Memorandum 82-103

Subject: Study F-640 - Community Property (Title and Gift Presumptions and Transmutations)

Attached to this memorandum is a staff draft of a tentative recommendation relating to title presumptions and transmutations of marital property. The tentative recommendation combines Commission decisions made at the May 1981 and May 1982 meetings:

(1) Property owned by a spouse during marriage is presumed to be community, and no contrary presumption is created by the form of title to property acquired by a married person during marriage, except in the case of a change in the form of title during marriage.

(2) A transmutation of real property must be in writing; a transmutation of personal property need not be in writing but the staff should consider whether there should be a writing requirement for property for which there is documentary title evidence (cars, stocks). (The staff draft imposes such a requirement.)

(3) In the case of an alleged gift between spouses, household furnishings and appliances are presumed to be community and personal items are presumed to be separate unless they are substantial in value (in which case they are presumed to be community).

In connection with transmutations and gifts, the staff draft includes a provision that the presumption of fraud in a transfer between members of the same household is not conclusive but only affects the burden of proof. This was the subject of an earlier Commission tentative recommendation, resolution of which was deferred until the subject of transmutations would be taken up. The Commission's proposal that there be no conclusive presumption was generally well received by persons who reviewed the proposal. The State Bar was split, with the Committee on Administration of Justice supporting the proposal (with the suggestion that it be made clear that the presumption affects the burden of proof) and the Debtor/Creditor-Business Law Executive Committee opposed. There was also a suggestion by Justice Kingsley that the presumption of fraud apply only to large items, e.g., $5,000 or more in value. Although this last proposal is attractive in theory, the staff has not included it in the draft because it necessitates a valuation

trial in addition to other issues involved in a determination of fraudulent conveyance.

If the staff draft appears satisfactory to the Commission, we will distribute it (including redistribution of the fraudulent conveyance provision) for comment.

Respectfully submitted,

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STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

MARITAL PROPERTY PRESUMPTIONS AND TRANSMUTATIONS

Property acquired during marriage is as a general rule community property, unless acquired with separate funds.[1] Thus there is a presumption that property of a married person is community property, but the married person can rebut the presumption by tracing to a separate property source.[2] These rules can be altered by agreement of the spouses. In particular, the spouses can indicate their intent with respect to the character of the property initially by specifying the form of title in which it is held, and thereafter the spouses can transmute the character of the property as between each other (and to some extent as it affects third parties).[3]

Separate Property Title Presumptions

Civil Code Section 5110, in addition to stating the basic rule that all property acquired during marriage is community property unless acquired with separate property funds, also states a number of exceptions based on presumptions drawn from the form of title to property. Among the title presumptions created by Section 5110 are:

(1) Property acquired by a married woman by an instrument in writing prior to January 1, 1975, is presumed to be her separate property. This presumption dates from the time when the husband had management and control of community property (prior to January 1, 1975) and does not apply to property over which the wife had management and control.[4] The

1. Civil Code §§ 687, 5110.

2. See, e.g., discussion in Lichtig, Characterization of Property, 1 California Marital Dissolution Practice § 7.16 (Cal. Cont. Ed. Bar 1981); Comment, Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement," 15 U.C.D. L. Rev. 95, 97-98 (1981).

3. See generally Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 829-830 (1982).

4. In re Marriage of Mix, 14 Cal.3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).

presumption can be rebutted both by tracing to a community property source and by evidence of a contrary understanding or agreement of the parties.[5]

(2) Property described in paragraph (1) that is acquired with another person is presumed to be held as tenants in common. However, if the other person with whom the married woman acquires property is her husband and the instrument describes them as husband and wife, the presumption is that the property is community. This presumption was enacted to overcome the rule of Dunn v. Mullan[6] that husband and wife acquisitions were presumptively half community and half the separate property of the wife. The presumption is now restricted to pre-January 1, 1975, property. It cannot be rebutted by tracing to a source of separate property but only by evidence of a contrary understanding or agreement of the parties.[7]

