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COMMUNITY PROPERTY *in* CALIFORNIA

ELIJAH Z. GRANET

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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 M was used, and **bold** text was generally limited.

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I BACKGROUND

§ 1 *Scope*

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 does not matter for community property, while the location of the divorce does.

§ 2 *General notes*

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

Constitution Corner

Cal. Const. 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.

§ 3 *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.

§ 4 *Grounds*

§ 4(1) *Dissolution:*

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

§ 4(2) *Nullity*

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

§ 5 *Court Documents*

§ 5(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

§ 6 *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.

§ 7 *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.[1] However, sometimes retroactive application of the Cal. Fam. Code is impermissible interference with vested property rights.[2]

§ 7(1) *The Retroactivity Test*

Case Law

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

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

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

(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.

§ 8 *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 the cheating spouse spent community property on the affair. A prenup cannot be based on fault.

II THE CHARACTER OF PROPERTY

§ 1 *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*.

§ 1(1) *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.

§ 2 *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.

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.").

§ 2(1) *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.

§ 3 *Rebuttable Presumptions*

§ 3(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.

§ 3(2) *Title presumptions*

It is not controlling that property is titled in just one spouse's name. Title does not control, whereas funds do. This is so that a spouse cannot deliberately take property in his name so as to transmute community property However, if it is titled jointly, the joint title presumption applies. This presumes that property jointly titled is community property.

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 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.

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

§ 3(3) *Family expense presumption*

From the leading case of *See v. See*,[3] we derive the presumption that absent contrary evidence, available community funds are presumed to be used for family expenses. If separate funds are used for family expenses, they are treated as a gift to the community. The separate estate is not entitled to later reimbursement (unless it can be proven there is contrary agreement).

§ 3(4) *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

3 64 Cal. 2d 778 (1966).

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*,[4] 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*,[5] the Cal. Sup. Ct. 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.

§ 3(5) *Income*

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

§ 4 *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

4 58 Cal. 4th 1396 (2014)
5 9 Cal. 5th 903 (2020) .

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.

§ 4(1) *"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.

§ 4(2) *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 (*i.e.*, loses her good faith belief) of the non-existence of her legal marriage. A common reason for putative spouse cases is that in California, divorces do not become final until at least six months after filing. People who do not know this sometimes marry shortly after a divorce hearing. Unlike most states, California will not retroactively validate these marriages once the prior divorce becomes final. Consequently, there are many people in California who mistakenly think they are married.

An important point is that the belief in the putative marriage need be only sincere, not necessarily reasonable. The test is thus not objective.[6]

6 *See* Ceja v. Rudolph & Sletten, Inc., 56 Cal. 4th 1113 (2013) .

Putative spouse cases arise in several typical fact patterns. In all of these, *A* "marries" *B*, while already married to someone else, often while in the process of divorcing that person. *B* does not know. Then, *B* files for divorce seeking property division. Spouse *A* claims there is not community property to be divided, because the marriage was invalid. *B* will get the property as a putative spouse.

One such fact pattern occurs where *A* dies intestate and *B* seeks to inherit. Some other relative claims that *B* should get nothing because the marriage was invalid. *B* will inherit as if the marriage was valid.

Another occurs where *A* dies in an in accident. *B* sues for wrongful death. Defendant tries to dismiss the case because *B* is not a spouse. *B* will win.

Another hypothetical is where *A* dies and *B* tries to collect on *A*'s pension. *B* often wins.

Although it can happpen,[7] cases where there are two spouses both seeking to collect are very rare.

The decision to invoke putative spouse status is at the discretion of the putative spouse.[8] The party lacking such a belief cannot invoke this.[9]

§ 4(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.

7 *See, e.g.*, In re Estate of Vargas, 36 Cal. App. 3d 714 (1974) .

8 *See* Cal. Fam. Code § 2251.

9 *Id*.

III DISSOLUTION AT DIVORCE

§ 1 *Separation*

§ 1(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.

§ 1(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 fate-

ful 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 construe*Baragry* 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. Among the factors that may be relevant are:

(i) Separate residences (relevant but not dispositive)
(ii) Sexual relations
(iii) Financial sharing
(iv) Efforts to reconcile
(v) Shared travel (but that shared travel could merely be a sign of the interests of the children in common holidays).

§ 2 *Reconciliation*

Efforts to reconcile can rebut intent required for separation. This is problematic because trying to reconcile can be financially unwise if it fails. There is a dispute about how to treat property acquired while separated if the couple later does reconcile.

§ 3 *Domestic Violence*

If a domestic violence victim divorces her abuser within five years of conviction or time served or probation for a violence felony, the victim can request that the date of separation be set to date of violent act or earlier.

The Statute Book

Cal. Fam. Code § 4324.5

(*a*) In any proceeding for dissolution of marriage where there is a criminal conviction for a violent sexual felony or a domestic violence felony perpetrated by one spouse against the other spouse and the petition for dissolution is filed before five years following the conviction and any time served in custody, on probation, or on parole, the following shall apply:

(1) An award of spousal support to the convicted spouse from the injured spouse is prohibited.

(2) If economic circumstances warrant, the court shall order the attorney's fees and costs incurred by the parties to be paid from the community assets. The injured spouse shall not be required to pay any attorney's fees of the convicted spouse out of the injured spouse's separate property.

(3) At the request of the injured spouse, the date of separation, as defined in Section 70, shall be the date of the incident giving rise to the conviction, or earlier, if the court finds circumstances that justify an earlier date.

(4) The injured spouse shall be entitled to 100% of the community property interest in the retirement and pension benefits of the injured spouse.

(*b*) As used in this section, the following definitions apply:

(1) "Domestic violence felony" means a felony offense for an act of abuse, as described in § 6203, perpetrated by one spouse against the other spouse.

(2) "Injured spouse" means the spouse who has been the subject of the violent sexual felony or domestic violence felony for which the other spouse was convicted.

(3) "Violent sexual felony" means those offenses described in paragraphs (3), (4), (5), (11), and (18) of subdivision (c) of § 667.5 of the Penal Code.

(*c*) If a convicted spouse presents documented evidence of the convicted spouse's history as a victim of a violent sexual offense, as

described in paragraphs (3), (4), (5), (11), and (18) of subdivision (c) of § 667.5 of the Penal Code, or domestic violence, as defined in § 6211, perpetrated by the other spouse, the court may determine, based on the facts of the particular case, that one or more of paragraphs (1) to (4), inclusive, of subdivision (a) do not apply.

(*d*) The changes made to this section by the bill that added this subdivision shall only apply to convictions that occur on or after January 1, 2019.

§ 4 *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 ordinary 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.

§ 5 *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 nondisclo-

sure.

(*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.

§ 6 *Prohibition of encumbrances*

Once a petition of divorce is filed, the courts will issue a temporary restraining order (TRO) prohibiting the unilateral sale or encumbrance of separate property or community property without the permission of the court under Cal. Fam. Code § 2040.

§ 7 *In-kind division*

There is a general presumption in favor of the in-kind division of assets. This means that for any given asset, each party receives half the asset. *E.g.*, if couple owns a pension and a house, each gets half of the pension and half of the house, rather than awarding the house to one and the pension to the other. However, this can often be impracticable or indeed impossible.

Hence, where an asset cannot be divided, Cal. Fam. Code § 2601 allows dividing by value rather than in kind. For instance, But, in-kind division can be impossible, value-reducing, or harmful in other ways. The criterion is where "economic circumstances warrant".

Some examples of this are relatively obvious. A partnership cannot be divided under the applicable law. A professional practice would lose value if owned by both spouses, one of whom cannot practice that profession. Often, small business run by one spouse would become impractical if owned by both. Clothing is not feasibly owned by both and would lose value if ordered to be sold.

With regard to shares of stock, the easiest division is to give half to each spouse. *Brigden* (*infra*) suggests this is usually mandated for public companies. For closely-held companies, like a small business, there is no market for the shares and the couple may use ownership to harass each other after divorce. In that context, in-kind division can be avoided with an offsetting payment (when possible) or a promissory note.

Case Law

In re Marriage of Bridgen

80 Cal. App. 3d 380 (1978)

FACTS The husband helped found a company and acquired 66,000 shares

of stock. He was also an employee and director.

ISSUE Should the stock be divided, or the asset kept with the husband to preserve his a position in the company and the value divided?

PROCEDURAL HISTORY The foolish trial court naïvely awarded the husband stock (with delayed payment to the wife) because it helps protect his positions.

HELD Trial court's dumb decision reversed. The mere fact that stock is useful to the husband does not rebut presumption for in-kind division, since it might also be useful to the wife. The wife might also wish become a director of the company. In order to show that a case for value division is made out, the applying party must demonstrate that in-kind division impairs the value of the stock. That is not true when shares can be sold on a national stock exchange. Thus, one rule derived from this case is that public companies are almost always divided in-kind.

As a secondary reason for reversal, the Court also noted that was that the husband could decide when to transfer shares to wife. This allowed him to time the transfer at low share price points. The wife also got no security. Both factors aggravated inequality in this division.

COMMENTARY Might the outcome be different if the husband was a controlling shareholder and division would cause loss of control?

Case Law

In re Marriage of Connolly

23 Cal. 3d 590 (1979)

FACTS The husband was awarded all of stock in a settlement with the wife, and gave the wife a promissory note for her share. The wife suggested that this arrangement because the company stock was volatile. When stock became very valuable after divorce, she requested to reopen case.

HELD Request rejected. The promissory note was of equal value to the shares at time, and she requested it. The promissory note's security interest is better than *Bridgen*. Furthermore, equal expected value is adequate; the law does not require equal risk when parties have different capacities to cope

with risk.

