#F-610/611 11/17/81

Memorandum 81-78

Subject: Study F-610/611 - Community Property (Goodwill and Enhanced Earning Capacity)

Attached to this memorandum is a copy of the second part of the community property study produced for the Commission by its consultant, Professor Carol S. Bruch, entitled The Definition and Division of Marital Property in California: Toward Parity and Simplicity. You should preserve your copy of the study because we will be taking up selected issues addressed by the study at future meetings.

For the December, 1981, meeting we have asked interested persons for comments on the portions of the study dealing with goodwill and enhanced earning capacity; these portions appear primarily at pages 57 to 71. We have received comments from the Standing Property Committee (North) of the Family Law Section of the California Bar Association (Exhibit 1), the Standing Property Committee (South) (Exhibit 2), Professor Paul J. Goda (Exhibit 3), and the Commission's consultant Professor William A. Reppy, Jr. (Exhibit 4). We have also received a proposal from Equity in the Family relating to enhanced earning capacity (Exhibit 5).

Goodwill

A business or professional practice ordinarily has associated with it a value that exceeds the value of the tangible and intangible assets of the business or practice. This added value is an expectation of continued patronage that arises from a variety of factors, such as the location of the business or practice and the reputation of the person running it. It is sometimes referred to as the "going-concern" value or more commonly the "goodwill" of the business or practice.

In the case of a community property business or professional practice the goodwill of the business or practice is community property just as are the other tangible and intangible assets of the business or practice. Because community property must be divided equally between the spouses at dissolution of marriage, the goodwill must also be "divided." This means in effect that the goodwill must be valued and awarded to the spouse managing the business or conducting the practice, and a comparable amount of other community property must be awarded to the other spouse.

There is no easy method for valuing goodwill; each case must be determined on its own facts. There are a number of approaches used, including: (1) Gross income multiplier. Average gross earnings are multiplied by a factor determined by the particular type of business or practice. (2) Capitalized excess earnings. Excess of average annual net earnings over amount earned by comparable salaried employee, capitalized and discounted. (3) Comparable sales. Market data for sale of a business or practice of that type, if available. None of these, or other possible valuation methods, is proper for all types of businesses or practices, and the court has great latitude in what it will and will not permit in a particular case.

As a consequence of this situation, in dissolution cases where goodwill is involved there is a complex litigation issue that requires expert testimony (and expert witness fees) consumes court time, and runs up litigation costs and attorney's fees. The result of the extended litigation is not necessarily an accurate valuation of the goodwill, however. Courts are conservative in valuing goodwill because it is speculative, because the spouse being awarded the goodwill may also be required to provide spousal or child support, and because it may seem unfair to award one spouse all the tangible assets of the community while leaving the other spouse impoverished with an intangible asset that may not be salable. In fact, there is some evidence that the courts simply find the value of the goodwill to be "exactly equal" to the amount necessary to arrive at an equal division of community property. Gold, Norton, & Ross, Special Problems of Property Division: the Family Residence, Pension Benefits, the Small Business or Professional Practice, 1 California Marital Dissolution Practice § 9.64 (1981). Professor Bruch states at page 61 of her study: "There is reason to believe that the current ad hoc practice is also embraced by the bench and bar for pragmatic rather than doctrinal reasons. One often hears, 'We know how much the goodwill is worth; it's worth the equity in the house.' If, as this comment suggests, goodwill serves as a safety valve that permits equitable results in some cases, the problem appears to be that the valve is not equally available to those without professions or businesses."

Professor Bruch concludes that greater certainty as to valuation is called for. She suggests that, in cooperation with accountants, we

develop statutory formulae for major classes of business that would control absent a showing of extraordinary circumstances. "The benefits in reduced litigation expenses and increased uniformity would outweigh the theoretical possibility of less precise results in individual cases."

Professor Goda believes statutory formulae "would truly simplify the process" and is in agreement with Professor Bruch's suggestion. The State Bar Committee (North) is concerned with the significance, magnitude, and comprehensive considerations involved in the suggestion, feels that it would require a great deal of study and time, and recommends that the issue be deferred for further study. The State Bar Committee (South) recommends that existing law not be changed in favor of statutory formulae for reasons summarized as follows:

> (1) Existing law may allow for division of goodwill where no market value exists but where there is an income producing asset.
> (2) Existing law may be confusing but such confusion stems from the subject matter and is not markedly different than confusion that may exist in many other areas of the law.
> (3) Expert witnesses do not presently agree on evaluations of goodwill and such uncertainty precludes development of a "standard" measure.
> (4) The recommendation invades the province of the trier of fact.
> (5) The recommendation could lead to unfair results because the standards would be required to be arbitrarily applied.
> (6) It is impossible to develop statutory formulae for all conceivable situations.

The staff as a matter of principle is disposed to favor the sort of approach suggested by Professor Bruch--rules of thumb that will reduce litigation and litigation costs, that will result in a rough measure of justice, and that will increase certainty, perhaps at the expense of absolute justice in individual cases. Since absolute justice is not attainable in this inherently speculative area in any event, simple rules have much to commend them. It is likely that more out-of-court settlements and fewer in-court disputes will result. If we are to adopt this approach, the staff recommends that we hire a consultant to prepare a practically-oriented study in this area that examines existing practices in some detail and considers the views of lawyers, judges, and accountants in presenting proposals to the Commission.

Enhanced Earning Capacity

During a marriage one spouse may substantially increase his or her earning capacity, perhaps at the expense of a career for the other spouse. Take two typical examples:

(1) Husband and wife marry upon graduation from college. Wife takes a job as secretary to support husband through medical school. After six years of medical education and training husband is about to commence active and highly-paid practice as a doctor and wife is still in same secretarial job, when dissolution of marriage occurs.

(2) Husband and wife marry in their 20's, husband works steadily for 20 years at gradually higher levels as he acquires experience while wife stays at home and raises family. As last children leave home for college husband and wife are in their 40's, at which time dissolution of marriage occurs. Husband is now at peak earning capacity and wife is now unemployable or employable only at a low level.

In both these situations equity seems to demand that some monetary recognition be given at dissolution of marriage for the wife's contribution to the husband's increased earning capacity. The question is, How? The Commission has before it Professor Bruch's study which argues at pages 62 to 71 for recognition of enhanced earning capacity as a property interest and at pages 119-121 for compensation on unjust enrichment principles. Equity in the Family (Exhibit 5) proposes that a percentage of earning capacity be paid by one spouse to the other as earned after dissolution of marriage. Professor Goda (Exhibit 3) believes that "human capital" is not property but believes that restitution should be allowed where one spouse contributes to the educational benefits of the other. Professor Reppy (Exhibit 4) argues that it would be unworkable to recognize enhanced earning capacity as a form of property, but that legislation is needed to recognize that the community is entitled to reimbursement for expenditures that enhance the earning capacity of a spouse. The State Bar Committee (North) is unanimously opposed to recognition of increased earning capacity as community property and believes that any inequities are better remedied through support. Exhibit 1. The State Bar Committee (South), by a divided vote, recommends that the question of valuing and dividing increased earning capacity warrants further study, noting a number of basic concerns that it has. Exhibit 2.

The Commission should read the views of Equity in the Family, the State Bar Committees, and Professors Bruch, Goda, and Reppy with care. We hope at the meeting to focus not on the need for some remedy, but on the nature of the remedy. This memorandum attempts to organize and analyze, as a vehicle for discussion at the meeting, a number of possible options. These options are: (1) Do nothing. (2) Revise the law governing spousal support. (3) Permit reimbursement for community expenditures that enhance the earning capacity of a spouse. (4) Permit restitution for educational benefits. (5) Recognize enhanced earning capacity as property. (6) Award one spouse a share of the other spouse's future earnings in recognition of increased earning capacity. (7) Allow an equitable division of the community property in recognition of enhanced earning capacity.

(1) Do nothing. Existng California law does not permit division at dissolution of marriage of the value of education, a professional licence, or enhanced earning capacity. The obligation of repaying an educational loan, however, is assigned to the spouse receiving the education unless to do so would be unjust. Civil Code § 4800(b)(4). Under California law inequities between the spouses with regard to their earning capacities are intended to be corrected through awards of spousal support. Civil Code Section 4801 provides in part:

> 4801. (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:
>
> (1) The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties.
>
> (2) The needs of each party.
>
> (3) The obligations and assets, including the separate property, of each.
>
> (4) The duration of the marriage.
>
> (5) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.
>
> (6) The time required for the supported spouse to acquire appropriate education, training, and employment.
>
> (7) The age and health of the parties.

(8) The standard of living of the parties.
(9) Any other factors which it deems just and equitable.

In Aarons v. Brasch, 229 Cal. App.2d 197, 40 Cal. Rptr. 153 (1964), for example, the court awarded the wife $7,500 as compensation for the many years during which she had struggled to provide the means by which the husband could pursue academic studies and thereby attain fruits and accumulations that, after dissolution of the marriage, the wife would not be entitled to share. When required to characterize this award as a property division or as support, the Court of Appeal noted that the award could only have been support, there being no other basis for it.

Equity in the Family believes that support is not an adequate means of redressing the inequity. The main criterion applied by the courts in awarding spousal support is the ability of the supported spouse to work. Professor Bruch agrees that spousal support awards do not provide an adequate means. "First, significant support awards are rarely made. Second, they are infrequently enforced. Third, support may terminate long before recompense has been made, since court-awarded support ends upon the death of either spouse or the remarriage of the supported spouse. Perhaps most importantly, the nonstudent spouse is often capable of self-support; although at a much more modest standard of living than that in store for the educated spouse. If so, no ownership recompense at all may be received." Professor Reppy sees death of a spouse as a problem--"In some situations the alimony remedy is inadequate--primarily because, unless paid in a lump sum at the time of divorce, the anticipated payments may never be realized because, for example, of the death of the obligor ex-spouse or of the obligee ex-spouse."

(2) Revise the law governing spousal support. If the theory of existing California law is that inequities in earning capacity are redressed by spousal support but in fact the spousal support laws are not being applied in such a maner as to redress the inequities, a logical conclusion is that the spousal support laws should be revised to make them more effective. The State Bar Committee (North) concludes that "any real inequities related to the concerns of the Equity in the Family proposal [are] better remedied by way of support and not by tortured property concepts." The State Bar Committee (South) recommends that

changes in spousal support be studied as a means of redressing the inequity. The only specific suggestion for study made by the Committee is, "If adjustments for enhanced earnings are made by way of spousal support, should that award be terminated by remarriage or should the termination on remarriage rule be changed in some circumstances so as to allow spousal support to continue?"

(3) Permit reimbursement for community expenditures that enhance earning capacity of a spouse. One case where the equities so favor the party whose earning capacity did not increase substantially during marriage that the law may not want to trust to the uncertain spousal support remedy is where the aggrieved party incurred personal sacrifices to enable the other to obtain enhanced earning capacity. An example is where the wife works to put her husband through professional school only to have the marriage dissolved as they are about to reap the financial rewards of the schooling. Professor Reppy states that in addition to an alimony award, reimbursement theory can be invoked to adjust the equities in such a case--the community should be able to claim reimbursement for tuition fees, cost of books, etc., plus any additional costs in living expenses incurred because of the need to adjust to the husband's education experience (in some instances this might include child care expenses). Professor Reppy offers as a model of how this would work the recent Minnesota Supreme Court case of De la Rosa v. De la Rosa, a copy of which is attached to his remarks as an Appendix.

Professor Reppy warns, however, that the reimbursement solution is not free of problems. In the case where the husband is about to enjoy the fruits of the education it is clear that all expenses should be reimbursed. But what about dissolution that occurs 30 years after the husband graduates and the spouses have been sharing the benefits of the increased earning capacity? Cases of intermediate length marriages present even more difficult problems. Also to be confronted is the question whether the spouse making reimbursement should be required to pay interest on the amount reimbursed. Professor Reppy suggests that the equities in each case should determine this.

It should be noted that Professor Reppy would not limit the reimbursement remedy to educational expenses. It would apply in any situation where one spouse incurred personal sacrifices for the benefit of

the other. However, it appears that the main application of this rule would be to the educational situation.

