NAILING  THE BAR

Simple CALIFORNIA COMMUNITY PROPERTY Outline

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

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NINETY PERCENT of the LAW in NINETY PAGES.®

This outline gives a simple explanation of the **BLACK LETTER LAW** and **BRIGHT LINE RULES** of **CALIFORNIA COMMUNITY PROPERTY** law, one of the most frequently tested areas of law on the California General Bar Exam.

While a handful of States use a community property approach to marital property California Community Property Law is so unique and so heavily tested on the California Bar Exam that **you need an outline specific to California law if you are going to adequately understand this subject.**

California Community Property Law is explained here in **plain English** with **examples**.

This book discusses far more **case law** than most of our outlines. But case discussion is still avoided when possible because it is often more confusing that illuminating.

YOUR PROFESSOR may focus on the details of the law in one or more narrow areas of personal interest. Those details are not covered here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, THIS BOOK HAS ALL THAT YOU NEED to really understand **California Community Property Law** for law school and California Bar examinations, and you will find the explanations given here to be far more understandable than you can get from any other source.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law using this book, you MUST make additional efforts to prepare for your law school exams. To do that, use Nailing the Bar's **How to Write Essays for Real California Community Property Law School and Bar Exams (Je)**.

Details on that publication and how to obtain it are given at the back of this book.

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Chapter 1: California Community Property Overview

California Community Property is frequently tested on the California General Bar Exam.[1]

1. Historical Background

California uses a 'community property' approach purely by historical coincidence. The concept was brought into Spain by the Visigoths, a wandering tribe of Swedish warriors, after the fall of the Roman Empire. The Spanish introduced it into Mexico, and the Mexicans introduced it into California before it became part of the United States.

2. Current Statutory Basis

California community property law is now codified as the Family Code. Previously it had been codified as the Family Law Act, a portion of the Civil Code. So some of the older case law refers to the Civil Code and/or the Family Law Act, and that can be confusing.

3. Confusion in Casebook or Historical Approach

Community property law has changed so significantly since 1975 that a casebook or historical study of the subject is more likely to cause confusion than impart knowledge. Many landmark cases have been negated or altered by subsequent legislation. As a result older cases should be read with a great deal of caution because they do not always reflect the current law.

4. Federal Law Always May Preempt

Always remember that California law is preempted by any conflicting federal law unless Congress specifically provides otherwise. There are many areas where this can occur including treatment of Social Security Income, U.S. military pensions, federal Civil Service compensation, U.S. Savings Bonds, Individual Retirement Accounts and other federal pension provisions such as ERISA retirement rules.

Congress may provide that a federal law does not preempt State law. So California community property law may or may not apply to these situations.

But federal law is always subject to change so just note that federal law may or may not preempt California law in any particular situation.

[1] In the seven consecutive California General Bar Exams given from February 2001 through February 2004, five questions were asked concerning California Community Property Law, a frequency rate of over 70%.

5. General Community Property Concept

The general concept of "community property" is that a married couple forms a unity called the "community."

Generally all property acquired by a married couple during marriage while living in California is presumed to be community property, unless there is a statutory exception that defines it as something else. The main exception is that it can be the separate property of one of the spouses. (FC § 760.)

> **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.**

All community property belongs to the "community" rather than to the married couple as individuals. So it is incorrect to think of it as simply property that is "half his and half hers." Community property is neither "his" nor "hers" but rather "the community's" and it never stops being "the community's property" until the marriage ends.

Until the marriage ends the spouses only have interests, each in one-half of the community property. (FC § 751.)

> **751. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests.**

The designation of interests in community property as "present, existing" interests allows a creditor to attach community property in satisfaction of a debt of either one of the spouses.

> **For example:** Bevis has debts before he marries Bambi. Together they earn enough money to buy a house. They buy it under title that describes it as "community property." Bevis' creditors can lien the house to satisfy Bevis' debts, because Bevis has a "present, existing" interest in the house. Bevis cannot claim that the "community" owns the house and that his interest in it is a "mere expectancy."

Property owned by the spouses before marriage is presumed to be their separate property and generally remains their separate property. Generally neither spouse obtains an interest in the separate property of the other spouse. (FC § 752.)

> **752. Except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other.**

But the wages earned by each spouse during the marriage (and also lottery winnings, etc.) are property of the "community." And all other income and property acquired during the marriage is also presumed to be community property (or at least treated as community

property in most cases) unless is earned on or attributable to assets that are the separate property of one of the spouses.

> **For example:** Bevis and Bambi are married. Bevis uses their joint bank account to buy a diamond for his mistress, Trixie, on the rationale that he has a right to do that since "half the money in the account is his". Wrong. None of the money in the account is "his" and none of it is Bambi's. Rather, the money in the account all belongs to "the community" formed by their marriage. Bambi has the right to bring an action recover possession of the ring. Not for herself, but for the community.

6. Valid Marriage Required

Generally California community property law only applies to a marriage that is valid in California. Typically it has significant application in three situations:

1. **During marriage.** The rights of a married person to unilaterally **sell or give away property during marriage**.
2. **Upon dissolution.** The division of **property** and allocation of **debts** in a **divorce, legal separation** or **annulment.**
3. **At death of a spouse.** The distribution of property and allocation of debts **at the death of a spouse**.

7. Equal Right to Equal Management and Control Subject to Fiduciary Duty

During marriage each spouse generally has a right to equal control and management of community property subject to a fiduciary duty. But the parties may by premarital agreement or other marital agreement alter their property rights. (FC § 1500.)

> **1500. The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement.**

Only property rights can be changed by agreement between the spouses, and the fiduciary duty and other legal relations established by law cannot be altered by contract. (FC § 1620.)

> **1620. Except as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property.**

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A. Fiduciary Duty

Each spouse owes the other a fiduciary duty of mutual respect and the "highest good faith and fair dealing" in the use of community property and this includes a duty of full disclosure, respect, fidelity and support. (Family Code §§ 720, 721, 1100 (e).)

> **§ 1100 (e) Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships … This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.**

Each spouse has a duty to reveal profits derived from community property transactions, to give the other spouse access to all documents regarding community property transactions and to give requested information regarding the community property. (FC § 721(b).)

This fiduciary duty continues even in divorce until the final separation of all property and debts.

Under FC § 1101 the remedies for a spousal breach of fiduciary duty may include an ordered accounting or that the other spouse's name be added to the title to property.

> **1101. (a) A spouse has a claim against the other spouse for any breach of the fiduciary duty …**
> **(b) A court may order an accounting …**
> **(c) A court may order that the name of a spouse shall be added to community property held in the name of the other spouse alone or that the title of community property held in some other title form shall be reformed to reflect its community character except …**
> **(d) … any action … shall be commenced within three years of the date a petitioning spouse had actual knowledge …**

Further, each spouse has the duty to support the other. (FC § 4300.) And if they have separate dwellings, neither can be excluded from the dwelling of the other. (FC § 753.)

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B. Forms of Jointly-Held Property

Within a marriage property can be jointly held during marriage in four forms of title. (FC § 750.)

> **750. A husband and wife may hold property as joint tenants or tenants in common, or as community property, or as community property with a right of survivorship.**

Property held in **"joint tenancy"** and "**tenancy in common"** is presumed to be jointly held separate property interests of each spouse. Property held as **"community property"** or **"community property with right of survivorship"** is presumed to be jointly held community property. Property acquired during the marriage and jointly held without being designated as being one of these forms is generally presumed to be held as **community property**. But there are possible exceptions to these presumptions depending on the facts.

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C. Property May Also be Held in Living Trust

Passing property to heirs via probate is an unnecessarily expensive and time-consuming process that can be avoided by married couples if is placed into a revocable living (inter vivos) trust. Any property placed in a revocable trust becomes property of the trust, rather than property of the marriage. But community property placed in trust after July 1, 1987 retains its character during the marriage under FC § 761. Either spouse can revoke the trust unless the trust instrument expressly indicates otherwise, and upon revocation the property has the same character it had prior to the trust transfer.

> **761. (a) Unless the trust instrument or the instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property … if the trust … is revocable … and the power, if any, exercised only with the joinder or consent of both spouses.**
>
> **(b) Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. Community property … distributed or withdrawn from a trust … remains community property unless there is a valid transmutation of the property at the time of distribution or withdrawal.**
>
> **(c) The trustee may convey and otherwise manage and control the trust property in accordance with the provisions of the trust without the joinder or consent of the husband or wife unless the trust expressly requires the joinder or consent of one or both spouses…**

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D. Control of Each Spouse over Personal Property

Generally each spouse has full control over all personal property of the community and can treat it in the same manner as if it were their own separate property. (Family Code § 1100 (a).)

> **1100. (a) Except as provided in subdivisions (b), (c), and (d) and Sections 761 and 1103, either spouse has the management and control of the community personal property … with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.**

There are three exceptions. (Family Code § 1100 (b)-(d).)

1) No Gifts of Personal Property during Life

The first exception when the spouses do not have equal management and control of all community property as if it were their own separate property is that neither spouse can give a gift of community property while they are alive to a third party (or sell it for less than actual value) without the written consent of the other spouse. (FC § 1100(b).)

> **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…**

This rule does not apply to testamentary gifts which are discussed below.

2) No Sale of Home Furnishings or Wearing Apparel

The second exception when the spouses do not have equal management and control of all community property as if it were their own separate property is that neither spouse can sell personal property used as the family home (e.g. the family lives in a travel trailer), home furnishings or wearing apparel of the other spouse or minor children without written consent. (FC § 1100(c).)

> **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…**

3) No Sale of Family Business without Notice

The third exception is that a spouse that manages a family business has primary management and control of that business and can act alone in all transactions, but must give the other spouse written notice prior to a sale of all or substantially all of the business or its assets. (FC § 1100(c).)

> **1100. …(d) Except as provided in subdivisions (b) and (c), and in Section 1102, a spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest… the managing spouse may act alone in all transactions but shall give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business… whether or not title to that property is held in the name of only one spouse…**

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E. Control over Real Property: Both Spouses Must Participate

Both spouses have equal and independent management and control of community real property but generally both spouses must concur before real property can be given away, sold, encumbered, or leased for more than a year. (Family Code § 1102(a).)

> **1102. (a) Except as provided in Sections 761 and 1103, either spouse has the management and control of the community real property… but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.**

1) Exception: Encumbrance to Fund Dissolution

An exception to this general rule is that a spouse CAN encumber community real property without the consent of the other spouse for the purpose of paying attorney's fees in order to pay for dissolution of marriage or legal separation. (FC § 1102(e).)

> **1102 … (e) Nothing in this section precludes either spouse from encumbering his or her interest in community real property, as provided in Section 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.**

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F. Right to Convey Property at Death

The restriction given above regarding gifts of community property applies only to inter vivos gifts. Each spouse can make a testamentary gift of one half of the community property via their Will at death.

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G. Recovering Misappropriated Community Property

If a spouse has misappropriated community property it is a violation of fiduciary duty.

1) Recovering Property in Possession of Spouse

If the property is in the possession of the wrongful spouse, the Court may order an accounting, order that the name of the injured spouse be added to the property title, and may order half of the misappropriated property to be conveyed to the injured spouse as his or her separate property. (FC § 1101.) If the Court finds evidence of oppression, fraud and malice within the ambit of Civil Code § 3294, the Court can order all of the misappropriated property to be conveyed to the injured spouse as his or her separate property. (FC § 1101(h).)

2) Recovering Personal Property from Third Parties

Under FC § 1100(b) a spouse cannot make a **gift** of community **personal** property without the written consent of the other spouse. But any gift made in violation of this is not automatically void. It is only voidable, and even if there is no written consent, actual consent may be proven by subsequent acts of ratification. (*Spreckels v. Spreckles* (1916) 172 Cal. 775.) However, the cause of action survives the non-consenting spouse so that the executor or personal representative of a deceased spouse can bring an action to void gifts of community personal property by the surviving spouse. (*Harris v. Harris* (1962) 57 Cal.2d 367.)

A gift of community personal property in violation of FC § 1100(b) is voidable in its entirety at any time during the life of the wrongfully acting (giving) spouse and the property can be entirely recovered. The spouse seeking to recover community personal property may bring an action during marriage, without filing an action for dissolution, nullity or legal separation, or upon the death of a spouse. (FC § 1101(f).)

But after the death of the giving spouse only one-half of the gift can be recovered. (*Mazman v. Brown* (1936) 12 Cal.App.2d 272, *Estate of Wilson* (1986) 183 Cal.App.3d 67.)

> **For example:** Bevis and Bambi are married. Bevis uses their joint bank account to buy a diamond for his mistress, Trixie. Bambi can bring an action to recover possession of the ring for the community at any time, and Trixie would be ordered to return the ring.

3) Recovering Real Property from Third Parties

Under FC § 1102(a) both spouses must join in executing a written instrument that sells, conveys, encumbers or leases community real property for more than a year.[2]

Any action concerning real property in violation of § 1102 is voidable the same as for a gift of community personal property except in the case of a **good faith purchaser for value without knowledge of the marital relationship.**

In the case of a **good faith purchaser for value without knowledge of the marital relationship**, a sale, encumbrance, or lease for over a year of community real property **held only in the name of the spouse executing the transaction** is voidable for one year from the date the transaction is recorded. (FC § 1102(d).)

Even when such a transaction is voidable within the statutory period, the action is essentially equitable in nature. So the objecting spouse is subject to the defense of estoppel, and the Court may require the community to pay restitution to the purchaser as an equitable requirement. (*Mark v. Title Guarantee & Trust Co.* (1932) 122 Cal.App. 301.)

> **For example:** Bevis and Bambi are married. Bevis uses their joint bank account to buy land in his name alone. Then he sells it to Butthead who is unaware Bevis is married. Bambi is present at the sale to Butthead and does not object or state that they are married. Then, within the one-year statutory period, Bambi brings an action to recover the land from Butthead. Butthead can raise the defense of **equitable estoppel** on the grounds that Bambi was aware of the sale and did not object. And the Court can also require the community (Bevis and Bambi) to return Butthead's money to him as an equitable requirement.

8. Community Generally Liable for All Debts of Spouses

Generally the community property of a marriage is liable during marriage for any and all debts incurred by either spouse **before or during marriage** regardless of whether the debt was incurred by one or both parties. (FC § 910.) This does not apply to debts incurred while a couple is living separate and apart pending divorce or legal separation.

> **910. (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.**

[2] This does not apply to a conveyance between the spouses per § 1102(b). For example a husband can 'quitclaim' his interest in community property to the wife without the wife signing the deed.

> **(b) "During marriage" for purposes of this section does not include the period during which the spouses are living separate and apart before a judgment of dissolution of marriage or legal separation of the parties.**

There are some important exceptions to this general rule that will be discussed more in a later chapter.

9. Characterization of Property and Debts is Essential

Each spouse has different powers of management and control over their own separate property as opposed to community property. And each spouse has different liabilities for their separate debts as opposed to community debts. And the distribution of separate and community property is different at the end of marriage. Therefore, **characterization of property and debts as separate or community is the most essential element** of community property law.

Chapter 2: Property Rights of Unmarried Couples

Unmarried people who know they are unmarried and stay unmarried cannot claim any rights under California community property law. The property they own, even if they own it jointly as a couple, is simply the separate property of each of them, held jointly. (See *Marvin v. Marvin* (1976) 18 Cal.3d 660.)

However, an unmarried couple can enter into a contractual agreement that gives them contractual rights rather than community property rights.

And different rules apply if one or both of the parties **reasonably believes they are married**, when in fact they are not. That is a "putative spouse" situation explained in a Chapter 4. And different rules apply when unmarried people acquire property first and then get married. But when both members of a "couple" know they are unmarried, and they never do get married, community property law simply does not apply.

> **For example:** Phil owns land and starts building a house. Sharon starts living with Phil and devotes all of her time to finishing the house of their dreams. Sharon completes the house and lives with Phil ten more years. But there is no understanding or agreement between them that she has any right to "his" house. Then Phil dies without a will. Sharon has no right to any interest in the house, at all, because they were never married. The house was Phil's separate property, not community property. They had no contractual agreement between them and he did not leave her any interest in the house by a Will. The house goes to his closest living intestate heir, his evil brother Butthead.

There is only ONE way unmarried parties can claim interests in the property of each other under California law. In *Marvin v. Marvin* (supra) 18 Cal.3d 660, the California Supreme Court held that income or property-sharing agreements between unmarried people (domestic partners), other than illegal agreements for meretricious sexual services (e.g. prostitution), should be enforced on contract law principals and not under the provisions of the Family Law Act (the prior codification of community property law in the Civil Code that is now codified as the Family Code.) In doing so it rejected much of the rationale used in a prior case, *Marriage of Cary* (1973) 34 Cal.App.3d 345. Further, the Court directed lower courts to "inquire into the conduct of the parties to determine" whether there was an "implied contract."

The Court specifically rejected the contention that the defendant (the late actor Lee Marvin) could be ordered to pay his domestic partner continuing support payments (dubbed "palimony") because she knew she and Lee Marvin were not legally married. As a result, she did not qualify as a "putative spouse".

In conclusion, *Marvin* held that people who cohabitate without a reasonable, good faith belief they are validly married can only bring a contract law claim and have no right to claim the benefits and protections of community property law.

Chapter 3: Lawful Marriages in California

California community property typically applies when there is a lawful, valid marriage. But if a marriage is not valid, alternative remedies may apply. A lawful marriage in California is defined by FC § 300:

> **300. Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division… (emphasis added.)**

While the validity of a marriage is seldom an issue, it does sometimes arise. When it does, it may be determinative as to what law applies and what the ultimate outcome will be. Generally on law school examinations you will either be told that the marriage of the subject couple was valid or invalid in California or else you should assume it is a valid marriage.

Under California Evidence Code § 663 a marriage solemnized by a marriage ceremony is presumed to be a valid marriage.

> **Evid. Code § 663: A ceremonial marriage is presumed to be valid.**

1. Requirements for Lawful Marriage

To become lawfully married in California the following requirements must generally be met:

1. **Man and Woman.** Marriage in California is only allowed between a man and a woman. (Family Code (FC) §§ 300, 301, 308.5.)[3]

   Only marriage between a man and a woman is valid or recognized in California. (FC 308.5)

2. **Consent.** Marriage is only valid between consenting, competent adults except that a consenting minor may also marry with the consent of both a) a court of law and b) the parents or guardians of the minor. (FC §§ 202-204.)
3. **Incest Ban.** Marriage is valid only if it is not incestuous. That means between a person and that person's own ancestor, descendant, half or whole blood sibling, niece or nephew.[4] (FC § 2200.)

[3] This issue is now being challenged, and the situation is changing so fast gay marriage may be legal before this book can be printed.

[4] Note that California allows marriage between first cousins, and some other States do not allow that. And a single person who was previously married may lawfully marry the "niece" or "nephew" of the former spouse, because legally that is not their own niece or nephew.

4. **License.** A marriage license is required for a marriage to be lawful. (FC §§ 300, 350.)
5. **Ceremony.** A marriage must be solemnized as prescribed by law to be lawful unless the religious beliefs of the parties to the marriage requires other procedures (FC §§ 305, 307, 400-402, 420-425)
6. **No Bigamy or Polygamy.** A marriage is lawful only if it is not bigamous or polygamous. This means if one of the parties has already been married to someone else another marriage is not valid unless 1) the prior spouse is dead, 2) the prior marriage has been dissolved or nullified, 3) the prior spouse is generally reputed or believed to be dead or 4) for the prior five year period the prior spouse has been absent and not known to be alive by the person seeking marriage (FC § 2201.)

