

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

relating to

Family Law

Marital Property Presumptions and Transmutations
Reimbursement of Educational Expenses
Special Appearance in Family Law Proceedings
Liability of Stepparent for Child Support
Awarding Temporary Use of Family Home
Disposition of Community Property

November 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Marital Property Presumptions
and Transmutations

September 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 Cal. L. Revision Comm'n Reports 205 (1984).

CALIFORNIA LAW REVISION COMMISSION

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September 24, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission herewith recommends elimination of the various title presumptions applicable to marital property and replacement by the general community property presumption. Transmutations between the spouses of the character of marital property would have to be in writing to be valid, except for gifts of personal items that are small in value. These and related recommendations are intended to favor the community and minimize litigation. The recommendations are made pursuant to 1983 Cal. Stats. res. ch. 40 (family law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

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

¹ Civil Code §§ 687, 5110.

² See, e.g., discussion in Lichtig, *Characterization of Property*, in 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, 829-30 (1982).

and control.⁴ The 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 the wife's name alone. However, with either spouse having management and control of the community

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

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. 853 (1980).

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 acceding 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 substantial problems in practice. The courts have failed to provide a standard to determine whether a "common understanding or agreement"

¹⁰ 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (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 from 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: Recommendations for Reform*, 34 Hastings L.J. 227, 265 (1982).

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 or transmuted by the spouses. 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.

Out-of-State Real Property

Community property, as defined by Civil Code Section 5110, does not include real property situated outside California, even though the property may have been acquired by the spouses with community property during their marriage while domiciled in California.¹⁵ The reason for this gap in the community property law is the assumption that California courts will apply the universally accepted choice of law rule that the law of the situs of real property governs the nature of interests acquired therein. Therefore, it is for the situs state to determine the kinds of estates in real property that exist there and to determine which of these is acquired in consequence of a purchase by a married person domiciled in California.¹⁶

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).

¹⁵ Civil Code Section 5110 provides, in relevant part, that "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 . . . is community property."

¹⁶ See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 Cal. L. Rev. Comm'n Reports, at I-12 to I-13 (1961).

Notwithstanding the rule that marital real property situated outside California is not community property, the property may nonetheless be treated as community property for purposes of division of property at dissolution of marriage or legal separation.¹⁷ Although the California court dividing the property cannot directly affect title to the property, if the court has personal jurisdiction over parties it can make appropriate orders to effectuate the division.¹⁸

The statute should accurately state that community property may include out-of-state real property. The California courts properly exercise their jurisdiction over out-of-state real property to the greatest extent possible, and this practice should be statutorily confirmed.¹⁹ Moreover, where the situs state elects choice of law rules that recognize characterization by the state of domicile, statutory assertion of the community character of the property by California will both fill a logical gap and ensure community treatment.

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.²⁰

California law permits an oral transmutation or transfer of property between the spouses notwithstanding the

¹⁷ See, e.g., *Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11 (1957); *Ford v. Ford*, 276 Cal. App.2d 9, 80 Cal. Rptr. 435 (1969).

¹⁸ See Civil Code § 4800.5; Assembly Committee on Judiciary, Report on Assembly Bill 124, Assembly J. at 1109 (March 11, 1970).

¹⁹ This recommendation is consistent with that made in *Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1, 12-13 (1984).

²⁰ For a detailed analysis of the law, see Reppy, *Debt Collection from 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, at 5161-62 (8th ed. 1974).

statute of frauds.²¹ This rule recognizes the convenience and practical informality of interspousal transfers.²² However, the rule of easy transmutation has also generated extensive litigation in dissolution proceedings. It encourages a spouse, 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 law should continue to recognize informal transmutations for certain personal property gifts between the spouses, but should require a writing for a transmutation of real property or other personal property. In the case of personal property "gifts" between the spouses, gifts of most items such as household furnishings and appliances should be presumed community and gifts of clothing, wearing apparel, jewelry, and other tangible articles of a personal nature should be presumed separate (unless large or substantial in value). These presumptions most likely correspond to the expectations of the ordinary married couple.

The requirement of a writing should not be satisfied by a statement in a married person's will of the community character of the property, until the person's death.²³ Such

²¹ See, e.g., *Woods v. Security First National Bank*, 46 Cal.2d 697, 299 P.2d 657 (1956). California is the only community property jurisdiction that has a clearly established rule dispensing with the statute of frauds in land transmutation cases. W. Reppy, *Community Property in California* 39 (1980).

²² See discussion in Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 Hastings L.J. 227, 262 (1982).

²³ This would overrule such cases as *In re Marriage of Lotz*, 120 Cal. App.3d 379, 174 Cal. Rptr. 618 (1981) and *Estate of Wilson*, 64 Cal. App.3d 786, 134 Cal. Rptr. 749 (1976).

statements are made for purposes of tax planning and disposition at death and are not intended to convey a present interest in the property. A will is ambulatory in character and subject to revocation or modification; it speaks only as of the date of the testator's death.

Fraudulent Conveyances

The general rule is that if a transmutation is not fraudulent as to creditors of the transferor, the transmutation can affect the right of creditors to reach the property.²⁴ Whether a transmutation is fraudulent as to creditors is governed by general fraudulent conveyance law.²⁵

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.²⁶

(2) The intimate relationship between the parties to the transfer may raise an inference of fraud as to creditors.²⁷

The conclusive presumption of fraud is ill-suited to transfers between members of a household.²⁸ The main purpose of Civil Code Section 3440 in requiring an

²⁴ 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).

²⁵ 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.

²⁶ 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 Equip. Co.*, 17 Cal. App.3d 592, 94 Cal. Rptr. 893 (1971).

²⁷ See, e.g., *Wood v. Kaplan*, 178 Cal. App.2d 227, 2 Cal. Rptr. 917 (1960).

²⁸ See Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 Hastings L.J. 227, 270 (1982); Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143, 221-25 (1981).

immediate delivery and continuous change of possession is to give notice to creditors.²⁹ 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 purely business relationship are unwarranted in such a 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 transfers within a household, inequitable results to third-party creditors could readily have been avoided without the conclusive presumption of fraud.³⁰

Elimination of the conclusive presumption of fraud will not affect the inference of fraud that may be drawn from an intrahousehold 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

²⁹ See *Joseph Henspring Co. v. Jones*, 55 Cal. App. 620, 203 P. 1038 (1921).

³⁰ See Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 *Hastings L.J.* 227, 270 (1982).

of the parties to the fraud, a creditor may infer fraud from circumstances surrounding the transaction, the relationship, and the interest of the parties.³¹ 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.³² 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.

Recommended Legislation

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

An act to add Sections 3444 and 5109 to, to add a heading immediately preceding Section 5100 of, to add Chapter 2 (commencing with Section 5110.110) to Title 8 of Part 5 of Division 4 of, to add a heading immediately preceding Section 5111 of, and to repeal Sections 687 and 5110 of, the Civil Code, and to amend Section 17150.5 of the Vehicle Code, relating to marital property.

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

Civil Code § 687 (repealed). Community property defined

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).

Civil Code § 3444 (added). Fraudulent conveyance presumption not conclusive when transfer between members of same household

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

³¹ See, e.g., *Fross v. Wotton*, 3 Cal.2d 384, 44 P.2d 350 (1935).

³² See, e.g., *Menick v. Goldy*, 131 Cal. App.2d 542, 280 P.2d 844 (1955).

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).

Heading for Chapter 1 (commencing with Section 5100) of Title 8 of Part 5 of Division 4 of the Civil Code (added)

SEC. 3. A heading is added immediately preceding Section 5100 of the Civil Code, to read:

CHAPTER 1. GENERAL

Civil Code § 5109 (added). Real property defined

SEC. 4. 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.

Civil Code § 5110 (repealed). Community property presumptions

SEC. 5. Section 5110 of the Civil Code is repealed.

~~5110. Except as provided in Sections 5107, 5108, and 5126, 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 the 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 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. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with a 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 the 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 the 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 5110.699 (property acquired by married woman before January 1, 1975). The fourth sentence relating to actions to invalidate a conveyance of real property acquired by a married woman prior to May 19, 1889, is not continued because it is obsolete. The last sentence is continued in Section 5109 (leasehold interest as real or personal property).

Civil Code §§ 5110.110-5110.930 (added)

SEC. 6. 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 property, real or personal, wherever situated, acquired by a married person during marriage while domiciled in this state is community property.

Comment. Section 5110.110 continues the substance of former Section 687 and the first portion of former Section 5110, and extends the definition of community property to include real property situated outside this state. The effect of including out-of-state real property in the definition is that California courts treat it as community for all purposes, including management and control and division at dissolution. The treatment given such property by the courts of the state in which the property is located will depend upon applicable choice of law rules of the state.

Section 5110.110 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 5110.710 (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 2-5. Reserved]

Article 6. Presumptions

§ 5110.610. Effect of presumptions

5110.610. (a) The presumptions established by this article are presumptions affecting the burden of proof.

(b) The presumptions established by this article are rebuttable by tracing the property to a different source or by proof of a transmutation of the character of the property.

Comment. Section 5110.610 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 (e.g., Sections 5107 and 5108) or by proof of a contrary agreement of the spouses. See, e.g., Lichtig, *Characterization of Property*, in 1 California Marital Dissolution Practice § 7.13 (Cal. Cont. Ed. Bar 1981).

§ 5110.620. Community property presumption

5110.620. Except as otherwise provided by statute, property of a married person is presumed to be community property.

Comment. Section 5110.620 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). The effect of the basic community property presumption is to impose the burden of proof on the person seeking to show that property of a married person is separate property. Section 5110.610. An exception to the general community property presumption created by this section may be found in Section 5110.640 (gift presumptions).

§ 5110.630. Title presumptions

5110.630. Except as otherwise provided by statute, the form of title to property acquired by a married person during marriage does not create a presumption or inference as to the character of the property, and is not in itself evidence sufficient to rebut the presumptions established by this article.

Comment. Section 5110.630 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 5110.630 the form of 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 in itself sufficient to rebut the basic community property presumption. A change in the form of title made during marriage in connection with a transmutation, however, may be evidence sufficient to rebut the community property presumption.

The rule of Section 5110.630 that the form of title does not create a presumption as to the character of the property may be subject to exceptions. Section 4800.1, for example, creates a presumption for the purpose of division of property at dissolution of marriage applicable to property acquired in joint tenancy form.

§ 5110.640. Gift presumptions

5110.640. The following presumptions apply to property acquired by a married person during marriage by gift from the person's spouse:

(a) Except as provided in subdivision (b), the property is presumed to be community property.

(b) Clothing, wearing apparel, jewelry, and other tangible articles of a personal nature, used solely or principally by the person, are presumed to be the person's separate property except to the extent they are substantial in value taking into account the circumstances of the marriage.

Comment. Section 5110.640 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. Under Section 5110.640, the gift of an automobile, for example, would not create a presumption that the property is separate, since an automobile is not an article of a personal nature within the meaning of the section. Section 5110.640 also qualifies the general rule that the spouses may transmute the character or ownership of property. See Section 5110.710 (transmutation). The presumptions established by Section 5110.640 can be rebutted by proof that the parties intended by the gift a transmutation of the character of the property. For limitations on transmutation, see Section 5110.730 (form of transmutation).

