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# Principles of Community Property

Paul J. Goda S.J.

*Santa Clara University School of Law*

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*Care Association case*.<sup>12</sup> His trenchant critique of that decision eventually led to a change in New York statutory law so that today's foster parents are accorded preference and may receive a subsidy when they seek to adopt foster children. Chapter four in *When Parents Fail* deals with foster care and expands the former article.

The functioning of courts in dispositional and placement situations is the subject of increasing concern. Professor Katz ranks in the advance guard of the fight for children's liberation; liberation, that is, from vestiges of feudalism, vague notions of *parens patriae*, and an unrealistic paternalism. *When Parents Fail* is a valuable contribution to the growing struggle to emancipate children from archaic law.

Doris Jonas Freed\*

PRINCIPLES OF COMMUNITY PROPERTY, 2ND ED. By William Q. de Funiak & Michael J. Vaughn. Tucson: University of Arizona Press. 1971. Pp. xix + 556. Hardbound. \$28.50.

William de Funiak wrote his masterful *Principles of Community Property* 29 years ago.<sup>1</sup> The supplements, the latest of which were published in 1948, were inadequate to keep up with the vigorous change in the legislation and interpretation of community property law. I had not made use of his first edition in my own course, California Community Property, because the book was outdated, also, because of a bias to which I shall later refer.

The second edition is basically an updating of the first volume. Chapter and section headings are the same, with some additions, except for Chapter XI on "Taxation," which has been abbreviated considerably.

It is with some fear and trembling that I undertake to review a classical work of legal erudition. I write as a novice teacher. I also write as one who has been affected by a bias. To teach California Community Property is to emphasize a particularistic, statute-oriented body of law.<sup>2</sup> To be immersed in California community

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<sup>12</sup> *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 183 N.Y.S.2d 65, 156 N.E.2d 700 (1959).

\* B.A. 1951, New York University; LL.B. 1946, LL.M. 1954, J.S.D. 1958, New York University Law School; Admitted to the New York, Maryland, and U.S. Supreme Court Bars.

<sup>1</sup> W. DE FUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* (1943).

<sup>2</sup> H. E. VERRALL & A. M. SAMMIS, *CALIFORNIA COMMUNITY PROPERTY* 2 (2d ed. 1971).

The character and extent of the statutes defining the system and a course of

property law is to be affected by the lack of a comprehensive system.<sup>3</sup>

Reading Professor de Funiak and Mr. Vaughn's work has made me conscious of the need to think through to the roots of a body of law in order to realize the stresses and strains within it. The authors do recognize the particularistic nature of community property law in the various states, the heavy emphasis on statutes, and the adverse affect of common law on civil law principles.<sup>4</sup>

But the authors do, nevertheless, think in terms of the system not as a rigid set of rules, but as law guided by purposes. The purposes which they have in mind are two: first, the need to support the family by social structures which aid the development of both man and woman; and second, the desire to present the community property system unencumbered by contradictory growth.

The foreword by Professor Margaret H. Amsler, of Baylor, well summarizes the basic principle behind the author's first purpose, support of the family unit:

*Principles of Community Property* deals not only with legal principles but also with philosophical principles. The philosophy may be said to consider that the functions of husbands and wives are complementary, rather than competitive. A marriage is regarded as a total which is larger than the sum of its parts.<sup>5</sup>

The authors, whether from prudence or necessity, wisely avoid the notion of the husband as the head of the family unit.<sup>6</sup> They do, however, condemn the attitude that women should not be partners in the marital enterprise. This strange attitude attributable to the early opponents of the community property system is exemplified by those who characterized it as "the doctrine of those mental her-

decisional law peculiar to California, have resulted in a community property system substantially different from that of the Mexican-Spanish parent system. . . . It has become *sui generis*. . . . Today reference to Spanish or Mexican legal material by lawyers or by courts is very infrequent. For over one hundred years the California Community Property System has been developed under typical American constitutions and with the use of common law procedures. . . . As a result the modern system in content and administration is so different from the parent system and its administration that reference to Spanish or Mexican authority seem of little value.

<sup>3</sup> *Id.* at 7. Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240, 240-44 (1966).

<sup>4</sup> W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 6-13, 382 (2d ed. 1971).

<sup>5</sup> *Id.* at vi-vii. *Cf.* at 25-27. Complimentariness is based on recognition of each as a person. *Cf.* at 5: "[recognition] of the wife as a person in her own right is one of the outstanding principles of the civil law and is one of those in which it diverges sharply from the common law."

<sup>6</sup> *Id.* at 328. "It is not particularly pertinent to this work to attempt a monograph on male dominance as resulting from religious, economic, biological or other considerations."

maphrodites, Abby Folsom, Fanny Wright and the rest of that tribe."<sup>7</sup>

On occasion, the authors may be oversensitive to what they think are criticisms of the community property system, even though those who supposedly criticize it have in mind the same purpose as the authors. For example, in discussing ownership and management problems, the authors state:

These latter matters are apparently not always understood by opponents of the community property system, who seem to think that it attempts to substitute some sort of cold-blooded partnership for what they view as a sacrament. But actually there is attached to the marriage a marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of the marriage.<sup>8</sup>

I happen to believe in the institution of marriage as a sacrament and as a way of living out promises of love. Moreover, I simply agree with the authors that such an institution needs societal protection—community property law is one of those protections which help to develop the mutuality and sharing that is a necessity to the marital relationship.

