

# Forum

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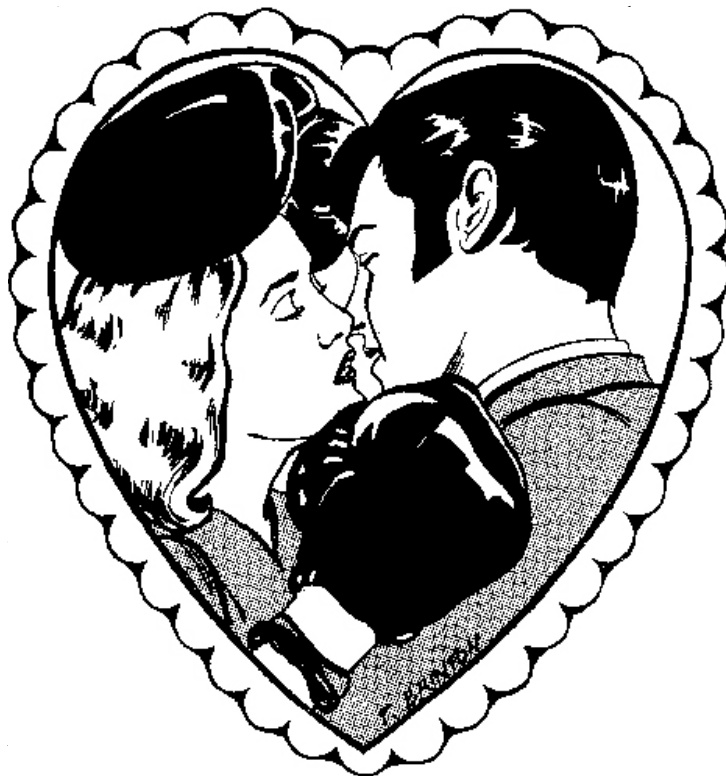
## Family Code Should Not Ignore Realities of Daily Married Life

By Fred Silberberg

When people are married they generally take on specific roles within both their life as a couple and their life as a family. As the years go on, many accept those roles as being what they are. Spouses take care of their chosen responsibilities, and they go about their business. It is, in part, this assignment of duties that makes marriages work. Each party knows what he or she is expected to be doing, and they do it. More often than not, one spouse does not question what the other is doing.

In this unspoken dance, more often than not that one spouse takes on the responsibility of the household and the other takes on the responsibility of the finances. That is not always the case, but even where both parties work full time there is often the delegation of duties that take place during nonworking hours. One spouse may still put more time into managing things regarding the house and children, while the other may put more time into managing finances. In the course of undertaking those tasks the spouses may not consult each other. Given this, one must question why the Legislature should care about what goes on during the day-to-day lives of a married couple.

What these couples do not necessarily realize is that the decisions that they make may be subject to review by the court. These decisions may be questioned not only in the event of a divorce (though that is the more likely scenario) but even while they remain married and living together. Not only may these decisions be questioned, the decisions themselves may result in penalties against the spouse who made them. In fact, those penalties may attach even when the parties have verbally agreed upon the decision. The fact that there is no writing documenting the agreement can become a serious problem at the time of a divorce. The problem is compounded by the absence of a codified statute



case. If it does not last, they don't expect to pay a penalty for a routine decision that was made, or for something that was agreed upon during the marriage. But at the time of the divorce all bets are off.

This is, however, the potential effect of Family Code Sections 1100 and 1101. These code sections amount not only to an unreasonable invasion into the marital relationship, but they have the effect of subjecting a party to stiff penalties for something that was done with the consent of the other spouse. The statutes ignore the realities of living day-to-day in a marital relationship. They demonstrate just how out-of-touch our Legislature can be. This point can be illustrated by common examples from every day life.

Family Code Section 1100 states that a "spouse may not sell, convey, or encumber community personal property, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse."

Unless the other spouse signed a written consent to the sale of the items that were sold during the garage sale, they may be subjected to penalties which include an award of 50 percent of the value of the assets, plus attorney fees.

Consider another example. During the marriage the parties agree to make charitable gifts or help out a relative. One of them actually carries it out, for example, by writing the checks. Once the divorce comes down the pipeline, the spouse who issued the payment is shocked to be defending a claim that the gifts were a breach of fiduciary duty. Nothing took place behind the other spouse's back, but there was also no written consent by the other spouse.

The Legislature intended to protect an unknowing spouse from suffering the financial consequences of a reckless or intentional conduct which deprived that spouse of his or her share of property. The goal is good, but the statutes ignore the realities of daily married life.

Every lawyer and most lay people know that when a divorce arises people do not behave rationally. In many cases, one party tries to get an advantage over the other. The fact that we live in a no-fault divorce state isn't the issue. Someone's behavior in a divorce is often motivated by many things: anger, resentment, jealousy, or the fear that one will not have enough money or will have to become responsible for oneself. These factors cause people to do things that they would not ordinarily do.

By maintaining the existing statutes, the Legislature is not acting to protect parties from damaging transactions, but it is giving one party an undue advantage over the other, which can result in great financial detriment.

The statutes disregard the fact that the family law court is a court of equity. By requiring a writing as evidence of consent to what are nothing more than normal transactions agreed to by parties in the course of a marriage, the statutes also disallow equitable principles.

There must be a change in the statutes. The legislation should be more narrowly tailored to serve its specific purpose. This is a community property state and most of our family law statutes are intended to put people in a position of parity to the extent possible during a divorce. The existing legislation works against that principle. If our Legislature cannot see fit to amend the statutes so that parties are not penalized for entering into consensual transactions, then at the very least marriage licenses given in California should also come with a pamphlet explaining that all inter-spouse transactions must be agreed upon in writing.

**Fred Silberberg** is a certified family law specialist and a partner at Silberberg & Ross in Brentwood. The firm specializes in family law.