although the language of Subsection (B) is far from perfect, it is believed that it represents an advance over the other community property states which have attempted to draft equal management provisions and which have totally ignored such problems.

Subsection (B)(1) incorporates the phrase "document of title" in stating that any spouse named alone on such a document has sole management powers over the property represented by it. Obviously, car titles are covered by this provision. What else is covered is a question that will have to be answered in litigation or in amendment of the statute in subsequent legislative sessions. Although the phrase "document of title" is used in § 50A-1-201(15), adopted from the Uniform Commercial Code, its definition there makes it fairly obvious that a broader definition is intended in this section.82

Further evidence that a broader definition than that contained in the UCC is intended for the phrase may be found from the use of the phrase "document or certificate" immediately following subsection (B)(2). Thus, stock certificates representing ownership clearly would be covered under this section. The application of the phrase most consistent with the intent of the Bar Committee draftsmen who invented it, if not the New Mexico Legislature, is to any situation where a paper title represents ownership of an item of personal prop-

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82. N.M. Stat. Ann. § 50A-1-201(15) (1953) defines the term "document of title" as used in the Uniform Commercial Code. That section provides that:

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

Quite obviously, the phrase "document of title" used in the Community Property Act is not intended to have such a limited commercial definition.
erty itself—car titles and stock certificates being the two most obvious examples.

In Subsection (B)(2), a spouse “named or designated in an agreement with a third party” is the only spouse who can manage the property which is the subject of the agreement. This language was intended to cover those situations where a formal document or certificate of title is not present but where both commercial law and practice dictate that only the named spouse be given management powers over the property. Examples of “agreements” covered by this subsection are contracts with insurance companies, which generally state that only the owner of the policy may change the named beneficiary, borrow against, or otherwise deal with the policy; stock accounts, which are opened under agreements or contracts between the customer and the brokerage firm which generally recognize the exclusive right of the customer to handle the account; and bank or savings and loan accounts, again generally opened by requiring the signature of the customer on an agreement which obligates the institution to recognize only the named party as having power to manage the funds in the account.

Thus, Subsection (B) attempts to recognize present commercial law and practice by giving sole management power over the property described in the section to the spouse in whose name it is held, regardless of the fact that the property may be community property, legal ownership of which is in both spouses.

It should be noted that the section makes no provision for the spouse not named on an account to gain access to management of what is in fact community property. It is entirely possible for a husband, the only wage-earner in a majority of marriages, to place the paycheck made out to him alone in a checking account in his name alone, thus effectively depriving his wife of management rights to property over which she legally has one-half ownership rights. Although this problem was considered at great length by the Bar Committee, no simple, commercially workable solution was apparent. As matters stand, the statute protects third parties from recognizing the rights of a non-named spouse to management of property, and in fact probably subjects third parties to liability if they do recognize such rights against the wishes of the spouse in whose name the property or account is held. The non-named spouse’s only re-

83. In 1970, almost forty percent of married women worked outside the home for compensation; over sixty percent did not. Thus, in the majority of marriages today, the husband is the only wage-earner. See the New York Times Almanac 483 (1973) and Hedges, Women Workers and Manpower Demands in the 1970's, 93 Monthly Labor Rev., June, 1970, at 19.
course is a possible suit against the other spouse for a declaration that the property is community property over which the spouses should share management rights. However, whether prosecution of a suit on this theory would be allowed in New Mexico or any other state is a completely unlitigated, untried question, and the explicit separate management provisions of Subsection (B) may make winning such a suit more difficult in New Mexico than it would be in Arizona, California or Washington. Also, since such a suit would probably be brought only when the parties were near divorce, this procedure, even if successful, is not likely to be tried often.

It may be noted, however, that this aspect of the statute's application raises a possible constitutional problem under the Equal Rights Amendment. That problem, simply stated, is whether, in a society in which 60% of the married women do not work, a legal system which accords management rights solely to the party who earns a paycheck, making the non-working wife totally dependent on her husband's goodwill for any right to manage the portion of the property which she theoretically owns, in fact provides "equality of rights under law." Under a long line of Supreme Court decisions in the area of racial discrimination, laws "neutral on their face but discriminatory in impact" have been held violative of the Equal Protection Clause. The same question is present here where total management power over property which is legally "owned" by both spouses is given by law to the spouse who earns the paycheck.