(3) Although Civil Code Section 5110 expressly limits the title presumptions applicable to a married woman to property acquired before January 1, 1975,[8] the cases nonetheless continue the effect of the title presumptions by creating an inference of a gift as to property acquired before or after January 1, 1975. If title is taken in the name of one spouse alone, and if the other spouse was aware of the state of title and acquiesced or did not object, there is an implication or inference that a gift has been made and that the property is the separate property of the spouse in whose name title stands.[9]

The case law inference of a gift, like the statutory presumption of the separate property of the wife, dates from a time when the husband had management and control of the community property. At that time it was logical to find a gift when the husband allowed title to stand in

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5. In re Marriage of Rives, 130 Cal. App.3d 138, 181 Cal. Rptr. 572 (1982).

6. 211 Cal. 583, 296 P. 604 (1931).

7. In re Marriage of Cademartori, 119 Cal. App.3d 970, 174 Cal. Rptr. 292 (1981).

8. 1973 Cal. Stats., ch. 987, § 5.

9. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 583 (1980).

the wife's name alone. However, with either spouse having management and control of the community property, this logic is no longer apt. The Legislature limited the separate property statutory presumption to pre-January 1, 1975, property when it enacted equal management and control, but the courts have failed to overturn the corresponding separate property case law gift implication.

In In re Marriage of Lucas,[10] for example, title to a mini-motorhome acquired in part with community funds and in part with separate funds of the wife was taken in the wife's name alone; the husband did not object to the form of title. The court found the mini-motorhome to be the separate property of the wife based on the case law inference that a gift is created by title in the wife and the husband's failure to object, despite evidence tracing the source of the funds.

Under equal management and control the husband had no reason or right to make such an objection. The wife was entitled to manage and control the community property funds and could purchase property with them in her own name if she wished to do so. There is no reason why one spouse, living happily with the other and not contemplating dissolution of marriage, would object when the other spouse exercises the statutory equal management and control powers. The gift inference of Lucas seems contrary to public policy in that it penalizes the husband for acceeding to his wife's exercise of equal management powers.[11] Under equal management and control, convenience, concerns with insurance, taxation or probate, or chance may be more likely to determine which spouse purchases or takes title to a given item than is an independent decision of the spouses as to ownership.[12]

In addition to the fact that the rationale for the separate property title presumptions is no longer sound, the presumptions have caused

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10. 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 583 (1980).

11. The gift preference interjects disharmony into marriage by encouraging husbands to demand that their wives carry on management powers only in the husband's or both partner's names. Reppy, Debt Collection for Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 157 (1981).

12. Bruch, Management Powers and Duties Under California's Community Property Laws 60 (unpublished 1980).

substantial problems in practice. The courts have failed to provide a standard to determine whether a "common understanding or agreement" between the spouses exists sufficient to overcome the effect of the presumptions, with detrimental results for the parties, their attorneys, and the judicial system.[13] Moreover, application of the presumptions has led to anomalous results in a number of situations.[14]

Civil Code Section 5110 should be revised not only to eliminate the title presumptions but also to overrule the title inferences of separate property. These presumptions and inferences were intended to protect the interest of the wife in an era when her rights in the community were minimal, but the presumptions and inferences are now obsolete. The law should continue to state the basic rule that all property acquired during marriage is community unless traced to a separate property source. The form of title should not create a separate property presumption or inference but should simply be evidence, like any other, of the intent of the spouses as to the manner of holding the property.

Presumption as to Single-Family Residence

Section 5110 of the Civil Code creates a community property presumption at dissolution of marriage for a single-family residence acquired by husband and wife during marriage as joint tenants.[1] This presumption can be rebutted only by evidence of an agreement or understanding to the contrary; it cannot be rebutted simply by tracing the funds used to acquire the property to a separate property source, or by evidence of a secret intent that the property was to be something other than community property.[2]

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13. Comment, Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement," 15 U.C.D. L. Rev. 95 (1981).