(4) Permit restitution for educational benefits. One step beyond reimbursement of the community is restitution made by one spouse to another on an unjust enrichment theory. Professor Goda endorses such a solution to the problem of one spouse having been "unjustly enriched" by educational benefits at the expense of the other. He would allow recovery of benefits conferred and preclude any presumption of gift. "It seems to me that such a limited solution prevents an unwarranted extension of the notion of property while protecting the spouse who has aided the other."

Such a restitution theory goes beyond reimbursement doctrines since it would also permit consideration of factors in addition to the actual monetary contribution by the community to the separate benefit of one spouse. Thus Professor Bruch identifies costs incurred in providing an education to one spouse as including the foregone wages of the student spouse (and correlative lower living standard of the family), the direct monetary contribution of the working spouse, and the loss of opportunity of the working spouse to obtain further education that might enhance his or her own lifetime earning capacity.

It should be noted, however, that Professor Goda limits his suggestion to restitution for educational benefits. This is arguably a distinct situation from that of the nonworking housewife; and indeed it appears that neither a restitution nor a reimbursement right would be particularly applicable to the housewife situation.

(5) Recognize enhanced earning capacity as property. Professor Bruch states that recognition of enhanced earning capacity as a property interest is an important means of achieving a fair distribution of community property. "To recognize accrued property rights in accounts receivable, pensions and goodwill but in no other form of future income provides protection to the relatively affluent without comparable benefits to those who depend on wages alone for sustenance." Professor Bruch believes a rule should be provided for division of enhanced earning capacity acquired during marriage, if not by equal division then at least on an unjust enrichment basis. Where the marriage is dissolved by death, the decedent's estate should not have a claim to the enhanced

earning capacity of the survivor, on the theory that the spouses would have assumed that the enhanced earning capacity was a benefit to be shared only during the mutual lifetime of the spouses.

Professor Reppy points out a number of problems with making increased earning capacity a form of community property. Earning capacity is not property but a personal attribute; it lives, grows, and dies with the person. It is incapable of joint ownership. To classify it as property creates problems for insurance law, tax law, probate law, and conflict of laws. If earning capacity is property, then a person comes to a marriage with earning capacity as separate property, which creates problems of tracing the character of property acquired during marriage. If the marriage is dissolved but the property is not divided, enhanced earning capacity becomes tenancy in common property, which introduces a whole new set of complications.

Professor Reppy states that earning capacity is not like goodwill of a business or profession. It is possible to award goodwill to one spouse and give a comparable value in property to the other spouse because goodwill is in fact property and can be transferred and sold. But earning capacity is not property and is not transferrable or salable. In this connection the Staff observes that if the spouse whose enhanced earning capacity is awarded to the other spouse subsequently fails to earn up to full capacity, either voluntarily or involuntarily, that spouse will suffer a double loss--the actual loss of earnings for himself or herself and payments made to the other spouse because the award of increased earning capacity assumes continued earning at full capacity.

Apart from the logical and practical problems of characterizing earning capacity as property, Professor Reppy notes that there would also be difficult valuation and proof problems. For example, inflation factors would have to be taken into account in gauging actual enhancement of earning capacity. The value of the increased earning capacity would vary with the age of the earning spouse--whether young or nearing retirement. And some account would have to be taken of "natural increase" of earning capacity--for example where a 15-year old marries and the marriage dissolves at age 20, with the 20-year old having enhanced earning capacity simply by virtue of growing older.

Professor Reppy believes there would be no constitutional problem with dividing enhanced earning capacity--this would not offend the due process clause. (Professor Reppy does not discuss the applicability of the contract clause--marriage is a civil contract. Nor does he discuss the applicability of the 13th Amendment--involuntary servitude--although he refers to the problem of involuntary servitude in connection with his discussion of enhanced earning capacity held in tenancy in common.)

Professor Reppy believes that the suggestion that enhanced earning capacity be treated as property is in effect an effort to provide for "equitable," rather than "equal" division of assets at dissolution. He suggests that if our policy is to permit equitable division, this should be done directly and all the equities (not just enhanced earning capacity) should be considered. Equitable division should not be adopted in the disguised form of a property right in earning capacity, with all its problems. The notion of equitable division of assets between spouses at dissolution is discussed below as a solution to the problem of inequities in earning capacity.

(6) Award one spouse a share of the other spouse's future earnings in recognition of increased earning capacity. Equity in the Family offers a more limited solution than classification of earning capacity as property--at dissolution one spouse would be awarded a percentage share of the other spouse's increased earning capacity, to be paid when and as earned. This proposal avoids many of the problems inherent in a classification of earning capacity as property--problems of insurance, tax, probate, conflict of laws, tracing, tenancy in common, and problems where the spouse voluntarily or involuntarily fails to earn up to full capacity, all disappear. But Professor Goda points out that the draft language offered by Equity in the Family (as opposed to their explanation of how their proposal would work) seems to require recognition of "human capital" as property.

Other problems remain, particularly problems in valuing the increased earning capacity. The State Bar Committee (North) believes that valuation would result in increased litigation, invite a new group of experts into the courtroom, and would return fault philosophy to dissolution of marriage. The State Bar Committee (South), in addition to noting substantial valuation problems, also is concerned about opening up areas of

personal conduct to litigation on fault theories--to what extent are increased earnings of one spouse enhanced by the moral or other support of the nonworking spouse or depressed by the "albatross factor" of an obstructionist spouse, and to what extent should decreased earning capacity be compensable by the community.

There are other obvious questions. Suppose the working spouse did a substantial amount of the housework when he or she came home from work--shouldn't this be recognized in equating the work of the working spouse with that of the nonworking spouse? If both spouses are working, is there a simple offset? Suppose one was diligent and worked hard and increased his or her earning capacity substantially whereas the other didn't work hard and only increased his or her earning capacity minimally? Suppose both worked hard but one had more native or acquired capabilities? Suppose one developed enhanced capacity by taking educational courses outside regular working hours, or by using separate rather than community property? How is a percentage increase to be calculated if the spouses aren't working at the time of marriage? Are antenuptial agreements to be permitted to waive rights to increased earning capacity? Will spousal support awards still be allowed? If increased earning capacity is awarded and the working spouse later becomes unemployed or injured, is the percentage due to the other spouse to be taken out of unemployment or disability insurance or damage awards? To what extent does the percentage off the top of the working spouse's earnings affect the right of general creditors to garnish any remaining wages, or does the nonworking spouse vie with general creditors to reach the available portion of the earnings?

The State Bar Committee (North) believes that the whole proposal is unfair, and the State Bar Committee (South) wonders whether it is possible or desirable to put both spouses on economic parity upon dissolution. Professor Goda agrees with the Equity in the Family goal of recognizing the equal worth of the spouses but believes the method they offer is inappropriate. He believes it comes perilously close to division of separate property, and might be acceptable in a jurisdiction that allows equitable division. "But in a state which mandates equal division of community property by law, the inflexibility of that mandate will make for expensive confrontations when attempting to specify the value of the

'human capital' and, if I may use the analogy, will be like the notion of slavery in attempting to divide what is really the future work of an individual. It would truly be a 'lien on the future.'"

(7) Allow an equitable division of the community property in recognition of enhanced earning capacity. One other possible approach is to shift to an equitable division scheme to recognize enhanced earning capacity. If this is done, Professor Reppy suggests that the court should be authorized to examine all the equities (with the possible exception of comparative fault of the parties), not just enhanced earning capacity:

> It seems to me illogical, unfair, and unacceptable to switch from a 50-50 division theory based on partnership concepts to what is a form of equitable division that examines only one equity. For example, H's earning capacity might have been decreased due to illness or injury. Or the value financially of the increase in his earning capacity may be more than offset by the increase in beauty, charm, domestic skills, etc., of W who, it appears to the trier of fact, will likely draw on these nonproprietary assets to promptly find a new husband who can support her in the style she is accustomed to.

Moreover, Professor Reppy points out, total earning capacity should be taken into account, not just so much of a spouse's earning capacity as was developed during marriage.

The Commission should consider the possibility of shifting to an equitable, rather than equal, division scheme. But the Commission should be aware that equal division was a long-sought and hard-fought battle that has now won the support of the family law bar generally because of its simplicity, its ability to minimize litigation, and its inherent fairness.

However, it is the contention of the proponents of division of increased earning capacity that equal division is not inherently fair in light of the actual positions of the spouses after dissolution. Of course, part of this is due to general societal and economic factors, such as the relative inequality between the positions of men and women in the labor market. This is changing as women's rights in society are achieved and as more women become working spouses and more men assume equal duties with respect to housework and child care.

At the beginning of this discussion reference was made to two "typical" examples of (1) the wife putting the husband through school

and (2) the wife staying at home raising a family while the husband works. Some statistics in this respect are worth noting. William P. Cantwell, reporter for the Uniform Marital Property Act, writes in Man + Woman + Property = ?, 6 The Probate Lawyer 3-4 (Summer 1980) (footnotes omitted):

> Any illusion that the traditional picture of a marriage as involving a husband working for wages outside of the home with a wife as a homemaker looking after one or more children in it as the standard pattern has to yield to the fact that only 17 percent of American marriages follow that pattern. Over 50 percent of all married women work outside during part of the year. There are some 23 million wives in the work force and 40 percent of all households with a living husband and wife have a woman in the work force. When there are children, the percentages are even higher. About 57 percent of married women with children work outside the home. Some 80 percent of all marriages with an income of more than $20,000 are two-earner marriages.

We haven't attempted to collect any data for California, but it is fair to speculate that the California figures are even more striking.

It is clear that the problem of inequities between earning capacities of the spouses at dissolution of marriage is lessening and will continue to lessen as society changes and as family living and working patterns change. This is not to imply that the needs of spouses in cases where inequity does exist should be ignored by the law. But any solutions the Commission develops should take into account social change and should be such as will appear reasonable to most married people.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Law Offices of
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MEMORANDUM

To: California Law Revision Commission

Fm: Standing Property Committee (North) of the Family Law Section of the California Bar Association

Re: Proposal by Equity in the Family concerning increase in earning capacity and good will as proposed in the F 600 Study by Professor Bruch

Dt: October 9, 1981

The committee North, having met in joint session with committee South, was unanimously opposed to the proposal put forth by Equity in the Family, which proposal was reflected in a July, 1981 memorandum from that group. The joint committee concluded that the proposal was unfair, would result in increased litigation, would invite a new group of experts into the courtroom, and would return fault philosophy to dissolution of marriage. It was also concluded that any real inequities related to the concerns of the Equity in the Family proposal were better remedied by way of support and not by tortured property concepts.

Concerning the issue of good will, the committee was concerned with the significance, magnitude, and comprehensive considerations involved in that concept. The committee feels that the issue of good will is one which requires a great deal of study and time. The committee respectfully recommends that the issue of good will be deferred for further study.

As chairman of the committee North, I am advised that the committee South has done further work with regard to the Equity in the Family Proposal, and the report from the committee South should be deemed to supersede the views expressed in this memorandum in behalf of the committee South.

Respectfully submitted,

Barry D. Russ

BARRY D. RUSS, Chairman of
the Property Committee (North)

EXHIBIT 2

REPORT OF STANDING COMMITTEE ON PROPERTY DIVISION (SOUTH)

The Committee held a meeting on September 26, 1981 to discuss the recommendations contained in the Bruch report concerning goodwill and enhanced earning capacity. The recommendations and conclusions are hereafter set forth.

GOODWILL

1. Recommendation: The Committee recommended that exsiting law not be changed and that goodwill, in appropriate circumstances, not be limited to market value.

2. Statement of Reasons: The reasons for the Committee recommendations were, in summary form:

a. Existing law may allow for the division of goodwill where no market value exists but where there is an income producing asset;

b. Existing law may be confusing but such confusion stems from the subject matter and is not markedly different than confusion which may exist in many other areas of the law;

c. Recommended alternatives were worse;

d. Expert witnesses do not presently agree on evaluations of goodwill and such uncertainty precludes the development of a "standard" measure;

e. The recommendations invade the province of the trier of fact;

f. The recommendations could lead to unfair results because they would be required to be arbitrarily applied;

g. It is impossible to develop statutory formulae for all conceivable situations.

COPY

ENHANCED EARNING CAPACITY

1. Recommendation: The Committee recommended, by majority vote, that the question of whether increased earning capacity should be valued and divided is one that warranted further study. A minority of the Committee felt it should be neither valued nor divided. The Committee also recommended that alternatives be studied as, for example, changes in spousal support.

