SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

February 17, 1975

The meeting was called to order at 9:10 a.m. by Senator Close. He explained that the meeting today would be a presenation by Jack F. Bonanno, Esq., Hastings Law Review on the subject of community property laws.

Present:

Senator Close, Chairman
Senator Wilson
Senator Bryan
Senator Sheerin
Senator Dodge
Senator Foote
Senator Hilbrecht

Mr. Bonanno: Since I wrote this article, the Trailer Bill referred to has passed. This was the result of some considerable review anddiscussion by the members of the legislative committee. The legislator's concern, regarding this due process question, was that the right of men in control is a property right and to apply the law retroactively could operate to take away vested proerty rights from the person who previously had the exclusive management and control of the community property. There was considerable debate on this. Soem had thought that my position was that "No, you could not take away any vested rights of management and control over property acquired prior to the first of January, 1975." I don't think that was my position at all. My position was that, at least according to the existing case law in the California courts, it would appear that the rights could not be taken away. However, according to some older cases, the United States Supreme Court - dealing with the then Washington Law which had recognized property interest of spouses - stated that the rights of management control were merely powers of a trustee rather than powers of an official owner. Thus the mere change of these powers or the mere requirement of the sharing of these powers could not, in any way, be taking away any vested rights of either party for purposes of the operation of the due process clause.

The approach taken by the California legislature did not seem to be the position in the Warburton case. Rather, the Claifornia legislature, in legislation enacted this year, recognized that there may be some property rights as far as management of control is concerned; but as far as California is concerned, this right of management of control is being diminished or taken away by the state legislature for a couple of policy reasons relating to the inherent police powers of the state. I have a copy of the California legislative service with this two paragraph statement regarding its reason for applying the legislation retroactively. I'll just briefly summarize some of the important concepts that came out of that statement.

First of all, this extension of the right to manage and control all of the community property of a marriage to both spouse entails important economic and social considerations. They took the position that this right to manage and control community property is not such a fundamental right that it may not be divested by the legislature. Perhaps whay they are doing here is reflected in the police power notion, speaking in terms of the right of the legislature, in times of emergency to limit certain rights. I suppose they are thinking in terms of the rights of a community, for example, to enact environmental protection laws that, in effect, diminish the quantum of rights one has over some land or some personal property that he or she might own. Thus the California legislature seems to make the distinction between that incident of ownership that we call management of control and other incidents of ownership of property which might include for example, rights of enjoinment; perhaps the right to derive income from that. These incidents of ownership, it would seem, according to the California legislature, have a higher priority in terms of the respective rights of individ-

uals than this mere right of management and control. I suppose if you consider this right of management and control merely the power of a trustee, it makes it easier to accept the position of the legislature that it is not such a fundamental right.

Senator Wilson: What precisely does the California legislature do?

Mr. Bonanno: It has taken the position that it's new statutory provisions concerning management and control operate retroactively. Therefore, any community property, whether it was acquired prior to January 1, 1975 or after that date, will be subject to the joint several management control of husband and wife.
California makes one distinction - and I think this is more for practical reasons than for anything else - it has provided that if there is community property business involved, then the management and control of that business will still continue with the spouse who had previously managed it. The language I believe was that "a spouse who was operating or managing a business or interest in a business, which is community property, has the sole management and control of the business of interest." So even though California says we now have the joint several management and control for certain purposes, at least as far as this business is concerned, the position is that we will leave it in the management and control of whoever managed it before. Let me pose some questions on that and what I think are going to be some real problems.
First of all, what do we mean by a business. What about the family investments, an apartment house that the vamily owns. Does that remain in the management and control of the one that goes there and collects the rent and sweeps up occasionally and whatever alse is done in terms of managing that apartment house. Do we mean "business" in the context of the Internal Revenue Code which has a different meaning for the purposes of determining whether it is an asset used in a trade or business. Or perhaps, do we mean "business" in the more traditional sense of the word where one is either a sole proprietorship or partnership; or in a corporation involving the tradtional notions of business with a commercial enterprise dealing with the public as a whole, rather than simply having an investment where we deal with a very limited group of the public. What about these investments and tax shelters where we have limited partnerships and where one is a general partner. Are these kinds of investments - where one is a limited partner in a syndication - is that considered business within the meaning of the law, or is that something where either spouse would have some say in terms of the rights of the spouses and what is to be done with the property. What if there is some kind of a contract which would purport to put limitations on the ability of an owner to sell? May the spouse not signing the contract have any rights with regard to dispositions of the property or the actions with regard to the syndication? This is another problem that may very well rise in terms of what can be done as far as these business interests are concerned.

