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ADMINISTRATION OF A DECEASED WIFE'S INTEREST IN COMMUNITY ASSETS

Jerry A. Kasner*

Modern estate planning practice, emphasizing a minimization of death taxes and probate costs, often discourages the traditional legacy of property by one spouse to the other. Property so passing may be subjected to probate and taxation twice within a short period of time. To prevent this, a surviving spouse may be given only a limited life interest, if any at all, in the estate of the deceased spouse, with the bulk of the beneficial interest passing to succeeding generations. Often the use of the trust device to carry out such a plan results in the selection of independent trustees and executors to achieve certain tax advantages and to provide continuity in the administration of estate assets.

This form of planning for the "splitting" of interest between husband and wife necessarily results in division of the community property upon the death of either. If the husband dies first there are few administrative problems of special significance because the entire community estate is subject to probate administration and jurisdiction. If, however, the wife dies first, the husband's continued management of the community, together with probate administration of her interest in the community estate, produce unusual problems and situations which will be discussed in this article.

THE NATURE AND EXTENT OF A WIFE'S TESTAMENTARY POWER OVER HER INTEREST IN THE COMMUNITY ESTATE

The evolution of the wife's right to make a testamentary disposition of her interest in the community may be considered in terms of the following periods:

1. Pre-1850. The courts relied upon an interpretation of Spanish community property law to the effect that upon the wife's prior

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1 RICE, FAMILY TAX PLANNING 84 (1962).
2 HARRIS, FAMILY ESTATE PLANNING GUIDE § 106, at 248 (1957); SNEE AND CUSAK, PRINCIPLES AND PRACTICE OF ESTATE PLANNING 336 (1961).
3 CAL. PROB. CODE, § 202.
death her interest remained an expectancy until the death of her husband, at which time her heirs succeeded to one-half of whatever was then left in the community.4

2. 1850-1861. The interest of each spouse in the community passed upon death to the heirs of that spouse.5

3. 1861-1923. The wife's interest in the community passed to her husband without probate; therefore she had no testamentary power except in situations involving divorce or separation.6

4. 1923-1927. The wife had testamentary power over her limited interest in the community, comparable to a power of appointment.7

5. 1927-Present. The wife has, in addition to the testamentary power she obtained in 1923, the "present, existing, and equal rights" she obtained in 1927.8

Although the 1923 amendment to section 1401 of the Civil Code, now section 201 of the Probate Code, purported to give each spouse an equal power to make a testamentary disposition of his or her interest in the community, which otherwise would pass to the surviving spouse, there are substantial differences in the treatment of their interests. When the husband dies, the entire community is subject to administration, regardless of whether he exercised his power of testamentary disposition.9 When the wife dies, not only does the husband's interest in the community vest in him without administration, but also any of the wife's interest which she did not dispose of by her will.10 Prior to 1927 this preferential treatment of the husband was consistent with the idea that he was effectively the owner of the community, subject only to the wife's testamentary power. But it seems clear that since 1927 the portion of the wife's interest in the community not disposed of by her will passes to the surviving husband only by reason of descent or succession.11

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4 Panaud v. Jones, 1 Cal. 488 (1851).
5 Cal. Stats. 1850, ch. 103, p. 255, § 11.
7 CAL. CIV. CODE § 1401, as amended by Stats. 1923, ch. 18, p. 29, § 1, now CAL. PROB. CODE § 201; Siberell v. Siberell, 214 Cal. 767, 7 Pac. 1003 (1932); Riley v. Gordon, 137 Cal. App. 311, 30 P.2d 617 (1934).
8 CAL. CIV. CODE § 161a, added by Cal. Stats. 1927, ch. 265, p. 484, § 1.
9 Estate of Coffee, 19 Cal. 2d 248, 120 P.2d 661 (1941).
10 Estate of Kurt, 83 Cal. App. 2d 681, 189 P.2d 528 (1948); 1 CONDEE, CALIFORNIA PRACTICE, Probate Court Practice § 31 at 20 (1955).
The Extent of a Surviving Husband’s Control, Possession and Use of the Community Estate: Knego v. Grover

The establishment in 1923 of the wife’s testamentary power over her share of the community was accompanied by amendments to section 1402 of the Civil Code, which survive substantially unchanged as sections 202 and 203 of the Probate Code. The first portion of Prob. C. 20212 establishes the groundwork for administration of community assets passing from the control of the husband by reason of his death or by reason of his wife’s testamentary disposition. Property so passing will be subject to his debts and to administration in accordance with Division III of the Probate Code. This general proposition was conditioned by the remaining provisions of Prob. C. 202 and Prob. C. 203.

The portion of Prob. C. 202 with which we are principally concerned reads as follows:

... but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had during her lifetime, and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect.

Prob. C. 203 provides in part as follows:

After 40 days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property is claimed by another under the wife's will.

There are differences in the wording of the two sections which may be significant. For example, while Prob. C. 202 grants the husband power to “manage” personal property, Prob. C. 203 does not specifically empower the husband to “manage” real property. Prob. C. 202 allows the husband to deal with the personalty as he did during the lifetime of his wife, while similar authorization is not granted him by Prob. C. 203. However, Prob. C. 203 apparently grants him as much, if not more, control over community realty than would exist during her lifetime under section 172a of the Civil Code. Prob. C. 203 empowers the husband to “dispose” of community realty, while Prob. C. 202 does not. But Prob. C. 202 does grant him the same power over community personalty that he had.

12 Because of repeated citations to particular sections of the California Codes in the text of this article, the author is adopting the following familiar abbreviations:
during her lifetime, and under section 172 of the Civil Code this would include the absolute power of disposition.

