Opinion No. 56-6499

July 17, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Frank Andrews, Attorney for the Department of Public Welfare, P. O. Box 1391, Santa Fe, New Mexico

You have presented to this office three questions which you phrase as follows:

"1. In enforcing payment of parental support against a married woman, can her interest in the community property be levied upon?

2. In enforcing payment of parental support against a married man, what part of the community property can be reached?

3. Does Section 57-3-6 of the 1953 New Mexico Statutes Annotated exempt the wife's earnings from being levied upon for the support of the husband's parents?"

Since the questions presented and our answers to these affect vitally the administration of the Department of Public Welfare, particularly with regard to the recently enacted Relative's Responsibility Act, we shall attempt to outline and examine all considerations and authorities bearing on these as we believe they affect the questions presented.

Our attempt to answer those you ask and our conclusions on these will be better understood, we believe, if we are permitted to answer and examine others which are related.

Implicit in, or at least related to, the three questions you ask are the following:

1. May the **whole** of the community property owned by husband and wife be subjected to liability where the wife owes the duty of support to a parent and action is brought to enforce that duty?

2. May the **whole** of the community property owned by husband and wife be subjected to liability where the husband owes the duty of support to a parent and action is brought to enforce such duty?

3. May the community be dissolved to the extent that a **wife's interest or share** therein can be made subject to liability where she owes duty of support to a parent and action is brought to enforce that duty?

4. May the community be dissolved to the extent that a **husband's interest or share** therein can be made subject to liability where he owes duty of support to a parent and action is brought to enforce that duty?

Chapter 3, Laws, Special Session, is the legislation which raises your questions. Sections 1, 2, and 3 of that Act provide:

"Section 1. CHILDREN TO SUPPORT PARENTS. -- Every child in the state who has reached his seventeenth birthday shall support or contribute to the support of his parent or parents if: (1) the parent is unable to support himself and is, or is about to become a public charge, and (2) the child is financially able to furnish partial or complete support."

"Section 2. ENFORCEMENT. -- Parents may enforce support from their children by civil action. If the parent is an applicant for, or recipient of public welfare assistance, the department of public welfare may: (1) bring an action in its own name for the benefit of the parent, or (2) bring an action as principal to recover amounts paid to the recipient to the extent the children would have been required to contribute under this act. A change in ability to furnish support shall not create a retroactive liability."

"Section 3. AMOUNT OF SUPPORT. -- The department of public welfare shall prepare and publish scales based on the income and primary obligations of the children which shall be used by the department in determining the extent and minimum amount of support recipients are entitled to receive from their children. The department may deviate from the standards it creates when adherence would cause undue hardship to the children."

The statutes dealing with community property generally and relevant to the questions asked are here set out:

Section 57-3-2, N.M.S.A., 1953 Compilation:

"Husband and wife may hold property as joint tenants, tenants in common, or as community property."

Section 57-3-4, N.M.S.A., 1953 Compilation:

"All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof is her separate property. The wife may without the consent of her husband convey her separate property."

Section 57-3-5, N.M.S.A., 1953 Compilation:

"All property owned by the husband before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is his separate property."

Section 57-3-6, N.M.S.A., 1953 Compilation:

"The earnings of the wife are not liable for the debts of the husband."

Section 57-4-1, N.M.S.A., 1953 Compilation, provides in part:

"All other real and personal property acquired after marriage by either husband or wife, or both, is community property; . . ."

Section 57-4-2, N.M.S.A., 1953 Compilation:

"The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband."

The obligation in question is not one arising out of contract nor is it one arising from tort. It is an obligation created by statute -- a statutory obligation arising in certain circumstances. The fact, however, that the obligation is not of contract or of tort does not mean that decisions dealing with contracts and torts of the spouses and the question as to whether or not the community property as a whole, or the respective shares therein may be attached, are not of value in arriving at a conclusion on the instant questions. Further examining the nature of the obligation it is apparent that it is not a community obligation. The statute makes it the duty of a:

". . . child (to) support or contribute **to the support of his parent or parents.** . ." (Emphasis Supplied.)