The second, and major purpose of this book is to present the community property system as a legal system unencumbered by contradictory growth.

The plan and purpose of this work is to present the principles of the law of community property as it actually existed in its fully developed form in Spain, the form, in other words, in which it came to this country and which is actually the law in this country in the community property states. And to present it freed and disencumbered of the many misconceptions and erroneous interpretations which have like barnacles attached to it.<sup>9</sup>

The authors succeed admirably in this purpose. The erudition that is evident in Chapter II, "Origin and Extent of Community Property System," Ch. III, "Spanish Laws and Their Historical Background," and Ch. IV, "Establishment of Community Property System in the United States" extends throughout the discussion of specific rules of community property law.

Conditioned as I am by my own past and more particularly by the California community property system, I believe that the authors have given me new insight into some of the broader areas of com-

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<sup>7</sup> *Id.* at 25, quoting Kirkwood, *Historical Background of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1 (1936).

<sup>8</sup> 2 W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 237 (2d ed. 1971)

<sup>9</sup> *Id.* at 13.

munity property law. An example would be the standard presumption that property acquired during marriage is community property is "a rule of substantive law, and is not just procedural, as a rule of evidence."<sup>10</sup> I think that I had tended to look upon the rule only as a rule of evidence.

Nor had I thought much about the giving of a gift to both spouses, assuming that an intention to show that it be held as community property would be acceptable. *Andrews v. Andrews*,<sup>11</sup> a California case, indicates too simply that a gift of a home to the spouses before marriage, taken in the husband's name, is held as a tenancy in common. No reasons are given. Once again, the California courts have failed to wrestle with the overarching nature of community property.

Much more importantly, the authors have forced me to look at historical community property principles. They emphasize that "by 'property acquired during marriage' is primarily meant property acquired by onerous title . . . ."<sup>12</sup> Onerous title is created by the payment of a valuable consideration. The authors argue that personal injury damages are not acquired by onerous title and thus should not be community property.<sup>13</sup> They complain that California (which was temporarily in the modern field by declaring that personal injury damages were separate property) has reverted to the older concept that personal injury damages are not acquired by gift, devise, or inheritance and hence must be community property.<sup>14</sup>

I suppose that it is on issues like this that I am most torn when reading *Principles of Community Property*. On the one hand, the general principles that have evolved from Spanish law do not solve all the special problems which each state may emphasize in developing its own rules. California, for example, went through several statutory contortions trying to avoid the consequences of contributory negligence in recovery for personal injury damages when husband and wife were involved.

On the other hand, I suspect that even the authors have similar difficulties in reconciling all of their principles with each individual application. For example, acquisitions, earnings, and gains during marriage which are obtained through labor and industry, that is, by onerous title, are community property.<sup>15</sup> If that is the case, then

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<sup>10</sup> *Id.* at 118-19.

<sup>11</sup> 82 Cal. App. 2d 521, 527-28, 186 P.2d 744, 747 (1947).

<sup>12</sup> 2 W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 128-29 (2d ed. 1971)

<sup>13</sup> *Id.* at 128-29, 198-205.

<sup>14</sup> *Id.* at 200-01, 207-09, & § 83.1.

<sup>15</sup> *Id.* at 142-43.

I fail to see how gains from one's separate property can be classified as community property simply because they arose during marriage.<sup>16</sup> Yet the authors roundly condemn California for declaring that rents, issues, and profits from separate property are separate property.<sup>17</sup>

Be that as it may, the authors have convinced me of the principle that rents, issues, and profits arising from separate property should be community property. They slyly indicate that California has been at least perceptive enough to apportion such rents, issues, and profits where community effort has contributed to its production.<sup>18</sup> And, they build a strong argument that rents, issues, and profits from separate property should be entirely community property because of the strengthening of the marital union.<sup>19</sup> Such a rule would avoid many of the complex problems of apportionment that exist today where the time, labor, and skill of a spouse have been applied to that spouse's separate property.

I will forego the pleasure of nit-picking which seems to be a usual pleasure of book reviewers. There are small errors of misprint or of interpretation but these are understandable in a work of such sweep, rewritten at a time when the body of law which it treats is in ferment in many jurisdictions.<sup>20</sup>

The basic value of *Principles of Community Property* is that it resets the topic of community property into the broad scope of history and policy. If there are any weaknesses, they lie in minor discrepancies with regard to the statement of the law of a particular state. I would not advise students to use the book for reference on particular points of California community property law because of the broad scope. But I would recommend it highly for those who wish to see how erudition, policy, and history may be woven together to cause one to reassess one's own point of view.

*Paul J. Goda, S.J.\**

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<sup>16</sup> *Id.* at 160-61.

<sup>17</sup> *Id.* at 57 n.8.

<sup>18</sup> *Id.* at 129.

<sup>19</sup> *Id.* at 161.

<sup>20</sup> Just for a little pleasure, CAL. CIV. CODE § 137 (West 1954) which is referred to in W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 324 n.92, 366 n.21 has been repealed. The recent amendment of CAL. CIV. CODE § 5131 (West 1970) again makes the husband's earnings community property during the wife's abandonment, not separate property as it was from 1955-69.

\* B.S. 1952, Loyola University (Los Angeles); J.D. 1963, Georgetown University; S.T.M. 1967, University of Santa Clara; LL.M. 1969, New York University; Assistant Professor of Law, University of Santa Clara.