Comments

LIABILITY OF THE COMMUNITY FOR ALIMONY FROM A PRIOR MARRIAGE

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"The obligations of marriage cannot be thrown aside like an old coat when a more attractive style comes along."[1] With this language, the Supreme Court of Arizona, in *Gardner v. Gardner*,[2] held that although the alimony award of a divorce decree which terminated a prior marriage is not a "contracted debt" within the meaning of Section 25-216B of the Arizona Revised Statutes,[3] which renders the community property liable for community debts contracted by the husband during marriage, nevertheless the community property of the second marriage is liable, as a matter of public policy, for the alimony obligations.

The husband, in this case, was divorced from his first wife in Nevada. A support order was entered which was later reduced to a judgment in Nevada. Meanwhile, the husband remarried and established his domicile in Arizona with his new wife. The first wife subsequently reduced the Nevada money judgment to an Arizona money judgment and the husband counterclaimed for a declaratory judgment exempting the community property of the second marriage from the Arizona judgment. Both parties moved for summary judgment on the counterclaim. The trial court entered judgment for the first wife and was affirmed by the Supreme Court of Arizona which, when confronted with the determination of the extent to which the first wife's judgment for alimony was collectible out of the community property of the second marriage, felt that as a matter of public policy the prior alimony obligation should reach all of the community property of the second marriage.

I. BACKGROUND OF COMMUNITY PROPERTY LAW IN ARIZONA

The community property law of Arizona is a creature of the legislature,[4] influenced largely by the community property laws of Spain and Mexico.[5] "As far back as the Fuero Real (Royal Code) of 1255 it was provided that neither spouse should be liable for the antenuptial debts of the other and that the community property should be liable only for the debts contracted during the marriage for the community benefit."[6]

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[1] Gardner v. Gardner, 95 Ariz. 202, 204, 388 P.2d 417, 418 (1964).

[2] 95 Ariz. 202, 388 P.2d 417 (1964).

[3] ARIZ. REV. STAT. ANN. § 25-216B (1956) reads: "The community property of the husband and the wife is liable for the community debts contracted by the husband during marriage unless specially excepted by law."

[4] Blackman v. Blackman, 45 Ariz. 374, 43 P.2d 1011 (1935).

[5] Lyons, *Development of Community Property Law in Arizona*, 15 LA. L. REV. 512 (1955).

[6] de Funiak, *Review in Brief of Principles of Community Property*, 32 KY. L. J. 63 (1943).

The extent of liability of the community property to satisfy the separate debts or obligations of one of the members of the marital community is based upon the Spanish law and is, in substance, that the interest of the innocent member should never be liable.[7]

The source of the present Arizona community property liability statute[8] was a bill signed into law in Texas on March 13, 1841, which defined "the marital rights of parties,"[9] and declared its purpose to be "to repeal the Mexican law and adopt the law of England."[10] The present Texas community property liability statute was adopted in 1856 and reads: "The community property of the husband and wife shall be liable for their debts contracted during marriage except in such cases as excepted by law."[11]

Except for the word "their," House Bill 73,[12] which was unanimously passed by the House and Senate of the Fourteenth Arizona Territorial Legislature, and signed into law on February 28, 1887, was the same and continues presently in its original form.[13] The alteration of this single pronoun conformed the law in Arizona with the Mexican law which governed community property in Arizona at that time.[14] The Arizona statutes have continued Mexican rule, except that where the Mexican law lists two specific exceptions to the rule,[15] Arizona provides that the liability of the community is limited to community debts only "unless specially excepted by law."[16]

With the exception of Louisiana, the community property states have derived their community property laws from a common source,[17] but the conclusions reached by their courts have been widely diverse, resulting in a departure from the liberal meaning of the original community property laws.[18]

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[7] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 448 (1943).

[8] ARIZ. REV. STAT. ANN. § 25-216B (1956).

[9] A DIGEST OF THE LAWS OF THE REPUBLIC AND STATE OF TEXAS, art. 2422(3), (1850).

[10] *Ibid.*

[11] VERNON'S TEX. REV. CIV. STAT., art. 4620 (1960).

[12] The word "their" was changed to the words "the community."

[13] ARIZONA TERRITORIAL LEGISLATIVE JOURNALS, FOURTEENTH TERRITORIAL LEGISLATURE, LAWS OF ARIZONA TERRITORY, ch. 3, § 21 (1887).