In terms, at least, no obligation is placed on the child **and his or her spouse to support.** As will be indicated later, the ultimate effect of the statute may be exactly this, but not because the obligation, as created, invests it with this character. Further, it is not an obligation which is incurred for the benefit of the community. It cannot be said that the discharge of this obligation in any direct manner enhances, or is intended to enhance, the interest of the community. It is, as we see it, a separate statutory obligation of each spouse. See Occidental Life Insurance Company vs. Powers, 192 Wash. 475, 74 Pac. 2d 27, 114 A.L.R. 531.

QUESTION NO. 1: Regarding the first question which we have set out above, the answer to us seems clear enough. **The whole of the community property** may not be subjected to the wife's separate obligation to support her parent or parents. And this follows whether the subject obligation be treated in the same manner as her separate contract obligation or as her separate tort obligation.

In New Mexico the wife's interest in the community property may be reached to satisfy a judgment arising from her separate **But this is only her interest and not the entire community.** McDonald vs. Senn, 53 N.M. 198, 204 Pac. 2d 990, 10 A.L.R. 2d 966 (1949).

And by statute, Section 57-4-2, supra, the community property ". . . is not liable for the contracts of the wife, made after marriage, . . .". The statute, as we construe it, means the wife's separate contracts as well as those attempted to be made by her for the community while the husband is the manager of the community, or her separate

contracts in the event she would be substituted as head of the community. See Section 57-4-3 and Section 57-4-5, N.M.S.A., 1953. It would seem, therefore, that no part of the community, either the whole or her share therein, may be reached to satisfy her separate contract obligation. If, thus, we should treat the wife's statutory obligation to support, whether in the manner of her separate contract or in the manner of her separate tort, still the result would be the same; **the whole of the community** may not be reached to satisfy her separate statutory obligation to support.

QUESTION NO. 2: The answer to this question is, in our opinion, the same as our answer to Question No. 1; **the whole of the community** may not be reached to satisfy the husband's separate obligation to support a parent.

However, in comparing the husband's separate contract and tort obligations with his separate statutory obligation to support, at least the following New Mexico decisions and authorities should be briefly mentioned and examined.

Two writers on community property in New Mexico have stated that the New Mexico decisions hold or at least indicate that the community property is liable for the post-nuptial separate debts of the husband. Clark's Community of Property and the Family in New Mexico, page 29, and Wood, The Community Property Law of New Mexico; a Report to the Senate Interim Committee Pursuant to Senate Resolution No. 3, page 37.

However, neither of these indicate whether it is the entire community or the husband's share therein which is liable for the husband's post-nuptial separate contractual obligations. Examination of the decisions cited to support this conclusion indicate to us that the question is not at rest and may still be in doubt. These decisions are:

Strong vs. Eakin, 11 N.M. 107, 66 P. 539 (1901) Carron vs. Abounador, 28 N.M. 491, 214 P. 772 (1923) In Re Winston's Will, 40 N.M. 340, 59 P. 2d 904 (1936)

In Strong vs. Eakin, supra, the husband had incurred a debt in connection with a partnership enterprise in which his wife was not a partner. The issue was whether or not the community property could be reached to satisfy a judgment on the debt. The Court held that the entire community could be looked to for satisfaction. However, the holding was based on the theory that **the debt which had been incurred by the husband was presumptively a community debt.**

". . . As a matter of law, therefore, **a presumption arises that the property was owned by the marriage community; that the indebtedness was the indebtedness of the community,** and that the community property is subject at least to such part of this indebtedness as may be chargeable against the interest of James D. Eakin and Mattie L. Eakin, in the net partnership assets of the firm of Eakin and Brady and Eakin and Melini. . . ." (Emphasis Supplied).

