0046b

#F-602 11/25/85

First Supplement to Memorandum 85-102

Subject: Study F-602 - Division Upon Dissolution of Marriage of Property Held in Joint Tenancy Form (Retroactive Application of Statute--response to Buol case)

The Supreme Court has denied the staff's suggestion for clarification of the opinion in Marriage of Buol, 39 Cal.3d 751 (1985) (copy attached as Exhibit 1). This leaves the Commission in the position of needing to propose cleanup legislation. For this purpose, a review of the historical development of the problems that led to Buol would be useful.

Until 1965 the general rule on division of property at dissolution of marriage was that property held by the spouses in joint tenancy form was presumed to be separate property, as the form of title would indicate, and the property was not considered as community except upon an affirmative showing of intent of the spouses. In 1965 the Legislature amended Civil Code Section 5110 to provide that for purposes of dissolution of marriage only, a single family residence held by the spouses in joint tenancy form was presumed to be community, and an affirmative showing of intent of the spouses was necessary to demonstrate the separate character of the property.

In 1980, the Supreme Court addressed the question that arises where at dissolution of marriage the single family residence is held in joint tenancy form, but the parties can demonstrate separate property contributions to its acquisition. Lower court cases were split on whether the contributions could be traced, and if so to what extent. The Supreme Court held in Marriage of Lucas, 27 Cal.3d 808, 166 Cal.Rptr. 583, 614 P.2d 285 (1980), that under the Section 5110 single family residence community property presumption, any separate property contributions to the acquisition of the property must be deemed to be a gift from the contributing spouse, to be divided as community property at dissolution of marriage absent a showing of an agreement or understanding that the contribution retains its separate character.

The Lucas case caused considerable consternation in family law and other circles because it was widely perceived as unfair--a person who contributes separate funds to acquisition of the family home may in fact intend it for the common use of the spouses during marriage, but probably does not intend to give half of the funds to the other spouse if the marriage breaks up.

In 1982 the Law Revision Commission recommended to the Legislature a broad-ranging solution to this problem. Under the Commission's recommendation all marital assets held by the spouses as joint tenants or tenants in common--not just the family home--would be subject to division by the court at dissolution of marriage, without characterization as community or separate property. The property would be divided according to the interests of the spouses, which would be presumed to be equal, subject to proof of different proportionate contributions of the parties to its acquisition or proof of an agreement as to the interests of the parties. Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage, 16 Cal.L.Revision Comm'n Reports 2165 (1982).

The Commission's legislation was introduced in the 1983 session by Assemblyman McAlister, but ran into opposition from the State Bar Family Law Section, which was concerned about a possible adverse tax consequence of this proposal. (This possible tax problem, which in the staff's opinion at the time was not a realistic problem, has since been totally eliminated by federal legislation.) In the same session the State Bar Conference of Delegates also sponsored legislation addressed to the Lucas problem, taking the approach that a spouse who contributed separate funds to a joint tenancy asset should be entitled to reimbursement of the funds as part of the division of the asset at dissolution of marriage. This legislation was authored by Assemblyman Calderon.

The outcome of the legislative process was a single bill, authored by Assemblyman McAlister, that combined the approaches of the Law Revision Commission and the State Bar Conference of Delegates. AB 26, enacted as Chapter 342 of the Statutes of 1983, created a

community property presumption for all joint tenancy property (not just the family home), and strengthened the presumption by requiring a writing to rebut it. Civil Code § 4800.1. The bill also provided that whenever community property of any kind is to be divided (not just community property in joint tenancy form), any party who can prove separate property contributions is entitled to reimbursement for them (unless the reimbursement right has been waived in writing). Civil Code § 4800.2. The Commission made a revised report, adopted by the Senate Judiciary Committee as evidence of legislative intent, explaining the need for and purpose of the legislation.

Late in the progress of the bill through the Legislature, the Commission received a request from the Executive Committee of the State Bar Family Law Section that the bill be made an urgency bill (to take effect immediately upon enactment) and that it be applied to any case not yet final on that date. The inequity caused by the Lucas case was so severe, and so many people were being hurt by it, that the Commission's corrective legislation should be immediately extended to as many cases as possible. Besides, if the legislation took effect on the normal operative date of January 1, 1984, there would be a rush by litigants who stand to benefit from Lucas to file their cases before that date. In response to this request, the Commission decided it was too late in the session to incorporate an urgency clause, but did make a final amendment to the bill to apply it to any case not yet final (including any case on appeal) on January 1, 1984. Because of the timing of the amendment, the reasons for it never appeared in the Commission's revised report.

The consequence of this transitional provision was that in every case in which there was a Lucas issue (and there were and are a great many of these indeed), a litigant who stood to benefit from the new legislation immediately took an appeal so that the case would still be pending on January 1, 1984. There was an instant surplus of cases involving application of Civil Code Sections 4800.1 and 4800.2 in the Court of Appeal, with the result of innumerable opinions issued between then and now (we have counted dozens of published opinions already) construing the sections. A fair number of cases have

involved challenges to the retroactive aspect of the new legislation. Most have held the statute valid as applied retroactively, but a couple have held the statute invalid, thereby creating a conflict that set the stage for the Supreme Court in the Buol case.

The Buol case was tried before January 1, 1984, the operative date of the new legislation, but was still pending on appeal at that date. In Buol, a case in which both the husband and wife worked during the marriage, the wife proved to the satisfaction of the trial court that the husband had orally agreed that her earnings during marriage were to be her separate property and that the joint tenancy family home purchased during the marriage with her earnings was to be her separate property. Under the law in effect at the time of trial the court recognized the oral agreement as a valid separate property agreement and awarded the family home to the wife in its entirety.

On appeal, the husband argued that the new law requires that the separate property family home be treated as community property absent a written agreement and that the wife is entitled to reimbursement of her separate property contributions, with the amount of the increase in value of the house divided equally between the husband and wife. The wife argued that the new law cannot constitutionally be applied retroactively to deprive her of the value of the entire house.

The Supreme Court ruled in favor of the wife, using the following line of reasoning:

(1) At the time of trial the wife had a "vested" property interest in the residence as her separate property, since the applicable law at that time permitted an oral agreement to transmute community property to separate property.

(2) The new law requiring a writing to rebut the community property presumption is more than a procedural rule--it has substantive effect as applied retroactively since a writing cannot be created if the case has already been tried.

(3) The Legislature may constitutionally impair vested property rights if necessary to protect the general welfare of the people. Whether a particular enactment is constitutional depends on the result of a balancing test taking into account such matters as the

significance of the state interest being served, the importance of retroactive application, and the degree of reliance of the owner of the vested interest on prior law.

(4) Applying this test, the balance is in favor of protecting the wife in this case:

(a) The state interest in equitable division of marital property is "only minimally" served by the new legislation, in the court's opinion. Moreover, the legislation is erratic in its operation since it requires a writing to rebut the community property presumption in the case of joint tenancy property but not in the case of property held in other title forms.

(b) The Legislature has given no reason for the need for retroactive application, and in the court's view there was no "rank injustice" in prior law that needed to be cured.

(d) Although it is impossible to gauge the degree of reliance of the parties in this case, the legislation frustrates the legitimate expectations of the parties. Moreover, the degree of impairment of the interest of the wife in this case is great.

(e) Applying the new legislation retroactively also disrupts orderly administration of justice by destroying finality and requiring a retrial.

In the staff's opinion, the Supreme Court decision is plainly wrong. However, at this point criticism of the decision is not a useful exercise. Rather, our task is to formulate legislation to handle problems that are caused by the decision.

