

## Enforcing Judgment Against A Debtor's Spouse

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November 21, 2017, 1:02 PM EST

Judgment creditors, and even their attorneys, often view collections as a time-consuming and expensive endeavor to obtain what a court has already ruled they are entitled to recover. To make matters worse, the various methods of judgment enforcement are typically controlled by arcane state laws inundated with debtor-friendly roadblocks.

A particularly thorny problem may arise when, after filing suit and obtaining judgment, a creditor learns that the debtor is insolvent and possesses no collectible assets. With no apparent means to satisfy their judgment, a creditor may contemplate abandoning collection efforts, refusing to throw good money after bad. But in the rare instance when otherwise collectible assets are owned by the debtor's spouse — who is not liable on the underlying judgment — a creditor must be more determined and creative in order to recover on their judgment.

### Discovery in Aid of Execution

First and foremost, a creditor should have information pertaining to the extent and location of a debtor's assets long before the time judgment is entered. But if a creditor learns at the end of the day that the debtor has no assets or they are otherwise encumbered, various devices may be employed to obtain information from a nondebtor spouse in aid of execution, such as written discovery demands and depositions. In certain situations, and if it is practical and cost-efficient to do so, a creditor may turn to the nondebtor spouse's assets as a means of recovery regardless of whether there is any underlying misconduct at play.

### Enforcement in the Absence of Wrongdoing

In any of the 10 community property jurisdictions throughout the country, which most notably include California and Texas, a creditor should first determine whether the underlying obligation is individual to the debtor or joint with their spouse.[1] While seemingly straightforward, a court may consider debt to be a joint obligation through application of traditional principles of agency, ratification or estoppel, and in instances when one spouse pays the other's bills. If the obligation is joint, then all property owned by both spouses may be subject to recovery.



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Even when the judgment is not an obligation of a nondebtor spouse, it still may be possible to reach their property in certain jurisdictions.[2] To do so, a creditor should determine whether the specific asset sought for collection is the nondebtor spouse's separate property or community property. While a nondebtor spouse's separate property is typically exempt from execution, it may nevertheless be subject to recovery if accrual of the underlying debt resulted from the purchase of certain so-called "necessaries" of life, such as food, clothing, medicine, and rent.[3] The same is true even in some common law jurisdictions that recognize a duty of familial support, enabling a creditor to recover from either spouse for debt resulting from these expenditures.[4]

A creditor's ability to recover community property to satisfy a judgment is derived from the general presumption that each spouse owns an equal, undivided interest in most property acquired during the marriage. While there is no uniform definition as to what this property specifically entails, it is generally referred to as assets acquired by the efforts of either spouse during the marriage, and may include income and earnings, the contents of a safe deposit box, and funds in a joint bank account even in some common law jurisdictions.[5] Recovery largely depends on the jurisdiction where the property is located, with California being the most creditor-friendly. There, all community property is subject to both premarital and marital debts of either spouse.[6] This rule is subject to important exceptions, however, such as protections for one spouse's post-marital earnings from the other's premarital debt, property the nondebtor spouse individually manages, as well as an overall exemption for debt arising from the other spouse's commission of a tort. In other jurisdictions, the ability to recover community property is typically determined by whether the property at issue is solely managed by the nondebtor spouse.

Outside community property jurisdictions, many states provide additional means for a creditor to enforce their judgment against a nondebtor spouse's assets. While highly dependent on state law, some jurisdictions allow creditors to attach a debtor's survivorship interest in property held with a nondebtor spouse as a tenancy by the entirety, even though the property itself is not available for immediate collection.[7] Additionally, a nondebtor spouse's property may be recovered if it was acquired through fraud or other wrongdoing.

### **Enforcement in the Face of Fraud and Other Misconduct**

It is unfortunately all too frequent for debtors to ignore or otherwise refuse to comply with the judgment enforcement process. In the worst scenario, debtors may resort to fraud or other wrongdoing by surreptitiously transferring otherwise collectible assets to their nondebtor spouse and then feigning insolvency to avoid collection. In this situation, a creditor may be forced to initiate new litigation just to satisfy the judgment it already obtained.