14. See discussion in Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 247-55 (1966).

1. Civil Code Section 5110 provides, in relevant part, "When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife." This part was added by 1965 Cal. Stats., ch. 1710, § 1.

2. In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

This presumption was enacted in 1965 to address the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property actually to be community.[3] The primary purpose of the presumption was to enable the courts to award the residence to the wife and children whenever it was equitable to do so by making it community property and thereby bringing it within the jurisdiction of the courts.[4] This occurred at a time when a greater share of the community property could be awarded to the innocent spouse.[5]

The special presumption that a single-family dwelling in joint tenancy form is community property differs significantly from the general community property presumption in that the general community property presumption can be rebutted by tracing to a separate property source whereas the special single-family presumption cannot.[6] This feature of the presumption has created real inequities in practice and is widely criticized.[7] In In re Marriage of Lucas,[8] for example, a married person who purchased a family home with separate funds lost the separate property investment due to the operation of the presumption when the marriage was dissolved shortly thereafter.

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3. Assembly Interim Committee on Judiciary, Final Report relating to Domestic Relations 123-25 (1965), 2 App. Assem. J. (1965 Reg. Sess.); Comment, 3 Whittier L. Rev. 617, 634-36 (1981); Lichtig, Characterization of Property, 1 California Marital Dissolution Practice § 7.39 (Cal. Cont. Ed. Bar 1981).

4. Review of Selected 1965 Code Legislation 40 (Cal. Cont. Ed. Bar 1965); In re Marriage of Bjornstead, 38 Cal. App.3d 801, 113 Cal. Rptr. 576 (1974); Reppy, Debt Collection for Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 164 (1981).

5. See, e.g., 1 A. Bowman, Ogden's Revised California Real Property Law § 7.12 (1974).

6. See discussion in Comment, Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement," 15 U.C.D. L. Rev. 95, 97-101 (1981).

7. See, e.g., Joint Ownership of Marital and Nonmarital Property 33 (Program Material, January 1982, Cal. Cont. Ed. Bar); Comment, 3 Whittier L. Rev. 617, 638-41 (1981).

8. 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 583 (1980).

The special presumption that a joint tenancy single-family dwelling is community property should be repealed. The general community property presumption achieves the same purpose, but does so in a more equitable manner by allowing tracing to a separate property source. Moreover, the presumption is of limited utility in an era of equal division. The objective of allowing the family law court discretion in assigning the family home to one spouse or the other can be achieved more simply, directly, and equitably by expanding the jurisdiction of the court to include property held by the spouses as joint tenants and tenants in common.[9]

Transmutations

Apart from the effect of the form of title in creating presumptions or inferences as to the character of marital property, there is a body of law governing agreements between the spouses to change community property to separate and separate property to community. Agreements of this type are known as transmutations. Under California law it is quite easy for spouses to transmute both real and personal property; a transmutation can be found based on oral statements or implications from the conduct of the spouses.[1]

California law permits an oral transmutation or transfer of property between the spouses notwithstanding the statute of frauds.[2] This rule recognizes the convenience and practical informality of interspousal transfers.[3] However, the rule of easy transmutation has also generated extensive litigation in dissolution proceedings. It encourages a spouse,

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9. The Law Revision Commission has made a separate recommendation to this effect. See Recommendation relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage 16 Cal. L. Revision Comm'n Reports ___ (1982).

1. For a detailed analysis of the law, see Reppy, Debt Collection for Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981); 7 B. Witkin, Summary of California Law, Community Property § 73 (8th ed. 1974).

2. See, e.g., Woods v. Security First National Bank, 46 Cal.2d 697, 299 P.2d 657 (1956).

3. See discussion in Bruch, Management Powers and Duties Under California's Community Property Laws 56 (unpublished, 1980).

after the marriage has ended, to transform a passing comment into an "agreement" or even to commit perjury by manufacturing an oral or implied transmutation.