2. Recognition of Marriages Valid in Other States

California will recognize "foreign marriages" as valid if they were entered into in another State and were valid in that state. The general rule is:

> **308. A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.**

This issue is further controlled by the "Full Faith and Credit Clause" of Article IV, Section 1 of the United States Constitution which states:

> **"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." (Article IV, Section 1, United States Constitution.)**

Since the establishment of marriage by and within any State other than California is a "public act", "record" or "proceeding" of that other State, California must afford it full recognition to the extent and in the manner prescribed by federal law. And since any valid federal law (and the Constitution of the United States is certainly 'valid' law) supersedes all conflicting State laws (pursuant to the "Supremacy Clause" of Article VI, section 2), California will have to recognize any marriage that is valid in the State where it is established.

But if a marriage is entered into in another State that is not valid in that other State, it will not be recognized as valid in California, even if it would originally have been valid in California, had it been entered into in California.

> **For example:** The State of Nevazona bans marriage between first cousins but California does not. Bevis and his first cousin Bambi live together in San Francisco. But they go to Renoex, Nevazona to get married. Even though their

marriage would have otherwise been valid in California, it is not because it was invalid in Nevazona where the ceremony was performed.

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A. Common Law Marriages

Common law marriage is a marriage that, by statute, is established by either cohabitation alone, or by cohabitation plus "holding one's self out to be married", but without the issuance of any marriage license or marriage ceremony. Common law marriage is NOT valid under California law <u>if entered into in California</u>. But, it will be recognized as a valid marriage in California if it was first established as a valid marriage in another state that recognizes it and afterward the parties relocated to California.

For example: The State of Arkexas recognizes common law marriage. Bevis and Bambi live together there in the prescribed manner and for the prescribed time to establish a common law marriage. They then move to California. Their marriage is valid in California because it first became valid in Arkexas, even though it would not have been a valid marriage if originally entered into in California.

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B. Same-sex and Polygamous Marriages

Until recent years no State recognized same-sex marriages or polygamous marriages as valid. But some State have recently begun to recognize homosexual marriages as valid. As a result California (and all other States) now has to recognize the marriages that take place in those States as valid under the Full Faith and Credit requirement.

For example: The State of Bliss adopts a statute recognizing same-sex marriage and Bevis (a man) goes there with Butthead (another man) to get married. California will have to recognize the marriage as valid under the Full Faith and Credit clause, even though it would not have been valid if entered into in California.[5]

3. Limited Recognition of Marriages Valid in Other Countries

California may recognize a "foreign" marriage as valid if it was entered into in <u>another country</u> in a manner that made it according to the laws of that jurisdiction, <u>and it does not directly conflict with California law.</u> However, this is subject to the provisions of federal treaties under the "Supremacy Clause" of the U.S. Constitution.

For example: Abdul marries Fatima and later marries her sister, Nahala, in Berserkistan, a foreign country that recognizes polygamy. They all move to California. Despite FC § 308, California will not recognize the marriage to Nahala

[5] This is a legal fact, yet newspapers and many "political activists" ignore it.

as valid because it is directly conflicts with FC § 2201 and does not fall under the provisions of the Full Faith and Credit Clause since it is a marriage in another country and not a marriage in another State of the United States. But if the federal government enters into a treaty with Berserkistan that provides the United States will recognize Berserkistan marriages as valid, California would be subject to the provisions of that treaty

4. Void and Voidable Marriages

Subject to the foregoing considerations, which are subject to change, a marriage entered into in California is void from the beginning if it is:

- Same-sex – between two men or two women (FC § 308.5);
- Incestuous – whether because of legitimate or illegitimate relationships (FC § 2200); or
- Knowingly bigamous (FC § 2201.)

Incestuous marriages are defined by FC § 2200:

> **2200. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.**

And, a marriage is voidable under FC § 2210 if it was:

- Not consensual (based on fraud, force, duress or entered into by a minor); or
- Unknowingly bigamous (FC § 2201); or
- One of the parties to the marriage is incurably and physically incapable of "entering into the marriage state" which seems to be a quaint way of saying "permanently unable to have sex" (FC § 2210(f).)

However, nullification of marriages under FC § 2210 is subject to certain statutes of limitation set forth in FC § 2211.

5. Transsexual Marriage

Although California will not recognize a marriage between two people of the same sex, it will recognize a marriage between two people that used to be the same sex if the marriage ceremony takes place after one of them has undergone the sex-change operation.

Chapter 4: Property Rights of Putative Spouses

When a party to marriage has a good faith, reasonable belief that the marriage is valid, but it is not a valid marriage, the party may ask to be found to be a **"putative spouse."** This would include situations when a "voidable" marriage is annulled. Upon such a finding the Court must declare the spouse to be **putative spouse** and the property of the putative spouse relationship is called **"quasi-marital property."** At the end of such a relationship the putative spouse has a right to have quasi-marital property distributed the same as if it were community property.

Prior to 1969 when the principals of FC § 2251 were first enacted, California courts created the **equitable** putative spouse concept as a remedy for people who **erroneously believed in reasonable good faith** that they were validly married. (See, for example, *Coats v. Coats* (1911) 160 Cal. 671 and *Schneider v. Schneider* (1920) 183 Cal. 335.) Under this doctrine an innocent party to a void or voidable marriage had standing as a "putative spouse" to make an equitable claim against part of the property of the relationship. The purpose was to protect the reasonable property expectations of parties to invalid marriages.

> **For example:** Bevis, a crafty law student, falsely convinced gullible Bambi that they were man and wife under common law. Bambi worked to put Bevis through law school. But when Bevis won the State lottery he dumped Bambi like a bad banana. As a putative spouse Bambi has standing to claim half of the lottery winnings because it would have been community property if the marriage were valid as she reasonably thought it was.

In 1969 the concept of equitable putative spouse was codified as part of the Family Law Act in the Civil Code. That has now been recodified as Family Code § 2251. Under § 2551 if a party to an invalid marriage is granted the status of putative spouse the division of property and debts of the relationship will be governed by the same rules of law that apply to dissolutions of valid marriages.

> **2251. (a) If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall:**
> **(1) Declare the party or parties to have the status of a putative spouse.**
> **(2) If the division of property is in issue, divide, in accordance with Division 7 (commencing with Section 2500), that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. This property is known as "quasi-marital property".**
> **…**

The Family Law Act also adopted FC § 2254 which allows a Court to order spousal support payments to parties that qualify as putative spouses, but not if they do not qualify.

> **2254. The court may, during the pendency of a proceeding for nullity of marriage or upon judgment of nullity of marriage, order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable if the party for whose benefit the order is made is found to be a putative spouse.**

FC § 2251 clearly lets parties claim putative spouse status for themselves when they act under a reasonable but mistaken belief the marriage is valid. But parties that secretly know the marriage is invalid cannot force putative spouse status onto the other party in order to benefit from their own deceptive acts.

> **For example:** Crafty Bevis falsely convinces gullible Bambi they are married under common law. Bambi discovers Bevis lied. Bevis has no right to claim spousal support under FC § 2254, but can he claim half of Bambi's property because he tricked her? No, because that would frustrate the equitable purpose of the statute and reward him for his own wrongful acts.[6]

Prior to *Marvin v. Marvin* one court stated that a person that was not a putative spouse could still claim an interest in the property of the other member of the couple if the other party qualified to be a putative spouse. In *Marriage of Cary* (1973) 34 Cal.App.3d 345, the court said that FC § 2251 gave both parties a right to claim half of all marital property as long as one party qualified to be a putative spouse. That was dictum in *Cary* since neither party there was a "putative spouse" and FC § 2155 did not even apply. In any event this no longer appears to be good law.

Marvin v. Marvin (1976) 18 Cal.3d 660 rejected much of the reasoning in *Cary*. While the Supreme Court did not expressly say the *Cary* interpretation of FC § 2251 was wrong, *Marvin* clearly held that people who are neither married nor putative spouses have no right to claim the remedies provided by the Family Law Act. And since the putative spouse provisions cited by *Cary* are in the Family Law Act, the holding in *Marvin* prevents any married person, except a putative spouse, from claiming rights under the putative spouse provisions of that Act.

Under *Marvin* the rights, remedies and protections of community property law are only available to parties in a valid marriage or otherwise to protect the reasonable expectations of the putative spouse in an invalid relationship.[7]

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[6] This issue was presented on the July 2002 California General Bar Exam. Attorney Hank tricked Wanda into believing they were married. That did not give Hank (and his creditors) a claim against Wanda's earnings. Unfortunately the "exemplary answers" released by the California Bar suggested it did. Those answers were wrong because it would be contrary to *Marvin v. Marvin* which clearly decided parties like Hank cannot claim any rights under community property law if they know they are not validly married. Hank's creditors have no more rights against Wanda than Hank himself would have.

[7] A claim of domestic contract a la *Marvin v. Marvin* was Hank's only argument in the July 2002 question mentioned in the prior footnote. Hank's claim should fail anyway because he used fraud to induce Wanda into the domestic relationship. An agreement induced by fraud is unenforceable at both law (because there is no meeting of the minds) or equity (because there are no 'clean hands'.)

The foregoing considerations can be summarized as follows:

1. **If there is a VALID marriage** the Court will apply community property law.
2. **If there is a PUTATIVE SPOUSE**, that party can elect application of community property principals under application of FC §§ 2251 and 2254.
3. **If there an ENFORCEABLE DOMESTIC PARTNER AGREEMENT** per *Marvin v. Marvin* community property law does not apply, but the Court can apply contract principles where there is an express or implied domestic agreement.

Chapter 5: Characterization of Property

The rights of spouses to control property during marriage, the rights of creditors, and the distribution of both property and debts at the termination of marriage because of **dissolution** or **death** depends on the **characterization** of the property and debts as being either **separate** or **community**. So characterization is very important and heavily tested in law school.

1. Property Characterization by Agreement

The parties to a marriage can agree by contract to the characterization and control of assets during marriage and/or distribution of assets and debts upon termination of the marriage in a manner different from that which would otherwise be proscribed by law. (FC § 1500.)

> **1500. The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement.**

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A. Premarital Agreements

Premarital agreements must be written and entered into voluntarily based on full disclosure of the financial resources and obligations of the opposing party with fair and reasonable terms. (FC §§ 1611, 1615.) An unconscionable premarital agreement will not be enforceable. (FC § 1615.)

Further, by law (FC § 1615 (c)) a premarital agreement will NOT be deemed to be executed voluntarily unless the court finds in writing or on the record that the party to be bound:

1. Was represented by independent legal counsel or expressly waived, in a separate writing, the right to representation;
2. Was presented with the proposed agreement and advised to seek legal counsel at least seven (7) days before the agreement was signed;
3. Was, if unrepresented by legal counsel, fully informed of the terms and effect of the agreement in writing in a language in which the party was proficient; AND
4. Was free from duress, fraud or undue influence and had the legal capacity to enter into the agreement.

   For example: Bambi invites 500 guests to her lavish wedding and ten days before the ceremony Brunehilda, mother of the sniveling groom, Bevis, threatens to call the wedding off unless Bambi signs a premarital agreement. Bambi signs it immediately. But it will not be enforceable against Bambi because she did not take seven (7) days to consider it between the time it was presented to her and her signing. Further, she did not waive her right to counsel in a separate writing, was

> not advised of her right to counsel, was not fully informed of the terms and effects, and was acting under duress and undue influence.[8]

A premarital agreement only becomes effective upon marriage. (FC § 1613.) And, if the marriage is later determined to be void a premarital agreement is only enforceable to the extent necessary to avoid injustice. (FC § 1616.)

After marriage a premarital agreement can be amended or revoked only by a written agreement signed by the parties. (FC § 1614.)

If a premarital agreement is enforceable under FC § 1615 it may control any of the following, pursuant to FC § 1612:

- Rights in all separate and marital property of the spouses;
- Rights to acquire, convey, control or encumber property;
- Disposition of property in dissolution or at death;
- Making of wills and creation of trusts;
- Life insurance benefits; and
- Choice of law as to construction of the agreement.

But the rights of a child to receive support cannot be adversely controlled by a premarital agreement. (FC § 1612(b).)

Further, the rights of a spouse to receive spousal support cannot be controlled by a premarital agreement if 1) the spouse was not represented by independent counsel at the time of the agreement, or 2) the provisions of the agreement are unconscionable, or 3) if enforcement of the agreement would be unconscionable given the circumstances of the spouse. (FC § 1612(c).)

If a legal defense based on a statute of limitations is raised in an action related to a premarital agreement, the statute is tolled during the term of the marriage. But equitable defenses including laches and estoppel may still be raised. (FC § 1617.)

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B. Transmutation During Marriage

During marriage a spouse may give his or her separate property to the other spouse or to the community and the spouses may convert community property to separate property. This is called **transmutation**. Transmutation is explained in detail in a later chapter.

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[8] The irony here is that immediately signing a premarital agreement as soon as it is presented makes it unenforceable.

C. Property Agreements in Dissolution

At the dissolution of a marriage the parties may by written agreement or on oral stipulation in open court agree to a division of property that differs from that distribution which would otherwise be provided by law. (FC § 2550.)

2. Property Characterization by Law

Absent an agreement between the spouses the law will characterize the property and debts of the parties for purposes of division and allocation. (FC § 2551.)

Property is characterized according to four categories:

1. **Separate property** of one or both of the spouses;
2. **Community property** acquired by the "community" of the marriage while the parties were validly married and domiciled in California;
3. **Quasi-community property** acquired by the "community" of the marriage while the parties were validly married and domiciled outside California; OR
4. **Quasi-marital property** acquired by the "community" while the parties were NOT validly married but where one or both were putative spouses that reasonably believed in good faith that they were validly married.

However, the quasi-community and quasi-marital property is almost always treated the same as community property. Consequently, the main issue in almost every situation is whether property is **separate property or not separate property** of one of the spouses. If property is NOT separate property it almost always treated the same, whether it is technically community property, quasi-community or quasi-marital property.

The debts of the parties to a marriage are also characterized as **separate debts** or **community debts** in many ways.

3. Separate Property

Property acquired during marriage is presumed to be community property under FC § 760 (quoted above) unless it is otherwise defined by statute. And the most significant exception where property acquired during marriage is **separate property** is defined by FC § 770(a) (2) and (3):

> **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.[9]**
> **(3) The rents, issues, and profits of the property described in this section.**

[9] To 'bequest' means to give property of any type by means of a will, and to 'devise' only means to give real property (i.e. land and/or buildings attached to the land) by means of a will.

> **(b) A married person may, without the consent of the person's spouse, convey the person's separate property.**
>
> **For example:** Bevis and Bambi are married. Bambi's mother gives her $10,000. The money is presumed to be her separate property because the source of the money was a gift.

Further, any property accumulated by a married person from separate sources during marriage but while living separate and apart from the other spouse is defined as their separate property by FC § 771:

> **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…**
>
> **For example:** Bambi files for a divorce but keeps living in the same house with Bevis. While the divorce is pending Bevis wins the Lottery. Bambi gets half of all Bevis' winnings because 1) they were married, and 2) she was not living separate and apart.

But any property accumulated by a married person from separate sources during marriage but after a legal separation is separate property, even if the spouses continue to live together under FC § 772:

> **772. After entry of a judgment of legal separation of the parties, the earnings or accumulations of each party are the separate property of the party acquiring the earnings or accumulations.**

Separate property specifically does not include quasi-community property. (FC § 2502.)

In summary, the **separate property** of a spouse is:

1. Property owned before marriage or accumulated while living separate and apart or after a judgment of legal separation even if still living together; or
2. Property acquired during marriage by gift, bequest, devise, or descent; plus
3. All rents, issues and profits received from separate property.

The separate property of each spouse belongs to the spouse alone and they may convey it without the consent of the other spouse the same as they could if they were not married. (FC § 770(b).)

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A. Definition of "Living Separate and Apart"

Property accumulated by a spouse during marriage but while living "separate and apart" is separate property under FC § 771(a). The term "living separate and apart" means the

spouses are physically separated because of a "complete and final break in the marital relationship" with "no present intention of resuming the marital relations and taking up life together under the same roof." (*Makeig v. United Security Bank & Trust Co.* (1931) 112 Cal.App.138, *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444.)

> **For example:** Bevis and Bambi were married but Bevis moved to Butthead's apartment. They tried marriage counseling for a year. Then Bambi won the lottery and filed for a divorce. The lottery winnings are NOT the separate property of Bambi because there was no "final break in the marital relationship" before she won the lottery.

And property accumulated by a spouse after a **decree of legal separation** is separate property, even if the spouses continue living live together. (FC § 772.)

> **For example:** Bevis was granted a legal separation order but kept living with Bambi anyway. Bevis wins the Lottery. Bambi does NOT get half of all Bevis' winnings because he won the Lottery AFTER he was granted legal separation.

An asset is "accumulated" if it is acquired as a result of the "industry, labor, skill or efforts" of a spouse. It does not mean merely converting community assets from one form to another. If a party uses community funds to buy an asset, or if community property is exchanged for an asset, the asset obtained is still community property, even though the exchange takes place after separation. (*Union Oil Co. v. Steward* (1910) 158 Cal. 149, *Boyd v. Oser*, 23 Cal.2d 613.)

But if spouses are living separate and apart, spousal support payments are not community property. And any funds generated from support payments are separate property as well. (See for example, *Marriage of Wall* (1972) 29 Cal.App3d 76.)

> **For example:** Bevis walked out on Bambi and filed for a divorce. Bambi used money from their joint bank account to buy a painting. The painting turned out to be a valuable Picasso. It is NOT her separate property because she used community property funds to buy it, and no "industry, labor, skill or effort" on her part increased its value.

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B. Income from Separate Property is Separate Property

Income acquired without the application of significant effort because of ownership of separate property such as "rents, issues and profits" are also separate property because no "community effort" was expended to obtain it.

> **For example:** Bevis owned a house and a hammer when he married Bambi. These were his separate property because he owned them before marriage. He received $10,000 from renting the house and $50,000 from using the hammer as a carpenter. The rents are Bevis' separate property because it was generated by his

separate property without significant labor. The earnings as a carpenter are community property because it is the result of his labor (community effort).

4. Community, Quasi-Community and Quasi-Marital Property

Every asset owned by a married couple that is not separate property will be community property, quasi-community property or quasi-marital property, and the latter three types of property are all treated about the same in division.

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A. Community Property

Generally, **community property** is all property, real or personal, wherever situated, acquired during marriage while domiciled in California, except as otherwise provided by statute. (FC § 760.) But for purposes of a distribution of property upon **death** the Probate Code (PC § 28) defines community property slightly differently.[10] You should be aware there is a slight difference, but it is rather unimportant for purposes of law school examinations, and everything acquired during marriage can generally be considered community property or quasi-community property unless it is separate property. Quasi-marital and quasi-community property are treated much the same as community property.

So your analytical focus on exams should be "is it separate property?" If property is not separate property it will either be community property or at least divided like community property.

