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Witkin Summary of California Law, Tenth Edition
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CHAPTER XVI - Community Property

Witkin Summary of California Law I. CHARACTERIZATION OF PROPERTY

A. In General.

1. Community Property System.

11 Witkin Sum. Cal. Law Com Prop § 1

[§ 1] Community Property System.

(1) *Origin and Theory.* The community property system originated in continental Europe, came to Mexico from Spain, and became California law through the treaty of 1848. (See 12 *Summary* (10th), *Real Property*, §204.) The general theory is that the husband and wife form a sort of partnership, and that property acquired during the marriage by the labor or skill of either belongs to both. (See Bassett, California Community Property Law §1.1 et seq.; Rutter Group, 2 Family Law, Chap. 8; 26 Cal. Western L. Rev. 1 [Characterizing Marital Property]; 24 *U.C.L.A. L. Rev.* 1 [persistence of separate property concepts]; 28 *U.C.L.A. L. Rev.* 1269 [The Development of Sharing Principles in Common Law Marital Property States]; 15A *Am.Jur.2d* (2000 ed.), *Community Property* §1 et seq.)

(2) *Law of Other Community Property States.* The system is in force in nine states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. (For discussions of law of other states, see 8 Cal. Western L. Rev. 117 [Texas law]; 24 *So. Cal. L. Rev.* 42 [discussing seven community property states, in addition to California]; 25 *So. Cal. L. Rev.* 149 [same]; 1990 *Wisconsin L. Rev.* 769, footnote 2 [Wisconsin Law]; 1990 *Wisconsin L. Rev.* 903, footnote 1 [same].)

California law, however, is distinct in many important respects, and caution must be exercised in the use of authorities from those states. (See *Grolemund v. Cafferata* (1941) 17 *C.2d* 679, 688, 111 *P.2d* 641 [rejecting Washington authority on liability of community property for debts]; *Commissioner v. Harmon* (1944) 323 *U.S.* 44, 65 *S.Ct.* 103, 89 *L.Ed.* 60 [contrasting former Oklahoma optional community property law].)

(3) *Dower and Curtesy Abolished.* The community property system supersedes these common law interests; except as provided in *Prob.C.* 120 (right of surviving spouse of nondomiciliary decedent; see *infra*, §254), "the estates of dower and curtesy are not recognized." (*Prob.C.* 6412.)

(4) *Other Forms of Joint Ownership.* The community property system does not preclude other forms of ownership by a husband and wife, such as joint tenancy, tenancy in common, or partnership. (See 12 *Summary* (10th), *Real Property*, §32; *infra*, §21 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Origin and Theory.* See C.E.B., Family Law Financial Discovery §2.18; California Family Law Practice, Chap. J et

seq.



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Witkin Summary of California Law I. CHARACTERIZATION OF PROPERTY A. In General. 2. Development of Modern California Law.

11 Witkin Sum. Cal. Law Com Prop § 2

[§ 2] Development of Modern California Law.

(1) *Early Law.* The original California community property law was frequently changed by amendments to the Civil Code enlarging the rights of the wife. However, in each instance in which the rights of the wife were increased and those of the husband limited, it was held that the statute could not be retroactively applied so as to affect vested rights of the husband in property previously acquired. (See *Roberts v. Wehmeyer* (1923) 191 C. 601, 605, 218 P. 22; *Stewart v. Stewart* (1928) 204 C. 546, 555, 269 P. 439; *McKay v. Lauriston* (1928) 204 C. 557, 565, 269 P. 519; *Boyd v. Oser* (1944) 23 C.2d 613, 619, 145 P.2d 312; *Ottinger v. Ottinger* (1956) 141 C.A.2d 220, 225, 296 P.2d 347 [amendment favoring husband could not retroactively divest rights of wife]; *Jacquemart v. Jacquemart* (1954) 125 C.A.2d 122, 125, 269 P.2d 951 [same].) It is sometimes necessary, therefore, to consider the date of the acquisition of the community property in order to determine the rights of the parties to that property.

The foregoing rule, requiring prospective application of changes affecting interests in community property, has been the subject of frequent discussion and considerable adverse comment by law writers. (See *Addison v. Addison* (1965) 62 C.2d 558, 43 C.R. 97, 399 P.2d 897, *infra*, §256; 27 *Cal. L. Rev.* 49; 32 *Cal. L. Rev.* 187; 33 *Cal. L. Rev.* 476; 42 *Cal. L. Rev.* 377; 51 *Cal. L. Rev.* 163; 57 *Cal. L. Rev.* 577; 17 *So. Cal. L. Rev.* 399; 39 *So. Cal. L. Rev.* 266; 18 *Stanf. L. Rev.* 514.)

(2) *Family Law Act.* The Family Law Act, effective in 1970 (see 11 *Summary* (10th), *Husband and Wife*, §1), recodified the community property statutes in former C.C. 5100 et seq. The principal change was in the division of property on dissolution of the marriage: With fault no longer the basis for dissolution (see 11 *Summary* (10th), *Husband and Wife*, §59), the community property is, in the usual case, divided equally. (See *infra*, §189 et seq.)

(3) *Legislation of 1973.* In 1973, the Legislature adopted a series of amendments designed to give equal management and control of community property to husband and wife, and to make community property subject to the debts of either contracted after marriage. (See 5 *Pacific L. J.* 352; *infra*, §§132, 177.) The 1974 Legislature enacted amendments making key provisions of the 1973 legislation retroactive. (See 5 *Golden Gate L. Rev.* 407 [Toward True Equality]; 1 *Hastings Const. L. Q.* 97 [The Constitution and "Liberated" Community Property in California]; 9 *Loyola L.A. L. Rev.* 493; 6 *Pacific L. J.* 303; 2 *Pepperdine L. Rev.* 101 [Prospective Changes in California Community Property Law]; 48 *So. Cal. L. Rev.* 986 [comprehensive article]; *infra*, §10, 132.)

(4) *Legislation of 1974.* The Community Property Set-Aside Law, governing the passing of community property to the surviving spouse without administration of the decedent's estate, was enacted in 1974 and revised in 1975. (See *infra*, §249 et seq.)

(5) *Family Code.* The 1989 Legislature directed the Law Revision Commission to review the statutes related to child and family civil proceedings and prepare a recommendation for a Family Code. "The major concern addressed by the legislative resolution was the dispersion of family law in several codes, including the Civil Code, Code of Civil Procedure, Evidence Code, Probate Code, and Welfare and Institutions Code. A result of this dispersion and piecemeal legislation over the years has been a multiplication of procedures and inconsistent and overlapping substantive rules and procedures." (23 Cal. Law Rev. Com. Reports, p. 9.) The Family Code, enacted in 1992 and effective January 1, 1994, "reorganizes the major family law statutes in a new code and resolves many procedural and technical inconsistencies in existing law. Consistent with its legislative directive, the Commission did not attempt to make major substantive revisions in the law." (23 Cal. Law Rev. Com. Reports, p. 10.) (See 11 *Summary* (10th), *Husband and Wife*, §2 et seq.)

(6) *Probate Code Revision.* A number of sections of the Probate Code deal with community property, and the Code has undergone extensive revision. (See 14 *Summary* (10th), *Wills and Probate*, §264 et seq.)

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A. In General.

3. Property Rights During Marriage.

11 Witkin Sum. Cal. Law Com Prop § 3

[§ 3] Property Rights During Marriage.

(1) *Methods of Holding Property.* A husband and wife may hold property as joint tenants or tenants in common, or as community property or community property with a right of survivorship. (*Family C. 750.*) (See *infra*, §157.)

(2) *Interests of Spouses in Community Property.* The interests of a husband and wife in community property during the marriage are present, existing, and equal interests. (*Family C. 751.*) (See *infra*, §130.)

(3) *Interest of Spouses in Separate Property.* "Except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other." (*Family C. 752.*)

(4) *Limitation on Disposition of Separate Property Residence.* When notice of the pendency of a proceeding for dissolution, nullity, or legal separation is recorded in a county where a spouse is living in the other spouse's separate property residence, for a period of 3 months the residence may not be transferred, encumbered, or otherwise disposed of, voluntarily or involuntarily, without the joinder of both spouses, unless the court otherwise orders. (*Family C. 754.*) (For limits on disposition of community property dwelling, see *Family C. 1100, 1102*, *infra*, §147 et seq.)

(5) *Leasehold Interest in Real Property.* For the purposes of Division 4 of the Family Code (which governs nearly all community property topics), a leasehold interest in real property is real property, not personal property. (*Family C. 700.*)

West's Key Number Digest, Husband and Wife k.1 et seq.

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11 Witkin Sum. Cal. Law Com Prop § 4

[§ 4] Community Property.

(1) *Definition.* "Except as otherwise provided by statute," all real and personal property, wherever it is located, acquired by a married person during the marriage while the person is domiciled in California is community property. (*Family C. 760.*) The predecessor statute (former C.C. 5110) did not include real property acquired outside of California within this definition. The Law Revision Commission Comment to *Family C. 760* states: "The effect of defining community property to include out-of-state real property is that California courts will treat it as community property for all purposes, including management and control. Under former law, such property was treated as community property for the purpose of liability for debts and for purposes of division at dissolution of marriage or legal separation. ... The treatment given such property by the courts of the state in which the property is located may depend on the applicable choice of law rules of the state."

The Law Revision Commission also observes that *Family C. 760* is not an exclusive statement of property classified as community. For example, *Family C. 761* provides that property in certain revocable trusts is community property. (See 13 *Summary* (10th), *Trusts*, §198.) (On conversion of community property to community property with right of survivorship, see *infra*, §§157, 251.)

(2) *Community Property Presumption.* *Family C. 760* establishes a rule, which works in nearly all cases, that calls for examination of the classes of separate property (*infra*, §5); property acquired during the marriage that does not fall into some statutory class of separate property is necessarily community property. (See *infra*, §15 et seq.) It is also helpful to remember the basic theory of the system, that the spouses contribute to the acquisition of the property and that property acquired through the efforts of one or both spouses is community. (See *supra*, §1.)

(3) *Quasi-Marital Property and Quasi-Community Property.* Two related concepts should be noted: (a) "quasi-marital property," referring to the property rights of a putative spouse (see *infra*, §264 et seq.); (b) "quasi-community property," referring to property acquired by a spouse while domiciled elsewhere that would have been community property if the spouse had been domiciled in this state (see *infra*, §§256, 257).

(4) *Expectancy.* A mere expectancy is not recognized as community property subject to division on dissolution. In *Speer v. Speer* (1962) 209 C.A.2d 233, 25 C.R. 729, the husband had substantial claims against a partnership and a corporation formed by the partners. The trial judge, evaluating the claims as community property, awarded the wife a

part, payable in monthly installments. The appellate court reversed, holding that, until the claims against the business were made enforceable by an accounting or other appropriate proceeding, they would remain a mere expectancy. (See criticism, 36 *So. Cal. L. Rev.* 486, arguing that husband's interest was much more than an expectancy, and that sweeping declaration of court might offer opportunity for husband to withdraw and invest community funds in business, and postpone liquidation of his interest until after divorce.)

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2. Separate Property.

11 Witkin Sum. Cal. Law Com Prop § 5

[§ 5] Separate Property.

Separate property is defined in *Family C. 770(a)* as including the following:

- (1) Property owned by either spouse before marriage. (See *infra*, §7.)
- (2) Property acquired during marriage by gift, bequest, devise, or descent. (See *infra*, §14.)
- (3) The rents, issues, and profits of separate property. (See *infra*, §121 et seq.)
- (4) Property acquired during the marriage with the proceeds of separate property. (See *infra*, §§13, 121 et seq.)

West's Key Number Digest, Husband and Wife k.110 et seq.

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3. Practical Effects of Distinction.

11 Witkin Sum. Cal. Law Com Prop § 6

[§ 6] Practical Effects of Distinction.

The community-separate property distinction becomes significant chiefly in the following situations:

- (1) Where a spouse seeks to set aside a gift of the property. (See *infra*, §136 et seq.)
- (2) Where a creditor seeks to satisfy a liability out of the property. (See *infra*, §121 et seq.)
- (3) Where the marriage is dissolved by a judgment of dissolution, or a judgment of legal separation is rendered, and the community property is divided. (See *infra*, §188 et seq.)
- (4) Where the marriage is dissolved by death, and the rights of testamentary disposition and succession are involved. (See *infra*, §249 et seq.)

For these and other reasons, the characterization of the property as community or separate is a major problem in dissolution and other proceedings involving the rights of husbands and wives and their successors. (See Rutter Group, 2 Family Law §8.10 et seq.; 19 Proof of Facts 3d 705 [Extent of Community and Separate Interests in Real Property].)

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4. Time of Acquisition.
a. Inception of Title Theory.

11 Witkin Sum. Cal. Law Com Prop § 7

[§ 7] Inception of Title Theory.

Property is not community unless acquired during the marriage. If acquired before celebration or after termination of the marriage it is separate property. (See *supra*, §§4, 5.) But the term "acquired" is an elusive one that may be variously interpreted. (See *In re Marriage of Joaquin* (1987) 193 C.A.3d 1529, 1533, 239 C.R. 175, *infra*, §8; Rutter Group, 2 Family Law §8:70 et seq.; 17 *Hastings L. J.* 815 [characterization when period of acquisition overlaps creation or termination of marriage]; 60 *A.L.R.4th* 217 [real estate or trust property vested before marriage but realized during marriage]; 15A *Am.Jur.2d* (2000 ed.), *Community Property* §24.)

In *Giacomazzi v. Rowe* (1952) 109 C.A.2d 498, 240 P.2d 1020, the court stated the approved "inception of title theory" as follows: "The status of property as separate or community property is fixed as of the time when it is acquired. The word 'acquired' contemplates the inception of title, and as a general rule the character of the title depends upon the existence or nonexistence of the marriage at the time of the incipency of the right by virtue of which the title is finally extended and perfected; the title when so extended and perfected relates back to that time. Stated in another way, the status of title, as belonging to one estate or the other, is determined by the status of the original right, subsequently matured into full title." (109 C.A.2d 500, quoting 11 *Am.Jur.*, p. 187.)

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11 Witkin Sum. Cal. Law Com Prop § 8

[§ 8] Equitable Title Theory.

Even though the legal title is acquired after marriage, if the equitable title was acquired before the marriage, it is separate property. Thus, in *Estate of Hill* (1914) 167 C. 59, 138 P. 690, land was sold without a conveyance, and the purchaser went into possession. Then he married, and later gained legal title by adverse possession. *Held*, the land was his separate property. (167 C. 65.) (See *Giacomazzi v. Rowe* (1952) 109 C.A.2d 498, 500, 240 P.2d 1020, *supra*, §7; Rutter Group, 2 Family Law §8:74.)

In *Ellis v. Ellis* (1950) 97 C.A.2d 808, 218 P.2d 823, the court cited federal cases holding that entry under the Federal Homestead Act gave no title until performance of the conditions, and that the patent must vest the entire title in the entryperson. The court therefore held that, where entry by the husband was made during marriage, but the final performance of conditions took place after an interlocutory decree of divorce, the property was separate; i.e., the inception of the title was after dissolution of the marriage. (97 C.A.2d 813.) (See 24 So. Cal. L. Rev. 195.)

In re Marriage of Joaquin (1987) 193 C.A.3d 1529, 239 C.R. 175, involved the application of the rules on extension of a lease to determine the time of acquisition. Before marriage, the husband leased farm land for 5 years with an option to renew for an additional 5 years. During the marriage the husband exercised the option, and the wife claimed a community interest in the new leasehold. *Held*, the leasehold was the husband's separate property.

(a) An option, on exercise, gives the optionee a right to specific performance relating back to the time it was given; hence, the equitable title to the property was acquired before marriage. (193 C.A.3d 1533.)

(b) The renewal of a lease on new consideration creates a new tenancy. But where, as here, the option is "to renew" for a specified term without execution of a new lease, it is properly regarded as an extension of the original lease. (193 C.A.3d 1534; see 12 Summary (10th), *Real Property*, §527.)

The same theory is followed in personal property cases, and there is less difficulty in its application. (See *Estate of Clark* (1928) 94 C.A. 453, 459, 271 P. 542 [right of action to contest will arose before marriage; money received in compromise after marriage was separate property]; *Waters v. Waters* (1946) 75 C.A.2d 265, 269, 170 P.2d 494, *infra*, §37; *Estate of Hansen* (1949) 91 C.A.2d 610, 613, 205 P.2d 686 [officer's military pay and allowances, paid after death,

were not community property]; *Finley v. Winkler* (1950) 99 C.A.2d Supp. 887, 891, 222 P.2d 345 [wife's right of action for personal injuries suffered prior to marriage was separate property]; *Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 123, 264 P.2d 626 [money earned before marriage is separate property even though it is collected during marriage]; *Foote v. Foote* (1959) 170 C.A.2d 435, 438, 339 P.2d 188 [same].) (On what constitutes "property," see Rutter Group, 2 Family Law §8:70 et seq.)

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11 Witkin Sum. Cal. Law Com Prop § 9

[§ 9] Former Law.

(1) *Wife's Earnings and Accumulations*. Former C.C. 169 provided that "[t]he earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." In 1969, the section became former C.C. 5118 of the Family Law Act. (See *Union Oil Co. v. Stewart* (1910) 158 C. 149, 155, 110 P. 313 [accumulations: wife living apart from husband could gain title to property by adverse possession against him]; *Tagus Ranch Co. v. First Nat. Bank* (1935) 7 C.A.2d 457, 460, 46 P.2d 809.)

(2) *Husband's Earnings*. In *Randolph v. Randolph* (1953) 118 C.A.2d 584, 258 P.2d 547, the husband was granted a divorce for his wife's desertion, and contended that, by abandoning him, she lost any interest in his subsequent earnings. The court held, however, that such a rule could only be established by statute. (118 C.A.2d 585.) (See 43 Cal. L. Rev. 691.) The Legislature responded by amending former C.C. 175 (dealing with nonliability for support of a deserting wife) to provide that the husband's earnings during the period of an "unjustified abandonment" were separate property. On the adoption of the Family Law Act it became former C.C. 5131, with its scope confined to nonliability for support, and is continued without substantive change in *Family C. 4302*. (See *Ottinger v. Ottinger* (1956) 141 C.A.2d 220, 224, 296 P.2d 347 [holding amendment nonretroactive]; *Polk v. Polk* (1964) 228 C.A.2d 763, 773, 39 C.R. 824 [term "abandonment" construed to mean wilful desertion, i.e., leaving with intent not to return]; 43 Cal. L. Rev. 691.)

(3) *Acquisition After Interlocutory Decree*. Under former law, an interlocutory decree was first entered, and this decree did not dissolve the marriage. (See 11 *Summary* (10th), *Husband and Wife*, §108.) Hence, if property was not divided until final judgment, the earnings and accumulations of the husband remained community property, but those of the wife became her separate property under former C.C. 169. In 1959, former C.C. 169.2 was enacted to make the earnings and accumulations of the husband his separate property. (See *Mears v. Mears* (1962) 201 C.A.2d 408, 412, 20 C.R. 214; *Brown v. Barham* (1966) 242 C.A.2d 696, 703, 51 C.R. 718.)

The 1971 amendments to the Family Law Act, continued in the Family Code, cover both spouses and ended the community property classification of earnings, accumulations, or personal injury damages after separation. (See *infra*, §10 et seq.)

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11 Witkin Sum. Cal. Law Com Prop § 10

[§ 10] Current Law.

(1) *Both Spouses Covered.* In 1971, the Family Law Act was amended to make the same provision for earnings and accumulations of husband, wife, and children. This provision was restated without change on enactment of the Family Code. "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." (*Family C. 771(a).*) Similarly, after entry of a judgment of legal separation, the earnings or accumulations of each party are their separate property. (*Family C. 772.*) (See *In re Marriage of Bouquet* (1976) 16 C.3d 583, 587, 128 C.R. 427, 546 P.2d 1371 [1971 amendments are retroactive]; *In re Marriage of Imperato* (1975) 45 C.A.3d 432, 436, 119 C.R. 590, *infra*, §46; *In re Marriage of Barnert* (1978) 85 C.A.3d 413, 424, 149 C.R. 616, *infra*, §213; *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 464, 152 C.R. 668 [statutory rule did not apply to increase in value of shares of corporation in which husband was merely one shareholder; i.e., increase in net worth of corporation did not represent "earnings" of husband]; *In re Marriage of Flockhart* (1981) 119 C.A.3d 240, 243, 173 C.R. 818 [federal employee's statutory "weekly layoff benefits," received to replace lost income, were separate property when received after separation]; *In re Marriage of Doherty* (2002) 103 C.A.4th 895, 899, 126 C.R.2d 919 [wife's mortgage subsidy, to extent received from employer after separation, was separate property earnings because it depended on wife's continued employment]; Rutter Group, 2 Family Law §8:110 et seq.) The same rule applies to personal injury damages. (See *infra*, §41.)

(2) *Exception: Professional Earnings of Minor.* A 1999 amendment to *Family C. 771* carves out an exception to the general rule. The earnings and accumulations of a minor child related to a contract subject to *Family C. 6750* (minor's contracts in art, entertainment, and professional sports; see 1 *Summary* (10th), *Contracts*, §36) remain the sole legal property of that child. (*Family C. 771(b).*)

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 - 3. Valuation Based on Date of Separation.

11 Witkin Sum. Cal. Law Com Prop § 11

[§ 11] Valuation Based on Date of Separation.

(1) *In General. Family C. 771* (supra, §10) qualifies the general rule that, for purposes of dissolution, community asset values should be determined as near to the date of trial as reasonably practicable (see *infra*, §193). If the parties separate, and the earnings of one spouse increase the value of a community asset, the court must apportion; i.e., "[v]aluation on date of separation is important only when it is used in conjunction with the final valuation for apportioning community and separate property." (*In re Marriage of Imperato* (1975) 45 C.A.3d 432, 436, 119 C.R. 590, *infra*, §46 [construing substantively identical predecessor statute].) (See Rutter Group, 2 Family Law §8:110 et seq.)

(2) *Burden of Proof.* The date of separation is subject to proof by a preponderance of the evidence, pursuant to *Ev.C. 115* (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §35). There is no public policy or constitutional basis for a higher standard of proof. The determination of a separation date results in the loss of an economic interest in property by one spouse or the other. Both parties have identical economic interests at risk in contesting the date of separation, and it is appropriate to apply the preponderance standard on the issue because of its roughly equal distribution of the risk of error. The mere fact that property that otherwise might be characterized as community will be considered separate after a certain date is no reason for a higher standard of proof. (*In re Marriage of Peters* (1997) 52 C.A.4th 1487, 1489, 61 C.R.2d 493.)

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11 Witkin Sum. Cal. Law Com Prop § 12

[§ 12] Permanent Separation.

(1) *In General.* The phrase "separate and apart" in *Family C. 771(a)* (supra, §10) means permanent separation with no present intention of resuming marital relations. The critical inquiry is whether the parties' conduct evidences a complete and final break in the marital relationship. While case law has described the phrase as referring to that condition when spouses have "come to a parting of the ways with no present intention of resuming marital relations," that language must be read in conjunction with the prerequisite of a complete and final break in the marital relationship. (*In re Marriage of von der Nuell* (1994) 23 C.A.4th 730, 735, 736, 28 C.R.2d 447 [trial judge erroneously determined that separation date was when husband moved out of the family home; before wife filed for dissolution parties had maintained joint finances, visited frequently, took vacations together, went out socially, sent cards and gifts on special occasions, continued having sexual relations, and attempted to reconcile until husband decided to take early retirement and stop paying spousal support].)

(2) *Physical Separation Is Required.* *In re Marriage of Norviel* (2002) 102 C.A.4th 1152, 126 C.R.2d 148, involved a marital dissolution proceeding in which the trial judge determined that the parties' date of separation was the date on which the husband stated his intention to end the marriage, even though the parties continued to reside in the same home for 2 months afterwards. *Held*, reversed. Under *Family C. 771(a)*, separation does not occur unless the parties are living separate and apart, which requires the contemporaneous conjunction of intent to separate and conduct evidencing that intent. Living apart physically is an indispensable threshold requirement to separation, whether or not it is sufficient, by itself, to establish separation. Typically, this entails each spouse taking up residence at a different address. But even if there may be cases in which parties could remain under the same roof and still live apart physically within the meaning of the statute, this was not such a case. Although the parties slept in separate bedrooms, they had done so for nearly 4 years before the husband announced his decision to end the marriage, and nothing had changed as a result of the husband's decision, except the parties' habit of sometimes taking Sunday dinner alone together. At a minimum, the physical separation must be qualitatively different from the parties' conduct during their ongoing marriage. (102 C.A.4th 1163.)

(3) *Temporary Separation Is Not Sufficient.* "Separate and apart" in *Family C. 771(a)* has no reference to a situation where, by reason of their work, the spouses are temporarily separated, even for considerable periods. (*Makeig v. United*

Sec. Bank (1931) 112 C.A. 138, 143, 296 P. 673 [construing substantively identical predecessor statute]; *Kerr v. Kerr* (1960) 182 C.A.2d 12, 18, 5 C.R. 630 [same; no permanent separation where husband ran away from state hospital, but he and his wife corresponded, she sent him money and visited with him, and he testified that his intention was at all times to return to her]; *In re Marriage of Marsden* (1982) 130 C.A.3d 426, 435, 181 C.R. 910, *infra*, §119 [same; no permanent separation where wife moved into own apartment and filed petition for dissolution, but took no further action on it for over 3 years, continued sexual relations with husband, and consulted marriage counselor]; *In re Marriage of Hardin* (1995) 38 C.A.4th 448, 454, 45 C.R.2d 308 [living apart for 14 years was not determinative of intent not to resume marriage where parties carried on significant economic and social relationship].)

(4) *Extramarital Activities Are Not Separation*. *In re Marriage of Baragry* (1977) 73 C.A.3d 444, 140 C.R. 779, involved a husband "enjoying a captain's paradise" (73 C.A.3d 449). He moved out of the family home, lived with another woman for 4 years, and had no sexual relations with his wife during that period. But he kept in close contact with his family, frequently had dinner at the family home, kept the mailing and voting address, took his wife out socially and sent her anniversary and Christmas greetings, paid the household bills, filed a joint income tax return, and brought his laundry home for his wife to wash and iron. *Held*, the date of separation was the date of the petition for dissolution, and his earnings during the 4-year period were community property. Living in separate residences is not determinative. "Wife was furnishing all the normal wifely contributions to a marriage that husband was willing to accept and most of the services normally furnished in a 20-year-old marriage. ... One who enjoys the benefit of a polygamous lifestyle must be prepared to accept its accompanying financial burdens." (73 C.A.3d 449.) (See Rutter Group, 2 Family Law §8:111 et seq.)

West's Key Number Digest, Husband and Wife k.110 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *In re Marriage of Manfer* (2006) 144 C.A.4th 925, 934, 50 C.R.3d 785 [proper test is whether parties subjectively intended to permanently separate, not whether general public would perceive that parties had permanently separated].



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CHAPTER XVI - Community Property

Witkin Summary of California Law
I. CHARACTERIZATION OF PROPERTY
B. Separate and Community Property.
4. Time of Acquisition.
c. Acquisition While Separated.
5. Accumulations.

11 Witkin Sum. Cal. Law Com Prop § 13

[§ 13] Accumulations.

In re Marriage of Wall (1972) 29 C.A.3d 76, 105 C.R. 201, throws light on the vague term "accumulations." In 1968 the spouses separated and divorce proceedings were commenced. They reconciled without dismissing the action and separated again in March 1971. In April 1971, the wife obtained an order for temporary support of \$ 150 per month, and she earned babysitting fees of \$ 40-45 per month. In May 1971, she bought a \$ 2.50 ticket on the Irish Sweepstakes, and in July 1971, was notified that she had won \$ 120,000. In February 1972, the judge decided the property issues, and awarded the winning ticket (as yet unpaid) to the wife. The husband appealed, claiming a community interest in the ticket. *Held*, judgment affirmed. The term "accumulations" applies to "any property which a person acquires and retains" except that obtained in exchange for community property. (29 C.A.3d 79.) The temporary support payments were not obtained by the wife in exchange for community property; by their nature they cannot be community property of the separated spouses, for their purpose is to prevent diminution of the wife's separate estate until the final determination of the action. (29 C.A.3d 79.)

Christiana v. Rose (1950) 100 C.A.2d 46, 56, 222 P.2d 891, held that the cause of action and damages for wrongful death of a child, or for injuries to a child, were within the category of "accumulations" of the wife having custody. (See 25 San Diego L. Rev. 1070 [characterization of credit acquisitions during postseparation period].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law

I. CHARACTERIZATION OF PROPERTY

B. Separate and Community Property.

5. Separate Property Acquired During Marriage.

11 Witkin Sum. Cal. Law Com Prop § 14

[§ 14] Separate Property Acquired During Marriage.

(1) *In General.* Two obvious categories of separate property are determined by the time of acquisition: property acquired before the marriage is celebrated, and property acquired after its termination. (See *supra*, §5). But, under the definition of separate property in *Family C. 770(a)* (*supra*, §5), and as a result of other statutory and case law developments, there are also a number of kinds of separate property acquired during the marriage:

(a) Property acquired by gift, devise, bequest, or descent. (*Family C. 770(a).*)

(b) Rents, issues, and profits of separate property. (*Family C. 770(a)*; see *Boyd v. Oser* (1944) 23 C.2d 613, 621, 145 P.2d 312 [construing substantively identical predecessor statute; income of property subject to "same attributes of ownership as the capital property"]; 24 A.L.R.4th 453 [appreciation in value of separate property without contribution by either spouse as separate or community property]; *infra*, §121 et seq.)

(c) Property acquired with separate property funds or proceeds. (*Family C. 770(a)*; see, construing substantively identical predecessor statute, *Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 123, 264 P.2d 626; *Kershman v. Kershman* (1961) 192 C.A.2d 18, 21, 13 C.R. 288; *Estate of Ney* (1963) 212 C.A.2d 891, 895, 28 C.R. 442; *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 454, 152 C.R. 668.)

(d) Money borrowed on the credit of separate property. (See *infra*, §99.)

(e) Earnings and accumulations of the spouses while permanently separated. (*Family C. 771*; see *supra*, §10 et seq.)

(f) Property changed from community to separate, by written agreement of the spouses made either before or after marriage and while living together. (*Family C. 850*; see *infra*, §151 et seq.) (On effect of right to reimbursement for party's separate property contributions to acquisition of other spouse's separate property during marriage, see *Family C. 2640(c)*, *infra*, §222.)

(2) *Former Sole Trader Statute.* Former C.C.P. 1811 et seq. provided that the earnings of the wife as a "sole trader" were her separate property. The sole trader statutes were repealed in 1980.

West's Key Number Digest, Husband and Wife k.249(2.1), 249.5

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*(a) *Property acquired by gift, devise, bequest, or descent:* See 38 A.L.R.6th 313 [inherited property as marital or separate property in divorce action].



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CHAPTER XVI - Community Property

Witkin Summary of California Law I. CHARACTERIZATION OF PROPERTY

C. Presumptions.

1. General Presumption of Community Property.

a. Nature and Effect.

11 Witkin Sum. Cal. Law Com Prop § 15

[§ 15] Nature and Effect.

(1) *General Rule.* Under the statutory definition of community property as including all property acquired during marriage that does not come within the specified classes of separate property (*Family C. 760*, supra, §4), a presumption arises that property acquired during the marriage is community. "This presumption is fundamental in the community property system and is an integral part of the community property law not only of this state but of other states and countries where the system is in operation." (See *Wilson v. Wilson* (1946) 76 C.A.2d 119, 126, 172 P.2d 568.) Accordingly, it has been said that "strong" evidence is necessary to overcome it. (See *Estate of Jolly* (1925) 196 C. 547, 553, 238 P. 353; *Simonton v. Los Angeles Trust & Savings Bank* (1928) 205 C. 252, 258, 270 P. 672; *Estate of Duncan* (1937) 9 C.2d 207, 217, 70 P.2d 174 ["This presumption has greater force in cases where the marriage has been a long-continued relation than in cases where the marriage was entered into shortly before the acquisition of the property"]; *Hurley v. Hibernia Savings & Loan Soc.* (1932) 126 C.A. 314, 319, 14 P.2d 574; *Estate of Walsh* (1944) 66 C.A.2d 704, 709, 152 P.2d 750; *Estate of Kane* (1947) 80 C.A.2d 256, 266, 181 P.2d 751; *Pope v. Pope* (1951) 102 C.A.2d 353, 366, 227 P.2d 867; *Estate of Brenneman* (1958) 157 C.A.2d 474, 480, 321 P.2d 86; *Mason v. Mason* (1960) 186 C.A.2d 209, 213, 8 C.R. 784, infra, §113; *Estate of Luke* (1987) 194 C.A.3d 1006, 1014, 1018, 240 C.R. 84; *Rutter Group*, 2 Family Law §8:361 et seq.; 26 Cal. Western L. Rev. 26; 1 So. Cal. L. Rev. 298; 25 So. Cal. L. Rev. 149.)

The presumption is rebuttable, and the trial judge's determination of the sufficiency of the rebutting evidence will usually be upheld. (See *Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 123, 128, 264 P.2d 626; *Morris v. Berman* (1958) 159 C.A.2d 770, 792, 324 P.2d 601; *Estate of Casella* (1967) 256 C.A.2d 312, 326, 64 C.R. 259 [land bought by husband with proceeds from sale of his separate property; trial judge could believe that parties did not understand significance of accountant's method of preparing income tax return]; *In re Marriage of Knickerbocker* (1974) 43 C.A.3d 1039, 1042, 118 C.R. 232, infra, §240; *Abbott Elec. Corp. v. Storek* (1994) 22 C.A.4th 1460, 1467, 27 C.R.2d 845 [following *Casella*; parties' declarations of intent to hold property as joint tenants were sufficient, despite contrary characterizations in dissolution proceeding based on their belief that community property presumption was controlling]; *Gagan v. Gouyd* (1999) 73 C.A.4th 835, 843, 86 C.R.2d 733, infra, §182 [proof that property acquired by married persons during marriage is separate must be by clear and convincing evidence].)

(2) *Exception: Where Marriage Is Dissolved More Than Four Years Before Death.* The presumption that property

acquired during marriage is community property does not apply to property held by a person at the time of the person's death, if the marriage during which the property was acquired was terminated by dissolution more than 4 years before the death. (*Family C. 802.*)

Estate of Layton (1996) 44 C.A.4th 1337, 52 C.R.2d 251, *infra*, §221, held that the exception was applicable in probate proceedings to determine rights in a residence acquired by a husband and wife as joint tenants more than 4 years before the death of one spouse, which occurred after the dissolution of the marriage. (44 C.A.4th 1339, footnote 4.) *Prob.C. 5601*, added in 2001, reverses the rule of the *Layton* case that dissolution or annulment does not sever a joint tenancy between former spouses; but *Prob.C. 5601* does not change the presumption that property acquired *during* marriage in joint tenancy form is community property. (See 14 *Summary* (10th), *Wills and Probate*, §319.)

West's Key Number Digest, Husband and Wife k.262.1(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See *In re Marriage of Ettefagh* (2007) 150 C.A.4th 1578, 1591, 59 C.R.3d 419, 1 Cal. Evidence (4th), *Burden of Proof and Presumptions, Supp.*, §39 [trial judge properly applied preponderance of evidence standard to determine whether community property presumption was overcome; case law on issue was inconclusive and parties' interests at risk in dispute were purely economic and relatively equal]; California Family Law Practice, §§J.58 et seq., P.66 et seq.; 37 *McGeorge L. Rev.* 33.



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CHAPTER XVI - Community Property

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C. Presumptions.

1. General Presumption of Community Property.
 - b. Distinction: Family Expense Presumption.
 1. Theory of Presumption.

11 Witkin Sum. Cal. Law Com Prop § 16

[§ 16] Theory of Presumption.

The cases developed another presumption that the expenses of the family are paid from community funds. "Where the husband, charged with the support of a family, has income derived from his separate property and income from his earnings which are community property, there is no presumption that he has supported the family out of the separate property and preserved intact the community funds. He is at perfect liberty to devote all that is necessary of the community earnings to the family support and to preserve his separate property intact." (*Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 126, 264 P.2d 626.)

Pursuant to this presumption, if there was no excess of income over living expenses, it would be concluded that the community property was consumed, and that any remaining assets of the husband were his separate property. "Evidence that there was no excess of community income over community expenses is as effective to prove that all assets in the name of the defendant are separate property as a specific showing from which separate source each asset flowed." (*Thomasset v. Thomasset*, *supra*, 122 C.A.2d 127; see *Huber v. Huber* (1946) 27 C.2d 784, 792, 167 P.2d 708; *Estate of Arnstein* (1961) 56 C.2d 239, 241, 14 C.R. 809, 364 P.2d 33 [where community income during marriage was maximum of \$ 71,931.25 and living expenses were at least \$ 108,868.40, husband's estate was all separate property]; *Estate of Neilson* (1962) 57 C.2d 733, 742, 22 C.R. 1, 371 P.2d 745, *infra*, §§124, 128; *Estate of Ades* (1947) 81 C.A.2d 334, 338, 184 P.2d 1; *Estate of Smith* (1948) 86 C.A.2d 456, 473, 195 P.2d 842; *Logan v. Forster* (1952) 114 C.A.2d 587, 601, 250 P.2d 730; *Estate of Gibson* (1954) 126 C.A.2d 534, 537, 272 P.2d 807; *Morris v. Berman* (1958) 159 C.A.2d 770, 792, 324 P.2d 601; *Hicks v. Hicks* (1962) 211 C.A.2d 144, 160, 27 C.R. 307; *Patterson v. Patterson* (1966) 242 C.A.2d 333, 342, 51 C.R. 339.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Presumptions.

1. General Presumption of Community Property.
 - b. Distinction: Family Expense Presumption.
2. Contrary Rule of See Case.

11 Witkin Sum. Cal. Law Com Prop § 17

[§ 17] Contrary Rule of See Case.

(1) *See Case*. In *See v. See* (1966) 64 C.2d 778, 51 C.R. 888, 415 P.2d 776, the trial judge followed the then accepted theory "that a proven excess of community expenses over community income during the marriage establishes that there has been no acquisition of property with community funds." (64 C.2d 782.) *Held*, reversed.

(a) "Such a theory, without support in either statutory or case law of this state, would disrupt the California community property system. It would transform a wife's interest in the community property from a 'present, existing and equal interest' ... , into an inchoate expectancy to be realized only if upon termination of the marriage the community income fortuitously exceeded community expenditures. It would engender uncertainties as to testamentary and *inter vivos* dispositions, income, estate and gift taxation, and claims against property." (64 C.2d 782.)

(b) The general presumption of community property may be overcome by tracing the source to separate funds. If it can be shown that community expenses exceeded community income at the time of acquisition, property purchased at that time was necessarily purchased with separate funds, for no other funds were available. (64 C.2d 783.)

(c) If, without fault of the spouse attempting to rebut the presumption (in this case, the husband), it is impossible to ascertain whether community expenses exceeded community income at the time of acquisition, then the method of "recapitulation of the total community expenses and income throughout the marriage" can be used to establish the separate character of the property. (64 C.2d 783.) But "without fault" means without initial fault. "Once he commingles, he assumes the burden of keeping records adequate to establish the balance of community income and expenditures at the time an asset is acquired with commingled property." (64 C.2d 784.)

(d) A spouse who elects to use separate instead of community funds to meet community expenses is not entitled to reimbursement from community assets. The principle underlying the rule that improvement of the other spouse's separate property is a gift to that spouse (*infra*, §115) applies here. "His use of separate property to maintain a standard of living that cannot be maintained with community resources alone no more entitles him to reimbursement from after-acquired community assets than it would from existing community assets." (64 C.2d 785.) It makes no difference that the separate funds were used when the community bank account was exhausted. "The basic rule is that the party

who uses his separate property for community purposes is entitled to reimbursement from the community or separate property of the other only if there is an agreement between the parties to that effect." (64 C.2d 785.)

(e) Contrary expressions in a number of Court of Appeal opinions were disapproved. (64 C.2d 784, 785.) (See Rutter Group, 2 Family Law §8.529 et seq.; 55 Cal. L. Rev. 1180; 19 Stanf. L. Rev. 661; 14 U.C.L.A. L. Rev. 935.)

(2) *Effect of See Case.* In *Beam v. Bank of America* (1971) 6 C.3d 12, 98 C.R. 137, 490 P.2d 257, infra, §§124, 125, 126, the court declared that neither the language of *See* nor the analyses of commentators indicates an abrogation of the family expense presumption. Further, *See* was distinguished on the ground that in that case, the husband *chose* to pay community living expenses from separate funds rather than from community property, and later, despite this election, attempted to claim reimbursement from after-acquired community assets. In the instant case the husband made no conscious choice. (6 C.3d 22.)

In *Estate of Murphy* (1976) 15 C.3d 907, 126 C.R. 820, 544 P.2d 956, the community property claim was asserted against the husband's estate by the surviving wife's executor. The husband's legatees contended that, because the husband's testimony was not available, the burden of proof should be lessened. In rejecting the contention, the court, quoting *See*, pointed out that the burden of establishing a spouse's interest in presumptive community property is not simply that of presenting proof at the time of litigation but also of keeping adequate records. "Murphy had the opportunity during his lifetime to maintain records adequate for tracing the disposition of his separate income. His legatees are bound by the consequences of his declining to do so." (15 C.3d 919.)

In re Marriage of Higinbotham (1988) 203 C.A.3d 322, 249 C.R. 798, involved the use of commingled funds to make payments on the husband's house. To support his claim that the payments were made from separate property, i.e., the rents from the house itself, the husband relied on the "recapitulation" method described in *See*, under which payments may be traced to a separate source by showing that community income throughout the marriage was exhausted by family expenses, so that any sums expended on separate property were necessarily separate in origin. *Held*, the husband failed to rebut the presumption that commingled funds are community funds, and the community acquired an interest in the house.

(a) There was no evidence establishing the actual amounts of community income and expenses over the course of the marriage; the fact that the wife stated that she paid bills from their two accounts, and then used whatever remained to cover family expenses, did not conclusively establish that all of the community funds of both parties were used for living expenses. Also, there was rebuttal evidence establishing that some of the rental income was directly applied to family expenses, and that there were some months in which there was no rental income, i.e., months in which the house payments were necessarily made from community funds. (203 C.A.3d 329.)

(b) The husband claimed that a sufficient basis for recapitulation was afforded by tax returns showing that the annual income from the house exceeded its annual expenses. However, "[e]vidence which merely establishes the availability of separate funds on particular dates without also showing any disposition of the funds is not sufficient proof of tracing to overcome the presumption in favor of community property." (203 C.A.3d 330, quoting *Murphy*.)

(c) Under *See*, the recapitulation method may only be employed when, through no fault of the party asserting a separate interest, it is impossible to ascertain the balance of income and expenditures at the time the separate property was acquired. Here, although the husband did not actively commingle the funds, he willingly turned the record-keeping over to his wife, even after she had asserted a community interest in his house. His attempt to transfer the property to his daughter supported an inference that he was aware of the community claim, but had failed to take any action to guard against it. (203 C.A.3d 330.) (See *In re Marriage of Mix* (1975) 14 C.3d 604, 612, 122 C.R. 79, 536 P.2d 479, citing the text [evidence failed to show that family expenses exhausted community funds]; 25 U.C.L.A. L. Rev. 1255 [*Mix* and *Murphy*].)

West's Key Number Digest, Husband and Wife k.262.1(3), 268(4)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Presumptions.

1. General Presumption of Community Property.
- b. Distinction: Family Expense Presumption.
3. Payments Made After Separation.

11 Witkin Sum. Cal. Law Com Prop § 18

[§ 18] Payments Made After Separation.

(1) *In General.* The issue of reimbursement of a spouse for separate funds used to pay community expenses was considered at length by *In re Marriage of Epstein* (1979) 24 C.3d 76, 154 C.R. 413, 592 P.2d 1165. The parties separated; during the separation period the wife and son remained in the family home, and the husband made all the mortgage, insurance, and tax payments. The trial judge ordered reimbursement. *Held*, reversed.

(a) The presumption of *See v. See* (1966) 64 C.2d 778, 51 C.R. 888, 415 P.2d 776, *supra*, §17, was justified by the natural feelings of mutual affection attending the marital state, and also by the obligation of a spouse to support the other spouse, if necessary out of his separate property. (24 C.3d 83; see 11 *Summary* (10th), *Husband and Wife*, §35 et seq.)

(b) *See*, however, did not consider the situation where payments were made after separation. *In re Marriage of Smith* (1978) 79 C.A.3d 725, 145 C.R. 205, did, and held that the no-reimbursement rule of *See* did not apply, for the following reasons: (1) Where the parties have separated in anticipation of dissolution of the marriage the rational basis for presuming an intention to make a gift is gone. (2) Application of the no-reimbursement rule would discourage payment of community debts after separation, exacerbate the financial and emotional disruption accompanying breakup of the marriage, and perhaps have the effect of impairing the credit reputations of both spouses. (24 C.3d 84; see footnote 2, disapproving contrary language of *In re Marriage of Fischer* (1976) 78 C.A.3d 556, 561, 146 C.R. 384.)

(c) Reimbursement, however, should not be ordered in the following circumstances: (1) under circumstances in which it would be unreasonable to expect it; e.g., where there was an agreement for nonreimbursement; or where the paying spouse intended a gift; or where the payment was made to acquire or preserve an asset that the paying spouse was using and the amount paid was not substantially in excess of the value of the use; (2) where the payment of a community debt was in reality a discharge of the paying spouse's duty to support the other spouse or a child. (24 C.3d 85, citing *Smith*.)

(d) The trial judge, in ordering reimbursement, did not have the benefit of the *Smith* opinion, and did not make findings on these issues. Hence, this part of the judgment was reversed for additional findings, with or without new

evidence. (24 C.3d 86.)

In re Marriage of Reilley (1987) 196 C.A.3d 1119, 242 C.R. 302, involved the husband's postseparation expenditure of separate income to remodel a community property house. The court held that although, under *Epstein*, there was no basis for presuming that the husband intended to make a gift to the community, he was not necessarily entitled to full reimbursement.

(a) If the improvements did not substantially increase the value of the property, full reimbursement might be inequitable where, as here, the result would be substantial elimination of the community equity. (196 C.A.3d 1123.) This approach would be reasonable where the postseparation improvements were the result of a spouse's unilateral decision. (196 C.A.3d 1124.)

(b) However, "[w]e do not hold that increase in value shall be the only measure of reimbursement to be applied. Factors may exist, even where the parties have been living apart at the time community property is improved, which, in equity, will justify reimbursement of the separate contribution in an amount which discounts a pure benefit approach. The evidence may disclose, for example, that the parties agreed that the improvement be made, or the improvement may have been necessary to preserve the asset. We leave consideration of such factors and their effect to the discretion of the trial court." (196 C.A.3d 1124.)

Other cases are to the same effect. (See *In re Marriage of Oldfield* (1979) 94 C.A.3d 259, 263, 156 C.R. 224 [*Epstein* followed where payment of mortgage debt by husband had not yet been made; wife was required to pay one-half the amount]; *In re Marriage of Trantafello* (1979) 94 C.A.3d 533, 543, 156 C.R. 556 [*Epstein* and *Smith* followed]; *In re Marriage of Tucker* (1983) 141 C.A.3d 128, 136, 190 C.R. 127 [*Epstein* followed]; *In re Marriage of Burkhart* (1986) 180 C.A.3d 198, 203, 225 C.R. 390 [same]; *In re Marriage of Stallworth* (1987) 192 C.A.3d 742, 752, 237 C.R. 829 [same]; *In re Marriage of Green* (1989) 213 C.A.3d 14, 22, 261 C.R. 294 [husband's failure to request statement of decision was fatal to challenge that trial judge abused discretion in refusing to allow full reimbursement]; *Rutter Group*, 2 Family Law §8:843 et seq.) (On effect of right to reimbursement under *Family C. 2640*, see *infra*, §222.)

(2) *Where One Spouse Has Exclusive Use of Community Asset*. The right of the community to reimbursement where one party has the exclusive use of a community asset following separation is based on the same principle as the right to reimbursement of a party who uses separate property after separation to pay community debts, as discussed by *Epstein*. Reimbursement is required in both instances, for the value of the use or for the payment from separate property, absent circumstances indicating that it would be unreasonable to expect reimbursement, e.g., a spousal agreement that there not be reimbursement or evidence that the other spouse intended to make a gift. (*In re Marriage of Watts* (1985) 171 C.A.3d 366, 373, 217 C.R. 301 [exclusive use of family residence and medical practice]; *In re Marriage of Bell* (1996) 49 C.A.4th 300, 311, 56 C.R.2d 623, *infra*, §185 [exclusive use of family residence].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Presumptions.

2. Transfer to Married Woman.

a. Former Presumption of Separate Property.

11 Witkin Sum. Cal. Law Com Prop § 19

[§ 19] Former Presumption of Separate Property.

(1) *Nature and Scope of Presumption.* At one time, by statute (former C.C. 164), property acquired by a married woman by an instrument in writing was presumed to be her separate property, unless a contrary intention was expressed in the instrument. (See *Estate of Lissner* (1938) 27 C.A.2d 570, 577, 81 P.2d 448 [applying presumption to husband's promissory note in favor of wife]; *Hogevoll v. Hogevoll* (1943) 59 C.A.2d 188, 192, 138 P.2d 693; 17 So. Cal. L. Rev. 64.) If there was no writing, the special presumption did not apply; hence, property orally transferred to the wife was presumed community. (*Estate of Walsh* (1944) 66 C.A.2d 704, 707, 152 P.2d 750.)

(2) *Effect of Presumption: Bona Fide Purchasers.* The presumption of former C.C. 164 was conclusive in favor of "any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property." Hence, bona fide purchasers, who acquired property from the wife that stood in her name, were protected. (See *Palmer v. Palmer* (1951) 101 C.A.2d 819, 823, 226 P.2d 613.)

(3) *Effect of Presumption: Others.* As to all except bona fide purchasers, the presumption was rebuttable. Hence, in dividing the property on divorce or determining its succession on death, or in an action by the husband to set aside the wife's transfer, or in any other situation in which the issue arose, evidence could be offered to overcome the presumption and to establish its community character. But where the conveyance to the wife was made with the husband's knowledge, a further judicially created presumption had to be rebutted: that by permitting her to take the property in her name he intended a gift to her. (See *Estate of Nelson* (1930) 104 C.A. 613, 620, 286 P. 439.)

The presumption could be overcome by the husband's testimony or by circumstantial evidence. (See *Nichols v. Mitchell* (1948) 32 C.2d 598, 197 P.2d 550 [quiet title action by creditor of husband, who purchased property at execution sale]; *Durrell v. Bacon* (1934) 138 C.A. 396, 401, 32 P.2d 644; *Williamson v. Kinney* (1942) 52 C.A.2d 98, 102, 125 P.2d 920; *Freer v. Wells Fargo Bank* (1946) 75 C.A.2d 150, 154, 170 P.2d 491 [presumption was overcome as to one parcel, but not as to others]; *Estate of Piatt* (1947) 81 C.A.2d 348, 352, 183 P.2d 919; *Estate of Baer* (1947) 81 C.A.2d 830, 835, 185 P.2d 412; *Steward v. Paige* (1949) 90 C.A.2d 820, 824, 203 P.2d 858 [action by husband against wife's trustee in bankruptcy]; *Sloper v. Sloper* (1949) 91 C.A.2d 238, 244, 204 P.2d 910; *De Boer v. De Boer* (1952) 111 C.A.2d 500, 504, 244 P.2d 953; *Geller v. Anolik* (1954) 127 C.A.2d 21, 25, 273 P.2d 29 [testimony of husband that

he did not intend gift]; *Guerin v. Guerin* (1957) 152 C.A.2d 696, 704, 313 P.2d 902 [property settlement describing all property as community, plus circumstantial evidence].) (For cases in which presumption was not overcome, see *Halloran v. Isaacson* (1949) 95 C.A.2d 357, 361, 213 P.2d 19; *Nevins v. Nevins* (1954) 129 C.A.2d 150, 154, 276 P.2d 655; *Estate of Bernatas* (1958) 162 C.A.2d 693, 696, 328 P.2d 539; 17 So. Cal. L. Rev. 64.)

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 - 2. Transfer to Married Woman.
 - b. Abolition of Presumption.

11 Witkin Sum. Cal. Law Com Prop § 20

[§ 20] Abolition of Presumption.

Family C. 803(a) restates the presumption (*supra*, §19) as to property, or an interest or encumbrance on property, acquired by a married woman by an instrument in writing before January 1, 1975. Thus, as to property acquired by a married woman after that date, the general presumption of community property stated in *Family C. 760* (see *supra*, §4) applies.

In re Marriage of Ashodian (1979) 96 C.A.3d 43, 157 C.R. 555, construing substantively identical predecessor statutes, discusses the purpose of the change and the method of applying former law to pre-1975 transactions. The wife, a real estate broker, used community funds to buy and sell numerous properties in her own name. The husband, a bus driver, was not interested in the business and did not participate except to sign grant deeds to two parcels at her request. *Held*, the trial judge's finding that properties so purchased were the wife's separate property was supported by sufficient evidence.

(a) The former presumption was designed to protect a married woman's title when the husband had exclusive management and control of community property; i.e., it was established to implement a public policy and consequently was a presumption affecting the burden of proof. (96 C.A.3d 47; see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §56.) The long history of decisional law supporting the presumption requires stronger proof than a preponderance of evidence to overcome it. It must be rebutted by clear and convincing evidence. (96 C.A.3d 47.)

(b) That evidence was not produced by the husband. "While pursuit of separate careers by spouses who do not discuss their business with each other cannot be deemed 'abandonment' without more, here the disavowal of having anything to do with the wife's transactions and the signing of grant deeds to such properties constitutes sufficient evidence of a gift." (96 C.A.3d 50.)

West's Key Number Digest, Husband and Wife k.262.1(7)

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a. To Wife and Stranger.

11 Witkin Sum. Cal. Law Com Prop § 21

[§ 21] To Wife and Stranger.

(1) *Former Presumption of Tenancy in Common.* Former C.C. 164 provided that if property was acquired "by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument."

(2) *Abolition of Presumption.* *Family C. 803(b)* restates the former presumption as to property acquired before January 1, 1975, but property acquired after that date is governed by the general presumption of community property under *Family C. 760*. (See *supra*, §20.)

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b. To Wife and Husband.

1. Community Property.

11 Witkin Sum. Cal. Law Com Prop § 22

[§ 22] Community Property.

(1) *Former Law.* Originally, the tenants in common presumption (supra, §21) applied to transfers to husband and wife, and it was held that the parties become tenants in common, the interest of the wife being separate property, and that of the husband, community property. (*Dunn v. Mullan* (1931) 211 C. 583, 587, 296 P. 604; *Estate of Regnart* (1929) 102 C.A. 643, 645, 283 P. 860.) The rule was changed in 1935.

(2) *Presumption in Favor of Community Property.* Family C. 803(c) now provides that when property is "acquired by husband and wife by an instrument in which they are described as husband and wife," the presumption, in the absence of a different intention expressed, is that the property is community. (See *In re Marriage of Cademartori* (1981) 119 C.A.3d 970, 975, 976, 174 C.R. 292; Rutter Group, 2 Family Law §8:39.) (On presumption in dissolution proceedings that all property acquired during marriage in joint form is community property, see *infra*, §220 et seq.)

In *Cardew v. Cardew* (1961) 192 C.A.2d 502, 13 C.R. 620, the presumption was held applicable to a conveyance to "George B. Cardew and Helen T. Cardew, his wife." The court said: "We think that in this case the parties are 'described as husband and wife' in the deed. We can see no difference between 'to A and B, his wife' and 'to A, husband and B, wife,' or 'to A and B, husband and wife' or 'as husband and wife.' B cannot be 'his (A's) wife' unless A is her husband. To hold otherwise is technical in the extreme." (192 C.A.2d 514.) (But see *Wilcox v. Berry* (1948) 32 C.2d 189, 192, 195 P.2d 414 ["Jess G. Berry and/or Violet A. Berry" was not a description as "husband and wife"].)

The presumption is rebuttable. (See *Tompkins v. Bishop* (1949) 94 C.A.2d 546, 550, 211 P.2d 14 [evidence of agreement between spouses that all property of wife was to be her separate property]; *In re Marriage of Wall* (1973) 30 C.A.3d 1042, 1048, 106 C.R. 690; *Estate of Petersen* (1994) 28 C.A.4th 1742, 1747, 34 C.R.2d 449 [presumption rebutted by grant deed stating that property was held in joint tenancy; second presumption that, upon death of spouse, property is as described in deed was upheld, in absence of contrary evidence].)

In re Marriage of Cademartori, supra, involved the purchase of a commercial warehouse by "John P. Cademartori and Sandy Cademartori, his wife." The trial judge concluded that John's tracing the source of the downpayment to his separate property was sufficient to rebut the presumption that the warehouse was community property. *Held*, reversed.

(a) The general statutory presumption that property acquired during marriage is community property (see supra, §4) may be rebutted by tracing the source of the funds used to acquire the property to separate property. (119 C.A.3d 973.) However, *In re Marriage of Lucas* (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285, infra, §219, involving the single-family residence presumption of former C.C. 5110 (now *Family C. 760*), held that the presumption could only be rebutted by a common understanding or agreement that the property traceable to the separate property was to remain separate. That decision's use of all-encompassing language concerning the "form of title" presumptions left little doubt that such an agreement or understanding is also necessary to rebut the presumption arising from an instrument of conveyance describing the spouses as husband and wife. (119 C.A.3d 975.)

(b) Here, there was no evidence of an agreement that the warehouse was separate property, and no possibility of that evidence because the parties agreed that the form of title to the warehouse was never discussed. Hence, the presumption was not rebutted, and the warehouse must be deemed to be community property. (119 C.A.3d 976.)

(3) *Accounts in Certain Financial Institutions*. *Prob.C. 5305* restates the general presumption that property of the spouses is community (see supra, §15) as to multiparty accounts. If parties to an account are married to each other, their net contribution to the account is presumed to be and remain their community property, regardless of whether they are described as husband and wife in the deposit agreement. (*Prob.C. 5305(a)*.) The presumption may be rebutted if (a) the sums claimed to be separate property can be traced to a separate property source, unless it is proved that the parties agreed in writing that those sums would be their community property, or (b) the parties made a written agreement, separate from the deposit agreement, expressly providing that the sums on deposit were not to be community property. (*Prob.C. 5305(b)*.) (On Multiple-Party Accounts Law, see *Prob.C. 5100* et seq., 4 *Summary* (10th), *Negotiable Instruments*, §77 et seq.)

An "account" is defined as "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement." (*Prob.C. 5122(a)*.) It does not include accounts established for deposit of funds of a partnership, joint venture, or other business association; accounts controlled by one or more persons as agent or trustee for a corporation, unincorporated association, or charitable or civic organization; regular fiduciary or trust accounts where the relationship is established other than by deposit agreement; or accounts established for the deposit of funds of the estate of a ward, conservatee, or decedent. (*Prob.C. 5122(b)*.)

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2. Exception: Driving With Permission Law.

11 Witkin Sum. Cal. Law Com Prop § 23

[§ 23] Exception: Driving With Permission Law.

The presumption of community property arising from a transfer to wife and husband (*Family C. 803(c)*, supra, §22) had the undesirable effect of imputing negligence under the driving with permission law (*Veh.C. 17150*). An exception was therefore enacted in 1965; the presumption is inapplicable in an action under *Veh.C. 17150* "with respect to the acquisition of a motor vehicle by a married woman and her husband." (*Veh.C. 17150.5*.) (On methods of registration and transfer of motor vehicles by two or more persons, see *Veh.C. 4150.5, 5600.5*; 13 *Summary* (10th), *Personal Property*, §35.)

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11 Witkin Sum. Cal. Law Com Prop § 24

[§ 24] In General.

(1) *Capacity To Contract*. Subject to the duties imposed on fiduciaries (see *infra*, §133), spouses may enter into property transactions with each other, or with any other person, that they might if unmarried. (*Family C. 721(a)*.)

(2) *Nature of Marital Agreements*. Parties contemplating marriage may enter into a premarital or other marital agreement. (See *In re Marriage of Dawley* (1976) 17 C.3d 342, 349, 131 C.R. 3, 551 P.2d 323; A.L.I., Principles of the Law of Family Dissolution §§7.01, 7.02; Rutter Group, 2 Family Law, Chap. 9; Cal. Civil Practice, 2 Family Law Litigation, §8:87 et seq. [sample agreement]; Cal. Transactions Forms, 1 Family Law, Premarital Agreements, Chap. 1; 92 Cal. L. Rev. 215 [postmarital agreements]; 116 Harv. L. Rev. 2075 [future of antenuptial agreement law]; 33 Loyola L.A. L. Rev. 1245 [premarital agreements and spousal support waivers]; 22 San Diego L. Rev. 627; 36 U.S.F. L. Rev. 151 [scope and enforceability of premarital agreements]; 41 Am.Jur.2d (1995 ed.), Husband and Wife §112 et seq.; 14 Am.Jur. P.P. Forms (1996 ed.), Husband and Wife, Form 51 et seq.; 5 Am.Jur. Legal Forms 2d (1997 ed.), §61:11 et seq.; 9B Am.Jur. Legal Forms 2d (2002 ed.), §139:2 et seq.; 14 Proof of Facts 2d 755 [transfer of assets in fraud of spouse's antenuptial contractual rights]; 1 Summary (10th), Contracts, §629.) (On contractual agreements of unmarried cohabitants, see *infra*, §271 et seq.)

(3) *Statutory Framework*. The provisions of the Family Code concerning marital agreements are set forth in three chapters:

- (a) General Provisions. (*Family C. 1500 et seq.*)
- (b) Uniform Premarital Agreement Act. (*Family C. 1600 et seq.*)
- (c) Agreements Between Husband and Wife. (*Family C. 1620.*)

(4) *Uniform Act*. *Family C. 1600 et seq.*, the Uniform Premarital Agreement Act, became effective January 1, 1986. (*Family C. 1601.*) The validity and effect of premarital agreements made before that date are determined by prior law. (*Family C. 1503.*) (See 9C U.L.A. (Master Ed.), p. 35; *Family C. 3* [construction of Act].)

(5) *Authority To Alter Property Rights*. The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or a marital property agreement. (*Family C. 1500.*) "Premarital agreement" is defined

as an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage. (*Family C. 1610(a)*; see 33 *Loyola L.A. L. Rev.* 1245 [premarital agreements].) "Property" is defined as an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. (*Family C. 1610(b)*.) (See *infra*, §25 et seq.)

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(2) *Nature of Marital Agreements*. See California Family Law Practice, §U.100 et seq.; 41 *Am.Jur.2d* (2005 ed.), *Husband and Wife* §81 et seq.



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11 Witkin Sum. Cal. Law Com Prop § 25

[§ 25] Requisites of Premarital Agreements.

(1) *Effective Upon Marriage.* "A premarital agreement becomes effective upon marriage." (*Family C. 1613.*)

(2) *Formalities.* A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration. (*Family C. 1611*; see *In re Marriage of Shaban (2001) 88 C.A.4th 398, 401, 105 C.R.2d 863* [writing was insufficient].) The Comment to the Uniform Act, §2 (9C U.L.A. (Master Ed.), p. 42), makes these observations:

(a) The section states the common requirement of writing and signing, but dispenses with other formal requirements such as notarization or acknowledgment.

(b) It also restates "the almost universal rule" that marriage is the consideration for the agreement. "The primary importance of this rule has been to provide a degree of mutuality of benefits to support the enforceability of a premarital agreement."

(3) *Capacity of Parties.* Because a premarital agreement is a contract, the parties must have capacity to contract; however, "[t]hose persons who lack the capacity to contract but who under other provisions of law are permitted to enter into a binding agreement may enter into a premarital agreement under those other provisions of law." (Uniform Act, §2, Comment.) *Family C. 1501* provides that a "minor may make a valid premarital agreement or other marital property agreement if the minor is emancipated or is otherwise capable of contracting marriage."

(4) *Recording.* A premarital agreement or other marital property agreement that is executed and acknowledged or proved in the manner required for a grant of real property may be recorded in each county in which real property affected by the agreement is situated. (*Family C. 1502(a).*) Recording or nonrecording has the same effect as recording or nonrecording a grant of real property. (*Family C. 1502(b)*; see 12 *Summary* (10th), *Real Property*, §316 et seq.)

(5) *Amendment or Revocation.* After marriage, a premarital agreement may be amended or revoked only by the same formalities required for its execution, i.e., a writing signed by the parties. The amended agreement or the revocation is enforceable without consideration. (*Family C. 1614.*)

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11 Witkin Sum. Cal. Law Com Prop § 26

[§ 26] Subjects of Premarital Agreements.

(1) *Permissible Subjects.* The parties to a premarital agreement may contract with respect to the following:

(a) Their rights and obligations in any property of either or both of them, whenever and wherever acquired or located. (*Family C. 1612(a)(1).*)

(b) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property. (*Family C. 1612(a)(2).*)

(c) The disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event. (*Family C. 1612(a)(3).*)

(d) The making of a will, trust, or other arrangement to carry out the provisions of the agreement. (*Family C. 1612(a)(4).*)

(e) The ownership rights in and disposition of the death benefit from a life insurance policy. (*Family C. 1612(a)(5).*)

(f) The choice of law governing construction of the agreement. (*Family C. 1612(a)(6).*)

(g) Any other matter, including the parties' personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty. (*Family C. 1612(a)(7).*) (On agreements violating public policy, see *infra*, §32.)

(2) *Limitations on Restrictions to Parties' Support Obligations.* *Family C. 1612* limits the ability of premarital agreements to restrict the parties' duty to provide child or spousal support:

(a) A child's right to support may not be adversely affected by a premarital agreement. (*Family C. 1612(b).*)

(b) A premarital agreement provision as to spousal support, including without limitation a provision for waiver of support, is not enforceable if (1) the spouse against whom enforcement of the provision is sought was not represented by independent counsel when the agreement containing the provision was signed, or (2) the provision is unconscionable

at the time of enforcement. However, an otherwise unenforceable spousal support provision does not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel. (*Family C. 1612(c)*; for similar requirement to show that premarital agreement was executed voluntarily, see *Family C. 1615(c)*, *infra*, §29.) (See *In re Marriage of Pendleton & Fireman* (2000) 24 C.4th 39, 49, 99 C.R.2d 278, 5 P.3d 839, *infra*, §32 [waiver, when made voluntarily by parties who are aware of its effect, does not offend contemporary public policy and is therefore permitted under *Family C. 1612*].)

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4. Defenses in Action To Enforce Premarital Agreement.

a. In General.

11 Witkin Sum. Cal. Law Com Prop § 27

[§ 27] In General.

The Comment to §6 of the Uniform Act notes that the conditions of enforceability of premarital agreements are comparable to concepts expressed in the statutory and decisional law of many jurisdictions. The primary defenses that may be raised in an action to enforce an agreement include the following:

- (1) Failure to comply with the formalities or other requisites for marital agreements. (See *supra*, §25.)
- (2) Invalid restrictions on the duty to provide child and spousal support. (See *supra*, §26.)
- (3) Involuntary or unconscionable agreements. (See *infra*, §§28, 29.)
- (4) A marriage declared void. (See *infra*, §30.)
- (5) Statute of limitations and equitable defenses. (See *infra*, §31.)
- (6) Agreements violating public policy. (See *infra*, §32.) (On restrictions on alterations of spouses' legal relations, see *infra*, §33.)

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1. In General.

11 Witkin Sum. Cal. Law Com Prop § 28

[§ 28] In General.

A premarital agreement is unenforceable if the party against whom enforcement is sought proves either of the following:

(1) The party did not execute the agreement voluntarily. (*Family C. 1615(a)(1).*)

(2) The agreement was unconscionable when executed *and* before execution the party (a) was not provided a fair, reasonable, and full disclosure of the other party's property or financial obligations, (b) did not voluntarily, expressly, and in writing waive any right to disclosure beyond what was provided, and (c) did not have, or reasonably could not have had, an adequate knowledge of the other party's property or financial obligations. (*Family C. 1615(a)(2).*) The unconscionability of a premarital agreement is an issue to be decided by the court as a matter of law. (*Family C. 1615(b).*) (On unconscionable contracts generally, see 1 *Summary* (10th), *Contracts*, §322 et seq.)

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2. Lack of Independent Counsel.

11 Witkin Sum. Cal. Law Com Prop § 29

[§ 29] Lack of Independent Counsel.

(1) *Bonds Case. In re Marriage of Bonds (2000) 24 C.4th 1, 99 C.R.2d 252, 5 P.3d 815*, involved a premarital agreement that S and B entered into the day before their wedding, and in which each waived any interest in the earnings and acquisitions of the other during marriage. When the couple divorced 6 years later, the trial court upheld the agreement. The Court of Appeal reversed, concluding that because S, unlike B, was not represented by counsel when she signed the agreement, and had not effectively waived counsel, the voluntariness of the agreement was subject to strict scrutiny. Applying this standard, the Court of Appeal determined that S did not enter into the agreement voluntarily: S was not represented by independent counsel when she executed the agreement, she had limited English language skills and lacked legal or business sophistication, she did not understand the meaning of the agreement and the consequences of signing it, and she was threatened with cancellation of the wedding if she did not sign. *Held*, substantial evidence supported the trial court's determination that the agreement was voluntarily executed.

(a) *Absence of independent counsel as factor. Family C. 1615* regulates the enforceability of premarital agreements. Under that statute, and in light of its legislative history and that of the Uniform Premarital Agreement Act on which it is modeled, a party seeking to avoid a premarital agreement may prevail by showing that the agreement was involuntary. No state has made the presence of independent counsel a prerequisite to enforceability. It is clear from decisions interpreting the statute in other jurisdictions, the Official Comment to the Uniform Act, and cases cited in that Comment, that the lack of the assistance of counsel is simply one factor in determining enforceability. Furthermore, where the Legislature has intended that the presence of independent counsel be a prerequisite to the enforceability of an agreement, it has explicitly so provided. (*24 C.4th 17.*)

(b) *Strict scrutiny is not required.* Although the ability of the party challenging a premarital agreement to obtain independent counsel is an important factor in determining whether the agreement was entered into voluntarily, it is not appropriate to subject an agreement to strict scrutiny when the less sophisticated party does not have independent counsel and has not waived counsel according to exacting waiver requirements. To require strict scrutiny under these circumstances would effectively shift the burden of proof on the issue of voluntariness to the party seeking to enforce the agreement, even though *Family C. 1615* expressly places the burden on the party challenging the agreement. Moreover, the Uniform Act was intended to enhance the enforceability of premarital agreements, and this goal would

not be furthered if agreements were presumed to be of doubtful voluntariness unless both parties were represented by independent counsel. (24 C.4th 24.)

(c) *Commercial contracts distinguished.* Contrary to B's assertion, premarital agreements must be distinguished from commercial contracts. Marriage is a highly regulated institution, and freedom of contract with respect to marital arrangements is tempered with statutory requirements and case law expressing social policy with respect to marriage in a way that commercial contracts are not. Thus, subtle coercion that would not be considered in a challenge to a commercial contract may be considered in the context of a premarital agreement. The issue of voluntariness must be examined in the unique context of the marital relationship. (24 C.4th 24.)

(d) *Marital settlement agreements distinguished.* Contrary to S's assertion, premarital agreements must also be distinguished from marital settlement agreements. Married persons are in a fiduciary relationship to each other, and when they enter into an agreement in which one party gains an advantage, that party bears the burden of demonstrating that the agreement was not obtained through undue influence. Parties who are not yet married, on the other hand, are not in a fiduciary relationship. The Uniform Act's goal of enhancing the enforceability of premarital agreements would be undermined by presuming the existence of a confidential or fiduciary relationship between prospective spouses. Moreover, there is no authority to show that the Legislature intended the policy of the community property law favoring the equal division of community property in marital settlement agreements to apply to premarital agreements. (24 C.4th 27.)

(e) *Substantial evidence supports enforceability.* The trial court's conclusion that S voluntarily entered into the premarital agreement is supported by substantial evidence. There was evidence that S had stated that she understood the agreement and had expressed a desire to sign it. S was advised at least a week before execution of the agreement that she had the right to obtain counsel, but declined to do so. At the meeting where the agreement was executed, B's attorneys read the agreement to S paragraph by paragraph and explained its nature and consequences. B testified that from the beginning of their relationship, S had agreed that the parties' earnings and acquisitions should be separate, and B's attorneys testified that S stated her intent to keep marital property separate. The couple's Las Vegas wedding was impromptu, with few guests, and could have been rescheduled without undue embarrassment had S wanted time to consider the agreement or obtain counsel. Moreover, there was evidence that S was an intrepid person whose will was not easily overborne. (24 C.4th 31.) (See *Estate of Gagnier* (1993) 21 C.A.4th 124, 129, 26 C.R.2d 128, 14 Summary (10th), *Wills and Probate*, §324 [waiver in premarital agreement of right to take statutory share of spouse omitted from will was valid despite wife's lack of independent legal counsel, where there was no basis for finding agreement unenforceable under former C.C. 5315 (now *Family C. 1615*)].)

(2) *Bonds Abrogated.* The 2001 Legislature largely nullified the *Bonds* holding by adding *Family C. 1615(c)*, which provides that a premarital agreement may not be deemed voluntary unless the court finds in writing or on the record all of the following:

(a) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the premarital agreement or, after being advised to seek independent counsel, expressly waived that representation in a separate writing. (*Family C. 1615(c)(1)*.) (For similar requirement to enforce spousal support provision in premarital agreement, see *Family C. 1612(c)*, *supra*, §26.)

(b) The party against whom enforcement is sought had at least 7 calendar days between the time the party was first presented with the premarital agreement and advised to seek independent counsel and the time the agreement was signed. (*Family C. 1615(c)(2)*.)

(c) The party against whom enforcement is sought, if unrepresented by independent legal counsel, was fully informed of the terms and basic effect of the premarital agreement and of the rights and obligations the party was giving up by signing the agreement, and was proficient in the language in which the explanation was made and in which the agreement was written. The explanation must be memorialized in writing and delivered to the party prior to signing the

agreement. On or before signing the agreement, the unrepresented party must execute a document declaring that the party received the required explanation and indicating who provided the explanation. (*Family C. 1615(c)(3).*)

(d) The premarital agreement and the writings executed under *Family C. 1615(c)(1)*, (c)(2), (c)(3) were not executed under duress, fraud, or undue influence, and the parties did not lack the capacity to enter into the agreement. (*Family C. 1615(c)(4).*)

(e) Any other factors the court deems relevant. (*Family C. 1615(c)(5).*) (See *In re Marriage of Friedman* (2002) 100 C.A.4th 65, 72, 122 C.R.2d 412, 1 Cal. Proc. (4th), Attorneys, Supp., §155 [*Family C. 1615(c)* does not apply to postnuptial agreements]; *Rest.3d, Property (Wills and Other Donative Transfers)* §9.4 [validity of premarital agreement that waives spouse's statutory rights (e.g., elective share) and *Bonds*]; 36 U.S.F. L. Rev. 151 [discussing *Bonds* and subsequent legislation]; 53 A.L.R.4th 85 [circumstances surrounding execution, particularly presence or absence of independent counsel].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Bonds Abrogated.*

In re Marriage of Friedman case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §130.



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4. Defenses in Action To Enforce Premarital Agreement.
c. Void Marriage.

11 Witkin Sum. Cal. Law Com Prop § 30

[§ 30] Void Marriage.

"If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result." (*Family C. 1616.*) (See 46 A.L.R.3d 1403 [enforcement of premarital agreement where marriage is subsequently declared void].)

The Comment to §7 of the Uniform Act explains: "Where parties have married and lived together for a substantial period of time and one or both have relied on the existence of a premarital agreement, the failure to enforce the agreement may well be inequitable. This section, accordingly, provides the court discretion to enforce the agreement to the extent necessary to avoid the inequitable result." (9C U.L.A. (Master Ed.), p. 56.)

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4. Defenses in Action To Enforce Premarital Agreement.

d. Statute of Limitations and Equitable Defenses.

11 Witkin Sum. Cal. Law Com Prop § 31

[§ 31] Statute of Limitations and Equitable Defenses.

(1) *Limitation of Actions.* Any statute of limitations applicable to an action seeking relief under a premarital agreement is tolled during the marriage. (*Family C. 1617.*) This provision is designed to avoid the potentially disruptive effect of compelling litigation between the parties in order to escape the running of the statute. (Uniform Act, §8, Comment; 9C U.L.A. (Master Ed.), p. 56.)

(2) *Equitable Defenses.* Despite the tolling of the statute of limitations, a party is not completely free to sit on his or her rights. Equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. (*Family C. 1617.*) (See *In re Marriage of Garrity & Bishton* (1986) 181 C.A.3d 675, 683, 226 C.A.3d 485 [refusing to rescind agreement based on wife's postseparation conduct in allegedly repudiated agreement and failing to perform her contractual promises]; 56 A.L.R.4th 998 [behavior, during marriage, of parties to premarital agreement as abandonment, estoppel, or waiver of contractual rights].)

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4. Defenses in Action To Enforce Premarital Agreement.

e. Agreements Violating Public Policy.

11 Witkin Sum. Cal. Law Com Prop § 32

[§ 32] Agreements Violating Public Policy.

Under *Family C. 1612(a)(7)* (see *supra*, §26), the parties in a premarital agreement may contract as to any matter "not in violation of public policy or a statute imposing a criminal penalty." The following are illustrations of invalid agreements.

(1) *Invalid Waiver of Right to Support*. A premarital agreement relating to the disposition of property rights that does not seek to alter legal support obligations is valid; but one that also relieves a spouse from the obligation of supporting the other spouse during the marriage is invalid to that extent. (See *In re Marriage of Higgason* (1973) 10 C.3d 476, 485, 110 C.R. 897, 516 P.2d 289.)

(2) *Agreement for Compensation on Divorce*. A contract that provides for a substantial payment to a spouse in the event of dissolution of the marriage is regarded as encouraging divorce and is consequently illegal. (See *In re Marriage of Noghrey* (1985) 169 C.A.3d 326, 329, 215 C.R. 153, 1 Summary (10th), *Contracts*, §622; *In re Marriage of Dajani* (1988) 204 C.A.3d 1387, 1389, 251 C.R. 871; 53 A.L.R.4th 22 [modern status of views on validity of premarital agreements contemplating divorce or separation]; 53 A.L.R.4th 161 [modern status on validity of premarital agreements governing support or property rights on divorce or separation as affected by fairness or adequacy of terms].)

(3) *Agreement Imposing Penalty for Fault During Marriage*. A contract that penalizes a spouse for misconduct during the marriage violates the public policy favoring no fault divorce embodied in *Family C. 2310* (see 11 Summary (10th), *Husband and Wife*, §60 et seq.), and is therefore unenforceable under C.C. 1667 (unlawful contracts). (See *Diosdado v. Diosdado* (2002) 97 C.A.4th 470, 474, 118 C.R.2d 494, 11 Summary (10th), *Husband and Wife*, §59 [postmarital contract requiring spouse who is guilty of sexual infidelity to pay liquidated damages to other spouse on dissolution of marriage]; *In re Marriage of Mehren & Dargan* (2004) 118 C.A.4th 1167, 1171, 13 C.R.3d 522 [postmarital contract requiring husband to forfeit his interest in certain community property should he use illicit drugs; following *Diosdado*].)

(4) *Distinction: Compensation Making Marriage Economically Feasible*. *In re Marriage of Bellio* (2003) 105 C.A.4th 630, 129 C.R.2d 556, involved a premarital agreement requiring the husband to pay the wife \$ 100,000 on their divorce. The agreement further stipulated that their separate property would remain separate property and that the

earnings and accumulations during the marriage would be held as separate property. The husband was a multimillionaire. When the agreement was signed, the wife was dependent on spousal support from an earlier marriage, and that support terminated on remarriage. The trial court refused to enforce the agreement, relying on the *Noghrey* and *Dajani* decisions. *Held*, reversed.

(a) Public policy renders a premarital agreement void insofar as its terms encourage or promote the dissolution of the marriage. Terms that encourage or promote dissolution offend the public policy to foster and protect marriage. On the other hand, neither reordering property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends this policy. "It is only when the terms of an agreement go further--when they promote and encourage dissolution, and thereby threaten to induce the destruction of a marriage that might otherwise endure--that such terms offend public policy." (105 C.A.4th 632, quoting *In re Marriage of Dawley* (1976) 17 C.3d 342, 131 C.R. 3, 551 P.2d 323.)

(b) *Noghrey* was correctly decided on its facts. The property involved in that case--the husband's house and the greater of \$ 500,000 or one-half of his assets--was so substantial that the premarital agreement "threatened to induce the destruction of a marriage that might otherwise endure" under the *Dawley* test. On the other hand, *Dajani* was wrongly decided. A dowry worth only \$ 1,700, payable upon dissolution, was insufficient to seriously jeopardize a viable marriage. (105 C.A.4th 634.)

(c) Unlike *Noghrey*, the \$ 100,000 payment provision here did not threaten the marriage relationship. It was the product of realistic planning, accounting for the possibility of dissolution. The wife's need for the \$ 100,000 payment provision arose from her dependence on spousal support from her former spouse, which would terminate on remarriage. The trial court expressly found that the provision was intended to compensate wife for the loss of this support. The purpose of the \$ 100,000 payment provision was to ensure that, if the husband died or the marriage was dissolved, the wife would be no worse off than she would have been had she remained single. Such a provision cannot reasonably be construed as "threatening to induce the destruction of a marriage that might otherwise endure." Rather, the provision made it economically feasible for the wife to enter into the marriage. It had the effect of encouraging rather than discouraging marriage. (105 C.A.4th 634.)

(5) *Distinction: Waiver of Spousal Support*. The waiver of spousal support on dissolution in a premarital agreement is not per se unenforceable. A waiver, when made voluntarily by parties who are aware of its effect, does not offend contemporary public policy and is therefore permitted under *Family C. 1612*. (See *In re Marriage of Pendleton & Fireman* (2000) 24 C.4th 39, 49, 99 C.R.2d 278, 5 P.3d 839.) However, *Family C. 1612(c)*, added in 2001, significantly limits waivers of spousal support in premarital agreements. (See *supra*, §26.) (See 36 U.S.F. L. Rev. 151 [*Pendleton & Fireman* and subsequent legislation].)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Restrictions on Alteration of Spouses' Legal Relations.

11 Witkin Sum. Cal. Law Com Prop § 33

[§ 33] Restrictions on Alteration of Spouses' Legal Relations.

"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." (*Family C. 1620*.) The Law Revision Commission comments that *Family C. 1620* "does not purport to limit the statutory and case-law exceptions to the rule stated in this section," and goes on to list the following exceptions provided in the Code:

- (1) *Family C. 2550* (agreement on division of community estate). (See *infra*, §190.)
- (2) *Family C. 2641* (agreement on community contributions and loans for spouse's education or training). (See *infra*, §109.)
- (3) *Family C. 3580 et seq.* (support agreements). (See *10 Summary* (10th), *Parent and Child*, §389.)
- (4) *Family C. 3651* (agreement that support is nonmodifiable). (See *10 Summary* (10th), *Parent and Child*, §439.)
- (5) *Family C. 4302* (support under separation agreement). (See *11 Summary* (10th), *Husband and Wife*, §37.)
- (6) *Family C. 4323* (agreement on effect of cohabitation on support). (See *11 Summary* (10th), *Husband and Wife*, §§283, 286.)
- (7) *Family C. 4337* (agreement on effect of death on support). (See *11 Summary* (10th), *Husband and Wife*, §294.)

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E. Conflict of Laws.
1. Personal Property Brought to California.

11 Witkin Sum. Cal. Law Com Prop § 34

[§ 34] Personal Property Brought to California.

During the lifetime of the spouses, interests in personal property are usually governed by the law of their domicile at the time of acquisition. (See *Schechter v. Superior Court* (1957) 49 C.2d 3, 10, 314 P.2d 10; *Rozan v. Rozan* (1957) 49 C.2d 322, 326, 317 P.2d 11; *Bruton v. Villoria* (1956) 138 C.A.2d 642, 645, 292 P.2d 638, *infra*, §38; *Rest.2d, Conflict of Laws* §§257, 258 [state that has "the most significant relationship," usually domicile]; 9 *Hastings L. J.* 295; 30 *So. Cal. L. Rev.* 92; 15A *Am.Jur.2d* (2000 ed.), *Community Property* §9 *et seq.*)

In *Fernandez v. Fernandez* (1961) 194 C.A.2d 782, 15 C.R. 374, the parties were married in Mexico. Under Mexican law they had a choice of separation of property or a conjugal society system, made by an antenuptial agreement that became an integral part of the marriage. Plaintiff wife selected the first. *Held*, in this California divorce proceeding, plaintiff could not assert a community property interest in that property. (194 C.A.2d 788.)

In *Estate of Warner* (1914) 167 C. 686, 140 P. 583, the husband and wife were domiciled in Illinois, and he bought California land with money that belonged solely to him although it would have been community property if accumulated in California. On his death, the court held that the absolute ownership that attached to that money under the law of his domicile remained despite its investment in California real property. (167 C. 692.) Thus, under this decision and subsequent cases, absolutely owned money or other personal property brought into California was unaffected by California community property law, both during the lifetime and at death of the owner.

Dissatisfaction with this result led to a series of legislative attempts to avoid it by a rule of succession, which finally achieved success in 1935. (See *Prob.C.* 66, 6101; *infra*, §252 *et seq.*) (On 1961 amendments creating *inter vivos* rights in quasi-community property, see *infra*, §256 *et seq.*)

West's Key Number Digest, Husband and Wife k.246

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11 Witkin Sum. Cal. Law Com Prop § 35

[§ 35] Real Property Purchased Elsewhere.

(1) *In General.* In the converse of the situation described in the preceding section, where a husband and wife domiciled in California use community funds to buy land in a noncommunity property state, rights in the land are treated as if the land were community property. In other words, the rights of a California spouse in community funds are not lost by taking them to another state and changing their form. The California court cannot directly affect the title to the foreign land but, with personal jurisdiction of the parties, can compel execution of the necessary conveyances to protect the community interest. (*Family C. 760*; see, construing substantively identical predecessor statute, *Tomaier v. Tomaier* (1944) 23 C.2d 754, 759, 146 P.2d 905; *Rozan v. Rozan* (1957) 49 C.2d 322, 330, 317 P.2d 11; *Tischhauser v. Tischhauser* (1956) 142 C.A.2d 252, 256, 298 P.2d 551; *Rest.2d, Conflict of Laws* §234 [law that would be applied by court of situs governs]; 32 Cal. L. Rev. 182, 186; 13 Stanf. L. Rev. 743 [*Tomaier*]; 2 Cal. Proc. (4th), *Jurisdiction*, §226.)

(2) *Real Property Purchased While Domiciled Outside of California.* Although interests in real property generally are determined by the law of the situs, this rule does not apply where the funds used for the purchase were acquired by the spouses while domiciled in another state. (*Barber v. Barber* (1958) 51 C.2d 244, 247, 331 P.2d 628.) Hence, where the parties were domiciled in California and the wife purchased real property in Nevada with her separate property funds, California law applied and the husband had no interest in the real property. (*Grappo v. Coventry Financial Corp.* (1991) 235 C.A.3d 496, 506, 286 C.R. 714, citing the text.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §235.



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A. In General.

11 Witkin Sum. Cal. Law Com Prop § 36

[§ 36] In General.

The following are the chief types of community property acquisitions:

- (1) The earnings of either spouse. (See *infra*, §37.)
- (2) Personal injury damages awarded to a spouse. (See *infra*, §38 et seq.)
- (3) The proceeds of community property. (See *infra*, §44 et seq.)
- (4) A loan on personal credit to a spouse. (See *infra*, §§99, 100.)
- (5) The goodwill of a spouse's profession or business. (See *infra*, §101 et seq.)
- (6) A spouse's educational degree or license. (See *infra*, §108 et seq.) (For other community property acquisitions, see *infra*, §111.) (See generally Rutter Group, 2 Family Law §8:125 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., Family Law Financial Discovery, Chaps. 10 [income and benefits from employment], 11 [investment and miscellaneous income], 12 [small business financial investments], 13 [nonbusiness property]; California Family Law Practice, §J.3 et seq.



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B. Earnings.

11 Witkin Sum. Cal. Law Com Prop § 37

[§ 37] Earnings.

The typical method of acquiring community property is by the earnings of either the husband or the wife during the marriage. (See *Martin v. Southern Pac. Co.* (1900) 130 C. 285, 286, 62 P. 515; *In re Marriage of House* (1975) 50 C.A.3d 578, 580, 123 C.R. 451 [husband's accounts receivable from medical practice, produced during the marriage and before separation, were community property]; Rutter Group, 2 Family Law §8:126 et seq.; 78 A.L.R.4th 1107 [accrued vacation, holiday time, or sick leave as community property].) (For exceptions, see *supra*, §10 et seq.)

Where present efforts result in future payment of compensation, a problem of time of acquisition arises. In *Waters v. Waters* (1946) 75 C.A.2d 265, 170 P.2d 494, defendant husband, an attorney, was employed to bring an action on a contingent fee. He lost in the superior court, obtained a reversal in the Court of Appeal, and a hearing in the Supreme Court was then granted. While the hearing was pending, the interlocutory decree of divorce was awarded to plaintiff wife on the ground of extreme cruelty. *Held*: (a) A portion of the prospective contingent fee was earned during the marriage; (b) the trial judge was therefore justified in concluding that at least half the fee was community property; and (c) because the divorce was granted on a ground then permitting the award of all community property to the wife (see *infra*, §188), an award of half the fee was within the judge's discretion. (75 C.A.2d 269.) (See 20 So. Cal. L. Rev. 281; 74 A.L.R.5th 671 [attorney's contingent fee contract as community property].)

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SUPPLEMENT: [This section is current through the latest supplement]
See 124 A.L.R.5th 537 [division of lottery proceeds in divorce proceedings].



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11 Witkin Sum. Cal. Law Com Prop § 38

[§ 38] Original Community Property Rule.

(1) *Cause of Action and Damages as Community Property.* It was long held in California that both the cause of action and the damages recovered for personal injuries to either the husband or the wife were community property, because they were property interests acquired after marriage and did not come within any of the classifications of separate property. (See *Sanderson v. Niemann* (1941) 17 C.2d 563, 567, 110 P.2d 1025; *Frost v. Mighetto* (1937) 22 C.A.2d 612, 614, 71 P.2d 932; 28 Cal. L. Rev. 211; 13 So. Cal. L. Rev. 503; 18 So. Cal. L. Rev. 278; 80 A.L.R.5th 533 [spouse's negligence action for personal injury as separate or community property].)

(2) *Effect of Theory: Imputation of Contributory Negligence and Res Judicata.* This theory, that damages recovered by the wife constituted community property under the husband's control, led to a harsh result where the husband drove a car with the wife as a passenger and the wife was injured by reason of the negligence of the husband and a third party. Even though she was without fault, the wife was denied recovery to prevent the husband from profiting despite his own contributory negligence. (See *Giorgetti v. Wollaston* (1927) 83 C.A. 358, 362, 257 P. 109; *Solko v. Jones* (1931) 117 C.A. 372, 374, 3 P.2d 1028 [rule applied even though husband died a few hours after accident and could not have benefited by recovery]; 24 Cal. L. Rev. 739; 28 Cal. L. Rev. 211; 37 Cal. L. Rev. 318; 13 So. Cal. L. Rev. 503; 22 So. Cal. L. Rev. 455; 1 Stanf. L. Rev. 765; 1 U.C.L.A. L. Rev. 377.)

Another effect of the theory was that the wife was considered in privity with the husband as to her cause of action. Hence, a prior judgment against him on his cause of action was res judicata on the issue of his contributory negligence in a later suit by her. (*Zaragosa v. Craven* (1949) 33 C.2d 315, 321, 202 P.2d 73.)

A halfway statutory solution of the problem was attempted in 1951 by the enactment of a statute giving the wife the "management, control and disposition" of personal injury damages, although they retained their character as community property. No authoritative determination of the effect of the statute on the imputed negligence rule was made. (See 42 Cal. L. Rev. 848; 6 *Hastings L. J.* 92.) But it did not eliminate the conclusive effect of a prior judgment against the husband; because the cause of action remained community property, the husband represented the community, and both he and the wife were thereafter estopped to relitigate the issues determined in the first action. (See *Nemeth v. Hair* (1956) 146 C.A.2d 405, 408, 304 P.2d 129.)

Another attempted solution to the contributory negligence problem was a relinquishment by the husband to the wife

of the accrued cause of action, thus making it her separate property free from his subsequent control and of no profit to him. But this also proved ineffective. *Kesler v. Pabst* (1954) 43 C.2d 254, 273 P.2d 257, held that the husband's act of relinquishment was an exercise of a major property right--the right to dispose of the community cause of action--and that this would allow him to profit by his own wrong. (43 C.2d 257.) (See *Ferguson v. Rogers* (1959) 168 C.A.2d 486, 488, 336 P.2d 234; 42 Cal. L. Rev. 838; 6 Hastings L. J. 88; 1 U.C.L.A. L. Rev. 377; 2 U.C.L.A. L. Rev. 124.)

(3) *Exceptions to Community Property Theory or Imputed Negligence Rule.* In later years, independently of these legislative attempts, a number of exceptions were worked out by the courts to allow recovery by the wife or to preclude characterization of the proceeds as community property.

(a) Where the husband died, the marriage was dissolved, the cause of action vested in the wife, and the husband could not profit; hence, the reason for the contributory negligence rule had ceased and it was not followed. (*Flores v. Brown* (1952) 39 C.2d 622, 632, 248 P.2d 922; *Carroll v. Beavers* (1954) 126 C.A.2d 828, 832, 273 P.2d 56; see 42 Cal. L. Rev. 486, 841; 6 Hastings L. J. 89; 26 So. Cal. L. Rev. 461; 2 U.C.L.A. L. Rev. 126.)

(b) Where the parties were divorced, the cause of action likewise vested in the injured party. Hence, where the husband was injured during the marriage, but received judgment after entry of the final decree of divorce, the recovery went to his estate and the divorced wife was not entitled to a share. (*Washington v. Washington* (1956) 47 C.2d 249, 252, 302 P.2d 569; see 4 U.C.L.A. L. Rev. 461.)

(c) Where a decree of annulment was granted, the effect was a determination that no valid marriage existed and no community property was accumulated. The equitable doctrine giving a putative wife quasi-marital property rights (infra, §264) was for her protection, and would not be invoked against her by requiring her to share her personal injury recovery with her putative husband; hence, he could not profit and his contributory negligence was not imputed. (*Caldwell v. Odisio* (1956) 142 C.A.2d 732, 736, 299 P.2d 14.)

(d) Where the parties were domiciled outside California, the cause of action could be governed by the law of a noncommunity property jurisdiction that did not give the husband an interest in or control over her damages. (*Bruton v. Villoria* (1956) 138 C.A.2d 642, 645, 292 P.2d 638; see supra, §34.)

SUPPLEMENT: [This section is current through the latest supplement]



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11 Witkin Sum. Cal. Law Com Prop § 39

[§ 39] Later Separate Property Rule.

The injustice of the imputed negligence rule, and the inadequacy of prior judicial and legislative attempts to eliminate it, induced the 1957 Legislature to take the bold step of a complete change in the character of the property. Under former C.C. 163.5, "[a]ll damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person." Although the statute solved the imputed negligence problem, it raised other serious problems and had unforeseen harmful effects. (See 45 *Cal. L. Rev.* 779; 9 *Hastings L. J.* 291; 24 *Hastings L. J.* 329.) These were as follows:

(1) *Cause of Action.* Despite the background of case law (see *supra*, §38), the statute referred only to "damages ... awarded," and left doubt about whether the unliquidated cause of action was community or separate. This gave rise to a further problem as to the effect of a settlement without judgment: If the cause of action remained community property, as held by a long list of prior decisions (*supra*, §38), money paid by way of compromise and satisfaction could likewise be regarded as community property, for the statute referred only to "damages ... awarded ... in a civil action." (See 45 *Cal. L. Rev.* 780, note 2; 9 *Hastings L. J.* 304.) However, in *Estate of Rogers* (1972) 24 *C.A.3d* 69, 77, 100 *C.R.* 735, the court, deciding an inheritance tax issue, held that the cause of action and recovery should be considered the same; hence, money received by the husband as a compromise settlement of his personal injury action was his separate property. (24 *C.A.3d* 77.) (See 24 *Hastings L. J.* 329 [criticizing holding].)

(2) *Damages.* Medical expense, although a community obligation that must be satisfied with community funds, was nevertheless recoverable as the separate property of the injured husband or wife. This meant that, in the case of an injured wife and a contributorily negligent husband, if a community right to reimbursement from the wife were recognized, the situation that gave rise to the imputed negligence rule (husband as manager of community profiting despite his own wrongful conduct) would be recreated. Also, earnings are the common source of community property, and a significant element of personal injury damages is compensation for loss of earnings, past and future. (See 6 *Summary* (10th), *Torts*, §1665 et seq.) Thus, the community lost the benefit of earnings, but the damage award substituted for them became separate property.

(3) *Succession and Testamentary Disposition.* The surviving spouse succeeds to all community property on death of an intestate (see *infra*, §250 et seq.), but she did not have that right as to personal injury damages; and the spouse who recovered the damages could dispose of them to strangers by will or inter vivos gift.

(4) *Tax Consequences.* Personal injury damages did not receive the favorable gift and inheritance tax treatment of community property; and if the recovery were converted into community property by commingling, a gift tax liability could be incurred. (See *Estate of Rogers, supra*; 24 *Hastings L. J.* 338.)

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Witkin Summary of California Law II. ACQUISITION OF COMMUNITY PROPERTY C. Personal Injury Damages. 3. Community Property Rule Restored.

11 Witkin Sum. Cal. Law Com Prop § 40

[§ 40] Community Property Rule Restored.

(1) *Repeal of Separate Property Statute.* The problems discussed in the preceding section were the subject of several critical comments (see 3 Cal. Western L. Rev. 69; 39 So. Cal. L. Rev. 244; 13 U.C.L.A. L. Rev. 587), and the Law Revision Commission recommended that personal injury damages again be classified as community property, with additional legislation to eliminate the specific evils. The 1968 Legislature accepted the recommendation and implemented it by deleting the separate property classification, thus making the general community property presumption (see *supra*, §4) applicable with some exceptions (see *infra*, §41). (See *Hand v. Superior Court* (1982) 134 C.A.3d 436, 439, 440, 441, 184 C.R. 588, citing the text and reviewing the legislative changes; 14 Pacific L. J. 973 [The Classification of Personal Injury Damages Under California Community Property Law: Proposals for Application and Reform].)

(2) *Wrongful Death of or Injuries to Child.* The cause of action and damages for the wrongful death of a child, or injuries to a child, are placed in the same category as those for injuries to a spouse; hence, they are community property. (See *Flores v. Brown* (1952) 39 C.2d 622, 630, 248 P.2d 922; *Cervantes v. Maco Gas Co.* (1960) 177 C.A.2d 246, 250, 2 C.R. 75; *Premo v. Grigg* (1965) 237 C.A.2d 192, 199, 46 C.R. 683.)

(3) *Wrongful Death of Spouse.* The recovery for wrongful death belongs to heirs, and is not community property. (See *Fiske v. Wilkie* (1945) 67 C.A.2d 440, 444, 154 P.2d 725; 6 Summary (10th), Torts, §1377 et seq.)

(4) *Workers' Compensation Award.* Because contributory negligence is not an issue in workers' compensation proceedings, the later separate property reclassification rule (*supra*, §39) did not change the character of an award, and it therefore remained, and still is, community property. (*Estate of Simoni* (1963) 220 C.A.2d 339, 342, 33 C.R. 845, quoting the text; see 4 Santa Clara Lawyer 236; 30 A.L.R.5th 139 [workers' compensation benefits as marital property subject to distribution].) There is a qualification to this rule. Only that portion of a workers' compensation award received during the marriage that compensates for the injured spouse's reduced earnings during the marriage, or for injury-related expenses paid with community funds, is community property. The remainder of the award is the injured spouse's separate property, because it is intended to compensate that spouse for his or her future diminished earnings capacity or medical expenses after separation. (*Raphael v. Bloomfield* (2003) 113 C.A.4th 617, 623, 624, 6 C.R.3d 583.)

Of course, a workers' compensation award received *after* separation or dissolution is the injured spouse's separate

property. (See *In re Marriage of McDonald* (1975) 52 C.A.3d 509, 512, 125 C.R. 160; *In re Marriage of Fisk* (1992) 2 C.A.4th 1698, 1703, 1704, 4 C.R.2d 95, *infra*, §42; *infra*, §41.)

(5) *Cause of Action*. Most of the earlier cases took the position that an unliquidated cause of action for personal injury damages was also community property. (See *supra*, §38.) The revised statutes laid down a contrary rule, defining "community property personal injury damages" as money or property "received by" the spouse in satisfaction of a judgment or pursuant to a settlement or compromise agreement. Hence, where the husband's action for damages was still pending at the time of the interlocutory decree, there was no community property interest to award to the wife. The ultimate recovery, which would be received after the interlocutory decree, would be separate property. (*In re Marriage of Pinto* (1972) 28 C.A.3d 86, 89, 104 C.R. 371.) This rule was changed by 1979 amendments restoring the earlier rule.

Subject to the rules under *Family C. 2603* for division on dissolution (see *infra*, §202), personal injury damages are community property if the cause of action for the damages arose during the marriage and is not separate property as defined in *Family C. 781* (*infra*, §41). (*Family C. 780*.) (See Rutter Group, 2 Family Law §8:266 et seq.; 80 A.L.R.5th 533 [spouse's cause of action for negligent personal injury, or proceeds of that action, as separate or community property].)

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4. Exceptions: Separate Property.

11 Witkin Sum. Cal. Law Com Prop § 41

[§ 41] Exceptions: Separate Property.

The present statutes make two kinds of exceptions to the general rule that personal injury damages are community property (*supra*, §40):

(1) *Interspousal Action*. If one spouse recovers damages against the other spouse, the general rule would permit the tortfeasor spouse to share the benefits of the recovery. To avoid this objectionable result, *Family C. 781(c)* makes any recovery the separate property of the injured spouse. (See *11 Pacific L. J. 486*.)

(2) *Dissolution or Separation*. The earnings and accumulations of married persons separated or living apart after a judgment dissolving the marriage are separate property (see *supra*, §9 et seq.). The same theory is now applied to personal injury damages; those damages are the separate property of the injured spouse if the cause of action arose after entry of a judgment of dissolution or legal separation, or while the injured spouse was living separate from the other spouse. (*Family C. 781(a)*; see *In re Marriage of McDonald* (1975) 52 C.A.3d 509, 512, 125 C.R. 160 [construing substantively identical predecessor statute; workers' compensation permanent disability award received after separation is injured party's separate property]; *In re Marriage of Fisk* (1992) 2 C.A.4th 1698, 1703, 1704, 4 C.R.2d 95, *infra*, §42 [same].)

Under the statutory language ("received by"), the recovery is separate property if received after a judgment, even though the cause of action arose before that time. (*In re Marriage of Pinto* (1972) 28 C.A.3d 86, 89, 104 C.R. 371, *supra*, §40 [construing substantively identical predecessor statute].)

Raphael v. Bloomfield (2003) 113 C.A.4th 617, 623, 624, 6 C.R.3d 583, partially extends this exception to workers' compensation permanent disability awards received *during* marriage. Only that portion of the award that compensates for the injured spouse's reduced earnings during the marriage, or for injury-related expenses paid with community funds, is community property. The remainder of the award is the injured spouse's separate property, because it is intended to compensate that spouse for his or her future diminished earnings capacity or medical expenses after separation.

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(2) *Dissolution or Separation*. See *In re Marriage of Klug* (2005) 130 C.A.4th 1389, 1401, 31 C.R.3d 327 [although breach and duty elements of wife's legal malpractice judgment occurred during marriage, injury element occurred after separation; thus, action arose after separation and award was wife's separate property].



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11 Witkin Sum. Cal. Law Com Prop § 42

[§ 42] Reimbursement for Expenses.

(1) *In General.* If the other spouse paid expenses by reason of the personal injuries from separate property or community property, that spouse is entitled to reimbursement from the damages received by the injured spouse. (*Family C. 781(b).*)

(2) *Distinction: Workers' Compensation Award.* *In re Marriage of Fisk* (1992) 2 C.A.4th 1698, 4 C.R.2d 95, involved a wife's claim that the reimbursement statute entitled the community to obtain reimbursement from a workers' compensation permanent disability award received by her husband after the parties separated. For 2 years before the separation, community savings were depleted and the community went into debt in order to pay expenses resulting from the husband's injury. The trial judge denied the request for reimbursement, ruling that the statute applied only to judgments or settlements in personal injury actions at law. *Held*, affirmed.

(a) A workers' compensation permanent disability award compensates the injured spouse for pain and suffering caused by the disability, but this purpose is secondary to the primary function of the award, which is to compensate for impairment of *future* earning capacity. The award is also distinguishable from a personal injury recovery because it is made without regard to fault. Hence, a disability award cannot be considered "damages" subject to reimbursement under former C.C. 5126. (2 C.A.4th 1706.)

(b) Furthermore, the statute applied only to a recovery for personal damages arising *after* the parties separated or the marriage was dissolved (see *supra*, §41). (2 C.A.4th 1706.) Here, the husband's injury claim arose *before* the parties separated and sought a judgment of dissolution. (2 C.A.4th 1707.) (See 30 A.L.R.5th 139 [workers' compensation benefits as marital property subject to distribution].)

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6. Spouse's Negligence as Concurring Cause.

11 Witkin Sum. Cal. Law Com Prop § 43

[§ 43] Spouse's Negligence as Concurring Cause.

(1) *General Rule.* The much criticized rule that an innocent injured spouse could not recover if the other spouse was guilty of contributory negligence was the principal reason for the later rule reclassifying damages as separate property. (See *supra*, §39.) In restoring the community property classification, the Legislature eliminated the imputed negligence rule. If a spouse is injured by the negligent or wrongful act or omission of a third party, the fact that the other spouse's negligent or wrongful act or omission was a concurring cause is not a defense in an action by the injured spouse, unless it would have been a defense if the marriage did not exist. (*Family C. 783.*)

(2) *Limitation: Injury to Child.* The imputed negligence rule remained applicable, however, to damages for wrongful death of or injuries to a child. Those damages were always community property, and contributory negligence of the parent constituted a bar to recovery. (See, construing substantively identical predecessor statute, *Cervantes v. Maco Gas Co. (1960) 177 C.A.2d 246, 250, 2 C.R. 75; Premo v. Grigg (1965) 237 C.A.2d 192, 199, 46 C.R. 683; see also 13 U.C.L.A. L. Rev. 603; supra*, §40.) There is nothing in the language of *Family C. 783* to change this rule, for the statute refers only to injuries to a "married person."

The complete defense of contributory negligence has been abrogated by judicial decision, and the doctrine of comparative negligence has been established. (See 6 *Summary* (10th), *Torts*, §1329.)

(3) *Limitation: Loss of Consortium.* *Family C. 783* is subject to a limitation. An award for loss of consortium to a spouse injured by a third party may be reduced by the spouse's percentage of comparative fault as required by C.C. 1431.2, which codified the change in law of Proposition 51 on joint and several liability for noneconomic damages (see 5 *Summary* (10th), *Torts*, §53). C.C. 1431.2 is the more specific statute in this context, and thus prevails over *Family C. 783*. Damages for loss of consortium are available only to married persons, and C.C. 1431.2 expressly mentions damages for loss of consortium. (*Craddock v. Kmart Corp. (2001) 89 C.A.4th 1300, 1309, 107 C.R.2d 881.*)

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D. Proceeds of Community Property.
1. In General.

11 Witkin Sum. Cal. Law Com Prop § 44

[§ 44] In General.

The characterization of "proceeds" of community property covers a wide variety of money or benefits received by a spouse during marriage, and the principal situations are considered in subsequent sections as follows:

- (1) Proceeds of personal injury damages. (See *infra*, §45.)
- (2) Profits from community property business. (See *infra*, §46.)
- (3) Proceeds of insurance. (See *infra*, §47 et seq.)
- (4) Proceeds of earnings. (See *infra*, §52 et seq.)
- (5) Pensions and retirement benefits. (See *infra*, §58 et seq.)
- (6) Military retirement benefits. (See *infra*, §78 et seq.)
- (7) Military disability pay. (See *infra*, §86 et seq.)
- (8) Employment or insurance disability benefits. (See *infra*, §91 et seq.)
- (9) Judges' retirement benefits. (See *infra*, §§95, 96.)
- (10) Social Security benefits. (See *infra*, §97.) (On characterization of other proceeds, see *infra*, §98.)

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D. Proceeds of Community Property.
2. Proceeds of Personal Injury Damages.

11 Witkin Sum. Cal. Law Com Prop § 45

[§ 45] Proceeds of Personal Injury Damages.

In re Marriage of Devlin (1982) 138 C.A.3d 804, 189 C.R. 1, presented the question whether the use of personal injury damages to acquire real property precluded the award of the property to the injured spouse on dissolution. The husband was severely injured and became a paraplegic. He used the personal injury damages of \$ 175,000 to acquire an equity in real property and a mobilehome used as a family residence. The trial judge determined that this community property was traceable to the husband's personal injury proceeds, and applied former C.C. 4800(c) (now *Family C. 2603(a)*, *infra*, §202) in awarding the bulk of it to the husband. The wife appealed, contending that the statute applied only to damages "received" from a cause of action arising during marriage, and that property purchased with those damages is outside the scope of the statute. *Held*, judgment affirmed.

(a) The wife's narrow interpretation would defeat the purpose of the statute, for it would require that community property personal injury damages be placed in a bank account and never utilized in order to prevent its treatment on dissolution as ordinary community property. "The fallacy in such reasoning is that often at least some portion, and possibly all, of the community property personal injury damages must be spent, both on the needs of the community and on needs unique to the injured spouse. Using community property personal injury damages to purchase an artificial limb, iron lung, specially adapted home or car, etc., may be essential to alleviate the pain and suffering of the injured spouse and to allow the injured spouse to function as normally as possible." (138 C.A.3d 808.) Thus mere conversion of community property personal injury damages from money into different form does not, standing alone, remove the items purchased from the purview of the statute. (138 C.A.3d 808.)

(b) Under the statute, community property personal injury damages will lose their character if irretrievably commingled with other community property. The wife contended that this rule applied here because the parties took title to the property acquired in joint tenancy; i.e., that the situation was the same as that arising when a spouse uses separate property to purchase a family residence (see *Family C. 2581*, *infra*, §220). The argument is unsound. Separate property is subject to complete control of the spouse owning the property, and when that spouse voluntarily decides to use it for community purposes it is logical to imply a gift of that property to the community. (138 C.A.3d 809, citing *Weinberg v. Weinberg* (1967) 67 C.2d 557, 63 C.R. 13, 432 P.2d 709, *infra*, §124, and *In re Marriage of Lucas* (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285, *infra*, §219.) Personal injury damages, however, are community property and subject to control of both spouses. "Aside from immediately dissolving the marriage, the injured spouse has no right to segregate community property personal injury damages from the other community property of the marriage. Because

community property personal injury damages are community property, it is to be expected that when the parties buy a residence with such proceeds they will take title in joint tenancy or as community property. Thus, the form of title in which property is taken when purchased with community property personal injury damages is not determinative as to how such property should be divided upon dissolution." (138 C.A.3d 809; see footnote 4, disagreeing with Law Revision Commission contrary view based on *Weinberg*--a case decided when personal injury damages were separate property.)

(c) There was no actual commingling in this case. Although the damages were initially deposited in the parties' joint bank account, the property purchased was easily traced, and there was no other community property with which the damages could be commingled. (138 C.A.3d 810.)

(d) Under the statute, the trial judge was required to award the property to the husband unless the interests of justice mandated a different disposition. Here, the judge took note of the facts that the husband would probably never recover from his injuries; the mobilehome had been specially adapted for his benefit; the husband for the rest of his life will probably exist at or below the poverty level; and the wife had both the education and ability to obtain gainful employment and be self-supporting. The award was therefore a proper exercise of discretion. (138 C.A.3d 811.)

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3. Profits From Community Property Business.

11 Witkin Sum. Cal. Law Com Prop § 46

[§ 46] Profits From Community Property Business.

In re Marriage of Imperato (1975) 45 C.A.3d 432, 119 C.R. 590, raised a novel problem of apportionment. The husband was the sole shareholder and managing officer of a corporation stipulated to be community property. In December 1971, when the parties separated, its net worth was \$ 1,665.85; in June 1973, just before the trial, the net worth was \$ 17,614.26. The wife's community half interest in the business was conceded, but the date of valuation was crucial. The trial judge followed the general rule of valuation as near to the date of trial as reasonably practicable (see *infra*, §193). The husband, however, contended that the increase in net worth should be considered his earnings and accumulations after separation, and therefore his separate property (see *Family C. 771*, *supra*, §10). To sustain this contention, it would be necessary to disregard the corporate entity and view the ostensible community property business as his sole proprietorship. The trial judge refused to consider evidence offered to show that in fact the corporation had been treated as the husband's alter ego. *Held*, judgment reversed, for a consideration of the evidence and a determination of the issue.

(a) If the evidence justifies disregarding the corporate entity, an apportionment must be made under the formulas in *Pereira v. Pereira* (1909) 156 C. 1, 103 P. 488, *infra*, §124, or *Van Camp v. Van Camp* (1921) 53 C.A. 17, 199 P. 885, *infra*, §126, *in reverse*. In those cases, the formulas were applied to apportion profits from a separate property business, here from a community property business; and, if the facts justify apportionment, some of the increase in value of the community property business occurring after separation will be classified as separate property. (45 C.A.3d 439.) The formula that best achieves substantial justice may be selected by the trial court. (45 C.A.3d 439; see *infra*, §122.)

(b) As a general rule, a sole stockholder is estopped to deny the validity of his or her own corporation; i.e., the entity should not be disregarded at the instance of the incorporators. (45 C.A.3d 439, citing the text.) However, exceptions have been recognized (see 9 *Summary* (10th), *Corporations*, §18), and a proper case for an exception may exist where the transactions are between the parties as stockholders and themselves as individuals, with no third parties affected. (45 C.A.3d 440.)

