COMMUNITY PROPERTY

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ELIJAH Z. GRANET

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Community Property

Elijah Z. Granet

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Disclaimer

This is designed as a personal notebook of interesting law facts, rather than a tool for scholarly research. It is more akin to an old-fashioned common-place book than a text-book (the cover and copyright page is just me being silly, as I am wont to do), consisting of case descriptions which have been copy-pasted, often without attribution and with minimal editing here—ie, the material here is partly stolen! For these reason, it is only for personal use, and **must not** be reproduced or distributed, as doing so would be a violation of copyrights. It also **must not** under any circumstances **ever** be cited or used directly for any examination or paper, except strictly as an *aide memoire* for revision. Absolutely no liability is made for any information here.—EZG

Cover Art

The painting has various names, but is generally called some variant on *The Arnolfini Wedding*, as it depicts the marriage of the merchant Giovanni di Nicolao Arnolfini. It was painted (oil on panel) by Jan van Eyck in 1434 and hangs in the National Gallery in London.

Colophon

This work was typeset in LaTeX, making use of LUA scripting to maximise the OpenType features of modern typefaces. The main text was set in Robert Slimbach's masterpiece, Arno Pro. Excerpts of statutes were set in Palatine Parliamentary, a typeface I created to be metrically identical to the official typeface of UK statutes, Book Antiqua Parliamentary; both are based off of Hermann Zapf's Palatino (cut by the legendary punchcutter August Rosenberger), with the quotation marks lifted from either Stanley Morison and Victor Lardent's Times New Roman or a libre clone thereof. Excerpts from cases were set in a variant of the Century Schoolbook used by the United States Supreme Court. The typeface used for quotations—Cronos Pro—is a a dignified sans-serif face by Robert Slimbach. Any maxims were set in TRAJAN PRO, whose classical forms forms reflect the Roman origins of many of our belovèd brocades in the law. Warnings about obsolete cases were set in **Linotext Std**, to ensure that readers would not inadvertently cite overturned law. Monospaced text was set in `Source Code Pro`. Fontawesome was used to provide symbols, while case law headings were set in Goudy Text MT Std. An indent of 1.5 M was used, and **bold** text was generally limited.

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I BACKGROUND

This discussion concerns community property in the State of California. Each state has its own family law, there is no federal family law. Consequently, the allocation of community property and what courts take into account when determining this depends on the state. The location of the marriage doesn't matter for community property, while the location of the divorce does.

§ 1 *General Notes*

Community property is one component of family law that is constitutionally enshrined in California.

Constitution Corner

Const. (Cal.) Art. I § 21

Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property.

In California, all divorce filings are public. This means the parties must also disclose income and expense statements Marriage is an economic arrangement governed by the state. It is like a contract that is generally entered into without knowing the terms. Community property arises because of the marriage; however, people in marriages most often do not act like business partners.

§ 2 *Jurisdiction*

In order for California must have jurisdiction over the people, or one of the people involved in the state of matrimony. One cannot file unless one were living in California for 6 months and were additionally resident of one's county for 3 months (whatever county one files in) If one has lived in California for less than 6 months, one can file for legal separation. *Nota bene*: this is distinct to the date of separation.

§ 3 *Grounds*

§ 3(1) *Dissolution:*

Dissolution in the state of California is on a 'no fault' basis, with a singular ground of irreconcilable differences.

§ 3(2) *Nullity*

The nullity of matrimony may arise, in California, on the grounds of fraud, bigamy, *etc*.

§ 4 *Court Documents*

§ 4(1) *Summons*

A summons contains standard Family Law Restraining Orders. These apply to everyone who files for dissolution. Law is trying to prevent parties from trying to take/destroy community property

§ 5 *Historical influences*

It is absolutely essential that one keeps at the forefront of one's in mind the history of California, because that has influenced the State's common law. California was acquired by the United States after Mexican-American War (1846–1848). Early settlers operated under a community property system derived from European civil law. Later, during the Gold Rush, flocks of miners came to California to strike it rich, and following them were lawyers from the East Coast, bringing their common law backgrounds.

Community property was then defined in the California Constitution, but it only described separate property of the wife. The laws at the time back then gave husbands control over all the finances of a *feme covert*. A wife's interest in the property was a "mere expectancy" that materialized only at divorce or death. It was only in 1927, that the Legislature declared that each spouse's interest was "present, existing, and equal." A husband in California was still given significant control to manage the community property as if it were his separate property, and to manage the wife's separate property except that he could not convey or encumber it without her consent. It took until 1975 for equal management and control by husband and wife went into effect.

§ 6 *Definitions*

§ 6(1) *No Fault*

California is a "no fault" state. The courts of would not consider a spouse's affair in determining the allocation of community property and debts. A notable exception is breach of

fiduciary duty, for instance where t th cheating spouse spent community property on the affair. A prenup cannot be based on fault.

§ 6(2) *Character*

The "character" of the property is determining whether the property is *community property* or *separate property*. As with quantum computing, there is a third intermediate state, which we can call *quasi-community property*.

§ 6(2)(a) COMMUNITY PROPERTY

Community property includes wages and property acquired during marriage through work (not through luck or inheritance).

The Statute Book

Cal. Fam. Code § 760

> Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

In the statute, *supra*, "personal property" includes banking accounts, and anything else which is not real property.

The Statute Book

Cal. Fam. Code § 751

> The respective interests of each spouse in community property during continuance of the marriage relation are present, existing, and equal interests.

Thus, either spouse has an equal interest in community property.

§ 6(2)(b) SEPARATE PROPERTY

Separate property is the money and property that a spouse had before marriage, as well as any inheritance, winnings from chance, or gifts during marriage.

The Statute Book

Cal. Fam. Code § 770

(*a*) Separate property of a married person includes all of the following:

(1) All property owned by the person before marriage.

(2) All property acquired by the person after marriage by gift, bequest, devise, or descent.

(3) The rents, issues, and profits of the property described in this section.

(*b*) A married person may, without the consent of the person's spouse, convey the person's separate property.

Thus, the rents, issues, and profits of separate property are separate property. The rights in separate property are thus plenary, as one spouse, without the other spouse's consent, can convey separate property. This would not breach fiduciary duty, because neither spouse has an interest in the other's property.[1] However, one exception to the separate property rule is that nither spouse may be excluded from the other's dwelling, notwithstanding if it is separate property.[2]

With respect to separate property, the courts have the jurisdiction to confirm separate property is separate, to order reimbursement if applicable, and to characterize disputed assets and liabilities as separate property or community property. However, the courts lack the jurisdiction to force the sale of separate property.

§ 6(2)(c) QUASI-COMMUNITY PROPERTY

This category refers to property acquired while domiciled elsewhere that would have been community property if it had been in California at the time. Such quasi-community property is dealt with in the same manner as community property.

§ 7 *Rebuttable Presumptions*

1 *See* Cal. Fam. Code § 752 ("Except as otherwise provided by statute, neither spouse has any interest in the separate property of the other.").

2 *See* Cal. Fam. Code § 753 ("Notwithstanding Section 752 […] neither spouse may be excluded from the other's dwelling.").

§ 7(1) *Property acquired in marriage*

There is a general presumption that property acquired in marriage is community property.

The Statute Book

Cal. Fam. Code § 760

> Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

This presumption also applies to property with no title, or title showing only one spouse's name. It further also applies also applies to property possessed during marriage (*i.e.* we don't know when it was acquired).

As one might expect, the standard of proof for rebuttal of this presumption is that of a preponderance of the evidence. In this process, the the role of title is less significant in determining character and does not necessarily determine what the character of property is. It can, however, be rebutted by tracing to separate property funds.

§ 7(2) *Joint Title Presumption*

In dividing property in a dissolution/legal separation, all property acquired by the parties during marriage in joint form is presumed to be community property.

The Statute Book

Cal. Fam. Code § 2581

> For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> (*a*) A clear statement in the deed or other documentary evi-

dence of title by which the property is acquired that the property is separate property and not community property.

(*b*) Proof that the parties have made a written agreement that the property is separate property.

Thus, it is important to emphasize that here the funds are not determinative. As a matter of legal history, it is interesting to note that prior to 1984, one could rebut with an oral agreement as well as written.

Hence, property acquired during marriage is community property unless:

(i) It is traceable to a separate property source

(ii) It is acquired by gift (here, the spouse has to prove it was given to only them) not the couple or bequest

(iii) It is earned or accumulated while the spouses are separated

§ 7(3) *Competing Presumptions*

As noted *supra*, Cal. Fam. Code § 2581 requires that, in dividing property in a dissolution or legal separation, all property acquired by the parties during marriage in joint form is presumed to be community property. This can conflict with a provision of the Cal. Evid. Code.

The Statute Book

Cal Evid. Code § 662

The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

The Cal. Evid. Code is counter to the community presumption and basic concept, which presumes that just because a name is on it does not mean it is separate property. The courts have thus had occasion to consider the conflicting statutes.

In *Valley v. Valley*,[3] the Cal. Sup. Ct. held that, to the extent that title holder presumption applies, it does not apply during dissolution of marriage. In *In re Brace*,[4] the Cal. Sup. Ct.

3 58 Cal. 4th 1396, 324 P. 3d 274 (2014)

4 9 Cal. 5th 903, 470 P. 3d 15 (2020) .

further held that this presumption apply to a married couple, whether in a dissolution or not. Thus, one cannot rely on the Cal. Evid. Code in family court.

§ 7(4) *Income*

Income earned during marriage is presumed community property, unless it comes from a separate property asset.

§ 8 *On Characterization*

The heuristics of characterizing property is often understood in terms of four "T"s. These are:

(i) Time (*cf.* Cal. Fam. Code § 760)

(ii) Tracing

(iii) Title (Refer to competing presumptions, *supra*)

(iv) Transmutation (*cf.* Cal. Fam. Code § 852, reproduced *infra*)

The Statute Book

Cal. Fam. Code § 852

(*a*) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.

(*b*) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(*c*) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.

(*d*) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.

(*e*) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to

apply.

§ 8(1) *Title*

It is not controlling that property is titled in just one spouse's name. Title does not control, whereas funds do. However, if it is titled jointly, the joint title presumption applies.

§ 8(2) *"Quasi-Marital" Property*

This term is what property is called if it is determined that your marriage is not valid. Note that in such cases, the couple may still be declared a putative spouse/spouses. A common reason for marital invalidity is that one spouse may believe she has been separated from her prior spouse, but is actually still married.

§ 8(2)(*a*) PUTATIVE SPOUSES

Putative spouse status is where one party has a sincere belief in marriage despite the absence of a legal marriage. If the putative spouse invokes this doctrine, then it is used, but it is not required to invoke it. The status ends when the putative spouse learns of the non-existence of her legal marriage.

§ 8(3) *Separate Property*

This type of property refers to property owned before marriage, as well as all property acquired after marriage by gift or bequest. It further describes any rents, issues, and profits of said property.

§ 9 *Separation*

§ 9(1) *The Effect of Separation*

Separation has the effect of severing the community property.

The Statute Book

Cal. Fam. Code § 771

(*a*) The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.

§ 9(2) *The Date of Separation*

The Statute Book

Cal. Fam. Code § 70

(*a*) "Date of separation" means the date that a complete and final break in the marital relationship has occurred, as evidenced by both of the following:

(1) The spouse has expressed to the other spouse the intent to end the marriage.

(2) The conduct of the spouse is consistent with the intent to end the marriage.

(*b*) In determining the date of separation, the court shall take into consideration all relevant evidence.

(*c*) It is the intent of the Legislature in enacting this section to abrogate the decisions in *In re Marriage of Davis* (2015) 61 Cal. 4th 846 and *In re Marriage of Norviel* (2002) 102 Cal. App. 4th 1152.

It is important that parties consistently, in order for the date of separation to remain constant. Separation has become defined less by colloquial terms, and more as a juridical term of art. This is because, since the length of marriage is measured by this date, it is important enough to be quite often disputed in the courts. In high-value cases, the location of the date can swing the amount of money owed by either side by millions of dollars. Hence, from the case law, we can derive certain principles.

Case Law

Makeig v. United Sec. Bank & Trust Co.

112 Cal. App. 138, 296 P. 673 (1931)

FACTS Parties were married for fourteen ½ years. They only lived together for six weeks. They occasionally lived in different cities over the succeeding years and did sleep together and go in public as man and wife on rare occasions. Other times they wouldn't have any communication for months.

Mostly their marriage was secret.

ISSUE Were they separated?

HELD There was no final rupture of the marital relationship over the many years, and therefore no separation. To quote the Court:

"Living separate and apart, however, as contemplated by said [statute], does not apply to a case where a man and wife are residing temporarily in different places due to economic or social reasons, but applies to a condition where the spouses have come to a parting of the ways and have no present intention of resuming the marital relations and taking up life together under the same roof. Under modern conditions there is many a man living and working in one place and his wife living and working in another, seeing one another only on week ends, sometimes not for months at a time, yet they are not living separate and apart within the meaning of the section, for there has been no marital rupture, and there is a present intention to live together as man and wife, and their status is only temporary, although it may happen that the condition might exist for some years."

Case Law

In re Marriage of Hardin

38 Cal. App. 4th 448, 45 Cal. Rptr. 2d (1995)

FACTS The husband moved out of the marital home and filed for dissolution 14 years later.

ISSUE Was the date of separation the date the husband moved out or the date he filed for dissolution?

HELD It was the date of dissolution. Per Sonenshine, Acting P. J.:

"The ultimate question to be decided in determining the date of separation is whether either or both of the parties perceived the rift in their relationship as final. The best evidence of this is their words and actions. (The husband's and the wife's subjective intents are to be objectively determined from all of the evidence reflecting the parties' words and actions during the disputed time in order to ascertain when during that period the rift in the parties' relationship was final. […]

"The [trial court failed to consider other significant evidence indicating Victor's intentions. […] Victor never disclosed to any person, including Doris, that he intended to end the marriage by divorce until January of 1983 and he sent her many cards in which he wrote: 'Love,' 'All my love,' 'Your loving husband,' 'I'll straighten out some day,' and 'You deserve lots of sympathy for putting up with me.'"

Case Law

In re Marriage of Baragry

Cal. App. 3d 444, 140 Cal. Rptr. 779 (1977)

FACTS The husband leaves the family home for a boat and later an apartment on Aug. 4, 1971, but returns home to eat regularly. He took a family vacation with his wife and kept up a mailing address. He appeared with the wife in public and sent her romantic cards. Sex, however, ceases on that fateful Aug. 4 day. Husband instead lives with much younger girlfriend, with whom he is having sex.