Because of this, whenever community property is spent, traded or used to acquire a new asset it is also going to be community property. (*Boyd v. Oser*, 23 Cal.2d 613.) A minor exception is an acquisition while domiciled outside California because then the asset is quasi-community property and not community property, even if the source of the asset was a community property source. But this is a trivial distinction because quasi-community property will almost always be distributed at death or in divorce the same as community property.

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B. Quasi-Community Property

Generally, for purposes of law-school classes on community property law, **quasi-community property** is either 1) property that was acquired by a spouse domiciled outside California during marriage that otherwise would have been community property if the spouse had been domiciled in California, or else 2) property obtained in exchange for quasi-community property. (FC § 125.) As stated above, the Probate Code (PC § 66)

[10] For distributions upon death Probate Code § 28 includes in "community property" any property acquired while living in other States if their laws follow community property principals, but Family Code §§ 760 and 125 define that to be quasi-community property.

defines quasi-community property slightly differently from the Family Code.[11] You should be aware of this slight difference but for law school exams the difference has very little importance.

> **125. "Quasi-community property" means all real or personal property, wherever situated, acquired … 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.**
>
> **For example:** While married and living in California Bevis uses his earnings (community funds) to buy a car. It is community property because he acquired it during marriage in California with community funds. Bevis moves to Nevada and trades the car for a boat. The boat is quasi-community property because it was acquired while domiciled outside California but would have been community property if domiciled in California. Bevis returns to California and trades the boat for a plane. The plane is still quasi-community property because he got it in exchange for quasi-community property.

All property of any type, obtained by a spouse during a valid marriage by any means, other than by means that make it separate property, is community or quasi-community property. Consequently, all **wages, salaries, earnings, profits, patents, discoveries, retirement benefits, windfalls, awards** and **winnings** by either spouse during marriage become property of the community -- either community property or quasi-community property.[12]

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C. Quasi-Marital Property

The law regarding putative spouses, people who act under a good faith, reasonable belief that their marriage is valid when in fact it is not, was explained in an earlier chapter. The property of such a relationship is called "quasi-marital property" and the putative spouse has a right to have the property distributed according to community property concepts pursuant to FC § 2251.[13]

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[11] For distributions upon death Probate Code 66 excludes from "quasi-community" property all real property located outside California. But the same property would be "quasi-community" property under the Family Code for distribution in the case of a divorce. This is not important to know for law school.
[12] Quasi-community property located in another state poses the problem that a California court may lack jurisdiction over the property and personal jurisdiction over a spouse. Without jurisdiction the court has no power to order the spouse to convey the land and an action in rem may have to be brought in the other State. Family Code § 2660 allows the court to adjust the allocation of community property to compensate.
[13] Quasi-marital property can be either community property or quasi-community property so it is possible to have quasi-marital-quasi-community property, but that just gets a little too quasi-crazy.

5. The General Presumption and Tracing

While the character of property is clearly defined by law, **presumptions** are used in the application of the law to the facts. There is a **General Presumption** regarding the character of property. And there are certain exceptions to the General Presumption including **special presumptions** that apply in special circumstances.

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A. The General Presumption

The General Presumption is the statutory provision that property acquired during marriage is presumed to be community property unless otherwise classified by law, and property acquired before marriage, during marriage by gift, inheritance, bequest or devise or after final separation is presumed to be separate property. [14]

The term 'acquired' means attaining ownership or the right to ownership rather than mere possession.

The General Presumption is rebuttable, but it is the first, basic presumption in characterizing property.

The General Presumption determines the character of the asset unless some exception applies or the presumption is rebutted. Rebuttal is done by **tracing** the history of the asset to prove the right of ownership of the asset can be traced to an ownership right that contradicts the General Presumption.

> **For example:** Bevis plans to get a divorce from Bambi. He has his boss hold back his wages until after he is granted a legal separation. Under the General Presumption wages Bevis receives after separation are presumed to be his separate property. But Bambi can rebut the presumption by **tracing** his right to receive the wages back to the work he did during the marriage.

Mere possession during marriage does not prove acquisition of title during marriage. **There is no general legal presumption that simply because property was <u>possessed</u> during marriage it was <u>acquired</u> during marriage**. But, there is a general inference that the longer a marriage lasts the more likely the assets possessed during marriage are community property acquired during marriage. The Courts are split in these cases on which party has the **burden of proving** that assets possessed during marriage were actually acquired during the marriage.

Most Courts have held that the party claiming an asset is community property has the burden of proving the asset was acquired during the marriage. But some courts have held

[14] The term "General Presumption" is not used universally and you may hear it referred to as the "legal presumption" or the "common law presumption" or something like that.

that the party claiming an asset is separate property has the burden of proof. In any case, once the time of acquisition is established, the General Presumption applies.

Once the presumption of the character of an asset is established by proof of when an asset was acquired (or how it was acquired in the case of an asset acquired by gift, inheritance or devise) the party challenging the presumption has the burden of **rebutting** the General Presumption by **tracing the asset to a contrary source**. And the **standard of proof** that is applied by the Court is a **preponderance of the evidence**. (See *Wilson v. Wilson* (1946) 76 Cal.App.2d 119.)

> **For example:** While married to Bambi, Bevis buys a boat. Under the General Presumption this boat is presumed to be community property because it was acquired during marriage. If Bevis challenges that presumption he has the burden of proving the boat was purchased with funds that were his separate property and not with community property funds. He must trace the boat back to money he had before marriage or to a gift, inheritance or devise he received during marriage, and convince the court by a preponderance of the evidence.

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B. Challenging the General Presumption by Tracing

When the General Presumption applies it is challenged by tracing. The basic **Tracing Principal** is that the character of an asset can generally be determined to be community property by tracing the source of the asset to earnings during marriage. Conversely, an asset can be determined to be separate property by tracing it to some source other than earnings during marriage.

Changes in the form of an asset do not generally change its character.[15] Whenever a married person earns money during marriage (e.g. wages, salary, profits, winnings, awards, prizes) it is community property, and everything purchased with that same money afterwards is generally community property. Conversely anything purchased with separate funds is separate property.

So regardless of how or when an asset is acquired, the General Presumption generally determines the character of the asset UNLESS it is rebutted by tracing to show the source of the asset was of a different character.

> **For example:** Bevis owned a Corvette before marrying Bambi so it is presumed to be his separate property. If he sells the Corvette during marriage the money he gets for it would be presumed to be community property under the General Presumption because he would acquire the sales proceeds during marriage. But Bevis can rebut the presumption by showing the source of the money can be

[15] There are minor exceptions. One was given in an example above: If a spouse moves out of state with community property and exchanges it for a different asset, the new asset is quasi-community property and not community property. This is a very minor point and will never be tested.

traced back to his Corvette, his separate property from before marriage. The change of form does not change the character of the asset.

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C. Credit Purchase Has Character of Borrowed Funds

When property is acquired on credit, the character of that property can be traced to the character of the borrowed funds. If the funds to buy property are obtained by the hypothecation of the separate property of a spouse (i.e. by borrowing against it), then the property acquired is the separate property as that spouse.[16]

> **For example:** Bevis owned Blackacre before marrying Bambi. He got a 'home equity loan' against Blackacre and used the proceeds to buy a Corvette. In divorce the Corvette will be his separate property because the funds used to buy it were derived from his 'hypothecation' of his equity in Blackacre.

Even if no separate property is pledged as collateral, property purchased during marriage with funds exchanged for an unsecured note will be the separate property of a spouse that can show the lender intended to rely solely upon that spouses' separate property and did in fact do so. (See *In Re Marriage of Grinius* (1985) 166 Cal.App.3d 1179.)

> **For example:** Bevis owned Blackacre before marrying Bambi. He got an unsecured loan from Butthead and used the money to buy a Corvette. In a divorce Butthead testifies that the reason he loaned Bevis the money was solely because he knew he could put a lien on Blackacre if he did not get paid. Therefore the Corvette will be Bevis separate property since the funds used to buy it were solely based on his separate property holdings.

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D. Major Exceptions to the General Presumption

The General Presumption is subject to certain exceptions. The most important situations when other limitations and presumptions apply are:

1. **Transmutation Exception.** The character of an asset may be changed by the parties. This may be by **express agreement**, either before or during marriage, or it may be **implied** by their affirmative acts, including the act of transferring property into title indicating a different character.
2. **Commingled Funds.** Separate property may be commingled with community property, and special rules apply to these situations.
3. **Separate Property Improved by Community Effort.** Community effort may increase the value of separate property. Special rules apply to these situations.
4. **Separate Debts Paid with Community Funds.** Community funds may pay for separate property. Special rules apply to these situations.

[16] "Hypothecation" merely means by pledging the separate property of the spouse as collateral for the loan.

5. **Joint Title Presumption in Dissolution.** Property acquired or held in joint title by a married couple generally will be treated as community property in a divorce even if it had a separate property source. (FC § 2581.)
6. **Married Woman Presumption.** Property acquired by a married woman in her own name by a written instrument prior to January 1, 1975 is generally presumed to be her separate property unless she and the husband are described as "husband and wife". (FC § 803.) In that case the property is presumed to be community property unless otherwise indicated.

These exceptions will be discussed in greater detail below.

6. Characterization of Property Traced to a Legal Claim

For purposes of the General Presumption, property that is derived from a legal claim is "acquired" when the claim "accrues" and that generally means when the events giving rise to the right to receive payment occur rather than when the payment is received.

- Rights to receive a **tort damage award** are generally acquired at the moment the tort occurs and not when the judgment for damages is awarded or payment received.
- Rights **under a contract** are generally acquired as contractual duties are performed and not when the contract is first executed or when payment is received.

Special rules apply in some situations. The following discussion provides most of the peculiar rules for common scenarios.

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A. Characterization of Personal Injury Awards

As indicated above, rights to recover damages for a tort are generally acquired at the moment the tort occurs. For purposes of discussion here the term "personal injury award" means a lump sum payment of money in compensation for past and future medical expenses, property damages, pain and suffering, lost wages and inconvenience arising out of a tortious act such as an auto accident.

"Personal injury awards" generally result from a tort action. "Disability payments" are typically a series of payments as opposed to a lump sum payment, and they may also arise out of a tort.

Personal injury awards and disability payments are characterized differently. The characterization of disability payments is explained below.

1) Injury During Marriage -- Community Property

A personal injury award is generally **community property** if the injury occurs during the marriage. (FC § 780.)

> **780. … money and other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries… is community property if the cause of action for the damages arose during the marriage.**

2) Injury Otherwise -- Separate Property

A personal injury award arising is generally the **separate property** of the injured spouse if the injury occurs before marriage or after permanent separation (FC § 781.)

> **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… 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 … or legal separation…**
> **(2) While … the injured person… is living separate…**
>
> **For example:** Before Bevis married Bambi he was in a traffic accident. Later, while married to Bambi, he sued Butthead and recovered a damage award of $25,000. That will generally be his **separate property** because the accident occurred before the marriage.

3) Injury by Other Spouse -- Always Separate Property

A personal injury award **to one spouse against the other spouse** is always going to be **separate property** regardless of when the cause of action arose. (FC § 781(c).)

> **781 … (c) Notwithstanding subdivision (a), if one spouse has a cause of action against the other spouse which arose during the marriage … money or property paid or to be paid by or on behalf of a party to the party's spouse of that marriage … for personal injuries … is the separate property of the injured spouse.**
>
> **For example:** Bevis was driving his car with his wife Bambi in the passenger seat. He had an auto accident and Bambi was injured. To force their insurance company to pay for her medical expenses and injuries, Bambi had to file suit against Bevis. Even though her injuries occurred during marriage, the injury award from the insurance company is her **separate property** because Bevis was the defendant in the suit.

4) Commingled Award -- Community Property in Dissolution

A personal injury award arising from events during marriage will be treated as community property in dissolution unless it is **separate property** arising from injury to a spouse caused by the other spouse AND has been commingled with community property. (FC § 2603(a).)

> **2603. (a) "Community estate personal injury damages" … means all money or other property received or to be received by a person in satisfaction of a judgment for damages for the person's personal injuries … if the cause of action for the damages arose during the marriage but is not separate property as described in Section 781, unless the money or other property has been commingled with other assets of the community estate.**

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B. Characterization of Contract Payments

The right to payments under a contract that requires performance generally accrues as the contractual duties are performed. If the contract performance is done during the marriage it is community effort and the money or property received under the contract will be community property. Conversely to the extent contract performance is done before marriage or after permanent separation the money or property received in exchange will be separate property.

> **For example:** Bevis entered into a $200,000 contract to build a house for Homer. When the house was one-fourth finished he married Bambi. When the house was three fourth's finished Bevis and Bambi permanently separated. And when the house was done Homer paid Bevis the full $200,000 promised. One-half of the money ($100,000) is community property because Bevis did half of the work while married. The other half is Bevis' separate property because he did not earn it during marriage.

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C. Characterization of Disability Payments

Disability payments are periodic payments received by an injured or otherwise disabled spouse. They may result from a tort (e.g. an auto accident) or under a contractual agreement (e.g. a disability insurance policy). If the disability payment is intended to be **compensation for lost wages during marriage** it is **community property**, regardless of when the injury occurred. Otherwise it is separate property.

> **For example:** Builder Bevis bought a disability insurance policy and was subsequently injured on the job. He received $50,000 in disability payments before he married Bambi, and those payments were his **separate property** because his right to receive the payments accrued before marriage. After marriage to Bambi he received $50,000 more in disability payments and those payments were **community property** because his right to receive them accrued during marriage. Then he and Bambi permanently separated, and all of the payments he received after separation were his **separate property**.

Note that military disability benefits may be subject to federal preemption.

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D. Characterization of Retirement Benefits

Retirement benefits and pensions are a form of **deferred compensation** for services rendered. If the right to receive the pension **accrued during marriage** it is **community property**. If the right did not accrue during marriage it is separate property. A "time rule" is used to allocate pension rights between community and separate property based on the amount of time the spouse worked under the employee benefit plan during marriage compared to total time worked.

> **For example:** Bevis worked for Enron as a lowly shipping clerk for 10 years before he married Bambi. Then he was promoted to CEO and he worked for Enron five more years at an obscenely high salary before he drove it into bankruptcy. One-third of Bevis' retirement benefits would be community property because he was married for one-third of the time he worked for Enron. The fact that his compensation was highest during the marriage is not considered.

Caution should be exercised concerning retirement benefits received from federal employment, as a result of military service, as Social Security payments, and further under pension plans governed by the federal ERISA laws. All such payments are subject to possible federal preemption.

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E. Characterization of Separation Allowance

A spouse laid off from a job may receive a "separation allowance." If the employee earned a vested right to the separation allowance during marriage, or if the amount of the separation allowance is calculated based on the length of service to the employer, the allowance will often be allocated between community and separate property in the same manner as a retirement benefit.

But if the employee had no vested right to the allowance and the allowance is calculated more to compensate for lost wages while the employee seeks subsequent employment, the allowance will often be treated more in the manner of a disability payment.

> **For example:** Bevis worked for Enron for 10 years while married to Bambi. After they separated he was laid off in a staff reduction and received a separation allowance of $10,000 based on $1,000 for each year of service. Since this separation allowance was calculated based on his years of service during which he was married, the money would most likely be characterized as community property.[17]

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[17] This is not always clear. The decision will depend on a variety of facts.

F. Characterization of Life Insurance Proceeds

Life insurance **bought with community funds** is **community property**. FC § 1100(b) prohibits a spouse from making a gift of community property without the consent of the other spouse but the purchase of life insurance is not a gift because the policy is exchanged for money and represents consideration. Both spouses have the right to spend community property for most purposes, including the purchase of life insurance, with the same power of disposition as they would have over their separate property. (See FC § 1100(a).)

But when the insured spouse dies the policy proceeds are community property, and the deceased spouse only has the power to dispose of his or her one-half of that community property. (See *Tyre v. Aetna Life Insurance Co.* (1960) 54 Cal.2d 399.)

The purchase of a life insurance policy is contractual in nature, but selection of a beneficiary that will receive the proceeds is essentially testamentary in character. (*Id*.)

Whether an insurance policy is community property or separate property often depends on whether the policy is a 'term' insurance policy or a 'whole life' policy.

1) Term Insurance

Term insurance is a policy that only promises a payment upon the death of the insured person as long as periodic payments are made. If the periodic payments are not made the insurance lapses and the policy has no cash value. A term insurance policy cannot be "paid up" and there never is a point at which the policy holder can stop making premiums without the policy lapsing and becoming worthless.

The character of the proceeds from a term insurance policy upon the death of the insured person depends on the character of the money used to make only the last payment before the death.

> **For example:** Bevis was married to Bambi for twenty years and every month he paid Flaky Insurance Company $100 (community property because from earnings during marriage) for a term life insurance policy that would have paid Bambi $100,000 in the event of his death. One day Bevis and Bambi permanently separated, and the next month Bevis changed the beneficiary of the policy from Bambi to Butthead. From his next paycheck (separate property because from earnings after separation) Bevis paid the $100 monthly premium. Then he was run over by a truck and killed. Bambi has no right to any of the policy proceeds because the last payment made was from Bevis' separate property.

2) Whole Life Insurance

Whole life is a type of life insurance policy that requires the policy holder to pay a fixed number of premium payments. The premiums accrue "cash value" and when all required payments have been made the policy holder can stop making payments. Even then the policy remains in effect. In addition the policy can be "cashed in" or borrowed against.

Upon death of the insured person the character of the proceeds from a whole life policy are divided pro-rata between community property and separate property depending on the number of premium payments made with community funds versus separate funds.

> **For example:** Bevis, a single man, bought a $60,000 whole life policy from Flaky Insurance Company. The policy required him to pay $100 a month for 20 years and then the policy would have a 'paid up' value of $60,000. He named his mother, Cruella, as the beneficiary. After paying premiums for 30 months he had paid a total of $3,000 (separate property.) Then Bevis married Bambi and did not change the beneficiary designation. He continued to make total payments for 15 more months, a total of $1,500 (community property). Then Bevis died. Since one-third of the total premiums he paid for the policy were from community property during the marriage, one-third of the insurance proceeds ($20,000) are community property. The other two-thirds ($40,000) were his separate property. Bevis could give Cruella all of his separate property and half of the community property at his death. So he could effectively give Cruella all of the $40,000 that was his separate property and $10,000 of the $20,000 that was community property. Therefore, Cruella gets $50,000 and Bambi gets $10,000.

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G. Combined and Substituted Disability, Pension and Insurance Plans

A spouse may receive payments that combine elements of disability payments, pension benefits and insurance proceeds or a disability payment in lieu of a pension payment. These payments will be characterized as community property to the extent the spouse **earned a right to receive the payment during marriage**. Conversely, the payment will be characterized as separate property to the extent the **purpose of the payment is to compensate for lost wages after dissolution**.

An injured spouse may be given an option to receive "disability payments" **in lieu of pension benefits earned during marriage**. If disability payments received after marriage are <u>substitutes for pension rights that vested during marriage</u>, the payments will be characterized as **community property** and not as separate property.

> **For example:** Bevis worked for Railroad for many years while married to Bambi. He was injured and was given a choice of either retiring under his regular pension plan or retiring under a disability plan in lieu of the pension plan. His disability

> payments would be community property because he would receive them as an alternative to pension payments that would have been community property.[18]

A spouse may also buy an insurance policy that provides for combined life insurance, disability insurance and retirement benefits. To the extent community funds are used to buy the policy, the proceeds from the policy will usually be community property.