2. Statement of Reasons: The Committee expressed the following reasons as the basis for its recommendation:

a. The proposal could duplicate present spousal support law;

b. The "flipside" of decreased earning capacity was not sufficiently addressed;

c. There is considerable question as to whether increased earning capacity is a property or spousal support issue;

d. The Committee was concerned as to whether the proposal, if enacted, would open up areas of personal conduct to litigation inimical to the "no-fault" theory divorce. The following examples were discussed:

(i) To what extent are increased earnings enhanced by the moral or other support of the non-working spouse vis-a-vis the extent to which they are decreased because of the "albatross factor" of an obstructionist spouse;

(ii) If earnings were decreased, should restitution be a factor;

e. If adjustments for enhanced earnings are made by way of spousal support, should that award be terminated by remarriage or should the termination on remarriage rule be changed in some circumstances so as to allow spousal support to continue?

f. Whether it was possible or desirable to put both spouses on ecomonic parity upon dissolution;

g. The proposal poses substantial valuation problems.

Respectfully submitted,

Richard W. Millar, Jr. Secretary

Comments and Suggestions on Equity in the Family Proposal and on Existing Law Relating to Division of "Goodwill."
(Paul J. Goda, S.J.)

I. General Problem--Practicality

Let me begin with a comment on the possible impracticability of a general revision of the laws on community property. In the May 11, 1981, issue of the Los Angeles Daily Journal, an article on p.1 described the complaints of judges about proliferating family law bills. Care will have to be taken that suggested legislation be seen as truly necessary lest legislators be turned off by the immensity of the project.

II. General Problem--Theory

A. Equity? For the Family?

One might ask why you are carrying on this study at this time. Prof. Bruch's study (which, by the way I believe to be a brilliant work) does not address the protection of the family as a possible theoretical foundation for a fairer division of property. The study developed by Equity in the Family does try to address this issue on pp. 5-8. But it does not do so directly. I think that its theory is that if you punish the person whose salary in the marketplace has risen, by mandating a division of the "human capital," then the tendency will be for families to stay together. The first page of Equity in the Family's study states this policy positively, "to stablize the institution of the family by bringing about ... full recognition of the equal worth of husband and wife..." I am in sympathy with their goal but I think that policy-makers should look closely at a tension in goal and methods, at the negative and positive elements.

B. Simplicity?

1. Equity in the Family's Proposed Solution

The solution proposed by Equity in the Family by the proposed addition of CC 4801.3 would lead to even more confusing complexity in the courts. First of all, "human capital" is not really property. I recognize that the notion of property has changed in our economy from a physical notion to a much more abstract notion, whether that of a one-step removal from control as demonstrated by stocks or that demonstrated by rapid flow of ideas. But so far, this kind of shift has not occurred in family law. Although goodwill has been denominated property, it is far closer to the older notions of division of physical property than division of "human capital."

Secondly, division of "human capital," by taking into consideration the possibility of future earnings of the individual as such, is perilously close to division of separate property. In a state which has the equitable division of property as its yardstick, the flexible nature of division may allow use of consideration of "human capital."

But in a state which mandates equal division of community property by law, the inflexibility of that mandate will make for expensive confrontations when attempting to specify the value of the "human capital" and, if I may use the analogy, will be like the notion of slavery in attempting to divide what is really the future work of an individual. It would truly be a "lien on the future."

Thirdly, I think Prof. Bruch recognizes this problem since she treats the division of "human capital" differently in division at divorce and division at death (compare pp. 119-120 and 130-131). If "human capital" were truly property, then it should be divisible at death as well.

Prof. Bruch does explicitly recognize the problem when she suggests on pp. 119-120 that "If an equal division is not to be mandated, unjust enrichment principles should be articulated and codified." I think she goes too far in note 343 but I do agree with the notion of unjust enrichment as the basis for restitution of benefits conferred where one spouse has contributed to the education of the other. I would suggest an addition to Civil Code 4800(b)(4) to allow for such a recovery and to preclude the presumption of gift. It seems to me that such a limited solution prevents an unwarranted extension of the notion of property while protecting the spouse who has aided the other.

Such a division can be made at both divorce and death thus making for a consistent solution. It would also be truly both simple and fair.

2. Goodwill.

Prof. Bruch recognizes the need for greater certainty in the area of dividing goodwill by proposing a statutory formula on pp. 61-62. This would truly simplify the process and I am in agreement with her suggestion.

PJG:jw
10/19/81

TO: California Law Revision Commission

FROM: W. A. Reppy, Jr., Consultant

TOPIC: Comments on Proposal to Legislatively Declare Enhanced Earning Capacity To Be Community Property

I. THE CAPACITY TO EARN IS NOT PROPERTY

The proposal is for legislation that would classify as community property "enhanced earning capacity" developed during marriage. Contrary to what is intimated in Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity (Study No. F-600) at pp. 57-71, there is no American statutory or caselaw supporting this proposal. One case, Inman v. Inman, 578 S.W.2d 266 (Ky. App. 1979) did classify a "license to practice dentistry" (id. at 267) as "marital property" for purposes of making an equitable (not an equal) division of property at divorce.

Of course, a license to practice a profession is property. For example, the Fourteenth Amendment due process clause provision barring a state's taking of "property" without compensation (as well as procedural due process) would preclude California from summarily revoking a license to practice law, dentistry, medicine, etc., which the state had issued. Likewise, a college degree is property. Basically, the term "property" simply refers to a bundle of rights and remedies that are usually more effective than those associated with nonproprietary interests (e.g., interests vindicated through tort law).[1]

The community property states have uniformly held that when such property is acquired by husband (H) or wife (W) during marriage so that, technically, the definition of community property is met (e.g., Cal. Civ. Code § 5110), the property right is not community, e.g., Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (college degree), "because it cannot be the subject of joint ownership." Muckelroy v. Muckelroy, 84 N.M. 14, 498 P.2d 1357 (1972) (license to practice medicine). If H is not a physician, of course he cannot co-own the license to practice granted to her; and even if he were a physician qualified to practice medicine, the license issued to his physician wife is necessarily personal to her.

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[1]For purposes of classification of marital property rights, present American law recognizes contract rights as "property" in most instances (e.g., a promissory note evidencing a contractual chose in action to recover money lent plus interest). A matured tort cause of action is also "property". However, the right given by the law not to be negligently injured is not property. The expectancy of an individual that he will not be subjected to pain and suffering by a tortfeasor is not property. That is clear when one considers the power of a legislature to abolish a tort cause of action (e.g., alienation of affections) prospectively. Such legislation takes no property but simply alters the expectancies of persons concerning possible future events.

In equitable division states like Kentucky, which classified the professional license in Inman, supra, as "marital" property, the problem of co-ownership does not arise. Kentucky's marital property system is the "deferred community."

Under it there never is any co-ownership. During marriage H's acquisitions are owned solely by him, W's solely by her. At the time of divorce, solely for the purpose of determining an equitable division of property, certain separate properties are momentarily labeled "marital." But there never is even an instant of co-ownership. For example, in Inman if W had died after the court had labeled H's license marital property but before the divorce decree was entered, surviving H would have been treated as sole owner of the license.

In sum, equitable distribution states are not concerned by the problem facing community property jurisdictions that the license or degree is not capable of joint ownership. The former states do not recognize joint ownership.

Stated differently, the Inman court's labeling the medical license marital property was a legal fiction -- a verbal formulation relied on by the court to determine the equities surrounding division of property at divorce.

Another case cited (Bruch at p. 63, n. 171) as supporting the proposition that enhanced earning capacity can be treated as property is Lynn v. Lynn, 7 Fam. L. Rptr. 3001 (N.J. Super, Bergen County 1981). However, Lynn conceded that earning capacity was not property under the New Jersey equitable distribution statutes being applied. Instead, the Lynn court treated the husband's degree as property (which it concededly was).[2]

In sum, earning capacity is a personal attribute -- like grace, beauty, charm, tact. It has none of the attributes of property. It cannot be transferred or licensed, etc. It is injured when the person is injured; it dies when the person dies.

II. PROBLEMS IF LEGISLATURE DECLARES EARNING CAPACITY TO BE PROPERTY

Although earning capacity would not under present law be treated as "property," presumably it is not unconstitutional for the state

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[2]The court said that Stern v. Stern, 66 N.J. 340 (1975), established that "earning capacity" was not marital property. It held that "the value of the asset (educational degree and/or professional license) is distinct from the ability of the individual to take that asset and develop his own earning capacity. . . . The concept of earning capacity is not before this court in this respect . . . ." 7 Fam. L. Rptr. at 3002.

legislature to declare that it is. (Not all stupid legislation is a denial of due process.) Such legislation would, however, cause numerous problems -- not only with respect to domestic relations law.

If a person with a large earning capacity were, after the enactment, injured in an auto accident, apparently the appropriate source of insurance coverage would be "property damage" insurance and not personal injury coverage. Conceivably two causes of action would arise: one for personal injuries and one in trespass for invasion of the "property right." For purposes of state income taxation, the "property" right to be created looks quite a bit like a depreciable asset. A basis for it perhaps can be calculated from educational expenses. Particularly when a person reaches middle age it seems clear that the asset is being consumed annually. I am confident the federal courts and IRS applying the federal income tax law will refuse to recognize any property right in earning capacity. But the state Franchise Tax Board cannot as readily brush off the legislation from the Legislature that creates the state income tax law that earning capacity is "property."

Perhaps the legislation proposed by Professor Bruch will contain a disclaimer that earning capacity is "property" only within the context of domestic relations law. There will still be many, many problems. Under the proposal only enhanced earning capacity during marriage is to be community property. Obviously, the earning capacity brought to the marriage must also be "property" and it has to be the earner's separate property.

Obviously, this separate, capital asset (earning capacity brought to marriage) will play a major role in the generating of profits by the earning spouse during marriage. The law will have to allocate a percentage of the gain as a return on this separate property and hence also separate. Beam v. Bank of America, 6 Cal. 3d 12, 98 Cal. Rptr. 137, 490 P.2d 257 (19871). One could expect the courts to use the allocation formula most favorable to the community: the fair-return on capital approach of Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909).[3]

For example, suppose H, a very successful investment counselor, was divorced from W-1, the court (under the Bruch proposal) valuing his earning capacity, all developed after the couple's marriage in their teens, as $1 million. H is awarded this by the divorce court,

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[3]Pereira favors the community in times of especially large gain because the separate return is fixed and the community share of the income "floats." Adler, Arizona's All-or-Nothing Approach to the Classification of Gain from Separate Property: High Time for a Change, 20 Ariz. L. Rev. 597 (1978).

W-1 receiving $1 million worth of securities H had amassed using his skills. H immediately marries W-2 and during the first year of marriage with W-2 he earns fees as an investment counselor totaling $300,000. Applying a Pereira apportionment and using fifteen percent as the interest rate[4] half the gain is separate property as a return on the capital.[5] If H saved $50,000 of the income for investment it would be presumed this was his separate property, the community share of gain being expended on family expenses and exhausted. Beam v. Bank of America, 6 Cal. 3d 12, 98 Cal. Rptr. 137, 490 P.2d 257 (1971). Probably no community wealth would be amassed during this second marriage.

Under present law, no separately owned property is viewed as being involved in H's business (as earning capacity is not property). All the $300,000 income would be community property. All savings invested would be community.

The proposed legislation would cause numerous difficulties when a California couple moved to another state. Suppose our investment counselor H never divorced W-1 but they reconciled and moved to Oregon. They bring with them "property", half-owned by W, worth $1 million. Even though Oregon law would not recognize W's "ownership" of H's earning capacity, constitutional principles demand that it does so. W's move from California to Oregon cannot be the occasion for stripping her of $500,000. See Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1 (1934). (Probably Oregon would convert the community ownership, not recognized there, into tenancy in common. See Edwards v. Edwards, 108 Okla. 93, 233 P. 477 (1924).) The property right vested in W by California prior to her move includes a right to a share of profits arising when H applies separate labor (his post-move labor will be separate under Oregon law) that combine with the co-owned property to produce gain. Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975). Thus Oregon is forced to apply a kind of "reverse" Pereira or Van Camp to segregate the return on former community property (earning capacity of H) from the return on H's separate labor.