The Probate Code sections quoted above were taken almost verbatim from former C.C. 1402. When these sections were combined in the Civil Code, they presented a logical definition of powers and limitations. It would seem reasonable to construe the two sections together, and conclude that there is no essential distinction in the husband’s control over community realty and personalty unless a 40 day notice is filed, cutting off his power to deal with realty.13

Not until 1962 did a California court in *Knego v. Grover*14 give us the first definitive interpretation of the nature and extent of the powers conferred upon a surviving husband by Prob. C. 202 and 203.

The code sections in question must be interpreted as part of the total law governing the wife’s right to make a testamentary disposition of her share in the community property; defining the extent of that share for testamentary purposes; prescribing a procedure governing the time and method by which it may be subjected to administration for such purposes; retaining in the husband a form of management of the community personal property essential to the use of his interest therein; also retaining in him control and possession of all the community property, restricted only to the extent necessary to carry into effect the provisions of his wife’s will, for the evident purpose of enabling him to preserve in the fullest measure commensurate with testamentary disposition both his and his wife’s interest therein; providing a method whereby the beneficiaries under a wife’s will may give notice of their claim to an interest in community real property under control of the husband; and protecting those who deal with him concerning the same where such notice has not been given.15

Prior to this decision little authority existed to guide practitioners in this area, and one author was led to observe that “Some day some lawyer will get some real high-powered litigation on this subject and make us some law.”16 It appears his hope has been realized. The few cases before *Knego* which touched upon the rights of the surviving husband presented a picture of conflict and inconsistency.

In *Makeig v. United Security Bank and Trust Company*17 the surviving husband sued the executor of his wife’s will to recover certain bank deposits which he contended were community property. The court found that part of these accounts were community in

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15 Id. at 144–45, 25 Cal. Rptr. at 164–65.
16 1 CONDEE, op. cit. supra note 10, § 922.
nature, but ordered the executor to pay over only one-half to the surviving husband. Answering the argument that the husband was entitled to possession and control of all community assets under section 1402 of the Civil Code, (now Prob. C. 202) the court commented:

While Section 1402 of the said Code provides that possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry the will into effect, in this case where only $10 is bequeathed to the husband and the entire balance to others, it is without question necessary for the personal representative of the wife in this case to retain possession of the amount subject to her testamentary disposition in order to carry her will into effect, not only to pay her debts, but the costs, charges, and expenses of administration as well as the legacies.\(^{18}\)

In a later case, a husband asserted a similar claim against the executrix of his wife's estate, contending certain assets held by the estate were community property. He argued that, since the wife had not disposed of any community property by her will, he was the owner of such property and entitled to its possession. The court held that the executrix was entitled to possession of all of the decedent's property. It decided that the probate court had jurisdiction to determine whether the assets were in fact community, and, if so, to order the assets transferred to the surviving husband. The opinion is extremely doubtful as to the probate court's jurisdiction to determine title to assets.\(^{20}\) The case is not directly in point in view of the fact the wife had not exercised her testamentary power over community assets. However, this decision is significant because of its broad interpretation of the personal representative's power over assets, community and separate, under Prob. C. 300 and 571.

A third decision more directly in point was Wilson v. Superior Court. The husband and executor were litigating the question of whether an apartment house was community property or separate property of the deceased wife. The executor contended that, even if the property were community, he was entitled to possession. The court rejected this contention, relying on both Prob. C. 202 and 203. It followed a construction of Prob. C. 202 to the effect that the surviving husband retained management powers even though administration was pending as to one-half of the community assets under the wife's will.\(^{22}\) The court also rejected the executor's argument that, as the bonded representative of the estate, it was entitled

\(^{18}\) Id. at 145, 296 Pac. at 676.
\(^{19}\) Parsley v. Superior Court, 40 Cal. App. 2d 446, 104 P.2d 1073 (1940).
\(^{20}\) Cf. notes 58-67 and accompanying text, infra.
\(^{22}\) The court relied upon 3 CAL. JUR. (Supp. 682).
to possession to prevent waste or appropriation of income from the property, reasoning that the courts had ample power to protect the estate.

The Wilson opinion quoted that part of the Makeig decision quoted above, but limited such reference to the question of jurisdiction of a probate court to try title to real property. These two decisions are completely inconsistent on the questions of management, possession and control. Although both are based on Prob. C. 202, Makeig concludes that when a wife makes a testamentary disposition of her interest in the community, that portion so disposed of must be transferred to her personal representative for administration in order to carry out the provisions of her will. Wilson reaches an opposite result. A possible distinction is that Makeig involved easily divisible personal assets, while Wilson involved realty. But the Wilson opinion makes no such distinction and in fact relies almost entirely upon Prob. C. 202, which relates primarily to personal property.

Neither of the above opinions were cited by the court in the Knego decision. But in accord with Wilson the court did not question the right of the surviving husband to possess, control and manage the entire community. Nevertheless, to some extent the rationale of Makeig seems present in part of the Knego opinion:

...the court had authority to direct the defendant-husband to pay over to the administrator of his wife's estate that part of the note payments and the bank account funds in question which were subject to administration, as aforesaid, if it was necessary that the administrator should have possession thereof to carry the wife's will into effect.\textsuperscript{23}

This indicates the following test: community assets should be transferred to the wife’s estate only when and to the extent necessary to carry out the testamentary intent of the wife. It is apparent that the Makeig decision applied the test too broadly, and in so doing virtually eliminated the powers of the surviving husband under Prob. C. 202. However, situations may arise in which probate administration and control over the entire community interest of the wife might be necessary to carry her will into effect, as when the husband’s continued possession and control would result in waste or dissipation.