§ 5110.699. Property acquired by married woman before January 1, 1975

5110.699. Notwithstanding any other provision of this chapter, 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:

(a) If acquired by the married woman, the presumption is that the property is the married woman's separate property.

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

(c) If acquired by husband and wife by an instrument in which they are described as husband and wife, 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 5110.699 continues the substance of a portion of former Section 5110.

Article 7. Transmutation

§ 5110.710. Transmutation of character of property

5110.710. Notwithstanding any other provision of this chapter and subject to the limitations provided in this article, married persons may by agreement or transfer, with or without consideration, do any of the following:

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

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

(c) Transmute separate property of one spouse to separate property of the other spouse.

Comment. Section 5110.710 codifies the basic rule that spouses may transmute the character of community or separate property. See, *e.g.*, 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 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 of specific property.

§ 5110.720. Fraudulent conveyance laws apply

5110.720. A transmutation is subject to the laws governing fraudulent transfers.

Comment. Section 5110.720 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).

§ 5110.730. Form of transmutation

5110.730. (a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.

(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.

Comment. Section 5110.730 imposes formalities on interspousal transmutations for the purpose of increasing

certainty in the determination whether a transmutation has in fact occurred. Section 5110.730 makes clear that the ordinary rules and formalities applicable to real property transfers apply also to transmutations of real property between the spouses. See Civil Code §§ 1091 and 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). Section 5110.730 also overrules existing law that permits oral transmutation of personal property; however, transmutation by gift of certain personal property is recognized. This is consistent with the rule of Section 5110.640 (gift presumptions).

§ 5110.740. Effect of will

5110.740. A statement in a will of the character of property is not admissible as evidence of the character of the property or of a transmutation of the property in any proceeding commenced before the death of the person who made the will.

Comment. Section 5110.740 reverses the case law rule that a declaration made in a will as to the character of property may be an effective transmutation of the property before the death of the declarant. See, *e.g.*, *In re Marriage of Lotz*, 120 Cal. App.3d 379, 174 Cal. Rptr. 618 (1981); *Estate of Wilson*, 64 Cal. App.3d 786, 134 Cal. Rptr. 749 (1981). Section 5110.740 is consistent with the general concepts that a will is ambulatory and subject to subsequent revocation or modification and does not speak until the testator's death.

[Article 8. Reserved]

Article 9. Transitional Provisions

§ 5110.910. Operative date

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

Comment. Section 5110.910 is included for drafting convenience.

§ 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.

Comment. Section 5110.920 applies the principles of characterization prescribed by this chapter retroactively to transactions that occurred before the operative date. Retroactive application is justified by the generally procedural character of many of the changes, the generally non-drastic impact on the rights of the parties, and the importance of the social policies favoring the community and transactional certainty. See *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 Cal. L. Revision Comm'n Reports 205 (1984).

§ 5110.930. Determination of character of property

5110.930. (a) Except as provided in subdivision (b), a determination of the character of marital property made 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.

(b) A determination of the character of marital property made on or after the operative date in a proceeding upon the death of a married person is governed by the applicable law in effect at the time of death.

Comment. Section 5110.930 is an exception to the general rule of retroactive application stated in Section 5110.920, in the interest of certainty and clarity and simplicity of litigation.

Heading for Chapter 3 (commencing with Section 5111) of Title 8 of Part 5 of Division 4 of the Civil Code (added)

SEC. 7. A heading is added immediately preceding Section 5111 of the Civil Code, to read:

CHAPTER 3. OTHER PROVISIONS RELATING TO MARITAL PROPERTY

**Vehicle Code § 17150.5 (technical amendment).
Limitation on Civil Code presumptions**

SEC. 8. Section 17150.5 of the Vehicle Code is amended to read:

17150.5. The presumptions created by Section ~~5110~~ *5110.699* of the Civil Code as to the acquisition of property by a married woman by an instrument in writing shall not apply in an action based on Section 17150 with respect to

the acquisition of a motor vehicle by a married woman and her husband.

Comment. Section 17150.5 is amended to correct a section reference.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Reimbursement of Educational Expenses

September 1983

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Reimbursement of Educational Expenses*, 17 Cal. L. Revision Comm'n Reports 229 (1984).

CALIFORNIA LAW REVISION COMMISSION

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September 24, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

A marriage may be dissolved shortly after the community makes substantial expenditures for education or training that benefits one of the spouses. In this situation, the Law Revision Commission recommends that the community should be reimbursed for the expenditures, subject to limitations explained in the recommendation.

This problem is also the subject of litigation pending before the California Supreme Court in the case of *In re Marriage of Sullivan* (hearing granted October 28, 1982). However, the Commission believes this problem can and should be addressed by legislation, regardless of the outcome of the pending litigation.

This recommendation is submitted pursuant to authority of 1983 Cal. Stats. res. ch. 40 (family law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

REIMBURSEMENT OF EDUCATIONAL EXPENSES

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

The plain inequity of this situation has generated efforts to provide some recompense for the working spouse. Litigants have attempted to classify the education, degree, or license obtained by the student spouse as "property," without success.¹ A number of commentators have urged that the enhancement of earning capacity that results from the education, degree, or license be made property subject to division.² Legislation has been enacted that an educational loan must be assigned for payment to the spouse receiving the education.³ There is currently pending before the California Supreme Court the case of *In re Marriage of Sullivan*,⁴ which involves these issues.

The Law Revision Commission has reviewed these proposals and others in an effort to fashion a fair resolution

¹ *Todd v. Todd*, 272 Cal. App.2d 786, 78 Cal. Rptr. 131 (1969); *In re Marriage of Aufmuth*, 89 Cal. App.3d 446, 152 Cal. Rptr. 668 (1979).

² See, e.g., Weitzmann, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. Rev. 1181, 1210-21 (1981); Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 813-21 (1982).

³ Civil Code § 4800(b) (4) (added by 1978 Cal. Stats. ch. 1323, § 2).

⁴ Hearing granted, October 28, 1982.

to the problem. Ordinarily, discrepancies in the earning capacities of the parties are remedied by spousal support.⁵ In many cases, however, the working spouse does not qualify for support because his or her earnings, while substantially lower than the student spouse's future earnings, are nonetheless sufficient for self-support. While it would be possible to revise the basic support standards, the Commission deems it inadvisable to disrupt the established support scheme in order to deal with this circumscribed problem.⁶

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

⁵ Civil Code § 4801.

⁶ It is possible, within the support scheme, to require the student spouse to support the working spouse while the working spouse receives equivalent education. This remedy is not completely adequate because the working spouse may already have received the education he or she desires, the dissolution may occur late in life when the education is of marginal future use, or the working spouse simply may have no desire for further education but would rather be recompensed for the substantial benefit he or she has conferred on the student spouse with the expectation of future benefit.

marriage. Such a rule—one that most people would think is unfair and the effect of which they would try to avoid—should not be codified in the law.

All factors considered, a more equitable solution, in the Commission's judgment, is to require the student spouse to reimburse the community for the community expenditures for his or her education and training.⁷ This solution in effect gives the working spouse the same amount the student spouse was given for the education. The working spouse can use the money for his or her own education or any other purpose. It puts the parties on equal footing without generating a windfall for the working spouse or permanently impairing the student spouse's future. It takes from the student spouse only what was actually given and restores to the working spouse only what he or she actually lost. It addresses the basic inequity with a minimum of disruption to the community property system.

Despite the virtues of a reimbursement right, there are a number of problems that must be resolved. The reimbursement right is appropriate in the typical situation where the student spouse receives education that substantially enhances his or her earning capacity. But in some cases the education may not enhance the student spouse's earning capacity, or may enhance it only marginally, or may enhance it but the student spouse engages in other work to which the enhancement is irrelevant. In these cases the equities change. If there is no enhancement or only a marginal enhancement of the student spouse's earning capacity, the basis of the reimbursement right—that the community contributed funds for the economic benefit of the student spouse—fails. The reimbursement right should apply only where enhancement of the student spouse's earning capacity is substantial. This will ensure fairness in imposing on the student spouse the economic burden of reimbursement and will avoid litigation over small expenditures such as weekend seminars whose impact on the student spouse's earning capacity is speculative or intangible. Where enhancement of the student spouse's earning capacity is substantial but the student spouse does not take advantage

⁷ The community expenditures consist of money actually contributed for payment of tuition, fees, books, supplies, etc.

of this, reimbursement should nonetheless be required. The higher earning potential is still available to the student spouse, who may take advantage of it in the future. The student spouse should not be able to avoid the reimbursement requirement simply by working at a lower-paying job until the marriage is dissolved.

Even where the student spouse's earnings are substantially enhanced there may be cases where reimbursement is inappropriate at dissolution of marriage. For example, the marriage dissolution may not occur shortly after the student spouse receives the education, degree, or license. The student spouse and working spouse may remain married for many years, enjoying a high standard of living and accumulating substantial community assets as a result of the education. In this situation, the community may already have received many times over the anticipated benefits of the working spouse's support of the student spouse during the education.

Or, even though the student spouse is educated at the working spouse's expense, the working spouse in turn may have been educated and trained at the student spouse's expense. There is in effect an offset and it makes little sense to require each to reimburse the other.

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

There may be other situations where the reimbursement right is simply not appropriate. To accommodate these situations, the Commission believes the reimbursement right should not be automatic in every case, but should be subject to reduction or modification by the court if circumstances render reimbursement unjust.⁸

⁸ Cf. Civil Code § 4800(b)(4) (educational loan assigned to spouse receiving education unless extraordinary circumstances render assignment unjust).

If the marriage endures any significant length of time after the student spouse receives the education and training, in addition to the possibility that the community will recoup its expenditures, problems of proof and computation become significant. Records of expenditures and their community or separate sources are unlikely to be kept, so that with the passage of time proof becomes less reliable. To address these problems, the Commission recommends that the reimbursement right be subject to a 10-year limitation period. This will recognize that over time the community is likely to benefit from the student spouse's enhanced earning capacity, and will limit the potential for unreliable evidence of expenditures. The 10-year limitation is admittedly arbitrary, but is designed to achieve simplicity and justice in the ordinary case.

Because the economic loss to the community can be substantial over time, reimbursement should be adjusted for interest at the legal rate.⁹ Again for simplicity of accounting, interest should commence to accrue at the end of the year in which the expenditures were made, since expenditures may be made frequently and in small amounts.

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

Ordinarily before the working spouse puts the student spouse through school the parties have discussed their expectations. They may even have agreed to matters such as the proportion of the costs each party is expected to bear, whether the student spouse in turn is expected to support the working spouse during his or her education, and possibly even their rights to recompense if the marriage dissolves. If a party can prove such an agreement, the

⁹ The legal rate is currently 10 per cent. Code Civ. Proc. § 685.010.

agreement should be recognized and should prevail over the reimbursement right provided by statute. The reimbursement right is intended only as a rough measure of justice that people generally would agree is fair and should be subject to express bargaining and agreement by the parties. Because such agreements or understandings may not be clearly articulated, however, they may generate substantial litigation. In order to avoid unmeritorious litigation and to ensure certainty, the agreement should be in writing.

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

An act to amend Section 4800 of, and to add Section 4800.3 to, the Civil Code, relating to husband and wife.

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

Civil Code § 4800 (amended)

SECTION 1. Section 4800 of the Civil Code is amended to read:

4800. (a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars (\$5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties.