ISSUE Did the marriage end, as the husband contends, in 1971, or much later, as the wife contends?

HELD The wife wins; sexual relations are not the determinative marker. Per Fleming, A.J.:

"The question is whether the parties' conduct evidences a complete and final break in the marital relationship. Here the only evidence of such a break is the absence of an active sexual relationship between the parties and husband's cohabitation elsewhere with a girlfriend. In our view such evidence is not tantamount to legal separation. So long as wife is contributing her special services to the marital community she is entitled to share in its growth and prosperity.

"At bench, husband was presumably enjoying a captain's paradise, savoring the best of two worlds, and capturing the benefits of both. Wife was furnishing all the normal wifely contributions to a marriage that husband was willing to accept and most of the services normally furnished in a twenty-year-old marriage. Husband was reaping the advantages of those services and may be presumed to owe part of his professional success during that four-year period to wife's social and domestic efforts on his behalf. One who

enjoys the benefit of a polygamous lifestyle must be prepared to accept its accompanying financial burdens. […] During the period that spouses preserve the appearance of marriage, they both reap its benefits, and their earnings remain community property. To hold otherwise would be tantamount to saying that because husband slept on the living room couch for four years, or because he regularly slept elsewhere with another woman, wife can be deprived of her share in the household earnings." (cleaned up)

Case Law

In re Marriage of Marsden

130 Cal. App. 3d 426 (1982)

HELD In determining whether parties have legally separated, question is whether the parties' conduct evidences a complete and final break in the marital relationship. Although wife moved out of family residence in April of 1975 and filed a petition for dissolution, finding of trial court that during period from date of marriage to mid-July 1978 the parties did not live separate and apart was supported by substantial evidence, which established that wife took no further legal action after filing her petition, that the parties continued their sexual relationship and attempted to resolve their marital differences with aid of a marriage counselor, that parties traveled together at various times and that wife moved back into family residence in October of 1976. Living separate and apart, for purposes of property division, does not apply to a case where a man and wife are residing temporarily in different places due to economic or social reasons.

Case Law

In re Marriage of von der Nuell

23 Cal. App. 4th 730 (1994)

FACTS The husband left the family home on Nov. 1, 1987. The wife alleged the break, however, happened much later on Sep. 12, 1991.

HELD The break did not occur until 1991. Per Klein, P.J.:

"The critical inquiry is whether the party's conduct evidences a complete and final break in the marital relationship. […] In sum, because rifts between spouses may be followed by long periods of reconciliation, and the intentions of the parties may change from one day to the next, we construeBaragry to hold legal separation requires not only a parting of the ways with no present intention of resuming marital relations, but also, more importantly, conduct evidencing a complete and final break in the marital relationship." (cleaned up)

Beware, O' Adventurer:
Here Be Dragons!
WARNING WARNING WARNING
THE BELOW CASE IS OBSOLETE
WARNING WARNING WARNING

Case Law

In re Marriage of Davis
61 Cal. 4th 846 (2015)

HELD There is a bright line rule that living apart is required for the date of separation.

WARNING WARNING WARNING
THE ABOVE CASE IS OBSOLETE
WARNING WARNING WARNING
Thou Hast Escaped the Dragons
But Beware: More Dangers Abound!

The decision in *Davis* was reversed by an enactment of the People which revised Cal. Fam. Code § 70 to the form quoted *supra* and required an examination of the totality of the circumstances.

§ 10 *Retroactivity*

The retroactive application of changes to the law is generally governed by Cal. Fam. Code § 4.

The Statute Book

Cal. Fam. Code § 4

(*a*) As used in this section:

(1) "New law" means either of the following, as the case may be:

(A) The act that enacted this code.

(B) The act that makes a change in this code, whether effectuated by amendment, addition, or repeal of a provision of this code.

(2) "Old law" means the applicable law in effect before the operative date of the new law.

(3) "Operative date" means the operative date of the new law.

(*b*) This section governs the application of the new law except to the extent otherwise expressly provided in the new law.

(*c*) Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action.

(*d*) If a document or paper is filed before the operative date, the contents, execution, and notice thereof are governed by the old law and not by the new law; but subsequent proceedings taken after the operative date concerning the document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the new law and not by the old law.

(*e*) If an order is made before the operative date, or an action

on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made, or alter a course of action commenced, before the operative date to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise provided in the new law.

(*f*) No person is liable for an action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and the person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences.

(*g*) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal or amendment by the new law.

(*h*) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.

Thus, as a general rule, changes to the family code apply retroactively.[5] However, sometimes retroactive application of the Cal. Fam. Code is impermissible interference with vested property rights.[6]

§ 10(1) *The Retroactivity Test*

Case Law

5 *See* In re Marriage of Fellows, 39 Cal. 4th 179 (2006).

6 *See* In re Marriage of Buol, 39 Cal. 3d 751 (1985).

In re Marriage of Bouquet
16 Cal. 3d 583 (1976)

HELD To determine whether a law should be applied retroactively, the court must consider:

(i) The significance of the state interest

(ii) Importance of retroactive application to cure a rank injustice

Recall that the statute provides in § 4(*c*) that the new law applies on operative date to all matters governed by new law. Further recall that the statute provides in § 4(*h*) that, if a party shows or a court determines that the new law would substantially interfere with effective conduct of proceedings or the rights of the parties, the court may apply the old law or the new law to the extent necessary to mitigate any substantial interference.

II ACQUISITIONS DURING MARRIAGE & TRANSMUTATIONS

§ 1 *Transmutations*

§ 1(1) *The Old Law*

Beware, O' Adventurer:
Here Be Dragons!

WARNING WARNING WARNING
THE BELOW CASE IS
PARTIALLY
OBSOLETE
WARNING WARNING WARNING

Case Law

In re Marriage of Lucas
27 Cal. 3d 808 (1980)

HELD The Cal. Sup. Ct. upheld the characterization of a motor home acquired during a marriage as entirely the wife's separate property. From the husband's failure to object when title was taken in the wife's name alone the trial court inferred that the husband had made a gift to the wife of his interest in community funds used to purchase the motor home. Thus, oral transmutations were permitted. This has ceased to be good law.

WARNING WARNING WARNING
THE ABOVE CASE IS

PARTIALLY
OBSOLETE
WARNING WARNING WARNING
Thou Hast Escaped the Dragons
But Beware: More Dangers Abound!

§ 1(2) *Anti-*Lucas *Legislation*

The law was changed through "anti-Lucas" legislation, under which oral transmutations are forbidden for events occurring after 1984 . Note that the relevant date is when the alleged transmutation occurred, not the date of purchase. This legislation applies to both transactions between spouses and properties purchased from third-parties. Such laws involved the following statutes:

(i) Cal. Fam. Code § 760 (*see* 3 *supra*)

(ii) Cal. Evid. Code § 662 (*see* 6 *supra*)

(iii) Cal. Fam. Code § 2581 (*see* 5 *supra*)

(iv) Cal. Fam. Code § 852 (*see* 7 *supra*)

§ 1(3) *Statutory requirements*

These are principally derived from Cal. Fam. Code § 852.

§ 1(3)(a) IN WRITING

The declaration must be in writing.

Case Law

In re Marriage of Benson
36 Cal. 4th 1096 (2005)

FACTS A husband claimed that he conveyed his house to the wife on the basis that she made a promise to waive her pension interest in his pension. However, the wife never did this.

ISSUE Does the equitable doctrine of part performance negate the writing requirement for transmutation? That is, because the wife made a promise and the husband performed on it, is writing still required?

HELD Reversing the lower court, the Cal. Sup. Ct. held that the rele-

vant statute simply requires writing, and there are no equitable exceptions (that the court has seen).

COMMENTARY Interestingly, had the case not settled, the husband would have a plausible argument for breach of fiduciary duty to undermine the house conveyance or for undue influence.

§ 1(3)(*b*) EXPRESS DECLARATION

This must be specific and clear, leaving no ambiguity. There are, however, no "magic words" guaranteed to transmute in every context.[1] From this, we derive the rule that the declaration must contain language that expressly states that the character of the property is being changed or show that the spouse being negatively affected knows they are giving up their rights.[2]

This is the requirement out of which the most disputes arise out of this requirement. It is generally not allowed to adduce extrinsic evidence to show the intent to transmute.[3] Even partial reliance on an oral promise will not allow extrinsic evidence. The phrase "giving my interest in the property" typically, but not inevitably shows intent to transmute.

§ 1(3)(*c*) JOINED IN BY THE PARTY CHARGED

The declaration must be signed by by the spouse who will be negatively affected.

§ 1(4) *The "Bauble" Exception*

This derives from Cal. Fam. Code § 852(*c*):

The Statute Book

Cal. Fam. Code § 852

[…]

(*c*) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.

1 *See* In re Estate of MacDonald, 51 Cal. 3d 262,794 P. 2d 911 (1990) .
2 *Id.*
3 *Id.*

Examples of gifts which are *not* tangible nor of a personal nature are financial intangibles include: bank accounts, stock certificates, *etc*. Where it operates, this exception allows transmutation without entering into a written agreement.

§ 1(5) *Things found Not to Be "Express Declarations"*

In one case, an "IRA Adoption Agreement" consenting to the husband naming someone other than the wife as beneficiary to the IRA that contained community property funds. It was held that there was no clear intent to transmute.[4]

In another case, a letter indicated that the husband was "transferring" shares to the wife. This mere indication, however, and was insufficient to transmute. The notion of "transferring" is not synonymous with transmutation.[5]

In yet another case, a DMV printout purported to show transmutation into separate property by re-registering a car formerly in the wife's name alone into both spouses' names. This was not sufficiently clear nor sufficiently unambiguous.[6]

In a further case, a trust whose instrument stated any asset in the trust is community property unless explicitly marked separate property was found to be insufficient. The husband conveyed his separate property to the trust without marking it as separate property. The document conveying it to the trust did not say that the character or ownership of property was changing, nor did it identify the property.[7]

In a further case, instructions to split sale proceeds of a community property asset 50%0 between the husband and wife were not enough to be a transmutation.[8]

The courts have also held that tenancy titling of property acquired by spouses using community funds on or after January 1, 1985 is not sufficient by itself to transmute community property into separate property.[9]

In yet a further case, a partnership agreement replaced the name of the husband as the partner with the names of the husband and wife. This was held not to be sufficient to show that the husband understood character to be changed.[10]

The same is true for a case where an insurance policy was taken out only in one spouse's name. This is not sufficient to indicate a change. It may also be that the wife inherently

4 *See* In re Estate of MacDonald, 51 Cal. 3d 262,794 P. 2d 911 (1990) . This case has been widely criticized, and the People by their legislature adjusted the outcome by amending Cal. Prob. Code § 5031 by providing that non probate transfers which fail to transmute can become effective at death if not otherwise revoked. This means at divorce, this case is still effective.

5 *See* In re Marriage of Barneson, 69 Cal. App. 4th 584 (1999) , *applying* In re Estate of MacDonald, 51 Cal. 3d 262,794 P. 2d 911 (1990) .

6 *See* In re Estate of Bibb, 87 Cal. App. 4th 46 (2001) .

7 *See* In re Marriage of Starkman, 129 Cal. App. 4th 659 (2005) .

8 *See* In re Marriage of Leni, 144 Cal. App. 4th 1087 (2006) .

9 *See* In Re Brace, 9 Cal. 5th 903, 470 P. 3d 15 (2020) .

10 *See* In re Marriage of Lafkas, 237 Cal. App. 4th 921 (2015) .

already owned part of the policy, so making it in her name alone did not necessarily show intent to surrender the share.[11]

§ 1(6) *Things Found to Be "Express Declarations"*

In one case, a grant deed signed by the husband transferring his separate property interest in an apartment to him and the wife as joint tenants. This was held to be a successful transmutation to community property. The word "grant" is historically operative word for transferring interests.[12] The same was true of a grant deed in another case.[13] Further, there is a presumption that transactions between spouses are not transmutations, which rebuttable by evidence that transaction was documented with a writing containing the requisite language.[14]

§ 1(7) *Conditional Transmutations*

One cannot have a conditional transmutation. This is quite simply impossible. It defies all known laws of legal physics and is an absurd concept and also morally wrong. Judges everywhere scoff at the idea.

Case Law

In re Marriage of Holtemann

166 Cal. App. 4th 1166

FACTS The parties had a transmutation agreement which only applied upon death, not upon separation or dissolution.

HELD A conditional transmutation be in truth no transmutation at all.

COMMENTARY I would add that a conditional transmutation is an abomination against the order of nature.

§ 2 *Transactions with* bona fide *purchasers*

When there's a potential transmutation and a sale to a *bona fide* purchaser, the Cal. Evid. Code § 662 title presumption prevails. Even if there was no successful transmutation from community property to separate property under the family code, if the title was under only one spouse's name when sold to a *bona fide* purchaser, the evidence code presumption that

11 *See* In re Marriage of Valli, 195 Cal. App. 4th 776 (2011) .
12 *See* In re Estate of Bibb, 87 Cal. App. 4th 46 (2001) .
13 *See* In re Marriage of Kushesh & Kushesh-Kaviani, (2018) 27 Cal. App. 5th 449 .
14 *See* In re Marriage of Barneson, 69 Cal. App. 4th 584 (1999) .

it was that spouse's SP prevails. The *bona fide* purchaser takes title free of claim from other spouse.[15]

§ 2(1) *Which controls? The epic battle between Cal. Evid. Code § 662 and Cal Fam. Code 2581*

First, let us refresh ourselves as to the contents of these glorious legal provisions, strapping statutes the pair of them.

The Statute Book

Cal. Evid. Code § 662

> The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

Cal. Fam. Code § 2581

> For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> (*a*) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
>
> (*b*) Proof that the parties have made a written agreement that the property is separate property.