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.

California is the only community property jurisdiction that has a clearly established rule dispensing with the statute of frauds in land transmutation cases.[4] California law should continue to recognize informal transmutations for personal property generally, but should require a writing for a transmutation of real property or personal property for which documentary evidence of title exists.

In the case of personal property generally, the law should presume that "gifts" of household furnishings, and appliances between spouses are community and "gifts" of personal items between spouses are separate (unless large or substantial in value). These presumptions most likely correspond to the expectations of the ordinary married couple.

Fraudulent Conveyances

The general rule is that if a transmutation or transfer of property between spouses is not fraudulent as to creditors of the transferor, the transmutation or transfer can affect the right of creditors to reach the property.[1] Whether a transfer between spouses is fraudulent as to creditors is governed by general fraudulent conveyance law.[2]

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4. W. Reppy, Community Property in California 39 (1980).

1. Cf. Bailey v. Leeper, 142 Cal. App.2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); Wikes v. Smith, 465 F.2d 1142 (1972) (bankruptcy).

2. Uniform Fraudulent Conveyance Act, Civil Code §§ 3439-3439.12. The act affects the validity of a transfer as to third-party creditors and not as between the parties to the transfer.

If a transfer of property from one member of a household to another has the effect of defeating creditors, the transfer is inherently suspect, whether the parties to the transfer are husband and wife, parent and child, or occupy some other relationship within the household. The likelihood of fraud in such a situation is sufficiently great that, in addition to the general rules governing fraudulent conveyances, two other rules apply to the transfer:

(1) The transfer is conclusively presumed fraudulent as to creditors if there is no immediate delivery of the property followed by an actual and continued change of possession.[3]

(2) The intimate relationship between the parties to the transfer may raise an inference of fraud as to creditors.[4]

The conclusive presumption of fraud is ill-suited to transfers between members of a household.[5] The main purpose of Civil Code Section 3440 in requiring an immediate delivery and continuous change of possession is to give notice to creditors.[6] This purpose is difficult to achieve in a household setting where the personal property that is transferred may remain in the same place as before and may be used by the same persons of the household who originally used it. There may be an actual and bona fide transfer of ownership between members of a household, but the transfer may not be apparent to third parties.

Transfers of personal property between household members tend to be casual and informal. The formalities applicable to a transfer in a

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3. Civil Code § 3440. Section 3440 governs all transfers in which there is no delivery and change of possession of the property transferred, including transfers within the household. See, e.g., Pfunder v. Goodwin, 83 Cal. App. 551, 257 P. 119 (1927); Gardner v. Sullivan & Crowe Equipment Co., 17 Cal. App.3d 592, 94 Cal. Rptr. 893 (1971).

4. See, e.g., Wood v. Kaplan, 178 Cal. App.2d 227, 2 Cal. Rptr. 917 (1960).

5. See Bruch, Management Powers and Duties Under California's Community Property Laws 68 (unpublished 1980); Reppy, Debt Collection for Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 221-25 (1981).

6. See Joseph Henspring Co. v. Jones, 55 Cal. App. 620, 203 P. 1038 (1921).

purely business relationship are unwarranted in a family setting. Failure of delivery between household members should not be conclusively presumed fraudulent. The members should at least have the opportunity to rebut the presumption of fraud and show that the transfer was bona fide. Otherwise, every transfer among household members, even though bona fide, will be fraudulent as to creditors since the transferor will always remain in constructive possession as a member of the household.