The most common of these actions sounds in fraudulent transfer, where a judgment creditor will seek to set aside an illicit conveyance or attach and levy whatever property a debtor wrongfully transferred to a third party, such as their nondebtor spouse. In the difficult instance when a creditor must prove actual fraud, many states provide for an indication, presumption or even a specific "badge of fraud" solely because a debtor transfers an asset to their spouse.[8] The same may be true in a constructive fraud case, as a nondebtor spouse's "insider" status may be sufficient in and of itself to warrant careful scrutiny of the challenged transaction.[9] While the need to commence new litigation is never ideal, many states like New York and Ohio permit a successful plaintiff to recover punitive damages and attorneys' fees in fraudulent transfer cases.[10]

In some jurisdictions, a creditor may even pursue the unusual claim of reverse corporate veil piercing to

recover assets belonging to a corporation that is owned by a nondebtor spouse, but actually controlled by a debtor. Connecticut courts, for example, have looked favorably on this claim in situations when a seemingly insolvent debtor perpetrates the fraud of “diversion of the fruits of their labor” by forgoing all distributions, salary and compensation of any kind despite operating and providing services to a corporation.[11] In these circumstances, courts find that equity demands the debtor and nondebtor spouse be deemed joint owners of the corporation for judgment enforcement purposes against corporate assets.

## Conclusion

While a debtor’s insolvency can be a significant impediment to satisfying a judgment, the ability to pursue a nondebtor spouse’s assets in certain circumstances can significantly increase a creditor’s chances of recovery.

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[1] The remaining community property jurisdictions include Arizona, Idaho, Louisiana, Nevada, New Mexico, Washington, Wisconsin and Puerto Rico. Alaska has an optional community property system, and Tennessee has a comparable measure enabling the transfer of property to a community property trust.

[2] See, e.g. Cal. Fam. Code § 910; Tex. Fam. Code § 3.202.

[3] See Cal. Fam. Code § 914; *Tedder v. Gardner Aldrich LLP*, 421 S.W.3d 651, 656 (Tex. 2013) (“We have suggested that a spouse’s necessities are things like food, clothing, and habitation — that is, sustenance ...”).

[4] See, e.g. Conn. Gen. Stat. § 46b-37.

[5] See Cal. Code Civ. P. § 700.160(b) (permitting levy on safe deposit box in name of nondebtor spouse); N.J. Stat. § 17:16I-4(a) (joint bank account belongs to parties in proportion with their net contributions, but in absence of such proof, property is owned in equal shares by every person with a right of withdrawal).

[6] See Cal. Fam. Code § 910.

[7] See, e.g. *In re Pletz*, 221 F.3d 1114, 1117 (9th Cir. 2000) (finding Oregon tenancy by the entirety treated as a tenancy in common with indestructible right of survivorship, allowing creditor of one spouse to execute on that interest); Colo. Stat. Ann. § 38-31-201.

[8] See, e.g. *United States v. Green*, 201 F.3d 251, 254-55 (3rd Cir. 2000) (noting long-standing Pennsylvania law holding transfers between spouses for nominal consideration presumed fraudulent); *In re Laines*, 352 B.R. 397, 404 (Bankr. E.D. Va. 2005) (reasoning under Virginia law that “[t]ransactions

between husband and wife must be closely scrutinized to assure that they are fair and honest and not merely contrivances resorted to for the purpose of placing ... property beyond the reach of [ ] creditors. In such a contest, the burden of proof is on the transferee to show the bona fides of the transaction.”); *People ex rel. Hartigan v. Anderson*, 597 N.E.2d 826, 828 (Ill. App. Ct. 1992) (“Where a [spouse] makes a voluntary conveyance to [their spouse] and afterward becomes insolvent, fraud is presumed and the burden of proof is on [debtor spouse] to disprove the implication of fraud as to creditors at the time of making the conveyance.”); *Thomas v. Shoots*, 651 S.W.2d 663, 665-66 (Mo. Ct. App. 1983) (presumption of fraud when real estate owned in debtor’s name conveyed to [spouse] leaving debtor personally immune from execution).

[9] See *In re Halloway*, 955 F.2d 1008, 1011 (5th Cir. 1992).

[10] See *Blood v. Nofzinger*, 834 N.E.2d 358, 372 (Ohio Ct. App. 2005) (“punitive damages and attorney fees may be awarded when appropriate in fraudulent conveyance cases”); *Blakeslee v. Rabinor*, 582 N.Y.S.2d 132, 134 (N.Y. App. Div. 1992) (“punitive damages may now be awarded in a case of fraudulent conveyance, but only if the defendant’s conduct was gross and wanton and involved high moral culpability.”); NY Dr & Cr § 276-a.

[11] See *Cadle Co. v. Steiner*, 51 Conn. L. Rptr. 480 (Conn. Super. Ct. 2011); *Cadle Co. v. Zubretsky*, 44 Conn. L. Rptr. 843 (Conn. Super. Ct. 2008).