The most immediate problem caused is confusion among the trial courts and practicing lawyers about what law is applicable to what cases. The Court's opinion is remarkably vague about the precise extent to which the new legislation can or cannot be applied. There is language and argument in the opinion supporting any of the following interpretations:

(1) The new legislation may not be applied to require a writing to rebut the community property presumption in any case tried before January 1, 1984.

(2) The new legislation may not be applied to require a writing to rebut the community property presumption in any case commenced before January 1, 1984.

(3) The new legislation may not be applied to require a writing to rebut the community property presumption as to any property acquired before January 1, 1984.

(4) The new legislation may not be applied in any respect (general community property presumption, writing requirement, reimbursement right) as to any property acquired before January 1, 1984.

It is this last possibility that most concerns the staff. And unfortunately, we understand from family law practitioners that at least one commissioner in Southern California is applying this interpretation to the Buol case. The staff wrote to the Supreme Court suggesting a modification of opinion to spell out the precise holding in the case, but the court declined to act, for reasons not divulged to us.

We must propose legislation that will clarify the confusion, pass constitutional muster, be fair, and avoid adding further transitional complexities to the law. The staff has considered a number of possible responses to Buol:

Do nothing. It is tempting simply to let the court straighten out the mess it has created. It could be argued that the courts will make sense out of it. This argument is belied by the fact that this is a heavily litigated area and there are certain to be many conflicting interpretations--witness the Southern California commissioner who is taking the opinion to its extreme interpretation. We owe a duty to practitioners and persons affected by the law to make the law workable. It is precisely the function of the Commission to address problems in the law that the courts and Legislature have had trouble dealing with rationally. And the Commission has traditionally assumed responsibility to see that legislation enacted on its recommendation is properly applied and is functioning well. Assemblyman McAlister plans to introduce legislation to limit the effect of Buol, and would like it to be Commission-recommended legislation. The staff recommends against the do nothing approach.

Codify the rule that the new legislation may not be applied to property acquired before January 1, 1984. The advantages of this approach are that it would clarify the law and would be clearly constitutional under Buol. Its disadvantages are that it would disrupt essentially every case tried between January 1, 1984, and the operative of the corrective legislation, it would preserve to the maximum extent what we perceive to be bad law, and it would generate a situation where two bodies of law are being applied for the next generation or more, depending on the date of acquisition of particular property being divided. This is a legitimate approach, but not one the staff recommends. We do note, however, that when the Legislature enacted legislation in 1984 recommended by the Commission to require any transmutation of community or separate property to be in writing (for any purpose, not just for purposes of dissolution), the Legislature added a provision that the writing requirement does not affect any transmutation made before January 1, 1985. See Civil Code § 5110.730(c).

Codify the rule that the new legislation may not be applied to cases commenced or tried before January 1, 1984. This approach makes alot of sense to the staff. It clarifies Buol and limits its damage; it also seems generally in accord with the language used in the opinion. If we limit the new law to cases tried after January 1, 1984, this will presumably disrupt the fewest cases, since until Buol all cases tried after January 1, 1984, will have been tried under the new law. If we limit the new law to cases commenced after January 1, 1984, this could have the effect of requiring a retrial in some cases, unless we add a transitional provision that keeps the new law for cases already tried under it even though commenced before January 1, 1984.

What is the risk in either of these approaches that the Supreme Court will hold them unconstitutional, ruling that the new law cannot be applied in any case where property was acquired before January 1, 1984, thereby entangling matters even further? The staff does not believe the risk is great--Buol is an aberrant case from the traditional deference given the Legislature in this area, these

approaches comport with the language of the case, and the staff believes we can bolster the approaches with a clear legislative policy statement about the need to apply the new legislation to cases tried or commenced after January 1, 1984. See discussion below.

Is it better to limit the new law to cases tried after January 1, 1984, or to cases commenced after January 1, 1984? The staff believes commencement is a better time--the court describes rights becoming "vested" upon commencement of a dissolution proceeding, and a strong argument can be made that if there is truly an oral agreement between the spouses that property is to be separate, that oral agreement can be reduced to writing or a written memorial made any time up to commencement of the proceeding (thereafter the parties are hostile and any actions are affected by the litigation). The Court in Buol says as much at one place in the opinion: "In the case at bar, and all similar proceedings instituted prior to January 1, 1984, the time for executing a written agreement as to the character of joint tenancy marital property has long passed." 39 Cal.3d at 769. For these reasons the staff would provide that the new law does not preclude proof of an oral agreement in any proceeding commenced before January 1, 1984.

A variation on this approach is to apply the new law to cases commenced after January 1, 1984, and to allow either spouse alone to memorialize an oral agreement by recording a notice of claimed agreement within a short time (say two years) after our corrective legislation is enacted. This could be a fall-back position if the approach described above fails. But the staff is convinced the approach described above is workable, and it is not unreasonable to require the spouses to confirm an oral agreement in writing before it will be given effect for purposes of dissolution of marriage; this will ensure that they are making a knowing waiver of their community property rights.

Make a legislative declaration of the public policy that demands retroactive application of the new legislation. The Buol court rightly notes that the Legislature made no clear findings on the need for retroactive application of the new law. This failure was a

function of the legislative process and the fact that the retroactivity provision was added late in the process. The staff believes that the cleanup legislation should include a clear statement of public policy to help ensure its validity. We do not believe a legislative policy statement standing alone would be sufficient to get the court to reverse itself at this point, but it would certainly be beneficial if combined with other changes that address the concerns expressed by the court.

In this connection, the staff notes the disturbing fact that the court in Buol assumed the rights of the wife were somehow "vested" despite the traditional rule that a party to a marriage has no assured property rights when it comes to division at dissolution. In order to prevent this sort of aberrant decision in the future, the staff believes it would be useful to add to our cleanup legislation a general policy statement that parties to a marriage acquire property during the marriage subject to possible future changes in the law. The Commission enacted similar legislation in the area of creditor/debtor law to preserve the constitutionality of future changes in exemptions. See Code Civ. Proc. § 703.060 (there are no vested rights in exemptions, Legislature reserves right to revise exemption law and apply it retroactively, and debtors and creditors are bound by these changes). We would enact a similar provision for purposes of division of property at dissolution of marriage.

Make basic substantive changes in the law that will result in a more equitable treatment of the separate interest of a spouse. One way to look at the Buol decision is that the court was unhappy with the substantial property loss suffered by the wife, and that a statute that gave greater recognition to the separate property interest could be constitutionally applied retroactively. Jan Gabrielson, a Los Angeles family law practitioner who was liaison between the Commission and the State Bar Family Law Executive Committee at the time the new legislation was developed has suggested to the staff that we could go back to the original Commission recommendation to recognize proportionate separate and community interests in the property. This would give greater weight to the separate contributions than a strict

reimbursement right. The staff does not favor this approach; the strict reimbursement right is a compromise approach that people seem generally happy with and that properly favors the community (more so in a long term marriage than in a short term marriage, giving a rough measure of justice), it is much simpler to administer than a proportionate contribution approach, and a return to that rule would add further confusion and disruption to the law.

Professor Bill Reppy, a community property expert that the Commission has retained in the past as a consultant, has written to the staff suggesting essentially the opposite approach. He notes the court's observation that the new law operates non-uniformly and suggests that we extend the new law to require a writing to preserve separate property character for other types of husband and wife title besides joint tenancy. Professor Ed Halbach has made the same suggestion to the staff orally, along the the suggestion that the new law also make clear that a general community property agreement does not amount to an express waiver of the separate property reimbursement right.