[14] Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States,* 11 WASH. L. REV. 1, 3 (1936). Arizona was acquired from Mexico by the Treaty of Guadalupe Hidalgo in 1848. Under normal principles of international law, the Spanish-American law previously in force, continued in effect. With the possible exception of the year 1864, community property in Arizona was governed by Mexican law from 1848 except where changed by statute.

[15] 1 COMPENDIUM OF THE LAWS OF MEXICO, art. 187 (1910).

[16] ARIZ. REV. STAT. ANN. § 25-216B (1956).

[17] The community property states of Arizona, California, Idaho, Nevada, New Mexico, and Washington all took their community property laws from the State of Texas. For a good discussion, see Mortenson v. Knight, 81 Ariz. 325,329, 305 P.2d 463,465 (1956).

[18] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 448, 453-462 (1943). There is an interesting discussion and comparison of the historical development

II. Possible Solutions

Several different answers have been given to the question of whether community property may be reached to satisfy the alimony obligations of a previous marriage.

A. *All Community Property Is Liable.* — The general rule in the majority of community property states places the alimony judgment in the same position as all other separate debts, and subjects the second community to such liability.[19] The husband's creditors can look "to the community property for the satisfaction of liabilities incurred by the husband, whether before or after marriage, in tort or in contract, as manager of the community or in his individual separate capacity."[20]

The Arizona Supreme Court initially followed this principle in *Villescas v. Arizona Copper Co.*[21] in 1919, but overruled that case in *Cosper v. Valley Bank*[22] in 1925. The court in the *Cosper*[23] case diligently pointed out that Arizona has a different theory of community rights than either Texas or California.[24] The California courts have tended "to regard the community property as actually the husband's property, regardless of lip service rendered to community property prin-

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of community property law in the various community property states in the opinion of Judge Magruder in De La Torre v. National City Bank of N.Y., 110 F.2d 976, 980 (1st Cir. 1940), where the court was required to review a decision of the Supreme Court of Puerto Rico relating to the community property law of Puerto Rico.

[19] III Vernier, American Family Laws 223 (1935).

[20] *Id.* at 224.

[21] 20 Ariz. 268, 179 Pac. 963 (1919). In this case the court held that the community property was liable for a criminal fine charged to the husband.

Dean John D. Lyons, in his Louisiana Law Review article, states that:

> The court . . . seems to be chiefly influenced by the conviction that any other rule would be unfair to creditors, who must be protected from what it calls 'secret contracts and agreements of the highly confidential relation of the spouses.' Presumably this refers to agreements between husband and wife whereby separate property may be transmuted into community. Nothing is said about the unfairness to the marital partnership of having its assets applied to pay debts which are in no way connected with its affairs. [Lyons, *Development of Community Property Law in Arizona*, 15 La. L. Rev. 512, 520 (1955).]

[22] 28 Ariz. 373, 237 Pac. 175 (1925).

[23] *Ibid.*

[24] *Id.* at 376, 237 Pac. at 176, states that there are three different positions as to the nature of the community estate taken from the community property states. The first was adopted by California and later copied by Nevada, Oregon, Idaho, and New Mexico. This position is that the wife owns merely a hope or expectancy, subject to be defeated at any time during coverture by the husband who may convey or incumber the community property at will.

The second position is that taken by Texas which holds that the wife has a vested equitable right in the community estate. Legal title and the right of disposition rests solely with the husband, who can convey or incumber the community property without the wife's consent. In cases of fraud or collusion to deprive her of her equitable rights, the wife can take action to protect them.

Arizona is placed in the third class of cases with Washington. The wife's interest in the community estate is equated to the interest of a partner in partnership property — a vested legal one. For reasons of business the stitute makes the husband the agent of the community, to handle and dispose of the community personalty for the benefit of the community.

ciples."[25] Other jurisdictions interpret their statutes in this manner in order to make the system function fairly. The result is not always strictly logical.[26] The Arizona Supreme Court reaffirmed the authority laid down in the *Cosper*[27] case by asserting in *Forsythe v. Paschal*[28] that the family as a whole is the state's foremost concern and that the mere possibility that community assets and earnings might be diverted from this purpose to satisfy debts which in no way are connected with the family would do much more harm than good.