Prob. C. 202 specifically grants the husband the same power to deal with community personality he had during his wife’s lifetime. His lifetime power, as defined in C.C. 172, includes an absolute power of disposition, limited only as to testamentary dispositions,

transfers without valuable consideration, and sales of certain personal chattels. Similar powers to deal with community realty are granted by Prob. C. 203 and C.C. 172a, except that the wife's consent is required to sales or transfers during her lifetime.

According to one authority California is the only community property jurisdiction in the United States which grants the husband such broad powers. In interpreting the extent of this power as it existed prior to 1927, Justice Holmes declared that the husband could spend community funds as he chooses and "...if he wastes it in debauchery the wife has no redress." While this language is undoubtedly too strong, it is clear that the husband's power during his wife's lifetime is indeed broad, and includes the power to expend or consume community assets for personal debts and expenses. The "present, existing and equal rights" in the community conferred upon the wife in 1927 did not alter this power. In Grolemund v. Cafferata the California Supreme Court held that, regardless of the equal rights of the wife created by section 161a of the Civil Code, the enactment of section 172 of the Civil Code subjected the entire community to "any and all contracts of the husband." He would thus be able to dispose of community assets in the same manner as he could his separate property, short of making a gift or transfer without the consent of his wife when required under C.C. 172 and 172a. Referring to Prob. C. 202, the court further pointed out that upon the death of either spouse, the community would be subject to all of the husband's debts. The principles announced in this decision have never been disputed in subsequent decisions.

If the husband has the unqualified right to subject the entire community to his personal debts and expenses during his wife's lifetime, could he not continue to do so after her death under the authority of Prob. C. 202? In Panaud v. Jones the California Supreme Court held that the interests of a deceased wife's heirs in the community were contingent and defeasible and could be

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26 In managing the community, the husband has always been characterized as a fiduciary. Cf. notes 46-48 and accompanying text, infra.
28 17 Cal. 2d 679, 111 P.2d 641 (1941).
29 Id. at 683, 111 P.2d at 644.
31 1 Cal. 488 (1851).
DECEASED WIFE'S ESTATE

perfected only after the death of the husband. The entire community would be subject to all of the debts of the husband, whether contracted before or after his wife's death. Just over thirty years later in Johnston v. San Francisco Savings Union the same court held that the community dissolved upon the death of the wife. A debt subsequently incurred by the husband would not be a charge against the entire community, although he did have the power to keep alive a debt incurred before his wife's death.

The obvious inconsistencies in these decisions is due to the fact Panaud was based upon a pre-1850 interpretation of Spanish community property law which gave the wife or her successors little more than a bare expectancy in the community until the death of her husband. Johnston, on the other hand, was based upon the 1850 statute, which the court construed as giving the wife an interest in the community which on her death vested absolutely in her heirs. In the latter opinion the court indicated that since death dissolves the community, the surviving husband occupies the status of a surviving, not continuing, partner. As the surviving partner, it would be his duty to settle the affairs of the community, not to impose new burdens upon it. He would therefore have the power to manage and sell community property. These powers would be the same in nature, though not in extent, as those powers he possessed during the lifetime of his wife. As the court had indicated in a prior decision, the surviving husband could contract debts of the community for the "common benefit," which meant debts and obligations necessary to preserve and maintain the community.

Despite the antiquity of the Johnston case and the peculiarities of the law at the time it was decided, its rationale was accepted by the court in the Knego decision as follows: "On the other hand, the debts of the husband referred to in Section 202 do not include those incurred by him after his wife's death which have no relationship to their community property. (See Johnston v. San Francisco Savings Union . . .) The court believed that any other interpretation of Prob. C. 202 would enable the husband to frustrate his wife's testamentary intent. It further concluded that the surviving husband did not have the power to consume his wife's interest in the community by giving it away or using it to pay debts other than those relating to the maintenance or preservation of the

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82 75 Cal. 134, 16 Pac. 753 (1888).
83 For a criticism of this interpretation of Spanish community property law, see DE Funiak, op. cit. supra note 20.
84 Packard v. Arellanes, 17 Cal. 525 (1860).
85 75 Cal. at 145, 16 Pac. at 756.
community property. The court compared the husband's status to that of a trustee. This, of course, is consistent with his status as manager of the community during the lifetime of his wife, which has been analogized to that of "a partner, agent or fiduciary" and has resulted in the protection of the wife against fraudulent transfers and gross mismanagement. It is certainly reasonable to conclude that her estate would succeed to the same protection.

The *Knego* decision also considered other problems and situations which will be developed later in this article. There are many problems it did not consider, including the effect of the provisions of section 171c of the Civil Code. This section, enacted in 1951, developed the principle of dual management of the community during the lifetime of the spouses. It granted the wife power of management, control, and disposition of community assets earned by her or received by her as compensation for personal injuries. Since Prob. C. 202 grants the surviving husband control over the entire community, would this control extend to such assets as had been under the control of his wife during her lifetime? Since Prob. C. 202 refers to the powers of the husband during the lifetime of his wife, it might be interpreted as excluding C.C. 171c property. However, the status of real property acquired with C.C. 171c property is certainly not clear, particularly since Prob. C. 203 does not specifically give to the husband the same powers he had during his wife's lifetime. Statutory clarification is needed in this area.

**PRACTICAL PROBLEMS OF PROBATE ADMINISTRATION**

The remainder of this article will deal with the specific problems of probate administration of the interest of the deceased wife's interest in community assets. It is clear that Division III of the Probate Code dealing with the rights, duties, and liabilities of personal representatives in the administration of estates, as well as the jurisdiction and powers of probate courts, made no allowance for the unusual situations created by Prob. C. 202 and 203. The problems encountered in the course of such administration are unique and require careful consideration.