~~(4) Educational loans shall be assigned to the spouse receiving the education in the absence of extraordinary circumstances rendering such an assignment unjust.~~

(c) Notwithstanding the provisions of subdivision (a), community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the

settlement or compromise of a claim for such damages, if the cause of action for such damages arose during the marriage but is not separate property as defined in Section 5126, unless such money or other property has been commingled with other community property.

(d) The court may make such orders as it deems necessary to carry out the purposes of this section.

Comment. The substance of former subdivision (b) (4) of Section 4800 is continued in Section 4800.3(b) (2) (expenses of education or training).

Civil Code § 4800.3 (added)

SEC. 2. Section 4800.3 is added to the Civil Code, to read:

4800.3. (a) As used in this section, “community contributions” to the education or training of a party means payments made with community or quasi-community property for the education or training or for a loan incurred for the education or training.

(b) Subject to the limitations provided in this section, upon dissolution of marriage or legal separation:

(1) The community shall be reimbursed for community contributions to the education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made, and shall be limited to community contributions made within 10 years before commencement of the proceeding.

(2) A loan incurred during marriage for education or training of a party shall not be included among the liabilities of the community for the purpose of the division but shall be assigned for payment by the party.

(c) The reimbursement and assignment required by this section shall be reduced or limited to the extent circumstances render the disposition unjust, including but not limited to the following:

(1) The community has substantially benefited from the education, training, or loan for education or training of the party.

(2) The education or training received by the party is offset by education or training received by the other party for which community contributions have been made.

(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

(d) Reimbursement for community contributions and assignment of loans pursuant to this section is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of earning capacity of a party. Nothing in this subdivision limits consideration of the effect of the education or training or enhancement on the circumstances of the parties for the purpose of an order for support.

(e) The provisions of this section are subject to an express written agreement of the parties to the contrary.

(f) This section applies to any proceeding commenced after December 31, 1984, regardless whether the education or training was received, a loan was incurred, or community contributions were made, before, on, or after that date.

Comment. Section 4800.3 is added to provide authority for reimbursement of educational expenses that have benefited primarily one party to the marriage. Although the education, degree, or license or the resulting enhanced earning capacity is not "property" subject to division, community expenditures for them are properly subject to reimbursement. Subdivision (d); see also *Todd v. Todd*, 272 Cal. App.2d 786, 78 Cal. Rptr. 131 (1969); *In re Marriage of Aufmuth*, 89 Cal. App.3d 446, 152 Cal. Rptr. 668 (1979); *In re Marriage of Sullivan* (hearing granted, October 28, 1982).

Subdivision (a) does not detail the expenditures that might be included within the concept of "community contributions." These expenditures would at least include cost of tuition, fees, books and supplies, and transportation.

Subdivision (b)(1) states the basic rule that community contributions must be reimbursed. The reimbursement right is limited to cases where the earning capacity of a party is substantially enhanced; this limitation is intended to restrict litigation by requiring that the education or training must demonstrably enhance earning capacity and to implement the policy of the section to redress economic inequity. However, it

is not required that the party actually work in an occupation to which the enhancement applies; community contributions were made to the enhancement for the benefit of one party, who retains the potential to realize the enhancement in the future. Reimbursement under subdivision (b) (1) is subject to a 10-year statute of limitations to minimize proof problems as well as potential inequity. Interest at the legal rate (Code Civ. Proc. § 685.010) accrues only from the end of each year in which expenditures were made in order to simplify accounting for numerous small expenditures made over the course of the education or training.

Subdivision (b) (2) continues the substance of former Section 4800(b) (4) (educational loans).

Subdivision (c) is intended to permit the court to avoid the requirements of this section in an appropriate case. For example, if one party receives a medical education, degree, and license at community expense, but the marriage endures for some time with a high standard of living and substantial accumulation of community assets attributable to the medical training, it might be inappropriate to require reimbursement. Subdivision (c) (1). If both parties receive education or training at community expense, it may be appropriate to allow no reimbursement even though the exact amounts expended for each are not equal. Subdivision (c) (2). This limitation is especially important where one party received education or training more than 10 years before the commencement of the dissolution or separation proceeding. See subdivision (b) (1). If toward the end of a lengthy marriage one party, who had been a homemaker during the marriage and had never completed an education or developed job skills, receives education or training to enable him or her to be gainfully employed, reimbursement could be improper. Subdivision (c) (3). Absent the education or training, support might be necessary to maintain the party or to obtain education or training.

Subdivision (e) recognizes that at the time community contributions are made to the education or training of a spouse, the parties may well have an agreement as to the conditions of the contributions. Since such agreements may be subject to litigation, subdivision (e) requires a writing.

Subdivision (f) makes this section retroactive to the extent practical. The inequity sought to be righted is so substantial that retroactive treatment is warranted.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Special Appearance in Family
Law Proceedings

September 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Special Appearance in Family Law Proceedings*, 17 Cal. L. Revision Comm'n Reports 243 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

September 24, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission herewith submits its recommendation to permit the respondent in a family law proceeding to make a special appearance for the limited purpose of contesting pendente lite orders during the pendency of the respondent's motion to quash service for lack of personal jurisdiction. This recommendation is made pursuant to 1983 Cal. Stats. res. ch. 40 (family law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson



RECOMMENDATION

relating to

SPECIAL APPEARANCE IN FAMILY LAW PROCEEDINGS

The respondent in a family law proceeding may make a special appearance to challenge the personal jurisdiction of the court.¹ During the pendency of the respondent's challenge the petitioner often seeks pendente lite relief in the form of an order for temporary spousal or child support,² restraint of personal misconduct by a party or disposition of property,³ attorney fees and costs pendente lite,⁴ or custody and visitation.⁵ The respondent in this situation cannot oppose the pendente lite order because opposition amounts to a general appearance in the family law proceeding, thus prejudicing the respondent's challenge to the personal jurisdiction of the court.⁶

As a result, a pendente lite order may go unopposed even though the respondent has good ground for opposition.⁷ This is inequitable, particularly if the respondent's challenge to the personal jurisdiction of the court is legitimate.

The law should not preclude a person from participating in a pendente lite family law proceeding for fear that to do so will result in waiver of the person's challenge to the

¹ Cal. Rules of Court 1234; Code Civ. Proc. § 418.10.

² Civil Code § 4357.

³ Civil Code § 4359; Code Civ. Proc. § 527.

⁴ Civil Code § 4370.

⁵ Civil Code § 4600.1.

⁶ See Brayton, *Jurisdiction, Venue, and Service of Process*, in 1 California Marital Dissolution Practice § 11.32 (Cal. Cont. Ed. Bar 1981).

⁷ For example, the petitioner may seek temporary spousal support and the order is unopposed even though the respondent's means are inadequate. Judge (now Justice) King gives the instance of several recent cases in which the wife seeks such an unopposed order—"I have felt very uncomfortable making such orders when there have been references in the motion to quash about poor economic circumstances on the part of husband." Letter from Judge Donald B. King, San Francisco Superior Court, to John H. DeMouly, Executive Secretary, California Law Revision Commission (February 23, 1982).

jurisdiction of the court. The Law Revision Commission recommends that the law be revised to enable the respondent in a family law proceeding to oppose a pendente lite order during the pendency of a challenge to the personal jurisdiction of the court without making a general appearance.⁸ This will enable fair litigation of the issues on the merits without prejudicing the rights of either party.

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

An act to add Section 4356 to the Civil Code, relating to family law.

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

Civil Code § 4356 (added)

SECTION 1. Section 4356 is added to the Civil Code, to read:

4356. (a) During the time a motion pursuant to Section 418.10 of the Code of Civil Procedure is pending, the respondent may appear in opposition to an order made during the pendency of proceedings under this part and the appearance shall not be deemed a general appearance by the respondent.

(b) As used in this section, a motion pursuant to Section 418.10 of the Code of Civil Procedure is pending from the time notice of motion is served and filed until the time within which to petition for a writ of mandate has expired or, if a petition is made, until the time final judgment in the mandate proceeding is entered.

⁸ This is consistent with the suggestions for reform made in Gorfinkle, *Special Appearance in California—The Need for Reform*, 5 U.S.F.L. Rev. 25 (1970). The Commission's present recommendation applies only to family law proceedings and not to civil procedure generally. Family law proceedings involve this situation with some frequency because the family law court may have subject matter jurisdiction without personal jurisdiction and because during the initial stages of dissolution of the family unit the parties often require early access to the court. See Samuels, *Orders to Show Cause and Pendente Lite Relief*, in 2 California Marital Dissolution Practice § 15.1 (Cal. Cont. Ed. Bar 1983).

Comment. Section 4356 is added to enable the respondent to contest pendente lite orders in family law proceedings without prejudicing the respondent's right to litigate the in personam jurisdiction of the court by special appearance pursuant to Code of Civil Procedure Section 418.10.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Liability of Stepparent
for Child Support

November 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Liability of Stepparent for Child Support*, 17 Cal. L. Revision Comm'n Reports 251 (1984).

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BEATRICE P. LAWSON

November 5, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Commission herewith submits its recommendation to make clear that the earnings of a stepparent are immune from liability for a child support obligation of the stepparent's spouse. This recommendation restates separately one aspect of the Commission's January 1983 recommendation relating to *Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1, 18-19 (1984). This recommendation is made pursuant to 1983 Cal. Stats. res. ch. 40 (family law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

LIABILITY OF STEPPARENT FOR CHILD SUPPORT

The extent to which marital property of a second marriage is liable for a child support obligation of a first marriage is unclear. Civil Code Section 199 provides that after dissolution of marriage a child support obligation may be satisfied "only" from the total earnings (or assets acquired therefrom) of each spouse.¹ Whether this provision is intended to immunize other community property of the second marriage, including earnings of the stepparent, is unclear. Civil Code Section 4807 appears to subject community property, including the community property interest of the parent in the earnings of the stepparent, to a child support obligation.² In this regard, Civil Code Sections 5127.5 and 5127.6 also appear to create exceptions to the rule of Section 199 under certain factual situations. These provisions were intended to comport with AFDC standards.³ However, the provisions are ineffective, unworkable, confusing, obsolete, and probably unconstitutional.⁴

¹ Civil Code Section 199 provides:

The obligation of a father and mother to support their natural child under this chapter, including but not limited to Sections 196 and 206, shall extend only to, and may be satisfied only from, the total earnings, or the assets acquired therefrom, and separate property of each, if there has been a dissolution of their marriage as specified by Section 4350.

² *In re Marriage of Brown*, 99 Cal. App.3d 702, 160 Cal. Rptr. 524 (1979). Civil Code Section 4807 provides:

The community property, the quasi-community property, and the separate property of the parents may be subjected to the support, maintenance, and education of the children in such proportions as the court deems just.

³ Beilenson and Agran, *The Welfare Reform Act of 1971*, 3 Pac. L.J. 475, 485 (1972); *Review of Selected 1979 California Legislation*, 11 Pac. L.J. 531-32 (1980); *Wood v. Woods*, 133 Cal. App.3d 954, 184 Cal. Rptr. 471 (1982).

⁴ Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 Hastings L.J. 227, 253-60 (1982); Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143, 204-06 (1981); *In re Marriage of Shupe*, 139 Cal. App.3d 1026, 189 Cal. Rptr. 288 (1983).