The courts have sometimes shied, understandably, from confronting the true epic conflict, one as primal as the code system of California legislation is old. Thus, even the notoriously

15 *See* In re Marriage of Brooks & Robinson, 169 Cal. App. 4th 176 (2008) .

brave and courageous judicial jouster MOSK, J. dared not decide this, writing instead in the Court of Appeal "[w]e do not and need not" decide whether Cal. Evid. Code § 662 applies in dissolution of marriage actions.[16] Assuming the title presumption may sometimes apply, it does not apply when it conflicts with the transmutation statutes.[17] The Cal. Sup. Ct. has further clarified that "Cal. Evid. Code § 662 does not apply when it conflicts with the Cal. Fam. Code § 760 presumption."[18]

§ 3 *Character of property acquired by loan proceeds*

§ 3(1) *Lender's intent doctrine*

There is a rebuttable presumption that property acquired on credit during marriage is community so that in the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the presumption.[19]

To rebut a community property presumption, a party needs to show the lender intended to rely solely on separate property.[20]

§ 3(2) *Determining lender's intent*

The parties need to provide evidence of intent, and "[i]n the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the [community property] presumption."[21]

Such evidence may include the following:

(i) The testimony of lender

(ii) Loan documents

(iii) Loan application

(iv) Documents submitted to lender for the loan

Note that creditworthiness is a community asset, whether it be the creditworthiness of a specific spouse or both, as earnings and earning ability are community assets. In *Grinius*, the

16 In Re Marriage of Valli, 195 Cal. App. 4th 776, 787 (2011).
17 *Id*.
18 In Re Brace, 9 Cal. 5th 903, 935, 470 P. 3d 15.
19 *See* In re Marriage of Brandes, 239 Cal. App. 4th 1461 (2015) .
20 *See* In re Marriage of Grinius, 166 Cal. App. 3d 1179 (1985) .
21 Gudelj v. Gudelj, 41 Cal. 2d 202, 210, 259 P. 2d 656.

lender relied on ability of community to repay through their business, but the community property presumption was not rebutted.[22]

As lenders can rely on many factors in decision to extend credit, and because hard to get someone to say they only looked at separate property in granting the loan, it is very difficult to have loan proceeds be characterized as anything but community property.

§ 3(3) *What is considered a loan Transaction?*

A loan transaction contemplates a debtor-creditor relationship with an obligation of the 'debtor' to repay the amount of the loan to the creditor.

Case Law

In re Marriage of Brandes

239 Cal. App. 4th 1461 (2015)

FACTS An option existed for the husband to buy stock from fellow shareholder, Mr. Brown, included a promissory note. Mr. Brown was asked whether he considered himself to be in a debtor-creditor relationship with the husband. He said "no" and that he did not consider himself a lender. Instead, in Mr. Brown's view, the two merely had a contract.

HELD Mr. Brown's thoughts are irrelevant where the substance of the relationship is a debtor-creditor relationship.

§ 3(4) *Determining Gifts*

Gifts received during marriage are community property. The community presumption can be rebutted by showing that it was a gift to one spouse only. To determine whether a gift is separate property or community property, one must look at evidence of donor's intent.

§ 4 *Personal Injury Damages*

The Statute Book

Cal. Fam. Code § 780

Except as provided in § 781 and subject to the rules of allocation set forth in § 2603, money and other property received

22 *See supra* note 20.

or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage.

Case Law

In re Marriage of Jackson
212 Cal. App. 3d 479

HELD Insurance proceeds are community property, but the proceeds are to be divided as the court deems just

§ 5 Community interest in the growth of separate property

When one spouse has a separate property business, during the course of the marriage, the community may come to have an interest in the separate property business. community property may have an interest in the growth.

§ 6 Separate property business

A business will be separate property if it meets any one of the following points:

(i) Business acquired before marriage

(ii) Business acquired during marriage with separate property funds

(iii) Business acquired during marriage from inheritance or gift

(iv) Business acquired during marriage from separate income

§ 6(1) Community interest in otherwise separate property businesses

Such interests may arise from either:

(i) The investment of community funds into the business

(ii) Personal efforts of either/both spouses

The decisions in *Van Camp v. Van Camp*[23] and *Pereira v. Pereira*[24] (*see infra*) are two different ways of apportioning the community's interest in the growth of a separate property business. But, *per Beam v. Bank of America*,[25] there is no bright line rule or set standard. Courts endeavor to adopt a yardstick that is most appropriate and equitable in a particular situation.

Overall, the *Pereira* approach is much more common than *Van Camp* since it gives the spouse some financial consideration. *Van Camp* is all or nothing, giving the out-spouse zero. The following table compares the two approaches.

Pereira v. Pereira	*Van Camp v. Van Camp*
Typically applied where business profits are principally attributed to efforts of the community.	Typically applied where community effort is more than minimally involved in an separate property business, yet the business profits accrued are attributed to the character of the separate asset.
Argued as more appropriate for labor intensive/personal service businesses	Argued as more appropriate for capital intensive businesses.
Method used when increase in value of asset is primarily due to skill and work of the owner spouse, even if the community received a fair wage for their work.	Method used when increase in the value of the asset is primarily due to factors other than the skill/hard work of the owner spouse.
Favors the community.	Favors the separate property owner.
Solo practitioner—always.	Not so.

§ 6(2) *The* Pereira *Approach*

If the value of the business increased during marriage, the difference between the two valuations is apportioned by the following method. If the increase in value exceeds a fair return of value at date of marriage and the managing spouse's efforts are significant to the increased value, then, the excess of fair return is community property

Therefore, when the court finds the efforts of one spouse created an increase in value, the value of business at the date of marriage is separate property. The increase above this date of marriage value is apportioned between community property and separate property. Any increase up to the amount of a reasonable rate of return is separate property. Anything beyond such reasonable rate of return is community property

Thus, to engage in the *computus* involved in this method, we must determine the following three types of information:

23 53 Cal. App. 17 (1921).
24 (1909) 156 Cal. 1.
25 6 Cal. 3d 12 (1971).

(i) the value at the date of marriage

(ii) the value at the date of separation,

(iii) the reasonable rate of return.

§ 6(2)(a) DETERMINING THE RATE OF RETURN

The starting point here is the rate earned on a long-term, well-secured investment. The choice of whether to use simple or compound interest is one at the discretion of the learned trial court.

§ 6(3) *The* Van Camp *approach.*

This seeks to determine reasonable compensation to spouse for services rendered to company during marriage. *Cf.* the accounting concept of goodwill. First, the court will determine the actual compensation paid to the other spouse during marriage. If such actual compensation exceeds reasonable compensation, then there is no community interest in the growth of the separate property business. However, if this actual compensation does not exceed reasonable compensation, or if spouse did not receive compensation, the court will take reasonable compensation, deduct community expenses, and the community is entitled to the difference.

If compensation was paid differently every year, the court will total all compensation.

Case Law

Van Camp v. Van Camp
53 Cal. App. 17 (1921)

HELD The Court distinguished this case from Pereira because:

(i) Without investment of the husband's capital, he could not have conducted the business and

(ii) the husband was compensated by the company through an adequate salary.

COMMENTARY This seems to be a stretch. The court appeared to go out of its way to diminish community property, perhaps out of some sympathy or antipathy towards one of the parties.

The sensible lawyer will argue for the *Van Camp* approach where it is her client who was the proprietress of the separate property business.

§ 6(4) *The* Brandes *approach*

In *In re Marriage of Brandes,* the court adopted a hybrid approach that used the *Pereira* method for some period of time, and the *Van Camp* method for another period of time.

Case Law

In re Marriage of Brandes

239 Cal. App. 4th 1461 (2015)

FACTS From 1986–1991, the trial court found the husband's personal efforts were the primary factors in the wife's business's growth, applying the Pereira method

From 1992–2004, the court found the business's growth was mostly attributed to factors other than the husband's personal efforts and applied Van Camp method.

HELD The Court of Appeal affirmed trial court's blending method, on the grounds that substantial growth of a business during marriage does not change the character of the business from separate property to community property.

To determine if the spouse was contributing to substantial growth, the court must consider if said spouse was in aleadership position. If he was, then the answer is likely "yes." By contrast, if there were there other players who had influential ideas or jobs that grew company, then the answer is likely "no."

III REIMBURSEMENTS

§ 1 *Statutory reimbursements*

The following table lists reimbursement rights under statute:

Code Section	Description
Cal. Fam. Code § 2640	Contributions to acquisition of property.
Cal. Fam. Code § 2641	community contributions for education or training.
Cal. Fam. Code § 2626	Reimbursement for debts paid after separation but before trial.
Cal. Fam. § Code 914(*b*)	Reimbursement for separate property used to pay other spouse's debt. To the extent that the community or other spouse's property is available but not applied to the debt.
Cal. Fam. Code § 915	Reimbursement for support paid from community property when separate property income was available.

Beware, D' Adventurer:
Here Be Dragons!
WARNING WARNING WARNING
THE BELOW CASE IS
PARTIALLY
OBSOLETE
WARNING WARNING WARNING

Case Law

In re Marriage of Lucas
27 Cal. 3d 808 (1980)

Court held that absent an agreement, written or oral, a party who uses separate property for community property purposes intends a gift to the community.

WARNING WARNING WARNING
THE ABOVE CASE IS
PARTIALLY
OBSOLETE
WARNING WARNING WARNING
Thou Hast Escaped the Dragons
But Beware: More Dangers Abound!

The People, by enacting Cal. Fam. Code § 2640(*b*) reversed the ruling in *Lucas*.

The Statute Book

Cal. Fam. Code § 2640

(*a*) "Contributions to the acquisition of property," as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(*b*) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.

Therefore, if transaction occurred before 1984, *Lucas* applies. If between 1984 and 1987, the Cal. Fam. Code § 2640 applied only to joint tenants. If after, those dates, it applies to all types of property with both names. Let us now analyze this glorious enactment.

§ 1(1) § 2640(a)

Cal. Fam. Code § 2640(*a*) provides that to the acquisition of property are: down payments, payments for improvements, and payments to reduce the principal of a loan used to finance the purchase or improvement of the property.

As to defining an "improvement", it is hard to successfully argue something was an improvement because it has to increase the value of the property. So, for instance, painting walls is not an improvement. Putting in pool, on the other hand, arguably might, although adding a pool may not increase the property value. Renovating a kitchen typically is an "improvement", but this depends on how long ago it was. A renovation twenty years ago will not be, whereas a renovation five years ago may well be traceable.

The following examples are *not* contributions:

(i) Payments of interest on loan

(ii) Payments made for maintenance

(iii) Payments made for insurance

(iv) Payments made for taxes

§ 1(2) § 2640(b)

Cal. Fam. Code § 2640(*b*) limits reimbursement, including by providing that if money is lost, one cannot get more than what the asset is now worth.

§ 1(3) § 2640(c)

Cal. Fam. Code § 2640(*c*) became operative on Jan. 1, 2005 and provides that separate property contributions to the acquisition of other spouse's separate property are reimbursed unless there is a transmutation in writing or a written waiver of the right to reimbursement.

This amount too is not adjusted for inflation and cannot exceed the value of the property. This section only applies if whole property is considered community property, not part separate property and part community property.

§ 1(4) § 2640 case law

Case Law

In re Marriage of Walrath

17 Cal. 4th 907 (1998)

HELD The Cal. Fam. Code § 2640(b) reimbursement claim not limited to original community property asset to which separate property was contributed. The § 2640 claim carries through to all subsequent purchases made to which separate property can be traced. This does not mean one can randomly seek reimbursement from any asset through which a party's separate property contribution at some time passed. The tracing rules limit the reimbursement out of each of the traceable community property assets to a proportionate share. Tracing must be applied on an asset by asset basis.

The trial court must ascertain what percentage of the (loan proceeds/money) traceable to each asset is based on each party's separate property contributions.

The community is entitled to any appreciation in assets above the amount necessary to reimburse the parties for their separate property contributions. If a spouse has a separate property claim to an asset that is underwater (worth less than loan), then that spouse gets the whole asset.

COMMENTARY Walrath issues come up when property is sold or refinanced, and the proceeds are used to purchase other property.

§ 1(5) *Educational expenses*

Cal. Fam. Code § 2641 provides authority for reimbursement of education expenses that have benefited primarily one party to the marriage. Although the education, degree, license, or resulting enhanced earning capacity is not "property" subject to division, community expenditures for them are properly subject to reimbursement.

The Statute Book

Cal. Fam. Code § 2641

(*b*) […] upon dissolution of marriage or legal separation of the parties:

(1) The community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal

rate, accruing from the end of the calendar year in which the contributions were made.

(2) A loan incurred during marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division pursuant to this division but shall be assigned for payment by the party.

(*c*) The reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust, including, but not limited to, any of the following:

(1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.

(2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.

(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

§ 1(5)(*a*) REBUTTABLE PRESUMPTIONS:

The rebuttable presumptions in subsection (*c*) can include payment for educational debt, when the education was received before marriage. At dissolution, the debt will be assigned to the spouse who received the education.

Consider in the statute *supra* the words "substantially enhances earning capacity". Just

because a degree can lead to an enhanced earning capacity, whether it actually does depends on the spouse. In *In re Marriage of Graham*,[1] it was held that the community is not entitled to reimbursement for payments made toward the husband's legal education because he did not intend to practice law (he stated he went to learn about the law but wished to remain a police officer).

§ 1(6) *Separate property used to pay other spouse's debt*

Under Cal. Fam. Code § 914(*b*), if one spouse owes child/spousal support from prior marriage, and this can be paid with separate property income but instead the spouse uses community property income, the community can be reimbursed.

The Statute Book

Cal. Fam. Code § 914

[…]

(*b*) The separate property of a married person may be applied to the satisfaction of a debt for which the person is personally liable pursuant to this section. If separate property is so applied at a time when nonexempt property in the community estate or separate property of the person's spouse is available but is not applied to the satisfaction of the debt, the married person is entitled to reimbursement to the extent such property was available.

§ 2 *Equitable reimbursement*

Equitable reimbursement rights are determined by the case law rather than statute.

Case Law

In re Marriage of Wolfe

91 Cal. App. 4th 962 (2001)

HELD The community was reimbursed for community property used to improve the husband's separate property The court threw out the prior "gift presumption" that community funds used to improve one spouse's separate property were a gift that didn't require reimbursement absent an agree-

1 109 Cal. App. 4th 1321 (2003).

ment.

Case Law

In re Marriage of Allen
96 Cal. App. 4th 497 (2002)

HELD The community was reimbursed for community property funds used to improve one party's separate property house. A spouse's consent for the use of community funds to improve the other party's separate property does not raise a presumption that the funds were a gift.

§ 2(1) *Cal. Fam. Code . § 2626,* Epstein *Credits, &* Watts *Charges*

The Statute Book

Cal. Fam. Code § 2626

The court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial.