> **For example:** While married to Bambi, Bevis used community funds to buy an insurance policy that made it almost certain he would receive "disability payments" when he was over 60 years old. If he divorces Bambi the payments he receives from the policy would be community property even though they are called "disability" payments since they represent a return on his investment of community funds.[19]

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H. Characterization of Lottery Winnings

If a lottery ticket is purchased with separate property funds, whether before or after marriage, the lottery winnings are separate property, even if the lottery is not held until after the party buying the ticket marries.

And if the lottery ticket is bought during marriage or after permanent separation with community property funds, the lottery winnings are community property, even if the lottery is not held until after the parties permanently separate.

But if a lottery ticket is bought after permanent separation with money "accumulated" from unspent spousal support or child support payments, the proceeds will be separate property because the "accumulations" are not community property. (*Marriage of Wall* (1972) 29 Cal.App3d 76.)

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[18] In other words, Bevis cannot deprive Bambi of her community property rights in the accrued pension and possibly make his future income all his own separate property by choosing a "disability retirement" as an alternative to the pension.

[19] The characterization of "disability payments" in these situations depends heavily on the facts concerning whether the policy truly provided disability insurance to compensate for future lost wages or if it actually represented an investment vehicle.

Chapter 6: Transmutation of Character

The main exception to the General Presumption is that the character of an asset can be changed by the acts of the parties adversely affected. This change in asset character is called a **"transmutation"**.

The **general rule** is that when a spouse spends separate funds for the community benefit, or when the spouses together spend community funds for the benefit of either spouse, that expenditure will be **deemed a gift**. This general rule is subject to specific exceptions that create **rights of reimbursement.** Those are explained in later chapters.

A transmutation occurs when a spouse transfers his or her separate property to the community (making it community property) or to the other spouse (making it the separate property of the other spouse) or the two spouses together give community property to one spouse or to both of the spouses as jointly held but separate property of each spouse. (FC § 850.)

> **850. Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following:**
> **(a) Transmute community property to separate property of either spouse.**
> **(b) Transmute separate property of either spouse to community property.**
> **(c) Transmute separate property of one spouse to separate property of the other spouse.**

Transmutation situations explained in this chapter involve the conveyance of an existing and identifiable asset from one spouse to the other, from a spouse to the community or from the community to the spouses. This chapter does NOT explain situations involving:

1. **Commingling** of separate and community funds,
2. **Increases in the value of separate property** as a result of community effort,
3. **Separate funds** spent for community property or debts,
4. **Community funds** spent for separate property or debts.

The law with respect to those situations is different and explained in later chapters.

1. Express and Implied Transmutation

Transmutation requires an intent to transmute the character of the property, and that intent may be express or implied by the acts of the party whose interest is adversely affected...

An **express transmutation** means that the party whose rights are adversely affected expressly states an intention to transmute the character of their own property interest.

An **implied transmutation** means that the actions of the party whose rights are adversely affected imply an intention to transmute the character of their property. One of the most significant of these affirmative acts is when parties transfer the title to their property in a manner that implies a transmutation of character.

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A. Burden of Proof

The **burden of proof** in the case of a disputed claim concerning transmutation generally depends on whether the asset is held under title or not. "Under title" means that the asset is held under a legal document that indicates form of title (e.g. "joint tenancy".)

If a disputed asset is NOT held under title the **burden of proof is on the party claiming a transmutation of the character of the** property and the **standard of proof** requires them to present **clear and convincing evidence** proving a transmutation did occur.

If a disputed asset IS held under title, the **title generally implies the character** of the property. Property held as "tenants in common" or "joint tenants" implies jointly-held separate property interests, property held in the name of one spouse alone implies separate property of that spouse, and property jointly-held otherwise implies community property. A special presumption called the Married Woman Presumption applies to some property. It will be explained later.

When property is held under title the **burden of proof is on the party claiming a different character** from that implied by the title form, and the **standard of proof** requires them to present **clear and convincing evidence** proving that a transmutation to the implied character did NOT occur because there was a contrary agreement or understanding.

In any case, for claimed transmutations after January 1, 1985 an express written statement of intent to transmute is required in many but not all situations. This is explained below.

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B. Statements in Wills Not Admissible to Prove Transmutation

No statements in a Will concerning the character of property are admissible to prove the testator had an intent to transmute property. (FC § 853.)

> **853. (a) A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in a proceeding commenced before the death of the person who made the will…**
>
> **For example:** While married to Bambi, Bevis used his inheritance to buy a painting he hung in their living room. Since this is an "inheritance" the **General Presumption** is that it is Bevis' separate property. But in divorce Bambi claims Bevis **transmuted** the painting to community property. As proof she offers Bevis' Will into evidence because it states the painting was community property. The statement in the Will cannot be admitted into evidence. (FC § 853(a).)

2. Writing Needed for Transmutation After 1984

After January 1, 1985 transmutations of property character generally require an express written statement of intent by the party whose interest would be adversely affected. (FC § 852.)

> **852. (a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.**
> **(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.**
> **(c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.**
> **(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.**
> **(e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply.**

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A. All Oral Transmutations Invalid after 1984

Oral transmutations were possible before 1985, but after 1984 they are all invalid under FC § 852.

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B. Written Statement and Informed Consent Needed After 1984

After 1984 a written statement of intent is generally needed whenever one spouse transfers his or her separate property to the other spouse or to the community or when community property is transferred to be separate property of one or both spouses.

Often a conveyance of this type involves a change of title such as when a deed is used to transfer the separate property of one spouse to both spouses as joint tenants. A change in title acts as an implied transmutation of character, and this is called the Title Presumption. It is explained in more detail below.

1) Statement of Intent must be Made Knowingly

Even if there is such a statement it is ineffective if the adversely affected party did not fully understand the effect of the conveyance.

> **For example:** While Bevis was married to Bambi he convinced her to sign a written statement in 1986 that said her hereditary estate, Blackacre, was owned by both of them as community property. Bambi did not understand the effect of the

conveyance. Later in divorce Bevis' claim to half of Blackacre will generally fail because Bambi was not fully informed.

2) Writing Must Usually State that Character is being Changed

The Supreme Court has been divided on whether the requirement of an express written statement of intent under FC § 852 should be strictly construed or be viewed more as a formal requirement before the Court can determination the decedent's intent in making a conveyance. (See *In Re Estate of MacDonald* (1990) 51 Cal.3d 262.)

The plurality in *MacDonald* held that a writing is not sufficient to satisfy § 852 unless it "**contains language which expressly states that the characterization or ownership of the property is being changed**." (*Id.* at 272.) In that case the majority holding was that although a written conveyance of ownership might be sufficient 'writing' to satisfy FC § 852 there was no holding that it would always be sufficient in every case.

3) Deed by Knowledgeable Spouse May Suffice

In a subsequent case, *Estate of Bibb* (2001) 87 Cal.App.4th 461, the court held that a **grant deed alone was sufficient writing and no additional statement of intent to transmute was necessary** to satisfy FC § 852 in a conveyance of a separate spouse's separate property to both parties in joint tenancy because **the conveying spouse knew the effect of the transfer**. But the Court held the act of placing the other spouse's name on the title to an automobile was NOT a sufficient writing because no evidence showed the conveying spouse knew the act would cause a transmutation of character.

> **For example:** Bambi **knowingly** signed a deed in 1986 that conveyed her hereditary estate, Blackacre, to herself and Bevis in joint tenancy. Bambi also put Bevis' name on the title to her Rolls Royce. Under *Bibb* the deed alone is enough writing to satisfy FC § 852 so Bevis gets Blackacre by right of survivorship upon her death. But putting his name on the car title was not sufficient writing for a transmutation.

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C. No Writing Required for Combined or Commingled Assets

FC § 852(d) does not apply when "separate property and community property are **commingled or otherwise combined**." This implies that transmutation can occur without an express written statement of intent when both parties act to combine their separate property interests or when one spouse acts to combine their separate property with other community property. In those cases prior law applies and FC § 852 does not.

> **For example:** Bevis married Bambi and each contributed their separate property from before marriage to buy Blackacre under a deed that described it as "community property." FC § 852 does not appear to require an express statement of intent to transmute separate property to community property because their have "combined" their separate funds in the transmutation.

Another situation is when the separate property of a spouse, or both spouses, is combined with community property. A formal statement of intent is not clearly required by § 852.

> **For example:** Bevis and Bambi bought Blackacre with their community funds but then Bevis used his separate property to improve Blackacre. Bevis later died leaving all of his separate property to his brother Butthead.[20] Butthead will have no claim against Blackacre because Bevis' act of spending his separate property funds on Blackacre combined it with community property and would be deemed to be a gift that transmuted it into community property. No express statement of intent was required.

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D. No Writing Needed for Certain Gifts Between Spouses

Under FC § 852(d) gifts between spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature used solely or principally by the receiving spouse that are not substantial in value taking into account the circumstances of the marriage may be deemed to be a transmutation of property without any express written statement of intent.

> **For example:** Colby, a famous basketball player, got caught having sex with Trixie at the No-Tell Motel. To appease his wife, Bambi, Colby gave her a $4 million ring, but did not give her an express written statement that he intended for it to be her own separate property. Since the ring was a gift between spouses of jewelry that was solely to be used by Bambi, she claims it is her separate property. But Colby claims it **was substantial in value** given the circumstances of their marriage so a written statement of intent was needed to transmute the community property to her separate property.[21]

3. The Title Presumption

The Title Presumption is that the affirmative act of specifying a form of ownership and taking title in that form creates a rebuttable presumption that the character of the property was impliedly transmuted to the character implied by the title form. [22]

The **Title Presumption** arises primarily from California Evidence Code section 662 which says the owner of legal title to property is presumed to be the legal owner of the full beneficial title absent **clear and convincing proof** otherwise.

> **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.**

[20] Note this is a death and not a divorce. In dissolution a special rule (FC § 2640) applies to give a right of reimbursement to the separate property interest in this situation. That is explained below.

[21] This raises the ironic point that the bigger the gift Colby made to his wife the more likely it will BOTH appease her for his sexual transgressions AND that he will get it back if it does not succeed in appeasing her.

[22] The term "Title Presumption" is not universally used and you may hear it referred to as the "joint title presumption" or "general title presumption" or some similar term.

The Title Presumption takes precedence over and forms an exception to the General Presumption and requires a higher standard of proof for purposes of rebuttal because it is based on the affirmative act of specifying a form of ownership and taking title in that form. That affirmative act, absent some contrary understanding or agreement, removes the property from the General Presumption so that mere tracing is not enough to overcome the presumption. (See for example, *In re Marriage of Lucas* (1980) 27 Cal.3d 808.)

The Title Presumption is subject to some exceptions. One is that after January 1, 1985 certain transmutations must be proven by an express written statement of intent as was explained previously. Other exceptions primarily apply when a marriage ends in dissolution and they will be explained in a later chapter.

> **For example:** Bevis and Bambi bought Blackacre with community funds, taking title as "tenants in common." Bambi died and left her separate property to Butthead. Under the Title Presumption Bambi's **affirmative act of taking her interest** in Blackacre as a tenant in common gave her a separate property interest. A written statement of intent is not clearly required by FC § 852 because the conveyance left separate property interests "otherwise combined." So Butthead will take Bambi's share in Blackacre unless Bevis has clear and convincing evidence of a contrary understanding or agreement.

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A. No Application to Commingled Assets

Where there is a mixing or commingling of assets without any affirmative act specifying that title be taken in a certain form the Title Presumption will generally not apply. The characterization rules concerning commingled and mixed assets are explained in chapters below.

> **For example:** Bevis and Bambi were married and put both community and separate funds in a bank account that was described as a "joint" account. The Title Presumption does not apply because their act of commingling funds was not an "affirmative act specifying title".

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B. No Application When No Title Form Specified

The Title Presumption arises from the affirmative act of specifying a form of ownership that implies a particular characterization and taking title in that form. So if property is conveyed and accepted without specifying an ownership form the Title Presumption will not apply and only the General Presumption determines character of property.

> **For example:** Bevis and his wife Bambi used their community property funds to buy Blackacre and receive title as only "Bevis and Bambi" without further designation of title form. Under the General Presumption property acquired during marriage is community property. And that presumption could not be rebutted by tracing the source of the funds. And the Title Presumption would not

apply to supersede the General Presumption because no title form was specified. Therefore Blackacre would be community property.

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C. Property Held by One Spouse Alone

Under the Title Presumption property legally held under title in the name of one spouse alone is generally presumed to be the separate property of that spouse absent clear and convincing evidence of a contrary understanding or agreement between the spouses.

> **For example:** Bevis owned Blackacre before he married Bambi so under the General Presumption it was his separate property, and he held title in his name alone. When they married in 1980 Bevis agreed Blackacre would become their community property. But he never changed the title and died intestate. His son and sole surviving issue, Butthead, claims Blackacre was separate property so he should get half of Blackacre under the rules of intestate succession.[23] Under the Title Presumption it is presumed to be Bevis' separate property. So if Bambi claims Blackacre was transmuted to community property she has the burden of presenting clear and convincing evidence of their contrary agreement.

You might note that there is a special statute, FC § 802, that states the General Presumption does not apply if an ex-spouse dies over four years after dissolution of marriage while holding title to property acquired during marriage. This odd statute has little or no importance and is never tested.[24]

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D. Property Held in Joint Title

As stated earlier, a married couple can jointly hold property in four joint title forms: **tenants in common, joint tenancy, community property,** or **community property with right of survivorship**. (FC § 750, stated previously.)[25]

Property acquired jointly during marriage with community funds without any further indication of title form will generally be presumed to be held as **community property** under the General Presumption. Conversely property jointly acquired during marriage as a gift or inheritance without any indication of title form will generally be presumed to be held as **tenants in common** under the General Presumption.

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[23] Since this is before 1985 no express written declaration of intent is required by FC § 852 and an oral transmutation can be valid as was explained above.

[24] It has no clear importance because if they die holding title to the property the Title Presumption applies, and that is a broad exception to the General Presumption based on time of acquisition anyway.

[25] Both **community property with right of survivorship** and **joint tenancy** have a "Right of Survivorship." This means that if one spouse dies the other spouse automatically and immediately gets full title to the asset, and the deceased spouse's interest does not pass to his or her heirs.

1) Features of Joint Title Forms

The basic features of the four forms in which a married couple can jointly hold title are:

1. Tenants in Common:
    a. Each spouse holds their share as their **separate property**;
    b. The shares of the spouses can be of **different sizes**;
    c. Shares are **alienable without consent** of the other spouse; and
    d. The share of the first spouse to die **passes to his or her heirs** (by terms of a will or by the rules of intestate succession applicable to separate property).[26]
    e. Under the common law, tenancy in common is the **default form** of joint title if no other form is specified in an instrument of conveyance.
2. Joint Tenancy:
    a. Each spouse holds their share as their **separate property**;
    b. Each spouse **owns half**;
    c. Shares are **alienable without consent** of the other spouse; and
    d. The share of the first spouse to die does NOT pass to heirs but rather **goes to the surviving spouse** by the **right of survivorship**.
3. Community Property:
    a. The property is **community property**;
    b. Each spouse **owns half** as a claim against one-half of the community property;
    c. Shares are **not alienable without consent** of the other spouse; and
    d. The share of the first spouse to die **passes to his or her heirs** (by terms of a will or by the rules of intestate succession applicable to community property).[27]
4. Community Property with Right of Survivorship:
    a. The property is **community property**;
    b. Each spouse **owns half** as a claim against one-half of the community property;
    c. Shares are **not alienable without consent** of the other spouse; and
    d. The share of the first spouse to die does NOT pass to heirs but rather **goes to the surviving spouse** by the **right of survivorship** the same as with a joint tenancy.

2) Character Presumption Based on Joint Title Form

Under the Title Presumption property held as **joint tenants** or **tenants in common** will be presumed to be jointly-held but separate property. Otherwise property held by a married couple will be presumed to be **community property** unless it is designated **community property with right of survivorship**.

> **For example:** Arthur and Guinevere receive two wedding gifts, a gold chalice and the deed to Camelot given to "Arthur and Guinevere as community property." Only the General Presumption applies to the gold chalice because it is not held under title, and it is presumed to be separate property because it was a gift received during marriage. Even though Camelot was also a gift, it was acquired under a specific joint title form, so the Title Presumption applies and it will be presumed to be **community property** because it was specifically conveyed in that title form. If Arthur died intestate his only child, Mordred, would inherit one-fourth of the chalice (half of Arthur's half-interest) under the rules of intestate

[26] The rules of intestate succession are briefly stated at the end of the penultimate chapter.
[27] Under the rules of intestate succession the surviving spouse gets all community property.

succession, but Mordred gets no interest in Camelot because Guinevere takes all community property in intestate succession.

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E. Title Presumption Does not Apply to Illegal or Invalid Transmutation

The Title Presumption does not form an exception to the General Presumption if the transfer is invalid or illegal. There are three situations –

1. Transmutation in violation of the need for an express written statement of intent under FC § 852 as explained above;
2. Misappropriation of community property by a spouse; or
3. Fraudulent transfer.

Invalid Transmutation. The application of FC § 852 was explained above. After January 1, 1985 some conveyances of title that imply a transmutation of character will be invalid unless supported by an express written statement of intent based on full disclosure.

Misappropriation. And, obviously one of the spouses cannot take the community property for themselves by just putting title in their own names or into the name of a third party. This is illegal because it violates the fiduciary duties established by FC § 1100 and § 721.

> **For example:** While married to Bambi, Bevis used community funds to buy Blackacre and had it put in his own name. To prove it is really community property Bambi **merely needs to trace** the source of the funds and does not have to present clear and convincing evidence.

Fraudulent Transfer. A "fraudulent transfer" is one done by parties while they are or reasonably believe they are insolvent for the purpose of preventing creditors from attaching assets. Under the Uniform Fraudulent Transfer Act (California Civil Code § 3439, et seq.) a fraudulent transfer can be avoided by a creditor.

> **Family Code § 851. A transmutation is subject to the laws governing fraudulent transfers.**

> **For example:** Bevis owned Blackacre before he married Bambi, but he owed Butthead so much money he deeded Blackacre to Bambi as her separate property to stop Butthead from foreclosing. Butthead can avoid the transfer and reach the property by **merely tracing** the Blackacre back to Bevis by showing it was a fraudulent transfer.

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F. Challenging the Title Presumption

The Title Presumption is a rebuttable presumption, and the parties to a marriage can always alter their property rights by agreement (FC § 1500.) So the Title Presumption can be rebutted by evidence there was a **contrary understanding or agreement**. But the standard of proof is **clear and convincing evidence.** Merely tracing funds to a conflicting source is generally not enough.[28] Even if the funds used to buy an asset are community property, the title form of the asset purchased will determine whether it is community property or jointly held separate property absent a contrary agreement. (See for example, *Beck v. Beck* (1966) 242 Cal.App.2d 396.)

> **For example:** Bambi knowingly let Bevis use community funds to buy Blackacre in his name alone. Bambi's understanding was that it was community property. Bevis died.[29] Under the Title Presumption Blackacre is presumed to be Bevis' separate property even though he acquired it during marriage with community funds since the Title Presumption is a general exception to the General Presumption. To rebut the Title Presumption Bambi must present clear and convincing evidence that Blackacre was purchased with an **understanding** between them that Blackacre was still going to be community property.