Elimination of the conclusive presumption of fraud in a transfer of personal property between members of the same household would not validate a transaction made with the purpose of defeating creditors. The Uniform Fraudulent Conveyance Act enables a creditor to avoid such a transfer not only if it was made with fraudulent intent but also if it was made for less than a fair consideration and either resulted in the transferor's insolvency or was made once the transferor was already insolvent. In the reported cases dealing with family members, inequitable results to third-party creditors could readily have been avoided without the conclusive presumption of fraud.[7]

Elimination of the conclusive presumption of fraud will not affect the inference of fraud that may be drawn from an intrafamily transfer. It has been held judicially that since direct proof of fraudulent intent is often impossible because the real intent of the parties and the facts of a fraudulent transaction are peculiarly within the knowledge of the parties to the fraud, a creditor may infer fraud from circumstances surrounding the transaction, the relationship, and the interest of the parties.[8] The relationship of parent and child, for example, when coupled with suspicious circumstances may be sufficient to raise an inference of fraud in a conveyance from one to the other.[9] The inference of fraud should be codified as a presumption affecting the burden of proof, to replace the conclusive presumption of fraud in a transfer within the household.

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7. See Bruch, Management Powers and Duties Under California's Community Property Laws 68 (unpublished 1980).

8. See, e.g., Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935).

9. See, e.g., Menick v. Goldy, 131 Cal. App.2d 542, 280 P.2d 844 (1955).

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

An act to add Sections 3444 and 5109 to, to add Chapter 2 (commencing with Section 5110.110) to Title 8 of Part 5 of Division 4 of, and to repeal Sections 687 and 5110 of, the Civil Code, relating to marital property.

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

043/144

SECTION 1. Section 687 of the Civil Code is repealed.

~~687. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.~~

Comment. The substance of former Section 687 is continued in Section 5110.110 (all property acquired during marriage is community).

045/081

SEC. 2. Section 3444 is added to the Civil Code to read:

3444. In the case of a transfer between members of the same household of personal property within or incident to the household, the presumption created by this chapter is not conclusive but is a presumption affecting the burden of proof.

Comment. Section 3444 is added in recognition of the fact that a valid transfer of property between members of a household may not involve an actual and continued change of possession due to the nature of household property. Section 3444 in effect codifies the inference of fraud that may arise in such a transfer. See, e.g., Menick v. Goldy, 131 Cal. App.2d 542, 280 P.2d 844 (1955).

045/082

SEC. 3. Section 5109 is added to the Civil Code to read:

5109. As used in this title, real property does include, and personal property does not include, a leasehold interest in real property.

Comment. Section 5109 continues the substance of the last sentence of former Section 5110.

SEC. 4. Section 5110 of the Civil Code is repealed.

~~5110. Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so 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; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. When a single/family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single/family residence is the community property of the husband and wife. The presumptions in this section mentioned are 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 the property.~~

~~In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.~~

~~As used in this section, personal property does not include and real property does include leasehold interests in real property.~~

Comment. The substance of the first portion of the first sentence of former Section 5110 is continued in Section 5110.110 (all property acquired during marriage is community). The substance of the second portion of the first sentence and the third sentence are continued in Section 5110.199 (property acquired by married woman before January 1, 1975).

The second sentence relating to a single-family residence held in joint tenancy form is superseded by [Section 4800.1]. The fourth sentence relating to actions to invalidate a conveyance of real property acquired by a married woman prior to May 19, 1889, is continued in effect by Section [5125.299 (transitional provisions)]. The last sentence is continued in Section 5109 (leasehold interest as real or personal property).

045/209

SEC. 5. Chapter 2 (commencing with Section 5110.110) is added to Title 8 of Part 5 of Division 4 of the Civil Code, to read:

CHAPTER 2. CHARACTERIZATION OF MARITAL PROPERTY

Article 1. Community Property

§ 5110.110. All property acquired during marriage is community

5110.110. Except as otherwise provided by statute, all real property situated in this state and all personal property wherever situated acquired by either spouse during marriage is community property.