The liability of the earnings of a stepparent for a child support obligation of the parent should be dealt with clearly and directly. A child to whom the parent owes an obligation of support should be in at least as good a position as a general creditor. This means that in the case of remarriage of the parent, the child should be permitted to enforce the support obligation not only against the separate property of the parent but also against all community property of the subsequent marriage except the earnings of the stepparent. To permit the child support obligation to be enforced against the earnings of the stepparent is not only unfair to the stepparent but will also impede remarriage of persons with child support obligations. The increased liability of the community created by the remarriage of the parent is sufficient protection for the child. However, the earnings of the stepparent should be taken into account in setting the amount of the child support obligation, in recognition of the fact that the parent's ability to pay may be affected by the earnings of the stepparent.⁵

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

An act to amend Sections 5120 and 5120.150 of the Civil Code, relating to family law.

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

Civil Code § 5120 (amended)

SECTION 1. Section 5120 of the Civil Code is amended to read:

5120. Neither the separate property of a spouse nor the earnings of the spouse after marriage is liable for the debts

Welfare and Institutions Code Section 11261, which was identical to and enacted together with Civil Code Section 5127.6, was repealed by 1981-1982 Cal. Stats. 1st Ex. Sess., ch. 3, § 20, and replaced with Welfare and Institutions Code Section 11008.14, which simply makes the earnings of the stepparent "considered available for purposes of eligibility determination and grant computation to the extent required by federal law."

⁵ *In re Marriage of Havens*, 125 Cal. App.3d 1012, 178 Cal. Rptr. 477 (1981).

of the other spouse contracted *or incurred* before the marriage, *including a child support obligation of the other spouse that does not arise out of the marriage.*

Comment. Section 5120 is amended to make clear that the earnings of a stepparent are not liable for a child support obligation of the parent, notwithstanding implications to the contrary in cases and other statutes. *Cf.* Section 4807 (community property may be subjected to support of children); *In re Marriage of Brown*, 99 Cal. App.3d 702, 160 Cal. Rptr. 524 (1979) (community interest of parent in income of stepparent obligated for child support). The implications to the contrary in Sections 5127.5 and 5127.6 are limited to AFDC benefit determinations and the sections themselves have been impliedly repealed. See, *e.g.*, *In re Marriage of Shupe*, 139 Cal. App.3d 1026, 189 Cal. Rptr. 288 (1983); Cal. Stats. 1981-82, 1st Ex. Sess., ch. 3 (repealing Welfare and Institutions Code § 11261, which was identical to Civil Code § 5127.6, and enacting Welfare and Institutions Code § 11008.14, substituting a new rule that income of a stepparent shall be considered available for purposes of eligibility determination and grant computation to the extent required by federal law). The effect of the amendment is to place pre-existing child support and other pre-existing obligations in the same position as general premarital contractual obligations.

Civil Code § 5120.150 (amended)

SEC. 2. Section 5120.150, as added to the Civil Code by Assembly Bill 1460 of the 1983-84 Regular Session, is amended to read:

5120.150. (a) For the purpose of this chapter, a child or spousal support obligation of a married person that does not arise out of the marriage shall be treated as a debt incurred before marriage, regardless whether a court order for support is made or modified before or during marriage and regardless whether any installment payment on the obligation accrues before or during marriage.

~~(b) Whether the earnings of a married person during marriage are liable for a child support obligation of the other person's spouse that does not arise out of the marriage shall not be determined by this chapter but by the law in effect immediately before the operative date of this chapter.~~

~~(e)~~ (b) If community property is applied to the satisfaction of a child or spousal support obligation of a married person that does not arise out of the marriage, at a time when nonexempt separate income of the person is available but is not applied to the satisfaction of the obligation, the community is entitled to reimbursement from the person in the amount of the separate income, not exceeding ~~one-half~~ the community property so applied.

~~(d)~~ (c) Nothing in this section limits the matters a court may take into consideration in determining or modifying the amount of a support order including, but not limited to, the earnings of the ~~spouse of the person obligated for child or spousal support~~ spouses of the parties.

Comment. Subdivision (a) of Section 5120.150 makes clear that a support obligation that arises before the marriage is a prenuptial debt for purposes of liability of marital property. As a result, the general rule is that the separate property of the obligor spouse and the community property of the marriage is liable for the support obligation, other than the earnings of the non-obligor spouse. See Section 5120.110 (liability of community property). Subdivision (a) also applies to an extramarital support obligation of a spouse that arises during the marriage.

Subdivision (b) codifies the rule of *Weinberg v. Weinberg*, 67 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967), that the community is entitled to reimbursement, but prescribes a fixed measure for the community reimbursement based on the separate income of the obligor spouse. See also *Bare v. Bare*, 256 Cal. App.2d 684, 64 Cal. Rptr. 335 (1967); *In re Marriage of Smaltz*, 82 Cal. App.3d 568, 147 Cal. Rptr. 154 (1978).

Subdivision (c) makes clear that despite the general rule that earnings of the non-obligor spouse are not liable for the support obligation, the earnings of the spouses of both parties may be taken into account by the court in setting the amount of the support obligation. This codifies existing law. See, e.g., *In re Marriage of Havens*, 125 Cal. App.3d 1012, 178 Cal. Rptr. 477 (1981).

Double-Jointing Provision

SEC. 3. Section 1 of this act shall not become operative if Assembly Bill 1460 is enacted and becomes effective January 1, 1985, and repeals Section 5120 of the Civil Code.

Double-Jointing Provision

SEC. 4. Section 2 of this act shall be operative only if Assembly Bill 1460 is enacted and becomes effective January 1, 1985, and this bill is enacted after Assembly Bill 1460.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Awarding Temporary Use of Family Home

November 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Awarding Temporary Use of Family Home*, 17 Cal. L. Revision Comm'n Reports 261 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

November 4, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation deals with one aspect of the law governing an award of temporary use of the family home to the party having custody of minor children. The Commission recommends that a court making such an award be given authority to terminate the award in case of remarriage or cohabitation.

This recommendation is submitted pursuant to authority of 1983 Cal. Stats. res. ch. 40.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

AWARDING TEMPORARY USE OF FAMILY HOME

In a marriage dissolution, the court has authority to award temporary use of the family home to the party having custody of minor children in order to minimize the adverse impact of the dissolution on the welfare of the children.¹ The award delays the sale of the home and division of the proceeds during the period of the temporary use. Such an award of temporary use, sometimes called a *Duke* award,² is within the discretion of the court, weighing the economic, social, and emotional benefits of the award against the economic detriments to the party temporarily denied his or her share of the proceeds of the family home (which may be the only substantial asset of the marriage).³

Some family law commentators have argued in recent years that existing judicial authority to make a *Duke* award is not sufficiently strong or properly used.⁴ The Law Revision Commission has studied this area of the law and has come to the conclusion that existing court discretion to make a *Duke* award is generally satisfactory and that codification or statutory modification of the law, with one exception, would not serve a useful purpose. Broad court discretion is necessary because the economic, social, and

¹ See, e.g., *In re Marriage of Boseman*, 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973); *In re Marriage of Herrmann*, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978).

² After the case of *In re Marriage of Duke*, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980).

³ See, e.g., Cal. Assembly Comm. on Judiciary, Report on Assembly Bill No. 530 and Senate Bill No. 252 (The Family Law Act), 1 Assembly J. 785, 787 (Reg. Sess. 1970) ("Where an interest in a residence which serves as the home of the family is the major community asset, an order for the immediate sale of the residence in order to comply with the equal division mandate of the law would, certainly, be unnecessarily destructive of the economic and social circumstances of the parties and their children.").

⁴ See, e.g., Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1207 (1981); Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 775 (1982).

emotional circumstances of each marriage are different. Enactment of statutory standards might restrict the existing flexibility the court has to fashion an award that is appropriate under the circumstances of each case where such an award is justified.

The Commission's study has identified one aspect of existing law that requires statutory modification. Existing law improperly limits the court's discretion to modify or terminate a *Duke* award upon remarriage or cohabitation of the custodial spouse in the family home. One Court of Appeal decision holds that the court may retain jurisdiction to modify the award in the event of cohabitation of the custodial spouse to the extent the cohabitation is a change of *economic* circumstances of the parties.⁵ Another Court of Appeal decision holds that a court order automatically terminating a *Duke* award upon remarriage or cohabitation of the custodial spouse is improper regardless of the change of economic circumstances of the parties.⁶

It is important that the court have broad discretion to fashion an appropriate *Duke* award. The Commission recommends the court be given express statutory authority to include in a *Duke* award a provision that remarriage or cohabitation automatically terminates the award. Absent such a provision in the award, the court should have discretion to modify or terminate the award in case of remarriage or cohabitation. Remarriage or cohabitation may affect not only the economic circumstances of the parties but the emotional and social circumstances as well, including the circumstances of the non-custodial spouse; the court should be free to consider all these factors. The court may find, for example, that the presence of a third party in the home unduly increases domestic strife in an already emotionally difficult situation, that the presence of the third party constitutes a substantial change in the need of the family unit for protection, or simply that there is a decreased need for support because the third party is present. The court should have discretion to modify or terminate the *Duke* award to accommodate these and other circumstances that could arise.

⁵ *In re Marriage of Gonzales*, 116 Cal App.3d 556, 172 Cal. Rptr. 179 (1981).

⁶ *In re Marriage of Escamilla*, 127 Cal. App.3d 963, 179 Cal. Rptr. 842 (1982).

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

An act to amend Section 4801.5 of the Civil Code, relating to orders under the Family Law Act.

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

SECTION 1. Section 4801.5 of the Civil Code is amended to read:

4801.5. (a) Except as otherwise agreed to by the parties in writing, there shall be a rebuttable presumption, affecting the burden of proof, of decreased need for support if the supported party is cohabiting with a person of the opposite sex. Upon a determination that circumstances have changed, the court may modify the payment of support as provided for in subdivision (a) of Section 4801.

(b) For the purpose of this subdivision, "family home award" means an order that awards temporary use of the family home to the party having custody of minor children in order to minimize the adverse impact of dissolution or legal separation on the welfare of the children. Except as otherwise agreed to by the parties in writing, a family home award may be modified or terminated at any time at the discretion of the court, or the court in its discretion may include in the family home award a provision that the award terminates automatically, if the party awarded the temporary use of the family home cohabits with a person of the opposite sex or remarries. Except as provided in this subdivision, nothing in this subdivision affects existing law governing the authority of a court to make a family home award. This subdivision applies whether the family home award is made before or after January 1, 1985.

~~(b)~~ (c) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

~~(e)~~ (d) Nothing in this section ~~shall preclude~~ *precludes* later modification or termination of an award of temporary use of the family home or of support upon proof of change of circumstances.

Comment. Subdivision (b) is added to Section 4801.5 to cover one aspect of the case where the court exercises its authority to

delay immediate sale of the family home and award temporary use of the home to the party having custody of minor children in order to minimize the adverse impact of the dissolution on the welfare of the children. See, e.g., *In re Marriage of Boseman*, 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973); *In re Marriage of Herrmann*, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978). Such an award is sometimes called a *Duke* award after the case of *In re Marriage of Duke*, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980). Except as provided in subdivision (b), the existing case law governing the authority of the court to make a *Duke* award remains unchanged.