(c) "The above cases illustrate the right of the courts to disregard the corporate entity at the urging of a stockholder in special situations, providing the facts support the *alter ego* theory. We believe a special situation exists when a husband and wife who are the sole stockholders of a corporation are dissolving their marriage and the other factors mentioned exist. One reason for justifying the *alter ego* doctrine is that it prevents injustice. If no third parties are

affected, and the husband and wife have not treated the corporation as a separate entity, logic and fairness would permit the court to disregard the corporate entity when evidence offered by either party justifies such a finding, and it would enable a fair apportionment of the property." (45 C.A.3d 440.) (See *In re Marriage of Barnert* (1978) 85 C.A.3d 413, 424, 149 C.R. 616, *infra*, §213 [following *Imperato*]; Rutter Group, 2 Family Law §8:135 et seq.; 16 *Santa Clara L. Rev.* 682.)

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D. Proceeds of Community Property.

4. Proceeds of Insurance.

a. Whole Life Insurance.

11 Witkin Sum. Cal. Law Com Prop § 47

[§ 47] Whole Life Insurance.

(1) *General Rule.* Where the premiums on a spouse's life insurance policy are paid with community funds, the chose in action represented by the policy is community property. (See *Blethen v. Pacific Mut. Life Ins. Co. of Calif.* (1926) 198 C. 91, 99, 243 P. 431; *Tyre v. Aetna Life Ins. Co.* (1960) 54 C.2d 399, 402, 6 C.R. 13, 353 P.2d 725, *infra*, §141; *New York Life Ins. Co. v. Bank of Italy* (1923) 60 C.A. 602, 605, 214 P. 61; *Mundt v. Connecticut General Life Ins. Co.* (1939) 35 C.A.2d 416, 421, 95 P.2d 966; *Bazzell v. Endriss* (1940) 41 C.A.2d 463, 465, 107 P.2d 49; *Estate of Wedemeyer* (1952) 109 C.A.2d 67, 71, 240 P.2d 8; *Fidelity & Cas. Co. of New York v. Mahoney* (1945) 71 C.A.2d 65, 69, 161 P.2d 944, *infra*, §113 [must show that premium was paid with community funds]; *O'Connor v. Travelers Ins. Co.* (1959) 169 C.A.2d 763, 765, 337 P.2d 893 [same]; *Estate of Mendenhall* (1960) 182 C.A.2d 441, 444, 6 C.R. 45; *Polk v. Polk* (1964) 228 C.A.2d 763, 781, 39 C.R. 824; *Patillo v. Norris* (1976) 65 C.A.3d 209, 217, 135 C.R. 210; 18 *Pacific L. J.* 969; 54 *A.L.R.4th* 1203 [valuation]; *Rutter Group*, 2 *Family Law* §8:331.)

(2) *Distinction: Spouse as Beneficiary.* If the spouse is the beneficiary of the insured spouse's policy, this is a gift of community property to the beneficiary spouse. At the death of the insured spouse, the proceeds vest in the beneficiary spouse as his or her separate property. (*Estate of Miller* (1937) 23 C.A.2d 16, 18, 71 P.2d 1117; *Shaw v. Board of Administration, State Employees' Retirement System* (1952) 109 C.A.2d 770, 774, 241 P.2d 635.)

However, a marital settlement agreement may result in a waiver of the beneficiary spouse's right. In *Life Ins. Co. of North America v. Cassidy* (1984) 35 C.3d 599, 200 C.R. 28, 676 P.2d 1050, defendant wife, beneficiary of her husband's policy, contended that she was entitled to the proceeds because the designation had not been changed by the husband, and their marital settlement agreement did not refer to her expectancy interest or to the designation as beneficiary. *Held*, her claim was properly rejected.

(a) *Thorp v. Randazzo* (1953) 41 C.2d 770, 264 P.2d 38, pointed out that general language in a marital settlement agreement will not be construed to include a renunciation of the expectancy interest of the beneficiary unless that intention clearly appears. But the court held that the language of the agreement in that case was sufficiently broad to divest the wife of her claim. (35 C.3d 605, 607.) The same is true here. (35 C.3d 607, 608.)

(b) The failure to exercise the power to change the beneficiary usually indicates a confirmation of the preexisting

designation; but in this case the sweeping language, releasing "all and every right as the spouse of the other *and any and all present or future claims or demands of every nature*," showed that "the parties intended to waive and relinquish any expectancy that was not thereafter reaffirmed." (35 C.3d 608.)

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D. Proceeds of Community Property.

4. Proceeds of Insurance.

b. Term Life Insurance.

11 Witkin Sum. Cal. Law Com Prop § 48

[§ 48] Term Life Insurance.

(1) *In General*. Unlike whole life insurance, which pays both death benefits and accumulates cash surrender value, term life insurance only protects against the death of the insured during the term of the policy. Coverage expires at the expiration of the specified term, but with the right of renewal for future terms without proof of current medical eligibility by timely paying premiums for the next term. The Courts of Appeal have disagreed on the legal significance of a term policy's fixed term and lack of cash surrender value, and have reached conflicting results about whether term life insurance and renewal rights are susceptible to community property characteristics. (See *In re Marriage of Havins* (1996) 43 C.A.4th 414, 418, 50 C.R.2d 763, *infra*, §49 [reviewing case law]; Rutter Group, 2 Family Law §8:84 et seq.)

(2) *Economic Value Approach*. *In re Marriage of Lorenz* (1983) 146 C.A.3d 464, 194 C.R. 237, held that a policy of term life insurance is not a community asset subject to division. An asset must have a monetary value, and unlike whole life insurance, a term policy is generally regarded as having no value because once its term has expired, it is worthless. (146 C.A.3d 468.) Cases holding that the proceeds of a term policy are community property are distinguishable; the proceeds have a value but until the benefits are payable, the policy itself does not. (146 C.A.3d 468.)

In re Marriage of Gonzales (1985) 168 C.A.3d 1021, 214 C.R. 634, came to a different conclusion. "Lorenz is simply incorrect in the assertion that assets such as term life insurance and accrued vacation time have no economic value." (168 C.A.3d 1024.) Pension benefits, earned during the marriage, whether vested or not, are a community asset subject to division. (168 C.A.3d 1025.) *Biltoft v. Wootten* (1979) 96 C.A.3d 58, 157 C.R. 581, holding that on the husband's death the wife was entitled to a share of term policy proceeds, by dictum suggests that the policy has an ascertainable value. (168 C.A.3d 1026.) Although valuation poses a greater challenge than does a whole life policy because it has no cash surrender value, "replacement cost of a term policy may be one method of valuation, as might the sum of the community's contributions." (168 C.A.3d 1026.)

In *Gonzales*, the trial court awarded the husband's term policy to the wife, and the opinion finds an "equally compelling" justification in former C.C. 4801.4 (now *Family C.* 4360; see 11 *Summary* (10th), *Husband and Wife*, §214), providing that the court, in making an order for spousal support, may include an amount sufficient to maintain insurance for the benefit of the supported spouse. Thus, although the policy was awarded as property, it does constitute a useful form of security for a reserved spousal support obligation. (168 C.A.3d 1026, 1027.) (See Rutter Group, 2

Family Law §§8:84 et seq., 8:331.)

(3) *Contract Right-Mere Expectancy Approach*. *Estate of Logan* (1987) 191 C.A.3d 319, 236 C.R. 368, follows *Lorenz* and rejects the *Gonzales* reasoning and holding.

(a) *Practical objections to holding*. "In addition to placing another roadblock in the way of simplified dissolution of marriage, the requirements of this decision would also significantly increase the cost of dissolution by requiring each side to employ expert witnesses to testify to the value of term life insurance policies. We suspect that in most cases the cost to the parties of expert witnesses would be greater than the value of the term life insurance policy." (191 C.A.3d 323.)

(b) *Nature of term life insurance*.

(1) Term insurance is life insurance written for a fixed or specified term. "To reflect the increasing risk of death as the insured increases in age, term insurance policies either have increasing premiums from year to year or provide decreasing death benefits paid on the insured's death. At the expiration of the term of years, the policy expires without retaining cash value. One advantage of term insurance is its cost. Since it does not retain cash value, the premium cost for comparable coverage is less than it is with whole life insurance. Some forms of term insurance may be converted into permanent or whole life policies or may be automatically renewable at regular intervals at a higher premium." (191 C.A.3d 324, quoting Markey, 5A Cal. Family Law, Practice & Procedure, §122.03[2][6].)

(2) If the premium for the next term is not paid, the policy is not renewed. "Thus when the premium is paid with community funds, the policy is community property for the period covered by that premium. This is true whether the premium is paid as a fringe benefit by the insured's employer, paid for by the insured, or a combination of both. The policy provides dollar coverage only for the specific term for which the premium was paid. Thus, as to dollar coverage, term life insurance upon which premiums were paid from community funds has no value after the term has ended without the insured having become deceased." (191 C.A.3d 324.)

(3) With respect to right to renew for additional terms, term life insurance has either a significant value or no value at all. "The right to renewal upon payment of the premium for the next term is significant because the insured possesses the right even if he or she has become uninsurable in the meantime." (191 C.A.3d 324.) But if the insured remains insurable, the community has received everything it bargained for (dollar protection during term and right to renew without proof of insurability), and the right to renew has no value because the insured can obtain comparable insurance in the open market. (191 C.A.3d 325.)

(c) *Community and separate interests*. "We believe the correct rule to be that term life insurance covering a spouse who remains insurable is community property only for the period beyond the date of separation for which community funds were used to pay the premium. If the insured dies during that period the proceeds of the policy are fully community. Otherwise, the insured remaining insurable, a term policy does not constitute a divisible community asset since the policy is of no value and the community has fully received what it bargained for. If the insured becomes uninsurable during the term paid with community funds, then the right to future insurance coverage which cannot otherwise be purchased is a community asset to be divided upon dissolution." (191 C.A.3d 325.)

In re Marriage of Spengler (1992) 5 C.A.4th 288, 6 C.R.2d 764, agrees with the *Logan* holding, except for "its dictum" that "if the insured becomes uninsurable during the marriage, the policy's renewal rights to continued coverage that cannot otherwise be purchased is a community asset to be divided upon dissolution." (5 C.A.4th 293.)

The issue of renewal rights was pivotal in *Spengler*, which, like *Logan*, *Lorenz*, and *Gonzales*, involved employment-related term life insurance. The former wife of a deceased insured sued his widow, the beneficiary of the policy, seeking to recover half the life insurance proceeds as a community asset. An expert testified that 4 years before the former wife and the insured separated, he had become uninsurable due to a diagnosis of prostate cancer. The insured died 3 years after the separation, and 3 months after the policy was renewed. *Held*, the trial judge erroneously awarded

the former wife half of the policy proceeds. As *Logan* correctly held, an employment-related term life insurance policy is a community property asset only during the term for which the policy was acquired with community funds and efforts. However, classifying the renewal right as community property is based on the faulty premise that during the marriage the insured was able to acquire a policy that could not be taken away. In fact, the right to continued insurance protection under an employment-related policy depends both on the insured's continuing to work at that employment and on the employer's continuing to provide the group insurance plan. (5 C.A.4th 297.) Therefore, the renewal right is a mere expectancy, not a contingent property interest subject to the community property laws. (5 C.A.4th 298.)

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c. Term Health Insurance.

11 Witkin Sum. Cal. Law Com Prop § 49

[§ 49] Term Health Insurance.

In re Marriage of Havins (1996) 43 C.A.4th 414, 50 C.R.2d 763, involved a former wife, G, who requested modification of a prior judgment of dissolution so that her health insurance premiums would be paid out of the gross amount of the retirement benefits of former husband M. M earned the right to have and renew his health insurance policy by his long-term employment with the federal Government. Renewal for the balance of his life was contingent only on the continued payment of premiums, and all postseparation premiums were paid from his separate retirement annuity. The trial judge entered judgment for G. *Held*, reversed. A spouse's right to renew employer-subsidized health insurance is not a community property asset, divisible on dissolution.

(a) Health insurance renewal rights are analogous to renewal rights under term disability insurance policies and term life insurance policies. Under *In re Marriage of Elfmont* (1995) 9 C.4th 1026, 39 C.R.2d 590, 891 P.2d 136, *infra*, §94, a postseparation right to renew a disability insurance policy does not give rise to a community interest in the insured's disability benefits. Here, by analogy, M's continuing right to renew his health insurance coverage by continued payment of premiums from his separate property does not give rise to a continuing community interest in his health insurance benefits. Similarly, the analysis of the renewal rights in a term life insurance policy in *Estate of Logan* (1987) 191 C.A.3d 319, 236 C.R.2d 368, *supra*, §48, is equally applicable to health insurance benefits. "The community having received everything it bargained for, there is no longer any community property interest in the policy and no community asset left to divide." (43 C.A.4th 423, quoting *Logan*.) Although M continues to receive subsidized health insurance coverage, he pays for a portion of that coverage with his separate property. Any community interest in his health insurance ended at the time of dissolution. (43 C.A.4th 423.)

(b) *In re Marriage of Spengler* (1992) 5 C.A.4th 288, 298, 6 C.R.2d 764, *supra*, §48, determined that a right to renew may be a mere expectancy, rather than an enforceable contract right. That conclusion is inapplicable to the facts here. M, as a retiree, has an enforceable right to continue to participate in the health insurance plan so long as he continues to pay premiums. Unlike the employee in *Spengler*, M's renewal right was earned during his employment and may not be eliminated by his employer. The renewal right is therefore property within the *Spengler test*. (43 C.A.4th 423.) Nevertheless, M's health insurance, including its current renewal rights, is his separate property because it has been purchased with postseparation earnings, and is a postseparation fringe benefit. "[A]lthough the right to continuation of subsidized health care coverage without evidence of good health is itself a property right that has some

value, the right is not subject to valuation and division at the time of dissolution when the employee or retiree continues to pay for the health insurance with his separate funds. In such a case, there is simply no community asset to divide." (43 C.A.4th 423, 424.) (See *In re Marriage of Ellis* (2002) 101 C.A.4th 400, 407, 124 C.R.2d 719 [following *Havins*].)

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4. Proceeds of Insurance.
d. Veteran's Insurance.

11 Witkin Sum. Cal. Law Com Prop § 50

[§ 50] Veteran's Insurance.

(1) *Federal Statute and Wissner Rule.* The rule on proceeds of whole life insurance (supra, §47) was applied by the California court to the proceeds of a National Service Life Insurance policy in *Wissner v. Wissner* (1949) 89 C.A.2d 759, 764, 201 P.2d 837. But the decision was reversed by the United States Supreme Court in *Wissner v. Wissner* (1950) 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424, holding that the federal statute precludes a community property claim contrary to the insured's express direction. (See *Ridgway v. Ridgway* (1981) 454 U.S. 46, 102 S.Ct. 49, 55, 70 L.Ed.2d 39, 48 [following *Wissner*]; *Carballo v. McFann* (1950) 101 C.A.2d 93, 224 P.2d 902; Rutter Group, 2 Family Law §§8:58, 8:59; 2 *Hastings L. J.* 66; 23 *So. Cal. L. Rev.* 608.)

However, when the beneficiary dies, the right to any remaining proceeds is determined under the California succession law, governing the right to property that was community property of a decedent and a previously deceased spouse. (See *Estate of Allie* (1958) 50 C.2d 794, 800, 329 P.2d 903 [construing predecessor statute to *Prob.C. 6402.5*]; 47 *Cal. L. Rev.* 374; 32 *So. Cal. L. Rev.* 199; 14 *Summary* (10th), *Wills and Probate*, §83 et seq.)

(2) *Fraud Exception.* In *Free v. Bland* (1962) 369 U.S. 663, 82 S.Ct. 1089, 1094, 8 L.Ed.2d 180, 185, the husband was held to have the same right to change beneficiaries on U.S. Savings Bonds purchased with community funds. But the court declared that the federal statute should not be used as a shield for fraud or breach of trust. (See *Yiatchos v. Yiatchos* (1964) 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724; *Estate of Bray* (1964) 230 C.A.2d 136, 142, 40 C.R. 750 [exception applied where husband gave away community property in violation of requirement of wife's consent]; 5 *Santa Clara Lawyer* 196; 38 *So. Cal. L. Rev.* 335.)

In *Thoen v. Thoen* (1967) 248 C.A.2d 354, 56 C.R. 614, the fraud exception recognized in the U.S. Savings Bonds cases was held inapplicable to National Service Life Insurance. The husband had a policy with his wife as beneficiary. The premiums were first paid from withheld Navy pay and later from Navy retirement pay, and the policy was community property under California law. In the divorce decree, the wife was awarded all community property and the husband was enjoined from changing the beneficiary named in the policy. Nevertheless, after the divorce, he remarried, and named his new wife as beneficiary. Then he died. The first wife sued to make the second wife a constructive trustee of the proceeds. *Held*, under *Wissner*, the change was valid. "Congress made clear its intent to allow a serviceman to select the beneficiary of his own government life insurance policy regardless of state law, even when it was likely that

the husband intended to deprive his wife of a right to share in his life insurance proceeds, a right guaranteed by state law. But the regulations governing savings bonds do not go that far.' " (248 C.A.2d 359.)

(3) *Equivalent Amount to Spouse*. The limited effect of *Wissner* was pointed out by *In re Marriage of Karlin* (1972) 24 C.A.3d 25, 29, 101 C.R. 240, *infra*, §78, dealing with retirement pay. *Wissner* precludes application of the incidents of community property that would frustrate the congressional plan. *In re Marriage of Milhan* (1974) 13 C.3d 129, 117 C.R. 809, 528 P.2d 1145, suggests that the wife may in some situations be fully protected in a dissolution judgment despite *Wissner*. The husband's National Service Life Insurance policies could not be subjected to the wife's claim of half the cash value; the forced surrender of the policy would defeat the congressional purpose of providing low-cost insurance protection to servicemen and their beneficiaries. However, the trial court may evaluate the community interest in the policy and give the wife an equivalent amount in other property available for disposition.

"Under such a procedure, Husband in the instant case would retain both policies in force, along with the right to change the beneficiaries thereunder. Wife would be awarded one-half of the cash value of those policies, payable out of assets which otherwise would be awarded to Husband. Provision could be made for Husband to discharge this obligation over a period of time if insufficient property exists at the time of dissolution. In no event, however, should Husband be ordered to surrender, or otherwise impair, his policies in order to satisfy Wife's community claim, for such an order would violate the overriding federal law discussed above." (13 C.3d 133.) (See 65 Cal. L. Rev. 305.)

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4. Proceeds of Insurance.

e. Federal Employees' Insurance.

11 Witkin Sum. Cal. Law Com Prop § 51

[§ 51] Federal Employees' Insurance.

The Federal Employees' Group Life Insurance (FEGLI) program provides group insurance for government employees in much the same way as private employees' group plans; and the overriding national interest in servicepersons that underlies the National Service Life Insurance program (*supra*, §50) is absent. Hence, the holding in *Wissner v. Wissner* (1950) 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424, *supra*, §50, does not apply, and a California spouse is entitled to recover one-half of the insurance where premiums were paid with community funds (see *supra*, §47). (*Carlson v. Carlson* (1974) 11 C.3d 474, 477, 113 C.R. 722, 521 P.2d 1114 [listing many differences between the two statutes]; see *Biltoft v. Wootten* (1979) 96 C.A.3d 58, 61, 157 C.R. 581 [FEGLI term insurance; proceeds apportioned in same ratio that premiums paid from community earnings bore to premiums paid from separate property].)

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11 Witkin Sum. Cal. Law Com Prop § 52

[§ 52] In General.

(1) *Loss of Earnings*. The proceeds of earnings during marriage follow the character of the earnings, and hence are community property. (See *supra*, §37.) Payments made as compensation for loss of earnings come within this rule. In *Estate of Worley (1948) 87 C.A.2d 760, 197 P.2d 773*, decedent, employed during World War II by a contractor doing government work on Wake Island, was captured by the Japanese and held prisoner for over 3 years until his death. A federal statute allowed compensation for injury, death, or detention of those employees, payable to the employee or his dependents. The government paid \$ 5,960. The widow claimed it as community property (proceeds of earnings); a child by a former marriage claimed an heir's share, contending that it was separate property (government gift of money). *Held*, the fund was community property. Congress had no intent to make a gift; the payments were intended as compensation for loss of earnings and were, in effect, a continuation of wages. (*87 C.A.2d 764.*)

In *Estate of Foy (1952) 109 C.A.2d 329, 240 P.2d 685*, decedent, an airline pilot, was killed in a flight. A \$ 10,000 accidental death benefit, provided for and paid by his employer, was awarded to his putative wife. "While there may have been no express agreement for such payment as a part of his wages it was forcefully implied by the hazardous nature of the services undertaken." (*109 C.A.2d 333.*)

(2) *Remuneratory Gift*. In *Downer v. Bramet (1984) 152 C.A.3d 837, 199 C.R. 830*, the husband, after separation, received a one-third interest in a ranch from his employer. The ranch was later sold, and the wife claimed a community interest in the proceeds. *Held*, judgment of nonsuit against the wife reversed. Although the conveyance was legally a gift under C.C. 1146, i.e., a transfer made voluntarily and without consideration, the evidence strongly suggested that it was actually a remuneratory gift in recognition of the husband's 30 years of loyal and skilled service to his employer. "To the extent it was and to the extent the efforts and services were rendered during the marriage ... , the ranch interest ... and the proceeds of its sale were community property." (*152 C.A.3d 844.*)

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11 Witkin Sum. Cal. Law Com Prop § 53

[§ 53] Insurance Agent's Termination Benefits.

In re Marriage of Skaden (1977) 19 C.3d 679, 139 C.R. 615, 566 P.2d 249, held that an insurance agent's termination benefits are community property. The husband, an insurance sales agent, was entitled to receive "termination benefits" if the agency agreement terminated 2 years or more after its effective date. The benefits consisted of specified percentages of net premiums collected within a 5-year period after termination, on policies credited to his account on the date of termination, and payable in installments, but subject to specified conditions relating to competition by the terminated agent. The trial judge concluded that the benefits were an expectancy and not divisible community property. *Held*, reversed.

(a) *Terminology*. The term "vested" has a special meaning in the context of dissolution. A vested right is one that survives the discharge or voluntary termination of the employee. If payment is subject to a condition, e.g., survival to a specified time, it is vested but "immature." If it is subject to no condition, i.e., is an unconditional right to immediate payment, it is "matured." (19 C.3d 685; see *In re Marriage of Brown (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561*, *infra*, §60.)

(b) *Vested immature right*. Because more than 2 years had passed since the agreement was made, the right was vested; but the agreement had not been terminated, and the posttermination conditions of payment had not been fulfilled, hence it was immature. (19 C.3d 685, 686.)

(c) *Pension rule governs*. The rights involved are similar to vested pension rights; i.e., the termination benefits are a form of deferred compensation for services rendered. (19 C.3d 686, 687.)

(d) *Proper method of division*. The pension cases have approved two methods, the choice being left to the sound discretion of the trial judge exercised in the light of the particular circumstances, unless the parties themselves reach a settlement. (19 C.3d 688.) First, a determination of the present value of the rights and an equal division or adjustment of them, if this is feasible. Second, if, because of uncertainties affecting vesting or maturation, the judge concludes that he should not attempt to divide the present value, he can award the husband and wife an appropriate portion of each payment as it is paid; this solution has the advantage of removing from the employee spouse the risk of paying the community for rights that may not mature; but it has the disadvantage of requiring reservation of jurisdiction in order to

supervise payments and their division at a future date. (19 C.3d 688.)

(e) *Limited retroactivity of decision.* As in *Brown*, this decision does not apply retroactively to cases in which the property rights have already been finally adjudicated, unless the decree expressly reserved jurisdiction to divide at a later date. But the decision will apply to cases in which those rights have not been adjudicated, the adjudication is still subject to appellate review, or the judge has expressly reserved jurisdiction. (19 C.3d 689.)

(f) *Nonvested pension rights.* Under *Brown*, even nonvested pension rights are property subject to division; however, because the rights involved in the instant case were clearly vested, "we are not called upon to determine whether nonvested rights of this character also constitute divisible community property." (19 C.3d 686, footnote 6.) (See Rutter Group, 2 Family Law §8:194 et seq.; 18 *Santa Clara L. Rev.* 279.)

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5. Proceeds of Earnings.

c. Severance Pay.

1. Community Property.

11 Witkin Sum. Cal. Law Com Prop § 54

[§ 54] Community Property.

In re Marriage of Horn (1986) 181 C.A.3d 540, 226 C.R. 666, followed *In re Marriage of Skaden* (1977) 19 C.3d 679, 139 C.R. 615, 566 P.2d 249, supra, §53, in holding that unconditional severance pay was community property. A professional football player with the National Football League retired and became eligible for a lump sum severance payment of \$ 100,000, based on eight seasons with the NFL. As in *Skaden*, the termination benefits were deferred compensation for services previously rendered. The player has an absolute right to severance pay even if he also receives retirement. The only requirement is that he permanently leave football; if he returns within 12 months and has to repay the severance pay, he will receive it back when he permanently retires. (181 C.A.3d 547, 548.)

In re Marriage of Gram (1994) 25 C.A.4th 859, 866, 30 C.R.2d 792, involved an enhanced early retirement plan offered as a voluntary termination incentive and selected by the husband after dissolution of the parties' marriage. *Held*, the trial judge's characterization as separate property was error; the plan was not compensation for lost earnings, but realization of a retirement expectation, and hence a form of deferred compensation for services rendered. (25 C.A.4th 866.) (See Rutter Group, 2 Family Law §8:190 et seq.)

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c. Severance Pay.

2. Separate Property.

11 Witkin Sum. Cal. Law Com Prop § 55

[§ 55] Separate Property.

In re Marriage of Flockhart (1981) 119 C.A.3d 240, 243, 173 C.R. 818, distinguished *In re Marriage of Skaden* (1977) 19 C.3d 679, 139 C.R. 615, 566 P.2d 249, supra, §53. By federal statute, the husband received "weekly lay-off" benefits, paid by the United States to employees adversely affected by expansion of Redwood National Park. *Held*, the benefits represented present rather than deferred compensation.

In re Marriage of Wright (1983) 140 C.A.3d 342, 189 C.R. 336, also distinguished *Skaden*. A voluntary lump sum payment was made by the husband's employer on termination of the employment, in recognition of the difficulties the husband would encounter in obtaining future employment. *Held*, the payment, received after separation, was not based on a contract right; it was similar to disability benefits and to workers' compensation awards. "The purpose underlying the separate property treatment of both is compensation for future loss of earnings, not payment for services previously performed." (140 C.A.3d 345.)

In re Marriage of DeShurley (1989) 207 C.A.3d 992, 255 C.R. 150, involved a pilot's severance pay received after separation under a bankruptcy court order. The order, which grew out of a strike by the pilot's union against the employer airline, gave the pilot the option of being reinstated or receiving severance pay. *Held*, the pay was separate property. As compensation for electing to forgo future employment, it represented present compensation for the loss of future earnings, which, had they been received by the pilot, would have been his separate property (see supra, §10). (207 C.A.3d 995.) And neither the fact that the pilot's termination was voluntary nor the fact that the amount of the pay was based on length of employment requires a different conclusion, at least not where, as here, there is a clear indication concerning the purpose of the pay. (207 C.A.3d 996.)

In re Marriage of Lawson (1989) 208 C.A.3d 446, 256 C.R. 283, held that the husband's postdissolution severance allowance, offered to employees who had received notice of termination due to an internal consolidation, was the husband's separate property.

(a) Numerous characteristics of the severance program establish its voluntary noncontractual nature, as contrasted with the absolute contractual right to pay involved in *In re Marriage of Horn* (1986) 181 C.A.3d 540, 226 C.R. 666,

supra, §54: (1) Payment was wholly conditional on participants' signing an agreement that the severance allowance was not part of their regular salary or benefit program. (2) The notice of termination had to have been received during a specified 3-month period, but the participants were required to continue to work until the employer determined that their services were no longer needed. (3) Actual termination of employment, either voluntary or involuntary, prior to the date selected by the employer disqualified participants from the program. (4) If a participant was reemployed, he was required to repay that portion of the allowance that was in excess of the salary he would have received had he continued working. (5) A participant's beneficiaries would not receive the allowance if the participant died prior to the employer's termination date. (6) The employer had the power to reject employees as participants and to revise or revoke the program at any time. (208 C.A.3d 453.)

(b) The repayment provision and a provision stating that the program's purpose was to aid employees affected by the work force reduction show that the allowance was intended as future replacement compensation for long-term employees seeking new jobs. (208 C.A.3d 453.)

(c) The fact that the amount of the allowance was based in part on length of employment should not be unduly emphasized. "In fashioning a severance allowance, fair play may dictate that longevity of employment be factored into the formula for arriving at a monetary figure, even though the right to participate in the plan does not accrue from past services." (208 C.A.3d 454.)

(d) A provision stating that the program was an employee welfare benefit plan under the Employee Retirement Income Security Act (ERISA) did not transform the allowance into a true retirement benefit, subject to community property division. ERISA is not limited to retirement plans. And the reference to it here merely reflects certain provisions of the Act and of the Code of Federal Regulations, to the effect that severance benefits are to be considered covered "welfare plans." (208 C.A.3d 454.)

Later cases are to the same effect. (See *In re Marriage of Frahm* (1996) 45 C.A.4th 536, 542, 53 C.R.2d 31 [payment offered former husband as incentive to take early retirement was separate property; although there was some correlation between amount of incentive and length of employment, right to payment resulted solely from employer's beneficence and did not accrue during marriage]; *In re Marriage of Steinberger* (2001) 91 C.A.4th 1449, 1456, 111 C.R.2d 521 [severance pay awarded to wife after separation was her separate property; severance pay was based on release she signed so company could avoid potential litigation, and not based on prior contractual obligation].)

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c. Severance Pay.

3. Military Severance Pay and Reenlistment.

11 Witkin Sum. Cal. Law Com Prop § 56

[§ 56] Military Severance Pay and Reenlistment.

In re Marriage of Kuzmiak (1986) 176 C.A.3d 1152, 222 C.R. 644, characterizes military "separation pay" as separate property. The parties were divorced in 1981, and in 1983 the husband, an Air Force officer with 16 years of service, was released. Because he had not completed the 20 years necessary for longevity retirement benefits, he was given \$ 30,000 as "separation pay." He then reenlisted, thereby reinstating his entitlement to longevity retirement benefits on completing 20 years of service, with a deduction of the \$ 30,000 separate payment. The trial judge treated the payment as community property. *Held*, reversed.

(a) Unlike military benefits based on longevity of service, separation pay does not serve to compensate for past services. The right to separation pay occurs only when there is an involuntary discharge; i.e., it is a contingency payment for an officer who is career committed but to whom a full military career may be denied. If the officer is married at the time, the loss of employment becomes a community loss, and separation pay serves to ameliorate it. If the officer is not married at the time, the adjustment to civilian loss is the officer's alone to make, and the payment is his or her separate property. (*176 C.A.3d 1157*.)

(b) If an officer reenlists after involuntary discharge and subsequently receives a longevity pension, the purposes of the separation pay have not been fulfilled; hence reimbursement is required. And the husband's application for a longevity retirement pension and the government's withholding of \$ 30,000 from this retirement pay improperly deprives the wife of her community interest in these funds: the husband cannot defeat the community interest by unilaterally transmuting community property into separate property. (*176 C.A.3d 1159*.)

(c) "For these reasons, we conclude that wife has a community property interest in husband's longevity pension, including the \$ 30,000 separation pay the government will withhold from his retirement benefits. This holding recognizes the separate property characteristic of the separation pay (until husband's actions in reenlisting and earning a longevity pension) and also protects wife's rights to a community property asset. Moreover, our holding does not frustrate congressional intent that separation pay ease the service member's reentry into civilian life." (*176 C.A.3d 1159*.) (See Rutter Group, 2 Family Law §§8:193, 8:193.1.)

West's Key Number Digest, Husband and Wife k.259

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law II. ACQUISITION OF COMMUNITY PROPERTY

D. Proceeds of Community Property.

5. Proceeds of Earnings.

d. Stock Options.

11 Witkin Sum. Cal. Law Com Prop § 57

[§ 57] Stock Options.

In re Marriage of Hug (1984) 154 C.A.3d 780, 201 C.R. 676, examines the nature and characterization of stock options. The parties were married in 1956 and separated in 1976. In 1972, the husband left an executive position for employment with a corporation and was granted a number of stock options under a plan designed to attract and retain executives. Some of the options, though granted prior to the date of separation, were exercisable after that date, and the trial judge employed a time rule for allocating the interests to community and separate property. *Held*, in this case of first impression, the allocation was a proper exercise of discretion.

(a) *Nature of employee stock options.* The underlying purposes differ, and options cannot always be classified as compensation exclusively for past, present, or future services. But they are an alternative to fixed salaries to secure optimal tax treatment. (154 C.A.3d 784, 785.) "In this sense, stock options fall into the same category as, for example, fringe benefits, health and welfare benefits, incentive compensation based on company profits, deferred compensation plans, and pension and profit-sharing arrangements." (154 C.A.3d 785.) Incentive options are granted for future services, either primarily or exclusively. (154 C.A.3d 786.) But in some situations, the primary goal of an option is to defer compensation for present services. Hence, whether they can be characterized as compensation for future services, past services, or both, depends on the circumstances. (154 C.A.3d 786.)

(b) *Time rule applied in allocation.* "It was not an abuse of discretion, under the facts of this case, for the trial court to allocate those interests by applying a time rule, finding that the number of options determined to be community property is a product of a fraction in which the numerator is the period in months between the commencement of the spouse's employment by the employer and the date of separation of the parties, and the denominator is the period in months between commencement of employment and the date when each option is first exercisable, multiplied by the number of shares which can be purchased on the date the option is first exercisable. The remaining options are the separate property of the employee." (154 C.A.3d 782; see *infra*, §65 et seq.)

(c) *Other methods of allocation.* The time rule used in this case will not always be the proper method. "For example, some stock options are publicly traded or can otherwise be valued, even though exercisable in the future. In either case, it would appear to be most equitable to fix the value of the community interests as of the date of separation and distribute the community interests to the employee spouse, awarding other community property of equivalent value

to the nonemployee spouse in order to achieve the equal division of community property. ... Employee stock options are normally exercisable on the condition that the employee remain with the employer and, as between the spouses, that is obviously within the control of the employee spouse. Additionally, to whatever extent an increase in the value of the company stock results from the employee's performance, or a decrease in the value of the stock occurs because of the company's poor performance or the economy, or because the employee terminates his employment, the risk of such rewards or losses is best borne by the employee spouse." (154 C.A.3d 794.)

In re Marriage of Nelson (1986) 177 C.A.3d 150, 222 C.R. 790, approves the holding and reasoning of *Hug*, but emphasizes the *Hug* court's statement that no single rule or formula is applicable in all cases.

(a) In the present case, the stock options fell into three separate categories and were treated by the trial judge as follows: (1) those that were granted and became exercisable before the parties separated were wholly community property; (2) those that were granted before the parties separated but were not exercisable until after they separated (the immediate options) were partly community property and partly husband's separate property, under a time rule; (3) those that were granted after the parties separated (the postseparation options) were wholly the husband's separate property. (177 C.A.3d 153.)

(b) The court also upheld the trial judge's order that the portion of the options valued as community property be reduced to reflect an assumed tax rate of 20%, and a credit to the husband with one-half this amount. (177 C.A.3d 155.)

In re Marriage of Walker (1989) 216 C.A.3d 644, 265 C.R. 32, involved the determination of community and separate property interests in stock options granted to the husband by his employer, which could be exercised on various dates. The stocks themselves were subject to forfeiture if the husband's employment was terminated, and they vested on various dates. The trial judge found that the dates the stocks vested were irrelevant, because the husband's employment had not been terminated and all the stocks vested irrevocably when the employer's business was sold, a year and 9 months after the parties separated. The judge applied the time rule used by *Nelson*, which is based on the dates the options were exercisable. *Held*, judgment modified.

(a) It was an abuse of discretion to use the *Nelson* formula rather than that applied by *In re Marriage of Harrison* (1986) 179 C.A.3d 1216, 225 C.R. 234, which is based on the date the stocks vested. (216 C.A.3d 650.) The court provided detailed diagrams of the formulas applied by *Hug*, *Nelson*, and *Harrison*. (216 C.A.3d 649, 650, footnotes 4, 5, 6.)

(b) Where, as here, the parties separate before benefits conferred during the marriage are vested, there must be an allocation taking into account the periods of time before and after separation, in order to comply with the statutory mandate (see *supra*, §10 et seq.) that earnings after separation are separate property. (216 C.A.3d 651.)

In re Marriage of Judd (1977) 68 C.A.3d 515, 137 C.R. 318, *infra*, §65, involved an asset akin to a stock option, i.e., an employee's shares of stock in the employer corporation acquired under a "contingent account." *Held*, the shares were community property. Under *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, *infra*, §60, future employment benefits, even if subject to a contingency, are a contractual right and not a mere expectancy. (68 C.A.3d 526.) (See *In re Marriage of Harrison*, *supra*, 179 C.A.3d 1224, 1226 [distinguishing qualified and nonqualified options, discussing *Hug* view of trial judge's discretion, and approving time formula]; 27 *Lincoln L. Rev.* 13 [Characterization of Stock Options in a California Dissolution Proceeding]; Rutter Group, 2 Family Law §8:1245 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Dividing Pensions and Other Employee Benefits, §10.1 et seq.



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CHAPTER XVI - Community Property

Witkin Summary of California Law II. ACQUISITION OF COMMUNITY PROPERTY

D. Proceeds of Community Property. 6. Pensions and Retirement Benefits. a. Nature and Types of Pension Plans.

11 Witkin Sum. Cal. Law Com Prop § 58

[§ 58] Nature and Types of Pension Plans.

Pension plans of whatever nature fit into two basic classifications, defined benefit plans and defined contribution plans.

(1) *Defined Benefit Plans.* A defined benefit plan may require contributions from the employer or employee, or both; the amount of the benefit depends not on the amount contributed, but rather on such factors as salary and years of service. The exact amount can be ascertained at any point during employment, although it may fluctuate. (See *In re Marriage of Bergman* (1985) 168 C.A.3d 742, 748, footnote 4, 214 C.R. 661, *infra*, §76; Rutter Group, 2 Family Law §§8:1462, 8:1463.)

In re Marriage of Stephenson (1984) 162 C.A.3d 1057, 209 C.R. 383, involved a defined benefit plan which, at the time of separation, consisted solely of an annuity that had been purchased for \$ 35,760. In rejecting the husband's contention that any value above this amount was postseparation earnings, and hence his separate property (see *supra*, §10), the court explained the nature of a defined benefit plan, and the method of valuation, as follows:

(a) In a defined benefit plan the employer obligates itself to pay a specified monthly pension at retirement. The employer contributes to the pension fund in advance of retirement, in order to reduce its financial strain when the employee retires. But while an employee is still working, there is not necessarily a portion of that fund that is allocated to him or her. The employee's present interest is not derived from the value of the pension fund, but is derived from the amount of monthly pension promised at retirement. (162 C.A.3d 1082.)

(b) The valuation of the employee's interest in a defined benefit retirement plan is possible, by first determining the value of the pension measured at the future retirement date, and then discounting that value back to the present date of valuation. The discounting procedure usually involves discounting for three separate factors: (1) interest, (2) mortality, and (3) vesting, if the participant was not 100% vested in the retirement benefit at the time of valuation. (162 C.A.3d 1083.)

(2) *Defined Contribution Plans.* Unlike a defined benefit plan, the amount of the benefit under a defined contribution plan does depend on the amount contributed, plus accumulations through investment; and the exact amount

of the benefit cannot be fixed until retirement. (See *In re Marriage of Bergman*, *supra*, 168 C.A.3d 748, footnote 4; Rutter Group, 2 Family Law §8:1464.)

If stated conditions have been fulfilled, such as service for a specified number of years, the employee's interest in either type of plan is said to be vested, i.e., it will survive despite termination of employment prior to retirement. A vested interest is mature if the employee has an immediate right to begin receiving periodic payments of benefits or the balance in the employee's retirement account. (See *In re Marriage of Brown* (1976) 15 C.3d 838, 842, 126 C.R. 633, 544 P.2d 561, *infra*, §60.)

The present value of a defined contribution plan is the amount of contributions and accruals during the marriage until separation, plus the accruals on those contributions between the date of separation and the time of division or trial. This value can be determined without expert actuarial testimony, but that testimony is required to ascertain the present value of a defined benefit plan. (See *In re Marriage of Bergman*, *supra*, 168 C.A.3d 748, footnote 4.)

West's Key Number Digest, Husband and Wife k.249(3)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Defined Benefit Plans*. See C.E.B., Dividing Pensions and Other Employee Benefits, §§1.25, 3.37; California Family Law Practice, §L.4 et seq. (2) *Defined Contribution Plans*. See C.E.B., Dividing Pensions and Other Employee Benefits, §§1.26, 3.38; California Family Law Practice, §L.1 et seq.



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CHAPTER XVI - Community Property

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D. Proceeds of Community Property.
6. Pensions and Retirement Benefits.
b. Vested Pension Rights.

11 Witkin Sum. Cal. Law Com Prop § 59

[§ 59] Vested Pension Rights.

A pension or right in a retirement fund, created by prior contributions or deductions from wages, has its source in past earnings. Hence, the interest or vested right in the pension or fund arises out of the proceeds of community property and is community property. (*Crossan v. Crossan* (1939) 35 C.A.2d 39, 40, 94 P.2d 609; *Gettman v. Los Angeles Dept. of Water & Power* (1948) 87 C.A.2d 862, 866, 197 P.2d 817 [death and retirement benefits are community property to extent that earnings are contributed]; *Shaw v. Board of Administration, State Employees' Retirement System* (1952) 109 C.A.2d 770, 774, 241 P.2d 635 [benefits under State Employees' Retirement Law]; *Estate of Perryman* (1955) 133 C.A.2d 1, 3, 283 P.2d 298 [benefits under Federal Civil Service Retirement Act]; *Williamson v. Williamson* (1962) 203 C.A.2d 8, 11, 21 C.R. 164 ["The principle established by these cases is that pensions become community property, subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds. To the extent that payment is, at the time of the divorce, subject to conditions which may or may not occur, the pension is an expectancy, not subject to division as community property"]; *In re Marriage of Jafeman* (1972) 29 C.A.3d 244, 261, 105 C.R. 483, *infra*, §197; *In re Marriage of Ward* (1975) 50 C.A.3d 150, 153, 123 C.R. 234; see 24 *Hastings L. J.* 347; 5 *Pepperdine L. Rev.* 191 [Domestic Relations Law and Retirement Plans]; 37 *So. Cal. L. Rev.* 594; 2 *Stanf. L. Rev.* 447; 9 *U.S.F. L. Rev.* 635; 94 *A.L.R.3d* 176 [division of pension or retirement benefits between spouses].)

In *Phillipson v. Board of Administration, Public Employees' Retirement System* (1970) 3 C.3d 32, 89 C.R. 61, 473 P.2d 765, the husband employee left his employment with the state on April 1, 1966. At that time he could elect to withdraw his contributions to the Public Employees' Retirement System, or could choose a life pension, the actual value of which was at least twice that of the contributions. On April 14, 1966, the wife obtained a default divorce decree for extreme cruelty, which awarded her all of the accrued retirement funds. In an effort to avoid this result, on July 19, 1967, the husband filed a formal application with defendant pension board, electing to receive a pension. The wife then brought the present action against the board to determine her right to the award, and the trial court gave judgment in favor of the board. *Held*, reversed.

(a) The prospective retirement benefits of a present employee are an expectancy, and neither those rights nor their actuarial equivalent can be divided as community property. But when an employee retires, or leaves the state service, both the accumulated contributions and matured retirement benefits allocable to them are community property and subject to division on dissolution of marriage. (3 C.3d 40.)

(b) The wife was not asserting the right of a beneficiary named by the employee; her claim was for a share in community property pension rights that had accrued and were unconditionally payable at the time of the divorce. (3 C.3d 42.)

(c) Government Code prohibitions against creditors' levies on pension funds are not relevant; plaintiff does not claim as a creditor but as the owner of a present, existing, and equal interest in community property. (3 C.3d 44.)

(d) "To sum up the essence of the case, we do not believe the Legislature has declared the employee's right to a pension so sacrosanct that it is incompatible with his spouse's ownership of her community share in it. Both employee and non-employee own community property rights in the pension fund that are of equal stature; such rights are equally subject to the power of the divorce court. Because the employee participates in the pension program he does not thereby strip his spouse of vested community property rights in that fund." (3 C.3d 50.)

In *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, the court said: "The law is now settled in California that 'retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved.' ... Because such benefits are part of the consideration earned by the employee, they are accorded community treatment regardless of whether they derive from a state, federal, or private source, or from a contributory or noncontributory plan." (13 C.3d 355.)

Waite v. Waite (1972) 6 C.3d 461, 99 C.R. 325, 492 P.2d 13, applied the *Phillipson* reasoning and holding to a retired judge's pension, even though it is not fixed in dollar amounts, but constitutes a percentage of the salary that automatically increases when the Legislature raises the salaries of active judges. (6 C.3d 470.) "Whether a pension plan provides for fixed or variable payments, and whether adjustments occur automatically or require legislation, the basic point remains that the pension payment serves as a remuneration for services rendered by the employee; if these services were discharged during the marriage, that remuneration must compose a community asset. Once the employee's right to a pension vests upon his retirement, variations in the amount of such payments do not affect the community character of that asset." (6 C.3d 471.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Dividing Pensions and Other Employee Benefits, §1.1 et seq.



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CHAPTER XVI - Community Property

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11 Witkin Sum. Cal. Law Com Prop § 60

[§ 60] Nonvested Pension Rights.

In re Marriage of Brown (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, overruled *French v. French* (1941) 17 C.2d 775, 112 P.2d 235, *infra*, §78. Husband had nonvested pension rights based on 24 years of employment during marriage. In 3 years he would be entitled to a monthly pension of \$ 311, and if he continued his employment until age 63 he would receive \$ 485 per month. The trial court in the dissolution proceeding followed *French* in refusing to divide the pension rights between husband and wife. Wife appealed. *Held*, reversed.

(a) *Terminology*. Nonmarital cases describe a pension as "vested" if the employer cannot unilaterally repudiate the right without terminating the employment relationship. As used in marital cases, however, the term "vested" refers to a right that survives the discharge of the employee or voluntary termination of the employment. This must be distinguished from a matured right to immediate payment. "Depending upon the provisions of the retirement program, an employee's right may vest after a term of service even though it does not mature until he reaches retirement age and elects to retire. Such vested but immature rights are frequently subject to the condition, among others, that the employee survive until retirement." (15 C.3d 842.)

(b) *Analysis of French rule*. The *French* rule rests on the theory that nonvested pension rights are not property but mere expectancies and hence not assets subject to division on dissolution of the marriage. Dicta in later cases reiterated the rule but failed to reexamine it. (15 C.3d 844.) On reexamination it is clearly unsound. The defining characteristic of an expectancy is that the holder (e.g., an heir apparent) has no enforceable right to the future beneficence. But pension benefits are not gratuities; they are part of the consideration earned by the employee, a form of deferred compensation. The employee has a contract right to it, whether it is vested or nonvested. (15 C.3d 845.) "[T]he courts have repeatedly reaffirmed that a nonvested pension right is nonetheless a contractual right, and thus a property right." (15 C.3d 846.) California courts have previously refused to allocate the nonvested pension rights between the spouses on the ground that it is contingent on continued employment. This theory is now rejected. In other situations involving a conditional right to future income (e.g., *Waters v. Waters* (1946) 75 C.A.2d 265, 269, 170 P.2d 494, *supra*, §37), it has been treated as a community asset. (15 C.3d 846.)

(c) *Disapproval of French rule*. "We conclude that *French v. French* and subsequent cases erred in characterizing nonvested pension rights as expectancies and in denying the trial courts the authority to divide such rights as community

property. This mischaracterization of pension rights has, and unless overturned, will continue to result in inequitable division of community assets." (15 C.3d 847.) A division of community property that awards one spouse the entire value of the pension, without any offsetting award to the other spouse, does not represent an equal division of community property. (15 C.3d 847.)

(d) *No unreasonable burden on court.* In view of the possibility that death or termination of employment may destroy rights before they mature, the court may be able to evaluate this risk in determining the present value of those rights. But if it concludes that it should not attempt to do so because of uncertainties, it can instead award each spouse an appropriate portion of each pension payment as it is paid. This method makes it unnecessary to compute present value, and divides the risk equally. (15 C.3d 848.) The latter method requires the court to continue jurisdiction to supervise payments. But this is so whenever the court cannot equitably award all pension rights to one spouse, whether vested or not; and the administrative burden cannot justify an inequitable substantive rule distinguishing between vested and nonvested rights. (15 C.3d 849.) Moreover, the practical consequence of the *French* rule has often been an award of alimony to the other spouse; and supervision of alimony entails a far more onerous burden than supervision of future pension payments. (15 C.3d 849.)

(e) *No infringement of employee's freedom of contract.* The employee can still change or terminate employment, agree to a modification of pension terms, or elect between alternative programs. "We do not conceive that judicial recognition of spousal rights in nonvested pensions will change the law in this respect. The employee retains the right to decide, and by his decision define, the nature of the retirement benefits owned by the community." (15 C.3d 849, 850.) (See 65 Cal. L. Rev. 275; 4 Pepperdine L. Rev. 147; 9 Southwestern U. L. Rev. 671; 25 U.C.L.A. L. Rev. 417 [community and separate interests in pensions and Social Security benefits after *Brown* and ERISA]; 33 U.C.L.A. L. Rev. 1250 [marital property aspects of pensions and other wage substitutes].)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Dividing Pensions and Other Employee Benefits, §1.1 et seq.



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- D. Proceeds of Community Property.
- 6. Pensions and Retirement Benefits.
- d. Enhanced Early Retirement Benefits.

11 Witkin Sum. Cal. Law Com Prop § 61

[§ 61] Enhanced Early Retirement Benefits.

Pension plans sometimes provide an early retirement option providing enhanced benefits, such as crediting the employee with extra years of service. A nonemployee spouse who owns a community property interest in the employee's retirement benefits owns a community property interest in those benefits as enhanced. (*In re Marriage of Gram* (1994) 25 C.A.4th 859, 862, 30 C.R.2d 792.)

In re Marriage of Lehman (1998) 18 C.4th 169, 177, 74 C.R.2d 825, 955 P.2d 451, involved a couple who divorced after 18 years of marriage. The husband retired 14 years later at age 54 after 33 years of service with his employer. He retired under a defined benefit retirement plan with an enhanced retirement package designed to encourage early retirement. The package added 3 putative years of service and waived the normal actuarial reduction of 18% for early retirement. The trial court apportioned the enhanced retirement benefit between community property and the husband's separate property based on the "time rule," which awards the community a fraction of the total retirement benefit, the numerator of which is the employee spouse's length of service during marriage before separation and the denominator of which is the employee spouse's total length of service (see *infra*, §65). The court refused to add the 3 putative years credited to the employee spouse's service to the denominator of the time rule fraction. *Held*, affirmed; a nonemployee spouse who owns a community property interest in an employee spouse's retirement benefits under a defined benefit plan owns a community property interest in those benefits as enhanced.

(a) *Character of retirement benefits.* Generally, all property acquired by a spouse during marriage before separation is community property. (18 C.4th 177; citing *Family C. 760, 771*, *supra*, §§4, 10.) Under *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, *supra*, §60, this rule applies to retirement benefits derived from employment. (18 C.4th 177.)

(b) *Computation of benefits at time of retirement.* The right to retirement benefits is the right to draw from a stream of income that begins at the time of retirement, as that stream is defined at the time of retirement. The stream's volume may depend on various events or conditions that arise after separation, or even after dissolution. For example, the employee spouse may terminate or change employment, agree to modification of the terms of the retirement agreement, or elect between alternative retirement programs. The nonemployee spouse owns an interest, by virtue of his or her interest in the community, in whatever the employee spouse chooses. This includes an enhanced retirement benefit,

because the right to a retirement benefit accruing, at least in part, during marriage before separation underlies any right to enhancement. On the other hand, where an employee spouse's right to a severance payment accrues solely after separation, the community has no interest in the payment. (18 C.4th 178.)

(c) *Nature of enhanced interest.* The enhancement is not a benefit separate from the retirement benefits. It is a modification of an existing asset, not the creation of a new one. Here, it was the retirement benefit in which the community owned a share that was enhanced. (18 C.4th 184.)

(d) *Apportionment by time rule.* Apportionment of community and separate property interests in retirement benefits by means of the time rule (infra, §65 et seq.) is proper when the benefit amount is substantially based on the number of years of service, as is the case here. However, it would not be proper to add the putative years of service to the time rule fraction. The time rule divides the total years of actual service into the years of service performed during the marriage before separation to ascertain the portion of the retirement benefit that belongs to the community. The putative years have no independent existence, and are simply one of a number of means an employer can choose to compute an enhanced retirement benefit. (18 C.4th 186.)

Two justices dissented on the grounds that (a) the enhancement was not part of the terms of compensation in effect during the existence of the community; (b) the form of an early retirement inducement (whether an enhanced retirement benefit package or stock options or a lump sum severance payment) ought not to determine whether or not the community participates in the inducement; and (c) the court's holding will discourage nonemployee spouses from cashing out the employee's pension at the time of dissolution. (18 C.4th 188.)

Later cases have applied the *Lehman* rule. (See *In re Marriage of Babauta* (1998) 66 C.A.4th 784, 786, 78 C.R.2d 281, infra, §84 [military separation incentive payments were community property]; *In re Marriage of Drapeau* (2001) 93 C.A.4th 1086, 1093, 114 C.R.2d 6, 11 Summary (10th), *Husband and Wife*, §234 [benefit about twice husband's annual salary during last 3 years of employment and payable on retirement either as lump sum or over 10-year period, declining each month after age 56 and reaching zero value at age 62, was community property]; *In re Marriage of Davis* (2004) 120 C.A.4th 1007, 1017, 16 C.R.3d 220 [husband police officer's deferred retirement option plan (DROP), which allowed officers with 25 years of service to simultaneously earn salary for 5 years and receive pension benefits to be deposited in savings account, but payable only on termination or retirement, was community property].)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Dividing Pensions and Other Employee Benefits, §3.56.



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D. Proceeds of Community Property.

6. Pensions and Retirement Benefits.

e. Federal Employee Retirement Income Security Act (ERISA).

1. Preemptive Effect of ERISA.

11 Witkin Sum. Cal. Law Com Prop § 62

[§ 62] Preemptive Effect of ERISA.

(1) *In General.* The right to recover a community interest in the employee spouse's pension raises a serious issue of the possible preemptive effect of the federal Employee Retirement Income Security Act of 1974 (ERISA). ERISA supersedes state law "insofar as they may now or hereafter relate to any employee benefit plan." (29 U.S.C., §1144(a).) A state law that conflicts with the provisions of ERISA or operates to frustrate its objects is preempted. (See Rutter Group, 2 Family Law §8.155 et seq.; 12 Cal. Western L. Rev. 560; 31 *Hastings L. J.* 1021 [Beyond Preemption: Accommodation of the Nonemployee Spouse's Interest Under ERISA]; 10 *Pacific L. J.* 881; 22 *Santa Clara L. Rev.* 33 [ERISA, Preemption and California Community Property Law]; 25 *U.C.L.A. L. Rev.* 417; 35 *U.S.F. L. Rev.* 255 [arguing that ERISA's social policy concerning death, taxes, and divorce harms women's rights]; 3 *Summary* (10th), *Agency and Employment*, §406 et seq.)

(2) *Preemption of Testamentary Division Under State Law.* In *Boggs v. Boggs* (1997) 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45, the surviving second wife of a deceased pension plan participant brought suit in federal district court against the sons of the marriage between the participant and his deceased first wife, seeking a declaratory judgment that ERISA preempted Louisiana's community property laws, which permitted the first wife to make a testamentary transfer to the sons of her community interest in undistributed pension plan benefits. The benefits under the plan included a lump sum savings plan distribution, which the participant rolled over into an individual retirement account (IRA), shares of stock from the company's employee stock ownership plan (ESOP), and an annuity with a survivorship feature. The district court granted the sons' motion for summary judgment, and the Court of Appeals affirmed. *Held*, reversed; Louisiana's community property laws conflicted with ERISA and were therefore preempted.

(a) *State law that permits testamentary transfer of first wife's interest in survivor's annuity is preempted.* State law is preempted to the extent that it provides the sons with a right to a portion of the second wife's survivor's annuity. That annuity is a qualified joint and survivor annuity mandated by 29 U.S.C., §1055(a). The object of that provision is to ensure a stream of income to surviving spouses. The economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity. (117 S.Ct. 1761, 138 L.Ed.2d 55, 56.) Even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to such an annuity. Nothing in ERISA supports the conclusion that Congress intended to permit a

predeceasing nonparticipant spouse to do so. Testamentary transfers could reduce the annuity below the minimum required by ERISA. Perhaps even more troubling, the recipient of a testamentary transfer need not be a family member, e.g., the survivor's annuity might be substantially reduced so that funds could be diverted to support an unrelated stranger. In the face of this direct clash between state law and ERISA, the state law cannot stand. (117 S.Ct. 1762, 138 L.Ed.2d 57.)

(b) *State law that permits testamentary transfer of first wife's interest in IRA, ESOP shares, and annuity payments received by plan participant is preempted.* Likewise preempted is the sons' state law claim to a portion of the plan participant's monthly annuity payments, IRA, and ESOP shares. ERISA's principal object is to protect plan participants and beneficiaries. (117 S.Ct. 1762, 138 L.Ed.2d 57.) It confers pension plan beneficiary status on a nonparticipant spouse or dependent only to the extent that a survivor's annuity is required in covered plans (see 29 U.S.C., §1055(a)) or a qualified domestic relations order (QDRO) awards the spouse or dependent an interest in a participant's benefits (see 29 U.S.C., §1056(d)(3)(J), (d)(3)(K)). (117 S.Ct. 1763, 138 L.Ed.2d 58.) These provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme. Silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist. The sons are neither plan participants nor beneficiaries, but base their claims on the first wife's attempted testamentary transfer. It would be inimical to ERISA to permit them to prevail. (117 S.Ct. 1764, 138 L.Ed.2d 59, 60.) That Congress intended to preempt these interests is given specific and powerful reinforcement by 29 U.S.C., §1056(d)(1), which requires pension plans to specify that benefits "may not be assigned or alienated." The first wife's testamentary transfer to her sons is such a prohibited assignment or alienation. Community property laws have, in the past, been preempted in order to prevent the diversion of retirement benefits. (117 S.Ct. 1765, 138 L.Ed.2d 61, 62.) It does not matter that the sons seek to enforce their purported rights only after the participant's benefits have been distributed, because those rights are based on the flawed theory that they had an interest in the undistributed benefits. (117 S.Ct. 1766, 138 L.Ed.2d 63.) (See 28 *Golden Gate L. Rev.* 571 [Boggs].)

(3) *No Preemption of Dissolution Division Under State Law.* In *re Marriage of Johnston* (1978) 85 C.A.3d 900, 149 C.R. 798, rejected the preemption argument and upheld a wife's right to payments under her husband's pension plan. The pension plan was joined as a party in the dissolution action, and the parties stipulated that the pension benefits were community property. The trial judge ordered that the plan make regular payments to the wife of her 50% share. *Held*, affirmed. The preemptive provision of the federal statute would prohibit any legislation or judicial order that affects the administration or regulation of a plan. But there is no frustration of the congressional object, and therefore no preemption, where the order merely affects distribution of pension benefits after the right to the benefits has been established. (85 C.A.3d 910.) "We conclude that the preemption clause of ERISA does not affect the operation of California community property laws; that ERISA does not interfere with the power of California courts to divide pension benefits between a husband and wife and to order direct payments of those benefits to a nonemployee spouse; that California community property law does not relate to and is thus not included in federal regulation of any pension benefit plan." (85 C.A.3d 912.) And, because the wife's claim is an assertion of a right of ownership, the ERISA prohibition against assignment of benefits is not applicable. (85 C.A.3d 912.)

In *re Marriage of Campa* (1979) 89 C.A.3d 113, 152 C.R. 362, on a careful examination of the legislative history and case law, again rejected the preemption arguments and declared that the California procedure accomplishes important objectives that do not conflict with those of Congress. "The family assets are fairly divided, the divorce proceedings are conclusively resolved with respect to the pension and both spouses ultimately share in the pension. The integrity of pension funds remains unaffected. They do not pay out one cent more than their plans call for." (89 C.A.3d 124, 125.) In denying a rehearing, the court declared that the United States Supreme Court decision in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 99 S.Ct. 802, 813, 59 L.Ed.2d 1, 16, footnote 24, *infra*, §64, dealing with the Railroad Retirement Act, was not controlling, for that decision expressly distinguished ERISA cases and took no position on the issue. (89 C.A.3d 132.)

California courts have jurisdiction concurrent with the federal courts over actions to enforce rights under ERISA,

and may order the trustees to pay a spouse his or her share of the retirement benefits. (*In re Marriage of Pilatti* (1979) 96 C.A.3d 63, 67, 157 C.R. 594; *In re Marriage of Lionberger* (1979) 97 C.A.3d 56, 64, 66, 158 C.R. 535; *In re Marriage of Mantor* (1980) 104 C.A.3d 981, 985, 164 C.R. 121.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., Dividing Pensions and Other Employee Benefits, §§5.1 et seq., 9.1 et seq.



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e. Federal Employee Retirement Income Security Act (ERISA).

2. Exception for Qualified Domestic Relations Order.

11 Witkin Sum. Cal. Law Com Prop § 63

[§ 63] Exception for Qualified Domestic Relations Order.

(1) *In General.* The Retirement Equity Act of 1984 (REA) amended ERISA to specifically state that the preemptive provision (29 U.S.C., §1144(a)) and the anti-assignment provision (29 U.S.C., §1056(d)(1)) do not apply if the state property division order is determined to be a qualified domestic relations order (QDRO). (29 U.S.C., §§1144(b)(7), 1056(d)(3)(A).) (See *In re Marriage of Baker* (1988) 204 C.A.3d 206, 213, 251 C.R. 126, 11 Summary (10th), *Husband and Wife*, §79 [no ERISA preemption]; Shulman, *Qualified Domestic Relations Order Handbook* (1993) [discussing QDRO from attorneys' and plan administrators' perspectives, and providing model documents and actuarial calculations regarding pension benefits]; Rutter Group, 2 Family Law §§8:158 et seq., 8:1170 et seq.; Cal. Civil Practice, 1 Family Law Litigation, §§6:48 et seq., 6:85; 79 A.L.R.4th 1081 [what constitutes qualified domestic relations order].)

State and federal courts have concurrent jurisdiction under ERISA to determine whether a domestic relations order is a QDRO. (*In re Marriage of Livingston* (1993) 12 C.A.4th 1303, 1306, 16 C.R.2d 100.)

(2) *Nonqualifying Orders.* *In re Marriage of Oddino* (1997) 16 C.4th 67, 73, 65 C.R.2d 566, 939 P.2d 1266, was a marital dissolution action. The wife was awarded a portion of the husband's retirement benefits, with payments to begin on his 55th birthday. At that time the husband was still working. The plan included an early retirement benefit known as the "Rule of 75," under which an employee who retired at or after 55, and whose age and years of service totaled at least 75, was entitled to a benefit calculated without actuarial reduction, i.e., an annuity in the same periodic amount as retirement at age 65. Although the husband would have been entitled to full benefits under the Rule of 75 had he retired at age 55, the plan determined that an order requiring payments to the wife under the Rule of 75 would not be a QDRO and that therefore ERISA prohibited these payments to the wife. Accordingly, the plan calculated actuarially reduced payments to the wife. The wife joined the plan in the marital dissolution action and sought an order requiring it to pay benefits to her calculated under the Rule of 75. The trial court denied the wife's request, but the Court of Appeal reversed. *Held*, reversed. An order is not a QDRO if it requires payment of early retirement benefits without actuarial reduction and the employee spouse, though eligible for unreduced benefits on early retirement, is still working.

(a) 29 U.S.C., §1056(d)(3)(E)(i)(II) provides that an order may be a QDRO even if it requires preretirement payment on or after the participant's earliest retirement age. However, it limits benefits payable under a preretirement

QDRO to "the present value of benefits actually accrued" without "taking into account the present value of any employer subsidy for early retirement." (16 C.4th 82.)

(b) An "accrued benefit" is an annual benefit commencing at normal retirement age or the actuarial equivalent (see 29 U.S.C., §§1002(23), 1054(c)(3)). Thus, 29 U.S.C., §1056(d)(3)(E)(i)(II) mandates, under its limitation to "the present value of benefits actually accrued," that early retirement benefits paid under a preretirement QDRO be based on the actuarial value of the participant's normal retirement age benefit. The plan was therefore not permitted, under ERISA, to pay the wife a portion of the husband's benefits before the husband's retirement without reducing those benefits to the actuarial equivalent of the husband's age 65 benefit. (16 C.4th 83.)

(c) The same conclusion follows from the meaning of "employer subsidy" in 29 U.S.C., §1056(d)(3)(E)(i)(II). (16 C.4th 83.) Although the periodic payments available under the Rule of 75 were the same as the age 65 benefit, the value of the Rule of 75 benefit was much greater, because it would be paid for a longer time. This excess value was an early retirement subsidy. (16 C.4th 84.)

Other cases are to the same effect. (See *In re Marriage of Marshall* (1995) 36 C.A.4th 1170, 1175, 43 C.R.2d 38 [QDRO was not available to wife to garnish annuity in order to enforce marital settlement agreement under which she was to be held harmless from tax assessment]; *In re Marriage of Shelstead* (1998) 66 C.A.4th 893, 898, 78 C.R.2d 365 [order allowing nonemployee spouse to name successor in interest to receive her community share of pension benefits on death is not QDRO].)

(3) *Effect of Death of Nonparticipant Spouse.* *In re Marriage of Rich* (1999) 73 C.A.4th 419, 86 C.R.2d 452, determined rights to benefits under a former husband's employee pension plan after his divorced wife's death. The pension plan entitled him to a monthly sum for the rest of his life. On dissolution of the marriage, the parties entered into a QDRO under which the wife received her community portion of the monthly payment for her life. After her death, the husband moved to modify or clarify the QDRO to reflect his entitlement to full payment. The trial court denied the motion, ruling that the wife's benefits were her separate property and that there was no reversion to the husband on her death. *Held*, reversed. Under ERISA, a nonparticipant spouse has no community ownership of the right to pension benefits unless the right is transferred by a QDRO. Thus, whatever interest in the pension the QDRO did not assign to the wife remains with the husband. The QDRO provided that payments to the wife would cease on her death, and there was no further assignment of any interest to her. Although the payments made pursuant to the QDRO ended with the wife's death, the pension trust fund's obligation to pay the full monthly benefit did not. The plan itself requires full payment to the husband until his death. (73 C.A.4th 423.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., Dividing Pensions and Other Employee Benefits, §§6.1 et seq., 7.1 et seq., 8.1 et seq.



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f. Railroad Retirement Act Benefits.

11 Witkin Sum. Cal. Law Com Prop § 64

[§ 64] Railroad Retirement Act Benefits.

(1) *Former Law: Benefits Not Subject to Community Property Claims.* *In re Marriage of Hisquierdo* (1977) 19 C.3d 613, 139 C.R. 590, 566 P.2d 224, held that the federal statute on railroad employees' benefits was not violated by application of California community property laws. (19 C.3d 616, 617, 618.) This decision was reversed by the United States Supreme Court in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1, holding that the state law was preempted by the federal statute. (99 S.Ct. 810, 59 L.Ed.2d 13.) The burden of marital dissolution may be particularly onerous for a spouse who has no expectation of Social Security benefits, and the distinction drawn between claims for spousal support and for division of community property may be found undesirable and call for reconsideration by Congress. But for the present, the community property interest asserted by the wife "conflicts with §231m, promises to diminish that portion of the benefit Congress has said should go to the retired worker alone, and threatens to penalize one whom Congress has sought to protect. ... It is not the province of state courts to strike a balance different from the one Congress has struck." (99 S.Ct. 813, 59 L.Ed.2d 16.)

(2) *Congressional Abrogation.* As amended by the Railroad Retirement Solvency Act of 1983, the preemption provision (45 U.S.C., §231m) provides that it does not prohibit retirement benefits from being treated as "community property for the purposes of ... distribution in accordance with a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree." (45 U.S.C., §231m(b)(2).) (See Rutter Group, 2 Family Law §8.221.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Congressional Abrogation.* See C.E.B., Dividing Pensions and Other Employee Benefits, §18.1 et seq.



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g. Time Rule for Determining Community Interest.
1. Basic Formula.

11 Witkin Sum. Cal. Law Com Prop § 65

[§ 65] Basic Formula.

(1) *In General. In re Marriage of Judd* (1977) 68 C.A.3d 515, 137 C.R. 318, involved a husband who, at the time of separation from his employment, had a 55% vested interest in a retirement annuity plan. The trial judge divided the benefits under the "vesting rule," determining the community interest as the vested part of the plan. *Held*, this was error.

(a) Under *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, *supra*, §60, the vesting rule is not the proper standard, for it does not necessarily reflect the community's contribution toward the earning of the benefits. (68 C.A.3d 520, 521, 522.) The most effective method of accomplishing the proper result is to apply the "time rule": "determine the community interest to be that fraction of retirement assets, the numerator of which represents the length of service during the marriage but before the separation, and the denominator of which represents the total length of service by the employee-spouse." (68 C.A.3d 522.)

(b) The husband's contention that later years of service are the most significant earning years, and that giving equal weight to postmarital and premarital years is erroneous, was rejected by *In re Marriage of Freiberg* (1976) 57 C.A.3d 304, 127 C.R. 792, and *In re Marriage of Anderson* (1976) 64 C.A.3d 36, 134 C.R. 252.

The *Anderson* opinion states: "The increase is not necessarily entirely his separate property because the amount of the pension is dependent upon the total number of years of service. Thus the first few years of service (during the marriage) must be given just as much weight in computing total service as the last few years (after separation)." (64 C.A.3d 39.)

Other cases are to the same effect. (See *In re Marriage of Lehman* (1998) 18 C.4th 169, 186, 74 C.R.2d 825, 955 P.2d 451, *supra*, §61 [excluding credited extra years of service from denominator in applying time rule to enhanced early retirement benefits; disapproving *In re Marriage of Gram* (1994) 25 C.A.4th 859, 867, 30 C.R.2d 792, to extent contrary]; *In re Marriage of Steinberger* (2001) 91 C.A.4th 1449, 1459, 111 C.R.2d 521 [where stock options received by wife from her employer included both separate and community property, time rule was appropriate for ascertaining community's interest, and 1-year period starting from wife's termination (during which time she received severance pay) counted as part of denominator]; Rutter Group, 2 Family Law §8:1115 et seq.; 24 *Santa Clara L. Rev.* 999, 1005; for

criticism of "time rule," see *10 Pacific L. J.* 847.)

(2) *Time Rule Applicable Despite Break in Service.* *In re Marriage of Gowan* (1997) 54 C.A.4th 80, 62 C.R.2d 453, involved a 1978 interlocutory dissolution judgment incorporating the parties' stipulated agreement to divide the husband's pension benefits. The parties had married in 1957, and the husband had joined his employer in 1960 and resigned in 1974. The husband rejoined the employer, at a greatly increased salary, in 1989. Five years later, on his retirement, the wife moved to enforce the pension division. The trial court applied the time rule and included in the division the pension benefits that the husband earned during the later employment period. *Held*, affirmed.

(a) Where the number of years served by an employee while married is a substantial factor in computing the amount of retirement benefits to be received, the community is entitled to have its share based on the time rule, that is, on the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years of service provides a fair gauge of that portion of the retirement benefits attributable to community effort. (54 C.A.4th 88.)

(b) Even when an employee spouse's service is not continuous, a pension based on total service years may be divided according to the time rule. The rationale for the time rule applies wherever the total number of years served by the employee spouse, continuous or otherwise, is a substantial factor in computing the retirement benefits. (54 C.A.4th 90.)

(c) The trial court acted within its discretion in applying the time rule to apportion the pension here, utilizing all the years of employment, despite the facts that the ultimate pension benefits were more than what they were estimated to be in 1978 and that the employment was not continuous. Although the husband had two separate employment periods, his pension was based on his total service years. The time rule fairly accounts for both the marital and postmarital years of service because it assigns to the community only a portion of the pension corresponding to the portion of service during marriage and before separation. (54 C.A.4th 90.) The community contribution to the husband's pension (approximately 14 years, beginning in 1960) was crucial to its final value and to the amount received by the husband. (54 C.A.4th 91.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., Dividing Pensions and Other Employee Benefits, §3.24 et seq.



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2. Distinctions.

11 Witkin Sum. Cal. Law Com Prop § 66

[§ 66] Distinctions.

(1) *Pension Unrelated to Years of Service. In re Marriage of Poppe (1979) 97 C.A.3d 1, 158 C.R. 500*, involved a Naval reservist's pension, the amount of which (\$ 592 per month) was based, not on the number of years served, but on the number of "points" earned; i.e., one point was earned for each drill attended. Because only 1,632 of his total of 5,002 points were earned during his marriage, the reservist argued that the community property interest in the pension should be computed by multiplying \$ 592 by 1,632/5,002. Use of this formula would have resulted in an award to the former wife of \$ 95 per month. However, the trial judge, applying the time rule, used a fraction of 27.25/31.5, i.e., the years of marriage up to separation divided by the "qualifying years" of service, and awarded her \$ 253 per month. *Held*, use of the time rule under these circumstances was unfair.

(a) "The only relationship between the number of years of service and the pension is that to be eligible for the pension former husband must have served a minimum number of 'qualifying' years, years in which he earned 50 or more points. That condition having been satisfied, all points earned, whether in a 'qualifying' year or not, counted in fixing the amount of his pension. The number of points that can be earned in a year may be as high as 364 or as low as 1, depending on the nature and frequency of the service rendered, not on the number of years served. Thus the amount of the pension is not a function of the number of years of service; the number of years of service during the marriage is not a fair gauge of the community contribution; and the court's apportionment of the pension on the basis of the number of 'qualifying' years served as compared to the number of years of service during the marriage must be said to be unreasonable, arbitrary and an abuse of discretion." (97 C.A.3d 9.)

(b) The use of the time rule is not justified by the fact that, but for the reserve service during the marriage, there would have been no pension at all. The same can be said for the service prior to the marriage and after separation. And to the extent that service during the marriage contributed to increased base pay for the reservist, the former wife shared in that increase by sharing in the pension, which consisted of a percentage of base pay. (97 C.A.3d 9.)

(2) *Pension Unrelated to Portion of Service During Marriage. In re Marriage of Henkle (1987) 189 C.A.3d 97, 234 C.R. 351*, involved military retirement benefits of a colonel who retired with 32 years of service, but whose maximum percentage of base pay was earned after 30 years of service. At the time of his retirement (and separation), he had been

married for 6 years. *Held*, once the maximum was reached, the further employment did not count as service during marriage for the purpose of applying the time rule, because it did not earn any additional benefit. Hence, the community interest was 4/30 of the pension, i.e., the number of years during both the marriage (numerator) and the period of service (denominator) during which additional benefits were being earned. (189 C.A.3d 100.)

Other cases are to the same effect. (See *In re Marriage of Davis* (1980) 113 C.A.3d 485, 488, 169 C.R. 863 [only years on active duty count in calculating community interest in retirement pay]; *In re Marriage of Hughes* (1994) 26 C.A.4th 34, 37, 31 C.R.2d 250 [following *Davis*]; *In re Marriage of Bowen* (2001) 91 C.A.4th 1291, 1295, 111 C.R.2d 431 [following *Henkle* and *Hughes*; in calculating wife's share of pension, it was improper to consider not only number of years husband worked for employer, but also number of years he worked for employer's successor company by merger; successor company's pension was not merged with employer, and employer's pension did not include successor company's wages].) (On other aspects of military pensions, see *infra*, §78 et seq.)

(3) *Pension Funds Accrued in Common Law State. In re Marriage of Moore & Ferrie* (1993) 14 C.A.4th 1472, 18 C.R.2d 543, involved the division of pension benefits where the parties had moved to Ohio, then separated. The wife returned to California while the husband remained in Ohio, where he obtained a divorce judgment that did not mention the pension. In the wife's California proceeding under *Henn v. Henn* (1980) 26 C.3d 323, 161 C.R. 502, 605 P.2d 10, *infra*, §244, to divide the pension, the trial judge valued the community interest by applying the time rule, including accruals up to the date of the parties' separation. *Held*, this was error; the relevant date was that on which the wife had left California to join her husband in Ohio. "While the move to Ohio could not divest wife of the community property interest she accrued while the parties lived in California, there is no basis for the trial court's assumption that wife continued to accrue an ownership interest under California law once the parties changed their domicile to a common law state." (14 C.A.4th 1482.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) (New) *"Brown Formula" Is Not Synonymous With Time Rule. In re Marriage of Gray* (2007) 155 C.A.4th 504, 66 C.R.3d 87, involved the interpretation of a 1980 judgment of dissolution for purposes of dividing the husband's union pension. About 25 years after the dissolution, the union calculated the wife's share of the husband's monthly pension benefit in accordance with the time rule. The husband then filed a motion to divide the pension. The trial judge did not exercise discretion in selecting the time rule as an equitable method of division, but rather interpreted the 1980 judgment as having already determined that that apportionment method should apply by its reference to the "Brown Formula," articulated by *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, text, §60. *Held*, reversed. "[E]ven if it is now, in 1980, the term 'Brown Formula' was not a universally accepted synonym for the 'time rule.' " (155 C.A.4th 509.) Rather, the judge was required to exercise judicial discretion to apportion community and separate property interests by selecting an appropriate and equitable method of apportionment based on the particular facts and circumstances of the parties. (155 C.A.4th 509, 523.)



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11 Witkin Sum. Cal. Law Com Prop § 67

[§ 67] Nature of Rule.

(1) *Origin and Development.* The "terminable interest rule," sometimes referred to as the *Benson-Waite* doctrine, limits the nonemployee spouse's community interest in accrued benefits under the employee spouse's pension in two ways: (a) The community interest terminates on death of the employee spouse. (b) The community interest also terminates on the death of the nonemployee spouse, and cannot be bequeathed by will. (See *Benson v. Los Angeles* (1963) 60 C.2d 355, 360, 33 C.R. 257, 384 P.2d 649; *Waite v. Waite* (1972) 6 C.3d 461, 472, 99 C.R. 325, 492 P.2d 13, supra, §59; *In re Marriage of Andreen* (1978) 76 C.A.3d 667, 674, 143 C.R. 94; *Estate of Allen* (1980) 108 C.A.3d 614, 619, 166 C.R. 653; Rutter Group, 2 Family Law §8:146; 14 Southwestern U. L. Rev. 613; 25 U.C.L.A. L. Rev. 417, 443, footnote 92; 9 U.S.F. L. Rev. 635, 638.)

(2) *Criticism of Rule.* The rule was subjected to strong criticism in decisions and commentary. (See *In re Marriage of Peterson* (1974) 41 C.A.3d 642, 656, 115 C.R. 184; *Bowman v. Bowman* (1985) 171 C.A.3d 148, 154, footnote 5, 217 C.R. 174; 14 Southwestern U. L. Rev. 613; 25 U.C.L.A. L. Rev. 417, 462; 9 U.S.F. L. Rev. 635, 642.) Nevertheless, it was repeatedly followed. "Whatever courts may have felt about the fairness of the terminable interest rule, however, they were confronted with the fact that these features were an integral part of legislatively enacted public pension plans which, by their terms, have been restrictive in their choice of beneficiaries." (*In re Marriage of Taylor* (1987) 189 C.A.3d 435, 440, 234 C.R. 486.)

(3) *Distinction: Accumulated Employee Contributions to Pension System.* In *Chirmside v. Board of Administration of the Public Employees' Retirement System* (1983) 143 C.A.3d 205, 191 C.R. 605, the community property consisted of accumulated contributions of an employee to a public pension system. The husband, an employee of a city water department, became a member of its public employees' retirement system (PERS) in 1948. The parties were divorced in 1975 with no adjudication of the rights in the PERS account. In 1977, the husband retired and elected to take his benefits upon an optional settlement providing for monthly payments, the balance payable on death to his designated beneficiary (here his sister). On his death in 1980, the balance was \$ 18,773.37. The administrative judge awarded this to the sister and the superior court denied mandamus. *Held*, reversed.

(a) The "terminable interest doctrine" recognizes that an interest in a retirement plan traceable to contributions of

community funds or labor constitutes community property, but the interest of the nonparticipant spouse does not extend to benefits payable after the death of either spouse. (143 C.A.3d 208.) The apparently unfair result was deemed necessary to permit the city flexibility in making reasonable modifications in the retirement scheme, which might be defeated by vesting of rights in a nonemployee. (143 C.A.3d 208.) The cases applying the rule have sometimes acknowledged its bad effects (see, e.g., *In re Marriage of Peterson*, *supra*, 41 C.A.3d 656), and commentators have criticized it, particularly for its failure to take into account the nature of the death benefits involved. (143 C.A.3d 209.)

(b) In the prior cases, the pension benefits involved more than just the employee's withholdings. Here the only benefits are the employee's accumulated contributions, and the case is more analogous to the distribution of a savings account containing community funds than the pension cases. (143 C.A.3d 210.) To allow the husband's designation of his sister as beneficiary to defeat the wife's interest would violate the statutory gift prohibitions (see *infra*, §137 et seq.). (143 C.A.3d 211, 212.) "[T]he nonemployee's community property interest in the accumulated contributions can be harmonized with the employee's power to designate a beneficiary by limiting the employee's power to his community property interest in the remaining contributions." (143 C.A.3d 212.) In determining how much of the remaining funds are subject to the wife's claim, the "time rule" fraction formula should be applied. (143 C.A.3d 213, 214; see *supra*, §65.) (See 14 Southwestern U. L. Rev. 613, 633.)

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- 6. Pensions and Retirement Benefits.
- h. Former Terminable Interest Rule.
- 2. Statutory Abrogation of Rule.

11 Witkin Sum. Cal. Law Com Prop § 68

[§ 68] Statutory Abrogation of Rule.

The terminable interest rule was abolished by statute in 1986. (See Rutter Group, 2 Family Law §§8:147 et seq., 8:1210 et seq.)

(1) *Division of Benefits--Appropriate Orders.* *Family C. 2610(a)* authorizes the court to "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." The options available to the court include, without limitation, the following:

(a) Ordering the division of any retirement benefits payable upon or after the death of either party in a manner consistent with *Family C. 2550* (infra, §190). (*Family C. 2610(a)(1).*)

(b) Ordering a party to elect a survivor benefit annuity or similar election for the other party's benefit, if permitted by the retirement plan; however, a plan may not be ordered to provide increased benefits determined on the basis of actuarial value. (*Family C. 2610(a)(2).*)

(c) On the agreement of the nonemployee spouse, ordering the division of accumulated community property contributions and service credit as provided in the following or similar enactments (*Family C. 2610(a)(3)*):

(1) *Govt.C. 21290* et seq. (Public Employees' Retirement System). (*Family C. 2610(a)(3)(A)*; see Rutter Group, 2 Family Law §8:1220 et seq.)

(2) *Educ.C. 22650* et seq. (Defined Benefit Program in the State Teachers' Retirement Plan). (*Family C. 2610(a)(3)(B)*; see Rutter Group, 2 Family Law §8:1212 et seq.)

(3) *Govt.C. 31685* et seq. (County Employees' Retirement Law). (*Family C. 2610(a)(3)(C)*; see Rutter Group, 2 Family Law §8:1230 et seq.)

(4) *Govt.C. 75050* et seq. (Judges' Retirement Law). (*Family C. 2610(a)(3)(D)*; see Rutter Group, 2 Family Law

§8:1225 et seq.)

(5) *Educ.C. 27400* et seq. (Cash Balance Benefit Program in the State Teachers' Retirement Plan). (*Family C. 2610(a)(3)(E)*; see Rutter Group, 2 Family Law §8:1212 et seq.)

(d) Ordering a plan to make direct payments to a nonmember party of his or her community property interest in retirement benefits. (*Family C. 2610(a)(4)*; see *In re Marriage of Schofield* (1998) 62 C.A.4th 131, 134, 73 C.R.2d 1 [federal agency handling husband's civil service and military retirement funds could be ordered to adjust payments so that wife was paid arrearages in addition to her monthly share of retirement pay; applying *Family C. 2610(a)(4)* and relevant federal law].)

(2) *Division of Benefits--Inappropriate Orders*. *Family C. 2610(b)* provides that a court may not make an order requiring a retirement plan to do either of the following:

(a) Make payments in a manner that will cause an increase in the amount of benefits provided by the plan. (*Family C. 2610(b)(1)*.)

(b) Pay benefits to any party before the member retires, except as provided in *Family C. 2610(a)(3)*, and unless the plan permits that payment. (*Family C. 2610(b)(2)*; see Rutter Group, 2 Family Law §8:1235 et seq.)

(3) *Retroactivity*. *Family C. 2610* may not be retroactively applied to payments made by a retirement plan to anyone who retired or died before January 1, 1987, or for plans subject to *Family C. 2610(a)(3)* before June 1, 1988.

West's Key Number Digest, Husband and Wife k.249(3), 272(4)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Death of Nonemployee Spouse*. *Family C. 2610* does not apply when a nonemployee spouse dies before the property has been divided in a divorce or legal separation proceeding. (*Regents of Univ. of Calif. v. Benford* (2005) 128 C.A.4th 867, 873, 27 C.R.3d 441.)



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11 Witkin Sum. Cal. Law Com Prop § 69

[§ 69] Election Not To Retire.

(1) *Election May Not Defeat Nonemployee Spouse's Community Interest. In re Marriage of Becker (1984) 161 C.A.3d 65, 207 C.R. 392*, involved a state employee covered by the Public Employees' Retirement System (PERS). At the time of separation, he and his then-wife had vested rights to the benefits, but he did not retire, and named his second wife as his beneficiary. On his death, his surviving spouse elected to take a monthly allowance pursuant to the statute. The trial judge made an order directing PERS to pay the first wife a sum equal to one-half of the employee's contributions to the system during their marriage and prior to their separation. *Held*, she was entitled to the contributions.

(a) The employee spouse may not defeat the community interest of the nonemployee spouse by electing not to retire, and choosing some optional payment program more beneficial to himself or designating a beneficiary other than the nonemployee spouse. (*161 C.A.3d 70.*) This rule does not apply here, because his surviving wife was the beneficiary under the governing statutes. (*161 C.A.3d 70, 71, 72.*)

(b) However, when the employee spouse elects not to retire, the nonemployee spouse may apply to the court for an immediate disposition of any community interest in retirement benefits. (*161 C.A.3d 72.*)

(c) The trial court's order directing PERS to make a payment to the first wife was directly contrary to the statute and cannot stand. (*161 C.A.3d 70.*) But the surviving spouse traded her right to receive the accumulated contributions for a monthly allowance; and under *Chirmside v. Board of Administration of the Public Employees' Retirement System (1983) 143 C.A.3d 205, 191 C.R. 605*, *supra*, §67, the first wife was entitled to receive her community share. (*161 C.A.3d 74.*) This can properly be accomplished by means of a resulting trust on a pro tanto basis. (*161 C.A.3d 75.*) Hence, the trust "will be impressed on a portion of each payment of the allowance received by the surviving spouse so long as she continues to receive the allowance." (*161 C.A.3d 77.*)

The resulting trust theory of *Becker* has been rendered unnecessary. *Family C. 2610* (*supra*, §68) allows trial courts to do directly what the *Becker* court could not do: order spouses' community shares in survivor and death benefits to be paid directly to them or their estates when the benefits become due and payable. (See *In re Marriage of Carnall (1989) 216 C.A.3d 1010, 1025, 265 C.R. 271*, *infra*, §77.) (On right of nonemployee spouse to immediate payment when employee spouse chooses not to retire, see *infra*, §73.)

(2) *Pension Plan May Not Be Required To Pay Nonemployee Spouse. In re Marriage of Nice (1991) 230 C.A.3d 444, 281 C.R. 415*, involved the issue of who may be required to pay the nonemployee spouse's share of pension benefits when the employee spouse elects to continue working beyond retirement age. The trial judge had ordered the city board of pension commissioners to begin paying the wife her community share of pension benefits and her distributive share of any survivor benefits that might become due. *Held*, this was error; the husband, not the pension plan, was required to compensate the wife while he continued working.

(a) *In re Marriage of Gillmore (1981) 29 C.3d 418, 174 C.R. 493, 629 P.2d 1*, *infra*, §73, while guaranteeing the nonemployee spouse the right to receive immediate payments, does not require the pension plan to pay, but assigns that responsibility to the employee spouse. (230 C.A.3d 450.)

(b) As to the survivor benefits, the wife was entitled to compensation for the portion of the retirement benefit attributable to the community even if the plan provided no survivor benefits for former spouses. On remand for reconsideration of the issue, it would be preferable, but not mandatory, for the trial judge to establish a present cash value for the survivor benefits and include it in the division of community assets. (230 C.A.3d 452.)

In re Marriage of Jensen (1991) 235 C.A.3d 1137, 286 C.R. 911, follows *Nice*, holding that a public pension plan may not be required, without specific provision in the plan, to disburse community property retirement funds to a nonemployee spouse before the employee spouse *actually* retires. (235 C.A.3d 1141.)

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j. Withdrawal and Redeposit of Contributions.

11 Witkin Sum. Cal. Law Com Prop § 70

[§ 70] Withdrawal and Redeposit of Contributions.

In re Marriage of Lucero (1981) 118 C.A.3d 836, 173 C.R. 680, deals with the effect of withdrawal and redeposit of employee retirement contributions. The parties separated in 1976, and the husband retired from federal employment in 1977 at age 57, having withdrawn all retirement contributions in 1966. To obtain maximum benefits, the husband redeposited the withdrawn amount (\$ 9,373) from his separate funds, and became entitled to monthly retirement benefits of \$ 840 instead of \$ 474. The trial judge concluded that the wife's community interest extended only to the smaller benefits the husband would have received without the redeposit. *Held*, this was error; the wife was entitled to share in the increased retirement benefits upon payment of her pro rata share of the redeposit.

(a) The parties must deal fairly with each other, and, in particular, one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse. (118 C.A.3d 841, citing *In re Marriage of Stenquist* (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96, *infra*, §87.)

(b) The husband's election to use his separate funds to redeposit contributions was exceedingly advantageous to him: The increased monthly benefits made it possible to recoup the total redeposit amount in about 2 years; in effect, he purchased a \$ 366 per month annuity, subject to periodic cost of living increases, for \$ 9,373. (118 C.A.3d 841.)

(c) The trial judge's ruling was contrary to *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, *supra*, §60. "To allow husband the sole right to decide whether to redeposit and the sole right to elect whether to redeposit with separate or community funds is to treat the redeposit right as husband's separate property. This is incorrect because the redeposit right is a pension right and 'the community owns all pension rights attributable to employment during the marriage.' " (118 C.A.3d 841, quoting *Brown*.)

(d) The reasoning of *In re Marriage of Forrest* (1979) 97 C.A.3d 850, 852, 159 C.R. 229, is contrary to that of *Brown* and not controlling; i.e., there is no material difference between the ordinary nonvested pension right and one subject to the single additional contingency of redeposit of retirement contributions previously withdrawn. "Both are contingent contract rights, and thus both should be treated as property subject to division on dissolution of marriage." (118 C.A.3d 843.)

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11 Witkin Sum. Cal. Law Com Prop § 71

[§ 71] Payment as Discharge.

Under *Family C. 755*, a payment or refund to an employee, a former employee, or the beneficiary or estate of an employee or former employee under an employee benefit plan, including a plan governed by ERISA, discharges the plan sponsor and the administrator, trustee, or insurer making the payment or refund from all adverse claims, *unless* the plan sponsor or administrator has received written notice of a third-party claim before the payment or refund is made. (See *In re Marriage of Baker* (1988) 204 C.A.3d 206, 218, 251 C.R. 126 [substantively identical predecessor statute was not preempted by ERISA].)

In *Schneider v. Standard Oil Co.* (1976) 55 C.A.3d 1018, 128 C.R. 141, husband S, heavily indebted to several creditors, entered into an agreement with defendant employer to sell some of his interest in a company stock plan and pay the proceeds to the creditors. On his death plaintiff wife sued defendant, alleging that her community interest in the stock plan had been improperly taken. *Held*, summary judgment for defendant affirmed.

(a) Although the interest was community property, at the time of its disposition by the husband (1971) he was the manager of the community property (see *infra*, §131), and that property could be used to satisfy the husband's debts (see *infra*, §177). (55 C.A.3d 1021.)

(b) Defendant was protected from liability for the payments by former C.C. 5106 (now *Family C. 755*) under the theory of the cases upholding payments by insurers pursuant to *Ins.C. 10172* (see *infra*, §138). (55 C.A.3d 1022.)

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11 Witkin Sum. Cal. Law Com Prop § 72

[§ 72] In General.

(1) *Two Basic Methods.* The two basic methods of dividing community property interests in pension benefits are commonly termed "cash out" and "in kind division." (See *Rutter Group*, 2 Family Law §8:1126 et seq.) The trial judge has broad discretion in choosing between the two methods. (*In re Marriage of Brown* (1976) 15 C.3d 838, 848, footnote 10, 126 C.R. 633, 544 P.2d 561, supra, §60 [expressing preference for cash out method]; *In re Marriage of Skaden* (1977) 19 C.3d 679, 688, 139 C.R. 615, 566 P.2d 249, supra, §53.)

Under the cash out method, the entire community interest in the plan is awarded to the member spouse, with offsetting assets of equal value awarded to the other spouse. (See *Phillipson v. Board of Administration, Public Employees' Retirement System* (1970) 3 C.3d 32, 46, 89 C.R. 61, 473 P.2d 765, supra, §59; *In re Marriage of Kaspar* (1978) 83 C.A.3d 388, 390, 147 C.R. 821; *In re Marriage of Bergman* (1985) 168 C.A.3d 742, 748, 214 C.R. 661, infra, §76.) Under an in kind division, the community interest in the plan is divided between the spouses, who receive proportionate shares of each payment as it becomes due. (See *In re Marriage of Brown*, supra, 15 C.3d 848; *In re Marriage of Skaden*, supra; *In re Marriage of Bergman*, supra, 168 C.A.3d 758.)

(2) *Public Retirement Benefits.* Govt.C. 21290 et seq. (Public Employees' Retirement System), Govt.C. 31685 et seq. (County Employees' Retirement Law), Govt.C. 75050 et seq. (Judges' Retirement Law), Educ.C. 22650 et seq. (Defined Benefit Program in the State Teachers' Retirement Plan), and Educ.C. 27400 et seq. (Cash Balance Benefit Program in the State Teachers' Retirement Plan) authorize the trial judge to order that the accumulated retirement contributions and service credit attributable to service during the marriage be divided into separate and distinct accounts in each spouse's name. The trial judge must address a number of the nonmember spouse's rights, including the right to a retirement allowance, to a refund of accumulated retirement contributions, to redeposit accumulated retirement contributions previously refunded to the member spouse, and to purchase additional service credit. (See *Rutter Group*, 2 Family Law §8:1210 et seq.)

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(1) *Two Basic Methods.* See C.E.B., Dividing Pensions and Other Employee Benefits, §4.20 et seq. (2) *Public Retirement Benefits.* See C.E.B., Dividing Pensions and Other Employee Benefits, §§12.1 et seq., 13.1 et seq., 14.1 et

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2. Nonemployee Spouse's Right to Immediate Payment.

11 Witkin Sum. Cal. Law Com Prop § 73

[§ 73] Nonemployee Spouse's Right to Immediate Payment.

In re Marriage of Gillmore (1981) 29 C.3d 418, 174 C.R. 493, 629 P.2d 1, involved the pension rights of the husband, over 50 and eligible to retire. If he had retired he would have been entitled to a monthly benefit of \$ 717.18, and the wife's community interest in the benefit would have been \$ 177.14 per month. However, the husband continued to work, and the wife requested an order directing him to pay her share immediately. *Held*, she was entitled to the order.

(a) The retirement benefits were matured; i.e., the only condition precedent to payment was his retirement, a condition totally within his control. A unilateral choice to postpone retirement does not impair the other spouse's community interest in the benefits. (*29 C.3d 423*, citing *In re Marriage of Stenquist (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96*, *infra*, §87.)

(b) In *Stenquist*, the husband's unilateral decision would have deprived the wife of any interest in the benefits. Here, the wife would be deprived of the immediate enjoyment of her community interest in the benefits, and might lose the asset completely if her husband were to die while still employed. Her interest was therefore entitled to protection. (*29 C.3d 424*.)

(c) The employed spouse may choose among alternative retirement plans, and may continue working after eligibility for retirement; but if the choice impairs the community interest of the other spouse in the benefits, that spouse must be compensated. (*29 C.3d 425, 426*.) Hence, the wife was entitled to immediate distribution of her determined interest in the matured retirement benefit. (*29 C.3d 426*.)

(d) The trial court may properly award all pension rights to an employee spouse, compensating the other spouse with other community property of equal value. This type of division was not possible here, for the court severed the issue of retirement benefits from the division of the remainder of the community property, and at the time of division of the retirement benefits there was no community property to distribute. (*29 C.3d 428*.)

(e) The other spouse may choose to wait until the employee spouse's retirement, thereby sharing in the increased value of the pension plan; but a demand for immediate payment is an irrevocable election to give up increased payments

in the future that might accrue from increased age, longer service and a higher salary. (29 C.3d 428, and footnote 9.)

(f) The employed spouse can compensate the other spouse in various ways; e.g., he could "buy out" that spouse's share, paying the present value, or he could begin to pay a share on a monthly basis. Because the parties may have preferences based on numerous factors, including tax consequences, the exact method of distribution must be left to the discretion of the trial court. (29 C.3d 429.)

In re Marriage of Shattuck (1982) 134 C.A.3d 683, 184 C.R. 698, follows *Gillmore* on unusual facts. The husband and wife were both employed by the same company, and each was a beneficiary of the pension plan. At the time of trial the wife's pension rights had vested but not matured, while the husband's were both vested and matured. Neither was obliged to retire, and neither had planned to do so until required by company rules. The trial judge in his judgment reserved jurisdiction over distribution of the pension funds, and the wife appealed. *Held*, reversed.

(a) The respective interests in the husband's retirement benefits should have been determined as provided by *In re Marriage of Judd* (1977) 68 C.A.3d 515, 137 C.R. 318, *supra*, §65, and *Gillmore*. (134 C.A.3d 685.)

(b) The wife contended that she was entitled to receive monthly payments equal to her community interest in the husband's pension fund if he had retired at the time of the dissolution proceeding. This is unsound. An employee spouse eligible to retire is under no legal compulsion to do so; and to grant the wife's request would violate the statutory directive of equal division, for if the husband elected not to retire for 10 more years, he would be obliged to pay her \$ 21,384 while he himself received no benefits. (134 C.A.3d 686.) The wife was entitled to immediate distribution of her community property share of the husband's pension fund, consisting of an amount equivalent to her interest. The present value of that interest will be actuarially determined as a question of fact, on a consideration of the uncertainties of the retirement benefit; and the trial judge has a broad discretion as to the manner in which the husband will be directed to pay the wife an amount equivalent to her interest. (134 C.A.3d 686, 687.)

(c) The pension fund of the wife will also, at the husband's request, be subject to appropriate division, as an offset to the husband's pension fund obligation. (134 C.A.3d 688.)

In re Marriage of Allison (1987) 189 C.A.3d 849, 234 C.R. 671, involved a bifurcated dissolution proceeding, in which the husband retired after entry of the judgment of dissolution, but before the property division. The retirement plan gave the husband a choice between a life annuity, which terminated upon his death, or a survivor annuity, which paid a lesser monthly amount, but that would continue making payments to the wife after his death. The husband chose the life annuity, and the wife appealed. *Held*, reversed.

(a) The federal Employee Retirement Income Security Act of 1974, as amended by the Retirement Equity Act of 1984 (see *supra*, §63), requires pension plans to provide survivor annuities if the employee and his spouse were married for a full year preceding the start of the annuity. It also provides that a former wife has the same right to a survivor annuity if a qualified domestic relations order (QDRO) so provides. Here, on the date the annuity began, the wife was not married, and no QDRO was in effect. Hence, she was not entitled to a survivor annuity under either of these provisions. (189 C.A.3d 853.)

(b) However, the wife's problem arose because the trial judge's decision to bifurcate the proceedings, coupled with the timing of the husband's decision to retire, created a short period during which she was neither married nor protected by a QDRO. (189 C.A.3d 853.) To allow an act taken for the benefit of the trial judge to divest the wife of any substantive right would defeat the federal statute's purpose of protecting the pension rights of nonemployee spouses. (189 C.A.3d 854.)

(c) The dilemma can be resolved by applying the principle that one spouse cannot, by invoking a condition wholly within his control, defeat the other spouse's community interest. (189 C.A.3d 854, citing *Stenquist*.) "By opting to retire in the brief period between the judgment of dissolution and the division of property, husband attempted to do just that. The remedy in this situation is to award wife the actuarial value of her forfeited interest." (189 C.A.3d 854, citing

Gillmore.)

(d) The wife also had the additional right to an order changing the retirement plan to a survivor annuity. (189 C.A.3d 855.)

Other cases are to the same effect. (See *In re Marriage of Cornejo* (1996) 13 C.4th 381, 385, 53 C.R.2d 81, 916 P.2d 476, *infra*, §74 [right to immediate payment of nonemployee spouse's share was triggered by filing motion requesting payment]; *In re Marriage of Oddino* (1997) 16 C.4th 67, 83, 65 C.R.2d 566, 939 P.2d 1266, *supra*, §63 [early retirement benefits of spouse who continues to work, although immediately payable, must be calculated by actuarial reduction of normal retirement age benefit]; Rutter Group, 2 Family Law §8:1136 et seq.; 22 *Santa Clara L. Rev.* 247 [*Gillmore*].)

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11 Witkin Sum. Cal. Law Com Prop § 74

[§ 74] Date of Entitlement to Immediate Payment.

In re Marriage of Cornejo (1996) 13 C.4th 381, 53 C.R.2d 81, 916 P.2d 476, involved a couple whose 21-year marriage was dissolved in 1979. The husband subsequently became eligible to retire on May 16, 1989, but elected to keep working. On August 3, 1992, the former wife informed her husband that she intended to file a motion to modify the judgment of dissolution to obtain retirement benefits if he did not retire soon. On March 31, 1993, she filed the motion, seeking payment of retirement benefits retroactive to May 16, 1989. The trial judge ordered payment of a stipulated amount retroactive to May 16, 1989, and the Court of Appeal affirmed. *Held*, reversed. Where the employee spouse continues to work and the nonemployee spouse chooses immediate payment, the nonemployee spouse is entitled to payment from the date of filing the motion seeking immediate payment.

(a) *Unacceptable dates for triggering right to immediate payment.* If an employee spouse continues to work, and the nonemployee spouse chooses immediate payment under *In re Marriage of Gillmore* (1981) 29 C.3d 418, 174 C.R. 493, 629 P.2d 1, *supra*, §73, at what date is the nonemployee spouse entitled to obtain payment? The following answers to this question are unacceptable:

(1) *Date of demand.* The date of the nonemployee spouse's demand before filing a motion could be uncertain. The demand might be oral, its substance uncertain, or its language ambivalent. (13 C.4th 385.)

(2) *Date of order.* The date of the order directing immediate payment would prejudice the nonemployee spouse's choice of immediate payment by giving the employee spouse an incentive to protract the litigation. (13 C.4th 385.)

(3) *Date employee is eligible to retire.* Where the employee spouse chooses not to retire and the nonemployee spouse seeks immediate payment of retirement benefits, the employee spouse may arrange to meet the nonemployee spouse's demand for immediate payment, or may decide to retire and allow the nonemployee spouse to draw the nonemployee spouse's share. To allow the nonemployee spouse to receive payment of benefits from the date of the employee spouse's eligibility to retire would prejudice this right of the employee spouse to satisfy or avoid the nonemployee spouse's choice of immediate payment. Moreover, the employee spouse might be required to come up with a large sum to satisfy a claim that has accrued retroactively for a long time. (13 C.4th 386.)

(b) *Proper date is date of filing motion for immediate payment.* The date of the motion for immediate payment clearly indicates the nonemployee spouse's election and puts the employee spouse on notice of the election. It is a formal act providing a date certain. (13 C.4th 385.) The trial judge accordingly erred insofar as he directed the employee spouse to make payment for the period from the date of his eligibility to retire through the filing date of that motion. (13 C.4th 386.)

(c) *Nonemployee spouse's knowledge of right to make motion.* The trial judge found that the wife did not know until August 3, 1992, that she could file the motion and that she acted with reasonable diligence thereafter. However, she could have filed the motion as early as 1981, when *Gillmore* held that a nonemployee spouse may require immediate payment of community property retirement benefits by a nonretiring spouse. And she recognized the retirement benefits issue at the time of the interlocutory judgment of dissolution in 1979. (13 C.4th 387.)

(d) *Prior cases applying different dates are distinguishable.* *Gillmore* and *In re Marriage of Crook* (1992) 2 C.A.4th 1606, 3 C.R.2d 905, *infra*, §75, are factually distinguishable. Although both cases involved premotion payments, the payments extended back no more than 3 months and 6 months, respectively. Moreover, these cases are not controlling because they did not consider whether premotion payment is mandated. (13 C.4th 387.)

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6. Pensions and Retirement Benefits.

1. Division of Benefits.

4. Waiver of Immediate Payment Rights.

11 Witkin Sum. Cal. Law Com Prop § 75

[§ 75] Waiver of Immediate Payment Rights.

In re Marriage of Crook (1992) 2 C.A.4th 1606, 3 C.R.2d 905, held that unless a marital settlement agreement contains an express unequivocal waiver, the nonemployee spouse retains the right to receive his or her share of a community property pension at the time the employee spouse is eligible to retire, under *In re Marriage of Gillmore* (1981) 29 C.3d 418, 174 C.R. 493, 629 P.2d 1, supra, §73. The settlement agreement in *Crook* provided that "[a]t such time as Husband begins receiving retirement payments, Wife shall receive from each retirement payment, that percentage ... allocable to her community interest." The husband elected not to retire when he was eligible to do so. The wife moved to obtain her share of the pension, retroactive to the date of the husband's eligibility. The trial court rejected the husband's argument that the settlement agreement gave him unilateral control over when the wife would begin to receive her share of the pension, and ordered him to pay her share of the pension calculated as of the date of his eligibility for retirement. *Held*, affirmed.

(a) The trial court properly found that "unless the marital settlement agreement on its face manifests a clear intention of the parties that the employee-spouse have full control over the date payments to the nonemployee-spouse shall commence, the *Gillmore* rule should apply." This is consistent with the statutory command (see *Family C. 2610*, supra, §68) that the court make necessary or appropriate orders to assure that each party receives his or her full community property share in a retirement plan. (2 C.A.4th 1610.)

(b) The settlement agreement was literally susceptible of the interpretation advanced by the husband, but also consistent with the wife's claim that she had expected the husband to retire at the earliest opportunity, which was accepted by the trial court. (2 C.A.4th 1610.) In view of *Gillmore's* recognition of the strong public policy favoring equal division of community property and the importance of control over the timing of receiving pension benefits, the agreement in the present case was insufficient to establish a waiver of the wife's "*Gillmore* rights." Like any other property right in a dissolution action, "*Gillmore* rights" may be bargained away or waived, but the intention to do so must be express and unequivocal. (2 C.A.4th 1611.)

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I. Division of Benefits.

5. Award to Employee Spouse With Offset.

11 Witkin Sum. Cal. Law Com Prop § 76

[§ 76] Award to Employee Spouse With Offset.

In re Marriage of Bergman (1985) 168 C.A.3d 742, 214 C.R. 661, comprehensively discusses the discretion of the trial judge to award the community interest in a pension plan to the employee spouse with an offsetting award of other assets.

(a) *Discretion of judge.* *Phillipson v. Board of Administration, Public Employees' Retirement System* (1970) 3 C.3d 32, 89 C.R. 61, 473 P.2d 765, supra, §59, suggested that the preferred method was an award to the employee spouse, but *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, supra, §60, rejected this notion, declaring that the trial court has discretion to divide the community assets in any fashion that complies with former C.C. 4800 (now *Family C. 2550 et seq.*, 2600 et seq.). (168 C.A.3d 749, citing *Brown* and *In re Marriage of Skaden* (1977) 19 C.3d 679, 139 C.R. 615, 566 P.2d 249, supra, §53.)

(b) *Award to employee spouse is proper.* The trial judge in his statement of decision indicated that he chose to cash out the wife because there were sufficient assets to award her property of equal value, and the economic circumstances justified the division. Because there are no comprehensive guidelines for making the choice, appellate courts should not second-guess the exercise of the trial judge's discretion in the absence of a clear showing of abuse. (168 C.A.3d 751.)

(c) *Valuation of pension.* "Until recently, trial courts seemed to possess almost unlimited discretion to fix values, as long as the value selected fell between the high and low values expressed in the opinions of the experts' witnesses, and the trial court's value was supported by substantial evidence." (168 C.A.3d 752, 753, citing *In re Marriage of Webb* (1979) 94 C.A.3d 335, 156 C.R. 334, infra, §92, and *In re Marriage of Fortier* (1973) 34 C.A.3d 384, 388, 109 C.R. 915, infra, §104.) *In re Marriage of Hargrave* (1985) 163 C.A.3d 346, 353, 209 C.R. 764, questioned this approach, pointing out that the judge is not required to accept the opinion of any expert as to the value of an asset. (168 C.A.3d 753.) However, in this case, the court made its determination after consideration of extensive expert testimony, and its statement of decision was adequate. (168 C.A.3d 754.)

(d) *Indefinite reservation of jurisdiction is improper.* The wife also had a pension, and the judge made an open-ended reservation of jurisdiction over the division when benefits became payable. But former C.C. 4800(a) (now

Family C. 2550 et seq.) does not directly authorize indefinite reservation of jurisdiction, and the only case to support it is *In re Marriage of Carl* (1977) 67 C.A.3d 542, 136 C.R. 703, which appears to be erroneous and contrary to *Brown*. "[T]here is something for the trial court to divide, that is, the community property interest of the parties in the pension. It is a property right, whether vested or nonvested, not an expectancy. In keeping with the intent of the Legislature providing for the division of community assets during the dissolution litigation, trial courts have only the two alternatives stated in *Brown*, i.e., to cash out the nonemployee spouse at the present value of the community interest in the pension and award it to the employee spouse, or to divide the community interest in the pension in kind. Additionally, we conceive of no good reason to perpetuate family law litigation indefinitely when such property interests can and should be divided as part of the litigation process of dividing all other community property of the parties." (168 C.A.3d 757.)

(e) *Promissory note to equalize division*. The trial judge ordered the wife to execute a secured promissory note in favor of the husband payable in 3 years from the date and bearing 10% interest compounded annually. Notes to equalize division have been invalidated where they were for an extended period of time and bore inadequate interest rates, but have been held proper where the periods were relatively short and the interest rates reasonable. (168 C.A.3d 761.) Under this test, the present note was proper. (168 C.A.3d 762.) (See Rutter Group, 2 Family Law §8.1126 et seq.)

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11 Witkin Sum. Cal. Law Com Prop § 77

[§ 77] Survivor and Death Benefits.

(1) *In General.* A court may make all necessary or appropriate orders to ensure that each party receives his or her full community property share of survivor or death benefits, including ordering a party to elect a survivor benefit annuity or other similar election for the benefit of the other party in any case in which a plan provides for that election. (*Family C. 2610(a)(2)*; see *supra*, §68.)

(2) *Plan Not Providing for Former Spouse.* A court may not order a pension plan to pay a former spouse a share of the decedent spouse's survivor or death benefits where the plan does *not* contain a provision authorizing that payment. The court also may not order the plan to pay the former spouse increased benefits determined on the basis of actuarial value. (*Family C. 2610(a)(2)*; see *In re Marriage of Cramer* (1993) 20 C.A.4th 73, 79, 24 C.R.2d 372 [former spouse, who had received her full community property share in husband's county retirement benefit, was not "surviving spouse," and thus could not collect survivor benefits].) To the extent that benefits for a surviving spouse have been earned during the marriage but the plan does not designate the former spouse as a "surviving spouse," the member spouse must compensate the former spouse in the community property division. (See *In re Marriage of Nice* (1991) 230 C.A.3d 444, 452, 281 C.R. 415, *supra*, §69 [even if pension plan did not provide survivor benefits for former spouses, wife had to be compensated for portion of retirement benefits attributable to community].) (See Rutter Group, 2 Family Law §8.1238.)

(3) *Plan Creating Third-Party Entitlement to Benefits.* *In re Marriage of Carnall* (1989) 216 C.A.3d 1010, 265 C.R. 271, involved a wife's claim to a share of her husband's survivor and death benefits under a county employee pension plan (the retirement benefits of the husband, who was still working after the parties' separation, were not at issue). The trial judge ordered the pension plan to designate the wife the "surviving spouse" under *Govt.C. 31780(a)*, providing death benefits for a spouse or child, and *Govt.C. 31760.1*, providing survivor benefits for a spouse who was married to the plan member for a year before the member's death. As to the survivor benefits, the judge specified that the wife was entitled to a percentage in the proportion that the length of the marriage bore to the husband's term of employment. The pension plan appealed, contending that the order substantially impaired its contract with the husband and jeopardized the rights of potential third parties (any future spouse or children). *Held*, the plan's contentions were meritorious.

(a) As a former spouse, the wife was not a "surviving spouse," and thus the trial judge had awarded her an

allowance to which she was not statutorily entitled, to the exclusion of or in addition to the entitlements of a subsequent qualified spouse or children. Further, she had been awarded more than her share of the community's interest in the husband's pension benefits, because she would receive all the death benefits, and survivor benefits that included a share of contributions made after the parties' separation. This would severely compromise the pension plan's fund and the actuarial projections on which it was structured. (216 C.A.3d 1022, 1024.)

(b) The pension plan's liability was limited by the statutory scheme provided in the County Employees Retirement Law (Govt.C. 31450 et seq.). Former C.C. 4800.8 (now *Family C. 2610*; see supra, §68), authorizing courts to make necessary and appropriate orders to divide community property interests in pension plans, did not alter the plan's liability or create new community interests; it only preserved those interests that under prior law would have been extinguished by the death of either party. (216 C.A.3d 1023.)