§ 2(1)(a) *EPSTEIN* CREDITS

Applying this section, *Epstein*[2] credits provide the right to be reimbursed for ½ of the separate property money used after the date of separation to pay a community debt. For example, if parties own a community property house, the monthly mortgage payment is community debt. If one party pays this with separate property earnings, the community owes that party ½ of the payment.

§ 2(1)(b) *WATTS* CHARGES

By contrast, *Watts*[3] charges provide an obligation for ½ the reasonable value for the exclusive use of a community asset after the date of separation. For example, if one party is the only

2 In re Marriage of Epstein, 24 Cal. 3d 76 (1979)
3 In re Marriage of Watts, 171 Cal. App. 3d 366 (1985)

one living in the community property house, that spouse owes the community for ½ the reasonable value of the asset.

IV TRACING

Tracing is done through accounting. It is showing through documentation what money was used and where it went.

§ 1 *Why trace?*

Tracing is necessary to rebut the community property presumption. It is also necessary to receive Cal. Fam. Code § 2640 reimbursement. It shows use of funds post-separation. There are many other reasons.

§ 2 *Commingled funds*

Case Law

See v. See

64 Cal. 2d 778 (1966)

HELD In the absence of an agreement to the contrary, the use of separate property to meet community living expenses is a gift to the community. The community property presumption applies when a spouse purchases property during marriage with funds from an undisclosed or disputed source, such as an account or fund in which there are commingled funds.

The courts have held funds are paid from a commingled account, the presumption is that the funds are community funds.[1]

There is a presumption that the commingled funds are community. However, separate property which has been commingled does not lose its separate property status, so long as it can be traced back to a separate property source. If the funds have been commingled such that it is impossible to trace, the entire fund is deemed community property.[2]

1 *See* In re Marriage of Frick, 181 Cal. App. 3d 997 (1986) ; In re Marriage of Higinbotham, 203 Cal. App. 3d 322 (1988) .

2 *See* In re Marriage of Braud, 45 Cal. App. 4th 797 (1996) ; In re Marriage of Ciprari, 32 Cal. App. 5th 83 (2019) .

§ 3 *Proof and methods*

One must demonstrate thorough planning and execution throughout the analysis. Thus, tracing is quite properly done by a forensic accountant.

§ 3(1) *Who has the burden of proof?*

The "separatizer"[3] bears the burden when tracing. The "separatizer" spouse is the one who is claiming separate property from within the commingled funds, *i.e.*, a spouse who can protect her separate property by not commingling. Once she commingles, she assumes the burden of keeping adequate records.

§ 4 *Methods of tracing*

§ 4(1) *Exhaustion Tracing (Family Expense)*

This method traces payment or purchase from commingled account to separate property funds by process of elimination. The basis of this method derives from the fact that all community property funds were exhausted at time the purchase was made, and thus logic dictates separate property must have been used. It further assumes that community property funds are used for family expenses before separate property are.[4] In this context, expenses include: food, rent, vacation, medical and dental care. When marital living expense exceeded income, other property was necessarily bought by separate property.[5]

§ 4(2) *Direct Tracing*

This method requires documentary proof that sufficient separate property funds were available in the account at the time of purchase. It also requires proof that the spouse making the purchase intended to use separate property rather than community property funds. This is the only tracing method that has an intent requirement.

§ 4(2)(a) WHAT IS SUFFICIENT PROOF OF INTENT?

Case Law

In re Marriage of McLain

7 Cal. App. 5th 262 (2017)

HELD Testimony with no documentary proof is not sufficient.Although Cal. Fam. Code § 2640 doesn't require tracing through documents, docu-

3 On behalf of the law, I hereby apologize for the existence of this awful word.

4 *See* In re Marriage of Frick, 181 Cal. App. 3d 997 (1986) .

5 *See* See v. See, 64 Cal. 2d 778 (1966) .

mentary proof is required because the Cal. Sup. Ct. in See v. See held that records must be kept. If there is a need to keep records, those records are needed as proof of tracing. Even a handwritten note that other spouse stipulates to admit into evidence is not sufficient proof. Although spouse stipulated to admit to evidence, they did not stipulate to other spouse's position. The testimony of the other spouse is not sufficient if it is unclear unclear what amount of separate property was used.

§ 4(3) *Other methods?*

Case Law

In re Marriage of Ciprari
32 Cal. App. 5th 83 (2019)

HELD Direct and Exhaustion Tracing aren't the only methods permissible to trace. There is no authority saying one cannot use use other methods of tracing. Trail courts are free to consider and credit "reasonable, well-supported, and nonspeculative expert testimony" when determining whether the spouse has successfully traced.

COMMENTARY What might these methods be in practice?

§ 4(4) *Presumptions*

Community living expenses are presumed to be made with community funds, if community funds are available anywhere. There is no such presumption when an investment is made from a commingled fund, if it can be demonstrated that all community funds in that account were exhausted before the investment was made. However, the mere fact that community expenses regularly exceeded community income is not sufficient to allow for an inference.

§ 5 Moore & Marsden

§ 5(1) *Apportionment in Real Estate*

Title affects apportionment in real estate. In the case of joint title, this leads to a joint potential Cal. Fam. Code § 2640 reimbursement claim. In the case of separate title, this leads to a potential *Moore* or *Marsden* situation.

§ 5(2) *Common elements of the* Moore *&* Marsden *fact patterns*

These situations occur where one spouse has separate property home. Then, during the marriage, community property is used to pay down mortgage principal and/or pay for improvements The community thus has a percentage interest in the increase in value of the property based on the principal payments/improvements. The common denominator connecting both cases is the equation: property value at date of marriage + cost of improvements

§ 5(3) Moore

Case Law

In re Marriage of Moore
28 Cal. 3d 366 (1980)

FACTS The wife purchased the property just before marriage fo r $56,640.57, with a down payment of $16,640.57, leaving the mortgage for $40,000. Prior to marriage, the balance of the loan had been reduced by monthly payments by $245.18. During the marriage, $5,986.20 was paid in mortgages. The wife paid a further $581.07 between separation and trial. By trial, $23,453.02 had been paid on the principle. This meant that the house, now at a market value of $160,000, with a balance on the mortgage of $33,187.55, and an equity of $126,812.45. This meant the house had appreciated by $103,359.43.

HELD With regards to mortgage payments, for community pay-down of mortgage principal, the community is first reimbursed for these funds. Then the community is entitled to a pro tanto interest, in the ratio that payments on the purchase price with community property funds bore to payments made with separate property funds. Note that this analysis does not consider interest payments or taxes. We may sum this with the following formula:

$$\frac{\text{community interest}}{\text{value of house}} \propto \frac{\text{community property payments on purchase price}}{\text{separate property payments on purchase price}}$$

Although the residence/property remains the spouse's separate property, the community can gain a proportional interest of total appreciation in home value at date of marriage to date of trial.

Or, to simplify things, the actual calculation becomes:

$$\frac{\text{CP payments of principal}}{\text{purchase price of home}}$$

Recall that the spouse who does not own the home only receives ½ the community interest. The spouse who owns the home gets their separate property interest plus ½ the community interest.

In this context, "payments" only includes principle payments, not interest, tax, or insurance. That is because only principle payments go towards purchasing/acquiring the house, while the rest are expenses.

§ 5(4) Marsden

Case Law

In re Marriage of Marsden

130 Cal. App. 3d 426 (1982)

FACTS The property in question was bought a while before the date of marriage and underwent significant change in value.

HELD To calculate the separate property interest, one must first credit the separate property owner of the residence with 100% of the appreciation of property value from the date of purchase to the date of marriage. Then, to determine the community interest in the property, one gives the community receives a dollar for dollar reimbursement for funds paying down the principal. In addition to this reimbursement, the community gets a pro tanto share in the home's appreciation in value during marriage. This pro tanto share is calculated by:

$$\frac{\text{community property payments}}{\text{payments to principal}} \div \text{purchase price of the home}$$

§ 5(5) *Improvements*

In a *Moore* or *Marsden* situation, with regards to improvements, community property used on a spouses's separate property residence is entitled to reimbursement or a *pro tanto*

interest.[6] Whether the spouse entitled to reimbursement or *pro tanto*interest depends on whether the improvements increased the property's value.[7] If improvements increased the value, the spouse contributing the improvement is entitled to a *pro tanto* interest. If the improvements did not increase value, the spouse contributing the improvement is entitled to reimbursement

§ 5(6) *Understanding* Moore *and* Marsden

These are not rebuttable presumptions but rules to be applied to calculate the community's interest in property where community property was used to reduce principal or improve. They apply both in family law proceedings and probate.

§ 5(7) *After the end of the community interest*

When the community interest ends, either in death or separation, the approach differs between two court streams.

§ 5(7)(a) PROBATE COURTS

In probate, the community's interest in appreciation ends at the first party's death.

§ 5(7)(b) FAMILY COURTS

The community continues to share in the appreciation until date of trial.[8]

§ 5(8) *Extent of* Moore *&* Marsden

§ 5(8)(a) COMMERCIAL PROPERTIES

Moore & *Marsden* have been extended to commercial properties.[9]

§ 5(8)(b) HOME EQUITY LOANS

Home equity loans are excluded to the extent that the proceeds were not used to acquire or improve the property.[10]

§ 5(8)(c) COMMUNITY PROPERTY LOANS

Paying off mortgage with proceeds from a community property loan is an acquisition.[11]

6 *See* In re Marriage of Wolfe, 91 Cal. App. 4th 962 (2001)
7 *See* Bono v. Clark, 103 Cal. App. 4th 1409 (2002) .
8 *See* In re Marriage of Sherman, 133 Cal. App. 4th 795 (2005) .
9 *See* In re Marriage of Frick, 181 Cal. App. 3d 997 (1986) .
10 *See* In re Marriage of Nelson, 139 Cal. App. 4th 1546 (2006) .
11 *See* In re Marriage of Branco, 47 Cal. App. 4th 1621 (1996) .

V EMPLOYEE BENEFITS

§ 1 *Definitions*

The Statute Book

Cal. Fam. Code § 80

"Employee benefit plan" includes public and private retirement, pension, annuity, savings, profit sharing, stock bonus, stock option, thrift, vacation pay, and similar plans of deferred or fringe benefit compensation, whether of the defined contribution or defined benefit type whether or not such plan is qualified under the Employee Retirement Income Security Act of 1974 (P.L. 93-406) (ERISA), as amended. The term also includes "employee benefit plan" as defined in Section 3 of ERISA (29 U.S.C.A. § 1002(3)).

Thus, employee benefit plans include:

(i) Retirement Plans

(ii) Deferred Compensation Plans

(iii) Stock Grants and Stock Options

(iv) Vacation Pay

(v) Annuities

(vi) All ERISA plans

All employee benefit plans are a form of compensation. They are characterized by when they are earned, not when they are received.[1]

1 *See* In re Marriage of Green, 56 Cal. 4th 1130 (2015) .

§ 2 *Equity awards and stock options*

Equity awards are all options to purchase shares of company stock, as well as any other stock-based award granted to the employee. Highly compensated employees sometimes receive company stock or the option to buy stock. Continued employment is usually a vesting condition. If it is earned during marriage, then there's a community interest. Stock options are the rights of an employee to buy a fixed number of shares at a set price (strike price) by a fixed date (expiration date). An employee cannot sell the options until they have vested. Employees can usually sell between vesting date and date of expiration.

§ 2(1) *Key Terms*

The following terms are key

§ 2(1)(a) GRANT DATE

When employer gave options to employee, subject to employee's continued employment.

§ 2(1)(b) VESTING DATE

When employee can buy stock with options, without restrictions.

§ 2(1)(c) EXERCISE DATE

When employee actually buys stock

§ 2(1)(d) EXPIRATION DATE

Deadline to sell vested options

§ 2(1)(e) STRIKE PRICE

Price at which employee can buy shares once vested

§ 2(1)(f) "IN THE MONEY"

If strike price is less than trading price, the options have value. One may always change until date of expiration.

§ 2(1)(g) "OUT OF THE MONEY" / "UNDER WATER"

If strike price is more than trading price, the options have no value. One may always change until date of expiration.

§ 2(1)(h) PLAN DOCUMENT

The plan document controls vesting conditions, controls whether options can be transferred on divorce.

§ 3 *The process of analysis*

§ 3(1) *Essential information*

In the context of employment benefits analysis, it is often essential to know the following information:

(i) Date of Hire

(ii) Date of Marriage

(iii) Date of Grant

(iv) Date of Separation

(v) Date of Vesting

(vi) Date of Exercise

(vii) Date of Receipt

(viii) Date of Expiration

§ 3(2) *The basics of analysis*

One must start by asking: "when did the employee spouse's right to this benefit accrue?" Was it after the date of marriage? Was it before or after the date of separation? Note that even if the benefit was unvested at the date of separation, there be a will community property interest if it accrued during the marriage.

However, how does one divide the spouse's interest? Unvested and/or unsold options are speculative products. Therefore, spouses often do not want to take a buy out of the community property interest. One cannot divide in-kind because employers don't permit options to be held by non-employee. Even if such division is allowed, there are sometimes tax reasons not to divide in-kind. One can have a promise to divide on receipt, by which the employee keeps options in her name, and the spouses agree that the employee spouse will pay other her share "if, as and when" the options are exercised.

However, what if employee spouse must continue working at job *post* the date of separation for the interest to vest? In such circumstances, she is not required to keep working. Instead, the court will apportion benefits earned during marriage and post-separation. If the spouse stops working, both spouses lose out.

§ 3(3) *Statutes relevant to this analysis*

The Statute Book

Cal. Fam. Code § 760

The Statute Book

Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

Cal. Fam. Code § 771

(*a*) The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, after the date of separation of the spouses, are the separate property of the spouse.

(*b*) Notwithstanding subdivision (*a*), the earnings and accumulations of an unemancipated minor child related to a contract of a type described in § 6750 shall remain the sole legal property of the minor child.

§ 4 *The Traditional Time Rule*

The time rule is so set in ancient legal tradition that its origins are difficult to discern. Was it first found in the Court of Chancery in 17th century England? Or earlier in the Anglo-Saxon Witengamot? Or even earlier under the Code of Justinian? Did Galen know of the time rule? Was it carved on lost tablets of Hammurabi? The answer to all these questions is "no". However, it is still traditional insofar as in California something need not be that old to be traditional.