Nowhere in the above case is there the least indication that the community property may be reached for his separate obligation in contract. On the contrary, there may be

found an implication that the law is otherwise. The cases cited from other jurisdictions in support of the conclusion in Strong vs. Eakin, supra, as well as the language quoted above, so indicate. The court dealt at length with the presumption that a debt incurred by the husband during marriage is chargeable to the community. Had it been deemed by the court that the separate contract debts of the husband were also chargeable against the community, then it would have been unnecessary to employ the aid of this presumption to arrive at its conclusion. Note the language approvingly quoted from Oregon Improvement Company vs. Sagmeister et ux, 30 Pac. 1058:

"That the property of the community can only be sold for a community debt has been so often decided by this court, and is so clear, under our statute, that we do not deem it necessary to here say anything in that regard. We will proceed at once to the consideration of the other questions presented; Was the debt for which the judgment was recovered a community debt? The undisputed facts show and the court below found, that it was for materials furnished to the husband in the prosecution of his business as a contractor and builder. Is a business prosecuted by the husband in the interest of the community, and from which the community will receive the benefits and profits, if any there are, a community business? We think it is. . . . **We think that every legal business conducted by the husband is prima facie in the interest of the community, and that, unless something appears to establish the contrary, the community is entitled to the profits thereof, and must bear the losses incident thereto."** (Emphasis Supplied).

What if sufficient evidence to overcome the presumption of community debt had been introduced? There is at least some doubt that the holding would have been that the community property was liable upon the showing that the obligation was a separate debt of the husband. See also for presumption of community debt, Brown vs. Lockhart, 12 N.M. 10.

In the next case, Carron vs. Abounador, supra, the plaintiff, Carron, had acquired title to an automobile from the trustee in bankruptcy of the estate of Ralph Abounador. The case was on a Writ of Replevin to secure the car from Rita Abounador who claimed it as separate property. The Court said:

". . . From these observations it is apparent that the automobile, being presumptively community property of the Abounadors, it was subject to the payment of the debts of Ralph Abounador, and upon the appointment of a trustee in bankruptcy, the title to all his property which was, at the time he was adjudicated a bankrupt, subject to forced sale for the payment of his debts, was, by virtue of the provisions of the Bankruptcy Act, transferred to and vested in such trustee and was thereby taken in custodia legis. Gibbons v. Goldsmith, 222 Fed. 826, 138 C.C.A. 252; Mueller v. Nugent, 184 U.S. 1, 22 Supt. Ct. 269,

It is from the language ". . . it was subject to the payment of the debts of Ralph Abounador . . ." and ". . . the title of all his property which was at the time he was adjudicated a bankrupt, subject to forced sale for the payment of his debts . . ." that it

has been concluded that the community property is liable for the separate debts of the husband.

However, it is noted that Gibbons vs. Goldsmith, supra, a Federal case arising in the Ninth Judicial District in the State of Washington, was cited by the Court in support of its language quoted above, and that case passed upon the same question as did our Court in Carron vs. Abounador, supra. In the Gibbons case, supra, the holding was based upon the theory that the debts of the husband for which the community property was liable in bankruptcy were those which were incurred by the husband during the marriage and thus presumptively community debts. The Gibbons case, does not deal at all with the husband's separate debts. In view of this, it is very doubtful that Carron vs. Abounador, supra, stands for the proposition that the whole of the community property is liable for the separate debts of the husband.

The third case above, In Re Winston's Will, supra, contains this language:

". . . This was classified as separate property, **and while community property is subject to the payments of the debts of the husband and the community** (Strong VS. Eakin, 11 N.M. 107, 66 P. 539) debts, or obligations incurred for the benefit of the husband's separate estate under a decree marshaling separate and community debts and property, should be paid out of the husband's separate property." (Emphasis supplied).

The statement underlined above was a mere gratuity as concerned the issues in the Winston case. But not only is it a mere gratuity, it is, as has been shown above, a misconstruction of the holding in Strong vs. Eakin, supra, if that case is intended as authority for the proposition that the community is subject to the husband's separate debts. But notwithstanding this, it should be noted that in the quotation above this Court indicated that, at least in some instances, the husband's separate estate should be looked to for his separate debts.

Thus, from the above, we believe it demonstrable that we have no decisions in New Mexico which are determinative on the question of the liability of the whole, or the husband's share, in community property for the husband's separate post-nuptial contractual obligations. It is our feeling that the above decisions on the contrary might, by implication, indicate otherwise, though without any indication whether it is the whole or only the wife's share therein which is exempt from liability.