A second constitutional problem is present in Subsection (B). As has been noted, all property acquired by married women by an "instrument in writing" prior to July 1, 1973, was, under the explicit provision of § 57-4-1 which was grandfathered into the new act by § 57-4A-6, the separate property of the married woman. Thus, to avoid giving property to their wives under these sections, New Mexico husbands necessarily either held the property in their names alone, in which case it remained community property, or held it in

84. See the text accompanying note 29, supra, which discusses the original Spanish community property law to the effect that the spouses were free to maintain suits against each other during marriage. See also de Funiak & Vaughn, supra note 8, at § 151 endorsing the allowance of such suits by courts in community property states.

85. See, for example, Gaston County v. United States, 395 U.S. 285 (1969), holding a North Carolina literacy test invalid because black persons had been systematically denied access to the state's educational system and thus could not pass the test; Gomillion v. Lightfoot, 364 U.S. 339 (1960), striking down an "ostensibly neutral classification" which operated to discriminate against the right of blacks to vote; and Lane v. Wilson, 307 U.S. 268 (1939). See also in this area, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Green v. County School Board, 391 U.S. 430 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); and United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir., 1966).
the names of both spouses. Under the decision in *August v. Tillian*, the latter course was potentially dangerous. The wisest legal advice for husbands, then, prior to July 1, 1973, was to take title to all property in their names alone, to avoid any possibility of later having been found to have given all or a portion of it to their wives as their separate property. Given this situation, which remains the law as to all property acquired prior to July 1, 1973, under the explicit provisions of § 57-4A-6, the constitutional problem is that Subsection (B) now gives management rights to all property held in the name of only one spouse to that spouse alone. In many situations, then, the husband will have been positively coerced by prior statutory and decisional law to take title in his name alone in order to preserve its community character. Under the new statute, his sole management power over such personal property continues under the explicit provisions of Subsection (B) of § 57-4A-8. Again, when this provision is scrutinized, it may be found to be "neutral on its face, but discriminatory in impact."

These two possible constitutional problems can be resolved by the courts only after the contours and requirements of an Equal Rights Amendment have been more thoroughly litigated and commented upon.

**C. Joint Management By Both Spouses**

Subsection (C) requires that both spouses join in the management of community personal property which is evidenced by a document of title where their names are joined by the word "and". In the many changes which the management sections of Senate Bill 8 went through during the 1973 Session, the words contained in Subsection

86. 51 N.M. 74, 178 P.2d 590 (1947).
87. In *Tillian*, the New Mexico Supreme Court held that a conveyance of real property to "George and Rose Tillian, husband and wife" gave the wife her interest as her separate property, while the husband took his interest as community property in which the wife had a one-half interest. Thus, under the decision, any such conveyance made prior to the effective date of the 1947 amendment to N.M. Stat. Ann. § 57-4-1 (1953), which overruled *Tillian*, is arguably held ½ by the wife and ½ by the husband; the word "arguably" is used because of the "rule of property" versus "rule of evidence" problem discussed at length in the text accompanying notes 50-51, supra. Similarly, because the overruling of *Tillian* was accomplished only as to deeds in which the husband and wife were "described as husband and wife," arguably any deed made simply to "John and Mary Doe" without describing them as husband and wife, would remain within the rationale of the *Tillian* decision.

Because the former N.M. Stat. Ann. § 57-4-1 (1953) under which *Tillian* was decided applied by its terms to both real and personal property, the term "instrument in writing" in that section cannot be construed to mean only deeds to real property. Thus, the practical effect of the section and the decision was, as stated in the text, to make cautious New Mexico attorneys advise their clients to take title to all property, real and personal, in the husband's name alone to avoid coming within the ambit of *Tillian* and the express provisions of N.M. Stat. Ann. § 57-4-1 (1953).
(B)(2) concerning an agreement with a third party were inadvertently dropped from the language of Subsection (C). By its terms, therefore, it requires joinder of the spouses only where what can be construed to be a "document of title" is involved and not where both spouses are named in an agreement with a third party. It is clear, however, from the general scheme of this section that the words should be inserted at the next session of the Legislature to avoid possible problems for third parties. For instance, if a stock account is held in the name of "John Doe and Mary Doe," and Mary Doe alone calls the broker and orders IBM stock to be sold, is the broker obliged to obtain John Doe's consent before executing the order? If the broker refused to sell on Mary Doe's order alone, would he be liable for any later drop in the stock's value? Under the strict wording of the present statute, it would appear that any agreement with a third party where both spouses are named on the account would fall under the general "equal" management provisions of Subsection (A), regardless of whether the parties' names are joined by the word "or" or "and". The broker then, should accept either spouse's orders concerning the account, as should any bank, insurance company or other third party where both spouses are named on the account. However, as noted above, this results from an inadvertent technical mistake in the drafting of this section, and should be corrected by subsequent legislation.