In this analysis, one starts by considering the days it took to earn the benefit. Then, one must consider the percentage of those days which were during the marriage. Then, consider what portion of those days were post-date of separation. In this analysis each day is given the same weight

Thus, consider the following formula:

$$\text{Benefit} = \frac{\text{number of days benefit accrued during marriage}}{\text{total number of days during which benefit accrued}}$$

§ 5 Other methods

However, any apportionment method may be used, provided it is representative of community property and separate property contributions.[2] Therefore, the clever lawyer will try a new method favorable to her client if she can support it. The courts can use these alternative methods if relying on credible evidence.[3]

§ 5(1) The Modified Time Rule

This method weights some days differently. One must show work personally performed that were most important in acquiring the benefit

Case Law

In re Marriage of Nelson

177 Cal. App. 3d 150 (1986)

HELD The modified time rule used to determine community property interest in stock option that was granted during marriage, but options did not vest until after date of separation. Consider the following pseudo-mathematics:

$$\text{Date of Grant} \rightarrow \text{Date of Exercise} = \text{Total Period}$$

$$\text{Total Period} \begin{cases} \text{Date of Grant} \rightarrow \text{Date of Separation} = \text{Community Property} \\ \text{Date of Separation} \rightarrow \text{Date of Exercise} = \text{Separate Property} \end{cases}$$

Case Law

In re Marriage of Hug

154 Cal. App. 3d

FACTS The husband started work at a new company, and then received stock options during marriage, two weeks after being hired. This was unusual because options are usually granted to incentivize workers to stay, but the purpose here was to attract and retain key employees. When should the

2 *See* In re Marriage of Sonne, 48 Cal. 4th 118 (2010) .

3 *See* In re Marriage of Ciprari, 32 Cal. App. 5th 83 (2019) .

unvested options count?

Here's the raw data:

Date	Event
1972-11	Starts work
1974-08	Options to purchase 2100 shares over the next four years
1975-09	Option to purchase 800 shares over four years
1976-6	Couple separate

HELD The Court used a different approach to the Time Rule and promulgated a new and majestic formula. Behold!

$$\text{Wife's Share} = \frac{\text{Years at job while married}}{\text{years at job before exercise}} \div 2$$

This is different from Nelson because Mr. Nelson's options were designed to reward and incentivize future productivity. Mr. Hug's options were designed to entice new hires to work for employer. Mr. Hug's options were also designed to reward past services.

COMMENTARY Note the Hug method is not favored unless the options were earned from date of hire. Options are more typically awarded for future services

§ 6 *Restricted stock units*

Restricted stock units (RSUs) are a right to receive shares of stock in the future, based on continued employment. These are thus fictional shares until vesting conditions are met. When conditions are met, the RSUs become real. At this time, the employee is taxed and employer withholds taxes. Typically, the employer sells enough shares ofRSUs to cover taxes. Typically, the amount is deposited into employee brokerage account. RSUs normally vest in "tranches" over 3-5 years. For examples, 100,000 shares on one date in 2021 followed by 100,000 shares on the same date in 2020, and so on.

§ 6(1) *Characterization*

The community property interest in RSUs is determined in the same way the community property interest in stock options is determined.

§ 7 Stock options case law

Case Law

In re Marriage of Harrison

179 Cal. App. 3d 1216 (1986)

FACTS The husband and the wife married in 1974 and separated in 1979. The husband received stock option grant during marriage. The husband had 4 option agreements. Options 2-4 had restrictions on the forfeiture of stock if the husband quit without company's approval.

HELD A modified time rule was applied.

$$\frac{\text{Date of Grant} \rightarrow \text{Date of Separation}}{\text{Date of Grant} \rightarrow \text{Date of Vestiture/Expiration}}$$

The trial court found the options were "golden handcuffs" meant to keep him with employer. Thus, the appellate court found the nature of this "benefit" justified the modified time rule.

Case Law

In re Marriage of Kerr

77 Cal. App. 4th 87 (1999)

FACTS

The husband and the wife were married for 20 years. Via his work at Qualcomm, the husband had stock options. The trial court divided these into some as community property and some as separate property. The trial court ordered the husband to pay child support and spousal support and to pay the wife a fixed percentage of income from future stock option vesting.

HELD Support should be based on marital standard of living and the needs of children. The learned court reasoned it was altogether proper to consider income from future options in calculating support However, the use of this formula in this case was in error because the options were so valuable. A fixed percentage of options would exceed marital standard of living and would be too high for support, greater than needs of children.

Case Law

In re Marriage of Macilwaine
26 Cal. App. 5th 514 (2018)

FACTS A case regarding post-judgment modification of child support and spousal support The husband was an executive and had stock options, but was subject to insider trading rules. When he wanted to sell options, had to implement advanced sales plan.

ISSUE When do stock options become income for purposes of child support?

HELD
Stock options are income for support purposes when they're 'vested and mature'—that is, Mature and saleable. Deferring income is not permissible Therefore, options are income for support purposes as soon as they can be sold, regardless of if they're sold.

§ 8 *Deferred Compensation*

Deferred compensation comes in many forms: bonuses, pensions, retirement, etc. Deferred compensation is community property, if earned during marriage, regardless of when it is paid out.

The Statute Book

Cal. Fam. Code § 2610

(*a*) Except as provided in subdivision (*b*), the court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, any of the following:

(1) Order the disposition of retirement benefits payable upon or after the death of either party in a manner consistent with § 2550.

(2) Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, when a retirement plan provides for that election, provided that no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value.

(3) Upon the agreement of the nonemployee spouse, order the division of accumulated community property contributions and service credit as provided in the following or similar enactments:

(A) Article 2 (commencing with Section 21290) of Chapter 9 of Part 3 of Division 5 of Title 2 of the Government Code.

(B) Chapter 12 (commencing with Section 22650) of Part 13 of Division 1 of Title 1 of the Education Code.

(C) Article 8.4 (commencing with Section 31685) of Chapter 3 of Part 3 of Division 4 of Title 3 of the Government Code.

(D) Article 2.5 (commencing with Section 75050) of Chapter 11 of Title 8 of the Government Code.

(E) Chapter 15 (commencing with Section 27400) of Part 14 of Division 1 of Title 1 of the Education Code.

(4) Order a retirement plan to make payments directly to a nonmember party of the nonmember party's community property interest in retirement benefits.

(*b*) A court shall not make an order that requires a retirement plan to do either of the following:

(1) Make payments in a manner that will result in an increase in the amount of benefits provided by the plan.

(2) Make the payment of benefits to a party at any time before the member retires, except as provided in paragraph (3) of subdivision (*a*), unless the plan so provides.

(*c*) This section shall not be applied retroactively to payments made

by a retirement plan to a person who retired or died prior to January 1, 1987, or to payments made to a person who retired or died prior to June 1, 1988, for plans subject to paragraph (3) of subdivision (*a*).

§ 9 *Bonuses*

Bonuses are community property if earned, or partially earned, during marriage. If partially earned, a proportion of the bonus is community property. Although it is paid on a certain date, it is typically based off of the work you did through the year Therefore, whether a bonus is community property or separate property is not decided by when the bonus is paid, but what work was done to earn the bonus and if that work was during marriage When one is married for part of the year the bonus is earned, one prorates the bonus for the amount of time married. An exception to this rule occurs if can prove that all of the bonus was due to work on a certain identifiable date.

§ 10 *Pensions*

These are governed by ERISA.[4] The pension interest can only be divided by a Qualified Domestic Relations Order (QDRO). To obtain a QDRO, one ought to have expert testimony. Alternatively, the employee spouse can "buy out" other spouse's interest in the pension.

§ 10(1) *Definitions*

§ 10(1)(*a*) PENSION

A retirement account to give employees a payout upon retirement if pension has vested. An employee's payout (monthly) upon retirement typically depends on how long the employee worked for this employer and the employee's salary. When the employee retires, she can elect lump sum or monthly payments.

§ 10(1)(*b*) VESTED

A pension right that survives the discharge or voluntary termination of the employee.

Case Law

In re Marriage of Brown

15 Cal. 3d 838 (1976)

FACTS The husband & the wife were married for 23 years. The husband worked for company with pension plan that required amount of "points" to

4 *See* 29 U.S.C. § 1001 *et seq.*

vest. An employee earned points based on years of service and age. In order to vest, the employee needed 78 points. At the date of separate the husband only had 72 points. Had the husband quit at date of separation, he would not get his pension.

PROCEDURAL HISTORY The trial court held that non-vested pension rights were mere expectancy, relying on the rule in French v. French, 17 Cal. 2d 775 . As pension was not vested, it wasn't community property subject to division. The wife therefore received nothing.

HELD The lower court was reversed. These pension rights are community property. The foolish trial court erred in finding unvested pension rights were mere expectancies. Pension rights, vested or unvested, are property rights, therefore they are community property subject to division. The Cal. Sup. Ct., however, did not say how to divide them. The Cal. Sup. Ct. further held that this does not mean the husband cannot leave job. If he does, both the husband and the wife lose out on their pension rights.

COMMENTARY The apex court has the easy job: it can merely propound grand principles. The poor trial courts have to figure out how to apply them and divide the community property in these rights.

§ 10(2) *Dividing community property in pensions*

There are two principle methods for this:

(i) Divide present value of pension rights

(ii) Award each spouse an appropriate portion of each payment as it is made

§ 10(3) Gillmore *election*

Case Law

In re Marriage of Gillmore

29 Cal. 3d 418 (1981)

FACTS The husband and the wife separated. The husband had a pension through his work. He could retire at 50, but was not required to retire until 70. The wife wanted her share of the pension now, but the husband

was not ready to retire.

HELD The husband's decision to delay retirement doesn't keep the wife from demanding her share of the pension. The husband is free to continue working, but the wife has an interest in the pension. Therefore, the husband must reimburse the wife for her share of the community property she "loses as a result of his decision.

Thus, *Gilmore* election occurs when one spouse elects to take their interest of the pension earlier than other spouse retires. It is paid out of pocket by the spouse who is not retiring.

There are several reasons not to take a *Gilmore* election. First, the longer one waits, the more money one gets. The wife gets payment of what would be paid if the husband retired at that time and loses out on potentially more money.

§ 10(4) *Retirement*

As discussed *supra*, Cal. Fam. Code § 2610 provides the fundamental basis of dividing retirement plans and deferred compensation. The purpose of the statute is to ensure they are equally divided.

Case Law

In re Marriage of Lehman

18 Cal. 4th 169 (1998)

FACTS The husband worked at PG&E, participated in Defined Benefit Pension Plan during marriage. 15 years later, the husband & the wife separate. The court retains jurisdiction of community property interest in his retirement plan. In 1993, PG&E offers enhanced retirement program. The husband meets requirements and makes election under the new program. The husband argues to make payments to the wife as if enhancements hadn't happened.

HELD Based on time rule, community property interest in retirement is 55%, separate property is 45%. W can benefit from the enhancement program. This is because the husband had gotten a worse plan, the wife would have suffered. the wife can benefit too.

Case Law

In re Marriage of Gram

25 Cal. App. 4th 859 (1994)

FACTS After former husband exercised his early retirement option, former wife sought order to show cause why husband's enhanced early retirement benefits should not be treated as community property.

HELD The Court of Appeal, Benke, Acting P.J., held that enhanced portion of early retirement benefits was community property:

> The plan essentially gave the employee a reasonable version of the retirement benefit expected had the merger not threatened employment and the continued accumulation of retirement credit. The enhanced early retirement plan was, therefore, fundamentally not a present payment for a loss of earnings; it was a part of, and intended to be, the realization of [Mr. Gram's] retirement expectation and thus a form of deferred compensation for services rendered. As such the enhanced retirement benefit should have been included in the computation of [Mrs. Gram's] community interest in the retirement payment.

§ 10(5) *Retirement Income*

This is intended to replace or supplement traditional retirement savings (such as pensions). It is based on years of service or services rendered in the past.

§ 11 *Disability*

§ 11(1) *True Disability Pay*

This is intended to compensate for the pain and suffering experienced by the disabled person. It is also intended to replace ongoing, lost wages. This, naturally, leads to the question: is it wage replacement?

§ 11(2) *Characterization*

Disability benefits may be separate property or community property. Disability payments received during marriage are community property. The lost earning capacity of a spouse dur-

ing marriage is a community loss.[5] Disability payments received after the date of separation are separate property.[6]

§ 11(3) *Disability benefits*

These are meant to compensate for wages that person is not getting The mere fact that something is called "disability" is not sufficient to render it separate property. Instead, the inquiring tribunal must ask:

(i) Are disability benefits paid after DOS?

(ii) Was the benefit acquired during marriage?

Case Law

In re Marriage of Jones
13 Cal. 3d 457 (1975)

HELD Disability is not deferred compensation for past services. Disability pay compensates disabled spouse for lost earning capacity. A serviceman's right to disability pay, acquired before the acquisition of a vested right to retirement pay, must be separate property because the community does not yet have any rights to future earnings.

Case Law

In re Marriage of Stenquist
21 Cal. 3d 779 (1978)

HELD The label does not define the character. Although the husband received a 'disability pension' when he retired, it was really retirement pay. The court must do a factual inquiry. When the husband retired, he received disability pension of 75% his basic pay, instead of retirement pension of 65% his basic pay. Only the excess of the disability pension rights over the alternative retirement pension was H's separate property because it was ad-

5 *See* In re Marriage of Jones, 13 Cal. 3d 457 (1975) . Note that as Mr. Jones was a federal serviceman in receipt of federal disability pay, this case would be decided differently today based on the federal pre-emption doctrine, but is good law for other situations.

6 *Id.*

ditional compensation attributable to his disability. The rest is community property to divide.

Case Law

In re Marriage of Rossin

172 Cal. App. 4th 725 (2009)

FACTS The wife buys disability policy before marriage (no community property contributed). She starts getting disability payments before marriage

HELD Her disability payments are her separate property. They are community property just because they are a "substitute for lost earnings."

Case Law

In re Marriage of Saslow

40 Cal. 3d 848 (1985)

HELD Disability benefits are separate to the extent they replace post-separation earnings (wage replacement) and community to the extent they were intended to provide retirement income. The trial court must conduct factual inquiry.

Case Law

In re Marriage of Elfmont

9 Cal. 4th 1026 (1995)

HELD Maintaining a retirement plan does not mean the disability pay wasn't intended to be retirement income. However, if the policy is maintained post-separation with separate property funds, the intent to be inferred is that the benefits are to replace separate property earnings, not to serve as retirement income. The court must consider the purpose of the

payment. Was it:

(i) True disability that replaces lost wages or retirement income?