B. *Second Community Is Not Liable.* — This solution would place an alimony obligation in the same category as all other separate debts and obligations of one spouse.[29] This was considered to be the settled rule in Arizona previous to the *Gardner*[30] case, that the community property is not chargeable with the separate debts of one of the spouses,[31] although upon the dissolution of the community, because of divorce or death, debts are chargeable to the debtor's one-half interest.[32]

Prior to 1964, the law of Arizona was accepted as being that the community was not liable for the obligation of one of the spouses,

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[25] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 470 (1943).

[26] III VERNIER, AMERICAN FAMILY LAWS 223 (1935):

> Though the joinder of both spouses may be required in a conveyance of community real property, the husband may indirectly dispose of the same by charging it with his separate obligations. Though the wife may be conceded to have a present vested interest in community property, such interest may be seized and sold to satisfy obligations from which neither she nor the community derived any benefit.

[27] 28 Ariz. 373, 237 Pac. 175 (1925).

[28] 34 Ariz. 380, 386, 271 Pac. 865, 867 (1928).

[29] See Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949).

[30] Gardner v. Gardner, 95 Ariz. 202, 388 P.2d 417 (1964).

[31] Babcock v. Tam, 156 F.2d 116 (9th Cir. 1946); Barr v. Petzhold, 77 Ariz. 399, 273 P.2d 161 (1954); Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948); Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940); McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181 (1938); Payne v. Williams, 47 Ariz. 396, 56 P.2d 186 (1936); Perkins v. First Nat. Bank of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1936); Jackson v. Griffin, 39 Ariz. 183, 4 P.2d 900 (1931); Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865 (1928).

For a good discussion of the doctrine of community debts: see Marsh, *California Family Law—A Review*, 42 CALIF. L. REV. 368, 381 (1954) where the author concludes by saying:

> It would seem that any court proposing to adopt the 'community debt' doctrine for the first time would have to be convinced of some definite social benefit resulting therefrom to justify its action. But to my knowledge, no one has ever demonstrated any such social benefit arising from this doctrine or suggested that the stability of marriage or the welfare of the family is any greater in the States of Washington and Arizona than in any of the other 46 States of the Union.

[32] Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940); Jackson v. Griffin, 39 Ariz. 183, 4 P.2d 900 (1931).

whether that obligation be one of contract,[33] one of tort,[34] or one imposed by the state as a duty to support.[35]

This result would have been consistent with *Maricopa County v. Douglas*,[36] which held in 1949 that the community was not liable for the wife's separate statutory obligation to support her aged mother. The Supreme Court of Arizona in that case stated "it would be against the policy of preserving the community to allow a separate judgment to be satisfied out of the community property of the parties with the consequences of the dissolution of the community property and may [*sic*] — perhaps the marriage itself."[37]

C. *Husband's Undivided One-Half Share In The Second Community Is Liable.* — It appears to be the law of Louisiana that the alimony judgment is collectible out of the husband's undivided one-half share of the second community.[38]

This view is "fair and equitable for the wife and children of the first marriage,"[39] and at the same time avoids "the emasculation of the community property principles."[40] Professor de Funiak describes this as basic Spanish community property law:

> It is undoubted . . . that where a spouse having a duty or obligation imposed by law had insufficient separate funds at the moment to meet such duty or obligation, it might be met from the *spouse's share* in the community property, provided that the other spouse suffered no detriment therefrom and that expenditures by one spouse from the common fund

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[33] Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175 (1925), which held that a suit to quiet title by a grantee of real property against a defendant claiming a judgment lien against the community property of the plaintiff's grantor did not lie, where the debt, on which the judgment was based, was incurred during coverture, and there was no evidence that it was anything but a community debt. See also Perkins v. First Nat. Bank of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1936), which held that the community property is not liable for the husband's separate liability on a contract as surety for a guarantor of a chattel mortgage; Payne v. Williams, 47 Ariz. 396, 56 P.2d 186 (1936), which held that the community property is not liable for an accommodation note signed by the husband which did not benefit the community; Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865 (1928), which held that community property is not liable for debts contracted before marriage by the wife, but represented by a note executed after marriage.

[34] Babcock v. Tam, 156 F.2d 116 (9th Cir. 1946) held that community property was not liable for the husband's automobile accident while driving out of state for the purpose of selling his separate property; Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948) held that community property was not liable for the husband's act of wrongfully conspiring to bring about another's unlawful arrest and imprisonment for the purpose of depriving him of custody of his minor child.