Several states, such as my home state of North Carolina, impose an annual property tax on intangible property. Our tax collector would be thrilled if the California couple moved here bringing with them the $1 million worth of intangible property consisting of H's earning capacity.

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[4]Without doubt H could get a rate as that applied given current economic conditions. Compare Marriage of Folb, 53 Cal. App. 3d 862, 126 Cal. Rptr. 306 (1976) (Pereira at twelve percent).

[5]If a fair salary for H would exceed $150,000, the community would want allocation made under Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921). I am assuming Van Camp would not produce a greater community share of the gain.

III. THE PROBLEM OF INVOLUNTARY SERVITUDE

Suppose either H or W obtains an ex parte divorce or that in a divorce action where both appear the court neglects to make an award of the community asset consisting of H's enhanced earning capacity. The former spouses now own the asset as tenants in common. See Henn v. Henn, 26 Cal. 3d 323, 161 Cal. Rptr. 502, 605 P.2d 10 (1980). Apparently, if divorced H decides he wants to retire while still able to utilize his earning capacity or if he decides to work just half time or otherwise not to earn as much as he can, he is answerable to his ex-wife in damages. That seems to follow from Marriage of Gillmore, 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1 (1980). There the divorced spouses held a package of pension benefits as tenants in common. Rather than take early retirement and start to receive pension payments H (a healthy man in his early 50s) decided to keep on working. (The effect of which was to cause the tenancy in common portion of the pension package to grow in value proportionately to the community contribution in labor although the separately portioned grew at a faster rate because additional separate labor was supplied by H as he remained on the job.) Gillmore invites the courts to second-guess the manner in which the tenant in common spouse in control of the former community asset exercises that control. He must make it as profitable as immediately as possible, it appears. Certainly, Gillmore's approach would not permit H after the divorce to just become a beach bum, thereby destroying the value of W's half interest in his earning capacity. "It is a 'settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse.'" Marriage of Gillmore, supra, 629 P.2d at 4. (The court obviously meant to refer to former community property that had become tenancy in common, since that was the nature of the asset at issue.)

Whatever one may think of Gillmore,[6] where H had to give part of his pay to W because he wanted to work, application of that doctrine

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[6] I think Gillmore is dreadful and should be legislatively abrogated. The court forgets that the former spouses there were legal strangers to each other and had no fiduciary duty owing to one another. That is, it approaches the issue before it as if the pension package were community property rather than tenancy in common. A tenant in common can deal with the property in his own self interest so long as no actual damage is cast upon the other cotenant. See Tompkins v. Superior Court, 59 Cal. 2d 65, 27 Cal. Rptr. 889, 378 P.2d 113 (1963) (cotenant cannot invite police into cotenancy premises knowing they will find evidence of other cotenant's criminal guilt). Perhaps Tompkins created a minimal fiduciary duty owed by one cotenant to the other, but Gillmore enormously expands it. Legislation is required which clearly re-establishes the rule that one cotenant has no obligation to make cotenancy property productive for the benefit of the other.

to make H pay because he wishes to retire seems fantastic. One of the reasons his earning capacity reached the value of $1 million (in the case of our hypothetical investment counselor) may be an extraordinary outburst of energy during his youth. Some very successful men and women may get "burned out" at a younger age. But one would not expect the courts to hold this meant the earning capacity had ceased to exist as an asset.

It should be clear that "earning capacity" is no more suited for ownership (as property) after divorce in tenancy in common than during marriage as community property.

IV. PROBLEMS ARISING AT DEATH OF NON-EARNER SPOUSE

Obviously, when the spouse with earning capacity dies, the property right Professor Bruch wishes to create would expire with the spouse. Suppose, however, W dies survived by our investment expert whose earning capacity is worth $1 million. She leaves a will: "Everything to Son." Does H now have to account to Son for a portion of his earnings? If the answer to the question is that W's interest in the earning capacity is not subject to testamentary power because of some implied exception to Probate Code section 201, then W's will may provide:

> I confirm to my husband my half interest in his earning capacity, worth $500,000, and I leave to Son all of the community interest (which includes my husband's) in our securities, which are worth $1 million. Son is my residuary legatee.

This type of will attempting to act on H's interest in community property puts him to an "election." Estate of Wolfe, 48 Cal. 2d 570, 311 P.2d 476 (1957); Tyre v. Aetna Life Ins. Co., 54 Cal. 2d 399, 6 Cal. Rptr. 13, 353 P.2d 725 (1960). It would seem H is unable to recapture his half interest in the securities without somehow giving up a half interest (W's) in the community-owned earning capacity in favor of Son. Perhaps H would have to make an inter vivos assignment to Son of half of all future earnings that are properly allocated to the earning capacity.

Professor Bruch's solution is quite surprising. She would revive the "terminable interest doctrine" which she and I both find unfair

and illogical[7] so that it applies to earning capacity,[8] although the same study by Professor Bruch is severely critical of the doctrine as it applies to pensions.[9] That a strong critic of the terminable interest doctrine would invoke it to resolve the succession problem surely evidences that she is trying to squeeze into a "property" mold something that does not fit there.

V. COMPARISON TO CALIFORNIA'S TREATMENT OF GOODWILL

One of the apparent reasons why the legislature is being urged to declare earning capacity to be property is a belief that present law unfairly favors at divorce wives of professional men whose business includes goodwill. It is of course settled California law that goodwill may exist not only in connection with a trade but also with a professional practice. See, e.g., Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); Marriage of Lopez, 38 Cal. App. 3d 93, 133 Cal. Rptr. 58 (1974); Marriage of Mueller, 144 Cal. App. 2d 245, 301 P.2d 90 (1956). When there is community goodwill in existence at marriage there naturally is more community property to divide. The goodwill is awarded to the professional spouse (say H) and the wife leaves the marriage with more money, realty, etc., than she otherwise would. It is urged that the law discriminates in favor of wives of

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[7]The doctrine causes the community interest in a worker spouse's pension plan to terminate (with the interest becoming separate property of the worker spouse or his estate) at the death of the spouse of the pensioner, Waite v. Waite, 6 Cal. 3d 461, 99 Cal. Rptr. 325, 492 P.2d 13 (1972), or the pensioner himself, Benson v. City of Los Angeles, 60 Cal. 2d 355, 33 Cal. Rptr. 257, 384 P.2d 649 (1963). Originally confined to pension plans created by statute, the doctrine has been expanded by the court so as to apply even to pensions created by the private contract of a spouse (despite his lack of power to impliedly amend the Civil Code provisions defining separate and community property). Estate of Allen, 108 Cal. App. 3d 614, 166 Cal. Rptr. 653 (1980). For criticism see Reppy, Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA, 25 UCLA L. Rev. 417, 443-482 (1978); Luther, Luther and Urie, Equal Treatment of the Community Property Pension Rights of Nonemployee Spouses, 8 Com. Prop. J. 91 (1981). The doctrine was rejected in Farver v. Department of Retirement Systems, _____ Wash. App. _____, 629 P.2d 903 (1981).

[8]Bruch, Study p. 131.

[9]Id. 47-49, 129-130 (doctrine is "peculiar", "remarkable," gender-biased against women -- "an oddity that should be legislatively overruled").

attorneys, physicians, shopkeepers, etc., and against such earners as government employees, salaried artisans, etc. It is clear, so goes the argument, they too will enjoy after divorce a flow of income that is the equivalent of goodwill of the attorney, physician, etc. Equal treatment requires their wives at divorce be given a "slice of the pie" equivalent to that of the wife of the professional.

The two situations are not equivalent. Goodwill exists as property distinct from the earning capacity of the professional spouse. If the spouse dies or is incapacitated and unable to work, the goodwill is still there. It can be sold in such an instance and converted to cash.[10] Thus when the professional spouse at divorce is awarded an amount of goodwill, he takes something of actual value, not just an expectancy.

Consider two hypothetical cases: both A and B have medical degrees and have been earning a net $50,000 per year for several years. A is in solo practice. B is a salaried hospital or university employee. At A's divorce the court may find $200,000 worth of community goodwill attached to his medical practice, award that to him and award Mrs. A $200,000 worth of community stock investments. The Bruch proposal would, apparently, have the court declare that Dr. and Mrs. B own some $200,000 worth of enhanced earning capacity.[11] It is proposed this be awarded to Dr. B with, again, the wife receiving $200,000 of tangible community assets.

Without question our hypothetical physician B ends up, under the Bruch proposal, in a far worse financial posture than A. If, six months after the divorce is final, both A and B are permanently

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[10]Where the professional spouse himself has entered into an agreement precluding the sale of goodwill, he is estopped to deny that his own agreement has eliminated the value of this property right. E.g., Marriage of Slater, 100 Cal. App. 3d 241, 160 Cal. Rptr. 686 (1979) (physician contracted with partners giving them first refusal rights based on valuation excluding goodwill). If the law forbids sale of the goodwill, it is still property but its value must be very small. Although it is said in Geffen v. Moss, 53 Cal. App. 3d 215, 125 Cal. Rptr. 687 (1975), that the canons of ethics forbid an attorney from selling his goodwill, as a practical matter the existence of the goodwill increases the value of the other assets (client files, for example) which the attorney can lawfully sell. Thus it is not surprising that the Geffen decision has not resulted in a noticeable reduction in the value placed at divorce on goodwill in a law practice compared to those in a medical practice which, so far as I am aware, may lawfully be sold.

[11]To simplify the comparison, I shall assume B and his wife married just after both graduated from high school.

disabled in an automobile accident, A can "cash out" his practice for a sum including something close to $200,000 for goodwill. The "property" awarded to B has disappeared because of the accident (unless B had disability insurance, something he would have to pay for -- a cost which A is not saddled with).

The foregoing analysis also indicates the property treatment at divorce of a college degree or a nontransferable license to practice a trade or profession acquired during marriage. Such assets are property and meet the definition of community property. Compare Cal. Civ. Code §§ 5107-5108 with 5110. The courts could, as has been done in New Mexico, create an exception to the statutes on a theory such an asset "is not community property because it cannot be the subject of joint ownership." Muckelroy v. Muckelroy, 84 N.M. 14, 498 P.2d 1357 (1972), or they could view the degree or license as community property of nominal value because it is merely a legal construct for expressing or regulating the nonproprietary earning capacity. Because such an asset is nontransferable, the value of such an asset as property is nominal.

The value as an expectancy is substantial, but that should be irrelevant. H's rich father is about to die and H will inherit valuable ranch lands in Texas which, under Texas law, will generate substantial community income. See Tex. Fam. Code § 5.05; Dillingham v. Dillingham, 434 S.W.2d 459 (Tex. Civ. App. 1968, no writ). Father may even be too senile to change his will devising all to H. Obviously there is an expectancy here the spouses may highly value. Father's will symbolizes the expectancy of a future flow of community income much as the professional spouse's license to practice or college degree symbolizes the expectancy.

VI. CHANGING TO AN UNEQUAL DIVISION APPROACH

The effect of what the Bruch proposal seeks, although disguised in the form of a new kind of property, is an unequal division of property at divorce taking into account enhanced earning capacity developed during the marriage.[12] Obviously, the Bruch proposal could be recast in terms of an amendment to the equal division statute calling for the divorce court to place a hypothetical value on the enhanced earning capacity and to divide the property so that the equality is achieved when that sum is added to the value of assets awarded to the spouse whose earning capacity was enhanced.

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[12]California Civil Code section 4800 now mandates a 50-50 division of the community except where divorce is by default and the divisible property is less than $5000 in value. Quasi-community property, as defined in Civil Code section 4803, is generally subject to the equal division rule. By caselaw, "pure" separate property (e.g., an inheritance), is not divisible. Robinson v. Robinson, 65 Cal. App. 2d 118, 150 P.2d 7 (1944).

It seems to me illogical, unfair, and unacceptable to switch from a 50-50 division theory based on partnership concepts to what is a form of equitable division that examines only one equity. For example, H's earning capacity might have been decreased due to illness or injury. Or the value financially of the increase in his earning capacity may be more than offset by the increase in beauty, charm, domestic skills, etc., of W who, it appears to the trier of fact, will likely draw on these nonproprietary assets to promptly find a new husband who can support her in the style she is accustomed to.

In sum, I think that if California is going to shift to an equitable division scheme, the court should be authorized to examine all the equities,[13] not just enhanced earning capacity. On a comparative equities approach, moreover, total earning capacity should be considered -- not just so much of a spouse's earnning capacity as was developed during marriage.