57-4A-9. JOINER OF MINOR SPOUSE IN CONVEYANCES, MORTGAGES AND LEASES

A married person under the age of majority may join with his or her spouse in all transactions for which joinder is required by section 57-4A-7 NMSA 1953 and such joinder shall have the same force and effect as if the minor spouse had attained his or her majority at the time of the execution of the instrument.

This section broadens the language of old § 57-4-4, which allowed a minor wife, but not a minor husband, to join in conveyances and mortgages affecting community real property. Under the new act, both minor wives and minor husbands will be able to convey real property owned jointly by them. The section was retained and broadened to accord with the requirements of the Equal Rights Amendment because it allows the sale, conveyance or mortgage of real property by a minor spouse without the expense and delay of having a guardian ad litem appointed by a district court to act on the minor's behalf. It should be noted, however, that under the new act two minor spouses may sell, convey, mortgage or lease real property...
without the appointment of a guardian, a result not possible under prior law.

At the time this section was drafted, the personal property management section contained no joinder requirement; Subsection (C) of § 57-4A-8 was added in the last days of the session, and this section was not amended to reflect the change. This is a minor problem which should be corrected in a subsequent legislative session.

57-4A-10. DISPOSITION AND MANAGEMENT OF REAL PROPERTY WITHOUT JOINDER AND MANAGEMENT OF COMMUNITY PERSONAL PROPERTY SUBJECT TO MANAGEMENT OF ONE SPOUSE ALONE WHERE SPOUSE HAS DISAPPEARED

A. If a spouse disappears and his location is unknown to the other spouse, the other spouse may, not less than thirty [30] days after such disappearance, file a petition setting forth the facts which make it desirable for the petitioning spouse to engage in a transaction for which joinder of both spouses is required by section 57-4A-7 NMSA 1953 or to manage, control, dispose of or encumber community personal property which the disappearing spouse alone has sole authority to manage, control, dispose of or encumber under section 57-4A-8 NMSA 1953.

B. The petition shall be filed in a district court of any county in which real property described in the petition is located or, if only community personal property is involved, in the district court of the county where the disappearing spouse resided.

C. The district court shall appoint a guardian ad litem for the spouse who has disappeared and shall allow a reasonable fee for his services.

D. A notice, stating that the petition has been filed and specifying the date of the hearing, accompanied by a copy of the petition, shall be issued and served on the guardian ad litem and shall be published once each week for four [4] successive weeks in a newspaper of general circulation in the county in which the proceeding is pending. The last such publication shall be made at least twenty [20] days before the hearing.

E. After the hearing, and upon determination of the fact of disappearance by one spouse, the district court may allow the petitioning spouse alone to engage in the transaction for which joinder of both spouses is required by section 57-4A-7 NMSA 1953 or to manage, control, dispose of or encumber community personal property which the disappearing spouse alone has authority to manage, control, dispose of or encumber under section 57-4A-8 NMSA 1953.

F. Any transfer, conveyance, mortgage or lease authorized by the district court pursuant to subsection E of this section shall be confirmed by order of the district court, and that order of confirmation
may be recorded in the office of the county clerk of the county where any real property affected thereby is situated.

This section replaces § 57-4-5, which provided for the appointment of the wife as head of the community in four situations: (1) where the husband was non compos mentis; (2) where the husband was an habitual drunkard; (3) where the husband had abandoned her; and (4) where the husband had been imprisoned for over a year for a felony. Of these, three were thought to be adequately covered by statutes already in existence, and so were simply deleted from the community property statutes. Sections 32-2-1 et seq. provide for the declaration of incompetency of a spouse who is an habitual drunkard or is non compos mentis; § 32-2-7 therein allows a district court to order the sale, lease, conveyance or encumbrance of any property, real or personal, owned by the incompetent. This statute adequately covers the first two situations, and a district court order allowing for a transaction requiring joinder of both spouses under § 57-4A-7 or for management of property held in the name of the other spouse alone can be obtained under its provisions where appropriate.

Because a felon is competent to sell real and personal property, the Bar Committee saw no reason to retain a procedure for obtaining a court order to sell or manage property for which joinder is required or which is held in the felon's name alone. Accordingly, that ground for district court action found in former law was dropped from this section.