Senator Dodge: Did the record indicate or do you know if the California legislature considered and ruled out the prospective application of the co-managership provision of community property law and say that it should not affect commitments that had been made by the single manager prior to January 1, 1975.

Mr. Bonanno: They took the position that completed transactions would not be overturned.

Senator Dodge: Do you mean by "completed transactions", committed positions. Suppose there was a contract for sale of property that was in escrow; that is not a completed transaction but may be a committed one.

Mr. Bonanno: It is completed in the sense that equity would be recognized upon the execution of the land sales contract that there had been an equitable conversion. Under these circumstances, the legislature clearly recognized that you could not take away

from the contractual rights and the equitable title that had been received.

Senator Dodge: In light of your constitutional analysis, what do you think they should have done as far as any transitional-type considerations in the law to recognize activities of a single manager, the husband, prior to January 1, 1975.

Mr. Bonanno: The safest position would have said that the statute had no application as to property acquired prior to January 1. That is not the preferred position but the safest in light of some possible conflict with respect to case law in California and some of the decisions of the U.S. Supreme Court.

Senator Hilbrecht: You stated that a community business would continue unaffected with respect to management. My question is, what about a new business commenced after January 1. Does joint-management apply with respect to that or does some written agreement have to be obtained between the parties if there is to be sole management?

Mr. Bonanno: My understanding is that if someone embarked on the management and control of that community property, without the other also being involved, it would appear that that individual would still continue managing and controlling that property. I will read the language so that you can make a determination as to what they say. It says here "a spouse who is operating or managing a business or an interest in a business which is community property has the sole management and control of the business or interest." The language leaves something to be desired because it uses the progressive present tense. It leaves you to wonder if they say "he is operating at the time this law goes into effect" or "if he is operating now or at any time in the future."

Senator Hilbrecht: It seems to be a rather serious internal conflict with the other policy you just stated. Might you not read that same language to mean that at the effective date of the act, the spouse who is managing the business will continue to do so; and if that were the case, then the general policy would change. If that interpretation were given, wouldn't you have to have some kind of written agreement of delegation of authority from the other spouse?

Mr. Bonanno: This is reflective of the peculiar case law in California, which unfortunately you don't have in Nevada. Thirty or 35 years ago, a line of decisions came down out of the California Supreme Court which said "spouses, between themselves, orally or even by acts from which you can infer an agreement, may transfer or transmust property from separate property into community property or from community property into separate property or may give complete management and control from one or the other."; as cited in the case of Hulsman v. Ireland in which the courts will imply more readily an agency agreement between husband and wife than they would between strangers. So, while the mere relationship of husband and wife will not create an agency relationship, less evidence will be required to imply an agency relationship between the spouses, with the result that if creditors wished to reach community property, managed supposedly by only one spouse, the best theory they used in the past was the theory of agency. The statute now makes it possible for the creditor to reach the community property without using the agency theory.

Senator Dodge: In light of your concern about the ambiguity of the term "business", do you have any ideas about how we could define it so that we could minimize the legal issues that might arise?