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G. Special Exceptions

The Title Presumption, General Presumption and general rules are subject to the following specific exceptions that are explained in subsequent chapters:

1. Commingled Funds;
2. Separate Property Improved by Community Effort (*Van Camp/Pereira*);
3. Separate Property Paid for with Community Funds (*Moore*);
4. Joint Title Presumption in Dissolution (FC § 2581); and
5. Married Woman Presumption (FC § 803).

[28] And, of course, one can always challenge for fraud or undue influence.
[29] Note that this is not a case of dissolution so the exception to the Title Presumption based on FC § 2581 that will be explained later. It applies in divorce and annulment situations.

Chapter 7: Characterization of Commingled Funds

The statute discussed in the previous chapter, FC 852(d), states that it does not alter the law regarding "commingled" funds. That means situations where fungible separate property and community property are mixed together. This almost always involves a bank account, and even if the account is called a "joint tenancy' account, the Title Presumption will not apply to acts of commingling (after the account is initially established) because they are not affirmative acts of specifying title.

> **For example:** Bevis married Bambi and established a joint bank account where they deposited their pay checks. Since the money deposited was earned during marriage it is community property. Then Bambi inherited money from her father and deposited it in the same account. This is her separate property since she acquired it by inheritance, but the account now contains "commingled" separate and community property. Suppose Bambi died with a will giving all of her "separate property" to Trixie. How would Trixie determine her separate interest in the account?

De Minimus Commingling. Whenever separate and community property are commingled, the assets will be characterized against the party that caused the commingling, unless the commingling is very minor, termed "de minimus."

> **For example:** Bambi had a separate bank account where she kept her $3 million inheritance. But over the years she deposited a few hundred dollars of community property in the same account, and the exact amount cannot be determined. She dies leaving her community property to her husband, Bevis, and all of her separate property to the SPCA. Even though she slightly commingled her funds, the de minimus rule would probably be applied to find the account continued to be her separate property.

If the commingling is not de minimus, the asset will usually be characterized as community property because the person causing the commingling is usually the party claiming a separate property interest.

Methods of Proving a Separate Interest. There are three ways for a party claiming an interest in commingled funds to prove their claim:

1. Most commonly by **direct tracing** of the contrary (e.g. separate property) interest in the commingled account;
2. Otherwise by the **Family Expense Method**; or
3. On rare occasions by the **Total Recapitulation Method**.

1. Direct Tracing

In the case of commingled funds direct tracing simply means that the party claiming the separate interest can present an accurate accounting to prove the separate property interest.

> **For example:** Bambi put both her $3 million inheritance (separate property) and her paychecks (community property) in the same account, but she can accurately prove the separate balance of each portion (and the interest earned on each portion).

2. Family Expense Method

If a party claiming a separate interest cannot directly trace the interest, they may be able to prove the **minimum possible balance** of their interest by tracing the community property deposits into and community expenses out of the account so that the **lowest intermediate balance** of the account never dropped low enough to exhaust their separate interest.

> **For example:** Bevis and Bambi had a joint checking account with a balance of $1000. Bevis inherited $20,000 which he put in the account, increasing the balance to $21,000. Over the course of their marriage the lowest the account balance dropped was to $19,000. At the time of divorce the balance is $23,000. Since the lowest intermediate balance was $19,000, that is the least Bevis' separate interest could be. The rest of the current $23,000 balance ($4,000) would be attributed to community property.[30]

3. Total Recapitulation Method

In a few rare cases where separate and community property have been mixed, but neither tracing nor the family expense method can be used to prove the separate interest **because no records are available and that is not the fault of the party trying to prove the separate interest**, courts have allowed a party to prove a separate interest by the **Total Recapitulation Method**. This simply means by adding up all of the community property income during the marriage, subtracting out all of the expenses, and showing that the net community property is less than the balance of assets in dispute. (See *See v. See* (1966) 64 Cal.2d 778.)

> **For example:** Bevis married Bambi when he was 80 years old. He died intestate six months later. In his safe deposit box they found $1 million in cash. Bevis' only child, Butthead, claims this is separate property so he gets half. But Bambi can show that while they were married Bevis won money at the race track and put it with the money in the box. That would be community property. And if Bevis commingled community property with his separate property, Butthead has to prove his interest. Otherwise it will ALL be community property (which Bambi gets by intestate succession.) Since Butthead cannot really trace the funds in the box, and Family Expense Method won't apply, his only hope is Total Recapitulation Method. If he can show that during the six months Bevis and Bambi were married their total community property income was $1,000 while their living expenses far exceeded that, then there could not have been any accumulation of community property savings, and the amount in the box must all be Bevis' separate property – savings he accumulated before marriage.

[30] Do you need to know how to do the math? You bet your bippy. On exams in law school and for the Bar Exams, if they give you dollar figures ($) then you are expected to give them back a dollar answer ($). If you are not good at math take a small calculator into the exams with you. Be sure to ask the exam proctor for permission.

Chapter 8: Community Interests in Separate Property (*Van Camp/Pereira*)

The prior chapter discussed "commingled" funds where fungible separate and community property get mixed together. Another situation is when the **separate property** of one of the spouses is increased in value during marriage because of community effort. The community has a property interest in the asset to the extent community effort increases the asset value. These are called **"mixed asset"** situations.

In particular, where one of the spouses works in a business that is separate property, part of the increase in the value of the business will be community property.

> **For example:** Bevis had a law practice worth $50,000 when he married Bambi. During the marriage Bevis' law practice grew and is worth $500,000 at the time of divorce.[31] Some part of the increase in the value of the practice is community property.

Two calculation methods are used in these **mixed asset** situations, and they are named after the cases from which they were developed:

1. **The *Van Camp* Method**: Gives the community a standard wage and attributes the rest of the increase in value to separate property when market forces primarily drove capital appreciation; OR
2. **The *Pereira* Method**: Gives a standard return on investment to the owner of separate property and attributes the rest of the increase in value to community property when the entrepreneurial talents and effort of the owner primarily drove the capital appreciation.

Note that the *Van Camp* and *Pereira* approaches **only apply to separate property** assets. This chapter has no application to the improvement of community property assets, either by application of community effort or by use of separate property funds to improve community property assets.

1. The *Van Camp* Method

If an asset is of a type that **increases in value primarily because of market forces** an **average wage** is attributed to the community (community property) and the rest of the increase in value of the asset is attributed to return on investment (separate property). (*Van Camp v. Van Camp* 1921) 53 Cal.App. 17.) This approach would primarily apply to capital intensive investments such as real estate, grazing land, farms, stock portfolios and art collections.

> **For example:** Bevis owned land worth $50,000 when he married Bambi. During marriage it went up in value to $500,000. Since **market forces were the major force driving the increase in value**, the Court will use the *Van Camp* Method.

[31] As footnoted in the prior chapter, if the exam question gives you dollar figures your answer should give them back dollar figures.

2. The *Pereira* Method

If an asset is of a type that **increases in value primarily because of the efforts and talents of the owner** an **average return on investment** is attributed to the owner (separate property) and the rest of the increase in value of the asset is attributed to the owner's efforts (community property). (*Pereira* (1909) 156 Cal. 1.) This approach would primarily be applied to labor intensive activities such as retail stores, medical practices and legal practices.

> **For example:** Bevis owned a flower shop worth $50,000 when he married Bambi. During the marriage most flower shops doubled in value. At divorce he had a chain of flower shops worth $500,000. Since Bevis' **skills and efforts as a retailer were the major force driving the increase** in value the Court will apply the *Pereira* Method. It will give a standard rate of return on investment to Bevis' separate property (e.g. 6% per year return on investment) and the remaining amount of the increase will be allocated to community property to reflect Bevis' community effort.

3. Creation of Community Interest Does Not Change Basic Character

A "mixed" asset situation always involves a **separate property asset** in which the community has developed a property interest because of community effort. But the basic character of the asset is still separate property. Generally the spouse that owns the separate property asset can still treat the asset as separate property despite the community interest.

> **For example:** Bevis owned a farm in his own name before he married Bambi. During the marriage he worked on his farm and the farm profits were largely community property because they largely reflected his (community) efforts. But he also improved the farm, and to that extent the community gained an interest in the farm. Now Bevis wants to sell the farm but Bambi objects. Can Bevis sell the farm without Bambi's approval? Yes, because it is still his separate property even if the community has an "interest" in it.

Chapter 9: Separate Property Paid for with Community Funds (*Moore*)

Another situation when community and separate property are mixed is when **community funds** are used to buy, improve or pay off loans against the **separate property** of one spouse. In these situations the community gains an interest in that property.

Often these are situations where a spouse with home marries and the couple later uses community funds to pay the mortgage or make improvements.

Early cases held that if a spouse enters into a purchase agreement before marriage and during marriage community funds are used to pay against the purchase agreement the **community gained a pro rata interest** in the property. (See *Vieux v. Vieux* (1926) 80 Cal.App. 222.) Originally the courts held that community payments toward interest and taxes would be counted in calculating the community interest.

> **For example:** Bevis bought a lakefront lot for $10,000 under an installment contract that obligated him to pay $1,000 a year for ten years. His rights under the contract are his separate property. But then he married Bambi and paid $5,000 in installment payments from wages he earned during marriage. At divorce the lakefront lot is worth $50,000. At that time the community would have a pro-rata 50% interest in the lakefront lot ($25,000) since half of the total installment payments due on the purchase contract were paid for with community funds.[32]

That generally applied rule today was established in *Marriage of Moore* (1980) 28 Cal.3d 366. Under *Moore* the community has an interest in the property equal to the sum of 1) the **community funds spent** to improve or otherwise pay for the separate property asset PLUS 2) a **portion of asset appreciation** equal to the portion of asset cost paid for with community funds. But community payments toward <u>interest, taxes, insurance, etc. are no longer counted</u> toward the community interest.

This produces a fairly complicated mathematical formula (for most law students, anyway) but you must understand it and be able to calculate it on exams.

While a *Moore* type exam problem may throw a lot of other confusing numbers at you, there are only **three things** you need to know:

1. What was the **cost** of the property? Call this **C** for total asset COST.
2. What is the current **value** of the property? Call this **V** for VALUE of the asset.
3. How much community funds were **paid** to improve or acquire the asset? Call this **P** for PAID out of community funds.

[32] Note that if you apply the *Moore Approach* to this example you get the same exact answer. The cost C is $10,000, the amount the community paid, P, is $5,000 and the value V is $50,000 so the community interest is $5,000 + ($5,000/$10,000) * ($50,000 - $10,0000 = $25,000.

The *Moore Approach* formula is:

Community Interest = **P** + [**P** / **C** * (**V** – **C**)]

In words the *Moore Approach* is: The community interest is the amount the community **Paid** toward the asset PLUS a portion of the appreciation (the excess of current **Value** over **Cost**) measured by the portion of the **Cost** that the community **Paid**.[33]

> **For example:** Bevis married Bambi when she owned a condo she had bought for $100,000 (**C**). She still owed $90,000 on the mortgage and during marriage paid that out of her salary (community property.) At their divorce the condo was worth $300,000 (**V**), and she still owed $80,000 on the mortgage. The mortgage was reduced by $10,000 with community funds so the community is entitled to reimbursement of that part (**P**) of the property cost. The property also appreciated $200,000 (**V-C**), and the community gets part of that appreciation equal to (**P / C**) or (10,000/100,000) times $200,000. That gives the community $20,000 of the appreciation and a total claim of $30,000.[34]

It is very important to work through some numerical examples of this and not be confused by extraneous facts. You only have to determine three values and plug them into the formula. Other facts are simply irrelevant. Capital improvements are calculated the same way:

> **For example:** Bevis married Bambi when she owned a condo she had inherited. It was appraised for $100,000 when she inherited it. During marriage they used $50,000 in community funds (**P**) to extensively remodel the dwelling. Total cost then was $150,000 (**C**). At their divorce the condo was appraised at $300,000 (**V**) so appreciation had been $150,000 (**V – C**). The community interest is the amount the community paid out of pocket (**P**) plus the portion of appreciation (**V – C**) equal to the portion of total cost paid for with community funds (**P/C**). Therefore the community interest is $50,000 + ($50,000/$150,000) * $150,000 = $100,000. The remaining condo value ($200,000) is Bambi's separate interest.

If you are given a question that only gives the value of property at the time of marriage and at the time of divorce assume the value at the time of marriage is the cost. State that assumption for the reader to show you know the correct formula but were unable to apply it with exactitude because some information was missing.

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[33] Note the formula uses the original value of the property and the amount of total capital appreciation the owner-spouse has experienced from the date of purchase to the date of divorce and NOT the value of the property at the date of marriage.

[34] Substituting into the formula **P** + [**P** / **C** * (**V** – **C**)] this produces $10,000 + [$10,000/$100,000*($300,000-$100,000)] which works out to $10,000 + $20,000 = $30,000.

Chapter 10: Jointly-Held Property in Dissolution

An express statutory exception to both the General Presumption and the Title Presumption is the **Joint Title Presumption in Dissolution**.[35] (FC § 2581.) This statute provides that in a **dissolution** all property acquired during marriage in joint form **joint title** is presumed to be **community property** regardless of the form in which it is held, UNLESS there is a **clear statement** in the deed or other title document or there is some other **written agreement** between the parties that it is separate property.

> **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.**

FC § 2581 was enacted in 1987, and it applies to all jointly held property regardless of when it was acquired.[36]

> **For example:** While married, Bevis and Bambi used their community property to buy Blackacre. The deed said, "to Bevis and Bambi as tenants-in-common." In a **dissolution** the Joint Title Presumption in Dissolution applies and Blackacre will be presumed to be **community property** unless there is some clear statement elsewhere on the deed or some written agreement between Bevis and Bambi that it was to be considered separately held, separate property interests.

1. Only Applicable in Dissolution

The Joint Title Presumption in Dissolution under FC § 2581 only has application in a dissolution, or else where there is, in fact, a clear statement in the deed or in a separate agreement that the property is to be treated as separate property and not community property.

Otherwise just the regular Title Presumption applies, or else the Married Woman Presumption explained in the next chapter.

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[35] This is not always called the "Joint Title Presumption in Dissolution" and may be referred to as the "Joint Title Presumption" or "Special Title Presumption" or some such.

[36] Although retroactive application of § 2581 to vested property rights acquired before its enactment was held to be unconstitutional in *Marriage of Buol* (1985) 39 Cal.3d 751, that decision was narrowed significantly later in *Marriage of Hilke* (1992) 4 Cal.4th 215 where the Court held that § 2581 could be applied to all property no matter when it was acquired as long as the property right remained contingent and had not yet vested with certainty at the time the statute was adopted.

> **For example:** In the same situation as above where Bevis and Bambi used community property to buy Blackacre as tenants-in-common, if Bevis **dies** the Joint Title Presumption in Dissolution under FC § 2581 does NOT apply. Since the title is held as tenants in common it will be presumed to be **jointly held separate property** under the Title Presumption unless that could only be rebutted by clear and convincing evidence of a contrary agreement.

2. Challenging the Joint Title Presumption in Dissolution

The Joint Title Presumption in Dissolution would generally be challenged by showing written evidence in the deed or some other agreement that the jointly-held property is to be considered separate property. But it could also be challenged by showing the property was transferred into joint title by fraud or means of undue influence or perhaps by an invalid transmutation into a joint form without an express written statement of intent required by FC § 852.

3. Joint Title Presumption Supersedes Married Woman Presumption

The Married Woman Presumption is explained in the next chapter.

It is useful to note that the Joint Title Presumption in Dissolution effectively supersedes the Married Woman Presumption in every situation when there is jointly held property at issue in a dissolution. The reason is that the Joint Title Presumption in Dissolution applies to all jointly held property regardless of when it was acquired or in what form of title it is held.

And the only exceptional situation when the Joint Title Presumption in Dissolution does not apply – when the deed or some written agreement states the jointly held interests are separate property – effectively negates or duplicates the Married Woman Presumption anyway in the case of jointly held assets.

Chapter 11: The Married Woman's Presumption

The Married Woman's Presumption is a presumption based on title form established by Family Code section 803.

> **803. Notwithstanding any other provision of this part, whenever any real or personal property, or any interest therein or encumbrance thereon, was acquired before January 1, 1975, by a married woman by an instrument in writing, the following presumptions apply, and are conclusive in favor of any person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest, regardless of any change in her marital status after acquisition of the property:**
> **(a) If acquired by the married woman, the presumption is that the property is the married woman's separate property.**
> **(b) If acquired by the married woman and any other person, the presumption is that the married woman takes the part acquired by her as tenant in common, unless a different intention is expressed in the instrument.**
> **(c) If acquired by husband and wife by an instrument in which they are described as husband and wife, the presumption is that the property is the community property of the husband and wife, unless a different intention is expressed in the instrument.**

Under the **Married Woman Presumption** property acquired by a married woman by written instrument prior to January 1, 1975 is:

1. Presumed to be all her **separate property** if it is transferred to her alone;
2. Presumed to be held by her as a tenant in common (**her share being her separate property**) if transferred to her and any other person, unless a contrary intent is shown on the conveyance instrument; and
3. Presumed to be **community property** if transferred to just her and her husband and they are described in the conveyance instrument as "husband and wife", unless a contrary intent is shown on the conveyance instrument.

1. May Not Apply to Jointly-Held Property in Dissolution

The Married Woman Presumption does not apply to property acquired in joint-title form in dissolutions because in those situations FC § 2581 now applies as explained in the prior chapter.[37] But it may apply as an exception to the regular Title Presumption.

2. Does Not Apply to Transmutations After 1984

The Married Woman Presumption can not apply to any transmutation after January 1, 1985 that would require an express written statement of intent under FC § 852, so these are mutually exclusive provisions.

[37] This was not the case before FC §2581 was adopted so older case law concerning the Married Woman Presumption often involves divorce situations. This can be very confusing because now FC § 2581 controls and the Married Woman Presumption does NOT generally apply to divorces.

3. Only Applies to Property Acquired Before 1975

The Married Woman Presumption only applies to property acquired before 1975.

4. Conclusively Separate Property if Wife gets Sole Title

The first provision of FC § 803 states that if a married woman (wife) acquires title to property during marriage in her name alone it is presumed to be her separate property. Since that was already the general, rebuttable presumption under the regular Title Presumption, and since statutes are not enacted without purpose, the implication of FC § 803(a), as interpreted by many courts, was that in the case of a married woman given sole and separate title to property during marriage, the presumption that it was her separate property was **conclusive** absent a showing of **fraud, undue influence** or **lack of intent to convey.**

5. Tenant In Common Presumed If Not "Husband and Wife"

The second provision of the statute establishes that if the married woman receives title with any other person (other than with her husband under title described as 'husband and wife') she receives her interest as a tenant in common unless a contrary intent is shown on the instrument.

6. Community Property Presumed if "Husband and Wife"

The last provision of the statute establishes that if a married couple receives title as "husband and wife" the property is community property unless a contrary intent is shown on the instrument. This is the same result that would be reached under the General Presumption and/or the regular Title Presumption.

> **For example:** Butthead gave Bevis and Bambi a deed to Blackacre in 1974 which said, "to Bevis and Bambi, husband and wife, as joint tenants with right of survivorship." The indication that this is to be a **joint tenancy** displays contrary intent and defeats the Married Woman Presumption. Each spouse will hold a half-interest as their **separate property** under FC § 803 with a right of survivorship and not as community property. This is the same result that would be reached under the regular Title Presumption.