Comment. Section 5110.110 continues the substance of former Section 687 and the first portion of former Section 5110. It states the basic rule that all property acquired during marriage is community unless it comes within a specified exception. The major exceptions are those relating to separate property. See, e.g., Sections 5107 (separate property of wife), 5108 (separate property of husband), 5126 (personal injury damages). Community property may be converted to separate property by transmutation or by a general marital property agreement. See, e.g., Section 5110.410 (transmutation). Section 5110.110 is not an exhaustive statement of property classified as community. See, e.g., Section 5113.5 (property transferred to trust).

[Articles 2-4. Reserved]

101/182

Article 5. Presumptions

§ 5110.510. Effect of presumptions

5110.510. The presumptions established by this article are presumptions affecting the burden of proof.

(b) The presumptions established by this article are rebuttable by proof of the character of the property as defined by statute or by proof of a transmutation or transfer of ownership between the spouses.

Comment. Section 5110.510 codifies the rule that the statutory presumptions as to the character of marital property are rebuttable presumptions affecting the burden of proof. They may be rebutted by tracing the property to a contrary source or by proof of a contrary agreement of the spouses. See, e.g., discussion in Lichtig, Characterization of Property, 1 California Marital Dissolution Practice § 7.13 (Cal. Cont. Ed. Bar 1981).

404/105

§ 5110.520. Community property presumption

5110.520. Except as otherwise provided by statute, property owned by either spouse during marriage is presumed to be community property.

Comment. Section 5110.520 codifies the case law community property presumption, rebuttable by agreement or by tracing to a separate property source. See, e.g., Haldeman v. Haldeman, 202 Cal. App.2d 498, 21 Cal. Rptr. 75 (1962); Lynam v. Vorwerk, 13 Cal. App. 507, 110 P. 355 (1910); See v. See, 64 Cal.2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

404/106

§ 5110.530. Gifts between spouses

5110.530. The following presumptions apply to property acquired by a spouse during marriage by gift from the other spouse:

(a) Household furniture, furnishings, appliances, or fittings of the home are presumed to be community property.

(b) Clothing or wearing apparel and other personal effects used by the spouse are presumed to be the separate property of the spouse except to the extent they are large or substantial in value taking into account the circumstances of the marriage.

Comment. Section 5110.530 qualifies the general rule that property acquired by a spouse by gift during marriage is separate property. See Sections 5107 (separate property of wife) and 5108 (separate property of husband). Notwithstanding this general rule, interspousal "gifts" are presumed to be separate or community depending on the nature of the property given. Section 5110.530 also qualifies the general rule that the spouses may transmute the character or ownership of property. See Section 5110.610 (transmutation). The presumptions established by Section 5110.530 can be rebutted by proof that the gift was actually

intended as such or that the parties intended a transmutation of character or ownership. Section 5110.510 (effect of presumptions).

[§ 5110.540. Reserved]

404/166

§ 5110.550. Title presumptions

5110.550. (a) The form of title to property acquired by either spouse during marriage does not create a presumption or inference as to the character of the property, and is not evidence sufficient to rebut the presumptions established by this article.

(b) This section does not apply to a change in the form of title pursuant to a transmutation or transfer of ownership of community or separate property between the spouses during marriage.

Comment. Section 5110.550 makes clear that the form in which title to property is taken does not create a presumption or inference contrary to the basic community property presumption. This overrules cases that held, for example, that where title to property acquired with community funds is taken in the name of one spouse alone with the knowledge of and without objection by the other spouse, there is an inference of a gift of community property to the person in whose name title is taken. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). Under Section 5110.550 the form title may be evidence of an agreement or of the source of the property, the weight of which depends on the circumstances of the case. The form of title is not of itself sufficient to rebut the basic community property presumption. A change in the form of title made during marriage in connection with a transmutation or transfer of ownership, however, may be evidence sufficient to rebut the community property presumption.

[§§ 5110.560-5110.590. Reserved]

404/191

§ 5110.599. Property acquired by married woman before January 1, 1975

5110.599. Notwithstanding Section 5110.510, whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the following presumptions apply, and are conclusive in favor of any person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest, regardless of any change in her marital status after acquisition of the property:

(1) The presumption is that the property is the married woman's separate property.