Subdivision (b) gives the court express statutory authority to include in a *Duke* award a provision that marriage or cohabitation automatically terminates the award. Under prior law, such a provision was held improper. *In re Marriage of Escamilla*, 127 Cal. App.3d 963, 179 Cal. Rptr. 842 (1982). Subdivision (b) leaves to the court's discretion whether to include an automatic termination provision in the *Duke* award. Absent an automatic termination provision in the award, the court is given discretion under subdivision (b) to modify or terminate the award in case of remarriage or cohabitation. The court has this authority under subdivision (b) whether or not it retains jurisdiction to modify or terminate the *Duke* award. Compare *In re Marriage of Gonzales*, 116 Cal. App.3d 556, 172 Cal. Rptr. 179 (1981) (court retained jurisdiction to modify award). Whether or not the award should be modified or terminated is a matter for the court's discretion.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Disposition of Community Property

September 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Disposition of Community Property*, 17 Cal. L. Revision Comm'n Reports 269 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

September 24, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Commission herewith submits its recommendation on one aspect of management and control of community property—limitations on disposition. The Commission recommends, among other changes, that a married person be permitted to make a unilateral gift of community personal property if usual or moderate (under the circumstances of the marriage) and to sell household goods and effects without the written consent of the person's spouse. The Commission also recommends that there be added to the law a provision enabling a married person to have his or her name added to title to community property.

This recommendation is made pursuant to 1983 Cal. Stats. res. ch. 40 (family law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

DISPOSITION OF COMMUNITY PROPERTY

Introduction

In 1975 California commenced a system of equal management and control of community property by married persons.¹ Under this system, either spouse may manage and control the community property,² subject to a duty of good faith to the other spouse³ and subject to a number of limitations on the ability of the spouse to control specific types of community property⁴ or to dispose of specific types of community property. This recommendation proposes clarifications of the community property law to implement the state policy of equal management and control with regard to disposition of community property.⁵

Real Property

Section 5127 requires joinder of both spouses for a disposition of community real property. This limitation on the right of either spouse to manage and control the community property was originally enacted in 1917 as a protection of the wife against the husband's then unilateral managerial powers.⁶

¹ 1973 Cal. Stats. ch. 987, operative January 1, 1975. See Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1974*, 24 U.C.L.A. L. Rev. 1 (1976).

² Civ. Code §§ 5125 (personal property) and 5127 (real property).

³ See discussion under "Duty of Good Faith," below.

⁴ See, e.g., Civil Code § 5125(d) (community property business operated or managed by spouse); Fin. Code § 851 (community property bank account in name of spouse); Prob. Code § 3051 (where spouse has conservator).

⁵ This is one aspect of the Law Revision Commission's general study of community property. As the Commission completes its work on management and control of community property the Commission may make additional recommendations relating to disposition.

⁶ 1917 Cal. Stats. ch. 583, § 2; see Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 U.C.L.A. L. Rev. 1, 53-56 (1976).

One effect of the joinder requirement is that title to both separate and community real property disposed of by a married person is clouded unless both spouses join in the disposition.⁷ The existing statute attempts to mitigate this problem by providing that if community property stands of record in the name of one spouse, a disposition of the property by that spouse alone is presumed valid as to a bona fide purchaser and an action to avoid the disposition must be commenced within one year after the disposition is recorded.⁸ As a protection against mismanagement by a spouse in whose name community property stands of record alone, the other spouse should have the right to have his or her name added to the title.⁹ This will help promote accurate land titles.

Personal Property

The general rule is that either spouse has absolute power of disposition over community personal property.¹⁰ This rule has generally worked well in practice. It is subject to a number of qualifications, however, that need refinement:

(1) **Gifts of personal property.** Prior to 1891 California followed the Spanish rule that a manager spouse may without consent of the other make reasonable gifts of community property.¹¹ In 1891 the law was revised to require the written consent of the wife to a gift by the husband. The 1891 anti-gift statute¹² became necessary because at that time the husband was considered the sole owner of community property, the wife's interest in the community property being a mere expectancy, and the wife needed the ability to protect the community property from depletion by gifts of the husband.¹³

⁷ E. Washburn, 1 *Ogden's Revised California Real Property Law* § 8.28A (Cal. Cont. Ed. Bar Supp. 1982); P. Basye, *Clearing Land Titles* § 60 (2d ed. 1970).

⁸ Civil Code § 5127.

⁹ See Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 *Hastings L.J.* 227, 280-81 (1982); Unif. Marital Prop. Act § 15 (1983).

¹⁰ Civil Code § 5125(a).

¹¹ See, e.g., *Lord v. Hough*, 43 Cal. 581 (1872).

¹² The statute is now codified as Civil Code Section 5125(b) and is applicable to gifts of community personal property by either spouse.

¹³ See discussion in W. Reppy, *Community Property in California* 191 (1980); Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1973*, 24 *U.C.L.A. L. Rev.* 1, 49-52 (1976).

The reasoning upon which the anti-gift legislation was based is no longer applicable. Both spouses own the community property in equal shares,¹⁴ and each may protect the property from dissipation by the other.¹⁵ Moreover, tips given waiters, waitresses, and others, offerings given at church, United Fund contributions, and other gifts are routinely made without thought of written consent by the other spouse. If a case were to arise involving such a gift the courts would undoubtedly find a ground to validate the gift, through ratification, waiver, implied consent, or other means.¹⁶ The law should clearly state the traditional community property rule that a spouse may make a gift of the community property without the written consent of the other spouse if the gift is usual or moderate in the circumstances of the particular marriage.¹⁷ This is consistent with the law in other community property jurisdictions.¹⁸

(2) **Household furnishings and personal effects.** Section 5125(c) of the Civil Code precludes a spouse from selling, conveying, or encumbering the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children that is community personal property, without the written consent of the other spouse. Like the other statutory limitations on the ability of a spouse to unilaterally dispose of community property, this provision had its origins in a time when the husband had management and control of the community property and the wife needed some protection against mismanagement.¹⁹

The written consent requirement for sale or conveyance of household furnishings and personal effects is unrealistic

¹⁴ Civil Code § 5105 (interests of husband and wife during marriage are present, existing, and equal).

¹⁵ Cf. Civil Code § 5125 (either spouse has management and control of community personal property).

¹⁶ See discussion in Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 *Hastings L.J.* 227, 239-40 (1982).

¹⁷ The requirement of written consent should likewise be inapplicable to a gift of community property between the spouses.

¹⁸ See, e.g., La. Civ. Code Ann. art. 2349 (West Supp. 1983); Unif. Marital Prop. Act § 6 (1983).

¹⁹ Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 *U.C.L.A. L. Rev.* 1, 52-53 (1976).

in an era of garage sales; it is unlikely that written consent will be sought for a sale of used furniture or clothing. The statute that requires written consent in effect permits a spouse to seek relief from a transfer of community personal property in nearly every case. Broadly applied, the statute would make it dangerous for a buyer to purchase any furniture or wearing apparel in a warehouse or shop without inquiring into marital status and authority.²⁰ This problem is compounded by the fact that a transfer without the written consent of the other spouse is void and not merely voidable. The result is that either spouse can rescind (possibly without the need to make restitution) and the transfer is not effective as to the transferor's interest even after the marriage has terminated by dissolution or death.²¹

The limitation on disposal of household furnishings and personal effects is unnecessary. Each spouse now has management and control of the community personal property and both should be able to protect their interests. This is particularly true in the case of household furnishings and personal effects—the very items to which the spouses are closest and with which they are most familiar. If one spouse mismanages property of this type, the other spouse will ordinarily be aware of the mismanagement and may take steps to procure compensation and to prevent further mismanagement.

One statutory protection that should be retained is the requirement of joinder for an encumbrance (other than a purchase money encumbrance) of household furnishings. Such a requirement would not affect peoples' ordinary dealing with property and would protect the innocent spouse from a harmful transaction that could occur without the knowledge of the innocent spouse.

(3) Documentary evidence of title to personal property. Title to community personal property may be evidenced by documents such as stock certificates or automobile registrations. Where this is the case, the spouse or spouses whose names are on the title documents should join in a transaction affecting the property,

²⁰ 7 B. Witkin, *Summary of California Law Community Property* § 68, at 5156 (8th ed. 1974).

²¹ *Dynan v. Gallinatti*, 87 Cal. App.2d 553, 197 P.2d 391 (1948); *W. Reppy*, *Community Property in California* 197 (1980).

notwithstanding the general rule that either spouse alone has absolute power of disposition. This will codify existing practice. Moreover, to protect against mismanagement by one spouse acting alone, the other should have the right to have his or her name added to the title.²²

Setting Aside a Disposition of Property

Despite the language of Civil Code Section 5127 that both spouses "must join" in a transaction involving community real property, this requirement has not been held to invalidate a transaction except during marriage, when it can be avoided by the nonjoining spouse.²³ After termination of marriage by dissolution or death the wife can set aside the husband's conveyance of community real property only as to her one-half interest.²⁴ The same rules apply to transactions involving community personal property, to transactions involving gifts, and to transactions made for consideration, even though different statutes are involved in each of these situations.²⁵

The reasons for these rules are rooted in the history of California community property law. From the beginning of the California community property system in 1849, the husband had the exclusive management and control of the community property and was considered to be the true owner of the property; the wife's interest was a "mere expectancy" to be realized only if she survived the termination of the marriage by death of her husband or by

²² See footnote 9, *supra*.

²³ During marriage the wife can set aside the husband's conveyance of community real property in toto. *E.g.*, *Britton v. Hammell*, 4 Cal.2d 690, 52 P.2d 221 (1935); *but see Mitchell v. American Reserve Insurance Co.*, 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage).

²⁴ *E.g.*, *Pretzer v. Pretzer*, 215 Cal. 659, 12 P.2d 429 (1932) (dissolution); *Dargie v. Patterson*, 176 Cal. 714, 169 P. 360 (1917) (death); *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933) (death).

²⁵ Civil Code § 5125; *e.g.*, *Lynn v. Herman*, 72 Cal. App.2d 614, 165 P.2d 54 (1946) (gift of personal property, wife recovers all during marriage); *Mathews v. Hamburger*, 36 Cal. App.2d 182, 97 P.2d 465 (1939) (transfer of personal property for consideration, wife recovers all during marriage); *Ballinger v. Ballinger*, 9 Cal.2d 330, 70 P.2d 629 (1937) (gift of personal property, wife recovers one-half after death of husband); *Gantner v. Johnson*, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969) (transfer of real and personal property for consideration, wife recovers one-half after death of husband); *but see Dynan v. Gallinatti*, 87 Cal. App.2d 553, 197 P.2d 391 (1948) (encumbrance of personal property, wife recovers all after death of husband). For a discussion of the cases, see Schwartz, *Gifts of Community Property: Need for Wife's Consent*, 11 U.C.L.A. L. Rev. 26 (1963).

dissolution of marriage.²⁶ The history of California community property can be viewed as an evolution from this position towards one of equality of the spouses, the major landmarks being the 1927 legislation declaring ownership of community property by the spouses as "present, existing and equal"²⁷ and the 1975 legislation giving either spouse the management and control of community property.²⁸ Within this broad progression of the law a series of smaller steps was taken to protect the interest of the wife from erosion by acts of the husband,²⁹ among them:

- 1891 Husband prohibited from making a gift of community property without wife's consent.
- 1901 Husband prohibited from encumbering or selling household furnishings without wife's written consent.
- 1917 Wife must join in any instrument whereby community realty is encumbered or conveyed.