Not only is it illogical under an equitable division approach to look only to enhancement of earning capacity during marriage, but that concept imposes extremely difficult valuation problems.

First, how is inflation to be treated? Suppose the evidence showed H and W married nine years ago. At that time he could expect to earn, after taxes,[14] $10,000 per year. Now, at divorce, he is earning after taxes $20,000 a year. The cost of living has about doubled during the nine year period. I would assume there has been no enhancement in H's earning capacity at all. Yet suppose W shows that H attended each year during marriage continuing education classes and her experts convincingly testify that had H not committed his time and energy to those studies he would now be earning only $15,000? Has there been an "enhancement" even though the buying power of H's earnings has been constant due to inflation?

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[13]For an example of a statutory listing of equities to be considered, see Idaho Code § 32-712(b).

Present public policy, see Cal. Civ. Code § 4509, may dictate excluding one of the "equities" that some states consider at divorce in dividing marital property: comparative "fault" of H and W leading to the breakdown of the marriage, see Murff v. Murff, 615 S.W.2d 696 (Tex. 1981), applying Tex. Fam. Code § 3.63.

[14]Surely the enhanced earning capacity would be calculated after deducting known, as opposed to hypothetical, tax costs of generating gains. Compare Marriage of Epstein, 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165 (1979), with Marriage of Fonstein, 117 Cal. 3d 738, 131 Cal. Rptr. 873, 552 P.2d 1169 (1976).

How is approaching retirement age to be treated?[15] Suppose H and W married when he was 40. He was then earning a net after taxes of $50,000; now he is 52 and being divorced; he is earning after taxes $200,000. But it is assumed he will retire at age 65 (as the typical person in his job does).[16] The evidence suggests his income will continue to rise until age 60 and then level off. Has there been enhanced earning capacity during marriage? Taking inflation into account, H has about doubled his effective earning power based on pressent pay received. Yet the amount of time remaining during which he will receive such income has been approximately halved. I confess I do not begin to know how Professor Bruch and the supporters of her proposal would solve this problem. If they do introduce legislation that requires the valuing of enhanced earning capacity specific guidance for the courts seems essential.

How about what appears to be "natural increase" in earning capacity during marriage other than that related to inflation? By "natural increase" here I mean an increase occurring that is not due to labors or other efforts of a spouse. Suppose W, a young high school drop-out, marries H when she is 15. Five years later they are divorced. The evidence shows that, making adjustments to account for inflation, W's earning power (still quite small, to be sure, due to her lack of skill and education) has significantly increased simply because she is now aged 20 rather than aged 15. This type of enhancement seems to be the natural growth of the separately-owned earning potential W brought to the marriage.[17] No enhancement attributable to the community should be found.

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[15]In this regard, what retirement age shall be utilized in the calculations? That date at which federal law makes full social security payments available? The date when the working spouse can retire and begin receiving the minimum amount of social security or pension payments? Compare Marriage of Gillmore, 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1 (1980). Should the court consider the health of the working spouse? His career plans?

[16]His pension rights after retirement will, of course, be divided under a valuation process examining solely that asset. See generally Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

[17]The problem of isolating natural growth from other types of growth is most often encountered in community property states following the civil law rule that rents and profits during marriage from separate capital are community owned. The courts must find a way to distinguish "profit" from the natural enhancement. See Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973).

VII. THE PROPER REMEDY: AN EXPANSION OF REIMBURSEMENT THEORY

The present California law declining first to recognize enhancement of earning capacity as community property and, second, to make a division of community property based on the equities (including that factor) which need not be equal causes little unfairness. California law presently looks to a spousal maintenance award (alimony), Cal. Civ. Code § 4801, to correct inequities that appear when comparing one spouse's post-dissolution earning capacity with that of the other.

In some situations the alimony remedy is inadequate -- primarily because, unless paid in a lump sum at the time of divorce, the anticipated payments may never be realized because, for example, of death of the obligor ex-spouse or of the obligee ex-spouse.

The case where the equities so favor the party whose earning capacity did not increase substantially during marriage that the law may not want to trust to the uncertain alimony remedy is where the aggrieved party incurred personal sacrifices to enable the other to obtain that enhanced earning capacity. For example, the instance where W works full time for seven years to put H through college and professional school (e.g., medical school). As soon as he is ready to start enjoying the financial rewards of the study, he divorces her for "another woman."

In addition to an alimony award, reimbursement theory can be invoked to adjust the equities in such a case.[18] The community claim to reimbursement (of which W can receive half out of the community property awarded H or out of his separate property) should extend to tuition fees, costs of books, etc., plus any additional costs in living expenses incurred because of the need to adjust to H's educational experience.[19] (In some instances this might include child care expenses.)

Except for one problem arising out of a badly-drafted recent amendment to California Civil Code section 4800, California courts ought to presently follow De la Rosa if a spouse presented the reimbursement issue in the manner the Minnesota Supreme Court recognized the claim. It is settled California law that at, or at lease incident

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[18] Unlike Texas, see Frausto v. Frausto, 611 S.W.2d 656 (Tex. Civ. App. 1980, writ dismissed), it has never been a requirement of California law that a community expenditure had to generate a property right before a reimbursement claim can be stated.

[19] A case California can follow as a model is De la Rosa v. De la Rosa, ____ Minn. ____, ____ N.W.2d ____ (August 28, 1981, 7 Fam. L. Rptr. 2689). A copy of the digest of that opinion from the Family Law Reporter is attached as an appendix to this memorandum.

to divorce, the spouses are entitled to an accounting in court in which reimbursement is ordered in favor of an aggrieved spouse for half of community sums used by the other spouse to pay debts that are classified as "separate." See, e.g., Marriage of Walter, 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1976); Gutierrez, Apportionment of Debts in Handling Disputes in Probate, at p. 11 (California Continuing Education of the Bar 1976). The debts are classified as community or separate under a "benefit" test.[20] If the community benefited from the obligation incurred (or would have benefited but for the contemplated gain never materializing), the obligation is community. If the only benefit would have been to one spouse's separate estate, the obligation is labeled separate.

Importantly, the cases permit splitting up a debt into a community component and a separate component. Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

By analogy to the methods used to characterize tort causes of action and tort recoveries,[21] the appropriate point in time for characterizing an obligation that has been paid (for reimbursement purposes) or an obligation outstanding (for assignment-to-pay purposes), is at the time of divorce. It would be illogical for the divorce court to blind itself to the fact that the marriage existing when the debt was incurred is about to terminate.[22]

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[20]Inexplicably, the benefit test has not been used when the obligation paid by H with community property was for alimony owed a prior wife or child support owed children not born of his marriage with W. See Marriage of Smaltz, 82 Cal. App. 3d 568, 147 Cal. Rptr. 154 (1978). This development is criticized in Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 178-80 (1981).

[21]See Washington v. Washington, 47 Cal. 2d 249, 302 P.2d 569 (1956). See also Cal. Civ. Code § 4800(c), in effect recharacterizing tort recovery on hand at divorce from community to separate property of the victim based on the fact then apparent that the recovery relates substantially to lost earnings and pain and suffering to be incurred after the marriage of the victim has been dissolved.

[22]Contra, Garfein v. Garfein, 16 Cal. App. 3d 155, 93 Cal. Rptr. 714 (1971), where the court said: "A debt is community or separate at the time it is incurred; it does not change its character merely because the beneficial effect of the consideration received may survive the marital cohabitation." This theory will lead to very unjust results. It is not required by statute and is unsupported by reasoned case law. Garfein should be disapproved by the Supreme Court of California or legislatively abrogated.

When a California divorce court is asked to characterize educational expenses (whether paid or owing, as in the case of a long-term student loan) as separate or community, in a situation like the above hypothetical where H divorces W just after graduating from professional school, it seems clear the full benefit of the expenses will generate separate property of H and no community gain. The expenses should be characterized as entirely separate.

Suppose the divorce occurs thirty years after H graduated and all the student loans have long since been paid in full? The community has substantially benefited from the education in the form of thirty years' enhanced income. True, we now know that after the divorce H will separately benefit for ten to fifteen more years. Conceivably the expenses should be pro-rated, but I believe the community has received a substantial return on its investment and equitable principles do not require reimbursement by apportioning the expenditures long ago into part community, part separate.[23]

Many divorces will present situations where the community has enjoyed just a few years of community gains stemming from substantial educational expenses. In those situations, perhaps an appropriate allocation of the expenses between community and separate could be obtained by characterizing educational loan balances unpaid as the separate debt of the educated spouse, the balance of the expenditures community. It will depend of course on the proportionate amount of the loan balance compared to the overall expenditures.

Should interest be awarded on the sum reimbursed to W? I think that should depend on the equities of the case.[24] One inquiry is whether, had the funds not been invested in education, they would have been used to acquire property that would have increased in value, generated actual profits (such as savings account interest) or potential profits (e.g., W as well as H would have been able to attend college level classes). At current rates an interest obligation attached to the reimbursement award might result in a "staggering burden" being placed on the educated H. Note, 42 Tex. L. Rev. 747, 751 (1964).

Civil Code section 4800(a)(4) states:

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

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[23]Certainly if there is to be reimbursement at all, there is no equitable basis for an interest award.

[24]Cf. Marriage of Folb, 53 Cal. App. 3d 862, 126 Cal. Rptr. 306 (1976) (whether to use a simple or compound interest factor in making a Pereira apportionment turns on what will achieve "substantial justice").

This recent amendment implies that educational loans are community debts. If they were separate debts, the court could not assign them to the non-educated spouse.

It is possible that section 4800(a)(4) will be construed as codifying the notion that debts are not recharacterized at divorce, taking into account the knowledge then available that the marriage did not last as long as anticipated.[25] The provision should be repealed and replaced with a statute of general application directing divorce courts (and probate courts too) to classify both debts paid and debts outstanding taking into account the fact the marriage has terminated or is about to terminate.

CONCLUSION

The proposal to make enhanced earning capacity community property must be rejected. The legislature may wish to consider shifting from a 50-50 division approach at a divorce to a scheme that makes a division of property based on all appropriate equities. It would be improper to amend Civil Code section 4800(a) so that only one such equity (enhanced earning capacity) were to be considered as a basis for departing from the equal division principle. Legislation is needed which makes clear that the courts are free to classify expenses of the community in obtaining enhanced earning capacity for one spouse as entirely separate (where the marriage ends before any earnings result from the expenditure) or at least partly separate. This will enable the courts to use reimbursement theory as well as alimony to adjust the equities when a 50-50 division results in unfairness.

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[25] That is, the legislation may have thought that the Garfein quote, supra note 22, was the law and intended to work within the Garfein rule by having community debts of a certain type assigned to the debtor spouse.

APPENDIX

WIFE RECOVERS COST OF SUPPORTING HUSBAND THROUGH MEDICAL SCHOOL

Minnesota Supreme Court upholds equity power of court to award restitution to a working wife who contributes to husband's educational expenses.

In a case of first impression, the Minnesota Supreme Court affirms an award to a wife for the financial support she provided her husband while he was a full-time student. The wife had "a reasonable expectation that she would be rewarded for her efforts by a higher standard of living when [her husband] began practicing medicine," the court reasons.

The court finds, however, that the wrong formula was used by the trial court in determining the amount. A new formula is devised resulting in a reduction in the amount of the award. The court also rejects the wife's contention that the husband's increased earning capacity is a marital asset subject to division. The court notes that he had not obtained his medical degree at the time of the divorce. (DeLa Rosa v. DeLa Rosa, 8/28/81)

Digest of Opinion: The parties were married in California where the husband obtained his undergraduate degree. They later moved to Minnesota where he attended medical school. The wife worked full time with the understanding that she would support him while he obtained his degrees. In his third year of medical school, the parties were divorced.

[*Text*] In this marriage dissolution proceeding, the petitioner, Pedro DeLa Rosa, appeals from a district court order awarding restitution to the respondent Elena DeLa Rosa, for financial support she provided the petitioner during his education. * * *

Prior to their separation, respondent was the primary source of financial income, thus permitting her husband to focus his energies upon obtaining an undergraduate degree, entering and attending medical school. The trial court found that respondent earned approximately $41,000 during coverture which was used for the parties' joint living expenses. Petitioner's contributions were nominal; he earned $2,300 and received Veterans' educational benefits in the total sum of $9,031. He also received a grant to attend medical school in the sum of $5,680. Petitioner had incurred student loans of approximately $10,000 at the time of separation. The record reveals that tuition for petitioner's undergraduate and medical educations during the parties' marriage was roughly $8,811.