(c) On remand, there were several options for awarding the wife her share of the pension benefits without tampering with the statutory definition of "surviving spouse," including the "in kind division" and "cash out" methods discussed by *In re Marriage of Brown* (1976) 15 C.3d 838, 848, 126 C.R. 633, 544 P.2d 561, supra, §72, and an order requiring the husband to elect a survivor benefit annuity or similar election for the wife's benefit. (216 C.A.3d 1024, 1025, 1026.) (See *In re Marriage of Colvin* (1992) 2 C.A.4th 1570, 1581, 4 C.R.2d 323, infra, §96 [order that PERS pay former spouse a percentage of any survivor benefits that might be paid to surviving spouse or other beneficiary was proper under former C.C. 4800.8(a) and *Carnall*]; Rutter Group, 2 Family Law §8.1239 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *In re Marriage of Smith* (2007) 148 C.A.4th 1115, 1125, 56 C.R.3d 341 [upholding postjudgment order requiring husband to participate in survivor benefit plan and to name wife as beneficiary; order was proper method of insuring that wife would receive her community interest in husband's retirement benefits, awarded on dissolution, that wife could not collect if husband died]; *In re Marriage of Cooper* (2008) 160 C.A.4th 574, 581, 73 C.R.3d 71 [trial judge erred in awarding all survivor benefits of husband to wife rather than ordering husband to buy out wife's community property share of benefits].



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11 Witkin Sum. Cal. Law Com Prop § 78

[§ 78] In General.

(1) *Right Not Vested (French Case)*. In *French v. French* (1941) 17 C.2d 775, 778, 112 P.2d 235, the future naval reserve pay of a seaman who had not completed the required period of service to become eligible was held a mere expectancy and not a present community property interest. (See 30 Cal. L. Rev. 469.) *French* was overruled by *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, supra, §60, and nonvested military retirement rights were held to be community property. (*In re Marriage of Freiberg* (1976) 57 C.A.3d 304, 308, 127 C.R. 792.)

(2) *Right Vested (Fithian Case)*. In *re Marriage of Karlin* (1972) 24 C.A.3d 25, 29, 101 C.R. 240, held that if the right vests, the benefits can be divided as community property. In *re Marriage of Fithian* (1974) 10 C.3d 592, 111 C.R. 369, 517 P.2d 449, restated this rule and reaffirmed it against a challenge based on federal supremacy. The husband, retired from the Marine Corps, was entitled to receive "retired pay" in monthly installments for the duration of his life under 10 U.S.C., §6323. Two years after retirement, in a dissolution proceeding, the trial judge found that the parties had been married for 16 of the husband's 22 years in the service, and therefore concluded that 71% of the retirement pay was community property. Accordingly, he directed the husband to pay 35 1/2% of postdissolution retirement benefits to the wife as he received them. *Held*, judgment affirmed.

(a) The husband contended that Congress intended federal military pay to be separate property of the recipient, relying on *Wissner v. Wissner* (1950) 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424, supra, §50. But that case does not require reclassification; it only precludes application of incidents of community property that would frustrate the congressional plan. (10 C.3d 598.) And the congressional records disclose no intent to classify retirement pay as separate property. Thus, the characterization of retirement pay as the "personal entitlement" of the serviceperson merely signifies that the benefits cease with his or her death and provide no continuing means of support for the serviceperson's spouse or family. (10 C.3d 599.) The fact that the pay ceases with death does not mean that the serviceperson's spouse has no vested right in the benefits; the spouse may maintain a nontestamentary community property right in benefits that extends only during the lifetime of the serviceperson. (10 C.3d 600, citing *Waite v. Waite* (1972) 6 C.3d 461, 99 C.R. 325, 492 P.2d 13, supra, §59.) The fact that, upon an award of benefits to the serviceperson's spouse on dissolution, that portion becomes the spouse's separate property, does not mean that on the spouse's death the right descends to the spouse's heirs so as to obligate the serviceperson to his or her ex-spouse's future spouse or subsequent children. On the

contrary, the pension terminates on the death of the serviceperson, and so does the share of the serviceperson's spouse if the spouse predeceases the serviceperson. (10 C.3d 601.)

(b) "[M]ilitary retirement pay must be realistically viewed as compensation for past, not present, services. Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to encourage him to remain in the military, and not to compensate him for his limited responsibility to the government after his retirement. Indeed, the amount of retirement pay a serviceman receives bears no relation to any continuing duties after retirement, but is calculated solely on the basis of the number of years served on active duty and the rank attained prior to retirement. ... Moreover, should the serviceman actually be recalled to active duty, he is not only additionally compensated according to the active duty pay scale, but his rate of retirement pay is also increased thereafter. ... The conclusion is inescapable that retirement pay is awarded in return for services previously rendered and therefore is divisible as community property to the extent the serviceman was married while on active duty." (10 C.3d 604.)

Other cases have followed the rule in *Fithian*. (See *Henn v. Henn* (1980) 26 C.3d 323, 329, 161 C.R. 502, 605 P.2d 10, *infra*, §244 [*Fithian* rule applied retroactively]; *In re Marriage of Mercier* (1975) 48 C.A.3d 775, 783, 121 C.R. 886; *In re Marriage of Martin* (1975) 50 C.A.3d 581, 584, 123 C.R. 634; *Gorman v. Gorman* (1979) 90 C.A.3d 454, 461, 153 C.R. 479; *In re Marriage of Luciano* (1980) 104 C.A.3d 956, 960, 164 C.R. 93; 64 Cal. L. Rev. 305; 8 Cal. Western L. Rev. 522; 24 *Hastings L. J.* 347.)

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a. Former California Law.
2. Law Held Unconstitutional.

11 Witkin Sum. Cal. Law Com Prop § 79

[§ 79] Law Held Unconstitutional.

McCarty v. McCarty (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, held that the California community property rule (supra, §78) violated the Supremacy Clause (see 7 Summary (10th), *Constitutional Law*, §8 et seq.). Plaintiff husband, an army colonel, having served 18 of the required 20 years for retirement with pay, brought a dissolution proceeding. The trial judge ordered division of the retirement benefits, so that when he retired, his ex-wife was entitled to 45% of the benefits. *Held*, reversed; the division could not be made.

(a) *Tests for application of Supremacy Clause.* State family property law controls unless it does "major damage" to "clear and substantial federal interests." (101 S.Ct. 2735, 69 L.Ed.2d 598, citing *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1, supra, §64.) The particular statutory language in *Hisquierdo* is not the only kind that will justify a finding of preemption; the question is (1) whether the right as asserted conflicts with the express terms of federal law, and (2) whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition. (101 S.Ct. 2735, 69 L.Ed.2d 598.)

(b) *Military retirement pay meets this two-fold test.* Regardless of whether military retired pay is deferred compensation for past services or reduced compensation for reduced current services, application of community property law conflicts with the federal statutory scheme. The language and statutory history make it clear that the retired pay is a personal entitlement of the retired member. (101 S.Ct. 2736, 2737, 69 L.Ed.2d 601, 602.) Application of the community property right threatens grave harm to the goals of the military retirement system, i.e., "to provide for the retired service member, and to meet the personnel management needs of the active military forces." (101 S.Ct. 2741, 69 L.Ed.2d 606.) A division of the pay as community property diminishes the benefit that the statute intends for the service member and impairs his ability to provide an annuity for his surviving spouse and children; and it interferes with the goal of offering an inducement for enlistment in military service. "Congress has determined that a youthful military is essential to the national defense; it is not for States to interfere with that goal by lessening the incentive to retire created by the military retirement system." (101 S.Ct. 2742, 69 L.Ed.2d 607.) (See *In re Marriage of Mansell* (1989) 217 C.A.3d 219, 228, 265 C.R. 227, infra, §89 [*McCarty* did not divest state courts of jurisdiction to divide military retirement benefits, but only required state courts to apply federal law in determining character of benefits]; 34 *Hastings L. J.* 293; 14 *Pacific L. J.* 27; 16 *U.S.F. L. Rev.* 377.)

The *McCarty* case was not retroactive. (See *In re Marriage of Sheldon* (1981) 124 C.A.3d 371, 376, 177 C.R. 380; *In re Marriage of Camp* (1983) 142 C.A.3d 217, 219, 220, 191 C.R. 45; *In re Marriage of Thomas* (1984) 156 C.A.3d 631, 638, 203 C.R. 58; *In re Marriage of Mansell*, *supra*.) A later federal statute nullified the effect of the *McCarty* rule (see *infra*, §80), and later cases and a curative California statute restricted its duration (see *infra*, §81).

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7. Military Retirement Benefits.

b. Federal Uniformed Services Former Spouses Protection Act (FUSFSPA).

1. Nature and Effect of Statute.

11 Witkin Sum. Cal. Law Com Prop § 80

[§ 80] Nature and Effect of Statute.

(1) *In General.* The rule in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, supra, §79, was nullified by the Federal Uniformed Services Former Spouses Protection Act (FUSFSPA) (10 U.S.C., §1408), which became effective February 1, 1983. A court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his or her spouse in accordance with the law of the jurisdiction of that court. (10 U.S.C., §1408(c)(1).) (See *In re Marriage of Frederick* (1983) 141 C.A.3d 876, 879, 190 C.R. 588; *In re Marriage of Hopkins* (1983) 142 C.A.3d 350, 355, 191 C.R. 70; *In re Marriage of Ankenman* (1983) 142 C.A.3d 833, 191 C.R. 292; *In re Marriage of Sarles* (1983) 143 C.A.3d 24, 191 C.R. 514; *In re Marriage of Hughes* (1994) 26 C.A.4th 34, 38, 31 C.R.2d 250 [retired pay and retainer pay are treated identically in determining community property interest]; *In re Marriage of Babauta* (1998) 66 C.A.4th 784, 787, 78 C.R.2d 281, infra, §84 [under FUSFSPA, California courts have jurisdiction to divide service members' retirement benefits, including separation incentive payments, according to California law]; Rutter Group, 2 Family Law §8:223 et seq.; 20 U.S.F. L. Rev. 83.) (On retroactivity of statute, see infra, §81.)

The Act does not create a disposable (including by inheritance) right, title, or interest in the former spouse. (10 U.S.C., §1408(c)(2).) Nor does it authorize a court order requiring a member to retire at a particular time. (10 U.S.C., §1408(c)(3).) The court's jurisdiction over the member must be based on the member's consent, or on his or her residence (other than because of military assignment) or domicile within the court's territorial jurisdiction. (10 U.S.C., §1408(c)(4); see infra, §246.)

(2) *Enforcement.* The Act provides for direct enforcement by service of the order on the Secretary concerned. Payment to the former spouse must then begin not later than 90 days after either the date of service (if the member was entitled to receive benefits on that date) or the date the member becomes entitled to receive benefits (if the member was not entitled to receive them on the date of service). (10 U.S.C., §1408(d)(1).) Payment may not be made more frequently than once a month, and the Secretary may not be required to vary normal pay and disbursement cycles. (10 U.S.C., §1408(d)(3).) Payment terminates on the date stated in the order, but not later than the date of death of the member or former spouse, whichever occurs first. (10 U.S.C., §1408(d)(4).)

To be eligible for payment the former spouse must have been married to the member for at least 10 years during which the member performed at least 10 years of service creditable in determining eligibility for benefits. (*10 U.S.C., §1408(d)(2).*) The total amount of payment may not exceed 50% of the member's disposable retired or retainer pay. (*10 U.S.C., §1408(e)(1).*)

If there are orders requiring payment to more than one former spouse, payment is made on a "first-come, first-served" basis. (*10 U.S.C., §1408(e)(2).*) If there are conflicting orders with respect to a single former spouse, the smaller amount is paid, and the difference is retained until the Secretary is provided with a certified order regarding payment of the retained amount. (*10 U.S.C., §1408(e)(3).*)

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b. Federal Uniformed Services Former Spouses Protection Act (FUSFSPA).

2. Retroactivity.

11 Witkin Sum. Cal. Law Com Prop § 81

[§ 81] Retroactivity.

(1) *In General.* Courts have held that the Federal Uniformed Services Former Spouses Protection Act (*supra*, §80) is retroactive to June 26, 1981 (the date of the decision in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, *supra*, §79), and is applicable to all cases not final as of February 1, 1983 (the effective date of the Act). (See *In re Marriage of Buikema* (1983) 139 C.A.3d 689, 691, 188 C.R. 856; *In re Marriage of Frederick* (1983) 141 C.A.3d 876, 879, 190 C.R. 588; *In re Marriage of Hopkins* (1983) 142 C.A.3d 350, 360, 191 C.R. 70; *In re Marriage of Ankenman* (1983) 142 C.A.3d 833, 837, 191 C.R. 292; *In re Marriage of Sarles* (1983) 143 C.A.3d 24, 28, 191 C.R. 514; *In re Marriage of Lockstrom* (1983) 148 C.A.3d 675, 677, 196 C.R. 185; *In re Marriage of Fairfull* (1984) 161 C.A.3d 532, 535, 207 C.R. 523; *Brunson v. Brunson* (1985) 168 C.A.3d 786, 788, 214 C.R. 378; *In re Marriage of Chambers* (1985) 174 C.A.3d 1079, 1082, 220 C.R. 504; *In re Marriage of Castle* (1986) 180 C.A.3d 206, 212, 225 C.R. 382, *infra*, §82; 10 U.S.C., §1408(c)(1) [limiting retroactivity]; Rutter Group, 2 Family Law §8:224.)

The effect of these decisions is to confine the impact of the *McCarty* decision to judgments that became final between June 25, 1981, and February 1, 1983. (*Aloy v. Mash* (1985) 38 C.3d 413, 422, footnote 5, 212 C.R. 162, 696 P.2d 656, 1 Cal. Proc. (4th), Attorneys, §337.)

(2) *California Interim Statute.* A 1983 statute (former C.C. 5124) permitted community property settlements, judgments, or decrees that became final on or after the day prior to the *McCarty* decision, and before the effective date of the federal law overturning the decision, to be modified to include the division of military retirement benefits payable on or after the latter date. (See *In re Marriage of Van Dyke* (1985) 172 C.A.3d 145, 150, 218 C.R. 11 [statute held applicable to settlement agreement entered into during designated period, even though incorporating judgment was not entered until afterward]; *In re Marriage of Downes* (1986) 177 C.A.3d 205, 212, 222 C.R. 776 [stipulated judgment treating pension as separate property held nonmodifiable if it was determined that settlement was entered into to eliminate risk that Congress might overturn *McCarty*]; *In re Marriage of Flack* (1988) 200 C.A.3d 18, 21, 245 C.R. 745 [motion to modify filed prior to federal nullification of *McCarty*, but not served until after that date, was timely]; *Berry v. Berry* (1989) 216 C.A.3d 1155, 1160, 265 C.R. 338, *infra*, §244 [statute did not affect right to bring independent action to determine previously unadjudicated community interest in pension benefits]; *In re Marriage of Walters* (1990) 220 C.A.3d 1062, 1070, 269 C.R. 557 [no need to proceed under statute where order terminating interest in pension

benefits contained express reservation of jurisdiction to respond to future changes in law].)

The statute was upheld over a number of constitutional challenges. (See *In re Marriage of Barnes* (1987) 43 C.3d 1371, 1377, 240 C.R. 855, 743 P.2d 915; *Mueller v. Walker* (1985) 167 C.A.3d 600, 609, 213 C.R. 442; *In re Marriage of Potter* (1986) 179 C.A.3d 73, 80, 224 C.R. 312; *In re Marriage of Doud* (1986) 181 C.A.3d 510, 521, 226 C.R. 423; *In re Marriage of Carpenter* (1986) 188 C.A.3d 604, 615, 231 C.R. 783.) The statute was repealed in 1986.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Aloy case:*

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §324.



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c. Nonemployee Spouse's Election.

11 Witkin Sum. Cal. Law Com Prop § 82

[§ 82] Nonemployee Spouse's Election.

In re Marriage of Scott (1984) 156 C.A.3d 251, 202 C.R. 716, rejected the contention that the Federal Uniformed Services Former Spouses Protection Act (*supra*, §80) precluded distribution of any interest in military pension benefits until actual retirement, and held that the rule of *In re Marriage of Gillmore* (1981) 29 C.3d 418, 174 C.R. 493, 629 P.2d 1, *supra*, §73, applied to military pensions; i.e., the nonemployee spouse may elect (a) to receive the present value of a community share in a vested, mature interest in a military pension, or (b) to delay payment until the member spouse retires. (156 C.A.3d 254.) (See *In re Marriage of Jacobson* (1984) 161 C.A.3d 465, 473, 207 C.R. 512.)

However, *In re Marriage of Castle* (1986) 180 C.A.3d 206, 225 C.R. 382, rejected an unwarranted exercise of the election by the wife, the nonemployee spouse. The marriage was dissolved in April 1979, with a stipulation containing the husband's consent to retention of jurisdiction over the value, nature, and extent of the wife's right to a share in the military retirement benefits. The wife's motion for division was heard in December 1984. It appeared that if the husband retired at that time, he would be entitled to a pension as a lieutenant, while if he waited until May 1986, he could retire as a lieutenant commander with a higher pension. The judge issued an order allowing the wife to choose either the present value or the higher future value. *Held*, this was erroneous.

(a) The nonemployee spouse may, if he or she chooses, elect to receive immediately his or her community interest in the benefit that would have been paid had the employed spouse actually retired at time of trial. The nonemployee spouse may instead choose to wait until the employed spouse's actual retirement and share at that time in the benefits calculated as of the date of separation. (180 C.A.3d 216, citing *Scott* and *Jacobson*.) If the nonemployee spouse elects not to wait until actual retirement, he or she gives up the right to future increases in the pension resulting from longevity of service, increased age, or higher salary. (180 C.A.3d 216, citing *Gillmore*.)

(b) In this case, permitting the wife to base her entitlement on the higher pension, long after the separation and time of trial, violates the *Gillmore* rule. The judge could have permitted her to postpone division of the pension until the husband's actual retirement, and thus become entitled to interim increases in value. "Electing a present benefit, however, she must be limited to the amount which would have been payable at time of trial; no authority permits her to elect a benefit calculated on a hypothetical retirement at a future date." (180 C.A.3d 216.)

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11 Witkin Sum. Cal. Law Com Prop § 83

[§ 83] Support Order To Enforce Division.

In re Marriage of McGhee (1982) 131 C.A.3d 408, 182 C.R. 456, approves a strategic method of enforcing one spouse's right to a pro rata share of the other spouse's military pension. Pursuant to stipulation, the interlocutory judgment awarded the wife 38.2% of the husband's monthly military retirement benefits, as allotted by him. The judgment recited that both parties waived their right to spousal support except that, in any month in which the wife did not receive her share of the retirement benefits, she would receive spousal support in an amount identical to the unpaid retirement benefits. The husband failed to pay for 4 months, and the wife sought execution pursuant to former C.C.P. 690.18, which provided that federal pensions were exempt "except with regard to a judgment or order for child or spousal support payments." Seeking to quash the writ, the husband contended that changing a division of community property into a spousal support order was contrary to the purpose of the federal law prohibiting garnishment of military pensions (42 U.S.C., §§659, 662). *Held*, the wife was entitled to levy execution on the pension.

(a) Collection of a spouse's pro rata share of a military pension frequently proved to be difficult unless there was adequate security for that court-ordered obligation; and creative lawyers found a means of solving the problem in the exemption statute. "Divided pensions would be 'supportified' as the technique to deal with recalcitrant military retirees. The failure of the retiree to comply with the court-ordered division of his pension would trigger a spousal support obligation for the identical sum in default, thereby giving the former spouse access to property which would otherwise be exempt." (131 C.A.3d 412, 413.)

(b) The questioned provision in the judgment was a sensible and cost-efficient way to deal with the collection problem. State courts should not be burdened in exemption proceedings by being required "to scrutinize every spousal support order to determine the psychological or economic basis for its genesis in order to establish whether its source falls within the spirit of the federal legislation." (131 C.A.3d 413.) (See *In re Marriage of Walters* (1990) 220 C.A.3d 1062, 1072, 269 C.R. 557 [where spousal support was set to match wife's share of husband's pension benefits, trial judge erroneously reinstated wife's community interest in pension benefits after passage of FUSFSPA (supra, §80), without also ruling on spousal support]; Rutter Group, 3 Family Law §18:264.)

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e. Separation Incentive Payments.

11 Witkin Sum. Cal. Law Com Prop § 84

[§ 84] Separation Incentive Payments.

In re Marriage of Babauta (1998) 66 C.A.4th 784, 78 C.R.2d 281, involved the questions whether a California state court has jurisdiction to divide military early retirement incentive benefits and whether those benefits should be characterized as community or separate property. In a postjudgment order following dissolution, the trial judge found that the husband's Marine Corps voluntary separation incentive (VSI) pay (*10 U.S.C., §1175*) was community property. *Held*, affirmed.

(a) *Jurisdiction of court.* Under the Federal Uniformed Services Former Spouses Protection Act (*supra*, §80), state courts may divide a service member's disposable retirement pay according to state law. VSI pay is part of a voluntary separation program implemented pursuant to a Department of Defense (DOD) policy to reduce active duty forces. Thus, VSI pay is a form of retirement pay. Indeed, DOD literature states that it is up to the state courts to rule on the divisibility of VSI pay. Equitable division of these benefits is consistent with congressional intent to assist separating military personnel and their families readjust to civilian life. (*66 C.A.4th 787.*)

(b) *Characterization of benefit as community.* Under California law, a nonemployee spouse who owns a community property interest in the employee spouse's retirement benefits also owns a community interest in the benefits paid as an incentive for early retirement. (*66 C.A.4th 788*; citing *In re Marriage of Lehman (1998) 18 C.4th 169, 177, 74 C.R.2d 825, 955 P.2d 451*, *supra*, §61.) This rule would apply to benefits under the military voluntary separation program, whether VSI monthly payments or SSB (special separation benefit) lump sum payments. By electing early retirement, the husband did not acquire the right to recharacterize his former wife's interest in his retirement benefits. Various events and conditions after separation and even after dissolution may affect the amount of retirement benefits that an employee spouse receives, but their character does not affect the amount of benefits. Once the employee spouse has accrued a right to retirement benefits, at least in part, during marriage before separation, the retirement benefits themselves are stamped a community asset from then on. As with pensions, the benefits accrued in this case are directly attributable to the years of service during marriage. (*66 C.A.4th 789.*)

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f. Forfeiture of Pension.

11 Witkin Sum. Cal. Law Com Prop § 85

[§ 85] Forfeiture of Pension.

(1) *Forfeiture by Criminal Act.* *In re Marriage of Beltran* (1986) 183 C.A.3d 292, 227 C.R. 924, involved the felony conviction of the husband, an army colonel, while the dissolution action was pending. A military tribunal dismissed him from the service with forfeiture of his pension and accrued leave. The trial judge determined the value of the pension and accrued leave, and ordered that distribution of the community property be equalized by the husband's payment of one-half of the amount to the wife. *Held*, affirmed.

(a) Analogous situations include reimbursement when community funds are used to pay a spouse's separate debt (see *In re Marriage of Epstein* (1979) 24 C.3d 76, 154 C.R. 413, 592 P.2d 1165, *infra*, §190) or taxes on separate property (see *In re Marriage of Walter* (1976) 57 C.A.3d 802, 129 C.R. 351). (183 C.A.3d 294.) *In re Marriage of Stitt* (1983) 147 C.A.3d 579, 195 C.R. 172, is closer in point. The wife made a note for \$ 10,989.20, secured by a trust deed against the family residence, in payment of attorneys' fees to defend her against a charge of embezzlement. This was a community obligation in the sense that the attorneys could hold the community liable; but as between the spouses, the attorneys' fees were the wife's separate obligation. Accordingly, it was proper to charge it against her share of the community assets. (183 C.A.3d 295.)

(b) The husband contended that *Stitt* is distinguishable because it involved voluntary payment of a debt rather than an imposed forfeiture; but the distinction has no legal significance. In *Stitt*, it was the wife's conduct that led the court to hold her personally responsible for the loss; and the *Stitt* reasoning "seems equally applicable whether the loss was incurred by contractual obligation, tort liability or criminal penalty." (183 C.A.3d 295.) "We accordingly conclude as a matter of equity that criminal conduct on the part of husband which directly caused forfeiture of pension benefits justified the trial court's conclusion that wife was entitled to reimbursement for her share of such lost community property." (183 C.A.3d 295.)

(2) *Forfeiture by Resignation.* *In re Marriage of Foster* (1986) 180 C.A.3d 1068, 227 C.R. 446, involved a 1977 dissolution action that ended the 25-year marriage of Betty and Johnnie. The previous year Johnnie had transferred from active Naval service to the Fleet Reserve, and was receiving retainer pay when the dissolution action was commenced. The trial judge awarded Betty 43% of the gross monthly amount to which Johnnie was entitled. Claiming that retainer pay was not part of his retirement fund, Johnnie refused to comply with the judgment, despite a series of contempt

proceedings by Betty, and in 1980, he resigned from the Fleet Reserve, thereby forfeiting both his retainer pay and his vested right to retirement pay, which would have matured in 1982. In Betty's action to recover the arrears, the trial judge not only determined the amount owed by Johnnie, but also made him a constructive trustee for the amount of the retirement fund that Betty would have received had he not resigned. *Held*, reversed, except for the portion of the order awarding Betty arrears for the period between the dissolution judgment and Johnnie's resignation.

(a) *In re Marriage of Mercier* (1975) 48 C.A.3d 775, 121 C.R. 886, held that retainer pay is community property divisible under the principles that govern the division of retirement pay. Moreover, because the dissolution judgment was final, Johnnie was precluded by res judicata principles from relitigating the character of his retainer pay. (180 C.A.3d 1072.)

(b) Although Betty had a community interest in retainer and retirement pay earned during the marriage, Johnnie, by resigning, divested his mature right to retainer pay and prevented his vested right to retirement pay from maturing. Betty could have protected her interest by valuing the benefits and accepting a cash out or in kind division (see *supra*, §72); but by accepting an award of 43% of the gross monthly amount to which Johnnie was entitled, she also accepted the risk that the benefits might be divested or never mature. (180 C.A.3d 1073.)

(c) Many cases have protected a former spouse's community property rights from the detrimental control of the other spouse. (180 C.A.3d 1074, citing *In re Marriage of Stenquist* (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96, *infra*, §87; *In re Marriage of Gillmore* (1981) 29 C.3d 418, 174 C.R. 493, 629 P.2d 1, *supra*, §73; *In re Marriage of Lionberger* (1979) 97 C.A.3d 56, 158 C.R. 535; *In re Marriage of Lucero* (1981) 118 C.A.3d 836, 173 C.R. 680, *supra*, §70.) "However, the protective principle evidenced in these cases does not apply with equal force here. Johnnie, by resigning, disadvantaged both Betty and himself. He has not, as in the above cases, somehow relabeled or shifted benefits to increase his share or augment his control over the pension. Most importantly, ... Betty has accepted the possibility of divestment. That this divestment comes by Johnnie's hand rather than the hand of fate or ill-fortune is of no consequence to Betty's community property rights. In these circumstances, Johnnie has not obtained the unjust advantage or enrichment which necessarily underlies a constructive trust." (180 C.A.3d 1074.)

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11 Witkin Sum. Cal. Law Com Prop § 86

[§ 86] Former Separate Property Rule.

Federal law provides for retirement of a permanently disabled member of the military with a right to one of two kinds of "retired pay": (1) on the basis of longevity, if the member has served at least 20 years, receiving 21/2% of his or her monthly basic pay for each year of service ("retirement pay"); and (2) on the basis of disability, multiplying the member's monthly basic pay by the rated percentage of disability ("disability pay"). (*10 U.S.C., §1401.*) *In re Marriage of Jones* (1975) 13 C.3d 457, 119 C.R. 108, 531 P.2d 420, involved a husband, a member of the military retired for disability after 12 years of service and receiving disability pay. His wife claimed a share in his right as a community asset. *Held*, the husband's future right to disability pay was his separate property.

(a) Nothing in the federal statutes or their history discloses a congressional intent to determine the community property issue, and its resolution under California law will not frustrate the objectives of the federal law. (*13 C.3d 461.*)

(b) Vested retirement benefits are regarded as deferred consideration for past services, and thus are community property. (See *supra*, §58 et seq.) Disability pay, however, is different. Disability pay is not a form of deferred compensation for past services. Although longevity plays a role, the right and amount depend primarily on the existence and extent of the disability; the payments serve to compensate for the loss of military pay caused by premature retirement and for diminished ability to compete for civilian employment. "So long as the marriage subsists, the veteran's reduced earnings works a loss to the community. But such community loss does not continue after dissolution; at that point the earnings or accumulations of each party are the separate property of such party. ... Then any diminution in earning capacity becomes the separate loss of the disabled spouse." (*13 C.3d 462.*)

(c) Disability pay serves the additional purpose of compensating for pain, suffering, and disfigurement; this "can never be wholly shared even by a loving spouse and surely not after the dissolution of a marriage by a departed one." (*13 C.3d 462.*)

(d) Disability pay is similar to compensation for personal injury; and the rule is now settled that personal injury damages received during marriage are community property but those received after dissolution are separate property. (*13 C.3d 463*; see *supra*, §40, 41.) The basis for this rule, equally applicable to disability payments, is set forth in *Washington v. Washington* (1956) 47 C.2d 249, 302 P.2d 569. When the marriage is dissolved, "not only may the

personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after acquired property, the wife's right, if any, to future support may be protected by an award of alimony." (13 C.3d 463, quoting *Washington*.)

(e) Thus, only payments received during the marriage were community assets. (13 C.3d 464.) The opinion was carefully limited to the situation in which the military member's right has not become vested by longevity of service; "we do not decide whether, or to what extent, a disability pension granted *after* the serviceman has earned by longevity of service a vested right to retirement pay may constitute a community asset." (13 C.3d 461.) (See 65 Cal. L. Rev. 305.)

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b. Only Disability Pay in Excess of Retirement Benefits Is Separate Property.

11 Witkin Sum. Cal. Law Com Prop § 87

[§ 87] Only Disability Pay in Excess of Retirement Benefits Is Separate Property.

(1) *Mueller Case. In re Marriage of Mueller (1977) 70 C.A.3d 66, 137 C.R. 129*, involved the distinction between disability and longevity retirement rights. The husband, an Air Force pilot, was eligible for voluntary longevity retirement and also for disability retirement. He had the election of two packages of benefits: One, based on longevity of service, would pay 65% of his final salary, but was subject to income tax. The other also provided for payment of 65%, but 30% of it would be based on his 30% disability and would be tax free. He chose the latter, and, in the dissolution proceeding, the trial court determined that the right to disability pay was the husband's separate property. *Held*, reversed.

(a) If the husband had elected the first package he would have received additional longevity retirement pay that would have been community property. In electing to take the second package, where his right to retirement pay had already matured, he could not claim the whole as his separate property. *In re Marriage of Cavnar (1976) 62 C.A.3d 660, 133 C.R. 267, infra, §91*, so holds, and is controlling. (70 C.A.3d 71.)

(b) The contrary rule would be inconsistent with the fiduciary duty owed by the spouse with management and control, for it would permit that spouse to transmute community property into his or her separate property. (70 C.A.3d 71.)

(c) "[W]here the employee spouse elects to receive disability benefits in lieu of a matured right to retirement benefits, only the net amount thus received over and above what would have been received as retirement benefits constitutes compensation for personal anguish and loss of earning capacity and is, thus, the employee spouse's separate property. The amount received in lieu of matured retirement benefits remains community property subject to division on dissolution." (70 C.A.3d 71.)

(2) *Stenquist Case. In re Marriage of Stenquist (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96*, follows *Mueller* and disapproves contrary language of *In re Marriage of Jones (1975) 13 C.3d 457, 119 C.R. 108, 531 P.2d 420, supra, §86*. The husband, in military service, suffered a service-related injury in 1953 and was given an 80% disability rating. If he had retired immediately his maximum "disability" pay at that time would have been 75% of basic pay, and his maximum "retirement" pay would have been only 22 1/2% of basic pay. He continued in military service until his

retirement in 1970. At that time, he elected to take disability pay (75% of basic) rather than retirement pay (65% of basic). In the dissolution proceeding, the trial judge characterized the excess of disability pay over retirement pay as separate property (compensation for disability), and treated the balance as replacement of retirement pay and therefore community property to be divided. *Held*, the ruling was correct.

(a) *Jones* held that a military member's right to disability pay, acquired before he or she had earned a vested right to ordinary retirement pay, was separate property. Then *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, supra, §60, held that vested and nonvested pension rights should be treated alike. (21 C.3d 784, 785.) The holding in *Brown* undermined the fundamental premise of *Jones*. "Under current law--in contrast to the law prevailing when *Jones* was decided--both the nonvested retirement pension in *Jones* and the husband's vested right to a 'retirement' pension in the present case constitute valuable community assets deserving of judicial protection." (21 C.3d 785.)

(b) The military member's election of a disability pension cannot be allowed to defeat the community interest in his right to a pension based on longevity. "[S]uch a result would violate the settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse." (21 C.3d 786, citing *Mueller*.) Only a portion of the husband's benefits is properly allocable to disability; and it would be unjust to deprive the wife of a valuable property right simply because a misleading label has been affixed to the benefits. (21 C.3d 786, citing *Cavnar*.)

(c) Military retired pay based on disability does not exclusively serve the purposes set forth in *Jones* (compensation for loss of earnings and for personal suffering). "Because it replaces a 'retirement' pension, and is computed in part on the basis of longevity of service and rank at retirement, it also serves the objective of providing support for the serviceman and his spouse after he leaves the service. Moreover, as the veteran approaches normal retirement age, this latter purpose may become the predominate function served by the 'disability' pension." (21 C.3d 787.) The present case illustrates the point, for the husband did not retire prematurely, but served for 26 years, retiring only after he had acquired a vested right to a retirement pension. (21 C.3d 787.)

(d) *Mueller* set forth the correct principles and formula for division of the benefits, which the judge followed in this case. (21 C.3d 788.) Language in *Jones*, "inconsistent with this opinion, is disapproved." (21 C.3d 789, footnote 11.)

(e) Following the policy of *Brown*, this holding applies retroactively only to cases in which (1) the property rights have not yet been adjudicated, or (2) adjudication is still subject to appellate review, or (3) the trial judge has expressly reserved jurisdiction to divide pension rights. (21 C.3d 791, footnote 14.)

One justice dissented, deploring the repudiation of *Jones*, criticizing the majority's reasoning, and asserting that the holding discriminates against the disabled employee. (21 C.3d 791; see majority's answer, 21 C.3d 788, footnote 10.) (See *In re Marriage of Stenquist* (1983) 145 C.A.3d 430, 432, 435, 193 C.R. 587 [following *Stenquist 1* and stating that its holding is also binding under doctrines of res judicata and law of the case]; *In re Marriage of Cullen* (1983) 145 C.A.3d 424, 427, 429, 193 C.R. 590 [following *Stenquist I*]; *In re Marriage of Mastropaolo* (1985) 166 C.A.3d 953, 962, 213 C.R. 26 [following *Cullen*]; *In re Marriage of Stier* (1986) 178 C.A.3d 42, 48, 53, 223 C.R. 599 [same]; *In re Marriage of Stephens* (1986) 184 C.A.3d 616, 622, 229 C.R. 238 [following *Stenquist I* and *Cullen*]; *In re Marriage of Daniels* (1986) 186 C.A.3d 1084, 1089, 1091, 231 C.R. 169 [following *Mueller* and *Mastropaolo*]; Rutter Group, 2 Family Law §8.176 et seq.; 67 Cal. L. Rev. 856; 7 Hastings Const. L. Q. 1061.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Stenquist Case*. See C.E.B., Dividing Pensions and Other Employee Benefits, §17.21 et seq.



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c. Disposable Versus Gross Retirement Benefits.

11 Witkin Sum. Cal. Law Com Prop § 88

[§ 88] Disposable Versus Gross Retirement Benefits.

The Federal Uniformed Services Former Spouses Protection Act (FUSFSPA) (see *supra*, §80) refers to a member's "disposable retired or retainer pay," defined as total monthly retired or retainer pay less specified deductions. (10 U.S.C., §1408.) In *Casas v. Thompson* (1986) 42 C.3d 131, 228 C.R. 33, 720 P.2d 921, the court made some observations on the meaning and effect of this language.

(a) Defendant, former husband of plaintiff, argued that California can only declare a community interest in the "disposable" part of his retirement pay (the gross pay less specified deductions that may vary significantly among retirees with the same gross pay). *In re Marriage of Costo* (1984) 156 C.A.3d 781, 787, 203 C.R. 85, supports this view, but it is based on a misunderstanding of *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, *supra*, §79. (42 C.3d 144.) The question is not whether FUSFSPA expressly grants to the states the power to divide the gross amount, but whether there remains a conflict between the federal retirement statutes and California community property rights threatening federal interests. "Stated differently, were *McCarty* to be decided after FUSFSPA, would the Supreme Court imply preemption?" (42 C.3d 145.) The answer is: "Not only does the legislative history of FUSFSPA document Congress's understanding that state laws characterizing military pensions as community property would apply in the same way as they did before *McCarty*, but even the *McCarty* analysis, applied after the enactment of FUSFSPA, would yield the conclusion there is no longer any implicit conflict between state laws and the federal scheme." (42 C.3d 146.)

(b) Defendant also argued that FUSFSPA prohibits state courts from dividing more than the retiree's "disposable" pay; but an analysis of the statute does not support this interpretation: "FUSFSPA is not inconsistent with a division of gross, rather than disposable, military retired pay. FUSFSPA's intended limitations reach only restrictions on the garnishment of and direct payment from the retiree's disposable pay. Characterization of retirement pay remains a state law question. Thus, in California the military retiree's gross pay is a community asset subject to equal division." (42 C.3d 151.)

The United States Supreme Court rejected the reasoning in *Casas* and impliedly overruled its conclusion in *Mansell v. Mansell* (1989) 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675, *infra*, §89.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

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II. ACQUISITION OF COMMUNITY PROPERTY
D. Proceeds of Community Property.
8. Military Disability Pay.
d. Effect of Waiver of Retirement Benefits.
1. Federal Preemption of Community Property Division.

11 Witkin Sum. Cal. Law Com Prop § 89

[§ 89] Federal Preemption of Community Property Division.

(1) *Mansell 1 and II Cases*. In *Mansell v. Mansell* (1989) 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (*Mansell II*), plaintiff husband, an Air Force major, received retirement pay and, pursuant to a waiver, disability benefits. In the dissolution proceeding, the parties entered into a property settlement agreement providing that plaintiff would pay defendant wife 50% of his total retirement pay, including the amount waived for the purpose of receiving disability benefits. Later, plaintiff sought to modify the decree by eliminating this provision. On denial of the request, plaintiff appealed, and the Court of Appeal in *Mansell 1*, relying on *Casas v. Thompson* (1986) 42 C.3d 131, 228 C.R. 33, 720 P.2d 921, supra, §88, rejected his contention that the Federal Uniformed Services Former Spouses Protection Act (FUSFSPA) (see supra, §80) precluded the California court from treating retirement pay that had been waived to receive disability benefits as community property. The California Supreme Court denied review. *Held*, holding in *Mansell 1* reversed.

(a) The amount of retirement pay is calculated according to the number of years served and the rank achieved. The amount of disability benefits is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired. In order to prevent double-dipping, a military retiree may receive disability benefits only to the extent that he or she waives a corresponding amount of retirement pay. Because disability benefits are exempt from federal, state, and local taxation, military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. (109 S.Ct. 2025, 104 L.Ed.2d 681.)

(b) "[T]he legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees. Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice. ... Given Congress' mixed purposes, the legislative history does not clearly support Mrs. Mansell's view that giving effect to the plain and precise language of the statute would thwart the obvious purposes of the Act." (109 S.Ct. 2031, 104 L.Ed.2d 688.)

(c) "We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to

decide as we do, and Congress is free to change it." (109 S.Ct. 2031, 104 L.Ed.2d 689.)

Two justices dissented, stressing the harshness of the result (109 S.Ct. 2032, 104 L.Ed.2d 689), approving the *Casas* reasoning (109 S.Ct. 2035, 104 L.Ed.2d 693), and concluding: "[U]nder the Court's interpretation of the Former Spouses' Protection Act, the former spouses Congress sought to protect risk having their economic security severely undermined by a unilateral decision of their ex-spouses to waive retirement pay in lieu of disability benefits. It is inconceivable that Congress intended the broad remedial purposes of the statute to be thwarted in such a way." (109 S.Ct. 2036, 104 L.Ed.2d 694.) "It is now once again up to Congress to address the inequity created by the Court in situations such as this one." (109 S.Ct. 2036, 104 L.Ed.2d 695.) (See *Rutter Group*, 2 Family Law §8.229.)

(2) *Mansell III Case*. On remand from the United States Supreme Court in *Mansell II*, the appellate court in *Mansell III* again affirmed the trial judge's refusal to modify the decree incorporating the parties' agreement for division of the husband's retirement and disability benefits. (*In re Marriage of Mansell* (1989) 217 C.A.3d 219, 265 C.R. 227.) In its earlier unpublished opinion (*Mansell I*), the appellate court had relied on *Casas* to refute the husband's claim that FUSFSPA prohibited state courts from treating his disability compensation as community property. While the United States Supreme Court had impliedly overruled the holding in *Casas* that federal law after the passage of FUSFSPA no longer preempted state community property law as applied to total military retirement pay, *Mansell II* involved a division of benefits *before* the passage of FUSFSPA and the decision in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, *supra*, §79, so the implicit rejection of *Casas* and its reasoning was not dispositive. (217 C.A.3d 226.) A postjudgment, nonretroactive reinterpretation of the law is not a basis for disturbing a final judgment; hence, the trial judge properly refused to reopen the judgment here. (217 C.A.3d 234.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Mansell I and II Cases*. See C.E.B., *Dividing Pensions and Other Employee Benefits*, §17.21 et seq.



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D. Proceeds of Community Property.

8. Military Disability Pay.

d. Effect of Waiver of Retirement Benefits.

2. Distinction: Postjudgment Election of Disability Over Retirement Benefits.

11 Witkin Sum. Cal. Law Com Prop § 90

[§ 90] Distinction: Postjudgment Election of Disability Over Retirement Benefits.

In re Marriage of Krempin (1999) 70 C.A.4th 1008, 83 C.R.2d 134, involved a stipulated judgment filed on the parties' dissolution awarding the wife a 25% interest in the husband's Air Force Retirement with monthly payments to commence on retirement from the Air Force. The marital settlement agreement incorporated into the judgment added: "Said monthly payments shall be in the amount of twenty-five (25%) of the monthly payments payable to [the husband] upon his retirement." "The Court in the parties' dissolution action will reserve jurisdiction to make such orders relating to these retirement benefits as are necessary to carry out this agreement." On the husband's subsequent retirement from the Air Force, he applied for service-connected disability payments, was first rated 40% and then 100% disabled, and first partly and then entirely waived his pension benefits in order to receive the disability benefits. As a consequence, payments on his military pension first declined by 40% and then stopped, and the wife's monthly payments from his retirement were reduced accordingly. The wife then filed a motion to restore the monthly payments "as previously agreed and stipulated" based on the husband's pension. The court denied the motion, citing *Mansell v. Mansell* (1989) 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675, supra, §89. *Held*, reversed.

(a) *Mansell* interpreted the Federal Uniformed Services Former Spouses Protection Act (10 U.S.C., §1408, supra, §80). The Act was enacted in response to the holding in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, supra, §79, that federal law prevented state courts from treating military retirement pay as community property. 10 U.S.C., §1408(c)(1) now authorizes a state court to treat "disposable retired pay ... as property of the [military] member and his spouse in accordance with the law of the jurisdiction of such court." However, 10 U.S.C., §1408(a)(4)(B) excepts from the definition of "disposable retired pay" amounts that "are deducted from the retired pay of such member ... as a result of a waiver of retired pay required by law in order to receive compensation" for disability. *Mansell* held that, under these clear statutory terms, retirement pay waived by a retiree to receive disability benefits may not be treated by state courts as property divisible on the retiree's divorce. (70 C.A.4th 1012.)

(b) In the years since *Mansell* was decided, postjudgment waivers of retirement pay, like the one at issue here and unlike that in *Mansell*, have caused problems for courts and litigants. (70 C.A.4th 1012.) While the situation has not yet been addressed in a published California case, courts in other states have protected the nonmilitary spouse's interest through various means. Some courts have found that the waiver of retirement pay and resulting reduction in the pension

payment to the nonmilitary spouse were changed circumstances that permitted reassessment of support payments or redistribution of marital property. In other cases the courts have enforced judgments that provided that the military spouse would take no action to diminish his or her retirement pay, and would indemnify the nonmilitary spouse for any diminution. The same result has been reached, under the particular language of the judgment, even where there was no express indemnity agreement. A majority of state courts, on one theory or another, compensate the former spouse when that spouse's share of retirement pay is reduced by the other's postjudgment waiver. (70 C.A.4th 1013.)

(c) The Supreme Court emphasized in *Mansell* that domestic relations are preeminently matters of state law, and that there is no federal preemption where not positively required by direct enactment. Unlike this case, the divorce decree in *Mansell* awarded the wife a community property interest in retirement pay the husband already had waived to receive disability benefits and thus directly conflicted with the requirements of the Act. There is no such "direct" conflict when the waiver of retirement pay occurs after the judgment and new payments are ordered to enforce what had been a proper division of marital property, even if the payments account for the military spouse's receipt of new benefits or pay that could not have been divided in the first instance. (70 C.A.4th 1015.)

(d) The wife's claim here hinges on the scope of the judgment's reservation of jurisdiction and the agreements in the judgment with respect to the wife's right to payment. If the reservation of jurisdiction and the payment provisions can be interpreted to apply in the event of a waiver of retirement pay, the court has the power to grant the relief the wife seeks. The trial court never reached those issues of interpretation because it concluded that *Mansell* was controlling. Because those issues may be ones of fact, a remand for further proceedings is required. (70 C.A.4th 1018.)

(e) In determining these issues, the trial court should note that the absence of an indemnity agreement is not necessarily fatal to the wife's position. The stipulation identifies the wife's interest in the retirement as a specific dollar amount owed to her monthly and might be deemed to quantify with certainty her community property interest in the military retirement benefits, which then could not be altered by the husband's subsequent waiver. (70 C.A.4th 1019.) Also, if the trial court were to conclude that the parties intended for the wife to continue to receive her original share of the retirement pay even if the husband waived all or a portion of it to obtain disability benefits, the Act would not prevent the trial court from giving the former wife the benefit of her bargain on a resulting trust theory. (70 C.A.4th 1021.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Smith* (2007) 148 C.A.4th 1115, 1124, 56 C.R.3d 341 [upholding postjudgment order requiring husband, if he elected to receive military disability benefits in lieu of military retirement benefits in future, to indemnify wife for unilateral reduction of community property retirement asset divided between the parties by stipulated judgment on dissolution; order ensured that wife would receive benefit of bargain she made at dissolution].



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D. Proceeds of Community Property.

9. Employment or Insurance Disability Benefits.

a. Only Disability Pay in Excess of Retirement Benefits Is Separate Property.

11 Witkin Sum. Cal. Law Com Prop § 91

[§ 91] Only Disability Pay in Excess of Retirement Benefits Is Separate Property.

In re Marriage of Cavnar (1976) 62 C.A.3d 660, 133 C.R. 267, involved a husband who, in 1971 at age 59, retired and received monthly benefits of \$ 212 from his union pension fund. Seven months later, he converted his early retirement benefit plan to a disability retirement plan under which he was paid \$ 305 monthly. The wife received an interlocutory judgment of dissolution in 1975. The trial judge characterized the disability retirement benefits as the husband's separate property. *Held*, this was erroneous; the major part was community property.

(a) If the husband had not elected to receive disability benefits, the wife would have been entitled to receive half his retirement pay; and the same would be true if the husband became ineligible for disability pay and thereafter received retirement pay. (62 C.A.3d 664.)

(b) *In re Marriage of Jones* (1975) 13 C.3d 457, 119 C.R. 108, 531 P.2d 420, *supra*, §86, and *In re Marriage of Olhausen* (1975) 48 C.A.3d 190, 193, 121 C.R. 444, characterize disability benefits as compensation for personal anguish and diminished earning capacity. But the payments here are for a different purpose: "Inasmuch as husband had retired and was receiving retirement pay before electing to receive disability pay, husband's disability cannot be said to compensate him for diminished earning capacity or his inability to compete in the job market." (62 C.A.3d 665.)

(c) Thus, although the benefits are termed "disability payments," only a portion, i.e., the net increase of \$ 93, is properly allocable to disability; and the misleading label cannot be permitted to deprive the wife of her community property interest. (62 C.A.3d 665.) (For approval of *Cavnar* and disapproval of reasoning in *Jones*, see *In re Marriage of Stenquist* (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96, *supra*, §87; for decisions based on disapproved reasoning in *Jones*, see *Olhausen*; *In re Marriage of Robinson* (1976) 54 C.A.3d 682, 686, 126 C.R. 779.)

In re Marriage of Higinbotham (1988) 203 C.A.3d 322, 249 C.R. 798, involved a police officer's choice between a disability pension and a longevity pension, each of which yielded an identical *gross* monthly benefit. However, the *net* benefit yielded under the disability plan was over \$ 400 per month higher due to its tax-exempt status. The officer chose the disability plan, and contended that the value of the tax exemption was his separate property. *Held*, this was correct. Because of the tax exemption for disability pensions, the officer will *receive* a larger benefit than he would have received under the longevity pension. Under the reasoning of *Stenquist* and *In re Marriage of Mueller* (1977) 70 C.A.3d

66, 137 C.R. 129, supra, §87, this excess constitutes a true disability benefit, and hence is his separate property. (203 C.A.3d 332.)

Other cases have applied and followed the *Stenquist* and *Mueller* rule that only disability pay in excess of longevity retirement benefits are separate property. (See *In re Marriage of Briltz* (1983) 141 C.A.3d 17, 20, 21, 189 C.R. 893 [distinguishing *In re Marriage of Samuels* (1979) 96 C.A.3d 122, 158 C.R. 38, infra, §92; following rule where husband's choice of disability payments instead of retirement benefits was attempt to defeat wife's right in already earned longevity pension]; *In re Marriage of Corriveau* (1984) 159 C.A.3d 836, 840, 842, 207 C.R. 323 [following rule, but remanding for determination of manner in which workers' compensation lien on disability benefits should be apportioned between the spouses' shares]; Rutter Group, 2 Family Law §8.170 et seq.; 33 U.C.L.A. L. Rev. 1250; 30 A.L.R.5th 139 [workers' compensation benefits as marital property].)

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9. Employment or Insurance Disability Benefits.

b. Division Where Vested Retirement Benefits Mature After Disability Payments.

11 Witkin Sum. Cal. Law Com Prop § 92

[§ 92] Division Where Vested Retirement Benefits Mature After Disability Payments.

In re Marriage of Webb (1979) 94 C.A.3d 335, 156 C.R. 334, applied *In re Marriage of Stenquist* (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96, supra, §87, to another factual situation. The husband had retired from the San Francisco Police Department with a permanent disability pension. It was conceded that the benefits were currently his separate property, but the issue was whether, on reaching 50 (the retirement age), they became longevity allowances in which the wife had a community interest. The court took note of distinguishable features in *Stenquist* (e.g., member of military could elect to make pension disability or retirement, here that election was not available; *Stenquist* did not receive his pension until 17 years after his injury, here disability payments began on retirement; the value of the military pension depended largely on rank at time of retirement, here on rank at time of disability). (94 C.A.3d 341, 342.) The court concluded, however, that *Stenquist* was not limited to its unusual facts, and that it calls for disregard of labels in determining the primary objective of a disability pension when the recipient reaches normal retirement age. (94 C.A.3d 342.) Hence, the community interest was determined by calculating the ratio between the number of years the husband was employed during the marriage and the total number of years from the date of his hiring to the date he would have become eligible for service retirement. (94 C.A.3d 343.)

In re Marriage of Samuels (1979) 96 C.A.3d 122, 158 C.R. 38, emphasizes the distinction between benefits before and after *longevity rights* arise. At age 50, the husband, a federal civil service employee, was injured, terminated his employment, and received monthly disability benefits. Having completed 5 years' service prior to disability, he would at age 62 have become eligible for a "deferred retirement annuity." *Held*: (a) Payment of the disability benefits serves the principal purpose of compensating the employee for his injury, and the benefits are his separate property. (b) At age 62, however, the predominant purpose of the payments shifts to retirement support. "[A]t that point the true character of the disability benefits commensurate in value to the fully matured retirement benefits based upon completion of five years of service during marriage ... effectively constitutes community property irrespective of the label affixed. ... Since the benefits payable are of like value (i.e., no excess) and are fully attributable to the requisite 5 years employment (and contributions made) during coverture, the total sums received ... after reaching 62 years of age comprise divisible community assets which under the circumstances reflected require no proportionate allocation." (96 C.A.3d 128.) (See *In re Marriage of Pace* (1982) 132 C.A.3d 548, 553, 183 C.R. 314 ["In this case, as in *Samuels*, the husband was forced to retire because of a disability after he had served well over the minimum number of years which entitled him both to a

disability retirement annuity and to a deferred retirement annuity at age 62. Until he reaches that age, his benefits compensate him for his injury and are his separate property; at age 62, the benefits serve as retirement support and are divisible community property"].)

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11 Witkin Sum. Cal. Law Com Prop § 93

[§ 93] Community Interest in Benefits.

In re Marriage of Saslow (1985) 40 C.3d 848, 221 C.R. 546, 710 P.2d 346, observes that "[a]lthough this court has twice addressed the status of a *disability* pension in the context of a marital dissolution, the court has never directly addressed the status of benefits from private disability insurance policies purchased with community funds." (40 C.3d 856.) The parties were separated in 1975 after 18 years of marriage. During the marriage, the husband used community funds to purchase and maintain three disability insurance policies, but did not invest in a retirement or pension plan. He retired from active medical practice in 1972, and in 1978, the time of trial, it appeared that he was likely to remain disabled for the rest of his life. At age 60 the first policy expired, the second would expire at age 70, and the third would expire at age 75, with benefits reduced to \$ 506 per month, payable until his death. The trial judge ruled that the future benefits from the disability policies were the husband's separate property, but ordered that half of these benefits be paid to the wife as spousal support. *Held*, reversed.

(a) The rationale of *In re Marriage of Jones* (1975) 13 C.3d 457, 119 C.R. 108, 531 P.2d 420, *supra*, §86, is no longer valid. (40 C.3d 856, 857.) Court of Appeal decisions, following *In re Marriage of Stenquist* (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96, *supra*, §87, have held that the portion of employer-provided disability benefits that functions as retirement pay must be treated as community property. (40 C.3d 859; see *supra*, §§91, 92.) The theory of these cases is that when the employee-spouse reaches the age at which he would be eligible for a retirement pension, "the predominate purpose" of his disability payments shifts to retirement support. (40 C.3d 859.) Accordingly, disability benefits have been characterized as community property to the extent that they equal the benefits forgone under a retirement pension; and the courts have determined the age at which the "shift" takes place by looking to the age of retirement eligibility specified in the employment contract. (40 C.3d 859.)

(b) The "purpose" analysis is more difficult to apply in this case, because there is no alternative retirement pension with which to compare the disability payments. The court could hold that "disability" benefits provided by private disability insurance policies are always separate property; but this would deprive the other spouse of a valuable property right simply because of a label. *Stenquist* held that in the context of military disability pensions such an inequitable result is unwarranted; and there is no reason to allow it where the disability benefits are paid pursuant to private insurance policies purchased with community funds. (40 C.3d 860.) The court could characterize all disability policies

purchased with community funds as community property; this would make apportionment easy, and would be consistent with basic community property principles because the source of the benefits is community property. (40 C.3d 860, citing the text.) But this rule might also have inequitable results. "[A] young ablebodied ex-spouse will be able to work and retain all his or her earnings, and will in addition be entitled to half the disability benefits of the disabled ex-spouse. This might impose a grave hardship on the disabled individual, who not only may not be able to work, but who may also require special equipment or extraordinary care." (40 C.3d 860.)

(c) "The approach taken by this court in *Stenquist* provides for the most equitable distribution of disability insurance benefits. This approach requires that the trial court treat disability benefits as separate property insofar as they are intended to replace postdissolution earnings that would have been the separate-property income of the disabled spouse, and treat the benefits as community property insofar as they are intended to provide retirement income." (40 C.3d 860.)

(d) The apportionment need not be arbitrary or speculative. "The court may consider testimony of the spouses' intent, both at the time the disability insurance was originally purchased and at the times that decisions were made to continue the insurance in force rather than let it lapse. Absent evidence of actual intent, the court may ascertain a normal retirement age at which the disabled spouse would have been most likely to retire had no disability occurred." (40 C.3d 861.)

(e) "In fixing that age, the court may take into account any circumstances relevant to the normal expectations in the disabled spouse's community or former workplace about the age at which a person having the spouse's occupation, qualifications, and vocational history would retire. There may be evidence of the ages at which similarly situated workers have retired. A range of expected retirement ages may be derived from such sources as the federal schemes for social security and for individual retirement accounts, or from the provisions in governmental or institutional retirement systems for retirement of particular classes of employees. The nature of the disability policies at issue may provide evidence of the parties' intent or expectations." (40 C.3d 861.)

(f) *In re Marriage of Donnelly* (1983) 142 C.A.3d 135, 190 C.R. 756, involved an "income protection" policy, purchased with community property, the benefits of which became payable following the parties' separation when the husband became totally disabled. Reasoning that the policy closely resembled a life insurance policy, the court held that the proceeds were community property. However, this reasoning is incorrect: "[L]ife insurance proceeds, unlike disability insurance benefits, can never be considered a substitute for subsequent earnings that would be separate property if accrued after separation of the spouses. By its very nature, life insurance purchased during the marriage with community funds is designed to make resources available to the surviving spouse after all possibility of gainful employment has been terminated by death." (40 C.3d 861, footnote 5.)

(g) Application of the *Stenquist* approach in the present case resulted in the following:

(1) "The evidence indicates that rather than investing in a retirement plan, the husband chose to utilize community funds to purchase extensive disability coverage. With his long history of psychological problems, he may have been aware that he may not be able to continue the practice of medicine due to his disability." (40 C.3d 862.)

(2) "There is no evidence that at the time the policies were purchased the parties contemplated dissolution. The husband may have chosen to protect the community's financial future through disability insurance rather than a retirement pension. Thus, the trial court may determine that the disability benefits in this case are entirely community property." (40 C.3d 862.)

(3) "Alternatively, the court may determine that at least some portion of the benefits was intended as a substitute for the husband's future preretirement earnings. This portion of the benefits, if received after the parties' separation, must be denominated the husband's separate property." (40 C.3d 862.)

(4) Because the trial judge ordered the husband to pay the wife half of the benefits as spousal support, on remand he

must redetermine spousal support in light of any recharacterization of the disability benefits as community property. (40 C.3d 862, footnote 6.)

West's Key Number Digest, Husband and Wife k.249(3)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Dividing Pensions and Other Employee Benefits, §9.40.



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D. Proceeds of Community Property.

9. Employment or Insurance Disability Benefits.

c. Disability Insurance Benefits.

2. Distinction: Postseparation Renewal of Policy With Separate Funds.

11 Witkin Sum. Cal. Law Com Prop § 94

[§ 94] Distinction: Postseparation Renewal of Policy With Separate Funds.

In re Marriage of Elfmont (1995) 9 C.4th 1026, 39 C.R.2d 590, 891 P.2d 136, distinguished *In re Marriage of Saslow* (1985) 40 C.3d 848, 221 C.R. 546, 710 P.2d 346, supra, §93, in determining the circumstances under which disability insurance benefits received by a spouse after dissolution of the marriage should be divided as community property. In *Elfmont*, husband originally used community funds during the marriage to purchase disability term insurance. At the time of separation, husband's medical practice was contributing almost \$ 60,000 annually to a corporate retirement plan. After separation, husband maintained the disability insurance by paying the premiums from his separate property. Evidence indicated that the premium payments during the marriage were made with an intent to provide retirement income. However, there was no evidence that husband renewed the insurance after separation with the intent to provide community retirement income. Two years after separation, husband became disabled and sold his medical practice. He began receiving disability benefits 32 months after separation. *Held*, the benefits were husband's separate property.

(a) *Intent to provide retirement income.* *Saslow* recognizes that the primary purpose of disability benefits is to compensate the disabled spouse for lost earnings, and that the benefits, if acquired with community funds, become community property only insofar as they are intended to provide retirement income for the community. (9 C.4th 1032.) The husband's investment in a pension plan did not preclude the trial judge from finding that the parties intended to supplement the retirement income with disability insurance benefits, and other evidence supported the view that, prior to the separation, the disability insurance was acquired and maintained out of community funds with an intent to provide retirement income. However, *Saslow* requires that intent be considered not only at the time the disability insurance was originally purchased, but also at the time that decisions were made to continue the insurance in force rather than let it lapse. "Spousal intent at the latter time is especially important when a basic change of circumstances, such as the parties' separation, has intervened since the insurance was originally purchased. Here ... there is no indication or suggestion that husband had any intent of providing *community* retirement income when ... he used his separate funds to renew the disability policies for additional terms." (9 C.4th 1033.)

(b) *Purchase of insurance with community funds.* Postseparation disability benefits, even if intended to provide retirement income, may be treated as community property only to the extent they were purchased during marriage with community funds.

(1) Term disability insurance is meant to replace lost earnings. If during marriage an insured spouse becomes disabled, the benefits received are community property because they replace community earnings. If the benefits continue after the spouses have separated, they are the separate property of the insured spouse whose earnings they replace, unless during the marriage the premiums were paid out of community funds with the intent that the benefits provide retirement income. (9 C.4th 1034.)

(2) If the insured spouse does not become disabled during the last policy term for which a premium was paid before the parties' separation, the community will have no interest in benefits produced by renewals of the policy for subsequent terms because the renewal premium will not have been paid during the marriage with community funds and with the intent of providing community retirement income. (9 C.4th 1035.)

(c) *Contractual renewal rights.* "A contractual renewal right that is included in a term disability policy purchased and renewed during the marriage with community funds may afford an insured spouse, who is medically ineligible for new insurance when the parties separate, an opportunity to obtain further disability coverage that would otherwise be unavailable. But unlike a right to renew term life insurance, which keeps alive a possibility of benefits in which the community will have an interest, the right to renew the insured spouse's term disability insurance after separation does not give rise to any community property interest in the insured's disability benefits." (9 C.4th 1035.)

(d) *All benefits separate property.* Husband became entitled to draw the benefits only after he had renewed the policies, following the parties' separation, with premiums paid out of his separate property and with no intent of providing the community with retirement income. Thus, all the benefits are the husband's separate property. (9 C.4th 1035.)

One concurring justice wrote separately advocating that *Saslow* be overruled because he considered that case poorly reasoned and incorrect in result. The principal objection was to *Saslow*'s notion that disability benefits can be a replacement for retirement income. (9 C.4th 1036.) Another justice, concurring and dissenting, argued that husband should be required "to reimburse the community for the value, at the time of separation, of the contractual right to renew the disability policies, a valuable asset that had been obtained and retained during the marriage through the expenditure of a significant amount of community funds." (9 C.4th 1038.) In a lengthy dissent, one justice argued that *Saslow* was entirely applicable, and although disability insurance is rarely purchased to provide retirement income, when a couple *has* bought a disability insurance policy with that goal in mind, disability insurance should be treated the same as a pension under the community property system, regardless of when the benefits on the disability insurance policy are first paid. (9 C.4th 1044, 1048.) (See *In re Marriage of Havins* (1996) 43 C.A.4th 414, 423, 50 C.R.2d 763, supra, §49 [following *Elfmont* analysis; right to renew employer-subsidized health insurance]; 23 *Pepperdine L. Rev.* 739 [*Elfmont*].)

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Witkin Summary of California Law II. ACQUISITION OF COMMUNITY PROPERTY D. Proceeds of Community Property. 10. Judges' Retirement Benefits. a. Nature of Benefits.

11 Witkin Sum. Cal. Law Com Prop § 95

[§ 95] Nature of Benefits.

In re Marriage of Andreen (1978) 76 C.A.3d 667, 143 C.R. 94, examined the community property rights in benefits under the Judges' Retirement Law (Govt.C. 75000 et seq.).

(a) *Lifetime allowances.* The lifetime allowances for retired judges, when produced by marital earnings, are a divisible community asset. (76 C.A.3d 674, citing *Waite v. Waite* (1972) 6 C.3d 461, 99 C.R. 325, 492 P.2d 13, supra, §59.) The wife was properly awarded a portion of the husband's allowance. (76 C.A.3d 674.) The husband objected to the trial court's formula, under which the wife's share of retirement payments would be pegged to the salary of whatever judicial position he holds at the time of retirement, rather than his position of superior court judge at the time of separation. *Held*, there was no abuse of discretion. The husband's possible judicial promotion "would stem from an indivisible mixture of past and future progress, some of which would have occurred during the marriage." The court is not bound to any fixed formula and may select any reasonable one. (76 C.A.3d 675.)

(b) *Disability retirement benefits.* The Retirement Law gives a disabled judge disability retirement benefits, and the judge awarded the wife a share of the benefits. *Held*, this was an abuse of discretion. *In re Marriage of Jones* (1975) 13 C.3d 457, 119 C.R. 108, 531 P.2d 420, supra, §86, dealing with an employee disabled before he had earned a vested right in a longevity pension, held that these benefits, like personal injury damages, were not a divisible community asset. The *Jones* court did not rule on disability benefits granted after the employee had earned longevity retirement. The instant case involves an active undischarged spouse; the court cannot predict when or whether he will become disabled; and an award based on a possibility that may never materialize is an abuse of discretion. The court should have reserved jurisdiction to consider a division of disability retirement benefits when and if they became payable. (76 C.A.3d 676, adding that the then pending case of *In re Marriage of Stenquist* (1978) 21 C.3d 779, 148 C.R. 9, 582 P.2d 96, supra, §87, may shed light on this issue.)

(c) *Allowances for surviving spouses.* The Retirement Law also establishes a system of allowances for the surviving spouses of judges who die in service or after retirement, and the trial court refused to make an award to the wife out of that expectancy. *Held*, the ruling was correct. Surviving spouse allowances are expectancies, payable only to the person who occupies that status at the time of the employee's death; hence, they do not constitute divisible community assets on dissolution. (76 C.A.3d 674.) "The Judges' Retirement Law designates the surviving spouse, not the ex-spouse, as

recipient; it is designed for the support of the former, not the latter. During marriage the survivor allowance represents an expectancy or contingent prospect, not an enforceable right. When the marriage of an unretired judge terminates, the spouse loses a contingent prospect, not an enforceable right. To view the prospect as a community asset would force the judge to pay for an expectancy which might never mature." (76 C.A.3d 674.) Moreover, the allowance is subject to many contingencies affecting the amount, and a valuation would entail much guesswork; reservation of jurisdiction would pursue a defendant no longer within the court's jurisdiction; and the covered employee has little control over the identity of the beneficiary. "Unlike an insurance policyholder, he may switch beneficiaries only by the indirect and terribly cumbersome device of changing mates." (76 C.A.3d 675.) (See *In re Marriage of Alarcon* (1983) 149 C.A.3d 544, 557, 196 C.R. 887 [husband's acceptance of federal judgeship, which, under Govt.C. 75033.5, reduced his early retirement allowance to zero, did not defeat wife's community interest in the benefits]; Rutter Group, 2 Family Law §8:1225 et seq.)

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D. Proceeds of Community Property.

10. Judges' Retirement Benefits.

b. Application of Time Rule.

11 *Witkin Sum. Cal. Law Com Prop* § 96

[§ 96] Application of Time Rule.

In re Marriage of Colvin (1992) 2 C.A.4th 1570, 4 C.R.2d 323, considered the effect of 1989 amendments to the Judges' Retirement Law (*Govt.C. 75000* et seq.) on the trial court's discretion under former C.C. 4800.8 (now *Family C. 2610*; see *supra*, §68) to allocate the community interest in a judicial pension plan. The trial judge had previously divided the asset, with a reservation of jurisdiction to determine the amount of the community interest at the time of actual retirement. The husband argued that the trial judge erroneously refused to allocate the community interest according to recent amendments to the Retirement Law that would have substantially reduced the wife's share and increased the husband's share. Instead, the trial judge applied the "time rule" (see *supra*, §65) adopted in the original order dividing the pension benefits, and also granted the wife a portion of any survivor benefits available after the husband's death, which had not been mentioned in the original order (under the terminable interest rule then in effect, no such benefits were available; see *supra*, §67). *Held*, affirmed.

(a) Despite the Legislature's stated intent that the Retirement Law amendments apply in all cases where the court reserved jurisdiction over the benefit, the trial court was not required to apply the amendments. The reservation of jurisdiction had been for the limited purposes of determining the percentage of the community interest based on the husband's actual retirement date and supervising the payments. This did not permit relitigating the pension division. The Retirement Law amendments were not intended to cure a "rank injustice" so as to require retroactive application. (2 C.A.4th 1578, citing *In re Marriage of Taylor* (1987) 189 C.A.3d 435, 234 C.R. 486, *supra*, §67.) Moreover, the trial judge correctly ruled that the amendments did not apply unless the wife chose to receive her payments under the new scheme. (2 C.A.4th 1579.)

(b) Former C.C. 4800.8(c) (now *Family C. 2610(a)(3)*), incorporating the Retirement Law amendments by its reference to the statutes governing the Public Employees' Retirement System (PERS), did not constrain the trial court's broad discretion to fashion an equitable division of the community's pension benefits. The methods of division specified in the statute are illustrative only, and do not prevent the court from choosing another method. Moreover, under *Govt.C. 75050*, the Retirement Law amendments themselves apply only *if* the trial court so orders. This construction of the amendments and former C.C. 4800.8(c) was consistent with the interpretation applied by PERS in the present case. (2 C.A.4th 1580.)

(c) The trial judge properly ordered PERS to pay the wife, or her estate, a percentage of any survivor benefits paid after the husband's death to a surviving spouse or other beneficiary. This retroactive application of former C.C. 4800.8(a) restored the wife's rightful share of the community asset that had been unjustly denied her under the terminable interest rule in effect at the time of the original order. Unlike the disposition of survivor benefits that was reversed in *In re Marriage of Carnall* (1989) 216 C.A.3d 1010, 265 C.R. 271, supra, §77, this order ensured that the wife would receive no more than her share of the community interest in survivor benefits. (2 C.A.4th 1581.) (See Rutter Group, 2 Family Law §8:1225 et seq.)

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11. Social Security Benefits.

11 Witkin Sum. Cal. Law Com Prop § 97

[§ 97] Social Security Benefits.

In re Marriage of Nizenkoff (1976) 65 C.A.3d 136, 135 C.R. 189, held that federal Social Security old age and retirement benefits are the separate property of the spouse receiving them. The court reasoned as follows:

(a) In order to qualify as a divisible community asset, an interest must be a contractual right or a property interest. In *Flemming v. Nestor* (1960) 363 U.S. 603, 80 S.Ct. 1367, 1374, 4 L.Ed.2d 1435, 1446, 7 Summary (10th), *Constitutional Law*, §207, the United States Supreme Court, interpreting 42 U.S.C., §1304, held that the Social Security Act created only a public benefit, not a property or contract right; that the provisions of the Act could be altered so long as the action was not arbitrary; and that §1304 was essential to insure flexibility of the system. (65 C.A.3d 139.) This characterization of Social Security benefits as noncontractual was reaffirmed in *Richardson v. Belcher* (1971) 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231, 8 Summary (10th), *Constitutional Law*, §809, and *Weinberger v. Wiesenfeld* (1975) 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514, 8 Summary (10th), *Constitutional Law*, §772. (65 C.A.3d 139.) Congress, while recognizing the need for vested pension rights in the private sector (e.g., by the Employee Retirement Income Security Act of 1974; see 3 Summary (10th), *Agency and Employment*, §406 et seq.), retained §1304. (65 C.A.3d 139.)

(b) *In re Marriage of Fithian* (1974) 10 C.3d 592, 111 C.R. 369, 517 P.2d 449, supra, §78, applying the tests of *Wissner v. Wissner* (1950) 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424, supra, §50, was unable to find any express intent of Congress to provide for the divorced spouse, and reasoned that Congress intended to leave surviving ex-spouses to state family law concepts of support, alimony, and community property. "The contrary is true here. A ruling that social security benefits are divisible community assets would seriously interfere with the express statutory scheme of the Social Security Act and is forbidden by the supremacy clause of the United States Constitution." Thus, the rationale of *In re Marriage of Milhan* (1974) 13 C.3d 129, 117 C.R. 809, 528 P.2d 1145, supra, §50, does not apply to the present case. (65 C.A.3d 141.) In *Mathews v. de Castro* (1976) 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389, 8 Summary (10th), *Constitutional Law*, §809, the United States Supreme Court held that Congress could rationally and constitutionally make a distinction between married and divorced spouses. (65 C.A.3d 141.)

Other cases are to the same effect. (See *In re Marriage of Cohen* (1980) 105 C.A.3d 836, 841, 843, 164 C.R. 672 [following *Nizenkoff*]; *In re Marriage of Hillerman* (1980) 109 C.A.3d 334, 337, 345, 167 C.R. 240 [commenting on better protection of worker's family under California community property law, but holding that Congress has provided a uniform federal system]; Rutter Group, 2 Family Law §8:255 et seq.)

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12. Other Proceeds.

11 Witkin Sum. Cal. Law Com Prop § 98

[§ 98] Other Proceeds.

(1) *Veterans' Education Benefits*. The federal program of veterans' education benefits was intended to make service in the armed forces more attractive to prospective recruits. They are similar in nature to other fringe benefits of the employment (employer-paid life insurance, tuition reimbursement, etc.), and are classified as separate or community property according to the same principles. Hence, where the military service occurred entirely before marriage, education benefits received after marriage are the separate property of the veteran. (*In re Marriage of Shea* (1980) 111 C.A.3d 713, 717, 169 C.R. 490; see Rutter Group, 2 Family Law §8:141 et seq.)

The *Shea* court rejected the nonmilitary spouse's contention that the statutory requirements of enrollment and satisfactory progress in an approved educational program should be deemed "employment," thus making the benefits a product of the time and effort of the veteran. "The education benefits flow from and are earned by service in the military, not attendance at school." (111 C.A.3d 718.)

(2) *Gambling Winnings and Losses*. *In re Marriage of Shelton* (1981) 118 C.A.3d 811, 173 C.R. 629, involved an apparent conflict between two rules: (a) the proceeds follow the character of their source, and (b) property acquired after separation is separate. (See *supra*, §9 et seq.) The husband, after separation, used \$ 10,000 of community funds at a casino and won \$ 22,000. *Held*, the winnings were community property. The "skill, efforts and industry" in successful gambling are minimal; hence, the separate property contribution (effort during separation) was inconsequential, and the entire sum could properly be viewed as the proceeds of community property. (118 C.A.3d 816.)

Conversely, gambling losses are generally viewed as a separate property obligation because they do not benefit the community. (*In re Marriage of Cairo* (1988) 204 C.A.3d 1255, 1267, 251 C.R. 731.) (See Rutter Group, 2 Family Law §8.333.)

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11 Witkin Sum. Cal. Law Com Prop § 99

[§ 99] Lender's Intent Governs Character.

(1) *Statement of Rule.* The intent of the lender test, i.e., whether the lender intended to rely on separate or community property for satisfaction, determines whether loan proceeds acquired during marriage are separate or community property. (See *Gudelj v. Gudelj* (1953) 41 C.2d 202, 210, 259 P.2d 656; *In re Marriage of Stoner* (1983) 147 C.A.3d 858, 864, 195 C.R. 351; *In re Marriage of Grinius* (1985) 166 C.A.3d 1179, 1186, 212 C.R. 803, *infra*, §100; Rutter Group, 2 Family Law §8:275 et seq.; 17 Cal. Western L. Rev. 173; 17 *Pacific L. J.* 129; 25 *San Diego L. Rev.* 1071; 37 *U.C.L.A. L. Rev.* 389.)

(2) *Loan Made on Personal Credit.* Where a loan is made on the personal credit of either spouse, the money is normally regarded as community property. (See *Schuyler v. Broughton* (1886) 70 C. 282, 285, 11 P. 719; *Mosesian v. Parker* (1941) 44 C.A.2d 544, 550, 112 P.2d 705; *Kenney v. Kenney* (1954) 128 C.A.2d 128, 142, 274 P.2d 951; *Hicks v. Hicks* (1962) 211 C.A.2d 144, 153, 27 C.R. 307; *Somps v. Somps* (1967) 250 C.A.2d 328, 337, 58 C.R. 304; *Ford v. Ford* (1969) 276 C.A.2d 9, 13, 14, 80 C.R. 435, citing the text; *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 455, 152 C.R. 668.)

(3) *Secured Loan.* If the loan is secured, thereby evidencing the lender's intent to rely on specified property for satisfaction, the characterization of that property as separate or community governs the characterization of the loan proceeds. (See *Dyment v. Nelson* (1913) 166 C. 38, 40, 134 P. 988; *Estate of Ellis* (1928) 203 C. 414, 416, 264 P. 743; *Ford v. Ford*, *supra*, 276 C.A.2d 13; *In re Marriage of Fischer* (1976) 78 C.A.3d 556, 561, 146 C.R. 384; 17 *So. Cal. L. Rev.* 64.)

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(1) *Statement of Rule.* See 47 *Santa Clara L. Rev.* 1 [arguing that community property law unfairly benefits creditors].



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11 Witkin Sum. Cal. Law Com Prop § 100

[§ 100] Proof of Lender's Intent.

Because loan proceeds acquired by a married person are presumed to be community property, in accordance with the general presumption regarding property acquired during marriage (see *supra*, §15), the issue is usually whether there is sufficient evidence of the lender's intent to rely on separate property to rebut the presumption. (See *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 456, 152 C.R. 668; *In re Marriage of Stoner* (1983) 147 C.A.3d 858, 864, 195 C.R. 351.)

In re Marriage of Grinius (1985) 166 C.A.3d 1179, 212 C.R. 803, involved interests in restaurant real property standing in the husband's name, but acquired after marriage by purchase money loans. Applying the intent-of-the-lender rule, the court held that the property was community.

(a) In early cases, to characterize loan proceeds as separate property, the Supreme Court required a showing that the lender relied *entirely* on separate property of a spouse in extending the loan. But the modern formulation of the rule was in *Gudelj v. Gudelj* (1953) 41 C.2d 202, 210, 259 P.2d 656. " 'In the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit,' " the trial court must find in accordance with the presumption of community property. (166 C.A.3d 1186, 1187.)

(b) Courts have found evidence of the lender's intent in reliance on or hypothecation of separate property; sole reliance on separate property; and extension of the loan on the faith of existing property belonging to the acquiring spouse. But in all of these cases, loan proceeds were characterized as separate property *only* when direct or circumstantial evidence indicated that the lender relied *solely* on separate property in offering the loan. (166 C.A.3d 1187.) In this case, the husband presented no direct evidence of lender intent, and the circumstantial evidence (166 C.A.3d 1187) was insufficient to overcome the presumption. (166 C.A.3d 1190.) (See 37 U.C.L.A. L. Rev. 389.)

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11 Witkin Sum. Cal. Law Com Prop § 101

[§ 101] In General.

(1) *Goodwill Defined. B. & P.C. 14100* defines goodwill as "the expectation of continued public patronage." *In re Lyons (1938) 27 C.A.2d 293, 81 P.2d 190*, offers a more complete definition. Goodwill is " 'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices. ... [I]t is the probability that the old customers will resort to the old place. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in.' " (27 C.A.2d 297, quoting *Bell v. Ellis (1867) 33 Cal. 620.*) (See Rutter Group, 2 Family Law §8:1437; 17 Pacific L. J. 165, 167; 7 Southwestern U. L. Rev. 186, 187.)

Although goodwill is usually associated with a professional practice, it may exist in any business that is founded on personal skill or reputation. (*In re Marriage of Foster (1974) 42 C.A.3d 577, 582, footnote 2, 117 C.R. 49* [listing examples]; *In re Marriage of Webb (1979) 94 C.A.3d 335, 344, 156 C.R. 334, supra*, §92 [private investigation service]; *In re Marriage of Rives (1982) 130 C.A.3d 138, 149, 181 C.R. 572* [queen bee business].)

(2) *Duty To Value and Divide as Community Property.* In a dissolution case involving a professional practice, the court must determine whether goodwill exists; and if goodwill does exist, the court must value it in dividing the community property. (*Todd v. Todd (1969) 272 C.A.2d 786, 792, 78 C.R. 131*; *In re Marriage of Lopez (1974) 38 C.A.3d 93, 107, 113 C.R. 58*; *In re Marriage of Fenton (1982) 134 C.A.3d 451, 460, 184 C.R. 597*; *In re Marriage of Watts (1985) 171 C.A.3d 366, 370, 217 C.R. 301*; see 76 A.L.R.4th 1025 [goodwill in medical or dental practice]; 79 A.L.R.4th 171 [goodwill in law practice]; Rutter Group, 2 Family Law §8:1437 et seq.)

In *Golden v. Golden (1969) 270 C.A.2d 401, 75 C.R. 735*, the court said: "[T]he practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. ... [T]he wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business." (270 C.A.2d 405.)

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(1) *Goodwill Defined. In re Marriage of McTiernan & Dubrow (2005) 133 C.A.4th 1090, 35 C.R.3d 287*, was a marital dissolution proceeding in which the trial judge valued the goodwill in the husband's business as a successful motion picture director at \$ 1.5 million, and determined that all of the goodwill was community property. *Held*, this finding was reversible error.

(a) Under *B. & P.C. 14100* (text, p. 659), future or continued public patronage is one essential aspect of goodwill. However, there is more to goodwill than the expectation of continued patronage. Under *B. & P.C. 14102*, goodwill of a business is property and is transferable. For purposes of goodwill, the term "business" is susceptible to two definitions: (1) a person doing business; or (2) a professional, commercial, or industrial enterprise with assets, i.e., an entity other than a natural person. Although the trial judge adopted the first definition, the second definition is the better one. That interpretation conforms to the historical understanding of goodwill, the plain text of *B. & P.C. 14100* and *14102* refers to "a business," and that interpretation ensures that the interest that is divided as goodwill is "property," i.e., something that is transferable. (*133 C.A.4th 1096, 1101.*)

(b) In the present case, the husband's elite professional standing was his alone and not susceptible to being transferred or sold, and thus did not constitute goodwill. (*133 C.A.4th 1100.*)



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F. Goodwill of Profession or Business.

2. Valuation.

a. In General.

11 Witkin Sum. Cal. Law Com Prop § 102

[§ 102] In General.

(1) *Factors Considered.* No rigid rule or formula has been devised for evaluating goodwill; each case must be determined on its own facts. (See *In re Marriage of Slater* (1979) 100 C.A.3d 241, 246, 160 C.R. 686.) The factors to be considered in evaluating goodwill include the following: "the practitioner's age, health, past demonstrated earning power, professional reputation in the community as to his judgment, skill, knowledge, his comparative professional success, and the nature and duration of his business as a sole practitioner or as a member of a partnership or professional corporation to which his professional efforts have made a proprietary contribution." (*In re Marriage of Lopez* (1974) 38 C.A.3d 93, 109, 110, 113 C.R. 58; see *In re Marriage of Foster* (1974) 42 C.A.3d 577, 583, 117 C.R. 49; *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 463, 152 C.R. 668, *infra*, §105 [law partner's relative inexperience supported finding that he had contributed nothing to firm's goodwill]; *In re Marriage of Rives* (1982) 130 C.A.3d 138, 151, 181 C.R. 572, *infra*, §103 [failure to consider husband's advanced age and desire to retire in assessing goodwill was error]; Rutter Group, 2 Family Law §8:1438 et seq.; 77 A.L.R.4th 609 [valuation of goodwill in accounting practice]; 77 A.L.R.4th 683 [valuation of goodwill in law practice]; 78 A.L.R.4th 853 [valuation of goodwill in medical or dental practice]; 8 Proof of Facts 3d 215 [valuation of goodwill of professional practice for distribution on divorce].)

(2) *Necessity for Showing Proprietary Interest.* *In re Marriage of Slivka* (1986) 183 C.A.3d 159, 228 C.R. 76, involving the valuation of a doctor's interest in a medical group partnership, held that because the doctor's situation was similar to that of an employee, the goodwill value of his interest was zero. In concluding that the doctor had no proprietary interest in the partnership, the court emphasized the following: (a) he made no capital contribution to the group on becoming a partner and had no assets to take with him on withdrawal; (b) he would receive no payment on departure and could not sell his interest; (c) the group's only practice was via its contract with Kaiser, and the partners were prohibited from earning outside income; (d) the compensation consisted of base pay, plus overtime pay for extra hours and incentive earnings composed of year-end bonuses and accruals. (183 C.A.3d 163.)

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Witkin Summary of California Law II. ACQUISITION OF COMMUNITY PROPERTY

F. Goodwill of Profession or Business.

2. Valuation.

b. No Consideration of Future Earnings.

11 Witkin Sum. Cal. Law Com Prop § 103

[§ 103] No Consideration of Future Earnings.

In accordance with the principle that a community interest can be acquired only during the marriage (see *supra*, §7), the trial judge may not consider the expectancy of future earnings in determining the value of goodwill. That value, if any, must exist at the time of dissolution. (See *In re Marriage of Fortier* (1973) 34 C.A.3d 384, 388, 109 C.R. 915, *infra*, §104; *In re Marriage of Foster* (1974) 42 C.A.3d 577, 584, 117 C.R. 49 [goodwill may be valued by "any legitimate method ... that measures its present value by taking into account some past result"]; *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 463, 152 C.R. 668, *infra*, §105; *In re Marriage of Slater* (1979) 100 C.A.3d 241, 246, 160 C.R. 686; *In re Marriage of King* (1983) 150 C.A.3d 304, 310, 197 C.R. 716 [fact that goodwill contemplates continuity of business (see *supra*, §101) does not mean that its value should be computed on basis of husband's postseparation efforts]; *Rutter Group*, 2 Family Law §8:1446.)

In re Marriage of Rives (1982) 130 C.A.3d 138, 181 C.R. 572, involved a queen bee business. The goodwill of the business, based on the potential income approach, was valued at \$ 50,815. This approach called for an estimation of what the business should produce and a determination of potential income from that figure by using the highest seasonal sales price for the bees. The value of goodwill was then derived by deducting expected expenses, return to capital, and the operator's labor from the potential income and capitalizing the remainder as being attributable to goodwill. *Held*, this method was improper. It was based entirely on the expectation of the husband's future efforts, which can play no part in the valuation of community property. It completely ignored the important facts that the husband was elderly and wished to retire. Even were this approach proper, the expert's valuation was based on assumptions that were not proven, i.e., he estimated that the husband should be able to produce 18,840 queen bees, even though that figure had never been approached, and he computed selling price for the bees at \$ 4.50 each, despite evidence that this price was only obtainable early in the season. (130 C.A.3d 150.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Valuation.

c. Market Value as Measure of Goodwill.

11 Witkin Sum. Cal. Law Com Prop § 104

[§ 104] Market Value as Measure of Goodwill.

In re Marriage of Fortier (1973) 34 C.A.3d 384, 109 C.R. 915, rejected various formulas that had valued the goodwill of a medical partnership at about \$ 300,000, and held that a valuation of \$ 11,000, based on market value, was reasonable. "[S]ince community goodwill may be evaluated by no method that is dependent upon the post-marital efforts of either spouse, then, as a consequence, the value of community goodwill is simply the market value at which the goodwill could be sold upon dissolution of the marriage, taking into consideration the expectancy of the continuity of the practice." (34 C.A.3d 388.)

However, *In re Marriage of Foster* (1974) 42 C.A.3d 577, 117 C.R. 49, held that the *Fortier* decision, which was based on specific evidence of the market value of goodwill, did not establish a general rule restricting the value of goodwill to its fair market value. That restriction would be incorrect. "In view of exigencies that are ordinarily attendant a marriage dissolution the amount obtainable in the marketplace might well be less than the true value of the goodwill." (42 C.A.3d 584.) (See, to same effect, *In re Marriage of Fenton* (1982) 134 C.A.3d 451, 461, 184 C.R. 597; *In re Marriage of King* (1983) 150 C.A.3d 304, 309, 197 C.R. 716; *In re Marriage of Hargrave* (1985) 163 C.A.3d 346, 353, 209 C.R. 764; *In re Marriage of Watts* (1985) 171 C.A.3d 366, 372, 217 C.R. 301; Rutter Group, 2 Family Law §8:1439.)

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2. Valuation.

d. Effect of Agreement Relating to Goodwill.

11 Witkin Sum. Cal. Law Com Prop § 105

[§ 105] Effect of Agreement Relating to Goodwill.

In re Marriage of Lopez (1974) 38 C.A.3d 93, 113 C.R. 58, held that, on remand to determine the community interest in the husband's law partnership, the trial judge should give "careful weight" to a provision in the partnership agreement specifying that the beginning capital was \$ 214,000, of which \$ 209,895 represented goodwill. (38 C.A.3d 110.)

In re Marriage of Slater (1979) 100 C.A.3d 241, 160 C.R. 686, involved a withdrawal right provision that included the value of the medical group's goodwill in the amount to be paid to the withdrawing partner. The trial judge concluded that he was forced to value the husband's interest in the partnership as a withdrawal right with a goodwill value of zero, because if he withdrew, he would not receive the goodwill. *Held*, this was incorrect. The asset being valued was the husband's interest in the partnership, not his contractual withdrawal right. (100 C.A.3d 245.) The value of the withdrawal right may provide a basis for evaluating the community interest, but it does not preclude a consideration of other factors. (100 C.A.3d 247.)

In re Marriage of Fenton (1982) 134 C.A.3d 451, 184 C.R. 597, involved a law corporation that gave the partners many withdrawal rights, including the right to receive \$ 1,000 for each of their shares in the corporation. Based on this stock purchase agreement, the trial judge refused to assign a value for goodwill. *Held*, this was error. "[H]usband here was the highest wage earner in his law firm, his professional reputation in the community was excellent, he had been in practice for over 25 years, and wife's expert testimony revealed that his earning power was considerably greater than that of his peers. This experience, reputation, and skill was developed over the years he was married to wife and it is a community asset. It indirectly creates excess income for husband whether he stays with his firm or strikes out on his own. The value of 'goodwill' is well established in the case law, and it cannot be eliminated by a recital in the corporate documents." (134 C.A.3d 463, citing *Slater*.)

The *Fenton* opinion distinguishes *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 152 C.R. 668, which involved a stock purchase agreement providing a formula governing the purchase and sale of shares in a law firm. The formula specifically excluded an allowance for goodwill, and an expert testified that the firm had no value beyond that expressed in the formula. The court upheld a finding assigning no value to goodwill, but on the following reasoning: "At the time of trial, husband was 31 years old and had been a member of the bar for only 7 years. He had been a member of his law firm for just five years, and a shareholder for only two years. In view of his youth and comparative inexperience, the

trial court could reasonably conclude that he had not contributed in any substantial way to whatever goodwill the law firm might possess. These factors support the court's determination that goodwill was not to be considered in evaluating his interest in the firm." (89 C.A.3d 463.) (See Rutter Group, 2 Family Law §8:1441 et seq.)

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2. Valuation.

e. Date of Valuation of Law Practice.

11 Witkin Sum. Cal. Law Com Prop § 106

[§ 106] Date of Valuation of Law Practice.

In re Marriage of Green (1989) 213 C.A.3d 14, 261 C.R. 294, held that, as a general rule, a law practice should be valued as of the date of separation.

(a) Selection of the proper date requires reconciliation of two directives: (1) community assets shall be valued as near as practicable to the date of trial (former C.C. 4800(a), now *Family C. 2552(a)*; see *infra*, §193); (2) earnings and accumulations after separation are separate property (former C.C. 5118, now *Family C. 771(a)*; see *supra*, §10 et seq.). (*213 C.A.3d 20.*)

(b) Under former C.C. 5118, any portion of law practice assets, including goodwill, attributable to a spouse's earnings and accumulations while separate, are his separate property. (*213 C.A.3d 20.*) Because the major assets of most law firms are not capital assets, the date of separation, rather than the date of trial, is ordinarily the proper date for determining the community property interest in law partnerships (including goodwill). (*213 C.A.3d 21.*)

(c) "This will not be a general rule without exceptions. However, exceptions will usually be related to situations where the postseparation efforts of the lawyer spouse have minimal impact upon any increase in the value of the law partnership interest. For example, a partnership interest in a large law firm (or shareholder interest in a large professional corporation) may be so relatively small that the lawyer spouse's postseparation efforts cannot be considered a significant factor in any increase in the value of the partnership (or professional corporation) between the date of separation and time of trial. ... Under these circumstances, it could certainly be argued that the lawyer with a small partnership interest in a large law firm may be indistinguishable from an executive with General Motors who also owns shares of General Motors stock, and thus the interest should be valued as near as practicable to the time of trial. In other cases, the general rule might not apply because a formula contained in the partnership agreement for payment upon withdrawal of a partner may also be an accurate method for determining the value of the partnership as a going business, or the parties may not dispute the use of a withdrawal formula to determine the value of the partnership interest." (*213 C.A.3d 21.*)

Other cases are to the same effect. (See *In re Marriage of Fink (1979) 25 C.3d 877, 888, 160 C.R. 516, 603 P.2d 881*, *infra*, §259 [valuation of law practice as of date of trial was proper where husband's commingling of postseparation

and preseparation operations made valuation as of date of separation impossible]; *In re Marriage of Kilbourne* (1991) 232 C.A.3d 1518, 1524, 284 C.R. 201, *infra*, §§127, 216 [following *Green*]; Rutter Group, 2 Family Law §8:1384 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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f. Particular Valuation Methods.

11 Witkin Sum. Cal. Law Com Prop § 107

[§ 107] Particular Valuation Methods.

Courts have approved numerous methods for evaluating goodwill. (See *Rutter Group*, 2 Family Law §8:1444 et seq.; 22 *Lincoln L. Rev.* 15 [application of "theory of the firm" method to valuation of closely held business]; 17 *Southwestern U. L. Rev.* 186, 193.) The following are illustrative:

(1) *Capitalized Excess Earnings Method*. Subtracting salary from the average net income over a period of years and capitalizing the difference over a period of years. (*Mueller v. Mueller* (1956) 144 C.A.2d 245, 252, 301 P.2d 90; see *In re Marriage of Foster* (1974) 42 C.A.3d 577, 580, 584, 117 C.R. 49 [subtracting from net income salary of comparable employee and multiplying by factor of from one to three]; *In re Marriage of Watts* (1985) 171 C.A.3d 366, 371, 217 C.R. 301 [trial judge erred in not using capitalized excess earnings method, and in valuing goodwill of medical practice at zero, when specific findings showed excess earnings of \$ 11,500]; *In re Marriage of Garrity & Bishton* (1986) 181 C.A.3d 675, 688, footnote 14, 226 C.R. 485; *In re Marriage of Rosen* (2002) 105 C.A.4th 808, 819, 821, 130 C.R.2d 1 [trial judge incorrectly calculated husband's goodwill under capitalized excess earnings method; judge used husband's income for 1 year rather than his annual average net income for reasonably illustrative period].)

(2) *Gross Income Multiplier Method*. Multiplying annual gross income by a factor deemed appropriate to the particular profession. (*Mueller v. Mueller*, *supra*; see *In re Marriage of Foster*, *supra* [multiplying net earnings by factor of from one to three]; *In re Marriage of Barnert* (1978) 85 C.A.3d 413, 424, 149 C.R. 616, *infra*, §213 [value of entire medical practice (not just goodwill) determined by multiplying gross billings adjusted for profitability by 25%]; *In re Marriage of Asbury* (1983) 144 C.A.3d 918, 924, 193 C.R. 562 [in dividing joint orthodontic practice, it was proper to use higher percentage of annual income in evaluating goodwill of entire practice than that used in evaluating goodwill that wife took with her, because she had to start over while husband's practice continued unchanged].)

(3) *Recent Income Method*. Taking an approximation of the last 3 months' income received on account. (*In re Marriage of Foster*, *supra*.)

(4) *Capitalized Excess Earnings and Market Value Method*. Splitting the difference between the amount obtained by capitalizing the excess earnings and the market value. (*In re Marriage of Webb* (1979) 94 C.A.3d 335, 344, 156 C.R. 334, *supra*, §92; see *Mueller v. Mueller*, *supra* [estimates ranged from zero to \$ 34,500; trial judge properly assigned

value of \$ 25,000]; *In re Marriage of Hargrave* (1985) 163 C.A.3d 346, 354, 209 C.R. 764 [valuation of \$ 35,000 (estimates ranged from zero to \$ 100,000) was improper where referee rejected all evidence and gave no explanation for his estimate; referee should have required parties to present more evidence or called his own expert].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Capitalized Excess Earnings Method*. See *In re Marriage of Ackerman* (2006) 146 C.A.4th 191, 202, 52 C.R.3d 744 [trial judge correctly calculated husband's goodwill under capitalized excess earnings method; judge properly relied on expert testimony to determine reasonable compensation of comparable professional, where judge also considered husband's actual business situation, talent, training, expertise, and reputation].



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CHAPTER XVI - Community Property

Witkin Summary of California Law II. ACQUISITION OF COMMUNITY PROPERTY G. Educational Degree or License. 1. In General.

11 Witkin Sum. Cal. Law Com Prop § 108

[§ 108] In General.

(1) *Case Law.* California courts have held that a professional education, although obtained with community funds and efforts, is not "property" and cannot be valued and divided as a community asset. (See *Todd v. Todd* (1969) 272 C.A.2d 786, 789, 78 C.R. 131; *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 461, 152 C.R. 668.) Commentators have disagreed on the issue whether the enhancement of earning capacity resulting from the education or license should be regarded as such an asset. (See 10 Cal. Western L. Rev. 590; 33 *Hastings L. J.* 771, 813; 16 *Loyola L.A. L. Rev.* 227; 16 *Pacific L. J.* 981; 22 *San Diego L. Rev.* 1275; 59 *So. Cal. L. Rev.* 1351; 28 *U.C.L.A. L. Rev.* 1181, 1210; 18 *U.S.F. L. Rev.* 275; 4 *A.L.R.4th* 1294 [spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement].)

(2) *Law Revision Commission Report.* The problem was the subject of a Law Revision Commission Study and Report in 1983 that recommended enactment of a statute providing that the community be reimbursed for the expenditures. (17 Cal. Law Rev. Com. Reports, p. 229.) The Report covers the background and reasons for the Recommendation as follows:

(a) "It is not uncommon for one spouse to work so the other can attend school. The working spouse ordinarily expects that the community will benefit from the higher earnings of the student spouse after the education is completed. But the marriage may break up before or shortly after the student spouse completes the education. If this happens, the community will not receive the expected benefit of the higher earnings. And there may be no community assets to divide, all of the community property having been used for the student spouse's education. In effect, the community property has gone to enhance the earning capacity of the student spouse at the expense of the working spouse." (17 Cal. Law Rev. Com. Reports, p. 233.)

(b) "Ordinarily, discrepancies in the earning capacities of the parties are remedied by spousal support. In many cases, however, the working spouse does not qualify for support because his or her earnings, while substantially lower than the student spouse's future earnings, are nonetheless sufficient for self-support. While it would be possible to revise the basic support standards, the Commission deems it inadvisable to disrupt the established support scheme in order to deal with this circumscribed problem." (17 Cal. Law Rev. Com. Reports, p. 234.)

(c) "The Commission does not believe that it would be either practical or fair to classify the value of the education,

degree, or license, or the enhanced earning capacity, as community property and to divide the value upon marriage dissolution. Classification of these items as community property would create problems involving management and control, creditor's rights, taxation, and disposition at death, not to mention the complexities involved in valuation at dissolution. The complexities are exacerbated in the typical case where part of the student spouse's education is received before marriage and part during marriage. Moreover, to give the working spouse an interest in half the student spouse's increased earnings for the remainder of the student spouse's life because of the relatively brief period of education and training received during marriage is not only a windfall to the working spouse but in effect a permanent mortgage on the student spouse's future. Such an approach would certainly discourage the student spouse from marriage until his or her education is complete. And, if the student spouse desired further education during marriage, such a rule would force the student spouse and working spouse to arrive at a fair determination of their rights by means of a marital agreement and might encourage a dissolution of the marriage." (17 Cal. Law Rev. Com. Reports, p. 234.)

(d) "All factors considered, a more equitable solution, in the Commission's judgment, is to require the student spouse to reimburse the community for the community expenditures for his or her education and training. This solution in effect gives the working spouse the same amount the student spouse was given for the education. The working spouse can use the money for his or her own education or any other purpose. It puts the parties on equal footing without generating a windfall for the working spouse or permanently impairing the student spouse's future. It takes from the student spouse only what was actually given and restores to the working spouse only what he or she actually lost. It addresses the basic inequity with a minimum of disruption to the community property system." (17 Cal. Law Rev. Com. Reports, p. 235.)

(e) "The reimbursement right should apply only where enhancement of the student spouse's earning capacity is substantial. This will ensure fairness in imposing on the student spouse the economic burden of reimbursement and will avoid litigation over small expenditures such as weekend seminars whose impact on the student spouse's earning capacity is speculative or intangible. Where enhancement of the student spouse's earning capacity is substantial but the student spouse does not take advantage of this, reimbursement should nonetheless be required. The higher earning potential is still available to the student spouse, who may take advantage of it in the future. The student spouse should not be able to avoid the reimbursement requirement simply by working at a lower-paying job until the marriage is dissolved." (17 Cal. Law Rev. Com. Reports, pp. 235, 236.)

(f) "Even where the student spouse's earnings are substantially enhanced there may be cases where reimbursement is inappropriate at dissolution of marriage." (17 Cal. Law Rev. Com. Reports, p. 236.)

(1) "[T]he marriage dissolution may not occur shortly after the student spouse receives the education, degree, or license. The student spouse and working spouse may remain married for many years, enjoying a high standard of living and accumulating substantial community assets as a result of the education. In this situation, the community may already have received many times over the anticipated benefits of the working spouse's support of the student spouse during the education." (17 Cal. Law Rev. Com. Reports, p. 236.)

(2) "[E]ven though the student spouse is educated at the working spouse's expense, the working spouse in turn may have been educated and trained at the student spouse's expense. There is in effect an offset and it makes little sense to require each to reimburse the other." (17 Cal. Law Rev. Com. Reports, p. 236.)

(3) "Perhaps after a lengthy marriage during which the one spouse worked and the other spouse stayed home and raised the children, the homemaker receives education out of community funds that enables him or her to be gainfully employed. Thereafter the marriage is dissolved. In this situation it would be inequitable to require the homemaker to reimburse the community. In fact, if the homemaker had not received the education, it is likely upon dissolution of the marriage that the working spouse would be required to support the homemaker so he or she could receive education and become gainfully employed." (17 Cal. Law Rev. Com. Reports, p. 236.)

(g) "If the marriage endures any significant length of time after the student spouse receives the education and

training, ... problems of proof and computation become significant. ... To address these problems, the Commission recommends that the reimbursement right be subject to a 10-year limitation period. This will recognize that over time the community is likely to benefit from the student spouse's enhanced earning capacity, and will limit the potential for unreliable evidence of expenditures. The 10-year limitation is admittedly arbitrary, but is designed to achieve simplicity and justice in the ordinary case." (17 Cal. Law Rev. Com. Reports, p. 237.)

(h) "Because the economic loss to the community can be substantial over time, reimbursement should be adjusted for interest at the legal rate. Again for simplicity of accounting, interest should commence to accrue at the end of the year in which the expenditures were made, since expenditures may be made frequently and in small amounts." (17 Cal. Law Rev. Com. Reports, p. 237.)

(i) "The community should be reimbursed for expenditures made during marriage regardless when the education was received. The student spouse's education may be received totally during the marriage. In many cases, however, it will be received in part before the marriage and in part during the marriage. In other cases the education will have been received totally before the marriage. If the education was received before marriage but bills are paid or an educational loan is paid during marriage with community assets, reimbursement is proper." (17 Cal. Law Rev. Com. Reports, p. 237.)

(j) "Ordinarily before the working spouse puts the student spouse through school the parties have discussed their expectations. They may even have agreed to matters such as the proportion of the costs each party is expected to bear, whether the student spouse in turn is expected to support the working spouse during his or her education, and possibly even their rights to recompense if the marriage dissolves. If a party can prove such an agreement, the agreement should be recognized and should prevail over the reimbursement right provided by statute. The reimbursement right is intended only as a rough measure of justice that people generally would agree is fair and should be subject to express bargaining and agreement by the parties. Because such agreements or understandings may not be clearly articulated, however, they may generate substantial litigation. In order to avoid unmeritorious litigation and to ensure certainty, the agreement should be in writing." (17 Cal. Law Rev. Com. Reports, pp. 237, 238.)

West's Key Number Digest, Husband and Wife k.249(2.1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Case Law.* See California Family Law Practice, §J.76.5 et seq.; 3 *A.L.R.6th* 447 [spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement; superseding 4 *A.L.R.4th* 1294, cited in the text, p. 666].



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Witkin Summary of California Law
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G. Educational Degree or License.
2. Nature and Scope of Reimbursement Statute.

11 Witkin Sum. Cal. Law Com Prop § 109

[§ 109] Nature and Scope of Reimbursement Statute.

(1) *In General.* Pursuant to the Law Revision Commission's recommendation (see *supra*, §108), the 1984 Legislature enacted former C.C. 4800.3 to state the basic rule of reimbursement and the authority of the court to reduce or modify reimbursement where circumstances render a disposition unjust. Effective January 1, 1994, former C.C. 4800.3 was repealed and replaced by *Family C. 2641* without substantive change; the Law Revision Commission comments on the former statute were also continued. (See *In re Marriage of Sullivan* (1984) 37 C.3d 762, 767, 209 C.R. 354, 691 P.2d 1020; *In re Marriage of Slivka* (1986) 183 C.A.3d 159, 167, 228 C.R. 76 [upholding retroactive application of statute to cure injustice in former law and to advance state interest in equitable division of community property]; Rutter Group, 2 Family Law §8:811 et seq.; 16 *Pacific L. J.* 643; 22 *San Diego L. Rev.* 1275; 60 Am.Jur. Trials 391 [increased earning power from professional degree or license as asset to be equitably distributed in divorce proceedings]; 83 Am.Jur. Trials 197 [compensation for spousal contributions to education].)

(2) *Community Contributions.* "Community contributions to education or training" as used in *Family C. 2641* means payments made with community or quasi-community property for education or training, or to repay a loan incurred for education or training, regardless of whether the payments were made while the parties were California residents. (*Family C. 2641(a)*.) The Law Revision Comment points out that the reference to quasi-community property is consistent with the principle of uniform treatment of quasi-community and community property stated by *In re Marriage of Craig* (1990) 219 C.A.3d 683, 268 C.R. 396.

In re Marriage of Watt (1989) 214 C.A.3d 340, 262 C.R. 783, involved a claim by the wife where the record showed that all of the husband's direct education expenses were paid from loan and grant funds. The wife argued that the statute should be broadly construed to include living expenses. The court, referring to the Law Revision Commission's Comment, concluded that the statute requires reimbursement only for "expenses that are related to the education experience itself," adding that "[t]he married couple would incur ordinary living expenses regardless of whether one spouse is attending school, staying home, or working." (214 C.A.3d 354.)

Family C. 2641 is not limited to education or training that is received during marriage, but also extends to education that takes place before marriage. (*In re Marriage of Weiner* (2003) 105 C.A.4th 235, 239, 129 C.R.2d 288.)

(3) *Exclusive Remedy.* Reimbursement for community contributions and assignment of loans under *Family C. 2641*

is the exclusive remedy of the community or a party to recover for the education or training and any resulting enhancement of earning capacity. However, this does not limit consideration of the effect of the education, training, or enhancement, or of the amount of reimbursement on the circumstances of the parties for the purpose of ordering support. (*Family C. 2641(d).*)

(4) *Waiver By Written Agreement.* The provisions of *Family C. 2641* are subject to an express written agreement of the parties to the contrary. (*Family C. 2641(e).*)

West's Key Number Digest, Husband and Wife k.249(2.1)

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11 Witkin Sum. Cal. Law Com Prop § 110

[§ 110] Reimbursement Requirements.

(1) *In General.* On dissolution or legal separation, the community must be reimbursed for community contributions to the education or training of a spouse that substantially enhanced the spouse's earning capacity. The amount reimbursed includes interest at the legal rate, accruing from the end of the calendar year in which the contributions were made. (*Family C. 2641(b)(1).*) The Law Revision Commission Comment explains that the requirement for substantial enhancement "is intended to restrict litigation by requiring that the education or training must demonstrably enhance earning capacity and to implement the policy of the section to redress economic inequity." The Comment cautions that the student spouse need not actually work in an occupation to which the enhancement applies, because the potential for future enhancement remains. (See *In re Marriage of Graham (2003) 109 C.A.4th 1321, 1325, 135 C.R.2d 685* [wife failed to prove that husband's legal education substantially enhanced his earning capacity to justify reimbursing community, where husband attained 2.2 GPA, had not taken bar examination, did not necessarily plan to become attorney, and might earn more income in present job as police officer].)

A loan incurred during marriage for a spouse's education or training is not to be included among the liabilities of the community, but must be assigned for payment by that spouse. (*Family C. 2641(b)(2).*)

(2) *Limits on Reimbursement.* Under *Family C. 2641(c)*, the reimbursement and assignment required by *Family C. 2641* may be reduced or modified to the extent that they are unjust under the circumstances, including without limitation the following:

(a) The community has substantially benefited from the spouse's education or training. There is a rebuttable presumption, affecting the burden of proof, that the community has *not* substantially benefited from contributions to education or training made less than 10 years before the commencement of the proceeding, and that the community *has* substantially benefited from contributions to education or training made more than 10 years before the commencement of the proceeding. (*Family C. 2641(c)(1).*)

(b) The education or training received by the spouse is offset by the education or training received by the other spouse for which community contributions were made. (*Family C. 2641(c)(2).*)

(c) The education or training enables the spouse to engage in gainful employment that substantially reduces the

need for support that would otherwise be required. (*Family C. 2641(c)(3).*)

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Witkin Summary of California Law
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H. Other Assets.

11 Witkin Sum. Cal. Law Com Prop § 111

[§ 111] Other Assets.

(1) *Copyright and Infringement Damages.* *In re Marriage of Worth* (1987) 195 C.A.3d 768, 241 C.R. 135, recognizes a new category of community property. Appellant husband wrote and published two books, and the 1982 divorce decree provided for equal division of the royalties. In 1984, he filed a copyright infringement action, and the trial judge ruled that the wife was entitled to one-half of any proceeds from that lawsuit. *Held*, the order was correct.

(a) Under the federal Copyright Act, a copyright vests initially in the author. But an artistic work created during the marriage is community property (195 C.A.3d 772), and the copyright itself obtains the same status. The Act expressly provides for transfer of a copyright "by operation of law," and the copyright is automatically transferred to both spouses by operation of the California law of community property. (195 C.A.3d 774.)

(b) The wife is therefore entitled to share in all of the proceeds of the copyright, including any settlement or award of damages resulting from infringement. (195 C.A.3d 776.) (See *Rutter Group*, 2 Family Law §8.332 et seq.; 36 U.C.L.A. L. Rev. 383; 30 U.S.F. L. Rev. 153 [*Worth*]; 80 A.L.R.5th 487 [copyright, patent, or other intellectual property as community property for purposes of alimony, support, or divorce settlement].)

(2) *Qui Tam Action.* *In re Marriage of Biddle* (1997) 52 C.A.4th 396, 60 C.R.2d 569, was a marital dissolution proceeding in which the trial court entered a judgment on reserved issues that decreed that the wife had no community property interest in a *qui tam* action being prosecuted by the husband on behalf of the United States. During the marriage, the husband, while an employee of the United States, discovered questionable billing practices by a university and filed the *qui tam* action pursuant to a federal statute. *Held*, reversed.

(a) A *qui tam* action is a type of private attorney general lawsuit; it allows an individual to sue to enforce a public statutory right and to retain a portion of any recovery. Causes of action are ordinarily deemed a form of property. (52 C.A.4th 398.) A *qui tam* action is not property in the strict sense that it can be owned without restriction by a *qui tam* plaintiff; the right that the *qui tam* plaintiff seeks to vindicate belongs to the United States government, which, even if it takes no active part in the case, is the real party in interest. However, the money generated by the cause of action that the plaintiff recovers clearly is property owned by the plaintiff. Contingent rights to future income may be divisible, in appropriate circumstances, as community property. (52 C.A.4th 399.)

(b) The realization of recovery in a *qui tam* action is dependent on at least two contingencies. A judicial action must

be initiated by the *qui tam* plaintiff, and the defendant must part with the money after trial or settlement. If these contingencies are satisfied, the plaintiff's entitlement to a cash recovery is, to all intents and purposes, established. In this case, the cause of action thus amounted to a contingent future interest and was community property. (52 C.A.4th 400.)

(3) *Incorporation of Separate Business During Marriage Is Not Acquisition of Community Asset. In re Marriage of Koester* (1999) 73 C.A.4th 1032, 87 C.R.2d 76, involved the characterization of a business that was the husband's separate property before the marriage but was incorporated during the marriage. On dissolution of the marriage, the trial court ruled that the business was community property, finding that its incorporation constituted an "acquisition" by the community. It accordingly limited the husband to reimbursement under *Family C. 2640* (infra, §222), based on separate property contributions to the acquisition (i.e., the value of the business at that time). *Held*, reversed. The business remained separate property on incorporation. Thus, the husband was entitled to a fair return on his separate business under *Pereira v. Pereira* (1909) 156 C. 1, 103 P. 488, infra, §124, rather than mere reimbursement under *Family C. 2640*.

(a) *In general.* The trial court should have applied the classic *Pereira* analysis (i.e., award the value of the separate property at the time of marriage plus a reasonable return to represent the appreciation of separate capital, with the balance going to the community) rather than a *Family C. 2640* reimbursement approach (i.e., reimburse the spouse for separate money contributed to what is now a community asset). (73 C.A.4th 1036.)

(b) *Family C. 2640 is not applicable.* *Family C. 2640* does not apply to separate property businesses. (73 C.A.4th 1036.) In the *Pereira* case, which also involved a profitable business, the California Supreme Court reasoned that the capital of the business was the owner spouse's separate estate, that some of the profits were justly due to the capital invested, and that it was error to classify those gains as community property. In contrast, *Family C. 2640* arose out of the case of a residence purchased with separate property, the title to which was taken in joint tenancy (see *In re Marriage of Lucas* (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285, infra, §219). Thus, published decisions involving the reimbursement statute typically arise out of conveyances or acquisitions of residences. (73 C.A.4th 1036.) The statute is inherently inapplicable to businesses. In contrast to the way title is taken when a married couple own residential property, the incorporation of a sole proprietorship business is typically done for reasons extrinsic to the marital relationship. It would be unusual for a married couple to use the occasion of the incorporation of a separate business to expressly transmute that business into community property, and that would certainly entail much more than mere incorporation. (73 C.A.4th 1037.)