§ 8 *Hard-to-divide assets*

Hard-to-divide assets present a challenge to the courts. One option is to order sale of challenging asset and divide the proceeds. This often works for real estate. Either spouse can bid on the property if he or she has adequate assets or can borrow. If the asset is not the family home, or there are no minor children, this solution can work.

Another approach is for the court to delay the division and retain jurisdiction over it. This is the solution for many pensions, which can be hard to value, are subject to risk, and often are so valuable that there is no offsetting asset to award to the other party. A house under construction might also warrant this treatment. Such an asset is hard to sell now, but can be sold one year later.

A third approach is to award the asset to one spouse and a short-term promissory note to other. If the asset can be sold soon, giving one spouse a promissory note (which itself can be sold) allows the non-owner to get cash faster. The note needs to have interest and perhaps a face value larger than half of the asset's value, so that it can be sold for half of the asset's value

§ 8(1) *Pets*

The People, via their legislature, passed in 2018 an amendment to the Cal. Fam. Code to provide for a special custody procedure for the allocation of pets distinct to that of other assets.

The Statute Book

Cal. Fam. Code § 2605

(*a*) The court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may enter an order, prior to the final determination of ownership of a pet animal, to require a party to care for the pet animal. The existence of an order providing for the care of a pet animal during the course of proceedings for dissolution of marriage or for legal separation of the parties shall not have any impact on the court's final determination of ownership of the pet animal.

(*b*) Notwithstanding any other law, including, but not limited to, § 2550, the court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may

assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal.

(*c*) For purposes of this section, the following definitions shall apply:

(1) "Care" includes, but is not limited to, the prevention of acts of harm or cruelty, as described in § 597 of the Penal Code, and the provision of food, water, veterinary care, and safe and protected shelter.

(2) "Pet animal" means any animal that is community property and kept as a household pet.

§ 9 *The Family Home*

If the housing market is at the time of divorce unfavorable to sale of the housing asset, the court may until market improves. If neither spouse lives there, the court can simply retain jurisdiction until the home is sold and order sharing of costs.

There may also be a delay so that the custodial parent can reside there with the minor child or children.[1] If the resident spouse pays mortgage interest and taxes, there no need to rent or otherwise offset. In other cases, the court can make order about costs. Sometimes the non-resident is credited with mortgage payments as part of child support. Additionally, sometimes the resident spouse is given title to the house and non-resident spouse gets equalizing payment or a security interest and promissory note.

§ 10 *Equal division and its exceptions*

The courts must divide community assets equally at divorce, absent a specific exception. Prior to that equal division, the community may seek reimbursements. For example, the community might be reimbursed for educational expenses or educational debt reduction, or for expenditures on child support when adequate separate property funds were available. The victim spouse might also move to set aside unauthorized gifts or transfers for which joint consent was required.

For valuation purposes, Cal. Fam. Code § 2552 requires that assets and debts be valued at the time of trial, absent good cause. One common cause for valuation at separation is a community property business run by one party where appreciation of the business post separation was due the manager's efforts.

1 *See* Cal. Fam. Code § 3800 *et seq*.

IV DISSOLUTION AT DEATH

§ 1 *Introduction*

Death is inevitable and nothing anyone can do can stop the grim progression of the human organism towards ceasing to exist.[1] In cases where a marriage is subsisting between two people and one of them dies, absent cases where the spouses die simultaneously, one will necessarily survive the other.[2]

What happens after death? Throughout the ages, the greatest minds of humanity have devoted time and effort to creating a multitude of answers to this question. Here, we mean this question in a narrower sense, which actually has a definitive answer. What happens to the community when it ceases to exist on account of one of its members "pining for the fjords"?[3]

§ 2 *An overview*

When a married person dies in California, the surviving spouse automatically owns half of every community asset. The survivor also gets all of joint tenancy or community property with right of survivorship property (outside of probate). The deceased may distribute by will the other half of the community and all of her separate property. Unlike those benighted states foolish enough to make use of the common law in such matters, spouses in the Golden State have no right to inherit any share (although of course they already own half of the community assets).

Generally, this pattern protects surviving spouse. However, if all assets are separate property of the deceased, the surviving spouse may get nothing. If a spouse dies intestate, the survivor gets 100% of community property and a share of the separate property.

1 No one said this law stuff was going to be uplifting or fun.

2 Remember, this is the *happy* outcome compared to divorce!

3 With apologies to Monty Python. This entire introductory section is strictly speaking unnecessary, but it's my notes and I can be silly if I so choose.

§ 3 *Rights of the survivor*

Just as at divorce,[4] the survivor can petition to set aside half of unauthorized gifts or transfers which required joint consent. According to *Fields v. Michael*,[5] that the survivor need not sue gift recipient to set aside gift, but can instead collect it from the deceased's half of the community estate. A further case, *Dargie v Patterson*,[6] makes clear that this is not required. The survivor can sue to set aside half of gift (*not* all, however, because the other half is binding on the deceased). The Court in that case makes clear that item-analysis is required at death. Each spouse owns half of each asset. They cannot be forced to accept equal value in place of half ownership of each asset. The survivor can also assert a right to unequal division of community assets based on rights of reimbursement or violations of fiduciary duty.

§ 4 *Life insurance policies*

Consider the following facts:

> Harold and Wanda are married. Harold uses community funds to buy a term life insurance policy on his life, naming his sister Harriet as his beneficiary. Harold dies.

In that scenario, who gets the proceeds? Applying the rules *supra*, Wanda and Harriet split them. If Wanda did not consent to naming Harriet as beneficiary, this was an unauthorized gift of community funds.

§ 5 *Surviving spouse election*

In most cases, there will be no question of a need for election. If the deceased did not try to give away things belonging to his spouse, no election issue will arise. However, sometimes a will *purports* to give to a third party property that belongs partly to the surviving spouse. When this happens, the survivor automatically owns her share of the thing allegedly given away. Yet, what happens if the will both purports to transfer, to a third party, community assets belonging (in half-share) to the survivor and to also give the survivor assets to which she otherwise has no claim? This is the fact pattern which can, but does *not* always, demand an election.

§ 5(1) *The question about election*

The question about election is: when a will purports to give away community assets partly owned by survivor and also gives other assets to the survivor, may the survivor assert an

4 *See* Cap. III, *supra*.
5 91 Cal. App. 2d 443 (1949).
6 176 Cal. 714 (1917).

interest in the community assets while also keeping the assets provided to her under the will? Or, must the surviving spouse choose between asserting a community interest and accepting the will's bequest? This latter option is what we term surviving spouse election.

§ 5(2) *The rule*

If the will explicitly states that the survivor *must* choose, then the survivor *must* choose. Otherwise, the law presumes that the deceased intended only to give away what they owned, not more. Thus, in such a scenario, the survivor can keep both her community share and the property given by will. However, if the will makes clear that the testator intended to give away assets belonging to the survivor, then election is *required* despite no explicit statement.

§ 5(3) *Determining intent*

Case Law

In re Estate of Prager

166 Cal. 450 (1913)

FACTS The late Mr. Prager wrote in his will that "all of the real property owned by me" should be distributed to various members of his family, with the remainder of the estate going to his then-wife, Mrs. Prager (now the Widow Prager).

ISSUE Does the Widow Prager have to elect between the claim over the real estate and the residual estate?

HELD The Widow Prager does have to elect. The language of property "owned by me" clearly did not evince an intention to give away more property than Mr. Prager owned, but rather merely the share of the community property he owned at the dissolution of the community estate upon his death. *Per* SLOSS, J., "[t]he widow's obligation to elect arises only where the testator has, by the terms of the will, clearly manifested the intention to make the testamentary gift to her stand in lieu of her interest in the community property."

§ 5(4) *Mistaken characterization*

A common reason for election is that one spouse makes a mistake in characterizing an asset.

Case Law

In re Estate of Wolfe
48 Cal.2d 570 (1957)

FACTS The husband, Mr. Wolfe, mistakenly believed that real estate in Northridge was his separate property. Mr. Wolfe left this to his wife (then Mrs. Wolfe, now the Widow Wolfe) and sister (Miss Wolfe) for life and then to charity. Mr. Wolfe also left Mrs. Wolfe various other property. The will explicitly stated that the Northridge property was his separate property and was premised on that.

ISSUE Did the will create an election despite the testator apparently not realizing that the community owned the Northridge property?

HELD The Widow Wolfe must choose between either half of the Northridge property (outright, not for life—this consequently reduces the charitable interest residual estate charity by half), or in taking the other separate property left to her by the will. The reasoning is that Mr. Wolfe clearly stated his intent to give the property he owned to the charity (though he did not know he did not fully own this particular property). *Per* SHENK, J., "[a]n intention on the part of the testator to dispose of his wife's interest in the community property will not be implied where another construction is permissible."

§ 5(5) *Interests in non-probate transfers*

An open question in the jurisprudence in this field is: what if the survivor asserts a community interest in an asset that is given via non-probate transfer? Does this require an election?

For example, Wanda dies, having named a friend as the sole beneficiary of a life insurance policy purchased with community funds. Harold, her husband, did not consent to this beneficiary designation. Wanda's will leaves all her community property and separate property to Harold. Can Harold assert a community interest in the life insurance policy and still inherit everything under the will? The case law is split on this question.

§ 6 *Allocation of debt at death*

If an estate goes through probate, all the debts of the deceased must be paid before the assets are distributed. For this to happen, it must be ascertained which debts can be attributed to the deceased and which assets are available to pay said debts. Since 2001, California has used the same rules to allocate debts at death as it uses at divorce.