In historical context it is clear why the courts have interpreted these apparent blanket requirements to provide that the wife may, during marriage, recover all community property conveyed in violation of the statutes but after termination of marriage by death or dissolution may recover only her one-half interest.³⁰ Since the husband

²⁶ Van Maren v. Johnson, 15 Cal. 308 (1860).

²⁷ Now Civil Code Section 5105.

²⁸ Civil Code §§ 5125, 5127. This history is chronicled in Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1973*, 24 U.C.L.A. L. Rev. 1 (1976).

²⁹ See Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 S. Cal. L. Rev. 977, 1053 (1975).

³⁰ Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935), states four reasons for this rule:

(1) If only one-half were recovered and that half were considered community property, the husband would retain control and could repeat his actions until a miniscule amount was left.

(2) If only one-half were recovered and that half were considered separate property of the wife, this would amount to a partition of the community during marriage by arbitrary act of the husband, contrary to public policy that allows division of the community only at termination of the marriage by dissolution or death or during marriage with the consent of both spouses.

(3) The cases allowing the wife to recover only one-half are based on the right of the husband to testamentary disposition of half, hence gifts before death are will substitutes; this reasoning does not apply in an ongoing marriage.

(4) If the wife could not recover the whole property during marriage the husband could impair the wife's right to receive a larger share of the community property at dissolution in case of adultery or extreme cruelty of the husband.

was the manager and controller, any conveyance he made was effective to bind his interest; the transaction was not void but only voidable by the non-joining wife. The husband has testamentary power over one-half the community property and is entitled to his share of the community property at dissolution of marriage; therefore, the husband's death or the dissolution of marriage has the effect of ratifying or validating the husband's transaction. The wife can thereafter recover only her one-half interest in the property.

The same basic principles should apply in an era of equal management and control to those types of dispositions for which joinder or consent is required. The law should make clear that a transaction in violation of a joinder or consent requirement is voidable.³¹ To give some assurance of transactional security, an action by a spouse to avoid a transaction for failure of joinder or consent should be limited to one year after the spouse had notice (actual or constructive) of the transaction or three years after the transaction was made, whichever occurs first.³² If the transaction is set aside during marriage, it should be set aside as to the interests of both spouses.³³ If the transaction is set aside after termination of marriage by dissolution or separation or by death, it should ordinarily be set aside only as to the interest of the spouse who did not join in or consent to the transaction. However, the court should have discretion to set aside the transaction as to all interests in special circumstances, such as where it is desirable to award the family home to the spouse who has custody of the children or as a probate homestead. In any case, the court should have authority to fashion an appropriate order that

³¹ This codifies general California law and overrules the contrary case of *Dynan v. Gallinatti*, 87 Cal. App.2d 553, 197 P.3d 391 (1948) (disposition void rather than voidable). Codification would not affect the equitable nature of the action to avoid a transaction, and equitable defenses such as estoppel would still be recognized in the action. See, e.g., *Mark v. Title Guar. & Trust Co.*, 122 Cal. App. 301, 9 P.2d 839 (1932).

³² This limitation period is consistent with existing law. See Civil Code § 5127 (one year for action to avoid a disposition of real property); Code Civ. Proc. § 338 (three years for recovery of personal property).

³³ This codifies general California law and overrules the contrary case of *Mitchell v. American Reserve Ins. Co.*, 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage). See, e.g., *Andrade Development Co. v. Martin*, 138 Cal. App.3d 330, 187 Cal. Rptr. 863 (1982) (*Mitchell* case irreconcilable).

may, for example, require restitution for the person to whom the transaction was made or provide for recovery of the value of the property rather than the property.³⁴

In addition to the limitation period for bringing an action to avoid a disposition made without the required joinder or consent, existing law seeks to achieve transactional security by validating a real property disposition by a spouse acting alone in whose name real property title stands, if made to a person in good faith, for value, without knowledge of the marriage relation.³⁵ The policy that supports this rule applies equally to cases involving personal property where documents appear to vest title in one spouse alone and a disposition of the personal property is made to a bona fide purchaser or encumbrancer for value without knowledge of the marriage relation. In such a situation the bona fide purchaser or encumbrancer who reasonably relied on apparent title should be protected against avoidance of the transaction; this would not preclude the aggrieved spouse from seeking recompense in an appropriate case from the other spouse at dissolution of marriage or otherwise.

Duty of Good Faith

Another limitation on the freedom of either spouse to manage and control community property and on the spouse's power of disposition is the duty of each spouse to act in good faith with respect to the other spouse in the management and control of the community property.³⁶ Prior to adoption in 1975 of equal management and control and the corresponding duty of good faith, California law

³⁴ Setting aside the disposition should not be the exclusive remedy for a disposition made without the joinder or consent of a spouse. It may be proper in a dissolution case, for example, simply to allow one spouse an offset out of the share of the other spouse for the value of the property disposed of, or to give the spouse a right of reimbursement.

³⁵ The disposition is presumed valid in such a situation. Section 5127. It is unclear whether the presumption is conclusive or rebuttable. Compare *Rice v. McCarthy*, 73 Cal. App. 655, 239 P. 56 (1925) (presumption conclusive) with *Mark v. Title Guaranty & Trust Co.*, 122 Cal. App. 301, 9 P.2d 839 (1932). See discussions in Marsh, *Property Ownership During Marriage*, in 1 *The California Family Lawyer* § 4.34 (Cal. Cont. Ed. Bar 1961) and 2 H. Miller & M. Starr, *Current Law of California Real Estate* § 13:31 (rev. 1977). The language of "presumption" should be replaced with a clear statement of the rule that such a disposition may not be set aside as to a bona fide purchaser or encumbrancer but is subject to remedial action between the spouses.

³⁶ Civil Code § 5125(e).

analogized the management duties between spouses to the law governing the relations of fiduciaries or partners.³⁷

The duty of good faith is more appropriate to California's current scheme of equal management and control than the fiduciary standards applicable before 1975, when the husband had sole management and control of the community property. Since either spouse may now manage and control the community assets, the good faith standard that the spouse have no fraudulent intent supersedes the older standards.³⁸

The proposed law continues without change the duty of good faith. This codifies pre-1975 law to the extent the prior law precluded a spouse managing and controlling community property from obtaining an unfair advantage over the other spouse.³⁹ But it does not impose a fiduciary standard that the spouse be as prudent as a trustee or keep complete and accurate records of income received and disbursed.⁴⁰

Recommended Legislation

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

An act to amend Sections 5106 and 5113.5 of, to add Chapter 4 (commencing with Section 5125.110) to Title 8 of Part 5 of Division 4 of, and to repeal Sections 5125, 5127, and 5128 of, the Civil Code, to amend Section 420 of the Corporations Code, to amend Section 24603 of the Education Code, to amend Section 21210 of the Government Code, to amend Section 10172 of the

³⁷ Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 Hastings L.J. 227, 236-37 (1982).

³⁸ Reppy, *Retroactivity of the 1975 California Community Property Reform*, 48 S. Cal. L. Rev. 977, 1013-22 (1975); Comment, *Toward True Equality: Reforms in California's Community Property Law*, 5 Golden Gate L. Rev. 407 (1975); Comment, *California's New Community Property Law—Its Effect on Interspousal Mismanagement Litigation*, 5 Pac. L.J. 723 (1974).

³⁹ See, e.g., *Weinberg v. Weinberg*, 67 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967) (duty not to take unfair advantage); *Vai v. Bank of America*, 56 Cal.2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961) (duty to account during property settlement negotiations); *Fields v. Michael*, 91 Cal. App.2d 443, 205 P.2d 402 (1949) (duty not to fraudulently dispose of community property); *Provost v. Provost*, 102 Cal. App. 775, 283 P. 842 (1929) (duty not to appropriate funds for improvement of separate property).

⁴⁰ See *Williams v. Williams*, 14 Cal. App.3d 560, 92 Cal. Rptr. 385 (1971) (dictum).

Insurance Code, and to amend Sections 3071, 3072, and 3073 of the Probate Code, relating to community property.

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

Civil Code § 5106 (technical amendment). Employee benefit or savings plan

SECTION 1. Section 5106 of the Civil Code is amended to read:

5106. ~~(a)~~ Notwithstanding the provisions of Section 5105 and 5125, whenever any other provision of this title:

(a) Whenever payment or refund is made to a participant or ~~his~~ *the participant's* beneficiary or estate pursuant to a written employee benefit plan governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended, ~~such~~ *the* payment or refund shall fully discharge the employer and any administrator, fiduciary or insurance company making ~~such~~ *the* payment or refund from all adverse claims thereto unless, before ~~such~~ *the* payment or refund is made, the administrator of ~~such~~ *the* plan has received at its principal place of business within this state, written notice by or on behalf of some other person that ~~such~~ *the* other person claims to be entitled to ~~such~~ *the* payment or refund or ~~some~~ part thereof. Nothing ~~contained~~ in this section shall affect ~~subdivision~~ *affects* any claim or right to any such payment or refund or part thereof as between all persons other than the employer and the fiduciary or insurance company making ~~such~~ *the* payment or refund. The terms "participant", "beneficiary", "employee benefit plan", "employer", "fiduciary" and "administrator" shall have the same meaning as provided in Section 3 of the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended.

(b) ~~Notwithstanding the provisions of Sections 5105 and 5125, whenever~~ *Whenever* payment or refund is made to an employee, former employee or ~~his~~ *the* beneficiary or estate ~~of the employee or former employee~~ pursuant to a written retirement, death or other employee benefit plan or savings plan, other than a plan governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as

amended, ~~such~~ *the* payment or refund shall fully discharge the employer and any trustee or insurance company making such payment or refund from all adverse claims thereto unless, before ~~such~~ *the* payment or refund is made, the employer or former employer has received at its principal place of business within this state, written notice by or on behalf of some other person that ~~such~~ *the* other person claims to be entitled to ~~such~~ *the* payment or refund or some part thereof. Nothing ~~contained~~ in this section shall ~~affect~~ *subdivision affects* any claim or right to ~~any~~ *such* ~~the~~ payment or refund or part thereof as between all persons other than the employer and the trustee or insurance company making such payment or refund.

Comment. The amendments to Section 5106 are technical.

Civil Code § 5113.5 (technical amendment). Certain trust property remains community property

SEC. 2. Section 5113.5 of the Civil Code is amended to read:

5113.5. Where community property, before or after the effective date of this section, is transferred by the husband and wife to a trust, regardless of the identity of the trustee, which trust originally or as amended prior or subsequent to such transfer (a) is revocable in whole or in part during their joint lives, (b) provides that the property after transfer to the trust shall remain community property and any withdrawal therefrom shall be their community property, (c) grants the trustee during their joint lives powers no more extensive than those possessed by a husband or wife under ~~Sections 5125 and 5127~~ *Chapter 4 (commencing with Section 5125.110)*, and (d) is subject to amendment or alteration during their joint lifetime upon their joint consent, the property so transferred to such trust, and the interests of the spouses in such trust, shall be community property during the continuance of the marriage, unless the trust otherwise expressly provides. Nothing in this section shall be deemed to affect community property which, before or after the effective date of this section, is transferred in a manner other than as described in this section or to a trust containing different

provisions than those set forth in this section; nor shall this section be construed to prohibit the trustee from conveying any trust property, real or personal, in accordance with the provisions of the trust without the consent of the husband or wife unless the trust expressly requires the consent of one or both spouses.

Comment. Section 5113.5 is amended to correct section references.