The staff has some sympathy with the suggestions that we make some basic substantive changes in this area of the law. However, our experience here has also taught us that we should not proceed with haste. Right now our objective should be to deal quickly and effectively with the immediate problems created by Buol. We would also like to further improve the substantive law, but we suggest that this be done carefully on a longer-term basis. Perhaps we can get Professor Reppy to prepare a study for us analyzing the law and possible improvements, together with the impact the improvements would have.

Meanwhile, the staff recommends that the Commission propose legislation that would limit proof of an oral agreement as to the separate character of property to cases commenced after January 1, 1984, that declares the importance of the public policy supporting this rule, and that reserves to the Legislature the power to make

changes in the law governing division of property at dissolution of marriage. A staff draft to implement this recommendation is attached as Exhibit 2.

Respectfully submitted,

Nathaniel Sterling,
Assistant Executive Secretary

EXHIBIT 1

[39 Cal.3d 751]

[S.F. No. 24823. Sept. 16, 1985.]

In re the Marriage of ESTHER and ROBERT BUOL.
ROBERT BUOL, Appellant, v.
ESTHER BUOL, Respondent.

SUMMARY

In dissolution of marriage proceedings in which the status of the home, purchased with the wife's separate funds, as separate or community property was the sole issue, the trial court entered judgment awarding the home to the wife, finding that the parties had an enforceable oral agreement that the earnings and the home were the wife's separate property. While the husband's appeal was pending, Civ. Code, § 4800.1, was enacted, providing that the only means of rebutting the presumption that property acquired during marriage in joint tenancy is community property is by providing evidence of a written agreement that the property is separate property. No writing existed in the instant case. (Superior Court of Marin County, No. 98723, Richard H. Breiner, Judge.)

The Supreme Court affirmed, holding that legislation requiring a writing to prove, on dissolution of marriage, that property taken in joint tenancy form is the separate property of one spouse, may not constitutionally be applied to cases pending before its effective date. The court held that, applied retroactively, the statute impaired the wife's vested property rights without due process of law in violation of Cal. Const., art. I, § 7. The state interest in equitable dissolution of the marital partnership was not furthered by giving retroactive effect to the statute, and that retroactivity only served to destroy the wife's legitimate separate property expectations as a penalty for lack of prescience of changes in the law occurring after trial. (Opinion by Reynoso, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Constitutional Law § 71—Retrospective Laws.**—The retrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligations of contract.

[39 Cal.3d 752]

(2a-2e) **Constitutional Law § 71—Contract Rights, Vested Rights, and Retrospective Laws—Community Property Presumption—Requirement of Writing to Rebut.**—Civ. Code, § 4800.1, requiring a writing to prove, on dissolution of marriage, that property taken in joint tenancy form is the separate property of one spouse, impaired a vested property right when applied retroactively in dissolution of marriage proceedings to a wife who had an agreement with her husband that a home purchased with her separate funds was her separate property, and violated due process of law (Cal. Const., art. I, § 7), where the state interest in equitable dissolution of the marital partnership was not furthered by retroactive effect, which only served to destroy the wife's legitimate separate property expectation as a penalty for lack of prescience of changes in the law occurring after trial. To the extent the statute furthered a policy of evidentiary convenience, that policy was not served, since the trial court correctly applied existing law in determining the home to be separate property. Moreover, the manifest interest in finality would be thwarted by retroactive application of the statute. (Disapproving holdings to the contrary *In re Marriage of Taylor* (1984) 160 Cal.App.3d 471 [206 Cal.Rptr. 557]; *In re Marriage of Benart* (1984) 160 Cal.App.3d 183 [206 Cal.Rptr. 495]; *In re Marriage of Martinez* (1984) 156 Cal.App.3d 20 [202 Cal.Rptr. 646]; *In re Marriage of Anderson* (1984) 154 Cal.App.3d 572 [201 Cal.Rptr. 498]; and *In re Marriage of Neal* (1984) 153 Cal.App.3d 117 [200 Cal.Rptr. 341].)

[See **Cal.Jur.3d**, Constitutional Law, § 274; **Am.Jur.2d**, Constitutional Law, § 667 et seq.]

(3) **Husband and Wife § 32—Determination of Character of Property—Evidence—That Property Is Separate—Sufficiency.**—Substantial evidence supported the trial court's finding in dissolution of marriage proceedings that a husband and wife had an oral agreement that a house purchased with the wife's separate earnings was her separate property where the wife and several family members testified to countless statements on the husband's part that the money and the house belonged to the wife, where the husband himself testified that he considered the wife's earnings to be her property and borrowed from her with that understanding, and where it was undisputed that the wife made the down payment and all the house payments from her separate account.

(4) **Husband and Wife § 7—Community and Separate Property Distinguished—Time and Mode of Acquisition.**—The status of property as community or separate is normally determined at the time of its acquisition, and such status is not dependent on the form in which title is taken.

[39 Cal.3d 753]

(5) **Constitutional Law § 73—Contract Rights, Vested Rights, and Retrospective Laws—Distinction Between Substantive and Procedural Legislation.**—Although the Legislature generally is free to apply changes in rules of evidence or procedure retroactively when no vested rights are involved, it is not so unrestrained when these changes directly affect such rights. Whether a particular statute is merely evidentiary or purely procedural is not always to be found in the statutory language. Alteration of a substantial right is not merely procedural, even if the statute takes a seemingly procedural form.

(6) **Constitutional Law § 73—Contract Rights, Vested Rights, and Retrospective Laws—Distinction Between Substantive and Procedural Legislation—Rebuttal of Community Property Presumption—Joint Tenancy.**—A statute is substantive in

effect when it imposes a new or additional liability and substantially affects existing rights and obligations. Thus, Civ. Code, § 4800.1, requiring a writing to prove, on dissolution of marriage, that property taken in joint tenancy form is the separate property of one spouse, is substantive when applied retroactively to transactions undertaken when an oral agreement was sufficient to rebut the community property presumption from joint tenancy. Section 4800.1 imposes a statute of frauds when there was none before, and, insofar as it applies retroactively, imposes an irrebuttable presumption barring recognition of the vested separate property interest. The provision (Civ. Code, § 4800.2) for reimbursement of the separate property contributions to what is now conclusively presumed to be community property, regardless of the parties' intent, provides only superficial protection against a potentially devastating impact upon vested property rights. To the extent that § 4800.1 makes insurmountable demands on vested property rights, that it does so under the guise of an evidentiary rule is of little avail.

(7) **Constitutional Law § 71—Contract Rights, Vested Rights, and Retrospective Laws—Vested Rights.**—Vested rights are not immutable; the state, exercising its police power, may impair such rights when considered reasonably necessary to protect the health, safety, or morals and general welfare of the people. In determining whether a given statute contravenes the due process clause courts look to the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions. When retroactive application is necessary to subserve a sufficiently important state interest, the inquiry may proceed no further.

[39 Cal.3d 754]

(8) **Constitutional Law § 71—Contract Rights, Vested Rights, and Retrospective Laws—Marital Property.**—The state's paramount interest in the equitable dissolution of the marital partnership justifies legislative action abrogating rights in marital property where those rights derive from manifestly unfair laws.

(9) **Husband and Wife § 30—Determination of Character of Property—Evidence—To Overcome Presumptions.**—A presumption that property taken as "husband and wife" is community property (Civ. Code, § 5110) may still be rebutted by evidence of a contrary oral agreement, and nontitle property acquired during marriage that is presumed to be community property may be proved otherwise by tracing alone.