§ 6(1) *Separate debts*

Educational debts, premarital debts, debts incurred during marriage not for benefit of community, and most debts while incurred separated are separate debts. At death, these can be satisfied out of the separate assets of the deceased or the deceased's share of community assets, but not the community assets of the survivor.

§ 6(2) *Community debts*

Debts incurred during the marriage for the benefit of the community may be satisfied out of all community property and the separate property of the person who incurred the debt.

§ 6(3) *Exceptions*

Life insurance payouts and property held in joint tenancy pass to the survivor outside of probate and so these are not part of the debt satisfaction process.

Furthermore, not all estates pass through probate. A surviving spouse can often elect to bypass probate, taking her share of community property and any other property left to her without administration. Doing so means that the surviving spouse becomes personally liable for all of the debts to which property she acquires would have been liable.

V ACQUISITIONS DURING MARRIAGE & TRANSMUTATIONS

§ 1 *Definitions*

Transmutation is the change in the character of property during marriage. Thus, changes from separate property to community property, from community property to separate property, and from one's separate property to the other separate property are all transmutations.

§ 2 *Acquisitions During Marriage*

The law, in its majestic wisdom, presumes property acquired during marriage is community property. Even where one cannot prove the acquisition of property occurred during the marriage, the mere fact of possession of the property later acquired during marriage is enough to give rise to a presumption of community property.[1]

Cal. Fam. Code § 770 sets out three categories of exceptions for property acquired during marriage to be community property. These are, as a reminder:

(i) Owned before marriage

(ii) Acquired by gift, bequest, devise, or descent

item Rents, issues, profits of above [including appreciation]

Note that the judiciary, in its great wisdom, has decreed that subsequent property exchanged from this initial exempted property retains the separate character.

Case Law

In re Estate of Clark

94 Cal. App. 453 (1928)

FACTS During his marriage, Major Clark had, by a settlement agreement, received half his son's estate although the will (which the major had disputed) left nothing to him. The half of the estate was in consideration for

1 *See* Lynam v. Vorwerk, 13 Cal. App. 507 (1910) ; *sed contra* the obsolete case of Fidelity & Casualty Co. v. Mahoney, 71 Cal. App. 2d 65 (1945) (holding *per incuriam* that a short marriage displaced the presumption, in a manner which obviously cannot be good law).

giving up his right to contest the will (which pre-dated the marriage) The major then died and his widow claimed the settlement was community property.

ISSUE Did the claim on the estate count as separate property, or did the date of the settlement agreement during the marriage mean it was community property?

HELD It was separate property. The right to contest the will based on a *bona fide* claim and was founded on probable cause. Most of all, the settlement involved a compromise to a statutory right which was separate property and the fact that the right compromised is separate makes the compromise separate property.

COMMENTARY Consider the traditional Spanish distinction between marital property acquired by "onerous title" (by labor or other such valuable consideration) and "lucrative title" (gifts, inheritance, succession). Does the work to achieve the settlement agreement make this onerous title, or does the fact it was attached to a will make it lucrative title? This case highlights some of the conceptual difficulties faced in the traditional classifications.

§ 3 *Transmutations*

§ 3(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!

§ 3(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* 7 *supra*)
(ii) Cal. Evid. Code § 662 (*see* 11 *supra*)
(iii) Cal. Fam. Code § 2581 (*see* 10 *supra*)
(iv) Cal. Fam. Code § 852 (*see* 11 *supra*)

§ 3(3) *Statutory requirements*

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

IN WRITING

The declaration must be in writing. Prior to 1985, oral transmutation was allowed and transmutation could be inferred from actions. This was problematic in death cases, when one part cannot testify regarding the transmutation.

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 relevant 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. Note also that an important aspect of this case is that writing is necessary for a valid transmutation, but it is not sufficient. The transmutation must also survive challenge as violating fiduciary duty laws.

EXPRESS DECLARATION

This must be specific and clear, leaving no ambiguity. There are, however, no "magic words" guaranteed to transmute in every context.[2] 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.[3]

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.[4] 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.

JOINED IN BY THE PARTY CHARGED

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

§ 3(4) *The "Bauble" Exception*

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

2 *See* In re Estate of MacDonald, 51 Cal. 3d 262 (1990) .
3 *Id.*
4 *Id.*

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.

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.

Under Cal. Fam. Code § 852(*d*, commingled assets or assets which combine separate and community property are also not subject to these rules. These rules also do not apply, *per* Cal. Fam. Code 852(*e*), to transfers before 1985.

§ 3(5) *Wills and revocable trusts*

Under Cal. Fam. Code § 853, neither wills nor revocable trusts transmute while the testator or settler is alive.

§ 3(6) *The fraudulent transfer doctrine*

Under Cal. Fam. Code § 851, transmutations are subject to the normal rules preventing transfers for the purpose of putting assets beyond the reach of creditors.

§ 3(7) *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.[5]

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.[6]

5 *See* In re Estate of MacDonald, 51 Cal. 3d 262 (1990) . This case has been widely criticized, and the People, via 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.

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

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.[7]

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.[8]

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.[9]

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.[10]

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.[11]

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 already owned part of the policy, so making it in her name alone did not necessarily show intent to surrender the share.[12]

§ 3(8) *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.[13] The same was true of a grant deed in another case.[14] 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.[15]

7 *See* In re Estate of Bibb, 87 Cal. App. 4th 46 (2001) .
8 *See* In re Marriage of Starkman, 129 Cal. App. 4th 659 (2005) .
9 *See* In re Marriage of Leni, 144 Cal. App. 4th 1087 (2006) .
10 *See* In Re Brace, 9 Cal. 5th 903(2020) .
11 *See* In re Marriage of Lafkas, 237 Cal. App. 4th 921 (2015) .
12 *See* In re Marriage of Valli, 195 Cal. App. 4th 776 (2011) .
13 *See* In re Estate of Bibb, 87 Cal. App. 4th 46 (2001) .
14 *See* In re Marriage of Kushesh & Kushesh-Kaviani, (2018) 27 Cal. App. 5th 449 .
15 *See* In re Marriage of Barneson, 69 Cal. App. 4th 584 (1999) .

§ 3(9) *Application to purchases*

A typical transmutation involves changing the ownership of an asset one already owns. However, parallel questions arise when an asset is purchased with separate funds and given to the community or purchased with community funds and then given to one person, as in the example we just did. The holding in the case of *In re Marriage of Valli* makes clear that transmutation doctrine applies to purchase cases.[16] Mr. Valli, the well-known singer, used community property funds to buy a whole life insurance policy, naming his wife as owner and beneficiary. The court saw no reason to distinguish a case where husband gives a jewel he inherited to his wife from one in which he uses separate property funds to buy a jewel for his wife. Both require transmutation. Thus, the same applied to the purchase of the insurance policy.

§ 3(10) *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.

§ 4 *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 it was that spouse's SP prevails. The *bona fide* purchaser takes title free of claim from other spouse.[17]

16 195 Cal. App. 4th 776 (2011).

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

§ 4(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 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.[18] Assuming the title presumption may sometimes apply, it does not apply when it conflicts with the transmutation statutes.[19] The Cal. Sup. Ct. has

18 In Re Marriage of Valli, 195 Cal. App. 4th 776, 787 (2011).

19 *Id.*

further clarified that "Cal. Evid. Code § 662 does not apply when it conflicts with the Cal. Fam. Code § 760 presumption."[20]

§ 5 Character of property acquired by loan proceeds

§ 5(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.[21]

To rebut a community property presumption, a party needs to show the lender intended to rely solely on separate property.[22]

§ 5(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."[23]

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 lender relied on ability of community to repay through their business, but the community property presumption was not rebutted.[24]

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.

§ 5(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.

20 In Re Brace, 9 Cal. 5th 903 (2020).
21 *See* In re Marriage of Brandes, 239 Cal. App. 4th 1461 (2015) .
22 *See* In re Marriage of Grinius, 166 Cal. App. 3d 1179 (1985) .
23 Gudelj v. Gudelj, 41 Cal. 2d 202, 210 (1953).
24 *See supra* note 22.

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.

§ 6 *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, not just the character of the gift.

Case Law

Downer v. Bramet

152 Cal. App. 3d 837 (1994)

FACTS The husband's employer, in an act of generosity, deeded his ranch in Oregon to his employees, and did not give the employees any retirement benefits. Legally, this was a gift, but it appeared it might be a way of compensating for the lack of a pension.

ISSUE Was the ranch an *ex gratia* gift to the husband or in consideration of the husband's labor? Did the legal characterization of the deeding of the property as a gift override the other evidence?

HELD The deed was in consideration of the husband's work and thus onerous property. *Per* KAUFMAN, J., "although the conveyance of the ranch interest to former husband was in the form of a gift, the evidence would support, indeed strongly suggests, that it was in whole or part a remuneratory gift in recognition of former husband's loyal and skilled efforts for and services to

his employer."

§ 7 Personal Injury Damages

Cal. Fam. Code § 780 deals with the fact that personal injury damages during marriage are generally community property.

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 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.

As suggested in that excerpt, there is a major exception for injuries after separation, which provides for reimbursement.

The Statute Book

Cal. Fam. Code § 781

(*a*) Money or other property received 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 those damages, is the separate property of the injured person if the cause of action for the damages arose as follows:

(1) After the entry of a judgment of dissolution of a marriage or legal separation of the parties.

(2) While the injured spouse is living separate from the other spouse.

(*b*) Notwithstanding subdivision (*a*), if the spouse of the injured person has paid expenses by reason of the personal injuries from separate property or from the community property, the spouse is entitled to reimbursement of the separate property or the community property for those expenses from the separate property received by the injured person under subdivision (*a*).