(c) *Mere incorporation does not change character of business.* The mere incorporation of a business is not a change in its character. Separate property does not change its character because of a change in form or identity. Here, there is nothing to indicate that the incorporation of the separate property business represented anything other than a mere change in the legal form under which the business was conducted; the customers and accounts receivable were the same after the incorporation as before. (73 C.A.4th 1037.) One might say that something was "acquired" during the marriage, but only by ignoring the reality of what was really happening, i.e., that a separate property asset was merely changing its legal form. (73 C.A.4th 1038.)

West's Key Number Digest, Husband and Wife k.249(2.1)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law III. COMMINGLING OF COMMUNITY AND SEPARATE PROPERTY A. In General. 1. Where Each Fund Is Traceable.

11 Witkin Sum. Cal. Law Com Prop § 112

[§ 112] Where Each Fund Is Traceable.

If community and separate property are commingled, as where funds are kept in the same account, or property is bought with mixed funds, there are several possible results. The first and basic rule is that, if each fund remains ascertainable or traceable into a proportionate share of the product, its character is unchanged. (See *Miller v. Brode* (1921) 186 C. 409, 413, 199 P. 531; *Estate of Smith* (1948) 86 C.A.2d 456, 473, 195 P.2d 842; *Faust v. Faust* (1949) 91 C.A.2d 304, 309, 204 P.2d 906; *Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 124, 264 P.2d 626; *Estate of Gibson* (1954) 126 C.A.2d 534, 538, 272 P.2d 807; *Kenney v. Kenney* (1954) 128 C.A.2d 128, 135, 274 P.2d 951; *Estate of McGee* (1959) 168 C.A.2d 670, 677, 336 P.2d 622; *Hicks v. Hicks* (1962) 211 C.A.2d 144, 157, 27 C.R. 307 [tracing of separate property was possible even though there were withdrawals from bank accounts of mingled separate and community funds]; *Brown v. Meredith* (1963) 220 C.A.2d 762, 764, 34 C.R. 153; *In re Marriage of Mix* (1975) 14 C.3d 604, 613, 122 C.R. 79, 536 P.2d 479 ["direct tracing" as in *Hicks*; wife's schedule showing source and expenditures, and her testimony, supported trial judge's finding]; *In re Marriage of Higinbotham* (1988) 203 C.A.3d 322, 328, 249 C.R. 798 [to establish that house payments were made with separate property, direct tracing requires that each payment be made when separate funds were present in relevant account and be accompanied by drawer's intent to utilize funds]; *Rutter Group*, 2 Family Law §8:526 et seq.; 26 U.C.L.A. L. Rev. 1231 [The *Mix-Hicks Mix*: Tracing Troubles Under California's Community Property System].)

West's Key Number Digest, Husband and Wife k.249(6), 262.1(8), 264(7)

SUPPLEMENT: [This section is current through the latest supplement]
See California Family Law Practice, §J.76.5 et seq.



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Witkin Summary of California Law III. COMMINGLING OF COMMUNITY AND SEPARATE PROPERTY A. In General. 2. Where Funds Are Not Traceable.

11 Witkin Sum. Cal. Law Com Prop § 113

[§ 113] Where Funds Are Not Traceable.

(1) *Community Property Presumption Controls.* If the funds are so commingled that they cannot be traced, the presumption in favor of community property (see *supra*, §15) applies, and all funds will be treated as community property. (See *Estate of Murphy* (1976) 15 C.3d 907, 918, 126 C.R. 820, 544 P.2d 956, *supra*, §17; *Estate of Fellows* (1930) 106 C.A. 681, 683, 289 P. 887; *Estate of Woods* (1937) 23 C.A.2d 187, 191, 72 P.2d 258; *Falk v. Falk* (1941) 48 C.A.2d 772, 777, 120 P.2d 720; *Bales v. Farley* (1951) 107 C.A.2d 642, 644, 237 P.2d 686; *Estate of Cesare* (1955) 130 C.A.2d 557, 568, 279 P.2d 607; *Haldeman v. Haldeman* (1962) 202 C.A.2d 498, 506, 21 C.R. 75, *infra*, §121; *Pack v. Vartanian* (1965) 232 C.A.2d 466, 470, 42 C.R. 729; *In re Marriage of Marsden* (1982) 130 C.A.3d 426, 442, 181 C.R. 910, *infra*, §119; *In re Marriage of Frick* (1986) 181 C.A.3d 997, 1010, 226 C.R. 766; 26 U.C.L.A. L. Rev. 1255.)

In *Mason v. Mason* (1960) 186 C.A.2d 209, 8 C.R. 784, plaintiff wife sued for divorce, alleging the existence of community property of a nature and extent unknown to her. Defendant defaulted. At the trial plaintiff showed that defendant purchased 16 notes secured by trust deeds during marriage, of a face value of \$ 466,286.90. Nevertheless, the trial judge, on evidence of court-appointed experts purportedly tracing the source of funds used in the purchase, found that there was no community property. *Held*, reversed for a retrial of this issue.

(a) *Presumption controls where separate funds are not traceable.* The community property presumption controls only if it is impossible to trace the sources of separate property. But the presumption places the burden of proof on the party asserting the separate interest. "Thus, where it is shown, not only that certain property was acquired during coverture, but that the funds used in its acquisition were commingled separate and community funds, the entire property must be treated as a community asset unless it be clearly shown that it is possible to trace the separate funds." (186 C.A.2d 213.) Accordingly, where the only competent evidence was that of the husband's tax accountant, who testified that he was unable to trace the source of the funds, the trial judge was required to find all of the commingled property to be community. (186 C.A.2d 213, 214.)

(b) *Finding of separate property based on incompetent evidence.* Testimony of the court-appointed experts confirmed that of the tax accountant, that defendant's records were incomplete and disorganized, and their audit was in large measure based on out-of-court statements of escrow and loan officers and their own unsupported inferences. Their opinions, being thus dependent on hearsay and conjecture, were inadmissible, and should have been excluded on plaintiff's timely objections. (186 C.A.2d 215.)

(2) *Distinction: Negligible Community Property.* Where the community property part is negligible, the whole may be regarded as separate. (See *Estate of Cudworth* (1901) 133 C. 462, 468, 65 P. 1041; *Estate of Barnes* (1932) 128 C.A. 489, 492, 17 P.2d 1046; *Kershman v. Kershman* (1961) 192 C.A.2d 18, 21, 13 C.R. 288 [wife's separate stocks and proceeds were separate, where her community effort in choosing investments was slight].)

In *Fidelity & Cas. Co. of New York v. Mahoney* (1945) 71 C.A.2d 65, 161 P.2d 944, decedent husband, married 2 months, bought an airplane-travel accident insurance policy for a \$ 1 premium and was killed on the flight. The named beneficiary, his son by a former marriage, claimed the proceeds, and his widow claimed half. Neither party produced evidence as to the source of the money used in payment of the premium or the amount of the husband's salary or bank account. *Held*, the beneficiary was entitled to the proceeds. The proceeds would have been community property if the premium had been paid with community funds, and the \$ 1 premium would have been presumed community property if it had been acquired after marriage. But the widow had failed to sustain her burden of proof in this last respect. (71 C.A.2d 69.) The decision seems unsatisfactory, for it is extremely unlikely that the widow could have discovered the source of the funds used. (See 19 So. Cal. L. Rev. 279.) The result can be explained, however, in terms of the negligible proportion theory.

West's Key Number Digest, Husband and Wife k.249(6), 262.1(8)

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11 Witkin Sum. Cal. Law Com Prop § 114

[§ 114] Recordkeeping Requirements.

In re Marriage of Stoll (1998) 63 C.A.4th 837, 74 C.R.2d 506, discussed the recordkeeping requirements involved in tracing and in valuing commingled property. In this marital dissolution proceeding, the trial judge did not allow the husband to offer his opinion as to the value of his separate property house, which had been converted to community property after his marriage. The judge consequently ruled that the husband failed to trace any separate interest in the property and that the house was 100% community property. *Held*, reversed. Strict recordkeeping is not required to establish the value of a separate property home for which a spouse seeks reimbursement.

(a) The trial judge failed to apprehend the distinction between tracing a separate interest to its *source*--to which case law has traditionally appended a recordkeeping requirement--and an owner's right to render an opinion as to the *value* of his or her own property--for which there are no per se documentary requirements. The concerns that animate the recordkeeping requirement of tracing contributions to a separate property source do not logically apply where there is no dispute about the source. (63 C.A.4th 838.)

(b) Tracing is done either directly, or by a process of elimination in which a spouse shows the exhaustion of available community funds at the time of acquisition. Direct tracing to a separate source has traditionally been subject to a requirement that it be done by specific records. (63 C.A.4th 841; citing *See v. See* (1966) 64 C.2d 778, 783, 51 C.R. 888, 415 P.2d 776, *supra*, §17.) This requirement is grounded on the general presumption that property acquired during a marriage is community. However, the strict recordkeeping requirement is inapplicable here, in the context of establishing the *value* of a separate property home for purposes of reimbursement. (63 C.A.4th 841.)

(c) Also, any rationale for strict recordkeeping that might apply to commingling of funds in a bank account, which was involved in *See*, does not apply when the asset transmuted from separate to community is real property. Any value assigned to a home can only be an estimate, even if it may be a very precise estimate based on a written appraisal. (63 C.A.4th 841.)

(d) A strict recordkeeping requirement to establish the value of separate real property runs contrary to the clear legislative purpose behind *Family C. 2640*, authorizing reimbursement for separate property contributions (see *infra*, §222). The transmutation of one spouse's separate property house to community property is one of the most common occasions for *Family C. 2640* tracing. Because an estimate of value is necessarily the best that can be achieved,

imposition of a strict recordkeeping requirement would amount to nothing more than judicial repeal of that statute. (63 C.A.4th 842.)

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11 Witkin Sum. Cal. Law Com Prop § 115

[§ 115] Former Traditional Rule.

If community funds are used to improve separate property, the improvement takes on the character of the land and the whole remains separate property. (*Shaw v. Bernal* (1912) 163 C. 262, 267, 124 P. 1012.) Is the community entitled to reimbursement? Prior to the 1973 amendments to the Family Law Act giving the wife equal powers of management and control (see *infra*, §132), the courts developed different rules for improvements on separate property of the wife and the husband.

(1) *Wife's Separate Property.* The husband had the power to control community funds. If he voluntarily improved the wife's separate property it was presumed, in the absence of any agreement to the contrary, that he intended a gift to her of those funds, and there was no right of reimbursement. (See *Dunn v. Mullan* (1931) 211 C. 583, 589, 296 P. 604; *Estate of Bernatas* (1958) 162 C.A.2d 693, 697, 328 P.2d 539; *Kershman v. Kershman* (1961) 192 C.A.2d 18, 22, 13 C.R. 288; 9 *Hastings L. J.* 39.) The rule was also applied where the husband, instead of contributing community funds, gave his time and effort to improvement or maintenance of the wife's property. (*Estate of Armstrong* (1966) 241 C.A.2d 1, 10, 50 C.R. 339.) Reimbursement was allowed, however, where there was an agreement to compensate. (See *In re Marriage of Warren* (1972) 28 C.A.3d 777, 781, 104 C.R. 860.)

(2) *Husband's Separate Property.* Where the husband improved his own separate property, the wife, having no control over his disposition of community funds, could not object, and her silence was not considered evidence of consent. Hence, the wife was held entitled to compensation to the extent that her share of the community funds increased the value of the property. (*Provost v. Provost* (1929) 102 C.A. 775, 780, 283 P. 842; *Estate of Chandler* (1931) 112 C.A. 601, 604, 297 P. 636; see 50 *Cal. L. Rev.* 844; 9 *Hastings L. J.* 37; 3 *So. Cal. L. Rev.* 226; 39 *So. Cal. L. Rev.* 259.)

The wife's right was denied, however, in *Estate of La Belle* (1949) 93 C.A.2d 538, 209 P.2d 432, where she actively participated in the improvement of the husband's property, and received a substantial share of the profits as her own separate property. It was held that she therefore consented that the community funds and efforts expended on the property should become the husband's separate estate. (93 C.A.2d 544.) (To same effect, see *In re Marriage of Jafeman* (1972) 29 C.A.3d 244, 256, 259, 105 C.R. 483, *infra*, §197.)

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11 Witkin Sum. Cal. Law Com Prop § 116

[§ 116] Current Rule: Reimbursement to Community.

(1) *Earlier View Adopting Traditional Rules.* Although the 1973 amendments of the Family Law Act (see *infra*, §132) removed the underlying theory of former case law (see *supra*, §115), *In re Marriage of Camire* (1980) 105 C.A.3d 859, 164 C.R. 667, involving the husband's use of community funds to improve the wife's separate property, held that the traditional rule denying reimbursement to the community in this situation was still good law. (105 C.A.3d 867.)

In re Marriage of Frick (1986) 181 C.A.3d 997, 226 C.R. 766, discussed the effect of the amendments on the rule allowing reimbursement where the husband used community funds to improve his separate property, and concluded that this rule also continues to be good law. "[W]e believe the effect of this change should be to place each spouse in the same position as the husband was before 1975. If either spouse appropriates community funds for his or her own benefit, *without the consent of the other spouse*, the community should be reimbursed. Even if in theory both spouses have an equal right to management and control, if one spouse acts in his or her self-interest to the detriment of the community interest, the community should be entitled to restitution." (181 C.A.3d 1019.)

(2) *Later View Rejecting Traditional Rule.* More recent cases have held that the traditional rule no longer applies. *In re Marriage of Wolfe* (2001) 91 C.A.4th 962, 110 C.R.2d 921, rejected the traditional rule. In a marital dissolution proceeding, the trial judge ordered that the wife be reimbursed for her share of community funds used to pay property taxes on the husband's separate property ranch and to install a drip irrigation system on the ranch, despite the husband's claim that the community expenditures should be presumed to be a gift. *Held*, the wife was entitled to reimbursement for the irrigation system, but not for the property taxes.

(a) The gift presumption applied in the present case "is a California invention, though not one in which we should take pride, cobbled together from misunderstood doctrine and miscited cases." (91 C.A.4th 967.)

(b) As stated by the California Supreme Court in *Dunn v. Mullan* (1931) 211 C. 583, 296 P. 604, the gift presumption was merely "dicta, and shaky dicta at that." Nevertheless, it "became gospel as Courts of Appeal adopted it as the ratio decidendi without any thoughtful examination or discussion. ... However, the Supreme Court has never adopted the presumption of a gift as a rule of decision in any case. We are thus free in the present case to construct a rule consonant with precedent and logic." (91 C.A.4th 972.)

(c) There is little logic in a rule that presumes an unconditional gift when one spouse uses community funds to improve the other spouse's property. That rule conflicts with public policy, which presumes acquisitions during marriage to be community, and disfavors changes in characterization without a strict adherence to formalities, which ensure thoughtful deliberation before decisions with potentially far-reaching consequences are made. California courts do not indulge in that presumption when community funds are used to assist in the purchase or to reduce an encumbrance on a separate asset; application of community funds in these situations are deemed to result in what amounts to coownership of the asset. Thus, there is no reason to presume a gift when community funds are applied to improve separate property. (91 C.A.4th 972.)

(d) Tax payments stand outside this rule, and thus the wife was not entitled to reimbursement for those payments. (91 C.A.4th 973, citing *In re Marriage of Moore* (1980) 28 C.3d 366, 168 C.R. 662, 618 P.2d 208, *infra*, §§118, 119.)

Other cases are to the same effect. (See *In re Marriage of Allen* (2002) 96 C.A.4th 497, 498, 116 C.R.2d 887, citing the text [following *Wolfe*; no gift-presumption rule, even where spouse consents to use of community funds for improvement to other spouse's separate property]; *Bono v. Clark* (2002) 103 C.A.4th 1409, 1423, 128 C.R.2d 31 [extending *Wolfe* rule to community funds used to *improve* husband's separate real property]; Rutter Group, 2 Family Law §8.864 et seq.) (On effect of right to reimbursement for party's *separate* property contributions to acquisition of other spouse's separate property during marriage, see *Family C. 2640(c)*, *infra*, §222.)

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11 Witkin Sum. Cal. Law Com Prop § 117

[§ 117] Taxes or Encumbrances.

Another method of commingling is the use of community funds to pay taxes or satisfy an encumbrance on separate property. The community is entitled to full reimbursement. Thus, where the husband paid taxes and assessments on his separate property with earnings, the wife was held entitled to recover the whole amount after his death intestate. (See *Estate of Turner* (1939) 35 C.A.2d 576, 580, 96 P.2d 363; *Kershman v. Kershman* (1961) 192 C.A.2d 18, 22, 13 C.R. 288; *Brown v. Meredith* (1963) 220 C.A.2d 762, 765, 34 C.R. 153, citing the text [gift to wife, no right of reimbursement; following *Dunn v. Mullan* (1931) 211 C. 583, 589, 296 P. 604]; 54 A.L.R.2d 429 [use of community funds in improving, or discharging encumbrance on, separate property as ground for reimbursement, lien, or charge]; but see *In re Marriage of Wolfe* (2001) 91 C.A.4th 962, 973, 110 C.R.2d 921, supra, §116 [wife was not entitled to reimbursement for her share of community funds used to pay property taxes on husband's separate property ranch].) (On effect of right to reimbursement for party's *separate* property contributions to acquisition of other spouse's separate property during marriage, see *Family C. 2640(c)*, infra, §222.)

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C. Payments for Benefit of Separate Property.

2. Part of Purchase Price.

a. Community Interest in Enhanced Value.

11 Witkin Sum. Cal. Law Com Prop § 118

[§ 118] Community Interest in Enhanced Value.

(1) *Statement of Rule.* Under the inception of title theory, if equitable ownership of land is acquired by a spouse before marriage, the land is that spouse's separate property although legal title is not perfected until after marriage. (See *supra*, §8.) If, however, after marriage, community funds are used to make payments on the purchase price or to retire the purchase loan, the community has an interest. In some jurisdictions the only right is one of reimbursement of the amount paid with interest. But in California, the community benefits by any enhanced value that the property may attain. The rule is that the community has a pro tanto interest in the ratio that the payments with community funds bear to the payments with separate funds. (*Vieux v. Vieux* (1926) 80 C.A. 222, 229, 251 P. 640; *Garten v. Garten* (1956) 140 C.A.2d 489, 494, 295 P.2d 23 [husband owned lot and substantially completed house before marriage; after marriage encumbrance placed on it and paid off in part with community funds]; *In re Marriage of Higinbotham* (1988) 203 C.A.3d 322, 328, 249 C.R. 798.) (On reimbursement for contributions to acquisition of property acquired during marriage, see *infra*, §222 et seq.)

In *Forbes v. Forbes* (1953) 118 C.A.2d 324, 257 P.2d 721, the husband acquired an apartment house before marriage and paid part of the price after marriage. The trial judge merely awarded the wife \$ 2,209.55 as reimbursement without finding the value of the property. *Held*, because she was entitled to share in the increased value, the award without that determination was prejudicial error as to her. (118 C.A.2d 326.)

(2) *Effect of Other Spouse's Consent to Improvements to Separate Property.* In *re Marriage of Gowdy* (1986) 178 C.A.3d 1228, 224 C.R. 400, reviewing apparently conflicting cases, attempted to clarify the law. Prior to the marriage, the husband purchased a home with his separate funds and a bank loan. After the marriage, the parties lived together in the home, and payments on the bank loan were made from their joint checking account. The trial judge, relying on *In re Marriage of Camire* (1980) 105 C.A.3d 859, 164 C.R. 667, *supra*, §116, concluded that the payments were intended as a gift by the wife and that the house was the separate property of the husband. The wife contended that *Camire* was inconsistent with *In re Marriage of Moore* (1980) 28 C.3d 366, 168 C.R. 662, 618 P.2d 208, *infra*, §119, which relied on *Forbes*, *Estate of Neilson* (1962) 57 C.2d 733, 22 C.R. 1, 371 P.2d 745, *infra*, §§124, 128, and *In re Marriage of Jafeman* (1972) 29 C.A.3d 244, 105 C.R. 483, *infra*, §197. *Held*, reversed.

(a) The *Camire* court, reciting the rule on consensual expenditures of community funds for improvements to

separate property in *Estate of La Belle* (1949) 93 C.A.2d 538, 209 P.2d 432, supra, §115, held that the community was not entitled to an interest in the wife's separate property (the family residence) even though community funds had also been used to reduce the encumbrance on the property. (178 C.A.3d 1232.)

(b) *Moore*, citing *Forbes*, *Jafeman*, and *Neilson*, and not discussing *Camire*, held that the community acquired an interest in the separate property home based on the community fund payments on the purchase loan. (178 C.A.3d 1232.) *In re Marriage of Marsden* (1982) 130 C.A.3d 426, 181 C.R. 910, infra, §119, also followed the *Forbes/Neilson/Jafeman* rule, without mentioning the *La Belle* rule applied in *Camire*. (178 C.A.3d 1232.)

(c) *In re Marriage of Stoner* (1983) 147 C.A.3d 858, 195 C.R. 351, applied the gift rule without mentioning *Camire*, and attempted to distinguish *Moore*. (178 C.A.3d 1233.)

(d) In 1983, the Legislature enacted former C.C. 4800.2 (now *Family C. 2640*; see infra, §222), providing that a spouse who permits his or her separate funds to be used to reduce an encumbrance on community property may obtain reimbursement of those amounts unless a writing expresses the intent to make a gift. (178 C.A.3d 1233.)

(e) The issue here--the reimbursement right of a spouse who permits use of community funds to reduce an encumbrance on separate property--is not addressed by that legislation, but on principle the result should be the same: "[I]t would be anomalous for us to hold that a spouse, like appellant wife, who permits community funds to be used to reduce an encumbrance on the other spouse's separate property has fewer rights than a spouse who permits his or her separate property to be used for the same purpose with respect to a community property. In the latter case, even if the spouse signs a writing evidencing a gift to the community of separate property funds, that spouse will still receive one-half of the funds back in the division of community property. By contrast, here wife was denied any interest in husband's separate property based on *Camire*, a decision which clearly contradicts the rationale of the *Forbes/Neilson/Jafeman* pro tanto interest rule followed in *Moore*." Regardless of the continuing validity of that rationale in light of the statutory amendments granting spouses equal control of community property (see infra, §131 et seq.), *Moore* "is still binding precedent." (178 C.A.3d 1234.)

(f) "We hold, therefore, that the payment of community funds to reduce the encumbrance on husband's separate property, even though done with knowledge and apparent consent of wife, gave the community a pro tanto interest in that separate property in proportion to husband's prior separate property payments on the down payment and loan principal whether premarital or postmarital." (178 C.A.3d 1234.)

(3) *Refinancing of Separate Property Home. In re Marriage of Branco* (1996) 47 C.A.4th 1621, 55 C.R.2d 493, involved a husband and wife who had refinanced the wife's separate home shortly after their marriage. The proceeds of the loan, which was secured by the home, were used to pay off the original mortgage, as well as various other community and separate debts of the parties. A second loan was obtained some years later, again secured by the home, with the proceeds used to pay for home improvements and to pay off other debts. At the time of the second loan, the wife was required to deed the home to the community, but the husband immediately deeded it back to her as her separate property. The trial judge ruled that the home was the wife's separate property, and that the husband had not acquired any interest in the home despite having paid his equal share of the community obligations during the marriage. *Held*, reversed.

(a) *Moore* rule applicable. Under the controlling authority of *Moore*, the community is entitled to an interest in the home to the extent that it has contributed toward its acquisition. There is no meaningful difference, for purposes of determining whether the community acquires an interest in real property, between the use of community funds to make payments on one spouse's preexisting loan, as in *Moore*, and the use of proceeds from a community property loan to pay off that loan. (47 C.A.4th 1625.)

(b) *Stoner* reasoning rejected. *Stoner* held that a community did not acquire an interest in a wife's separate property home, even though community funds were used to make payments on the wife's separate loan, when the husband

executed a quitclaim deed at the time the loan was obtained. It was determined that he thereby transmuted his community interest in the property and that the use of community funds to repay the loan was a gift to the community. This holding cannot be reconciled with *Moore* and will not be followed. (47 C.A.4th 1627.) (On calculation of respective community and separate property interests, see *infra*, §119.)

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SUPPLEMENT: [This section is current through the latest supplement]



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C. Payments for Benefit of Separate Property.
2. Part of Purchase Price.
b. Apportionment of Separate and Community Property Interests.

11 Witkin Sum. Cal. Law Com Prop § 119

[§ 119] Apportionment of Separate and Community Property Interests.

(1) *Only Principal Payments Are Considered.* *In re Marriage of Moore* (1980) 28 C.3d 366, 168 C.R. 662, 618 P.2d 208, deals with the method of determining the pro tanto interest of the community (see supra, §118). The established rule considers only payments on principal, and excludes payments for interest and taxes. This rule is sound. Although interest and taxes often represent a substantial part of current home purchase payments, they do not increase the equity value of the property and therefore should not be considered in division of the property on dissolution. "A variety of expenses may be incurred in the maintenance of investment property, but such expenses are not considered in the valuation of the property except to the extent they may be relevant in determining its market value from which in turn the owners' equity is derived by subtracting the outstanding obligation." (28 C.3d 372.) (See 8 Pepperdine L. Rev. 564.)

(2) *Basic Formula.* The formula for calculating the respective separate and community interests is illustrated by *In re Marriage of Marsden* (1982) 130 C.A.3d 426, 181 C.R. 910. The husband purchased the property in 1962 for \$ 38,300, with a downpayment of \$ 8,300 and a \$ 30,000 loan. By the time he married in 1971, he had reduced the loan by \$ 7,000, and the fair market value of the property had risen to \$ 65,000. During the marriage, the community reduced the loan by \$ 9,200; and between the date of separation in July 1978, and the trial in February 1979, the husband reduced it by another \$ 655. At the time of trial (and presumably at the time of separation), the fair market value had risen to \$ 182,500. *Held*, applying the *Moore* formula, the separate and community interests were \$ 131,931.50 and \$ 37,423.50, respectively.

(a) The separate property percentage interest is computed by crediting the separate property with the down payment (\$ 8,300) plus the full amount of the loan (\$ 30,000) less the community property payments (\$ 9,200). The sum (\$ 29,100) divided by the purchase price (\$ 38,300) gives a separate property percentage share of 75.98%. The community property *percentage* interest of 24.02% is arrived at by dividing the community property payments (\$ 9,200) by the purchase price (\$ 38,300). (130 C.A.3d 437.)

(b) The husband's separate property cash interest of \$ 131,931.50 is arrived at by adding the following amounts: the down payment (\$ 8,300); the loan payments before marriage (\$ 7,000) and after separation (\$ 655); the appreciation before marriage (\$ 26,700, i.e., fair market value at the time of marriage minus the purchase price); and 75.98% of the appreciation during marriage (\$ 89,276.50, i.e., 75.98% of the difference between the fair market value at the time of

marriage and time of trial). (130 C.A.3d 439.)

(c) The *Moore* formula made no provision for prenuptial appreciation. However, if the husband's separate property was owned for a considerable period before the marriage, the increase in value in an inflationary market would be substantial, and the fair market value at the time of marriage would usually be significantly greater than the purchase price. Hence, it is equitable to credit the separate property interest with the prenuptial appreciation. (130 C.A.3d 438.)

(d) The community property cash interest of \$ 37,423.50 consists of the community loan payments (\$ 9,200) plus 24.02% of the appreciation after marriage (\$ 28,223.50). (130 C.A.3d 440.)

Other cases are to the same effect. (See *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 457, 152 C.R. 668; *In re Marriage of Frick* (1986) 181 C.A.3d 997, 1008, 226 C.R. 766; Rutter Group, 2 Family Law §8:295 et seq.)

(3) *Where Separate Property Home Is Refinanced*. *In re Marriage of Branco* (1996) 47 C.A.4th 1621, 55 C.R.2d 493, supra, §118, sets forth the proper calculation of respective interests where a separate property home has been refinanced. The community property interest in the home is to be computed by dividing the community's contribution to the purchase price of the home by the purchase price. This percentage should then be multiplied by the appreciation of the home during the years of the marriage. The husband is entitled to one-half this amount as his share of the community interest. The wife is entitled to the other one-half of the community interest in the appreciation during marriage, as well as all the appreciation before the marriage and after separation, the downpayment, and payments on the original loan made before the marriage. (47 C.A.4th 1629.)

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(2) *Basic Formula*. See *In re Marriage of Sherman* (2005) 133 C.A.4th 795, 801, 35 C.R.3d 137 [value of residence purchased by husband before marriage was improperly calculated at date of separation, rather than at trial date; although value of residence had increased by \$ 450,000 between separation and trial, increase was not attributable to husband's efforts]; *In re Marriage of Nelson* (2006) 139 C.A.4th 1546, 1554, 44 C.R.3d 52 [rental value of marital residence is not proper factor in making calculation].



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3. Part of Insurance Premiums.

11 Witkin Sum. Cal. Law Com Prop § 120

[§ 120] Part of Insurance Premiums.

The same principle (see *supra*, §117 et seq.) governs where life insurance is procured by a spouse before marriage but paid for in part after marriage with community funds; i.e., normally the proceeds will be apportioned in the ratio that the amount of community funds used bears to the amount of separate funds used. (See *Gettman v. Los Angeles Dept. of Water & Power* (1948) 87 C.A.2d 862, 865, 197 P.2d 317 [rule applied to retirement benefits]; *Biltoft v. Wootten* (1979) 96 C.A.3d 58, 61, 157 C.R. 581; but see *Gelfand v. Gelfand* (1934) 136 C.A. 448, 456, 29 P.2d 271 [suggesting reimbursement of payments].)

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 D. Profits From Separate Property Business.
 1. In General.
 a. Duty To Apportion.

11 Witkin Sum. Cal. Law Com Prop § 121

[§ 121] Duty To Apportion.

(1) *In General.* Where a spouse has a separate property business in which he or she is employed, and the business increases in value and makes profits, the enhanced value and profits are partly attributable to the original capital of the business (separate property) and partly to the spouse's labor, skill, or capacity (community property). When it becomes necessary, as on death or dissolution of the marriage or for tax purposes, to identify the community property, the court must allocate the proper portion of the enhanced value and profits to the separate and community interests. (See *Estate of Neilson* (1962) 57 C.2d 733, 740, 742, 22 C.R. 1, 371 P.2d 745, *infra*, §§124, 128; *Millington v. Millington* (1968) 259 C.A.2d 896, 907, 67 C.R. 128; *Beam v. Bank of America* (1971) 6 C.3d 12, 17, 98 C.R. 137, 490 P.2d 257, *infra*, §§124, 125, 126 [necessity of apportionment arises where more than minimal community effort is devoted to separate property business]; *In re Marriage of Dekker* (1993) 17 C.A.4th 842, 851, 21 C.R.2d 642 [same]; 51 Cal. L. Rev. 161; 8 Cal. Western L. Rev. 381; 13 Santa Clara Lawyer 121; 36 So. Cal. L. Rev. 481; 39 So. Cal. L. Rev. 261; 10 U.C.L.A. L. Rev. 655; 29 A.L.R.2d 530 [business profits]; 55 A.L.R.2d 960 [dividends]; *supra*, §46.)

In *Haldeman v. Haldeman* (1962) 202 C.A.2d 498, 21 C.R. 75, at the time of the marriage in 1937, the husband had a one-third interest in a small pharmacy grossing \$ 18,000 per year, and an agreement to buy out his partners. At the time of the divorce in 1959, the gross was over \$ 170,000 with a net profit of \$ 41,000 before taxes. *Held*, the trial judge's finding that it was all separate property was not supported by the evidence. The presumption of community property, particularly strong when the marriage is of long duration, requires a strong showing to overcome it, and there was none; the husband produced no evidence of present value of the business. "[I]t seems inescapable that the court merely determined, we think arbitrarily, that because respondent owned the shell of a business at the time of his marriage, it was all his separate property--however much its assets may have multiplied due to his labor and skill." (202 C.A.2d 506.)

(2) *Apportionment of Profits Received After Separation.* The community also is entitled to an equitable portion of the income from a business that is generated after separation, resulting from the investment of a spouse's time and energies during marriage. (See *In re Marriage of Zaentz* (1990) 218 C.A.3d 154, 164, 267 C.R. 31, *infra*, §122.)

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Witkin Summary of California Law III. COMMINGLING OF COMMUNITY AND SEPARATE PROPERTY D. Profits From Separate Property Business. 1. In General. b. Alternative Apportionment Methods.

11 Witkin Sum. Cal. Law Com Prop § 122

[§ 122] Alternative Apportionment Methods.

(1) *In General*. There is no invariable formula or precise standard; allocation is a question of fact, to be governed by the circumstances of each case. (See *Estate of Gold* (1915) 170 C. 621, 623, 151 P. 12; *Todd v. McColgan* (1949) 89 C.A.2d 509, 514, 201 P.2d 414; *Estate of La Belle* (1949) 93 C.A.2d 538, 542, 209 P.2d 432, supra, §115 [apportionment rule recognized, but husband's business was wholly separate where wife had already received, from profits, greater amount than could be attributed to personal efforts of spouses]; *Logan v. Forster* (1952) 114 C.A.2d 587, 599, 250 P.2d 730; *Haldeman v. Haldeman* (1962) 202 C.A.2d 498, 505, 21 C.R. 75, supra, §121; *Millington v. Millington* (1968) 259 C.A.2d 896, 907, 67 C.R. 128; 51 Cal. L. Rev. 161; 36 So. Cal. L. Rev. 481; 10 U.C.L.A. L. Rev. 655.) Two alternative approaches, however, are commonly used:

(a) *Pereira approach: Fair return on investment*. This approach, set forth in *Pereira v. Pereira* (1909) 156 C. 1, 103 P. 488, infra, §124, allocates a fair return on the separate property of the spouse as separate income and allocates any excess to the community property as arising from that spouse's efforts.

(b) *Van Camp approach: Reasonable value of services*. This approach, explained in *Van Camp v. Van Camp* (1921) 53 C.A. 17, 199 P. 885, infra, §126, determines the reasonable value of the spouses' services to the business and allocates that as community property, and treats the balance as separate property attributable to normal earnings of that property.

The court may select whichever method will effect substantial justice; typically, *Pereira* is applied where profits are attributable to community effort, and *Van Camp* where profits are attributable to the character of the separate asset. (*In re Marriage of Dekker* (1993) 17 C.A.4th 842, 853, 21 C.R.2d 642; see *Beam v. Bank of America* (1971) 6 C.3d 12, 18, 98 C.R. 137, 490 P.2d 257, infra, §§124, 125, 126; *In re Marriage of Folb* (1975) 53 C.A.3d 862, 873, 126 C.R. 306; Rutter Group, 2 Family Law §8:341 et seq.; infra, §§124, 126.)

(2) *"Overall Financial Picture" Approach*. *In re Marriage of Zaentz* (1990) 218 C.A.3d 154, 166, 267 C.R. 31, involved the allocation of profits earned by the husband's separately owned movie production company. The company had been in poor financial condition during the first part of the 5-year marriage. During the last 2 years of the marriage, the husband devoted himself entirely to the production of one movie, which generated no profits during the marriage

but ultimately achieved great success. After hearing testimony from film industry experts and from officers of the husband's company and interrelated companies, the trial judge awarded the wife \$ 300,000 for her community property interest in the company's profits aggregating during the 2 years following the parties' separation. *Held*, the award was proper.

(a) The husband's personal guaranty of a loan for the project had placed not only his separate property but also community property at risk, "strongly indicating that a fair apportionment of the economic rewards was justly allocable to the community." (218 C.A.3d 165.)

(b) The evidence supported the conclusion that "without husband's personal efforts in acquiring the film rights, acting as its producer and managing the financial arrangements, there would have been no economic increase in the value of the company." (218 C.A.3d 166.)

(c) While the *Pereira* and *Van Camp* models are generally used to apportion the increased value in separate property, here the judge properly considered the increased value of the husband's company as only one factor in the actual financial picture, and reimbursed the community for the husband's efforts on the movie project *without specifically apportioning his company's increased value*. (218 C.A.3d 166.)

(d) Any error in the failure of the judge's statement of decision to disclose the calculations underlying the allocation to the community was harmless; the judge had "diligently and conscientiously sorted through and evaluated a welter of complex and conflicting evidence in arriving at a patently just and equitable determination." (218 C.A.3d 167.)

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D. Profits From Separate Property Business.

1. In General.

c. Where Apportionment Is Not Required.

11 Witkin Sum. Cal. Law Com Prop § 123

[§ 123] Where Apportionment Is Not Required.

The apportionment rule is not mechanically applied in every case of personal efforts exerted in making profits from separate property. If no sufficient contrary showing is made, the enhanced value may simply be held to follow the character of the original property. In *Cozzi v. Cozzi* (1947) 81 C.A.2d 229, 183 P.2d 739, the husband had separate real and personal property before marriage. He devoted his full time to the management of the property, and the wife devoted a portion of her time to that work. Their only income came from this property. In granting a divorce to the wife, the trial judge found that the property was entirely separate. The wife appealed, pointing out that the greater part of the income, resulting from efforts of the spouses, had been used to make payments on mortgages and other claims against the property. *Held*, the finding of no community property was not erroneous.

(a) Assuming that the care of income properties is a "business," "it is not the profits of the business, but only the ascertained earnings of the defendant from his individual efforts in managing, laboring on and caring for such property, in the nature of salary, wages or the equivalent thereof, which would be community property." (81 C.A.2d 232.)

(b) There was no evidence appraising the value of the husband's earnings or to what proportion of the income they should properly be allocated. (81 C.A.2d 232.) The trial court was entitled to consider that any earnings "may well have been expended by him in support of his wife and child, thus leaving his separate estate intact." (81 C.A.2d 233.)

Cozzi illustrates the importance of producing affirmative evidence justifying a particular apportionment, and it would seem that the use of most of the income for the retirement of obligations against the property could have been the basis of a finding of some community interest. (See *Seligman v. Seligman* (1927) 85 C.A. 683, 690, 259 P. 984; *Strohm v. Strohm* (1960) 182 C.A.2d 53, 62, 5 C.R. 884; *Estate of Ney* (1963) 212 C.A.2d 891, 899, 28 C.R. 442 [stock trading without special skill; enhancement in value was natural one].)

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11 Witkin Sum. Cal. Law Com Prop § 124

[§ 124] Amount Over Investment Plus Fair Return.

(1) *Pereira Rule*. In *Pereira v. Pereira* (1909) 156 C. 1, 103 P. 488, the husband invested \$ 15,000 of separate property in a business at the time of his marriage. This increased to over \$ 70,000. *Held*, the separate property amounted only to \$ 15,000 plus at least the usual interest on a long-term investment well secured, e.g., 7%. (156 C. 7.)

The *Pereira* case has been frequently cited on the propriety of this method of allocating to the separate property only the original investment plus a fair return, and classifying the rest of the enhanced value and profits as community property. (See *McDuff v. McDuff* (1920) 48 C.A. 175, 178, 191 P. 957; *Stice v. Stice* (1947) 81 C.A.2d 792, 796, 185 P.2d 402; *Berry v. Berry* (1953) 117 C.A.2d 624, 629, 256 P.2d 646; *In re Marriage of Folb* (1975) 53 C.A.3d 862, 873, 126 C.R. 306 [12% return to separate property upheld despite evidence of typical returns of over 15%; husband's skill as developer, which made valuable contribution, called for percentage to be assigned to community property]; Rutter Group, 2 Family Law §8:342 et seq.)

Estate of Neilson (1962) 57 C.2d 733, 740, 22 C.R. 1, 371 P.2d 745, quoting *Randolph v. Randolph* (1953) 118 C.A.2d 584, 587, 258 P.2d 547, declared: " 'Only when the profits and accruals actually attributable to the separate property are proved to differ from [the usual interest rate for a well-secured investment] ... is there reason to depart from this system.' " The implication that the *Pereira* formula is the normal one, and that the use of any other must be justified by special circumstances, seems inconsistent with earlier statements that no particular formula is to be mechanically applied (supra, §122). (57 C.2d 740.) (For criticisms of *Neilson* dictum and failure of court to go more fully into practical aspects of apportionment, see 51 Cal. L. Rev. 161; 36 So. Cal. L. Rev. 481; 10 U.C.L.A. L. Rev. 655.)

(2) *Illustrations of Rule*. In *Todd v. McColgan* (1949) 89 C.A.2d 509, 201 P.2d 414, involving state income taxes, the commissioner allocated an 8% return on the separate capital investment. This was approved, and the contention that the *Pereira* case limited the return to 7% was rejected. "Flexibility, as this case well illustrates, is not only a desirable but an essential element of any workable system for allocation of income." (89 C.A.2d 514.) (See 20 So. Cal. L. Rev. 108, discussing similar result under federal income tax law.)

In *Weinberg v. Weinberg* (1967) 67 C.2d 557, 63 C.R. 13, 432 P.2d 709, separate property stock increased in value. The trial judge attributed 7% per year as a fair return and found that the balance was attributable to defendant's labor and skill. Defendant's contention, that 7% is not currently an adequate return on risk capital invested in a close

corporation, and that the increase in net worth was partially attributable to inflation, was rejected, for lack of any evidence on these factors. (67 C.2d 565.)

In *Beam v. Bank of America* (1971) 6 C.3d 12, 98 C.R. 137, 490 P.2d 257, the trial judge used the *Pereira* approach, and the Supreme Court affirmed the judgment, holding it supportable under either *Pereira* or *Van Camp v. Van Camp* (1921) 53 C.A. 17, 199 P. 885, *infra*, §126. Mr. and Mrs. B were divorced in 1968 after 29 years of marriage. Before the marriage and during its early years Mr. B had inherited \$ 1,629,129, and practically all of his time was spent in managing and investing this separate property. At the time of the decree, the increase was only to \$ 1,850,507.33. By stipulation, the divorce court awarded Mrs. B the whole of a \$ 38,000 promissory note that it classified as community property, and awarded the rest of the property to the husband as his separate property. *Held*, affirmed. At 7% (the legal rate of interest), the original separate estate would have been worth \$ 4,200,000; hence, the entire increase in value would be separate property; i.e., none of the increase would be attributable to the husband's efforts. (6 C.3d 19.) (See 8 Cal. Western L. Rev. 381 [*Beam*]; 13 Santa Clara Lawyer 121 [same].)

In *re Marriage of Frick* (1986) 181 C.A.3d 997, 226 C.R. 766, involved a hotel and restaurant business that increased in value from \$ 131,000 at the time of the marriage to \$ 290,000 at the time of the trial. Using the *Pereira* formula, the trial judge concluded that the separate and community interests were \$ 99,850 and \$ 59,150, respectively, but then ruled that all of the community interest had been exhausted due to community expenses incurred during the marriage. *Held*, this was error. During the marriage, the husband took out of the business whatever income was needed to meet community expenses. These disbursements represented business profits to which the community would have been entitled under *Pereira* had they not been withdrawn. Hence, a second family expense deduction would be unfair to the community. (181 C.A.3d 1019.)

Other cases have applied the *Pereira* rule. (See *In re Marriage of Dekker* (1993) 17 C.A.4th 842, 854, 21 C.R.2d 642 [*Pereira* rule was properly applied, where company began with small separate property investment by wife, and grew due to husband's contacts, expertise, and full-time efforts]; *In re Marriage of Koester* (1999) 73 C.A.4th 1032, 1036, 87 C.R.2d 76, *supra*, §111 [separate business remained separate property on its incorporation during marriage, entitling owner spouse on dissolution to fair return under *Pereira* rule].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Pereira* Rule. See 39 A.L.R.6th 205 [appreciation in value of separate property during marriage with contribution by either spouse as separate or community property (i.e., doctrine of "active appreciation")].



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11 Witkin Sum. Cal. Law Com Prop § 125

[§ 125] Fluctuating Value With No Net Increase.

In re Marriage of Denney (1981) 115 C.A.3d 543, 171 C.R. 440, involved a business that was the property of the husband before the parties married in 1969. In 1976, when they separated, the business had the same value as it had at the time of marriage, and the normal conclusion would have been that there was no community interest. To establish that interest, the wife offered to testify that at some time between marriage and separation, the business became valueless, and she proceeded to build it up. The trial judge refused to admit the proffered evidence. *Held*, the ruling was correct.

(a) *In re Marriage of Winn* (1979) 98 C.A.3d 363, 159 C.R. 554, recognized one situation where a fluctuation in value could be determinative: bankruptcy proceedings, establishing the fact that at a precise time during the marriage the business had no value. In *Winn*, therefore, the court justifiably concluded that the husband's efforts in reestablishing the business made the increased value a community asset. (115 C.A.3d 549.)

(b) *Winn* must be limited to its facts to avoid complex testimony concerning month-to-month fluctuations in the value of an ongoing business. *Beam v. Bank of America* (1971) 6 C.3d 12, 98 C.R. 137, 490 P.2d 257, *supra*, §124 and *infra*, §126, requiring trial courts to determine the fair market value of a separate business at the time of marriage and again at the time of separation, "did not anticipate that the trier of fact would be required to track the oscillations in growth or decline of a business throughout the marriage." (115 C.A.3d 550.)

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11 Witkin Sum. Cal. Law Com Prop § 126

[§ 126] Salary or Value of Services.

(1) *Van Camp Rule*. In *Van Camp v. Van Camp* (1921) 53 C.A. 17, 199 P. 885, the husband organized a corporation with money from his separate estate, secured a large quantity of stock, and received a large salary. *Held*, the salary was obviously community property, but all of the dividends on the stock were his separate property. The court refused to attempt to apportion any part of these profits to his labor. Under this formula, the reasonable value of the husband's services was allocated to the community interest, and the rest of the value and profits retained the separate character of the business itself. (53 C.A. 27.) (See *Harrold v. Harrold* (1954) 43 C.2d 77, 80, 271 P.2d 489; *Tassi v. Tassi* (1958) 160 C.A.2d 680, 690, 325 P.2d 872; *Somps v. Somps* (1967) 250 C.A.2d 328, 335, 58 C.R. 304; *Rutter Group*, 2 Family Law §8:345 et seq.; 14 Cal. L. Rev. 402; 8 Cal. Western L. Rev. 386; 13 Santa Clara Lawyer 121; 1 So. Cal. L. Rev. 161.)

(2) *Illustrations of Rule*. In *Logan v. Forster* (1952) 114 C.A.2d 587, 250 P.2d 730, the wife's Mexican corporation, a utility enterprise, increased greatly in value and made substantial profits after the marriage, and was then sold. *Held*, the surviving husband had no community interest in the sale price. The determinative facts were that the wife was 68 at the time of the marriage and 74 at the time of the sale, and did little by way of management. Hence, the trial judge properly found that her salary during this period (\$ 40,697) was the only community property; the enhancement in value and profits were characteristic of a capital investment in a flourishing business, and her participation was not responsible for its success. (114 C.A.2d 601.)

In *Gilmore v. Gilmore* (1955) 45 C.2d 142, 287 P.2d 769, the husband's auto dealership corporations increased in value during the marriage from about \$ 182,000 to \$ 786,000. *Held*, however, the salaries received by the husband were sufficient to compensate in full for the community efforts, and the dealerships were all separate property. The court pointed out that the corporations were staffed by well trained personnel capable of carrying on the business unassisted, that the husband worked short hours and took extended vacations, and that auto dealer franchises had generally increased in value as the auto business increased. (45 C.2d 149.)

In *Beam v. Bank of America* (1971) 6 C.3d 12, 98 C.R. 137, 490 P.2d 257, *supra*, §§124, 125, the court observed that, if the *Van Camp* approach were used, the wife still would not be entitled to an allocation of the increase in value of the property. Her argument was that a professional investment manager performing services such as those undertaken by Mrs. B would have charged an annual fee of one percent of the corpus, amounting to \$ 17,000 per year or a total of \$

357,000 for the 29 years. But her claim of half that sum was answered by the family expense presumption (supra, §16 et seq.): Once the amount of community income has been ascertained under the approach in either *Van Camp* or *Pereira v. Pereira* (1909) 156 C. 1, 103 P. 488, supra, §124, the community's living expenses are deducted from community income to determine the balance of the community property. (6 C.3d 21.) Here the evidence showed normal living expenses of \$ 24,000 per year, and, charging these against the claimed community income of \$ 17,000 per year, there was no balance of community property. (6 C.3d 21.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law III. COMMINGLING OF COMMUNITY AND SEPARATE PROPERTY D. Profits From Separate Property Business. 5. Time Rule.

11 Witkin Sum. Cal. Law Com Prop § 127

[§ 127] Time Rule.

In re Marriage of Kilbourne (1991) 232 C.A.3d 1518, 284 C.R. 201, infra, §216, involved the division of contingency fees from the husband's law practice, which was his separate property. The trial court accepted the balance sheet prepared by the wife's expert, who used a "time rule" to value those cases that were in progress when the parties separated, and afterward generated fees. Under the time rule, the period from the date of the first cost in a case to the date of recovery was measured, and the community and separate shares of the proceeds calculated in proportion to the periods of time before and after the parties' separation. The husband argued that this method accounted only for the gross fees and not the expenses that went into generating them. *Held*, the time rule was appropriately applied under the circumstances of this case.

(a) The time rule presumes that operating expenses on open cases remain at a relatively constant level over time, and the husband himself acknowledged that his overhead had varied only slightly over the relevant period. While not absolutely accurate in accounting for expenses, the time rule has the advantage of avoiding a case-by-case review and accounting analysis, saving litigation time and costs. (232 C.A.3d 1527.)

(b) The time rule might not be appropriate in all cases, particularly where there is sufficient evidence of actual expenses or where other formulas are advanced by expert witnesses. Here, however, the husband presented no evidence of his actual operating expenses, and offered no expert witness of his own to provide an alternative method of calculation. (232 C.A.3d 1527.) (On time rule for determining community interest in retirement benefits, see *supra*, §65.)

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11 Witkin Sum. Cal. Law Com Prop § 128

[§ 128] Farming on Separate Property.

(1) *Former Separate Property Rule.* In *Estate of Pepper* (1910) 158 C. 619, 112 P. 62, the husband had separate property consisting of a nursery and orchard. *Held*, all of the profits were separate property. The Court declared that it was impossible to determine what share of the product was due to labor and what part to the land, and treated the entire product as having the character of the land. (158 C. 623.) Although attempts have been made to explain this result in terms of the peculiarity of the business, the case has been criticized and is inconsistent with later decisions firmly establishing the apportionment rule. (See *supra*, §121 et seq.)

(2) *Pepper Overruled.* The *Pepper* case was overruled in *Estate of Neilson* (1962) 57 C.2d 733, 22 C.R. 1, 371 P.2d 745. Decedent, at the time of his marriage in 1939, had acquired three parcels of land on which he raised grain. After the marriage he paid substantial sums on the balance of the price, and his income was almost entirely from the grain and sales of portions of the land. He died in 1958, leaving all his property to his children, and his widow elected to take half of the community property. In this heirship proceeding the trial judge refused to instruct the jury on the rule of the *Pepper* case. *Held*, this was correct. The much criticized holding in that case was based on an erroneous concession of counsel unsupported by the existing case law, and mistakenly assumed that because exact apportionment could not be made no apportionment was possible. "There is no reason why a grain farmer or nursery operator who conducts his enterprise on separate real property should be exempted from the normal apportionment rule and not be required to account to the community for a portion of the profits." Accordingly, the *Pepper* case was overruled. (57 C.2d 741.)

Later decisions reaffirmed the *Neilson* holding. (See *Mayhood v. La Rosa* (1962) 58 C.2d 498, 500, 24 C.R. 837, 374 P.2d 805 [orchard and vineyard]; *Machado v. Machado* (1962) 58 C.2d 501, 505, 25 C.R. 87, 375 P.2d 55 [farming and dairy operations]; 51 Cal. L. Rev. 161; 36 So. Cal. L. Rev. 481; 10 U.C.L.A. L. Rev. 655.) (For comment on *Neilson* dictum on apportionment formulae, see *supra*, §124.)

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Witkin Summary of California Law

IV. TITLE AND CONTROL

A. Interest of Spouses.

1. Former Law.

11 Witkin Sum. Cal. Law Com Prop § 129

[§ 129] Former Law.

Originally the wife's interest in community property in California was the subject of considerable uncertainty. The early cases declared that it was "a mere expectancy," a right "to take one-half of the residue after payment of debts in case the marriage be dissolved during her life." (*Spreckels v. Spreckels* (1897) 116 C. 339, 347, 48 P. 228.) The amendments of 1891 and 1901 to former C.C. 172, now *Family C. 1100*, prohibiting gifts of community property, or sale or encumbrance of the personal effects of the wife and children, without the wife's consent, were held merely to limit the husband's power of disposition, and not to invest the wife with any further interest. (*Spreckels v. Spreckels* (1916) 172 C. 775, 782, 158 P. 537.)

In *Estate of Moffit* (1908) 153 C. 359, 95 P. 653, 1025, the wife contended that she had an interest in the community property that, upon the husband's death, became vested, so that she took her share of the property as her property and not as his heir. It was held, however, that she took only as an heir and had to pay the state inheritance tax. (153 C. 364.) In 1917, the Legislature amended the Inheritance Tax Law to provide that "for the purpose of this act" the one-half of the community property should be deemed to pass to the wife *not as an heir*. Consequently, she was not required to pay the California tax. Much debate followed thereafter in the federal courts over unsuccessful attempts to establish a vested interest in the wife for federal tax purposes. (See 12 *Cal. L. Rev.* 99; 14 *Cal. L. Rev.* 351, 441; 16 *Cal. L. Rev.* 244.)

Stewart v. Stewart (1926) 199 C. 318, 249 P. 197, exhaustively reviewed the earlier decisions and held that the wife did not have a vested interest in one-half the community property, and could not quiet title to an undivided one-half interest in a piece of land purchased with community funds; but the court also expressed the view that her interest was "a much more definite and present interest than that of an ordinary heir." (199 C. 342.) (See 15 *Cal. L. Rev.* 502; 19 *Cal. L. Rev.* 567; 22 *Cal. L. Rev.* 404; 7 *So. Cal. L. Rev.* 1.)

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IV. TITLE AND CONTROL

A. Interest of Spouses.

2. Present, Existing, and Equal Interest.

11 Witkin Sum. Cal. Law Com Prop § 130

[§ 130] Present, Existing, and Equal Interest.

(1) *Enactment in 1927.* The 1927 Legislature added former C.C. 161a, which then read in part: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests, under the management and control of the husband."

(2) *Vested Interest.* Although the statute did not use the term "vested," the interest must be so regarded if it is equal to that of the husband, and the decisions established a vested right in the wife. (See *Cooke v. Cooke* (1944) 65 C.A.2d 260, 265, 150 P.2d 514; *Estate of Kelley* (1953) 122 C.A.2d 42, 43, 264 P.2d 210 [wife's right to elect to take community property survives her death]; *Ottinger v. Ottinger* (1956) 141 C.A.2d 220, 225, 296 P.2d 347 [statute making husband's earnings after wife's abandonment his separate property could not constitutionally be retroactive]; 42 Cal. L. Rev. 373.)

(3) *Change Not Retroactive.* As in the case of other statutes enlarging the wife's rights (see supra, §2), any new rights that she gained by virtue of former C.C. 161a were effective only as to property acquired after the date of its adoption. (*Stewart v. Stewart* (1928) 204 C. 546, 555, 269 P. 439; *Henry v. Hibernia Savings & Loan Soc.* (1935) 5 C.A.2d 141, 144, 42 P.2d 395.)

(4) *Amendment in 1973.* The concept of equal and vested interest was not fully carried out by the original enactment; e.g., the wife's interest in community property was not subject to liability for her torts (see infra, §174), the entire community property including her share was liable for the husband's personal debts (see infra, §173), and she could not succeed to her share without going through administration (see infra, §249). (See 23 So. Cal. L. Rev 237; 4 Stanf. L. Rev. 440.)

Former C.C. 161a became former C.C. 5105, in the Family Law Act. A 1973 amendment deleted the language referring to the husband's management and control. (See infra, §§131, 132.) Other amendments effective in 1973 changed the rules on liability for debts. (See infra, §172 et seq.) Changes in the law of administration on the husband's death were made in 1975. (See infra, §250 et seq.)

(5) *Current Statute.* Family C. 751 provides: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests."

(6) *Damage by Spouse to Undivided Community Property Is Punishable Under Criminal Law.* In *People v. Kahanic* (1987) 196 C.A.3d 461, 241 C.R. 722, the wife was convicted of vandalizing an automobile that was the community property of herself and her husband. During the couple's dissolution proceedings, she had thrown a bottle of beer through the car's rear window when she found it parked in front of another woman's residence. On appeal, she argued that she could not vandalize her own property. *Held*, conviction affirmed. Each community property owner had an equal ownership interest that, though undivided, is protected by the criminal law from unilateral nonconsensual damage or destruction by the other marital partner. (196 C.A.3d 464, 466.)

West's Key Number Digest, Husband and Wife k.265

SUPPLEMENT: [This section is current through the latest supplement]



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IV. TITLE AND CONTROL

B. Management and Control.

1. Former Law: Control by Husband.

11 Witkin Sum. Cal. Law Com Prop § 131

[§ 131] Former Law: Control by Husband.

(1) *Statutory Rules.* Former C.C. 172 provided that, with certain exceptions, "the husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate." Former C.C. 172a provided that, with certain exceptions, "the husband has the management and control of the community real property."

(2) *Incidents of Husband's Control.* One incident was the husband's right to bring and defend actions concerning the community property. (See *Sternes v. Sutter Butte Canal Co.* (1929) 99 C.A. 465, 471, 278 P. 921; *Johnson v. National Surety Co.* (1931) 118 C.A. 227, 229, 5 P.2d 39; *Yearout v. American Pipe & Steel Corp.* (1946) 74 C.A.2d 139, 143, 168 P.2d 174 [wife was not necessary party]; 4 Cal. Proc. (4th), *Pleading*, §134.) He could also sue the wife to recover possession of community property wrongfully withheld by her. (See *Wilcox v. Wilcox* (1971) 21 C.A.3d 457, 459, 98 C.R. 319; 4 Cal. Proc. (4th), *Pleading*, §134.)

The husband could make contracts investing community funds, or an agreement for a winding up period or option in favor of surviving members of a partnership or family corporation, even though these arrangements temporarily postpone the wife's right to control her share of community property on his death. (See *Tyre v. Aetna Life Ins. Co.* (1960) 54 C.2d 399, 403, 6 C.R. 13, 353 P.2d 725, *infra*, §141; *Salveter v. Salveter* (1933) 135 C.A. 238, 240, 26 P.2d 836 [wife who collected rentals of community property was treated as his agent and he could sue for accounting]; *Cox v. Kaufman* (1946) 77 C.A.2d 449, 452, 175 P.2d 260 [husband has control of community automobile; wife, though a present owner, was not liable under driving with permission law]; *Martinez v. Dempsey-Tegeler & Co.* (1974) 37 C.A.3d 509, 513, 112 C.R. 414 [sale of community property shares of stock].)

(3) *Exceptions.* A number of exceptions to the general declarations of the husband's control were stated in several former statutes that were carried over into the Family Law Act and continued in the Family Code. (For present statement of exceptions as limitations on the powers of both husband and wife, see *infra*, §§132, 137, 138.)

A nonstatutory but obviously practical qualification of the husband's exclusive control was declared in *Kenney v. Kenney* (1950) 97 C.A.2d 60, 217 P.2d 151. Community real property was subject to an equitable mortgage, and plaintiff wife paid the debt out of her separate property. In this divorce action, she was given a lien against that property to the extent of her payment, against defendant husband's objection that she had no power to make a contract concerning

community property. Affirming the judgment, the court said: "[I]t is to be observed that no woman possessing common sense and ordinary prudence should allow a debt secured by a lien against community property to become in default if she has funds with which to avoid such embarrassment. It is true that the husband has the management of community property but if he fails properly to manage it and subjects a community property to be jeopardized by not paying encumbrances against it his wife will be protected if she ventures to advance her separate funds in the discharge of such indebtedness." (97 C.A.2d 63.)

West's Key Number Digest, Husband and Wife k.265 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Incidents of Husband's Control.*

Right to bring and defend actions about community property:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §153.

Right to sue wife to recover possession of community property:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §153.



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B. Management and Control.
2. Current Law: Control by Either Spouse.

11 Witkin Sum. Cal. Law Com Prop § 132

[§ 132] Current Law: Control by Either Spouse.

(1) *Criticisms of Former Law.* The general principle of the husband's control was challenged with increasing frequency on both constitutional and policy grounds, and a number of statutory changes were proposed. (See 23 *Hastings L. J.* 249; 6 *Loyola L.A. L. Rev.* 66; 46 *So. Cal. L. Rev.* 892; 6 *U.C. Davis L. Rev.* 383.)

(2) *Family Law Act.* The 1973 Legislature followed the most radical of the suggested reform paths by giving the wife the same control as the husband. Former C.C. 172 and 172a were replaced with former C.C. 5125 and 5127. (See 5 *Golden Gate L. Rev.* 407; 1 *Hastings Const. L. Q.* 97; 34 *Hastings L. J.* 229 [Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform]; 9 *Loyola L.A. L. Rev.* 493; 5 *Pacific L. J.* 352, 723; 10 *Pacific L. J.* 861 [effect of discharge in bankruptcy on each spouse's liability for debts]; 11 *San Diego L. Rev.* 999; 24 *U.C.L.A. L. Rev.* 73; 2 *Western State L. Rev.* 180.)

Former C.C. 5125 and 5127 (now *Family C. 1100* and *1102*), as originally adopted, were expressly nonretroactive. The 1974 Legislature made them expressly retroactive. (On purpose and effect of change, and inconsistent language on prospective effect in enacting statute, see *Robertson v. Willis* (1978) 77 *C.A.3d* 358, 143 *C.R.* 523; 6 *Pacific L. J.* 302; 48 *So. Cal. L. Rev.* 990, 1007, 1052.)

(3) *Enactment of Family Code.* Effective January 1, 1994, former C.C. 5125 et seq. were repealed and replaced without substantive change by *Family C. 1100* et seq. (See *infra*, §133 et seq.) Subject to specified restrictions (see *infra*, §136 et seq.), *Family C. 1100(a)* and *1102(b)* state that "either spouse has the management and control" of community personal or real property.

West's Key Number Digest, Husband and Wife k.265 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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IV. TITLE AND CONTROL

B. Management and Control.

3. Duty To Act as Fiduciary.

a. Statutory Requirement.

11 Witkin Sum. Cal. Law Com Prop § 133

[§ 133] Statutory Requirement.

(1) *In General.* In the management and control of community property, the spouses must act toward each other in accordance with the general rules governing confidential fiduciary relationships, as specified in *Family C. 721*, until the property has been divided by the parties or by a court. This includes the obligation to fully disclose all material facts and information as to 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 the duty to provide equal access to all information, records, and books pertaining to the value and character of those assets and debts, upon request. (*Family C. 1100(e).*) (See, construing predecessor statute, *In re Marriage of Czapar* (1991) 232 C.A.3d 1308, 1318, 285 C.R. 479, *infra*, §§192, 201 [dissolution judgment properly required husband to reimburse wife for his personal expenses paid by community property business in violation of his statutory duty]; *In re Marriage of Reuling* (1994) 23 C.A.4th 1428, 1435, 28 C.R.2d 726 [disclosure requirements imposed on spouses by state law are preempted by federal securities laws insofar as they apply to insider information]; *Vai v. Bank of America* (1961) 56 C.2d 329, 337, 15 C.R. 71, 364 P.2d 247, 11 Summary (10th), *Husband and Wife*, §353 [discussing confidential and fiduciary relationship duties]; Rutter Group, 2 Family Law §8:600 et seq.; 23 So. Cal. L. Rev. 84.)

Prior to 1991, the statute imposed a "good faith" standard with respect to the management and control of community property. (See *In re Marriage of Czapar*, *supra*; 18 Pacific L. J. 601.) A 1991 amendment substituted the current fiduciary standard. The 1991 amendment was intended to impose a higher standard of duty on spouses, but did not apply retroactively. (See *In re Marriage of Reuling*, *supra*, 23 C.A.4th 1439; 23 Pacific L. J. 615.)

(2) *Mutual Obligations Between Spouses.* "Husband and wife contract toward each other obligations of mutual respect, fidelity, and support." (*Family C. 720.*)

(3) *Transactions With Each Other and Third Parties.* Spouses may enter into any property transaction with each other, or with any other person, that they might if unmarried. (*Family C. 721(a).*)

Except as provided in *Prob.C. 143, 144 and 146* (fiduciary obligations in interspousal transactions do not apply where surviving spouse waives survivor rights; see 14 Summary (10th), *Wills and Probate*, §§324, 325) and *Prob.C. 16040 and 16047* (standard of care required of trustees by prudent investor rule; see 13 Summary (10th), *Trusts*, §§75,

80), "in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." (*Family C. 721(b)*.) This fiduciary relationship is subject to the rights and duties of nonmarital business partners, provided in *Corp.C. 16403, 16404, and 16503*, "including, but not limited to," the following:

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

(b) Providing upon request true and full information of anything affecting a transaction that concerns the community property; however, this does not impose a duty for either spouse to keep detailed books and records of community property transactions.

(c) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction concerning the community property conducted by one spouse without the consent of the other. (*Family C. 721(b)*.) (See *In re Marriage of Haines* (1995) 33 C.A.4th 277, 301, 39 C.R.2d 673 [quitclaim deed from wife to husband was to husband's advantage and created presumption of undue influence]; *In re Marriage of Friedman* (2002) 100 C.A.4th 65, 72, 122 C.R.2d 412, 1 Cal. Proc. (4th), Attorneys, Supp., §155 [upholding, over wife's claim of unfairness, postnuptial agreement making parties' individual income, business property, and debts separate property; agreement did not favor either party and protected wife's property from husband's creditors]; *In re Marriage of Lange* (2002) 102 C.A.4th 360, 363, 125 C.R.2d 379 [following *Haines*]; *In re Marriage of Delaney* (2003) 111 C.A.4th 991, 997, 4 C.R.3d 378 [same].)

In re Marriage of Duffy (2001) 91 C.A.4th 923, 111 C.R.2d 160, held that the fiduciary duty owed by one spouse to the other under *Family C. 721* does not include a duty of care in managing investments. (91 C.A.4th 937.) In 2002 the Legislature abrogated that holding by adding the reference to *Prob.C. 16047* and the phrase "including, but not limited to." "It is the intent of the Legislature in enacting this act to clarify that *Section 721 of the Family Code* provides that the fiduciary relationship between spouses includes all of the same rights and duties in the management of community property as the rights and duties of unmarried business partners managing partnership property, as provided in *Sections 16403, 16404, 16503 of the Corporations Code*, and to abrogate the ruling in *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, to the extent that it is in conflict with this clarification." (Stats. 2002, Chap. 310, §2.)

West's Key Number Digest, Marriage k.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *In re Marriage of Walker* (2006) 138 C.A.4th 1408, 1419, 42 C.R.3d 325 [even if IRA was husband's separate property rather than parties' community property, wife could be liable for breach of fiduciary duty under *Family C. 721(b)* and *1100(e)* for mismanaging IRA]; California Family Law Practice, §§J.80.1 et seq., J.101 et seq.; 37 *McGeorge L. Rev.* 33 [undue influence]. (3) *Transactions With Each Other and Third Parties.* *In re Marriage of Kieturakis* (2006) 138 C.A.4th 56, 41 C.R.3d 119, involved a former wife who filed a challenge under *Family C. 2122* (text, §243) to a marital settlement agreement that she and her former husband had reached through mediation on the grounds of fraud, duress, and lack of disclosure. Applying the presumption of undue influence arising under *Family C. 721(b)* when an interspousal transaction advantages one spouse, the trial judge ruled that the husband bore the burden of proving no undue influence. *Held*, although there was no dispute that the agreement favored the husband, there were three independently sufficient reasons for not applying the presumption of undue influence:

(a) The presumption does not apply to a marital settlement agreement such as this one that is reached through mediation. While mediation is no guarantee against undue influence, it helps to minimize unfairness in the process by which an agreement is reached. Even more important, applying the presumption would severely undermine the practice of mediating agreements. (138 C.A.4th 85.)

(b) The presumption does not apply in a case like this where the influence is alleged in a challenge under *Family C. 2122* to a judgment that has long been final. (138 C.A.4th 87.) A party seeking relief under *Family C. 2122* from a judgment that incorporates an unequal marital settlement agreement must bear the burden of proof, at least where the judgment, as in this case, is at least 6 months old. (138 C.A.4th 90.)

(c) The presumption does not apply where, as here, the parties have acknowledged in the agreement that no undue influence was exercised. (138 C.A.4th 90.) (See 8 Pepperdine Dispute Resolution L. J. 199 [impact of *In re Marriage of Kieturakis* on mediation confidentiality law].)

See *In re Marriage of Mathews* (2005) 133 C.A.4th 624, 632, 35 C.R.3d 1 [husband rebutted presumption of undue influence arising from wife signing quitclaim deed permitting him to acquire family residence in his name only; wife, who had bad credit rating, freely and voluntarily signed to obtain lower interest rate on mortgage, managed most of spouses' combined financial affairs as well as her own, and, although English was not her first language, had above-average English skills]; *In re Marriage of Walker*, supra, 138 C.A.4th 1425 [2002 amendments to *Family C. 721*, imposing fiduciary duty on spouse as to investments, did not apply retroactively to parties who separated before amendments took effect]; *In re Marriage of Burkle* (2006) 139 C.A.4th 712, 736, 43 C.R.3d 181 [presumption of undue influence under *Family C. 721(b)* did not apply to postmarital agreement where both obtained advantages, both were represented by sophisticated counsel, and both spouses expressly acknowledged in agreement that neither had obtained unfair advantage; further, even if presumption applied, it was rebutted by substantial evidence]; *In re Marriage of Balcof* (2006) 141 C.A.4th 1509, 1519, 47 C.R.3d 183 [wife failed to rebut presumption of undue influence arising from writing made during marriage stating that husband transferred his interest in marital residence and 20% of stock of his separate property business to her; wife had struck husband and had threatened to divorce him and disrupt his relationship with children if he did not transfer property]; *In re Marriage of Leni* (2006) 144 C.A.4th 1087, 1092, 50 C.R.3d 886 [wife had no fiduciary duty to give husband right of first refusal on sale of community home after separation]. *In re Marriage of Friedman* case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §130.



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IV. TITLE AND CONTROL

B. Management and Control.

3. Duty To Act as Fiduciary.

b. Action for Breach of Duty.

11 Witkin Sum. Cal. Law Com Prop § 134

[§ 134] Action for Breach of Duty.

Family C. 1101 sets forth the remedies for breach of fiduciary duty, including those set out in *Family C. 721* and *1100* (supra, §133). (See Rutter Group, 2 Family Law §8.612 et seq.; on legislative intent underlying substantially identical predecessor statute, former C.C. 5125.1, see Stats. 1986, Chap. 1091, §1.)

(1) *Claim for Breach of Duty.* A spouse has a claim against the other spouse for a breach of the fiduciary duty that results in impairment of the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions that have caused or will cause a detrimental impact. (*Family C. 1101(a)*.) The claim may be brought either independently of, or in conjunction with, an action for dissolution, nullity, or legal separation; it may also be brought on the death of a spouse. (*Family C. 1101(f)*.) (See *Bono v. Clark* (2002) 103 C.A.4th 1409, 1430, 128 C.R.2d 31 [in action against deceased husband's estate, wife was not entitled to one-half interest in community personalty, because mere absence of that property for 4 years did not raise inference that decedent had disposed of it inappropriately].)

(2) *Order for Accounting.* The court may order an accounting of the property and obligations of the spouses and determine their rights of ownership in, beneficial enjoyment of, or access to community property, as well as the classification of all property of the spouses. (*Family C. 1101(b)*.)

(3) *Adjustments in Title.* A court may order a spouse's name to be added to community property held in the other spouse's name alone, or to reform the title of community property held in some other form of title to reflect its community character, except with respect to the following:

(a) A partnership interest held by the other spouse as a general partner. (*Family C. 1101(c)(1)*.)

(b) An interest in a professional corporation or professional association. (*Family C. 1101(c)(2)*.)

(c) An asset of an unincorporated business, if the other spouse is the only spouse involved in its operation and management. (*Family C. 1101(c)(3)*.)

(d) Any other property, if the revision would adversely affect a third party's rights. (*Family C. 1101(c)(4)*.)

(4) *Exceptions to Requirement of Consent.* In a transaction affecting community property where the consent of both spouses is required, the court may, upon motion of a spouse, dispense with the requirement of the other spouse's consent if both of the following requirements are met:

(a) The proposed transaction is in the best interest of the community. (*Family C. 1101(e)(1).*)

(b) Consent has been arbitrarily refused or cannot be obtained due to the physical or mental incapacity or prolonged absence of the nonconsenting spouse. (*Family C. 1101(e)(2).*)

(5) *Compensatory Damages.* The remedies for breach of a spouse's fiduciary duty, including those set out in *Family C. 721* and *1100* (supra, §133), include without limitation an award to the other spouse of 50%, or an amount equal to 50%, of any asset undisclosed or transferred in breach of the duty, plus attorneys' fees and court costs. The value of the asset is its highest value at the date of breach of fiduciary duty, the date of the asset's sale or disposition, or the date of the award by the court. (*Family C. 1101(g)*; see *In re Marriage of Hokanson* (1998) 68 C.A.4th 987, 992, 80 C.R.2d 699 [under *Family C. 1101(g)*, court lacks discretion to deny request for attorneys' fees when other spouse breaches fiduciary duty].)

As originally enacted, *Family C. 1101(g)* continued the prohibition of former law against interest being assessed against the managing spouse. But that prohibition was deleted by a 2001 amendment.

(6) *Exemplary Damages.* When the breach of fiduciary duty falls within the ambit of C.C. 3294 (exemplary damages), the remedies include without limitation an award to the other spouse of 100%, or an amount equal to 100%, of any asset undisclosed or transferred in breach of the duty. (*Family C. 1101(h)*; see *In re Marriage of Rossi* (2001) 90 C.A.4th 34, 40, 108 C.R.2d 270 [husband was entitled to 100% of lottery winnings purchased with community property funds that wife fraudulently concealed during dissolution proceedings].)

(7) *Laches.* The defense of laches may be raised in any action under *Family C. 1101(d)*. (*Family C. 1101(d)(3).*)

(8) *Limitation of Action.* A claim for breach of a spouse's fiduciary duty may be commenced on the death of a spouse or in conjunction with an action for dissolution, nullity, or legal separation, without regard to the time limits imposed by *Family C. 1101(d)*. Otherwise, an action must be commenced within 3 years of the date the petitioner had actual knowledge of the transaction or event for which remedy is sought, and the transactions or event must have occurred on or after July 1, 1987. (*Family C. 1101(d)(1)*, (d)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Exemplary Damages.* See 124 A.L.R.5th 537 [discussing *In re Marriage of Rossi* (2001) 90 C.A.4th 34, 108 C.R.2d 270, text, p. 703].

(7) *Laches.* See *In re Marriage of Burkle* (2006) 139 C.A.4th 712, 752, 43 C.R.3d 181 [laches is available in action in which spouse asserts breach of fiduciary duty that impairs community property entitlements].



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4. Spouse Operating Business.

11 Witkin Sum. Cal. Law Com Prop § 135

[§ 135] Spouse Operating Business.

Family C. 1100(d) states an exception to the rule of control by either spouse (supra, §132). (See Rutter Group, 2 Family Law §8.587 et seq.)

(1) *Primary Management and Control*. Except as provided in *Family C. 1100(b)*, (c), and 1102 (see infra, §136 et seq.), a spouse who is operating or managing a business or business interest that is all or substantially all community personal property has primary management and control of the business or interest. (*Family C. 1100(d)*; see *Goss v. Edwards* (1977) 68 C.A.3d 264, 270, 137 C.R. 252.)

(2) *Notification of Other Spouse as to Transactions*. The managing spouse may act alone in all transactions, but must 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 business, whether or not title to the property is held in one spouse's name. However, written notice is not required when prohibited by the law otherwise applicable to the transaction. (*Family C. 1100(d)*.)

(3) *Failure To Give Notice*. Remedies for the managing spouse's failure to give the requisite prior written notice are limited to those specified in *Family C. 1101* (see supra, §134). However, failure to give notice does not adversely affect the validity of a transaction. (*Family C. 1100(d)*.)

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1. In General.

11 Witkin Sum. Cal. Law Com Prop § 136

[§ 136] In General.

A variety of restrictions apply to the management and control of community property by either spouse:

- (1) Gift of community personal property. (*Family C. 1100(b)*; see *infra*, §137 et seq.)
- (2) Transfer, etc., of clothing, home furnishings, and community personal property used as a family dwelling. (*Family C. 1100(c)*; see *infra*, §146.)
- (3) Transfer of real property. (*Family C. 1102*; see *infra*, §147 et seq.)
- (4) Transfer where a spouse is incompetent. (*Family C. 1103*; *Prob.C. 3000* et seq.; see *infra*, §158 et seq.)
- (5) Nonprobate transfers of community property on death. (*Prob.C. 5010* et seq.; see 14 *Summary* (10th), *Wills and Probate*, §308 et seq.)

West's Key Number Digest, Husband and Wife k.265 et seq.

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2. Gift of Community Property.

a. Statutory Limitation.

11 Witkin Sum. Cal. Law Com Prop § 137

[§ 137] Statutory Limitation.

(1) *Original Statutes.* Former C.C. 172, stating the husband's control (see *supra*, §129), contained the proviso that "he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration." Former C.C. 172a required that the wife join with him in executing any conveyance of community real property. (See *infra*, §147.) The result was that he could not make a gift of either real or personal property without the consent of the wife. (See *11 U.C.L.A. L. Rev.* 26.)

(2) *Current Statutes.* The statutory protection given the wife under the original sections was greatly weakened by decisions holding that the gift is normally only voidable, and, under some conditions, free from attack. (See *infra*, §138 et seq.) Ultimately, statutory law was revised to state the same restrictions on both spouses:

(a) 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 other spouse's written consent. (*Family C. 1100(b)*.) (See *17 A.L.R.2d 1118* [power of either spouse to make gift of community property to third party without consent of other spouse].)

(b) Both spouses must join in executing any instrument by which community real property is leased for longer than 1 year, or is sold, conveyed, or encumbered. (*Family C. 1102(a)*, *infra*, §147.) (See *Rutter Group*, 2 *Family Law* §8:666 et seq.; on permissible transactions, see *infra*, §138.)

West's Key Number Digest, Husband and Wife k.266.4

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b. Permissible Transactions.

11 Witkin Sum. Cal. Law Com Prop § 138

[§ 138] Permissible Transactions.

(1) *Original Statutes.* The courts, construing the original statutes (see *supra*, §137), held that the husband's gift of community property was not wholly void, and that the wife could be denied recovery in several situations:

(a) The wife could subsequently consent to the transfer. In *Spreckels v. Spreckels* (1916) 172 C. 775, 158 P. 537, the husband made gifts to certain children without the wife's consent. However, after his death, she stated in her will that she had omitted to provide for those children because of the prior gifts. *Held*, this was sufficient consent. (172 C. 788.) (See *Harris v. Harris* (1962) 57 C.2d 367, 370, 19 C.R. 793, 369 P.2d 481, *infra*, §140 [purported consent by husband as guardian of incompetent wife]; *Fidelity & Cas. Co. of New York v. Mahoney* (1945) 71 C.A.2d 65, 69, 161 P.2d 944, *supra*, §113 [dictum that burden of proof was on wife to show that she did not consent to gift of community funds].)

(b) The wife could be estopped to attack the gift. In *Lahaney v. Lahaney* (1929) 208 C. 323, 281 P. 67, community real property stood in the name of the husband. He made a deed of gift to his wife and his sister, granting to each "an undivided one-half interest in and to all his right, title and interest" in the property. The deed was delivered to the sister, and the wife knew nothing of it until her husband's death, when the sister sought to partition the property. *Held*, the property should be divided equally between the wife and the sister. The court reasoned that the deed showed an unmistakable intention on the part of the husband to dispose of all of his interest in the property, and to give one-half of that interest to each of the grantees; that he had the power to give half away; and that because the wife could only protect her undivided one-half interest, her acceptance of the half interest under the deed left her without further right to attack the validity of the deed. (208 C. 327.) (See *Mazman v. Brown* (1936) 12 C.A.2d 272, 275, 55 P.2d 539 [similar reasoning applied to husband's insurance policy naming parents and wife as beneficiaries]; 18 Cal. L. Rev. 400.)

(c) The husband's satisfaction of his legal obligation was not considered a gift. In *Perry v. Manning* (1952) 109 C.A.2d 557, 241 P.2d 43, the father of an illegitimate child married plaintiff wife, and later used community funds to buy property that he transferred to defendant, the child's mother. *Held*, plaintiff was not entitled to impress a constructive trust on the property, for the transfer was in furtherance of the father's legal duty to support his child. (109 C.A.2d 560.)

(2) *Current Statutes*. A spouse may make a gift of community personal property with the written consent of the other spouse. The gift prohibition also does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse. (*Family C. 1100(b)*.)

A number of cases, construing the substantively identical predecessor statute, have held that the statutory gift prohibition was not violated. (See *In re Marriage of Stephenson* (1984) 162 C.A.3d 1057, 1071, 1072, 209 C.R. 383, 13 Summary (10th), *Personal Property*, §146; *Willis v. Board of Administration* (1986) 181 C.A.3d 779, 782, 226 C.R. 567 [husband's selection of retirement benefit option providing for maximum lifetime payments but minimum survivor benefits was not gift of community property requiring wife's consent]; *Willis v. California* (1994) 22 C.A.4th 287, 293, 294, 27 C.R.2d 413 [delivery of state payroll warrants after employee's death (*Govt.C. 12479*) to employee's designee other than spouse was proper].) (On *Prob.C. 5010* et seq., governing nonprobate transfers of community property and issues relating to spousal consent, see 14 Summary (10th), *Wills and Probate*, §308 et seq.; on proceedings to set aside nonprobate transfers of community property that were not consented to by other spouse, see *Prob.C. 5021*, 14 Summary (10th), *Wills and Probate*, §310.)

(3) *Payment by Insurer*. Early cases held that a wife could not recover from an insurer that, on the husband's death and without notice of the wife's claim, paid the beneficiary. She could recover only from the beneficiary. (See *Blethen v. Pacific Mut. Life Ins. Co. of Calif.* (1926) 198 C. 91, 101, 243 P. 431; *New York Life Ins. Co. v. Bank of Italy* (1923) 60 C.A. 602, 605, 214 P. 61.)

Ins.C. 10172 codifies this rule and applies it to either spouse. Notwithstanding the statutory gift prohibition, the insurer may pay in accordance with the policy terms unless it receives written notice of an adverse claim at its home office before payment is made. (See *Leonard v. Occidental Life Ins. Co.* (1973) 31 C.A.3d 117, 123, 106 C.R. 899 [statute upheld against widow's claim that it denies reasonable time to assert community property right or other adverse claim].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Current Statutes*. See *Regents of Univ. of Calif. v. Benford* (2005) 128 C.A.4th 867, 877, 27 C.R.3d 441 [pension plan provisions prohibiting nonemployee spouse who predeceased employee spouse from bequeathing community property interest in plans did not violate *Family C. 1100(b)*; distinguishing *Chirmside v. Board of Administration of the Public Employees' Retirement System* (1983) 143 C.A.3d 205, 191 C.R. 605, text, §67].



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c. Recovery of One-Half After Death.

1. Rule and Theory.

11 Witkin Sum. Cal. Law Com Prop § 139

[§ 139] Rule and Theory.

(1) *Gift by Husband*. The earlier cases took the position that the widow was entitled to avoid the gift to the extent necessary to protect her interests. Thus, in *Dargie v. Patterson* (1917) 176 C. 714, 169 P. 360, the court pointed out that, under the law then in force, on the death of the husband one-half of the community property went to the wife, and the remainder to other heirs. The wife would not gain by recovery of more than one-half from the donee and consequently was permitted to recover only that. (176 C. 720, 721.)

In 1923, the Probate Code was amended (see *infra*, §249) to provide that, in the event of no testamentary disposition by the husband, the whole of the community property vested in the wife. It would appear that, under the theory of the *Dargie* case, the wife could now set aside the entire gift. The Supreme Court, however, held that previous cases established a right on the part of the husband to give away half the community property, and that this right was unaffected by the change in the rule of succession. (*Trimble v. Trimble* (1933) 219 C. 340, 347, 26 P.2d 477; see *Beemer v. Roher* (1934) 137 C.A. 293, 296, 30 P.2d 547; *Estate of McNutt* (1940) 36 C.A.2d 542, 553, 98 P.2d 253; *Medeiros v. Cotta* (1955) 130 C.A.2d 740, 746, 279 P.2d 814; *Morghee v. Rouse* (1964) 224 C.A.2d 745, 749, 37 C.R. 112 [action by wife's devisee]; Rutter Group, 2 Family Law §8:692; 22 Cal. L. Rev. 409.)

In *Estate of Wilson* (1986) 183 C.A.3d 67, 227 C.R. 794, decedent husband, without informing his wife, deposited community property funds in three bank accounts in his name as trustee for his children ("Totten trusts"; see 13 Summary (10th), Trusts, §8 et seq.). Decedent subsequently died intestate. *Held*, his surviving wife was entitled to one-half of each account as her share of community property. Although she had already received more than one-half of the total community property, decedent's right of disposition was limited to one-half of each community property asset. "In sum, since each Totten trust is an individual community property asset in which the decedent had only a one-half undivided interest at the time he died, he could pass on to third parties only his one-half of that asset--in this case one-half of the funds in each account. Although the practical effect of this rule limits the ability to make testamentary dispositions of community property through Totten trusts, individuals possess virtually unlimited ability to dispose of their share of the community assets at death by will." (183 C.A.3d 73.)

(2) *Gift by Wife*. In *Odone v. Marzocchi* (1949) 34 C.2d 431, 211 P.2d 297, decedent wife took community

earnings of herself and her husband and gave them to defendant. After her death plaintiff husband brought this action to recover the whole. *Held*, the rule that limits recovery to one-half when the wife sues applies also to the action by the husband. The court followed the explanation given in *Britton v. Hammell* (1935) 4 C.2d 690, 52 P.2d 221, *infra*, §143, that the gift is treated as the equivalent of a testamentary disposition. Because the wife, as well as the husband, may make a testamentary disposition of one-half the community property, either spouse may make a gift good as to one-half when the action is brought after death of the donor. (34 C.2d 439.) (See Rutter Group, 2 Family Law §8:683; 23 So. Cal. L. Rev. 83; 17 A.L.R.2d 1118 [power of either spouse to make gift of community property to third party without consent of other spouse].)

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2. Survival of Right.

11 Witkin Sum. Cal. Law Com Prop § 140

[§ 140] Survival of Right.

In *Harris v. Harris* (1962) 57 C.2d 367, 19 C.R. 793, 369 P.2d 481, the wife was adjudged incompetent in 1948, and the husband was her guardian until his replacement by plaintiff in March 1957. She died in September 1957. From 1950 to March 1957, the husband made gifts of community property to defendants, and made further gifts after that time. The wife at all these times was incapable of consenting. *Held*, plaintiff was entitled to recover one-half of the gifts.

(a) The chief defense--that the wife's right to avoid gifts violating the statutory prohibition was personal and did not survive--was summarily rejected; the present interest of the wife in community property was invaded by the gift, and the cause of action was for violation of a property right, which survives. (57 C.2d 370.)

(b) The other untenable defense related solely to the gifts during the first period, when the husband was the wife's guardian. A guardian may make some charitable gifts or allowances for support of next of kin that an incompetent would have approved, but he has no authority to do so without court permission. Here, not only was that permission not obtained, but no showing was made that the gifts would have been approved by the wife if competent. (57 C.2d 370, 371.) (See Rutter Group, 2 Family Law §8:677.1; 10 U.C.L.A. L. Rev. 664.)

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3. Life Insurance Policy.

11 Witkin Sum. Cal. Law Com Prop § 141

[§ 141] Life Insurance Policy.

In *Tyre v. Aetna Life Ins. Co.* (1960) 54 C.2d 399, 6 C.R. 13, 353 P.2d 725, a husband took a life insurance policy with defendant for \$ 20,000 face value. All premiums were paid with community funds, and since 1946 his wife was the lump sum beneficiary. In 1950, without his wife's knowledge, the husband exercised an option directing that (a) she was to receive an annuity based on her life expectancy at his death; (b) if she failed to survive him by 10 years, the monthly annuity payments were to be divided among the alternate beneficiaries--three daughters--for the remainder of the 10-year period only. He died in 1957, at which time she was 59, with a technical life expectancy of 14 years, but, having suffered heart attacks, she had a probable lesser expectancy. She therefore claimed half the face value (\$ 10,000) as her share of community property; and, as to the husband's half, demanded payment of it to her as annuities under his plan. *Held*, she was entitled only to the \$ 10,000 as her share of community property.

(a) *No control by husband after death.* The change of plan with the insurance company was a valid contract between the insured and insurer. But its effect on the wife was testamentary, and her right to set it aside, as to her half of the community property, was the same whether it was a true testamentary gift by will or an informal gift testamentary in effect. "Just as the husband cannot deprive his wife of her community interest by exceeding his testamentary powers to make gifts of more than half the community property to third persons, so he cannot defeat her interest by making a testamentary gift to her under conditions that restrict her management and control of the property. Her remedy in both situations is to disavow the gift and stand on her community rights." (54 C.2d 405.)

(b) *Necessity of election by wife.* Where the husband attempts to dispose of his wife's share of community property and names her as one of the takers, she must elect between her community rights and her husband's gift. Here, by standing on her community rights, she disqualified herself from also claiming as beneficiary of the gift. (54 C.2d 405.)

(c) *Rights of alternate beneficiaries.* Where a primary beneficiary to a life policy disqualifies himself, the proceeds are payable to the alternate beneficiary, not to the insured's estate. This is true even though the alternate beneficiary's interest was subject to a condition such as survival of the primary beneficiary. (54 C.2d 406.) Hence, the daughters take the remaining part of the annuity for the life of the wife, which still remains as the measurement of that annuity. (54 C.2d 406.) (See Rutter Group, 2 Family Law §8:695 et seq.; 49 Cal. L. Rev. 544; 13 Stanf. L. Rev. 616; 7 U.C.L.A. L.

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4. Qualification: Intention of Donor Spouse.

11 Witkin Sum. Cal. Law Com Prop § 142

[§ 142] Qualification: Intention of Donor Spouse.

In *Ballinger v. Ballinger* (1937) 9 C.2d 330, 70 P.2d 629, the rule of recovery of only one-half was followed, but the court indicated that the theory of *Lahaney v. Lahaney* (1929) 208 C. 323, 281 P. 67, supra, §138, might still be invoked to deny any recovery, thus introducing the difficult question of fact concerning the *intention* of the husband. The community property included certain shares of stock. Plaintiff's husband had new certificates issued for a number of shares, some to defendant, his brother, and some to plaintiff wife, all being delivered to defendant. After her husband's death, plaintiff learned the facts and sued defendant to set aside one-half the gift. Conceding the general rule of recovery, defendant nevertheless contended that, because the wife accepted the shares issued in her name, she elected to take the gift rather than to enforce her community rights. However, the judge found that the husband's transfer of stock to her was made "as a gift, without reference or relation to her share of the community property," and the appeal was on the judgment roll alone. *Held*, plaintiff could recover one-half the stock issued to defendant.

(a) The husband's gift to her made that part of the stock her separate property, and the contention that it was an acceptance of a division of community property was refuted by the express finding to the contrary. (9 C.2d 335.)

(b) "Had the transfers of these several shares of stock been made by the husband with the intention on his part of dividing the community property between his wife and himself, or his donee, then it might very properly be said that the acceptance of the gift by the wife would be deemed an election to take the same under the disposition made thereof by the husband, and that she thereby waived her right to revoke the gifts of the stock to appellant." (9 C.2d 335.) (See 26 Cal. L. Rev. 376.)

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d. Right To Recover the Whole.

1. During Marriage.

11 Witkin Sum. Cal. Law Com Prop § 143

[§ 143] During Marriage.

In *Britton v. Hammell* (1935) 4 C.2d 690, 52 P.2d 221, the husband made a gift deed of community property, and the wife brought suit to avoid it. *Held*, the gift was void and the entire property should be restored to the community. The court reasoned that the husband had no power during the marriage to divide the community property by giving away any part of it. *Trimble v. Trimble* (1933) 219 C. 340, 26 P.2d 477, was explained as resting on the theory that the gift before death was the equivalent of a valid testamentary disposition of one-half. (4 C.2d 692.) (See *Lynn v. Herman* (1946) 72 C.A.2d 614, 618, 165 P.2d 54 [automobile, given away by husband, recovered by wife]; *Rutter Group*, 2 Family Law §8:684 et seq.; 24 Cal. L. Rev. 306; 9 So. Cal. L. Rev. 400.)

Despite the manifest justice of this rule so far as the wife was concerned, it has vaguely troublesome implications in its restoration to the husband's control of property that he sought illegally to dissipate. An added complication arose in *Novo v. Hotel Del Rio* (1956) 141 C.A.2d 304, 295 P.2d 576. The husband paid a gambling debt to defendant using community funds; and plaintiff wife sought to recover the money. The defense was that this would permit the husband, as manager of the community property, to obtain relief indirectly (ordinarily denied to one *in pari delicto*); and the analogy of the former imputed contributory negligence rule (supra, §38) was suggested. The court, however, reversed a judgment for defendant, holding that the payment of the illegal gambling debt was a transfer of funds without valid consideration. "In the instant case, the husband, although benefiting by the wife's recovery, would not thereby be unjustly enriched. There would be but a return to the community of that which was unlawfully taken from it. The restoration of that which was unlawfully obtained does not result in the husband profiting from his own wrong. It merely places the parties in the positions which they occupied prior to the transaction. No one is penalized nor is anyone unduly enriched. The enforcement of the innocent wife's statutory right is neither inequitable nor unjust." (141 C.A.2d 308.) (See 30 So. Cal. L. Rev. 95; 9 Stanf. L. Rev. 400.)

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2. Where Property Is Commingled.

11 Witkin Sum. Cal. Law Com Prop § 144

[§ 144] Where Property Is Commingled.

A curious inconsistency in the theories of recovery appears where a spouse uses community funds to pay taxes on encumbrances on his or her separate property, and after that spouse's death intestate the surviving spouse seeks reimbursement from the deceased spouse's estate. The surviving spouse may recover the whole of the funds. (*Estate of Turner (1939) 35 C.A.2d 576, 580, 96 P.2d 363.*)

This decision follows the usual rule on the right of a spouse to compel reimbursement of the community where community property is commingled in some manner with the other spouse's separate property (see *supra*, §116 et seq.), and the effect of *Trimble v. Trimble* (1933) 219 C. 340, 26 P.2d 477, does not appear to have been considered. In substance, however, the factual situations are quite similar. (1) The husband gives community property to third persons; the wife, after his death, may recover only one-half. (*Trimble v. Trimble*, *supra*, 219 C. 347.) (2) The husband takes community funds to improve or protect his title to his separate property (he gives community property to himself, and after his death, to his heirs or devisees, who are third persons); the wife, after his death, may recover the whole. (*Estate of Turner*, *supra*.)

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2. Gift of Community Property.

e. Personal Liability of Spouse or Estate.

11 Witkin Sum. Cal. Law Com Prop § 145

[§ 145] Personal Liability of Spouse or Estate.

In *Fields v. Michael* (1949) 91 C.A.2d 443, 205 P.2d 402, plaintiff alleged that she married her husband in 1900; he deserted her shortly afterwards; he made many gifts of community property to donees who could not be found or had dissipated the property; and he died in 1946 leaving a large estate. The prayer was for judgment against defendant executor of the estate in the amount of half of certain gifts, and for an accounting as to other gifts. *Held*, a cause of action was stated. (a) The husband, as manager of the community property, occupies a position of trust; and a gift of the property without the wife's consent is a breach of his fiduciary obligation to her. (91 C.A.2d 447, 448.) (b) The wife, like the beneficiary of an express trust, may elect either to follow the property by suing the donee, or to hold the trustee or his estate personally liable. (91 C.A.2d 448.) (c) The husband's wrongful act in that kind of a case amounts to an "injury" to property of the wife, and therefore creates a survivable cause of action. (91 C.A.2d 449.)

The court did not determine whether the wife could have sued the husband during his lifetime. The reasoning of the opinion, with its trust analogy, necessarily supports that action. But the court found it unnecessary to make that holding. "The question is not whether plaintiff, during the existence of the marriage, could have prosecuted her cause of action against Fields and have obtained the relief which she now seeks against his estate. It is sufficient that he was guilty of wrongful acts for which she was entitled to redress. If she could not then have maintained an action against him for the value of her interest in the property which he had given away, it would have been due to the policy of the law to forbid vexatious and unnecessary litigation between spouses, and also upon the ground that during the existence of the marriage the husband has the control and management of the community property of which he cannot be divested except through procedure authorized by statute." (91 C.A.2d 451.)

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a. Personal Property.

11 Witkin Sum. Cal. Law Com Prop § 146

[§ 146] Personal Property.

(1) *Assignment of Wages*. Earnings of a married person are community property (supra, §37), and freely transferable when received. But a special statute requires the written consent of the spouse of a person who makes an assignment of wages or salary earned or to be earned. (*Lab.C. 300*; see 1 *Summary* (10th), *Contracts*, §724.)

(2) *Dwelling, Furnishings, and Clothes*. "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." (*Family C. 1100(c)*.)

The original statute, former C.C. 172, was construed in *Matthews v. Hamburger* (1939) 36 C.A.2d 182, 97 P.2d 465. The parties stored their furniture and took an automobile trip, and the husband deserted the wife. He sold the furniture to defendant, who inquired whether he was married, but accepted his explanation that the wife was unable to attend. *Held*, the wife could recover its value from defendant. The contention that the statute did not cover furniture in storage was rejected; so long as it is furniture of the home, rather than commercial furnishings, it is covered, regardless of whether it is *in* the home or elsewhere. (36 C.A.2d 184.) Broadly applied, this rule would make it dangerous for a buyer to purchase any furniture or wearing apparel in a warehouse or shop, without inquiring into the marital status and authority of the husband.

In *Matthews*, the defendant also contended that the wife could recover only one-half the value, under the theory of *Trimble v. Trimble* (1933) 219 C. 340, 26 P.2d 477, and the court answered that during the marriage the wife could recover the whole, under *Britton v. Hammell* (1935) 4 C.2d 690, 52 P.2d 221, supra, §143. Both the contention and the answer seem irrelevant; the rule of the *Trimble* case relates to gifts by the husband, and has nothing to do with transfers for consideration. The real basis for recovery of the whole of community property--real or personal--wrongfully sold by the husband without the wife's consent, is that the defendant buyer, an innocent party, is himself entitled to recover the consideration that he paid. The action is analogous to one to rescind a voidable transfer of title; the title, and of course the physical possession of the property, is restored to the true owner (the community), and the transferee gets back what he paid. Of course, in the usual case, the defendant could only recover from the husband, for the wife seldom would be in a position to restore any of the consideration. (But see *Mark v. Title Guarantee & Trust Co.* (1932) 122 C.A. 301,

312, 9 P.2d 839, *infra*, §150.)

In *Dynan v. Gallinatti* (1948) 87 C.A.2d 553, 197 P.2d 391, the husband borrowed money and gave a note and chattel mortgage on household furnishings as security, forging his wife's name. After his death, the holder of the note sought to enforce the claim against the estate. *Held*, the money claim was good, but the purported lien on the furnishings was void. The court rejected the argument that, under *Trimble*, the wife could only set aside half the transfer after death of the husband. The reason given was that the statutory prohibition was explicit; and the legislative intention was to make the wearing apparel and family furnishings entirely free from claims of creditors and from the husband's power of disposition. (87 C.A.2d 556.) (See 22 So. Cal. L. Rev. 291.)

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b. Real Property.

1. Requirement of Spouse's Consent.

11 Witkin Sum. Cal. Law Com Prop § 147

[§ 147] Requirement of Spouse's Consent.

(1) *Statutory Rule.* Except as provided in *Family C. 761* (property in certain revocable trusts; see 13 *Summary* (10th), *Trusts*, §198) and *Family C. 1103* (spouse without legal capacity; see *infra*, §158), either spouse has management and control of community real property, whenever it was acquired. However, 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 in the real property is leased for a longer period than 1 year, or is sold, conveyed, or encumbered. (*Family C. 1102(a).*) (See Rutter Group, 2 *Family Law* §8:656 et seq.)

(2) *Exception: Interspousal Transactions.* *Family C. 1102* does not apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife. (*Family C. 1102(b).*)

(3) *Limitation of Action.* An action to avoid an instrument mentioned in *Family C. 1102* that affects property standing of record in the name of either spouse alone, and is executed by the spouse alone, must be commenced within 1 year of the filing for record of that instrument. (*Family C. 1102(d).*) (See, construing original statute, former C.C. 172a, applicable only to husband, *Strong v. Strong* (1943) 22 *C.2d* 540, 544, 140 *P.2d* 386 [after 1-year period wife could not set up claim defensively in grantee's quiet title action]; *Maxwell v. Carlon* (1939) 30 *C.A.2d* 356, 360, 86 *P.2d* 666 [deed is voidable, not void]; *Yearout v. American Pipe & Steel Corp.* (1946) 74 *C.A.2d* 139, 141, 168 *P.2d* 174 [oil lease]; *Horton v. Horton* (1953) 115 *C.A.2d* 360, 364, 252 *P.2d* 397 [deed set aside]; *Morghee v. Rouse* (1964) 224 *C.A.2d* 745, 748, 37 *C.R. 112* [statute inapplicable to action by wife's devisee after her death].)

The 1-year statute is intended to protect third parties who might rely on the recorded instrument; it is not a bar where the transfer takes place without the knowledge or consent of the nonsigning spouse and the transferee has knowledge of the marriage relationship. (*Byrd v. Blanton* (1983) 149 *C.A.3d* 987, 990, 197 *C.R. 190.*)

(4) *Estoppel.* In cases decided under the original statute that restricted only the husband, it was held that the wife by her conduct might be estopped to attack the conveyance, as where she is present at the negotiations leading to its execution and makes no objection. (*Bush v. Rogers* (1941) 42 *C.A.2d* 477, 480, 109 *P.2d* 379; see *MacKay v. Darusmont* (1941) 46 *C.A.2d* 21, 26, 115 *P.2d* 221; Rutter Group, 2 *Family Law* §8:688.)

(5) *No Partial Specific Performance or Damages.* In *Andrade Dev. Co. v. Martin* (1982) 138 C.A.3d 330, 187 C.R. 863, plaintiff purchaser contracted from defendant husband and wife. Plaintiff sought partial specific performance (as to the husband's undivided one-half interest) or damages. The wife cross-complained for cancellation of the contract. *Held*, plaintiff could not recover and the contract should be cancelled.

(a) Following the approach of *Britton v. Hammell* (1935) 4 C.2d 690, 52 P.2d 221, *supra*, §143 (involving a void gift), the entire community property transferred without spousal consent should be returned. (138 C.A.3d 334.)

(b) Damages for breach of contract might be appropriate if title were in the husband's name alone and he led the purchaser to believe he was able to convey. But here that representation was not made, and the contract clearly indicated that the wife was a necessary party to the transaction. (138 C.A.3d 337.) (See *Harper v. Raya* (1984) 154 C.A.3d 908, 912, 201 C.R. 563 [applying rationale of *Andrade* to oral agreement to convey].)

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b. Real Property.

2. Lien on Community Realty.

aa. Entire Lien Is Voidable.

11 Witkin Sum. Cal. Law Com Prop § 148

[§ 148] Entire Lien Is Voidable.

(1) *Statement of Rule.* Under former C.C. 5127 (now *Family C. 1102*), the nonconsenting spouse could void a lien only as to his or her community interest in the property, or avoid the lien in its entirety. A line of cases following *Mitchell v. American Reserve Ins. Co.* (1980) 110 C.A.3d 220, 223, 167 C.R. 760 (promissory note, secured by deed of trust on community property residence, was made by husband without wife's consent), limited recovery to the nonconsenting spouse's community interest. Another line of cases following *Andrade Dev. Co. v. Martin* (1982) 138 C.A.3d 330, 187 C.R. 863 (husband signed contract to purchase community property realty but wife did not), allowed full recovery.

Droeger v. Friedman, Sloan & Ross (1991) 54 C.3d 26, 283 C.R. 584, 812 P.2d 931, approved the view that the lien might be avoided in its entirety. A wife pursuing dissolution proceedings executed a promissory note in favor of her attorneys for their fees and costs, secured by a deed of trust on two parcels of community real property. The husband, who did not sign the note or the deed, sued the wife's attorneys to quiet title to the encumbered community realty, contending that the encumbrance was invalid. *Held*, the husband's position was correct.

(a) The plain language of the statute required the consent of both spouses for a valid transfer or encumbrance of community real property. (54 C.3d 37.)

(b) Although economically weak spouses are at a disadvantage in securing adequate counsel in dissolution proceedings, nothing in the language or legislative history of former C.C. 5127 permitted a general rule against unilateral transfers to be subjected to an exception for securing attorneys' fees in dissolution proceedings. (54 C.3d 41.) C.C.P. 412.21(a)(2), providing that the automatic restraining order against alienation of property during dissolution proceedings does not preclude the parties from using community property to pay attorneys' fees, may be interpreted to apply only to liquid community assets, so as not to conflict with former C.C. 5127. (54 C.3d 43.) (See 19 *Pepperdine L. Rev.* 827; on legislative response to *Droeger*, as applied to lien for family law attorneys' fees, see *infra*, §149.)

(2) *Waiver.* In *Hyatt v. Mabie* (1994) 24 C.A.4th 541, 29 C.R.2d 447, the husband, without his wife's knowledge or

consent, encumbered his interest in the residence they held in joint tenancy shortly before trial in their dissolution proceeding. The dissolution judgment found that the residence was community property and ordered it sold, with the proceeds divided equally. The judgment also ordered the husband to use his share to pay off a note he had executed that was secured by the wife's separate property, and expressly reserved jurisdiction to resolve any future disputes over the sale or disposition of the proceeds. A prospective buyer was found, and a title search revealed the second deed of trust securing the husband's secret loan. The wife's counsel informed the lenders that the second trust deed was invalid and demanded that they cancel it, which they refused to do. The wife then filed, but did not serve, the instant action against her husband and the lenders, alleging fraud and conspiracy and seeking either cancellation of the note or damages in the amount of the encumbrance. Another buyer for the property was found, and during escrow the wife signed instructions directing that the note be paid from the proceeds of sale. The note was paid from the husband's share, reducing the amount available to pay down the encumbrance on the wife's separate property. Then the wife filed her complaint and summons. The husband defaulted, and the trial judge entered judgment in favor of defendant lenders. *Held*, affirmed; the wife showed no wrongdoing by the lenders, and had waived her remedy, which was to move the dissolution court for a modification of the judgment to equalize the property division in light of the newly discovered encumbrance. During the existence of the community, a nonconsenting spouse may under *Droeger* invalidate an encumbrance that does not conform to the statute. But this remedy is designed to protect the community, and in the present case the community had been dissolved before the wife knew of the encumbrance. Hence, she had no right to void the encumbrance in its entirety, but could only invalidate it to the extent of her interest in the property. Because the encumbrance did not affect her interest, the remedy of partial invalidation did not lie. She could have requested a modification of the dissolution judgment to adjust the property division, but she waived this remedy by choosing to proceed with the sale, knowing her husband's share of the proceeds would be used to pay off defendants' note. (24 C.A.4th 547.)

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2. Lien on Community Realty.

bb. Distinction: Family Law Attorney's Lien.

11 Witkin Sum. Cal. Law Com Prop § 149

[§ 149] Distinction: Family Law Attorney's Lien.

(1) *Enactment of Statutory Lien.* In response to the decision in *Droeger v. Friedman, Sloan & Ross* (1991) 54 C.3d 26, 283 C.R. 584, 812 P.2d 931, supra, §148, the 1992 Legislature enacted statutory procedures for the encumbrance of a spouse's interest in community real property in order to pay attorneys' fees in actions under the Family Law Act. (See 24 *Pacific L. J.* 812.) Effective January 1, 1994, these statutes were repealed and replaced by Family Code provisions. (See Cal. Civil Practice, 2 Family Law Litigation, §10:23.)

(2) *Creation of Lien.* Either party may "encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain legal counsel" in proceedings for dissolution, nullity, and legal separation. The encumbrance is designated as a "family law attorney's real property lien." (*Family C. 2033(a).*) Nothing in *Family C. 1102* (supra, §§147, 148) precludes a spouse from encumbering his or her interest in community real property to pay reasonable attorneys' fees in a proceeding for dissolution, nullity, or legal separation, as authorized by *Family C. 2033*. (*Family C. 1102(e).*)

An attorney for whom the lien is obtained must comply with *Rule 3-300 of the Rules of Professional Conduct*, regarding avoidance of adverse interests (see 1 *Cal. Proc.* (4th), *Attorneys*, §497). (*Family C. 2033(e).*)

A court has jurisdiction to resolve any dispute arising from the existence of the lien. (*Family C. 2034(c).*)

(3) *Notice.* Notice of the lien must be served either personally or on the opposing attorney at least 15 days before the encumbrance is recorded. The notice must contain a declaration under penalty of perjury, providing a description of the subject property, its value (with supporting documentation), existing encumbrances, a list of community assets and liabilities (with estimated values), and the amount of the lien. (*Family C. 2033(b).*) (See Cal. Civil Practice, 2 Family Law Litigation, §10:29 [form of notice].)

(4) *Objections.* The other party may file an ex parte objection to the lien, which must include a copy of the notice received, and a request to stay the recordation until further notice of the court. It must also include a declaration under

penalty of perjury, with specific objections to the lien and to items in the notice, the objector's belief as to appropriate items or value (with supporting documentation), and a specific statement as to why the encumbrance would likely result in an unequal property division or be otherwise unjust. (*Family C. 2033(c)*.) Except as otherwise provided by *Family C. 2033*, the general procedural rules regarding ex parte motions apply. (*Family C. 2033(d)*.)

Upon receiving an objection to the lien, the court may on its own motion determine whether the case warrants implementation of a case management plan under *Family C. 2032(d)* (see 11 *Summary* (10th), *Husband and Wife*, §201). (*Family C. 2034(b)*.)

(5) *Denial or Limitation of Lien*. On application of either party, the court may deny the lien based on a finding that it "would likely result in an unequal division of property because it would impair the encumbering party's ability to meet his or her fair share of the community obligations or would otherwise be unjust under the circumstances of the case." The court may also for good cause limit the amount of the lien, but that limitation is not to be construed as a determination of reasonable attorneys' fees. (*Family C. 2034(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Creation of Lien*.

Rule 3-300 of Rules of Professional Conduct:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §§436, 437.



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b. Real Property.

3. Bona Fide Purchasers.

11 Witkin Sum. Cal. Law Com Prop § 150

[§ 150] Bona Fide Purchasers.

(1) *Presumption of Validity.* A sole lease, contract, mortgage, or deed transferring community real property that is executed by the *husband* prior to January 1, 1975, or by *either spouse* after January 1, 1975, is presumed to be valid if the transferor spouse held record title to the property and the lessee, purchaser, or encumbrancer acted in good faith without knowledge of the marriage relation. (*Family C. 1102(c).*) (See *Mark v. Title Guarantee & Trust Co. (1932) 122 C.A. 301, 307, 9 P.2d 839* [presumption of valid transfer by husband under former statute was rebuttable; wife could recover even from bona fide purchaser, if she brought action within the 1-year period]; *16 Cal. L. Rev. 68; 21 Cal. L. Rev. 170; 1 So. Cal. L. Rev. 467; 7 So. Cal. L. Rev. 106.*)

(2) *Restoration of Consideration.* The problem of protecting both the nonconsenting wife and the innocent purchaser was before the court in *Mark*, where the husband sold the property and dissipated the purchase price. The court pointed out that the proceeds, though used for himself, were community funds, and held that the community, having profited by their receipt, was not entitled to restoration of the property without compensation to the purchaser. Accordingly, the wife's prayer for recovery should be granted "only upon condition that the innocent purchasers shall be restored to the position which they occupied when ... they parted with their money in return for his sole transfer." (*122 C.A. 312.*)

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1. Former Case Law.

11 Witkin Sum. Cal. Law Com Prop § 151

[§ 151] Former Case Law.

(1) *Agreement Changing Character of Property.* The husband and wife may, by contract, change property from community to separate or from separate to community. They may "fix their interests in real property as they wish, and may do this notwithstanding apparent conflict between such agreements and the form of the conveyance by which they acquire title, and notwithstanding disparity between amounts contributed from their separate property by each." (*Geller v. Anolik* (1954) 127 C.A.2d 21, 27, 273 P.2d 29; see *Weinberg v. Weinberg* (1967) 67 C.2d 557, 570, 63 C.R. 13, 432 P.2d 709; *Estate of Stuart* (1950) 97 C.A.2d 218, 226, 217 P.2d 723 [discussing pitfalls in agreements]; *Haseltine v. Haseltine* (1962) 203 C.A.2d 48, 58, 21 C.R. 238, citing the text; *Estate of Wilson* (1976) 64 C.A.3d 786, 798, 134 C.R. 749; 18 *San Diego L. Rev.* 143; 30 *A.L.R.2d* 1241 [transmutation of community property into property held by spouses in joint tenancy]; 67 *A.L.R.2d* 708 [what circumstances will render wife's personal earnings as separate property].)

After-acquired property, as well as that currently held, may be covered by a written contract defining its character. (See *Tompkins v. Bishop* (1949) 94 C.A.2d 546, 550, 211 P.2d 14 [contract between spouses, made at inception of marriage, that all property the wife "now has or may hereafter acquire" is her separate property].)