Mr. Bonanno: There are a couple of ways you could approach it. Perhaps you could use a broader definition of "business" as has been used in interpreting certain sections of the Internal Revenue Code; where the ownership of a single piece of prop-

erty which is rented to simply one party would constitute a trade or business. Or perhaps you might use a definition which is reflective of what the California legislature had in mind; thinking in terms of a business which has frequent or regular or recurring transactions on a daily basis as distinguished from receipt of rent once each month or receipt of a dividend. The difference, in terms of sales transactions, could resort to the test used in the Internal Revenue Code when one is determining whether someone who buys or sells property should have dealer status.

Senator Bryan: Aside from the defintion of "business", are there any other provisions in the California law that you would suggest we modify or that you find substantial ambiguity with?

Mr. Bonanno: If you are going to deal in liability for debts or tort debts of a spouse, I think you are going to run into some definitional problems. In the past, all community property subject to the husband's management and control could be reached to pay for his tort debt. As far as the wife was concerned, only the property she managed and controlled could be reached to pay tort debts. Of course, only 2 or 3 forms of property were subject to the wife's management and control prior to 1975: her earnings; her personal injury damages and any property over which she had been given management and control by agreement with the husband. In the process of making things equal, there was a recognition on the part of the legislautre that if a spouse had separate property and there was also community property, it would seem rather unfair that the community property might be taken in its entirety and the separate property of that spouse left in tact. The California legislature made an interesting distinction, which on its surface sounds very equitable but which is one very difficult to define. It said that if a spouse commits a tort and there is liability, the separate property of that spouse can be reached first by a creditor, if the conduct of the spouse did not relate to any activity for the benefit of the community. On the other hand, if at the time the tort was committed, the spouse was engaging in an activity which was for the benefit of the community, then the community property could be reached first before the spouses' separate property. The question is, what do we mean by an activity for the benefit of the community?

Senator Wilson: Why do you need a distinction at all; why not proceed against the separate property to begin with? It is a policy question as to the classification of property.

Mr. Bonanno: The rationale arises that, why should a spouse's separate property be used to pay for the liability of a tort, when the spouse was acting for the benefit of the community. This is a fundamental principle, that if an activity is performed for the benefit of the community, the expenditures incurred for that activity should also come from the community. Again, in Hulsman v. Ireland, the court, in saying that the community should be liable for those debts said if that business had been successful, the community would have received one-half of the income. The thrust of the new law, relative to management and control, is getting awsy from this notion of trusteeship, where the husband is the trustee for the benefit of the wife or the community. It is coming closer to the concept that they have in the State of Washington, which is more like a partnership. We are now saying it is trusteeship of each spouse toward the other rather than the primary trusteeship of the husband toward the wife.

Senator Hilbrecht: When Senator Bryan asked you about other areas that needed clarification, you alluded to the tort situation and you mentioned you were going to indicate a better test or a better standard.

Mr. Bonanno: Let me explain what the better test might be. Simply say that the tort liability will be allocated between the community property and the separate property of

the tortfeasor in accordance with the amount of community and separate property owned. The provision for easiest administration would simply say that the liability would be apportioned in accordance with the ratio of community property owned to separate property owned by the tortfeasor. As a consequence, if we had a liability of $10,000, $4,000 would come from the separate property and $6,000 would come from the community.

Senator Dodge: You would do that even if the tort was committed in pursuit of community acitivity?

Mr. Bonanno: Even so. The reason being that it is so difficult to make a determination as to whether it is for one of the other that it is probably simplest to make an allocation between the two. You can justify it on this basis: if there were no community property and the activity was undertaken for the benefit of the community, the creditors could still reach the separate property. Because, after all, the creditor has rights independent of the property available against the individual person.

Senator Dodge: I would like to pursue another question with you. We have had, in the course of discussion on the Equal Rights Amendment, inequities in our present law having to do with women in community property laws and other sections. Did the California law make any changes or simplify in any way, the establishing of separate property interest of either spouse, particularly the wife?

Mr. Bonanno: Yes they have. One special piece of legislation specifically provides that, if on the basis of the earnings of a spouse, that spouse, as a single person, could have obtained credit, then the creditors must also give credit on the basis of the earnings of the individual without regard to marital status. Additionally, they have generally placed severe restrictions on the creditors ability to discriminate against a woman simply because she is married.