There was no specific testimony concerning payment of individual items by the respective parties. All funds were kept in a common pool. The parties owned no real property and had for the most part divided their modest personal property by agreement.

At the time of trial, respondent was admittedly self-supporting, earning an annual salary of approximately $15,600. For that reason, the trial court properly concluded that respondent was not entitled to maintenance under Minn. Stat. §518.552 (1980). Otis v. Otis, [7 FLR 2948] (Minn. 1980). Respondent was awarded $29,669 for contributions she made to petitioner's education. [The trial court utilized the following formula in determining the award: respondent's financial contribution to community fund during college and medical school less petitioner's financial contribution to community fund during college and medical school excluding student loans and grants equals restitutionary award to respondent. ($41,000 - $11,331 = $29,669).] The trial court's award was grounded in equity and represented restitution of the financial support respondent provided to petitioner during the time he was attending college and medical school. Payment was ordered on an installment basis in increasing amounts since petitioner's financial situation was expected to improve.

Both parties have appealed. This case presents issues of first impression in this state. The initial question before us is whether the trial court had authority to make an equitable award to respondent for the financial support she provided to petitioner during the time he was a full-time student. Secondly, we must determine whether the amount awarded by the trial court was an abuse of discretion or otherwise erroneous.

Petitioner argues that because there is an absence of a specific statute authorizing restitutionary relief incident to a dissolution, the trial court was without power to make the award in question. We disagree.

Although dissolution is a statutory action and the authority of the trial court is limited to that provided for by statute, Melamed v. Melamed, 286 N.W.2d 716, 717 (Minn. 1979), the district courts are guided by equitable principles in determining the rights and liabilities of the parties upon a dissolution of the marriage relationship. Christenson v. Christenson, 162 N.W.2d 194, 203 (1960). The district court therefore has inherent power to grant equitable relief "as the facts in each particular case and the ends of justice may require." See Johnston v. Johnston, 158 N.W.2d 249, 254 (1968).

The case at bar presents the common situation where one spouse has foregone the immediate enjoyment of earned income to enable the other to pursue an advanced education on a full-time basis. Typically, this sacrifice is made with the expectation that the parties will enjoy a higher standard of living in the future. Because the income of the working spouse is used for living expenses, there is usually little accumulated marital property to be divided when the dissolution occurs prior to the attainment of the financial rewards concomitant with the advanced degree or professional license. Furthermore, the working spouse is not entitled to maintenance under Minn. Stat. §518.552 (1980) as there has been a demonstrated ability of self-support. The equities weigh heavily in favor of providing a remedy to the working spouse in such a situation and the district courts have the equitable authority to provide that relief. [Courts in other jurisdictions have considered the issue of a working spouse's entitlement to relief incident to a dissolution where that spouse supported the marriage during the student spouse's education. The jurisdictions which have allowed a recovery to the working spouse have based their rulings on divergent theories. Awards have been upheld on the ground that the student spouse's capacity for increased earnings is a marital asset subject to equitable distribution, In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa, 1978); that the professional degree or license constitutes marital property, Inman v. Inman, 578 S.W.2d 266 (Ky. 1979); Lynn v. Lynn, No. M-9842-7 (N.J. Super. Ct. Ch. Div., filed Dec. 5, 1980), appeal docketed, Feb. 19, 1981); Mahoney v. Mahoney, 175 N.J. Super. 443, 419 A.2d 1149 (1980); See Moss v. Moss, 80 Mich. App. 693, 264

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N.W.2d 97 (1978); Daniels v. Daniels, 20 Ohio App. 2d 458, 185 N.E.2d 773 (1961), and that the working spouse has an equitable claim for her past investment, Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979). The method of calculating an award is also a subject upon which these courts disagree. Compare, e.g. Lynn, supra, with Mahoney, supra.

Courts that have refused to recognize a property interest in cases of this type have done so on the grounds that an advanced degree or education lacks traditional property attributes, Graham v. Graham, 194 Colo. 429, 574 P.2d 75 (1978); Aufmuth v. Aufmuth, 89 Cal. App. 446, 152 Cal. Rptr. 668 (1979) overruled in part on other grounds, Lucas v. Lucas, 27 Cal. 3d 808, 614 P. 2d 285, 166 Cal. Rptr. 853 (1980); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); that future earnings do not constitute a vested present interest subject to distribution, Wilcox v. Wilcox, 173 Ind. App. 661, 365 N.E.2d 792 (1977); and that increased earning capacity is not marital property although the working spouse has aided and enhanced its development. Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975).]

In Englund v. Englund, 286 Minn. 227, 175 N.W.2d 461 (1970), we recognized the right of one spouse in a divorce action to recover monies expended on joint living expenses if there was an original expectation of repayment. Id. at 230, 175 N.W.2d at 463. See McGough v. McGough, 311 Minn. 381, 384, 249 N.W.2d 885, 888 [3 FLR 2231] (Minn. 1977). Although the evidence is insufficient to support such a finding in the instant case, respondent had a reasonable expectation that she would be rewarded for her efforts by a higher standard of living when petitioner began practicing medicine. We find that the trial court did not abuse its discretion in making an equitable award to respondent for the financial support she provided to petitioner during his schooling in light of the facts and circumstances of this case.

Respondent urges this court to hold that petitioner's education or increased earning capacity is marital property within the meaning of Minn. Stat. §518.58 (1980), thus entitling her to a division of the present value of that asset. [Respondent's expert testified that the present value of petitioner's completed professional education was $246,478.] In decisions which have so held, the student spouse had obtained either an advanced degree or professional license prior to the dissolution. That is not the situation here and we therefore find the cases cited by respondent inapposite.

Having concluded that the trial court in this case properly allowed an equitable recovery to respondent for the marital support she provided to petitioner during his education, we must consider whether the amount awarded constituted an abuse of discretion. It should be noted we have never addressed this issue and that the trial court did not have the benefit of guidelines in determining a proper award.

It is this Court's view that the award should have been limited to the monies expended by respondent for petitioner's living expenses and any contributions made toward petitioner's direct educational costs. To achieve this result, we subtract from respondent's earnings her own living expenses. This has the effect of imputing one-half of the living expenses and all the educational expenses to the student spouse. The formula subtracts from respondent's contributions one-half of the couple's living expenses, that amount being the contributions of the two parties which were not used for direct educational costs: working spouse's financial contributions to joint living expenses and educational costs of student spouse less 1/2 (working spouse's financial contributions plus student spouse's financial contributions less cost of education) equals equitable award to working spouse. Under this formula, respondent is entitled to the sum of $11,400 as opposed to the $29,669 figure awarded by the trial court.

The case is remanded to the trial court with directions to vacate the prior judgment and to enter judgment in accordance with this opinion, with interest to be awarded from the date of the original judgment. [*End Text*] — Amdahl, J.

(DeLa Rosa v. DeLa Rosa; Minn SupCt, 8/28/81)

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Equity in the Family

. . . presents . . .

A PROPOSAL FOR LEGISLATION IN FAMILY LAW TO THE CALIFORNIA LAW REVISION COMMISSION FOR DISCUSSION AT THE COMMISSION'S MEETING OF DECEMBER 3-5, 1981, IN SAN FRANCISCO

INTRODUCTION

Rather than organize public demonstrations and marches, flamboyant protests -- perhaps plant a bomb in a courthouse or burn down a judge's house -- Equity in the Family has resolved to seek justice, and to work for the preservation of liberty and the institution of the family, in an orderly, civilized manner. We rely on the decency and good sense of our elected representatives and others in positions of influence in government. For if we may not so rely, any other effort in behalf of our cause would be futile; and if we may so rely, sensationalism is unnecessary.

What is our cause? It is to stabilize the institution of the family by bringing about, in law and public policy, full recognition of the equal worth of husband and wife in any given marriage irrespective of role. We do not have such recognition today. If it is to be established for the future, it will be largely through after-the-fact treatment of marriage in the present.

First, we approached state legislators. Among others, Senator Arlen Gregorio agreed that something should be done about the inequitable economic plight of divorced homemakers -- a plight revealing the unequal regard in which homemakers are held by the law. He directed us to the Senate Subcommittee on Administration of Justice. From there, after letters and phone calls to Steven Belzer, counsel for that body, we corresponded with members of the Family Law Advisory Commission. This was an ad hoc group of highly respected, highly qualified individuals appointed by the Governor to seek out solutions to serious problems in family law and to report to the subcommittee of which I just spoke. That commission invited us to present our proposal at its February 1979 meeting. We did so. Following that, the Advisory Commission stated that they believed -- and I quote from a letter from Mr. Belzer -- "that the proposal raises important considerations and merits in-depth study." They recommended in their formal report that it be included in the community-property study in which the California Law Revision Commission has been authorized to engage under ACR 85 (Resolution Chapter 65, 1978). Because the Advisory Commission was shortly to be dissolved at the time of our presentation, and the subject of our proposal is community property, this was the logical place to go.

Some omitted in oral presentation

WHY NEEDED

That former homemakers nearly always come out with the short end of the stick following divorce has been well publicized in the media. Formal

studies have shown it to be true. The problem has not been corrected: Divorced homemakers have not been provided equal protection of the laws. This will be provided only when each party in a divorce is entitled to keep as property one-half the interests in all of the economic benefits acquired and accrued through the operations of the marriage partnership -- and when such entitlement is enforced.

Even if it were equitable as to amount, duration and enforcement, spousal support (alimony) cannot fully correct the problem; and the way this is awarded removes justice even further from the divorced homemaker. The courts have added their own criterion to the criteria provided by written law, one which outweighs all others -- namely, the ability of the supported party, after a relatively brief period, to keep herself off welfare, no matter how minimally, irrespective of the earning capacity of her former spouse. Nor does "duration of marriage" carry any definitive weight -- Morrison notwithstanding. Even the "extent" of one spouse's earning-capacity "impairment" incurred because of duties in the home, is only one of the circumstances which the court is to consider, giving it any weight it chooses -- or none at all. Prior to this 1980 amendment to Civil Code Section 4801(a), earning capacity of each spouse, along with duration of marriage, implied what the new law intended to effect; yet, the courts chose to ignore any rational correlation among these three circumstances. The latitude still permitted makes justice a hit-or-miss proposition -- mostly miss. An effect of the Judiciary position has been to make the pursuit of a homemaking vocation the one exception to no fault in divorce: Former homemakers are penalized for their role during marriage.

It seems inconceivable that government in a freedom-loving state would support such a policy. Yet, this is precisely what is being done through the power imbalance created in family law: By granting over-broad discretionary power to the Judiciary, the Legislature has given that branch of government free rein to determine state policy on the institution of the family and its future course -- that is, to manipulate the family, and hence society, for the purposes of those controlling the Judiciary. The state is in grave need of legislation to remedy this imbalance. Not only must the full property rights of both parties in a divorce be clearly recognized in law, but, in addition, the courts' over-broad discretionary power must be curtailed by unambiguous, unequivocal legislation.

PROPOSAL

We propose that Section 4801.3 be added to the Civil Code to read:

> 4801.3. Notwithstanding any other provision of law, in any judgment decreeing the dissolution of a marriage or a legal separation, the court shall regard the interests in the increase achieved in the gainful-employment earning capacity of each spouse during the marriage as community property. In determining such interests, the court shall regard the spouse's earning capacity on the date of the marriage, and at all times subsequent to said date, as reduced by the percentage comprising the interests which are property from a previous marriage.

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Presumably the courts would not compare "apples and oranges" by failing to consider the qualifications which the spouse had at the beginning of the marriage, in terms of the worth of those same qualifications in the job market at the end of the marriage. For instance, the qualifications that earned $500 a month in 1967 might be worth $1300 a month in 1981. Thus, the earning-capacity increase, gained by 1981, which the person made who, in 1967, had those qualifications, would be measured, not from $500, but from $1300.