(2) *Executed Oral Agreement During Marriage.* A change of community property to separate property, or vice versa, by agreement of the spouses, did not require a writing; an oral agreement, if fully executed, was sufficient. (See *Woods v. Security-First Nat. Bank of Los Angeles* (1956) 46 C.2d 697, 701, 299 P.2d 657; *Estate of Neilson* (1962) 57 C.2d 733, 744, 22 C.R. 1, 371 P.2d 745, supra, §§124, 128; *Estate of Wahlefeld* (1930) 105 C.A. 770, 775, 288 P. 870; *Estate of Sill* (1932) 121 C.A. 202, 204, 9 P.2d 243; *Estate of Sehabiaque* (1941) 47 C.A.2d 793, 799, 119 P.2d 30; *Mooney v. Mooney* (1949) 91 C.A.2d 118, 121, 204 P.2d 630; *Faust v. Faust* (1949) 91 C.A.2d 304, 308, 204 P.2d 906; *Estate of Sears* (1960) 182 C.A.2d 525, 529, 6 C.R. 148; 42 *Cal. L. Rev.* 371; 8 *So. Cal. L. Rev.* 327; 9 *Stanf. L. Rev.* 183.)

The requirement that the agreement be "executed" was taken to mean only that, after the oral agreement, the acts or declarations of the parties must confirm and be consistent with the change in character of the property. (See *Kenney v. Kenney* (1934) 220 C. 134, 136, 30 P.2d 398.)

(3) *Proof of Agreement.* The agreement could be proved by testimony of the husband or wife (see *Estate of Cummins* (1955) 130 C.A.2d 821, 824, 280 P.2d 128), or testimony of a distributee (see *Estate of Wieling* (1951) 37

C.2d 106, 109, 230 P.2d 808).

Where the parties, to receive the benefit of split returns, reported income as community property, this was held evidence of a transmutation of property formerly separate to community. (See *Estate of Raphael* (1949) 91 C.A.2d 931, 938, 206 P.2d 391; *Handley v. Handley* (1952) 113 C.A.2d 280, 283, 248 P.2d 59; *Estate of Cummins*, *supra*, 130 C.A.2d 829; *Lawatch v. Lawatch* (1958) 161 C.A.2d 780, 790, 327 P.2d 603.)

A joint will executed by the parties and declaring their property to be community was also held effective to change its character from separate to community. (See *Estate of Watkins* (1940) 16 C.2d 793, 797, 108 P.2d 417; *Chase v. Leiter* (1950) 96 C.A.2d 439, 454, 215 P.2d 756; *Sandrini v. Ambrosetti* (1952) 111 C.A.2d 439, 447, 450, 244 P.2d 742; *Van Houten v. Whitaker* (1959) 169 C.A.2d 510, 517, 337 P.2d 900; *Knego v. Grover* (1962) 208 C.A.2d 134, 141, 25 C.R. 158; *Thompson v. Boyd* (1963) 217 C.A.2d 365, 383, 32 C.R. 513; *Estate of Wilson* (1976) 64 C.A.3d 786, 798, 134 C.R. 749.)

(4) *Gift by One Spouse to Other*. The cases decided under the original statutes giving the husband control of the community property (see *supra*, §131) held that he could make a gift of community property to her, and that it then became her separate property. Former C.C. 172 and 172a, requiring the written consent of the wife (see *supra*, §137), did not apply; i.e., he could make a gift to her without obtaining her written consent. (*Estate of Dobbel* (1894) 104 C. 432, 435, 38 P. 87; *Miller v. Brode* (1921) 186 C. 409, 411, 199 P. 531; *Logan v. Thorne* (1928) 205 C. 26, 28, 269 P. 626; *Dale v. Dale* (1927) 87 C.A. 359, 363, 262 P. 339; *Rice v. Ransom* (1960) 186 C.A.2d 191, 194, 8 C.R. 840.)

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2. Law Revision Commission Report.

11 Witkin Sum. Cal. Law Com Prop § 152

[§ 152] Law Revision Commission Report.

The Law Revision Commission in 1983 recommended that transmutations between the spouses of the character of marital property should be in writing to be valid, except for gifts of personal items that are small in value. (See 17 Cal. Law Rev. Com. Reports, p. 213.) The following reasons were given for the recommended change:

(1) "The convenience and practice of informality recognized by the rule permitting oral transmutations must be balanced against the danger of fraud and increased litigation caused by it. The public expects there to be formality and written documentation of real property transactions, just as it expects there to be formality in dealings with personal property involving documentary evidence of title, such as automobiles, bank accounts, and shares of stock. Most people would find an oral transfer of such property, even between spouses, to be suspect and probably fraudulent, either as to creditors or between each other." (17 Cal. Law Rev. Com. Reports, p. 214.)

(2) "California law should continue to recognize informal transmutations for certain personal property gifts between the spouses, but should require a writing for a transmutation of real property or other personal property. In the case of personal property 'gifts' between the spouses, gifts of most items such as household furnishings and appliances should be presumed community and gifts of clothing, wearing apparel, jewelry, and other tangible articles of a personal nature should be presumed separate (unless large or substantial in value). These presumptions most likely correspond to the expectations of the ordinary married couple." (17 Cal. Law Rev. Com. Reports, p. 214.)

The 1984 Legislature followed this recommendation by enacting former C.C. 5110.710 et seq. (see 16 *Pacific L. J.* 644), which is continued without substantive change in *Family C. 850* et seq. (See *infra*, §153 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Authority To Transmute.

11 Witkin Sum. Cal. Law Com Prop § 153

[§ 153] Authority To Transmute.

(1) *Transmutation by Agreement or Transfer*. Subject to *Family C. 851-853*, inclusive (governing fraudulent conveyance), married persons may by agreement or transfer, with or without consideration, do any of the following:

(a) Transmute community property to the separate property of either spouse.

(b) Transmute the separate property of either spouse to community property.

(c) Transmute the separate property of one spouse to the separate property of the other spouse. (*Family C. 850*.) (See 24 Western State L. Rev. 157 [preserving benefits of community property ownership under transmutation statute]; Rutter Group, 2 Family Law §8:471 et seq.)

The Law Revision Commission Comment points out: "[T]he spouses are subject to the general rules governing the validity of agreements and transfers, as well as the special rules that control the actions of persons occupying confidential relations with each other. ... The characterization of community and separate property may be affected by a general marital property agreement, prenuptial or otherwise, as well as by a transmutation of specific property." (On effect of marital agreements, see *Family C. 1500* et seq., supra, §24 et seq.)

(2) *Fraudulent Transfer Laws Apply*. A transmutation is subject to the laws governing fraudulent transfers (see 8 *Cal. Proc. (4th), Enforcement of Judgment*, §460 et seq.). (*Family C. 851*.)

In *State Bd. of Equalization v. Woo* (2000) 82 C.A.4th 481, 98 C.R.2d 206, the State Board of Equalization notified the wife that it would seek an earnings withholding order against her to pay her husband's sales tax debt. The couple then entered into a marital agreement transmuting their future earnings into their separate property. The wife subsequently became employed, earning approximately \$ 500,000 per year. The trial court entered an earnings withholding order, finding that the marital agreement was fraudulent and unenforceable. *Held*, affirmed.

(a) Under C.C. 3439.06(d) (8 *Cal. Proc. (4th), Enforcement of Judgment*, §470), "[a] transfer is not made until the debtor has acquired rights in the asset transferred." Relying on this provision, defendant contends that the marital agreement did not constitute a fraudulent transfer of community property because her husband had no property interest in her potential future earnings. This contention lacks merit; the husband had a present interest in defendant's future

earnings at the time he executed the marital agreement. It is well settled that earnings of either the husband or the wife acquired during the marriage constitute community property. Under *Family C. 751* (supra, §130), spouses' respective interests in community property during continuance of the marriage are "present, existing, and equal interests." The husband's interest in defendant's earnings was thus not dependent on whether she was employed at the time she executed the agreement. (82 C.A.4th 483.)

(b) Defendant's attempt to transmute these community property earnings to her separate property constituted a fraudulent transfer. Under *Family C. 851*, a transmutation is subject to the laws governing fraudulent transfers. Former C.C. 3439.04(a) (now C.C. 3439.04(a)(1); see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §467) provides that a transfer is fraudulent as to a creditor if made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." Here, defendant does not dispute that the community estate was liable for husband's tax debt under *Family C. 910* (infra, §177). Nor does she dispute that she entered into the marital agreement after learning that plaintiff intended to garnish her wages. Given these facts, the trial court correctly held that there was a fraudulent transfer. (82 C.A.4th 484.)

West's Key Number Digest, Husband and Wife k.266.1

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Fraudulent Transfer Laws Apply.*

Fraudulent transfer laws:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §488 et seq.C.C. 3439.06(d):

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §493.

C.C. 3439.04(a)(1):

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §495.



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a. In General.

11 Witkin Sum. Cal. Law Com Prop § 154

[§ 154] In General.

Family C. 852 sets forth the formal requisites for a valid transmutation of real or personal property. The Law Revision Commission Comment observes that the statute "imposes formalities on interspousal transmutations for the purpose of increasing certainty in the determination whether a transmutation has in fact occurred" and "makes clear that the ordinary rules and formalities applicable to real property transfers apply also to transmutations of real property between the spouses." (See 49 *U.C.L.A. L. Rev.* 1187 [conflict between transmutation and reimbursement statutes and proposal for solution].) (On exception to formality requirements for certain estate planning transactions, see *infra*, §156.)

(1) *Writing Requirement.* A transmutation of real or personal property made on or after January 1, 1985, is not valid unless made in writing by an express declaration that is made or accepted by the spouse whose interest in the property is adversely affected. (*Family C. 852(a)*; see *infra*, §155.)

(2) *Recordation of Real Property Transmutation.* A transmutation of real property must be recorded to be effective as to third parties without notice of the transaction. (*Family C. 852(b)*.)

(3) *Gift Exception.* *Family C. 852* does not apply to a gift between the spouses of apparel, jewelry, or other tangible articles of a personal nature that is used principally by the recipient spouse and that is not substantial in value considering the circumstances of the marriage. (*Family C. 852(c)*; but see *In re Marriage of Steinberger* (2001) 91 C.A.4th 1449, 1463, 111 C.R.2d 521 [diamond ring purchased with community funds without writing indicating its transmutation to separate property was community property, because ring was substantial asset].)

(4) *Commingling Exception.* *Family C. 852* does not affect the law governing characterization of commingled separate and community property (see *supra*, §112 et seq.). (*Family C. 852(d)*.)

(5) *Nonretroactivity.* *Family C. 852* does not apply to transmutations made before January 1, 1985; the law that would otherwise be applicable to such transmutations continues to apply. (*Family C. 852(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Commingling Exception.* See *In re Marriage of Weaver* (2005) 127 C.A.4th 858, 871, 26 C.R.3d 121 [under *Family*

C. 852(d), failure to comply with writing requirement of *Family C. 852(a)* did not prevent home acquired by spouses before marriage as separate property from being transmuted to community property by commingling of their separate property interest with community property used to pay mortgage and improvements on home during marriage].



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4. Form of Transmutation.
b. Writing Requirement.

11 Witkin Sum. Cal. Law Com Prop § 155

[§ 155] Writing Requirement.

(1) *Express Statement of Change Is Required.* A transmutation of real or personal property made on or after January 1, 1985, is not valid unless made in writing by an express declaration that is made or accepted by the spouse whose interest in the property is adversely affected. (*Family C. 852(a)*, supra, §154.) In *Estate of MacDonald (1990) 51 C.3d 262, 272 C.R. 153, 794 P.2d 911*, the requirement of an express declaration to effect a transmutation under former C.C. 5110.730(a), identical to *Family C. 852(a)*, was construed to mean that the writing must contain language expressly stating that the characterization or ownership of the property is being changed. The husband received a pension plan disbursement that was community property a few months after the wife learned that she had terminal cancer. The funds were deposited in IRA accounts opened in the husband's name. The designated beneficiary of the accounts was a revocable living trust, and the wife signed forms consenting to that designation. The trial judge found that when the wife executed the consent forms she had intended to waive her community property interest in the IRAs, and had transmuted her share of the funds to the husband's separate property. *Held*, reversed; the execution of the consent forms was insufficient to effect a transmutation under the statute.

(a) The Legislature intended to create a writing requirement that would enable courts to validate transmutations without resorting to extrinsic evidence, so as to discourage perjury and the proliferation of litigation. (*51 C.3d 272.*)

(b) Because the consent forms here did not state that the wife was changing the characterization or ownership of her interest in the funds, they failed to satisfy the "express declaration" requirement. (*51 C.3d 273.*)

(c) The statute does not require any particular locution; here it would have been sufficient if the forms had included a statement that "I give to the account holder any interest I have in the funds deposited in this account." (*51 C.3d 273.*)

Other cases are to the same effect. (See *Estate of Blair (1988) 199 C.A.3d 161, 165, 168, 244 C.R. 627* [cited with approval by *MacDonald*; neither wife's allegation in legal separation petition nor husband's deposition testimony, both claiming that family residence was community property, was sufficient writing]; *Abbott Elec. Corp. v. Storek (1994) 22 C.A.4th 1460, 1467, 27 C.R.2d 845* [following *Blair*]; *In re Marriage of Haines (1995) 33 C.A.4th 277, 293, 39 C.R.2d 673* [quitclaim deed from wife to husband transmuting community property to separate property gave rise to presumption of undue influence under *Family C. 721* (see supra, §133)]; *Estate of Bibb (2001) 87 C.A.4th 461, 468*,

469, 104 C.R.2d 415 [grant deed was sufficient to establish transmutation as to realty, but unsigned DMV reregistration computer printout was not sufficient to establish transmutation as to automobile]; *In re Marriage of Cross* (2001) 94 C.A.4th 1143, 1147, 114 C.R.2d 839 [Family C. 850 et seq. did not entitle husband or community to reimbursement for husband's separate property contributions to wife's separate property residence; even though husband did not agree in writing that his contributions were gifts, wife never agreed in writing to transmute her residence into husband's separate or community property]; *In re Marriage of Delaney* (2003) 111 C.A.4th 991, 997, 4 C.R.3d 378 [following *Haines*]; Rutter Group, 2 Family Law §8:472 et seq.; 23 Pacific L. J. 361 [donative and interspousal transfers of community property after *MacDonald*]; 18 Pepperdine L. Rev. 743 [*MacDonald*].) (On legislative abrogation of *MacDonald* as to consent to nonprobate community property transfers effective on death, see *infra*, §156.)

(2) *Extrinsic Evidence Is Not Admissible.* *In re Marriage of Barneson* (1999) 69 C.A.4th 583, 81 C.R.2d 726, applying Family C. 852(a), followed the *MacDonald* requirement of an express writing stating that a change in the characterization or ownership of the property is being made. In *Barneson*, the husband, after suffering a stroke, requested in written instructions that his stockbroker "transfer" stock into his wife's name and "journal" stock in his account into his wife's account. The husband thereafter filed a petition for dissolution of marriage and sought return of the stock. The trial court found that the stock transfers effectively transmuted the stock to the wife's separate property in compliance with Family C. 852(a). *Held*, reversed.

(a) The determination whether the language of a writing purporting to transmute property meets the *MacDonald* test must be made by reference to the writing itself, without resort to parol evidence. (69 C.A.4th 588.) Nothing in the husband's directions to transfer his stock into his wife's name or to journal the stock in his account into his wife's account expressly states that the characterization or ownership of the property is being changed. (69 C.A.4th 590.) The husband may simply have intended to transfer management of the property to his wife to enable her to more easily manage his financial affairs for him after his stroke without changing the ownership or characterization of the property. (69 C.A.4th 591.)

(b) The Supreme Court in *MacDonald* made clear that it was attempting to effectuate legislative intent by creating a bright-line test for evaluation of purported transmutions. The *MacDonald* test is not difficult to meet. It requires only a clear demonstration of a change in ownership or characterization of the property at issue. Here, if the husband truly intended a transmutation, he could have added to his directions to transfer stock a sentence indicating that he was giving his interest in the stock to the wife; he could even have directed them transferred into her name "as her sole and separate property." In the absence of such language, the documents are not sufficient to demonstrate a transmutation under Family C. 852(a). (69 C.A.4th 593.)

In re Marriage of Campbell (1999) 74 C.A.4th 1058, 88 C.R.2d 580, also held that Family C. 852 precludes the admission of extrinsic evidence to prove an oral transmutation agreement. In a dissolution of marriage proceeding, the trial court refused to consider extrinsic evidence that the family residence, owned by the husband before marriage, had been orally transmuted to community property before entering judgment that the residence was his separate property. *Held*, affirmed. The trial court's ruling complied with the plain language of Family C. 852 that a transmutation must be in writing. The ruling also effected the intent of the Legislature to create a writing requirement that enables courts to validate transmutions without resort to extrinsic evidence and thus without encouraging perjury and the proliferation of litigation. (74 C.A.4th 1062.) The fact that the ordinary rules and formalities applicable to real property transfers apply also to transmutions of real property between spouses does not mean that the doctrine of estoppel, as a long established exception to the statute of frauds, allows use of extrinsic evidence to prove a transmutation. (74 C.A.4th 1064.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Express Statement of Change Is Required.* See *In re Marriage of Benson* (2005) 36 C.4th 1096, 1107, 32 C.R.3d 471, 116 P.3d 1152 [relying on *Estate of MacDonald* (1990) 51 C.3d 262, 272 C.R. 153, 794 P.2d 911, text, p. 724, and its progeny; husband's retirement accounts were not transmuted to separate property without express writing, notwithstanding that oral agreement to transmute accounts was partially performed; part performance exception of

statute of frauds does not apply to writing requirement of *Family C. 852(a)*]; *In re Marriage of Starkman* (2005) 129 C.A.4th 659, 664, 28 C.R.3d 639 [husband did not transmute his separate property into community property by transferring it to family revocable trust, even though trust stated that transferred property was community unless transferor identified it as separate; some provisions in transfer documents referred to separate property, and thus documents did not expressly change characterization or ownership of husband's property]; *In re Marriage of Holtemann* (2008) 166 C.A.4th 1166, 1172, 83 C.R.3d 385 [separate property transferred to family trust by express transmutation agreement designating it as community property became community property, notwithstanding stated limitations in agreement; relying on and distinguishing *In re Marriage of Starkman*]; 37 McGeorge L. Rev. 33 [undue influence in transmutations].



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c. Estate Planning Transactions.

11 Witkin Sum. Cal. Law Com Prop § 156

[§ 156] Estate Planning Transactions.

(1) *Statement in Will Is Not Admissible.* A statement in a will of the character of property is inadmissible as evidence of a transmutation of the property in a proceeding commenced before the death of the testator. (*Family C. 853(a).*) (See *Estate of Gallio* (1995) 33 C.A.4th 592, 598, 39 C.R.2d 470 [living stepmother's will was inadmissible as evidence of transmutation despite declaration in deceased father's will that "all property in which I have any interest I hold as community property with my wife"].)

(2) *Waiver of Retirement Benefits.* Waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act does not effect a transmutation. (*Family C. 853(b).*)

(3) *Consent to Nonprobate Transfers of Community Property Effective on Death.* Prob.C. 5010 et seq., added in 1992, govern nonprobate transfers of community property and issues relating to spousal consent. (See 14 *Summary* (10th), *Wills and Probate*, §308 et seq.) The statutes are expressly inapplicable to written consents that meet the requirements of *Family C. 852*, which are governed by the law applicable to transmutations. (*Family C. 853(c)*; *Prob.C. 5022(b).*)

Prob.C. 5010 et seq. are, however, intended to overrule the effect of *Estate of MacDonald* (1990) 51 C.3d 262, 272 C.R. 153, 794 P.2d 911, supra, §155, on nonprobate transfers by making a written consent like the one signed by the wife in *MacDonald* irrevocable upon the death of either spouse. (Law Rev. Com. Comment to *Prob.C. 5030(c)*, 14 *Summary* (10th), *Wills and Probate*, §311.) This rule applies only to written consents given by spouses who die on or after January 1, 1993. (*Prob.C. 5014(b).*) (See *Estate of Petersen* (1994) 28 C.A.4th 1742, 1750, 1754, 34 C.R.2d 449, 14 *Summary* (10th), *Wills and Probate*, §310 [distinguishing *MacDonald* as to transmutation of annuity contracts, and following *MacDonald* as to insufficiency of money market account statement to accomplish transmutation]; Rutter Group, 2 Family Law §§8:487.5 et seq., 8:710 et seq.; 30 *San Diego L. Rev.* 425 [discussing *MacDonald*, legislative history, and subsequent statutory developments].)

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5. Conversion to Community Property With Right of Survivorship.

11 Witkin Sum. Cal. Law Com Prop § 157

[§ 157] Conversion to Community Property With Right of Survivorship.

(1) *Conversion.* Community property of a husband and wife, when expressly declared in a transfer document to be community property with right of survivorship, passes to the survivor on the death of one of the spouses without administration. The transfer may be accepted in writing on the face of the document by a statement signed or initialed by the grantees. (C.C. 682.1(a); on disposition on death of community property with right of survivorship, see *infra*, §251.)

(2) *Exception: Joint Bank Accounts.* C.C. 682.1 does not apply to a joint account in a financial institution governed by *Prob.C. 5100* et seq., the Multiple-Party Accounts Law (see 4 *Summary* (10th), *Negotiable Instruments*, §77 et seq.). (C.C. 682.1(b).)

(3) *Termination of Conversion.* Prior to the death of either spouse, the right of survivorship may be terminated under the same procedures by which a joint tenancy may be severed. (C.C. 682.1(a).) (On severance of joint tenancy, see 12 *Summary* (10th), *Real Property*, §54 et seq.; on *Prob.C. 5601*, reversing common law rule that dissolution or annulment does not sever joint tenancy between *former* spouses, see 14 *Summary* (10th), *Wills and Probate*, §319.)

(4) *Effective Date of Statute.* C.C. 682.1 became operative on July 1, 2001, and applies to instruments created on or after that date. (C.C. 682.1(c).)

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1. In General.

11 Witkin Sum. Cal. Law Com Prop § 158

[§ 158] In General.

(1) *Former Law.* The community property statutes require joinder of a spouse in a conveyance of real property (see *supra*, §147 et seq.), and an incompetent person cannot make an effective conveyance (see 12 *Summary* (10th), *Real Property*, §206). To overcome this obstacle, a statutory procedure was provided in former Prob.C. 1535.1 et seq. to govern transfers where one spouse is incompetent. (See *Estate of Risse* (1957) 156 C.A.2d 412, 419, 319 P.2d 789.) The statute was enacted prior to the 1973 legislation giving either spouse the management and control of community property (see *supra*, §132), and was not only obsolete in part but complex and lacking in specificity.

(2) *Enactment of Revised Law.* Prob.C. 3000 et seq. superseded the earlier statute, as of January 1, 1981, and brought the procedure up to date. (See 14 Cal. Law Rev. Com. Reports, p. 573; 11 *Pacific L. J.* 271; 14 *Summary* (10th), *Wills and Probate*, §1062 et seq.) Under *Family C. 1103* (*supra*, §136), Prob.C. 3000 et seq. apply in the following situations:

(a) Where one or both spouses either has a conservator of the estate or lacks legal capacity to manage and control the community property. (*Family C. 1103(a)*.)

(b) Where one or both spouses either has a conservator of the estate or lacks legal capacity to consent to a gift or disposition of community personal property as required by *Family C. 1100(b)* (*supra*, §137 et seq.) and *Family C. 1100(c)* (*supra*, §146), or to a real estate transaction as required by *Family C. 1102* (*supra*, §147 et seq.). (*Family C. 1103(b)*, (c).)

(3) *Definitions.* A number of terms are specifically defined:

(a) *Conservator, conservatorship estate, and conservatorship proceeding.* "Conservator" includes the guardian of the estate of a married minor (*Prob.C. 3004*); "conservatorship estate" includes the guardianship estate of a married minor (*Prob.C. 3006*); and "conservatorship proceeding" includes a guardianship of the estate proceeding of a married minor (*Prob.C. 3008*).

(b) *Community property.* "Community property" includes a community property business under the primary management and control of one spouse. (*Prob.C. 3002*.)

(c) *Lack of legal capacity.* A spouse "lacks legal capacity" to (1) manage and control community property if he or she is "substantially unable to manage or control the community property"; (2) join in or consent to a transaction involving community property if he or she "does not have legal capacity for the particular transaction measured by principles of law otherwise applicable to the particular transaction"; (3) do any act or engage in any activity described in (1) or (2) "if the spouse has a conservator." (*Prob.C. 3012(b).*)

Whether or not lacking legal capacity, however, a spouse may control an allowance (*Prob.C. 2421*); control wages or salary to the extent provided in *Prob.C. 2601*; make a will; and enter into transactions to the extent reasonable to provide the necessities of life to the spouse, the other spouse, and their minor children. (*Prob.C. 3012(c).*)

(4) *Preservation of Community Property Interests.* The proceeds of community property disposed of and property taken in exchange are community property. (*Prob.C. 3020(a).*)

(5) *Determination of Character of Property.* Where one or both spouses has a conservator, the court in which the conservatorship proceeding is pending may determine whether the property is community or separate. (*Prob.C. 3023(a).*) However, a person claiming title to or an interest in the property may object to the hearing if the court is not the proper court. (*Prob.C. 3023(b).*) Further, if a civil action is pending with respect to the issue the court must abate the hearing until its conclusion (*Prob.C. 3023(c)*), unless the court determines that the civil action was filed for the purpose of delay (*Prob.C. 3023(d)*).

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2. Management, Control, and Disposition.

11 Witkin Sum. Cal. Law Com Prop § 159

[§ 159] Management, Control, and Disposition.

(1) *Community Property.* Subject to joinder or consent requirements (see *infra*, §160), the right of *either spouse* to manage or control community property is not affected by the lack of legal capacity of the other spouse. (*Prob.C. 3051(a).*) Thus, if one spouse has legal capacity and the other has a conservator, the competent spouse has exclusive management and control. The community property is not part of the conservatorship estate, although the competent spouse may give written consent to have all or part of it included in, and managed, controlled, and disposed of as part of the conservatorship estate. (*Prob.C. 3051(b), (c).*) If *both* spouses have conservators, an undivided one-half interest in the community property is included in and managed, controlled, and disposed of as a part of each conservatorship estate. (*Prob.C. 3051(d).*) But a court may authorize the conservators to agree to include all or part of the property in one or the other of the estates to be managed, controlled, and disposed of as part of that conservatorship estate. (*Prob.C. 3051(e).*) (See Law Rev. Com. Comment; *11 Pacific L. J. 284*; Cal. Civil Practice, 4 Probate and Trust Proceedings, §31:49 [consent to inclusion of community property in conservatorship estate].)

(2) *Authority of Court.* When community property is included or proposed to be included in the conservatorship estate of a spouse, the court may make such orders to include or not include some or all of the property in the conservatorship estate "as may be appropriate for the orderly administration of the conservatorship estate or to protect the interests of the spouses." (*Prob.C. 3054.*)

(3) *Effect of Death or Subsequent Incapacity.* If consent is given that community property be included in the conservatorship estate of a spouse, the death of either spouse terminates the consent. (*Prob.C. 3055(a).*) If a spouse consents that community property be included in the conservatorship estate of the other, the subsequent lack of legal capacity of the consenting spouse has no effect on the property continuing to be so included. The appointment of a conservator for the consenting spouse, however, terminates the consent. (*Prob.C. 3055(b).*)

(4) *Powers of Conservator.* Except as otherwise provided in the statute or by the statute's joinder or consent requirements (*Prob.C. 3071*; see *infra*, §160), when community property is included in a conservatorship estate under *Prob.C. 3051 et seq.* for the purpose of management, control, and disposition, the conservator has the same powers and duties with respect to that property as the conservator has with respect to other property of the conservatorship estate. (*Prob.C. 3056.*)

(5) *Protection of Rights of Spouse Lacking Legal Capacity.* If one spouse *has* a conservator and the other spouse is managing or controlling community property, the conservator has the duty to keep reasonably informed concerning the management and control, including the disposition, of the property. If the conservator knows or believes the conservatee's property rights are being prejudiced, an action may be brought on behalf of the conservatee to enforce the duty to act as a fiduciary in managing and controlling community property as required by *Family C. 721 and 1100* (see *supra*, §133) and to obtain appropriate relief. (*Prob.C. 3057(b)*; see *Prob.C. 3057(a)* [authorizing "any interested person" to bring action where one lacks legal capacity but has no conservator].)

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3. Substitute for Joinder or Consent.

11 Witkin Sum. Cal. Law Com Prop § 160

[§ 160] Substitute for Joinder or Consent.

(1) *Satisfaction of Joinder or Consent Requirements.* If one or both spouses lacks legal capacity for a transaction for which the joinder or consent of both spouses is required by *Family C. 1100* or *1102* or by any other statute, the requirement of joinder or consent is satisfied as provided in *Prob.C. 3071*. (*Prob.C. 3070, 3071(a)*; for joinder or consent requirements, see *supra*, §146 et seq.; on lack of legal capacity, see *supra*, §§158, 159.) The requirements under *Prob.C. 3071* are as follows:

(a) Where one spouse is competent to transact and the other has a conservator, the requirement is satisfied if there is joinder or consent by both the competent spouse and the conservator. (*Prob.C. 3071(b)*.)

(b) Where both spouses have conservators, each conservator must join in or consent to the transaction. (*Prob.C. 3071(c)*.)

(c) Where a spouse lacks legal capacity and does not have a conservator, either a conservator must be appointed to join in or to consent to the transaction under *Prob.C. 3071(b)* or (c), or a proceeding may be brought under *Prob.C. 3100* et seq. (see *infra*, §161 et seq.) to authorize a particular transaction, thereby avoiding the need to appoint a conservator for that spouse. (*Prob.C. 3071(d)*; see Law Rev. Com. Comment.)

(2) *Court Order Authorizing Joinder or Consent by Conservator.* Ordinarily, court authorization is required before a conservator may join in or consent to a transaction under *Prob.C. 3071*. The order is obtained either in the conservatorship proceeding (see *Prob.C. 2403* [instructions from or confirmation by court], *Prob.C. 2540* et seq. [sales by guardian or conservator], or *Prob.C. 2580* et seq. [substituted judgment]; see 14 *Summary* (10th), *Wills and Probate*, §1025), or in a proceeding for a particular transaction pursuant to *Prob.C. 3100* et seq. (*Prob.C. 3072(a)*.) But court authorization is not required for a conservator to consent to a sale, conveyance, or encumbrance of community personal property requiring consent under *Family C. 1100(c)* if the conservator could sell or transfer the property under *Prob.C. 2545* (see 14 *Summary* (10th), *Wills and Probate*, §1016) without court authorization where the property is a part of the conservatorship estate. (*Prob.C. 3072(b)*.)

(3) *Manner of Joinder or Consent.* The joinder or consent under *Prob.C. 3071* must satisfy the requirements of the statute applicable to the transaction. The spouse with legal capacity must comply just as if both spouses had legal

capacity. The conservator must similarly satisfy the requirements of the statute applicable to the transaction and, in addition, the joinder or consent executed by the conservator must refer to the court order (if one is required by *Prob.C.* 3072) authorizing the conservator to join in or consent to the transaction. (*Prob.C.* 3073; for joinder and consent requirements of statutes applicable to various transactions, see Legislative Com. Comment.)

(4) *Good Faith Real Property Transactions.* Notwithstanding *Prob.C.* 3070 et seq., a transaction affecting real property, entered into "by a person acting in good faith and for a valuable consideration, is not affected by the fact that one or both spouses have conservators" unless a notice of the conservatorship or conservatorships has previously been recorded in the county in which the property is located. (*Prob.C.* 3074; for comparable provision, see *Prob.C.* 1875; 14 *Summary* (10th), *Wills and Probate*, §953.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Proceeding for Particular Transactions.

a. Nature of Proceeding.

11 Witkin Sum. Cal. Law Com Prop § 161

[§ 161] Nature of Proceeding.

(1) *Authorization of Transaction.* A proceeding may be brought pursuant to *Prob.C. 3100* et seq. for a court order authorizing a proposed transaction, whether or not joinder or consent of both spouses is required, if *both* of the following conditions are satisfied: (a) one of the spouses is alleged to lack legal capacity for the proposed transaction, whether or not that spouse has a conservator; and (b) the other spouse either has legal capacity for the proposed transaction or has a conservator. (*Prob.C. 3101(a)*.) Approval of a proposed transaction avoids the need to establish a conservatorship for a spouse lacking legal capacity merely to accomplish that transaction. (Law Rev. Com. Comment.)

The court may determine in the proceeding whether property is the community or separate property of either spouse, unless the court determines that "the interest of justice" requires that the determination be made in a civil action. (*Prob.C. 3101(d)*.)

(2) *Declaration of Legal Capacity.* *Prob.C. 3101(b)* authorizes a proceeding for a court order declaring that one or both spouses has legal capacity for a proposed transaction. It covers the case where a spouse does not have a conservator and it is uncertain whether the spouse has that legal capacity. (See Law Rev. Com. Comment.)

(3) *Consolidation of Proceedings.* One proceeding may be brought under both *Prob.C. 3101(a)* and (b). (*Prob.C. 3101(c)*.) This enables a proceeding to be brought, for example, to have one spouse declared to have legal capacity for a proposed transaction, to have the other spouse determined to lack that capacity, and to authorize the proposed transaction. (See Law Rev. Com. Comment.)

(4) *Nonexclusive Procedure.* The procedure in *Prob.C. 3100* et seq. is not exclusive of other remedies. (*Prob.C. 3101(e)*.)

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4. Proceeding for Particular Transactions.

b. Authorized Transactions.

11 Witkin Sum. Cal. Law Com Prop § 162

[§ 162] Authorized Transactions.

As used in *Prob.C. 3100* et seq., a "transaction" is one that involves tangible or intangible community real or personal property, an interest in that property, or a lien or encumbrance on that property, including, but not limited to, those transactions listed in *Prob.C. 3102*. (*Prob.C. 3100(a)*.) However, if the proposed transaction involves property in which a spouse also has a separate property interest, the court may, for good cause, include that separate property in the transaction. (*Prob.C. 3100(b)*.) Under *Prob.C. 3102*, covered transactions include, but are not limited to, the following:

(1) *Contracts*. "Sale, conveyance, assignment, transfer, exchange, conveyance pursuant to a preexisting contract, encumbrance by security interest, deed of trust, mortgage, or otherwise, lease, including but not limited to a lease for the exploration for and production of oil, gas, minerals, or other substances, or unitization or pooling with other property for or in connection with such exploration and production." (*Prob.C. 3102(a)*.)

(2) *Compromise or Settlement of Claims*. "Assignment, transfer, or conveyance, in whole or in part, in compromise or settlement of an indebtedness, demand, or proceeding to which the property may be subject." (*Prob.C. 3102(b)*.)

(3) *Public or Charitable Dedications or Conveyances*. A number of public and charitable conveyances or dedications meet the statutory definition of "transaction":

(a) Dedication or conveyance, with or without consideration, of the property to a public entity for any purpose, or an easement over the property to any person for any purpose. (*Prob.C. 3102(c)*.)

(b) Conveyance, release, or relinquishment to a public entity, with or without consideration, of access rights to a street, highway, or freeway from the property. (*Prob.C. 3102(d)*.)

(c) Consent as a lienholder to a dedication, conveyance, release, or relinquishment under *Prob.C. 3102(c)* and (d) by the owner of the property subject to the lien. (*Prob.C. 3102(e)*.)

(d) "Conveyance or transfer, without consideration, to provide gifts for such purposes, and to such charities, relatives (including one of the spouses), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the spouses." (*Prob.C. 3102(f)*.)

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c. Petition.

11 Witkin Sum. Cal. Law Com Prop § 163

[§ 163] Petition.

(1) *Who May File or Join in Petition.* Either spouse (whether competent or not) or the conservator of either spouse may file or join in a petition, but if the petition requests approval of a proposed transaction, at least one of the petitioners must be either a conservator or a spouse with legal capacity for the transaction. (*Prob.C. 3111*; see *Prob.C. 3113* [conservator or competent spouse may bring proceeding without need to appoint conservator for other spouse].)

If the petitioning spouse is one whose legal capacity for the proposed transaction is sought to be determined, the court may permit the spouse to appear without a representative, appoint a guardian ad litem for the spouse, or take other action warranted by the circumstances. (*Prob.C. 3112(a)*.) If a petitioning spouse lacks legal capacity, the court may require the spouse to be represented by his or her conservator or appoint a guardian ad litem for the spouse. (*Prob.C. 3112(b)*.)

(2) *Content and Form of Petition.* A proceeding brought under *Prob.C. 3100* et seq. may seek either court authorization of a proposed transaction, or a judicial declaration of legal capacity for the proposed transaction, or both. (See *Prob.C. 3101(a)*, (b), and (c); supra, §161.) To implement the expanded character of these proceedings, *Prob.C. 3120* provides not only that several proposed transactions may be included in one petition and proceeding, but also that the petition may contain inconsistent allegations and may request relief in the alternative.

Prob.C. 3121 prescribes the contents of a petition filed under *Prob.C. 3100* et seq., regardless of the relief sought. In addition, special allegations are required depending on the relief requested. (See *Prob.C. 3122* [petition for court order authorizing transaction]; *Prob.C. 3123* [petition for court order declaring legal capacity for transaction]; Cal. Civil Practice, 4 Probate and Trust Proceedings, §31:53 [form of petition].)

(3) *Jurisdiction.* Jurisdiction over the proceeding is in the superior court. (*Prob.C. 3110(a)*.)

(4) *Venue.* The proper county for commencement of the proceeding is the county in which a conservatorship proceeding for one of the spouses is pending. If no conservatorship proceeding is pending, then the proper county is either (a) the county of residence of one or both spouses; or (b) any other county that is in the spouses' best interests. (*Prob.C. 3110(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Content and Form of Petition.* The fee for filing a petition for an order concerning a community property transaction under *Prob.C. 3100* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(a)*, amended in 2008; *Govt.C. 70655(c)(5)*, added in 2005.)



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d. Notice and Hearing.

11 Witkin Sum. Cal. Law Com Prop § 164

[§ 164] Notice and Hearing.

(1) *Citation and Notice.* At least 15 days before the hearing, a citation must be issued to each nonpetitioning spouse alleged to lack legal capacity for the proposed transaction or, if the spouse has a conservator, notice must be served on the conservator. A copy of the petition must accompany the citation or notice. If the conservator is served with notice, no citation need be issued to the spouse unless the court otherwise orders. (*Prob.C. 3130(a)*, (b); for manner of service, see *Prob.C. 3130(c)*.)

Prob.C. 3131 prescribes similar procedures for serving notice on a nonpetitioning spouse having legal capacity for a proposed transaction. In addition, notice (but not a copy of the petition) must be mailed to those persons required to be named in the petition. The Law Revision Commission Comment observes that the statute takes into account the fact that, because of the expansion of the class of persons who may bring a proceeding under *Prob.C. 3100* et seq., the nonpetitioning spouse may have legal capacity, thus making unnecessary the issuance and service of a citation.

(2) *Representation of Incompetent Spouse.* A conservator served pursuant to *Prob.C. 3130* must appear and the Director of Mental Health or the Director of Developmental Services given notice pursuant to *Prob.C. 1461* may appear and represent a spouse alleged to lack legal capacity. (*Prob.C. 3140(a)*; for notice requirement when ward or conservatee is or has been state hospital patient, see 14 *Summary* (10th), *Wills and Probate*, §911.) If a spouse alleged to lack legal capacity is not otherwise represented, the court may appoint the public guardian, public administrator, or a guardian ad litem to represent his or her interests. (*Prob.C. 3140(b)*.) If that spouse is unable to retain legal counsel, the court on request must appoint the public defender or private counsel under *Prob.C. 1471* and, if the appointment is made, *Prob.C. 1472* (compensation of court-appointed attorneys) applies. (*Prob.C. 3140(c)*; see 14 *Summary* (10th), *Wills and Probate*, §909.) Except as provided in *Prob.C. 3140(c)*, the court may fix a reasonable fee, payable from proceeds of the transaction or as the court directs, for all services rendered by private counsel, the public guardian, public administrator, or guardian ad litem, and by counsel for those persons. (*Prob.C. 3140(d)*.)

(3) *Presence of Incompetent Spouse at Hearing.* If a spouse is alleged to lack capacity for the proposed transaction and has no conservator, the spouse must be produced at the hearing unless unable to attend. (*Prob.C. 3141(a)*; for method of showing medical inability to attend, see *Prob.C. 3141(b)*, (c); 14 *Summary* (10th), *Wills and Probate*, §944.)

(4) *Information to Incompetent Spouse.* Except when the presence of that spouse at the hearing is not required, a spouse alleged to lack legal capacity for the proposed transaction who has no conservator must be informed by the court at the commencement of the hearing that a determination of lack of legal capacity may result in approval of the proposed transaction and that the spouse has a right to legal counsel, including appointed counsel if unable to retain one. (*Prob.C. 3142.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Representation of Incompetent Spouse.* *Prob.C. 3140* was amended and resubdivided in 2008 as follows:

(a) A conservator, served pursuant to *Prob.C. 3130*, must appear and the Director of Mental Health or the Director of Developmental Services, given notice pursuant to *Prob.C. 1461*, may appear and represent a spouse alleged to lack legal capacity. (*Prob.C. 3140(a)*; for notice requirement when ward or conservatee is or has been state hospital patient, see 14 *Summary* (10th), *Wills and Probate*, §911.)

(b) The court may appoint an investigator to review the proposed transaction and report to the court about its advisability. (*Prob.C. 3140(b).*)

(c) If the court determines that a spouse alleged to lack legal capacity has not competently retained independent counsel, the court may appoint the public guardian, the public administrator, or a guardian ad litem to represent his or her interests. (*Prob.C. 3140(c).*) If that spouse is unable to retain legal counsel, the court on request must appoint the public defender or private counsel under *Prob.C. 1471* and, if the appointment is made, *Prob.C. 1472*, governing compensation of court-appointed attorneys, applies. (*Prob.C. 3140(d)(1)*; see 14 *Summary* (10th), *Wills and Probate*, §909.) If the petition proposes a transfer of substantial assets to the petitioner from the other spouse and the court determines that the spouse has not competently retained independent counsel for the proceeding, the court may appoint counsel for the other spouse if the court determines that appointment would be helpful to resolve the matter or necessary to protect the interests of the other spouse. (*Prob.C. 3140(d)(2).*)

(d) Except as provided in *Prob.C. 3140(d)(1)*, the court may fix a reasonable fee, payable from the proceeds of the transaction or as the court directs, for all services rendered by private counsel, the public guardian, the public administrator, or a guardian ad litem, and by counsel for those persons. (*Prob.C. 3140(e).*)



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e. Orders.

11 Witkin Sum. Cal. Law Com Prop § 165

[§ 165] Orders.

(1) *Order Declaring Legal Capacity.* If the court determines that the spouse has legal capacity for the proposed transaction, it must so order. (*Prob.C. 3143.*) A court determination that a spouse *lacks* legal capacity for the proposed transaction affects the legal capacity of the spouse for that transaction alone and has no effect on the legal capacity of the spouse for any other purpose. (*Prob.C. 3145.*)

(2) *Order Authorizing Transaction.* The court may authorize the proposed transaction if it determines all of the following:

(a) The property that is the subject of the proposed transaction is the community property of the spouses, and, if the proposed transaction involves property in which a spouse also has a separate property interest, that there is good cause to include that separate property in the transaction. (*Prob.C. 3144(a)(1).*)

(b) One of the spouses has a conservator or otherwise lacks legal capacity for the proposed transaction. (*Prob.C. 3144(a)(2).*)

(c) The other spouse either has legal capacity for the proposed transaction or has a conservator. (*Prob.C. 3144(a)(3).*)

(d) Each of the spouses either joins in or consents to the proposed transaction, has a conservator, or is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved by isolated incidents of negligence or improvidence. (*Prob.C. 3144(a)(4).*)

(e) The proposed transaction is one that should be authorized under *Prob.C. 3100* et seq. (*Prob.C. 3144(a)(5).*)

If the court determines that the transaction should be authorized, it must so order and may authorize the petitioner to do and perform all acts and execute and deliver all papers, documents, and instruments necessary to effectuate the order. (*Prob.C. 3144(c).*) In its order, the court may prescribe appropriate terms and conditions, including but not limited to requiring joinder or consent of another person. (*Prob.C. 3144(d).*) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §31:54 [form of order].)

If the proposed transaction is to provide gifts or otherwise affect estate planning of the spouse who is alleged to lack capacity, as would be properly the subject of a petition under *Prob.C. 2580* et seq. (substituted judgment; see 14 *Summary* (10th), *Wills and Probate*, §1025 et seq.) in the case of a conservatorship, the court may authorize the transaction under *Prob.C. 3100* et seq. only if the transaction is one that the court would authorize under *Prob.C. 2580* et seq. (*Prob.C. 3144(b).*)

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f. Consummation of Transaction.

11 Witkin Sum. Cal. Law Com Prop § 166

[§ 166] Consummation of Transaction.

(1) *Bond*. A bond is required unless dispensed with by the court for good cause. The bond is conditioned on the duty of the petitioner to account for and apply the proceeds of the transaction received by the petitioner only as the court directs. (*Prob.C. 3150(a)*.) Unless fixed at a lesser amount, a bond given by an admitted surety company must be in an amount not less than the value of the personal property to be received by the petitioner. If the sureties are personal sureties, the bond must be approved by the court and be for twice the amount required for a bond given by an admitted surety company. (*Prob.C. 3150(b), (c)*.) *Prob.C. 2328*, relating to bonds in guardianship and conservatorship proceedings, applies to the bond of the petitioner under *Prob.C. 3100* et seq. (*Prob.C. 3150(d)*; see 14 *Summary* (10th), *Wills and Probate*, §983 et seq.)

(2) *Execution, Delivery, and Recording*. The petitioner must, on receipt of consideration, execute, acknowledge, and deliver any necessary instruments or documents as directed, setting forth in them that they are made by authority of the order. (*Prob.C. 3151(a)*.) A certified copy of the order must be recorded in each county in which there is any real property affected by the order or on which there is a lien or encumbrance affected by the order. (*Prob.C. 3151(b)*.)

If a sale is made on credit pursuant to the order, the petitioner must take the note of the person to whom the sale is made for the amount of the unpaid balance of the purchase money, with that security for its payment as the court by order approves. The note must be made payable to the petitioner or, if the petition was made by a conservator, to the petitioner as conservator. (*Prob.C. 3151(c)*.)

(3) *Validity of Transfer*. "A sale, conveyance, assignment, transfer, exchange, encumbrance, security interest, mortgage, deed of trust, lease, dedication, release, or relinquishment, and any instrument or document, made pursuant to the court's order, is as valid and effectual as if the property affected thereby were the sole and absolute property of the person making it." (*Prob.C. 3152*.)

(4) *Liability of Conservator*. "Notes, encumbrances, security interests, mortgages, leases, or deeds of trust," executed as provided in *Prob.C. 3100* et seq. by a petitioning conservator, "create no personal liability against the conservator so executing, unless the conservator is one of the spouses and then only to the extent that personal liability would have resulted had both spouses had legal capacity for the transaction and joined in the execution." (*Prob.C. 3153*)

.)

(5) *Further Proceedings If Transaction Is Not Consummated.* If a party to the transaction, other than the petitioner, does not consummate an authorized transaction, the court, on application of the petitioner and notice to the parties, may vacate the order authorizing the transaction. (*Prob.C. 3154(a).*) If the order authorized the sale or encumbrance of property, the petitioner may apply to the court by supplemental petition for an order authorizing any other sale or encumbrance of the property "to the advantage, benefit, or best interests of the spouses or their estates." (*Prob.C. 3154(b).*) The required notice of hearing on the supplemental petition is set forth in *Prob.C. 3154(b).*

If the court grants the order, it may authorize the petitioner "to do and perform acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order." (*Prob.C. 3154(c).*)

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5. Support of Conservatee Spouse.

a. Nature and Purpose of Legislation.

11 Witkin Sum. Cal. Law Com Prop § 167

[§ 167] Nature and Purpose of Legislation.

(1) *Law Revision Commission Recommendation.* In 1980, the California Law Revision Commission published a study of the procedure for enforcement of support of a conservatee spouse from community property. Existing law permitted only a civil action, with unnecessary expense and delay. The Commission recommended a summary proceeding, similar to that provided by *Prob.C. 2250* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §975) where a conservatee claims title to or possession of property held by another. (See 15 Cal. Law Rev. Com. Reports, p. 1459.) The recommended legislation was enacted in 1981 by the addition of *Prob.C. 3080* et seq.

(2) *Nonexclusive Procedure.* The statute does not affect or limit the right of the conservator or an interested person to institute an action against a person or to otherwise enforce the duty imposed by law to support the spouse having a conservator. (*Prob.C. 3092.*) The Law Revision Commission Comment points out that a civil action is necessary if support is sought from the separate property of a spouse managing and controlling the community property or from some other person.

(3) *Judicial Council Rules.* "Notwithstanding any other provision of law, the Judicial Council may provide by rule for the practice and procedure in proceedings under" *Prob.C. 3080* et seq. (*Prob.C. 3091.*)

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5. Support of Conservatee Spouse.

b. Petition and Citation.

11 Witkin Sum. Cal. Law Com Prop § 168

[§ 168] Petition and Citation.

(1) *Petition.* The petition may be filed by the conservator or conservatee, a relative or friend of the conservatee, "or any interested person." (*Prob.C. 3080*; see Cal. Civil Practice, 4 Probate and Trust Proceedings, §31:50 [form of petition].) The Law Revision Commission Comment observes that a public officer, public employee, or public entity may file as an "interested person."

(2) *Citation and Examination.* On filing of the petition, the court may cite the spouse who has the management or control of community property to appear for examination under oath. The court and the petitioner may examine the spouse concerning the community property and other relevant matters. The court may then make an order requiring the person cited to disclose his or her knowledge of the community property and other relevant matters. If the person cited fails to appear and submit to an examination, or to comply with an order, the court may proceed against the person under *Prob.C. 8870* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §600). (*Prob.C. 3082.*)

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c. Hearing and Incidental Proceedings.

11 Witkin Sum. Cal. Law Com Prop § 169

[§ 169] Hearing and Incidental Proceedings.

(1) *Notice of Hearing.* Notice of hearing must be given as provided in *Prob.C. 1460* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §910 et seq.). (*Prob.C. 3081(a)*.) If the managing spouse is not the conservator, notice and a copy of the petition must be served on that spouse in accordance with *C.C.P. 410.10* et seq. (see 3 *Cal. Proc.* (4th), *Actions*, §918 et seq.). (*Prob.C. 3081(b)*.) (On request for special notice, see *Prob.C. 2700*, 14 *Summary* (10th), *Wills and Probate*, §987; on notice and service when conservatee is mental patient or property consists of veterans' benefits, see *Prob.C. 1461(b)(2)* and *1461.5(b)*, 14 *Summary* (10th), *Wills and Probate*, §§911, 913.)

(2) *Continuance.* "Any person interested in the proceeding" may request time for filing a response to the petition, for discovery proceedings, or for other preparation for the hearing, and the court must grant a continuance for a reasonable time for any of these purposes. (*Prob.C. 3086*.)

(3) *Income, Expense, and Property Declaration of Managing Spouse.* The managing spouse must serve and file a current income and expense declaration and a current property declaration in the form prescribed by the Judicial Council for use in family law proceedings. (*Prob.C. 3084*; for Income and Expense Declaration, Property Declaration, and related forms, see Judicial Council Form No. FL-150 et seq., 11 *Summary* (10th), *Husband and Wife*, §199.)

(4) *Support Pendente Lite.* The court may, after notice and hearing, order the managing spouse to pay from the community property "such amount as the court determines is necessary to the support and maintenance of the conservatee spouse" pending decision on the petition. That order "does not prejudice the rights of the spouses or other interested parties with respect to any subsequent order." An order may be modified or revoked "at any time" except as to accrued amounts. (*Prob.C. 3083*.)

(5) *Ex Parte Protective Orders.* During the pendency of a proceeding, the court, on application of the petitioner, may issue ex parte orders (a) restraining the managing spouse from transferring, encumbering, hypothecating, concealing, "or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life"; or (b) requiring the managing spouse to notify the petitioner of any proposed "extraordinary expenditures" and to account to the court for them. (*Prob.C. 3085*.)

(6) *Determination of Character of Property*. If the issue is raised, the court may hear and determine whether property is community property or separate property of either spouse. (*Prob.C. 3087*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice of Hearing*.

C.C.P. 410.10 et seq.:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1000 et seq.



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5. Support of Conservatee Spouse.

d. Orders.

11 Witkin Sum. Cal. Law Com Prop § 170

[§ 170] Orders.

(1) *Order To Apply Community Property to Support.* The court may order the managing spouse "to apply the income or principal, or both" of the community property to the support and maintenance of the conservatee. (*Prob.C. 3088(a)*; see Cal. Civil Practice, 4 Probate and Trust Proceedings, §31:51 [form of order].)

(2) *Factors Considered in Determining Amount.* The court, in determining the amount ordered, must consider the following circumstances: (a) the earning capacity and needs of each spouse; (b) the obligations and assets, including the separate property, of each spouse; (c) the duration of the marriage; (d) the age and health of the spouses; (e) the standard of living of the spouses; (f) any other relevant factors the court considers "just and equitable." (*Prob.C. 3088(b)*.) At the request of an interested person, the court must make appropriate findings on the circumstances. (*Prob.C. 3088(c)*.)

(3) *Periodic Payments.* The court may order the managing spouse to make a specified monthly or other periodic payment to the conservator or to any other person designated in the order. The court may order that the managing spouse give reasonable security for those payments. (*Prob.C. 3088(d)*; see Law Rev. Com. Comment [order may designate State Department of Mental Health or the State Department of Developmental Services].)

(4) *Jurisdiction To Modify or Vacate Order.* On petition, "where justice requires," the court may modify or vacate the order except as to accrued amounts. The petitioner must mail a notice of the time and place of the hearing, with a copy of the petition, to the managing spouse, at least 15 days before the hearing. Notice must also be given for the period and in the manner prescribed by *Prob.C. 1460* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §910 et seq.) to persons entitled to notice under that statute. At the request of an interested person, the order of modification or revocation must include findings of fact, and may be made retroactive to the date of filing of the petition to revoke or modify, or to any date subsequent thereto. (*Prob.C. 3088(f)*.) An order made under *Prob.C. 3088* may also be modified by the court in a dissolution or legal separation proceeding. (*Prob.C. 3088(g)*.)

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CHAPTER XVI - Community Property

Witkin Summary of California Law
IV. TITLE AND CONTROL
E. Management or Disposition Where Spouse Lacks Capacity.
5. Support of Conservatee Spouse.
e. Enforcement.

11 Witkin Sum. Cal. Law Com Prop § 171

[§ 171] Enforcement.

(1) *In General.* Orders may be enforced by execution, the appointment of a receiver, contempt, "or by such other order or orders as the court in its discretion may from time to time deem necessary." (*Prob.C. 3090.*)

(2) *Wage Assignment.* Where periodic payments have been ordered (see *supra*, §170), the court may order an assignment of a sufficient part of the earnings of the managing spouse to the person designated to receive the payments. (*Prob.C. 3088(e).*)

(3) *Division of Community Property on Refusal To Comply With Order.* If the managing spouse refuses to comply with a support order made in the proceeding or in a separate action, the court, on request of the petitioner or other interested person, may in its discretion divide the community property and the quasi-community property "as it exists at the time of division, equally in the same manner as where a marriage is dissolved." The property awarded to each spouse becomes the separate property of that spouse, and the court must order that the property awarded to the conservatee spouse be transferred or paid over to his conservator and treated as part of the conservatorship estate. "The fact that property has been divided pursuant to this section has no effect on the nature of property thereafter acquired by the spouses, and the determination whether the thereafter-acquired property is community or separate property shall be made without regard to the fact that property has been divided pursuant to this section." (*Prob.C. 3089.*)

"The authority granted by Section 3089 is useful, for example, where property awarded to the conservatee spouse will be sufficient to provide for support and maintenance of that spouse. Division in such a case will avoid the need for further proceedings to enforce the support obligation from the community property. Division of community property does not, however, necessarily eliminate the support obligation of the competent spouse. If community property is acquired by the competent spouse after division of the property, that community property may be ordered applied to support the conservatee under this article or by other procedures. However, a separate action is necessary to obtain future support from separate property of the competent spouse." (Law Rev. Com. Comment.)

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CHAPTER XVI - Community Property

Witkin Summary of California Law V. LIABILITY OF SEPARATE AND COMMUNITY PROPERTY FOR DEBT A. Former Law.

1. Liability of Separate Property for Debts.

11 Witkin Sum. Cal. Law Com Prop § 172

[§ 172] Liability of Separate Property for Debts.

(1) *Separate Property of Husband.* The separate property of the husband was not liable for his wife's debts, whether they were contracted before or after marriage. As to the wife's debts contracted before the marriage, former C.C. 170 so provided; and as to her debts contracted after the marriage, the rule followed from the fact that even the community property was not liable for the debts. (See 22 *Cal. L. Rev.* 554.)

(2) *Separate Property of Wife.* Under former C.C. 171, the wife's separate property was liable for all of her debts, whenever contracted, except that her separate property was not liable for a debt secured by a mortgage or other hypothecation of the community property unless she expressly consented in writing. (See 26 *Cal. L. Rev.* 332; 11 *So. Cal. L. Rev.* 92; 48 *So. Cal. L. Rev.* 996.) Under former C.C. 171, her separate property was not liable for her husband's debts. (See *Hansen v. Cramer* (1952) 39 *C.2d* 321, 324, 245 *P.2d* 1059; *Newman v. Newman* (1969) 268 *C.A.2d* 895, 898, 74 *C.R.* 444.)

(3) *Revision in 1973.* Former C.C. 5120, 5121 and 5123 were amended in 1973, effective January 1, 1975, to eliminate the specific provisions on husband and wife and refer to the spouses. (See *Carroll v. Puritan Leasing Co.* (1978) 77 *C.A.3d* 481, 488, 143 *C.R.* 772.)

(4) *Other Spouse's Necessaries: Original Law.* Although the wife's separate property was not liable for the husband's ordinary debts, a special liability was imposed by former C.C. 171. Her separate property was liable for his necessities of life, furnished while they were living together, except as to property held by her at the time of her marriage or acquired by her after marriage by devise, succession, or gift, other than by gift from the husband. (See *In re Marriage of Higgason* (1973) 10 *C.3d* 476, 488, 110 *C.R.* 897, 516 *P.2d* 289; *Ackley v. Maggi* (1927) 86 *C.A.* 631, 635, 261 *P.* 311; *Taggart v. Shepherd* (1932) 122 *C.A.* 755, 759, 10 *P.2d* 808; *Smith v. Bentson* (1932) 127 *C.A.* Supp. 789, 794, 15 *P.2d* 910; *Credit Bureau of San Diego v. Johnson* (1943) 61 *C.A.2d* Supp. 834, 842, 142 *P.2d* 963 [medical services rendered to husband]; *Follansbee v. Benzenberg* (1954) 122 *C.A.2d* 466, 476, 265 *P.2d* 183 [same]; *Credit Bureau of Santa Monica Bay Dist. v. Terranova* (1971) 15 *C.A.3d* 854, 857, 93 *C.R.* 538.)

The liability of the wife was limited and conditional. It reached her "through her property rather than her property through her"; i.e., certain kinds of her separate property could be reached, but the liability was not her personal debt. (*Medical Finance Assn. v. Allum* (1937) 22 *C.A.2d* Supp. 747, 752, 66 *P.2d* 761.) Probably three types of her separate

property were liable: (a) gifts from her husband; (b) her earnings and accumulations while living separate from her husband; and (c) the proceeds of her business as a sole trader. But the usual kinds of wife's separate property--that acquired before marriage or by devise, succession or gift (from a third person) after marriage--were expressly exempt. (See *Lane v. McAlpine* (1931) 115 C.A. 607, 610, 2 P.2d 184 [where wife herself incurred indebtedness for necessities of herself and her husband, her separate property was liable without exemptions, because it was her own debt and not his]; *Wahl v. Martinelli* (1951) 101 C.A.2d 869, 870, 226 P.2d 668.)

(5) *Other Spouse's Necessaries: Revision in 1973.* An amendment to former C.C. 5121, effective January 1, 1975, made the liability that of either spouse, and eliminated the categories of exempt property. The separate property of a spouse was liable for debts contracted by either spouse "for the necessities of life pursuant to Section 5132." Former C.C. 5132 stated the obligation of a spouse to support the other spouse when there was no community property or quasi-community property. (See 48 So. Cal. L. Rev. 1032.)

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CHAPTER XVI - Community Property

Witkin Summary of California Law V. LIABILITY OF SEPARATE AND COMMUNITY PROPERTY FOR DEBT A. Former Law. 2. Liability of Community Property for Debts.

11 Witkin Sum. Cal. Law Com Prop § 173

[§ 173] Liability of Community Property for Debts.

(1) *Debts of Husband: Community Property Liable.* The community property was liable for all debts of the husband, however and whenever contracted. There was no legal theory of "community debts" in this state, and with respect to liability no distinction was made between debts of the husband contracted for the benefit of the community and those contracted for his personal benefit. The rule was derived from the husband's control over community property under former C.C. 172 and 172a, and was unaffected by the enactment of former C.C. 161a, giving the wife a vested interest in the community property. (See *Grolemond v. Cafferata* (1941) 17 C.2d 679, 688, 111 P.2d 641; *Odone v. Marzocchi* (1949) 34 C.2d 431, 440, 211 P.2d 297; *Weinberg v. Weinberg* (1967) 67 C.2d 557, 562, 63 C.R. 13, 432 P.2d 709 [first wife as creditor could levy on community property of second marriage]; *Brunvold v. Victor Johnson & Co.* (1943) 59 C.A.2d 75, 80, 138 P.2d 32; *Harley v. Whitmore* (1966) 242 C.A.2d 461, 471, 51 C.R. 468 [community property awarded to wife by divorce decree was liable for debts incurred by husband during marriage]; *Gould v. Fuller* (1967) 249 C.A.2d 18, 24, 57 C.R. 23; *Alameda v. Aberle* (1968) 268 C.A.2d 424, 425, 73 C.R. 926 [community property was liable for husband's obligation to county for support of his aged mother]; *In re Marriage of Smaltz* (1978) 82 C.A.3d 568, 570, 147 C.R. 154 [husband's court-ordered support obligations to his former wife]; *In re Marriage of D'Antoni* (1981) 125 C.A.3d 747, 750, 178 C.R. 285 [obligation for child and spousal support arising out of dissolution of earlier marriage]; *Gunn v. United Air Lines* (1982) 138 C.A.3d 765, 767, 188 C.R. 302 [husband's obligation under property settlement with former wife, to designate children by that former marriage as beneficiaries of his retirement policy]; 13 Cal. L. Rev. 46; 42 Cal. L. Rev. 378; 26 So. Cal. L. Rev. 198; 39 So. Cal. L. Rev. 255; 68 A.L.R.4th 877 [liability of community property for antenuptial debts].)

Although the community property was liable, the community was entitled to reimbursement. (*Weinberg v. Weinberg*, *supra*; *In re Marriage of Walter* (1976) 57 C.A.3d 802, 806, 129 C.R. 351.) (See 56 Cal. L. Rev. 1746.)

(2) *Debts of Husband: Exceptions for Wife's Earnings and Personal Injury Damages.* Originally, the earnings of the wife, though community property, were expressly exempt from liability for either the husband's separate debts or those contracted for the benefit of the community. (Former C.C. 168, carried over into former C.C. 5117; see *Street v. Bertolone* (1924) 193 C. 751, 754, 226 P. 913; 13 Cal. L. Rev. 46.) This was even true as to debts contracted by the husband for his necessities. (See 14 Cal. L. Rev. 402.) But a 1937 amendment made an exception to the exemption. The wife's earnings were liable for debts contracted by the husband or wife for necessities furnished to either of them while they were living together. (See 26 Cal. L. Rev. 331.)

The exemption was lost when the wife's earnings were commingled with other community property so as to lose their separate identity. (*Pfunder v. Goodwin* (1927) 83 C.A. 551, 553, 257 P. 119 [earnings were invested in other community property held in husband's name]; *Truelsen v. Nelson* (1941) 42 C.A.2d 750, 754, 109 P.2d 996 [wife's earnings commingled with husband's in common bank account in wife's name, without segregation or records]; *Tedder v. Johnson* (1951) 105 C.A.2d 734, 738, 234 P.2d 149 [earnings used to purchase realty taken in joint tenancy].)

On the reclassification of personal injury damages as community property (see *supra*, §40), the exemption from liability for the husband's debts was extended to "community property personal injury damages of the wife." (Former C.C. 168, later former C.C. 5117.)

(3) *Debts of Wife Contracted Before Marriage*. With one exception, the community property was liable for debts of the wife contracted before marriage. This rule was based on the common law, there being no statutory provisions on the subject. (*Van Maren v. Johnson* (1860) 15 C. 308; *Johnson v. Taylor* (1931) 120 C.A. Supp. 771, 772, 4 P.2d 999 ["When a man takes to himself a wife, he takes her for better or for worse and with her debts and encumbrances"]; see 68 A.L.R.4th 877 [liability of community property for antenuptial debts].)

The exception, stated in former C.C. 167, later former C.C. 5120, was that the earnings of the husband after marriage were not liable for the premarital debts of the wife. Because those earnings are the principal source of community property, this made a substantial change in the rule; but the rule laid down in connection with the wife's earnings, i.e., that the exemption was lost by commingling with other community property, was logically applicable to the husband's earnings as well.

(4) *Debts of Wife Contracted After Marriage*. Under former C.C. 167, later former C.C. 5116, the community property was not liable for the contracts of the wife made after marriage, unless they were secured by a pledge or mortgage thereof executed by the husband. (See *Grace v. Carpenter* (1941) 42 C.A.2d 301, 302, 108 P.2d 701 [community property was not liable for wife's statutory obligation to support her mother]; *General Ins. Co. v. Schian* (1967) 248 C.A.2d 555, 557, 56 C.R. 767.)

An exception was recognized in *Hulsman v. Ireland* (1928) 205 C. 345, 349, 270 P. 948, where the wife acted as an "agent" for the community. (See 17 Cal. L. Rev. 265; 2 So. Cal. L. Rev. 375.) In 1937, an amendment to former C.C. 167, later former C.C. 5116, made another exception by providing that earnings of the wife were liable for her contracts "heretofore or hereafter made before or after marriage." (See *Tinsley v. Bauer* (1954) 125 C.A.2d 724, 728, 271 P.2d 116; 6 Cal. L. Rev. 329.)

(5) *Revision of 1973*. The 1973 revision, effective January 1, 1975, followed the new approach of uniform rules for husband and wife.

(a) *Debts contracted before marriage*. The "earnings of the spouse after marriage" were not liable for the debts of the other spouse contracted before the marriage. (Former C.C. 5120.)

(b) *Debts contracted after marriage*. The "property of the community" was liable for the contracts of either spouse made after the marriage. (Former C.C. 5116.) (See *Robertson v. Willis* (1978) 77 C.A.3d 358, 365, 369, 143 C.R. 523; 6 Pacific L. J. 303; 18 San Diego L. Rev. 184; 48 So. Cal. L. Rev. 1029, 1117, 1122.)

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CHAPTER XVI - Community Property

Witkin Summary of California Law
V. LIABILITY OF SEPARATE AND COMMUNITY PROPERTY FOR DEBT
A. Former Law.
3. Nonliability of Community Property for Torts.

11 Witkin Sum. Cal. Law Com Prop § 174

[§ 174] Nonliability of Community Property for Torts.

(1) *Torts of Husband.* Community property has traditionally been liable for all of the husband's obligations, including his tort liabilities. (See *Grolemund v. Cafferata* (1941) 17 C.2d 679, 683, 111 P.2d 641; *Vest v. Superior Court* (1956) 140 C.A.2d 91, 94, 294 P.2d 988.)

(2) *Torts of Wife.* The early rule that the husband was personally liable for the wife's torts (see *Henley v. Wilson* (1902) 137 C. 273, 274, 70 P. 21) was changed by the enactment of former C.C. 171a in 1913. Under former C.C. 161a, giving the wife a vested interest in community property, it could have been urged that her interest was subject to the claim of her tort creditor. But the courts held otherwise. (See *Smedberg v. Bevilockway* (1935) 7 C.A.2d 578, 581, 46 P.2d 820; *McClain v. Tufts* (1947) 83 C.A.2d 140, 142, 187 P.2d 818; 24 Cal. L. Rev. 218; 51 Cal. L. Rev. 451; 9 So. Cal. L. Rev. 270; 21 So. Cal. L. Rev. 388.) However, if the husband actually participated in the wrongful act, the community property was liable for his tort. (*Meyer v. Thomas* (1940) 37 C.A.2d 720, 725, 100 P.2d 360.) But the mere fact that he benefited from the act, e.g., where property or money was acquired by her conversion, was not sufficient for imposition of liability. (*Tinsley v. Bauer* (1954) 125 C.A.2d 724, 728, 271 P.2d 116.)

(3) *Statutory Revision.* The 1968 Legislature changed the law on liability of the community property for torts of either spouse, by revisions of former C.C. 171a, later former C.C. 5122, and enactment of former C.C. 164.7, later former C.C. 5113; and the 1973 revision, effective January 1, 1975, made an additional change in former C.C. 5122; that statute provided that a married person is not liable for any injury or damage caused by the other spouse "except in cases where he would be liable therefor if the marriage did not exist." (See 26 *Hastings L. J.* 1575; 18 *San Diego L. Rev.* 181; 48 *So. Cal. L. Rev.* 1036, 1122.)

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Witkin Summary of California Law V. LIABILITY OF SEPARATE AND COMMUNITY PROPERTY FOR DEBT B. Revised Law. 1. Law Revision Commission Report.

11 Witkin Sum. Cal. Law Com Prop § 175

[§ 175] Law Revision Commission Report.

The Law Revision Commission in 1983 made a recommendation for recodification and clarification of the law governing the rights of spouses and creditors, including provisions governing reimbursement rights between the spouses. (See 17 Cal. Law Rev. Com. Reports, p. 1.) The Report contains an elaborate treatment of the background law and the reasons for proposed provisions.

(1) *General Approach*. "Most community property states, including California, employ a system that is most favorable to creditors. Creditors under this system may satisfy their debts out of property over which the debtor spouse has management and control. In California, this means that generally a creditor may reach the separate property of the debtor spouse and all the community property since the spouses have equal management and control of the community property. This general rule is subject to exceptions, which are discussed below." (17 Cal. Law Rev. Com. Reports, p. 10.)

"Of the possible approaches to liability of marital property for debts, the managerial system (which is the present California system) is generally most sound in theory and practice. It gives greatest assurance that debts of the spouses will be satisfied, subject to the statutory scheme of exemptions which will preserve property necessary for basic needs of the spouses. Systems that require characterization of type of debt and partition of community property create serious administrative problems. Moreover, liability of the property over which the debtor has management and control conforms to the reasonable expectations of both spouses and creditors. The Commission recommends that the general approach of existing California law to liability of marital property for debts be preserved." (17 Cal. Law Rev. Com. Reports, p. 10.)

(2) *Property Under Management and Control of One Spouse*. "Under California's managerial approach to liability of marital property, property over which a spouse has management and control is liable for the debts of the spouse. Since both spouses have equal management and control of the community property, this yields the rule that all community property is liable for a debt of either spouse." (17 Cal. Law Rev. Com. Reports, pp. 10, 11.)

"California law, however, prescribes three situations where community property is under the management and control of only one spouse. A spouse who is operating or managing a business that is community personal property has the sole management and control of the business. A community property bank account in the name of a spouse is free

from the control of the other spouse. If one spouse has a conservator, the other spouse having legal capacity has exclusive management and control of the community property. Whether these types of community property are liable for a debt of the spouse not managing and controlling the property is not clear." (17 Cal. Law Rev. Com. Reports, p. 11.)

"The policy supporting liability of community property for a debt of either spouse incurred before or during marriage--maximum protection of creditors' rights with minimum procedural burdens--also supports liability of the property regardless whether it is under the management and control of one or both spouses. The law should make clear that the community property is liable for a debt of either spouse notwithstanding the concept that liability follows management and control." (17 Cal. Law Rev. Com. Reports, p. 11.)

(3) *Liability of Quasi-Community Property.* "The most significant provisions of existing law refer only to community and separate property in prescribing rules governing the property that is liable for debts incurred by one or both spouses. These provisions make no reference to quasi-community property--property acquired by a spouse while domiciled in another jurisdiction that would have been community property if acquired while domiciled in California. The result of the failure specifically to recognize quasi-community property is that the liability of the property for debts appears to be governed by the rules that apply to separate property rather than the rules that apply to community property." (17 Cal. Law Rev. Com. Reports, p. 11.)

"Quasi-community property should be treated as community property for the purpose of determining liability for debts. This rule is consistent with the public policy of California that the marital unit shares its assets and its liabilities. This policy is particularly important in the area of creditors' remedies not only because it promotes sharing of common obligations but also because it both helps ensure equal access to credit by both spouses and protects California creditors who extend credit in reliance on the availability of marital assets to satisfy debts." (17 Cal. Law Rev. Com. Reports, p. 12.)

(4) *Out-of-State Real Property.* "Community property ... does not include real property situated outside California, even though the property may have been acquired by the spouses with community property during their marriage while domiciled in California." (17 Cal. Law Rev. Com. Reports, p. 12.) "Real property situated outside California that is acquired with community assets should also be treated as community property for the purpose of liability for debts. The fact that real property is located outside California should not immunize the property from claims of community creditors. A court that has personal jurisdiction of the parties can make appropriate orders for conveyance of the property to satisfy claims of creditors." (17 Cal. Law Rev. Com. Reports, p. 13.)

(5) *Order of Satisfaction Against Property.* "Under the California approach to liability of marital property, all of the community property as well as the debtor's separate property is liable for a debt. However, existing California law prescribes an order of satisfaction against community and separate property in a few situations." (17 Cal. Law Rev. Com. Reports, p. 13.)

"An order of satisfaction scheme creates a number of practical problems. It requires a special mechanism in the procedure for enforcing a judgment to determine whether the debt is community or separate in character. It requires a creditor who seeks to satisfy the debt out of one type of property to ascertain whether the other types of property have been exhausted; this may involve cumbersome court proceedings. Moreover, even if there are other types of property that have not been exhausted, an order of satisfaction scheme may require the creditor to seek satisfaction from property that is likely to be exempt or that is of such a nature that the cost of applying it to the judgment will exceed its worth." (17 Cal. Law Rev. Com. Reports, p. 14.)

"The Commission believes the mechanical problems caused by an order of satisfaction against property are too great to justify such a scheme. A creditor should be able to reach any property that is liable for the satisfaction of the judgment without the burden of first seeking out and attempting to exhaust particular classes of assets. The existing California order of satisfaction provisions should be repealed. In place of the order of satisfaction provisions, the

Commission recommends adoption of a reimbursement right between spouses, which is discussed below." (17 Cal. Law Rev. Com. Reports, pp. 14, 15.)

(6) *Reimbursement*. "Where community property has been used during marriage to satisfy a separate debt or obligation of one of the spouses, and where separate property of one of the spouses has been used during marriage to satisfy a community obligation, as a general rule there is a right to reimbursement of the community or separate estate only in limited situations. At dissolution the parties do not ordinarily go back through all the transactions that have occurred over the course of a marriage and attempt to ascertain whether a particular expenditure was for a community or separate purpose and whether the particular expenditure was made with community or separate funds. There are several important exceptions to this generalization." (17 Cal. Law Rev. Com. Reports, p. 15.)

"In three types of situations the community may obtain reimbursement for expenditures for separate debts--where the separate property of the spouse making the expenditure is benefited by the expenditure, where the expenditure is for a child or spousal support obligation that predates the marriage, and where the expenditure is made within a short time before dissolution." (17 Cal. Law Rev. Com. Reports, p. 15.)

"The Commission believes that the general rule of California law denying reimbursement except in limited situations is sound in principle. Reimbursement generally involves close questions of characterization of debts and property and generates difficult accounting and proof problems. It is litigation-breeding and not conducive to easy settlement of rights between the parties. Reimbursement is also inimical to sharing principles during marriage, since it encourages spouses to scrutinize the type of debt and nature of funds being applied in the event of future accountability." (17 Cal. Law Rev. Com. Reports, p. 16.)

"Even though reimbursement as a general marital property principle is undesirable, specific types of cases demand reimbursement. If community funds are used by a spouse to pay a premarital support obligation or improve separate property, if separate property is taken for a necessities debt of the other spouse, or if property of a former spouse is taken for a debt assigned to the other spouse, a right of reimbursement should arise. And of course if property not liable for a debt at all is applied by a spouse to the debt, there should be a reimbursement right." (17 Cal. Law Rev. Com. Reports, p. 16.)

"In the case of a tort debt, California law requires that a separate debt be satisfied first out of separate property and then out of community property, and that a community debt be satisfied first out of community property and then out of separate property. To implement the policy of this rule, the law should substitute a provision that where property of one type is in fact applied to a debt of the other type, a reimbursement right arises. The rule of reimbursement should not apply, however, where the tort debt is satisfied out of insurance proceeds, whether separate or community. The function of insurance is to spread the risk of loss, and reimbursement would not be appropriate in such a situation." (17 Cal. Law Rev. Com. Reports, p. 16.)

"If the spouses are separated, any debt incurred should be the separate debt of the spouse who incurred it. This is consistent with the principle that after separation the earnings of a spouse are the separate property of the spouse. Thus if the spouse applies community property to the postseparation debt, the community should be entitled to reimbursement. This rule would not apply where the debt was incurred for production or preservation of community property or for the common necessities of life of a spouse." (17 Cal. Law Rev. Com. Reports, pp. 16, 17.)

"The reimbursement right in these cases should apply regardless of whether the debt was satisfied voluntarily by payment by a spouse or involuntarily by action of the creditor. This will eliminate litigation over such matters as intent to make a gift, consent to the payment, and agency relationship, and will also encourage expeditious settlement of debts out of the most readily available assets without the need for concern about legal implications of use of those assets. However, the law should also make clear that a spouse may expressly waive reimbursement rights." (17 Cal. Law Rev. Com. Reports, p. 17.)

"A major problem with existing law as to reimbursement is that the character of the debt must be ascertained, the character of the property applied to the debt must be determined, and any gift, consent, or agency must be found, at the time of dissolution of marriage, which may occur many years after the operative events. This causes substantial discovery and proof problems and increases the likelihood of error. To minimize these problems, the reimbursement rights should be determinable during marriage as well as at dissolution, and the right should be strictly limited to a period of three years after application of the property to the satisfaction of the debt. It should be recognized that the reimbursement right will be largely unused during an ongoing marriage; nonetheless, the right should be authorized for those spouses concerned to keep an accurate accounting of property, particularly in second marriages or separate property marriages." (17 Cal. Law Rev. Com. Reports, p. 17.)

(7) *Prenuptial Debts*. "If a person contracts a debt before marriage, the earnings of the person's spouse after marriage are not liable for the debt. The principle implies two related rules: (1) Community property other than the earnings of the person's spouse after marriage is liable for prenuptial contract debts. (2) The earnings of the person's spouse after marriage are liable for tort and other noncontractual prenuptial debts." (17 Cal. Law Rev. Com. Reports, pp. 17, 18.)

"The first related rule is sound. Since the debtor spouse owns the community property, all community property other than earnings of the nondebtor spouse (which is peculiarly personal) should be liable for the satisfaction of the prenuptial debt. This principle should be codified expressly." (17 Cal. Law Rev. Com. Reports, p. 18.)

"The second related rule is not sound. There is no logical basis to distinguish prenuptial tort and other debts from contract debts. The earnings of the nondebtor spouse should not be liable for any prenuptial debts of the debtor spouse, whether based on contract or tort, with the exception of certain support obligations." (17 Cal. Law Rev. Com. Reports, p. 18.)

"Another matter is how long the earnings of the nondebtor spouse should remain not liable for a prenuptial debt of the debtor spouse. The Commission recommends that the earnings should lose their protection from liability upon a change in form, but that they should retain their protection so long as traceable in bank accounts. This will ensure that substantial amounts of community property are not immunized from creditors, that the judicial system is not burdened by extensive tracing requirements, and that earnings will remain exempt so long as they retain their peculiarly personal character. This will also parallel the protection given to funds exempt from enforcement of judgments." (17 Cal. Law Rev. Com. Reports, p. 18.)

(8) *Support Obligations*. "The extent to which marital property of a second marriage is liable for a child support obligation of a first marriage is unclear. ... These provisions were intended to comport with AFDC standards. However, the provisions are ineffective, unworkable, confusing, obsolete, and possibly unconstitutional." (17 Cal. Law Rev. Com. Reports, pp. 18, 19.)

"The liability of marital property for child support obligations (and for spousal support obligations as well) should be dealt with clearly and directly. A child or former spouse to whom a person owes an obligation of support should be in at least as good a position as a general creditor. This means that in the case of remarriage of the support obligor, the child or former spouse should be permitted to enforce the support obligation not only against the separate property of the support obligor but also against all community property of the subsequent marriage except the earnings of the nonobligor spouse. However, the earnings of the nonobligor spouse should be taken into account in setting the amount of the child support obligation." (17 Cal. Law Rev. Com. Reports, p. 19.)

"Where community property is applied to a premarital support obligation of one of the spouses, the community should be entitled to reimbursement to the extent the amount of community property used is disproportionate to the amount of separate property of the obligor spouse that was available but not used to satisfy the obligation." (17 Cal. Law Rev. Com. Reports, p. 20.)

(9) *Liability for Necessaries*. "Under existing law, separate property of a spouse is not liable for the debts of the other spouse except in one situation: The separate property is liable for the necessities of life contracted by either spouse when living together. This exception is based on the obligation of the spouses to support one another." (17 Cal. Law Rev. Com. Reports, p. 20.)

"The requirement that the necessities be 'contracted' is unduly restrictive. This language has the effect of immunizing the separate property from debts for necessities such as emergency medical care not contracted by one of the spouses. In such situations, the separate property of the nondebtor spouse should be liable for the necessities debt regardless of the contractual nature of the debt." (17 Cal. Law Rev. Com. Reports, p. 20.)

"The separate property of the nondebtor spouse is liable for necessities debts incurred only while the spouses are living together. After separation by agreement, there is no liability unless support is stipulated in the agreement. The provision abrogating the support obligation of the spouses in a separation by agreement penalizes spouses who need support following an informal separation and violates the policy of the Family Law Act requiring mutual support during marriage. The presumption should be reversed--the separate property of the spouses should remain liable for the necessities obligations incurred following separation unless liability is expressly waived in the separation agreement. However, after informal separation the property should be liable only for debts for 'common' necessities of life; the nondebtor spouse should not be required to maintain the estranged spouse after informal separation in the accustomed style of life." (17 Cal. Law Rev. Com. Reports, pp. 20, 21.)

"The separate property of the nondebtor spouse may not be applied to the satisfaction of a judgment unless the nondebtor spouse is made a party to the action. This rule is sound and should be recodified in terms of the personal liability of the nondebtor spouse. This will satisfy due process demands and will assure the nondebtor spouse the opportunity to contest the validity of the debt before his or her separate property is applied to its satisfaction." (17 Cal. Law Rev. Com. Reports, p. 21.)

"Existing law permits satisfaction of a necessities debt out of separate property of the nondebtor spouse only after all other types of marital property have been exhausted. Such a limitation on the right of a creditor is undesirable. A preferable means of implementing the policy of existing law is to permit the creditor to reach separate property of the nondebtor spouse but to provide reimbursement if this is done when other marital property is available but not used. The proposed law adopts the reimbursement procedure." (17 Cal. Law Rev. Com. Reports, p. 21.)

(10) *Liability After Division of Property*. "Upon legal separation or dissolution of marriage, the community and quasi-community property and the debts are divided between the spouses. Notwithstanding the division of property and debts, a creditor may seek to satisfy the debt out of any property that would have been liable for the debt before the division. Thus, a creditor may reach former community property awarded to a nondebtor spouse even though the property division requires that the debtor spouse pay the debt. In such a situation the nondebtor spouse has a cause of action against the debtor spouse for reimbursement." (17 Cal. Law Rev. Com. Reports, p. 22.)

"This scheme is unsound. It creates procedural burdens of tracing former community property in the hands of the nondebtor spouse and raises problems whether any increase in value of the property, due to improvements, inflation, or otherwise, is also liable and whether the property should be traceable through changes in form after it has lost its community identity. These practical difficulties also demonstrate that the principles supporting liability of community property during marriage are not applicable after division of the property upon dissolution. Community property is liable during marriage because this avoids the serious administrative problems of characterizing the type of property and debt and partitioning the community property, and gives greatest assurance that creditors will be satisfied. Upon dissolution, however, the property and debts are characterized as separate or community, and the community property and debts are partitioned among the parties; one or both of the spouses are required to satisfy the creditors. The administrative and policy reasons for undifferentiated liability of community property are thus eliminated upon dissolution and division of the property and debts." (17 Cal. Law Rev. Com. Reports, p. 23.)

"Liability of community property for debts should cease upon dissolution and division of the property. A creditor should be able to collect a debt from the person to whom the debt is assigned for payment, without regard to the type of property--former community or separate property--from which the debt is satisfied. This eliminates tracing problems and is consistent with the purposes of the Family Law Act to require payment of a debt by the person to whom the debt is assigned, but does not impair the creditor's rights against the debtor. In allocating the debts to the parties, the court in the dissolution proceeding should take into account the rights of the creditors so there will be available sufficient property to satisfy the debt by the person to whom the debt is assigned, provided the net division is equal. If a judgment of the debt is entered after division of the property and debts, the judgment should not be enforceable against the nondebtor spouse to whom the debt is assigned unless the nondebtor spouse is made a party. This preserves the due process rights of the nondebtor spouse after division by providing the nondebtor spouse the opportunity to contest the validity of the debt, raise defenses, and take other necessary actions." (17 Cal. Law Rev. Com. Reports, pp. 23, 24.)

(11) *Liability After Judgment of Nullity*. "The law relating to creditors' rights against property of former spouses whose marriage has been annulled as void or voidable is not clear. In the case of putative spouses, upon annulment the property and debts may be divided as quasi-marital property. In this situation the statute should make clear that creditors' rights against the property are the same as against property of a valid marriage that ended in dissolution. The parties held themselves out as being married and third persons relied to their detriment. The ultimate invalidity of the marriage is a fortuity and should not affect the rights of creditors or the community property protections between the parties." (17 Cal. Law Rev. Com. Reports, p. 24.)

SUPPLEMENT: [This section is current through the latest supplement]



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11 Witkin Sum. Cal. Law Com Prop § 176

[§ 176] Nature and Scope of Revision.

(1) *In General.* Pursuant to the Recommendation of the Law Revision Commission (*supra*, §175), the 1984 Legislature adopted former C.C. 5120.010 et seq., governing the liability of marital property. (See *16 Pacific L. J.* 637.) Effective January 1, 1994, former C.C. 5120.010 et seq. were repealed and replaced without substantive change by *Family C. 900* et seq. (See Rutter Group, 2 Family Law §8:730 et seq.)

(2) *Transitional Provisions.* The following transitional provisions apply:

(a) *Enforcement of debts.* Except as otherwise provided by statute, *Family C. 900* et seq. govern the liability of separate and community estate property and spouses' personal liability for debts enforced on or after January 1, 1985, regardless of when the debts were incurred. (*Family C. 930.*)

(b) *Reimbursement rights.* The reimbursement provisions apply to all debts, regardless of when they were satisfied. (*Family C. 931.*)

(3) *Definitions.* *Family C. 50* et seq. and *900* et seq. define the key terms governing the statutes on liability of marital property for debt, including the following:

(a) "Community estate" includes both community property and quasi-community property. (*Family C. 63*; see *11 Summary* (10th), *Husband and Wife*, §4.) (On definition of community property, see *Family C. 760*, *supra*, §4.)

(b) "Quasi-community property" means all real or personal property acquired by a spouse (or received in exchange for other property) at any time, which would have been community property if the spouse who acquired it had been domiciled in California at the time of its acquisition. (*Family C. 125*; see *11 Summary* (9th), *Husband and Wife*, §4.)

(c) "Debt" means an obligation incurred by a spouse before or during marriage, whether based on contract, tort, or otherwise. (*Family C. 902.*)

(d) A debt is "incurred" when a contract is made, when a tort occurs, or when an obligation otherwise arises. (*Family C. 903.*) (See *In re Marriage of Feldner* (1995) 40 C.A.4th 617, 622, 47 C.R.2d 312 [community estate was subject to entire liability represented by suit against husband contractor for allegedly defective work under contract

"made" before separation from wife, though completed thereafter; citing *Family C. 903*].)

(4) *Liability of Quasi-Community Property*. Quasi-community property is liable to the same extent as community property, and is treated the same in other respects. (*Family C. 912*.) The Law Revision Commission Comment points out that this reverses prior law, which treated quasi-community property as separate for purposes of liability for debts.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See C.E.B., Family Law Financial Discovery §14.1 et seq.; California Family Law Practice, §§J.71.1 et seq., J.81 et seq. *Correction:* Page 756, line 25, "11 Summary (9th), *Husband and Wife*, §4" should be "11 Summary (10th), *Husband and Wife*, §4".



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11 Witkin Sum. Cal. Law Com Prop § 177

[§ 177] General Rule.

(1) *Community Estate Is Liable for Debt of Either Spouse.* "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." (*Family C. 910(a)*.) The term "during marriage" does not include the period when the spouses are living separate and apart before a judgment of dissolution or legal separation. (*Family C. 910(b)*.) (See *28 Lincoln L. Rev. 29* [Bankruptcy and Family Law--A Guide for the Family Law Practitioner].)

The Law Revision Commission Comment observes:

(a) The community estate (other than earnings of the nondebtor spouse) is liable for the prenuptial contracts of the spouses.

(b) The nondebtor spouse need not be made a party for the purpose of enforcing a judgment out of the community estate. However, special procedural provisions may apply. (See, e.g., *C.C.P. 706.109* [issuance of earnings withholding order against spouse of judgment debtor].)

(2) *Illustrations.* A number of cases have construed and applied *Family C. 910*. (See *In re Marriage of Feldner* (1995) 40 C.A.4th 617, 622, 47 C.R.2d 312 [community estate was subject to entire liability represented by suit against husband contractor for allegedly defective work under contract made before separation from wife, though completed thereafter]; *11601 Wilshire Associates v. Grebow* (1998) 64 C.A.4th 453, 455, 74 C.R.2d 912 [married person may not be joined as defendant in action against spouse solely to facilitate enforcement against community of potential judgment against spouse; summary judgment was properly granted to wife in action based on husband's personal guaranty of another's debt because she was not personally liable and her separate property could not be reached for that debt]; *State Bd. of Equalization v. Woo* (2000) 82 C.A.4th 481, 484, 98 C.R.2d 206, supra, §153 [wife's future earnings were subject to husband's tax debt].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Community Estate Is Liable for Debt of Either Spouse.* See 47 *Santa Clara L. Rev.* 1 [arguing that community property law unfairly benefits creditors].

(2) *Illustrations.* See *In re Marriage of Leni* (2006) 144 C.A.4th 1087, 1098, 50 C.R.3d 886 [expenditure of community funds by husband to support his indigent mother was not unauthorized gift, because mother's support was community obligation].



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11 Witkin Sum. Cal. Law Com Prop § 178

[§ 178] Exception for Earnings.

A person's earnings during marriage are free of liability for a debt incurred by the person's spouse before marriage. After the earnings 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 not commingled with a significant amount of other property in the community estate. (*Family C. 911*; see *28 Lincoln L. Rev. 29* [Bankruptcy and Family Law--A Guide for the Family Law Practitioner].) As used in *Family C. 911*, "deposit account" has the meaning prescribed in U.C.C. 9102(a)(29) (see *4 Summary* (10th), *Secured Transactions in Personal Property*, §44) and "earnings" means "compensation for personal services performed, whether as an employee or otherwise." (*Family C. 911(b)*.)

The Law Revision Commission Comment points out the following:

(1) *Family C. 911(a)* codified the rule that, for purposes of liability, earnings may not be traced through changes in form (see, e.g., *Pfunder v. Goodwin* (1927) 83 C.A. 551, 257 P. 119, *supra*, §173).

(2) "The effect of the [new language] is to protect a deposit account only where the nonobligor spouse has an account into which only his or her earnings and separate property or property of a third person are deposited (unless the amount of other community estate property deposited in the account is insignificant). In such a situation, it is clear that the nonobligor spouse has carefully set aside his or her earnings and separate property and it is appropriate to continue the protection given the earnings. Where the account is commingled with any significant amount of other property in the community estate (such as the earnings of the other spouse or income from other community in the community estate), the intent to segregate the earnings and separate property is not clear, and hence the protection is not continued. The same reasoning justifies not protecting the account where the obligor spouse has a right to withdraw funds from the account."

West's Key Number Digest, Husband and Wife k.268(2)

SUPPLEMENT: [This section is current through the latest supplement]



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11 Witkin Sum. Cal. Law Com Prop § 179

[§ 179] Debt Incurred Before or During Marriage.

(1) *Liability of Debtor.* A spouse's separate property is liable for that spouse's debts incurred before or during the marriage. (*Family C. 913(a).*)

(2) *Nonliability of Debtor's Spouse.* Except as otherwise provided by statute, a spouse's separate property is not liable for debts incurred by the other spouse before or during marriage. A spouse's separate property is also not made liable by an encumbrance of community estate property to secure payment of a debt incurred solely by the other spouse. (*Family C. 913(b).*)

In *Leasefirst v. Borrelli* (1993) 13 C.A.4th Supp. 28, 17 C.R.2d 114, a judgment creditor of the husband sought to levy on the wages of the wife. The debt arose from a lease agreement signed only by the husband, during the marriage. The spouses had signed a written prenuptial agreement characterizing the wife's wages as her separate property. At a debtor's examination, the husband testified that he had no earnings and was supported by his wife. The trial judge, applying substantively identical predecessor statutes, ruled that the wife was treating her wages as community property by supporting the husband, and entered an order permitting the levy. *Held*, reversed; treatment of the wages as community property was contrary to statutory law.

(a) The spouses had transmuted the wife's wages into her separate property by their prenuptial agreement, as permitted by statute (see *supra*, §153 et seq.). Under former C.C. 5120.130 (now *Family C. 913*) and former C.C. 5120.140 (now *Family C. 914*, *infra*, §180), the wife's separate property was liable for her husband's debt only if it was incurred for necessities of life, and there was no suggestion that the debt at issue was of this kind. (13 C.A.4th Supp. 30, 31.)

(b) The creditor argued that the statutory scheme does not protect innocent third-party creditors. However, creditors may avoid the risk of unknown interspousal transfers simply by obtaining both spouses' signatures on contracts and notes. (13 C.A.4th Supp. 31.)

West's Key Number Digest, Husband and Wife k.268(2)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Liability for Debts.
b. Liability of Separate Property.
2. Personal Liability for Debts for Spouse's Necessaries.

11 Witkin Sum. Cal. Law Com Prop § 180

[§ 180] Personal Liability for Debts for Spouse's Necessaries.

(1) *Liability for Necessaries.* Notwithstanding *Family C. 913* (supra, §179), a spouse is personally liable for the following debts incurred by the other spouse during marriage:

(a) A debt incurred for the other spouse's necessities of life while the spouses are living together. (*Family C. 914(a)(1).*)

(b) Except as provided in *Family C. 4302* (support liability while spouses are living separate by agreement; see 11 *Summary* (10th), *Husband and Wife*, §37), a debt incurred for the other spouse's "common necessities of life" while the spouses are living separately. (*Family C. 914(a)(2).*)

The Law Revision Commission comments as follows:

(a) *Family C. 914* is an exception to the nonliability rule of *Family C. 913* (supra, §179); but the separate property of a spouse may not be reached by necessities creditors unless the spouse is made a party for the purpose of enforcing the liability (see, e.g., *Credit Bureau of Santa Monica Bay Dist. v. Terranova* (1971) 15 C.A.3d 854, 93 C.R. 538).

(b) *Family C. 914(a)(1)* is consistent with *Family C. 4301* (support obligation while spouses living together), but does not require exhaustion of community property before separate property of a nondebtor spouse can be reached.

(c) *Family C. 914(a)(2)* applies where the spouses are living separately not by agreement; e.g., where one spouse leaves.

(d) *Family C. 914(a)(2)* should not be deemed to limit the obligation of a spouse for support pursuant to a court order pendente lite or in a judgment decreeing the legal separation of the spouses. A spouse who desires to limit the liability pursuant to *Family C. 914(a)(2)*, or a spouse who desires a greater support obligation than provided in *Family C. 914(a)(2)*, may seek a support order, which supersedes liability under *Family C. 914(a)(2)*.

(e) *Family C. 914(a)(2)* abolished the "station in life" test of *Wisnom v. McCarthy* (1920) 48 C.A. 697, 192 P. 337,

in determining what is a necessary of life; the separate property of the nondebtor spouse is liable only for debts for the "common" necessities of life (see *Ratzlaff v. Portillo* (1971) 14 C.A.3d 1013, 92 C.R. 722).

(2) *Reimbursement*. A spouse's separate property may be applied to the satisfaction of a debt for which the spouse is personally liable under *Family C. 914(a)*, but the spouse is entitled to reimbursement to the extent that nonexempt property in the community estate or separate property of the other spouse was available but not applied to satisfy the debt. (*Family C. 914(b)*.)

(3) *Limitations Period for Statutory Actions*. The 1-year limitations period of *C.C.P. 366.2* applies to an action brought under *Family C. 914* if the spouse for whom the married person is personally liable dies. (*Family C. 914(c)(1)*), codifying the rule of *Collection Bureau of San Jose v. Rumsey* (2000) 24 C.4th 301, 308, 99 C.R.2d 792, 6 P.3d 713, 3 Cal. Proc. (4th), Actions, Supp., §653 [1-year period of *C.C.P. 366.2* barred action against surviving spouse to recover expenses of decedent's last illness].)

There is an exception. If the surviving spouse had actual knowledge of the debt prior to the expiration of that 1-year limitations period *and* if the personal representative of the deceased spouse's estate fails to provide the creditor asserting the claim under *Family C. 914* with a timely written notice of the probate of the estate as required by *Prob.C. 9050*, then the appropriate period is either the 4-year limitations period of *C.C.P. 337* (action on contract founded on written instrument; see 3 Cal. Proc. (4th), Actions, §474 et seq.) or the 2-year limitations period of *C.C.P. 339* (action on contract not founded on written instrument; see 3 Cal. Proc. (4th), Actions, §478 et seq.), as applicable. (*Family C. 914(c)(2)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Limitations Period for Statutory Actions*.

Collection Bureau case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §719.

C.C.P. 337:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §508 et seq. *C.C.P. 339:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §512 et seq.



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B. Revised Law.
3. Liability for Debts.
c. Child or Spousal Support Obligations.

11 Witkin Sum. Cal. Law Com Prop § 181

[§ 181] Child or Spousal Support Obligations.

Family C. 915 deals with child or spousal support obligations not arising out of the marriage.

(1) *Treatment as Prenuptial Debt.* A spouse's child or spousal support obligation not arising out of the current marriage is treated as a debt incurred before marriage, whether or not a support order is entered or modified or an installment payment accrues before or during the marriage. (*Family C. 915(a)*.) Hence, the separate property of the obligor spouse and the community property of the marriage are liable (except for earnings of the nonobligor spouse). *Family C. 915(a)* also applies to an extramarital support obligation of a spouse that arises during the marriage. (Law Rev. Com. Comment.)

(2) *Reimbursement of Community.* If property in the community estate is applied to satisfy the support obligation, the community estate is entitled to reimbursement from the obligor's separate income to the extent that nonexempt separate income was available but not applied to satisfy the obligation. (*Family C. 915(b)*.) *Family C. 915(b)* codifies the rule of *Weinberg v. Weinberg* (1967) 67 C.2d 557, 63 C.R. 13, 432 P.2d 709, supra, §124, but prescribes a fixed measure for community reimbursement based on the separate income of the obligor spouse. (Law Rev. Com. Comment, also citing *Bare v. Bare* (1967) 256 C.A.2d 684, 64 C.R. 335, and *In re Marriage of Smaltz* (1978) 82 C.A.3d 568, 570, 147 C.R. 154.)

(3) *No Effect on Amount of Support.* *Family C. 915* does not limit the matters a court may consider in determining or modifying the amount of a support order, including the earnings of the parties' spouses. (*Family C. 915(c)*.) *Family C. 915(c)*, codifying *In re Marriage of Havens* (1981) 125 C.A.3d 1012, 178 C.R. 477, makes clear that despite the rule that earnings of the nonobligor spouse are not liable, the earnings of both spouses may be considered by the court. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Reimbursement of Community.* See *In re Marriage of Sherman* (2005) 133 C.A.4th 795, 804, 35 C.R.3d 137 [community was not entitled to reimbursement under *Family C. 915(b)* for support husband paid from community funds to former spouse, where wife could only show that husband had nonexempt separate income at some point during marriage, but not that nonexempt separate income was available when community funds were used to make particular

support payment]; *In re Marriage of Leni* (2006) 144 C.A.4th 1087, 1098, 50 C.R.3d 886 [community was not entitled to reimbursement under *Family C. 915(b)* for community funds spent to support husband's indigent mother].



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B. Revised Law.
3. Liability for Debts.
d. Property Owned or Received at Division.

11 Witkin Sum. Cal. Law Com Prop § 182

[§ 182] Property Owned or Received at Division.

Family C. 916 deals with liability of former community and quasi-community property and former separate property, following a division on judgment of separation or dissolution or a later division under *Family C. 2500* et seq. (infra, §189 et seq.).

(1) *Spouse's Liability for Own Debt.* After the division of community and quasi-community property, separate property owned by a spouse at the time of the division and property the spouse received in the division is liable for a debt incurred by that spouse before or during marriage, and the spouse is personally liable for the debt whether or not it was assigned to the other spouse in the division. (*Family C. 916(a)(1)*.) Hence, an unpaid creditor may satisfy the debt out of property of the debtor, although the debtor will have a right of reimbursement under *Family C. 916(b)*. (Law Rev. Com. Comment.)

(2) *Spouse's Liability for Other Spouse's Debt.* Separate property owned by a spouse at the time of the division and property the spouse received in the division are *not* liable for a debt incurred by the other spouse before or during marriage, and the nondebtor spouse is not personally liable *unless* the debt was assigned to that spouse in the property division. This does not affect the liability of property for the satisfaction of a lien on the property. (*Family C. 916(a)(2)*.) If the debt is assigned to the spouse in the property division, the spouse is personally liable and his or her separate property may be applied to satisfy the debt; if a judgment for the debt is entered after the division, however, it may only be enforced if the spouse is made a party to the judgment. (*Family C. 916(a)(3)*.)

The Law Revision Commission Comment observes:

(a) These provisions reverse the case law rule that a creditor may enforce a money judgment against the former community property in the hands of a nondebtor spouse after dissolution of the marriage (see *Bank of America v. Mantz* (1935) 4 C.2d 322, 49 P.2d 279); liability occurs only if the nondebtor spouse is assigned the debt.

(b) In the case of a judgment entered after division of the property, the nondebtor spouse must be made a party for due process reasons.

(c) *Family C. 916(a)(2)* does not affect enforceability of liens (see *Kinney v. Vallentyne* (1975) 15 C.3d 475, 124 C.R. 897, 541 P.2d 537).

Cases have applied and construed *Family C. 916(a)(2)* and its substantively identical predecessor statute. (See *Lezine v. Security Pac. Financial Services* (1996) 14 C.4th 56, 65, 58 C.R.2d 76, 925 P.2d 1002 [community real property awarded to spouse remained subject to judgment lien recorded before property division]; *In re Marriage of Braendle* (1996) 46 C.A.4th 1037, 1041, 54 C.R.2d 397 [former wife, who was neither assigned former husband's debt in division nor named as party in judgment for creditor entered after dissolution, was not personally liable to creditor on loan; security interest in stock owned as community property assigned to her on property division took priority over creditor's later judgment lien].)

(3) *Reimbursement With Interest and Attorneys' Fees*. If a spouse's property is applied to satisfy a money judgment under *Family C. 916(a)* for a debt incurred by the spouse that was assigned to the other spouse, the owner spouse has a right of reimbursement from the other spouse to the extent of the property applied, with interest at the legal rate, and may recover reasonable attorneys' fees incurred in obtaining reimbursement. (*Family C. 916(b)*.) *Family C. 916(b)* is not intended to authorize reimbursement precluded under the bankruptcy law by discharge of the debt (see *In re Marriage of Clements* (1982) 134 C.A.3d 737, 184 C.R. 756). (Law Rev. Com. Comment.)

(4) *Applicability of Uniform Fraudulent Transfer Act*. Citing *Family C. 916(a)(3)*, *Gagan v. Gouyd* (1999) 73 C.A.4th 835, 86 C.R.2d 733, held that the transfer of property to a spouse as part of a marriage dissolution is not a fraudulent transfer under the *Uniform Fraudulent Transfer Act*. (73 C.A.4th 842.) The *Gagan* case was disapproved, however, in *Mejia v. Reed* (2003) 31 C.4th 657, 3 C.R.3d 390, 74 P.3d 166, which reached a contrary result, based on the language and legislative history underlying the Act and *Family C. 916*. (31 C.4th 663.) The *Mejia* court also rejected claims that public policy required that the *Gagan* court's view be upheld:

(a) *Gagan* opined that to engraft fraudulent transfer remedies onto a valid and approved marital settlement agreement would needlessly complicate the dissolution process and result in the unraveling of agreements negotiated between the parties and their attorneys. However, this argument does not deserve substantial weight. "In our view, the parties' debts, and how to pay them, are matters that *should* be considered in marital settlement negotiations even if, like pension plans and income tax consequences, they make the process of reaching an agreement more complex." (31 C.4th 669.)

(b) The claim that the state and the parties need to rely on the finality of dissolution judgments is without merit. California and federal law already permit dissolution judgments to be set aside for extrinsic fraud. Under *Family C. 2122(a)*, either spouse may attack the property division under a dissolution judgment on the ground that it was procured by extrinsic fraud. Under federal bankruptcy law, a bankruptcy trustee, acting in the interest of creditors, may set aside the property division on the ground of fraud. (31 C.4th 669.)

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11 Witkin Sum. Cal. Law Com Prop § 183

[§ 183] Reimbursement.

Family C. 920 provides for a right of reimbursement where property is applied to satisfaction of the debt. (On reimbursement for education and training, see *supra*, §110; on reimbursement for traceable separate property going into community property, see *infra*, §222; on reimbursement for community debts paid with postseparation earnings, see *infra*, §225.)

(1) *Right of Reimbursement.* A right of reimbursement under *Family C. 900* et seq. arises regardless of which spouse applies the property to the satisfaction of the debt, or whether the property is applied voluntarily or involuntarily, or whether the debt is satisfied in whole or in part. (*Family C. 920(a)*.) Thus, the right applies even though the spouse seeking reimbursement may have satisfied or consented to satisfaction of the debt out of a particular type of property. (Law Rev. Com. Comment.)

(2) *Waiver of Right.* The right is subject to express written waiver by the spouse in whose favor the right arises. (*Family C. 920(a)*.)

(3) *Measure of Reimbursement.* Reimbursement is measured by the value of or interest in the property at the time the right arises. (*Family C. 920(b)*.)

(4) *Time Limits on Exercise of Right.* Under *Family C. 920(c)*, the right must be exercised by the earlier of the following times:

(a) Three 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. (*Family C. 920(c)(1)*.)

(b) In proceedings to divide community and quasi-community property under *Family C. 2500* et seq. (*infra*, §189 et seq.), or in proceedings on a spouse's death. (*Family C. 920(c)(2)*.)

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B. Revised Law.
5. Liability for Torts.
a. Liability of Tortfeasor.
1. In General.

11 Witkin Sum. Cal. Law Com Prop § 184

[§ 184] In General.

(1) *Limitation on Liability.* A spouse is liable for death, injury, or damage caused by the other spouse only in cases where the liability would exist regardless of the marriage. (*Family C. 1000(a).*)

(2) *Satisfaction of Liability.* The source from which a spouse's liability for death or injury to a person or damage to property must be satisfied depends on whether it is based on an act or omission occurring while the spouse was performing an activity for the benefit of the community. If so, the liability is satisfied first from the community estate and second from the spouse's separate property. If not, the liability is satisfied first from the spouse's separate property and second from the community estate. (*Family C. 1000(b)*; for illustrations, see *infra*, §185.)

(3) *Effect of Insurance.* *Family C. 1000* does not apply to the extent the liability is satisfied by insurance, whether the proceeds are separate property or belong to the community estate. (See *California Cas. Ins. Co. v. Northland Ins. Co.* (1996) 48 C.A.4th 1682, 1695, 56 C.R.2d 434 [watercraft exclusion in couple's homeowners liability policy barred coverage for tortfeasor husband; thus, insurer did not have separate duty to cover wife based on liability of her community property interest for his torts under *Family C. 1000(b)*].)

(4) *Time Limit on Reimbursement.* Notwithstanding *Family C. 920* (general time limits on exercise of reimbursement right; see *supra*, §183), no right of reimbursement under *Family C. 1000* may be exercised more than 7 years after the spouse in whose favor the right arises had actual knowledge of the application of the property to the debt. (*Family C. 1000(c).*)

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11 Witkin Sum. Cal. Law Com Prop § 185

[§ 185] Illustrations.

In re Marriage of Hirsch (1989) 211 C.A.3d 104, 259 C.R. 39, involved plaintiff husband's motion to classify as community debts the expenses incurred in his defense and settlement of various lawsuits. Plaintiff had been sued for negligence and intentional misconduct in connection with his service on the board of directors of a bank that later failed. The motion was denied; the trial judge, applying *In re Marriage of Stitt* (1983) 147 C.A.3d 579, 195 C.R. 172, supra, §85, found plaintiff's settlement obligations to be his separate debt because in the underlying lawsuits it was alleged that he had engaged in tortious conduct. *Held*, reversed.

(a) *Stitt distinguished*. Former C.C. 4800(a) (now *Family C. 2550* et seq., infra, §189 et seq.), calling for the equal division of the community estate, governs the assignment of spousal obligations. *Stitt* found a "legislative direction" to apply former C.C. 5122 (now *Family C. 1000*) in a dissolution proceeding to effect an "equitable" division of property where negligent or intentional tortious conduct is involved. However, former C.C. 5122(b) (now *Family C. 1000(b)*, supra, §184) is designed to protect creditors; the "benefit of the community" language, although useful in characterizing an obligation as separate or community, does not mark a return to the "fault" concept of marital property division. "Confined to its facts, *Stitt* is correct. An innocent spouse is not required to share in losses incurred by the intentionally tortious or criminal conduct of a spouse where there is no benefit to the community. But the holding in *Stitt* is overbroad because it includes negligent as well as intentional torts. Thus, to the extent *Stitt* holds the negligent conduct of a spouse engaged in an activity benefiting the community provides sufficient justification to characterize a debt as a separate obligation, it is incorrect." (211 C.A.3d 110.)

(b) *Plaintiff's conduct benefited community*. Plaintiff's settlement of the lawsuits before trial made it impossible to determine whether his allegedly tortious conduct was negligent or intentional. However, even if his conduct was intentional, the evidence showed that his activities benefited the community. His exposure to liability arose out of his actions while serving on the board of the bank, which took place for the most part during the marriage. The remuneration he received for serving on the board was undisputedly community property. The wife presented no evidence that service on the board was to protect the husband's separate property stock or further any of his separate property businesses. There was therefore no legitimate basis to characterize the settlement obligations as his separate debt. (211 C.A.3d 111.)

In re Marriage of Bell (1996) 49 C.A.4th 300, 56 C.R.2d 623, involved a wife who had embezzled from her employer. The couple subsequently settled a civil action brought by the employer. The husband had been unaware of the embezzlement, but the community benefited from the proceeds of the embezzlement. In the property division on dissolution of their marriage, the trial judge charged to the wife (a) the legal costs and taxes arising from the tort and (b) the entire amount of the settlement. *Held*, reversed.

(a) *Governing statutes.* Under both *Family C. 1000(b)* and *Family C. 2625* (classification on dissolution of separate debts of spouses; see *infra*, §212), whether the community benefited is a factor in determining whether an obligation is separate or community property. (49 C.A.4th 309.)

(b) *Analysis of precedents.* *Stitt* and *Hirsch* presented facts comparable to those here. The major differences between the two cases are that the offense in *Stitt* was an intentional tort and the court found there was no evidence of a benefit to the community, while in *Hirsch* the conduct involved no more than gross negligence and the community benefited from the acts that led to liability. The present case involves an intentional tort (as well as a crime) but also a benefit to the community. (49 C.A.4th 309.)

(c) *Spouse committing intentional tort is chargeable with related legal costs and taxes.* The trial judge correctly decided that the wife was liable for the attorneys' fees in both the civil and the criminal actions, and that she was liable for the state and federal taxes arising from the embezzlement, including interest and penalties. The wife engaged in intentional activity and knowingly accepted the risk that she would be caught. The husband, who knew nothing of the risk and could do nothing to avoid it, could not in fairness bear the same burden. (49 C.A.4th 309.)

(d) *Settlement amount attributable to community where community benefited by tort.* However, as to the settlement amount, the uncontradicted evidence showed that the community received a major infusion of funds, and that these funds were put to community use, rather than to the wife's separate use. Therefore, it was erroneous to allocate the settlement, which had previously been paid out of community property, to the wife as part of her share of the community property distribution. The community had shared in the benefit and could properly be asked to share in the cost. (49 C.A.4th 310.)

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B. Revised Law.
5. Liability for Torts.
b. Interspousal Injuries.

11 Witkin Sum. Cal. Law Com Prop § 186

[§ 186] Interspousal Injuries.

(1) *Exhaustion of Separate Property.* Where an injury to a spouse is caused by the negligent or wrongful act or omission of the other spouse, community property may not be used to discharge the tortfeasor spouse's liability to the injured spouse, or to a joint tortfeasor for contribution, until after the exhaustion of the tortfeasor spouse's separate property that is not exempt from enforcement of a money judgment. (*Family C. 782(a).*) (On sanctions against spouse for attempted murder of other spouse, see *infra*, §187.)

(2) *Exception: Written Consent.* Community property may be used to discharge that liability if the injured spouse consents in writing after the occurrence of the injury. (*Family C. 782(b).*)

(3) *Right to Indemnity.* *Family C. 782* does not affect the right to indemnity under 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. (*Family C. 782(c).*)

(4) *Injuries to Married Person by Third Party Involving Concurring Negligence of Spouse.* If a spouse is injured by the negligent or wrongful act or omission of a third party, the fact that the other spouse's negligent or wrongful act or omission was a concurring cause is not a defense in an action by the injured spouse, unless it would have been a defense if the marriage did not exist. (*Family C. 783.*)

Family C. 783 is subject to a limitation: An award for loss of consortium to a spouse injured by a third party may be reduced by the spouse's percentage of comparative fault as required by C.C. 1431.2 (joint and several liability for noneconomic damages); see 5 *Summary* (10th), *Torts*, §53. C.C. 1431.2 is the more specific statute in this context, and thus prevails over *Family C. 783*. Damages for loss of consortium are available only to married persons, and unlike *Family C. 783*, C.C. 1431.2 expressly mentions damages for loss of consortium. (*Craddock v. Kmart Corp.* (2001) 89 C.A.4th 1300, 1309, 107 C.R.2d 881.)