**Jurisdiction**

Although Prob. C. 300 grants the superior courts sitting in probate and the personal representatives broad jurisdiction over
the property of a decedent, Prob. C. 202 expressly conditions such
jurisdiction upon continuing management and control of community
assets by the surviving husband. This, of course, does not mean that
the surviving husband is not accountable for his activities as manager
of the community.41 But it does mean that the jurisdiction of the
probate court can be applied only in a manner consistent with the
powers retained by the husband. As a result, problems of jurisdiction
will be considered with reference to specific areas of probate ad-
ministration.

Appointment of a Personal Representative

The appointment of a personal representative other than the
surviving husband should present no particular problems in this
situation, except possibly in cases when a bond will be required.42
Since the amount of the bond is based upon the value of the personal
property and the value of probable income from real property
"belonging to the estate,"43 the amount should include that portion
of the community assets over which the wife exercised testamentary
power and which are therefore subject to administration under
Prob. C. 202. Though it might be argued that the intent of Prob. C.
541 was to afford protection only to estate assets within the posses-
sion and control of the personal representative under section 571
of the Probate Code, no such limitation is suggested in the section's
wording.44 In any case, the assets will eventually be transferred to
the personal representative to carry the wife's will into effect.

The appointment of the surviving husband as the personal
representative will materially affect his rights and powers, particu-
larly with reference to probate court jurisdiction over him. He
becomes subject to probate court jurisdiction in determining his
interest in the community, even though the community assets are in
his possession as the survivor, not as the personal representative.
He also becomes chargeable in probate with all community assets
within his possession and control.45

Although executors and administrators are fiduciaries, and
subject to the obligations and liabilities of trustees in the broadest

42 Since we are here concerned with testamentary dispositions, it is very likely
the requirement of a bond would be waived in the provisions of the will. Of course,
the personal representative could be an administrator with the will annexed.
43 CAL. PROB. CODE § 541.
44 Ibid.
45 Estate of Kelpsh, 203 Cal. 613, 265 Pac. 214 (1928); Bauer v. Bauer, 201 Cal.
267, 256 Pac. 820 (1927).
sense of the term, they are not trustees in the strict legal sense of the term. Since the surviving husband's position is in a general sense that of a trustee accountable for his management of the community, there would seem to be no essential conflict between his position as personal representative and his position as surviving spouse. However, the surviving husband has broad powers of management conferred upon him by Prob. C. 202 and 203, while the executor or administrator has no such inherent power. The latter are strictly limited by statute or by the will and may not engage in certain transactions without prior court approval or subsequent court confirmation. Following sections will consider the impact of the husband's dual role in specific areas of administration.

Marshaling the Assets and Filing the Inventory and Appraisement

Although section 571 of the Probate Code imposes upon the executor or administrator the duty to take into his possession all of the estate of the decedent, it is apparent that he is not entitled to possession of any of the community assets, unless possibly he can show immediate possession is necessary to carry out provisions of the decedent's will. If the surviving husband is also the personal representative, his possession in either role would seem to satisfy Prob. C. 571.

Under section 600 of the Probate Code the executor or administrator must file an inventory and appraisement of the estate of the decedent "which has come to his possession or knowledge." He could properly include assets in the husband's possession, if he had knowledge of them. However, he would be well advised to require the surviving husband to submit a separate inventory of the community assets on a form similar to the one prescribed by Prob. C. 600 which includes an oath similar to that required of the personal representative. This document should be attached as an exhibit to the executor's or administrator's inventory and appraisement, which under Prob. C. 600 must be all inclusive. The Knego decision provides ample authority for such a procedure, and in any event section 615 of the Probate Code is available for this

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46 Larrabee v. Tracy, 21 Cal. 2d 645, 134 P.2d 265 (1943); Estate of Boggs, 19 Cal. 2d 324, 121 P.2d 678 (1942).
49 See generally, 4 Witkin, Summary of California Law, Wills and Probate § 208–218.
purpose. Under this section, upon a complaint under oath by the executor or administrator, the court may cite any person "entrusted with any part of the estate of the decedent" to render a full account under oath of any such property. The surviving husband is such a person. If he refuses to co-operate, both Prob. C. 614 and 615 are available to convince him, since under the former section the alternative to compliance is commitment to the county jail. It would appear that the same sections could be employed if the surviving husband did not allow the personal representative and the appraiser a reasonable right of inspection and investigation.

In preparing the inventory the executor or administrator must attempt to ascertain what portion of the estate is community property and which is separate property of the decedent. This, of course, is only his opinion at the time the inventory is prepared. However, if the surviving husband is also the representative, he must express an opinion and include assets in the inventory either as his wife's separate property or as community property. If he does so, is he estopped from later asserting a conflicting claim as to the nature of such assets? The decision in *Estate of Kelpsch* indicated that the surviving husband should not be estopped from asserting a community interest in assets which he as executor listed in the inventory of his wife's estate, in view of their clear designation therein as community property. In an earlier decision the surviving wife made a sworn statement to an inventory, prepared by her as representative, that certain assets were separate property of her husband. The court held that this was a declaration against interest and admissible in later proceedings in which she contended the same assets were community property. In another case on similar facts, the surviving wife-executrix was not estopped from asserting her claim where the inventory had been erroneously prepared by her attorneys and their error was called to the attention of the probate court. It would certainly seem that a statement of opinion under these circumstances should not give rise to estoppel, although it might constitute material evidence.