The only portion of former law retained in the new act, then, was the provision allowing appointment of the wife to manage community property where the husband had abandoned her. This provision, of course, was broadened to include abandonment by either spouse, not just the husband. Because it was thought that legal "abandonment" might be hard to prove in a particular case, the word "disappearance" was substituted for it. Thus, under the new act, either spouse may come into district court and show that the other disappeared more than thirty days prior to the date of petition, and that the petitioning spouse does not know of the other's location. When the remaining provisions of the section have been complied with, a district court may issue an order validating a transaction for which joinder of the spouses would otherwise be required or allowing the remaining spouse to manage community property held in the name of the disappearing spouse alone.

It may be noted that this section does not cover the problem of management of property of a spouse who is a prisoner of war or missing in action. In the Bar Committee's original draft, provisions
were made in this section for those contingencies as well as for outright disappearance, but the Equal Rights Committee of the Legislative Council, in its discussion of the bill before the 1973 session began, felt that such provisions might unduly upset husbands who returned home to find that the wife had sold the family home. Accordingly, the provisions were deleted from this section. However, during the Session, provisions for management of property of spouses who were prisoners of war or missing in action were enacted in a separate bill, and are now codified at § 57-4-11. Thus, although not included in the Community Property Act of 1973, an escape hatch from the joinder requirements of § 57-4A-7 and from the separate management provisions of § 57-4A-8(B) does exist where spouses are prisoners of war or missing in action and the remaining spouse needs to take action with regard to community property.

Finally, it might be noted that Subsection (F) of Section 57-4A-10 was inserted to remind attorneys who obtained orders pursuant to this section that such orders relating to real property should be recorded in the county where the property is located, so that title examiners and attorneys rendering title opinions will know that a conveyance of real property signed by only one of the spouses is nonetheless valid.

57-4A-11. JUDGMENTS TO BE RECORDED

All orders rendered pursuant to section 32-3-7 NMSA 1953 authorizing the transfer, conveyance, mortgage or lease of community real property or other real property owned by the spouses as cotenants in joint tenancy or tenancy in common may be recorded in the office of the county clerk of the county where any real property affected thereby is situated.

Like Subsection (F) of § 57-4A-10, this section was included to remind attorneys who obtained district court orders under the incompetency statute allowing the sale or mortgage of real property that such orders should be recorded in the county in which the real property is located in order to avoid future title problems relating to the property. Like the earlier provisions, it will allow title examiners to find a record of the district court proceedings, and thus clear title to real property conveyed by one spouse alone pursuant to such proceedings.

CONCLUSION

The Bar Committee which worked on the new act tried to strike a
compromise between dealing solely with those problems which arose because of the Equal Rights Amendment, and clarifying difficult areas of New Mexico community property law. Obviously, many problems were left untouched: the transmutation question in New Mexico, the lack of recognition of the common-law marriage in this state and its attendant property difficulties, as well as specific decisions concerning the characterization of property as community or separate with which the Committee may not have agreed had they been considered. However, the attempt was made to enact a fairly comprehensive community property act, which could be understood by lawyers and lay persons reading it for the first time. Whatever the New Mexico Bar's final verdict as to the wisdom of each of the specific decisions made by the draftsmen, it is hoped that the new act in its entirety will be thought an improvement over former law.

89. See note 35, supra, for a brief discussion of the transmutation problem raised by New Mexico Supreme Court decisions.

90. The New Mexico Supreme Court held in In re Gabaldon's Estate, 38 N.M. 392, 34 P.2d 672, 94 A.L.R. 980 (1934), that common law marriages were not valid in New Mexico and would not serve as a basis for establishing rights in property accrued during the time the spouses cohabited. The failure to recognize either the common law or a putative marriage as a basis for acquiring property rights may in fact be discriminatory against women under the theory put forward in the text at note 84, supra, concerning rules "neutral on their face, but discriminatory in impact." Since over 60% of the women in a common law or putative marriage will not be wage-earners, they may in fact be discriminated against by allowing the man with whom they live to have ownership rights to one hundred percent of the property he earns during the cohabitation.

91. One decision which has been much criticized by commentators, and appears to be out of line with the rule in other community property jurisdictions, is Richards v. Richards, 59 N.M. 308, 283 P.2d 881 (1955), holding that a workman's compensation award was the separate property of the injured workman, not community property. For a discussion of the treatment of this question in other community property states, see de Funiak & Vaughn, supra note 8, at § 68.