(ii) Consider the final premium rule, what was the character of final premium before benefits began?

§ 12 *Severance*

Let us begin by considering the purpose of the severance pay. Sometimes it occurs as a consequence of termination otherwise than for cause. Sometimes for resignations. Sometimes it is a nice thing one's employer does for one. In other circumstances, it is required by contract. It can also be tied to years of service. Thus, we must ask ourselves: it replacing community earnings or future, separate property earnings? In answer, we must recall that how the right is acquired is not as relevant, but rather what matters is what the payment is intended to be and its purpose?

Thus, generally we examine with a replacement analysis. In general, severance can be characterized as separate property if it is replacing marriages after wages. This would be different if the pay was due without severance.

Case Law

In re Marriage of Wright

140 Cal. App. 3d 342

FACTS Husband going through acrimonious divorce is also terminated due to disruption caused by his soon to be ex-wife and her family. This was purely voluntary and not done by obligation of the employer.

ISSUE Is this separate property?

HELD per Andreen, J. that 100% of the husband's severance pay received after separation is his separate property, intended to be wage replacement for lost future separate property wages.

The holding in *Wright* was distinguished from the prior holding of the court in *In re Marriage of Skaden*,[7] where the Cal. Sup. Ct. found that a contractual guarantee of termination benefits within a certain period for an insurance policy salesman was a proprietary right.

7 19 Cal. 3d 679 (1977).

However, this relates to premiums on sold policies and may not be generalizable to other cases not involving similar sales fact patterns. Let us also consider the holding in *In re Marriage of Horn*,[8] which concerned an absolute right to severance created in an NFL contract. This was community property in part because it greatly resembled a pension. Again, we can usefully distinguish this from most situations not involving the unusual sporting contracts and benefits.

Although for the purposes of examination by the learned Bar Examiners of the State of California, it is generally acknowledged the replacement analysis *per se* is sufficient, one must keep in mind a general wave of criticism of the rule in *Horn* from academics in light of the holding of the Cal. Sup. Ct. in the case of *In re Marriage of Lehman*.[9] This case dealt with an early retirement benefit,[10] by which those who took the voluntary early retirement were granted a bit of pension enhancement (the artificial and counterfactual adding on of years of service to the pension). Mr. Lehman took this, while in fear of being fired. Mrs. Lehman sued claiming this enhancement to the pension was community property. The husband said it was replacement of the benefit he would have as separate property had he remained employed. The Cal. Sup. Ct., *per* MOSK, J. (that glorious sage of justice), held that the right at issue here was not the earnings of missed employment for which Lehman was being compensated but rather the pension *per se*. *Sed quære* how this analysis of source of funds rather than the purpose of the payment squares with the jurisprudence discussed *supra*.

Case Law

In re Marriage of Ficke

217 Cal. App. 4th 10 (2013)

HELD 100% of the wife's severance pay received prior to separation is community property, even though the severance represented a period of time that fell after separation, in part because benefits intended to satisfy the community's discrimination claims.

8 181 Cal. App. 3d 540 (1986).

9 18 Cal. 4th 169 (1998).

10 *Nota bene*: this resembles what in England might be called "voluntary redundancy", I think.

VI GOODWILL

Goodwill is an asset. It is divisible in a dissolution action. It is an element of a business.

The concept of goodwill has many definitions, but basic: expectation of continued public patronage. The goodwill of a business is property and is transferable The goodwill of a person is not transferable

California has decided that professional practices have goodwill.

§ 1 *"Double Dip"*

One must pay spousal support based on compensation, and extra money to keep working.

§ 2 *"Business" in the definition of goodwill*

This is a professional, commercial or industrial enterprise with assets, not a person doing business.[1]

Case Law

In re Marriage of Iredale & Cates

121 Cal. App. 4th 321 (2004)

FACTS The wife was partner at the fine firm Paul Hastings, LLP during the marriage. She had a small interest in the firm, but did not buy into firm's work in progress or accounts receivable. At time the wife joined firm, Paul Hastings already had good reputation (as one might expect of such a fine firm).

ISSUE Does the wife have goodwill in her partnership interest?

HELD The wife did have goodwill, but it is relatively low in value.This value can be computed by looking to the wife's partnership agreement and compare against other partners at other firms, locations. Under this analy-

1 *See* In re Marriage of McTiernan & Dubrow, 133 Cal. App. 4th 1090 (2005) .

sis, she She made a little more than comparably situated partners.

COMMENTARY This brings up the question of: what is a similarly situated professional?

Case Law

In re Marriage of McTiernan & Dubrow

133 Cal. App. 4th 1090 (2005)

FACTS Mr. McTiernan was a successful movie director, including of Die Hard. In the dissolution, the wife argued he had professional goodwill as a famous director.

HELD The husband did not have professional goodwill. Skill, reputation, and experience are not community property. The goodwill found by lower court is just the husband's skill, reputation, and experience. The husband cannot sell his standing nor transfer it.

COMMENTARY Due to this case, by law, actors, producers, directors do not have goodwill. This may seem strange, because obviously in some cases, (e.g., surgeons, there are also professionals with non-transferable goodwill. However, because celebrity goodwill is always and by definition non-transferable, the courts, in their majestic wisdom, have decided that there is a bright line rule that professional goodwill is presumed valuable regardless of if there is an actual market, whereas celebrity/individual goodwill is not.

Case Law

In re Marriage of Finby

222 Cal. App. 4th 977 (2014)

FACTS The wife left UBS for Wells Fargo, was paid for her book of business (i.e, the list of clients and their loyalty) through a loan forgiven over

time.

HELD Book of business is a community property asset.

COMMENTARY This is an important case for financial advisors moving between institutions.

§ 3 *Date of valuation*

It is clear that goodwill is an important aspect of business valuation. However, to when should that valuation be dated?

The Statute Book

Cal. Fam. Code § 2552

(*a*) For the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties, except as provided in subdivision (*b*), the court shall value the assets and liabilities as near as practicable to the time of trial.

(*b*) Upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner.

Case Law

In re Marriage of Duncan

90 Cal. App. 4th 617 (2001)

FACTS The husband was running business, and argued increase in value after the date of separation was from his sole efforts.

HELD This argument was rejected: "the court has broad discretion to select a valuation method that will most effectively achieve substantial justice between the parties as long as that method is within the range of the evidence presented."

§ 4 *Methods of valuation*

Valuation an issue of fact for the trial court. Both sides present evidence on what goodwill should be. Evidence can include what someone would pay for the business. However, it cannot take into account future expected profits, because earnings after separation are separate property

VII CREDITORS' RIGHTS

§ 1 *Debts & Creditor Protection*

Cal. Fam. Code § 910 is designed to protect creditors.

The Statute Book

Cal. Fam. Code § 910
Liability of community estate for debt incurred before or during marriage

(*a*) Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.

(*b*) "During marriage" for purposes of this section does not include the period after the date of separation, as defined in Section 70, and before a judgment of dissolution of marriage or legal separation of the parties.

As you can see, this determines what property creditors can go after when collecting on a separate property debt. It provides community estate is liable for the debts of either party incurred before or during marriage.

The Statute Book

Cal. Fam. Code § 911

(*a*) The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before mar-

riage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate, except property insignificant in amount.

(*b*) As used in this section:

(1) "Deposit account" has the meaning prescribed in paragraph (29) of subdivision (*a*) of § 9102 of the Commercial Code.

(2) "Earnings" means compensation for personal services performed, whether as an employee or otherwise.

Thus, the earnings of a married person during marriage are not liable for a debt incurred by their spouse before marriage. As long as debtor-spouse does not have access and funds are not commingled (except for small amounts), the non-debtor-spouse's earnings and income are shielded from liability

The Statute Book

Cal. Fam. Code § 913

(*a*) The separate property of a married person is liable for a debt incurred by the person before or during marriage.

(*b*) Except as otherwise provided by statute:

(1) The separate property of a married person is not liable for a debt incurred by the person's spouse before or during marriage.

(2) The joinder or consent of a married person to an encumbrance of community estate property to secure payment of a debt incurred by the person's spouse does not subject the person's separate property to liability for the debt unless the person also incurred the debt.

Thus, a spouse's separate property is liable for their own debts, but not for the debts of the other spouse.

The Statute Book

Cal. Fam. Code § 914

(*a*) Notwithstanding Section 913, a married person is personally liable for the following debts incurred by the person's spouse during marriage:

(1) A debt incurred for necessaries of life of the person's spouse before the date of separation of the spouses.

(2) Except as provided in § 4302, a debt incurred for common necessaries of life of the person's spouse after the date of separation of the spouses.

Thus, as an exception, a spouse's separate property is liable for a debt incurred for the 'necessaries of life' while living together and for the 'common necessaries of life' when living apart. By "necessaries of life", it is meant the living costs consistent with the spouse's station in life. The "common necessaries of life" refers to expenses required to sustain life.

The Statute Book

Cal. Fam. Code § 915

(*a*) For the purpose of this part, a child or spousal support obligation of a married person that does not arise out of the marriage shall be treated as a debt incurred before marriage, regardless of whether a court order for support is made or modified before or during marriage and regardless of whether any installment payment on the obligation accrues before or during marriage.

(*b*) If property in the community estate is applied to the satisfaction of a child or spousal support obligation of a married person that does not arise out of the marriage, at a time when nonexempt separate income of the person is available but is not applied to the satisfaction of the obligation, the community estate is entitled to reimbursement from the person in the amount of the separate income, not exceeding the property in the community estate so applied.

(*c*) Nothing in this section limits the matters a court may take into

consideration in determining or modifying the amount of a support order, including, but not limited to, the earnings of the spouses of the parties.

Thus, child support or spousal support from a prior marriage will be treated as a debt incurred before marriage

The Statute Book

Cal. Fam. Code § 916

(*a*) Notwithstanding any other provision of this chapter, after division of community and quasi-community property pursuant to Division 7 (commencing with § 2500):

(1) The separate property owned by a married person at the time of the division and the property received by the person in the division is liable for a debt incurred by the person before or during marriage and the person is personally liable for the debt, whether or not the debt was assigned for payment by the person's spouse in the division.

(2) The separate property owned by a married person at the time of the division and the property received by the person in the division is not liable for a debt incurred by the person's spouse before or during marriage, and the person is not personally liable for the debt, unless the debt was assigned for payment by the person in the division of the property. Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property.

(3) The separate property owned by a married person at the time of the division and the property received by the person in the division is liable for a debt incurred by the person's spouse before or during marriage, and the person is personally liable for the debt, if the debt was assigned for payment by the person in the division of the property. If a money judgment for the debt is

> entered after the division, the property is not subject to enforcement of the judgment and the judgment may not be enforced against the married person, unless the person is made a party to the judgment for the purpose of this paragraph.
>
> (*b*) If property of a married person is applied to the satisfaction of a money judgment pursuant to subdivision (*a*) for a debt incurred by the person that is assigned for payment by the person's spouse, the person has a right of reimbursement from the person's spouse to the extent of the property applied, with interest at the legal rate, and may recover reasonable attorney's fees incurred in enforcing the right of reimbursement.

Consider the following hypothetical. If Spouse A and B divorce:

(i) Spouse A remains liable for Spouse A's own debts, even if a marital settlement agreement requires Spouse B to pay some or all of those debts;

(ii) Spouse A is not liable for any of Spouse B's debts, except for any of Spouse B'ss debts that the marital settlement agreement requires Spouse A to pay;

(iii) Spouse A is liable for any of Spouse B's debts that the marital settlement agreement requires Spouse A to pay;

(iv) If Spouse A pays any debts that the marital settlement agreement requires Spouse B to pay, Spouse B must reimburse Spouse A; and

(v) Vice versa.

The main goal is to ensure that there is property available to meet the obligations of the spouses.

Note further that damages due by spouse also considered debt.[1]

1 *See* Grolemund v. Cafferata, 17 Cal. 2d 679 (1941) .

VIII FIDUCIARY DUTIES

§ 1 *Introduction*

Spouses have fiduciary duties to each other.

The Statute Book

Cal. Fam. Code § 721

(*a*) Subject to subdivision (*b*), either spouse may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.

(*b*) Except as provided in §§ 143, 144, 146, 16040, 16047, and 21385 of the Probate Code, in transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:

(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

(2) Rendering upon request, true and full information of all things affecting any transaction that concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books

and records of community property transactions.

(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse that concerns the community property.

Thus we see the following duties: loyalty, care, disclosure pre-separation, adn disclosure post-separation (*e.g.*, obligated to share/disclose W-2's, stock options, *etc.*). There is a presumption of undue influence if benefit is obtained and remedies for breach. There is no statute of limitations for breaches during marriage; claims are tolled until divorce or death. In sum, this duty is as high as it gets.

Turning now to subsection (*b*) of Cal. Fam. Code § 721, we can see that spouses are subject to the rules defining confidential relationships. this means neither shall take unfair advantage of the other. There is a duty of the highest good faith and fair dealing. There further is a duty of accounting and holding any profit as trustee if it arose from a transaction that didn't have consent of both spouses.

§ 2 *Loyalty*

Here, the source of the definition of the fiduciary duties of couples comes from the Cal. Corp. Code.

The Statute Book

Cal. Corp. Code § 16404

(*a*) The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subdivisions (*b*) and (*c*).

(*b*) A partner's duty of loyalty to the partnership and the other partners includes all of the following:

(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.

(2) To refrain from dealing with the partnership in the con-

duct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.

(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

- Corp Code 16404
- Pre and post-date of separation
- To account to partnership and hold as trustee partnership opportunity
- To refrain from dealing with partnership in adverse manner
- To refrain from competing with partnership before dissolution

§ 3 *Duty of care*

See Cal. Corp. Code § 16404, *supra*. This applies before and after the date of separation. A partner's duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law

§ 4 *Disclosure*

The Statute Book

Cal. Corp. Code § 16403

[…]

(*c*) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability, both of the following, which may be transmitted by electronic transmission by the partnership pursuant to paragraph (4) of Section 16101:

(1) Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter; and

(2) On demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

§ 5 *Public Policy Considerations*

It is the public policy to foster and promote the institution of marriage. The structure of society depends upon marriage. It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. Further, while marriage includes a confidential relationship, it encompasses much more.[1]

§ 6 *Confidential relationship*

There is a presumption of confidential relationship arising from marriage This does not mean it is a secret relationship. A confidential relationship is based on a duty of loyalty and a duty of disclosure. Due to these duties, it is harder to enter into agreements with spouse after marriage (such as to change the character of things)

If things are done/changed, there is a presumption of undue influence. To rebut this presumption, the advantaged spouse must show that the disadvantaged spouse knew, understood and voluntarily entered into the agreement.