It is clear that although declarations in an inventory as to the nature and extent of the estate are not final, any controversies should be resolved as soon as possible. This protects both the estate and the surviving husband, whether or not he is the personal representative. Despite the power of the representative to require

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53 1 Condee, op. cit. supra note 10; § 341.
54 203 Cal. 613, 265 Pac. 214 (1928).
55 Estate of Hill, 167 Cal. 59, 138 Pac. 690 (1914).
an accounting from the husband, it might be difficult to obtain the necessary information if the husband decided certain assets were his separate property and simply excluded them from his accounting. It has been held that proceedings under Prob. C. 613, 614, and 615 are in the nature of bills of discovery to aid executors in locating and inventorying assets of an estate. Such proceedings are not appealable and thus do not constitute an adjudication of title to the assets involved. Any person cited under any of these sections may demand that his claim of title be adjudicated by a court of competent jurisdiction. It would appear that the surviving husband could be required to account for all property in his possession or control, whether or not he contended it was his separate property or community, thereby furnishing the representative with all necessary information to determine the interests of the estate.

Assuming conflicting claims of title between the surviving husband and the estate, does a probate court have jurisdiction to adjudicate such claim and determine title to property? The decision of the California Supreme Court in *Central Bank v. Superior Court* contains a comprehensive discussion of this issue, which may be summarized as follows:

1. As a general proposition a probate court cannot decide a disputed claim between an estate and a stranger.

2. However, the probate court will adjudicate such claims if the claimant is not a stranger to the probate proceeding and is in privity with the estate.

3. The most common example of a claimant who is in privity with the estate is the executor or administrator, including a surviving spouse who is also the personal representative.

4. This rule has not been extended to include a surviving spouse who is not also the representative of the estate, even if such spouse is also the heir of the estate as to assets other than those in which he claims ownership.

57 Estate of Schechtman, 45 Cal. 2d 50, 286 P.2d 345 (1955).
60 Citing Schlyen v. Schlyen, supra note 59; Stevens v. Superior Court, 155 Cal. 148, 99 Pac. 512 (1909).
61 Citing Schlyen v. Schlyen, supra note 59; Estate of Roach, 208 Cal. 394, 281 Pac. 607 (1929); Bauer v. Bauer, 201 Cal. 267, 256 Pac. 820 (1927); Estate of Fulton, 188 Cal. 489, 205 Pac. 681 (1922); Estate of Klumpke, 167 Cal. 415, 139 Pac. 1062 (1914); Stevens v. Superior Court, supra note 60.
5. The claim of a surviving husband to his share of the community is adverse to the estate, since the property does not pass through the probate proceeding.63

6. The power of the probate court ends with discovery of the property, and title to property should be determined in an appropriate action upon issues framed for that purpose.64

In the later decision of Woods v. Security-First National Bank,65 probate court jurisdiction was extended to a situation in which a surviving husband filed a petition to determine heirship, contending that the will was invalid as to him because it was executed prior to marriage, and later contended that certain assets held by the executor were community property and not the separate property of his deceased spouse. The court expressly disapproved anything to the contrary in the oft-cited decision of Estate of Kurt,66 which had held that the probate court had no such jurisdiction. However, still a later case held that the Woods rationale should be applied only when the husband first claimed as an heir, bringing him into privity with the estate, and subsequently claimed a community interest. It held that the Kurt decision was fully applicable to situations in which the basis of such a petition is the claim of a community interest.67 It is therefore reasonable to conclude that the claims of community interest by the surviving husband cannot be determined in the probate proceeding unless he is also the personal representative, or unless he otherwise is in privity with the estate.

Powers of Management

An executor or administrator is severely limited by the provisions of the will or the probate court in his management of the estate, including the making of investments, performance of decedent's contracts, carrying on the decedent's business, entering into new contracts, borrowing money, and encumbering estate assets. On the other hand, the surviving husband has broad powers under the provisions of Prob. C. 202 and 203. There is apparently no way the representative of the estate or the probate court can

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directly control the management activities of the surviving husband or require him to obtain court approval for his activities. Even the Knego decision, while imposing limitations upon the surviving husband, granted that he had the power to encumber community real property without probate court approval. Conversely, the dominion of the surviving husband should preclude the estate or the court from exercising any form of management power over the community assets, even if such power is granted by the will of the deceased wife or would be in the best interests of the estate. If continued management by the husband threatens the estate, apparently the only remedy available to the estate would be the one already suggested, i.e., the estate’s interest in the assets be turned over to the representative to carry the wife’s will into effect.

The appointment of the surviving husband as executor or administrator results in a basic conflict in this area which the author is unable to resolve. If the husband comes within probate jurisdiction so that his management powers are no greater than those of an executor or administrator, his position is impossible. He would in effect be a tenant in common with himself. But it is said that an executor or administrator cannot be interested in the purchase of estate property, occupy estate property without trying to rent it, use estate funds, carry on the estate business without authority, and enter into new contracts binding the estate. Fortunately, a representative is not liable for commingling unless he uses the funds for his own purposes. A reasonable interpretation would be that the husband is managing the community in his capacity as a surviving husband under Prob. C. 202 and 203, but handling strictly estate matters in his capacity as representative of the estate. This is not a perfect solution, but it may be the only one possible. In situations where this could lead to difficulties, the best protection available to the surviving husband would be to petition for instructions under Prob. C. 588, asking the court to delineate his rights, duties, and responsibilities.