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C. Attempted Murder of Spouse.

11 Witkin Sum. Cal. Law Com Prop § 187

[§ 187] Attempted Murder of Spouse.

(1) *Forfeiture of Interest in Pension and Retirement Benefits.* In addition to any other remedy, when one spouse is convicted of attempting to murder the other spouse, as punishable pursuant to P.C. 664(a) (see 3 *Cal. Crim. Law (3d)*, *Punishment*, §241), the injured spouse is entitled to an award of 100% of the community property interest in his or her retirement and pension benefits. (*Family C. 782.5.*)

(2) *Other Sanctions.* The injured spouse may be awarded attorneys' fees and costs as sanctions against the offending spouse. (*Family C. 274(a).*) The award is payable from the separate property or income of the offending spouse, or from the offending spouse's share of the community property. (*Family C. 274(c).*) (On elimination of injured spouse's duty to support offending spouse, see *Family C. 4324*, 11 *Summary* (10th), *Husband and Wife*, §174.)

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1. Former Law Based on Fault.

11 Witkin Sum. Cal. Law Com Prop § 188

[§ 188] Former Law Based on Fault.

(1) *Equal Division in Ordinary Case.* Former C.C. 146 provided for division of community property where a marriage was dissolved by a decree of divorce or separate maintenance. If the decree was granted for a ground other than adultery, incurable insanity, or extreme cruelty, an equal division was required. (See *Vasquez v. Vasquez* (1952) 109 C.A.2d 280, 282, 240 P.2d 319 [default divorce for desertion; award of all property to plaintiff was in excess of court's jurisdiction]; 26 So. Cal. L. Rev. 96.)

(2) *Adultery, Extreme Cruelty, or Insanity.* If the decree was granted for any of these three grounds, former C.C. 146 gave the court discretion to divide the property in a manner deemed just. But the apparently unlimited discretion was judicially limited by the rule in cruelty and adultery cases that the greater part must be awarded to the innocent party. (*Tipton v. Tipton* (1930) 209 C. 443, 444, 288 P. 65; *Quagelli v. Quagelli* (1929) 99 C.A. 172, 176, 277 P. 1089; *Arnold v. Arnold* (1946) 76 C.A.2d 877, 881, 174 P.2d 674 [where decree is granted for both adultery and cruelty, innocent party should receive more than if ground were cruelty alone]; *Goldberg v. Goldberg* (1956) 144 C.A.2d 402, 403, 301 P.2d 5 [husband was granted divorce and custody of children, but wife was given greater share of property; reversed].) The rule did not apply where the divorce was granted to both parties; neither was innocent and an equal division was required. (See *De Burgh v. De Burgh* (1952) 39 C.2d 858, 874, 250 P.2d 598; *Hong v. Hong* (1965) 237 C.A.2d 239, 240, 46 C.R. 710; 5 Stanf. L. Rev. 544.)

(3) *Amount and Manner in Judge's Discretion.* What was the appropriate "greater part" was largely within the trial judge's discretion and was seldom disturbed. On a proper showing it could be substantially more than half, three-fourths, or even all of the property, depending on the seriousness of the misconduct or the conditions of the parties. (See *Falk v. Falk* (1941) 48 C.A.2d 762, 770, 120 P.2d 714; *Crouch v. Crouch* (1944) 63 C.A.2d 747, 756, 147 P.2d 678; *Fahnestock v. Fahnestock* (1946) 76 C.A.2d 817, 822, 174 P.2d 660; *Hill v. Hill* (1947) 82 C.A.2d 682, 696, 187 P.2d 28; *Gonsalves v. Gonsalves* (1949) 92 C.A.2d 334, 341, 206 P.2d 1127; *Nelson v. Nelson* (1950) 100 C.A.2d 348, 351, 223 P.2d 636; *Cash v. Cash* (1952) 110 C.A.2d 534, 536, 243 P.2d 115; *Margolis v. Margolis* (1952) 115 C.A.2d 131, 135, 251 P.2d 396; *La Vigne v. La Vigne* (1950) 96 C.A.2d 531, 537, 216 P.2d 75 [all to wife]; *Hellman v. Hellman* (1952) 108 C.A.2d 588, 593, 239 P.2d 458 [virtually all to wife; property consisted of home and furnishings]; *Finley v. Finley* (1958) 161 C.A.2d 390, 326 P.2d 867 [nearly all to wife; husband's earning power was good, wife's was not]; *Irish v. Irish* (1966) 246 C.A.2d 705, 708, 55 C.R. 55.)

In exceptional situations, the judge could depart from or only technically follow the "more than one-half to the innocent party" rule. (See *Harrold v. Harrold* (1954) 43 C.2d 77, 82, 271 P.2d 489 [innocent wife given only 51.13% of property]; *McKannay v. McKannay* (1924) 68 C.A. 701, 706, 230 P. 214 [offending wife with custody of 13-year-old child was entitled to one-half]; *Hill v. Hill* (1957) 150 C.A.2d 34, 37, 309 P.2d 44 ["the time having arrived for apportioning the community property, the amount thereof, the age of the parties, their physical and mental condition, their ability to support themselves, and the needs of minors, if such there be, are all matters ranking higher in the scale of importance than the infliction of punishment for wrongdoing"].)

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SEPARATION
A. In General.
2. Current Law Eliminating Fault.

11 Witkin Sum. Cal. Law Com Prop § 189

[§ 189] Current Law Eliminating Fault.

(1) *Family Law Act*. The Family Law Act (former C.C. 4800 et seq.) eliminated the theory of fault in granting a judgment of dissolution of marriage or legal separation (see 11 *Summary* (10th), *Husband and Wife*, §59), and introduced the rule of equal division except in specified unusual circumstances. The Report of the Judiciary Committee stated: "Equality in the division of the property is most important if acrimony is to be reduced or eliminated. Much bitterness was fomented under the old law because the parties had something economic to gain by proving the other at fault, i.e., a greater share of the community property. The motivation to fix blame should be substantially ameliorated under the new law." (See 1 *Pacific L. J.* 310, 317; 33 *U.C.L.A. L. Rev.* 1181, 1184.)

"The equal division of the community property of the spouses, upon dissolution of marriage, appears to be an implicit recognition of this equality in interest that prevailed during marriage." (*In re Marriage of Brigden* (1978) 80 *C.A.3d* 380, 389, 145 *C.R.* 716, *infra*, §§190, 210.)

(2) *Family Code*. Effective January 1, 1994, former C.C. 4800 et seq. was repealed and replaced by *Family C.* 2500 et seq. without substantive change. (See *infra*, §190 et seq.)

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11 Witkin Sum. Cal. Law Com Prop § 190

[§ 190] General Rule of Equal Division.

Except as provided in the parties' written agreement or oral stipulation in open court, or as otherwise provided in *Family C. 2500* et seq., the court must divide the community estate equally in proceedings for dissolution or legal separation, either in the judgment or at a later time, if it expressly reserves jurisdiction for that purpose. (*Family C. 2550*.) (See *In re Marriage of Walrath* (1998) 17 C.4th 907, 924, 72 C.R.2d 856, 952 P.2d 1124, *infra*, §224 [court is required by *Family C. 2500* to distribute both assets and obligations of community so that residual assets awarded to each party after deduction of obligations are equal]; Rutter Group, 2 Family Law §8:1000 et seq.; 33 *Hastings L. J.* 771, 842 [The Definition and Division of Marital Property in California: Towards Parity and Simplicity]; 1 *Pacific L. J.* 310; 28 *U.C.L.A. L. Rev.* 1181, 1188, 1199 [Economics of Divorce]; 4 *U.S.F. L. Rev.* 397 [income tax consequences of equal division]; 56 *A.L.R.4th* 12 [excessiveness or adequacy of property award]; 56 *A.L.R.4th* 862 [division of family business].) (On methods of nonjudicial division, see *infra*, §217; on application of equal division rule in statutory proceedings for relief from judgment, see *Family C. 2120* et seq., *infra*, §§242, 243; on applicability of rule in nullity proceedings, see *Family C. 2251, 2252, 11 Summary* (10th), Husband and Wife, §148 et seq.)

In re Marriage of Cream (1993) 13 C.A.4th 81, 16 C.R.2d 575, *infra*, §§209, 217, construing the predecessor statute, observes: "[U]nlike virtually every other state, California has restricted judicial authority by requiring trial courts to divide the community estate equally between the parties, except for limited circumstances. ... The parties, on the other hand, by written agreement or oral stipulation in open court, are free to divide their community estate in any fashion they wish and need not divide it equally." (13 C.A.4th 87.)

In re Marriage of Brigden (1978) 80 C.A.3d 380, 145 C.R. 716, *infra*, §210, states: "This subdivision establishes equal division as the general rule both in terms of the method of division and the result to be achieved. For division by any method other than by partition into equal portions (equal in kind division) will result in the spouses receiving different property even though they receive property of mathematically equal value." (80 C.A.3d 390.)

In re Marriage of Epstein (1979) 24 C.3d 76, 154 C.R. 413, 592 P.2d 1165, involved an order that the family residence be sold and the proceeds divided, made with no consideration of state and federal capital gains tax liability. The court distinguished *In re Marriage of Fonstein* (1976) 17 C.3d 738, 131 C.R. 873, 552 P.2d 1169, *infra*, §191, as dealing with speculative tax consequences of a possible future sale; here the tax would be incurred because of the court

order dividing the community property. Hence, the correct approach was that of *In re Marriage of Brigden*, *supra*, and *In re Marriage of Clark* (1978) 80 C.A.3d 417, 145 C.R. 602, *infra*, §211; i.e., in order to equalize division of the community property, the court should provide that the tax liability, if any, is owed equally by both spouses; and, in unusual cases, it could retain jurisdiction to supervise the payment of taxes and adjust the division. (24 C.3d 88.) (See *In re Marriage of Davies* (1983) 143 C.A.3d 851, 856, 192 C.R. 212 [facts similar to *Epstein*; order modified to provide that tax burdens from sale of residence be equally shared by spouses, but wife's contention that jurisdiction should be retained to accomplish this purpose was rejected].)

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See C.E.B., Family Law Financial Discovery §8.6 et seq.; California Family Law Practice, §J.91 et seq.



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11 Witkin Sum. Cal. Law Com Prop § 191

[§ 191] Speculation Improper.

In re Marriage of Fonstein (1976) 17 C.3d 738, 131 C.R. 873, 552 P.2d 1169, involved the valuation of the husband's interest in a law partnership, which was awarded to the husband with compensating property to the wife. The partnership agreement established a contractual right to certain payments on voluntary withdrawal from the firm. However, the trial judge took into account the tax consequences of a withdrawal at a later time, and reduced the value of his interest accordingly. *Held*, this was error.

(a) *General principle.* As *Weinberg v. Weinberg* (1967) 67 C.2d 557, 63 C.R. 13, 432 P.2d 709, *supra*, §124, makes clear, once the court has made its equal division it need not "engraft on the division further adjustments reflecting situations based on theory rather than fact." (17 C.3d 749.) "Regardless of the certainty that tax liability will be incurred if in the future an asset is sold, liquidated or otherwise reduced to cash, the trial court is not required to speculate on or consider such tax consequences in the absence of proof that a taxable event has occurred during the marriage or will occur in connection with the division of the community property." (17 C.3d 749, footnote 5, disapproving contrary suggestion of *In re Marriage of Folb* (1975) 53 C.A.3d 862, 126 C.R. 306, *supra*, §124.)

(b) *Application of principle.*

(1) The tax obligations that the husband seeks to charge against the community property will be incurred, if at all, only after dissolution and division of the property, when his interest in the law partnership will be his separate property, and his decision to receive taxable withdrawal payments will be his alone. This distinguishes the situation where debts are incurred by one spouse and the parties take the property awarded subject to the community debts. Here, the husband is not withdrawing and there is no indication of an intention to withdraw; thus there is no equitable reason for allocating to the wife a portion of the tax liability that may be incurred if and when he does. (17 C.3d 750.)

(2) The suggestion of *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, *supra*, §60, that the court should consider the possibility of nonvesting of pension rights, has no relevancy here; the tax obligations are not contingencies to the realization of a community asset, but are merely potential debts associated with the use or disposition of an item properly chargeable to the person owning the property at the time the tax obligation is incurred.

(17 C.3d 751.)

(3) "We recognize that when community assets are divided in kind the risk of future tax liabilities from the disposition or realization of the assets is apportioned equally, while such risks are not necessarily distributed evenly when the community property is divided according to its value. There will be some compensating distribution of the potential liabilities, however. For example, the award of the family residence to Sarane imposed upon her a burden of a capital gains tax should she choose to sell the house at some future time. Harold, on the other hand, will assume the risk of a tax liability upon his receipt of withdrawal payments. We do not believe that any hypothetical inequity in the distribution of these tax burdens or in disregarding tax consequences in valuing the community assets is adequate justification for introducing an unnecessarily complicated and speculative factor into the process of dividing the community property. The amount of taxes which Harold will incur if he ever withdraws from his firm will depend upon a number of variables, the variety of which makes impossible anything more than a speculative approximation of the potential tax liability. Since these variables are largely subject to Harold's control, it is appropriate to allocate to him the potential liability." (17 C.3d 750.)

In re Marriage of Harrington (1992) 6 C.A.4th 1847, 8 C.R.2d 631, involved capital gains tax liability on profits from the sale of a family home that the parties had divided equally while their dissolution was pending. The husband acquired a replacement residence for an amount that enabled him to defer recognition of state and federal capital gains tax on his half of the profits. The wife, however, used only part of her share to purchase a replacement residence, and incurred a substantial capital gains tax liability on the remainder. She sought an order requiring the husband to pay half of that tax liability, claiming that she had to use some of her share of the profits to support herself while she changed occupations and could not afford a more expensive residence. The trial judge denied the wife's motion. *Held*, affirmed.

(a) Once having divided the community property equally, the court is not required to speculate about the tax consequences of what either party might do with his or her share. Whether either party can defer capital gains taxes depends on factors unrelated to the equal division of community property. (6 C.A.4th 1851.) Nor is it appropriate for the trial court to retain jurisdiction to consider apportionment of any capital gains tax liabilities. (6 C.A.4th 1852.)

(b) Here, the wife mistakenly relied on *In re Marriage of Davies* (1983) 143 C.A.3d 851, 192 C.R. 212, *In re Marriage of Epstein* (1979) 24 C.3d 76, 154 C.R. 413, 592 P.2d 1165, *supra*, §190, and *In re Marriage of Clark* (1978) 80 C.A.3d 417, 145 C.R. 602, *infra*, §211. "Those decisions concerned unequal distribution of proceeds from the sale of a community asset in order to equalize the uneven division of other community assets. Under those circumstances, each party is responsible for one-half of the capital gains taxes incurred by the sale, regardless of the party's share of the sale proceeds." (6 C.A.4th 1852.) (See *In re Marriage of Sharp* (1983) 143 C.A.3d 714, 718, 192 C.R. 97 [following *Fonstein*]; 24 U.C.L.A. L. Rev. 1354 [analyzing *Weinberg* and *Fonstein*, and arguing that future tax consequences can and should be considered]; 74 A.L.R.3d 621 [evaluation of interest in law firm or medical partnership; note discusses superseded Court of Appeal decision in *Fonstein*]; 9 A.L.R.5th 568 [consideration of tax consequences in distribution of marital property].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION

B. Valuation.

1. In General.

b. Consideration of Covenant Not To Compete.

11 Witkin Sum. Cal. Law Com Prop § 192

[§ 192] Consideration of Covenant Not To Compete.

(1) *Speculation About Value of Noncompetition Covenant Is Improper. In re Marriage of Czapar (1991) 232 C.A.3d 1308, 285 C.R. 479, infra, §201*, presented a question of first impression in California: whether the hypothetical value of a covenant not to compete, given by a managing spouse to effectuate the sale of a community business, may be considered in valuing the community property interest in the business. The trial judge reduced the value of the parties' community property manufacturing business, which it awarded to the husband, by what it found to be the financial impact on the husband of a 4-year covenant not to compete which a future buyer would probably require. *Held*, this was error.

(a) While the value of a noncompetition agreement that has actually been negotiated as part of the sale of the property is the separate property of the covenanting spouse, it is inappropriate when awarding the property to one spouse to reduce the value of the business by the value of a *hypothetical* noncompetition agreement. (232 C.A.3d 1314.) Establishing a value for a future covenant not to compete, separate from the value of the business goodwill itself, is entirely too speculative. (232 C.A.3d 1315, citing *In re Marriage of Fonstein (1976) 17 C.3d 738, 131 C.R. 873, 552 P.2d 1169, supra, §191.*)

(b) In this case, there was no evidence that a sale was required for the husband to meet his payment obligations to the wife, or that a sale would occur at any time in the future. Although it was reasonable to assume that, as a commercial reality, a future buyer would probably require the husband to give a covenant not to compete, there were any number of scenarios (such as the husband's retirement or disability) in which a sale of the business would not require such a covenant, or in which the covenant would not have the value that was assigned to it by the trial judge. (232 C.A.3d 1315.)

(2) *Covenant Giving Value to Community Property Stock. In re Marriage of Quay (1993) 18 C.A.4th 961, 22 C.R.2d 537*, discussed the effect of an actual covenant not to compete on division of the community property interest in the proceeds of the sale of a company. During the marriage, the husband founded a company that was sold after the parties separated. At the time of the sale, the community owned 14% of the company's stock, for which it received about \$ 7.5 million. As a condition of buying the company, the purchaser required the husband to agree not to compete

for 5 years. The trial judge found that, compared to what he could have earned had he not signed the noncompetition agreement, the husband suffered a detriment of \$ 1,320,000. Then the judge ruled that because the community owned only 14% of the stock, only 14% of the husband's detriment should be charged to the community. *Held*, reversed.

(a) *Czapar*, the only California case on evaluating covenants not to compete, is distinguishable because it did not involve an actual covenant, but it does stand for the proposition that the value of a noncompetition covenant may properly be considered in dividing the community's interest in the sale proceeds of a business. (18 C.A.4th 967.)

(b) Ordinarily, compensation received for a promise not to compete after separation would be the covenanting spouse's separate property under former C.C. 5118 (now *Family C. 771*; see *supra*, §10). However, in this case the husband had suffered a detriment that gave value to the community property stock; without his promise, the stock would have been worthless. Assigning only 14% of the detriment to the community was inequitable, because of the benefit received by the community and the lack of a mechanism by which the other shareholders could bear the other 86% of the detriment. Accordingly, the whole detriment should be borne by the community. (18 C.A.4th 968.)

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SEPARATION
B. Valuation.
2. Date of Valuation.
a. In General.

11 Witkin Sum. Cal. Law Com Prop § 193

[§ 193] In General.

(1) *Statutory Rule.* As a general rule, the court must value the parties' assets and liabilities "as near as practicable to the time of trial." (*Family C. 2552(a)*.) However, upon 30 days' notice by the moving party to the other party, and on a showing of good cause, the court may value all or part of the assets and liabilities as of a date after separation and before trial, in order to accomplish an equal and equitable division of the community estate. (*Family C. 2552(b)*.) (See *In re Marriage of Barnert* (1978) 85 C.A.3d 413, 423, 149 C.R. 616, *infra*, §213; Rutter Group, 2 Family Law §8:1375 et seq.; 34 A.L.R.4th 63 [date of valuation]; 51 A.L.R.4th 11 [necessity of valuation].) (On valuation date to be used in statutory proceedings for relief from judgment, see *Family C. 2125*, *infra*, §243.)

The notice must be a noticed motion served on all parties on the prescribed form. (C.R.C., Rule 5.126(a); see Judicial Council Form No. FL-315 [Application for Separate Trial (Family Law)].) A declaration must state (a) the proposed alternate valuation date; (b) whether the proposed date applies to all or only a portion of the assets, and if only to a portion, then separately identifying each asset; and (c) the reasons supporting the alternate valuation date. (C.R.C., Rule 5.126(b).)

(2) *Revaluation.* *In re Marriage of Olson* (1980) 27 C.3d 414, 165 C.R. 820, 612 P.2d 910, construing the predecessor statute, involved a family residence awarded to the wife in an intended decision, but lost through foreclosure prior to entry of judgment. The trial judge denied the wife's motion to reopen the case to revalue the community's worth. *Held*, this was an abuse of discretion. The intended decision was not a final judgment restricting the trial judge from reconsidering his proposed division. (27 C.3d 421.) Hence, upon being informed that there had been substantial changes in the nature of the community property, he was statutorily required either to redistribute equally the remainder of the property, or find applicable one of the statutory exceptions permitting unequal division (see *infra*, §201 et seq.). (27 C.3d 422.)

Olson was distinguished by *In re Marriage of Hahn* (1990) 224 C.A.3d 1236, 273 C.R. 516, a dissolution proceeding in which the husband sought to have the family home sold and the proceeds divided, and he stipulated at the trial to the value set by his own appraiser. The court, however, acceded to the wife's request that the property be awarded to her with appropriate offsets. After trial, the husband moved to reopen to offer evidence of higher and more

recent comparable sales figures. The trial judge denied the motion. *Held*, affirmed.

(a) "Nothing quite so dramatic" as the foreclosure sale of *Olson* had occurred here. (224 C.A.3d 1240.) Real estate values, and the value of other assets like stocks, may fluctuate after trial and even before final judgment, but family law courts are not required to take new evidence and redistribute community assets until the moment a judgment is formally entered. (224 C.A.3d 1240, 1241.)

(b) Moreover, the husband had to bear the risk he assumed by his stipulation. "Parties frequently stipulate because values are difficult to ascertain and expensive to prove and certainty is desirable. Additionally, stipulations are often the product of compromise. To allow husband to escape a part of his bargain might lead wife to renege on the stipulated values regarding other community assets and result in a full-blown trial of a case that was, for the most part, amicably settled previously." (224 C.A.3d 1239.)

Other cases, construing the substantively identical predecessor statute, are to the same effect. (See *In re Marriage of Rives* (1982) 130 C.A.3d 138, 152, 181 C.R. 572, supra, §103 [after notice of intended decision, business awarded to husband substantially decreased in value due to wife's mismanagement]; *In re Marriage of Johnson* (1983) 143 C.A.3d 57, 61, 191 C.R. 545 [boat valued at \$ 90,000 in intended decision was sold prior to judgment for \$ 140,000]; *In re Marriage of Reilley* (1987) 196 C.A.3d 1119, 1124, 242 C.R. 302 [house with stipulated value of \$ 120,000 was awarded by judgment to husband, but was sold for \$ 160,000; on remand, trial judge had discretion to take evidence on fair market value].)

(3) *Distinction: Division After Judgment Is Vacated in Equitable Action.* In *Brink v. Brink* (1984) 155 C.A.3d 218, 202 C.R. 57, plaintiff former wife brought an independent action for equitable relief from a judgment of dissolution that had awarded defendant former husband most of the community property. Applying the predecessor statute, the trial court rendered judgment awarding plaintiff a one-half interest in the net value of the community residence, to be valued as of the date of the spouses' separation, rather than the date of the original trial. *Held*, affirmed; plaintiff's election to bring an independent equitable action, instead of proceeding by way of motion in the dissolution action, gave the court broad equitable powers to fashion an appropriate remedy.

(a) "An independent equitable action for relief from the provisions of a dissolution judgment is not a proceeding under the Family Law Act, but is a common law action of long-standing. In such actions 'the nature of the relief available is not restricted to setting aside the former judgment; to the contrary, the court has power to provide *any appropriate equitable remedy*.' " The restrictions of former C.C. 4800 (now *Family C. 2552*) "are entirely inconsistent with this broad equitable power." (155 C.A.3d 222.)

(b) "In fashioning an equitable remedy, the court is not precluded from considering whether the result in the equitable proceeding should be identical to what it would be if the action had been brought under the Family Law Act, but it is not required to apply it." (155 C.A.3d 222.) (See 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §§214, 215.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Rule.* See *In re Marriage of Sherman* (2005) 133 C.A.4th 795, 801, 35 C.R.3d 137 [value of residence purchased by husband before marriage was improperly calculated at date of separation, rather than at trial date; although value of residence had increased by \$ 450,000 between separation and trial, increase was not attributable to husband's efforts]; *In re Marriage of Geraci* (2006) 144 C.A.4th 1278, 1291, 51 C.R.3d 234 [good cause existed to value putative community property business at separation, rather than at trial date; business had no capital assets, its earnings were all based on husband's efforts, and all of its profits were generated after separation]; C.E.B., Family Law Financial Discovery §10.1 et seq. (3) *Distinction: Division After Judgment Is Vacated in Equitable Action.*

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §215 et seq.



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11 Witkin Sum. Cal. Law Com Prop § 194

[§ 194] Bifurcated Trial.

In re Marriage of Walters (1979) 91 C.A.3d 535, 154 C.R. 180, presented the question whether, in a bifurcated marital dissolution proceeding, the property should be valued at the time of the decree of dissolution or at the later time of division of the property. The wife obtained the decree by default in October 1975, and was awarded the family residence. In June 1977, on the husband's motion, the property award provisions were vacated, and the trial judge, thus free to make a new determination, ordered the residence sold and the proceeds equally divided. But the time of valuation was crucial. When the dissolution decree was entered, the property was worth \$ 26,000; the wife lived there and made payments until the second order 2 years later, when the property was worth \$ 50,000. The wife contended that the increase in value should be considered her separate property, and that the husband should receive only \$ 13,000. In rejecting this contention, the court construed the statutory requirement that the court value the assets "as near as practicable to the time of trial" to refer to the time of trial of the property division. "The division generally depends on the value and the court is in a better position to determine value at the time it divides the property than at some other date. Unless compelling reasons exist to do otherwise, property should be valued as of the time it is divided." (91 C.A.3d 539.)

The opinion stresses the equitable considerations: (a) The wife had exclusive use of the house for 2 years, and would, equally with the husband, benefit from the increased valuation. (b) If the property had decreased in value to \$ 13,000, and the earlier time of the dissolution had governed, the husband would have received one-half of \$ 26,000, or the entire proceeds of the sale. (91 C.A.3d 539.)

In re Marriage of Hayden (1981) 124 C.A.3d 72, 79, 177 C.R. 183, followed the *Walters* approach in its directions on reversal of the interlocutory judgment. Community property must "be divided at its value as near as practicable to the court proceeding in which a *proper* division takes place. While normally it will be at trial, it may also be on remand after appeal." (124 C.A.3d 79.) (See *In re Marriage of Reuling* (1994) 23 C.A.4th 1428, 1435, 28 C.R.2d 726 [stock shares that declined in value after parties separated were properly valued as of trial date, where husband was under no obligation to transfer stocks before judgment, wife opposed bifurcation that would have allowed earlier division, and husband was not responsible for reduction in stock's value].)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Date of Valuation.

c. Valuation as of Time of Separation.

11 Witkin Sum. Cal. Law Com Prop § 195

[§ 195] Valuation as of Time of Separation.

(1) *Valuation at Separation Date Held Improper. In re Marriage of Priddis* (1982) 132 C.A.3d 349, 183 C.R. 37, involved the unusual circumstances of an 11-year period between separation and date of trial. During the period the husband remained in the home, and paid all but \$ 6,000 of the couple's \$ 35,000 indebtedness, including the mortgage on the house. The net value of the house at the time of separation was \$ 29,036; at the time of trial it was \$ 110,000. The trial judge valued the property as of the date of separation, and awarded the home (with its increased value) to the husband. The husband was also credited with payment of community debts, and was ordered to pay the wife \$ 15,115 to equalize the division. *Held*, reversed.

(a) The husband contended that, because he made mortgage payments, paid taxes and maintenance costs, and paid community debts after the separation, it would be unfair to permit the wife to share in the increased value of the residence. This argument, similar to that rejected by *In re Marriage of Walters* (1979) 91 C.A.3d 535, 154 C.R. 180, *supra*, §194, is not persuasive. While the husband made mortgage payments, he also had exclusive use of the home for over 11 years; during that time the wife owned half of the residence but received no benefit from it. The fact that the husband paid numerous community debts is not good cause for depriving the wife of her share of that increased value. (132 C.A.3d 356.)

(b) The trial judge was apparently influenced by the substantial length of time between the separation and trial. But the fact of lengthy separation does not necessitate an alternate valuation date. "On the contrary, under such circumstances, when the value of community assets has been affected by inflation or other market factors, the fairest equal division of those assets lets the parties share equally in either gains or losses." (132 C.A.3d 357.)

In re Marriage of Koppelman (1984) 159 C.A.3d 627, 205 C.R. 629, discussing *Priddis* (159 C.A.3d 632), held it reversible error for the trial judge to value property at the time of separation (6 years before trial) as a means of reimbursing the wife for the husband's failure to contribute reasonable child support during the separation. (159 C.A.3d 633.)

In re Marriage of Crook (1992) 2 C.A.4th 1606, 3 C.R.2d 905, *supra*, §75, held that the appropriate date for the

valuation of retirement or pension benefits may be the date of trial or the date the benefits are paid, but *not* the date of separation. Where payments to the nonemployee spouse are ordered to commence on the date the employee spouse is first eligible to receive benefits, under the rule of *In re Marriage of Gillmore* (1981) 29 C.3d 418, 174 C.R. 493, 629 P.2d 1, supra, §73, the benefits are calculated based on the employee spouse's rate of pay at that time. (2 C.A.4th 1612.)

(2) *Valuation at Separation Date Held Proper.* *In re Marriage of Green* (1989) 213 C.A.3d 14, 261 C.R. 294, supra, §106, held that as a general rule, the value of a spouse's law practice should be determined as of the date of separation.

In re Marriage of Stevenson (1993) 20 C.A.4th 250, 24 C.R.2d 411, involved the valuation date for a small general contracting business operated by the husband, which had declined following the parties' separation. The wife moved to establish the date of separation as the date for valuing the community interest in the business. The trial judge, finding that the wife failed to show that her husband had "deliberately trashed the business," denied the motion. *Held*, reversed.

(a) Under the "good cause" exception (see supra, §193), a professional practice should generally be valued as of the date of separation, in order to avoid including postseparation earnings and accumulations, which are separate property. (20 C.A.4th 253, 254, citing *Green*.)

(b) "We believe a small general contracting business ... also falls within the general exception to trial date valuation. ... [T]he value of a small general contracting business, like that of a small law office or consulting firm, devolves largely from the personal skill, industry and guidance of the operating spouse, as opposed to its capital assets. ... Thus, its value generally should be determined as of the date of separation consistent with the rule the earnings and accumulations of a spouse following separation are the separate property of that spouse. ... Valuing the business as of the date of separation also relieves the concern the operating spouse might deliberately 'trash' the business prior to the date of trial, although the trial court found no such conduct in the present case." (20 C.A.4th 254, 255.) (See *In re Marriage of Duncan* (2001) 90 C.A.4th 617, 624, 108 C.R.2d 833 [value of husband's investment advisory business was properly determined at separation date, rather than trial date, where value and success of business depended almost exclusively on his skill, industry, guidance, and reputation].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Valuation at Separation Date Held Proper.* See *In re Marriage of Nelson* (2006) 139 C.A.4th 1546, 1551, 44 C.R.3d 52 [value of wife's business was properly determined at separation date, rather than trial date, because wife's poor bookkeeping made it difficult to calculate value after separation, and business was sole proprietorship operated by wife alone after separation].



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3. Transfer of Asset During Proceeding.

11 Witkin Sum. Cal. Law Com Prop § 196

[§ 196] Transfer of Asset During Proceeding.

In *Lee v. Superior Court* (1976) 63 C.A.3d 705, 134 C.R. 43, the husband claimed a floor covering business and an apartment building as his separate property, and sought a court order authorizing the sale of the business real property and the apartment to pay large accumulated debts of the business. The wife, who claimed a community interest in both properties, was not opposed to the sale, but insisted that the proceeds be kept in a manner to protect her interest, and recorded a lis pendens against the property. The trial judge ordered release of the lis pendens and authorized the sale and use of the proceeds to pay the business debts. *Held*, mandamus granted to compel reinstatement of the lis pendens and to require protection of the wife's interest in the event of sale.

(a) By statute (see 11 *Summary* (10th), *Husband and Wife*, §89), the court may issue ex parte orders restraining a person from transferring community or separate property except in the usual course of business. The trial judge's order was based on the "course of business" exception, but ignored the purpose of the statute--to limit transfers, not to authorize them. (63 C.A.3d 710.)

(b) The court nevertheless had jurisdiction to make orders carrying out the purpose of equal division of the community property; and it could have ordered a sale of a potential community asset to save another community asset, with appropriate safeguards. "Thus, nothing in the Family Law Act would have prohibited the trial court from conducting a partial trial limited to a determination of the community or separate character of the apartment building and the existence of other community assets sufficient to offset any loss Enrietta might incur from the loss of proceeds from the apartment building. Alternatively, nothing in the Family Law Act would have prevented the trial court from ordering the sale of a claimed community asset--particularly where, as here, the opposing spouse has no objection to the sale itself--without making any factual determinations beyond the value of the asset to be sold, provided it required security sufficient to protect the objecting spouse." (63 C.A.3d 711.) (On court-ordered sale of community or quasi-community assets so as to avoid unreasonable market or investment risks, see *infra*, §232; on disclosure requirements as to community assets and investment opportunities, see *infra*, §233 et seq.)

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11 Witkin Sum. Cal. Law Com Prop § 197

[§ 197] Attorneys' Fees.

In re Marriage of Jafeman (1972) 29 C.A.3d 244, 105 C.R. 483, was decided under a statute in the Family Law Act authorizing attorneys' fees. The husband was ordered to pay the wife's attorney's fee that, under the circumstances, would require resort to his half of the community property. He contended that the award was in violation of the requirement of equal division. *Held*, order affirmed.

(a) The Family Law Act provision for attorneys' fees was a substantial reenactment of the former statute, not intended to change existing law. (29 C.A.3d 263.) And the former statute was interpreted to permit an award to be made independent of the property division and without regard to the source from which payment would be made. (29 C.A.3d 264, 265.)

(b) The primary intent of the Family Law Act requirement of equal division was to eliminate acrimony. "This purpose is not thwarted by permitting an award of attorneys' fees. We cannot assume that a spouse will utilize his right to attorneys' fees to promote discord." (29 C.A.3d 266.)

(c) Without an award of fees a spouse lacking funds may be unable to participate in the proceedings and may thereby be deprived of the equal share of the community property that the Legislature intended to give. (29 C.A.3d 266.)

(d) A spouse's liability for his or her own attorneys' fees may be considered in dividing the community property. The undisputed liability of spouses to their respective attorneys is a community debt, and may be treated as any other community debt in determining the amount of property available for distribution. Similarly, where one spouse satisfies his liability to his own counsel by withdrawing funds prior to the division, the court may give a credit to the other spouse in order to assure equal division. (29 C.A.3d 267.) (See *In re Marriage of Folb* (1975) 53 C.A.3d 862, 875, 126 C.R. 306 [following *Jafeman* view of award independent of property division].) (On statutory provision for case management plan to allocate attorneys' fees equitably between parties, with broad authorization for allocation of separate or community assets for that purpose, see 11 *Summary* (10th), *Husband and Wife*, §201; on family law attorney's lien against spouse's interest in community real property to secure payment of fees, see *supra*, §149.)

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5. Transfer of Debts as Spousal Support.

11 Witkin Sum. Cal. Law Com Prop § 198

[§ 198] Transfer of Debts as Spousal Support.

In re Marriage of Chala (1979) 92 C.A.3d 996, 155 C.R. 605, involved a dissolution with community assets of \$ 28,773 and community debts of \$ 19,971. After dividing the assets equally, the trial judge ordered the husband to pay all of the debts, but labeled one-half of those payments as a lump sum spousal support award. *Held*, this was error.

(a) In appropriate cases, the judge may include in a spousal support award a provision requiring payment of overdue or future debts (see 11 *Summary* (10th), *Husband and Wife*, §215). (92 C.A.3d 1000.) But that provision may not be used to subvert the requirement of equal division of community assets and community debts when the former exceed the latter. "What appears to be happening is that trial courts, reluctant to equalize the community property as required ... , seek refuge by labeling an unauthorized differential as 'spousal support.' " (92 C.A.3d 1002.)

(b) In effect, the award here allowed the husband to discharge all of his spousal support obligations by paying the wife's share of the community debts. The award had no relationship to the wife's future needs; hence, it violated statutory support standards (see 11 *Summary* (10th), *Husband and Wife*, §230). Instead, the judge should first have ordered the debts paid from the community cash on hand, and divided the remaining balance equally; he should then have considered the issue of spousal support under the statutory standards. (92 C.A.3d 1003.) (See *In re Marriage of Marx* (1979) 97 C.A.3d 552, 557, 159 C.R. 215 [following *Chala* approach].)

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6. Spouse's Postseparation Use of or Payment for Community Asset.

11 Witkin Sum. Cal. Law Com Prop § 199

[§ 199] Spouse's Postseparation Use of or Payment for Community Asset.

In re Marriage of Garcia (1990) 224 C.A.3d 885, 274 C.R. 194, involved two issues that frequently arise in family law matters: "(1) an order that one spouse pay a community debt in lieu of spousal support; and (2) the obligation of a spouse to compensate the community for the exclusive use of a community asset following separation." (224 C.A.3d 887.) After the wife filed for dissolution, the trial judge granted her temporary use of the family residence, and ordered the husband, who had moved out and was cohabiting and sharing expenses with another woman, to make the mortgage payments "in lieu of spousal support." The final judgment required the husband to continue to pay the mortgage in lieu of spousal support until the residence was sold, and ordered the wife to reimburse the community for the rental value of the residence during her exclusive occupancy. *Held*, reversed as to the reimbursement order.

(a) Where a spouse with exclusive use of a community asset after separation makes the monthly finance payments on the asset, he or she is not required to further compensate the community for use of the asset under *In re Marriage of Watts* (1985) 171 C.A.3d 366, 372, 217 C.R. 301, if the finance charges equal or exceed the asset's reasonable rental value and the paying spouse does not receive credits for the monthly payments under *In re Marriage of Epstein* (1979) 24 C.3d 76, 154 C.R. 413, 592 P.2d 1165, *supra*, §190. (224 C.A.3d 891.)

(b) Here, the wife claimed that she in effect had been paying the mortgage since the husband's payments were in lieu of support, while the husband contended that he had been ordered to make the payments without owing the wife any support. The wife's position was correct. Payment of debts as a form of support is statutorily authorized (see 11 *Summary* (10th), *Husband and Wife*, §215), and can serve the useful functions of ensuring that the support is spent for living expenses, and of guaranteeing the preservation of community assets. (224 C.A.3d 892.) In this case, the parties' relative needs and abilities to pay, the wording of the pendente lite orders, and the policy of fixing temporary support in an amount sufficient to preserve community assets all indicated that the husband's mortgage payments had been intended to be a form of spousal support. Hence, the mortgage payments were made from spousal support funds that effectively were the wife's separate property; and because she did not seek or receive *Epstein* credits, the payments satisfied her responsibility to compensate the community for her use of the home. (224 C.A.3d 893.)

In re Marriage of Jeffries (1991) 228 C.A.3d 548, 278 C.R. 830, involved facts similar to those of *Garcia*, but the court reached the opposite result. In *Garcia*, house payments "in lieu of spousal support" were ordered by the trial court.

In *Jeffries*, they were provided for by a written stipulation entered into by the parties before trial. During the year between the parties' separation and the sale of the marital home, the wife had exclusive possession of the residence. She received no direct spousal support from the husband, but he made the house payments "in lieu of spousal support" under the terms of the stipulation. The stipulation specified that the characterization of the payments and the husband's right to reimbursement, if any, was for the trial judge to determine. In dividing the community estate, the trial judge credited the husband for \$ 9,063 of the \$ 11,063 he had spent on the stipulated house payments, *and* charged the wife for the reasonable rental value of the house during the year she lived there. *Held*, affirmed; the net effect of the allocations was consistent with the trial judge's statutory duty (see *supra*, §190) to divide the community assets equally.

(a) The "*Epstein* credits" allocated to the husband were in effect shared equally by the parties, because they were subtracted from the total portion of the community estate awarded to the husband prior to the calculation of any equalizing payment. The \$ 2,000 difference between the amount of the credits and the amount the husband had actually spent on house payments was presumably deemed by the trial judge to be "in lieu" payment of spousal support under the terms of the stipulation. (228 C.A.3d 553.)

(b) Likewise, the "*Watts* charges" allocated to the wife for her use of the home were divided equally by the parties, because they were added to the total value of the community estate awarded to her before considering any equalizing payment. (228 C.A.3d 554.)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Division by Agreement.

11 Witkin Sum. Cal. Law Com Prop § 200

[§ 200] Division by Agreement.

(1) *Agreement Held Invalid.* The statutory provision for division by agreement of the parties was considered by *In re Marriage of Maricle* (1990) 220 C.A.3d 55, 269 C.R. 204. The husband and wife, without the knowledge of their attorneys, made an oral agreement to divide a portion of their community assets and obligations. While the husband's dissolution action was pending, with counsel representing both sides, the couple agreed to sell their residence with the wife to receive the proceeds, part of which she would use to pay a community debt. They also agreed not to share their pension benefits. The agreement was carried out the year it was made (which was before the effective date of legislation requiring agreements for the transmutation of community to separate property to be in writing). More than 3 years later, during trial, the attorneys learned about the arrangement. Finding that the agreement had been freely made and was valid, the trial judge confirmed that the interests divided were the parties' separate property, over the wife's objection. *Held*, it was error to accept the agreement.

(a) Former C.C. 4800(a) (now *Family C. 2550*; see *supra*, §190) required the court to divide the community estate equally except upon the written agreement of the parties or on stipulation in open court, neither of which requirements was met here. The statute is intended to prevent overreaching by one party and to ensure that a party's rights are not dependent on faulty recollection or false testimony, and thus does not permit enforcement of a private oral agreement. (220 C.A.3d 58.)

(b) Even if the statute were not applicable, where a party is represented by an attorney of record, a stipulation or agreement made without the attorney's knowledge and consent should not be accepted. (220 C.A.3d 58.) This kind of agreement may be ratified after consultation with counsel, but that did not occur here. (220 C.A.3d 58.)

(2) *Agreement Held Valid.* *In re Marriage of Hasso* (1991) 229 C.A.3d 1174, 280 C.R. 919, also involved an agreement dividing community property that was negotiated by the parties without the advice of counsel. After three earlier agreements, all mediated by family members without the assistance of attorneys, had failed to resolve the issues, the wife sought enforcement of a fourth agreement. *Held*, the agreement was properly enforced, despite the husband's claim that approval of the parties' counsel had been intended as a precondition to enforceability.

(a) Although there were signature lines in the agreement for counsel's "Approval As To Form," there was no

mention of content approval, and the parties acknowledged that they had access to counsel before signing and were fully informed on the issues. Extrinsic evidence also militated against the husband's argument: he had always expressed a preference for mediation by family members instead of by counsel; and, after signing the instant agreement, the parties had immediately begun performing it without waiting for attorney approval. The approval issue appeared to be a smokescreen to conceal the husband's real motive for renouncing the agreement--his daughters' refusal to consent to a secret plan to reconvey a parcel of property to him after they obtained title under the terms of the agreement. (229 C.A.3d 1181.)

(b) The husband's position was not supported by public policy, which favors settlements. Where there are no elements of fraud, coercion, or overreaching, and both parties, freely and with full understanding of their right to advice of counsel, wish to negotiate a settlement without the involvement of their attorneys, there is no reason for the law not to let them do so. (229 C.A.3d 1185.)

(3) *Securities Fraud Laws Do Not Apply*. In *d'Elia v. d'Elia* (1997) 58 C.A.4th 415, 68 C.R.2d 324, the state securities fraud laws were held inapplicable to agreements dividing community property. Here, the wife, in negotiations regarding a marital settlement agreement, refrained from having an independent appraisal made of community held securities. She relied on the husband's misrepresentation as to their value, despite advice by her lawyers to obtain an independent appraisal and a newspaper article making her aware that the securities might be worth more than the husband claimed. The trial court rendered judgment for the wife on causes of action under the state securities fraud laws on the basis that the transfer of the wife's stock interest was a "sale" within the meaning of *Corp.C. 25017(a)* (9 Summary (10th), *Corporations*, §410). The trial court also awarded the wife damages on common law claims for misrepresentation and breach of fiduciary duty. *Held*, judgment reversed as to the damages awards for violation of the state securities fraud laws.

(a) There is no precedent for applying securities fraud laws to marital settlement agreements. In fact, the idea is a bad one, because it forces couples undergoing the already traumatic process of dissolution of marriage into the role of securities buyer and seller. It creates an incentive to carry over the (all too often) characteristic bitterness of family litigation into the separate arena of securities litigation. (58 C.A.4th 418.)

(b) The application of securities fraud law to marital settlement agreements does not accord with the fundamental reality of the division of a community estate. It is inaccurate to characterize the division of the community estate pursuant to a marital settlement agreement as a "sale." A marital settlement agreement is a contract to divide up the whole of a community estate--and often to resolve other legal obligations as well--not a contract to sell particular shares of stock. (58 C.A.4th 426.)

(c) Everything about the transaction at issue here was connected to the marital relationship of the parties and the need to find a way to divide the community estate. The wife's interest in the stock in the first place was the result of the operation of California's community property laws, not any contract she entered into to buy the stock. The reason for the marital settlement agreement was the dissolution of the parties' marriage. Most importantly, the only reason that the wife can even possibly surmount the reasonable reliance barrier for any sort of fraud claim is the special solicitude that *family law*, under the constructive fraud doctrine, affords to spouses who are induced not to conduct independent appraisals of community assets. (58 C.A.4th 427, citing *Vai v. Bank of America* (1961) 56 C.2d 329, 337, 15 C.R. 71, 364 P.2d 247, 11 Summary (10th), *Husband and Wife*, §353.) Calling the marital settlement agreement here a sale of stock does not accord with the substance of the transaction. In fact, the wife predicated her lawsuit on the very fact that she was owed special duties of disclosure under *Family C. 1100* because of her status as a spouse. (58 C.A.4th 432.)

(d) Nothing said in this opinion is intended to countenance any kind of fraud, intrinsic, extrinsic, constructive, securities, or otherwise. But when the fraud claim is predicated on misrepresentations of value of community stock made in the process of dissolution, the remedy is the traditional one of timely seeking to set aside the judgment or marital settlement agreement in the appropriate forum, not a securities fraud suit. (58 C.A.4th 432.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Presumption That Agreement Was Result of Undue Influence. In re Marriage of Kieturakis (2006) 138 C.A.4th 56, 85, 87, 90, 41 C.R.3d 119, Supp., supra, §133*, held that the presumption of undue influence that arises under *Family C. 721(b)* (text, §133) when an interspousal transaction advantages one spouse does not apply to a marital settlement agreement under any of the following circumstances:

- (a) Where the agreement is reached through mediation.
- (b) Where the influence is alleged in a motion under *Family C. 2122* (text, §243) challenging a judgment that has been final for at least 6 months.
- (c) Where the parties have acknowledged in the agreement that no undue influence was exercised.



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8. Exceptions to Rule. a. Misappropriation by Spouse.

11 Witkin Sum. Cal. Law Com Prop § 201

[§ 201] Misappropriation by Spouse.

(1) *General Rule: Award Against Offending Spouse's Share.* The court may award from one party's share an amount determined to have been deliberately misappropriated by that party to the exclusion of the other party's interest. (*Family C. 2602.*) (See, construing substantively identical predecessor statute, *In re Marriage of Moore* (1980) 28 C.3d 366, 374, 168 C.R. 662, 618 P.2d 208 [evidence was insufficient to support finding that husband had deliberately misappropriated community property by disposing of it without valuable consideration to purchase alcoholic beverages]; *In re Marriage of Schultz* (1980) 105 C.A.3d 846, 855, 164 C.R. 653 [phrase "deliberately misappropriated" may apply to gross mishandling of community funds that is tantamount to fraud, but it does not apply to negligence]; *In re Marriage of Economou* (1990) 224 C.A.3d 1466, 1483, 274 C.R. 473 [evidence was sufficient to support unequal division of community property misappropriated by husband and secreted in another state]; *In re Marriage of Partridge* (1990) 226 C.A.3d 120, 127, 276 C.R. 8 [husband's failure to cooperate in filing joint income tax return was not "deliberate misappropriation" where he did not act in bad faith].)

(2) *Distinction: Violation of Duty Owed by Spouse Managing Community Business.* *In re Marriage of Czapar* (1991) 232 C.A.3d 1308, 285 C.R. 479, supra, §192, involved a wife's right to reimbursement for sums spent during the parties' separation by a community property manufacturing company operated by the husband. The trial judge had ordered the husband to pay the wife half the amount spent by the company on numerous personal expenses of the husband. On appeal, the husband challenged the order with regard to three items: a sports car that was purchased for him when he already had a slightly older model provided by the company, a charitable contribution to his alma mater, and the salary paid to his girlfriend as a marketing director although she had no experience in the field and produced almost no sales. *Held*, the order was proper. Reimbursement of the community is allowed when a spouse abuses the right to manage and control a community property business. In this case, substantial evidence supported the trial judge's findings on the disputed items. (232 C.A.3d 1318.)

In re Marriage of Quay (1993) 18 C.A.4th 961, 22 C.R.2d 537, held that a bad loan was properly assigned to the husband, where he was managing community funds after the parties separated, and made the loan against the wife's wishes and in violation of court orders freezing the funds and requiring the wife's consent for their disbursement. (18 C.A.4th 972.) (On spouses' duties regarding community assets in period between separation and division of assets, see

infra, §235; on "good cause" exception to rule of equal division in statutory proceedings for relief from judgment, see *Family C. 2125*, infra, §243.)

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8. Exceptions to Rule. b. Personal Injury Damages.

11 Witkin Sum. Cal. Law Com Prop § 202

[§ 202] Personal Injury Damages.

(1) *Definition.* *Family C. 2603* governs the division of "community estate personal injury damages." This means money or property received in satisfaction of a judgment or settlement for personal injury damages, if the cause of action arose during the marriage but is not separate property as described in *Family C. 781* (supra, §40 et seq.), and if the money or other property has not been commingled with other community assets. (*Family C. 2603(a).*)

(2) *Manner of Division.* Under *Family C. 2603(b)*, two kinds of division may be made:

(a) Ordinarily, the damages must be assigned to the party who suffered the injuries. (See *In re Marriage of Mason* (1979) 93 C.A.3d 215, 222, 155 C.R. 350 [construing substantively identical predecessor statute].)

(b) However, the court, after taking into account each party's economic condition and needs, the time that has elapsed since the recovery of the damages or accrual of the cause of action, and all the other facts, may make another disposition if the court determines that the interests of justice so require. In that case, the damages must be assigned to the parties in the proportions the court determines to be just, but at least 50% must be assigned to the party who suffered the injuries.

In re Marriage of Morris (1983) 139 C.A.3d 823, 189 C.R. 80, makes it clear that the assignment of community property personal injury damages to the injured spouse is an exception to the rule of equal division, requiring no *offset* by award of other community property to the other spouse. The wife, injured by a runaway horse in 1974, suffered numerous injuries. In 1978, she received \$ 42,987.72 in settlement. The parties separated in 1980, and at the time of trial she was 51 years of age, unemployed, and had not been employed during the marriage. The trial judge, construing the former statute, awarded the entire settlement to her, without awarding offsetting community property to the husband. *Held*, affirmed.

(a) "The statute is designed to assure that other than in exceptional circumstances, community property personal injury damages, or the bulk thereof, will be awarded to the injured spouse and that under no circumstances will the injured spouse receive less than one-half of such damages. On the other hand, the statute gives the court discretion in

exceptional circumstances to assign community property personal injury damages in such proportions as the court determines to be just, subject to the limitation that not less than one-half be awarded to the injured spouse. The court would have no such discretion, of course, had the Legislature simply declared personal injury damages to be the separate property of the injured spouse or if such damages were to be disposed of as the separate property of the injured spouse." (139 C.A.3d 827.)

(b) If the statute were interpreted as requiring an award of offsetting property to the uninjured spouse, its enactment would have been unnecessary, for, where economic circumstances warrant, the court has authority to award a particular asset to one spouse with offsetting property to the other. (139 C.A.3d 828; see *Family C. 2601*, *infra*, §204.)

In re Marriage of Jackson (1989) 212 C.A.3d 479, 260 C.R. 508, held that the proceeds of the parties' uninsured motorist coverage constituted community estate personal injury damages under the former statute. During the marriage, husband and wife bought an insurance policy with \$ 300,000 uninsured motorist coverage, paying the premiums with community earnings. In a collision with a car driven by R, an uninsured driver, wife was injured. The parties sued R, seeking damages for wife's injuries and husband's loss of consortium. The insurer paid \$ 85,000 to the medical providers and issued a check for \$ 225,000 to wife and the parties' attorney. The attorney withheld \$ 75,000 for fees, and the parties used the remaining sum to buy a home and an automobile. In this dissolution proceeding, the trial judge awarded the insurance fund and the home and automobile to wife. *Held*, affirmed.

(a) Although the statutory definition of community personal injury damages does not expressly refer to proceeds from uninsured motorist coverage, the payment by the insurer was directly traceable to R's negligent act. "Under these circumstances the injured party's insurer approaches issues of liability and damages in the same manner as the tortfeasor would have. Thus, the injured party's recovery under her uninsured motorist coverage mirrors that which would have been obtained from the tortfeasor." (212 C.A.3d 485.) The uninsured motorist coverage proceeds "essentially constituted a statutorily mandated settlement of the claim for personal injuries." (212 C.A.3d 485.)

(b) The fact that community funds were used to pay the premiums does not compel a contrary result. "[U]ninsured motorist coverage is not an item of protection in most instances which a member of the consuming public consciously seeks out and buys"; receipt of uninsured motorist proceeds "more accurately results from the enlightenment of state policy than from the consequence of the insured's own thrift." (212 C.A.3d 486, quoting *Waite v. Godfrey* (1980) 106 C.A.3d 760, 773, 163 C.R. 881.)

(c) Interpreting the statute in this manner is consistent with the statutory purpose. The provision is "designed to assure that other than in exceptional circumstances, community property personal injury damages, or the bulk thereof, will be awarded to the injured spouse and that under no circumstances will the injured spouse receive less than one-half of such damages." (212 C.A.3d 486, quoting *Morris*.)

(3) *Domestic Violence Damages*. If a proceeding for dissolution or legal separation is pending prior to entry of final judgment, a court may enforce a judgment for civil damages for domestic violence, perpetrated by one spouse against the other spouse, against the abusive spouse's share of community property. (*Family C. 2603.5*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Domestic Violence Damages*. See 36 *McGeorge L. Rev.* 922.



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11 Witkin Sum. Cal. Law Com Prop § 203

[§ 203] Other Exceptions.

Notwithstanding *Family C. 2550* et seq. (supra, §190) and *Family C. 2620* et seq. (infra, §212), the following special rules for division of community property debts apply:

(1) *Where Community Estate Is Less Than \$ 5,000 and One Party Cannot Be Located.* If the net value of the community estate is less than \$ 5,000 and one party cannot be located through the exercise of reasonable diligence, the court may award the entire estate to the other party on conditions the court deems proper in the judgment of dissolution or legal separation. (*Family C. 2604.*)

(2) *Educational Loans.* Educational loans must be assigned pursuant to *Family C. 2641* (supra, §109). (*Family C. 2627.*)

(3) *Tort Liability.* Liabilities subject to *Family C. 1000(b)(2)* (spouses' tort liability; see supra, §184) must be assigned to the spouse whose act or omission provided the basis for the liability, without offset. (*Family C. 2627.*)

(4) *California Income Tax Liability.* Joint California income tax liabilities may be revised by a court in a marital dissolution proceeding provided the requirements of Rev.C. 19006 (order for revision of income tax liability for spouses filing joint return; see 11 Summary (10th), *Husband and Wife*, §86) are satisfied. (*Family C. 2628.*)

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C. Award of Particular Asset to One Party.

1. Statutory Rule.

11 Witkin Sum. Cal. Law Com Prop § 204

[§ 204] Statutory Rule.

The requirement of equal division, based on the no-fault theory of dissolution, is not absolute. (See *Family C. 2600*.) Where economic circumstances warrant, the court may award an asset of the community estate to one party on conditions the court deems proper to effect a substantially equal division of the community estate. (*Family C. 2601*.)

Thus, "if one major asset is a going business, it could well be destructive to award each spouse a half interest therein. Under the 'substantially equal' requirement, however, the court could award the entire business to the husband and grant the wife her one-half interest in cash or give her a greater share of other property or a greater support allowance." (Judiciary Committee Report to predecessor legislation.) (See Rutter Group, 2 Family Law §8:1050 et seq.; 1 *Pacific L. J.* 310, 319.) (For decisions under original law approving cash award to wife in lieu of her share of community property, see *Weinberg v. Weinberg* (1967) 67 *C.2d* 557, 566, 63 *C.R.* 13, 432 *P.2d* 709; *Johnston v. Johnston* (1939) 33 *C.A.2d* 90, 91, 91 *P.2d* 142; *Wuest v. Wuest* (1945) 72 *C.A.2d* 101, 109, 164 *P.2d* 32; *Pope v. Pope* (1951) 102 *C.A.2d* 353, 372, 227 *P.2d* 867.)

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C. Award of Particular Asset to One Party.

2. Division Must Be Equal.

11 Witkin Sum. Cal. Law Com Prop § 205

[§ 205] Division Must Be Equal.

Both the language of the "economic circumstances" clause and the legislative comment (see *supra*, §204) make it clear that under no circumstances is an unequal division justified. *In re Marriage of Juick* (1971) 21 C.A.3d 421, 98 C.R. 324, emphasizes this point. The judge gave the wife an \$ 18,000 family home with a \$ 10,407 encumbrance, and ordered her to pay the husband \$ 4,250 for his interest at \$ 40 per month. In reversing for inadequacy of findings the court observed:

(a) "When a trial court utilizes the single asset proviso in the manner chosen in the instant case (awarding an entire asset to one spouse and directing that that spouse pay the other the money equivalent of his one-half interest therein over a period of time in installments secured by a lien), in one sense, the trial court is making a division of the asset by giving one spouse an equity and the other an encumbrance in it; but in another sense, it is causing one spouse to presently receive the entire community asset and to turn over to the other spouse certain non-community assets to be acquired in the future. Although we do not believe that this method is to be ruled out as one of the conditions contemplated in the single asset proviso, we feel that the proviso's primary contemplation was for the trial court to deal with other existing community assets in working out its conditions. This was why it injected the concept of substantial equality. Exact equality might not be achievable using existing community assets. When monies to be acquired by one's spouse in the future are injected as an element, there is no reason why the effort should not be made to reach mathematical equality where a variance in time of enjoyment creates an economic differentiation between the value of a single tangible asset and its money equivalent, by way of requiring the payment of interest at a proper rate." (21 C.A.3d 428.)

(b) Although spousal support payments might be considered in the process of equalization, child support payments should not be. "[T]he equal property division envisioned by the Legislature ... should be worked out first and then child support should be set based upon the financial circumstances of the parties which would then pertain." (21 C.A.3d 430.)

In re Marriage of Tammen (1976) 63 C.A.3d 927, 134 C.R. 161, rejected a superficially equal division on judicial notice of business realities. The wife was awarded community property, including the family home, with the result that she received \$ 19,820.80 more than an equal division. To equalize the division the judge ordered the wife to execute a promissory note to the husband in the amount of \$ 19,820.80, bearing 7% simple interest, payable in 10 years (or on the wife's remarriage or death, or sale, voluntary refinancing, or ceasing to occupy the residence), and secured by a second

deed of trust on the residence awarded to her. *Held*, this was not an equal division. The value of a promissory note is not its face value but its market value; and, although no evidence of that market value was offered, "its face value would most certainly be discounted by the inferiority of its security, the long and uncertain deferment of its enjoyment, the probable effect of inflation upon it, and the concerns of its ownership." (63 C.A.3d 931.)

In re Marriage of Hopkins (1977) 74 C.A.3d 591, 141 C.R. 597, considers other inequities in a *Tammen*-type division. The judge awarded the family home to the husband and ordered the wife to accept a \$ 12,500 note at 7% interest payable at the rate of \$ 135 per month and secured by a first deed of trust on the home. *Held*, the award was improper. The "economic circumstances" did not warrant the emergency arrangement. (a) The husband could have borrowed the \$ 12,500 on the security of the home. (b) He also had that amount in liquid assets. (c) The rate of interest was below the prevailing rate, thereby decreasing the market value of the note. (d) The note should contain a "due-on" clause covering the borrower's death or sale or refinancing of the home. "Under the court's judgment Herbert can sell the house any time he wishes and, in practical effect, Ruth would be lending her money to strangers for just about the rest of her life." (74 C.A.3d 598.)

Other cases are to the same effect. (See *In re Marriage of Brigden* (1978) 80 C.A.3d 380, 390, 145 C.R. 716, *supra*, §190 and *infra*, §210 [award to husband of all of publicly traded stock of company he helped found on condition he compensate wife for her interest was improper]; *In re Marriage of Clark* (1978) 80 C.A.3d 417, 421, 145 C.R. 602, *infra*, §211 [distinguishing *Brigden*; award to husband of all stock in closely held corporation he operated]; *In re Marriage of Herrmann* (1978) 84 C.A.3d 361, 366, 148 C.R. 550 [following *Tammen*]; 10 A.L.R.5th 191 [award of interest on deferred installment payments of marital asset distribution].)

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C. Award of Particular Asset to One Party.

3. Deferred Sale of Family Home.

a. Development of Case Law.

11 Witkin Sum. Cal. Law Com Prop § 206

[§ 206] Development of Case Law.

In re Marriage of Boseman (1973) 31 C.A.3d 372, 107 C.R. 232, involved a marriage in which the only community asset was an unencumbered home valued at \$ 15,500. Custody of an 18-year-old daughter was given to the husband and custody of three younger girls was given to the wife. The judge awarded equal interests in the real property, but gave the wife possession, as additional support for the minor children until majority or emancipation of the youngest, following which it was to be sold and the proceeds divided. *Held*, the award was proper, but required clarification.

(a) The Legislature did not intend that the family home should always be sold and the proceeds divided when it is the only community asset; on the contrary, the Committee Report suggests that a conditional award to the wife with child custody would be desirable. (31 C.A.3d 375.)

(b) The husband's suggestion that the wife could have been required to refinance the property in order to give him his share in cash might be appropriate in some circumstances, but not here: The wife's earnings, together with the child support award, were barely sufficient to maintain the household. (31 C.A.3d 377.)

(c) The order was, however, uncertain on how contingencies might be resolved and who was responsible for maintenance and repair; and it failed to deal with the effect of total or partial destruction of the premises. (31 C.A.3d 377.)

In re Marriage of Herrmann (1978) 84 C.A.3d 361, 364, 148 C.R. 550, followed *Boseman*, but added a caveat: "The economic circumstances of the parties here warranted the court's order which, for the sake of the minor child, delayed the sale of the residence. We can visualize a situation, however, where economic circumstances could preclude a delay in the cash distribution of a principal asset and such an order, even if it benefits a minor, could be an abuse of discretion." (84 C.A.3d 367.) (See 19 A.L.R.4th 239 [consideration of needs of children in making property division].)

In re Marriage of Escamilla (1982) 127 C.A.3d 963, 179 C.R. 842, in an extensive discussion, points out that *Herrmann* approves the imposition of "a wide range of contingencies in order to prevent actions that unfairly impact upon the rights of the party not in possession." (127 C.A.3d 969.) Several of the eight contingencies imposed by the trial

judge were held proper; e.g., termination of the wife's exclusive occupation on the youngest child reaching majority, death of the wife, and destruction of the home. (127 C.A.3d 969.) But two conditions were held improper. The wife's exclusive occupancy would terminate 6 months after her remarriage or if an unrelated male moved into the residence.

(a) "We fail to perceive what adverse impact these conditions would have upon respondent's rights in the property or upon the children's need to live in the house as a means of support. While the continual presence of a third person in the residence might well have an adverse emotional impact upon a nonpossessory father, any such effect would be far outweighed by the benefits accruing to the children from occupancy of the family home. It would be unduly harsh to penalize the children for the possessory owner's personal relationship with third parties. Moreover, with respect to the remarriage condition, it has been held that the continuing parental duty to support minor children is independent of the marital status of the parents." (127 C.A.3d 970.)

(b) Under former C.C. 5127.5, a wife's interest in community property, including the earnings of her husband, was liable for support of her children (see 10 *Summary* (10th), *Parent and Child*, §378 et seq.). Hence, if the wife should remarry, availability of those earnings for child support might justify sale of the house. But the statute also provided that the natural father was not relieved of any legal obligation for support, and that the contribution of the wife's new spouse was not a change in circumstances that would affect the court-ordered support obligation. Thus, the condition requiring immediate termination of appellant's occupancy in the house 6 months after her remarriage would be contrary to the policy expressed in former C.C. 5127.6. (127 C.A.3d 971.) (See *In re Marriage of Johnson* (1982) 134 C.A.3d 148, 160, 184 C.R. 444 [following *Escamilla*; on impropriety of condition that wife's promissory note to her husband for his share of family residence should become due on wife's cohabitation with another adult male].)

In re Marriage of Duke (1980) 101 C.A.3d 152, 161 C.R. 444, held that the trial judge must balance the significant emotional, economic, and social impacts of an immediate sale of the family home against foreseeable detriment to the noncustodial spouse. "The value of a family home to its occupants cannot be measured solely by its value in the marketplace. The longer the occupancy, the more important those noneconomic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of their neighborhood." (101 C.A.3d 155.)

In re Marriage of Horowitz (1984) 159 C.A.3d 368, 205 C.R. 874, disagrees with an extreme view attributed to *Duke*. "*Duke* has been described as holding that deferring the sale of the family home until the youngest child of the parties reaches the age of majority must always be ordered where adverse economic, emotional and social impacts on the minor result from an immediate loss of a long-established family home and are not outweighed by the economic detriment to the out-spouse by the delay in receiving his or her share of the proceeds in the equity of the family home. We believe the better rule is that of *In re Marriage of Herrmann* ... and *In re Marriage of Boseman*..., that the trial judge should weigh these factors, as well as others, and be vested with broad discretion in making a disposition of the family home." (159 C.A.3d 374, footnote 6.)

In re Marriage of Stallworth (1987) 192 C.A.3d 742, 237 C.R. 829, quoted the *Horowitz* disagreement with *Duke* (192 C.A.3d 748), and reversed an award to the wife until the son reached 18 (10 years), on the ground that no evidence was presented on the factors and hence, the judge could not have weighed them. (192 C.A.3d 749.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION

C. Award of Particular Asset to One Party.

3. Deferred Sale of Family Home.
- b. Statutory Procedure and Factors.

11 Witkin Sum. Cal. Law Com Prop § 207

[§ 207] Statutory Procedure and Factors.

(1) *In General.* Former C.C. 4800.7 was enacted in 1985 to provide for the entry, modification, and termination of a "family home award." (See *In re Marriage of Cooper* (1985) 170 C.A.3d 883, 886, 216 C.R. 611; *In re Marriage of Howard* (1986) 184 C.A.3d 1, 7, 8, 228 C.R. 813; *In re Marriage of Guthrie* (1987) 191 C.A.3d 654, 659, 663, 236 C.R. 583.) It was replaced in 1988 by former C.C. 4700.10, a much more comprehensive treatment of the subject. (See 20 *Pacific L. J.* 596.) Effective January 1, 1994, former C.C. 4700.10 was repealed and replaced by *Family C. 3800* et seq. (See Rutter Group, 2 *Family Law* §6:540 et seq.)

(2) *Definitions.* *Family C. 3800* defines the principal terms in the statute as follows:

(a) "Custodial parent" refers to a party awarded physical custody of a child. (*Family C. 3800(a).*)

(b) "Deferred sale of home order" means an order that temporarily delays the sale and awards the temporary exclusive use and possession of the family home to a custodial parent of a minor child or child for whom support is authorized under *Family C. 3900* (duty to support minor child; see 10 *Summary* (10th), *Parent and Child*, §380) or *Family C. 3901* (duty to support certain adult high school students; see 10 *Summary* (10th), *Parent and Child*, §422) or under *Family C. 3910* (duty to support incapacitated child of any age; see 10 *Summary* (10th), *Parent and Child*, §423), whether or not the custodial parent has sole or joint custody, in order to minimize the adverse impact of dissolution of marriage or legal separation on the welfare of the child. (*Family C. 3800(b).*)

(c) "Resident parent" means a party who has requested or has already been awarded a deferred sale of home order. (*Family C. 3800(c).*)

(3) *Preliminary Determination of Economic Feasibility.* If one of the parties has requested a deferred sale of home order, the court must first determine whether it is economically feasible "to maintain the payments of any note secured by a deed of trust, property taxes, insurance for the home during the period the sale of the home is deferred, and the condition of the home comparable to that at the time of trial." (*Family C. 3801(a).*) In making this determination, the court must consider the income of the resident parent; the availability of spousal support, child support, or both; and any

other sources of funds available to make those payments. (*Family C. 3801(b)*.)

By requiring a determination of economic feasibility, it is the intent of the Legislature to avoid the likelihood of possible defaults on the payments of notes and resulting foreclosures; avoid inadequate insurance coverage; prevent deterioration of the condition of the home; and prevent any other circumstance that would jeopardize both parents' equity in the home. (*Family C. 3801(c)*.)

(4) *Factors To Be Considered.* After making the preliminary determination under *Family C. 3801*, the court may grant a deferred sale of home order to a custodial parent if it determines that the order is necessary to minimize the adverse impact of the parties' dissolution of marriage or legal separation on the child. (*Family C. 3802(a)*.) In exercising its discretion to grant or deny a deferred sale of home order, *Family C. 3802(b)* requires the court to consider all of the following:

- (a) The length of time the child has resided in the home.
- (b) The child's placement or grade in school.
- (c) The accessibility and convenience of the home to the child's school and other services or facilities used by and available to the child, including child care.
- (d) In the case of a physically disabled child or resident parent, whether the home has been adapted or modified so that a change in residence may adversely affect the ability of the resident parent to meet the child's needs.
- (e) The emotional detriment to the child associated with a change in residence.
- (f) The extent to which the location of the home permits the resident parent to continue employment.
- (g) The financial ability of each parent to obtain suitable housing.
- (h) The tax consequences to the parents.
- (i) The economic detriment to the nonresident parent in the event of a deferred sale of home order.
- (j) Any other factors the court deems "just and equitable."

In re Marriage of Braud (1996) 45 C.A.4th 797, 53 C.R.2d 179, held that the trial judge had jurisdiction under *Family C. 3800* et seq. to make a deferred sale of home order even though the nonresident spouse had a substantial separate property investment in the home. It was sufficient that the "out-spouse" was a child support obligor; the house qualified as the family home; and there was evidence to support the trial judge's findings about economic feasibility and the welfare of the children. (45 C.A.4th 808.) Also, the trial judge did not abuse his discretion in adjusting the out-spouse's child support obligations in an equitable manner, under *Family C. 4057(b)(2)* (adjustment in child support where deferred sale of home order is entered; see 10 Summary (10th), *Parent and Child*, §411), by awarding him a reasonable percentage of the net fair rental value of the home as an offset against his support obligations. (45 C.A.4th 818.)

West's Key Number Digest, Parent and Child k.3.1(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 42 U.S.F. L. Rev. 539 [why feminist theory supports exclusive use of appraisers as valuation experts when wife wants to keep home]; California Family Law Practice, Chap. K.



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C. Award of Particular Asset to One Party.

3. Deferred Sale of Family Home.

c. Orders.

11 Witkin Sum. Cal. Law Com Prop § 208

[§ 208] Orders.

(1) *Contents and Recordation.* A deferred sale of home order must state the duration of the order, and may include the legal description and assessor's parcel number of the real property that is subject to the order. (*Family C. 3803.*) The order may be recorded with the county recorder of the county in which the real property is located. (*Family C. 3804.*)

(2) *Order Concerning Maintenance and Capital Improvements.* The court may make an order specifying the respective responsibilities of each party for the payment of the costs of routine maintenance and capital improvements. (*Family C. 3806.*)

(3) *Modification or Termination.* Except as otherwise agreed to by the parties in writing, the following conditions apply:

(a) An order may be modified or terminated at any time at the discretion of the court. (*Family C. 3807.*)

(b) If the party awarded the deferred sale of home order remarries, or if there is otherwise a change in circumstances affecting the determinations made under *Family C. 3801* or *3802* (supra, §207) or affecting the economic status of the parties or the children on which the award is based, a rebuttable presumption affecting the burden of proof is created that further deferral of the sale is no longer an equitable method of minimizing the adverse impact of the dissolution of marriage or legal separation on the children. (*Family C. 3808.*)

(4) *Reservation of Jurisdiction by Court.* In making an order, the court must reserve jurisdiction to determine any issues that arise with respect to the order including, but not limited to, the maintenance of the home and the tax consequences to each party. (*Family C. 3809.*) (See *In re Marriage of Schenck* (1991) 228 C.A.3d 1474, 1484, 279 C.R. 651, 11 Summary (10th), *Husband and Wife*, §69 [where family law department of superior court had reserved jurisdiction in deferred sale of home order, wife was precluded from proceeding in any other superior court department to execute against the husband's interest in home to satisfy support arrears].)

West's Key Number Digest, Parent and Child k.3.1(1)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Award of Particular Asset to One Party.

4. Family Business.

11 Witkin Sum. Cal. Law Com Prop § 209

[§ 209] Family Business.

(1) *Court's Power To Award Business to One Spouse. In re Marriage of Burlini* (1983) 143 C.A.3d 65, 191 C.R. 541, held that the court may reject an in-kind award of a going family business where this would impair the business, and may award the entire community business to one spouse. The husband was the "key person" running a coin laundry business, servicing the machines and having primary contact with the owners of the property where the machines were located, and the wife could not operate the business without taking in a partner to perform the husband's functions. (143 C.A.3d 70, 71.)

In re Marriage of Kozen (1986) 185 C.A.3d 1258, 230 C.R. 304, upheld an award to the wife of a valuable fast food franchise that had been operated by the husband. The court distinguished *Burlini*. There, the business consisted of washers and dryers located in apartment complexes, and the husband had serviced the machines, while the wife performed only clerical functions. (185 C.A.3d 1262.) Here, no special expertise was necessary to operate the franchise, for which the primary duty was to hire capable managers; and the franchisor would accept the wife as a franchisee and provide training for her. (185 C.A.3d 1263.) The restaurant income was important for the three minor children, and no workable method of cashing out the support of the wife had been achieved. (185 C.A.3d 1262.) Further, former C.C. 5125(d) (now *Family C. 1100(d)*; see *supra*, §135) did not require award of all family businesses to the operating spouse. (185 C.A.3d 1262.) (See 59 A.L.R.4th 1075 [validity of order requiring spouse not to compete with former marital business].)

(2) *Court's Duty To Determine Fair Market Value. In re Marriage of Cream* (1993) 13 C.A.4th 81, 16 C.R.2d 575, involved the valuation of a family business that the wife was particularly interested in and capable of running, but that the husband sought, offering significantly more than market value. The business, which had been purchased during the marriage, was unique--the only privately owned geyser in the United States. The trial judge gave exclusive occupancy and control pending trial. However, stating that he had a duty to both parties to maximize the value of community assets, the judge decided that husband's offer to pay more than market value could not be ignored. Therefore, over wife's repeated objections, the judge ordered a nonbinding private auction between the parties. Each would bid for the other's half interest in the business; if the successful bidder failed to close escrow on time, the other party could either buy at his or her last bid or refer the matter to the court, which would either fix a value and award the business or order its public sale to a third party. Husband outbid wife but was unable to close escrow. Wife, under protest, purchased his

interest for the amount of her highest bid, which was 50% higher than the appraisals the parties were prepared to submit, and filed an appeal. *Held*, reversed; determination of the value and division of community property is a nondelegable judicial function.

(a) *Trial court's responsibility to fix fair market value.* Except for the statutory provisions specifying circumstances in which the community estate need not be divided equally (*supra*, §201 et seq.), which did not apply to this case, the court has no authority to divide the community estate other than equally, and must fix the fair market value of the community estate where assets are not divided in kind. (13 C.A.4th 88.) "Without a stipulation of the parties, the trial court cannot abdicate its statutory responsibility to value and divide the community estate. We hold the court has no authority to order an interspousal auction of a community asset, over the objection of a party, as a substitute for the court valuing and making its award of that asset." (13 C.A.4th 89.)

(b) *Definition of fair market value.* "In our view, the fair market value of a marketable asset in marital dissolution cases is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no obligation or urgent necessity to do so, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing. We restrict the use of this definition to marketable assets because some marital assets are not marketable, but nonetheless may have to be valued." (13 C.A.4th 89.)

(c) *Unfairness of auction in this case.* The procedure ordered by the trial judge in this case did not establish fair market value, because of the ground rules and, most importantly, because wife's objection established that she was not a willing buyer. The fact that the bidding was not binding created the possibility for husband, knowing how much wife wanted the business, to outbid wife without being required to buy at his bid price. Furthermore, the judge's statement that a public sale would be held if neither party purchased the business at the auction could have been especially coercive, and this potential took the auction result outside the definition of fair market value. (13 C.A.4th 89.)

(d) *Sale to third party of business sought by spouse disfavored.* The foregoing does not limit the court's statutory authority to order an asset sold, with the proceeds divided as necessary to accomplish an equal division of the community estate. (13 C.A.4th 89.) "A sale is often required. However, where the asset at issue is a family business which the court finds either party is capable of operating, and each seeks its award and can purchase the other's share, a sale to a third party should not be ordered. Although the business may be difficult to value, and it may be even more difficult to decide the spouse to whom it should be awarded where both have been operating the business and both want it and can purchase it, it will usually be an abuse of discretion not to award it to one of the spouses. ... No matter how difficult the decision, the trial judge must bite the bullet, value the business and award it to one of the parties." (13 C.A.4th 89, 90.) (For court's discussion of *nonjudicial* alternative methods of settling disputes over valuation and division of community property, see *infra*, §217.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Court's Power To Award Business to One Spouse.* See California Family Law Practice, Chap. M.



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C. Award of Particular Asset to One Party.

5. Publicly Traded Stock.

11 Witkin Sum. Cal. Law Com Prop § 210

[§ 210] Publicly Traded Stock.

In re Marriage of Brigden (1978) 80 C.A.3d 380, 145 C.R. 716, supra, §190, examined the limitations on the single asset proviso and reversed a trial court award to the husband. Logicon, a systems engineering and manufacturing corporation, was founded in 1961 during the marriage, and became a large and successful business at the time of trial in 1976, with its stock publicly traded. The husband was one of the founders, and held executive office and a directorship. During the marriage the parties acquired 66,304 shares of stock, constituting 7.6% of the total. The husband requested the award of all the stock to him, in order to maintain his "power base" in the company; the wife requested an equal division on the grounds that the asset was likely to become more valuable and that she might be able to participate in the company's activities. The trial judge gave the entire block to the husband, on condition that he compensate the wife for her interest, despite the fact that the husband had no current separate assets or sources of funding for this obligation. *Held*, reversed.

(a) *Unsupported findings of trial judge.* The judge found that the wife's object was to extend the marital dispute into the corporate affairs, and that the husband needed the stock to keep his executive position and maintain his ability to support himself and also pay spousal and child support. These findings were not based on substantial evidence and therefore furnished no support for the award. (80 C.A.3d 386, 387, 388.)

(b) *Economic circumstances exception must be strictly construed.* The basic rule is one of equal division, and division by any method other than in kind gives a spouse different property from that in which he or she had a prior equal interest. (80 C.A.3d 390, 391; see supra, §190.) Equal in-kind division avoids valuation problems, eliminates the need to place a disproportionate risk of loss on either party, apportions the risk of future tax liabilities equally, and provides the parties with the most postdissolution economic stability. (80 C.A.3d 391.) The legislative history indicates that the exception was intended to apply only where division of the asset would result in its "impairment," and the cases so hold. (80 C.A.3d 391, 392.) The determination whether division is possible without that impairment "must be flexibly made." (80 C.A.3d 392.) If the stock holding is in a close corporation, or its ownership is essential to the husband's ability to earn a living, an award of the entire block to him might be justified. "A close corporation is the functional equivalent of a family business. An asset which is essential to a party's ability to earn a living satisfies a critical need which cannot be satisfactorily replaced." (80 C.A.3d 393.) But where, as here, the stock is traded on a national exchange, and its possession is merely helpful, the circumstances do not warrant award of the entire block to one

spouse. It is subject to division without impairment, and both spouses have economic concerns that must be considered. (80 C.A.3d 393.)

(c) *Even if asset is awarded to one spouse, division must be equal.*

(1) The judgment provided that the husband purchase the shares representing the wife's interest or release them to her under a decreed schedule. (80 C.A.3d 383, footnote 1.) But the husband alone had the power to decide whether to advance the times of payment or release, and, in view of the fluctuations in the price of the traded stock and his intimate knowledge of the corporate business, his election could be extremely profitable to him. (80 C.A.3d 394.)

(2) The judgment deprived the wife of future control over her share of the property; she had no interest that could be sold or used as security. This is inconsistent with the legislative and judicial objective of achieving equality of the spouses. (80 C.A.3d 394.)

(3) The judgment gave the wife no security; if the husband should fall into financial difficulties she would be in the position of a general unsecured creditor. (80 C.A.3d 395.)

(4) The tax consequences were unduly harsh on the wife. The husband's retention of the stock gives rise to no tax liability, for the division of community property between the parties is not a taxable event. But the husband must make his payments to the wife from his separate property; and, to the extent that the decree gives one spouse separate property in exchange for part of the community property, that spouse has sold or exchanged the community property, and any gain is taxable. "Although no evidence was received upon the stock's basis, it is apparent that the gain recognized on valuable stock acquired during a corporation's infant years would constitute a large percentage of that stock's value. Thus, the judgment imposes a substantial tax burden upon Wife." (80 C.A.3d 395.)

In re Marriage of Connolly (1979) 23 C.3d 590, 153 C.R. 423, 591 P.2d 911, reached a different result on distinguishable facts. Stock in a corporation of which the husband was a director was traded at \$ 5 to \$ 10 per share. The trial judge valued the stock at \$ 7.50 and awarded all of it to the husband with a compensating promissory note to the wife. Later the corporation went public and its stock sold for \$ 27.50 per share. The wife moved to vacate the decree on several grounds, one of which was that it was a "mistake of law" to award all of the stock to the husband. *Held*, denial of motion affirmed. *Brigden* found the award inequitable because no immediate financial compensation was made to the wife. (23 C.3d 602, 603.) But that case did not lay down any strict requirement of division in kind.

(a) "Contrary to wife's assertions," former C.C. 4800 (now *Family C. 2601*) "was intended to, and does, vest in the court considerable discretion in the division of community property in order to assure that an equitable settlement is reached. In particular cases, strict 'in kind' divisions, such as wife now urges, may cause, rather than avoid, financial inequalities. A spouse with a high income may be able to afford to retain high-risk assets while an unemployed spouse wholly dependent upon spousal support may not. By dividing 'in kind' high-risk assets such as the Amdahl stock, a court may, for purposes of fairness, divide the risk of loss disproportionately. The exercise of a trial court's sound discretion is best preserved by maintaining a maximum degree of allowable flexibility." (23 C.3d 603.)

(b) "This uncertain, nonincome-producing stock might be a valuable holding for an individual who was otherwise financially secure, but a court or counsel might well conclude that a less-risky, more assured income-producing investment such as an interest-bearing note with a fixed principal would more appropriately serve an unemployed woman with custody of two minor children." (23 C.3d 603.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Award of Particular Asset to One Party.

6. Stock in Close Corporation.

11 Witkin Sum. Cal. Law Com Prop § 211

[§ 211] Stock in Close Corporation.

In re Marriage of Clark (1978) 80 C.A.3d 417, 145 C.R. 602, deals with the distinguishable situation discussed by *In re Marriage of Brigden* (1978) 80 C.A.3d 380, 145 C.R. 716, supra, §§190, 210. The community asset consisted of 50% of the shares of a close corporation; the other 50% was held by Mark, a certified public accountant. The husband's position, supported by Mark, was that the bulk of the company's work was performed for a government agency, which would be "very sensitive" to any internal conflict and might cease doing business with the company; and Mark also stated that he would probably abandon the company if the wife were given one-half of the stock. The trial judge found that the husband should retain responsibility for the operation of the business. *Held*, the finding was supported by the evidence, and the award of all the stock to the husband was proper. (80 C.A.3d 421.) As in *Brigden*, however, the court reversed the trial judge on the issue of equal division, for failure to give consideration to the capital gain tax.

(a) To offset the award of stock, the judge ordered the husband to give the wife his secured promissory note for \$ 114,798. This would mean that payment of the note would be made from the husband's separate assets, subjecting the wife to a capital gain tax of about \$ 33,565. Unlike the situation in *In re Marriage of Fonstein* (1976) 17 C.3d 738, 131 C.R. 873, 552 P.2d 1169, supra, §191, this was not a wholly speculative possibility, but a specific existing tax liability, analogous to a mortgage or lien against the property. (80 C.A.3d 423.)

(b) The husband's argument that he might have a similar tax if and when he sells his stock was speculative, and that future tax liability is within the *Fonstein* rule. (80 C.A.3d 423.)

(c) In most cases, a fair determination can be made if the court bases the capital gain tax on the transaction in question without considering the other income of the selling spouse; this would eliminate continued litigation on computation. "In order to equalize division of the community property, the buying spouse (buyer) should pay one-half of the capital gain tax caused by the transaction. This can be accomplished by the court in the most feasible manner, i.e., adjusting division of other community property, increasing the value of the installment promissory note, cash reimbursement, etc." (80 C.A.3d 424.) In unusual cases, retention of jurisdiction is a possibility. (80 C.A.3d 424.)

In re Marriage of Lotz (1981) 120 C.A.3d 379, 174 C.R. 618, pointed out that it is improper to use the same formula in determining value of stock in closely held corporations as in determining value of stock in publicly traded

corporations. (120 C.A.3d 384.)

In re Marriage of Hewitson (1983) 142 C.A.3d 874, 191 C.R. 392, approved and followed the *Lotz* approach. (142 C.A.3d 886, 889.) The opinion elaborately considered the two principal methods to determine value of a community owned close corporation: (a) investment value (142 C.A.3d 881), and (b) market value. (142 C.A.3d 882.) The court held that a determination of present market value was not required, and that the determination of the value of the close corporation by its investment value was statutorily permissible. (142 C.A.3d 887.) (See *In re Marriage of Micalizio* (1988) 199 C.A.3d 662, 674, 245 C.R. 673 [approving *Hewitson* requirement of considering each factor that might bear on value, and applying it to case where husband owned mere minority interest in corporation].)

In re Marriage of Behrens (1982) 137 C.A.3d 562, 187 C.R. 200, approved an in-kind division. The judge ordered that 918 shares be divided equally, subject to the condition that the corporation and all shareholders waive their right, under an earlier shareholders' agreement, to repurchase the wife's shares at a 25% discount in the event of dissolution of marriage. The wife opposed the in-kind division on the ground that it left her, as a minority shareholder, subject to the decisions of management (that included the husband) without any means of realizing the value of her shares. She argued that the husband or the corporation should be required to purchase her shares or, at least, that any restrictions on her right to sell her shares should be removed. *Held*, there was no abuse of discretion. "The trial court took careful account of matters of liquidity, restrictions on transfer, and tax consequences. The division leaves Wife and Husband with exactly equal holdings of the corporation's shares. Under California law, their positions as shareholders are equivalent. ... It is true that Husband is in a position to influence corporate decisions which may affect Wife as a shareholder. But it is also true that as a shareholder Wife has the benefit of the various provisions of California law designed to protect minority shareholders against majority abuse. ... Any of the orders Wife seeks would have the direct effect of giving her a better position as a shareholder than Husband would have as a shareholder." (137 C.A.3d 572.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Characterization and Confirmation of Debts.

11 Witkin Sum. Cal. Law Com Prop § 212

[§ 212] Characterization and Confirmation of Debts.

(1) *In General.* For purposes of property division, the court must characterize the parties' liabilities as separate or community, and confirm or assign them to the parties in accordance with *Family C. 2620* et seq. (*Family C. 2551*; see *Family C. 2620* [community debts that are unpaid at trial or become payable after trial must be confirmed or divided as provided in *Family C. 2620* et seq.].) *Family C. 2621* et seq. set forth the rules applicable to each type of debt. (See Rutter Group, 2 Family Law §8:1280 et seq.)

(2) *Debts Incurred Before Marriage.* Debts incurred by either spouse before the date of marriage must be confirmed without offset to the spouse who incurred the debt. (*Family C. 2621.*)

(3) *Debts Incurred After Marriage but Before Separation.* Debts incurred by either spouse after marriage but before separation must be divided as provided in *Family C. 2550* et seq. (equal division rule; see supra, §190 et seq.) and in *Family C. 2601* et seq. (special rules for division; see supra, §201 et seq.). (*Family C. 2622(a).*) To the extent that community debts exceed total community and quasi-community assets, the excess debt must be assigned as the court deems just and equitable, taking into account factors such as the parties' relative ability to pay. (*Family C. 2622(b)* [codifying rule of *In re Marriage of Eastis* (1975) 47 C.A.3d 459, 464, 120 C.R. 861; *In re Marriage of Vanderbeek* (1986) 177 C.A.3d 224, 234, 222 C.R. 832].)

(4) *Debts Incurred After Separation and Before Judgment.* Under *Family C. 2623*, debts incurred by either spouse after separation but before entry of a judgment of dissolution or legal separation must be confirmed as follows:

(a) *Debts for common necessities.* Debts incurred for the common necessities of life of either spouse or of children of the marriage eligible for support must be confirmed to either spouse according to the parties' respective needs and abilities to pay at the time the debt was incurred, in the absence of a court order or written agreement for support or for the payment of these debts. (*Family C. 2623(a).*)

(b) *Debts for nonnecessaries.* Debts for "nonnecessaries" of the spouse incurring the debt or of children of the marriage eligible for support must be confirmed without offset to the spouse who incurred the debt. (*Family C. 2623(b).*)

(5) *Debts Incurred After Entry of Judgment.* Debts incurred by either spouse after entry of a judgment of dissolution but before termination of the parties' marital status, or after entry of a judgment of legal separation, must be confirmed without offset to the spouse who incurred the debt. (*Family C. 2624.*)

(6) *Separate Debts.* Notwithstanding *Family C. 2620* et seq., all separate debts, including those incurred by a spouse during marriage and before the date of separation that were not incurred for the benefit of the community, must be confirmed without offset to the spouse who incurred the debt. (*Family C. 2625.*) (See *In re Marriage of Bell* (1996) 49 C.A.4th 300, 309, 56 C.R.2d 623, supra, §185 [under *Family C. 2625*, legal costs and taxes arising from intentional tort (embezzlement) were attributable to tortfeasor spouse, but settlement expense was chargeable to community, which had benefited from tort].)

(7) *Reimbursement for Debts Paid After Separation and Before Trial.* The court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial. (*Family C. 2626.*) (See *In re Marriage of Williams* (1989) 213 C.A.3d 1239, 1245, 262 C.R. 317 [premarital child support debts were within purview of substantively identical predecessor statute, where husband had no separate income during marriage].)

West's Key Number Digest, Husband and Wife k.268, 269, 272(4), 272(5)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION

E. Methods of Division.

1. In General.

11 Witkin Sum. Cal. Law Com Prop § 213

[§ 213] In General.

(1) *Discretion of Court.* Under *Family C. 2550*, the trial court must value and divide the community property equally (see *supra*, §190), but the court has wide discretion in choosing the method of division to be used to accomplish that goal. (See *In re Marriage of Connolly* (1979) 23 C.3d 590, 603, 153 C.R. 423, 591 P.2d 911, *supra*, §210; *In re Marriage of Fink* (1979) 25 C.3d 877, 886, 160 C.R. 516, 603 P.2d 881, *infra*, §259; *In re Marriage of Emmett* (1980) 109 C.A.3d 753, 758, 169 C.R. 473; *In re Marriage of Behrens* (1982) 137 C.A.3d 562, 572, 187 C.R. 200, *supra*, §211; *In re Marriage of Vanderbeek* (1986) 177 C.A.3d 224, 234, 222 C.R. 832; *In re Marriage of Nichols* (1994) 27 C.A.4th 661, 670, 33 C.R.2d 13 [trial judge properly valued husband's shareholder interest in law firm according to stock purchase agreement that excluded accounts receivable and work in progress]; *Iredale v. Cates* (2004) 121 C.A.4th 321, 329, 16 C.R.3d 505 [following *Nichols*; trial judge properly valued community property interest in law firm, in which wife was partner, based on partnership agreement, i.e., wife was entitled to interest in hard assets but not in accounts receivable, work in progress, or goodwill]; *Rutter Group*, 2 Family Law §8:1030 et seq.)

There is a limitation on the court's discretion. Without a stipulation of the parties, the court cannot abdicate its statutory responsibility to value and divide the community estate, because those duties are nondelegable functions. Thus, no matter the scope of the impasse between the parties or the complexity of the dispute, mediators, arbitrators, or other nonjudicial alternative dispute resolution methods (except pursuant to *Family C. 2554*, *infra*, §232) may not be used to value and divide the community estate unless both parties expressly agree to it. (*In re Marriage of Cream* (1993) 13 C.A.4th 81, 84, 16 C.R.2d 575, *supra*, §209 and *infra*, §217; see *Rutter Group*, 2 Family Law §8:1031.)

(2) *Residue After Discharge of Debts.* The property to be divided is the residue remaining after discharge of debts for which the community is liable. The court may therefore consider a party's liability to his or her attorney, as the court may any other debt; but the court cannot adjudicate, as between the party and the attorney, the amount due. (*Wong v. Superior Court* (1966) 246 C.A.2d 541, 547, 54 C.R. 782, 11 Summary (10th), *Husband and Wife*, §9.)

In re Marriage of Barnert (1978) 85 C.A.3d 413, 420, 421, 149 C.R. 616, observed that the trial court may award different assets to each party, balanced by the award of obligations to each party, so that the residual assets are equal. In most cases, division is made by using the net value of each item. If the asset is encumbered, the party receiving that asset has received the value of the asset minus the lien, and the same party becomes primarily liable for the lien debt,

which ceases to play a part in further consideration by the court. Hence, where the trial judge deducted an encumbrance of \$ 55,000 from the market value of the family residence before awarding the net equity of \$ 26,000 to the wife, it was error to also assign her the \$ 55,000 encumbrance. The assignment annulled the encumbrance, and resulted in the remaining community obligations of \$ 33,473 being assigned entirely to the husband, rather than being divided in accordance with the community property statutes. (85 C.A.3d 421, 422.)

(3) *Methods of Division.* The three principal methods of dividing a community asset are the following:

(a) Equal in-kind division. (See *infra*, §214.)

(b) Sale of assets and division of proceeds. (See *infra*, §215.)

(c) Award of an entire asset to one spouse with an offsetting award to other spouse. (See *supra*, §204 et seq.) (On methods of nonjudicial division, see *infra*, §217; on division of pension benefits, see *supra*, §58 et seq.)

West's Key Number Digest, Husband and Wife k.272(5)

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E. Methods of Division.

2. Division in Kind.

11 Witkin Sum. Cal. Law Com Prop § 214

[§ 214] Division in Kind.

In re Marriage of Brigden (1978) 80 C.A.3d 380, 145 C.R. 716, supra, §§190, 210, classified in-kind division as the general rule "both in terms of the method of division and the result to be achieved." (80 C.A.3d 390.) "For division by any method other than by partition into equal portions (equal in kind division) will result in the spouses receiving different property even though they receive property of mathematically equal value. Methods of division other than division in kind can achieve no more than 'a substantially equal division of the property' and therefore are permitted ... only '[w]here economic circumstances warrant.' " (80 C.A.3d 390.) "Equal in kind division avoids valuation problems. It eliminates the need to place a disproportionate risk of loss on either party, is impervious to charges of favoritism, and apportions the risk of future tax liabilities equally. ... It also accomplishes an immediate division of property and provides the parties with the most post-dissolution economic stability." (80 C.A.3d 391.)

Notwithstanding its widespread use and its advantages, in-kind division is not required, and courts have broad discretion to utilize another method when the circumstances warrant. (See *supra*, §213.)

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E. Methods of Division.

3. Sale of Property and Division of Proceeds.

11 Witkin Sum. Cal. Law Com Prop § 215

[§ 215] Sale of Property and Division of Proceeds.

(1) *In General.* Under *Family C.* 2553 (see *infra*, §232), the court may make orders necessary to carry out the purposes of *Family C.* 2500 et seq.; thus, the court has jurisdiction to order a sale of community property when this is necessary to effect an equal division. (See *In re Marriage of Davis* (1977) 68 C.A.3d 294, 306, 308, 137 C.R. 265 [by statute (see *infra*, §258), court with personal jurisdiction of party may order party to sell property beyond territorial jurisdiction of court; it would be incongruous to have greater power over that property than over property within territorial jurisdiction]; *In re Marriage of Holmgren* (1976) 60 C.A.3d 869, 872, 130 C.R. 440 [family residence]; *In re Marriage of Rives* (1982) 130 C.A.3d 138, 156, 181 C.R. 572, *supra*, §103 [queen bee business]; *In re Marriage of Stallworth* (1987) 192 C.A.3d 742, 754, 237 C.R. 829 [mobilehome].) (On court-ordered sale of community or quasi-community assets to avoid unreasonable market or investment risks, see *infra*, §232.)

(2) *Right to Interest Where Sale Is Delayed.* *In re Marriage of Teichmann* (1984) 157 C.A.3d 302, 203 C.R. 619, raised the question whether a spouse is entitled to interest on an award when its payment is delayed without the fault of the parties. The judgment required immediate sale of the family residence and division of the proceeds. However, prior to the division, the wife was to receive \$ 89,000 to equalize the overall division of the community assets. Due to unfavorable market conditions, the house was not sold until 19 months after entry of judgment. During this period, the wife lived in the residence, maintained it, and made the mortgage payments. After the sale, she filed a cost bill requesting \$ 10,282 in accrued interest from the date of judgment. *Held*, judgment striking the cost bill affirmed.

(a) *Interest is not required to effect equal division.* Cases involving the delayed sale of the family residence suggest that the payee spouse should be compensated for the loss of use of the deferred payment if the payor spouse enjoyed the exclusive use of the home prior to sale. (157 C.A.3d 306.) Here, however, not only did the payee spouse retain possession, but she also shared equally in any appreciation in value during the 19-month period. Under these conditions the delay in payment resulted in no unequal division justifying an award of interest. (157 C.A.3d 307.)

(b) *No postjudgment interest is required.* As an alternative theory of recovery, the wife argued that the \$ 89,000 constituted a money judgment that earned interest at the legal rate from the date of judgment (see 7 Cal. Proc. (4th), Judgment, §272). However, in the cases on which she relied, the payee spouse received payments directly from the other spouse, while here the wife's award of \$ 89,000 was neither due nor payable from the husband, but was to be

distributed to her from the proceeds of the eventual sale. This situation is analogous to a partition proceeding, i.e., there is neither a money judgment nor a judgment debtor, and hence, no accrued interest. (157 C.A.3d 307.)

In re Marriage of Pollard (1988) 204 C.A.3d 1380, 251 C.R. 751, distinguished *Teichmann* and allowed interest. By agreement incorporated into the judgment of dissolution, the wife was to have exclusive possession of the family residence and the husband was to receive \$ 33,429 as his equity share, based on its 1981 market value. In order not to disrupt the minor children, the parties agreed that the husband would not be paid until the wife sold the house; but the agreement did not require a sale. In 1987, the husband brought an action to compel the wife to sell. She elected to keep it, and agreed to pay his award by May 1, 1988. The trial judge deferred payment until that date, but refused the husband's request for interest from the date of entry of the judgment of dissolution. *Held*, reversed.

(a) The husband's award was a money judgment entitled to accrued interest from the date it was entered. (204 C.A.3d 1383.) In *Teichmann*, the court found that there was no money judgment because the property was ordered to be sold at the time of the judgment and the wife was to receive \$ 89,000 from the proceeds of the sale. Here, a sum was ordered payable from one spouse to the other to equalize division of the community property; hence, the award was a money judgment even though the exact date of payment was unspecified. (204 C.A.3d 1384.)

(b) In equitable terms, this situation is "*Teichmann's* factual flip side." In that case, the payor spouse did not have the use of the payee spouse's award during the interval between entry of judgment and sale of the property, and during this interval, the payee spouse had exclusive possession of the property and shared equally in its appreciation. Here, the payee was excluded from the residence, and the payor had the use of the payee's interest during the 7 years he was deprived of the use of his money award. (204 C.A.3d 1384.)

(c) There was no evidence showing whether the actual appreciation in the house's value was greater or less than the accumulated interest. In view of the parties' ambiguous agreement and the husband's limited request for interest at the legal rate, the trial judge, on remand, must compare the relative values of the husband's award computed as a money judgment and the property's fair market appreciated value, and modify the order to award the husband the lesser of the two amounts. (204 C.A.3d 1386.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Right to Interest Where Sale Is Delayed.* *Interest on judgment:*

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §326.



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E. Methods of Division.

4. Reservation of Jurisdiction To Divide.

11 Witkin Sum. Cal. Law Com Prop § 216

[§ 216] Reservation of Jurisdiction To Divide.

(1) *Statutory Authorization.* Under *Family C. 2550* (supra, §190), the court may make a property division subsequent to judgment if it expressly reserves jurisdiction for that purpose. *In re Marriage of Munguia* (1983) 146 C.A.3d 853, 195 C.R. 199, construed the identical predecessor statute. In dispute was the valuation of a community property business, due to uncertainty whether its 5-year lease, which was to expire 8 months after trial, would be renewed. Expert testimony valued the business at approximately \$ 42,000 if the lease was not renewed, and at between \$ 65,000 and \$ 75,000 if it was. The leasing agent testified that the owners were willing to consider a 3-year extension. The trial judge refused the wife's request for a reservation of jurisdiction until the status of the lease was resolved, and valued the business at \$ 42,000. *Held*, this was error.

(a) It is an abuse of discretion for the trial court to attempt to divide "conjectural" community assets. To avoid the unequal division of community assets that cannot be accurately valued at the time of trial, the statute "authorizes the court expressly to reserve jurisdiction over certain properties." (146 C.A.3d 858, 859.)

(b) On remand, the trial judge should reevaluate the property if he determines that the lease has been renewed. And if he determines that it was not renewed, and that the nonrenewal was due to the husband's intentional mismanagement or negligence, he should also consider this factor in reevaluating. (146 C.A.3d 859.)

(2) *Limitation: Reservation of Jurisdiction May Not Be Indefinite.* *In re Marriage of Bergman* (1985) 168 C.A.3d 742, 757, 214 C.R. 661, supra, §76, held that the trial court committed reversible error by indefinitely reserving jurisdiction to divide pension benefits. *Bergman* was distinguished by *In re Marriage of Kilbourne* (1991) 232 C.A.3d 1518, 284 C.R. 201, supra, §127, involving the valuation of the husband's law practice. The law practice consisted almost entirely of personal injury cases taken on a contingency fee basis. The husband argued that the trial judge had erroneously reserved jurisdiction to divide the unpaid fees in cases that were in progress, instead of determining a present value for those cases. *Held*, the reservation of jurisdiction was proper.

(a) Former C.C. 4800 expressly empowered the trial court to reserve jurisdiction to make a property division at a later time (citing *Munguia*). Unlike in *Bergman*, here the period of reserved jurisdiction was necessarily finite, because the dismissal statutes (C.C.P. 583.110 et seq.; see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §281 et seq.) put a time

limit on the resolution of the litigation. (232 C.A.3d 1525.)

(b) The trial judge had little choice but to reserve jurisdiction in this case, in light of the husband's claim that no value could be placed on the unpaid contingency fees, his failure to keep time records, his refusal to open his files, and his failure to call an expert witness regarding the valuation of his practice. (232 C.A.3d 1525.) (See *In re Marriage of Gowan* (1997) 54 C.A.4th 80, 85, 62 C.R.2d 453, supra, §65 [trial court's retention of jurisdiction, in 1978 interlocutory dissolution judgment, to divide husband's pension benefits included jurisdiction over benefits earned during separate employment period with same employer that began in 1989, after 15-year interruption].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Limitation: Reservation of Jurisdiction May Not Be Indefinite.* Dismissal statutes:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §315 et seq.



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5. Nonjudicial Division.

11 Witkin Sum. Cal. Law Com Prop § 217

[§ 217] Nonjudicial Division.

In re Marriage of Cream (1993) 13 C.A.4th 81, 16 C.R.2d 575, after resolving issues arising from the division of a family business (*supra*, §209), provides an extended discussion of "alternative methods of resolving property division and valuation disputes which are frequently suggested by family law judges and lawyers, and stipulated to by parties." (*13 C.A.4th 90.*)

(a) *Parties' stipulations must be accepted.* Under former C.C. 4800 (now *Family C. 2550*), the court must accept stipulations of the parties with regard to the disposition of their property. The court has no role in approving or disapproving property divisions agreed to by the parties, except for conduct violative of former C.C. 4800.11 (now *Family C. 2120 et seq.*, *infra*, §242), providing grounds for relief from the support or property provisions of a judgment. "The court's only role with regard to a proper stipulated disposition of marital property is to accept the stipulation and, if requested, to incorporate the disposition into the judgment." (*13 C.A.4th 91.*)

(b) *Role of judge.* "For the most part, the methods to resolve disputes over marital property listed in the appendix can and should be utilized without any direct judicial participation. Although the judge may recommend one or more of these methods at a settlement conference or at trial, negotiation of the terms and implementation of the method chosen can be done outside the presence of the judge." (*13 C.A.4th 91.*)

(c) *Advantages of nonjudicial methods.* "[T]here is rarely any hesitancy on the part of divorcing spouses to agree to use one or more of these methods to resolve an impasse in the division of assets. ... These methods can be valuable tools in both ascertaining the value of community property and determining the party to whom it is awarded. Their use can avoid game-playing, discovery disputes, the expense of experts and lengthy and costly trials. ... If the process is conducted fairly, the recipient of the property at the price specified has no basis for complaint because the recipient believes the property is worth what he or she is paying for it. The other party has no basis for complaint because that party is receiving more for the property than he or she thought it was worth, since he or she was unwilling to pay that much to the other party to obtain the property." (*13 C.A.4th 91.*) "[T]he best resolution of marital disputes is that reached by agreement of the parties themselves. ... We encourage the family law bench and bar to recommend that parties in marital dissolution actions consider making use of whatever alternatives to judicial resolution of property disputes can be agreed upon by the parties." (*13 C.A.4th 92.*)

(d) *Property amenable to nonjudicial division.* "The items most typically disposed of by the use of one of these methods are the proverbial 'pots and pans.' Indeed, furniture, furnishings and other personal property are regularly disposed of by one of these methods. The alternative may be a court-ordered garage sale. Disputes over appraised items where the appraised value is accepted by the parties as correct, such as wine collections, works of art, etc., are often resolved by one of these methods. These methods are especially useful when, as is frequently the case, each party wants the same item or items and there is no good reason for the court to award an item to one spouse rather than the other. ... [T]hese methods can also be used to determine both the value and the disposition of a community business, although this may be appropriate only where each spouse is capable of operating the business. Even where a family business is not operated by both spouses, one of these methods may be utilized when each spouse wants the business, if the business is readily saleable or can be operated by a capable manager." (13 C.A.4th 91, 92.)

(e) *List of alternative methods.* "For the benefit of the family law bench and bar--indeed, for the benefit of the increasing number of parties who represent themselves in marital dissolution cases--we attach as an appendix to this opinion a laundry list of alternative methods of resolving property division and valuation disputes." (13 C.A.4th 90.) The court's list includes explanations and suggestions, as follows (13 C.A.4th 94, 95):

(1) *In-kind division.* "Each party takes one-half of fungible assets such as bank accounts, stock in a corporation, etc."

(2) *Trade-off division.* "The parties stipulate to settle their property disputes, without regard to value, by agreeing one will take certain items of property, e.g., the furniture, and the other will take other items, e.g., the car."

(3) *Piece-of-cake division.* "This method gets its name from the common situation where two children have a piece of cake to be cut in half. To avoid the argument over who gets the 'bigger' half, it is agreed that one will cut the cake and the other gets to choose which piece he or she will receive. In the marital property context, one party makes up two lists of the property in question, ... which he or she believes are equal, and the other party chooses which list of items she or he will take. In using this or any other method, it is important not to break up sets, e.g., a dining room set, a set of dishes, matching art works, etc. The piece-of-cake method is particularly useful for dividing furniture and furnishing which usually have a real value to the parties far in excess of their fair market value as used furniture. This method is also useful in short-term marriages where the dispute is over the division of wedding gifts received by the parties."

(4) *One values, the other chooses.* "In this method, one party places a value on each item of community property in dispute and the other party chooses those items he or she will take at the stated value up to one-half the total value. Alternatively, the parties may agree that the party choosing may select any, all or none of the items, with any items not chosen going at the stated value to the one who set the value. An equalization payment can be required. In dividing furniture and furnishings using this or one of the other methods listed, an alternative to piece-by-piece choice is to list furniture and furnishings room-by-room and have alternate choices by room."

(5) *You take it or I will take it.* "In this method one party places a value on an asset at which that party is willing to let the other party be awarded the asset, or else the former will be awarded the asset at that value."

(6) *Appraisal and alternate selection.* "An appraiser is selected by stipulation to value each of the items in question. The parties then choose items alternately until all items are taken. The one to make the first choice can be designated by the flip of a coin. Another approach is to let one party go first and the other party then gets two selections, after which choices are made alternatively. ... It might be agreed that if a party takes a set it counts as that many choices, e.g., a dining room table and four matching chairs counts as five choices, and the other party then makes the next five choices."

(7) *Sale.* "The parties agree that the items in question be sold at a public sale or to a particular buyer with the proceeds divided equally, or in whatever other proportion is necessary to accomplish a satisfactory or equal division, considering the other marital assets or obligations each is receiving. For modest furniture or furnishings, the sale may be

a garage sale, since this might be what the court would order."

(8) *Sealed bid*. "Each of the parties submits a sealed bid on each item of property in dispute, using the same list. The bids are opened simultaneously and the one bidding the highest amount for an item gets that item valued at the figure he or she bid, with an equalizing payment to be made, if necessary. This method can also be used for disposition of the family home, other real property and a family business which both parties have operated, where each seeks to have it awarded to him or her."

(9) *Interspousal auction*. "This is a straight auction between the parties, usually with an agreed minimum incremental increase over the last bid being required. The high bidder gets the asset at the amount of his or her bid with an equalizing payment being made, if necessary. To the extent a major asset is involved such as a family business or real estate, the stipulation might provide that each of the parties have an advisor present during the bidding."

(10) *Arbitration*. "The valuation and division of the community property in question could be determined by an arbitrator selected by the parties. The parties should understand that the arbitrator is not required to follow the law, and his or her decision, for all practical purposes, is final and not subject to appeal. Because arbitration usually takes much less time than a court trial, the parties might consider stipulating with the consent of the judge, that the judge hear the case as an arbitrator."

(11) *Mediation*. "Mediation is greatly underutilized in family law cases. It can be a very effective and satisfying way for the parties to reach agreement on the value and division of their marital property."

(12) *Real property*. "If both parties want community real property, one of the foregoing methods of resolution can be used. If neither wants it, it can be listed for sale with a broker stipulated to by the parties, at a listing price recommended by the broker. If one wants the property but the other feels he or she is offering too little, the latter can list it for sale with a broker of his or her choosing. If the property does not sell within a specified period of time, the listing price will be periodically reduced until it reaches the figure where the net proceeds would be equal to what the other party offered. The property then goes to the offering party for the amount of the offer."

(13) *Combination*. "Where more than one marital asset is in dispute, one of the foregoing methods might be used for one asset, while one or more other methods might be used for other assets."

SUPPLEMENT: [This section is current through the latest supplement]



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F. Division of Jointly Held Property.

1. Community Property Presumption.

a. Former Law.

1. Joint Tenancy With Separate Interests.

11 Witkin Sum. Cal. Law Com Prop § 218

[§ 218] Joint Tenancy With Separate Interests.

(1) *In General.* In *Siberell v. Siberell* (1932) 214 C. 767, 7 P.2d 1003, property had been conveyed to a husband and wife as joint tenants. The court held that in a joint tenancy, the interests of the joint tenants must be identical and coextensive; therefore, the form of the joint tenancy deed overcame the statutory presumption that property acquired during marriage is community property (see *supra*, §15). The effect of this decision was that the deed to the husband and wife created a presumption of joint tenancy, in which the interest of each spouse was separate property. (214 C. 772.) (See *Young v. Young* (1932) 126 C.A. 306, 310, 14 P.2d 580; *In re Rauer's Collection Co.* (1948) 87 C.A.2d 248, 257, 196 P.2d 803 [evidence showed intention to create joint tenancy, despite homestead declaration that land was "the Community Property in Joint-Tenancy of the Declarants"]; *Saunders v. Saunders* (1950) 98 C.A.2d 133, 135, 219 P.2d 28 [note to husband and wife "each an undivided one-half interest as separate property"]; *Barba v. Barba* (1951) 103 C.A.2d 395, 396, 229 P.2d 465 [real property purchased with separate funds of husband]; *King v. King* (1951) 107 C.A.2d 257, 259, 236 P.2d 912; *Walker v. Walker* (1952) 108 C.A.2d 605, 608, 239 P.2d 106; *Cash v. Cash* (1952) 110 C.A.2d 534, 537, 243 P.2d 115 [joint tenancy bank account was gift of half to wife, although most deposits were husband's separate property]; *Blankenship v. Blankenship* (1963) 212 C.A.2d 736, 740, 28 C.R. 176; *Gloden v. Gloden* (1966) 240 C.A.2d 465, 469, 49 C.R. 659; 20 Cal. L. Rev. 546; 14 Pacific L. J. 927 [Joint Tenancy and Community Property in California]; 20 San Diego L. Rev. 779 [Community Property With Right of Survivorship; argument that property can simultaneously be community and possess incident of right of survivorship]; 5 So. Cal. L. Rev. 144; 39 So. Cal. L. Rev. 252; 14 Stanf. L. Rev. 87.)