COUNSEL

T. G. Fitzgerald for Appellant.

Mary Catherine Farley for Respondent.

OPINION

REYNOSO, J.—May legislation requiring a writing to prove, upon dissolution of marriage, that property taken in joint tenancy form is the separate property of one spouse constitutionally be applied to cases pending before its effective date? We conclude that it may not. Applied retroactively, the statute impairs vested property rights without due process of law.

Esther and Robert Buol married in 1943 and separated in 1977. The Buols had three children together and Esther had one child from a previous marriage.

Robert worked as a laborer until 1970 when he was fired, at least in part, due to alcoholism. He began receiving Social Security total disability payments in 1973. Esther began working in 1954 as a housekeeper, a babysitter and an attendant to elderly women. Since 1959 she has been employed as a nursing attendant at a local hospital.

With Robert's knowledge and consent, Es-

ther put her earnings in a separate bank account.[1] Esther used the money to support the family, and in

[39 Cal.3d 755]

1963, purchased a home in San Rafael. Although title was taken in joint tenancy on the advice of the realtor handling the sale, Esther made all mortgage, tax, insurance and maintenance payments out of her separate account. Robert contributed nothing. The original purchase price was $17,500. The home is now valued at approximately $167,500.

The sole issue at trial was the status of the home as separate or community property. Esther testified that she purchased the home with her earnings which Robert had emphasized numerous times were hers to do with what she pleased. She also testified that she never would have gone to work without such an agreement because "that would be more money for him to put into gambling and drinking." In addition, she testified that he had always maintained that the house was hers and that he wanted no responsibility for it, until after he moved out and started demanding that she sell it so that he could have a share of the proceeds.

Esther's testimony was corroborated by two of the Buols' children, Roy and Judith, Judith's husband, and Esther's brother-in-law. Each remembered many conversations with Robert, alone or in family gatherings, in which he confirmed that the house was Esther's. Robert offered conflicting testimony, but conceded that he considered Esther's earnings to be hers alone, that he borrowed from her occasionally and that she made all the house payments out of her separate account.

Finding that the parties had an enforceable oral agreement (*In re Marriage of Lucas* (1980) 27 Cal.3d 808 [166 Cal.Rptr. 853, 614 P.2d 285]) that the earnings and the home were Esther's separate property, the court entered judgment awarding the home to Esther. Robert appealed, contending that there was insufficient evidence to support the finding of an oral agreement.

While the appeal was pending, Civil Code section 4800.1[2] was enacted.[3] Under that section the only means of rebutting the presumption that property acquired during marriage in joint tenancy is community property is by providing evidence of a written agreement that the property is separate property.[4] No writing exists in the instant case.

[39 Cal.3d 756]

I

We must determine whether section 4800.1 may be given retroactive effect without offending the state Constitution. It appears that the Legislature intended section 4800.1 to apply retroactively to cases such as the one at bench. Section 4 of Assembly Bill No. 26 states, "This act applies to the following proceedings: [¶] (a) Proceedings commenced on or after January 1, 1984. [¶] (b) Proceedings commenced before January 1, 1984, to the extent proceedings as to the division of property are not yet final on January 1, 1984." (Stats. 1983, ch. 342, § 4.) As the trial court's judgment awarding the $167,500 residence to Esther as her separate property was on appeal as of section 4800.1's January 1, 1984, effective date, the division of property was not yet final. (Code Civ. Proc., § 1049. See *In re Marriage of Brown* (1976) 15 Cal.3d 838 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164].) Presumably, therefore, section 4800.1 would op-

[1]She also put a $2,000 child support payment she had received from her former husband into the separate account. The separate property status of that sum is uncontested.

[2]Unless otherwise indicated all further statutory references are to the Civil Code.

[3]In July 1983, Assembly Bill No. 26 was enacted, which added sections 4800.1 and 4800.2 and amended section 5110. (See Stats. 1983, ch. 342, §§ 1-4.)

[4]Section 4800.1 provides: "For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

"(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

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

erate to defeat Esther's separate property interest to the extent it is unprotected by section 4800.2's formula for reimbursing separate property contributions to community assets.[5] Under section 4800.2, only $17,500 would be credited as Esther's separate property; the remaining $150,000 would be attributed to the community.

Legislative intent, however, is only one prerequisite to retroactive application of a statute. Having identified such intent, it remains for us to determine whether retroactivity is barred by constitutional constraints. **(1)** We have long held that the retrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract. (*Rosefield Packing Co.* v. *Superior Court* (1935) 4 Cal.2d 120, 122 [47 P.2d 716]; *San Bernardino County* v. *Indus. Acc. Com.* (1933) 217 Cal. 618, 628 [20 P.2d 673]. See *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592 [128 Cal.Rptr. 427, 546 P.2d 1371]; *Robertson* v. *Willis* (1978) 77 Cal.App.3d 358, 365 [143 Cal.Rptr. 523].)

[39 Cal.3d 757]

(2a) Retroactive application of section 4800.1 would operate to deprive Esther of a vested[6] property right without due process of law. (Cal. Const., art. I, § 7.) At the time of trial, Esther had a vested property interest in the residence as her separate property. (Cf. *Bouquet, supra,* 16 Cal.3d at p. 591; *Addison* v. *Addison* (1965) 62 Cal.2d 558, 566 [43 Cal.Rptr. 97, 399 P.2d 897, 14 A.L.R.3d 391].) The law had long recognized that "separate property . . . [might] be converted into community property or *vice versa* at any time by oral agreement between the spouses. [Citations.]" (*Woods* v. *Security-First National Bank* (1956) 46 Cal.2d 697, 701 [299 P.2d 657]. See also *Beam* v. *Bank of America* (1971) 6 Cal.3d 12, 25 [98 Cal.Rptr. 137, 490 P.2d 257].)

(3) (See fn. 7.) The Buols had such an agreement as to Esther's earnings and the home she purchased and maintained with those earnings.[7] **(4)** "The status of property as community or separate is normally determined at the time of its acquisition." (*Bouquet, supra,* 16 Cal.3d at p. 591; *Trimble* v. *Trimble* (1933) 219 Cal. 340, 343 [26 P.2d 477].) Such status is not dependent on the form in which title is taken. (*Machado* v. *Machado* (1962) 58 Cal.2d 501, 506 [25 Cal.Rptr. 87, 375 P.2d 55].)

(2b) At all relevant times—when Esther purchased the home, during trial and when the trial court entered judgment for Esther—proof of an oral agreement was all that was required to protect Esther's vested separate property interest. (See *Lucas, supra,* 27 Cal.3d 808; *Ma-*

[5]Section 4800.2, also adopted as part of Assembly Bill No. 26, provides: "In the division of community property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division. As used in this section, 'contributions to the acquisition of the property' include down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property."

[6]"The word vested assumes different meanings in different contexts. [Citation.] We use the word vested here to describe property rights that are not subject to a condition precedent." (*Bouquet, supra,* 16 Cal.3d at p. 591, fn. 7.)

[7]Robert contends that the record does not support the trial court's finding that the parties had such an agreement. This contention is without merit. "In reviewing the sufficiency of the evidence . . . . '[T]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted' to support the trial court's findings. [Citations.]" *Estate of Leslie* (1984) 37 Cal.3d 186, 201 [207 Cal.Rptr. 561, 689 P.2d 133].