Civil Code § 5125 (repealed). Management and control of community personal property

SEC. 3. Section 5125 of the Civil Code is repealed.

~~5125. (a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.~~

~~(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.~~

~~(c) A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.~~

~~(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.~~

~~(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.~~

Comment. The substance of subdivision (a) of former Section 5125 is continued in Sections 5125.120 (either spouse has management and control) and 5125.210 (power of disposition absolute).

The substance of subdivision (b) is continued in Section 5125.240(a) (gifts). Subdivision (c) is superseded by Sections 5125.250 (disposition of family dwelling) and 5125.260 (encumbrance of household goods).

The substance of subdivision (d) is continued in Section 5125.140 (community property business). The substance of subdivision (e) is continued in Section 5125.130 (duty of good faith).

Civil Code §§ 5125.110-5125.299 (added)

SEC. 4. Chapter 4 (commencing with Section 5125.110) is added to Title 8 of Part 5 of Division 4 of the Civil Code to read:

CHAPTER 4. MANAGEMENT AND CONTROL

Article 1. General Provisions

§ 5125.110. Definitions

5125.110. Unless the provision or context otherwise requires, as used in this chapter:

(a) "Disposition" includes, but is not limited to, a transfer, conveyance, sale, gift, encumbrance, or lease.

(b) "Management and control" includes disposition.

(c) "Property" means real and personal property and any interest therein.

Comment. Subdivision (a) of Section 5125.110 makes clear that the term "disposition" is used in a broad sense and is not limited to a sale of the property. Subdivision (b) is included for drafting convenience. Subdivision (c) reflects the fact that real and personal property are treated the same in this chapter, except in special cases. A reference to community property means any interest in the property, including the interests of either spouse in the property.

§ 5125.120. Either spouse has management and control

5125.120. Except as otherwise provided by statute, either spouse has the management and control of the community property.

Comment. Section 5125.120 continues the substance of the first portions of former Sections 5125(a) (personal property) and

5127 (real property). It applies to all community property, whether acquired before or on or after January 1, 1975, the date of inception of equal management and control. This chapter contains exceptions to and limitations on the rule of Section 5125.120. See also Section 5113.5 (management and control of community property by trustee), Fin. Code § 851 (management and control of community property bank account by spouse in whose name account stands). Exceptions and limitations may also be found in a marital property agreement between the spouses.

§ 5125.130. Duty of good faith

5125.130. Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

Comment. Section 5125.130 continues the substance of former Section 5125(e). Special provisions of this chapter relating to management and control are subject to the overriding duty of good faith, which applies notwithstanding any implication in any provision of this chapter to the contrary. See, e.g., Section 5125.210 and Comment thereto (power of disposition absolute); see also Section 5125.110(b) (“management and control” includes disposition). The duty of good faith arises out of the confidential relationship of the spouses; it does not impose a standard of conduct that would be applicable to a fiduciary in an investment context. Section 5103 (confidential relationship); *cf.* *Williams v. Williams*, 14 Cal. App.3d 560, 92 Cal Rptr. 385 (1971) (dictum); see also Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 S. Cal. L. Rev. 977, 1013-22 (1975); Comment, *Toward True Equality: Reforms in California’s Community Property Law*, 5 Golden Gate L. Rev. 407 (1975) (subjective rather than objective standard of good faith would more appropriately fulfill legislative intent).

§ 5125.140. Community property business

5125.140. A married person who is operating or managing a business or an interest in a business that is community property has the sole management and control of the business or interest.

Comment. Section 5125.140 continues the substance of former Section 5125(d).

§ 5125.150. Where married person has conservator or lacks legal capacity

5125.150. Where a married person either has a conservator of the estate or lacks legal capacity to manage and control community property, the procedure for management and control of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

Comment. Section 5125.150 continues subdivision (a) of former Section 5128. Subdivisions (b) and (c) of former Section 5128 were elaborations of subdivision (a) and are not continued because they are unnecessary. See Section 5125.110(b) (“management and control” includes disposition).

§ 5125.160. Agency

5125.160. A spouse may act by duly authorized agent in the management and control of community property, and may appoint the other spouse to act as agent.

Comment. Subdivision (a) of Section 5125.160 generalizes a provision of former Section 5127 (real property joinder requirement may be satisfied by duly authorized agent).

§ 5125.170. Adding name to title to property

5125.170. (a) A married person in whose name record title or other documentary evidence of title to community property stands shall, upon request of the person’s spouse, add the spouse’s name to the title.

(b) This section does not apply to community property that is subject to the sole management and control of the married person pursuant to Section 5125.140.

Comment. Section 5125.170 implements the right of either spouse to exercise management and control of community property. See Section 5125.120 (either spouse has management and control). Where title to property stands in the names of both spouses, both must join in a disposition. Section 5125.220 (person in whose name title stands must join). The right to have name added to title to property does not extend to a community property business operated by one spouse. Section 5125.140 (community property business). The right provided in this section is enforceable by court order. Section 4351 (jurisdiction of superior court to settle property rights).

Article 2. Disposition of Community Property

§ 5125.210. Power of disposition absolute

5125.210. (a) Subject to the limitations provided in this article, each spouse has absolute power of disposition, other than testamentary, of community property of which that spouse has management and control, and may make a disposition of the property without the joinder or consent of the other spouse.

(b) The limitations provided in this article do not apply to a disposition of community property between the spouses.

Comment. Subdivision (a) of Section 5125.210 continues the substance of the last portion of former Section 5125(a), which gave either spouse absolute power of disposition of community personal property. Subdivision (a) is subject to exceptions stated in this article, including the requirement of joinder for disposition of community real property. Section 5125.230 (disposition of real property). In addition to the specific limitations on the power of disposition provided in this article, a spouse is subject to the overriding requirement of good faith in the management and control of the community property. Section 5125.130. For the power of testamentary disposition of community property, see Probate Code Section 6101.

Subdivision (b) is drawn from former Section 5127. The validity and effect of a disposition between spouses is governed by law other than this article. The limitations in this article may also be subject to a marital property agreement.

§ 5125.220. Person in whose name title stands must join

5125.220. (a) Except as provided in subdivision (b), each spouse in whose name record title or other documentary evidence of title to community property stands must join in a disposition of the property.

(b) If record title or other documentary evidence of title to community property stands in the names of both spouses in the alternative, either spouse may make a disposition of the property without the joinder of the other spouse.

Comment. Subdivision (a) of Section 5125.220 codifies practice under former law. Subdivision (a) governs community property, including community property in joint tenancy form.

It should be noted that a married person may have his or her name added to community property title. Section 5125.170.

Subdivision (b) makes clear that the joinder requirement is subject to an express direction in the title of alternative rights.

§ 5125.230. Disposition of real property

5125.230. Both spouses must join in a disposition of community real property.

Comment. Section 5125.230 continues the substance of a portion of former Section 5127.

§ 5125.240. Gifts

5125.240. (a) Except as provided in subdivision (b), a spouse may not make a gift of community personal property or make a disposition of the property without a valuable consideration, without the written consent of the other spouse.

(b) A spouse may make a gift of community personal property, or make a disposition of community personal property without a valuable consideration, without the written consent of the other spouse, if the gift or disposition is usual or moderate, taking into account the circumstances of the case.

Comment. Subdivision (a) of Section 5125.240 continues the substance of former Section 5125(b).

Subdivision (b) is new. It is drawn from comparable provisions in other jurisdictions and is consistent with the traditional community property rule applicable in California prior to 1891. See, e.g., La. Civ. Code Ann. art. 2349 (West Supp. 1983) (usual or moderate gifts of value commensurate with economic status of spouses); *Lord v. Hough*, 43 Cal. 581 (1872) (manager spouse may without consent of the other make reasonable gifts of community property). In making a determination after the death of the donor spouse whether a gift is usual or moderate the court should take into account such factors as amounts received by the other spouse by will, succession, gift, or other disposition, including insurance proceeds, joint tenancy, and inter vivos and testamentary trusts, and any special or unique character of the community personal property given.

§ 5125.250. Disposition of family dwelling

5125.250. A spouse may not make a disposition of a community personal property family dwelling without the written consent of the other spouse.

Comment. Section 5125.250 continues the substance of a portion of former Section 5125(c).

§ 5125.260. Encumbrance of household goods

5125.260. (a) A married person may not create a security interest in the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the person's spouse or minor children, that is community property without the written consent of the person's spouse.

(b) This section does not apply to the creation of a purchase money security interest.

Comment. Section 5125.260 supersedes former Section 5125(c). Written consent is no longer required for a sale of community property household furnishings and clothing.

§ 5125.270. Avoiding and setting aside disposition

5125.270. (a) A disposition of community property by a married person made without the joinder or consent of the person's spouse required by this article is voidable upon order of the court in an action commenced by the spouse before the earlier of the following times:

(1) One year after the spouse had actual or constructive notice of the disposition.

(2) Three years after the disposition was made.

(b) Subject to such terms and conditions or other remedy as appears equitable under the circumstances of the case, taking into account the rights of all the parties:

(1) A court order pursuant to subdivision (a) made during marriage shall set aside the disposition of community property as to the interests of both spouses.

(2) A court order pursuant to subdivision (a) made after termination of marriage by dissolution or legal separation or by death shall set aside the disposition of community property as to the interest of the spouse who did not join or consent and may, in the discretion of the court, set aside the disposition as to the interests of both spouses.

(c) The sole disposition of community property by a married person in whose name record title or other documentary evidence of title stands alone is not voidable pursuant to this section if made to a person in good faith for value without knowledge of the marriage relation.

(d) Nothing in this section affects any remedy a married person may have against the person's spouse for a disposition of community property made without the joinder or consent required by this article.

Comment. Subdivision (a) of Section 5125.270 makes clear that a disposition in violation of the joinder and consent requirements of this article is voidable rather than void. This codifies general California law and overrules the contrary case of *Dynan v. Gallinatti*, 87 Cal. App.2d 553, 197 P.2d 391 (1948) (disposition void). Although subdivision (a) codifies the action to avoid a disposition, the action remains equitable in nature and equitable defenses such as estoppel may still be recognized. See, e.g., *Mark v. Title Guar. & Trust Co.*, 122 Cal. App. 301, 9 P.2d 839 (1932). Subdivision (a) also imposes a statutory limitation period on an action to avoid the disposition, consistent with prior law. See former Section 5127 (one year for action to avoid a disposition of real property); Code Civ. Proc. § 338 (three years for recovery of personal property).

Subdivision (b) codifies general California law that a disposition avoided during marriage must be set aside as to the interests of both spouses, not just as to the interest of the non-joining or non-consenting spouse. See, e.g., *Britton v. Hammell*, 4 Cal.2d 690, 52 P.2d 221 (1935) (community real property); *Lynn v. Herman*, 72 Cal. App.2d 614, 165 P.2d 54 (1946) (gift); *Mathews v. Hamburger*, 36 Cal. App.2d 182, 97 P.2d 465 (1939) (personal property); *Andrade Development Co. v. Martin*, 138 Cal. App.3d 330, 187 Cal. Rptr. 863 (1982) (contract to convey real property). This overrules *Mitchell v. American Reserve Ins. Co.*, 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (setting aside disposition of non-joining spouse's interest in family home during marriage). Where a disposition is set aside after termination of marriage by dissolution, separation, or death, the court will in the usual case set aside the disposition only as to the non-joining or non-consenting spouse so as to effectuate the disposition as to the interest of the spouse who made the disposition. See, e.g., *Pretzer v. Pretzer*, 215 Cal. 659, 12 P.2d 429 (1932) (community real property after dissolution); *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933) (community real

property after death); *Ballinger v. Ballinger*, 9 Cal.2d 330, 70 P.2d 629 (1937) (community personal property after death); *Gantner v. Johnson*, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969) (community real and personal property after death). However, paragraph (2) of subdivision (b) does not mandate this result and recovery of the whole property may be proper in a case, for example, where it is desirable to award property such as a family home to the spouse who has custody of the children or as a probate homestead.