(2) If acquired by the married woman and any other person the presumption is that the married woman takes the part acquired by her as tenant in common, unless a different intention is expressed in the instrument.

(3) When any of the property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that the property is the community property of the husband and wife.

Comment. Section 5110.599 continues the substance of a portion of former Section 5110.

404/192

Article 6. Transmutation

§ 5110.610. Transmutation of character or ownership of property

5110.610. Notwithstanding any other provision of this title and subject to the limitations provided in this article, the spouses may by agreement or transfer, with or without consideration, do any of the following:

(a) Transmute community property to separate property of either spouse.

(b) Transmute separate property of either spouse to community property.

(c) Transfer ownership of separate property between the spouses.

Comment. Section 5110.610 codifies the basic rule that spouses may transmute the character or ownership of community or separate property. See, e.g., discussion in Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981). In addition to the limitations on transmutation or transfer of ownership provided in this article, the 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. See Section 5103. The characterization of community and separate property may be affected by a general marital property agreement, antenuptial or otherwise, as well as by a transmutation or transfer of ownership of a specific property.

§ 5110.620. Fraudulent conveyance laws apply

5110.620. A transmutation or transfer of ownership of community or separate property between the spouses is subject to the laws governing fraudulent transfers.

Comment. Section 5110.620 codifies existing law. Cf. Bailey v. Leeper, 142 Cal. App.2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); Wikes v. Smith, 465 F.2d 1142 (1972) (bankruptcy). See, e.g., Section 3444 (presumption of fraud in transfer between members of household without delivery).

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§ 5110.630. Form of transmutation or transfer of ownership

5110.630. A transmutation or transfer of ownership of community or separate property between the spouses shall be made by an express declaration in the agreement or transfer. If the declaration is made in a deed or other documentary evidence of title to property, the declaration is not effective as a transmutation or transfer of ownership of the property between the spouses unless made, joined in, consented to, or accepted by the spouse, if any, whose interest in the property is adversely affected.

Comment. Section 5110.630 imposes formalities on interspousal transmutations and conveyances for the purposes of increasing certainty in the determination whether a transmutation or conveyance has in fact occurred.

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§ 5110.640. Transmutation or transfer of ownership of real property

5110.640. (a) A transmutation or transfer of ownership between the spouses of real property is not valid unless made in writing.

(b) A valid transmutation or transfer of ownership of real property between the spouses is not effective as to third parties without notice thereof unless recorded.

Comment. Section 5110.640 makes clear that the ordinary rules and formalities applicable to real property transfers apply also to transmutations and transfers of real property between the spouses. See Civil Code §§ 1091, 1624 (statute of frauds); 1213-1217 (effect of recording). This overrules existing case law. See, e.g., Woods v. Security First Nat'l Bank, 46 Cal.2d 697, 701, 299 P.2d 657, 659 (1956).

§ 5110.650. Transmutation or transfer of ownership of personal property

5110.650. A transmutation or transfer of ownership between the spouses of personal property for which documentary evidence of title exists is not valid unless made in writing.

Comment. Section 5110.650 continues existing law that permits oral transmutation of personal property; however, it requires a writing for transmutation of property for which title documentation exists, such as stocks and automobiles.

[Articles 7-8. Reserved]

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Article 9. Transitional Provisions

§ 5110.910. Operative Date

5110.910. As used in this article, "operative date" means January 1, 1985.

§ 5110.920. Application of chapter

5110.920. Except to the extent limited by this article, this chapter applies to all marital property whether acquired before, on, or after the operative date.

§ 5110.930. Determination of character of property

5110.930. A determination of the character of marital property made before, on, or after the operative date in a proceeding commenced before the operative date is governed by the applicable law in effect at the time the proceeding was commenced.