(2) *Joint Tenancy Form Was Not Conclusive.* Because the joint tenancy form was often used in property transfers without a full understanding of its implication, it was soon established that evidence could be offered to show that the intention was to take the property as community. (See *Tomaier v. Tomaier* (1944) 23 C.2d 754, 757, 146 P.2d 905; *Cummins v. Cummins* (1935) 7 C.A.2d 294, 304, 46 P.2d 284; *Beck v. Beck* (1966) 242 C.A.2d 396, 406, 51 C.R. 491; 32 Cal. L. Rev. 182; 17 So. Cal. L. Rev. 401; 3 U.C.L.A. L. Rev. 641.)

Thus, the joint tenancy form was overcome where it was shown that the parties had an oral or written mutual agreement for community property ownership, or where conduct or declarations were proved from which a mutual

agreement might be inferred. (See *Socol v. King* (1950) 36 C.2d 342, 346, 223 P.2d 627; *Wood v. Wood* (1947) 81 C.A.2d 727, 185 P.2d 53; *Rogers v. Rogers* (1948) 86 C.A.2d 817, 821, 195 P.2d 890; *Perdicalis v. Perdicalis* (1949) 92 C.A.2d 274, 276, 206 P.2d 650; *Estate of Jameson* (1949) 93 C.A.2d 35, 42, 208 P.2d 54 [where wife died and husband claimed property as surviving joint tenant, wife's heirs could show that spouses had executed mutual wills declaring that property was community]; *De Boer v. De Boer* (1952) 111 C.A.2d 500, 505, 244 P.2d 953; *Mademann v. Sexauer* (1953) 117 C.A.2d 400, 256 P.2d 34; *Stauffer v. Stauffer* (1955) 135 C.A.2d 515, 517, 287 P.2d 518; *Lovetro v. Steers* (1965) 234 C.A.2d 461, 469, 44 C.R. 604; *Hansford v. Lassar* (1975) 53 C.A.3d 364, 373, 125 C.R. 804; *In re Marriage of Mahone* (1981) 123 C.A.3d 17, 22, 176 C.R. 274 [evidence that property was placed in joint tenancy form to facilitate refinancing supported inference of understanding that true joint tenancy was not intended]; *In re Marriage of Hayden* (1981) 124 C.A.3d 72, 77, 177 C.R. 183.)

However, evidence that one spouse was ignorant of the legal effect of the deed and "did not intend" to create a joint tenancy was insufficient to overcome the presumption arising from the form of the deed. (See *Gudelj v. Gudelj* (1953) 41 C.2d 202, 213, 259 P.2d 656; *Edwards v. Deitrich* (1953) 118 C.A.2d 254, 260, 257 P.2d 750; *Perkins v. West* (1954) 122 C.A.2d 585, 590, 265 P.2d 538; *Fifield v. Greeley* (1955) 132 C.A.2d 512, 520, 282 P.2d 552; *Guerin v. Guerin* (1957) 152 C.A.2d 696, 710, 313 P.2d 902; *Borgerding v. Mumolo* (1957) 153 C.A.2d 821, 826, 315 P.2d 347; *In re Marriage of Wall* (1973) 30 C.A.3d 1042, 1047, 106 C.R. 690.) (On exception to rule where wife did not participate or consent, see *Estate of Baglione* (1966) 65 C.2d 192, 195, 53 C.R. 139, 417 P.2d 683; *Schindler v. Schindler* (1954) 126 C.A.2d 597, 604, 272 P.2d 566.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION

F. Division of Jointly Held Property.

1. Community Property Presumption.

a. Former Law.

2. Single-Family Residence in Joint Tenancy.

11 Witkin Sum. Cal. Law Com Prop § 219

[§ 219] Single-Family Residence in Joint Tenancy.

(1) *Community Property Presumption.* Beginning in 1965, former California statutes established a special presumption to overcome the joint tenancy form in dissolution and legal separation proceedings. When a single-family residence of a husband and wife was acquired by them during marriage as joint tenants, for the purpose of the division of that property upon dissolution of marriage or legal separation only, the presumption was that the residence was community property.

The Courts of Appeal took conflicting approaches as to the proper method of determining ownership interests in a residence purchased during marriage in joint tenancy with both separate and community funds. (See *In re Marriage of Bjornestad* (1974) 38 C.A.3d 801, 806, 113 C.R. 576 [allowing reimbursement for separate property contributions to downpayment]; *In re Marriage of Aufmuth* (1979) 89 C.A.3d 446, 457, 152 C.R. 668 [apportioning equity appreciation between separate and community property contributions to purchase price]; *In re Marriage of Trantafello* (1979) 94 C.A.3d 533, 539, 156 C.R. 556 [residence was entirely community in absence of contrary agreement or understanding between parties].)

(2) *Rebutting Presumption.* *In re Marriage of Lucas* (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285, resolved the conflict in the Courts of Appeal. In *Lucas*, the wife used separate funds as the downpayment on a home, and title was then taken in the names of husband and wife as joint tenants. The wife also paid for improvements with separate funds. *Held*, even though the separate funds were traceable, the property would be community in the absence of a contrary agreement.

(a) The problem that gave rise to the statutory presumption of community property was described by the Legislative Committee as follows: "[H]usbands and wives take property in joint tenancy without legal counsel but primarily because deeds prepared by real estate brokers, escrow companies and by title companies are usually presented to the parties in joint tenancy form. The result is that they don't know what joint tenancy is, that they think it is community property, and then find out upon death or divorce that they didn't have what they thought they had all along and instead have something else which isn't what they had intended." (27 C.3d 814.) The effect of the statutes was to change the

presumptive form of ownership to that more closely matching the intent and assumptions of most spouses. (27 C.3d 814.)

(b) The special presumption arising from the form of title differs from the general presumption that property acquired during marriage is community. It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the general presumption; and a greater showing is necessary to overcome the special presumption than is necessary to overcome the general presumption. The general presumption may be overcome simply by tracing the source of funds to separate property; it is not necessary to show that the parties understood or intended that the traceable property remain separate. The special presumption, however, requires an understanding or agreement to overcome it, and this requirement is supported by sound considerations of policy. "To allow a lesser showing could result in unfairness to the spouse who has not made the separate property contribution. Unless the latter knows that the spouse contributing the separate property expects to be reimbursed or to acquire a separate property interest, he or she has no opportunity to attempt to preserve the joint ownership of the property by making other financing arrangements. The act of taking title in a joint and equal ownership form is inconsistent with an intention to preserve a separate property interest. Accordingly, the expectations of parties who take title jointly are best protected by presuming that the specified ownership interest is intended in the absence of an agreement or understanding to the contrary. We therefore resolve the conflict in Court of Appeal opinions by following *Trantafello* and disapproving *Aufmuth* and *Bjornestad* to the extent they are inconsistent with this opinion." (27 C.3d 815.)

(c) The following considerations govern retrial of this case:

(1) The findings that neither party intended a gift to another are insufficient to rebut the presumption. (27 C.3d 815.)

(2) If the judge finds that there was no understanding or agreement and that the house is entirely community property, the wife will not be entitled to reimbursement for the separate funds she contributed in the absence of an agreement therefor. (27 C.3d 816.)

(3) If the judge finds that there was an understanding or agreement that the wife was to retain a separate property interest, the most equitable method of apportionment is that set forth in *Aufmuth*. The spouse who made the separate property downpayment receives a separate property interest in the proportion that the downpayment bears to the purchase price; the community acquires that percentage of the residence that the community loan bears to the purchase price. (27 C.3d 816; see supra, §119.)

(4) If the judge finds no agreement or understanding that the wife was to retain a separate property interest in the residence, her contribution of separate funds for improvements should have no effect on the parties' interests. If there was an understanding that her separate interest should be maintained, but no separate understanding as to improvements, she should receive no additional credit for her expenditures for improvements; it may be presumed that she intended that they redound to both the community and her separate interest. (27 C.3d 817, citing *See v. See* (1966) 64 C.2d 778, 51 C.R. 888, 415 P.2d 776, supra, §17.)

Numerous cases involving single family residences have applied the *Lucas* rule. (See, e.g., *In re Marriage of Miller* (1982) 133 C.A.3d 988, 991, 184 C.R. 408 [community property presumption was applicable where contract was entered into before marriage, but title was taken by both parties as joint tenants after marriage]; *In re Marriage of Tucker* (1983) 141 C.A.3d 128, 135, 190 C.R. 127 [community property presumption was applicable to purchase of property in joint tenancy by contract of sale, rather than by note and deed of trust]; *In re Marriage of Johnson* (1983) 143 C.A.3d 57, 60, 191 C.R. 545 [remanded for determination whether rebuttal evidence was sufficient]; *In re Marriage of Scherr* (1986) 177 C.A.3d 314, 319, 222 C.R. 872 [community property presumption was rebutted by evidence that only purpose for joint tenancy deed was to protect wife if husband died, and that parties agreed that residence was to remain husband's separate property]; *Estate of Levine* (1981) 125 C.A.3d 701, 706, 178 C.R. 275 [community property presumption was inapplicable in probate proceedings]; Rutter Group, 2 Family Law §8:286 et seq.; 70 Cal. L. Rev. 1263

[The Division of the Family Residence Acquired With a Mixture of Separate and Community Funds]; 15 *Loyola L.A. L. Rev.* 157 [The Marital Residence Acquired With Separate and Community Property Funds During the Marriage]; 15 *Loyola L.A. L. Rev.* 289 [Computation of Proportionate Ownership of the Family Residence upon Dissolution of Marriage]; 15 *U.C. Davis L. Rev.* 95 [Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement"]; 28 *U.C.L.A. L. Rev.* 1365 [What's Yours is Mine and What's Mine is Mine: The Classification of the Home Upon Dissolution].)

The requirement of a "Lucas agreement" to rebut the presumption arising from the form of title has been applied in various situations in addition to single-family residences held in joint tenancy. (See *In re Marriage of Cademartori* (1981) 119 C.A.3d 970, 975, 174 C.R. 292, supra, §22 [warehouse held by "husband and wife"]; *In re Marriage of Mahone* (1981) 123 C.A.3d 17, 22, 176 C.R. 274 [residences, other than family residence, held in joint tenancy]; *In re Marriage of Hayden* (1981) 124 C.A.3d 72, 77, 177 C.R. 183 [bank account held in joint tenancy]; *In re Marriage of Priddis* (1982) 132 C.A.3d 349, 360, 183 C.R. 37, supra, §195 [stock held in joint tenancy]; *In re Marriage of Munguia* (1983) 146 C.A.3d 853, 860, 195 C.R. 199 [liquor license held as partnership between husband and wife]; *In re Marriage of Stitt* (1983) 147 C.A.3d 579, 585, 195 C.R. 172, supra, §85 [wife's separate residence deeded after marriage to husband and wife as joint tenants, and then deeded back to wife "as an unmarried woman"].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

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F. Division of Jointly Held Property.

1. Community Property Presumption.

b. Current Law.

1. In General.

11 Witkin Sum. Cal. Law Com Prop § 220

[§ 220] In General.

(1) *Presumption Affecting Burden of Proof.* A 1983 enactment expanded the former single-family residence presumption (see *supra*, §219) by making it applicable to all property held in joint tenancy. (See *15 Pacific L. J. 605.*) A 1986 enactment made it applicable to all property held in joint form. These enactments were subsequently incorporated into *Family C. 2581*, effective January 1, 1994. (See Rutter Group, 2 Family Law §8.400 et seq.; 26 Cal. Western L. Rev. 26; *18 Pacific L. J. 603.*)

Family C. 2581 provides that, for purposes of property division in dissolution and legal separation proceedings, property acquired during the marriage in joint form, including tenancy in common, joint tenancy, tenancy by the entirety, or community property, is presumed to be community property. This presumption affecting the burden of proof may be rebutted by either of the following:

(a) A clear statement in the deed, or other documentary evidence of title by which the property is acquired, that the property is separate property and not community property.

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

The Law Revision Commission Comment explains that the presumption governs (a) real and personal property, whether situated in California or another jurisdiction; (b) property acquired during marriage while domiciled in another jurisdiction; and (c) property initially acquired before marriage, where title was taken in joint tenancy form by the spouses during marriage. The requirement of a writing to rebut the presumption "is important to help ensure that a party waives community property rights only on mature consideration," but "does not affect the validity of an oral agreement for any purpose other than division of property at dissolution of marriage. ... This treatment of an oral agreement ... is fair because an oral agreement, whatever other purpose it might have (management and control, disposition at death, etc.), is not ordinarily intended to affect rights at dissolution or to make a present gift for that purpose. Casual statements made during marriage generally are not made with full knowledge of their consequences or with the intention that they change the rights of the parties if the marriage is dissolved." (See *In re Marriage of Neal (1984) 153*

C.A.3d 117, 124, 200 C.R. 341 [residence purchased before marriage by one spouse, but deeded after marriage to both spouses in joint tenancy, was "acquired" during marriage within meaning of statute]; *In re Marriage of Anderson (1984) 154 C.A.3d 572, 578, 201 C.R. 498* [same].)

(2) *Presumption Is Limited to Dissolution or Legal Separation Proceedings.* The presumption that property acquired by married persons in joint tenancy is community property applies, under the terms of the statute, only in dissolution or legal separation proceedings. In *Dorn v. Solomon (1997) 57 C.A.4th 650, 67 C.R.2d 311*, an action to quiet title and to cancel a quitclaim deed executed by plaintiff's wife before her death purporting to transfer her interest in the family home to an irrevocable trust, the trial court granted summary judgment for plaintiff. *Held*, affirmed. Because title to the home was held by the parties in joint tenancy, the presumption arose that title to the property passed to plaintiff as a joint tenant by right of survivorship when his wife died, and the burden was on defendant trustee to demonstrate that there was a triable issue of material fact whether the property was held as community property. The presumption of *Family C. 2581* that property acquired during marriage in joint tenancy is community property applies only for purposes of division of property on dissolution of marriage or legal separation. An unsigned marital settlement agreement prepared by plaintiff's attorney 2 years earlier, listing the property as community property, was insufficient to demonstrate a triable issue of material fact, because there was no evidence that plaintiff viewed the family home as community property. (*57 C.A.4th 652.*)

West's Key Number Digest, Husband and Wife k.262.1(6), 272(5)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Presumption Affecting Burden of Proof.* See *In re Marriage of Weaver (2005) 127 C.A.4th 858, 866, 26 C.R.3d 121* [during marriage, husband acquired joint tenancy interest in mother's residence from mother as gift, but residence was subsequently deeded during marriage to mother, husband, and wife in joint tenancy; absent writing to contrary, husband and wife's joint tenancy interest was presumed community property].



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F. Division of Jointly Held Property.

1. Community Property Presumption.

b. Current Law.

2. Effect of Party's Death After Dissolution but Before Division.

11 Witkin Sum. Cal. Law Com Prop § 221

[§ 221] Effect of Party's Death After Dissolution but Before Division.

(1) *Presumption Applies. In re Marriage of Hilke* (1992) 4 C.4th 215, 14 C.R.2d 371, 841 P.2d 891, considered the question whether the community property presumption of former C.C. 4800.1 (now *Family C. 2581*) applied to a residence acquired by a husband and wife as joint tenants, where the wife died after the entry of judgment dissolving the marriage, but before the trial judge had exercised his reserved jurisdiction to divide the marital property. The trial judge applied the presumption and found the residence to be community property. The Court of Appeal reversed on the ground that the wife's death had intervened before the presumption could be applied. *Held*, reversed; the presumption applied.

The determinative question was whether the present proceeding involved a "division of property upon dissolution of marriage" within the meaning of former C.C. 4800.1(b). The death of a spouse abates a cause of action for dissolution, but does not deprive the court of its retained jurisdiction to determine collateral property rights if the court has previously rendered judgment dissolving the marriage (see 11 *Summary* (10th), *Husband and Wife*, §72). Hence, the trial judge properly exercised his retained jurisdiction to determine the character of the residence in accord with the statutory presumption, despite the wife's intervening death. (4 C.4th 220.) (See 22 *Pepperdine L. Rev.* 269.) (On retroactivity issue decided in *Hilke*, see *infra*, §231.)

Other cases are to the same effect. (See *In re Marriage of Allen* (1992) 8 C.A.4th 1225, 1231, 10 C.R.2d 916 [reaching same result as *Hilke* on similar facts]; *Estate of Mitchell* (1999) 76 C.A.4th 1378, 1386, 91 C.R.2d 192, 12 *Summary* (10th), *Real Property*, §63 [because community property presumption applies when spouse dies after judgment of dissolution but before final judgment dividing community property, joint tenancy property was divided equally between surviving spouse and deceased spouse's estate, and surviving spouse had no right of survivorship; citing *Hilke* and *Allen*].)

(2) *Joint Tenancy Is Severed. Estate of Layton* (1996) 44 C.A.4th 1337, 52 C.R.2d 251, was another action to determine rights in a residence acquired by a husband and wife as joint tenants in which one spouse died after dissolution of the marriage but before the trial judge had exercised reserved jurisdiction to divide the marital property.

The court found that the joint tenancy had not been severed, ruling that a status-only dissolution does not of itself sever a joint tenancy, absent specific words or conduct that can be construed as severing it. The community property presumption was deemed inapplicable because of *Family C. 802*, providing that property acquired during marriage and held at death is *not* presumed community property if the marriage was dissolved more than 4 years before (see *supra*, §15). (*44 C.A.4th 1339*, footnote 4.) *Hilke* was distinguished on the ground that the result there rested on the application of the community property presumption, rather than on the severance of a joint tenancy by a status-only divorce. (*44 C.A.4th 1340*.)

Prob.C. 5601, added in 2001, reverses the rule of the *Layton* case that dissolution or annulment does not sever a joint tenancy between former spouses, but *Prob.C. 5601* does not change the presumption that property acquired during marriage in joint tenancy form is community property. (See *14 Summary (10th)*, *Wills and Probate*, §319.)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Division of Jointly Held Property.

2. Reimbursement for Contributions.

a. Statutory Rule.

11 Witkin Sum. Cal. Law Com Prop § 222

[§ 222] Statutory Rule.

(1) *Statement of Rule.* *Family C. 2640* provides for reimbursement of a spouse for separate property contributions to the acquisition of property. (See Rutter Group, 2 Family Law §8.430 et seq.; 26 Cal. Western L. Rev. 39 [discussing predecessor statute]; 49 U.C.L.A. L. Rev. 1187 [conflict between transmutation and reimbursement statutes and proposal for solution]; *infra*, §223 et seq.)

(a) *Contributions to acquisition of community property.* Unless a party has waived the right to reimbursement in writing, or has signed a writing having the effect of a waiver, the party must be reimbursed for contributions to the acquisition of community property to the extent the party traces the contributions to a separate property source. The amount reimbursed is without interest or adjustment for change in value, and may not exceed the net value of the property at the time of the division. (*Family C. 2640(b).*)

(b) *Contributions to acquisition of separate property.* *Family C. 2640* affords a similar reimbursement right to a party who contributes separate property to acquire separate property for the other spouse during the marriage, unless there has been a transmutation in writing under *Family C. 850* et seq. (see *supra*, §151 et seq.) or a written waiver of the right to reimbursement. The amount reimbursed is without interest or adjustment for change in value, and may not exceed the net value of the property at the time of the division. (*Family C. 2640(c).*)

(c) *Contributions defined.* As used in the statute, "contributions to the acquisition of property" include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property. They do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property. (*Family C. 2640(a).*)

In re Marriage of Martinez (1984) 156 C.A.3d 20, 202 C.R. 646, remanded the matter for determination of the right to reimbursement and, for guidance of the trial judge, stated the following rules: (a) For purposes of separate property contributions for the acquisition of community property, tracing is the sole method by which the right to reimbursement can be established. The statute does not authorize reimbursement by agreement of the parties. (b) "Contributions" to acquisition of the property include separate property gifts subsequently used to acquire the property. (*156 C.A.3d 31.*)

(2) *Law Revision Commission Comment.* The Law Revision Commission Comment observes:

(a) *Family C. 2640* abrogates the no reimbursement rule of *In re Marriage of Lucas* (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285, supra, §219. Under the statute, "a party making a separate property contribution to the acquisition of the property is not presumed to have made a gift, unless it is shown that the parties agreed in writing it was a gift, but is entitled to reimbursement for the separate property contribution at dissolution of marriage."

(b) The contribution is measured by its value at the time it is made; if the property has appreciated in value the community is entitled to the appreciation. On the other hand, if it has depreciated in value, reimbursement may not exceed the value of the property.

(c) "[I]f both parties are entitled to reimbursement and the property has insufficient value to permit full reimbursement of both, reimbursement should be on a proportionate basis."

(3) *Illustrations.* Many other cases have applied and construed *Family C. 2640* and its substantively identical predecessor statute:

In re Marriage of Tallman (1994) 22 C.A.4th 1697, 1699, 28 C.R.2d 323 [where wife used \$ 43,000 in separate property funds to extinguish \$ 53,000 in encumbrances on community residence, she was entitled only to \$ 43,000 reimbursement].

In re Marriage of Braud (1996) 45 C.A.4th 797, 822, 53 C.R.2d 179, supra, §207 [husband did not have separate property interest in improvements to family home, where tracing ran through commingled checking account into which husband deposited his inheritance, but into which parties also regularly deposited his community property paychecks, and respective interests could not be identified].

In re Marriage of Stoll (1998) 63 C.A.4th 837, 841, 74 C.R.2d 506, supra, §114 [strict recordkeeping is not required to establish value of separate property home for which spouse seeks reimbursement].

In re Marriage of Koester (1999) 73 C.A.4th 1032, 1036, 87 C.R.2d 76, supra, §111 [incorporation of husband's private property business during marriage was not "acquisition" by community under *Family C. 2640*, and thus did not limit him on dissolution to reimbursement under that statute].

In re Marriage of Cochran (2001) 87 C.A.4th 1050, 1056, 104 C.R.2d 920 [husband was entitled to partial reimbursement of separate property funds used for home improvement loan (but not for interest on loan) and for school fees required to obtain permit for improvements; during marriage, husband had deposited profit sharing funds acquired both before and during marriage into checking account, and under family expense presumption (see supra, §16 et seq.), it was possible to compute his separate property contribution].

In re Marriage of Cross (2001) 94 C.A.4th 1143, 1146, 114 C.R.2d 839 [*Family C. 2640* did not entitle one spouse to reimbursement for separate contribution made to other spouse's separate property].

In re Marriage of Carpenter (2002) 100 C.A.4th 424, 427, 122 C.R.2d 526 [premarital agreement providing that parties keep property separate and quitclaim deed signed by husband transferring title to home as community property did not waive husband's reimbursement rights, where both instruments were silent as to reimbursement].

In re Marriage of Nicholson & Sparks (2002) 104 C.A.4th 289, 293, 127 C.R.2d 882 [no reimbursement for separate property used to pay community credit card debt, even though paying debt allowed parties to qualify for mortgage; credit card debt existed before acquisition of realty, and had to be paid regardless of whether parties acquired realty, and thus, payments did not contribute to acquisition; distinguishing *Cochran*, supra].

West's Key Number Digest, Husband and Wife k.272(4), 272(5)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Illustrations.* The following case also has applied and construed *Family C. 2640*:

In re Marriage of Geraci (2006) 144 C.A.4th 1278,1285, 51 C.R.3d 234 [husband was not entitled to reimbursement for his alleged separate property contributions to community residence, where he failed to meet burden of tracing those contributions to community residence].



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- F. Division of Jointly Held Property.
 - 2. Reimbursement for Contributions.
 - b. Conversion of Separate Property into Joint Tenancy.

11 Witkin Sum. Cal. Law Com Prop § 223

[§ 223] Conversion of Separate Property into Joint Tenancy.

(1) *Right to Reimbursement.* *In re Marriage of Anderson* (1984) 154 C.A.3d 572, 201 C.R. 498, involved a husband's separate property residence that was converted into joint tenancy during the marriage, and hence, was presumed to be community property (see *supra*, §219). *Held*, the husband was entitled to reimbursement. Conversion was a "contribution to the acquisition of the property," even though it is not within the statutory list of payments included within that phrase. Because the term "includes" is a word of enlargement, rather than limitation, the statute should not be construed as applying only to the forms of contributions enumerated therein. (154 C.A.3d 580.) Disallowing reimbursement in this situation would reinstate the inequities of the rule of *In re Marriage of Lucas* (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285, *supra*, §219. The rule often required the equal division of joint tenancy property, even where one spouse had shown (as in the present case) that he had contributed a substantial portion of his separate property. (154 C.A.3d 581.)

(2) *Measure of Reimbursement.* *In re Marriage of Neal* (1984) 153 C.A.3d 117, 200 C.R. 341, stated the measure of reimbursement in conversion cases under the substantively identical predecessor to *Family C. 2640* "as being the value of the property at the time of its conversion to joint tenancy form. Presumably what the Legislature really meant was that the amount to be reimbursed is the value of the separate property *equity* in the property at the time of conversion, that is, the fair market value of the property less outstanding encumbrances and less any community property contributions prior to its conversion which are found not to be a gift to the separate property." (153 C.A.3d 124, footnote 11.) (See *In re Marriage of Martinez* (1984) 156 C.A.3d 20, 31, 202 C.R. 646, *supra*, §222; *In re Marriage of Benart* (1984) 160 C.A.3d 183, 190, 206 C.R. 495 ["contributions to the acquisition of the property" refers to the acquisition of the property by the community, not to its earlier acquisition as the separate property of one of the spouses]; *In re Marriage of McNeill* (1984) 160 C.A.3d 548, 565, 206 C.R. 641.)

Hence, appreciation of the property prior to the conversion is reimbursable. (*In re Marriage of Benart*, *supra*, 160 C.A.3d 190.) Appreciation thereafter accrues to the community (*In re Marriage of Huxley* (1984) 159 C.A.3d 1253, 1260, 206 C.R. 291 [criticizing result as unfair, but noting that change must come from Legislature].) If the community has made contributions prior to the conversion, it acquires a pro tanto share of the appreciation from the date of marriage to the date of conversion, based on the *Moore/Marsden* formula (see *supra*, §119). (*In re Marriage of Benart*,

supra; *In re Marriage of Kahan* (1985) 174 C.A.3d 63, 72, 219 C.R. 700; *In re Marriage of Rico* (1992) 10 C.A.4th 706, 708, 12 C.R.2d 659.)

(3) *Waiver*. *Family C. 2640* requires an express written waiver. Without a waiver, the contributing spouse's intent to make a gift to the community does not, by itself, bar the right to reimbursement. (*In re Marriage of Witt* (1987) 197 C.A.3d 103, 108, 242 C.R. 646.)

In re Marriage of Kahan rejected the argument that the deed that converted the property from separate to joint tenancy was itself a written waiver of the right to reimbursement. The predecessor statutes to *Family C. 2581* and *2640* were enacted for the purpose of changing the *Lucas* rule. If the same deed that created a presumption of community property under *Family C. 2581* were to operate as a waiver of reimbursement rights under *Family C. 2640*, the net effect would be no change whatsoever in the *Lucas* rule. "Thus it is obvious that the deed will not serve as a waiver." (174 C.A.3d 72.)

In re Marriage of Perkal (1988) 203 C.A.3d 1198, 250 C.R. 296, involved a conversion of the husband's separate residence by a "Grant Deed Joint Tenancy," which, at the husband's direction, was altered to provide that the conversion was "For A Gift," rather than "For A Valuable Consideration Receipt of Which is Hereby Acknowledged." The deed was executed and recorded on January 25, 1984. *Held*, there was no waiver of the husband's right to reimbursement: "Husband testified the reason for his insertion of the phrase 'For A Gift' was to attempt to negate the payment of a documentary transfer tax and to obviate the possibility of reassessment and a concomitant rise in property taxes. While not laudable motives, these reasons are credible. Wife presented no testimony to the contrary on the meaning of the phrase 'For A Gift.' To accept Wife's argument would mean that Husband, who had not consulted an attorney in regard to the transaction, intended to give up a statutory right created by a statute which had taken effect less than a month prior. Husband's status as a licensed real estate broker adds nothing of significance as concededly he had taken no 'refresher' class since 1977." Thus, the husband had no reason to know of the enactment of the statutes. (203 C.A.3d 1203.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Right to Reimbursement*. See *In re Marriage of Weaver* (2005) 127 C.A.4th 858, 866, 26 C.R.3d 121 [following *In re Marriage of Rico* (1992) 10 C.A.4th 706, 12 C.R.2d 659, text, p. 827; during marriage, husband acquired joint tenancy interest in mother's residence from mother as gift, but residence was subsequently deeded during marriage to mother, husband, and wife in joint tenancy; husband and wife's joint tenancy interest was presumed community property, but husband was entitled to reimbursement for separate property contributions to spouses' joint tenancy interests in residence].



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c. Later Acquired Assets.

11 Witkin Sum. Cal. Law Com Prop § 224

[§ 224] Later Acquired Assets.

In re Marriage of Walrath (1998) 17 C.4th 907, 72 C.R.2d 856, 952 P.2d 1124, held that the contributing spouse's reimbursement right carries through to property acquired with proceeds from the original acquisition. Here, the husband deeded a house he owned when single to himself and his wife as joint tenants after their marriage. The property then had a market value of \$ 228,000, which included an \$ 82,000 mortgage and equity of \$ 146,000. The wife later contributed \$ 20,000 from her separate property to reduce the mortgage principal. The next year, when the property had a market value of \$ 240,000, the couple refinanced the home, borrowing \$ 180,000 against their equity interest. They then used approximately \$ 60,000 of the loan proceeds to pay down the existing loan on the property, another \$ 62,000 to pay off the mortgage on a property in Nevada, and an additional \$ 40,500 to acquire and improve a property in Utah. They placed \$ 16,000 in a joint savings account. The parties agreed that once the original property was deeded to themselves as joint tenants, it was community property, and also agreed that the subsequently obtained loan proceeds, the Nevada and Utah properties, and the joint bank account were likewise community property. The trial court ruled the husband and wife were each entitled to reimbursement on a proportionate basis, assessed at 88% and 12%, respectively, for their contributions to the original property. The court limited reimbursement, however, to the amount of equity in that property at the time of division. Based on a reduced market value of \$ 175,000 and an indebtedness of \$ 174,000, the equity was only \$ 1,000, and the trial court consequently ordered reimbursement of \$ 880 to the husband and \$ 120 to the wife. The trial court found that there was no reimbursable claim for the loan proceeds traced to the Nevada and Utah properties. The husband appealed, and the Court of Appeal affirmed. *Held*, reversed.

(a) The trial court and Court of Appeal erred in construing *Family C. 2640* to mean that a spouse's reimbursement right for a separate property contribution to a community property acquisition does not carry through to other community property subsequently acquired with proceeds from the original acquisition. (17 C.4th 917.) The "property" referred to in *Family C. 2640* includes not only the specific community property to which the separate property is originally contributed, but also any other community property that is subsequently acquired from the proceeds of the initial property, and to which the separate property contribution can be traced. Nothing in the language of the statute precludes this result; the only exceptions to the statutory reimbursement right are a signed written waiver or a signed writing that has the effect of a waiver. (17 C.4th 918.) Also, this interpretation is supported by important policy

considerations: it encourages married persons to freely and without reservation contribute their separate property assets to benefit the community, and alleviates the need for spouses to negotiate with each other during marriage regarding continuing reimbursement rights. Accordingly, the husband's reimbursement right for his separate property contribution to the original property acquisition carries through to the other community property subsequently acquired with proceeds from the original acquisition. (*17 C.4th 919.*)

(b) Reimbursement is limited to the amount of his separate property contribution that may be traced to each particular asset. (*17 C.4th 921.*) It would be unfair to allow a contributing spouse to obtain greater reimbursement from a particular community property asset than the amount that he or she contributed to that asset, even though it may subsequently have increased in value. Here, the trial court would calculate the ratio of the husband's separate property contribution (\$ 146,000) to the original property's total equity at the time of refinancing (\$ 180,000) to ascertain what portion of the loan proceeds represented his separate property contribution traceable to the original property, the Utah and Nevada properties, and the joint bank account. Because the husband contributed 81% of the equity, calculated at the time of the refinancing, he is entitled to recover 81% of the amount of the loan proceeds spent on each of those assets and the wife is entitled to 11%, similarly calculated. The community is entitled to anything above the amount necessary to reimburse the parties for their separate property contributions to each asset. (*17 C.4th 922.*)

(c) Because the parties' reimbursement is thus limited to the contributions made with respect to each specific property, and because the equity in the original property is insufficient to reimburse the parties for their contributions with respect to that property, reimbursement can be made only on a proportionate basis as to that property. This was done in the court below, although applying different percentages. The parties are not entitled to make up the difference not received as to that property from the other assets with excess equity. (*17 C.4th 922.*)

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d. Postseparation Payments.

11 Witkin Sum. Cal. Law Com Prop § 225

[§ 225] Postseparation Payments.

A number of cases raised, but did not decide, whether the statutory limitations on reimbursement were applicable to postseparation separate property payments on community debts, otherwise reimbursable under *In re Marriage of Epstein* (1979) 24 C.3d 76, 154 C.R. 413, 592 P.2d 1165, supra, §190. (See *In re Marriage of Neal* (1984) 153 C.A.3d 117, 124, footnote 11, 200 C.R. 341; *In re Marriage of Benart* (1984) 160 C.A.3d 183, 191, 206 C.R. 495; *In re Marriage of McNeill* (1984) 160 C.A.3d 548, 563, 206 C.R. 641; *In re Marriage of Reilley* (1987) 196 C.A.3d 1119, 1124, footnote 3, 242 C.R. 302.)

In re Marriage of Hebring (1989) 207 C.A.3d 1260, 255 C.R. 488, finally decided the issue. The trial judge had ruled that, because the payments in question were on debts incurred for the acquisition of property, former C.C. 4800.2 (now *Family C. 2640*) was applicable, and reimbursement was limited to amounts by which the payments reduced principal. *Held*, this was error.

(a) The statute was enacted specifically to abolish the unjust doctrine that the use of separate property funds to acquire community property during marriage resulted in a presumption of a gift to the community. It would be ironic if this statute, which eliminated one injustice, was used to create another injustice by restricting the reimbursement available under *Epstein*, a case that was based on the premise that postseparation separate property payments on community debts raise *no* presumption of a gift. (207 C.A.3d 1269.)

(b) When the Legislature added former C.C. 4800(e) in 1986 (now *Family C. 2626*; see supra, §212), giving the trial judge discretion to order reimbursement for payment of postseparation debts, it made no mention of any limitations on reimbursement, such as those imposed by former C.C. 4800.2. (207 C.A.3d 1268.)

(c) Former C.C. 4800.2 affects only property rights, while the issue of *Epstein* is typically one of support, i.e., in fashioning a temporary support order, the trial judge must consider which party will pay the community debts and whether there should be reimbursement. The best practice is to follow the guidelines set forth in *Epstein*, and to order reimbursement for payment of some community debts, but not for others. (207 C.A.3d 1271.) The worst practice is to defer the issue for decision at trial, because "it offers no help to the parties and, indeed, can be a considerable hindrance

to settlement." (207 C.A.3d 1272.)

(d) Hence, former C.C. 4800.2 was not intended to impose the requirement that reimbursement be limited to principal reduction payments only. That requirement would be an unwarranted curtailment of the trial judge's broad discretion, under *Epstein* and former C.C. 4800(e), to order reimbursement in an amount that is equitable. (207 C.A.3d 1272.)

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3. Division of Separate Property.

a. Former Law.

11 Witkin Sum. Cal. Law Com Prop § 226

[§ 226] Former Law.

(1) *No Jurisdiction To Divide.* Prior to 1986, the rule was that the court in a family law proceeding lacked jurisdiction to divide the separate property interests of the spouses in an asset held as joint tenants or tenants in common. (See *Barba v. Barba* (1951) 103 C.A.2d 395, 396, 229 P.2d 465; *Jenkins v. Jenkins* (1952) 110 C.A.2d 663, 665, 243 P.2d 79; *Porter v. Superior Court* (1977) 73 C.A.3d 793, 803, 141 C.R. 59.) The property could only be divided in an independent partition proceeding. (See *C.C.P. 872.010* et seq.; 12 *Summary* (10th), *Real Property*, §65 et seq.; 13 *Summary* (10th), *Personal Property*, §45.)

(2) *Law Revision Commission Recommendation.* In 1982 the Law Revision Commission recommended legislation to provide for division of joint tenancy and tenancy in common property on dissolution. (16 Cal. Law Rev. Com. Reports, p. 2165.) The Commission pointed out that the lack of jurisdiction to divide that property had undesirable consequences: "For example, it may be desirable to award a working spouse the spouse's community property pension and to offset the value of the pension by awarding real property to the other spouse. But because real property is frequently held in joint tenancy, the court may be unable to accomplish this disposition. The result is that the pension must be divided at dissolution and the real property divided in a later partition proceeding. As a further example, it may be desirable to award temporary occupancy of the family home to the spouse awarded custody of the minor children; this can be done if the property is community but not if it is joint tenancy." (16 Cal. Law Rev. Com. Reports, p. 2169.)

"To overcome these difficulties, courts when faced with property held by the spouses in joint tenancy title form have strained to find that the property is actually community and subject to the court's jurisdiction. The result has been an extensive and growing body of law that is confusing and inconsistent and that offers no useful guidance as to when property held by the spouses in joint tenancy form will be found to be community and when it will be found to be true joint tenancy. This problem is particularly troublesome because a substantial amount of the marital wealth in California is held in joint tenancy title form." (16 Cal. Law Rev. Com. Reports, p. 2170.)

The 1982 Recommendation was rejected because of potential tax problems thereafter resolved by federal tax legislation enacted in 1984. The Commission then renewed its recommendation. (See 18 Cal. Law Rev. Com. Reports, p. 147.)

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3. Division of Separate Property.

b. Statutory Revision.

11 Witkin Sum. Cal. Law Com Prop § 227

[§ 227] Statutory Revision.

(1) *In General.* Former C.C. 4800.4 was added in 1985 on the recommendation of the Law Revision Commission (see *supra*, §226) to deal with division of jointly held separate property. It was continued without substantive change in *Family C. 2650*. (See Rutter Group, 2 Family Law §8.905 et seq.) (On effect of right to reimbursement for party's separate property contributions to acquisition of other spouse's separate property during marriage, see *Family C. 2640(c)*, *supra*, §222.)

(2) *Jurisdiction To Divide.* The court has jurisdiction at either party's request to divide the parties' separate property interests in real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. (*Family C. 2650*.)

(3) *Manner of Division.* The property must be divided together with the community estate, and according to the same procedures and limitations. (*Family C. 2650*.) The Law Revision Commission Comment explains the purpose and scope of the statute as follows:

(a) It reverses the rule that the court in a dissolution or separation proceeding has no jurisdiction over property other than community or quasi-community, and supplements the provisions governing community property held in joint tenancy form by covering separate property held in joint tenancy.

(b) It is consistent with the general rule that the court has jurisdiction to settle the property rights of the parties, and with the principle that the court has jurisdiction to settle matters submitted to it by the parties.

(c) Property subject to division includes property acquired by the parties either before or during marriage, and property acquired or situated either in this state or elsewhere.

(d) Jurisdiction extends only to the interests of the spouses, whether equal or unequal; the court may not affect interests of third parties (which may be subject to partition under *C.C.P. 872.010* et seq.).

(e) Because division is subject to the same limitations applicable to division of community property, "an express

agreement of the parties precluding partition or other division of the property and providing a mechanism for dispute resolution or otherwise governing their rights in the property prevails over this section."

(4) *Procedure for Omitted Assets. Family C. 2650* gives the court jurisdiction to divide jointly held separate property at the time of division of the community property; it does not contain a grant to divide community property. Thus, if a community asset is overlooked in the dissolution judgment, the remedy is a separate action under the rule of *Henn v. Henn* (1980) 26 C.3d 323, 161 C.R. 502, 605 P.2d 10, *infra*, §244, not a motion under *Family C. 2650* in the dissolution action. *Family C. 2650* does not abrogate *Henn* and does not authorize a show cause hearing for division of an omitted community asset. (See *In re Marriage of Graves* (1988) 198 C.A.3d 1047, 1052, 244 C.R. 110 [construing predecessor statute; postjudgment motion to divide omitted assets (see *infra*, §247) was proper].)

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c. Enforcement of Premarital Loan.

11 Witkin Sum. Cal. Law Com Prop § 228

[§ 228] Enforcement of Premarital Loan.

In re Marriage of Gagne (1990) 225 C.A.3d 277, 274 C.R. 750, upholds the jurisdiction of a dissolution court over an issue traditionally adjudicated in a separate civil proceeding. James (unmarried) and Alexandria (in the process of dissolving a marriage) purchased a family residence, taking title in "James Gagne, an unmarried man, and Alexandria Colman, a married woman, as her separate property as joint tenants." To make the downpayment, Alexandria lent James \$ 59,735 and he agreed to repay the loan on demand with interest. The parties then married, and some years later, James filed a petition for dissolution, including as an asset for division the residence purchased before their marriage. Alexandria also listed the residence as an asset subject to division, and requested the court to confirm as her separate property the "assets contributed to purchase" (i.e., the amount of the loan). The trial court accordingly divided the property and ordered James to repay the loan. James appealed, contending that the dissolution court had no jurisdiction to confirm the loan. *Held*, affirmed.

(a) "We reject as a matter of logic and common sense James's claim that the loan, used as the down payment for the purchase of the property, is unrelated to the parties' rights or interests in that property. James's argument, essentially, is that a family law court's authority" under former C.C. 4800.4 (now *Family C. 2650*) "is to mindlessly acknowledge the state of the title and divide the parties' interests accordingly. James contends the court may not inquire as to the extent of each party's interest, nor how they acquired such interest before simply dividing the property." (225 C.A.3d 282.)

(b) An express agreement between the parties governing their rights controls in the division; hence, it was proper for the trial court to inquire as to the existence or nonexistence of any agreement the parties had in connection with the property. (225 C.A.3d 283.) To suspend the dissolution proceeding while another court determined the existence and terms of the loan would be a complete waste of judicial resources, and taxpayers' as well as the litigants' money. (225 C.A.3d 284.)

(c) An additional basis for exercising this jurisdiction is that the parties both submitted the issue through their pleadings, and it was not until James's attorney made his first objection to testimony at the trial that the court became aware that James wanted to reserve the issue for a separate civil trial. (225 C.A.3d 287.) Hence, the objection was waived. (225 C.A.3d 288.)

(d) James made the additional contention that by assuming jurisdiction, the dissolution court deprived him of the right to a jury trial which he would have in a civil action. There might have been merit in this objection if James had made a proper and timely objection. But James never indicated a desire for a jury trial until he filed his brief on appeal; hence, whatever right he had to a jury trial of the premarital agreement issue was waived by his voluntary submission to the jurisdiction of the dissolution court. (225 C.A.3d 289.)

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4. Retroactive Application Held Unconstitutional.

a. Community Property Presumption.

11 Witkin Sum. Cal. Law Com Prop § 229

[§ 229] Community Property Presumption.

In re Marriage of Buol (1985) 39 C.3d 751, 218 C.R. 31, 705 P.2d 354, involved the retroactive application of former C.C. 4800.1 (now *Family C. 2581*; see *supra*, §220), which by Stats. 1983, Chap. 342, §4 (see *infra*, §231) was made applicable to cases in which division of property was not final on its effective date (January 1, 1984). Under prior law, the spouses could convert separate property into community, or community into separate, by oral agreement. Under current law, the presumption of community property can be overcome only by a written agreement that the property is separate. In the present case, defendant wife was the sole support of the spouses and four children; by oral agreement with plaintiff husband, she kept her earnings in a separate bank account, using the money to support the family and to purchase a home. Although title was taken in joint tenancy on advice of a realtor, defendant made all payments for mortgage, tax, insurance, and maintenance. In the dissolution proceeding, the trial judge found that the oral agreement was binding and awarded the home to defendant wife. Plaintiff husband appealed, challenging the sufficiency of the evidence; former C.C. 4800.1, requiring a writing, became effective pending the appeal. *Held*, retroactive enforcement of the statute would deny due process of law.

(a) Defendant wife had paid the purchase price of \$ 17,500 for a home now valued at \$ 167,500. To apply the new statute, simply reimbursing her for that contribution and attributing the remaining \$ 150,000 to community property, would give her substantially less than she would have received under the original valid oral agreement, plaintiff husband would receive a windfall of \$ 75,000, and defendant would have to sell the home to satisfy plaintiff's claim. (39 C.3d 756, 760.)

(b) Several Court of Appeal decisions have expressly or impliedly upheld the retroactive effect of former C.C. 4800.1, giving literal effect to its statement that it establishes a presumption, and thus it merely alters the evidentiary burden of proof where a husband and wife take property by a joint tenancy deed. (39 C.3d 757.) But whether a statute is procedural or substantive in effect is not always determined by its language, and the statute is unquestionably substantive. It "imposes a statute of frauds where there was none before, penalizing the unwary for relying upon the law as it existed at the time the property rights were created rather than at the time dissolution proceedings were already underway." (39 C.3d 759.) And the presumption is not rebuttable, because the time for executing a written agreement has long passed. "By eliminating the means by which one might prove the existence of the vested property right,

imposing instead an evidentiary requirement with which it is impossible to comply, section 4800.1 affects the vested property right itself." (39 C.3d 759.) Hence, retroactive effect of the statute would impair the vested right of the wife. (39 C.3d 760.)

(c) Retroactive application is justified where it is necessary to subserve a sufficiently important state interest, as in two important prior decisions--*In re Marriage of Bouquet* (1976) 16 C.3d 583, 128 C.R. 427, 546 P.2d 1371, supra, §10, and *Addison v. Addison* (1965) 62 C.2d 558, 43 C.R. 97, 399 P.2d 897, infra, §256. In *Bouquet*, the retroactive application was an exercise of police power to correct a patently unfair former law by making the postseparation earnings of *both spouses*--not just those of the wife--separate property. In *Addison*, retroactive application of quasi-community property legislation was upheld. Both cases involved the state's interest in the "equitable dissolution of the marital relationship," and the retroactive application was necessary to remedy "the rank injustice of the former law." (39 C.3d 761.)

(d) That interest was not shown here. Although the Legislature's primary objective was equitable distribution of marital property, the writing requirement does not achieve this purpose. It applies only to joint tenancy property, not to property taken as "husband and wife" or nontitle property acquired during marriage. (39 C.3d 762.) Thus, whether a spouse will be able to prove that certain property is separate may well depend on happenstance. (39 C.3d 762.) Defendant wife's reliance on prior law may be inferred from the record. The spouses considered the house to be her property, and if existing law had required a writing, the likelihood that they would have made one appears great. (39 C.3d 763.)

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4. Retroactive Application Held Unconstitutional.

b. Right to Reimbursement.

11 Witkin Sum. Cal. Law Com Prop § 230

[§ 230] Right to Reimbursement.

In re Marriage of Fabian (1986) 41 C.3d 440, 224 C.R. 333, 715 P.2d 253, followed the reasoning of *In re Marriage of Buol* (1985) 39 C.3d 751, 218 C.R. 31, 705 P.2d 354, supra, §229, and reached the same conclusion. During the marriage, plaintiff husband invested \$ 275,000 of separate property funds in a motel purchased by the spouses, title to which was taken in their names as "community property." In the dissolution proceeding, the trial judge found that the motel and its income were community property, that there was no promise or agreement that the husband should be reimbursed, and that under the existing law, plaintiff had made a gift of the separate funds to the community. Plaintiff appealed, contending that the transaction was a business arrangement governed by partnership law and that the characterization of the motel as community property was error. While the appeal was pending, former C.C. 4800.2 (now *Family C. 2640*) was enacted, providing that a spouse contributing separate property should be reimbursed unless the spouse made "a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver." (See supra, §222.) *Held*, judgment for defendant wife affirmed; the statute could not be retroactively applied to this proceeding.

(a) The record contained no evidence to overcome the presumption of community property; hence, from the time of purchase defendant wife had a vested one-half interest in the motel as community property. (41 C.3d 446.) For more than 20 years prior to the enactment of the statute, the rule was established that separate property contributions to a community asset were deemed gifts to the community. (41 C.3d 446.)

(b) As applied to this proceeding (division not final pending appeal), application of the statute would substantially decrease defendant's community interest by giving plaintiff reimbursement for his \$ 275,000 contribution. Under the reasoning of *Buol*, this retroactive impairment of defendant's vested right would be a violation of due process. (41 C.3d 444.)

(c) Retroactive application was not necessary to subserve a sufficiently important state interest. As pointed out in *Buol*, the significant state interest that compelled retroactivity by *In re Marriage of Bouquet* (1976) 16 C.3d 583, 128 C.R. 427, 546 P.2d 1371, supra, §10, and *Addison v. Addison* (1965) 62 C.2d 558, 43 C.R. 97, 399 P.2d 897, infra, §256--promoting "equitable dissolution of the marital relationship" by curing a "rank injustice in the law"--is lacking.

The legislative intent was to abrogate the rule of *In re Marriage of Lucas* (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285, supra, §219; but this perceived need for reform was not a sufficiently important state interest to mandate retroactivity. Prior to the new statute, the contributing spouse could readily preserve the separate property character of the contribution by making an agreement, written or oral, with the other spouse. "In leaving the agreement option open to the contributing spouse, prior law was not inherently inequitable or unfair." (41 C.3d 449.)

(d) Defendant wife could have legitimately relied on the former law, for at any time during the marriage, competent counsel would have advised the parties that unrestricted separate property contributions were gifts to the community. (41 C.3d 449.)

(e) The disruptive effect of retroactive application is clear, for the change would alter substantial property rights of parties completely incapable of complying with the dictates of the new law. "By the time the Legislature created the new right ... , the parties' marriage had been terminated by a final judgment of dissolution. The spouse who asserted a separate property right adverse to the community could hardly be expected to then execute a writing waiving his right to the property he claimed." (41 C.3d 450.)

In re Marriage of Heikes (1995) 10 C.4th 1211, 44 C.R.2d 155, 899 P.2d 1349, involved a husband's 1976 conveyance of his separate, undeveloped real property to himself and his wife in joint tenancy. There was no oral or written agreement that the husband would retain any interest in the parcels other than the interests created by the 1976 deeds. Dissolution proceedings commenced in 1990 and the 1992 judgment classified both parcels as community property. Husband sought reimbursement under former C.C. 4800.2, arguing permissible retroactivity of the statute, and was granted a partial new trial. *Held*, reversed.

(a) *Classification as community property.* The presumption of former C.C. 4800.1 (now *Family C. 2581*; see supra, §220) applies to all joint tenancy property, including unimproved land. (10 C.4th 1217.) Although husband's 1976 conveyance preceded the enactment of the statute, *Buol* does not preclude retroactive application of the statutory presumption that the unimproved parcel is community property because husband held no vested property right as a joint tenant that he would not also have held as an owner of a community property interest while both spouses were still alive. (10 C.4th 1217; citing *In re Marriage of Hilke* (1992) 4 C.4th 215, 14 C.R.2d 371, 841 P.2d 891, infra, §231.) Thus, treating the unimproved parcels as community property accords with the statute. (10 C.4th 1218.)

(b) *Right of reimbursement.* No reported case has addressed the constitutionality of impairing vested property rights acquired before January 1, 1984, by retroactively applying former C.C. 4800.2 in a proceeding commenced after that date. Here, as in *Fabian*, husband contributed to the community property well before the effective date of the statute by conveying his separate property to his wife and himself as joint tenants, thereby conferring on his wife a vested property right. (10 C.4th 1223.) The dissolution proceeding was commenced 5 or 6 years after the statute took effect. During that interval the parties were on notice of the statute entitling husband to reimbursement unless he waived the right in writing. However, "[t]he theoretical possibility of wife's obtaining husband's written waiver during that interval ... is too insubstantial to offset the other factors that, as in *Fabian*, call for protection of her vested property right against retroactive enforcement of husband's claim to reimbursement." (10 C.4th 1224.) Thus, although the statute requires reimbursement for separate property contributions to the acquisition of any property the court divides as community property, the applicability of that requirement is limited by the Due Process Clause to property acquired on or after January 1, 1984. (10 C.4th 1225.) (See 24 *Pepperdine L. Rev.* 265 [*Heikes*].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION

F. Division of Jointly Held Property.

4. Retroactive Application Held Unconstitutional.

c. Attempted Statutory Solution.

11 Witkin Sum. Cal. Law Com Prop § 231

[§ 231] Attempted Statutory Solution.

(1) *Original Statute and Legislative Intent.* As originally enacted, former C.C. 4800.1 and 4800.2 (now *Family C. 2581* and *2640*, supra, §§220, 222) were applicable to (a) proceedings commenced on or after January 1, 1984, and (b) proceedings commenced before January 1, 1984, that were not final as of that date. (Stats. 1983, Chap. 342, §4.) In 1986, an urgency statute, amending uncodified §4, made the statutes applicable to "proceedings commenced on or after January 1, 1984, regardless of the date of acquisition of property subject to the proceedings or the date of any agreement affecting the property." (Stats. 1986, Chap. 49, §1; see *20 Pacific L. J. 97, 116.*)

The legislative intent was stated in §2. "This act is intended to resolve the confusion caused by Buol and to reaffirm the need for immediately applicable legislation, to the extent constitutionally permissible, in order to assure all litigants of equitable treatment upon dissolution of marriage. Any further delay will accentuate unreasonably the current confusion and problems in this area of the law." (Stats. 1986, Chap. 49, §2.)

(2) *Revised Law.* The 1986 amendment making former C.C. 4800.1 applicable to all property held in joint title form (see supra, §220) contained a finding and statement of intent (continued without substantive change in *Family C. 2580*) as follows:

(a) It is public policy to provide a uniform standard of proof in establishing the character of property jointly acquired by spouses during marriage and for the allocation of community and separate interests in such property.

(b) The methods provided by case and statutory law have resulted in inconsistent treatment of jointly held property and confusion as to the applicable law.

(c) To fulfill the compelling state interest in uniform treatment of property, former C.C. 4800.1 and 4800.2 (as continued in *Family C. 2581* and *2640*) apply to all property held in joint title regardless of the date of acquisition or of any agreement affecting the character of the property. These provisions apply in all proceedings commenced on or after January 1, 1984, but not to property settlement agreements executed before January 1, 1987, or to proceedings in which judgments, final or not, were rendered before January 1, 1987.

(3) *Statute Unconstitutional. In re Marriage of Buol* (1985) 39 C.3d 751, 218 C.R. 31, 705 P.2d 354, supra, §229, and *In re Marriage of Fabian* (1986) 41 C.3d 440, 224 C.R. 333, 715 P.2d 253, supra, §230, dealt only with the constitutionality of applying former C.C. 4800.1 and 4800.2 to proceedings that were pending as of January 1, 1984. They did not consider the constitutionality of proceedings filed after that date, but involving property acquired before that time. The legislative attempt to make the remedial statutes applicable regardless of the time of acquisition was unsuccessful. The Courts of Appeal have held that the state's interest in uniformity is an insufficient constitutional basis for disrupting the spouse's vested property rights. (See *In re Marriage of Griffis* (1986) 187 C.A.3d 156, 161, 231 C.R. 510; *In re Marriage of Hopkins & Axene* (1987) 199 C.A.3d 288, 290, 245 C.R. 433; *In re Marriage of Lockman* (1988) 204 C.A.3d 782, 784, 251 C.R. 434; *In re Marriage of Cairo* (1988) 204 C.A.3d 1255, 1262, 251 C.R. 731.)

In re Marriage of Bankovich (1988) 203 C.A.3d 49, 249 C.R. 713, states the basis of this holding: "[A]n after-the-fact legislative declaration of intent challenging Supreme Court precedent, by merely disagreeing with the judicial declaration as to constitutionality without defining a state interest sufficiently compelling to justify interference with vested property rights in addition to those already considered and rejected by the courts, cannot itself create a compelling state interest." (203 C.A.3d 55.) "In other words, although the Legislature has responded to the *Buol* criticism regarding uniformity by making the statute applicable to all types of joint title acquisitions, it fails to overcome the constitutional flaws discussed in *Fabian*. There, the court's decision was primarily based on the absence of a 'rank injustice' within the former law rendering retroactivity wholly unnecessary, the disruptive effect of retroactive application upon the reasonable and legitimate expectations of all affected parties, and the failure of retroactivity to advance the state's interest in equitable dissolution of the marital partnership. Although the uniform treatment of property is a laudable goal, its advancement alone does not justify disrupting vested property rights acquired under the previous settled law." (203 C.A.3d 56.)

(4) *Distinction: No Impact on Vested Rights. In re Marriage of Hilke* (1992) 4 C.4th 215, 14 C.R.2d 371, 841 P.2d 891, supra, §221, was a case filed after the effective date of former C.C. 4800.1, but involved property acquired before that time. The court distinguished *Buol* and *Fabian*, and held that there was no constitutional impediment to the retroactive application of the statute where no vested property rights were affected.

The husband in *Hilke*, relying on *Buol* and *Fabian*, argued that former C.C. 4800.1 could not be applied retroactively to convert into community property the marital residence that he and his wife had acquired as joint tenants in 1969. He contended that he had sufficiently rebutted the presumption established by former C.C. 164 (see supra, §19), which was in effect in 1969, to entitle him to the property by right of survivorship as a joint tenant (his wife had died after the marriage was dissolved, but before the property was divided). *Held*, retroactive application of former C.C. 4800.1 was proper on the facts of this case.

(a) There is no doubt that the Legislature intended the courts to apply former C.C. 4800.1 in dissolution proceedings regardless of the date the property was acquired, because former C.C. 4800.1(a)(3) (now *Family C. 2580(c)*) expressly said so. "Unless there are constitutional impediments to its application, therefore, we may not refuse the statutory mandate." (4 C.4th 222.)

(b) In *Buol* and *Fabian*, a spouse's *vested* property interests were infringed without due process by retroactive legislation enacted during the pendency of an appeal. In the present case, however, the husband's interest was not vested, but *contingent* on his surviving his former wife; furthermore, the statute was enacted well before the wife filed for dissolution. In the absence of a vested interest, retroactive legislation does not violate due process. (4 C.4th 223.) (See 7 Summary (10th), *Constitutional Law*, §625.)

West's Key Number Digest, Husband and Wife k.262.1(6)

SUPPLEMENT: [This section is current through the latest supplement]



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11 Witkin Sum. Cal. Law Com Prop § 232

[§ 232] In General.

(1) *Necessary Orders*. The court may make any orders it considers necessary to carry out the purposes of the Family Code. (*Family C. 290*; see *Family C. 2553* [necessary orders to enforce purposes of *Family C. 2500* et seq., governing manner of dividing property; see supra, §213 et seq.]; Rutter Group, 3 Family Law, Chap. 18; 11 *Summary* (10th), *Husband and Wife*, §§5, 204, 248.)

The trial court's disposition of the community estate is subject to revision on appeal in all particulars, including those stated to be in the court's discretion. (*Family C. 2555*.) This power of modification of the judgment on appeal has seldom been exercised. (See *Hill v. Hill* (1957) 150 C.A.2d 34, 37, 309 P.2d 44 [modification ordered]; *Irish v. Irish* (1966) 246 C.A.2d 705, 708, 55 C.R. 55 [modification refused].)

(2) *Execution or Contempt*. A judgment or order of the court made under the Family Code may be enforced by the court by execution or by contempt. (*Family C. 290*; see 11 *Summary* (10th), *Husband and Wife*, §248 et seq.)

In re Marriage of Farner (1989) 216 C.A.3d 1370, 265 C.R. 531, involved a wife's attempt to use a writ of execution issued by the clerk of the court to enforce a judgment determining her community property interest in her husband's military retirement pay, retroactive to the date the couple separated. The trial judge denied the husband's motion to quash, ruling that the wife had received "a clearly ascertainable money judgment." *Held*, the judge erroneously rendered a decision based on the *nature* of the wife's judgment without exercising discretion under former C.C. 4380 (now *Family C. 290*) as to the *advisability* of enforcement by execution. While execution was a potential remedy, review and a hearing in the trial court was required first. (216 C.A.3d 1377.)

(3) *Appointment of Receiver*. A judgment or order in a family law proceeding may be enforced by the court by the appointment of a receiver as the court in its discretion determines to be necessary. (*Family C. 290*.) (See *Rosenthal v. Rosenthal* (1966) 240 C.A.2d 927, 933, 50 C.R. 385 [community property was in danger of being dissipated by husband's speculative investments]; Rutter Group, 2 Family Law §18:620 et seq.; 15 A.L.R.4th 224 [appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation]; 15A *Am.Jur.2d* (2000 ed.), *Community Property* §105; 24 *Am.Jur.2d* (1998 ed.), *Divorce and Separation* §§605, 641; 24A *Am.Jur.2d* (1998 ed.), *Divorce and Separation* §§895 et seq., 1199; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §§103, 202; 6 *Cal. Proc.*

(4th), *Provisional Remedies*, §435; 11 *Summary* (10th), *Husband and Wife*, §§248 et seq., 360.)

(4) *Order Liquidating Asset To Avoid Risk*. At any time during a dissolution, nullity, or legal separation proceeding, on the application of a party and for good cause, the court may "order the liquidation of community or quasi-community assets so as to avoid unreasonable market or investment risks, given the relative nature, scope, and extent of the community estate." However, the order may not be granted to a party who has not complied with the disclosure requirements of *Family C. 2100* et seq. (see *infra*, §233 et seq.). (*Family C. 2108*.)

(5) *Case Management*. The court, on the stipulation of the parties, may order the imposition of judicial case management procedures intended to expedite dissolution proceedings, including the division of property. (*Family C. 2450* et seq.; see 11 *Summary* (10th), *Husband and Wife*, §71.)

(6) *Judicial Arbitration in Absence of Voluntary Agreement*. Where the parties do not voluntarily agree in writing to division of the community estate, the court may submit the matter to judicial arbitration if the total value of the community and quasi-community property in controversy does not exceed \$ 50,000. The court's decision regarding the value of the property for this purpose is not appealable. (*Family C. 2554(a)*.)

"The court may submit the matter to arbitration at any time it believes the parties are unable to agree upon a division of the property." (*Family C. 2554(b)*.) (On procedure in judicial arbitration, see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §535 et seq.)

West's Key Number Digest, Husband and Wife k.270, 272(4)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Appointment of Receiver*. See 24 *Am.Jur.2d* (2008 ed.), *Divorce and Separation* §569; 24A *Am.Jur.2d* (2008 ed.), *Divorce and Separation* §§819, 820.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §439.

(6) *Judicial Arbitration in Absence of Voluntary Agreement*.

Judicial arbitration procedure:

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §584 et seq.



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G. Procedure.

2. Mandatory Financial Disclosure.

a. In General.

11 Witkin Sum. Cal. Law Com Prop § 233

[§ 233] In General.

(1) *Enactment and Recodification of Statute.* *Family C. 2100* et seq. provide elaborate disclosure requirements in nullity, legal separation, and marital dissolution proceedings, applicable to *all* of the parties' assets and liabilities, whether community, quasi-community, or separate. (See *24 Pacific L. J. 812* [predecessor statute]; Rutter Group, 3 *Family Law* §11.40 et seq.)

(2) *Policy Goals.* The statute states four public policy goals: (a) To marshal and preserve community and quasi-community assets so as to avoid their dissipation before distribution; (b) to ensure fair and sufficient support awards; (c) to properly divide the community and quasi-community assets and liabilities on dissolution or nullity of marriage or legal separation; and (d) to reduce the adversarial nature of the proceedings and the attendant costs. (*Family C. 2100(a), (b).*)

(3) *Definitions.* *Family C. 2101* provides the following definitions, applicable unless the context requires otherwise:

(a) "Asset" includes, without limitation, real or personal property of any nature, tangible or intangible, currently existing or contingent.

(b) "Default judgment" does not include a stipulated judgment or any judgment entered under a marital settlement agreement.

(c) "Earnings and accumulations" includes income from any source, as provided in *Family C. 4058* (defining annual gross income; see *10 Summary* (10th), *Parent and Child*, §397).

(d) "Expenses" includes, without limitation, all personal living expenses, but not business expenses.

(e) "Income and expense declaration" includes the Income and Expense Declaration forms approved for use by the Judicial Council, and any other financial statement approved by the Judicial Council in lieu of the Declaration, if the financial statement form satisfies all other applicable criteria. (For Income and Expense Declaration and related forms, see Judicial Council Form No. FL-150 et seq.)

(f) "Liability" includes, without limitation, any debt or obligation, currently existing or contingent.

(4) *No Impact on Work Product Privilege or Protective Orders.* A disclosure required by *Family C. 2100* et seq. does not abrogate the attorney work product privilege, or impede the court's power to issue protective orders. (*Family C. 2111.*)

(5) *Mandatory Forms.* Required disclosures must be made on mandatory Judicial Council forms executed under penalty of perjury. (*Family C. 2104(a)* [preliminary declaration]; *Family C. 2105(a)* [final declaration]; see *Family C. 2112* [Judicial Council must adopt appropriate forms and modify existing forms to effectuate purposes of *Family C. 2100* et seq.]; Rutter Group, 3 Family Law §11.60 et seq.; infra, §§236, 237.)

The Family Law Rules of Court state that the property declaration forms (Judicial Council Form Nos. FL-160 and FL-161) must accompany moving papers when relevant to the issues to be determined. (See C.R.C., Rules 5.118(b), 5.128(b).) However, Judicial Council Form Nos. FL-160 and FL-161 are substantively identical to the alternate form required under *Family C. 2100* et seq. (Judicial Council Form No. FL-142 [Schedule of Assets and Debts]). (See infra, §236.) Because this alternative form is mandated by *Family C. 2100* et seq., and because the property declarations are rarely if ever used in pretrial motions for monetary relief, one commentator has opined that the property declarations have become obsolete. (See Rutter Group, 1 Family Law §5.336.)

West's Key Number Digest, Divorce k.85

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Policy Goals.* The Legislature intended the asset requirements of *Family C. 2100* et seq. to apply to property agreements "executed in connection with or in contemplation of a judgment of dissolution of the marriage. Nothing in the statutory language suggests any intent to extend the asset disclosure requirements to postmarital agreements that do not contemplate imminent dissolution, and instead contemplate an effort to reconcile." (*In re Marriage of Burkle* (2006) 139 C.A.4th 712, 747, 43 C.R.3d 181.)



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2. Mandatory Financial Disclosure. b. Scope of Disclosure Requirements.

11 Witkin Sum. Cal. Law Com Prop § 234

[§ 234] Scope of Disclosure Requirements.

(1) *In General.* The parties must make a "full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest" in the early stages of the proceeding, regardless of the property's characterization as community or separate, together with a complete disclosure of the parties' income and expenses. Moreover, the parties have a continuing duty to immediately, fully, and accurately update that disclosure to the extent that there have been any material changes, so that at the time the parties enter into a settlement agreement, or at the time of trial, "each party will have a full and complete knowledge of the relevant underlying facts." (*Family C. 2100(c)*.)

The parties are subject to fiduciary standards of disclosure. (*Family C. 2102*; see *infra*, §235.) Each must serve on the other a preliminary disclosure declaration and, unless waived, a final disclosure declaration, and must file proof of service of each with the court. (*Family C. 2103*; *infra*, §§236, 237.) (See *Los Angeles v. Superior Court (Williamson)* (2003) 111 C.A.4th 883, 890, 3 C.R.3d 915, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §52 [peace officer's payroll records may be discovered in marital dissolution proceeding]; Cal. Civil Practice, 1 Family Law Litigation, §§5:86 et seq., 5:99; 2 Family Law Litigation, §13:3 et seq.)

(2) *Exceptions.* Less or more disclosure is required in the following situations:

(a) *Summary dissolution.* In summary dissolution proceedings only the preliminary disclosure is required. (*Family C. 2109*; see C.R.C., Rule 5.130(b).)

(b) *Default judgment.* If judgment is taken by default, the petitioner is not required to serve or receive a final declaration of disclosure, but he or she must provide preliminary disclosure. (*Family C. 2110*.) If the petition does not demand money, property, costs, or attorney fees, no "filing" of income and expense declarations and property declarations may be required. (*Family C. 2330.5*.)

Service may be problematic where the petitioner cannot locate the defaulting respondent. Although *Family C. 2110* is unclear, one commentator has suggested that the statute does not contemplate service by publication in such cases, assuming jurisdiction has already been perfected by proper service of a summons and petition. Rather, the petitioner can

probably effect service of the preliminary declaration by mail at the respondent's last known address, but the commentator advises that the declaration of service should probably include a factual statement of reasonable efforts made to locate the respondent. (See Rutter Group, 3 Family Law §11.54.2.)

(c) *Arbitration*. Parties to dissolution who engage in nonjudicial arbitration of property issues may adopt more summary procedures of financial disclosure than those set forth in the Family Code. (*Elden v. Superior Court* (1997) 53 C.A.4th 1497, 1503, 62 C.R.2d 322.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

Discovery of peace officer's payroll records: Los Angeles v. Superior Court (Williamson) (2003) 111 C.A.4th 883, 3 C.R.3d 915, text, p. 844, held that a peace officer's salary, benefits, and other financial records may be discovered in a marital dissolution proceeding without affording the officer the procedural protections of a *Pitchess* motion (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §50 et seq.). *Slayton v. Superior Court* (2006) 146 C.A.4th 55, 52 C.R.3d 731, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §52, while recognizing that exception, held that the exception does not apply to all information sought from police personnel records. *Pitchess* protections are still required where, as in this case, there is an attempt in a marital dissolution action to discover complaints filed against an officer or other personnel information that is not directly related to the officer's compensation. (146 C.A.4th 60.) The court then applied the *Pitchess* protections and found that the wife nevertheless was entitled to discover personnel information about her peace officer husband's disciplinary history and citizen complaints, because that information was potentially relevant about whether the husband had been abusive during the marriage for purposes of determining his fitness for child custody. (146 C.A.4th 61.) Correction: Page 845, lines 2 and 3, "C.R.C., Rule 5.130(b)" should be "C.R.C., Rule 5.130(a)".



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G. Procedure.

2. Mandatory Financial Disclosure.

c. Fiduciary Duties.

11 Witkin Sum. Cal. Law Com Prop § 235

[§ 235] Fiduciary Duties.

(1) *Assets and Liabilities: From Separation to Distribution.* The fiduciary standards provided in *Family C. 721* (supra, §133) apply from the date of separation to the date of distribution of a community or quasi-community asset or liability, "as to all activities that affect the assets and liabilities of the other party." (*Family C. 2102(a).*) Under *Family C. 2102(a)*, the following must be disclosed:

(a) "[A]ll assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes." (*Family C. 2102(a)(1).*)

(b) An investment opportunity, business opportunity, or other income-producing opportunity arising after separation, but directly resulting from "any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive." This disclosure must be made in writing, and in sufficient time for the other spouse to make an informed decision as to whether to participate. (*Family C. 2102(a)(2).*)

(c) The operation or management of a community business or business interest. (*Family C. 2102(a)(3).*)

(2) *Assets and Liabilities: From Disposition to Distribution.* The fiduciary standards provided in *Family C. 721* apply from the date that a valid, enforceable, and binding resolution of the disposition of an asset or liability is reached until the date the asset or liability has actually been distributed, "as to all activities that affect the assets or liabilities of the other party." A party's fiduciary duty with respect to a particular asset or liability ends on its distribution. (*Family C. 2102(b).*)

(3) *Support and Professional Fees: From Separation to Resolution of Issues.* The fiduciary standards provided in *Family C. 721* apply from the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees, "as to all issues relating to the support and fees." A party is specifically required to make an "immediate, full, and accurate disclosure of all material facts and information" about

his or her income or expenses. (*Family C. 2102(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Assets and Liabilities: From Separation to Distribution.* See *In re Marriage of Geraci* (2006) 144 C.A.4th 1278, 1294, 51 C.R.3d 234 [trial judge properly imposed sanctions against husband for breaching his fiduciary duty by failing to accurately declare his postseparation commission income].



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G. Procedure.

2. Mandatory Financial Disclosure.

d. Preliminary Declaration.

11 Witkin Sum. Cal. Law Com Prop § 236

[§ 236] Preliminary Declaration.

(1) *Mechanics of Service.* After or concurrently with service of a petition for dissolution, nullity, or legal separation, each party must serve on the other a preliminary declaration of disclosure, executed under penalty of perjury on Judicial Council Form No. FL-140. (*Family C. 2104(a).*) The preliminary declaration is not to be filed with the court, unless the court so orders. However, the parties must file proof of service with the court. (*Family C. 2104(b).*)

(2) *Contents.* The preliminary declaration must identify with reasonable particularity the declarant's assets and liabilities, and the percentage of ownership or obligation as to each item not solely owned by one or both parties. The requirement applies regardless of the characterization of the asset or liability as community, quasi-community, or separate; the declarant may include his or her characterization of each item. (*Family C. 2104(c).*) (See Judicial Council Form No. FL-142 [Schedule of Assets and Debts].)

Amendment of the preliminary declaration is permitted without leave of court. Proof of service of the amendment must be filed with the court. (*Family C. 2104(d).*) (See Judicial Council Form No. FL-141.)

The declaration must be accompanied by a completed income and expense declaration, unless a current version has already been provided. (*Family C. 2104(e).*) (See Judicial Council Form No. FL-150 et seq.; Cal. Civil Practice, 1 Family Law Litigation, §5:100.)

(3) *Service Is Mandatory.* The exchange of preliminary declarations pursuant to *Family C. 2104* is mandatory. (*Family C. 2104(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Procedure.

2. Mandatory Financial Disclosure.

e. Final Declaration.

11 Witkin Sum. Cal. Law Com Prop § 237

[§ 237] Final Declaration.

(1) *Service.* Except by court order for good cause or where there is a waiver, each party or party's attorney must serve on the other party a final declaration of disclosure and a current income and expense declaration before the parties enter into a property or permanent support agreement, or at least 45 days before the first assigned trial date if the case goes to trial. The declarations must be executed under penalty of perjury on forms prescribed by the Judicial Council. (*Family C. 2105(a)*.) (See Judicial Council Form No. FL-140 [Declaration of Disclosure]; Judicial Council Form No. FL-142 [Schedule of Assets and Debts]; and Judicial Council Form No. FL-150 et seq. [Income and Expense Declaration].)

The Code does not provide for filing of the final disclosure declaration, but the parties must file a declaration stating that service on the other party was accomplished. (*Family C. 2106*; see *infra*, §238.)

(2) *Contents.* Under *Family C. 2105(b)*, the final declaration must include all material facts and information regarding the following:

- (a) The characterization of all assets and liabilities.
- (b) The valuation of all assets in which it is contended that the community has an interest.
- (c) The amounts of all obligations in which it is contended that the community has liability.
- (d) The earnings, accumulations, and expenses set forth in the income and expense declaration.

(3) *Exceptions.* No final disclosure declaration is required in proceedings for summary dissolution. (*Family C. 2109*.) Where a default judgment is entered, the petitioner may waive the final disclosure requirements and, if the petition does not demand money, property, costs, or attorney fees, no "filing" of income and expense declarations and property declarations may be required. (*Family C. 2110, 2330.5*; see *supra*, §234.)

(4) *Waiver.* The parties may stipulate to a mutual waiver of the requirements of *Family C. 2105(a)* by a waiver under penalty of perjury entered into in open court or by separate stipulation. (*Family C. 2105(d)*.) If they do so, *Family*

C. 2105(d) requires the waiver to contain all of the following representations:

(a) The parties have complied with the preliminary disclosure requirements of *Family C. 2104* (see *supra*, §236).

(b) The parties have completed and exchanged a current income and expense declaration.

(c) The parties have fully complied with their fiduciary duties under *Family C. 2102* (see *supra*, §235) and have fully augmented their preliminary declarations, including disclosing all material facts and information about the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

(d) The parties have knowingly and intelligently entered into the waiver.

(e) The parties understand that the waiver does not limit their disclosure obligations, but rather is a statement under penalty of perjury that those obligations have been fulfilled. The parties further understand that noncompliance with those obligations will result in the court setting aside the judgment.

In re Marriage of Fell (1997) 55 C.A.4th 1058, 64 C.R.2d 522, involved a couple married for 18 years. During that time, they had two sons and acquired substantial assets. In 1995 dissolution proceedings, the parties filed a purported "waiver of declarations of disclosure requirement," stating that the parties had "performed satisfactory discovery" regarding the estates, that each "expressly waives the requirement of a Final Disclosure," and "that each has to his or her complete and full satisfaction, been provided with a complete and full understanding of the ... estates of each of the parties." In 1996, the trial court granted the wife's motion to set aside the dissolution judgment and the marital settlement agreement. *Held*, affirmed.

(a) The trial court correctly determined that there was a mistake of law on the face of the purported waiver, warranting vacation of the judgment and property agreement for mistake under *Family C. 2122(e)* (see *infra*, §243). (55 C.A.4th 1063.)

(b) While anyone may waive the advantage of a law intended solely for his or her benefit, laws established for a public reason, such as those relating to marriage dissolution, cannot be contravened by a private agreement. Under the law existing at the time the judgment of dissolution was entered here, the parties were not permitted to waive the exchange of financial disclosure statements required by law. They could not stipulate to violate statutory pronouncements, such as these, that effectuate public policy. (55 C.A.4th 1063.)

(c) *Family C. 2105* was subsequently amended, effective January 1, 1996, to permit limited waiver of disclosure requirements. However, the parties also failed to comply with the amended statute. The parties neither obtained a court order on good cause permitting them, under *Family C. 2105(a)*, to dispense with the final declaration of disclosure nor did they make the required representations. The waiver agreement did not state, as required by that statute, that the parties complied with *Family C. 2104*, that the preliminary declarations had been completed and exchanged, or that both parties had completed and exchanged a current income and expense declaration. (55 C.A.4th 1064.)

(d) Waiver of rights is rarely permitted. A party claiming waiver of favored statutory rights must prove it by clear and convincing evidence, and doubtful cases are decided against waiver. Where the Legislature permits a particular, limited waiver of a right on satisfaction of a set of conditions, it intends that no other related waivers be permitted. Also, agreements the object of which, directly or indirectly, is to exempt its parties from violation of the law are against public policy and may not be enforced. (55 C.A.4th 1065.)

(e) Where, as here, neither party complies with the mandatory disclosure requirements of *Family C. 2105*, the trial court was expressly authorized, under former *Family C. 2105(d)* (now *Family C. 2107(d)*, 2122(f); see *infra*, §§238, 243), to decide whether the judgment should be set aside. Because there has been a long-term marriage involving two

minor children, substantial assets, and heavily conflicting positions regarding distribution and support, the trial court properly set aside the dissolution and the marital support agreement. (55 C.A.4th 1066.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION G. Procedure.

2. Mandatory Financial Disclosure. f. Effect of Failure To Disclose.

11 Witkin Sum. Cal. Law Com Prop § 238

[§ 238] Effect of Failure To Disclose.

(1) *Failure To Execute and Serve Final Declaration.* Except as provided in *Family C. 2105(c)* (infra, this section) or *Family C. 2110* (supra, §234), absent good cause, no judgment may be entered regarding the parties' property rights unless both parties, or their attorneys, have executed and served final disclosure declarations and current income and expense declarations. The parties, or their attorneys, must execute and file a declaration signed under penalty of perjury stating that these documents were served on the other party, or that service has been waived pursuant to *Family C. 2105(d)* or *2110*. (*Family C. 2106*.) (See *Elden v. Superior Court* (1997) 53 C.A.4th 1497, 1509, 62 C.R.2d 322 [*Family C. 2106* barred entry of judgment confirming nonjudicial arbitration award resolving property issues where both parties failed to comply with arbitrator's order that they serve disclosure declarations within 7 days of award, and parties did not specify alternative remedy for nondisclosure]; Judicial Council Form No. FL-141.)

(2) *Compelling Disclosure.* If one party fails to serve on the other a preliminary or final declaration of disclosure, or fails to provide the required information with sufficient particularity, the complying party may within a reasonable time request the other party to fulfill the statutory requirements. (*Family C. 2107(a)*.) If the noncompliance persists, the complying party may either (a) file a motion to compel a further response, or (b) move for an order barring the noncomplying party from introducing evidence on issues that should have been covered in the disclosure declaration. (*Family C. 2107(b)*.)

If a party fails to disclose an investment opportunity (on the disclosure requirement, see supra, §235), the division of any gain resulting from the opportunity is governed by the standard of *Family C. 2556* (equal division unless otherwise required by interests of justice; see infra, §247). (*Family C. 2102(b)*.)

(3) *Setting Aside Judgment for Noncompliance.* Prior to 2002, the statutory disclosure statutes were interpreted to require a party to show that he or she was prejudiced by the opposing party's noncompliance in order to set aside a judgment. (*In re Marriage of Jones* (1998) 60 C.A.4th 685, 694, 70 C.R.2d 542 [failure to exchange final declaration in violation of *Family C. 2106* does not mandate vacation of judgment; error in entering judgment contrary to that statute is reversible only where it is reasonably probable that result more favorable to appealing party would otherwise have been reached]; *In re Marriage of McLaughlin* (2000) 82 C.A.4th 327, 331, 98 C.R.2d 136 [trial court's erroneous failure

to require husband's preliminary declaration under *Family C. 2104* was not prejudicial, where wife admitted in deposition that she had not subsequently become aware of property belonging to husband of which she was unaware when she entered into settlement agreement[.]

A 2001 statutory amendment provides that failure to comply with the disclosure requirements is not "harmless error." (*Family C. 2107(d)*; see Rutter Group, 3 Family Law §16.124.4.) *In re Marriage of Steiner* (2004) 117 C.A.4th 519, 11 C.R.3d 671, observed: "It appears that the sentence was added precisely to undo the rule articulated by *Jones and McLaughlin*." (117 C.A.4th 526.) Notwithstanding the 2001 statutory amendment, the *Steiner* court refused the wife's request to set aside a dissolution judgment based on both parties' failure to file final declarations, as required by *Family C. 2105*, where the wife had suffered no prejudice. (117 C.A.4th 528.) The court held that Cal. Const., Art. VI, §13 (judgment may be set aside based on procedural error only for miscarriage of justice) provides an independent basis for a prejudicial error standard that trumps the 2001 statutory amendment. (117 C.A.4th 527, citing the text; see 9 Cal. Proc. (4th), *Appeal*, §408.) "[T]he failure on the part of two divorcing spouses to exchange final declarations of disclosure ... does not constitute a 'get-a-new-trial-free' card, giving either one of them the automatic right to a new trial or reversal on appeal when there is no showing of a miscarriage of justice." (117 C.A.4th 522.)

On a motion to set aside a judgment, the court may order the parties to provide the preliminary and final disclosure declarations exchanged between them. In the absence of a court order to the contrary, the disclosure declaration may not be filed with the court and must be returned to the parties. (*Family C. 2107(e)*.) The commission of perjury in a preliminary or final disclosure declaration by a party is a ground for relief from judgment, in addition to any other available civil and criminal remedies. (*Family C. 2104(a)*, *2105(a)*.) In making an order setting aside a judgment for failure to comply with final disclosure requirements, the court may limit the set aside to those portions of the judgment materially affected by the nondisclosure. (*Family C. 2105(c)*.) (On relief from judgment, see *infra*, §§242, 243.)

(4) *Award of Fees Incurred Due to Noncompliance*. If a party fails to comply with any of the statutory disclosure requirements, the court must, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party. The sanctions must be in an amount "sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (*Family C. 2107(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Setting Aside Judgment for Noncompliance*. Cal. Const., Art. VI, §13:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §416.

(4) *Award of Fees Incurred Due to Noncompliance*. See *In re Marriage of Feldman* (2007) 153 C.A.4th 1470, 1481, 1494, 64 C.R.3d 29 [trial judge properly awarded attorneys' fees to wife and monetary sanctions against husband; husband, who had created numerous privately held companies, failed to disclose financial information about purchase of bond, purchase of residence through one company, existence of 401(k) account, and existence of several companies].



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CHAPTER XVI - Community Property

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VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL
SEPARATION
G. Procedure.
3. Claims of Third Parties.

11 Witkin Sum. Cal. Law Com Prop § 239

[§ 239] Claims of Third Parties.

Under former law, the court in a divorce action had power to determine the community character of the property and award a share to a spouse even though it stood in the name of a third person. Hence, a wife could join as a defendant a third person to whom the husband had transferred community property in violation of her rights; and, if she did not do so, but simply alleged that certain property was community and sought a division of it, the third person claiming rights in that property could intervene in the divorce action to establish the husband's rights. (See *Elms v. Elms* (1935) 4 C.2d 681, 683, 52 P.2d 223; *Callnon v. Callnon* (1935) 7 C.A.2d 676, 680, 46 P.2d 988; 4 Cal. Proc. (4th), *Pleading*, §197.) However, the third party was not an indispensable party because the decree would only determine rights as between the husband and wife, leaving the third party free to litigate his or her claim at some future time. (*Melny v. Melny* (1949) 90 C.A.2d 672, 676, 203 P.2d 588; see *McElroy v. McElroy* (1948) 32 C.2d 828, 831, 198 P.2d 683 [wife joined husband and husband's parents to whom he had transferred community property]; 4 Cal. Proc. (4th), *Pleading*, §157.)

Under the Family Code, intervention is no longer necessary. *Family C. 2021* authorizes joinder of third parties by order of court, and C.R.C., Rules 5.150 et seq. implement the statute. The rules provide for permissive joinder on application of either spouse, or of the third party if he or she has been served with an injunctive order restraining the use of property in his or her possession. (C.R.C., Rules 5.154(a), (c); see 5 Cal. Proc. (4th), *Pleading*, §842; 11 *Summary* (10th), *Husband and Wife*, §78.)

In re Marriage of Davis (1977) 68 C.A.3d 294, 302, 137 C.R. 265, involved a wife's petition for dissolution that joined the husband's mother as a party, alleging that she held legal title to community real property for convenience only. The mother appeared and contended that the domestic relations court was one of limited jurisdiction and could not try title to the mother's property. *Held*, the court had jurisdiction, and its determination of the issue and order that the mother convey title to the husband and wife was proper. (68 C.A.3d 300, 302, 304.) (See *Glade v. Glade* (1995) 38 C.A.4th 1441, 1455, 45 C.R.2d 695, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §46 [once marital dissolution action was commenced, family law court acquired jurisdiction over alleged community property in hands of third parties and could properly join them and stay their foreclosure action].)

SUPPLEMENT: [This section is current through the latest supplement]

Wife's right to join third person to whom husband had wrongfully transferred community property:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §216. Third party as not indispensable party:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §175.

Joinder under Rules of Court:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §888.

Glade case:

Cross-Reference: 6 Cal. Proc. (5th), Proceedings Without Trial, §47.



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION

G. Procedure.

4. Judgment.

a. Former Interlocutory Decree Law.

11 Witkin Sum. Cal. Law Com Prop § 240

[§ 240] Former Interlocutory Decree Law.

(1) *Leupe Case*. There was formerly some uncertainty about the power of the trial court to make an actual effective division of the community property in the interlocutory divorce decree. (See 9 *Cal. L. Rev.* 153; 20 *Cal. L. Rev.* 294; 1 *So. Cal. L. Rev.* 165.) The subject was reexamined in *Leupe v. Leupe* (1942) 21 *C.2d* 145, 130 *P.2d* 697, where the judge gave the wife an interlocutory decree, with a lien on the husband's personal property and business to secure payments in lieu of a division of community property. No appeal was taken from the interlocutory decree, but after 11 months the husband moved to modify it, and the court removed the lien and made a final decree incorporating the change. *Held*, the trial court lacked jurisdiction to terminate the lien. The case established these rules:

(a) *Propriety*. The trial court should determine the property issues at the trial along with the other issues; i.e., it should decide what division should be made. But it should not undertake the actual division of the property at that time; i.e., it should not assign and dispose of the community property prior to actual dissolution of the marriage (the time of the final decree). (21 *C.2d* 149.)

(b) *Power to make immediate decision*. If the trial court does in fact make an actual division of the property in the interlocutory decree, the decree is res judicata on that issue as well as on other issues involved in the action. Hence, upon affirmance on appeal, or expiration of the time for appeal or relief under *C.C.P.* 473, the division becomes conclusive. (21 *C.2d* 148, 149.)

(c) *Power or jurisdiction to modify*. When the interlocutory decree becomes res judicata by lapse of time, the trial court no longer has jurisdiction to modify its terms relating to division of the property. (21 *C.2d* 150.)

In reaching the conclusion that the trial court's division could not be changed after the time for appeal or other review had passed, the *Leupe* case followed prior decisions holding that the death of a party, after the interlocutory decree though before the final decree, does not affect the division. (See *Abbott v. Superior Court* (1924) 69 *C.A.* 660, 666, 232 *P.* 154; *Klebora v. Klebora* (1931) 118 *C.A.* 613, 618, 5 *P.2d* 965; *Peis v. Mohr* (1932) 126 *C.A.* 300, 305, 14 *P.2d* 878.)

These rules were reaffirmed in a number of subsequent cases. (See *Estate of Teel* (1949) 34 C.2d 349, 354, 210 P.2d 1 [approval of property settlement agreement in interlocutory decree was effective disposition of property, where no appeal taken and wife died]; *Hughes v. Bank of America* (1947) 78 C.A.2d 631, 636, 178 P.2d 533; *Harrold v. Harrold* (1954) 127 C.A.2d 582, 584, 274 P.2d 183 [res judicata after judgment sustained on appeal]; *Newell v. Brawner* (1956) 146 C.A.2d 337, 348, 303 P.2d 850; 23 So. Cal. L. Rev. 132.)

In *Darter v. Magnussen* (1959) 172 C.A.2d 714, 342 P.2d 528, plaintiff wife received an interlocutory decree with an award of certain property, and an order that a community ranch be sold within 90 days. The court reserved jurisdiction to make any further order respecting the sale, allocation of the proceeds, and for attorneys' fees. About 6 weeks after the interlocutory decree, plaintiff wife died. Her executor sought an order for a receiver to sell the ranch, and defendant husband moved to modify the decree for change in circumstances (her death). *Held*, order appointing receiver to sell affirmed. The decree could only be modified for reasons applicable to judgments generally. (172 C.A.2d 717.) Although a present disposition should not be made in the interlocutory decree, where the disposition is made, it is within the jurisdiction of the court; hence, when, as here, no appeal was taken, it cannot be changed. (172 C.A.2d 718.) Death of a party to a divorce action does not affect the court's power to take action that is necessary to enforce property rights adjudicated by the interlocutory decree. (172 C.A.2d 718.)

(2) *McClenny Case and Subsequent Decisions*. A more extended examination of the problem was made in *McClenny v. Superior Court* (1964) 62 C.2d 140, 41 C.R. 460, 396 P.2d 916. Wife sued for divorce. On failure of defendant husband to meet interlocutory support orders, a receiver was appointed. An interlocutory decree on grounds of extreme cruelty was awarded wife, with reservation of power to determine the division of community property. Then wife died. Her special administrator sought intervention, alleging that she had willed her property in trust for the benefit of the three minor children. Petitioner husband contended that death abated the action and deprived the superior court of jurisdiction to adjudicate community property rights and to continue the receivership. *Held*, the lower court retained both kinds of jurisdiction.

(a) The abatement of a divorce action on death relates only to status, not property rights theretofore adjudicated in the interlocutory decree. (62 C.2d 144, citing the text.)

(b) In the instant case the property was not yet divided, but granting a divorce for extreme cruelty "necessarily constitutes an adjudication" that wife was entitled to more than half. (62 C.2d 146, citing the text.) Thus wife, and thereafter her estate, had a property right to that share, which the lower court could enforce. (62 C.2d 146.)

The *McClenny* case was followed in a different factual situation in *Stevenson v. Superior Court* (1964) 62 C.2d 150, 41 C.R. 466, 396 P.2d 922. The interlocutory decree was in the wife's favor, for cruelty, but the husband died before division. *Held*, the lower court, under its reserved jurisdiction, properly awarded the wife about 75% of the community property. (62 C.2d 152.) (See *Fritsch v. Teed* (1963) 213 C.A.2d 718, 723, 724, 29 C.R. 114 [reservation of power to grant further relief at time of final decree does not preclude finality of division of property in interlocutory decree].)

The Supreme Court again upheld the power to make an immediately effective division in *Decker v. Occidental Life Ins. Co.* (1969) 70 C.2d 842, 76 C.R. 470, 452 P.2d 686. Mr. D, a veteran, purchased a residence through a contract of sale with the California Department of Veterans Affairs. With the consent of the department, the contract was assigned to Mr. and Mrs. D as joint tenants. Pursuant to law, a life insurance policy was issued by defendants, obligating them to pay to the department, on Mr. D's death, the balance owing under the contract, provided he still had an insurable interest and was not in default. In February 1963, Mrs. D received an interlocutory decree of divorce, in which the court found the property to be community, and awarded it to Mrs. D. Mr. D died in July 1963. In February 1964, at Mrs. D's request, the court entered a *nunc pro tunc* order purporting to make the award of property effective on entry of the final decree. Defendant insurance companies contended that Mr. D's interest in the property terminated under the award in the interlocutory decree; hence, Mrs. D could not recover the amount due. *Held*, this position was sound. The language of the decree, "awards," made an immediate disposition; and the *nunc pro tunc* order was an ineffectual attempt to correct

a judicial error. (70 C.2d 846.)

(3) *Effect of Appeal*. The *Leupe* court said that the trial judge should only decide how the property is to be divided, and should not undertake to make a presently effective division, but that if, nevertheless, the judge does make that division, it may (if unchallenged) in time become final and binding. (21 C.2d 149.) The court did not decide what happens if an appeal is taken from the interlocutory decree.

This question was answered in *Wilson v. Wilson* (1946) 76 C.A.2d 119, 172 P.2d 568: "It would appear that a proper solution of this problem would be to hold that the interlocutory may make a present disposition of the community property, but that the title thus conveyed is limited and conditional until the entry of the final decree. A reconciliation before that time or the death of one of the parties, and perhaps other circumstances, would prevent the conditional title from becoming absolute." (76 C.A.2d 132.) Accordingly, the language of present disposal of the community property was stricken from the interlocutory decree, and the judgment was affirmed as so modified. (76 C.A.2d 133.)

The *Wilson* case was followed in *Brown v. Brown* (1960) 177 C.A.2d 387, 2 C.R. 255. The interlocutory decree adjudged that shares of stock were community property and half "shall forthwith be transferred" to plaintiff wife, also that the household furniture "is hereby awarded" to plaintiff. On appeal, the court held that the present disposition was error. Accordingly, the judgment was modified by striking the word "forthwith," striking the words "is hereby" and inserting "shall be," and adding at the end: "The provisions of this judgment dividing and disposing of the community property of the parties hereto shall be effective upon the entry of the final judgment of divorce herein." (177 C.A.2d 389.) (See *Irish v. Irish* (1966) 246 C.A.2d 705, 709, 55 C.R. 55 [where time for entry of final decree arrived, and judge reserved jurisdiction to grant further relief at that time, deletion would be useless act and judgment may be affirmed].)

(4) *Mandatory Duty*. In *re Marriage of Knickerbocker* (1974) 43 C.A.3d 1039, 118 C.R. 232, decided a point of first impression. The interlocutory judgment read in part: "All community property shall be equally divided between the parties, under the supervision of Counsel for the Parties." No findings were made as to the actual division, and no distribution was made. *Held*, judgment reversed and cause remanded for final distribution.

(a) Under the then applicable statute and Rule of Court, the power and duty of the court to distribute the property was clear. "A mere order that unspecified property designated 'community' be divided equally cannot meet the requirement of certainty by which judgments are measured." (43 C.A.3d 1045.)

(b) In *re Marriage of Lopez* (1974) 38 C.A.3d 93, 107, 113 C.R. 58, relying on *May v. May* (1969) 275 C.A.2d 264, 79 C.R. 622, held that in order to divide the property equally, the court must make specific findings of fact. *May* was decided prior to 1969 amendments that eliminated reference to findings, and its holding on that point was questioned. (43 C.A.3d 1045, 1046, 1047.) However, the applicable statute and Rule of Court must prevail in dissolution proceedings, and they require the trial court to determine the character of the property and the value of each asset unless the parties stipulate thereto. (43 C.A.3d 1047, 1048.)

Where the pleadings set forth the community property and request its distribution, it is error for the trial court to merely determine the value and method of division; the parties are entitled to distribution. (*In re Marriage of Jafeman* (1972) 29 C.A.3d 244, 267, 105 C.R. 483, *supra*, §197.)

(5) *Effect of Reconciliation*. In *Leupe*, the court also left open the question of the effect of a division of property in the interlocutory decree where the parties become reconciled before the final decree. (21 C.2d 150.) The subsequent decisions do not announce a definitive rule, but most of them hold that property settlement agreements, made in anticipation of divorce, were cancelled or nullified by subsequent reconciliations. (See *Peters v. Peters* (1936) 16 C.A.2d 383, 387, 60 P.2d 313; *Mundt v. Connecticut General Life Ins. Co.* (1939) 35 C.A.2d 416, 418, 95 P.2d 966; *Morgan v. Morgan* (1951) 106 C.A.2d 189, 192, 234 P.2d 782; *Purdy v. Purdy* (1956) 138 C.A.2d 402, 405, 291 P.2d 1005.)

The correct rule appears to be that whether the agreement remains in effect depends on the intention of the parties. The inference of intent to cancel is usually drawn from the fact of reconciliation; but the evidence may justify a contrary inference. (See *Coffer v. Lightford* (1954) 129 C.A.2d 191, 194, 276 P.2d 618; *Tompkins v. Tompkins* (1962) 202 C.A.2d 55, 59, 20 C.R. 530 [finding of reconciliation upheld].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

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G. Procedure.

4. Judgment.

b. Statutory Requirement of Division.

11 Witkin Sum. Cal. Law Com Prop § 241

[§ 241] Statutory Requirement of Division.

(1) *In General.* The unsatisfactory state of the prior law (see *Decker v. Occidental Life Ins. Co.* (1969) 70 C.2d 842, 848, 76 C.R. 470, 452 P.2d 686 [concurring opinion]; *Wilson v. Wilson* (1946) 76 C.A.2d 119, 132, 172 P.2d 568; *In re Marriage of Juick* (1971) 21 C.A.3d 421, 425, footnote 2, 98 C.R. 324) led to the adoption of a clear statutory rule, now stated in *Family C. 2550*: Except as provided in the parties' written agreement or oral stipulation in open court, or as otherwise provided in *Family C. 2500* et seq. (division of marital property), the court must divide the community estate equally in proceedings for dissolution or legal separation, either in the judgment or at a later time if it expressly reserves jurisdiction for that purpose. (See *In re Marriage of Knickerbocker* (1974) 43 C.A.3d 1039, 1044, 118 C.R. 232, supra, §240 [construing substantively identical predecessor statute]; on equal division rule, see supra, §190 et seq.; on manner of division, see supra, §213 et seq.; on collateral estoppel effect of judgment, see 7 *Cal. Proc.* (4th), *Judgment*, §365.)

(2) *Statement of Decision.* Under the Family Code, a statement of decision is required in dissolution of marriage proceedings only if requested pursuant to *C.C.P.* 632 and *C.R.C.*, Rule 232. (See *Family C. 2338*; *C.R.C.*, Rule 5.21; Rutter Group, 3 *Family Law* §15:90 et seq.; 11 *Summary* (10th), *Husband and Wife*, §107; 7 *Cal. Proc.* (4th), *Trial*, §399 et seq.)

(3) *Stipulation.* A written agreement or oral stipulation made in open court (*Family C. 2550*, supra, §190) takes the place of a detailed statement of decision, and the court need only ascertain the nature and extent of community property to the degree necessary to exercise its discretion. (*In re Marriage of Carter* (1971) 19 C.A.3d 479, 485, 97 C.R. 274.) But an oral agreement, not disclosed to the court, is unenforceable. (*In re Marriage of Elkins* (1972) 28 C.A.3d 899, 903, 105 C.R. 59.)

West's Key Number Digest, Husband and Wife k.270(10), 272(4)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Collateral estoppel effect of judgment:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §426.

(2) *Statement of Decision*. C.R.C., Rule 232 was renumbered C.R.C., Rule 3.1590 in 2006.

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §390 et seq.



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G. Procedure.
5. Relief From Judgment.
a. In General.

11 Witkin Sum. Cal. Law Com Prop § 242

[§ 242] In General.

(1) *Enactment and Recodification of Statute.* *Family C. 2120* et seq. govern relief from family court judgments involving property division. (See *24 Pacific L. J. 812.*) *Family C. 2120* et seq. apply to judgments entered on or after January 1, 1993. (*Family C. 2129*; see *Rubenstein v. Rubenstein (2000) 81 C.A.4th 1131, 1145, 97 C.R.2d 707*, infra, §248 [1-year statute of limitations set forth in *Family C. 2122* applied to action to set aside marital dissolution judgment for fraud and perjury entered in 1992 and was affirmed on appeal in 1994; definition of "judgment" is not limited to decision entered by trial court].)

(2) *Public Policy.* Only full disclosure of assets and liabilities, and decisions freely and knowingly made, can implement the strong public policy favoring division of property according to statutory requirements and provision of fair and sufficient support awards. (*Family C. 2120(a).*) Property divisions and support awards are "occasionally" inequitable due to nondisclosure or other misconduct by one of the parties. (*Family C. 2120(b).*) Accordingly, "[t]he public policy of assuring finality of judgments must be balanced against the public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct." (*Family C. 2120(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION G. Procedure.

5. Relief From Judgment. b. Grounds and Time Limits.

11 Witkin Sum. Cal. Law Com Prop § 243

[§ 243] Grounds and Time Limits.

(1) *Grounds for Relief.* In proceedings for dissolution, nullity, or legal separation, *Family C. 2121(a)* authorizes the court to relieve a spouse from the support or property provisions of the judgment "on any terms that may be just," after expiration of the 6-month time limit of *C.C.P. 473* (see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152 et seq.). An action or motion to set aside a judgment must be based on one of the following grounds, and is subject to the following time limits:

(a) *Actual fraud.* Where a party was kept in ignorance or otherwise fraudulently prevented from fully participating in the proceeding, through no lack of care or attention, the proceeding must be brought within 1 year after the fraud was or should have been discovered. (*Family C. 2122(a)*; see *Rubenstein v. Rubenstein* (2000) 81 *C.A.4th* 1131, 1148, 97 *C.R.2d* 707, *infra*, §248 [suspicion of fraud during dissolution proceeding did not constitute discovery of that fraud].)

(b) *Perjury.* A proceeding for relief based on the commission of perjury in the disclosure declarations (or waiver of the final disclosure declaration) required by *Family C. 2104* and *2105* (*supra*, §§236, 237) must be brought within 1 year after the perjury was or should have been discovered. (*Family C. 2122(b)*; see *Rubenstein v. Rubenstein*, *supra* [suspicion of perjury during dissolution proceeding did not constitute discovery of that perjury].)

(c) *Duress or mental incapacity.* Proceedings for relief on these grounds must be brought within 2 years after entry of judgment. (*Family C. 2122(c)*, (d); see *In re Marriage of Rosevear* (1998) 65 *C.A.4th* 673, 681, 76 *C.R.2d* 691 [court did not abuse discretion in denying wife's motion to set aside stipulated judgment on ground of duress where evidence showed that she was represented by competent counsel before, during, and after lengthy settlement conference and executed stipulated judgment 3 months later].)

(d) *Mistake.* Mutual or unilateral mistakes of law or fact are grounds for relief from stipulated or uncontested judgments, or portions of the judgment stipulated to by the parties. A proceeding for relief based on mistake must be brought within 1 year after entry of judgment. (*Family C. 2122(e)*; see *In re Marriage of Varner* (1997) 55 *C.A.4th* 128, 142, 63 *C.R.2d* 894 [spouse's failure to disclose existence or value of community asset is basis for setting aside judgment for mistake under *Family C. 2122(e)*]; *In re Marriage of Fell* (1997) 55 *C.A.4th* 1058, 1063, 64 *C.R.2d* 522,

supra, §237 [where mistake of law appeared on face of stipulated waiver of statutory financial disclosure requirements, dissolution judgment could be set aside under *Family C. 2122(e)*]; *In re Marriage of Rosevear*, supra, 65 C.A.4th 681 [court did not abuse discretion in denying wife's motion to set aside stipulated judgment on ground of mistake where evidence showed that she was represented by competent counsel before, during, and after lengthy settlement conference and executed stipulated judgment 3 months later]; *In re Marriage of Brewer & Federici* (2001) 93 C.A.4th 1334, 1346, 113 C.R.2d 849 [following *Varner*; marital settlement agreement and dissolution judgment were properly set aside, based on husband's unilateral mistake caused by wife's failure to furnish accurate and complete valuations of her pension plans].)

(e) *Noncompliance with financial disclosure requirements.* An action or motion based on noncompliance with the financial disclosure requirements of *Family C. 2100* et seq. (see supra, §233 et seq.) must be brought within 1 year after the noncompliance was or should have been discovered. (*Family C. 2122(f)*.)

(2) *Other Conditions for Relief.* Before granting relief, the court must find that the alleged grounds materially affected the original outcome, and that the moving party would materially benefit from the grant of relief. (*Family C. 2121(b)*.) The court may set aside only those parts of the judgment materially affected by the circumstances providing grounds for relief, although it has discretion to set aside the entire judgment, if necessary, for equitable considerations. (*Family C. 2125*.) However, the judgment may not be set aside *only* because it is found to have been inequitable when made, or because subsequent circumstances have made the property division inequitable or the support inadequate. (*Family C. 2123*; see *In re Marriage of Heggie* (2002) 99 C.A.4th 28, 32, 120 C.R.2d 707 [relief from stipulated judgment was not justified on ground that stock transferred to wife had greatly increased in value, resulting in imbalance in division of marital property].)

On granting relief, the court must equally divide the asset or liability, unless good cause is shown for an unequal division; the date of valuation is subject to equitable considerations. (*Family C. 2126*.) If a timely request is made, the court must render a statement of decision where it has resolved controverted factual evidence. (*Family C. 2127*.) (On statement of decision, see supra, §241.)

(3) *No Imputation of Attorney's Negligence.* An attorney's negligence may not be imputed to a client to bar relief from judgment, unless the court finds that the client knew or should have known of the negligence and unreasonably failed to protect himself. (*Family C. 2124*; see *In re Marriage of Rosevear*, supra, 65 C.A.4th 686 [attorney negligence, while not imputable to client under *Family C. 2124*, is not basis for relief from judgment; grounds for relief are limited to those set forth in *Family C. 2122*].)

(4) *Other Rights and Remedies Preserved.* *Family C. 2128* provides that *Family C. 2120* et seq. do not:

(a) Prohibit a party from seeking relief under *Family C. 2556* (division of previously adjudicated assets and liabilities; see infra, §247).

(b) Change existing law as to contract remedies where the contract has not been merged or incorporated into a judgment (see 11 Summary (10th), *Husband and Wife*, §350 et seq.).

(c) Restrict a family law court from acting as a court of equity.

(d) Limit existing law on modification or enforcement of support orders (see 10 Summary (10th), *Parent and Child*, §439 et seq.; 11 Summary (10th), *Husband and Wife*, §249 et seq.).

(e) Affect the rights of a bona fide lessee, purchaser, or encumbrancer for value of real property.

The enumeration in *Family C. 2128* of other remedies that coexist with *Family C. 2120* et seq. by implication excludes remedies not specified. (*Rubenstein v. Rubenstein*, supra, 81 C.A.4th 1147 [tort damages are not available].)

(5) *Appeal From Underlying Judgment. Family C. 2120 et seq.* do not extend or otherwise affect the time within which a notice of appeal must be filed from the underlying dissolution judgment. These provisions simply establish longer statutory limitations periods for filing actions or motions challenging dissolution judgments in the trial court. They have no effect on the time for filing an appeal *from* the trial court's orders or judgments. (See *In re Marriage of Eben-King & King* (2000) 80 C.A.4th 92, 110, 95 C.R.2d 113 [appeal was untimely under deadlines of C.R.C., Rules 2 and 3 (see 9 Cal. Proc. (4th), *Appeal*, §§467, 478)].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Grounds for Relief.*

C.C.P. 473:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144 et seq.(c) *Duress or mental incapacity.* See *In re Marriage of Kieturakis* (2006) 138 C.A.4th 56, 90, 41 C.R.3d 119, Supp., supra, §133 [party seeking relief under *Family C. 2122* from judgment that incorporates unequal marital settlement agreement has burden of proving undue influence, at least where judgment is at least 6 months old].(5) *Appeal From Underlying Judgment.* C.R.C., Rules 2 and 3 were renumbered C.R.C., Rules 8.104 and 8.108, respectively, in 2006.

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §§575, 587.



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CHAPTER XVI - Community Property

Witkin Summary of California Law VI. DIVISION OF COMMUNITY PROPERTY ON DISSOLUTION OR LEGAL SEPARATION

G. Procedure.

6. Undivided and Newly Discovered Property.

a. In General.

11 Witkin Sum. Cal. Law Com Prop § 244

[§ 244] In General.

(1) *Former Law.* Under California's former divorce law, if the pleadings did not tender issues respecting property, or the court did not decide them or dispose of the property, the rights of the parties remained and could be litigated in subsequent proceedings. (*Estate of Williams (1950) 36 C.2d 289, 292, 223 P.2d 248*; see *Estate of Fulton (1937) 23 C.A.2d 563, 569, 73 P.2d 664* [if husband dies, widow has usual rights of surviving wife in community property].)

Prior to litigation, the parties became tenants in common, except where the divorce was granted for adultery, extreme cruelty, or incurable insanity. In these cases, which called for an unequal division, the respective interests were left for determination in a separate action. (See *Brown v. Brown (1915) 170 C. 1, 3, 147 P. 1168*; *Lorraine v. Lorraine (1935) 8 C.A.2d 687, 698, 48 P.2d 48*; *Fieger v. Fieger (1938) 28 C.A.2d 736, 738, 83 P.2d 526*.)

In *Kelley v. Kelley (1977) 73 C.A.3d 672, 677, 141 C.R. 33*, the court invoked the doctrine of collateral estoppel, and held that a property settlement agreement incorporated into a judgment of dissolution was a conclusive determination of community property rights; i.e., the issue of right to retirement benefits was involved and impliedly decided.

Other Court of Appeal decisions were to the contrary. In *Lewis v. Superior Court (1978) 77 C.A.3d 844, 144 C.R. 1*, the husband's military retirement benefits were not listed in the pleadings, decrees, or settlement agreement. The court applied the general rule of tenancy in common in unadjudicated property (*77 C.A.3d 851*), criticized the *Kelley* reasoning (*77 C.A.3d 852*, footnote 2), and added the following comment: "The judgment of divorce did not award wife an interest in the pension, but neither did it award the pension to the husband. Plaintiff's interest was present, existing and equal to that of her husband prior to divorce and a judgment which did not purport to affect that interest will not have the effect of terminating such interest. The purposes of res judicata should not be exalted over the policy of allowing a party a full and fair hearing on the merits of a controversy." (*77 C.A.3d 852*.) (See *Bridges v. Bridges (1978) 82 C.A.3d 976, 978, 147 C.R. 471* [approving *Lewis* reasoning and result, and suggesting that conflict in decisions should be resolved by Supreme Court]; *Gorman v. Gorman (1979) 90 C.A.3d 454, 463, 464, 153 C.R. 479* [rejecting *Kelley* analysis].)

(2) *Current Law: Independent Action Rule.* In *Henn v. Henn* (1980) 26 C.3d 323, 161 C.R. 502, 605 P.2d 10, 7 Cal. Proc. (4th), *Judgment*, §366, the court approved the *Lewis*, *Gorman*, and *Bridges* reasoning and result, and disapproved *Kelley*. (26 C.3d 331, and footnote 6.) A dissolution decree that does not mention pension benefits is neither *res judicata* nor a collateral estoppel on the issue, and an independent action may be brought to determine the right to the benefits.

Later cases have applied the rule. (See *In re Marriage of Smethurst* (1980) 102 C.A.3d 494, 496, 162 C.R. 300; *Miller v. Miller* (1981) 117 C.A.3d 366, 369, 172 C.R. 745; *Hill v. Hattrem* (1981) 117 C.A.3d 569, 573, 172 C.R. 806; *Huddleson v. Huddleson* (1986) 187 C.A.3d 1564, 1574, 232 C.R. 722 [12-year delay in filing action to divide pension benefits did not constitute laches where nonemployee spouse filed suit 1 year after learning of her interest in pension]; *In re Marriage of Moore & Ferrie* (1993) 14 C.A.4th 1472, 1479, 18 C.R.2d 543, *supra*, §66 [pension omitted from Ohio divorce judgment could be divided by California court under *Henn*, without depriving Ohio judgment of full faith and credit]; *In re Marriage of Melton* (1994) 28 C.A.4th 931, 939, 33 C.R.2d 761 [rights to pension benefits not divided by stipulated judgment should have been adjudicated in *Henn* action, where trial judge lacked authority to alter terms of judgment partially dividing benefits].)

Berry v. Berry (1989) 216 C.A.3d 1155, 265 C.R. 338, holds that the right to bring an independent action was not affected by the enactment of former C.C. 5124 (*supra*, §81). That statute provided for modification of certain community property dispositions in order to divide military pension benefits; it was repealed by its own terms on January 1, 1986. Former C.C. 5124 was not intended to extinguish the right to bring a separate partition action under *Henn* merely because the judgment came within the period specified in the statute for seeking modification (January 25, 1981, through January 31, 1983). Thus, an ex-wife who was barred from proceeding under former C.C. 5124 due to the expiration of the statute was not precluded from bringing a *Henn* action. (216 C.A.3d 1160.)

It should be noted, however, that a 1990 amendment to the Federal Uniformed Services Former Spouses Protection Act prohibits the reopening of certain military retirement pension divisions (see *infra*, §§245, 246). (On postjudgment motion procedure to award omitted assets under *Family C. 2556*, see *infra*, §247.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Current Law: Independent Action Rule.*

Henn case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §427.



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6. Undivided and Newly Discovered Property. b. Military Retirement Pension. 1. In General.

11 Witkin Sum. Cal. Law Com Prop § 245

[§ 245] In General.

In *Casas v. Thompson* (1986) 42 C.3d 131, 228 C.R. 33, 720 P.2d 921, plaintiff wife and defendant husband were divorced in 1966 by a decree that made no mention of his military retirement pension. He retired from the Navy in 1970 after 26 years of duty, and began receiving monthly retirement pay. In November 1980, plaintiff filed a complaint for partition of this omitted asset. The judge awarded her 30% of the gross retirement pay for any future pension payments, but only 30% of disposable pay for money received by defendant from the date of the complaint (November 1980) to the date of the judgment (June 1983). *Held*, affirmed.