Under subdivision (b) the court has discretion to fashion an appropriate order, depending on the circumstances of the case. The order may, for example, require restitution for the person to whom the disposition was made, or provide for recovery of the value of the property instead of the property.

Subdivision (c) supersedes the presumption of validity of former Section 5127 and extends it to personal as well as real property. Subdivision (c) adopts the construction of this provision given by *Rice v. McCarthy*, 73 Cal. App. 655, 239 P. 56 (1925).

Subdivision (d) makes clear that this section does not provide the exclusive remedy where a spouse has made a disposition of community property without the joinder or consent of the other spouse. It may be proper in a dissolution case, for example, simply to allow one spouse an offset for the value of the property disposed of out of the share of the other spouse, or to give the spouse a right of reimbursement.

§ 5125.299. Transitional provisions

5125.299. (a) This article applies to a disposition of community property made on or after January 1, 1985, regardless whether the property was acquired before, on, or after January 1, 1985.

(b) A disposition of community property made before January 1, 1985, is governed by the law in effect at the time of the disposition.

(c) A reference to, or an incorporation by reference of, former Section 5125 or 5127 in a trust or other instrument executed before January 1, 1985, shall, on or after January 1, 1985, be deemed to refer to or incorporate this article.

Comment. Section 5125.299 makes clear that enactment of this article is not intended to validate or invalidate any disposition made before its enactment; such a disposition is governed by former law.

Civil Code § 5127 (repealed). Management and control of community real property

SEC. 5. Section 5127 of the Civil Code is repealed.

5127. Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and that the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

Comment. The substance of former Section 5127 is continued in Sections 5125.120 (either spouse has management and

control), 5125.160 (agency), 5125.230 (disposition of real property), and 5125.210 (disposition between spouses). See also Section 5125.270 (avoiding and setting aside disposition).

Civil Code § 5128 (repealed). Management and control of community property of incompetent persons

SEC. 6. Section 5128 of the Civil Code is repealed.

~~5128. (a) Where one or both of the spouses either has a conservator of the estate or lacks legal capacity to manage and control community property; the procedure for management and control (which includes disposition) of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.~~

~~(b) Where one or both spouses either has a conservator of the estate or lacks legal capacity to give consent to a gift of community personal property or a disposition of community personal property without a valuable consideration as required by Section 5125 or to a sale, conveyance, or encumbrance of community personal property for which a consent is required by Section 5125, the procedure for such gift, disposition, sale, conveyance, or encumbrance is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.~~

~~(c) Where one or both spouses either has a conservator of the estate or lacks legal capacity to join in executing a lease, sale, conveyance, or encumbrance of community real property or any interest therein as required by Section 5127, the procedure for such lease, sale, conveyance, or encumbrance is that prescribed in part 6 (commencing with Section 3000) of Division 4 of the Probate Code.~~

Comment. Subdivision (a) of former Section 5128 is continued in Section 5125.150 (where spouse has conservator or lacks capacity). Subdivisions (b) and (c) were elaborations of subdivision (a) and are not continued because they are unnecessary.

Corporations Code § 420 (technical amendment).

Immunity from liability of corporation, transfer agent, or registrar

SEC. 7. Section 420 of the Corporations Code is amended to read:

420. Neither a domestic nor foreign corporation nor its transfer agent or registrar is liable:

(a) For transferring or causing to be transferred on the books of the corporation to the surviving joint tenant or tenants any share or shares or other securities issued to two or more persons in joint tenancy, whether or not the transfer is made with actual or constructive knowledge of the existence of any understanding, agreement, condition or evidence that the shares or securities were held other than in joint tenancy or of a breach of trust by any joint tenant.

(b) To a minor or incompetent person in whose name shares or other securities are of record on its books or to any transferee of or transferor to either for transferring the shares or other securities on its books at the instance of or to the minor or incompetent or for the recognition of or dealing with the minor or incompetent as a shareholder or security holder, whether or not the corporation, transfer agent or registrar had notice, actual or constructive, of the nonage or incompetency, unless a guardian or conservator of the property of the minor or incompetent has been appointed and the corporation, transfer agent or registrar has received written notice thereof.

(c) To any married person or to any transferee of such person for transferring shares or other securities on its books at the instance of the person in whose name they are registered, without the signature of such person's spouse and regardless of whether the registration indicates that the shares or other securities are community property, in the same manner as if such person were unmarried.

(d) For transferring or causing to be transferred on the books of the corporation shares or other securities pursuant to a judgment or order of a court which has been set aside, modified or reversed unless, prior to the registration of the transfer on the books of the corporation, written notice is served upon the corporation or its transfer agent in the manner provided by law for the service of a summons in a civil action, stating that an appeal or other further court proceeding has been or is to be taken from or with regard to such judgment or order. After the service of such notice neither the corporation nor its transfer agent has any duty

to register the requested transfer until the corporation or its transfer agent has received a certificate of the county clerk of the county in which the judgment or order was entered or made, showing that the judgment or order has become final.

(e) The provisions of the California Commercial Code shall not affect the limitations of liability set forth in this section. ~~Section 5125~~ *Chapter 4 (commencing with Section 5125.110) of Title 8 of Part 5 of Division 4* of the Civil Code shall be subject to the provisions of this section and shall not be construed to prevent transfers, or result in liability to the corporation, transfer agent or registrar permitting or effecting transfers, which comply with this section.

Comment. Section 420 is amended to correct a section reference.

Education Code § 24603 (technical amendment). State Teachers' Retirement System

SEC. 8. Section 24603 of the Education Code is amended to read:

24603. (a) Payment pursuant to the board's determination in good faith of the existence, identity or other facts relating to entitlement of persons constitutes a complete discharge of and release of the system from liability for the payment so made.

(b) Notwithstanding the provisions of ~~Sections 5105 and 5125~~ *Title 8 (commencing with Section 5100) of Part 5 of Division 4* of the Civil Code relating to community property interests, whenever payment or refund is made by this system to a member, former member, beneficiary of a member or estate of a member pursuant to any provision of this part, the payment shall fully discharge the system from all adverse claims thereto unless, before payment is made, the system has received at its office in Sacramento written notice of adverse claim.

Comment. The amendments to Section 24603 are technical.

Government Code § 21210 (technical amendment). Public Employees' Retirement Law

SEC. 9. Section 21210 of the Government Code is amended to read:

21210. Notwithstanding the provisions of ~~Sections 5105 and 5125~~ *Title 8 (commencing with Section 5100) of Part 5 of Division 4* of the Civil Code, whenever payment or refund is made by this system to a member, former member, beneficiary of a member or estate of a member pursuant to any provision of this part, ~~such the~~ payment shall fully discharge this system from all adverse claims thereto unless, before ~~such the~~ payment or refund is made, this system has received at its office in Sacramento written notice by or on behalf of some other person that ~~such the~~ person claims to be entitled to ~~such the~~ payment or refund.

Comment. The amendments to Section 21210 are technical.

Insurance Code § 10172 (technical amendment). Life insurance

SEC. 10. Section 10172 of the Insurance Code is amended to read:

10172. Notwithstanding the provisions of ~~Sections 5105 and 5125~~ *Title 8 (commencing with Section 5100) of Part 5 of Division 4* of the Civil Code, when the proceeds of, or payments under, a life insurance policy become payable and the insurer makes payment thereof in accordance with the terms of the policy, or in accordance with the terms of any written assignment thereof if the policy has been assigned, ~~such the~~ payment shall fully discharge the insurer from all claims under ~~such the~~ policy unless, before such payment is made, the insurer has received, at its home office, written notice by or on behalf of some other person that ~~such the~~ other person claims to be entitled to ~~such the~~ payment or ~~some an~~ interest in the policy.

Comment. The amendments to Section 10172 are technical.

Probate Code § 3071 (technical amendment). Satisfaction of joinder or consent requirement where spouse lacks legal capacity

SEC. 11. Section 3071 of the Probate Code is amended to read:

3071. (a) In case of a transaction for which the joinder or consent of both spouses is required by ~~Section 5125 or 5127~~ *Article 2 (commencing with Section 5125.210) of Chapter 4 of Title 8 of Part 5 of Division 4* of the Civil Code or by any other statute, if one or both spouses lacks legal capacity for the transaction, the requirement of joinder or consent shall be satisfied as provided in this section.

(b) Where one spouse has legal capacity for the transaction and the other spouse has a conservator, the requirement of joinder or consent is satisfied if both of the following are obtained:

(1) The joinder or consent of the spouse having legal capacity.

(2) The joinder or consent of the conservator of the other spouse given in compliance with Section 3072.

(c) Where both spouses have conservators, the joinder or consent requirement is satisfied by the joinder or consent of each such conservator given in compliance with Section 3072.

(d) In any case, the requirement of joinder or consent is satisfied if the transaction is authorized by an order of court obtained in a proceeding pursuant to Chapter 3 (commencing with Section 3100).

Comment. Section 3071 is amended to correct section references.

Probate Code § 3072 (technical amendment). Joinder or consent by conservator

SEC. 12. Section 3072 of the Probate Code is amended to read:

3072. (a) Except as provided in subdivision (b), a conservator may join in or consent to a transaction under Section 3071 only after authorization by either of the following:

(1) An order of the court obtained in the conservatorship proceeding upon a petition filed pursuant

to Section 2403 or under Article 7 (commencing with Section 2540) or 10 (commencing with Section 2580) of Chapter 6 of Part 4.

(2) An order of the court made in a proceeding pursuant to Chapter 3 (commencing with Section 3100).

(b) A conservator may ~~consent~~ *join* without court authorization ~~to a sale, conveyance, or encumbrance of in the creation of a security interest in~~ community personal property requiring ~~consent under subdivision (e) of Section 5125~~ *joinder under Section 5125.260* of the Civil Code if the conservator could sell or transfer such property under Section 2545 without court authorization if the property were a part of the conservatorship estate.

Comment. Section 3072 is amended to correct a section reference.

Probate Code § 3073 (technical amendment). Manner of joinder or consent

SEC. 13. Section 3073 of the Probate Code is amended to read:

3073. (a) The joinder or consent under Section 3071 of a spouse having legal capacity shall be in such manner as complies with ~~Section 5125 or 5127~~ *Article 2 (commencing with Section 5125.210) of Chapter 4 of Title 8 of Part 5 of Division 4* of the Civil Code or other statute that applies to the transaction.

(b) The joinder or consent under Section 3071 of a conservator shall be in the same manner as a spouse would join in or consent to the transaction under the statute that applies to the transaction except that the joinder or consent shall be executed by the conservator and shall refer to the court order, if one is required, authorizing the conservator to join in or consent to the transaction.

Comment. Section 3073 is amended to correct section references.