(*c*) Notwithstanding subdivision (*a*), if one spouse has a cause of action against the other spouse that arose during the marriage of the parties, money or property paid or to be paid by or on behalf of a party to the party's spouse of that marriage in satisfaction of a judgment for damages for personal injuries to that spouse, or pursuant to an agreement for the settlement or compromise of a claim for the damages, is the separate property of the injured spouse.

At the divorce, the community estate's damages, under Cal. Fam. Code § 2603 are awarded to the injured spouse but the court has the discretion to award up to 50% of this to the non-injured spouse.

Note that insurance proceeds can constitute community estate personal injury damages.

Case Law

In re Marriage of Jackson

212 Cal. App. 3d 479 (1989)

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

§ 8 *Insurance (non-personal injury)*

§ 8(1) *Casualty insurance*

Here, the court applies a replacement analysis.

§ 8(2) *Life insurance*

For whole life insurance, the court applies a source of funds analysis to premium payments. For term life insurance, the court applies an analysis of the source of funds for the most recent term payment when the person insured dies. One case suggests that the seeming expectancy

in the right to renew life insurance may itself be a thing of value for the community if absent that right the insured would be uninsurable.[25] Where a policy insuring a deceased spouse designates a person other than the spouses, but is community property, the surviving spouse owns half the payout to the other beneficiary unless the surviving spouse did give her consent to the designation.

25 *See* In re Estate of Logan, 191 Cal. App. 3d 319 (1987) .

VI COMMUNITY INTEREST IN THE GROWTH OF SEPARATE PROPERTY

The appreciation and profits of separate property assets remain, in principle, separate. If Wanda owns a trust fund upon marriage and a trustee manages it during the marriage, all payouts and increased value remain her separate property. However, what if Wanda spends all her time managing her premarital (or inherited) stock portfolio?

It is in cases like this in which the separate property status of premarital businesses come into question. Perhaps the community comes to own part of the business (or is owed some compensation) due to the contribution of community labor. After all, if Wanda and her spouse were not managing funds or working at the business, they could have been earning salaries, which would have been community labor. 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. The following case illustrates this:

Case Law

Beam v. Bank of America

6 Cal. 3d 12 (1971)

FACTS Mr. Beam had come into an inheritance before and at the start of marriage which was his separate property. However, during the marriage, he spent his time managing the separate property investment and had no other employment.

ISSUE Did the labor of Mr. Beam in stewarding the inheritance turn a portion of the increase into essentially employment income?

HELD Applying the *Pereira* rule (*see infra*), the growth in the inheritance was held to be beneath a reasonable rate of return and therefore none of it could be attributed to Mr. Beam's efforts time or skill. Applying the *Van Camp* rule (*see infra*), the notional salary of a manager was less than the amount the separate property portfolio paid in family expenses. Therefore,

Mrs Beam had no community share.

§ 1 *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

§ 1(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*[1] and *Pereira v. Pereira*[2] (*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*,[3] 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.

1 53 Cal. App. 17 (1921).
2 156 Cal. 1 (1909).
3 6 Cal. 3d 12 (1971).

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.

§ 1(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:

(i) the value at the date of marriage
(ii) the value at the date of separation,
(iii) the reasonable rate of return.

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.

§ 1(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.

§ 1(4) *Choosing between approaches*

Courts have broad discretion to pick a formula. Sometimes the question depends on reliable evidence. If it is easy to find comparable businesses, *Pereira* might make more sense. If finding the value of comparable services is simple, *Van Camp* might make sense. Sometimes it depends on whether the judge thinks that any exceptional success in the business is due to special feature of the worker or special features of the business. If the worker has some special feature, then the judge will apply *Pereira* . It might also depend on a sense of fairness. If the couple lived modestly and put all profits back into the business, *Van Camp* (which

merely reimburses the community, but does not offer it a share of appreciation) might seem unjust.

§ 1(5) *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 a leadership 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."

VII 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. § 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 com-

munity.

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 ran-

domly 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.

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).

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

§ 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 agreement.

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.

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.

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

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

VIII 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) *Recapitulative tracing*

Recapitulative tracing involves simply showing that community expenses exceeded community income This is a wicked method which is strictly forbidden and must not be allowed,[6] unless there are truly no other records.

§ 4(3) *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.

Case Law

In re Marriage of Mix

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) .
6 *Id*.

14 Cal. 3d 604 (1975)

FACTS The Mix family is divorcing (getting unmixed, if you will). Mrs. Mix's separate property was commingled with community property. Mrs. Mix adduced a thorough schedule showing she had always cept track of how much separate property was in the account and when she withdrew it to spend on other separate property. Mr Mix by contrast said the schedule was insufficient because it could not prove which funds were being withdrawn, since they were commingled.

ISSUE Can a commingled account still be directly traced?

HELD Yes. Although the schedule is by itself insufficient to prove direct tracing (since it can't actually be shown which of the commingled funds was being spent), the trial court was entitled to accept in addition the credibility of Mrs. Mix's witness testimony as corroborating evidence and part proof of the separate funds analysis. The testimony was the key not the records.

COMMENTARY The schedule Mrs. Mix used comes dangerously close to the forbidden recapitulative method by having simply annual accounts showing the share of separate property. Furthermore, by giving no consideration to the expenses of the community, it ignores that some of Mrs. Mix's separate property may have been used on community expenses.

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, documentary 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(4) *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(5) *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 for $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.

ISSUE The husband, Mr. Moore, argued the community ought to be reimbursed for its contributions to all of reduction, interest, and taxes. The husband further argued that the formula used for mortgages to be

$$\frac{\text{Community contributions to debt reduction}}{\text{Total debt reduction}}$$

.

HELD Interest and taxes did not increase equity in the house. They are no different than rent–a community expense. With regards to mortgage payments and appreciation, the husband's formula is an abomination, and no decent jurist would ever make use of it. Instead, for community pay-down of mortgaged 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:

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

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.

Applying this to the figures *supra*, we start with:

Purchase price	$56,640.57
Down payment	$16,640.57
Separate property debt reduction	$826.25
CP debt reduction	$5,986.20
Outstanding debt	$33,187.55
Current value	$160,000
Equity	$126,812.45
Appreciation	$103,359.43

Let us first reimburse funds to the appropriate parties. Note that the Bank, of course, gets, *ab initio*, $33,187.55.

Mr. Moore	**Mrs. Moore**
	DOWN PAYMENT
	$16,640.57
	SEPARATE DEBT REDUCTION
	$826.25
50% COMMUNITY DEBT REDUCTION	50% COMMUNITY DEBT REDUCTION
$2993.10	$2993.10
$2993.10	**$20,459.92**

Having thus divided up these sums, the task remaining to us is to allocate the appreciation of $103,359.43 between the respective parties. Recalling the

formula of the Court *supra* of the community contribution divided by the purchase price, we arrive at a community share of:

$$\frac{\$5986.20}{\$56,640.57} = 10.56\%$$

Then, we apply that share to the total appreciation:

$$.1056 \times \$103,359.43 = \$10,914.76$$

Recall, however, that this is the share of the community. We must then subdivide this share into equal halves so that we may give each member of the former community his or her portion.

$$\$10,914.76 \div 2 = \$5457.38$$

Now, the sole outstanding task is to give the remainder of the appreciation to Mrs. Moore. Note that this sum is *in addition* to the $5457.38 we just awarded to her!

$$\$103,359.43 - \$10,914.76 = \$92444.67$$

Q.E.D.

§ 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.[7] Whether the spouse entitled to reimbursement or *pro tanto*interest depends on whether the improvements increased the property's value.[8] 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.

§ 6 *After the end of the community interest*

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

PROBATE COURTS

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

FAMILY COURTS

The community continues to share in the appreciation until date of trial.[9]

§ 6(1) *Extent of* Moore *&* Marsden

COMMERCIAL PROPERTIES

Moore & *Marsden* have been extended to commercial properties.[10]

7 *See* In re Marriage of Wolfe, 91 Cal. App. 4th 962 (2001) .
8 *See* Bono v. Clark, 103 Cal. App. 4th 1409 (2002) .
9 *See* In re Marriage of Sherman, 133 Cal. App. 4th 795 (2005) .
10 *See* In re Marriage of Frick, 181 Cal. App. 3d 997 (1986) .

HOME EQUITY LOANS

Home equity loans are excluded to the extent that the proceeds were not used to acquire or improve the property.[11]

COMMUNITY PROPERTY LOANS

Paying off mortgage with proceeds from a community property loan is an acquisition.[12]

§ 7 *Credit acquisitions*

During marriage, case law generally emphasises that credit acquisitions, even where partly paid for by separate property, rely on community assets and are therefore largely community property. The doctrinal basis for this is the doctrine of the lender's intent, by which the court considers the degree to which the lender was giving a loan to the community or to the separate individuals. Absent evidence to the contrary, the lender is presumed to make a loan to the community.

Case Law

Gudelj v. Gudelj

41 Cal. 2d 202 (1953)

FACTS During marriage, Catherine and John buy a cleaning business, using separate property for a down payment and borrowing the rest. There is no evidence as to lender intent, so it is presumably community property. John claimed that he was notoriously bad at business, so the lender must have relied on some separate property real estate.

HELD Absent proof, the presumption remains that the lender mostly based the loan on community assets.

The generally used formula is to be found in the case of:

Case Law

In re Marriage of Grinius

166 Cal. App. 3d 1179 (1985)

FACTS During the marriage Joyce and Victor buy a restaurant building using some separate property, but mostly loans. The lender wanted both

11 *See* In re Marriage of Nelson, 139 Cal. App. 4th 1546 (2006) .