(a) Under *Henn v. Henn* (1980) 26 C.3d 323, 161 C.R. 502, 605 P.2d 10, *supra*, §244, the nonmilitary spouse could bring an independent action for partition only if the spouse had a divisible interest at the time of the divorce (1966). The characterization of a military retirement pension was unsettled until 1974, when California courts held it to be community property (see *supra*, §78). *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, *supra*, §79, rejected this view, but the Federal Uniformed Services Former Spouses Protection Act (FUSFSPA) was then enacted to remove the effect of *McCarty* (see *supra*, §80), and its provisions were made retroactive to the day before the decision (*supra*, §81). (42 C.3d 139, 140.)

(b) Defendant contended that *McCarty*, applied retroactively, determined that in 1966, the court lacked jurisdiction to divide the asset. But *McCarty* has been held nonretroactive (see *supra*, §79). (42 C.3d 140, 141.) Under *In re Marriage of Fithian* (1974) 10 C.3d 592, 111 C.R. 369, 517 P.2d 449, *supra*, §78, which was applied retroactively because it did not overturn a settled rule of law, the trial judge correctly concluded that plaintiff had a community interest in the pension in 1966. (42 C.3d 141, 142.) (See *Berry v. Berry* (1989) 216 C.A.3d 1155, 1161, 265 C.R. 338, *supra*, §244 [following *Casas* on retroactivity of FUSFSPA and its nullification of *McCarty*]; *In re Marriage of Curtis* (1992) 7 C.A.4th 1, 11, 9 C.R.2d 145 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Undivided and Newly Discovered Property.
 - b. Military Retirement Pension.
 2. Jurisdiction Limited by FUSFSPA.

11 Witkin Sum. Cal. Law Com Prop § 246

[§ 246] Jurisdiction Limited by FUSFSPA.

(1) *Personal Jurisdiction*. The Federal Uniformed Services Former Spouses Protection Act (FUSFSPA), which became effective February 1, 1983, nullified the U.S. Supreme Court holding in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, supra, §79, and allowed state courts to apply state community property law in characterizing and dividing military retirement pensions and retainer pay. (10 U.S.C., §1408; see *In re Marriage of Stephens* (1986) 184 C.A.3d 616, 622, 229 C.R. 238 [property settlement agreement construed as agreement by parties to be governed by provisions of FUSFSPA and applicable subsequent case law]; Rutter Group, 2 Family Law §8:223 et seq.; supra, §80.)

However, FUSFSPA specifies only three jurisdictional bases as to the military spouse: (a) residence other than by military assignment; (b) domicile; or (c) consent. (10 U.S.C., §1408(c)(4).) For purposes of FUSFSPA, "domicile" means "present domicile," and past domicile coupled with "minimum contacts" to the forum does not satisfy FUSFSPA in personam jurisdiction requirements. (*In re Marriage of Hattis* (1987) 196 C.A.3d 1162, 1168, 242 C.R. 410, 2 Cal. Proc. (4th), Jurisdiction, §130.)

A military spouse who is not domiciled in California may consent to the dissolution court's jurisdiction over nonpension issues, but successfully challenge the court's jurisdiction to divide his or her pension under FUSFSPA. (*In re Marriage of Tucker* (1991) 226 C.A.3d 1249, 1256, 277 C.R. 403.)

(2) *Subject Matter Jurisdiction Over Pre-McCarty Final Judgments*. The FUSFSPA provision permitting military retirement benefits to be divided between spouses according to the law of the jurisdiction (10 U.S.C., §1408(c)(1); see supra, §80) was amended in 1990 to add a provision prohibiting the reopening of a property division in order to divide military retired pay if the final decree (a) was issued before June 25, 1981 (the day prior to the *McCarty* decision); and (b) did not treat (or reserve jurisdiction to treat) the retired pay as the property of both spouses. This amendment applies to all judgments, whether entered before, on, or after November 5, 1990, the date the amendment was enacted. However, as to judgments entered before that date, the amendment does not relieve any otherwise valid obligation to make a payment due before November 5, 1992. (See *In re Marriage of Curtis* (1992) 7 C.A.4th 1, 14, 15, 9 C.R.2d 145;

In re Marriage of Olsen (1994) 24 C.A.4th 1702, 1707, 30 C.R.2d 306, 11 Summary (10th), *Husband and Wife*, §219 [affirming award of support to wife, after her property rights in husband's pension were defeated by 1990 amendment]; Rutter Group, 2 Family Law §8:224.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Personal Jurisdiction*.

In re Marriage of Hattis case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §136.



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6. Undivided and Newly Discovered Property. c. Postjudgment Motion.

11 Witkin Sum. Cal. Law Com Prop § 247

[§ 247] Postjudgment Motion.

(1) *In General.* *Family C. 2556* authorizes an alternative procedure to accomplish the object of an action authorized under *Henn v. Henn* (1980) 26 C.3d 323, 161 C.R. 502, 605 P.2d 10, supra, §244. (On other statutory procedures for relief from judgment, see supra, §§242, 243.)

(a) *Continuing jurisdiction of dissolution court.* In dissolution, nullity, and legal separation proceedings, the court has continuing jurisdiction to award community estate assets or liabilities that have not been previously adjudicated. (*Family C. 2556.*) (See *In re Marriage of Mason* (1996) 46 C.A.4th 1025, 1028, 54 C.R.2d 263 [husband's attempt to invoke trial court's continuing jurisdiction in order to divide business goodwill as omitted asset was barred by prior denial, affirmed on appeal, of husband's motion to set aside dissolution judgment on ground of wife's fraud regarding value of business; res judicata barred identical claim based on new theory]; *In re Marriage of Hixson* (2003) 111 C.A.4th 1116, 1121, 4 C.R.3d 483 [extensively discussing *Family C. 2556*, and upholding limitation of future discovery by wife, where she failed to demonstrate that there were any unadjudicated assets or opportunities].)

(b) *Motion or order to show cause.* A party may obtain adjudication of a community asset or liability that was omitted or not adjudicated by the judgment by filing a postjudgment motion or order to show cause. (*Family C. 2556.*)

(c) *Division of property.* The court must equally divide the omitted or unadjudicated asset or liability, unless it finds upon good cause shown that the interests of justice require an unequal division. (*Family C. 2556.*) (See *In re Simundza* (2004) 121 C.A.4th 1513, 1517, 18 C.R.3d 377 [no omitted asset under *Family C. 2556*, where wife agreed in stipulated marital dissolution judgment to accept \$ 200 per month from husband's pension for 12 years, even though pension's value had increased since time of agreement].)

The Law Revision Commission Comment observes that *Family C. 2556* applies to quasi-community as well as community property. The Comment refers to *Family C. 63* ["community estate" includes both community and quasi-community property] and to *In re Marriage of Craig* (1990) 219 C.A.3d 683, 268 C.R. 396 [noting uniform statutory treatment of quasi-community and community property].

(2) *Impact of FUSFSPA Amendment.* The availability of relief under *Family C. 2556* is restricted by a 1990 amendment to the Federal Uniformed Services Former Spouses Protection Act, prohibiting the reopening of certain military retirement pension divisions. (See *In re Marriage of Curtis* (1992) 7 C.A.4th 1, 14, 9 C.R.2d 145.)

West's Key Number Digest, Husband and Wife k.272(4)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

(c) *Division of property.* See *In re Marriage of Klug* (2005) 130 C.A.4th 1389, 1403, 31 C.R.3d 327 [unclean hands doctrine barred husband from claiming interest in wife's legal malpractice settlement proceeds as omitted asset].



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6. Undivided and Newly Discovered Property. d. Tort Action for Concealment.

11 Witkin Sum. Cal. Law Com Prop § 248

[§ 248] Tort Action for Concealment.

In *Dale v. Dale* (1998) 66 C.A.4th 1172, 78 C.R.2d 513, a divorced wife brought a tort action for damages against her former husband and the bookkeeper for the husband's medical practice several years after a final judgment of dissolution had been entered, alleging that defendants had concealed community assets related to the practice, causing her to forgo spousal support and to stipulate that the husband be awarded the practice without full knowledge of its assets. The trial judge dismissed the action for lack of jurisdiction, concluding that plaintiff's exclusive remedy lay in seeking to set aside the judgment of dissolution in the family court. *Held*, reversed. In the absence of a pending dissolution proceeding in which the parties' property and support rights have yet to be finally determined, a plaintiff who alleges injury because his or her former spouse tortiously concealed community assets, thereby preventing the plaintiff from fully presenting his or her case in the dissolution proceeding, is entitled to bring a subsequent tort action for damages against the former spouse based on the alleged concealment. (66 C.A.4th 1174.) When a dissolution proceeding is still pending in the family court, another department of the superior court may not interfere with the family court's exercise of its powers in that proceeding. But that rule is inapplicable where the dissolution proceeding has been finally disposed of by a final judgment. (66 C.A.4th 1183.) (On priority of jurisdiction between dissolution court and another court, see 2 Cal. Proc. (4th), *Jurisdiction*, §436.)

Rubenstein v. Rubenstein (2000) 81 C.A.4th 1131, 97 C.R.2d 707, disagreed with the reasoning of the *Dale* case, and found that its holding was superseded by the enactment of *Family C. 2120* et seq. (supra, §242). The former wife, alleging concealment of community assets, sought both to set aside the marital dissolution judgment and to recover resulting tort damages. *Held*, available relief was limited to setting aside the judgment.

(a) *Family C. 2120* et seq., which provide a comprehensive statutory scheme for setting aside judgments on grounds of fraud, perjury, duress, mental incapacity, or mistake, govern this proceeding. The remedy provided is the traditional setting aside of the judgment. On vacating the judgment, in whole or in part, a trial court is empowered to make an unequal distribution of the concealed assets. However, no tort action lies for concealment of community assets in the dissolution proceeding. (81 C.A.4th 1146.)

(b) It is true that *Dale* held that a defrauded spouse may bring a tort action for concealment of community assets as

an alternative to moving to set aside the dissolution judgment. However, *Dale* clearly was a major departure from existing law. Where a civil judgment is procured by extrinsic fraud, the normal remedy is to seek equitable relief from the judgment, not to sue in tort. Moreover, the absolute litigation privilege of C.C. 47(b) (see 5 *Summary* (10th), *Torts*, §562) bars derivative tort actions and applies to all torts other than malicious prosecution. In any event, leaving aside the soundness of the *Dale* decision, it concerned a judgment rendered before the effective date of *Family C. 2120* et seq. and is therefore no longer operative. (81 *C.A.4th* 1146.)

(c) *Family C. 2128* (supra, §243) specifically lists the remedies that are not excluded under the statutory scheme of *Family C. 2120* et seq. Under the statutory construction doctrine of *expressio unius est exclusio alterius*, the expression of certain things in a statute necessarily involves the exclusion of other things not expressed. Accordingly, the enumeration in *Family C. 2128* of other remedies that coexist with *Family C. 2120* et seq. by implication excludes remedies not specified, including the recovery of tort damages. (81 *C.A.4th* 1147.) (See *Kuehn v. Kuehn* (2000) 85 *C.A.4th* 824, 834, 102 *C.R.2d* 743 [disagreeing with *Dale* and following *Rubenstein* in holding that no tort action is available against spouse for concealment of community assets].)

SUPPLEMENT: [This section is current through the latest supplement]
Priority of jurisdiction between dissolution court and another court:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §450.



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CHAPTER XVI - Community Property

Witkin Summary of California Law VII. DIVISION OF COMMUNITY OR QUASI-COMMUNITY PROPERTY ON DEATH A. In General. 1. Former Law.

11 Witkin Sum. Cal. Law Com Prop § 249

[§ 249] Former Law.

(1) *Statute of Succession*. Prior to 1923, the wife's rights were limited by statute as follows: (a) On the death of the husband intestate, she received only half the community property. (b) She had no right to dispose of any part of it by her own will. In 1923, former Prob.C. 201 was amended to provide: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse." (See *Estate of Piatt* (1947) 81 C.A.2d 348, 350, 183 P.2d 919.)

(2) *Retroactive Effect of Statute of Succession*. In *Estate of Phillips* (1928) 203 C. 106, 263 P. 1017, community property was acquired prior to 1923. The husband died intestate in 1925. *Held*, the surviving wife was entitled to the whole, to the exclusion of the son. That part of the statute that applied to the wife's right to take community property on the death of the husband was a statute of succession, and the right of inheritance is wholly statutory and subject to complete legislative control. (203 C. 109, 110.)

(3) *Nonretroactive Effect of Grant of Testamentary Power*. In *McKay v. Lauriston* (1928) 204 C. 557, 269 P. 519, the community property was acquired in 1918. In 1926 the wife died, leaving a will in which she attempted to dispose of one-half. *Held*, the husband was entitled to quiet title. On the death of the wife, the husband did not take as heir, but kept the property as owner; hence, this part of the statute was not a rule of inheritance and, if applied retroactively, was an unconstitutional attempt to abridge the husband's vested right in the property. (204 C. 566.) (To same effect, see *Henry v. Hibernia Savings & Loan Soc.* (1935) 5 C.A.2d 141, 144, 42 P.2d 395; 16 Cal. L. Rev. 243; 1 So. Cal. L. Rev. 496.)

In *Boyd v. Oser* (1944) 23 C.2d 613, 145 P.2d 312, the wife died 12 years after the effective date of former Prob.C. 201. Her administrator with the will annexed conceded that, under prior decisions, she could not will away any of the property acquired before the amendment, but contended that she could dispose of one-half of the income from the property (e.g., rents) received after 1923. *Held*, there was no more right to dispose of the income than of the property itself; the rights of the husband included the right to use the property and to take and keep its proceeds, both in their original form and in any subsequent form resulting from reinvestment. (23 C.2d 620.) (See 32 Cal. L. Rev. 187; 33 Cal. L. Rev. 476; 17 So. Cal. L. Rev. 399.)

(4) *Property Subject to Debts and Administration*. Under former Prob.C. 202, "[c]ommunity property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife," was subject to his debts and to administration. Hence, before the widow could take any part of the property by succession, or the wife could dispose of her share by will, the husband's debts and expenses of administration had to be paid, although if there was also separate property of the husband, an apportionment would be made. (See *Estate of Coffee* (1941) 19 C.2d 248, 252, 120 P.2d 661; *Estate of King* (1942) 19 C.2d 354, 364, 121 P.2d 716; *Sieroty v. Silver* (1962) 58 C.2d 799, 804, 26 C.R. 635, 376 P.2d 563; *Estate of Kurt* (1948) 83 C.A.2d 681, 684, 189 P.2d 528; *Estate of Phillips* (1954) 123 C.A.2d 570, 573, 266 P.2d 954; *Estate of Algee* (1958) 158 C.A.2d 691, 696, 323 P.2d 221; *Knego v. Grover* (1962) 208 C.A.2d 134, 146, 25 C.R. 158; *Thompson v. Boyd* (1963) 217 C.A.2d 365, 386, 32 C.R. 513.)

(5) *Necessity of Claim of Interest in Real Property*. Former Prob.C. 203 provided that the surviving husband, 40 days after the wife's death, had power to sell, lease, mortgage, or otherwise deal with and dispose of the community real property, "unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property is claimed by another under the wife's will." (See *Morghee v. Rouse* (1964) 224 C.A.2d 745, 748, 37 C.R. 112 [statute only applied to transactions for consideration].)

West's Key Number Digest, Husband and Wife k.272(2), 273 et seq.

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CHAPTER XVI - Community Property

Witkin Summary of California Law VII. DIVISION OF COMMUNITY OR QUASI-COMMUNITY PROPERTY ON DEATH

A. In General.

2. Probate Code Revision.

11 Witkin Sum. Cal. Law Com Prop § 250

[§ 250] *Probate Code Revision.*

(1) *Enactment and Organization.* Former Prob.C. 202 et seq. (supra, §249) were repealed effective January 1, 1985, and replaced by former Prob.C. 649.1 et seq. Former Prob.C. 649.1 et seq., in turn, were repealed effective July 1, 1987, and replaced by *Prob.C. 13500* et seq. These statutes, governing the disposition of community property on death, are arranged in six chapters:

(a) Chapter 1. General Provisions (*Prob.C. 13500* et seq.). (See *infra*, §251.)

(b) Chapter 2. Right of Surviving Spouse to Dispose of Property (*Prob.C. 13540* et seq.). (See *infra*, §251; 14 *Summary* (10th), *Wills and Probate*, §821.)

(c) Chapter 3. Liability for Debts of Deceased Spouse (*Prob.C. 13550* et seq.). (See *infra*, §251; 14 *Summary* (10th), *Wills and Probate*, §823.)

(d) Chapter 3.5. Liability for Decedent's Property (*Prob.C. 13560* et seq.). (See *infra*, §251; 14 *Summary* (10th), *Wills and Probate*, §824.)

(e) Chapter 4. Collection by Affidavit of Compensation Owed to Deceased Spouse (*Prob.C. 13600* et seq.). (See 14 *Summary* (10th), *Wills and Probate*, §825.)

(f) Chapter 5. Determination or Confirmation of Community Property Passing or Belonging to Surviving Spouse (*Prob.C. 13650* et seq.). (See *infra*, §251; 14 *Summary* (10th), *Wills and Probate*, §829 et seq.)

(2) *Applicability of Revision.* The statutes apply "whether the deceased spouse died before, on, or after July 1, 1987." (*Prob.C. 13505*.) However, "community property held in a revocable trust" described in *Family C. 761* (see 13 *Summary* (10th), *Trusts*, §198) "is governed by the provisions, if any, in the trust for disposition in the event of death." (*Prob.C. 13504*.)

Preexisting wills and trusts are protected by the following language: "A reference in any statute of this state or in a written instrument, including a will or trust, to a provision of former Sections 202 to 206, inclusive, of the Probate Code

(as repealed by Chapter 527 of the Statutes of 1984) or former Sections 649.1 to 649.5, inclusive, or *Sections 650 to 658, inclusive, of the Probate Code* (as repealed by Chapter 783 of the Statutes of 1986) shall be deemed to be a reference to the comparable provision" of *Prob.C. 13500* et seq. (*Prob.C. 13506*.)

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Witkin Summary of California Law VII. DIVISION OF COMMUNITY OR QUASI-COMMUNITY PROPERTY ON DEATH

A. In General.

3. Disposition of Community Property.

11 Witkin Sum. Cal. Law Com Prop § 251

[§ 251] Disposition of Community Property.

(1) *Community Property Passing Without Administration.* Except as provided in *Prob.C. 13500* et seq., when a spouse dies intestate leaving property that passes to the surviving spouse under *Prob.C. 6401* (see 14 *Summary* (10th), *Wills and Probate*, §§76, 78), or dies testate devising all or a part of his or her property to the surviving spouse, the property passes to the survivor subject to *Prob.C. 13540* et seq. (surviving spouse's right to dispose of property) and *Prob.C. 13550* et seq. (liability for debts of deceased spouse), and no administration is necessary. (*Prob.C. 13500.*)

Thus, under *Prob.C. 13500*, all community property left in fee to the surviving spouse will normally pass without administration, subject to liability for debts (*Prob.C. 13550* et seq.). This rule, however, is subject to exceptions (see *Prob.C. 13501*) and to the surviving spouse's right to elect administration (*Prob.C. 13502*) or to transfer to a trust (*Prob.C. 13503*). (For complete coverage of these statutes, see 14 *Summary* (10th), *Wills and Probate*, §818 et seq.)

(2) *Judicial Confirmation of Community Property.* *Prob.C. 13650* et seq. create a procedure for a judicial determination that property is community and passes without administration. (For complete coverage, see 14 *Summary* (10th), *Wills and Probate*, §829 et seq.)

(3) *Community Property With Right of Survivorship.* Where community property is held with right of survivorship (see *supra*, §157), the property passes to the survivor "without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy." (C.C. 682.1(a); on disposition at death of property held in joint tenancy, see 12 *Summary* (10th), *Real Property*, §34.) Under C.C. 682.1(a), the following Probate Code provisions apply:

(a) *Prob.C. 5000* et seq., regarding nonprobate transfers. (See 14 *Summary* (10th), *Wills and Probate*, §305 et seq.)

(b) *Prob.C. 13540* et seq.

(c) *Prob.C. 13550* et seq.

(d) *Prob.C. 13560* et seq., regarding liability for the decedent's community property. (See 14 *Summary* (10th), *Wills and Probate*, §824.)

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CHAPTER XVI - Community Property

Witkin Summary of California Law VII. DIVISION OF COMMUNITY OR QUASI-COMMUNITY PROPERTY ON DEATH

B. Property Acquired Outside California.

1. Former Law and Corrective Legislation.

11 Witkin Sum. Cal. Law Com Prop § 252

[§ 252] Former Law and Corrective Legislation.

(1) *Former C.C. 164.* The problem created by parties bringing absolutely owned property into California, which was not governed by California community property laws (see *supra*, §34), was the subject of a series of amendments to former C.C. 164. The general purpose of the amendments was to provide that personal property acquired while domiciled elsewhere, which would have been community property if acquired while domiciled here, should be community property. A section of the Civil Code dealing with rights *inter vivos*, the amended statute purported to require that a person, as a condition to entering this state, submit to having his or her absolutely owned property changed to community property. (For discussion of early decisions upholding due process objections, see *Estate of Bruggemeyer* (1931) 115 C.A. 525, 536, 2 P.2d 534; *Melvin v. Carl* (1931) 118 C.A. 249, 253, 4 P.2d 954; 10 Cal. L. Rev. 154; 15 Cal. L. Rev. 399; 20 Cal. L. Rev. 201; 21 Cal. L. Rev. 221; 5 So. Cal. L. Rev. 309.)

In *Estate of Thornton* (1934) 1 C.2d 1, 33 P.2d 1, the Supreme Court followed the earlier Court of Appeal decisions and held the statutory condition invalid as a deprivation of a vested property right of the owner (usually the husband). (1 C.2d 3.) As applied to an attempted change of property rights on divorce or for other purposes during the lifetime of the parties, the decision has been generally regarded as correct. But the actual result reached in the *Thornton* case seems erroneous. The proceeding was after the death of the owner of the property, and it is well settled that the Legislature may validly limit the rights of succession and testamentary disposition. (*Estate of Phillips* (1928) 203 C. 106, 109, 263 P. 1017; see *supra*, §249; 14 *Summary* (10th), *Wills and Probate*, §1.) For the purpose of determining rights after death, former C.C. 164, insofar as it was applicable, might have been viewed as a statute of succession. (See *Addison v. Addison* (1965) 62 C.2d 558, 563, 43 C.R. 97, 399 P.2d 897, *infra*, §256; 47 Cal. L. Rev. 215; 50 Cal. L. Rev. 210; 18 *Hastings L. J.* 295; 8 So. Cal. L. Rev. 221.)

(2) *Former Prob.C. 201.5.* The Legislature of 1935 took an important step in the direction of a solution to the problem by repeating the appropriate part of former C.C. 164 in former Prob.C. 201.5, thus making it a statute expressly declaring rights of succession. But the uncertain language, as construed by the courts, proved inadequate.

In *re Miller* (1947) 31 C.2d 191, 187 P.2d 722, involved the problem of classification of the property for inheritance tax purposes, under the exemption provision of former Rev.C. 13555. The court, construing that statute in the same manner as former Prob.C. 201.5 had been construed, held that former Rev.C. 13555 could only be applied to

personal property. Hence, if the husband invested funds in real property, or otherwise transformed personalty into realty, the real property left at his death fell outside the scope of the statute and had the character (absolutely owned) given by the law of the other state. (31 C.2d 199.) (See 21 Cal. L. Rev. 390; 35 Cal. L. Rev. 121; 47 Cal. L. Rev. 215.)

In *Paley v. Bank of America* (1958) 159 C.A.2d 500, 324 P.2d 35, the portion of former Prob.C. 201.5 that purported to give the wife the power of testamentary disposition over one-half of the property was held unconstitutional. Under *Thornton* and similar decisions, the section could function only as a statute governing succession to the husband's property after his death; it could not operate to take away any portion of his property during his lifetime. (159 C.A.2d 509.) (See 47 Cal. L. Rev. 216.)

(3) *Revision of 1957.* Acting on a study by the California Law Revision Commission, the 1957 Legislature revised the law by amending former Prob.C. 201.5 and adding former Prob.C. 201.6, 201.7, and 201.8. The revised law was designed to eliminate the constitutional objections, to clarify the law, and to broaden its scope. (See 47 Cal. L. Rev. 216; 6 U.C.L.A. L. Rev. 178.) Amendments to the Revenue Code were contemporaneously adopted to make the Inheritance Tax Law conform. (See 47 Cal. L. Rev. 231.)

(4) *Subsequent Probate Code Revisions.* The statutes governing wills and intestate succession were revised and renumbered in 1983. (See 14 Summary (10th), *Wills and Probate*, §22 et seq.) Effective January 1, 1985, former Prob.C. 201.5 was superseded by Prob.C. 66, 101, 6101, and 6401 (see *infra*, §253); former Prob.C. 201.6 was continued in Prob.C. 120 (see *infra*, §254); former Prob.C. 201.7 was repealed (see 16 Cal. Law Rev. Com. Reports, p. 2507); and former Prob.C. 201.8 was superseded in part by Prob.C. 102 (see *infra*, §255) and repealed in part, the provision regarding election by a surviving spouse not having been continued (see 16 Cal. Law Rev. Com. Reports, p. 2507).

(5) *Election To Take Under or Against Will.* A surviving spouse has certain rights in actual community property, and, if the testator attempts to give strangers more than the surviving spouse's half of the community property by the will, the surviving spouse may challenge the excessive disposition. However, if the will also makes provision for the surviving spouse, he or she must ordinarily elect to take either under the will or the statute. (See 14 Summary (10th), *Wills and Probate*, §268.) Former Prob.C. 201.7, imposing the same election requirement as to property rights under former Prob.C. 201.5, has been repealed. Thus, as with community property, an election is required only if the testator expressly or impliedly so requires. (See 14 Summary (10th), *Wills and Probate*, §269.)

West's Key Number Digest, Husband and Wife k.246, 272(2)

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CHAPTER XVI - Community Property

Witkin Summary of California Law VII. DIVISION OF COMMUNITY OR QUASI-COMMUNITY PROPERTY ON DEATH

B. Property Acquired Outside California. 2. Where California Law Applies.

11 Witkin Sum. Cal. Law Com Prop § 253

[§ 253] Where California Law Applies.

(1) *Rules of Succession.* On the death of a spouse, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent. (*Prob.C. 100(a)*.) A similar rule of succession applies to quasi-community property. On the death of a spouse domiciled in California, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent. (*Prob.C. 101(a)*.) Notwithstanding either rule, a husband and wife may agree in writing to divide community or quasi-community property on the basis of a non pro rata division of the aggregate value of that property, on the basis of a division of each individual item or asset of that property, or partly on each basis. (*Prob.C. 100(b)* and *101(b)*.) (On what may be disposed of by will, see *Prob.C. 6101, 14 Summary* (10th), *Wills and Probate*, §103; on intestate share of surviving spouse, see *Prob.C. 6401, 14 Summary* (10th), *Wills and Probate*, §76.)

(2) *Property Subject to Rules.* Under *Prob.C. 28*, "community property" means the following property:

(a) Property acquired during the marriage by a married person while domiciled in California. (*Prob.C. 28(a)*.)

(b) All personal property wherever situated, and all real property situated in California, acquired during the marriage by a married person while domiciled elsewhere, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition. (*Prob.C. 28(b)*.)

(c) All personal property wherever situated, and all real property situated in California, acquired during the marriage by a married person in exchange for real property or personal property, wherever situated, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time the property was exchanged or acquired. (*Prob.C. 28(c)*.)

Under *Prob.C. 66*, "quasi-community property" means the following property:

(a) All personal property wherever situated, and all real property situated in California, or subsequently acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving

spouse if the decedent had been domiciled in California at the time of its acquisition. (*Prob.C. 66(a).*)

(b) All personal property wherever situated, and all real property situated in California, subsequently acquired in exchange for real property or personal property, wherever situated, that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in California at the time the exchanged property was acquired. (*Prob.C. 66(b).*)

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Witkin Summary of California Law VII. DIVISION OF COMMUNITY OR QUASI-COMMUNITY PROPERTY ON DEATH

B. Property Acquired Outside California. 3. Will of California Property by Nondomiciled Testator.

11 Witkin Sum. Cal. Law Com Prop § 254

[§ 254] Will of California Property by Nondomiciled Testator.

(1) *Former Law.* Another unfortunate result of the difference in the laws of succession of a noncommunity property state and California occurred where a nondomiciled decedent acquired California land and disposed of it by will to others. Two settled doctrines may have had the effect of depriving the surviving spouse of any interest: (a) The right he or she had in the other state to take against the will did not exist as to California land, which is governed by the law of its situs (see 14 *Summary* (10th), *Wills and Probate*, §52); and (b) if the land was acquired with funds that the decedent owned absolutely under the law of the other state, the land was treated as the proceeds of separately owned property and was separate property (see *supra*, §§5, 14). Because the parties did not become domiciled in California, former Prob.C. 201.5 (*supra*, §252) did not apply.

(2) *Revised Law.* To remedy this situation, legislation established in California land the rights the surviving spouse had under the law of the state of domicile. If a spouse is not domiciled in California at death and leaves a valid will disposing of real property in California that is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in that property against the will of the decedent as though the property were located in the decedent's domicile at death. (*Prob.C. 120.*) "Real property" includes a leasehold interest in real property. (*Prob.C. 68.*)

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Witkin Summary of California Law VII. DIVISION OF COMMUNITY OR QUASI-COMMUNITY PROPERTY ON DEATH

B. Property Acquired Outside California. 4. Restoration of Property Transferred Inter Vivos.

11 Witkin Sum. Cal. Law Com Prop § 255

[§ 255] Restoration of Property Transferred Inter Vivos.

In noncommunity property jurisdictions, the surviving spouse's protection is usually an expectant interest in the decedent's estate that cannot be defeated by will, but that does not prevent the decedent from making ordinary inter vivos dispositions. However, a fraudulent transfer designed to defeat the surviving spouse's expectancy while preserving the decedent's control over the property may be held invalid. (See *47 Cal. L. Rev. 220*; *49 A.L.R.2d 521* [gift or other voluntary transfer by one spouse as fraud on other spouse].) This theory is the basis of *Prob.C. 102*, which protects the surviving spouse's expectancy in *Prob.C. 101* property (see *supra*, §253) as follows:

(1) *Surviving Spouse's Right to Restoration of Transferred Property.* The decedent's surviving spouse may require the transferee of property in which the surviving spouse had an expectancy under *Prob.C. 101* at the time of the transfer to restore to the decedent's estate one-half of the property, if the transferee retains the property; one-half of the proceeds, if the transferee has not retained the property; or one-half of the property's value at the time of its transfer, if there are no proceeds. Restoration may be required only if all of the following conditions have been satisfied:

(a) The decedent died while domiciled in California.

(b) The decedent transferred the property to a person other than the surviving spouse without receiving in exchange a consideration of substantial value and without the written consent or joinder of the surviving spouse.

(c) The transfer is any of the following types: (1) a transfer where the decedent retained at the time of death the possession or enjoyment of, or the right to income from, the property; (2) a transfer where the decedent retained at the time of death a power, either alone or in conjunction with another person, "to revoke or to consume, invade, or dispose" of the principal for the decedent's own benefit; or a transfer whereby property is held at the time of the decedent's death by the decedent and another with a right of survivorship. (*Prob.C. 102(a)*.)

All property restored to the decedent's estate under *Prob.C. 102* belongs to the surviving spouse, pursuant to *Prob.C. 101*, as though the transfer had not been made. (*Prob.C. 102(c)*.)

(2) *Exceptions: Insurance and Pension Benefits.* *Prob.C. 102* does not require a transferee to restore to the

decedent's estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse. (*Prob.C. 102(b).*)

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Witkin Summary of California Law VIII. INTER VIVOS RIGHTS IN QUASI-COMMUNITY PROPERTY A. Definition of Quasi-Community Property. 1. Nature and Purpose of Legislation.

11 Witkin Sum. Cal. Law Com Prop § 256

[§ 256] Nature and Purpose of Legislation.

(1) *In General.* Previous attempts to solve the problems arising from acquisition of property outside the state, within the limitations of *Estate of Thornton* (1934) 1 C.2d 1, 33 P.2d 1, supra, §252, were confined to the enactment of laws governing succession after death. (See supra, §253 et seq.) In 1961, pursuant to a recommendation of the California Law Revision Commission, the Legislature undertook to make changes in the rights of the parties during their lifetime. The theory of the Commission was that, for most purposes, the absolutely owned property brought here by a spouse should continue to be treated as separate property during his or her lifetime, but that it should be treated as if it were community property for purposes of division on dissolution or legal separation (infra, §§258, 259). (See 50 Cal. L. Rev. 226; 54 Cal. L. Rev. 252; 57 Cal. L. Rev. 577; 18 Hastings L. J. 307; 3 San Diego L. Rev. 119; 39 So. Cal. L. Rev. 240, 269; 18 Stanf. L. Rev. 514; 22 U.S.F. L. Rev. 463 [proposal to repeal quasi-community property and readopt unitary marital property scheme]; 14 A.L.R.3d 404 [change of domicile as affecting character of property previously acquired as separate or community property]; Rutter Group, 2 Family Law §8.535 et seq.)

(2) *Quasi-Community Property.* To avoid confusion and repetition, former statutory language relating to property acquired elsewhere was deleted, and a new basic definition of "quasi-community property" was enacted. As continued without substantive change in current law, "quasi-community property" means all real or personal property acquired by a spouse (or received in exchange for other property) at any time, which would have been community property if the spouse who acquired it had been domiciled in California at the time of its acquisition. (*Family C. 125*; see *In re Marriage of Craig* (1990) 219 C.A.3d 683, 686, 268 C.R. 396 [marital property laws are intended to provide uniform treatment of quasi-community and community property when parties have moved to California]; 11 *Summary* (10th), *Husband and Wife*, §4.)

The Law Revision Commission Comment points out that *Family C. 125* "ensures that the division of marital property on dissolution of the marriage, nullity of the marriage, or legal separation of the parties will not be controlled by the fortuity of when or where the property was initially acquired."

(3) *Constitutionality.* Former *Family C. 4803*, substantively identical to *Family C. 125*, was held constitutional in *Addison v. Addison* (1965) 62 C.2d 558, 43 C.R. 97, 399 P.2d 897. *Estate of Thornton* was first disparaged, then distinguished on the ground that the former statutory definition attempted to alter property rights merely on the party's crossing the boundary of California, while the subsequent definition applies only if an action is brought after the parties

establish their domicile in California: "Thus, the concept is applicable only if, after acquisition of domicile in this state, certain acts or events occur which give rise to an action for divorce or separate maintenance. These acts or events are not necessarily connected with a change of domicile at all." (62 C.2d 566.) The state of domicile has a substantial interest that justifies this provision for a fair and equitable distribution of marital property on dissolution of marriage. (62 C.2d 567.)

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(1) *In General.* See California Family Law Practice, §J.36 et seq.



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Witkin Summary of California Law VIII. INTER VIVOS RIGHTS IN QUASI-COMMUNITY PROPERTY A. Definition of Quasi-Community Property. 2. Clarifications and Distinctions.

11 Witkin Sum. Cal. Law Com Prop § 257

[§ 257] Clarifications and Distinctions.

(1) *Excluded Property.* The Law Revision Commission Comment to *Family C. 125* notes that property of the type described in *Family C. 771, 772, and 781* (earnings, accumulations, and personal injury damages received by parties after separation; see *supra*, §§10, 40) is not quasi-community property. *Family C. 3515* (11 *Summary* (10th), *Husband and Wife*, §174) and *Family C. 2502* make a further clarification by providing that separate property does not include quasi-community property.

(2) *Necessity of Change in Domicile.* *Family C. 125* applies only where both parties change their domicile to California. *In re Marriage of Roesch* (1978) 83 C.A.3d 96, 147 C.R. 586, involved parties who lived in Pennsylvania for virtually their entire married life. After separation, the husband came to live in California while the wife remained in Pennsylvania with their minor son. *Held*, former C.C. 4803 (now *Family C. 125*) applies only where both parties change their domicile to California. Here, California's interest in the Pennsylvania marital property was minimal, Pennsylvania's interest was substantial, and California's quasi-community property statute could not be applied. (See *In re Marriage of Fransen* (1983) 142 C.A.3d 419, 430, 190 C.R. 885 [*Roesch* criteria met and statute applied where both spouses established California domicile].)

(3) *Necessity of Applying to Marriage Being Dissolved.* *Fredericks v. Fredericks* (1991) 226 C.A.3d 875, 277 C.R. 107, holds that *Family C. 125* must be applied in the context of the marriage that is being dissolved. Hence, where the parties had married, divorced, then married again in Pennsylvania, and the second marriage was dissolved in California, it was error to grant the wife a quasi-community interest in military pension benefits earned by the husband prior to the second marriage; she was limited to whatever equitable interest in the pension she could establish under *Pennsylvania law*. (226 C.A.3d 879.)

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VIII. INTER VIVOS RIGHTS IN QUASI-COMMUNITY PROPERTY
B. Division on Dissolution or Legal Separation.
1. Statutory Rule.

11 Witkin Sum. Cal. Law Com Prop § 258

[§ 258] Statutory Rule.

(1) *In General.* *Family C. 2550* provides for equal division of community property and quasi-community property (see *supra*, §190). *Family C. 125* includes in quasi-community property real property situated outside of California. (See *supra*, §§256, 257.) If the California court attempted to directly alter the title to that property its judgment would be ineffective. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §247.) But the court does have power to order a spouse over whom it has personal jurisdiction to make a conveyance of that property. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §226.) Accordingly, *Family C. 2660* provides as follows:

(a) Community or quasi-community real property situated in another state must, if possible, be divided under *Family C. 2500* et seq. in such a manner that it is unnecessary to change the nature of the interests held in property. (*Family C. 2660(a)*.)

(b) If it is impossible to preserve the nature of those interests, the court may either require the spouses to execute conveyances or take other actions with respect to the property as necessary, or award to the spouse who would have benefited by the conveyances or other actions the money value of the interest that would have been received had the conveyances been executed or other actions taken. (*Family C. 2660(b)*.) (See Rutter Group, 2 *Family Law* §8.541 et seq.; on statutory disclosure requirements affecting division of community and quasi-community property, see *supra*, §233 et seq.)

(2) *Law Revision Commission Comment.* The Law Revision Commission Comment makes the following observations:

(a) *Family C. 2660* "recognizes that the judgment of the court dividing the property cannot directly affect real property in another state, even though the court has personal jurisdiction over both spouses, unless the judgment is allowed that effect by the laws of the state in which the property is situated. ... On the other hand, where the court has personal jurisdiction over both parties, it may order one of the parties to execute a deed by acting in personam; if the person so ordered does execute the deed, it effectively conveys the interest transferred, even though executed under threat of contempt proceedings."

(b) *Family C. 2660* "requires that the court first attempt to effect the equal division of the community property and

quasi-community property required by this division without making any change in the nature of the interests held in the real property situated in the other state. This will be the result where the value of the other community and quasi-community property is equal to or exceeds the value of the real property situated in the other state. ... Where the court determines that the real property situated in another state or an interest in such property must be transferred from one party to the other to effect the equal division ... , the court may order the parties to execute the necessary conveyances or to take other actions--such as selling the property and including the proceeds in the property division--that may be necessary to effect an equal division ... , and may enforce its order by contempt proceedings. If a party refuses to execute the instrument necessary to effect the transfer or sale of the property or to take some other necessary action, the problem may be dealt with by awarding the money value of the property or interest therein to the other party, which award must be given full faith and credit."

West's Key Number Digest, Husband and Wife k.246, 247, 249(2.1), 272(4)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Judgment altering title to property as ineffective:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §256.

Court's power to order spouse to convey property:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §235.



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Witkin Summary of California Law
VIII. INTER VIVOS RIGHTS IN QUASI-COMMUNITY PROPERTY
B. Division on Dissolution or Legal Separation.
2. Illustrations.

11 Witkin Sum. Cal. Law Com Prop § 259

[§ 259] Illustrations.

(1) *Asset Distribution Method. In re Marriage of Fink* (1979) 25 C.3d 877, 160 C.R. 516, 603 P.2d 881, quoting the Law Revision Commission Report, explores the background and purpose of former C.C. 4800.5 (now *Family C. 2660*). *Fink* notes that the statute was concerned with the difficulties affecting title to real property in another state, and sought to avoid orders that are cumbersome to enforce. But it was not a directive that property be divided in kind. The statute establishes "only a preference that community real property situated in other states be divided without changing title thereto. It still leaves the determination of when such a division is possible to the sound discretion of the trial court consistent with its duty to achieve a practical, equitable and equal property division." (25 C.3d 885.)

In the present case, the trial judge used the "asset distribution method": Certain assets of special interest to the husband were awarded to him, and others personal to the wife were awarded to her, with a payment by the wife to offset the difference in net value. This was approved as a practical method of achieving an equal division. (25 C.3d 882, 886.)

(2) *Res Judicata and Full Faith and Credit Considerations. In re Marriage of Economou* (1990) 224 C.A.3d 1466, 274 C.R. 473, shows how a California spouse may obtain a community interest in out-of-state property under accepted principles of res judicata and full faith and credit, despite the limitations of former C.C. 4800.5. The trial judge rendered a separate judgment in favor of the wife on bifurcated issues to facilitate the division of community property located in Georgia. The judge also provided the wife with a document notifying the Georgia court that the parties had an equal interest in the Georgia property as tenants in common. *Held*, this was proper.

(a) Applying former 4800.5(b)(1) (now *Family C. 2660(b)(1)*), the trial court "attempted to fashion an order which wife could present to the Georgia courts in an effort to obtain full faith and credit in Georgia." (224 C.A.3d 1479.) Although the order could not itself change the title, in a subsequent action in Georgia for that purpose the adjudication would be binding under the principle set forth in *Rozan v. Rozan* (1957) 49 C.2d 322, 330, 317 P.2d 11. (224 C.A.3d 1479; see 2 Cal. Proc. (4th), *Jurisdiction*, §230.)

(b) The Georgia court applied that principle in the wife's subsequent action. "Examining the California judgment on its four corners, we do not construe it as an attempt to change the title to the Georgia real property directly. Rather, the California court, as it was authorized to do, applied California community property law to determine whether appellee had an interest in the appellant's real and personal property in Georgia, which he attempted to obtain as separate

property by the unauthorized conversion of community property. ... 'Although the trial court determined that the appellee was entitled to a one-half interest in the appellant's real property, it is through the domestication of the California judgment that title will vest in appellee.' " (224 C.A.3d 1481, quoting Georgia opinion.)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Res Judicata and Full Faith and Credit Considerations*. *Rozan principle*:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §239.



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Witkin Summary of California Law
IX. RIGHTS OF PUTATIVE SPOUSES
A. Nature and Scope of Rules.

11 Witkin Sum. Cal. Law Com Prop § 260

[§ 260] Nature and Scope of Rules.

(1) *Equitable Rights of Putative Spouse.* Under the traditional view, both the right to permanent support and the right to a division of community property are dependent on the existence of a valid marriage and grounds for dissolution. If the marriage is invalid and annulled or declared void, there can be no community property and no award of permanent support. (See 11 *Summary* (10th), *Husband and Wife*, §208.)

The harsh effects of this rule on innocent persons honestly and properly believing they are married have been the subject of much critical comment, and a few states refuse an alimony award in an annulment decree. (See 11 *Summary* (10th), *Husband and Wife*, §366.) California's solution was the development of extremely liberal equitable rules for the benefit of a putative or de facto wife. These were: (a) division of quasi-marital property on dissolution of the marriage or death (*infra*, §264 et seq.); (b) quasi-contractual recovery for the value of services rendered (*infra*, §267); and (c) enforcement of an agreement to pool and divide earnings and acquisitions (*infra*, §§269, 270). (See 50 *Cal. L. Rev.* 866; 24 *Hastings L. J.* 311; 6 *U.C. Davis L. Rev.* 354; Rutter Group, 2 *Family Law* §8.1540 et seq.)

A putative spouse was also held to be a surviving widow entitled to the maximum death benefit under the Workers' Compensation Act (*Brennfleck v. Work. Comp. App. Bd.* (1970) 3 *C.A.3d* 666, 670, 84 *C.R.* 50) and to the death benefit of a police officer (*Adduddell v. Board of Administration, Public Employees' Retirement System* (1970) 8 *C.A.3d* 243, 248, 87 *C.R.* 268).

The Family Code codifies, and in one respect enlarges (see *infra*, §268), the judicially developed rules. (See *infra*, §265 et seq.)

(2) *Rights of Putative Husband.* Although most of the cases deal with a putative wife, the same rights are accorded to a putative husband. Thus, he is entitled to an equitable apportionment of the property jointly acquired even though it stands in the name of the purported wife. (*Feig v. Bank of Italy* (1933) 218 *C.* 54, 58, 21 *P.2d* 421; *Feig v. Bank of America* (1936) 5 *C.2d* 266, 273, 54 *P.2d* 3; see *infra*, §264.)

(3) *Void Marriage.* The putative spouse is protected even where the marriage is wholly void. (See *Schneider v. Schneider* (1920) 183 *C.* 335, 341, 191 *P.* 533 [bigamous]; *Figoni v. Figoni* (1931) 211 *C.* 354, 357, 295 *P.* 339 [incestuous]; 9 *Cal. L. Rev.* 68; 2 *So. Cal. L. Rev.* 293, 307; 31 *A.L.R.2d* 1255 [rights and remedies as to property accumulated by man and woman living together in illicit relations or under void marriage].)

(4) *Distinction: Estoppel To Deny Validity of Marriage.* Another means of protection often exists in case of a remarriage after an invalid divorce. The second spouse need not treat the remarriage as void and claim the remedies of a putative spouse. The second spouse may invoke the doctrine of estoppel to prevent the other spouse from denying the validity of the divorce and remarriage, thereby establishing the second spouse's rights as a de jure spouse of an existing marriage. (See *Spellens v. Spellens* (1957) 49 C.2d 210, 222, 317 P.2d 613, 11 Summary (10th), *Husband and Wife*, §142.)

West's Key Number Digest, Husband and Wife k.1, 248, 272(5); Marriage k.1, 54

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Equitable Rights of Putative Spouse.* See California Family Law Practice, §C.0.1 et seq.



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B. Good Faith Belief in Validity of Marriage.
1. Early View.

11 Witkin Sum. Cal. Law Com Prop § 261

[§ 261] Early View.

(1) *Judicially Developed Rule.* The plaintiff's good faith belief that the marriage is valid has long been an essential basis for a claim of rights as a putative spouse. Under this rule, if the relationship was known to be illicit no division of property or quasi-contract recovery could be had. (See *Vallera v. Vallera* (1943) 21 C.2d 681, 684, 134 P.2d 761; *Estate of Jackson* (1952) 112 C.A.2d 16, 17, 245 P.2d 684; 20 Cal. L. Rev. 453; 37 Cal. L. Rev. 672; 24 Hastings L. J. 311; 6 U.C. Davis L. Rev. 354.)

In *Flanagan v. Capital Nat. Bank* (1931) 213 C. 664, 3 P.2d 307, plaintiff went to live with decedent without a license or solemnization of marriage, despite an obvious knowledge of their necessity. *Held*, plaintiff's claim of a share in the property was properly denied. "Everything in the record suggests that she viewed the relationship not as a marriage, but as a satisfactory substitute for a marriage." (213 C. 667.)

Other cases are to the same effect. (See *Oakley v. Oakley* (1947) 82 C.A.2d 188, 190, 185 P.2d 848 [plaintiff knowingly entered into bigamous marriage]; *Baskett v. Crook* (1948) 86 C.A.2d 355, 360, 195 P.2d 39 [relationship was knowingly illicit]; *Updeck v. Samuel* (1954) 123 C.A.2d 264, 267, 266 P.2d 822 [reversing judgment]; *Miller v. Johnson* (1963) 214 C.A.2d 123, 126, 29 C.R. 251 [fanciful tale of divorce and marriage documents furnished by "man" in "divorce-marriage office" in Tijuana].)

(2) *Good Faith Found.* In *Estate of Foy* (1952) 109 C.A.2d 329, 240 P.2d 685, plaintiff went through a marriage ceremony with decedent in Tijuana. She relied on his representation that he had received a final divorce from his wife, and on the advice of a Tijuana attorney that the marriage was valid there. *Held*, she was entitled to a share in the community estate. (109 C.A.2d 331, 332.)

In *Partrick v. Partrick* (1952) 112 C.A.2d 107, 245 P.2d 704, the wife's first husband, an alcoholic and in poor health, was missing and believed dead. Under her lawyer's advice she took the precaution of filing a divorce action, serving her absent husband by publication, and received an interlocutory decree; but she remarried before the year was up. *Held*, her marriage, though invalid, was in good faith, and on its annulment (by the second husband) she was entitled to a division of the property. (112 C.A.2d 111.) (To same effect, see *Estate of Krone* (1948) 83 C.A.2d 766, 768, 189 P.2d 741 [remarriage after interlocutory decree due to ignorance of law]; *Brown v. Brown* (1969) 274 C.A.2d 178, 186, 82 C.R. 238.)

It was held that a sufficient showing of good faith, based on the lack of intelligence or education of the putative spouse, could be made even where there was no marriage ceremony. (See *Santos v. Santos* (1939) 32 C.A.2d 62, 65, 89 P.2d 164 [non-English-speaking parties, unfamiliar with marriage laws, obtained marriage license and thought it was sufficient]; *Sancha v. Arnold* (1952) 114 C.A.2d 772, 778, 252 P.2d 55 [relationship began in Nevada when common law marriages were recognized; it was unnecessary to find common law marriage because of good faith]; *Estate of Goldberg* (1962) 203 C.A.2d 402, 411, 21 C.R. 626, 11 Summary (10th), *Husband and Wife*, §56.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Good Faith Belief in Validity of Marriage.
2. Later View.

11 Witkin Sum. Cal. Law Com Prop § 262

[§ 262] Later View.

Former C.C. 4452 appeared to have adopted the judicially developed good faith test. Property division was authorized after determination that a marriage was void or voidable if the court finds that "either party or both parties believed in good faith that the marriage was valid." But *In re Marriage of Cary* (1973) 34 C.A.3d 345, 109 C.R. 862, held that this view was contrary to the legislative intent and general objectives of the Family Law Act. Paul Cary and Janet Forbes lived together for more than 8 years. They held themselves out publicly as a married couple, and used the name of Cary in all business transactions and in the birth certificates and school registration of their children; and Paul worked while Janet took care of the children and the home. But they knew they were not married, and, although they talked about a wedding ceremony, they never did anything about it. In this proceeding for a declaration of nullity of marriage, the property, acquired with Paul's earnings, was equally divided by the trial judge. *Held*, affirmed.

(a) *Judicially established rule.* The courts applied community property principles in dividing property where the parties mistakenly but in good faith believed themselves married, but denied that division where they knowingly lived together in a "meretricious" or "sinful" relationship. (34 C.A.3d 349, 350, citing the text.) A similar approach was taken to a valid marriage, where one spouse had committed a serious marital offense. The large part, or even all, of the community property, was awarded to the innocent spouse as punishment of the guilty spouse. (34 C.A.3d 350.)

(b) *Family Law Act objectives.* The basic change made by the Family Law Act was elimination of fault as a factor in dissolution of marriage; and the provision for equal division of property was one of the ways of advancing the Act's no-fault philosophy. (34 C.A.3d 351.)

(c) *One party innocent.* Under former C.C. 4452, where one party in bad faith knew of the marriage's infirmity or nonexistence and the other did not, equal division must be made; i.e., the Act does not reward the innocent party or penalize the guilty one. (34 C.A.3d 351.)

(d) *Neither party innocent.* The present case, in which neither party in good faith believed that they were married, did not come within the terms of the statute. But to hold that for this reason the old law applies would frustrate the public policy objective of the Act (the no-fault principle). "We should be obliged to presume a legislative intent that a person, who by deceit leads another to believe a valid marriage exists between them, shall be legally guaranteed half of the property they acquire even though most, or all, may have resulted from the earnings of the blameless partner. At the

same time we must infer an inconsistent legislative intent that two persons who, candidly with each other, enter upon an unmarried family relationship, shall be denied any judicial aid whatever in the assertion of otherwise valid property rights." (34 C.A.3d 352.) In accordance with the rules of statutory interpretation (reasonable, avoid absurd results, ascertain legislative intent from general tenor and scheme rather than exact words), the Legislature had repudiated the judicially established good faith rule. (34 C.A.3d 352.) (See 25 *Hastings L. J.* 1226; 12 *San Diego L. Rev.* 436; 9 *U.S.F. L. Rev.* 186.)

Cary was followed in *Estate of Atherley* (1975) 44 C.A.3d 758, 769, 119 C.R. 41, but both decisions were later disapproved. (See *infra*, §263.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Modern View.

11 Witkin Sum. Cal. Law Com Prop § 263

[§ 263] Modern View.

Beckman v. Mayhew (1975) 49 C.A.3d 529, 122 C.R. 604, disagreed with the reasoning and result of *In re Marriage of Cary* (1973) 34 C.A.3d 345, 109 C.R. 862, and *Estate of Atherley* (1975) 44 C.A.3d 758, 119 C.R. 41. Citing *Vallera v. Vallera* (1943) 21 C.2d 681, 134 P.2d 761, and *Keene v. Keene* (1962) 57 C.2d 657, 663, 21 C.R. 593, 371 P.2d 329, *infra*, §270, as binding authority, the court said: "We do not agree with the *Cary* court's expressed belief that the Legislature intended to abrogate the *Vallera-Keene* rule when it adopted the Family Law Act. The Family Law Act deals with divisions of property at the termination of solemnized marriages and ... at the termination of putative marriages. Neither in terms nor by implication does it deal with nonmarital family relationships of the kind involved in *Vallera*, *Keene* and the present case. ... If indeed the Family Law Act has the effect accorded it by the *Cary* decision, the Legislature selected an extraordinarily indirect, extremely devious and remarkably subtle means of repealing a well-established and well-known rule of substantive law." (49 C.A.3d 534.)

The issue was resolved in *Marvin v. Marvin* (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106, *infra*, §275, disapproving the *Cary* analysis but reaching a similar result on other theories. (See 11 *Loyola L.A. L. Rev.* 45 [Property and Inheritance Rights of Putative Spouses in California].)

In re Marriage of Vryonis (1988) 202 C.A.3d 712, 248 C.R. 807, a dissolution of marriage proceeding, involved F, an Iranian woman employed as a visiting professor. She married S in a private ceremony that she performed herself in conformity with the requirements of her Moslem sect. Although F was unfamiliar with the requirements of California law, she believed S's assurances that the ceremony created a valid marriage. They kept the marriage secret, maintained separate residences, did not commingle finances or assume support obligations, did not take title to any property jointly, and filed separate tax returns, each claiming single status. They spent only a few nights together, and S continued to date other women, marrying one approximately 21½ years after the marriage to F. *Held*, F was not a putative spouse.

(a) *Requirement of void or voidable marriage.* Former C.C. 4452 (now *Family C.* 2251 and 2252; see *infra*, §265), codifying the putative marriage doctrine, required a void or voidable marriage, but the circumstances here did not give rise to either as those terms are statutorily defined. However, the void/voidable aspect simply requires "a threshold determination that a legal infirmity in the formation renders a marriage invalid," and here, the purported marriage was clearly defective. (202 C.A.3d 719.)

(b) *Requirement that good faith belief be reasonable.* Proper assertion of putative spouse status must be based on facts that would cause a reasonable person to believe in good faith that a valid marriage existed. Where there is no attempted compliance with the procedural requirements of a valid marriage, and where the usual indicia of marriage and conduct consistent with a valid marriage are absent, even a sincere belief in the existence of a valid marriage is unreasonable and thus not in good faith. (202 C.A.3d 721.) Here, "the alleged private marriage went unsolemnized, unlicensed and unrecorded. Thereafter, the parties did not cohabit, or hold themselves out as husband and wife, and in no way approximated the conduct of a married couple." (202 C.A.3d 722.)

(c) *Requirement of belief in existence of lawful marriage.* The putative marriage doctrine protects innocent persons who believe they are lawfully married in accordance with the statutory requirements. Thus, F's belief that she had celebrated a valid Moslem marriage was insufficient. (202 C.A.3d 723.) (See *Estate of DePasse* (2002) 97 C.A.4th 92, 107, 118 C.R.2d 143 [absent valid marriage certificate, putative spouse doctrine did not apply to man seeking share of decedent's estate based on their marriage 1 day before her death from terminal illness; man did not have good faith belief that marriage was lawful and they never held themselves out as man and wife].)

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Ramirez* (2008) 165 C.A.4th 751, 756, 81 C.R.3d 180 [man did not have good faith belief that marriage was valid where wedding was performed in California by Mexican official and license stated that wedding was performed in Mexico].



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C. Division of Quasi-Marital Property.
1. Judicially Developed Rules.

11 Witkin Sum. Cal. Law Com Prop § 264

[§ 264] Judicially Developed Rules.

(1) *Division During Lifetime.* If the purported marriage is nullified or the parties terminate the relationship, the putative spouse may be awarded the same share of the property accumulated as if it were community property of a valid marriage. The rule was developed on equitable principles without a statutory basis, but its application invokes the statutory rules and practices relating to the manner of division of community property. (See *Schneider v. Schneider* (1920) 183 C. 335, 341, 191 P. 533; *Turknette v. Turknette* (1950) 100 C.A.2d 271, 274, 223 P.2d 495; *Partrick v. Partrick* (1952) 112 C.A.2d 107, 112, 245 P.2d 704; *Pack v. Vartanian* (1965) 232 C.A.2d 466, 475, 42 C.R. 729 [equitable action was governed by 4-year statute of limitations in C.C.P. 343]; 37 Cal. L. Rev. 673.) As in cases involving dissolution of a valid marriage, the judge has no power to award what would have been the separate property of one of the parties. (*Middlecoff v. Middlecoff* (1958) 160 C.A.2d 22, 26, 324 P.2d 669.)

(2) *Division on Death: Succession by Putative Spouse.* The equitable doctrine applies to rights after death. Thus, on the death of the "husband," the putative wife is entitled to the same share in the property as a de jure wife would have had. And, if he dies intestate, she is entitled to all the property that would have been community property of a valid marriage. "[I]f according to statute the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit all." (*Estate of Krone* (1948) 83 C.A.2d 766, 769, 189 P.2d 741.) (See *Mazzenga v. Rosso* (1948) 87 C.A.2d 790, 793, 197 P.2d 770; *Estate of Foy* (1952) 109 C.A.2d 329, 332, 240 P.2d 685; *Union Bank & Trust Co. v. Gordon* (1953) 116 C.A.2d 681, 689, 254 P.2d 644; *Kunakoff v. Woods* (1958) 166 C.A.2d 59, 65, 66, 332 P.2d 773 ["The effect of Krone was to recognize a putative wife as a legal spouse for the purpose of succession"]; 21 So. Cal. L. Rev. 385.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Division of Quasi-Marital Property.
2. Codification.

11 Witkin Sum. Cal. Law Com Prop § 265

[§ 265] Codification.

(1) *In General.* The Family Law Act codified the putative marriage rules (supra, §260 et seq.), and these provisions are continued without substantive change in the Family Code. *Family C. 2251* and *2252* deal with division of property, and *Family C. 2254* deals with support (infra, §268). Property in which the putative spouse has an interest is termed "quasi-marital property." (*Family C. 2251(a)(2).*)

(2) *Division of Property.* 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 must do the following: (a) Declare the party or parties to have the status of a putative spouse. (b) If the division of property is in issue, divide, in the same manner as the community property of a valid marriage (see supra, §190 et seq.) that property acquired during the union that would have been community property or quasi-community property if the union had not been void or voidable. (*Family C. 2251(a).*) (See *In re Marriage of Trantafello* (1979) 94 C.A.3d 533, 539, 156 C.R. 556; *In re Marriage of Monti* (1982) 135 C.A.3d 50, 56, 58, 185 C.R. 72 [putative spouse protected by statute includes divorced spouse who continues to live with ex-spouse in ignorance of final divorce decree and with good faith belief in continuing validity of marriage]; 24 *Hastings L. J.* 311.) If the court expressly reserves jurisdiction, it may divide the property after the judgment. (*Family C. 2251(b).*)

(3) *Liability of Property for Debt.* The quasi-marital property divided under *Family C. 2251* is liable for the debts of the parties to the same extent as if the property had been community property or quasi-community property (see supra, §175 et seq.). (*Family C. 2252.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Division of Property.* See 32 Western State L. Rev. 255 [criticizing *Family C. 2251* as applied to putative spouse who is deceived by other spouse].



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3. Where Legal Spouse Also Claims.

11 Witkin Sum. Cal. Law Com Prop § 266

[§ 266] Where Legal Spouse Also Claims.

(1) *Division During Lifetime.* In *Blache v. Blache* (1945) 69 C.A.2d 616, 160 P.2d 136, a husband, thinking he was divorced, married again. In a separate maintenance action, it was held that (a) the second wife, not being validly married, was entitled to one-half the community property under the putative spouse doctrine; and (b) the first wife, being validly married, was entitled to one-half of the husband's half, as her share of the community property of a valid marriage. (69 C.A.2d 624.)

(2) *Division Where Spouse Dies Intestate.* In *Estate of Ricci* (1962) 201 C.A.2d 146, 19 C.R. 739, an heirship proceeding, the lower court found that V was the lawful surviving wife of a 1907 marriage with an intestate decedent, and that A was the putative wife of a 1919 marriage with him. In the earlier case of *Union Bank & Trust Co. v. Gordon* (1953) 116 C.A.2d 681, 254 P.2d 644, the lawful widow was held estopped to claim an interest because of her attempted remarriage after a void divorce. Here, there was no basis for an estoppel, and the court followed the view of textwriters that, because each in the absence of the other would take the whole estate, the two should share equally. (201 C.A.2d 150.)

In *Estate of Vargas* (1974) 36 C.A.3d 714, 111 C.R. 779, decedent married M in 1929, and J in 1945. He lived with both women until his death in 1969, and had children from both marriages. The probate judge divided the property equally between them. *Held*, affirmed. The court observed that in nearly all of the prior decisions the husband had left his lawful wife, but concluded that the same equitable solution of the problem should be made where the bigamous relationship continued until death. (36 C.A.3d 719.) (See 81 A.L.R.3d 6 [rights in decedent's estate as between lawful and putative spouses].)

In *Estate of Hafner* (1986) 184 C.A.3d 1371, 229 C.R. 676, decedent married J in 1954 and left her and their three daughters in 1957 without obtaining a dissolution. In 1962 he married H, who was at all times a good faith putative spouse, and they had one daughter. Decedent died intestate in 1982, leaving an estate consisting entirely of proceeds from a 1975 personal injury settlement. The probate judge awarded the entire estate to H. *Held*, reversed. Applying former C.C. 5118 (now *Family C. 771*; see *supra*, §10) and former C.C. 5126 (now *Family C. 781*; see *supra*, §41) mechanically, decedent's entire estate would be considered to be his separate property, and would go to J and the four children. On the other hand, applying former C.C. 4452 (now *Family C. 2251, 2252*) broadly would result in the entire estate being treated as quasi-marital property that would go to H. Either result "would be grossly unfair and

unconscionable." (184 C.A.3d 1394.) Because the statutes were not designed to provide for the unique circumstances present in the case, and were in conflict, equitable principles would be applied. Here, "equity demands" that one-half of the estate should be distributed to the putative spouse, and the other half to the legal spouse and the four children. "This result is inherently fair." (184 C.A.3d 1394.)

(3) *Division Where Spouse Leaves Will.* In *Sousa v. Freitas* (1970) 10 C.A.3d 660, 89 C.R. 485, decedent left a will in favor of defendant putative wife, with whom he had lived from 1919 to 1962. Plaintiff, his lawful wife, claimed her share. *Held*, in accordance with the theory of *Blache*: (a) Under former C.C. 4452 (now *Family C. 2251, 2252*), defendant was entitled to one-half of the quasi-marital property as a putative wife. (b) Decedent was entitled to devise the remaining one-half under the general testamentary power of a spouse, and plaintiff was entitled to assert her community property claim against that half; hence, plaintiff was entitled to only one-quarter of the entire estate. (10 C.A.3d 666.) "We do not undertake to state that this analysis would be equitable in all cases, but we are satisfied that it is under the facts here." (10 C.A.3d 666.)

SUPPLEMENT: [This section is current through the latest supplement]



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IX. RIGHTS OF PUTATIVE SPOUSES
D. Support of Putative Spouse.
1. Judicially Developed Rules.

11 Witkin Sum. Cal. Law Com Prop § 267

[§ 267] Judicially Developed Rules.

(1) *General Principle.* Under case law, the putative spouse received protection where no common property was accumulated. A putative spouse who in good faith was induced by fraud to enter into a purported marriage could recover in quasi-contract for the value of services rendered. The measure of recovery was the reasonable value of these services over and above the value of the support and maintenance furnished by the other spouse. (See *Sanguinetti v. Sanguinetti* (1937) 9 C.2d 95, 100, 69 P.2d 845; 37 Cal. L. Rev. 676.)

But proof was required of the services actually rendered. In *Middlecoff v. Middlecoff* (1958) 160 C.A.2d 22, 324 P.2d 669, plaintiff wife sued for separate maintenance, the guardian ad litem of defendant husband cross-complained for annulment, and an annulment was granted for incompetency of the husband. The judge awarded plaintiff a separate property residence and \$ 7,500 for services of a 15 1/2-year marriage. *Held*, reversed. The judge might take judicial notice of the value of ordinary services proved, but cannot judicially notice their value unless there is evidence of their nature and extent. Here, although the award for 15 years seemed modest, there was no evidence as to any services. It was wholly improper to award the husband's separate property; the only authority in this respect would have been to place an equitable lien on the property to secure an allowance properly granted. (160 C.A.2d 25.)

(2) *Extension of Rule.* The earlier cases usually stated the rule in the limited form set forth above; i.e., it applied where the marriage was procured by fraud of the husband; where the normal remedy--division of quasi-marital property--was not available; and where the putative wife rendered services for which compensation should be allowed to prevent unjust enrichment of the husband. These limitations were questioned and to some extent repudiated by later decisions.

In *Sanguinetti, supra*, defendant husband was not guilty of fraud, and both parties believed their marriage to be valid, but plaintiff wife had received only an interlocutory decree from her first spouse. Later, the final decree was entered in the first action. Subsequently, plaintiff and defendant separated because of the husband's cruelty, and both parties sought an annulment. The lower court granted an annulment to defendant husband, but awarded plaintiff wife quasi-contractual recovery for services rendered. *Held*, this was proper. After the final decree in the prior action these parties were free to marry, and plaintiff wife, having rendered services in expectation of the continuing benefits of her status, was entitled to recovery, because the termination of those benefits was not due to the original invalidity of the marriage but to the husband's subsequent acts of cruelty. (9 C.2d 101.) (See 37 Cal. L. Rev. 676.)

In *Lazzarevich v. Lazzarevich* (1948) 88 C.A.2d 708, 200 P.2d 49, defendant husband obtained an interlocutory decree of divorce from plaintiff wife. Later defendant's attorney, without his knowledge, had a final decree entered in 1933. In 1935, the parties became reconciled. In 1945 they separated, and plaintiff discovered that the final decree had been entered, but they became reconciled again and lived together for about 6 months. This action was then brought. *Held*, partial recovery to plaintiff granted.

(a) Plaintiff was entitled to recover for the value of her services during the period of the first reconciliation. The court thus allowed recovery based on the husband's innocent but material misrepresentation. The court saw no difference between the usual situation of a woman mistakenly believing that a valid marriage had been contracted, and the present situation of a woman mistakenly believing that an existing valid marriage had not been dissolved. (88 C.A.2d 715.) Plaintiff was also entitled to recover her contributions of earnings during this period. (88 C.A.2d 717.)

(b) Plaintiff was not, however, entitled to any recovery for the period of the second reconciliation, for, having discovered that the marriage had been dissolved, she knowingly entered into a meretricious relationship. (88 C.A.2d 718.) (See 37 Cal. L. Rev. 678.)

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D. Support of Putative Spouse.
2. Codification.

11 Witkin Sum. Cal. Law Com Prop § 268

[§ 268] Codification.

In lieu of the judicially developed rule of quasi-contract recovery for services (*supra*, §267), *Family C. 2254* authorizes court-ordered support--temporary and permanent--to a putative spouse "during the pendency of a proceeding for nullity of marriage or upon judgment." The court may 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." (See *11 Summary* (10th), *Husband and Wife*, §§171, 172.) The predecessor statute (former C.C. 4455) contained a good faith condition. The condition was eliminated in 1970, and the only requirement is a finding that the party is "a putative spouse." (See *24 Hastings L. J.* 324.)

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IX. RIGHTS OF PUTATIVE SPOUSES
E. Agreement To Divide Property or Compensate.
1. Judicial Rule of Recovery.

11 Witkin Sum. Cal. Law Com Prop § 269

[§ 269] Judicial Rule of Recovery.

(1) *Theory of Recovery.* The courts developed an additional means of protection of a putative spouse. Irrespective of a good faith belief in the validity of a marriage ceremony, or even where no purported marriage took place at all, relief could be afforded under the law of contract. Thus, a woman and a man could agree to pool their efforts and earnings and to share equally or in proportion to their contributions any property accumulated, or to compensate in some other way. Because any two persons, without the meretricious relationship, may engage in a joint venture of this kind, recovery was allowed on sufficient proof of the agreement with that legal object. (See *Vallera v. Vallera* (1943) 21 C.2d 681, 685, 134 P.2d 761; *Garcia v. Venegas* (1951) 106 C.A.2d 364, 369, 235 P.2d 89 [woman entitled to half-interest as tenant in common; man entitled to lien for expenditures in preserving property]; *Sancha v. Arnold* (1952) 114 C.A.2d 772, 779, 252 P.2d 55; *Cline v. Festersen* (1954) 128 C.A.2d 380, 384, 275 P.2d 149; *Weak v. Weak* (1962) 202 C.A.2d 632, 639, 21 C.R. 9; 50 Cal. L. Rev. 877; 6 U.C. Davis L. Rev. 354; but see *Vallera v. Vallera* (1946) 73 C.A.2d 466, 471, 166 P.2d 893 [on retrial evidence was insufficient to prove agreement].)

(2) *Defense of Illegality.* Recovery was allowed on the theory that the contract was not dependent on the immoral relationship. If, however, it appeared that the main object or consideration was the relationship, the whole contract could be deemed tainted with illegality and recovery denied. (See *Hill v. Estate of Westbrook* (1950) 95 C.A.2d 599, 603, 213 P.2d 727; *Hill v. Estate of Westbrook* (1952) 39 C.2d 458, 460, 247 P.2d 19; 1 Summary (10th), *Contracts*, §419 et seq.)

The *Hill* cases illustrate the difficulty of applying this thin distinction. Plaintiff woman lived with decedent for 16 years, bore him two children, and performed services in running his rooming house. In this action on a rejected claim for the value of services, she received judgment for \$ 3,000. *Held*, reversed for failure to specify the amounts found due for legal and illegal recovery. There was sufficient evidence of an express agreement to compensate plaintiff for her services. But the findings showed that the trial judge awarded the lump sum for services including "living with him as man and wife during all of said time, ... and bearing ... two children." These elements were not compensable. (95 C.A.2d 603.) On retrial, the judge found that plaintiff's contributions were made "gratuitously and voluntarily in contemplation of, as a part of, in consideration of and as acts dependent upon the meretricious relationship." *Held*, these findings, based upon sufficient evidence, supported the judgment denying recovery. (39 C.2d 461.)

In *Marvin v. Marvin* (1976) 18 C.3d 660, 134 C.R. 815, 537 P.2d 106, *infra*, §271, the court declared that the *Hill*

decisions "demonstrate that a contract between nonmarital partners, even if expressly made in contemplation of a common living arrangement, is invalid only if sexual acts form an inseparable part of the consideration for the agreement." (*18 C.3d* 672.)

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2. Distinction: No Resulting Trust.

11 Witkin Sum. Cal. Law Com Prop § 270

[§ 270] Distinction: No Resulting Trust.

In *Keene v. Keene* (1962) 57 C.2d 657, 663, 21 C.R. 593, 371 P.2d 329, plaintiff wife sued for divorce and to impress a trust on the proceeds of ranch property sold by defendant husband. The trial judge found that there was no de jure or de facto marriage but only a meretricious relationship. Accordingly he gave judgment for defendant, finding that there was no confidential relationship or representation or agreement by defendant. *Held*, affirmed.

(a) *Vallera v. Vallera* (1943) 21 C.2d 681, 685, 134 P.2d 761, denying recovery to a woman in a meretricious relationship, recognized that equity would protect an agreement to pool earnings and accumulations. But there must be a monetary contribution; here there was none, and services as housekeeper, etc., do not meet the test. (57 C.2d 663, 664.)

(b) The implied and quasi-contract cases, under which a wife may recover any reasonable value of her services above the support and maintenance furnished (see *supra*, §264), are inapplicable where the action seeks to establish an interest in property acquired by the defendant. (57 C.2d 664.)

(c) The contention that plaintiff furnished part of the consideration for the property acquired and was therefore entitled to a part interest on a theory of resulting trust, failed for lack of a showing. The consideration furnished by the wife consisted of "non-wifely" services--farm chores and assistance in operation of defendant's farm. But the consideration--monetary or otherwise--must be given to the grantor who then transfers to the grantee in payment therefor. Here defendant husband owned the ranch before marriage, and the services were rendered merely to improve the land to which defendant had clear legal title; even monetary contributions would not raise a resulting trust under those circumstances. "It is not enough simply to assert that if by her work on defendant's ranch or in defendant's businesses plaintiff 'increased the value' of that ranch or those businesses, she thereby furnished 'consideration' in the amount of such increase and is entitled to a proportionate share in the proceeds of sale. The labor of a farm hand or the sales effort of a realtor's agent or a furniture store employe also 'increases the value' of the ranch or the business where he works; yet it is manifest that he thereby acquires no interest in the property itself or in the proceeds of its sale, in the absence of a specific agreement to that effect with the owner. The rule is not different when the parties are a man and a woman knowingly living in unwed cohabitation. If anything, in such a situation the implication is even stronger that any services performed by one party in assisting in the operation of the other's business or trade, without an express agreement for compensation or for sharing in joint accumulations, are intended by the one performing them as gifts or as his or her contribution to the general living expenses of both." (57 C.2d 668.) (See 50 Cal. L. Rev. 874; 6 U.C. Davis

L. Rev. 354.)

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A. Marvin Doctrine.
1. In General.

11 Witkin Sum. Cal. Law Com Prop § 271

[§ 271] In General.

(1) *Theories of Recovery.* In *Marvin v. Marvin* (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106, the court declared far-reaching contract and equitable rights of a party to a nonmarital living arrangement. Plaintiff Michelle Marvin lived with defendant Lee Marvin for 7 years, during which all property acquired (worth over \$ 1 million) was taken in defendant's name. The period began in October 1964, when defendant was still married to B, and continued after defendant's divorce from B in January 1967, until May 1970, when defendant compelled plaintiff to leave his household. He continued to support her until November 1971, and then stopped. Plaintiff alleged that she and defendant had made an oral agreement to combine their efforts and earnings and share equally any property accumulated; that they further agreed to hold themselves out as husband and wife, and that plaintiff would render services as a companion, homemaker, housekeeper, and cook; that plaintiff shortly afterwards agreed to give up her lucrative career as an entertainer in order to devote her full time to the duties, and that defendant agreed to provide for her support for the rest of her life. The complaint sought declaratory relief and a constructive trust. The trial judge gave judgment on the pleadings for defendant, and refused to permit plaintiff to amend the complaint to allege that she and defendant reaffirmed their agreement after defendant's divorce was final. *Held*, reversed; the complaint stated a cause of action for breach of express contract (see *infra*, §272 et seq.), and could be amended to state a cause of action on theories of implied contract or equitable relief (see *infra*, §275). (On rights of domestic partners, see *infra*, §§281, 282.)

(2) *Commentary and Practice.* This innovative decision produced the expected flood of comment. (See 65 *Cal. L. Rev.* 937; 14 *Cal. Western L. Rev.* 485 [The Property Rights of Unmarried Cohabitants--A Proposal]; 6 *Golden Gate L. Rev.* 179; 90 *Harv. L. Rev.* 1708; 93 *Harv. L. Rev.* 1289 [constitutional protection of rights of parties to nonmarital relationships]; 12 *Loyola L.A. L. Rev.* 409 [Property Rights of Same-Sex Couple: The Outlook After Marvin]; 5 *Pepperdine L. Rev.* 49, 283; 32 *San Diego L. Rev.* 163 [recognition and responsibility of domestic partnerships]; 16 *Santa Clara L. Rev.* 783 [discussing prior cases and proposed statute]; 17 *Santa Clara L. Rev.* 947; 10 *Southwestern U. L. Rev.* 699; 17 *U.C. Davis L. Rev.* 257 [nonmarital cohabitation for tax advantages]; 25 *U.C.L.A. L. Rev.* 1 [Sharing Principles and the Future of Marital Property Law]; 27 *U.C.L.A. L. Rev.* 1240 [federal tax consequences of wealth transfers between nonmarital cohabitants]; 28 *U.C.L.A. L. Rev.* 1125 [Cohabitation Without Marriage: A Different Perspective]; 14 *U.S.F. L. Rev.* 157 [nonmarital property rights when relationship is terminated by death]; 35 *A.L.R.4th* 409 [temporary support upon separation of unmarried persons pending contract action based on services relating to relationship]; 69 *A.L.R.5th* 219 [property rights arising from cohabitation without marriage]; A.L.I., Principles of the

Law of Family Dissolution, Chap. 6; Rutter Group, 3 Family Law, Chap. 20; Cal. Civil Practice, 3 Family Law Litigation, Chap. 20.)

West's Key Number Digest, Contracts k.108(2), 111; Husband and Wife k.1, 248, 272(5); Marriage k.1, 54

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Commentary and Practice*. See California Family Law Practice, §U.23 et seq.; 95 Proof of Facts 3d 1 [proving property and other rights of cohabitants and domestic partners].



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A. Marvin Doctrine.
2. Express Contract Theory.
a. Nature of Theory.

11 Witkin Sum. Cal. Law Com Prop § 272

[§ 272] Nature of Theory.

(1) *Marvin Case. Marvin v. Marvin (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106*, supra, §271, first deals with the cause of action for breach of express contract. Under *Vallera v. Vallera (1943) 21 C.2d 681, 685, 134 P.2d 761*, nonmarital partners may lawfully contract to pool earnings and share equally in their joint accumulations. (*18 C.3d 667*.) Defendant's four theories in support of the lower court's judgment in his favor are untenable.

(a) *Violation of public policy based on immoral relationship.*

(1) Defendant alleged that the contract was so closely related to an immoral relationship that its enforcement would violate public policy. Former P.C. 269a, which prohibited living "in a state of cohabitation and adultery," was repealed in 1975; the cases, moreover, did not distinguish between illegal relationships and lawful nonmarital relationships; and plaintiff herself was unmarried and not guilty of any adulterous cohabitation. (*18 C.3d 668*, footnote 4.) The cases mainly relied on by defendant are those assertedly holding that a contract between nonmarital partners is unenforceable if it is "involved in" an illicit relationship or is made in "contemplation of such a relationship." (*18 C.3d 668*.) But the opinions have not employed those broad and uncertain standards to strike down contracts; they disclose a narrower and more precise standard: "a contract between nonmarital partners is unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services." (*18 C.3d 669*.)

(2) Many decisions (e.g., *Trutalli v. Meraviglia (1932) 215 C. 698, 701, 12 P.2d 430, Croslin v. Scott (1957) 154 C.A.2d 767, 771, 316 P.2d 755*) hold that an agreement to pool earnings and hold property jointly is lawful where the immoral relation is not made a consideration of the agreement. "The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services. Thus the rule asserted by defendant, that a contract fails if it is 'involved in' or made 'in contemplation' of a nonmarital relationship, cannot be reconciled with the decisions." (*18 C.3d 670*.)

(3) Cases declining to enforce similar agreements (e.g., *Hill v. Estate of Westbrook (1950) 95 C.A.2d 599, 213 P.2d*

727, *supra*, §269, *Heaps v. Toy* (1942) 54 C.A.2d 178, 182, 128 P.2d 813) dealt with a consideration expressly founded on illicit sexual services. (18 C.3d 671, 672, and footnote 6.)

(4) The subjective approach, which inquires whether the agreement is "involved" in or "contemplates" a nonmarital relationship, is vague and unworkable; virtually all can be said to be "involved" in some sense in the fact of mutual sexual relationship or to "contemplate" the existence of that relationship. "By looking not to such uncertain tests, but only to the consideration underlying the agreement, we provide the parties and the courts with a practical guide to determine when an agreement between nonmarital partners should be enforced." (18 C.3d 672.)

(b) *Violation of public policy based on impairment of lawful spouse's community property rights.* Defendant alleged that the contract, made in 1964, violated public policy because it impaired the community property rights of defendant's lawful wife under the then law, prior to the 1972 amendment (earnings and accumulations of the husband living apart were community property). But an improper transfer of community property is merely voidable at the instance of the aggrieved spouse (see *supra*, §138); the wife had her opportunity to assert community property rights in the divorce action, and the decree in that action fixed her interest; hence, enforcement of this contract will not impair any right of hers. (18 C.3d 673.)

(c) *Violation of writing requirement.* Defendant alleged that former C.C. 5134, requiring a writing for marriage settlements (repealed in 1985), applies. Contracts between nonmarital partners do not come within the definition of marriage settlement, and, in the majority of cases enforcing them, they were oral. (18 C.3d 673, 674.)

(d) *Violation of prohibition against action for breach of promise.* Defendant alleged that C.C. 43.5(d), abolishing the cause of action for breach of promise of marriage, precludes this action. The statute is not open to this interpretation. (18 C.3d 674.)

(e) *Principles underlying theory.* "In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements." (18 C.3d 674.) "A great variety of other arrangements are possible. The parties might keep their earnings and property separate, but agree to compensate one party for services which benefit the other. They may choose to pool only part of their earnings and property, to form a partnership or joint venture, or to hold property acquired as joint tenants or tenants in common, or agree to any other such arrangement." (18 C.3d 674, footnote 10.)

(2) *Law Governing Marvin Action.* A *Marvin* action is a civil action based on contract principles. It is not a family law matter and is not entitled to be processed under the special family law rules. (*Schafer v. Superior Court* (1986) 180 C.A.3d 305, 309, 225 C.R. 513.) However, the Family Code (see *Family C. 3000 et seq.*, 3500 et seq.) applies where there are issues involving child custody or support. (See 10 *Summary* (10th), *Parent and Child*, §§194 et seq., 378 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Law Governing Marvin Action.* See *Velez v. Smith* (2006) 142 C.A.4th 1154, 1174, 48 C.R.3d 642, 11 *Summary* (10th), *Husband and Wife*, Supp., §34 [following rule that *Marvin* actions are based on contract principles and may not be enforced in family law court].



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A. Marvin Doctrine.

2. Express Contract Theory.

b. Illustrations: Express Contract Established.

11 Witkin Sum. Cal. Law Com Prop § 273

[§ 273] Illustrations: Express Contract Established.

Byrne v. Laura (1997) 52 C.A.4th 1054, 60 C.R.2d 908, involved probate proceedings in which the decedent's unmarried cohabitant sought to enforce an express oral agreement that the decedent would support her for the rest of her life and that "someday" she would have all his assets. The trial court granted summary adjudication for the decedent's estate. *Held*, reversed.

(a) *Support agreement*. The evidence of repeated promises to care for plaintiff presented a triable issue of fact as to the existence of an express contract for her support. This support agreement was "indistinguishable" from that of the defendant in *Marvin v. Marvin* (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106, *supra*, §271. (52 C.A.4th 1063.) It was not void for uncertainty, even though the amount of support had not been spelled out; this issue could be "resolved in light of extrinsic evidence." (52 C.A.4th 1066.)

(b) *Property agreement*. The property agreement, similarly, was not too uncertain to enforce. (52 C.A.4th 1067.) Whether the decedent's estate was estopped from asserting the statute of frauds as a defense to the property agreement was an issue of fact because there was evidence that plaintiff had changed her position in reliance on the promises. (52 C.A.4th 1069.) (See *Feldman v. Nassi* (1980) 111 C.A.3d 881, 884, 169 C.R. 9 [complaint upheld against demurrer].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Chiba v. Greenwald* (2007) 156 C.A.4th 71, 81, 67 C.R.3d 86 [parties agreed to "live together, cohabitate and combine their efforts and earnings," to "share equally any and all property accumulated as a result of their efforts whether individual or combined," and "hold themselves out to the public as husband and wife," and putative husband promised to provide lifetime support to putative wife in exchange for her promise to perform homemaking services].



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A. Marvin Doctrine.

2. Express Contract Theory.

c. Illustrations: Express Contract Not Established.

11 Witkin Sum. Cal. Law Com Prop § 274

[§ 274] Illustrations: Express Contract Not Established.

Several unsuccessful actions have produced decisions setting forth the conditions of an action based on express contract pursuant to *Marvin v. Marvin* (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106, supra, §§271, 272.

In *Taylor v. Fields* (1986) 178 C.A.3d 653, 224 C.R. 186, Leo and his wife Jean lived together for 50 years until his death. During that period, plaintiff was Leo's mistress for 42 years. After Leo's death, plaintiff filed this action against his widow Jean, alleging that Leo promised to take care of her financially if she would continue their relationship, and that plaintiff promised that she would not marry anyone else. *Held*, summary judgment for defendant affirmed.

(a) "[N]either *Marvin* nor any other case to date has allowed recovery to an unmarried partner without a showing of a stable and significant relationship evolving out of cohabitation. A further requirement is a showing the agreement relied upon does not rest on illicit meretricious consideration." (178 C.A.3d 658.) Here, plaintiff's deposition testimony showed that sex formed an inseparable part of the consideration for any alleged agreement between them; "her relationship with Leo was nothing more than that of a legally married man and his mistress, albeit a long term one." (178 C.A.3d 658.)

(b) All prior cases allowing enforcement of agreements between nonmarital partners involved cohabitation (178 C.A.3d 661); in the present case, there was no evidence that plaintiff and Leo ever lived together or that Leo ever lived apart from his wife. The allegation that plaintiff and Leo occasionally spent weekends together and registered as husband and wife was inadequate to bring their relationship within the *Marvin* principles. (178 C.A.3d 663.)

(c) Plaintiff's allegation that she acted as Leo's confidante, friend, travel companion and lover in return for his promises is likewise insufficient. As in *Jones v. Daly* (1981) 122 C.A.3d 500, 176 C.R. 130, infra, §280, the rendering of sexual services for Leo was inseparable from the rest of the contract. (178 C.A.3d 665.)

In *Henderson v. Superior Court* (1978) 77 C.A.3d 583, 591, 593, 597, 142 C.R. 478, all of the acts relied upon by plaintiff to establish the nonmarital agreement took place in Florida, and she did not become a California resident until after termination of the relationship. A *Marvin* suit in California was held improper on two grounds: (a) There was no basis for personal jurisdiction over the defendant, a Florida resident; (b) California was an inconvenient forum. (See 2

Cal. Proc. (4th), Jurisdiction, §§135, 136, 372.)

In *Bergen v. Wood* (1993) 14 C.A.4th 854, 18 C.R.2d 75, plaintiff sued for breach of an oral contract by which she agreed to be defendant's companion, confidante, homemaker, and social hostess in return for his financial support. However, they never cohabited, plaintiff maintaining her apartment in Germany and keeping a hotel room (paid for by defendant) when she was in California. She was a traveling companion for defendant, who was a widower and retired business executive, and she accompanied him at social events. The trial court ruled that the oral contract was enforceable, that the parties' relationship had not been meretricious because sexual relations were collateral to their companionship, and that plaintiff was entitled to support of \$ 3,500 per month for 48 months. *Held*, reversed.

(a) Recovery by an unmarried partner under *Marvin* requires a showing of a stable and significant relationship arising out of cohabitation. (14 C.A.4th 857, citing *Taylor v. Fields*, *supra*.) Cohabitation is a necessary element because from it flows the rendition of domestic services that amount to lawful consideration for a contract between the parties. Furthermore, if cohabitation were not a prerequisite, every dating relationship would have the potential for giving rise to *Marvin* claims. (14 C.A.4th 858.)

(b) Because the parties did not cohabit, there was no consideration provided by plaintiff that was severable from the sexual relationship. In *Whorton v. Dillingham* (1988) 202 C.A.3d 447, 248 C.R. 405, *infra*, §280, the court explained that services may properly be characterized as independent of the sexual aspect of a relationship if they are the type for which monetary compensation is ordinarily expected. Services as a social companion and hostess are not normally compensated, and are inextricably intertwined with the sexual relationship. Hence, the agreement in this case was unenforceable for lack of consideration. (14 C.A.4th 859, 860.)

SUPPLEMENT: [This section is current through the latest supplement]
No jurisdiction and inconvenient forum:

Cross-Reference: 2 *Cal. Proc. (5th), Jurisdiction, §§141, 142, 383.*



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A. Marvin Doctrine.

3. Implied Contract or Equitable Relief.

a. Nature of Relief.

11 Witkin Sum. Cal. Law Com Prop § 275

[§ 275] Nature of Relief.

(1) *Marvin Case. Marvin v. Marvin (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106*, supra, §271, explores at considerable length the alternative theory of recovery under the proposed amended complaint.

(a) *Decisions prior to Cary.*

(1) *Vallera v. Vallera (1943) 21 C.2d 681, 134 P.2d 761*, citing *Flanagan v. Capital Nat. Bank (1931) 213 C. 664, 3 P.2d 307*, supra, §261, concluded that a woman living with a man in a known nonmarital relationship is entitled to share in property jointly accumulated only in proportion to her contribution. And the broad assertion in *Vallera* that equitable considerations are not present led *Lazzarevich v. Lazzarevich (1948) 88 C.A.2d 708, 200 P.2d 49*, supra, §267, and *Oakley v. Oakley (1947) 82 C.A.2d 188, 190, 185 P.2d 848*, supra, §261, to preclude recovery on those theories. (*18 C.3d 676.*) *Keene v. Keene (1962) 57 C.2d 657, 663, 21 C.R. 593, 371 P.2d 329*, supra, §270, rejected a claim of resulting trust, on the ground that the woman's services were not rendered in acquisition of the property but only in its subsequent improvement. (*18 C.3d 677.*) In contrast, the cases on putative spouse permitted recovery on theories of implied agreement of partnership or joint venture, reasonable value of services less value of support received, and fair division of property on equitable principles. (*18 C.3d 677, 678*; see supra, §264 et seq.)

(2) The cases prior to *In re Marriage of Cary (1973) 34 C.A.3d 345, 109 C.R. 862*, supra, §262, "exhibited a schizophrenic inconsistency. By enforcing an express contract between nonmarital partners unless it rested upon an unlawful consideration, the courts applied a common law principle as to contracts. Yet the courts disregarded the common law principle that holds that implied contracts can arise from the conduct of the parties. Refusing to enforce such contracts, the courts spoke of leaving the parties 'in the position in which they had placed themselves,' just as if they were guilty parties *in pari delicto*." (*18 C.3d 678.*) Another inconsistency was that a partner who contributed funds or property obtained a proportionate share in the acquisition, but one who only contributed services did not. "[T]he cases apparently held that a nonmarital partner who rendered services in the absence of express contract could assert no right to property acquired during the relationship." (*18 C.3d 679.*)

(b) *Cary theory disapproved.* The theory of *Cary* was criticized by commentators, was followed in *Estate of Atherley (1975) 44 C.A.3d 758, 119 C.R. 41*, and was rejected in *Beckman v. Mayhew (1975) 49 C.A.3d 529, 122 C.R.*

604, *supra*, §263. If *Cary* is interpreted as holding that the Family Law Act requires an equal division of property accumulated in nonmarital "actual family relationships" it "distends the act" (as *Beckman* says); there is no legislative intent to change the decisional law. (18 C.3d 681.)

(c) *Cary objective approved*. "But although we reject the reasoning of *Cary* and *Atherley*, we share the perception of the *Cary* and *Atherley* courts that the application of former precedent in the factual setting of those cases would work an unfair distribution of the property accumulated by the couple. ... We should not, therefore, reject the authority of *Cary* and *Atherley* without also examining the deficiencies in the former law which led to those decisions." (18 C.3d 681.) The reasons advanced to justify denial of relief on grounds of implied contract or equity are without merit:

(1) Concepts of guilt cannot justify an unequal division of property between two equally "guilty" persons. (18 C.3d 682.)

(2) Although parties to a nonmarital relationship cannot have reasonable expectations of benefits attending the status of marriage, other expectations and equitable considerations remain. "We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them only as we do any other unmarried persons." (18 C.3d 682.)

(3) There is no reason to presume that services are contributed as a gift, while funds are not; the better approach is "that the parties intend to deal fairly with each other." (18 C.3d 683, quoting *Keene v. Keene*, *supra*.)

(4) Perpetuation of judicial rules resulting in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out the policy to foster and promote marriage. (18 C.3d 683.)

(d) *Policies that should govern decision*. "In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice." (18 C.3d 683.)

(e) *Rule declared for cases where there is no express agreement*.

(1) "We do not seek to resurrect the doctrine of common law marriage. ... Thus we do not hold that plaintiff and defendant were 'married,' nor do we extend to plaintiff the rights which the Family Law Act grants valid or putative spouses; we hold only that she has the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other unmarried person." (18 C.3d 684, footnote 24.)

(2) The court may inquire into the conduct of the parties to determine whether it demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding; when appropriate the court may employ principles of constructive trust or resulting trust; and a nonmarital partner may recover in quantum meruit for the reasonable value of household services (less value of support received) if the partner can show that services were rendered with the expectation of monetary reward. (18 C.3d 684.)

(3) "Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise." (18 C.3d 684, footnote 25.)

(f) *No decision on right to support*. "We do not pass upon the question whether, in the absence of an express or implied contractual obligation, a party to a nonmarital relationship is entitled to support payments from the other party after the relationship terminates." (18 C.3d 685, footnote 26.)

(2) *Burden of Proving Interest in Real Property.* Where the plaintiff seeks to establish an interest in real property held in the defendant's name, the burden of proof is on the plaintiff, and the standard of proof is clear and convincing evidence. This follows from *Ev.C.* 662, which provides that 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. (See *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §87.*) A *Marvin* action, although based on contract, is within the terms of this section. (*Tannehill v. Finch (1986) 188 C.A.3d 224, 227, 228, 232 C.R. 749.*)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Marvin Doctrine.

3. Implied Contract or Equitable Relief.

b. Illustrations: Recovery Allowed.

11 Witkin Sum. Cal. Law Com Prop § 276

[§ 276] Illustrations: Recovery Allowed.

(1) *Implied Contract Established.* In *Alderson v. Alderson* (1986) 180 C.A.3d 450, 225 C.R. 610, plaintiff alleged that she cohabited with defendant for 12 years, during which period they held themselves out as married, had children, and acquired substantial real property. The complaint "in essence, alleges an implied contract between the parties to equally share the property acquired during the course of their relationship." (180 C.A.3d 458.) The trial judge gave judgment accordingly. *Held*, affirmed.

(a) The trial court "impliedly found" that the parties' conduct evidenced "an implied contract between them" to share the property, and "impliedly found" that this contract did not rest on a consideration of sexual services. The evidence supports these implied findings. (180 C.A.3d 461.)

(b) The fact that plaintiff perceived sexual relations as part of her "role" does not invalidate the agreement relating to earnings, property, or expenses. "In today's society when so many couples are living together without the benefit of marriage vows, it would be illogical to deny them the ability to enter into enforceable agreements in respect to their property rights." (180 C.A.3d 463.)

Other cases are to the same effect. (See *Maglica v. Maglica* (1998) 66 C.A.4th 442, 454, 78 C.R.2d 101 [parties living together, parties holding themselves out as husband and wife, and plaintiff providing services as companion and confidant were proper factors to be considered in conjunction with factors bearing more directly on arrangement to share property]; *Della Zoppa v. Della Zoppa* (2001) 86 C.A.4th 1144, 1149, 103 C.R.2d 901 [*Marvin* agreement was not invalid as meretricious even though it provided for plaintiff to bear children; "meretricious" refers to prostitution, while sexual relations were only one aspect of parties' relationship, which overall was one of mutual commitment; relying on *Alderson*]; *Cochran v. Cochran* (2001) 89 C.A.4th 283, 290, 106 C.R.2d 899 [full-time cohabitation is not required to support *Marvin* claim; claim was sufficient where parties shared long-term, stable, and significant relationship and lived together 2 to 4 days per week before and at time they entered into agreement].)

(2) *Equitable Relief Granted.* In *Nelson v. Nevel* (1984) 154 C.A.3d 132, 201 C.R. 93, plaintiff filed her complaint in September 1981, alleging that she lived with defendant from January 1969 to February 1978, performing various services and acting as his intimate companion; and that it was the expectation of both parties that she would share

equally in all property acquired by either party during the period of cohabitation. The prayer was for a sale of real property and division of the proceeds. Defendant contended that the action was based on implied contract and was barred by the 2-year statute of limitations in *C.C.P. 339(1)*. *Held*, the action was not barred; the complaint could be amended to state a cause of action for equitable relief; e.g., constructive or resulting trust (*154 C.A.3d 138, 139*), and the statute of limitations for that action was the 4-year period of *C.C.P. 343* (see *3 Cal. Proc. (4th), Actions, §617*).

"[A]ppellant can simply claim an equitable interest in the property which now stands solely in respondent's name and ask the court to impose an equitable trust. *Marvin* paved the way for the courts to fashion equitable relief in light of the facts." (*154 C.A.3d 141.*) (See *Byrne v. Laura (1997) 52 C.A.4th 1054, 1073, 60 C.R.2d 908*, supra, §273 [recognizing causes of action for declaratory relief, specific performance, constructive trust, and injunctive relief in *Marvin*-type case].)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Equitable Relief Granted.*

C.C.P. 343:

Cross-Reference: *3 Cal. Proc. (5th), Actions, §677 et seq.*



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A. Marvin Doctrine.

3. Implied Contract or Equitable Relief.

c. Illustrations: Recovery Denied.

11 Witkin Sum. Cal. Law Com Prop § 277

[§ 277] Illustrations: Recovery Denied.

In *Marvin v. Marvin* (1981) 122 C.A.3d 871, 176 C.R. 555, the *Marvin* case was tried after the first reversal (supra, §271). The trial judge found that there had been no agreement as alleged by plaintiff, that defendant owed her no obligation for maintenance, and that she was not damaged but actually had benefited economically and socially from the cohabitation of the parties. The judge also found, however, that plaintiff was unemployed and was not likely to become employable unless she learned new employable skills. Accordingly, he awarded her the sum of \$ 104,000 to be used primarily for her economic rehabilitation. He based the award on footnotes 25 and 26 of the *Marvin* opinion (supra, §275), suggesting that courts might fashion equitable remedies to protect the expectations of the parties. *Held*, judgment modified to delete the award. The findings in support of the award merely established plaintiff's need and defendant's ability to pay; in view of the other findings of no obligation to support and no damage, the award had no basis in equity or law. (122 C.A.3d 876.)

Taylor v. Polackwich (1983) 145 C.A.3d 1014, 194 C.R. 8, quotes the second *Marvin* decision and takes the same position. "[W]hile a rehabilitative award is a proper means of enforcing rights which cannot otherwise be adequately enforced, an equitable remedy may not be employed to grant rehabilitation to one who has no underlying right to relief on any theory." (145 C.A.3d 1021.)

In *Friedman v. Friedman* (1993) 20 C.A.4th 876, 24 C.R.2d 892, plaintiff filed a *Marvin* action after the end of a 21-year relationship with defendant. The parties, who had vowed to live as husband and wife without sanction by the state, raised three children, one of them plaintiff's from a previous marriage. For several years they homesteaded in Alaska, then returned to California where defendant went to law school and began a successful practice. Plaintiff's plans to return to school fell through, due partly to an illness of the parties' second child; her principal role in the relationship was as a homemaker. She experienced severe back trouble toward the end of the relationship, and was disabled when she filed her action. On her motion for temporary support, the trial judge found insufficient evidence of an express agreement to provide support, but made an award under county spousal support guidelines based on an implied contract that if the parties separated defendant would support plaintiff "in the same manner as if they had been legally married." The judge framed the original order as an injunction, but recharacterized it as an "order to pay money" when denying defendant's motion to dissolve the injunction. *Held*, reversed; the "order to pay money" was not a cognizable provisional remedy.

(a) *Estoppel did not apply.* Plaintiff argued that defendant was estopped under principles of promissory and equitable estoppel from denying his responsibility to support her. But there was no evidence that plaintiff had relied on any promise by defendant as to support after termination of their relationship. Signing joint tax returns was an insufficient basis for equitable estoppel--there was no claim that plaintiff's *Marvin* action arose out of that conduct, and no showing that plaintiff was ignorant of the true facts. (20 C.A.4th 885, citing the text; see 13 Summary (10th), *Equity*, §191.)

(b) *The judge lacked "inherent equity power" to award support.* In footnote 25 of the *Marvin* opinion, the Supreme Court recognized that further equitable remedies might be fashioned to protect the expectations of parties in a nonmarital relationship. However, footnote 24 makes it clear that such an award may not be based on the statutory spousal support provisions (see *supra*, §275). Courts of equity have broad powers, but they may not create totally new substantive rights under the guise of doing equity. In the second *Marvin* opinion, the Court of Appeal reversed an award for "rehabilitation," noting that nothing suggested the award was warranted to protect both parties' expectations, and that need and ability to pay were not enough; a "nonconsensual" award requires support by some recognized underlying obligation in law or equity. In this case, the only potential equitable remedy that could justify an award of temporary spousal support was an injunction; insofar as the trial judge invoked other "inherent equitable principles," he exceeded his authority. (20 C.A.4th 886.)

(c) *An implied agreement to provide temporary support was not shown.* An implied contract may be inferred from the parties' conduct, situation, or mutual relation, but the essence of such an agreement is an intent to promise. (20 C.A.4th 887.) Here, there was no conduct from which it could be implied that the parties, particularly defendant, intended to promise that plaintiff would be supported as if she and defendant had actually been married if the relationship ended. In fact, the parties specifically chose to live together "without any sanction by the State." The fact that they took title to real property as husband and wife might affect their rights in that property after the end of their relationship, but there was no basis for concluding that they had agreed to be bound by state laws governing temporary spousal support from the termination of their relationship until the establishment of contractual rights at trial. The net effect of the trial judge's findings on support was to resurrect common law marriages, which were abolished by the Legislature in 1895 (see 11 Summary (10th), *Husband and Wife*, §42). (20 C.A.4th 888.)

(d) *Plaintiff failed to demonstrate irreparable harm.* The trial judge confused plaintiff's perceived need for cash in the near term with the concepts of irreparable injury and inadequacy of damages as prerequisites for injunctive relief. Plaintiff's *Marvin* action, seeking an award of damages in the form of spousal support, constituted an adequate legal remedy that precluded issuance of an injunction. And her showing of dwindling savings and lack of other resources fell far short of establishing irreparable harm if temporary support were not awarded. At best, she showed a need and defendant's ability to meet it, which was not enough. (20 C.A.4th 889.) Unmarried cohabitants have the same contract rights as other civil litigants; nonmarital cohabitation does not confer any special privilege over and above those of other civil litigants. The trial judge's order improperly gave plaintiff relief to which other noncohabiting contracting parties would not have been entitled. (20 C.A.4th 890.)

A strong dissent supported the trial judge's assessment of the case. The dissenter took the majority to task for glossing over the realities of the parties' life together and the severity of plaintiff's current disability, and for relying on the "legal fiction" of an adequate remedy at law. (20 C.A.4th 894.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Marvin Doctrine.
4. Accrual of Cause of Action.

11 Witkin Sum. Cal. Law Com Prop § 278

[§ 278] Accrual of Cause of Action.

Early decisions held that a *Marvin* action accrues on termination of the parties' relationship. (See *Estate of Fincher* (1981) 119 C.A.3d 343, 352, 354, 174 C.R. 18 [cause of action on alleged oral contract was barred by 2-year statute of limitations]; *Kurokawa v. Blum* (1988) 199 C.A.3d 976, 985, 245 C.R. 463 [action filed 15 years after relationship had terminated was time-barred]; *Whorton v. Dillingham* (1988) 202 C.A.3d 447, 456, 248 C.R. 405, *infra*, §280 [action for breach of oral cohabitation agreement filed within 24 months of termination of relationship was not barred by 2-year statute of limitations for oral contracts, 3-year statute for fraud, or 4-year statute for actions based on equitable grounds].)

Cochran v. Cochran (1997) 56 C.A.4th 1115, 1120, 66 C.R.2d 337, 3 Cal. Proc. (4th), *Actions*, Supp., §486, refused to follow *Fincher*, *Kurokawa*, and *Whorton* to the extent that they "stand for the blanket proposition that all *Marvin* agreements are automatically breached once the parties end their relationship." (56 C.A.4th 1123.) A *Marvin* cause of action accrues, and the statute of limitations commences to run, at the time the agreement is breached. Breach ordinarily occurs when one partner ends the nonmarital relationship. However, an obligor partner who continues to perform after separation does not, applying ordinary contract rules, breach the agreement until performance ceases. In other words, a *Marvin* agreement is breached only when the party charged with the duty to perform refuses to do so. (56 C.A.4th 1120.) (On accrual of causes of action generally, see 3 Cal. Proc. (4th), *Actions*, §486 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Cochran case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §520.

Accrual of causes of action:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §520 et seq.



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A. Marvin Doctrine.
5. Subsequent Marriage of Parties.

11 Witkin Sum. Cal. Law Com Prop § 279

[§ 279] Subsequent Marriage of Parties.

Where the parties lived together before marriage, a party cannot in a dissolution proceeding prove a *Marvin* agreement; the trial court lacks jurisdiction over that claim in a family law proceeding. That party may, however, file an independent action, and this may then be consolidated with the dissolution proceeding. (*In re Marriage of Johnson* (1983) 143 C.A.3d 57, 63, 191 C.R. 545.)

In *Watkins v. Watkins* (1983) 143 C.A.3d 651, 192 C.R. 54, the husband contended that a *Marvin* agreement is not enforceable if the parties thereafter marry. The court rejected this contention. "An equitable distribution of property accumulated with the help of the homemaker partner would hardly be achieved by holding the *Marvin* contract automatically unenforceable upon marriage. In the instant case, for example, Judy and Buster lived together for about six years, married, and separated eight months later. Judy was a homemaker who helped raise Buster's children. By Buster's theory, Judy forfeited her property rights obtained by implied contract during the six years of premarital relationship when she and Buster embarked on their eight months of marital bliss. Buster would have Judy share only in whatever community property was acquired in the eight months between marriage and separation. However, the policy of *Marvin* requires that Judy's earned property rights be protected." (143 C.A.3d 653, 654.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Rights of Same-Sex Partners.

11 Witkin Sum. Cal. Law Com Prop § 280

[§ 280] Rights of Same-Sex Partners.

(1) *Recovery Denied.* In *Jones v. Daly* (1981) 122 C.A.3d 500, 176 C.R. 130, plaintiff and decedent, both males, entered into a "cohabitators agreement," under which they were to live together, share earnings and property, and hold themselves out as cohabiting mates. On the death of decedent, plaintiff sought to enforce his alleged property rights against the estate, alleging several causes of action. *Held*, judgment for defendant executor on demurrer affirmed: The complaint disclosed that the agreement was based on the rendition of sexual services ("meretricious consideration"), and there was no severable portion of it supported by independent consideration. (122 C.A.3d 507, 508, 509.)

(2) *Recovery Allowed.* *Jones* was distinguished in *Whorton v. Dillingham* (1988) 202 C.A.3d 447, 248 C.R. 405. Plaintiff and defendant orally agreed that plaintiff's full-time occupation was to be defendant's chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, and to appear on defendant's behalf when requested. Plaintiff was to furnish his labor, skills, and personal services for the benefit of defendant's business and investment endeavors; to be defendant's companion, confidant, and lover; to consult defendant before making any investment; and to abandon his original intent to enroll in a 4-year college. In return, defendant was to give plaintiff a one-half interest in all real estate acquired in their joint names, and in all property thereafter acquired by defendant; to support plaintiff for life; to open, fund, and give plaintiff access to bank accounts; to permit plaintiff to charge on defendant's personal accounts; and to engage in a homosexual relationship with plaintiff. The partners also agreed that any portion of their agreement found legally unenforceable was severable, and that the remaining provisions would remain in effect. Plaintiff complied with the agreement for 7 years until defendant barred him from his house and refused to give him the promised consideration. The trial judge concluded that the contract was inseparably based on sexual services, and dismissed the action. *Held*, reversed.

(a) The sexual relationship here was an express part of the consideration for the contract, and plaintiff's complaint did not state a cause of action to the extent it sought damages for termination of that relationship. (202 C.A.3d 452.)

(b) However, unlike the situation in *Jones*, the sexual component of the consideration was severable. "We hold that *Whorton* ... has stated a cause of action arising from a contract supported by consideration independent of sexual services. Further, by itemizing the mutual promises to engage in sexual activity, *Whorton* has not precluded the trier of fact from finding those promises are the consideration for each other and independent of the bargained for consideration for *Whorton's* employment." (202 C.A.3d 454.)

In *Bergen v. Wood* (1993) 14 C.A.4th 854, 18 C.R.2d 75, supra, §274, the court criticized the reasoning of *Jones*, and followed that of *Whorton*. (See 38 Cal. Western L. Rev. 547 [arguing that Canadian alternative to California's analytical approach is preferable].) (On rights of domestic partners, see infra, §§281, 282.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Rights of Domestic Partners.
1. In General.

11 Witkin Sum. Cal. Law Com Prop § 281

[§ 281] In General.

(1) *Enactment of Statute.* Division 2.5 of the Family Code, entitled "Domestic Partner Registration," added in 1999, recognizes domestic partnerships and prescribes their requisites and general effect. (*Family C. 297 et seq.*; see 32 *San Diego L. Rev.* 163 [recognition and responsibility of domestic partnerships]; C.E.B., California Domestic Partnerships, §1.1 et seq.; Rutter Group, 3 Family Law §20.200 et seq.) The California Domestic Partner Rights and Responsibilities Act, adopted in 2003, generally extends the rights and liabilities of spouses to persons registered as domestic partners on or after January 1, 2005. (Stats. 2003, Chap. 421.) (For comprehensive coverage, see 11 *Summary* (10th), *Husband and Wife*, §25 et seq.)

(2) *"Domestic Partners" Defined.* Domestic partners are "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." (*Family C. 297(a).*) The partnership may be established between two adults of the same sex or, if both persons are over the age of 62 and meet specified eligibility criteria, opposite sexes, who share a common residence and meet other prescribed requirements. On or after 2005, a couple that wishes to establish a domestic partnership must file a prescribed form with the Secretary of State declaring that these requirements have been satisfied. (*Family C. 297(b)*; see Stats. 2003, Chap. 421, §11.) (See 11 *Summary* (10th), *Husband and Wife*, §28.)

West's Key Number Digest, Husband and Wife k.1; Marriage k.4.1; Partnership k.1

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Enactment of Statute.* See 54 *U.C.L.A. L. Rev.* 185 [retroactive effect of Act]; California Family Law Practice, §U.165 et seq.; 95 Proof of Facts 3d 1 [proving property and other rights of cohabitants and domestic partners].



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C. Rights of Domestic Partners.
2. Legal Effect of Status.

11 Witkin Sum. Cal. Law Com Prop § 282

[§ 282] Legal Effect of Status.

(1) *Prior Law.* Before January 1, 2005, the legal effect of domestic partnership status was as follows:

(a) *Third-Party Enforcement of Joint Responsibility for Basic Living Expenses.* Creditors could enforce domestic partners' joint responsibility for basic living expenses if, in extending credit or providing goods or services, they relied on the existence of the domestic partnership and the agreement of both partners to be jointly responsible for the expenses. (*Family C. 297(d), (e).*)

(b) *Property Rights.* Filing a declaration of domestic partnership (see 11 *Summary* (10th), *Husband and Wife*, §27) did not create in one partner rights to real or personal property owned by the other partner similar to community property or quasi-community property rights. (*Family C. 299.5(d).*) Any property or interest acquired by the partners during the domestic partnership where title was shared was held by the partners in proportion of the interest assigned to each partner at the time the property or interest was acquired unless otherwise expressly agreed in writing by both parties. On termination of the domestic partnership, property jointly acquired by the partners was to be divided accordingly. (*Family C. 299.5(e).*)

(c) *Tax Liability.* The formation of a domestic partnership did not change the individual income or estate tax liability of either domestic partner prior to and during the partnership, unless otherwise provided under another state or federal law or regulation. (*Family C. 299.5(f).*)

(d) *Duties Cease on Termination of Relationship.* Partners' obligations to each other under *Family C. 297* et seq., or under any law specifically referring to domestic partners, ceased on termination of the domestic partnership. (*Family C. 299.5(b).*) (For comprehensive coverage, see 11 *Summary* (10th), *Husband and Wife*, §34.)

(2) *Current Law: Rights and Duties Are Those of Spouses.* Effective January 1, 2005, prior law governing the legal status of domestic partners was repealed. (See Stats. 2003, Chap. 421, §11.) On or after that date, registered domestic partners, former domestic partners, and surviving domestic partners of a deceased partner generally have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law, as are granted and imposed on spouses. This is so whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law. (*Family C. 297.5.*) Registered domestic

partners who terminate their partnership are governed by the same procedures, possess the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties as spouses who terminate their marriages. (*Family C. 299.*) (For comprehensive coverage, see 11 *Summary* (10th), *Husband and Wife*, §30.)

(3) *Current Law: Recognition of Same-Sex Unions in Other Jurisdictions.* On and after January 1, 2005 (see Stats. 2003, Chap. 421, §11), a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in the Act, is recognized as a valid domestic partnership in California regardless of whether it bears the name domestic partnership. (*Family C. 299.2.*) (For comprehensive coverage, see 11 *Summary* (10th), *Husband and Wife*, §30.)

West's Key Number Digest, Husband and Wife k.1; Marriage k.4.1; Partnership k.1

SUPPLEMENT: [This section is current through the latest supplement]