Senator Dodge: What kind of provisions did they have and did they retain as far as identification of separate property? In Nevada, we have a filing of a record of inventory. Do they do that in California?

Mr. Bonanno: They have very comparable legislation, except that the Nevada legislature is a little more detailed than California's. California allows either spouse to file an inventory of separate property and when that inventory is filed, it is considered prima facie evidence that such property is separate property. It is not generally used; usually when the parties are substantially wealthy.

Senator Dodge: In another area, on securities and bank accounts and those types of personal assets as distinguished from a business enterprise, on a co-management concept, does the California law still get back to the situation where, in effect, you create an agency relationship or where one partner is the manager for the community or is it so set up now that you have to have dual signatures and that sort of thing.

Mr. Bonanno: As far as I know, the banking institutions have not required two signatures every time a spouse opens up an account. The rationale for that is that under California law, there are special provisions for financial institutions as there would be for insurance companies, that unless notified otherwise by a spouse making a claim to the contrary, that financial institution or insurer, by paying out the funds upon the demand of the spouse, will be removed from any liability. They have not dealt with securities except to the extent that there was an agreement between the broker and the individual authorizing the broker to go ahead and make the transaction.

Senator Dodge: Specifically then, in the case where the husband is going to deal in securities in the future, does the broker require and agreement to be filed giving him that authority from the community.

Mr. Bonanno: As I understand the California law, one spouse or the other can enter into a transaction. But as a matter of prudence, more brokers are requiring the signature of both spouses. It is joint and several rather than joint. It is not a situation where they must act jointly.

Senator Bryan: In regard to the allocation of a tort liability, assuming a judgment against one of the spouses, doesn't that invite a prolonged litigation to determine what property is subject to execution?

Mr. Bonanno: That statute only exists as far as the husband vis-a-vis the wife in concerned in the event that they are subsequently going to make a division of their property because of the dissolution of the marriage or in the event that claims are being made by heirs or beneficiaries under a will. But as between the creditor and the spouses, the creditor has the right to recover against all that separate or community property. This statutory provision can not, in any way, take away any vested creditors' rights. Under California law, the only time a wife's separate property could be reached for anything done by the wife is in the situation where the husband has no funds of his own or any community property with which to buy necessities. If the husband buys necessities, the wife's separate property can be reached to pay for them. In times past, California made the distinction that all of the husband's separate property could be reached to pay for necessities incurred by the wife but only limited separate property of the wife could be reached to pay for necessities incurred by the husband. They have now equalized it.

Senator Dodge: If we change our community property laws, we want to conform as much as possible to the other community property law states. As far as we know, there are four other states: Washington, New Mexico, Arizona and California. Would you recommend the general approach of one over the other?

Mr. Bonanno: Becuase Washington has been dealing with this for a longer period of time, I would suspect that they have developed their laws somewhat better on treating spouses as partners. California's recent enactment did go into more transactions that might occur but they ran into considerable problems as far as estates are concerned. Here I would make a suggestion as to dealing with administration of estates. I believe under Nevada law, you have something comparable to what California used to have. That is, if the husband dies first, all community property goes through administration; if the wife dies first, the only community property that goes to the administration is that property that is going to be separate to her testimentary disposition. California has changed its probate laws to provide that one spouse can confirm the decedent's share of the community property to the other spouse and avoid administration entirely. The thrust was to avoid probate as well as to provide for equality in terms of saying each spouse, when he or she dies, will be treated equally in terms of what must go through administration. It has posed some problems: what about the rights of creditors who want the property to go through administration; what about transfer agents of title insurers who want some kinds of document on the record indicating that this is community property. I would suggest either have everything go through administration regardless of who died first so that you are sure that it is community property or have some preliminary proceeding that would establish whether the property in question is community or separate property. After such determination, then that property which is community will not be subject to administration except to the extent that any spouse seeks to dispose of that property by will. Secondly, even before such a determination, the creditors must be protected.