12 *See* In re Marriage of Branco, 47 Cal. App. 4th 1621 (1996) .

spouses to co-sign. The main collateral for the load was the building, itself.

HELD The loan was community property. The collateral mainly being the building meant that it would be circular to try to attribute a separate property source. This was bolstered by the lender having both spouses co-sign. The rule was that unless exclusively separate property was used, the loan was presumed to be generally community property.

§ 8 *Specific permutations*

§ 8(1) *Property acquired after Marriage otherwise than joint title*

If property purchased during marriage with a mix of separate property and community property has no title (such as an antique) or sole title, then the property is presumed community property because it was acquired after marriage. This presumption may be rebutted by tracing to a separate source. The ban on tracing to a separate source applies only to joint title.[13]

In such cases, the source is entitled to a *pro rata* ownership share, much like in *Moore*. Unlike *Moore*, any portion financed by debt is likely attributed to the community unless separate owner can show that lender relied only on separate assets. The formula used is for calculating separate property interest (not community property) It is separate property which gets reimbursed and owns a share of appreciation equal to separate property contributions to equity and/or the purchase price.

§ 8(2) *Jointly Titled Property at Divorce*

For any jointly titled asset purchased in 1987 or later, the rules for divorce are that it is:

(i) It is presumed community property.
(ii) Such presumption can be rebutted only by written evidence of intent (*not* by tracing).
(iii) Despite said community property presumption, Cal. Fam. Code § 2640 requires that separate property contributions be reimbursed without interest (absent written rebuttal).

With regards to any similar purchase before 1984, one should presume that separate property was a gift to the community, but allow oral or written rebuttal to create an entitlement to receive a *pro rata* share.

Between 1984 and 1987, the first paragraph of this subsection applies to joint tenancy, while the the second applies to other joint title forms.

13 *See* CAL. FAM. CODE § 2581.

§ 8(3) *Jointly titled property at death*

Property which is held as joint tenancy or community property with right of survival automatically belongs to a surviving spouse. There is no reimbursement right for a separate property contributor. Cal. Fam. Code § 2581 (community property presumption for joint form) only applies at divorce. Joint tenancy is not a form of community property. Thus, the Cal. Fam. Code § 2640 right of reimbursement does not apply to joint tenancy (at death).

The outcome for property held as tenants-in-common or as community property is less certain. Most scholars, however, think that the reimbursement right does not exist. Cal. Fam. Code § 2640 discusses "the division of the community estate, under this division." However, the regulation of property at death is not "under" the Cal. Fam. Code but under the Cal. Prob. Code. For that reason, Cal. Fam. Code § 2640 is thought *not* to apply. It is more likely that the *Lucas* presumption that separate property contributions are gifts to the community applies at death.

§ 8(4) *A complication*

The Cal. Fam. Code § 2640 right to reimbursement refers to separate property "contributions" to the acquisition of community property. It lists as examples down payments, improvements, and principal reductions. The paradigmatic case resembles *Lucas* where separate property funds are used during marriage for a down payment on a house.

Yet, consider the following fact pattern:

> Harold owns a house before marriage. During marriage he transfers title to himself and his wife Wanda as joint tenants. At divorce, Harold claims a right to reimbursement of the value of the house at the time of transfer.

In such a scenario, does Cal. Fam. Code § 2640 apply? We have no case law on point, so it remains an enigma. However, in *In re Marriage of Heikes*, 10 Cal. 4th 1211 (1995) , the Cal. Sup. Ct. faced this fact pattern. The Court held that Cal. Fam. Code § 2640 could not be retroactively applied (as the events took place before 1984). It did not comment on whether Cal. Fam. Code § 2640 would otherwise have applied.

IX 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]

§ 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

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

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

GRANT DATE

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

VESTING DATE

When employee can buy stock with options, without restrictions.

EXERCISE DATE

When employee actually buys stock

EXPIRATION DATE

Deadline to sell vested options

STRIKE PRICE

Price at which employee can buy shares once vested

"IN THE MONEY"

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

"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.

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

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

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) .

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 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

§ 5(2) *Avoiding injustice*

The courts can also avoid the time rule where using it would create injustice. For instance, in *In re Marriage of Poppe*,[4] , a military pension for reserve duty depended on specific work done, rather years served. Consequently, the Court of Appeal held the time rule was not appropriate for the division.

§ 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 of RSUs 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

4 97 Cal. App. 3d 1 (1979).

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 contri-

butions 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*

Where it applies (*i.e.*, in the private sector, these are governed by ERISA.[5] 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.

Pensions are community property to the extent they are earned during marriage. They are a form of deferred compensation (like royalties).

§ 10(1) *Definitions*

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.

VESTED

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

§ 10(2) *Unvested Pensions*

Unvested pensions are property. It is true that they might have no value if the employee quits or is fired before vesting, but ut lottery tickets and contingent remainders also might have no value. The same is true for vested pensions if the employee dies before retirement

Unvested pensions cannot be unilaterally terminated by employers, suggesting that they are property. Furthermore, not treating them as property deprives spouses of a valuable asset in the cases where the pension does eventually vest. Pensions remain unvested for shorter times due to ERISA(so this is nowadays a less frequent issue). Courts rarely divide an unvested pension at divorce (since it's value is speculative). Instead, courts retain jurisdiction to divide that pension at retirement, when its value will be known.

5 *See* 29 U.S.C. § 1001 *et seq*.

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 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(3) *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(4) 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.

Gilmore orders might seem coercive, as they can appear to compel the worker to retire. Often one's salary is higher than one's pension. So if one will be able to live on a retirement benefit (after sharing it), one can often afford to make these payments. On the other hand, in retirement, expenses go down or assets can be sold (such as houses). Often, the *Gilmore* order will take the form of a QDRO, so the working spouse need not pay out of current income. It will be paid by the pension administrator (but, of course, this will lower ultimate pension payments). However, QDROs are available for private pensions (under ERISA) and some state and federal pensions, but not for most county and city employees in California.

§ 10(5) *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.

§ 10(6) *Early retirement pay*

Early retirement pay might be understood as a subcategory of severance pay – when the pay is for voluntary departure that the employer seeks to encourage. Sometimes it is described this way by the employer. It also often is a lump sum payment, or a short-term series of payments (such as a percentage of salary for one year). Often its amount or availability depends on years of service and salary.

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(7) *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.

§ 10(8) *Reinstatement of pensions*

Pensions can have complicated features. Often, California courts characterize rights connected to pensions as the same as the underlying pension.

Case Law

In re Marriage of Lucero

`118 Cal. App. 3d 836 (1981).`

FACTS In that case, during the marriage, the couple withdrew funds from pension and spent them. After the divorce, the husband returned to his job and was allowed to buy back into the pension. This was a very good deal. He used separate property funds to buy in.

PROCEDURAL HISTORY The trial court found that the pension is community property only for the value absent the buy-in.

HELD Reversed on appeal. The pension was community property. So the right to reinstate was also community property. The husband is entitled to be reimbursed by the community for the buy-in price.

§ 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.[6] Disability payments received after the date of separation are separate property.[7]

§ 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 additional compensation attributable to his disability. The rest is community property

6 *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.

7 *Id.*

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.

COMMENTARY There is some question as to if this is still good law due to the subsequently distinguished cases (*infra*).

The holding in *Wright* was distinguished from the prior holding of the court in *In re Marriage of Skaden*,[8] where the Cal. Sup. Ct. found that a contractual guarantee of termination

8 19 Cal. 3d 679 (1977).

benefits within a certain period for an insurance policy salesman was a proprietary right. 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*,[9] 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*.[10] This case dealt with an early retirement benefit,[11] 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.

§ 12(1) *The applicable analysis method*

If severance pay is now determined by *when* a right arose (rather than the *purpose* of the pay) this would Blumberg's question about why we treat life insurance and pensions as

9 181 Cal. App. 3d 540 (1986).

10 18 Cal. 4th 169 (1998).

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

based on source of funds (rather than seeing them as wage replacements). However, this leaves unexplained why disability payments (*Jones*, but not *Rossin*), unemployment benefits, or casualty insurance are governed by replacement analysis. No matter how the specific question of severance pay is resolved, community property law will continue to have a schism in its approach to assets with deferred payments.

§ 13 *Terminable interest rule*

This rule, which ends the interest in death benefits when the divorcé remarries and has a new surviving spouse, arises in two scenarios. The first is obsolete but the second partially revived.

§ 13(1) *The first scenario*

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

Harry earns a pension while married to Wanda. They divorce. Harry retires and marries Goldie. Pension payments go partly to *Wanda* during Harry's life. Harry dies. The pension plan gives all of the monthly survivor benefits to Goldie, the surviving (new) spouse. This outcome was upheld in *Benson v. City of Los Angeles*.[12] However, the People, via their Legislature, overturned this with the enactment of Cal. Fam. Code § 2610.

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

§ 13(2) *The second scenario*

Harry earns a pension while married to Wanda. They divorce. Wanda dies, leaving all her assets to Goldie. Harry refuses to share pension payments, claiming Wanda's interest terminated at death. This outcome was upheld in *Waite v. Waite*.[13] The People, via their Legislature, overturned this holding by enacting Cal. Fam. Code § 2610. However, this holding was partly revived by ERISA, in areas where it preëmpts state law.

12 60 Cal. 2d 355 (1963).
13 6 Cal. 3d 461 (1972).