[35] See Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949), where the court held that community property is not liable for an obligation imposed by law to support the wife's aged mother.

[36] 69 Ariz. 35, 208 P.2d 646 (1949).

[37] *Id.* at 43, 208 P.2d at 651.

[38] Bender v. Pfaff, 282 U.S. 127 (1930); Fazzio v. Krieger, 226 La. 511, 76 So. 2d 713 (1954); Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926).

[39] Lyons, *Development of Community Property Law in Arizona*, 15 LA. L. REV. 512, 524 (1955).

[40] *Ibid.*

> were properly charged against that spouse's share. . . . In the case of the ordinary separate creditor, his rights to reach his debtor's properties were subordinated to the well-being and interests of the family which required that the community property be kept intact for its benefit during the marriage. But obligations imposed by the state itself took priority over everything else.[41] (Italics supplied)

This alternative would treat the common property, in the case of public obligations, as divisible, while continuing to abide by the boundaries of our basic community property laws and customs for purely private obligations.[42]

D. *Equitable Portion Of The Community Personal Property Is Liable.* — In the state of Washington the community personalty only is liable for the alimony judgment, subject to "adjustment and allocation" by a court "upon a showing by the present wife of necessitous circumstances."[43] The proponents of this solution contend that it best protects the previously established public obligation to pay the alimony without intruding on the home (real property), which is essential to the second marriage.

This has been criticized as resting upon unsound principles. Even though the husband has much broader control over community personal property, this control is only as an agent, and it gives him no greater right or title to the personalty than the wife's vested interest.[44] Furthermore, there are homestead[45] and other exemption laws[46] in Arizona pertaining to execution, attachment, and garnishment which were passed for the specific purpose of protecting that property which is essential to the family, and these have been recognized as being sufficient to protect the family. To the extent that such laws protect the real property which has been previously designated as the homestead, the Washington solution would only protect real property which is not within the homestead exemption. It can be argued that if such greater protection is needed for the second community, it should be provided by legislative expansion of the exemption laws and not by judicial legislation.

E. *All Community Property Is Liable For Prior Alimony Obligations.* — The Supreme Court of Arizona in *Gardner v. Gardner*[47] held

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[41] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 448, 468 (1943).

[42] Oglesby v. Poage, 45 Ariz. 23, 40 P.2d 90 (1935).

[43] Stafford v. Stafford, 10 Wash. 2d 649, 117 P.2d 753 (1941); Fisch v. Marler, 1 Wash. 2d 698, 97 P.2d 147 (1939); State *ex rel.* Brown v. Brown, 31 Wash. 397, 72 Pac. 86 (1903).

[44] See La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426 (1914), where the court stresses that despite the fact that the husband has much greater control over community personal property, the wife's interest is just as great in community personalty as in community realty.

[45] ARIZ. REV. STAT. ANN. §§ 33-1101 to -1107 (1956).

[46] ARIZ. REV. STAT. ANN. §§ 33-1121 to -1129 (1956).

[47] 95 Ariz. 202, 388 P.2d 417 (1964).

all of the community property liable for the alimony judgment, the court basing its decision on a public policy foundation, distinguishing public obligations[48] from other personal debts, rather than establishing in Arizona the same law as in all of the community property states with the exception of Washington and Louisiana.[49]

By distinguishing between separate voluntary commercial obligations and involuntary obligations imposed by the state for family welfare, the Supreme Court of Arizona sought not to disturb previously well-settled law in Arizona. The court cited several cases which make this distinction,[50] but it made no effort to reconcile *Oglesby v. Poage*[51] (which favored a public liability over the community in enforcing a wife's tax obligation) and *Maricopa County v. Douglas*[52] (which subordinated the public obligation to support a parent). The court did not explain why the husband's alimony obligation to support his first wife should be greater, as a matter of public policy, than a person's duty to support a parent.

One author, some years ago, found this distinction between separate debts contracted by the spouse and his separate obligations which are imposed by law to be inconsistent with the basic community property law and custom in Arizona.[53] He stated:

> [T]his appears to be a distinction without a difference. There would seem to be no principle of community property law under which community property, as such, is free from liability for separate ordinary debts, yet answerable for separate public obligations. Certainly no such principle prevails in Arizona where the community has been held not answerable for a

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[48] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 448, 469 n. 7 (1943): "The mistake should not be made of assuming that a judgment obtained by a creditor against the debtor spouse was, by reason of being a judgment, an obligation imposed by law. It did not come within the meaning of that term."