Esther and several family members testified to countless statements on Robert's part that the money and the house belonged to Esther. Even Robert himself testified that he considered Esther's earnings to be her property and borrowed from her with that understanding. It is undisputed that Esther made the downpayment and all the house payments from her separate account. Despite Robert's testimony that he had no agreement with Esther that the house was her separate property, the trial court's conclusion to the contrary is supported by substantial evidence.

chado, supra, 58 Cal.2d 501.) Section 4800.1's requirement of a writing evidencing the parties' intent to maintain the joint tenancy asset as separate property operates to substantially impair that interest.

Two Courts of Appeal have summarily rejected the contention that section 4800.1 directly impairs vested property rights, finding instead that the mea-

[39 Cal.3d 758]

sure "merely alters the evidentiary burden of proof where a husband and wife take property by a joint tenancy deed." (*In re Marriage of Martinez* (1984) 156 Cal.App.3d 20, 30 [202 Cal.Rptr. 646]. See also *In re Marriage of Taylor* (1984) 160 Cal.App.3d 471, 474 [206 Cal.Rptr. 557]; *In re Marriage of Benart* (1984) 160 Cal.App.3d 183, 188, fn. 2 [206 Cal.Rptr. 495].)[8] This literal reading of the statute without due consideration for its practical application to proceedings initiated prior to its effective date, unnecessarily exalts form over substance, substantially impairing vested property rights along the way.

(5) While the Legislature generally is free to apply changes in rules of evidence or procedure retroactively when no vested rights are involved, it is not so unrestrained when these changes directly affect such rights. (See e.g., *Augustus* v. *Bean* (1961) 56 Cal.2d 270 [14 Cal.Rptr. 641, 363 P.2d 873] [no vested right in remedy in place prior to contribution by joint tortfeasors]; *Owens* v. *Superior Court* (1959) 52 Cal.2d 822 [345 P.2d 921, 78 A.L.R.2d 388] [no vested right in more limited scope of preamendment long arm statute]; *San Bernardino County* v. *Indus. Acc. Com., supra,* 217 Cal. 618 [amendment designed to prevent injured employee from realizing double recovery impairs no substantive right]; *Los Angeles* v. *Oliver* (1929) 102 Cal.App. 299 [283 P. 298] [vested right to just compensation in condemnation proceeding not affected by change in method of computing amount due].)

The answer to the question whether a particular statute is "merely evidentiary" or "purely procedural" is not always to be found in the statutory language. "'Alteration of a substantial right . . . is not merely procedural, even if the statute takes a seemingly procedural form.'" (*People* v. *Smith* (1983) 34 Cal.3d 251, 260 [193 Cal.Rptr. 692, 667 P.2d 149], quoting *Weaver* v. *Graham* (1981) 450 U.S. 24, 29, fn. 12 [67 L.Ed.2d 17, 23, 101 S.Ct. 960].) "Destroying enforcement of a vested right is, . . . tantamount to destroying the right itself." (*Baldwin* v. *City of San Diego* (1961) 195 Cal.App.2d 236, 240 [15 Cal.Rptr. 576].) We must, therefore, extend our analysis beyond the Legislature's chosen evidentiary language—"this presumption is a presumption affecting the burden of proof"—and focus upon the realities of retroactive application of the statute.

(6) Applied retroactively, section 4800.1 unquestionably is substantive. A statute is substantive in effect when it "imposes a new or additional

[39 Cal.3d 759]

liability and substantially affects existing rights and obligations." (*Aetna Cas. & Surety Co.* v. *Ind. Acc. Com.* (1947) 30 Cal.2d 388, 395 [182 P.2d 159].) Section 4800.1 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. This paradoxical approach is aptly illustrated by the *Martinez* court's gratuitous offer to remand that case "in fairness to [the husband] . . . for a hearing at which he shall have the opportunity to prove a written agreement in accordance with section 4800.1." (*Id.,* 156 Cal.App.3d at p. 30.) Understandably, the court refrains from suggesting just how the husband might go about creating the document that is missing solely because it was never required to prove a separate property interest under former law.

The statute does much more than simply articulate the means by which the community

[8]Several Courts of Appeal have assumed section 4800.1 applies retroactively without addressing the issue whether such application is constitutional. (See, e.g., *In re Marriage of Huxley* (1984) 159 Cal.App.3d 1253 [206 Cal.Rptr. 291]; *In re Marriage of Koppelman* (1984) 159 Cal.App.3d 627 [205 Cal.Rptr. 629]; *In re Marriage of Anderson* (1984) 154 Cal.App.3d 572 [201 Cal.Rptr. 498]; *In re Marriage of Neal* (1984) 153 Cal.App.3d 117 [200 Cal.Rptr. 341].)

property presumption might be rebutted. Insofar as it applies retroactively, the statute imposes an irrebuttable presumption barring recognition of the vested separate property interest. In the case at bar, and all similar proceedings instituted prior to January 1, 1984, the time for executing a written agreement as to the character of joint tenancy marital property 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.

In this respect, section 4800.1 is virtually indistinguishable from the "substantive" measure considered in *Vegetable Oil Products Co.* v. *Superior Court* (1963) 213 Cal.App.2d 252 [28 Cal.Rptr. 555], which also purported to impose a writing requirement after the fact. In that case, a worker, injured while completing a project on Vegetable Oil's premises, brought suit against Vegetable Oil for personal injury. The trial court denied Vegetable Oil's motion to file a cross-complaint against the employer for indemnification based on the employer's contributory negligence, because Labor Code section 3864, adopted after the injured worker filed suit, barred such indemnity absent a written indemnification agreement predating the injury.

The Court of Appeal reversed, concluding that retroactive application of the statute would contravene due process. (*Id.*, at p. 258.) Because the parties' legal relationship was established on the date of the injury, Vegetable Oil's indemnification rights accrued before the legislation became effective. "'Where a statute operates immediately to cut off an existing remedy and by retroactive application deprive a person of a vested right, it is ordinarily invalid because it conflicts with the due process clauses of the federal and state constitutions.'" (*Ibid.*, quoting *California Emp. etc. Com.* v. *Payne*

[39 Cal.3d 760]

(1947) 31 Cal.2d 210, 215 [187 P.2d 702]. Accord *Wells Fargo & Co.* v. *City etc. of San Francisco* (1944) 25 Cal.2d 37, 41 [152 P.2d 625]; *Wexler* v. *City of Los Angeles* (1952) 110 Cal.App.2d 740, 747 [243 P.2d 868].)

Notwithstanding the language used in section 4800.1, that measure imposes the same impossible burden declared to be unconstitutional in *Vegetable Oil Products.* (See also *General Ins. Co.* v. *Commerce Hyatt House* (1970) 5 Cal.App.3d 460, 469-471 [85 Cal.Rptr. 317] [statutory amendment which would alter contract rights to require written notice of intent to invoke particular contract right does not apply retroactively].) In each instance, the party attempting to assert a vested right is precluded from doing so by imposition of a writing requirement long after any opportunity to obtain such a writing has passed. To the extent that section 4800.1 makes such insurmountable demands on vested property rights, that it does so under the guise of an evidentiary rule is of little avail. Applied retroactively, section 4800.1 is a substantive measure which directly impairs vested property rights. (Cf. *Lane* v. *Wilson* (1939) 307 U.S. 268 [83 L.Ed. 1281, 59 S.Ct. 872] [onerous procedural requirements handicapping Blacks' ability to exercise voting rights are unconstitutional].)