69 CAL. PROB. CODE § 583.
72 Estate of McPhee, 156 Cal. 335, 268 P.2d 107 (1954); In re Rose’s Estate, 80 Cal. 166, 22 Pac. 86 (1889).
75 See for example, Estate of McKenzie, 199 Cal. App. 2d 393, 18 Cal. Rptr. 680 (1962). The surviving husband, who was also the personal representative, continued operating a ranch which was community property. The Court indicated that his authority to manage the business was based upon his status of surviving husband under Cal. Prob. Code § 202, but that he should account therefor as the personal representative of the estate.
Sales of Property

Sections 750-814 of the Probate Code set out the circumstances under which estate assets may be sold, and the procedure to be followed in such sales. Since the personal representative has no inherent power, he will be limited to the circumstances set out in the Code, unless the will grants him a power of sale. Even then a sale is subject to confirmation by the court. It is clear that the power of sale of the surviving husband under Prob. C. 202 and 203 is absolute and unconditional. Again we are faced with the problem of the surviving husband who is also the personal representative, and the comments made above with reference to powers of management under such circumstances are equally applicable here. Since the matter of selling estate assets is subject to so many limitations, it seems the surviving husband who is also the representative would be well advised to protect himself by asking for instructions when such sales are contemplated.

One possible area of difficulty would be sales in which the wife’s consent would have been required during her lifetime. Prob. C. 202 grants the husband power to sell personal property, but also refers to the power to deal with community personal property as he had during the lifetime of his wife. Civil Code 172 requires during the wife’s lifetime her consent to any transfers not for valuable consideration or any sales of furniture, wearing apparel, and similar assets. Would the estate succeed to this right of consent? Under the authority of C.C. 172, the Knego decision held that the husband could not give away estate assets after the death of his wife, and this argument might be extended to cover sales of personal chattels. It would seem that the purpose of C.C. 172’s limitations on sale of personal assets is to protect the wife’s right of enjoyment during her life, and that the section has no application after her death. In most cases this would not be an important matter unless personal assets have a high value, as in the case of antique furniture, fur coats, or jewelry.

Unless an appropriate forty day notice is recorded, Prob. C. 203 grants the husband the power of sale over realty. This section makes no reference to a limitation on his power because the wife’s consent to a transfer would have been required during her lifetime by C.C. 172a. Again referring to the Knego decision the court held that the right of the surviving husband to execute a deed of trust on community realty, absent the forty day notice, was not questioned. In view of the fact that the wife’s consent would have been required by C.C. 172a for any deed, mortgage, or encumbrance, it

is clear that the court did not believe her estate succeeded to any such right of consent.

It has been the experience of the author that some title companies refuse to recognize the power of sale of the surviving husband and will not insure title without a probate court order confirming the sale as to the estate's interest. Their main authorities for this position apparently are title company manuals, which this author refuses to accept as authority for any proposition. Additionally they argue that confirmation by the probate court is some form of substitute for the wife's lifetime power of consent. Even assuming the power of consent did pass to the estate, confirmation of sales under Prob. C. 784 and 785 is not equivalent to the consent power of a living wife, particularly in view of the power of the probate court to accept higher bids under Prob. C. 785. It is submitted that title companies following this view have no basis for it, even in their most cited authority on real property law and title practice.\textsuperscript{77}

The Knego decision indicated that the proceeds of a loan obtained by encumbering community real property are community insofar as the interest of the estate is concerned. The same rule should logically follow as to the proceeds of a sale of community assets. As that decision further indicates, sales, encumbrances and transfers by the surviving husband may change the nature of the community from real property to personal property, or vice-versa, in which case his management and control might vary to some degree under Prob. C. 202 or 203.

It is clear that the representative of the estate cannot have any power of sale over community assets which are under the management and control of the surviving husband. However, if such a sale were necessary under Prob. C. 754 to pay debts, legacies, family allowance, or expenses, it would be necessary to make the sale to carry the wife's will into effect. In such a case the husband could be required to transfer community assets to the estate to be sold for such purposes. More questionable would be the right of the representative to take such action under Prob. C. 754 when the sale is for the "advantage, benefit, and best interests of the estate, and those interested therein. ..." Depending on the facts in each situation, it might be a great deal more difficult to show that a transfer of community assets to the personal representative for an advantageous or beneficial sale is necessary to carry out the provisions of the wife's will.

When a forty day notice has been recorded, it would appear

\textsuperscript{77} See Ogden's, \textit{California Real Property Law} § 19.9 (1956).
that the estate representative obtains a power to sell community real property under Prob. C. 754. If the recording of the notice divests the husband of his power of sale, it would be unreasonable to conclude no one has the power to sell the wife's interest in the realty. This property is generally subject to administration, except in situations where the husband retains powers under Prob. C. 202 and 203. Not so clear is the status of the power of sale during the first forty days after the wife's death.

**Debts and Expenses of Administration**

Under the clear wording of Prob. C. 202, the entire community passing from the control of the husband by reason of his death or the wife's testamentary disposition is subject to his debts and expenses of administration. Whether husband or wife dies first, the interest of the wife in the community is subject to no more than one-half of the total indebtedness. If the husband dies first, it has been held that the provisions of his will may exonerate the community interest of the survivor from such debts either by express provision or by a general statement that all debts are to be paid out of "my estate," which means that estate over which the husband had testamentary control. It is not entirely clear that the same rationale could be applied in the case of the wife's prior death, since she would be exonerating the husband's share of the community from his debts. This would in effect be a testamentary gift to the husband, and the courts would undoubtedly require a clear statement of such purpose in the will before reaching such a conclusion. Obviously a reference by a wife to "my debts" could not be construed as including the debts of the husband.