§ 7 *Fiduciary duties and pensions*

In investing defined contribution pensions, there are requirements that a fiduciary duty be invested wisely, though that is limited in terms of, for example, not restricting freedom of employment to demit one's job to the detriment of one's pensions.

1 *See* In re Marriage of Haines, 33 Cal. App. 4th 277 (1995) .

IX MANAGEMENT & CONTROL

§ 1 *Cal. Fam. Code § 1100*

The Statute Book

Cal. Fam. Code § 1100

(*a*) Except as provided in subdivisions (*b*), (*c*), and (*d*) and §§ 761 & 1103, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

Either spouse has management and control of community property. Neither has to to tell the other everything she is doing. If one spouse runs a company, she can run it the way she wants. However, if spouse asks to see financials of company, the other cannot withhold books or records To sell the company one needs consent

The Statute Book

Cal. Fam. Code § 1100

(*b*) A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. This subdivision does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse.

Note that under this provision, routine gifts are allowed without written consent, like gifts at a birthday party. However, non-routine gifts aren't allowed. For instance, money

given to one's parents without written consent is acceptable because one has statutory duty to support one's parents. By contrast, no such duty exists for support to one's siblings, and thus money given to siblings without consent is against the rules. The other spouse can argue for reimbursement. Cheating on one's spouse is making an unauthorized gift of community property (for dinners, travel, jewelry, hotels, *etc.*). Thus, one cannot misappropriate community property.

The Statute Book

Cal. Fam. Code § 1100

(*c*) A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, 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.

Thus, one sell, convey, or encumber community property used as furniture, clothing of other spouse, or minor children without written consent. This provision is in real life not very practical mainly comes of use with very recent events.

§ 2 *Cal. Fam. Code § 1101*

The Statute Book

Cal. Fam. Code § 1101

(*a*) A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.

This section is where the teeth is and from which claims against the other spouse are derived.

The Statute Book

Cal. Fam. Code § 1101

(*a*) A court may order an accounting of the property and obligations of the parties to a marriage and may determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties to a marriage.

This provision gives one spouse the right to file action to force the other spouse to give information during marriage.

The Statute Book

Cal. Fam. Code § 1101

(*d*)

(1) Except as provided in paragraph (2), any action under subdivision (*a*) shall be commenced within three years of the date a petitioning spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred.

(2) An action may be commenced under this section upon the death of a spouse or in conjunction with an action for legal separation, dissolution of marriage, or nullity without regard to the time limitations set forth in paragraph (1).

(3) The defense of laches may be raised in any action brought under this section.

(4) Except as to actions authorized by paragraph (2), remedies under subdivision (*a*) apply only to transactions or events occurring on or after July 1, 1987.

As you can see, this provision relates to the statute of limitations, providing limitation of three years from time of actual knowledge.

The Statute Book

Cal. Fam. Code § 1101

(*e*) In any transaction affecting community property in which the consent of both spouses is required, the court may, upon the motion of a spouse, dispense with the requirement of the other spouse's consent if both of the following requirements are met:

(1) The proposed transaction is in the best interest of the community.

(2) Consent has been arbitrarily refused or cannot be obtained due to the physical incapacity, mental incapacity, or prolonged absence of the nonconsenting spouse.

(*f*) Any action may be brought under this section without filing an action for dissolution of marriage, legal separation, or nullity, or may be brought in conjunction with the action or upon the death of a spouse.

Thus, under subdivision (*f*), any action may be brought under this section without filing for dissolution or separation.

The Statute Book

Cal. Fam. Code § 1101

(*g*) Remedies for breach of the fiduciary duty by one spouse, including those set out in §§ 721 & 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court.

Note that this provision means punitive damages are in effect built in.

The Statute Book

Cal. Fam. Code § 1101

(*h*) Remedies for the breach of the fiduciary duty by one spouse, as set forth in §§ 721 & 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.

Thus, when the wrongdoer is guilty of oppression, fraud, or malice, the injured party may be entitled to 100% of the undisclosed or transferred asset.

§ 3 *End of the duty*

The duty of management and control does not end at separation.

Rather, the duty continues until the date of the distribution of the community or quasi-community asset or liability in question.

§ 4 *Selected case law*

Case Law

In re Marriage of McTiernan & Dubrow

133 Cal. App. 4th 1090 (2005)

FACTS After filing for dissolution, the husband sold community stock without the wife's permission. The value of the stock increased after the sale.

HELD The husband was charged for the increased value of stocks because the sale was in violation of the automatic temporary restraining orders.

Case Law

In re Marriage of Rossi

90 Cal. App. 4th 34 (2001)

FACTS The wife won the lottery. The wife then fraudulently concealed this happy information from her husband and the court. The wife claimed that proceeds were a gift to her, and she did not disclose them out of fear of former husband.

HELD The husband entitled to 100% of the lottery winnings under Cal. Fam. Code § 1101(h). The evidence established the wife filed for dissolution after winning, she consulted with lottery personnel about how to avoid sharing jackpot with the husband, she gave mother's address, failed to disclose at dissolution despite warranties in marital settlement agreement and judgment that all assets had been disclosed.

COMMENTARY The court could have imposed attorney fees on the wife as additional sanctions/penalties under Cal. Fam. Code § 1101(h)

Case Law

In re Marriage of Quay

18 Cal. App. 4th 961 (1993)

FACTS The husband made bad loan over W's objection the husband was subject to standard restraining order and knew the wife did not want him to make the loan.

HELD The bad loan was properly awarded to the husband without offset.

Case Law

In re Marriage of Brewer & Federici

93 Cal. App. 4th 1334 (2001)

FACTS In dissolution proceeding, the wife failed to disclose value of her pension. The wife was a vice-president at NBC, while the husband was an artist and managed the household and paid bills. Disclosures by the wife and the husband said the value of her pension was unknown. In fact, both knew the wife had a pension. The two had negotiated a marital settlement agreement, and a judgment was entered. Then, the husband made motion

to set aside.

HELD Motion granted, the wife didn't make an effort to find out value of pension; the wife is in superior position to know/obtain this information.

Case Law

In re Marriage of Hokanson

68 Cal. App. 4th 987 (1998)

FACTS The wife refused to comply with court's order regarding sale of family residence. The wife then caused delays, meanwhile the value of the house went down.

HELD The wife was liable for attorney fees and lost value.

Houses

§ 5 *Prevention of sale*

Note there is a risk of being charged with what house could have been sold for, if one does not prevent the sale and/or does not maintain the house.

§ 6 *Post-separation disclosure rights and obligations*

The Statute Book

Cal. Fam. Code § 2100

(*c*) In order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or separate, together with a disclosure of all income and expenses of the parties. Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agree-

ment for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts.

This section, as you can see, requires declaration of disclosure. In order to promote public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made, regardless of the characterization. One also must disclose all income and expenses. There is a continuing duty to update in the event of a material change.

Spouses' duties continue from the date of separation to the date of a valid, enforceable, and binding resolution of support and fees.

§ 7 *Preliminary declaration of Disclosure*

The Statute Book

Cal. Fam. Code § 2104

(*a*) Except by court order for good cause, as provided in § 2107, or when service of the preliminary declaration of disclosure is not required pursuant to § 2110, in the time period set forth in subdivision (*f*), each party shall serve on the other party a preliminary declaration of disclosure, executed under penalty of perjury on a form prescribed by the Judicial Council. The commission of perjury on the preliminary declaration of disclosure may be grounds for setting aside the judgment, or any part or parts thereof, pursuant to Chapter 10 (commencing with § 2120), in addition to any and all other remedies, civil or criminal, that otherwise are available under law for the commission of perjury. The preliminary declaration of disclosure shall include all tax returns filed by the declarant within the two years prior to the date that the party served the declaration.

(*b*) The preliminary declaration of disclosure shall not be filed with the court, except on court order. However, the parties shall file proof of service of the preliminary declaration of disclosure with the court.

(*c*) The preliminary declaration of disclosure shall set forth with sufficient particularity, that a person of reasonable and ordi-

nary intelligence can ascertain, all of the following:

(1) The identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate.

(2) The declarant's percentage of ownership in each asset and percentage of obligation for each liability when property is not solely owned by one or both of the parties. The preliminary declaration may also set forth the declarant's characterization of each asset or liability.

(*d*) A declarant may amend the preliminary declaration of disclosure without leave of the court. Proof of service of an amendment shall be filed with the court.

(*e*) Along with the preliminary declaration of disclosure, each party shall provide the other party with a completed income and expense declaration unless an income and expense declaration has already been provided and is current and valid.

(*f*) The petitioner shall serve the other party with the preliminary declaration of disclosure either concurrently with the petition for dissolution or legal separation, or within 60 days of filing the petition. When a petitioner serves the summons and petition by publication or posting pursuant to court order and the respondent files a response prior to a default judgment being entered, the petitioner shall serve the other party with the preliminary declaration of disclosure within 30 days of the response being filed. The respondent shall serve the other party with the preliminary declaration of disclosure either concurrently with the response to the petition, or within 60 days of filing the response. The time periods specified in this subdivision may be extended by written agreement of the parties or by court order.

These declarations are executed under penalty of perjury, but not filed with the court. Sufficient particularity is required. The spouse msut identify all assets and liabilities, percentage of ownership in each asset, with no requirement for characterization or values.

§ 8 *Income and expenses declaration*

The Statute Book

Cal. Fam. Code § 2105

(*a*) Except by court order for good cause, before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before the first assigned trial date, each party, or the attorney for the party in this matter, shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury on a form prescribed by the Judicial Council, unless the parties mutually waive the final declaration of disclosure. The commission of perjury on the final declaration of disclosure by a party may be grounds for setting aside the judgment, or any part or parts thereof, pursuant to Chapter 10 (commencing with § 2120), in addition to any and all other remedies, civil or criminal, that otherwise are available under law for the commission of perjury.

(*b*) The final declaration of disclosure shall include all of the following information:

(1) All material facts and information regarding the characterization of all assets and liabilities.

(2) All material facts and information regarding the valuation of all assets that are contended to be community property or in which it is contended the community has an interest.

(3) All material facts and information regarding the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

(4) All material facts and information regarding the earnings, accumulations, and expenses of each party that have been set forth in the income and expense declaration.

(*c*) In making an order setting aside a judgment for failure to comply with this section, the court may limit the set aside to those portions of the judgment materially affected by the nondisclosure.

(*d*) The parties may stipulate to a mutual waiver of the requirements of subdivision (*a*) concerning the final declaration of disclosure, by execution of a waiver under penalty of perjury entered into in open court or by separate stipulation. The waiver shall include all of the following representations:

(1) Both parties have complied with § 2104 and the preliminary declarations of disclosure have been completed and exchanged.

(2) Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses.

(3) Both parties have fully complied with § 2102 and have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

(4) The waiver is knowingly, intelligently, and voluntarily entered into by each of the parties.

(5) Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment.

Thus, the following information is required:

(i) Material facts and information (MFI) on characterization

(ii) MFI regarding valuation of community property and property in which community property contended has an interest

(iii) MFI regarding amounts of community property obligations and for which the community property contended has a liability

(iv) MFI regarding earnings, accumulations, and expenses

One can waive this disclosure, if such waiver is done knowingly, intelligently, and voluntarily. Waiver does not limit disclosure obligations; confirms disclosure obligation fulfilled set aside.

§ 9 *More case law*

Case Law

In re Marriage of Prentis-Margulis & Margulis
198 Cal. App. 4th 1252 (2011)

FACTS The husband controlled all investments during marriage. The husband continues to manage community investments for twelve years after separation and has complete control of substantial community investment accounts. The wife trusts the husband to manage finances for their mutual benefit. Just before trial, the husband discloses for first time that their once-brimming investment accounts are virtually empty. Without any corroborating evidence, the husband attributes dissipation of account values to property expenditures and stock market losses. The wife argues the husband should be charged with missing funds unless he can prove money not misappropriated. The wife's only evidence of missing funds is financial statement the husband prepared three years after separation and nine years before trial.

PROCEDURAL HISTORY Trial court found document insufficient, doesn't charge the husband with missing funds, but sanctions him for failing to keep adequate records.

HELD The trial court was reversed. The trial court erred in failing to shift managing spouse burden of proof concerning missing community assets Once the non-managing spouse makes a prima facie showing of the existence and value of community assets in other spouse's control post-separation, burden of proof shifts to the managing spouse to prove proper disposition or

lesser value of assets. Failing such proof, court should charge managing spouse with assets according to the prima facie showing.

Case Law

In re Marriage of Feldman

153 Cal. App. 4th 1470 (2007)

FACTS The couple parted after a 34-year marriage. The husband had created a corporation with many sub-entities. The husband estimated value of assets at $50 million. The wife was not involved in the business The husband failed to disclose $1 million Israeli bond, purchase of house by newly-created company after the date of separation, a 401(k), and the addition of new companies after the date of separation. The husband further failed to inform the wife when asked in deposition The wife found out months later.

HELD The husband fined was $250,000 in money sanctions, $140,000 in attorney fees. It does not matter if the wife already has information; this does not relieve the husband of disclosure obligations. The fact that the business entity owns assets does not excuse spouse from the disclosure duty. The Transactions involving property are clearly relevant to understand "the existence, characterization, and valuation of all assets." The spouse in the superior position to obtain records or information must acquire and disclose.

COMMENTARY This case shows sanctions may be imposed even if moving party fails to prove actual injury.

Case Law

In re Marriage of Kamgar

18 Cal. App. 5th 136 (2017)

FACTS The wife agreed the husband can deposit $2.5 million into a brokerage account and have free reign on risky investments. The husband and the wife were required to take a test because the investments the husband wants to make are so risky as to have requirements. The husband forged the wife's name on the test. The husband then invested more money than

the $2.5m and lost it all. His risky trading placed almost all of the parties' net worth at risk.

HELD Court found he breached his duty. The husband ordered to reimburse the wife $2m. she also got one half of the net loss on additional funds.

§ 10 *Bad Acts*

Case Law

In re Marriage of Beltran

183 Cal. App. 3d 292 (1986)

FACTS The husband and the wife married 20 years. The husband was in military and earned a pension and accrued leave. While the divorce was pending, the husband was convicted of committing lewd and lascivious acts on a child under 14. A tribunal convicted the husband. As a result, he was dismissed from the military and stripped of all military benefits, including his pension and accrued leave

ISSUE Does the husband owe a reimbursement to the community for the amount of the forfeited pension?