Section 4800.2's provision for reimbursement of the separate property contributions to what now is conclusively presumed to be community property regardless of the parties' intent, does little to neutralize section 4800.1's adverse effect on vested property rights. In the instant case, the trial court ruled that the $167,500 home was Esther's separate property. Retroactive application of the new statutory scheme would decrease that separate property interest to only $17,500. Esther would not be reimbursed for interest payments on the mortgage (which would have constituted virtually all of her monthly payments during the early years of the loan), taxes, insurance payments or maintenance costs. The remaining $150,000 would be credited to the community, an interest which arose only after judgment was entered by the trial court. Robert would thus receive a windfall of $75,000. Moreover, because the house represents the full extent of Esther's property, she would be forced to sell it to satisfy Robert's claim. As this case all too painfully demonstrates, section 4800.2 may provide only superficial protection against section 4800.1's potentially devastating impact upon vested property rights.

II

(2c) We turn to the question whether impairment of Esther's vested property right violates due process of law. (7) Vested rights are not immutable; the state, exercising its police power may impair such rights when considered reasonably necessary to protect the health, safety, morals

[39 Cal.3d 761]

and general welfare of the people. (*Bouquet, supra,* 16 Cal.3d at p. 592.) In determining whether a given provision contravenes the due process clause we look to "the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (*Ibid.*)

Where "retroactive application is necessary to subserve a sufficiently important state interest" (*Bouquet, supra,* 16 Cal.3d at p. 593), the inquiry need proceed no further. (See *Addison, supra,* 62 Cal.2d at p. 567.) In *Bouquet,* where we validated retroactive application of an amendment to Civil Code section 5118 making the postseparation earnings of both spouses, not just those of the wife, separate property, we emphasized that "[t]he state's interest in the equitable dissolution of the marital relationship supports this use of the police power to abrogate rights in marital property that derived from the patently unfair former law." (*Bouquet, supra,* 16 Cal.3d at p. 594.) As noted in *Bouquet,* we reached the same conclusion in *Addison, supra,* 62 Cal.2d 558, wherein we upheld the constitutionality of retroactive application of quasi-community property legislation despite its interference with the husband's vested property rights.

In both *Bouquet* and *Addison* we identified an important state interest in the "equitable dissolution of the marital relationship" and stressed that retroactive application was necessary to remedy "the rank injustice of the former law." (*Bouquet, supra,* 16 Cal.3d at p. 594; *Addison, supra,* 62 Cal.2d at p. 567.) (8) Thus, these cases support the proposition that the state's paramount interest in the equitable dissolution of the marital partnership justifies legislative action abrogating rights in marital property where those rights derive from manifestly unfair laws. **(2d)** No such compelling reason exists for applying section 4800.1 retroactively. Section 4800.1 cures no "rank injustice" in the law and, in the retroactivity context, only minimally serves the state interest in equitable division of marital property, at tremendous cost to the separate property owner.

As evidence of legislative intent, the Senate reprinted the California Law Revision Commission's Report Concerning Assembly Bill No. 26 in the Senate Journal. (See Sen. Com. on Judiciary Rep. on Assem. Bill No. 26 (July 14, 1983) 3 Sen. J. (1983 Reg. Sess.) pp. 4865-4867.) While the report sheds no light on the Legislature's decision to give the measure retrospective effect, it does elucidate the reasoning behind enactment of section 4800.1. The Senate was concerned that because marital partners often use community property funds to acquire assets taken in joint tenancy without

[39 Cal.3d 762]

knowledge of the legal distinctions between the two, and the courts are without jurisdiction to divide joint tenancy property upon dissolution, absent section 4800.1's community property presumption, the courts may be precluded from making "the most sensible disposition of all the assets of the parties." (*Id.*, at p. 4865.) Although section 5110 already contained such a presumption for the single-family residence, the Senate wanted to extend the presumption to all marital property taken in joint tenancy because "spouses frequently hold substantial amounts of their wealth in joint tenancy form, including bank accounts, stocks, and other real property." (*Ibid.*) In addition, the report states that a writing satisfying the statute of frauds is necessary to rebut the community property presumption, but fails to set forth the reasoning underlying that conclusion. (*Id.*, at pp. 4865-4866.)

From this statement of intent we can infer that the Legislature's primary motivation in enacting section 4800.1 was to promote the state's interest in equitable distribution of marital property upon dissolution. We are at a loss to explain, however, how retroactive applica-

tion of the statute is "necessary to subserve" that interest.

Retroactive application of the writing requirement does not advance the goal of insuring equitable division of community property where, as here, the asset in question is the separate property of one spouse. Moreover, because the writing requirement only applies to joint tenancy property, it fails to achieve uniformity in the division of marital property. (9) The presumption that property taken as "husband and wife" is community property (§ 5110) may still be rebutted by evidence of a contrary oral agreement. (See *Lucas, supra,* 27 Cal.3d at p. 816.) Nontitle property acquired during marriage is presumed to be community property (§ 5110), but may be proved otherwise by tracing alone. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 608-612 [122 Cal.Rptr. 79, 536 P.2d 479].

Thus, whether or not a spouse will be able to prove that certain property is separate may well depend on happenstance alone.[9] The Legislature and

[39 Cal.3d 763]

the courts have long been aware that "'husbands 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 . . . .' [Citation.]" (*Lucas, supra,* 27 Cal.3d at p. 814.) (2e) Given the lack of uniformity in treatment of marital property presumptions, it seems manifestly unfair to apply section 4800.1 to penalize one marital partner after all is said and done, for making an uninformed legal decision at the insistence of a real estate agent, where retroactivity of the statute advances no sufficiently compelling state interest.

The extent and legitimacy of Esther's reliance on former law is, of course, difficult to gauge with certainty. However, the record is clear that Esther and Robert considered the house to be her property despite the joint tenancy form of title. The decision to take the property as joint tenants was made solely at the suggestion of a realtor. Had existing law required the parties to execute a writing as proof that the property was to remain separate, the likelihood that Esther and Robert would have done so appears great. As it stands, retroactive application of section 4800.1 vitiates Esther and Robert's oral agreement, which the trial court found to be valid and enforceable under existing law, and imposes a new writing requirement with which Esther cannot possibly comply. The parties' legitimate expectations, therefore, are substantially disregarded in favor of needless retroactivity.

Two other policy considerations work against retroactive application of section 4800.1. First, ". . . to the extent the statute furthers a policy of evidentiary convenience, that policy is not served by application of the statute to cases already tried." (*Taylor, supra,* 160 Cal.App.3d 471, 478 (Sims, J. dis.).) This is particularly true in cases, such as the one at bench, where the trial court correctly applied existing law in determining the asset to be separate property. Second, the manifest interest in finality pervading this sensitive area of the law is thwarted by retroactive application of the statute. "The net effect of retroactive legislation is that parties to marital dissolution actions cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then-applicable law." (*Id.*, at p. 479 (Sims, J. dis.).)

We conclude that retroactive application of section 4800.1 would substantially impair Es-

[9]For example, in *Neal, supra,* 153 Cal.App.3d 117, the wife converted the form of title to her home to joint tenancy at the insistence of the lending institution refinancing the property. After the trial court ruled that the home, and a car and some furnishings purchased with the loan proceeds were the wife's separate property, section 4800.1 was enacted and the Court of Appeal reversed. The court held that the house was community property, but found that because the lender was relying on the equity in the home, rather than the parties' income, in making the loan, and the parties had an oral *Lucas* agreement, the loan proceeds were the wife's separate property. Accordingly, the court concluded that the furniture was her separate property. Without access to the vehicle registration, however, the court was uncertain whether the car was separate property. If the registration reads "Patricia *or* Henry" then the car would be deemed to be held in joint tenancy (Veh. Code, §§ 4150.5, 5600.5) and section 4800.1 would apply. If, on the other hand, it reads "Patricia *and* Henry," then section 4800.1 would not apply and the parties' oral agreement would control.

ther's vested property right without due process of law.[10] The state interest in equitable dissolution of the marital partnership is not

[39 Cal.3d 764]

furthered by retroactive effect. Retroactivity only serves to destroy Esther's legitimate separate property expectations as a penalty for lack of prescience of changes in the law occurring after trial. Due process cannot tolerate such a result.