X GOODWILL

Business goodwill is the value of a business beyond the value of its assets. Mostly, this value stems from the anticipated future income of current customers' continued patronage (or future customers patronage based on current reputation). Some states do not treat goodwill as a marital asset unless there is a market for that goodwill. California has the opposite view. Business goodwill in a community property business is a community property asset even if there is no market (or in imperfect market) for the goodwill. In our glorious state, the policy is thus that goodwill is an asset. It is likewise divisible in a dissolution action. It is an essential an element of a business. The goodwill of a business is property and is transferable The goodwill of a person is not transferable

California has likewise decided that professional practices have goodwill, although the market for such goodwill may be quite limited.

§ 0(1) *Valuing goodwill*

Valuing goodwill can be complex. Sometimes, courts will look to sales of comparable businesses to estimate. Sometimes, they have actual sales (or compensation for a book of business, or a non-compete agreement) that can help with estimates. Sometimes they will use the capitalization of excess earnings method. The idea is to compare the current earnings of a professional (say, a doctor) with the amount that doctor could earn as an employee for an HMO (where individual doctor reputation matters little). The difference (roughly) is the value of the doctor's goodwill. At divorce, that income stream needs to be reduced to present value and then divided. Courts are often wary of valuation methods that look to future revenue because they worry that this amounts to treating post-marital income as owned by the community. The idea of capitalizing excess earnings seeks to avoid this problem by separating future anticipated income due to skill and effort (the HMO salary) from future income due to current 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 analysis, 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

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

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

§ 5 *Advanced degrees*

In theory, advanced degrees would fit the definition of professional goodwill. Like professional goodwill, they represent future earning capacity acquired during marriage, and, like goodwill, they have value even if they cannot be sold. However, thanks to an enactment of the People, via their Legislature, *viz*. Cal. Fam. Code § 2641, this is not the case. Advanced degrees simply cannot be divided. It is an impossibility. However, the same statute does assign student loan debt solely to the borrower, not the community. It also entitles the community to reimbursement for The cost of tuition, books, transportation, and money expended to repay educational loans.

However, this statutory provision is somewhat deficient. Living expenses and foregone income (from the educated spouse's non employment) are ignored in the Cal. Fam. Code § 2641 reimbursement. However, such living expenses can be considered in awarding spousal support. The statute governing such support, Cal. Fam. Code § 4320, uses the phrase

"contributed to the attainment" with regards to such expenses, which is is broader than language in Cal. Fam. Code § 2641: "contributions to education or training" Assigning all educational loans to the degree earner seems fair. However, there is an odd potential consequence. If those loans were used for living expenses, the degree earner has to pay them back. Yet, if living expenses were paid with community funds, the degree earner does not need to reimburse the community!

Reimbursement for advanced degrees can be avoided (or reduced) if:

(i) The degree did not substantially enhance earning capacity; or

(ii) The community already substantially benefited from the degree (this is presumed to be so if ten or more years between degree and separation); or

(iii) The supporting spouse also received degree during marriage to which the community contributed; or

(iv) The education reduced the degree earner's need for spousal support.

XI 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 marriage. Af-

ter 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 sup-

port 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) .

XII FIDUCIARY DUTIES

§ 1 *Introduction*

Spouses have fiduciary duties to each other. In 2002, the People, via their Legislature, amended the Cal. Fam. Code to, at least purportedly, mirror the duties of business partners provided in Cal. Corp. Code §§ 16403 & 16503.[1] The statute of limitations here is three years from discovery. However, cases may also be brought at the end of a marriage, either by death or divorce.

The exclusive remedy is unequal division of community assets and debts, not personal liability from the other spouse's separate estate. Usually, the victim is entitled to half of the harm done to the community, plus attorney's fees and costs. One exception is that in extreme cases of fraud or malice Cal. Fam. Code § 1101(*h*) allows a court to award 100% of any loss to the victim.

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

1 The People are romantic that way.

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, and 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 part-

ners 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 conduct 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.[2]

§ 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.

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

XIII 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 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.

Case Law

In re Estate of Bray

230 Cal. App. 2d 136 (1964)

FACTS The husband deposited money into a joint tenancy account with his son (from a prior marriage) because the son worked for his father. Son knew about the accounts, but not the amount deposited. Upon the husband's death, the wife sued to have these set aside as unauthorized gifts.

HELD The court rules for the wife. The son was paid for his work. No consideration was given for these deposits. Thus, they were gifts.

COMMENTARY What about annual bonuses, which were not challenged in this case? Are they different? Would the bank accounts have been community in the son's marriage because they were earned? Incidentally, the husband also named his son as beneficiary on U.S. Savings bonds. These designations preëmpt California community property law.

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 may not 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.

Thus, the automatic highest value is chosen from the three potential dates. 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 § 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.

Note that Cal. Civ. Code § 3294 provides:

The Statute Book

Cal. Civ. Code § 3294

(*a*) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

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 *Real property*

The Statute Book

Cal. Fam. Code § 1102

(*a*) Except as provided in §§ 761 and 1103, either spouse has the management and control of the community real property, whether acquired prior to, or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, are required to join in executing an instrument by which that community real property or an interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.

Thus, it is altogether forbidden for one spouse to so encumber real property without consent for longer than a year, and the other spouse can commence an action to set this aside. However, there are special rules for good faith purchasers:

The Statute Book

Cal. Fam. Code § 1102

(*b*) This section does not apply to a lease, mortgage, conveyance, or transfer of real property, or of an interest in real property, between spouses.

(*c*) Notwithstanding subdivision (*b*), both of the following shall apply:

(1) The sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975.

(2) The sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without

knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975.

(*d*) An action to avoid an instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall not be commenced after the expiration of one year from the filing for record of that instrument in the recorder's office in the county in which the land is situated.

(*e*) This section does not preclude either spouse from encumbering that spouse's interest in community real property, as provided in § 2033, to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties.

Note that setting aside a sale or encumbrance does not relieve the community of a duty to repay the sale price or the loan. Thus, the transaction can be undone, but if the money to repay is not available, the other party is owed amount lent or the sale price.

Case Law

Lezine v. Security Pacific Fin. Services, Inc.

14 Cal.4th 56 (1996)

FACTS The husband forged his wife's name on a deed (giving him title) and borrowed money. The wife discovered the betrayal and sued to set aside the mortgage. She won. However, the bank got a judgment against the husband for the deficiency and filed a judgment lien on the same house. The court then awarded the house to wife as separate property. The wife tried to have the new lien set aside.

HELD The wife loses. The setting aside did not change the bank's interest.

COMMENTARY This problem could not have arisen had the court divided the couple's assets at the same time that it set aside the transaction.

§ 4 *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.

§ 5 *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

§ 6 *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.

§ 7 *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 agreement 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.

§ 8 *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 Cap. 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 ordinary 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 must identify all assets and liabilities, percentage of ownership in each asset, with no requirement for characterization or values.

§ 9 *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 Cap. 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 infor-

mation 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.

§ 10 *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 po-

sition 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.

§ 11 *Bad Acts*

§ 11(1) *Crimes*

Case Law

In re Marriage of Stitt

147 Cal. App. 3d 579 (1983)

FACTS The wife committed embezzlement, violating fiduciary duty.

HELD The crime was recent, and therefore it was justified to unevenly divide the community estate. Had there been more time and the husband grown to enjoy the rich benefits of embezzled cash, there might be the equitable defense of laches because of the decision to wait while enjoying the benefits of crime.

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 the age of fourteen. 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.

§ 11(2) *Torts*

Case Law

In re Marriage of Hirsch

211 Cal. App. 3d 104 (1989)

FACTS The husband settled after being used for violating his duties as a corporate director.

HELD The unintentional tort was ultimately committed for the benefit of the community and not a criminal act.

COMMENTARY Would the outcome be the same under an. intentional tort that did not benefit the community, like being sued for sexual harassment?.

§ 11(3) *Missing desirable investment opportunities*

Consider the following two cases and asks: what distinguishes the two?

Case Law

In re Marriage of Lucero

118 Cal. App. 3d 836 (1981)

FACTS The husband had a community property pension. He withdrew and spent all of the funds. Later, he had a chance to reinvest funds in that same pension and used separate property funds (which was a valuable opportunity).

HELD The court found that because the pension was community property, so was the reinvestment right. So, the community had an interest in the new pension, but had to reimburse the husband for his separate property investment.

Case Law

Somps v. Somps

250 Cal. App. 2d 328 (1967)

FACTS The husband owned a construction business that was partly community property. He used separate property funds to buy some investment real estate. The wife claims he should have used community funds.

HELD The wife is incorrect. There was no duty to use community property funds.

§ 12 *Community funds for separate property purposes*

In *Beltran* (*supra*), cites cases holding which unilaterally diverting community property funds to separate property purposes violates the fiduciary duty. For example, spending community property money to pay debt on a separate property house.

§ 13 *Consumption*

A spouse is perfectly entitled to engage in individual expenditure and consumption of community property, including for purposes associated with vice like gambling and drinking, although this any have an exception for extreme cases of drinking away the entire estate!

Case Law

In re Marriage of Moore

28 Cal. 3d 366 (1980)

FACTS The wife complained that household items disappeared. She thinks the husband sold them to buy alcohol.

PROCEDURAL HISTORY The trial court found misappropriation, as if the items were given away.

HELD The silly trial court is reversed! There was no evidence of gift, and elementary logic dictates that if they were given away, the theory that they were sold cannot be true. that idea. There was no evidence that they were protected household items—furniture, furnishings, clothing, jewelry (though that could be discussed on remand). The mere fact they were sold for alcohol is not a breach of fiduciary duty.

COMMENTARY Using community property funds for personal consumption is normal. The courts do not want to micromanage which consumption is excessive.