Administration is tied to some extent to management and control because the idea is, upon death, the person who had managed and controlled the property before, continues to control it subject only to transferring whatever property is necessary to carry out the will of the decedent. If we are going to administer them equally, that is fine in theory but the practical question is, when you say "administer them equally" do you mean avoid probate or do we mean more extensive probate regardless of who dies first. If you are going to go that route, I would strongly suggest finding some means of placing some kind of limitation on executor's commissions and attorney's fees so that you won't have a large public outcry that this is just an attempt to make more money for executors and attorneys.

Senator Hilbrecht: Would you discuss earnings, particularly those of the wife, and describe any problems in this area.

Mr. Bonanno: The problem in the past used to be that if the husband had earned any community property and put it into a co-mingled account, the husband still maintained the management and control. However, if the wife earned funds that were community property, if she co-mingled them with other community property, she lost management and control thereof. California changed the law to provide that regardless of who earns it, the mere fact of co-mingling is not going to change the management and control.

Senator Hilbrecht: Have they abolished the difference in the standards used to determine whether or not the earnings of the wife are community or separate? I recall some cases which held that in the event the wife deposits her earnings into a separate account, and the husband agrees to this, they may not be community property but separate. Whereas the same would not apply to the husband.

Mr. Bonanno: California has eliminated that distinction except that they have made it prospective. There were provisions as far as the financial code was concerned that protected the savings and loan institutions where a joint account was established and one would earn the funds but either one could draw them out. By case law, they have recognized that even though one may have had some separate property that was put into a joint account, that could be evidence that there had been an agreement of transmutation of property in the community. In that particular sense, we would still be subject to California case law that says one spouse may earn it but if a spouse puts it into a bank account in the other spouse's name, there may be evidence created thereby of a gift to the other spouse. In the past, there was a tendancy to favor the wife over the husband. What Nevada should do is be more explicit in its statute that there would be a presumption of a gift in either case or there would not be a presumption without more express conduct on the part of the individual.

Senator Sheerin: Is there an exception to that rule as to real property that requires both signatures?

Mr. Bonanno: If the property was in both names, both spouses had to sign and if the property was in one name only but it was for property that was going to be leased for more than one year or to be sold or encumbered, that the signatures of both spouses were required, subject to the one year rule that after one year the bona fide purchaser would have the property free and clear. Also furniture, furnishings, fittings of the home and the wearing apparel of the other spouse and the minor children required the signatures of both spouses. They made a distinction in California that these forms of property were so fundamental to the ability of the other spouse to live, that one single spouse should not be able to sell such items.

Senator Close: Going back to the business question. You mentioned that there were

cases in California that permitted establishment of authority orally. Since Nevada does not have that case law, what would happen if we decided to follow the same route California did.

Mr. Bonanno: In Nevada, if it is subject to the statute of frauds, you apply the statute of frauds. If Nevada, in its own right, will permit oral agreements to be made, then you would enforce it the same way you would enforce any other oral agreement. If there is no agreement, you would have an implied in fact contract. You would have to apply the normal principles as to whether the conduct of the parties was sufficient to imply, in fact, a contract.

Senator Close: Should we have a statute on this question to clarify it.

Mr. Bonanno: You probably should, to define exactly what acts will be sufficient to establish the existence either of the agency relationship or the exclusive management and control right.

Senator Wilson: What happened to the basic prinicples we touched on just a moment ago of real and apparent authority in an agency. Why is it necessary for this legislature to define this.

Mr. Bonanno: To cut down on litigation. The more nebulous your statutory law is, the more cases you are going to have coming into court. This is only a matter of convenience.

Senator Bryan: Some of the statutes in Nevada seek to affirmatively state the rights women have with respect to their power to acknowledge conveyances and things of that nature, which is undoubtedly a carry-over from the Married Women's Emancipation Act. Is there a concern that if you repeal some of these provisions, that we might revive some of those common law disabilities and, if so, how did California attack that problem.