The judgment is affirmed.

Bird, C. J., Mosk, J., Kaus, J., Broussard, J., Grodin, J., and Lucas, J., concurred.

[10]Holdings to the contrary in the following cases are disapproved: *Taylor, supra,* 160 Cal.App.3d 471; *Benart, supra,* 160 Cal.App.3d 183; *Martinez, supra,* 156 Cal.App.3d 20; *Anderson, supra,* 154 Cal.App.3d 572; *Neal, supra,* 153 Cal.App.3d 117.

Exhibit 2

Staff Draft

Tentative Recommendation
relating to
Retroactive Application of Civil Code Sections 4800.1 and 4800.2

Civil Code Sections 4800.1 and 4800.2 were enacted in 1983 upon joint recommendation of the Law Revision Commission and the State Bar Conference of Delegates.[1] The purpose of the enactment was to correct major problems that had developed in the law governing division of community property held by the spouses in joint tenancy form.[2]

The Legislature in 1965, after careful study[3], had acted to strengthen the community property system and ensure an equitable property division at dissolution of marriage by creating a presumption for purposes of dissolution that a single family residence taken by the spouses as joint tenants is in fact community property.[4] The salutary purpose of this legislation was frustrated by the rule that community property in joint tenancy form could be transmuted to

---

[1]Cal.Stats. 1983, ch. 342, §§ 1 and 2.

[2]See California Law Revision Commission Report Concerning Assembly Bill 26, 83 Senate Journal 4865 (July 14, 1983).

[3]Final Rep. of Assem. Interim Com. on Judiciary Relating to Domestic Relations (1965) pp. 121-122, 2 Appen. to Assem. J. (1965 Reg. Sess.).

[4]Cal. Stats. 1965, ch. 1710, p. 3843.

separate property by an oral agreement. This rule generated substantial litigation over alleged informal agreements and undermined the strong public policy favoring community ownership of marital property. More serious problems were created by the Supreme Court's construction of the community property presumption in the 1980 case of In re Marriage of Lucas.[5] Lucas held that because of the presumption, a spouse who contributes separate funds to the acquisition of a joint tenancy single family residence is deemed to have made a gift to the community for purposes of division at dissolution, absent an express agreement to the contrary. The Lucas doctrine was widely perceived as unfair by the public as well as by family law professionals.

In response to these problems, the Legislature in 1983 enacted Civil Code Sections 4800.1 and 4800.2 to provide that (1) all property held in joint tenancy form by the spouses is presumed community absent a written agreement otherwise and (2) all community property is divided subject to a right of reimbursement for separate property contributions absent an express agreement otherwise. The corrective legislation strengthens the community property presumption and at the same time tempers the presumption with a measure of fairness by reimbursement of unintended contributions to the community. Because of the importance of this area of the law and the number of persons substantially and adversely affected by the problems in the law, the corrective legislation was made applicable in all cases not yet final on January 1, 1984, the operative date of the legislation.[6]

The Supreme Court has now held in the 1985 case of In re Marriage of Buol[7] that the corrective legislation cannot constitutionally be

---

[5]27 Cal.3d 808, 614 P.2d 285, 166 Cal.Rptr. 853 (1980).

[6]Cal.Stats. 1983, ch. 342, § 4.

[7]39 Cal.3d 751 (1985).

applied retroactively to preclude proof of an oral separate property agreement. The precise scope of the decision is not clear; the opinion can be interpreted to allow proof of an oral agreement in cases tried before the operative date of the new legislation, in cases commenced before the operative date of the new legislation, or in cases in which the alleged agreement was made before the operative date of the new legislation. The opinion is even susceptible of the interpretation that no aspect of the new legislation may be applied to any case where property was acquired before the operative date.[8]

The Buol decision, besides negating important and strongly-expressed public policy, has caused major disruption and confusion among the substantial numbers of judges, lawyers, and litigants affected by this fundamental area of family law. Without further legislative action to clean up the problems created, extensive litigation, at substantial cost to the parties and to the judicial system, will be required to straighten matters out on a piecemeal basis for years to come. Legislation should be enacted that will clarify what law applies to what case, that will avoid adding further transitional complexities to the law, that will be fair to the parties, and that will satisfy constitutional standards as announced in Buol.

To this end, the Law Revision Commission recommends enactment of an urgency measure (taking effect immediately) to provide that the new legislation does not preclude proof of an oral agreement in any case commenced before its operative date. The urgency measure should also reaffirm the Legislature's intention, backed by an express statement of the strong public policy involved, that the new legislation should apply to pending proceedings in all other respects. This approach is consistent with a reasonable reading of the opinion in Buol. It is also consistent with the reasonable expectations of the parties who,

---

[8]The Commission is informed that at least one court commissioner in Southern California is interpreting Buol to preclude reimbursement of separate property contributions and to require application of the Lucas gift presumption in any case where property was acquired in joint tenancy form before the operative date of the new legislation.

until the Buol case, were proceeding under the new legislation. And it treats fairly parties who may have made an oral agreement before the operative date of the new legislation.[9]

In addition, to help avoid this sort of problem from arising in the future, the Commission recommends that a provision be added to the Family Law Act that declares the fundamental state interest in achieving an equitable marriage dissolution, that states the reserved power of the Legislature to apply legislation for this purpose retroactively, and that makes clear that parties to a marriage do not acquire vested rights in property for the purpose of division at dissolution of marriage.

---

[9]It is proper to require that an alleged oral agreement be reduced to writing before commencement of a proceeding for division of property. The practice of permitting oral statements to defeat the community property presumption frustrates the strong public policy favoring community ownership of property acquired during marriage. Casual statements made during marriage are often not made with full knowledge of their consequences or with the intention that they change the rights of the parties in property at dissolution of marriage. The requirement of a writing is important to help ensure that a party waives his or her community property rights only upon mature consideration. If there truly is an oral agreement between the parties, it is appropriate for the same reasons that the parties confirm their agreement in writing before litigation to dissolve the marriage and divide the property is commenced.

The Commission's recommendation would be effectuated by enactment of the following measure.

An act to add Section 4800.10 to the Civil Code, and to amend Section 4 of Chapter 342 of the Statutes of 1983, relating to family law, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Civil Code § 4800.10 (added). Reserved power of Legislature to make retroactive changes affecting division of property

SECTION 1. Section 4800.10 is added to the Civil Code, to read:

4800.10. The Legislature finds and declares that fair and equitable division of marital property is of fundamental importance and that the fairness and equity of the manner of division may change with changes in social conditions, as indicated by experience in the application of the law. For this reason the Legislature reserves the power to revise the laws governing division of marital property, whether community, quasi-community, separate, or mixed, at any time and to apply the revised laws retroactively, in the interest of fairness and equality of treatment for all litigants, regardless of the date of marriage, the date of acquisition of the property, the date of any agreement affecting the property, the date of commencement of a proceeding for dissolution or legal separation, or the date of trial. The parties to a marriage acquire property and make agreements affecting the property subject to this reserved power of the Legislature, and do not, by virtue of the law in effect at the time of acquisition of the property or at the time of an agreement affecting the property or at any other time, acquire any vested rights in property for purposes of division of property upon dissolution or legal separation.