§ 14 *Negligent management*

Case Law

In re Marriage of Schultz

105 Cal. App. 3d 846 (1980)

FACTS The husband owed money to a creditor, but did not pay. The creditor sued, and the husband failed to show up for court, apparently because he did not receive notice of the court date since he gave the court his former address. He represented himself.

PROCEDURAL HISTORY Trial court divides community assets unevenly on the basis that the husband was negligent in managing this suit at law.

HELD The idiotic trial court once again got things wrong. Reversed! This was not deliberate misappropriation. Unless the husband managed funds or debt with gross negligence, tantamount to fraud—which this was not—the

community is responsible for marital losses.

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

Case Law

In re Marriage of Duffy
91 Cal. App. 4th 923 (2001)

FACTS The husband invested in risky tech stock and lost money.

HELD The court found that the fiduciary duty included a duty of loyalty, but not a duty of care. Thus, there was no breach.

COMMENTARY The People, via their Legislature, amended Cal. Fam. Code § 721 to add a duty of care. Would this case come out differently today?

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

§ 15 *Adding names*

Under Cal. Fam. Code § 1101(*c*), if one spouse keeps community assets in a form that the other cannot control, the court may order that title be changed or a spouse's name added so that both spouse's have effective control.

XIV PRE- AND POST-NUPTIAL AGREEMENTS

§ 1 *Introduction*

Pre-nuptial agreements occur at the start of marriage or a domestic partnership (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)

§ 2 *History*

Before the 1970 introduction of no-fault divorce in California, pre-nuptial agreements largely focused on the division of assets at death rather than at divorce. Pre-nups were a common law matter until 1986, when California adopted the Uniform Pre-Marital Agreement Act (UPAA). Undermining the "Uniform" bit of that name, California then made major amendments to the UPAA in 2002.

§ 3 *Formation*

According to Cal. Fam. Code § 1611, pre-nups *must*s be made in writing unless a statue of frauds exception such as estoppel applies. The same statute provides that consideration is not required.

The Statute Book

Cal. Fam. Code § 1611

A premarital agreement shall be in writing and signed by both parties. It is enforceable without consideration.

§ 3(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 uncon-

scionable 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

sectionWhat cannot be covered?

§ 3(2) *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).

§ 3(3) *Religious upbringing of children*

Any clause like this is void.

§ 3(4) *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.

§ 3(5) *Duty of mutual support during Marriage*

This cannot be waived.[1]

§ 3(6) *Penalties*

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

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

§ 3(7) *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.

§ 4 *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.

§ 5 *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. The statute providing for disclosure is of course, Cal. Fam. Code § 1615(*a*), as any schoolchild knows. This statute was changed in 2002 by the People through their Legislature to require "reasonable and full" disclosure of property or a waiver of this in writing or evidence the party already had such knowledge. Note that disclosure violations alone do not invalidate an agreement; rather, the disclosure must be accompanied by unconscionability. Only the pairing of the two will do—on their own, each is utterly useless.

§ 6 *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.

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

§ 6(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.

§ 7 *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.

§ 8 *Recitals*

Recitals create conclusive presumptions.[3]

Recitals ought properly to include:

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

3 *See* Cal. Evid. Code § 622; *see also* In re Marriage of Kieturakis, 138 Cal. App. 4th 56 (2006) .
4 *See generally* Cal. Evid. Code § 912.

§ 9 *Common Terms and Public Policy*

§ 9(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.

§ 9(2) *Provisions for Separation/Dissolution/Death*

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

§ 9(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.

§ 9(4) *Limits on attorney fees, prevailing party provisions*

These arguably should be void on public policy grounds.

§ 10 *Common law & legislation*

As previously noted, 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 (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. The 2002 amendments came about because of how the judiciary had interpreted, in a prominent then-recent case, the definition of voluntariness.

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

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, claiming 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 the pre-nup was knowing and voluntary was supported by fact. Courts must consider several factors to determine voluntariness, not just whether a party was represented by counsel. Although the short notice Mr. Bonds gave to Mrs. Bonds was not ideal, the wedding had no guests and could have been cancelled. Thus, coercion was not present. While Mrs. Bonds's lack of counsel, unequal bargaining power, surprise presentation, proximity of wedding were all relevant, they did not mean the trial court's finding was wrong. In the face of conflicting witness testimony about whether Mrs. Bonds understood the terms, there was reason to uphold the finding. Furthermore, the unequal distribution was not *per se* unconscionable. There was also conflicting evidence on whether Mrs. Bonds knew she could have a lawyer and understood Mr Bonds's finances. The trial court finding was thus sustained. The apex court also noted that the couple does not owe each other any fiduciary duty before marriage Cal. Fam. Code § 721 is for spouses).

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.

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

§ 10(1) *Anti*-Bonds *legislation*

In response to these cases, the People, via their Legislature, enacted two major revisions to the UPAA. First, they added a new presumption:

The Statute Book

Cal. Fam. Code § 1615

(*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 indepen-

dent 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.

Thus, now any provision in a pre-nup regarding spousal support is held to be involuntary unless:

(i) Both parties have independent counsel, or unrepresented was advised to get one and signed a document acknowledging advice

(ii) Seven days between presentation of prenup and signing.

(a) This period was initially thought to apply only to unrepresented parties. However, the People, via their Legislature clarified in 2020 that this applies to all pre-nups.

(iii) The unrepresented party, if applicable, was informed of agreement terms. Any rights lost must be explained in writing. The unrepresented party must sign a document acknowledging receipt of information.

(iv) The weaker party was not subject to duress, fraud, undue influence, or lack of capacity.

Note that this section's presumption of involuntariness is seemingly in tension with Cal. Fam. Code § 1615(*a*), which puts the burden on the resisting party!

§ 11 *Spousal support*

§ 11(1) *Background*

Before 1986, spousal support could not be waived or set in pre-nup. The 1986 UPAA did not mention spousal support. Most people assumed that ban remained. The courts interpreted this statutory silence as permitting spousal support waivers, if they were otherwise formally valid (voluntary, *etc.*).

§ 11(2) *2002 Amendments*

In 2002, along with the other anti-Bonds legislation, the People, via their Legislature, made amendments to waivers of spousal support by passing Cal. Fam. Code § 1612(*c*). These forbid spousal support terms unless recipient was represented by independent counsel. These also forbid spousal support terms if unconscionable at time of enforcement

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.

§ 12 *Invalidation*

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. It can also be declined enforcement if it is unconscionable *and* there was insufficient disclosure of assets. The burden of proof lies on the party resisting it.

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 recital 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.

§ 12(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.

§ 13 *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.

§ 14 *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.

§ 14(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 at the time of enforcement (*i.e.*, at trial).

§ 14(2) *Other Defenses*

Other defenses to enforcement include:
(i) Duress
(ii) Fraud
(iii) Undue Influence

§ 15 *Cohabiting couples*

Traditionally, the law, like the rest of Californian society, looked down on those who would cohabit outside of marriage. Before 1976, upon dissolution, non-marital unions lack access to courts, or to marital property or spousal support. Agreements to share outside of marriage were often struck down as based on illicit sexual exchange (*i.e.*, prostitution).

After 1976, the famous so-called "palimony" case of *Marvin v. Marvin*[5] (and many others) will enforce agreements which opt in to the sharing of assets. Pre-"nuptial" (except there are no nuptials here) agreements are enforced (opting out of sharing). The result is that : sharing for marriage and not sharing for cohabitation are the default rules. One can always opt out of presumed norm by agreement.

§ 15(1) *Policy justifications*

There are several reasons for this mirrored opt-in/opt-out structure for marriage and cohabitation. The first is that majoritarianism in the default rules. We can presume what most people want and allow opt-out for minority who want differently.

5 18 Cal. 3d 660 (1976).

There is also an argument for clarity via bright-line rules. Marriage requires license and celebration and is clearly voluntary and a serious decision. There is also a writing requirement for pre-nup. However, there is no writing requirement for cohabitation agreement (nor even explicit agreement under *Marvin*).

There is also a protective argument. It is harder to write enforceable pre-nup than it is to marry. Furthermore, in *Marvin*, there were arguments about an implied contract, unjust enrichment, and constructive/resulting trusts. These exist to stop unconscionable behavior.

§ 15(2) *Writing (or lack thereof)*

Prenups, real-estate contracts, and long-term leases must be in writing. Oral cohabitations are an exception because informal agreements are to be expected with informal relationships. However, oral agreements do cause their fair share of problems. They get litigated when relationships end and one party has an incentive to lie. They also get litigated at death, when only one party is available to testify. Finally, they are often insufficiently exact about important details Even when parties acknowledge an agreement, they may have different interpretations of its terms.

§ 15(3) *Facts suggesting implied agreement*

A *Marvin* style implied agreement is suggested by, for instance, foregone opportunities and lost earning capacity. It may also be suggested by joint contributions to acquisitions (either financial or via unpaid home labor). However, *quantum meruit* means the value of services minus support received. Often this will be equal.

XV 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.

XVI CHOICE OF LAW

§ 1 *Introduction*

The choice of law, and the conflict of laws which may result, occurs in four distinct scenarios, *viz.*:

(i) What happens to out-of-state property (real or personal) acquired by a married California resident who then dies or divorces in California?
(ii) What happens to California property (real or personal) owned by a non- domiciliary who divorces or dies elsewhere?
(iii) What happens to property (real or personal) acquired by a married person living elsewhere if they later relocate to California and then divorce or die?
(iv) What rules govern the property described in point three during an ongoing marriage after the couple arrives in California? Are there fiduciary duties? What rights do creditors have?