A Federal case arising in New Mexico and decided in 1906 held that the community property was subject to the husband's separate ante-nuptial contract obligations. In Re Chavez, 149 Fed. 73, 80 C.C. A. 451. This case is of doubtful value, since it was decided at a time when the wife's interest in community property in this State was considered to be something less than a vested interest as subsequently held in Beals vs. Ares, 25 N.M. 459, 185 P. 780 (1919).

Other community property states have taken divergent views on the liability of community property for the husband's separate contract obligations. The differences are attributable to the particular state statutory provisions as well as the different views of the various courts on the underlying theory of community property.

See 1 De Funiak, Principles of Community Property, Sections 160 through 164.

Thus, on the question of the liability of community property for the husband's separate contract obligations, in the absence of clearer authority than we have in this jurisdiction, or better aid than can be given as by decisions in other states, we decline to state a conclusion on the question. The New Mexico decisions and authorities are cited and discussed above only to indicate that if we were to treat the husband's statutory obligation to support in the same manner as one in contract, these would be doubtful authority and do not compel the conclusion that the separate statutory obligation to support can be enforced against the whole of the community property.

Upon the question of recovery from the community property for an obligation based on the husband's separate tort, though we have no decisions squarely in point, it would seem that, not the whole of the community, but only his share therein, could be subjected to payment. This would seem to follow as a corollary of the rule in McDonald vs. Senn, supra, where a lien was permitted to be impressed upon the wife's interest for her separate tort.

Thus, whether the husband's statutory obligation to support his parent or parents is treated in the same manner as either his separate contractual obligation or his separate obligation for tort, it is our opinion that the **whole of the community may not be looked to for satisfaction thereof.**

QUESTION NO. 3: It has been pointed out in Question No. 1 that the community property, either the whole or her share therein, may not be subjected to the payment of the wife's separate contractual obligations. This conclusion is based upon the interpretation of Section 57-4-2. If we treated the wife's separate statutory duty to support her parents as her separate contractual obligations it would be clear that no part of the community property could be made subject to the discharge of such obligation. De Funiak, in his Principles of Community Property, supra, Section 165, suggests that:

". . . Where an obligation of a separate nature, such as for the support of a parent, is imposed by law upon a spouse, the extent to which separate or community property is liable usually follows the pattern applied in the particular state in the case of contractual obligations . . ."

Were this the case in this jurisdiction then, as pointed out above, the community property would not be liable for the wife's duty to support her parents. However, we feel that in this State there is a sound reason for following the tort rule instead of the contract rule as concerns the wife's obligation in question.

De Funiak, in support of the quotation above, cites the case of Grave vs. Carpenter, 42 Cal. App. 2d 301, 108 P. 2d 701, noted in 14 So. Calif. Law Review 481. In Grace vs. Carpenter, Supra, the mother of a married daughter had secured judgment on a statutory duty to support. It appeared that the daughter had no earnings of her own and that all the property of the daughter and her husband was community. On appeal it was held that the duty of the daughter to support her mother could not be enforced against the community property. The reasons given by the California Court for its holding are not as significant to us as the New Mexico Supreme Court's appraisal of that and other California cases, and the nature of the wife's interest in community property in that State as compared with the nature of her interest in this State.

McDonald vs. Senn, supra, in allowing the wife's share in the community to be reached for her separate tort is based squarely upon the reason that her interest is a presently existing half interest equal to that of her husband. See also Beals vs. Ares, supra.

Grace vs. Carpenter, supra, was cited to the Court in McDonald vs. Senn, supra, to support the proposition that a lien based on the wife's separate obligation would not reach community property. Our Court rejected this contention and based its opposite result on the fact that in New Mexico the wife's interest is one that is "vested", while, according to our Court, the interest of the wife in California though "more than a mere expectancy" is less than a "vested" interest.