Comment. Section 4800.10 is added to state expressly the reserved power of the Legislature to make retroactive changes in the law governing division of marital property. The parties to a marriage cannot acquire "vested" rights in marital property for the purpose of division of the property at dissolution or legal separation or otherwise, notwithstanding language to that effect in earlier cases. See, e.g., In re Marriage of Buol, 39 Cal.3d 751 (1985).

QUERY. The staff does not believe that statement of the reserved power with respect to division of marital property implies there is no reserved power with respect to other critical family law matters such as support and management and control. It might be useful to statutorily state the reserved power with respect to these matters as well, although the staff is reluctant to go too far afield from the Buol problem. Perhaps the following statement could be added to the Comment: "This section deals only with the reserved power of the Legislature with respect to division of marital property. Nothing in this section should be deemed to limit the ability of the Legislature to make retroactive changes in the law in any other family law matter, including but not limited to changes in the law affecting child or spousal support or changes affecting the management and control rights of the spouses."

Stats. 1983, Ch. 342, § 4 (amended). Application of Civil Code Sections 4800.1 and 4800.2

SEC. 2. Section 4 of Chapter 342 of the Statutes of 1983 is amended to read:

SEC. 4. This act applies to the following proceedings:

(a) Proceedings commenced on or after January 1, 1984.

(b) Proceedings commenced before January 1, 1984, to the extent proceedings as to the division of the property are not yet final on January 1, 1984. This subdivision does not preclude proof of an oral agreement between the spouses that property is separate property and not community property in any proceeding commenced before January 1, 1984, if the proceeding is not yet final on the date the act that adds this sentence becomes effective.

Comment. Section 4 of Chapter 342 of the Statutes of 1983 is amended to legislatively recognize the holding of In re Marriage of Buol, 39 Cal.3d 751 (1985), that Section 4800.1 of the Civil Code cannot constitutionally be applied to preclude proof of an oral agreement as to the separate character of marital property in a proceeding commenced before January 1, 1984.

The amendment is limited to the situation that was the subject of the Buol case. The Legislature intends, and hereby reaffirms its intention, that Sections 4800.1 and 4800.2 be applied retroactively in all other respects to proceedings not yet final on January 1, 1984, regardless of the date of acquisition of property or the date of any agreement as to the character of the property or the interests of the spouses in the property. In order to achieve an equitable dissolution of the marital relationship, the Legislature finds it is important that the rules embodied in Sections 4800.1 and 4800.2 be applied immediately, with the effect that (1) all property held in joint tenancy form by the spouses is presumed community absent a written agreement otherwise and (2) all community property is divided subject

to a right of reimbursement for separate property contributions absent an express agreement otherwise.

These rules are necessary to remedy the rank injustice in former law created by:

(1) The Supreme Court's interpretation of the community property presumption of former law in the case of In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal.Rptr. 853 (1980), that found a gift of separate funds used to acquire a community asset absent an express agreement otherwise. The injustice to persons who contributed their separate funds for use by the community with the end result of losing the funds entirely to the community at dissolution of marriage is so great and so widespread and such a substantial cause of public concern that immediate corrective action is necessary.

(2) The rule that a spouse could disprove the community property presumption for a single-family residence by evidence of an oral agreement that the residence is separate property. This rule has promoted actions characterized by conflicting and inconsistent testimony, with each side offering different explanations for the effect of a joint tenancy deed. Often the intent of the parties who long ago filed a joint tenancy deed may be confused by faded memories or altered to self-serving testimony. The requirement of a writing provides a reliable test by which to determine the understanding of the parties; it seeks to prevent the abuses and unpredictability that have resulted from the oral agreement standard. See discussion in In re Marriage of Martinez, 156 Cal.App.3d 20, 30, 202 Cal.Rptr. 646 (1984) (disapproved in In re Marriage of Buol, 39 Cal.3d 751 (1985)). Retroactive application of the writing requirement is necessary to prevent these serious problems from continuing in every case in which property was acquired or an alleged agreement was made before the operative date.

Moreover, it is proper to require that an alleged oral agreement be reduced to writing before commencement of a proceeding for division of property. The practice of permitting oral statements to defeat the community property presumption frustrates the strong public policy favoring community ownership of property acquired during marriage. Casual statements made during marriage are often not made with full knowledge of their consequences or with the intention that they change the rights of the parties in property at dissolution of marriage. The requirement of a writing is important to help ensure that a party waives his or her community property rights only upon mature consideration. If there truly is an oral agreement between the parties, it is appropriate for the same reasons that the parites confirm their agreement in writing before litigation to dissolve the marriage and divide the property is commenced. For these strong considerations of public policy, the Legislature deems it critical that the corrective legislation be applied retroactively.

Apart from correction of the rank injustice of former law and furtherance of social policy that retroactive application of Sections 4800.1 and 4800.2 seeks to achieve, failure to apply the corrective rules immediately to all litigation will result in unequal treatment of parties and the potential for having two different bodies of law applying for many years to come, depending upon the time of acquisition of property and the time of commencing a lawsuit. In the

interest of equality and for the purpose of having available to the public a manageable and understandable body of family law, the Legislature finds that retroactive application of the legislation to cases not yet final serves important public policies.

QUERY. We have included the legislative declaration of public policy in the Comment rather than in the statute itself. It might be stronger if included in the statute, and it would avoid the problem of having to obtain separate adoption of the Comment by the legislative committees considering the statute. On the other hand, the statement is a rather lengthy argument, and it affords numerous opportunities for legislative quibbling if included in the statute. At least inclusion in the statute would not clutter the statute books, since it would appear in an uncodified section.

The proposed statute preserves prior law on oral agreements for cases not yet final when the corrective legislation takes effect. This means that cases tried under the new law before Buol would be subject to retrial if one of the parties is able to mount an oral agreement issue. We could attempt to preserve new law for cases tried under new law notwithstanding Buol--after all one of the grounds of Buol is that application of the new law to cases not yet final would disrupt already-conducted litigation, and to go back to prior law in cases already tried under new law would disrupt already-conducted litigation. Nonetheless, the staff believes that Buol must be read to allow these cases to be reopened, if we are to take seriously their argument about not impairing vested property rights. We do note, however, that as with other aspects of the Buol opinion, its impact on already-tried cases is not clear.

Urgency clause (added)

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

Civil Code Sections 4800.1 and 4800.2 were enacted by Chapter 342 of the Statutes of 1983 and applied immediately to all family law proceedings not yet final on its effective date (January 1, 1984) in order to cure a serious problem in the law governing division of assets at dissolution of marriage. See Report of Senate Committee on Judiciary on Assembly Bill 26, 83 Senate Journal 4865 (July 14, 1983). The Supreme Court in In re Marriage of Buol, 39 Cal.3d 751 (1985), has held that this legislation cannot be applied to pending litigation in some circumstances, but the precise scope of the opinion is unclear.

The Buol decision has caused confusion among family law judges and lawyers as to what law governs in a heavily litigated area in which important property rights are affected. The decision also frustrates the intent of the Legislature to correct a serious problem in the law that is causing inequitable treatment of many parties in currently pending dissolution proceedings.

This act is intended to clarify the confusion caused by Buol and to reaffirm the need for immediately applicable legislation to assure all litigants of equitable treatment at dissolution of marriage. Any further delay will accentuate unreasonably the current confusion and problems in this area of the law.