Mr. Bonanno: I don't think California was ever concerned with that because their law, in effect, expanded rights that existed before.

Senator Bryan: We have considered the option of repealing those statutes.

Mr. Bonanno: I think what would happen, with the absence of any statutory provision dealing with a subject, then resort is had to common law. If resort is had to common law, then what you are really doing is raising a new question - is the common law unconstitutional?

Senator Dodge: Under the joint and several concept, do you conceive that financial institutions will still require dual signatures, and if so, in order to remove that, should we mandate in the law, acceptance of single signatures.

Mr. Bonanno: In California, in most instances, the single signature would be sufficient but another spouse could seek to overturn this by saying they have rights as far as this property is concerned. I think most institutions, to be safe, are going to require dual signatures, regardless of which spouse initially set up the account. I would be very leery about having the legislature mandate that there must be two signatures because this could create a great deal more paperwork and difficulty where there are distances involved or where one spouse is not readily available to sign the agreement. On the other hand, I don't know if I would want to compel the institution to accept just one signature, particularly if there is some question of irresponsibility of one of the spouse. I am afraid I am caught in the middle on this question. The

only thing you have to make sure is that if the creditor is going to require both signatures, the creditor must do that equally to both spouses.

Senator Close: Does California still have the Sole Trader Act?

Mr. Bonanno: As far as I know, it still exists. Particularly in the situation where one spouse does not manage the property adequately, one could go ahead and take that property and have it as the separate property to prevent the incompetency of the other from causing the community property to be lost.

Senator Sheerin: Does it go both ways?

Mr. Bonanno: To apply the law correctly, it would seem to do so.

Senator Bryan: Under Nevada law, there is a specific statute which indicates that the wife, living separate and apart from her husband, at that point her earnings are her separate property. There is no such provision for the husband. How did Caifornia address this problem?

Mr. Bonanno: In 1970, California repealed the code section dealing with the earnings of the husband being separate property after the wife unjustifiably abandons him. In 1972, they amended certain code sections to provide that after the separation of the spouses, the earnings and accumulations of either spouse will be the separate property of that spouse. Prior to that time, it read as Nevada law did, which was after separation, the wife's earnings would be separate property but the husband's would still be community property. This has raised a very serious due process question. In a case where a husband and wife had separated prior to the change in the law on March 4, 1972, the question arose as to whether all the property he earned either before or after the separation would remain separate property or whether it would be community property. The court ruled that you had to set up a cut-off date as of March 4, 1972. Any property acquired before that date would be community property and any acquired after that would be separate. The more serious question involved, is if you decide that you are going to recognize that any property acquired by a spouse after separation now will be the separate property of that spouse, (California makes no distinction between abandonment and voluntary separation) the problem is that one or the other, either physically or by law, is going to have the management and control of part or all of the community property. When they separate, money needs to be expended to live on; what is going to stop the spouse with the control of the community property from using the community property first for living expenses and keep the separate property in tact. California statute did not define which property would be used first.

Senator Wilson: What principle of trusteeship does California maintain to protect community property possessed by the managing but separated spouse?

Mr. Bonanno: In terms of trustee provisions, two levels: 1) in terms of gift and 2) in terms of control over disposition of community or separate property. As I understand, in Nevada there is not an absolute prohibition against gifts of community property by one of the spouses. Rather the prohibition is simply against large gifts or gifts made in fraud of the community property rights of the other spouse. In California, the prohibition is absolute.

There was further discussion as to the length of time it would take Nevada to revise their community property laws; obtaining copies of the minutes of the hearings held in California on their community property laws; etc.

The meeting was adjourned at 11:00 a.m.

Respectfully submitted,

Cheri Kinsley

Cheri Kinsley, Secretary

APPROVED:

SENATOR MELVIN D. CLOSE, JR., CHAIRMAN