In all these fact patterns, we need four answers according to the following matrix of the four scenarios in the permutations of "death/divorce" and "real/personal" property.

§ 2 *Out-of-state property of California domiciliaries*

Out-of-state property of California domiciliaries

		Event	
		Divorce	Death
Type of property	Real	Cal. Fam. Code § 2660	Out-of-state court handles it according to applicable out-of-state law.
	Personal	Cal. court divides it	Cal. court divides it

§ 2(1) *Divorce*

When a married person domiciled in California acquires real estate or personal property outside California, it is treated by California courts as community at divorce.

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.

Consequently, personal property is treated as community no matter where located. Thus, a bank account in, say, New York, or a storage locker filled with antiques in, say, Maine, will be divided by a California court. Courts in other states will enforce these orders.

Real estate is more complicated because of the difficulty establishing jurisdiction over the property *in rem*, although the court will have jurisdiction over the property holder *in personam*. Cal. Fam. Code § 2660 authorizes courts to divide out-of-state real property at divorce in several ways. The court can:

(i) Award real property to the title holder and give other party offsetting assets to equalize (when possible).

(ii) Order the title-holder to convey half of the real estate to the spouse (assuming she is present).

(iii) Award the non-owner spouse judgment in the amount of half the value of the real property, which can then be turned into a lien or enforced in the other state.

The reason for the unusual division in *(iii)* is that other states generally defer to final judgments of California as to personal property, but not always as to ownership of real property.

It is important to recall that only one spouse needs to have been a California domiciliary at the time of property acquisition for this to work if the divorce is filed in California. However, in most cases, both spouses are domiciliaries, as otherwise the property would be likely to be acquired during separation.

§ 2(2) *Out-of-state Property: death*

Property acquired by a California domiciliary who then dies in California is treated as follows:

REAL PROPERTY

Real property is left for administration by a court of the state where it is located. Some states apply their own laws of title and distribution. Others use California title, but apply their own law of distribution. Still others use California law to distribute the asset.

PERSONAL PROPERTY

Personal property is divided as community property no matter where located. California courts divide equally the community property over which the court has control (as if the out-of-state real property did not exist).

§ 3 *In-state property of non-California domiciliaries*

This is a simpler matrix with a unified answer:

In-state property of non-California domiciliaries

		Event	
		Divorce	Death
Type of property	Real	Cal. court defers to law of domicile	Cal. court defers to law of domicile
	Personal	Cal. court defers to law of domicile	Cal. court defers to law of domicile

California defers to the laws of the place of domicile in both death and divorce outside California. This is true for both personal property and real estate. Although a nominal public policy threshold applies, this is not a practical issue, as courts generally do not object to recognizing the external court's jurisdiction.

§ 4 *Quasi-community property*

When an out of state married couple acquires property and then moves to California, the applicable legal framework differs depending on whether the marriage ends in divorce or death.

Quasi-community property

		Event	
		Divorce	Death
Type of property	Real	Cal. court defers to law of domicile	Cal. court defers to law of domicile
	Personal	Cal. court defers to law of domicile	Cal. court defers to law of domicile

§ 4(1) *Divorce*

For divorce, any asset or debt acquired during marriage that would have been community had the couple lived in California is quasi-community property. At divorce, it is treated exactly like community property.

The Statute Book

Cal. Fam. Code § 125

"Quasi-community property" means all real or personal property, wherever situated, acquired before or after the operative date of this code in any of the following ways:

(*a*) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(*b*) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

§ 4(2) *Death*

At death, *per* Cal. Prob. Code § 101, one half of the quasi-community property of the decedent belongs to the surviving spouse.

The Statute Book

Cal Prob. Code § 101

(*a*) Upon the death of a person who is married or in a registered domestic partnership, and is domiciled in this state, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other one-half belongs to the decedent.

(*b*) Notwithstanding subdivision (*a*), spouses may agree in writing to divide their quasi-community property on the basis of a non *pro rata* division of the aggregate value of the quasi-community property, or on the basis of a division of each individual item or asset of quasi-community property, or partly on each basis. Nothing in this subdivision shall be construed to require this written agreement in order to permit or recognize a non *pro rata* division of quasi-community property.

It must be at this juncture emphasized that there is a clear distinction between the treatment of community property and quasi-community property, in that only the property *of the decedent* is so divided. The surviving spouse's property is not treated as quasi-community property and thus the surviving spouse retains all her property as if it were separate property. Thus, Unlike community property, quasi-community property at death protects a surviving spouse and the earner, but not a deceased spouse who was not an earner.

§ 4(3) *Exchange*

Quasi-community property remains quasi-community property when exchanged.

§ 4(4) *During marriage*

During marriage, quasi-community property is treated like separate property for most management purposes. Its owner can give it away without consent, and cannot be sued for mismanagement.

There are two ways, however, that quasi-community property is not treated like separate property during an ongoing marriage:

(i) Creditors have access to quasi-community property to satisfy any debt that can be satisfied with community property during a marriage. here is some question about whether this is constitutional. But thus far, it has not been struck down.

(ii) At death, the survivor can undo half of gifts made with quasi-community property in limited circumstances.

The gift made without consent can be half set aside if the decedent retained possession, or power to revoke the gift, or created a joint tenant by gift. This does not allow setting aside life insurance policies naming a third party as beneficiary.

XVII FEDERAL PREËMPTION

§ 1 *Introduction*

The U.S. Constitution establishes that federal law is supreme.

Constitution Corner

U.S. Const. Art. VI cl. 21

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In applying this supreme constitutional imperative, the courts of the federation formed from amongst the several states by said Constitution (the federal courts, if you will) have found that many statutes preëmpt state community property law. Sometimes, the Congress has overturned these decisions or created exceptions.

§ 2 *Federal employee benefits*

Federal employee salaries, once earned, can be treated as community property without issue. Similarly, federal benefits, once paid, can be community property. For example, if a retired federal employee receives pension payment it becomes community property once it is in the bank.

However, unpaid federal employee benefits *cannot* be divided by a state court unless specifically authorized by federal statute. Many federal statutes do authorize such divisions for federal pensions, including military and most federal civil service employees. However, outside of federal pensions, there are not always such statutes. In one such case, *In re*

Marriage of Stenquist,[1] the fact pattern arose out of lost military disability pay. it was held that, when electing disability pay in lieu of pension, only the net additional amount between the two could be separate property. This remains good law for most situations. However, it is no longer valid for military disability pay (the very fact pattern on which it was decided), which has subsequently been held to preëmpt state law in this matter!

§ 3 *Pensions regulated by* ERISA

Where a pension is regulated by ERISA,[2] federal law allows for a QDRO issued by a state court to divide a community property pension regulated by ERISA. This is a federal statutory exception to the general anti-alienation rule. It allows a court to direct regulated pension payments to a former spouse or a child of the earner.

As noted in discussions of employee benefits,[3] ERISA preëmpts the effect of Cal. Fam. Code § 2610 in overturning *Waite v. Waite*.[4]

§ 3(1) *Application*

Case Law

Boggs v. Boggs

520 U.S. 833 (1997)

FACTS Mr. Boggs earned pension while married to Mrs. Dorothy Boggs . Mrs. Dorothy Boggs died, leaving her communitiy interest property to her sons. Mr. Boggs remarried, espousing the newly re-surnamed Mrs. Sandra Boggs. Mr. Boggs then, as human beings so often do, died. Mrs. Sandra Boggs then claimed the pension *in toto*.

ISSUE Can Mrs. Dorothy Boggs give away her community share of the pension interest where the pension covered by ERISA?

HELD No. ERISA prevents Mrs. Dorothy Boggs from giving her share to her children, because the statute protects the surviving spouse's right to pension.

On its face, this holding would seem to also also overturn *Benson v. City of Los Angeles,*[5] as that case also hurts the surviving spouse. However, in *Benson,* the payments are under a

1 21 Cal.3d 779 (1978).
2 29 U.S.C § 1001 *et seq*.
3 *See* Cap. IX, (2), at 95.
4 6 Cal. 3d 461 (1972).
5 60 Cal.2d 355 (1963)

QDRO, which is expressly authorized by ERISA. Later courts make clear that QDRO cannot authorize distribution to heirs of non-earner as in*Boggs* or *Waite*. ERISA is about protecting the living beneficiaries of earner.

§ 4 *Employer-provided life insurance*

Normally, life insurance is governed by source of funds analysis. However, private employer-provided life insurance is governed by ERISA. Thus, if an employee designates someone other than his spouse as beneficiary, said spouse cannot assert a community property right over the proceeds.

§ 5 *U.S. Savings Bonds*

When a U.S. Savings Bond is co-owned, it has a survivor benefit. The survivor thus owns the entire bond (much like with a joint tenancy) If one spouse uses community funds to purchase a bond and names a third-party as the co-owner, then there is no way to assert a community interest upon the spouse's death.

§ 6 *Circumventing preëmption*

Courts have tried to circumvent preemption by dividing other assets unevenly. However, this has been rejected in case arising in the past decade.

Case Law

Howell v. Howell

137 S. Ct. 1400 (2017)

FACTS Mr. Howell elected disability pay rather than retirement pay when he left the Air Force. Although retirement pay can be divided as community property under 10 U. S. C. § 1408 (overruling *McCarty v. McCarty*, 453 U. S. 210 (1981)), military disability pay cannot as no such statute exists.

PROCEDURAL HISTORY The trial court ordered other community assets to be divided unequally to offset the loss of retirement pay.

HELD This unequal division violates federal preëmption. The form of clever ways to use individual jurisdiction to make up for the exclusive award of disability pay to the veteran is irrelevant, because, *per* BREYER, J., "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress."

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