7. Conclusive Presumption for Third Party

FC § 803 expressly creates a **conclusive presumption** in favor of a person who deals with the wife or her agents in good faith for valuable consideration.

8. Does Not Apply to Illegal Transfers

As with the regular Title Presumption, the Married Woman Presumption does not apply to illegal transfers like **misappropriation** of community property by a wife that puts it in her own name or **fraudulent transfers**.

9. Rebuttable With Clear and Convincing Evidence

Except when a married woman receives sole title to property during marriage, the Married Woman Presumption is **rebuttable with clear and convincing evidence of a contrary agreement, intent or understanding**.

But if a husband **transfers** title to his wife by a written instrument or the wife receives title to property by written instrument with the husband's **knowledge and express or implied consent**, then the husband is not going to be able to present clear and convincing evidence that he did not intend for her to own it as her separate property, and the presumption cannot be rebutted. (See *Marriage of Ashodian* (1979) 96 Cal.App.3d 43.)[38]

10. Wife May Receive Three-Fourths of Property

If a married couple used community property to acquire property prior to 1975 without the title instrument describing them as "husband and wife" or otherwise clearly define their interests, the Married Woman Presumption **gives the wife a three-fourths interest** in the property in some situations. This is because she would receive half of the property as a tenant in common under FC § 803 (b), and the rest of the property would be received by the community as community property.

But the Joint Title Presumption in Dissolution under FC § 2581 will generally make all jointly held property community property in a dissolution, regardless of the title form or when the property was acquired, so this odd result from the Married Woman Presumption will usually arise only at the death of a spouse.

> **For example:** Bevis and Bambi bought Blackacre in 1974 with community funds under a deed that says, "to Bevis and Bambi." Under FC § 803 (b) Bambi takes her interest (1/2) as a tenant in common. The rest of the title would be presumed to be community property because no other title form is indicated and community funds were used to purchase the property. Bambi dies leaving all of her estate to Butthead. Since Bambi owned half of Blackacre as her separate interest, that goes to Butthead. But she also has a community property interest in the other half. So Butthead gets three-fourth's of Blackacre.

[38] *Marriage of Ashodian* would be decided differently now because it concerned a divorce and also FC § 852 would now require an express written statement of intent to transmute. This is an example how studying old cases can be very confusing.

Chapter 12: Debts and Reimbursement during Marriage

The debts of a married couple might be characterized as "separate" and "community" debts, but that is very misleading. Debts are not treated the same way as property. Community property can be liable for "separate" debts and separate property can be liable for "community" debts.

In other words, the rules for debts are very different from the rules for classifying property.

In addition, three distinct sets of liability rules apply to three different situations:

1. Rules of liability for debts during marriage;
2. Rules of liability for debts upon dissolution; and
3. Rules of liability for debts at the death of a spouse.

This chapter focuses on the first situation: the liability rules that apply during marriage. Here the issue is: **What property can a creditor reach** to satisfy a judgment against a debtor spouse?

A 'debt' during marriage is any obligation incurred by a married person before or during marriage, whether based on contract, tort or some other basis. (FC § 902.)

Whether the property of a spouse is liable for a debt often depends on whether the debt arose:

1. Before marriage,
2. During marriage,
3. While living separately but before entry of final judgment, or
4. After the final judgment of dissolution or legal separation.

A debt is incurred as follows:

- Debts based on **contract** are incurred **when the contract is executed** (FC § 903);
- Debts resulting from **torts** are incurred **when the torts occur** (FC § 903);
- Debts for **spousal support** or **child support** not arising out of the marriage are deemed to have been incurred **before the marriage** regardless of when support orders are issued and regardless of when payments on the obligation are (FC § 915(a));
- **All other debts** are incurred **when the obligations arise** (FC § 903.)

1. Separate Property Always Liable for each Spouse's Debts

A general rule without exception is that the separate property of each spouse is always liable for the debts incurred by that spouse no matter when they arise. (FC § 913(a)) Therefore, every time one of the spouses has incurred a debt the creditors can always reach the separate property of that particular spouse.

2. Separate Property Not Liable for Other Spouse's Debts

And, as a general rule the separate property of a spouse is not liable for the debts incurred by the other spouse no matter when they arise. (FC § 913(b).)

> **For example:** When Bevis married Bambi he already owned Blackacre as his separate property. After they were married Bambi ran up a debt of $25,000 on her credit cards. Bambi's creditors cannot reach Blackacre seeking payment of that debt because Bevis' separate property is not liable for Bambi's debts.

However this general rule is subject to an exception for the "common necessities of life".

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A. Exception: Necessities while Living Together

During marriage, as long as the spouses are living together, each has an absolute duty to support the other, each has a duty to use their separate property to support the other if the community and quasi-community property are insufficient for that purpose, and each is personally liable for debts the other incurs for the "common necessities of life." (FC §§ 914(a) (1), 4300, 4301.)

> **For example:** When Bevis married Bambi he already owned Blackacre. After they were married Bambi went into the hospital and incurred debts of $25,000. The hospital can seek recovery by proceeding against Bevis' separate property, Blackacre, if Bambi's hospital bills were incurred for a "common necessity of life."[39]

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B. Exception: Necessities Living Apart Without Support Agreement

Subject to the terms of a contrary agreement between the spouses, during marriage while living apart each spouse continues to be personally liable for debts incurred by the other spouse for the "common necessities of life". (FC §§ 914(a) (2), 4302.)

> **For example:** Bevis got mad and walked out on Bambi. He got an apartment and ended up owing $5,000 in back rent. Bambi will be personally liable to the

[39] But what if it was just for a breast enlargement?

landlord for Bevis' rent because housing is a "necessity" and there was no agreement she would not be liable.

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C. Separate Property Liable for Necessities for Other Spouse

Since each spouse has a duty to provide the other with the necessities of life, the **separate property of each spouse is liable for debts incurred to provide necessities of life:**

1. During the marriage while living together, and
2. While living apart, as long as there is no contrary agreement between the spouses. (FC § 914(b).)

Further, each spouse can bring a legal action against the other to force them to make support payments. And the county may also bring an action on behalf of a spouse. And if the county furnishes support to a spouse the county has the same right to seek and enforce a support obligation against the other spouse. The court may order that the oblige spouse pay the county reasonable attorney's fees and court costs. (FC § 4303.)

> **For example:** After Bevis walked out on Bambi she ended up on welfare, and the county paid $25,000 to support her. Bevis will be personally liable to the county and may have to pay the county's attorney fees and costs in any action it takes against him seeking a recovery.

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D. Right to Reimbursement for Payments for Necessities of Life

A spouse that uses his or her separate property to pay for the other spouse's necessities of life has a **right to reimbursement** if <u>at the time of payment</u> community property or separate property of the other spouse was available to pay for those debts. (FC § 914(b).)

3. Community Liable for All Debts before and during Marriage

During marriage community property is generally liable for all debts incurred by both spouses whether those debts were incurred <u>before or during the marriage</u>. (FC § 910)

There is **generally no right to reimbursement** when community property pays for debts incurred before marriage.

> **For example:** When Bevis married Bambi she owed $25,000 on her credit cards and she also owned Blackacre as her separate property. Bevis' salary (community property) was used to pay off those debts. During the marriage Bambi has no general duty to reimburse the community for that even though she had her own separate property.

However there is one exception that can shield community property from creditors seeking satisfaction of debts arising before marriage. And there are two exceptions when the community has a right to reimbursement: 1) liability for torts against third parties and 2) child and spousal support liability.

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A. Wages in Blocked Account Not Liable for Debts of Other Spouse

One exception to the general rule that community property is liable for the debts of each spouse from before marriage is that the earned income of a spouse cannot be garnished to pay the debts of the other spouse from before marriage. And after earnings are received by the non-debtor spouse they can still be shielded from the other spouse's creditors by keeping them separate and apart in a bank account that cannot be reached by the other spouse. (FC § 911.)

> **911. (a) The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate, except property insignificant in amount.**
> **(b) … "Earnings" means compensation for personal services performed…**

Note that this exception only pertains to 'earned income' and 'commingling' other community property funds in the account will defeat the statutory protections.

> **For example:** Bevis was an executive with an annual income of $75,000 when he married Bambi. She owed $25,000 on her credit cards at the time of marriage. Bevis had all of his salary automatically deposited in a blocked account that Bambi could not reach. So even though his salary was community property it could not be reached by Bambi's creditors if she could not reach it.

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B. Special Rules for Tort Liability

Special rules apply to tort liability arising out of the accidental or intentional torts of one spouse.

A spouse is not liable for injuries or damage caused by the other spouse unless he or she would have been liable for the same tort even if they had not been married. (FC § 1000(a).)

> **1000. (a) A married person is not liable for any injury or damage caused by the other spouse except in cases where the married person would be liable therefore if the marriage did not exist.**

> **For example:** Bevis and Butthead got in a bar fight and Bevis hit Butthead with a pool cue. Bevis' wife Bambi is not liable for his actions simply because they are married.

Nevertheless, community property is always liable for every tort committed by a spouse, before or during marriage, even though only one spouse committed the tort and the other spouse is not personally liable. Further, the separate property of the spouse that commits a tort will also always be liable.

> **For example:** While driving his car Bevis accidentally hit Butthead. If Butthead gets a damage award against Bevis, all of the **community property** of Bevis and his wife Bambi will be liable along with all of Bevis' separate property.

1) Community Liability if Activity for Community Benefit

If a tortious act or omission is committed by a spouse against a third party while acting for the benefit of the community the community property is primarily liable and the separate property of the tortfeasor is only secondarily liable to the extent community property is insufficient to pay the damages. (FC § 1000(b) (1).)

> **1000. … (b) The liability of a married person for death or injury to person or property shall be satisfied as follows:**
> **(1) If the liability of the married person is based upon an … activity for the benefit of the community, the liability shall first be satisfied from the community estate and second from the separate property of the married person.**

> **For example:** Bevis is driving to work when he accidentally hits Butthead, and Butthead gets a damage award against Bevis. All of the **community property** of Bevis and his wife Bambi will be **primarily liable** because Bevis was engaged in an activity for the benefit of the community (going to work, a community effort.) Bevis' separate property is only secondarily liable to the extent community property is insufficient.

2) Separate Liability for Injury to Spouse

If a tortious act or omission is committed by a spouse against the other spouse, absent written consent by the injured spouse, community property may not be used to pay for damages until the separate property of the tortfeasor has been exhausted. (FC § 782.)

> **782. (a) Where an injury to a married person is caused in whole or in part by the negligent or wrongful act or omission of the person's spouse, the community property may not be used to discharge the liability of the tortfeasor spouse to the injured spouse or the liability to make contribution to a joint tortfeasor until the separate property of the tortfeasor spouse, not exempt from enforcement of a money judgment, is exhausted.**
> **(b) This section does not prevent the use of community property to discharge a liability referred to in subdivision (a) if the injured spouse gives written consent thereto after the occurrence of the injury.**

> **(c) This section does not affect the right to indemnity provided by an insurance or other contract to discharge the tortfeasor spouse' s liability, whether or not the consideration given for the contract consisted of community property.**

Further, if a spouse is **injured by the acts of a third party**, the injured spouse can seek a recovery from that party **even if their own spouse also was a cause of injury**. (FC § 783.)

> **783. If a married person is injured by the negligent or wrongful act or omission of a person other than the married person's spouse, the fact that the negligent or wrongful act or omission of the spouse of the injured person was a concurring cause of the injury is not a defense in an action brought by the injured person to recover damages for the injury except in cases where the concurring negligent or wrongful act or omission would be a defense if the marriage did not exist.**

> **For example:** Bevis and Butthead get in a drag race with each other and crash, causing injury to Bevis' wife Bambi. Pursuant to § 783 Bambi is not barred from suing Butthead simply because her husband Bevis also was a cause of her injury. Bambi obtains a damages award of $100,000 against both Bevis and Butthead on a finding they were equally at fault. Bambi then seizes Butthead's property, Blackacre, and sells it to satisfy the entire $100,000 judgment. Bambi makes no effort to collect her damages from Bevis. But Butthead (the joint tortfeasor) has a **right to indemnity** (for $50,000) from Bevis. Pursuant to § 782 Butthead must first take all of the **separate property** of Bevis and that must be exhausted before he can seek indemnity from the **community property** of Bevis and Bambi.

3) Separate Liability if Activity NOT for Community Benefit

If a tortious act or omission is committed by a spouse while NOT acting for the benefit of the community the separate property of the tortfeasor is primarily liable and the community property is secondarily liable to the extent the separate property is insufficient. (FC § 1000(b) (2).)

> **1000. … (b) The liability of a married person for death or injury to person or property shall be satisfied as follows:**
> **…**
> **(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community estate.**

> **For example:** While drinking in a bar Bevis hit Butthead with a pool cue. If Butthead obtains a damage award against Bevis, the **separate property** of Bevis is **primarily liable** because Bevis was NOT engaged in an activity for the benefit of the community. But if Bevis' separate property is insufficient to pay the damage award the community property will be secondarily liable to the extent his separate property is insufficient to pay the damages.

4) No Liability to Extent Insurance Coverage Available

If a tortious act or omission is committed by a spouse, to the extent the resulting liabilities are covered by insurance, neither the community property nor the separate property of the tortfeasor are liable, regardless of whether the insurance coverage was paid for with community or separate property funds.

> **1000. … (c) This section does not apply to the extent the liability is satisfied out of proceeds of insurance for the liability, whether the proceeds are from property in the community estate or from separate property…**

> **For example:** While driving in the family car (community property) to visit his mistress, Trixie, Bevis gets in an auto accident with Butthead. If Butthead obtains a damage award against Bevis, the **separate property** of Bevis is **primarily liable** because Bevis was NOT engaged in an activity for the benefit of the community. But if his car insurance (community property) pays for Butthead's injuries, Bevis will have no liability.

5) Right to Reimbursement

When tort damage awards are satisfied by property that is only secondary liable a **right to reimbursement** will exist to the extent property that was primarily liable existed but was not used to satisfy the damage award. Rights to reimbursement in this case are governed generally by FC § 920.

> **920. A right of reimbursement provided by this part is subject to the following provisions:**
> **(a) The right arises regardless of which spouse applies the property to the satisfaction of the debt, regardless of whether the property is applied to the satisfaction of the debt voluntarily or involuntarily, and regardless of whether the debt to which the property is applied is satisfied in whole or in part. The right is subject to an express written waiver of the right by the spouse in whose favor the right arises.**
> **(b) The measure of reimbursement is the value of the property or interest in property at the time the right arises…**

A special 7-year statute of limitations applies in this case. (FC § 100(c).)

> **1000 … (c) … no right of reimbursement under this section shall be exercised more than seven years after the spouse in whose favor the right arises has actual knowledge of the application of the property to the satisfaction of the debt.**

> **For example:** Butthead obtains a damage award against Bevis in the amount of $10,000 for injury received in a bar fight. The **separate property** of Bevis is **primarily liable** because Bevis was NOT engaged in an activity for the benefit of the community. Bevis has separate property, a ranch, worth more than $10,000. But he pays the damage award out of community property, the joint account he

shares with his wife Bambi. Since Bevis' separate property was primarily liable but not used to satisfy the debt, the community has a right to reimbursement from Bevis, subject to the seven-year statute of limitations.

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C. Community Liability for Child and Spousal Support

As stated earlier, debts for **spousal support** or **child support** not arising out of the marriage are deemed to have been incurred **before the marriage** regardless of when support orders are issued and regardless of when payments on the obligation are made. (FC § 915(a)).

> **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.**

Under the general rule the community property of the marriage is liable for these spousal support and child support obligations. (FC § 910.) But if community property is used to pay child or spousal support obligations <u>at a time when separate income of the person was available</u> the community has a **right to reimbursement** subject to a 3-year statute of limitations. (FC § 915(b).)

> **915. … (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 …**

For example: Bill is married to Hillary. Monica claimed Bill was the father of her child, and although Bill claimed he never had sex with Monica a court ordered him to pay child support. Bill and Hillary deposit their bribes and other earnings in a joint bank account, and Bill uses that account to pay his child support obligations. But Bill owns South Fork as his separate property, and it generates profits that are his separate income. Since Bill had separate income available to pay the child support, the community has a right of reimbursement.

4. Summary of Debt Liabilities during Marriage

- During marriage community property is generally liable for all debts of both spouses from before marriage or while living together, without a right of reimbursement.
- A blocked account can shelter wages from the other spouse's debts from before marriage.
- The separate property of a spouse is always liable for that spouse's debts.
- The separate property of a spouse is not liable for any debts of the other spouse except debts for necessities of life while living together or apart without contrary agreement, and then there is a right of reimbursement if other property existed at time of payment.
- Either community or separate property of a tortfeasor will be primarily liable for tort damages depending on circumstances and if secondarily liable property is used to pay the debt when primarily liable property existed there is a right to reimbursement.
- The community is liable for child or spousal support debts arising outside the marriage but has a right of reimbursement if separate property existed at time of payment.

Chapter 13: Reimbursement, Allocation of Debts and Division of Property in Dissolution

This chapter focuses on the division of property and assignment of debts to be paid by one spouse or the other when a marriage is dissolved (i.e. divorce, annulment and termination of a relationship in which a party has valid standing as a putative spouse.)

It is important to note that in divorce each spouse continues to have the same fiduciary duty to the other that exists during marriage, and that fiduciary duty continues until the final distribution of all assets and liabilities. FC § 1100(e)

Before property can be divided and debts assigned to be paid by each spouse, rights to reimbursement must be considered. They are essentially "debts" owed by a spouse to the community or vice versa. They are subject to their own set of rules.

1. Rights to Reimbursement in Dissolution

As a general rule, when a spouse uses his or her separate funds to benefit the community it is **considered a gift** to the community, absent a contrary understanding or agreement, and there is **no right to reimbursement** in a dissolution.

> **For example:** Bevis married Bambi and used his inheritance to take Bambi on a cruise. In a divorce Bevis has no right to reimbursement because it would be deemed a gift to the community.

In *Marriage of Lucas* (1980) 27 Cal.3d 808 the court affirmed this general principal and also held that a spouse that contributes separate funds to buy or improve a **community property** has made a gift to the community absent a contrary understanding or agreement.

However, there were always certain exceptions to the general rule. The previous chapter explained rights to reimbursement during marriage in two situations: 1) child or spousal support obligations, and 2) tort damage awards. Further, in a dissolution situation there are other statutory rights to reimbursement.

Following *Lucas* the Legislature changed the law again by adopting Family Code § 2640 which creates another exception explained below when property is being distributed in a dissolution.[40]

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[40] Some texts may refer to this as the "Anti-Lucas" statute, but that is an unfortunate term. The general rule stated in *Lucas* that expenditures of separate funds for community benefit are gifts to the community, absent contrary understanding or agreement is still good law. But the subsequent passage of FC § 2640 created a new exception to that general rule for dissolutions. Further, if a separate property asset is transmuted to community property after January 1, 1985, FC § 852 now requires an express written statement of intent.

A. Reimbursement in Dissolution for Payment for Necessities of Life

A spouse that uses his or her separate property to pay for the other spouse's necessities of life during marriage has a **right to reimbursement** if at the time of payment community property or separate property of the other spouse was available to pay for those debts. (FC § 914(b).)