Originally our proposal explicitly covered this point. However, in his letter to me of July 23, 1980, the Chairman of the Executive Committee of the Family Law Section of the State Bar wrote, "I would suggest, in order to enhance your proposal's chance of being adopted as legislation, that you first establish the concept of your proposition and let the courts work out the amounts involved." We believe that in our following this suggestion, the proposal's chance of being approved by the State Bar will be enhanced.

I should mention at this point that the measure would not put the obligor in some sort of indentured servitude -- which means loss of liberty to do what one chooses with one's life. As far as this measure is concerned, he is free to change jobs, take a lower-paying job, work only part time, or not work at all. Recognizing that part of the base for his future gainful-employment earnings was established during marriage, the measure allocates a fixed percentage of such earnings to the former spouse and applies as long as, and whenever, the obligor is gainfully employed. (A detailed example of the mathematics involved will come later in this presentation.) Omitted in oral presentation

Presumably the parties might agree to a lump-sum cash settlement at the time of dissolution or to payments over a lesser period of time than that of the obligor's estimated remaining years of gainful employment. However, this would be speculative in the extreme. Not only are there a great many unpredictable factors, but the implications involved in part of the payor's future gainful-employment earnings belonging to the former spouse but paid to her ahead of time -- perhaps potentially reflective in Social Security and other benefits -- would further complicate the settlement. Incidentally, we have approached members of Congress to have legislation introduced which would recognize that the portion of the obligor's gainful-employment earnings paid to a former spouse through court order (except child support) constitutes, at least indirectly, part of the earnings of the former spouse and should be so considered in determining Social Security taxes and benefits. For, the spouse in the home had already, some years earlier, put in the time and services, in behalf of the other spouse, that permitted the accrual of the pertinent portion of the earning capacity. Hence, the proceeds from her investment of such time and services -- notwithstanding that the proceeds are indirect -- belong to her. Because of its potential for adding revenue to the Social Security fund, this suggestion has generated considerable interest.

PREMISES AND POINTS

Not foreseeing a return to "fault" in divorce proceedings, we present our premises and points from two positions: that of justice and that of public policy.

From the Position of Justice

From the position of justice, the two basic premises in the context of no-fault are:

(1) The woman a man marries must be presumed, by the fact of his having chosen to marry her, to be his equal in worth -- and "worth" includes considerations not normally or explicitly recognized in the marketplace.

(2) Marriage is an equal partnership, irrespective of role.

In argument to the first premise -- that is, concerning the equal worth of husband and wife in any given marriage -- the opinion has been expressed that "one of the leading causes of divorce is a recognition of a mistake having been made in the first instance." In other words, one spouse supposedly comes to "recognize" his "superiority" to the other. Yet, the various aspects of one's character are worthy only in the measure of the humility accompanying them. Hence, the arrogance of such "recognition" reveals a serious lack of qualification, with the alleged superiority thereby nullified. Such considerations aside, however, to deny the equal worth of husband and wife in any given marriage is to make an exception to no fault -- in which case a whole new structure of family law is needed.

Absent any consideration of fault, each partner's role or combination of roles must be deemed to be of worth to the family and society equal with the worth of the other partner's role or combination of roles. For, fault is implied by any suggestion that the role of one spouse is of lesser worth than that of the other. Such a suggestion implies that one is not contributing as much as the other -- certainly a fault in an equal partnership.

Within the context of the domestic duties of the family, incurred jointly by husband and wife (these duties, as just indicated, being equally worthy with the career supporting the family), the wife is neither more nor less of a benefit than the husband -- even if primarily indirect -- in the accrual of interests in his earning-capacity increase gained in the operations of the marriage partnership, just as the husband is neither more nor less of a benefit than the wife -- even if primarily indirect -- in the birth and rearing of their children -- which fact is now reflected in California law.

When speaking of the wife in terms of an indirect benefit in the accrual of the interests in the husband's earning-capacity increase, I refer to her time and services in taking on the bulk of his equal share, in addition to her own equal share, of the domestic duties of the family, thereby leaving him with more time and freedom to give attention to his career than had such duties been equally divided. He has exploited her if he keeps for himself the larger portion of the benefits thus gained. Moreover, those duties in the home are basically what the family is all about and must not be downgraded in favor of the career which makes fulfilling them in the home possible.

Rather than a single individual acquiring an adjunct, whose purpose is to serve his or her career, the marriage parntership itself is a single

entity. The responsibilities which the two persons comprising it incur jointly, belong equally to husband and wife -- who are nevertheless free to delegate them according to whatever arrangement they make between themselves. And neither spouse becomes of lesser worth than the other by reason of the nature of the responsibilities delegated to him or her.

Even when both husband and wife were gainfully employed during the marriage, the economic benefits each thereby acquired and accrued are not necessarily an accurate measure of his or her contributions, both direct and indirect, to the total economic benefits acquired and accrued in the operations of the marriage partnership. A greater dedication by one spouse than by the other to the nonfinancial responsibilities of the marriage would have contributed indirectly to the other's career advancement at the expense of her own. Many factors might have entered into a difference between the economic advantages of their respective careers -- among them, past and present discrimination in the job market (why should one spouse have to bear the brunt of this more than the other?), as well as a system of compensation that reflects distorted values. It is arguable, for example, that the average lawyer contributes as much to society as the average schoolteacher; yet, the economic advantages of his career are undoubtedly greater.

But, in any case, it is the nonfinancial contributions to the family that make it a significant part of society -- far more so than the spouse's pursuit of her own paying-career interests. Without such nonfinancial contributions, society might as well -- indeed, probably would -- do away with the family, set up communes and turn child-rearing over to the state (if women don't give up having children altogether).

Whatever may have contributed to a difference between the respective career advantages of husband and wife, we must return to the premises of the equal worth of the spouses in the equal partnership of marriage, in the context of no fault, and conclude that both contributed equally (whether directly or indirectly is immaterial) to the total economic benefits acquired and accrued in the operations of the marriage partnership.

For those who favor the traditional family, I should like to mention that this equal-worth concept does not preclude a hierarchy within the family which recognizes the husband as the head, the voice of final authority. However, because such authority must reside in love -- which comes from God and cannot be legislated -- its mandate properly arises from religion, not from secular law.

There are those who, ignoring the points brought out in this presentation, claim that an ex-wife should receive payments from her ex-husband only according to her need -- and these in the form of spousal support, or alimony. True, this should be considered when there are children in her custody who preclude her full-time gainful employment. Nevertheless, aside from the fact that "need" is a nebulous thing -- subject to opinion, contention, and skill or lack thereof in convincing the court one way or the other, as well as to the court's own predisposition -- such a view places the ex-wife in a position comparable to that of an applicant for welfare, instead of as one of the parties in what had been an equal part-

nership. Is only her need, or lack thereof, properly to be considered and not his? Why not ask, would the prospective obligor be in need if he delivered to her the value of half of the interests in his earning capacity which they had accrued jointly? (The answer would have to be no; for, however much he retained would be more than that with which he had begun the marriage, and he had survived adequately on that.) But, in any event, to say that payment to her should be based on her need is like saying that I don't have to repay the money I borrowed from my friend, because she has ample assets and will not be in need without it.

If a man delegates to his wife a large part of his share of their jointly and equally incurred domestic responsibilities in order to be free to pursue his career -- that is, if he uses her time and services in the interests of making greater economic gain than would be possible were he himself to directly discharge his full half of such responsibilities -- if he makes this kind of arrangement with her, he incurs a debt to her. And since marriage is an equal partnership, with neither party more nor less worthy than the other, his debt is half of whatever economic benefits he acquires and accrues in the arrangement. For him not to pay this debt, and for millions of other men not to pay their debts to former wives -- that is, to have retroactively exploited them -- is to undermine, and eventually to collapse, the institution of the family, since decreasing numbers of women will wish to invest their lives in it. And, of course, this is precisely what is happening today.

In discussing the idea of having to share, as property, some of the interests in his earning capacity with his ex-wife, a man declared, "But it's my earning capacity." He is only partially correct. The percentage representing the interests in it prior to his marriage is entirely his own (assuming he had not been married previously), as is a percentage representing half of the interests in the earning-capacity increase gained during the marriage. However, the percentage representing the interests in what was gained during the time released to him by his wife while she took on most of his share of their jointly incurred domestic responsibilities, is hers -- that is, the percentage representing the interests in the other half of the earning-capacity increase gained during the marriage. The man's past experience will always, inevitably, contribute to his future earning capacity. Again, for him not to concede half of the marriage-accrued interests in it to his ex-wife as property, earned equally with him -- not as a dole because she is in "need" -- is to have retroactively exploited her. And a civilized society does not condone the exploitation of one human being by another.

From the Position of Public Policy

From the position of public policy, our proposal rests on three basic premises, in addition to the need for a balance of power in government:

(1) The family, exercising its functions itself, is a valuable institution for preserving responsible liberty.

(2) Law which coerces, or even encourages, the relinquishment of such functions to others is undesirable.

(3) The present divorce rate indicates, and fosters, an unhealthy condition in society. It is therefore desirable to formulate laws with the potential for reducing the divorce rate.

In today's society, with the "carrot" of supposedly fulfilling careers dangling before both men and women, and the "stick" of the inequitable economic treatment of divorced homemakers threatening from behind (coupled with an extremely high divorce rate), it is essential -- if the primary functions of the family are generally to remain with the family -- that the law be revised to make a homemaking vocation no less economically rewarding in any given family than the career financially supporting that family. Present law has established an economic disincentive for this vocation. This is not to say that for every dollar earned in the career, a matching dollar must come from somewhere to pay the homemaker. It means only that whatever benefits are gained in the career during the marriage must be shared equally with the homemaker. Should the marriage fail, the former homemaker must not be left trailing in the dust, while the other party walks off with the bulk of the economic benefits of their partnership. And such benefits include not only what has already been tangibly acquired in the operations of the marriage partnership, but what has been accrued, as well -- that is, what will be realized as a tangible benefit later, by reason of the foundation laid for it during the marriage. And one such benefit is constituted by the interests in any earning-capacity increase gained in the partnership operations.

Nor is it valid to say that because the economy requires (supposedly) that women abandon the homemaker role, any law to protect the role would be moot; therefore why bother? Historically, women have faced economic crises in the home, yet held their ground. Much more than the economy has contributed to the present exodus from the home, with the resultant inflationary trend contributing even further to the problem -- like self-fulfilling prophecy. Family law must not be made to bow either to the economy or to the manipulative designs of those who wish to revolutionize society.

Our proposal serves to emphasize that when a man and a woman marry, the domestic responsibilities which they incur -- serving in the home, caring for the children of the marriage -- are of equal significance and worth with the paying work supporting the family which they have now become. The proposal promotes a public policy to fully recognize the equal worth of husband and wife in any given marriage irrespective of role. As this policy becomes a part of public consciousness, the healthy mutual esteem of husband and wife will be enhanced, as will be the healthy self-esteem of each. We can then expect the quality of family life to improve and the divorce rate to decline.

The following section is to be omitted in the oral presentation (except to point out that it's here.

EXAMPLE SHOWING THE EFFECTS OF A WOMAN'S MARRIAGES ON THE INTERESTS IN HER MONTHLY EARNING CAPACITY

All of the amounts in the example about to be given are stated in terms of the current dollar value of each pertinent earning capacity at the time of the given dissolution.

First Marriage $1200 to $2000 = $800 increase

$$\frac{\$800}{\$2000} = .4 = 40\%$$

Increase constitutes 40% of total earning capacity by date of marriage dissolution. Forty percent of interests in wife's total earning capacity were gained during this marriage.

The $800 representing this 40%, as well as its subsequent increases and/or decreases, belongs equally to wife and first husband.

Second Marriage $2100 to $3000: increase in total earning capacity

Reducing these amounts, in accord with the proposal, by the 40% which comprises the property interests from the first marriage (100% - 40% = 60% = .6):

$$(.6)(\$2100) = \$1260$$

$$(.6)(\$3000) = \$1800$$

$1260 to $1800 = $540 increase in reduced earning capacity

$$\frac{\$540}{\$1800} = .3 = 30\%$$

Increase in earning capacity reduced by interests of first marriage constitutes 30% of earning capacity so reduced.

If we let x = total earning capacity,

then .6x = reduced earning capacity.

Hence,
30% of reduced earning capacity = (.3)(.6x)

= .18x

= 18% of total earning capacity

18% of interests in wife's total earning capacity were gained during second marriage.