[49] III VERNIER, AMERICAN FAMILY LAWS 223, 224 (1935):

> Except in Arizona and Washington, the general rule seems to be that the husband's creditors may look to the community property for the satisfaction of liabilities incurred by the husband, whether before or after marriage, in tort or in contract, as manager of the community or in his individual separate capacity. . . . The Louisiana statute . . . seems to forbid the husband's premarital creditors from attacking the community.

For cases illustrating this point, see Greear v. Greear, 303 F.2d 893 (9th Cir. 1962); Godchaux v. United States, 102 F. Supp 266 (E.D. La. 1952); Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941); Holt v. Empey, 32 Idaho 106, 178 Pac. 703 (1919); Ginn v. MacAluso, 62 N.M. 375, 310 P.2d 1034 (1957); Cleveland v. Cole, 65 Tex. 402 (1886); Achilles v. Hoopes, 40 Wash. 2d 664, 245 P.2d 1005 (1952).

[50] Audubon v. Shufeldt, 181 U.S. 575 (1901); Long v. Stratton, 50 Ariz. 427, 72 P.2d 939 (1937); Lewis v. Lewis, 80 Ga. 706, 6 S.E. 918 (1888); Fazzio v. Krieger, 226 La. 511, 76 So. 2d 713 (1954); Fickel v. Granger, 83 Ohio St. 101, 93 N.E. 527 (1910); Haakenson v. Coldiron, 190 Wash. 627, 70 P.2d 294 (1937).

[51] 45 Ariz. 23, 40 P.2d 90 (1935), where the court applied the wife's half of the community property to pay her separate tax obligation.

[52] 69 Ariz. 35, 208 P.2d 646 (1949).

[53] Lyons, *Development of Community Property Law in Arizona,* 15 LA. L. REV. 512, 523 (1955).

separate criminal penalty assessed against the husband, nor upon the wife's separate statutory obligation to support her aged mother.[54]

CONCLUSION

The real problem facing the courts is how to resolve the conflicting public policies of (1) the first marriage and the related alimony obligation of the husband to support the wife and children of the first marriage, and (2) the second marriage and the property relationship between the husband and the second wife. This problem was clearly stated in 1955:[55]

> The principle that community property is not answerable for the husband's separate debts has given rise to some modern problems not present in those community property states which hold to a contrary view. . . . [T]here is the problem of the divorced man who remarries. Is the property of the second community chargeable with the alimony and child support decreed to the wife and children of the first? It is his separate obligation. To charge it to the community is contrary to the rule and unfair, by community property standards, to the wife and children of the second marriage. Yet, to exempt the community property may put him beyond the reach of his legal and moral obligations.

The trial judge in *Gardner v. Gardner*[56] appears to have accepted the reasoning of the last quoted sentence when he differentiated between a judgment for alimony and an ordinary and separate debt, and added that public policy favors the payment of such alimony obligations as much as it favors the protection of an existing community. The Supreme Court of Arizona, in its terse conclusion that obligations of marriage should not be treated as a garment which can be discarded at will when new styles become more attractive, is clearly adopting the approach that public policy requires alimony to be met from any of the husband's available assets.

Just how far the court will extend this doctrine is a matter of pure speculation. It is uncertain what the court would do in a case where the second wife is the sole breadwinner, or where a man has been ordered to pay alimony, remarries, and accumulates a business of some value with his second wife. It is questionable also whether the court would draw this same distinction if there were a third marriage with previous support obligations owed by the husband.

Social policies are not matters of absolute certainty dependent on inflexible premises which point to an inescapable conclusion; they often call for value judgments predicated upon an accumulation of

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[54] *Ibid.*
[55] *Id.* at 521.
[56] Record, p. 95, Gardner v. Gardner, 95 Ariz. 202, 388 P.2d 417 (1964).

experiences within the context of our culture. There is a definite need for an approach which does not attempt to be all-embracing for all future problems, but rather which solves the particular problem before the court on its facts, leaving future cases with different facts to be dealt with as they may arise. The *Gardner* case is most acceptable if regarded as not going beyond such an approach.