HELD Yes. As a matter of equity, criminal conduct on the part of the husband which directly caused forfeiture of pension benefits justify trial court's conclusion that the wife is entitled to reimbursement for her share lost.

X PRE- AND POST-NUPTIAL AGREEMENTS

§ 1 *Pre-nuptial or pre-marital agreements (PMAs)*

These occur at the start of marriage (therefore needs to be signed before marriage). They allow couples to:

(i) Opt-out of community property system

(ii) Alter community property rights

(iii) Waiver or limit spousal support

(iv) Establish inheritance rights (used often when spouse has children from prior marriage)

§ 1(1) *What Can Be Covered in Premarital Agreements?*

The Statute Book

Cal. Fam. Code § 1612

(*a*) Parties to a premarital agreement may contract with respect to all of the following:

(1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.

(2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

(3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.

(4) The making of a will, trust, or other arrangement to carry out the provisions of the agreement.

(5) The ownership rights in and disposition of the death benefit from a life insurance policy.

(6) The choice of law governing the construction of the agreement.

(7) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(*b*) The right of a child to support may not be adversely affected by a premarital agreement.

(*c*) Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.

Rights to, and disposition of property:

- During marriage
- Upon separation/divorce and death, or
- The occurrence/non-occurrence of any event

The parties choice of the law governing agreement and indeed over any matter not in violation of public policy, including:

(i) Payment of living expenses

(ii) Spousal support (can be waived or limited; post 1986 only; requirements higher post 2002)

(iii) Attorney fees

§ 1(2) *What cannot be covered?*

§ 1(2)(*a*) CHILD CUSTODY

This can be in a marital settlement agreement, but not in premarital. One cannot take away the court's jurisdiction to make custody orders, it must be based on what is best for the child(ren).

§ 1(2)(*b*) RELIGIOUS UPBRINGING OF CHILDREN

Any clause like this is void.

§ 1(2)(*c*) CHILD SUPPORT

Public policy of state that spouses have equal obligations to their children. Under Cal Fam. Code § 1612(*b*), one cannot opt-out of child support.

§ 1(2)(*d*) DUTY OF MUTUAL SUPPORT DURING MARRIAGE

This cannot be waived.[1]

§ 1(2)(*e*) PENALTIES

California is a no fault state. One cannot put penalties in pre-nups. If included, they are void

§ 1(2)(*f*) TERMS PROMOTIVE OF DIVORCE

Prenuptial agreements are not *per se* promotive of divorce.[2] However, the terms cannot be promotive of divorce. For example, a large lump sum payment upon divorce is barred by public policy. A simple fix to such a clause is to break it up into periodic payments.

§ 2 *The practice of pre-nups*

Preparing pre-nups is not divorce planning *per se*. Rules for how to divide property after divorce already exist in community property law; pre-nups only allow you a opportunity to set your own rules.

Regrettably, many attorneys don't like doing pre-nups. Malpractice rates and liability are very high. Compounding this, liability is for indefinite time, one does not know when or if a couple will divorce. Pre-nups can be overturned far in the future. They also involve for an unknown amount: how much will the couple be worth at time of divorce? Pre-nups are further vulnerable to challenge.

There is no fiduciary duty in making a pre-nup unless there is a confidential relationship. However, confidential relationships are very hard to establish outside of a business or marriage. Thus, one places a lot of reliance on one's partner.

In practice, pre-nups are prepared sometimes and litigated sometimes.

1 *See* Cal. Fam. Code § 4301 and Cal. Fam. Code § 914(*a*)(1).

2 *See* In re Marriage of Dawley, 17 Cal. 3d 342 (1976) .

§ 3 *How much disclosure is needed?*

Of all the agreements in marriage, this requires the least out of all agreements. However, that still totals up to quite a lot of disclosure, which protects one from being questioned later.

§ 4 *Premarital agreements as a practice area*

Working with a PMA is a specialized practice area. One becomes involved in one of two ways: either transactional (engaged before marriage, for drafting), or in litigation (at divorce, disputing). It is a very idea to have the attorney who drafted the agreement as the attorney litigating dissolution. There is a conflict of interest.

For a pre-nup, both parties need counsel. One party's attorney can give referrals for other party, but these must be good referrals. If challenged, the attorney wants to be clear that the other party's attorney is competent.

§ 4(1) *Skill sets needed*

One must have expertise in: family law, trusts and estate law (or hire expert), contract law, transactional negotiation, risk management. One must also be mindful of potential litigation. One will have to deal with highly emotional parties and situations and encounter potentially awkward questions, can cause fights or break up engagements. One must compromise and not personalize. Thus, one absolutely must respect the other party and attorney. It is essential to listen and suggest, rather than to dictate. One must also ensure there is enough time for an agreement. It is essential one does not sign off on a bad deal.

§ 5 *Benefits and pitfalls of PMAs*

A good PMA can foster a good relationship. This requires early discussion of finances. and clear expectations. By contrast, one-sided deals create a resentful spouse.

One common pitfall is that the marital residence being separate property of one party. Here, one must beware of a potential Cal. Fam. Code § 2640 reimbursement claim..

It is good to create economic incentive to follow the PMA. This can create a benefit for both sides. If one takes away one right, one ought to offer a different one.

§ 6 *Recitals*

Recitals create conclusive presumptions.[3]

Recitals ought properly to include:

(i) Information regarding Age, health, education, timing

3 *See* Cal. Evid. Code § 622; *see also* In re Marriage of Kieturakis, 138 Cal. App. 4th 56 (2006) .

(ii) Presence of capacity

(iii) Certification that there was no duress, menace, fraud, or undue influence

(iv) The absence of undue influence (a grossly oppressive and unfair advantage of another's necessities or distress)

(v) That the agreement was signed freely and voluntarily

(vi) That each received adequate disclosures

(vii) And have waived any further disclosures

(viii) That each had ample time to consider and consult

(ix) and each would sign "no matter what"

(x) And whatever else one might would want to prove at trial

One ought to be aware of claims about attorney certifications. The Uniform Premarital Agreement Act does not require attorney certification. These do not waive attorney client privilege.[4] If one certifies recitals, one can be called as a witness upon dissolution.

§ 7 Common Terms and Public Policy

§ 7(1) Opt-out of community property system

By opting out, one can then specify on one's own terms which property will be "joint", and with precision define separate property to avoid further disputes.

§ 7(2) Provisions for Separation/Dissolution/Death

These involve guaranteed payments at each event, and provide protection for children from prior relationships.

§ 7(3) Spousal support/fees

Limitations or waivers of spousal support are the most risky. These be found invalid, if unconscionable at dissolution. If they are so unconscionable that they cannot be severed from the agreement, the entire agreement can be invalidated. One can try to save such clauses by giving the spouse losing spousal support a sum of money for each year they were married.

§ 7(4) Limits on attorney fees, prevailing party provisions

These arguably should be void on public policy grounds.

4 *See generally* Cal. Evid. Code § 912.

§ 8 *Common law & legislation*

The law that applies depends on when the PMA was executed. There are four relevant periods: Pre-1986, 1986–2001, 2002–2019, and 2020–future.

The Uniform Premarital Agreement Act (UPAA, codified at Cal. Fam. Code § 1600) was enacted on Jan. 1, 1986 and amended on Jan. 1, 2002. No part of the UPAA is retroactive

Case Law

In re Marriage of Bonds

24 Cal. 4th 1 (2000)

FACTS Barry Bonds was a baseball player who entered into a PMA with his fiancée, Susann "Sun" Margaret Bonds, the night before the wedding. Mrs. Bonds did not have an attorney and English was not her native language.

In divorce proceedings, Mrs. Bonds challenged the PMA She claimed she did not enter into such agreement voluntarily. PROCEDURAL HISTORY Trial court found enforceable. The Court of Appeal held the PMA was unenforceable. It held that PMAs are subject to "strict scrutiny where the less sophisticated party does not have legal counsel."

HELD The Cal. Sup. Ct. found the PMA was enforceable. The trial court's finding was supported by fact. Courts must consider several factors to determine voluntariness, not just whether a party was represented by counsel.

Case Law

In re Marriage of Pendleton and Fireman

24 Cal. 4th 39 (2000)

FACTS The husband and the wife were both highly educated, with graduate degrees. The two entered into premarital agreement that waived spousal support for both the husband and wife. Upon dissolution the wife argued for spousal support.

PROCEDURAL HISTORY Trial court ruled waiving spousal support is against public policy. The Court of Appeal reversed this.

HELD Such waivers are not in violation of public policy. The Cal. Sup.

Ct. acknowledged public attitude and official policy about marriage have changed over the century. Although public policy continues to encourage marriage, it also acknowledged that it may not be a lifetime commitment. When legitimate grounds for dissolution exist, dissolution is the preferred solution. These changes warrant a reassessment of the rule that premarital waivers of spousal support may promote dissolution and if they do, are unenforceable. When entered into voluntarily by parties who are aware of the effect of the agreement, a premarital waiver of spousal support does not offend contemporary public policy. They are permitted. Each of the spouses here are self-sufficient in property and earning ability. Both had counsel when executing waiver.

2002: Anti-*Bonds* legislation is enacted

The Statute Book

Cal. Fam. Code § 1612

(*c*) Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.

Thus, now any provision regarding spousal support is not enforceable if:

(i) One party didn't have independent representation; or

(ii) It is unconscionable at the time of enforcement

§ 9 *Cal. Fam. Code § 1615*

The agreement is not enforceable if it is not voluntary. It will be deemed not voluntary unless court finds in writing or on the record all of the following requisite conditions.

The Statute Book

Cal. Fam. Code § 1615

(*a*) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(*b*) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(*c*) For the purposes of subdivision (*a*), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel. The advisement to seek independent legal counsel shall be made at least seven calendar days before the final agreement is signed.

(2) One of the following:

(A) For an agreement executed between January 1, 2002, and January 1, 2020, the party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the final agreement and advised to seek independent legal counsel and the time the agreement was signed. This requirement does not apply to nonsubstantive amendments that do not change the terms of the agreement.

(B) For an agreement executed on or after January 1, 2020, the party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the final agreement and the time the agreement was signed, regardless of whether the party is represented by legal counsel. This requirement does not apply to nonsubstantive amendments that do not change the terms of the agreement.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations the party was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that the party received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.

Some of these provisions raise questions. For instance, if only minor changes are made to the first draft, can it be considered "final" for purposes of Cal. Fam. Code § 1615?

Case Law

In re Marriage of Clarke & Akel

19 Cal. App. 5th 914 (2018)

FACTS The husband and the wife set March 7 wedding date. On February 26, the husband gave the wife a PMA agreement form. The husband retained an attorney to represent the wife, but chose to represent himself despite attorney's advice. On March 4, the attorney spoke with the husband and the wife individually, asked whether the husband intended to waive his Cal. Fam. Code § 2640 reimbursement rights. On March 5, attorney prepped final version of the PMA. On March 6, parties signed the 'final version' including the Cal. Fam. Code § 2640 waiver. The recitals said that both parties had agreement for more than 7 days before signing. Upon dissolution, the wife sought enforcement of the PMA.

HELD The PMA was unenforceable. The husband, the unrepresented party, had not been provided a seven day period to review the final version. It was also invalid for lack of advisement of right to independent counsel and waiver. Note that the unrepresented party was the husband, who created the initial draft. The ecital stating they both had seven days before signing was not binding because Cal. Evid. Code § 622 did not apply to invalid contracts and situations not involving arm's length negotiations.

§ 9(1) *Jan. 1, 2020: amendments to Cal. Fam. Code § 1615*

This clarified the seven day rule applies to final agreements, regardless of whether the party is represented by legal counsel. However, the requirement does not apply to non-substantive amendments that do not change the terms of the agreement.

§ 10 *Requirements and Standards*

Consult the following table for chronological information:

Pre-1986	**Jan. 1, 1986 to Aug. 20, 2000**	**Aug. 21, 2000 to Dec. 31, 2001**
Spousal support waivers not valid.	Spousal support waiver valid if voluntary	*Pendleton, Bonds* : Spousal support waivers valid if they satisfy *Bonds*

Jan. 1, 2002 to Dec. 31, 2020	**Jan. 1, 2020 to present**
Cal. Fam. Code § 1612(*c*) added regarding spousal support and unconscionability. The burden of proof is also shifted for presumption of invalidity.	Cal. Fam. Code § 1612 is amended.

§ 11 *Defenses: Disclosures and Unconscionability*

Under Cal. Fam. Code § 1615(*a*), the resisting party must show:

(i) It was involuntary; or

(ii) The following:

1) Inadequate disclosure,
2) disclosure rights not waived
3) no independent knowledge of omitted info
4) and unconscionability at time of execution.

Note that Cal. Fam. Code § 1615(*c*) (waiving spousal support) has different defenses.

§ 11(1) *Unconscionability*

This has no clear definition. *Indicia* of unconscionability include one-sidedness, oppression, and overreaching. After 2002, spousal support provisions are tested for unconscionability.

The relevant time for analysis of unconscionability is as of enforcement (trial).

§ 11(2) *Other Defenses*

Other defenses to enforcement include:

(i) Duress

(ii) Fraud

(iii) Undue Influence

XI POST-NUPTIAL AGREEMENTS

These are marital agreements are used for intact marriages. They allow couples to:

(i) Transmute property

(ii) Alter community property rights

(iii) Establish inheritance rights

As these occur during marriage, fiduciary duties come into play. This can be worse (meaning riskier) for attorneys. If the agreement benefits one spouse more than the other, there is a presumption of undue influence.[1]

In practice, these are rarely prepared and frequently litigated. This may be because these require the most disclosure of all types of marital agreements.

§ 1 *Marital Settlement Agreements (MSAs)*

These are used at the end of marriage. The allow couples to:

(i) Divide property

(ii) Allocate child custody

(iii) Establish rights to child support, spousal support, and fees

(iv) Stipulate to entry of judgment

There is still a fiduciary duty to one another.

These are often prepared and rarely litigated. They require some disclosure, falling in the middle in the middle of pre-nuptial and post-nuptial agreements.

§ 2 *On Cohabitation Agreements*

Cohabitation agreements are enforceable in California.

1 *See* Cal. Fam. Code § 721.