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B. Reimbursement in Dissolution for Payment of Tort Damages

As explained in the prior chapter, community property is primarily liable when a spouse commits a tort against a third party while engaged in an activity for the benefit of the community. Otherwise the separate property of the tortfeasor is primarily liable. (FC §§ 1000, 782.) As before, if property that is secondarily liable was used to pay tort damages when property that was primarily liable existed, there is a right to reimbursement in dissolution. The measure of reimbursement is the value of the property or interest in property at the time the right arose. (FC § 920(b).)

> **920… (b) The measure of reimbursement is the value of the property or interest in property at the time the right arises…**

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C. Reimbursement for Payment of Spousal and Child Support

As explained in the prior chapter, the separate property of a spouse that has debts for **spousal support** or **child support** not arising out of the marriage is primarily liable. If community property was used to pay the child or spousal support obligations when separate income of the obligated spouse was available, the community has a **right to reimbursement**. (FC § 915(b).)

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D. Reimbursement from Separate Award for Injury Expenses

As explained previously a personal injury award will be the separate property of the injured spouse if the injury occurred before marriage. (FC §§ 780, 781, 2603.) But in a dissolution the community (or other spouse) has a right to reimbursement from a separate property personal injury award **if community (or separate property of the other spouse) was used to pay for the expenses resulting from the injury.** (FC § 781(b).)[41] There is no requirement that the injured spouse have other separate property that could have been used to pay the expenses at the time the expenses were paid.

[41] Note that if the personal injury award is community property and the expenses were paid with the separate property of either spouse there is no apparent right to reimbursement under the statute.

> **781. … (b) … 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)….**
>
> **For example:** Bevis is injured in an accident before he marries Bambi. After marriage Bevis' medical expenses are paid with Bambi's earnings. Bevis receives a personal injury award. Then they divorce. Since the personal injury occurred before marriage, the damage award is all Bevis' **separate property**. But since **community property was used to pay** for his medical expenses, the community has a **right of** reimbursement for those payments.[42]

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E. Reimbursement in Dissolution for Payment of Education Expenses

As explained previously, in dissolution student loan debts will be assigned as the separate debts of the spouse that received education and training. (FC §§ 2627, 2641.) In addition, in a dissolution, the **community has a right to reimbursement for education expenses** if they "substantially enhance the earning capacity" of the spouse receiving education. Plus, this right includes interest. (FC § 2641.)[43]

> **2641. … (b) Subject to the limitations provided in this section, 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…**

1) Education Expenses Includes Student Loan Payments

For purposes of this right to reimbursement, the expenses at issue are payments of community funds directly for education (e.g. tuition, books, student fees, etc.) and against student loans of a spouse, whether while domiciled in California or elsewhere. (FC § 2641(a).)

> **2641. (a) "Community contributions to education or training" as used in this section means payments made with community or quasi-community property for education or training or for the repayment of a loan incurred for education or training, whether the payments were made while the parties were resident in this state or resident outside this state.**

[42] Note: 1) The community would have no right to reimbursement if there were no dissolution. And, 2) the right to reimbursement does not require Bevis to have separate funds to pay the medical expenses at the time they were paid.
[43] This is heavily tested on examinations.

2) No Reimbursement for Living Expenses

There is no right to reimbursement for ordinary living expenses such as food, shelter, clothing, etc. while a spouse is receiving an education because each spouse has a duty to provide the necessities of life to the other.

> **For example:** Bambi worked as a waitress putting Bevis through law school. She spent $50,000 of her salary paying for all of their living expenses. Bevis never worked and got student loans for an additional $100,000 to pay for his tuition and books. After Bevis passed the bar he used his earnings to pay down his loan debts by $10,000. In a dissolution Bevis will be assigned the remaining student loans as his separate debt pursuant to FC § 2641(b) (2). And the community has a right to reimbursement for the $10,000 Bevis paid against his loan debts plus interest. But the community will have no right to reimbursement for the $50,000 Bambi spent supporting Bevis because it was spent for "living expenses" and not for "education expenses".

3) Substantial Enhancement Required

The community only has a right to reimbursement for education expenses to the extent the earning capacity of the spouse receiving education has been substantially enhanced.

> **For example:** Bevis spent $100,000 of community funds going to Laughable Law School. But he could never pass the bar exam. Bambi spent $20,000 of community funds studying the metaphysics hoping to learn levitation.[44] In a dissolution the community would have no right to reimbursement from either spouse because the earning capacity of neither was 'substantially enhanced' by this education.

4) Court has Discretion to Reduce or Modify

The Court has substantial discretion in reducing or modifying this reimbursement requirement to the extent necessary to prevent injustice. (FC § 2641 (c).)

> **2641. … (c) The reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust…**

[44] To be able to meditate so that she can physically float in the air.

5) No Reimbursement if Community has Benefited

The community only has a right to reimbursement for education expenses to the extent the community has **not already fully benefited**, and there is a rebuttable presumption that the community has NOT fully benefited if the education was received less than ten years prior to dissolution. Conversely, there is a rebuttable presumption the community HAS fully benefited if the education is received more than ten years prior to dissolution. (FC § 2641(c) (1).)

6) Reimbursement is Subject to Offset

The community right to reimbursement for education expenses from each spouse is subject to offset for education expenses paid for the other spouse.

> **2641. … (c) The reimbursement and assignment required by this section shall be reduced or modified to the extent …(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.**
>
> **For example:** Bevis spent $20,000 of community funds going to law school and Bambi spent $20,000 of community funds studying transcendental meditation. In a dissolution the community would have no right to reimbursement from Bevis because his education expense is offset by the payments for Bambi's education.[45]

7) Reduction to Extent Spousal Support Avoided

The community right to reimbursement for education and training to a spouse will be reduced to the extent the expenditures substantially reduce the need of the educated party to be given continuing spousal support following dissolution.

> **2641. … (c) The reimbursement and assignment required by this section shall be reduced or modified to the extent … (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.**
>
> **For example:** Bambi spent $20,000 of community funds learning to be a hair dresser while married to Bevis. In a dissolution the community would have no right to reimbursement from Bambi to the extent the training she received reduced Bevis' responsibility to pay her spousal support following dissolution.

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[45] The statute does not require the 'offsetting' expenditures to 'substantially enhance' earning capacity.

F. Reimbursement for Separate Property Funds Spent on Community Property

As stated earlier, following *Marriage of Lucas* (1980) 27 Cal.3d 808 where the court affirmed the general principal that a spouse that contributes separate funds for the benefit of the community has made a gift to the community absent a contrary understanding or agreement, the Legislature changed the law by adopting Family Code § 2640 which creates an exception to the general rule when property is being distributed in a dissolution.

Now when a spouse **uses his or her separate property to acquire or improve jointly held community property** or to pay down loans obtained to acquire or improve community property, that spouse has a **right to reimbursement in dissolution** unless the spouse has signed a written waiver of this right. (FC § 2640.) This rule does not provide for reimbursement for payments toward interest, maintenance, insurance or taxes.[46]

> **2640. (a) "Contributions to the acquisition of the 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 the 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 shall not exceed the net value of the property at the time of the division.**
>
> **…**

1) Applies in Opposite Situation from the *Moore* Rule

FC § 2640 applies to the opposite situation from the application of the *Moore* rule that was explained previously. *Moore* applies when community funds are used on separate property. FC § 2640 applies when separate funds are applied to community property. This only creates a right to reimbursement in a dissolution and not an "interest" in the property as with the *Moore* rule.

2) Applies to All Property No Matter When Acquired

FC § 2640 applies in dissolution to all community property regardless of when it was acquired.[47]

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[46] This is heavily tested.

[47] Retroactive application of FC § 2640 (as Civ Code § 4800.2) was held to violate due process in *Marriage of Fabian* (1986) 41 Cal3d 440 on the same grounds that *Marriage of Buol* (1985) 39 Cal.3d 751 found FC § 2581 (as Civ Code § 4800.1) defective. But *Marriage of Hilke* (1992) 4 Cal.4th 215 substantially narrowed the application of this holding.

3) Reimbursement in Dissolution Only

FC § 2640 only gives a right to reimbursement in dissolution and does not create any separate property interest in the community property.

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G. Reimbursement for Separate Property Funds Spent on the Separate Property of the Other Spouse

FC §2640(c) provides that **in dissolution** each spouse has a right to be reimbursed for separate property funds they spent to improve or acquire the separate property of the other spouse. This right of reimbursement is **limited to the amount spent, but not more than the net value of the property** involved at the time of dissolution, and there is no right to reimbursement for appreciation of the separate property involved. This right can be waived in writing or via a written transmutation agreement..

> **2640. … (c) A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement. 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.**

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H. Reimbursement in Dissolution for Debts Paid After Separation

The Court has discretion to order reimbursement as appropriate for debts paid by the parties after separation but before trial.

> **2626. The court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial.**
>
> **For example:** Bevis used $20,000 from his earnings after permanent separation to make house payments on the home he previously shared with Bambi (community property) pending the final judgment of dissolution and property settlement. In dissolution the Court has discretion to order reimbursement from the community to Bevis for these payments.

2. Assignment of Debts in Dissolution

Upon dissolution of a marriage, absent an agreement between the spouses, the Court will characterize the debts as separate or community debts and assign the debts to each party based on that character. (FC § 2551.)

> **2551. For the purposes of division and in confirming or assigning the liabilities of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties …**

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A. Assignment of Separate Debts in Dissolution

All separate debts are assigned to the spouse that incurred the debt without offset. (FC § 2625.)

> **2625. Notwithstanding Sections 2620 to 2624, inclusive, all separate debts, including those debts incurred by a spouse during marriage and before the date of separation that were not incurred for the benefit of the community, shall be confirmed without offset to the spouse who incurred the debt.**

1) Debts Not for Community Purpose are Separate Debts

Debts incurred by a spouse for a purpose that is not a "community purpose" will be assigned to that spouse as their separate debt. (FC § 2625.) The term "community purpose" generally means an expenditure intended to benefit both parties or which both spouses agreed to incur. Expenditures for purposes that caused the dissolution of the marriage would hardly be for a "community purpose."

> **For example:** Bevis runs up a large gambling debt while married to Bambi. In a divorce that debt will be assigned to Bevis as his separate debt because he was not acting for a "community purpose".

Sometimes it is arguable if a debt is for a "community purpose" or not.

> **For example:** Bambi incurs medical bills for a breast enlargement. In a divorce it might be arguable whether that was for a "community purpose."

2) Debts from Before Marriage are Separate Debts

Debts of each spouse from before marriage are the separate debts of the spouse and will be assigned to them without offset. (FC § 2621.)

> **2621. Debts incurred by either spouse before the date of marriage shall be confirmed without offset to the spouse who incurred the debt.**

3) Debts After Dissolution or Legal Separation are Separate

Debts incurred by a spouse after the entry of a judgment of dissolution or legal separation will be the separate debt of the spouse and assigned to them without offset. (FC § 2624.)

> **2624. Debts incurred by either spouse after entry of a judgment of dissolution of marriage but before termination of the parties' marital status or after entry of a judgment of legal separation of the parties shall be confirmed without offset to the spouse who incurred the debt.**

4) Debts for Non-Necessities After Separation are Separate

Debts of each spouse after separation but before the entry of a judgment of dissolution or legal separation are the separate debts of the spouse that incurred the debt and will be assigned to them without offset **if they are not for the "common necessities of life"** of that spouse or the children of the marriage. (FC § 2623(b).)

> **2623. Debts incurred by either spouse after the date of separation but before entry of a judgment of dissolution of marriage or legal separation of the parties …**
> **…**
> **(b) … for nonnecessaries of that spouse or children of the marriage … shall be confirmed without offset to the spouse who incurred the debt.**

5) Debts for Necessities After Separation at Court Discretion

Debts of each spouse after separation but before the entry of a judgment of dissolution or legal separation **for the "common necessities of life"** of that spouse or the children of the marriage **may be assigned to either spouse at the discretion of the Court** based on respective needs and ability to pay. (FC § 2623(a).) But the Court has discretion to find them community debts.

> **2623. Debts incurred by either spouse after the date of separation but before entry of a judgment of dissolution of marriage or legal separation of the parties …**
> **(a) … by either spouse for the common necessaries of life of either spouse or the necessaries of life of the children of the marriage for whom support may be ordered, in the absence of a court order or written agreement for support or for the payment of these debts, shall be confirmed to either spouse according to the parties' respective needs and abilities to pay at the time the debt was incurred…**

6) Student Loans Separate Debt of Spouse Receiving Education

Student loans for the education and training of a spouse are assigned to be the separate debt of the spouse that received the education and training. (FC §§ 2627, 2641.)[48]

> **2627. Notwithstanding Sections 2550 to 2552, inclusive, and Sections 2620 to 2624, inclusive, educational loans shall be assigned pursuant to Section 2641 …**
>
> **2641. … (b) … upon dissolution of marriage or legal separation of the parties: … (2) A loan incurred during marriage for the education or training of a party shall … be assigned for payment by the party…**

7) Tort Liability Separate Debt if Not for Community Purpose

A damage award that results from a tort committed by a spouse while NOT acting for the benefit of the community, as set forth in FC § 1000(b)(2), will be assigned to be the separate debt of the spouse committing the tort. (FC § 2627.)

> **2627. Notwithstanding Sections 2550 to 2552, inclusive, and Sections 2620 to 2624, inclusive, … liabilities subject to paragraph (2) of subdivision (b) of Section 1000 shall be assigned to the spouse whose act or omission provided the basis for the liability, without offset.**

8) Court Can Assign Joint California Income Tax Liabilities

The Court has discretion to revise and assign joint state income tax liabilities as the separate debts of the spouses in accordance with the State tax code. (FC § 2628.)

> **2628. Notwithstanding Sections 2550 to 2552, inclusive, and Sections 2620 to 2624, inclusive, joint California income tax liabilities may be revised by a court in a proceeding for dissolution of marriage, provided the requirements of Section 19006 of the Revenue and Taxation Code are satisfied.**

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B. Assignment of Community Debts in Dissolution

Community debts will generally be assigned on an **equal basis** between the spouses along with an equal distribution of community property. (FC § 2622(a).)

> **2622. (a) Except as provided in subdivision (b), debts incurred by either spouse after the date of marriage but before the date of separation shall be divided as set forth in Sections 2550 to 2552, inclusive, and Sections 2601 to 2604, inclusive.[49]…**

[48] This is heavily tested on examinations.

[49] This basically means the debts would be allocated equally to the spouses along with equal division of the property to the extent possible.

1) Exception: Community Debts Exceed Assets

An exception to the equal division of community debts is that if the community debts exceed the community assets, the Court has discretion to allocate them to either party based on ability to pay so that creditors will be protected.[50]

> **2622… (b) To the extent that community debts exceed total community and quasi-community assets, the excess of debt shall be assigned as the court deems just and equitable, taking into account factors such as the parties' relative ability to pay.**
>
> **For example:** Bevis, an unemployed welder, and Bambi, a lawyer, divorce and community debts exceed community property by $20,000. The Court has discretion to allocate this excess debt based on the relative earning capacity of the spouses so that the creditors are most likely going to be paid.

2) Exception: Torts Between Spouses

As already discussed above, expenses arising from a tort between spouses will be treated as the separate debt of the tortfeasor even if the tort arose out of activities for the community benefit, absent written agreement otherwise, but the excess will be charged as a community debt. (FC § 782.)

> **For example:** Bevis was driving Bambi to work when he negligently had an auto accident. Bambi's medical expenses are a debt of the community because Bevis was acting for community benefit. But later in a divorce Bambi's medical expenses would be charged as Bevis' **separate debt** to the extent he had separate property. But any excess over the amount of Bevis' separate property would be a **community debt** pursuant to § 782.

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C. Liability to Creditors Following Assignment of Debts

The assignment of debts in a dissolution does not limit the rights of creditors and can expand them.

1) Each Spouse Remains Liable for Debts Incurred by Them

Following a division of property and an assignment of debts in a dissolution, the property retained by a spouse remains liable for **any debt occurred before or during marriage by that spouse** and the spouse is **personally liable** for those debts **even if they were assigned** to be paid by the other spouse. (FC § 916 (a) (1).)

[50] Note that the Court's main consideration would be protecting the creditors and not whether it is 'fair' as between the two spouses.

> **916. (a) Notwithstanding any other provision of this chapter, after division of community and quasi-community property pursuant to Division 7 (commencing with Section 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) No Liability for Debts of Other Spouse if Not Assigned

But the property retained by a spouse following dissolution is NOT liable for any debt occurred before or during marriage **by the other spouse** and the spouse is NOT **personally liable** for those debts **UNLESS they were assigned** to be paid by the spouse. (FC § 916 (a) (2).)

> **916. (a) … (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) Each Spouse Liable for all Debts Assigned Them

However, the property retained by a spouse following dissolution IS liable for any debt occurred before or during marriage by the other spouse and the spouse IS personally liable for those debts **IF they were assigned to pay the debt.** (FC § 916 (a) (3).)

> **916. (a) … (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.**

4) Right to Reimbursement for Payment of Assigned Debts

If the property retained by a spouse following dissolution is **used to satisfy a money judgment for a debt assigned to the other spouse,** the spouse has a **right to reimbursement** from the other spouse including attorney's fees. (FC § 916 (b).)

> **916. … (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.

3. Distribution of Property upon Dissolution

Upon dissolution of a marriage, the division of property and assignment of debts is controlled by Family Code sections 2500, et seq.

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A. Court Jurisdiction

The Court has broad powers to make any order necessary to divide the community estate, and retains jurisdiction to award community estate assets or liabilities that have not been previously adjudicated. (FC §§ 2553, 2556, 2600.)

The Court may, at the request of either party, divide the parties' separate property interests in real or personal property held in joint tenancy or as tenants in common, wherever the property is situated and however it was acquired. (FC § 2650.) But the Court will avoid changing interests held in real property in other States unless it is necessary. (FC § 2660.)

The disposition of the community estate is subject to revision on appeal in all aspects, including those which were within the discretion of the trial court. (FC § 2555.)

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B. General Rule: Equal Division of Community Property

Absent an agreement between the spouses, the general rule is that each party will retain his or her separate property and the community estate will be distributed equally, absent an agreement of the parties otherwise. (FC § 2550.)

> **2550. Except upon … agreement of the parties, … or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall …divide the community estate of the parties equally.**

Further, the property and debts of the community will generally be evaluated as closely as possible to the date of trial, not the date of permanent separation. However, on the motion of a party, the court has discretion to evaluate the assets at a prior date after the final separation of the parties and before trial.

> **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.**

If an asset cannot be physically divided it will be allocated to one of the spouses with a cash offset to the other.

1) Division of Business Goodwill

If one or both spouses start a business (e.g. a law practice) during marriage the business is a community property asset. If one of the spouses owns a business before marriage the business is the separate property of that spouse, but the community may gain an interest in the business as explained in Chapter 8. In either case the most valuable asset of the business is often **goodwill**, which means the name, identification, reputation, and position of the business as an on-going enterprise in the community, including the ability to generate sales and cash-flow.

The **goodwill** of a business enterprise can be determined by the sales and earnings generated by past operation. In dissolution the value of business goodwill and all other business assets (e.g. receivables, plant and equipment) will be evaluated. If the entire business is a community property asset the value of the assets will generally be divided equally. If the business is a separate property asset the community interest (as explained in Chapter 8) will be determined and generally allocated equally.