". . . The California decisions are necessarily bottomed upon the holding that Sec. 161a of the Civil Code 'does not change the nature of the wife's interest to a vested (interest)'; if it did (quoting from the Grolemund case) '. . . her half of the community property would have been subjected to . . . the rights of the judgment and other creditors.' Anything to the contrary in the Smedberg, Grace, and McClain cases must give way to this higher authority.

"If the California Supreme Court had held that the wife's interest was vested in her, as it is asserted here, its conclusion would necessarily have been identical with ours. The California Supreme Court's construction of that state's statutes should be binding on the world, and we accept it as the law of California. The California Supreme Court having concluded that the wife's interest in the community property in that state is not vested in her, the California decisions are not authority here, as our holding that the wife's interest **is vested in her, forces a different conclusion."**

And our Court further stated in the same case:

"Our statutes do not provide for any specific liability of the community property; only that for which it is not liable. It is not liable for the contracts of the wife made after marriage unless secured by a pledge or mortgage thereof, signed by the husband. Sec. 65-402, N.M. Sts. 1941. It is not specifically exempted from liability for the torts of either husband or wife."

Now as is shown above, if the contract rule were followed, the wife's interest could not be reached to satisfy the obligation in question. Yet since this is not an obligation in contract and since no provision in our community property statutes exempts this type of obligation, as no provision exempted from tort obligation in McDonald vs. Senn, supra, we conclude that the wife's interest may be reached for the statutory obligation to support her parents.

It may be stated here that the general managerial powers which the husband has over community personal property does not affect the conclusion above, as this factor, also, did not influence the holding in McDonald vs. Senn, supra.

Now in effect Chapter 3, Laws, Special Session 1955, has made the husband, in an indirect manner, responsible for the support of his wife's parents. Half of the husband's earnings being, at the time of acquisition, property of the wife, these may be reached in discharge of the wife's separate obligation to support. However, the parents of the wife benefit, not because the statute places a duty on the husband to support his in-laws, but because the laws on community property vests in the wife half of his earnings and other acquisitions during the existence of the marriage.

QUESTION NO. 4: As pointed out in the discussion under Question No. 2, there is a definite question as to whether either the whole or the husband's share in community property may be reached to satisfy his separate contractual obligation. But as under Question 3, it is our opinion that this obligation should be treated in the same manner as the case of a husband's separate tort. In the latter, as indicated earlier, the husband's share of the community property is probably liable for his separate tort in the same manner as the wife's

However, Section 57-3-6 must be considered in connection with the question here. That section as set out above indicates that the wife's earnings are not liable for the debts of the husband's. And it has been held that although the husband's debts cannot be satisfied out of the wife's earnings, nevertheless, such earnings are community property. Albright vs. Albright, 21 N.M. 606, 157 Pac. 662 Ann. Cas. 1918 E. 542.

It is clear enough that as used in Section 57-3-6, ". . . debts of the husband" means the husband's separate debts and not community debts. However, it is not so clear whether this means the husband's separate debts incurred by contract, those incurred by his separate tort, or those, as the one in question, imposed by statute. We will not attempt to distinguish among these. We take the broadest meaning of the language and rule, for purposes of this opinion, that it means all types of the husband's separate debts, including the separate statutory obligation to support. Thus in determining which property of the husband may be looked to for support of his parents the wife's earnings must be excluded. It is realized that this produces inequality as between husband and wife where their shares are sought to enforce the present obligation, but the statute, we believe, prevents any other conclusion.

It may perhaps be that once her earnings become merged in the balance of the community property to the point where they can no longer be traced, as where they, together with the husband's funds, are invested and reinvested, that they may lose their character as "earnings of the wife" within the meaning of Section 57-3-6, and that, thereafter, the share which becomes the husband's could be reached for his separate obligation to support his parents.

From the above your questions are answered as follows:

Number 1: Yes.

Number 2: The husband's share in the community property can be reached with the exception of the "earnings of the wife" while those earnings retain their character as such under Section 57-3-6, N.M.S.A., 1953.

Number 3: Yes.

I trust the above helps answer your inquiries.

By: Santiago E. Campos

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