Since California does not recognize, at least in modern times, the concept of community debts, the phrase "husband's debts" is interpreted as including all debts incurred by the husband on behalf of the community, as well as the separate debts of the husband. Although there was some early confusion in the matter, it is now clear that such debts include medical and funeral expenses for the wife incurred by the husband. However, even though the husband is liable for such expenses, the estate of the wife is primarily liable for them. If the husband pays the expenses of the last illness and

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79 In re Marino's Estate, 39 Cal. App. 2d 1, 102 P.2d 443 (1940).
80 10 CAL. JUR. 2d, Community Property § 88.
82 Estate of Weringer, 100 Cal. 3d 345, 34 Pac. 825 (1893); Brezzo v. Brangero, 51 Cal. App. 79, 196 Pac. 87 (1921).
84 CAL. PROB. CODE § 951.1; § 950; In re Dennis' Estate, 110 Cal. App. 2d 667, 243 P.2d 579 (1952).
funeral, he should be entitled to charge the entire amount against the share of the community over which the wife has exercised testamentary power, or seek reimbursement from separate property held by her estate, or both. It would seem equitable that the total amount of such expenses be prorated between her separate property and her entire interest in the community, so that in the event she does not dispose of her entire interest in the community, the part passing to her husband would be equitably charged with a portion of such costs.

The failure to distinguish between separate debts of the husband and so-called community debts presents an interesting problem when the husband has separate property. The cases are clear that when the husband dies first his debts must be prorated between the community property and his separate property on the basis of value. However, the author knows of no case in which the same issue was raised when the wife died first. On one hand, Prob. C. 202 clearly subjects the community to the husband’s debts, and thus during the lifetime of his wife the husband may use community funds to discharge his separate obligations without resorting to his separate funds. On the other hand, the concept of proration of debts between separate and community property upon the husband’s death is based upon equitable principles, and application of this principle when the wife dies first is undoubtedly equitable. In one of the cases involving the death of a husband, a court intimated that upon proper facts it would be necessary to consider whether debts incurred by the husband prior to marriage or on his separate account after marriage should be properly charged to his separate property. The author predicts that should such a case arise, the courts may well segregate such “separate” debts of the husband and charge them against his separate property, or in the alternative prorate all of the husband’s debts between his separate property and the community property.

The procedure for the presentation and payment of claims of the creditors of the decedent, as set out in sections 700-739 of the Probate Code, should not apply to creditors of the husband, regardless of how their claims arose. To require such presentation for payment would not only be contrary to the surviving husband’s

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89 Ibid.
management and control, but would also require a distinction to be made between those debts which pertain to the husband separately and those which arose from community transactions. In addition the period of limitations on such claims provided by Prob. C. 708 could hardly be applicable. In any event, the wife's separate estate is not liable for the debts of the husband. This raises the possibility that the interest of the wife in the community could be distributed in probate subject to debts and obligations, unless the husband has an affirmative duty to discharge and settle all of his obligations during the period of probate administration. The court suggested this might be necessary in Johnston v. San Francisco Savings Union. In the Knego decision the court held that the surviving husband could not be required to pay the estate an amount equal to an outstanding encumbrance against community real property, since this would result in double recovery to the estate. But the court did not specifically discuss the question of whether the husband had an affirmative duty to settle his debts. Nevertheless, the net effect of the decision was that the realty in question passed to the estate subject to an encumbrance. If the award of a portion of community property to the wife upon divorce is analogous, the estate would take such property subject to all its burdens, including the husband's separate debts incurred prior to death, regardless of whether they were reduced to judgment. In the divorce situation, it may be possible for the wife to marshal assets and require the creditors to look first to the husband for payment, but it is not clear the same doctrine would be extended to the probate situation. There seems to be no way to afford the estate complete protection or isolation from such liability. Even if it should be held the husband has an affirmative duty to settle these debts, or that he is primarily liable on any debts he does not settle, the interest passing to the estate would of necessity remain subject to them, otherwise the interests of creditors would be prejudiced. There is a definite need for statutory clarification in this area.

Is the wife's interest in the community subject to her separate debts? It would not be during her lifetime. The wording of Prob. C. 202 would suggest that it is not subject to her separate debts after her death, where she does not dispose of any part of it by her will.

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90 Cal. Civ. Code § 171. Of course, the wife's separate property would be liable for certain necessaries under the section.

91 75 Cal. 134, 16 Pac. 753 (1888).


93 Bank of America v. Mantz, supra note 92; Mayberry v. Whittier, supra note 92.
It should be mentioned that the 1850 statute expressly made the interest of each spouse passing to his or her heirs after death subject to the debts of that spouse. This provision was deleted by the 1863 statute and has never been reinstated. This has led one author to suggest that the wife’s share of the community might not be subject to her separate debts, even if she exercises her power of testamentary disposition over it. He suggests that the testamentary power of the wife is essentially a statutory general power of appointment, and that upon exercise of the power, the creditors of the wife could reach the appointed assets. Stated more particularly in terms of future interest law, this would mean that the wife has a general testamentary power of appointment over her interest in estate assets, which assets pass to her husband in default of appointment. In the event she exercises her power, the assets are “captured” by her estate and become subject to the claims of her creditors. This analogy is essentially sound, much more so than any concept that the wife can make a testamentary disposition of her interest in the community to the prejudice of her creditors.

In the portion of the Makeig decision quoted above, the court specifically stated that the interest in the community over which the deceased wife exercised testamentary power should be available to her personal representative to pay her debts. This was considered by the court necessary to carry her will into effect. Therefore, either on the authority of the Makeig decision or by analogy to general testamentary powers of appointment, it seems that the part of the community over which the wife exercises her testamentary power will be subject to her separate debts.