2) No Division of Academic Degrees and Certificates

If a spouse has obtained an academic degree or certification during marriage (e.g. obtained a legal degree and became a licensed attorney) the community has no interest and this is not considered an "asset" that will be divided in dissolution.

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C. Exception: Missing Spouse and a Small Estate

One exception to the general rule is that a community estate of less than five thousand dollars may be entirely awarded to the filing spouse if the respondent cannot be located. (FC § 2604.)

> **2604. If the net value of the community estate is less than five thousand dollars ($5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all the community estate to the other party on conditions the court deems proper in its judgment of dissolution of marriage or legal separation of the parties.**

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D. Exception: Offset for Misappropriated Community Property

Another exception to the general rule is that the Court may award additional community property to a spouse to compensate them for a deliberate misappropriation of community property by the other party in violation of fiduciary duties to the community. (FC § 2602.) [51]

> **2602. As an additional award or offset against existing property, the court may award, from a party's share, the amount the court determines to have been deliberately misappropriated by the party to the exclusion of the interest of the other party in the community estate.**

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E. Exception: Personal Injury Awards

Another exception to the general rule is that **the Court must award all of a community property personal injury award to the injured spouse UNLESS the Court finds that justice requires another disposition**. However, the Court **cannot award less than half** of a personal injury award to the injured spouse. (FC § 2603.)[52]

> **2603. … (b) Community estate personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the community estate personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of the damages shall be assigned to the party who suffered the injuries.**
>
> **For example:** Bevis was injured while married to Bambi. Bevis secretly lost $50,000 of community funds gambling before he received a personal injury award of $100,000. In a dissolution the Court must generally give the entire amount of the personal injury award ($100,000) to Bevis pursuant to § 2306. But the Court also has discretion to award an offset of $50,000 to the community for deliberate misappropriation of community funds in violation of fiduciary duty pursuant to § 2602. Consequently Bevis may only be given $50,000 of the award, and then he would receive another $25,000 as his half of the $50,000 offset to the community.

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[51] This is heavily tested on examinations.
[52] This is also very heavily tested on examinations.

F. Exception: Retirement Benefits of Attempted Murder Victim

Another very unusual exception to the general rule is that if one spouse is convicted of attempting to murder the other, all of the retirement benefits of the victim spouse will be awarded to them, even if some or all of them are community property. (FC § 782.5.)[53]

> **782.5. In addition to any other remedy authorized by law, when a spouse is convicted of attempting to murder the other spouse, as punishable pursuant to subdivision (a) of Section 664 of the Penal Code, the injured spouse shall be entitled to an award to the injured spouse of 100 percent of the community property interest in the retirement and pension benefits of the injured spouse.**

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G. Division of Retirement Benefits: *Gilmore* Election

As explained earlier the rights of a spouse under the provisions of a retirement plan are community property to the extent the spouse earned those rights as compensation for services provided during marriage. And the proportionate interest of the community in the retirement plan is proportionate to the amount of time the spouse worked under the plan during marriage.

In a dissolution the Court shall make whatever orders necessary to assure that each party receives compensation for his or her community property interest in the retirement plan of the other spouse. (FC § 2610.)

> **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 any retirement benefits payable upon or after the death of either party in a manner consistent with Section 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, in any case in which a retirement plan provides for such an election, provided that no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value…**
>
> **(b) A court shall not make any order that requires a retirement plan to …:**
>
> **(1) Make payments … increase … the amount of benefits provided by the plan.**

[53] This is seldom if ever going to be tested.

> **(2) Make the payment of benefits to any party at any time before the member retires, … unless the plan so provides…**

If one spouse is working under a pension plan in which the community has an interest, the other spouse may, in a dissolution, elect to receive his or her one-half of the community interest in the pension plan immediately or as a series of payments, even if the working spouse wishes to keep working under the plan. This is called a **"Gilmore Election"** in reference to *Marriage of Gilmore* (1981) 29 Cal.3d 418.

Since the pension benefits represented by the community interest in the plan generally will not be available until the working spouse opts to retire, the Court has discretion to order a method of distribution. Under FC § 2610 the Court has the power to order the working spouse to make certain elections to this effect, and the Court can allocate other community property to the non-working spouse to effect an equal division of property pursuant to FC § 2601.

> **2601. Where economic circumstances warrant, the court may award an asset of the community estate to one party on such conditions as the court deems proper to effect a substantially equal division of the community estate.**

If the retirement plan has provisions for direct payments to the non-working spouse before the retirement of the working spouse, the Court can order the working spouse to elect for such payments to begin. Otherwise the Court does not have the power to order retirement plan to begin making direct payments to the non-working spouse. (*Marriage of Nice* (1991) 230 Cal.App.3d 444, *Marriage of Jensen* (1991) 235 Cal.App.3d 1137.)

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H. Deferred Sale of Family Home

If a dissolution would affect children, the Court may defer the sale of the family home residence until a later time, to the extent that is financially feasible, if it would be in the best interests of the children. (FC § 3802.)

> **3802. (a) If the court determines pursuant to Section 3801 that it is economically feasible to consider ordering a deferred sale of the family home, the court may grant a deferred sale of home order to a custodial parent if the court determines that the order is necessary in order to minimize the adverse impact of dissolution of marriage or legal separation of the parties on the child.**

Chapter 14: Property Division and Debts after Death

Upon the death of a spouse, the property of the decedent consists of his or her own separate property and half of the community property. (Probate Code § 100.)

> **Probate Code § 100. (a) Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.**

Debts that have already been paid or that are payable may then be allocated between the surviving spouse and the decedent's estate, and after payment of the debts the balance of the decedent's estate, if any, will be distributed according to the terms of the decedent's will or according to the rules of intestate succession.

1. Allocation of Debts

If a debt of a deceased spouse has been paid or is payable by the surviving spouse, or a debt of a surviving spouse has been paid or is payable from the property of the decedent's estate, the debts may be allocated between the surviving spouse and the decedent. (Probate Code § 11440.)[54]

> **Probate Code § 11440. If it appears that a debt of the decedent has been paid or is payable in whole or in part by the surviving spouse, or that a debt of the surviving spouse has been paid or is payable in whole or in part from property in the decedent's estate, the personal representative, the surviving spouse, or a beneficiary may, at any time before an order for final distribution is made, petition for an order to allocate the debt.**

Note that debts that have already been paid by either spouse are subject to allocation to the extent there would have been a **right of reimbursement** during marriage[55]

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A. Allocation by Agreement

The surviving spouse and the personal representative of a deceased spouse may, with Court approval, agree to an allocation of debts between the surviving spouse and the decedent's estate.

> **11444. (a) The personal representative and the surviving spouse may provide for allocation by agreement and, on a determination by the court that the**

[54] This is seldom tested.

[55] Family Code § 920(c) (2) expressly states that the right to reimbursement can be claimed at the death of a spouse. This would include the rights to reimbursement for injury expenses prior to settlement of a separate property claim (FC § 781(b)), necessaries of life (FC § 914), child and spousal support (FC § 915), and tort liabilities (FC § 1000), but not those rights that are only provided in dissolution (FC §§ 2600, et seq.).

> **agreement substantially protects the rights of interested persons, the allocation provided in the agreement shall be ordered by the court…**

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B. Allocation by Law

If debts are to be allocated by law, they are first characterized as separate and community debts and applied to the property of the respective spouses according to a statutory hierarchy.

1) Debts Characterized as Separate and Community

Absent a contrary agreement, the debts paid or payable by the surviving spouse and the decedent will be characterized by the same rules as for a dissolution, which were explained in the prior chapter subject to one exception explained immediately below. (Probate Code § 11444.)

> **11444. … (b) In the absence of an agreement, each debt subject to allocation shall first be characterized by the court as separate or community, in accordance with the laws of the state applicable to marital dissolution proceedings…**

2) Exception: Funeral and Last Illness are Separate Debts

The funeral expenses and expenses from the last illness of the deceased spouse are the separate debts of that spouse and cannot be charged against the surviving spouse's property. (FC § 11446.)

> **11446. Notwithstanding any other statute, funeral expenses and expenses of last illness shall be charged against the estate of the decedent and shall not be allocated to, or charged against the community share of, the surviving spouse, whether or not the surviving spouse is financially able to pay the expenses and whether or not the surviving spouse or any other person is also liable for the expenses.**

3) Separate Debts Paid by Separate Property of Each Spouse

After characterization, the separate debts of each spouse will be paid from the separate property of that spouse, and the community debts will be paid equally from the community property of each spouse.[56]

> **11444. (b) … Following that characterization, the debt or debts shall be allocated as follows:**

[56] Note that debts are actually "allocated" to separate and community property and not necessarily "paid" immediately because some of the debts may not be due to be paid until some time in the future. But for ease of discussion the debts are referred to here as being "paid" at the time of allocation.

> **(1) Separate debts of either spouse shall be allocated to that spouse's separate property assets, and community debts shall be allocated to the spouses' community property assets.**

4) Excess Debts are Unsecured Debts

If separate debts secured by separate property exceed the value of the property they are treated as unsecured separate debts.

> **11444. (b) … (2) If a separate property asset of either spouse is subject to a secured debt that is characterized as that spouse's separate debt, and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt shall be treated as an unsecured separate debt of that spouse and allocated to the net value of that spouse's other separate property assets.**
>
> **For example:** Bevis owned separate property worth $100,000 at his death, subject to a $110,000 mortgage. The mortgage was Bevis' "separate" debt. But since the debt exceeded the value of the land, $10,000 of the debt would be unsecured separate debt.

Likewise, if community debts secured by community property exceed the value of the property they are treated as unsecured community debts.

> **11444. (b) … (4) If a community property asset is subject to a secured debt that is characterized as a community debt, and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt shall be treated as an unsecured community debt and allocated to the net value of the other community property assets.**

But if nonrecourse debts exceed the value of the assets securing them, the excess debts are ignored and not allocated as unsecured debts. A nonrecourse debt means no deficiency judgment can be obtained if sale of the collateral securing the loan fails to raise enough to pay the debt.[57]

> **11444. (c) … (3) In the case of a nonrecourse debt, the amount of that debt shall be limited to the net equity in the collateral, based on the fair market value of the collateral as of the date of the decedent's death, that is available to satisfy that debt. For the purposes of this paragraph, "nonrecourse debt" means a debt for which the debtor's obligation to repay is limited to the**

[57] In California home loans are probably the most common category of non-recourse debt. California Code of Civil Procedure 580b prohibits a deficiency judgment following a foreclosure sale of any property (up to a four-plex) if the borrower occupied any part of the property after using any part of the loan to buy the property. Therefore most purchase money home loans are nonrecourse debt.

> **collateral securing the debt, and for which a deficiency judgment against the debtor is not permitted by law.**

5) Excess Separate Debts Paid by Community Property Half

Separate debts that cannot be paid from the separate property of a spouse will be paid from that spouse's one-half share of the community property.[58]

> **11444. (b) … (3) If the net value of either spouse's separate property assets is less than that spouse's unsecured separate debt or debts, the unsatisfied portion of the debt or debts shall be allocated to the net value of that spouse's one-half share of the community property assets…**
>
> **For example:** Bevis' separate debts were $10,000 more than his separate property when he died so the $10,000 would be paid from Bevis' half of the community property.

6) Unpaid Debts Paid by Other Spouse's Community Property

If the total debts of a spouse exceed the total property of the spouse, the excess debts will be paid from the other spouse's half interest in the community property. (FC § 11444(b)(3).) However, an exception is that funeral expenses and expenses of the last illness of the deceased spouse are not to be paid from the other spouse's share of community property. (FC § 11446.)

> **11444. (b) … (3) … If the net value of that spouse's one-half share of the community property assets is less than that spouse's unsatisfied unsecured separate debt or debts, the remaining unsatisfied portion of the debt or debts shall be allocated to the net value of the other spouse's one-half share of the community property assets.**
>
> **For example:** Bevis' debts were $5,000 more than all of his property when he died, and the net value of the community property Bevis shared with Bambi was $15,000. Bevis' unsatisfied debts of $5,000 will have to be paid out of Bambi's half of the community property ($7,500) leaving her with only $2,500 of community property.

7) Unpaid Community Debts Paid by Separate Property

Community debts that cannot be paid with community property will be will paid with the separate property of both spouses on an equal basis, and if one spouse's separate property

[58] For separate property the term "net value" means the fair market value of the asset at the date of the decedent's death less any liens and encumbrances on that asset that are separate debts. And for community property the term "net value" means the fair market value of the asset at the date of the decedent's death less any liens and encumbrances on that asset that are community debts. (FC § 11444 (c) (1) and (2).)

is exhausted the remaining debt will be paid only from the other spouse's separate property.

> **11444. (b) … (5) If the net value of the community property assets is less than the unsecured community debt or debts, the unsatisfied portion of the debt or debts shall be allocated equally between the separate property assets of the decedent and the surviving spouse. If the net value of either spouse's separate property assets is less than that spouse's share of the unsatisfied portion of the unsecured community debt or debts, the remaining unsatisfied portion of the debt or debts shall be allocated to the net value of the other spouse's separate property assets.**

8) Court Has Discretion to Order Different Allocation

The Court may order a different allocation of debts based on equity. (FC § 11444(d).)

9) Allocation of Debts Does Not Impair Rights of Creditors

The allocation of debts between the surviving spouse and the decedent's estate does not impair the rights of creditors or other third parties. (FC § 11444(e).)

2. Distribution of Property

Following the allocation of debts, the property of a decedent would be distributed either according to the terms of the decedent's Will or else, if the decedent died intestate, by the rules of intestate succession. However, a decedent can effectively make a testamentary distribution by means of life insurance, and that bears some discussion.

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A. Distribution by Will

If a spouse dies with a valid Will (i.e. "testate"), the property of the decedent (i.e. the "estate") is distributed according to the Will's terms. The Will can distribute **all separate property of the decedent** and **half of the community property** to the extent that property exceeds the debts applied against that property as discussed above.

1) No Gift to Surviving Spouse Required

In California a deceased spouse does not have to give anything in a Will to a surviving spouse or children.

> **For example:** Bevis and Bambi were married and owned Blackacre as community property. At his death Bevis' Will said "I leave my entire estate to Butthead." Bevis had the testamentary power to devise only his half of the community property, and his interest was only in half of the estate. So he could only give half of Blackacre to Butthead.

2) Surviving Spouse Must Take or Reject All Gifts in Will

If a deceased spouse makes a gift by Will to the surviving spouse and at the same time clearly attempts to give away any of the surviving spouse's interest in any community property, **the surviving spouse must elect to reject all gifts provided in the deceased spouse's Will to assert any community property rights.** (See *Estate of Prager* (1913) 166 Cal. 450.)

> **For example:** Bevis and Bambi were married and owned an estate called "Loaf" as community property. Bevis also owned an island called "Nunn Atoll" as his separate property. At his death Bevis' Will said "To Bambi I give Nunn Atoll. To Butthead I give Loaf as his sole and separate property along with the residual of my estate." Even though Bevis had no right to give away Bambi's half of Loaf, Bambi must reject the gift of Nunn Atoll if she wants to assert her community property rights to half of Loaf. And if she does that, Bevis' interest in Nunn Atoll would become part of the residual of his estate and go to Gomer under the terms of the Will.[59]

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B. Life Insurance as a Testamentary Distribution

As explained earlier, either spouse has the power to spend community funds to buy life insurance because under FC § 1100(a) each generally has "absolute power of disposition other than testamentary, as the spouse has of the separate property of the spouse." Neither spouse can make gifts of community property, but the purchase of a life insurance policy is not a gift.

If the life insurance policy is purchased with community funds it becomes community property, but at death the designation of a beneficiary on a life insurance policy constitutes a "testamentary disposition" of community property, and that is not authorized under § 1100(a).

So, if a deceased spouse designates a third party as the beneficiary of a life insurance policy purchased with community funds, the surviving spouse can recover half of the proceeds.

However, the right of a surviving spouse to assert community property rights over the proceeds of a life insurance policy is subject to the same election rule as for a gift by Will. If a deceased spouse buys an insurance policy that names the surviving spouse as the beneficiary, **the surviving spouse must elect to either take the insurance proceeds exactly as provided in the insurance policy or assert community property rights and lose all other rights under the policy.** (See *Tyre v. Aetna Life Insurance Co.* (1960) 54

[59] So her decision boils down to whether half of Loaf is better than Nunn Atoll.

Cal.2d 399, *Mazman v. Brown* (1936) 12 Cal.App.2d 272, and *Fidelity & Casualty Co. of New York v. Mahoney* (1945) 71 Cal.App.2d 65.)

> **For example:** Bevis used community funds to buy $100,000 in life insurance naming Bambi as the beneficiary. But the policy was convertible into an annuity, and before he died Bevis converted the policy to the annuity without Bambi's consent. Bambi was to have an annuity for life, but if she died early Butthead would have an annuity. Bambi can still demand half the insurance proceeds ($50,000) as her community property, but she then waives all further rights. Butthead would be paid one-half the original annuity amount, but for the rest of Bambi's life. (*Tyre v. Aetna Life Insurance Co.*)

— o0o —

C. Intestate Distribution

If a spouse dies without a will (i.e. "intestate"), the surviving spouse gets **the deceased spouse's other half of the community property** and a share of the **deceased spouse's separate property**.

If the deceased spouse leaves no living issue, and there are no living issue of the decedent's parents, the surviving spouse gets **all** of the decedent's separate property.[60]

If the deceased spouse is survived by **one child or the issue of one child**, the decedent's parents or issue of the decedent's parents then the surviving spouse gets **half** of the decedent's separate property.

And if the deceased spouse is survived by **two or more children and/or issue of two or more children** then the surviving spouse gets **one-third** of the decedent's separate property.

The portion of the deceased spouse's separate property that is not given to the surviving spouse is distributed to the closest generation of blood kin with living members, divided in as many equal shares as there are living members and deceased members of that generation with living issue, each living member getting one share and the share of each deceased member with living issue divided among the living issue in a similar manner.[61]

[60] Issue means children, grandchildren, great-grandchildren, etc., including adopted children. Also be aware that the terms "niece" and "nephew" legally mean the children of one's own sibling (brother or sister) and do not mean the children of a spouses' sibling.
[61] Adopted and half-blood relatives are treated the same as 'blood kin'.

Chapter 15: Conclusion

This outline provides a summarized explanation of the black letter law and bright line rules of **CALIFORNIA COMMUNITY PROPERTY LAW**.

Black letter law means statutes and basic rules of broad theoretical application. And **bright line rules** are those decisional rules or logical guidelines created by the courts for the determination of close cases.

To make the explanation here simple and avoid unnecessary confusion much of the historical development has been ignored in this outline. Nevertheless the foregoing reflects about ninety percent of everything you should know to succeed in law school, and more than enough explanation of the rules of law for you to pass any bar examination.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the rules of law set forth herein.

Other than those cases where a professor demands further knowledge in a narrow area, the foregoing should be entirely sufficient to impart an adequate **understanding** of **California Community Property Law**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the law on your examinations. You are urged to consult **"How to Write Real Property, Wills, Trusts and California Community Property Law School Exams"**. Information about that publication is available inside the front cover of this outline.

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