When the husband dies first, the entire community is subject to his debts, family allowance, and expenses of administration. The wording of Prob. C. 202 indicates that, when the wife dies first, only that portion of the community over which she exercises her testamentary power is subject to administration. Thus such costs should be charged only against the assets so disposed of by her will. Statutory fees of representatives and attorneys are predicated on the value of the property actually administered and which must come under the control and possession of the personal representative to

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96 Verrall, op. cit. supra note 40, at 289.
97 Ibid.
98 See generally, Simes, Future Interests § 63 (1951).
99 See note 18 and accompanying text supra.
be accounted for by him.\textsuperscript{101} When the husband dies first, the fees are chargeable against the entire community, since administration, control and possession pertains to all of it;\textsuperscript{102} but when the wife dies first, the fees should be chargeable only against that part of the community over which she exercises testamentary power, since the balance of the community never comes within the representative's possession and control.\textsuperscript{103}

As the Knego decision indicates, the husband may incur expenses for the preservation, maintenance, and protection of the community, which will be allowed as a charge against the entire community.\textsuperscript{104} Could the personal representative also incur expenses for the protection of the entire community and, if so, could they be charged against both the estate's share and the husband's share? Prob. C. 202 seems to foreclose such a possibility. It would seem, however, that where an emergency arises and the representative must protect the estate's interest in the community, the courts will find a way to allow expenditures so incurred and charge the husband accordingly.

The husband's share of the community is not includable in the wife's estate either for California Inheritance Tax purposes\textsuperscript{105} or for Federal Estate Tax purposes.\textsuperscript{106}

If the wife disposes of her entire interest in the community, it is clear that these taxes will be charged against assets so passing. If the wife does not dispose of her entire interest in the community, may the portion retained by the surviving husband under Prob. C. 201 be similarly taxed? As has been noted, it seems that since 1927 the surviving husband takes the wife's interest in the community only by reason of descent or succession, and he should be chargeable with any death taxes properly allocable to any part of the wife's interest in the community passing to him. Such an interest is exempt from California inheritance tax\textsuperscript{107} but not from federal estate tax.\textsuperscript{108} The liability of the surviving husband should be based upon the value of what he receives compared to the value of all taxable

\begin{footnotes}
\item[101] CAL. PROB. CODE § 901.
\item[105] CAL. REV. & TAX. CODE § 13551. See also CAL. REV. & TAX. CODE § 13553, repeated Cal. Stats. 1961, ch. 2189, p. 4530, § 2.5.
\item[106] See generally, COMMERCE CLEARING HOUSE, FED. EST. & GIFT TAX REP. § 1310 (1961).
\item[107] CAL. REV. & TAX. CODE § 13551.
\item[108] INT. REV. CODE OF 1954 § 2033.
\end{footnotes}
transfers in the estate, even though the interest he receives is outside of probate.\textsuperscript{109}

\textit{Accounting and Distribution}

The surviving husband is clearly accountable for his management of the deceased wife's interest in the community. In such accounting he is chargeable with all community assets over which his wife exercised testamentary power and any of their income. He is entitled to credit for any expenses or costs incurred in the preservation and maintenance of those assets and of course for the total amount transferred to the personal representative to carry the wife's will into effect.\textsuperscript{110} He is also accountable for any sales, proceeds of loans, or other changes in the nature of the assets.\textsuperscript{111} Vouchers may be required at the discretion of the court.\textsuperscript{112} Since the personal representative is not chargeable for any transactions which occurred prior to the time such assets are transferred to him, the husband's accounting and the estate accounting are completely separate, and both should be filed with the court. If the husband refuses to file such an accounting, Prob. C. 615 can be used to force compliance.

In many situations the community assets will not be transferred to the personal representative until time for distribution, when definitely needed to carry the wife's will into effect. The author foresees many problems with regard to distribution, but space does not permit an extended discussion of them. For example, suppose the wife dies leaving her interest in Blackacre, a community asset, to her Aunt Mathilda and the balance of her interest in the community to her daughter. Her surviving husband who does not like Aunt Mathilda but does like the daughter, sells Blackacre and uses the proceeds of the sale to pay all of his debts. It appears that since this was done after the death of the wife by the husband, who is a fiduciary, the probate court would have authority to adjust this situation under the general rules relating to order of resort and abatement.\textsuperscript{118} In fact the probate court should have sufficient authority to make such adjustments any time the husband's management is contrary to the testatrix's intention or the general law relating to payment of legacies, but only at such time as possession and control of the assets are transferred to the personal representative.

\textsuperscript{109} CAL. PROB. CODE § 970-72, 976-77(a); Estate of Miller, 154 Cal. App. 2d 544, 299 P.2d 1005 (1956).
\textsuperscript{111} Ibid.
\textsuperscript{112} Estate of McKenzie, 199 Cal. App. 2d 393, 18 Cal. Rptr. 680 (1962).
\textsuperscript{113} CAL. PROB. CODE §§ 750-54. See generally, 4 WITKIN, op. cit. supra note 49, § 272.
Problems would also arise if the wife's will disposed of less than her entire interest in the community and the assets so disposed of were chargeable with debts, expenses of administration, or taxes. Would the husband be required to transfer only the assets disposed of, or would he also be required to transfer additional community assets sufficient to liquidate such costs? The answer would depend on the intention of the testatrix. If her will indicates that the legacies in question are to be exonerated, this may be an implied testamentary disposition of additional community assets necessary to exonerate the gift by payment of costs. If she exonerates by providing that all such costs will be paid from the residue of her estate, or fails to exonerate, and she has not brought the balance of her community interest into the residue, the costs will in effect be borne by her separate property in the residue or by the legatees.\footnote{Ibid.}

**Conclusion**

The suppositions and analogies which the author has frequently resorted to in this article are required by the unique concept of dual management and administration which apparently is novel in the law. In this situation, the law tells us what must be done without telling us how to do it. It may be that future legislation or case decisions will eventually clarify these matters and provide more definite guidelines in the practical problems of administration encountered under these circumstances. Until that happens, it may be that all we can do is hope that the husband dies first.

\footnote{\textit{Ibid.}}