The $540 representing this 18%, as well as its subsequent increases and/or decreases, belongs equally to wife and second husband.

40% of interests in total earning capacity still belongs equally to wife and first husband.

If either or both of the husbands gained earning-capacity increases during their respective marriages to the wife, the interests would be determined independently of the interests in her earning-capacity increases.

The following section is to be omitted in oral presentation.

INTEREST IN EARNING-CAPACITY INCREASE AS RELATED TO SPOUSAL AND CHILD SUPPORT

Spousal support needed while caring for the children of the marriage whose interests would be interfered with by the full-time gainful employment of the custodial parent, and/or "rehabilitation" spousal support, would be payable in addition to the obligee's interest in the obligor's earning-capacity increase. Such interest would be considered among the "other assets" which the court is required to take into account in determining amount of spousal support. Ideally during this period, the total respective incomes of the parties prior to payment and receipt of child support should be equal; for, the custodial parent either continues in behalf of both parents to exercise duties incurred jointly by them -- duties precluding the custodial parent's full-time gainful employment -- or is engaged in training or education to make up for an earning-capacity deterioration incurred in the operations of the marriage partnership. After such equalization is set up, child support should be awarded the custodial parent to cover one-half the actual expenses of maintaining the child or children in the custodial parent's home appropriately with the parents' combined economic circumstances.

Following this period, spousal support would presumably in most cases be terminated; however, the obligee's property interest in the obligor's earning-capacity increase gained during the marriage would remain (barring a lump-sum settlement at the time of dissolution). Child support to be awarded the custodial parent should then be determined by a proration according to the parties' respective assets and incomes (whether the income be presumed or actual) prior to payment and receipt of child support -- that is, a proration of whatever amount is deemed necessary to appropriately maintain the child or children in the custodial parent's home and to provide whatever care and supervisorial services may be necessary.

In determining the parents' respective incomes for the purpose of prorating child support, the court should (except in unusual cases) presume both parents to be now fully exercising their respective earning capacities but may not rightly otherwise penalize a parent should he or she elect only part-time gainful employment, or elect no gainful employment at all -- which she might do in the event that her share of the economic benefits gained during the marriage, and her other assets, permit her to devote full time to homemaking for herself, and the child or children. It is an evil presumption on the part of the courts to force divorced mothers out of the home irrespective of the fathers' incomes, as they do in manipulating spousal-support awards. They would not be so free to do so under law from this proposal.

CLOSING COMMENTS

In a 6-3 split decision on June 26 of this year, the U.S. Supreme Court determined that the property division of military retirement pay held the potential for frustrating the purposes of the armed services; therefore

state law may not declare such pay community property. The same argument presumably would apply to any kind of federal military pay: The spouse's property interests in marriage-accrued economic benefits of a military nature must give way to the interests of (supposedly) protecting the nation; that is, the military institution has pre-eminence over the institution of the family -- which, however, is the building block of the nation; which existed before the nation or the military was ever formed; to protect which, is the fundamental purpose of the military; and over which, jurisdiction has been reserved by the United States Constitution to the states. This is an astonishing position for a nation "conceived in liberty"! (A related issue is whether the military active-duty pay or retirement pay of a California resident, whose spouse is also a California resident, may be regarded as community income in an ongoing marriage. Will it be legally regarded as solely his own to be used as he alone wishes? Will he be free to make major purchases, such as a house, without his wife's signature?)

Contrary to the Supreme Court's statement, many contend that in not being assured of their rightful share of marriage-acquired and marriage-accrued economic benefits, individuals will increasingly persuade spouses who are potential military careerists to pursue other careers. Surely all thinking women deplore the Supreme Court decision; they are well aware of the exceedingly vulnerable position in which it places military wives. Indeed, decreasing numbers of women will wish to marry into the military; for, in today's social climate especially, they will certainly not be disposed to becoming chattel. The very ruling ostensibly designed not to potentially frustrate the purposes of the armed services is very probably even now doing so.

But even more fundamental, in a pluralistic nation of free people, is the question of where the greater protection is needed to assure not only the strength and health of the nation, but freedom as well. Barring a national emergency, which institution rightfully has primacy? The military? or the family -- which, if the nation is to be strong and healthy, must itself be strong and healthy; and which, if the state is not to control virtually every aspect of citizens' lives from birth to death, must not be coerced, or even encouraged, by law to relinquish its functions to agencies outside itself (potentially to the state)? Most assuredly in today's society, the purposes of the family -- instituted by the Creator of life before any nation or military force ever existed -- will continue to be frustrated, as they are even now, if the law continues to not fully recognize the equality of worth between husband and wife in any given marriage irrespective of role.

We are not locked into McCarty, which, in any event, has only indirect and limited application to the proposal presented herein. Even though the action now necessary might be the initiation of a constitutional amendment explicitly giving the family-law jurisdiction of the states precedence over federal interests (except temporarily, in a national emergency), McCarty is not sufficient reason to shelve the present proposal (there will surely be enough woman who have steered clear of military men, to make a law from it worthwhile). The system of checks and balances provided by our form of government must continue to operate.

--Elaine Elwell
Legislative Chairman
EQUIY IN THE FAMILY

July 1981

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THE DEFINITION AND DIVISION OF MARITAL PROPERTY IN CALIFORNIA: TOWARD PARITY AND SIMPLICITY*

*This study was prepared for the California Law Revision Commission by Professor Carol S. Bruch. No part of this study may be published without prior written consent of the Commission.

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Copies of this study are furnished to interested persons solely for the purpose of giving the commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CALIFORNIA LAW REVISION COMMISSION
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THE DEFINITION AND DIVISION OF MARITAL PROPERTY IN CALIFORNIA: TOWARD PARITY AND SIMPLICITY*

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* Background study for the California Law Revision Commission prepared by Carol S. Bruch, Professor of Law, University of California, Davis.

THE DEFINITION AND DIVISION OF MARITAL PROPERTY IN CALIFORNIA: TOWARD PARITY AND SIMPLICITY*

by

Carol S. Bruch+

INTRODUCTION

A. Recent Developments in California

With the adoption of no-fault divorce in 1970,[1] California's rule for the division of community property at divorce[2] became what it had been at

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1. 1969 Cal. Stats. ch. 1608, p. 3312 (effective Jan. 1, 1970).

2. The current formulation is found in Cal. Civ. Code § 4800 (West Supp. 1981):

> (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 interlocutory 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 the jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, 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

death for almost 60 years:[3] equal division was mandated, albeit with minor exceptions for special circumstances.[4] Women, who were protected as

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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 property on such conditions as its 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 subdivison, "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 its deems necessary to carry out the purposes of this section.

3. In 1923, wives were given succession and testamentary rights equal to those of their husbands. 1923 Cal. Stats. ch. 18, p. 29 (enacting Probate Code § 201).

4. Cal. Civ. Code § 4800(b),(c), set forth at note 2, supra.

the innocent spouses in many pre-1970 divorce cases and therefore received more than half of the acknowledged community property,[5] were now limited to a 50% share. However, as property valuation improved dramatically in precision during the seventies, it became apparent that husbands under the old law had frequently received important community assets to which no dollar value or no accurate value had been assigned. Some of these assets are now valued and divided, but others are not. For example, although vested pensions had been subject to division for many years,[6] until 1976

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5. Under the former law, a divorce was granted to an innocent party on the basis of the other spouse's marital fault. Former Cal. Civ. Code § 92, enacted 1 Cal. Civ. Code § 92 (1872), as amended in 1941 Cal. Stats. ch. 951, § 1, p. 2547 (listing adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of a felony and incurable insanity as grounds). Women were the petitioners in most cases under that law. See, e.g., Seal, A Decade of No-Fault Divorce: What it Has Meant Financially for Women in Cali-fornia, Fam. Advocate, Summer 1978, at 10, 12 (75.2% of San Diego County divorces in 1968 resulted from actions filed by wives). An equitable distribution of community and quasi-community property was ordered in cases of adultery, incurable insanity or extreme cruelty; in other cases equal division was mandated. Former Cal. Civ. Code § 146, enacted 1 Cal. Civ. Code §§ 146, 147 (1872), as amended in 1951 Cal. Stats. ch. 1700, § 10, p. 3913 (amending § 146 and repealing § 147), and finally amended in 1968 Cal. Stats. ch. 457, § 1, p. 1077.

   Dr. Weitzman reports that in 1968 women received well over one half of the community property in 86% of San Francisco County divorces and 58% of Los Angeles County divorces. Weitzman, The Economics of Divorce: The Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 U.C.L.A.L. Rev. ____, at table 9 (1981).

6. French v. French, 19 Cal. 2d 775, 112 P.2d 235 (1941); Sweesy v. Los Angeles Co. Peace Officers' Retirement Bd., 17 Cal. 2d 356, 110 P.2d 37 (1941). Case law later included vested but not mature pensions, (i.e., pensions under which payments were not yet due). Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1st Dist. 1972) (employee was eligible to retire but had not done so); In re Marriage of Brugel, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (4th Dist. 1975) (employee had worked the required number of years but had not yet reached the plan's minimum retirement age).

other pension rights were not.[7] Because men are much more likely than women to acquire pension rights through their employment,[8] these unvalued assets typically went to the husband although they were not reflected in the statistics of the division. Similarly, although the goodwill of a business or profession was invariably awarded to the spouse who received the business (the husband in more than 90% of a 1968 sample[9]), the assigned values may well have been artificially low. Most importantly, California courts have been consistently unwilling to classify a spouse's enhanced earning capacity as community property,[10] and this -- the most

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7. The California Supreme Court extended the definition of community property to include unvested pension rights in In re Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976). More recently, the right to enhance a pension through the repayment of previously withdrawn community property contributions has also been recognized as a community asset. In re Marriage of Lucero, 118 Cal. App. 3d 836, 173 Cal. Rptr. 680 (4th Dist. 1981).

8. Ownership of pensions and retirement funds vary greatly by gender as well as by marital duration and family income. Husbands are much more likely to have acquired pensions during marriage than their wives, and their pensions are highly correlated with both income and length of marriage. . . . [A]mong men with yearly incomes under $20,000, pension ownership rises from 9 percent of those married less than 10 years to 50 percent of those married . . . 18 years or more. The same pattern is evident among men earning more than $20,000 a year: 29 percent of those in short marriages own pensions compared to 60 percent of those married 18 years or more.

   Married women, in contrast, are much less likely to have acquired pensions, irrespective of the length of marriage (or their age). . . . [O]nly 11 percent of the divorcing women had pensions in contrast to 24 percent of the divorcing men. The only group of women who have acquired pensions are women who have incomes of $20,000 or more a year, and only 2 percent of all [divorcing] women earn that much.

   Weitzman, supra note 5, at table 8.

9. Weitzman, supra note 5, at table 11.

10. See In re Marriage of Aufmuth 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1st Dist. 1979); Todd v. Todd 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969). But see Aarons v. Brasch, 229 Cal. App. 2d 197, 200 n.1, 40 Cal. Rptr. 153, 156 n.1 (1st Dist. 1964).

valuable asset in many marriages -- goes to a spouse without mention in the property division. At the other extreme, debts, which were not considered property before 1970 (and therefore were treated separately at divorce),[11] have gradually been incorporated into the equal division calculus.[12] The result is that divorcing women now receive a smaller share of a larger, yet still incomplete, pool of community property, and bear a larger share of responsibility for the couple's debts.

At the same time, related changes in support law have been interpreted as reducing the justifications for spousal support. The impact has been dramatic. Although spousal support seems rarely to have been awarded to more than 15% of divorcing women, even those few who receive awards under the new law receive smaller amounts for a much shorter period.[13] Child support awards also lag farther and farther behind poverty levels[14] and, since 1972, have been authorized only until a child's eighteenth birthday.[15] Because now as before children remain almost exclusively in

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11. B. Armstrong, 1 California Family Law 855 (1953). This rule coexisted with a rule mandating the equal division of community property in some cases. See note 5 supra. But see the cases cited at Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 28 U.C.L.A.L. Rev. ___, ___ n.67 (1981).

12. Bruch, supra note 11, at nn.59-60.

13. See Weitzman and Dixon, The Alimony Myth: Does No-Fault Divorce Make a Difference?, 14 Fam. L.Q. 141, 143 (1980); see also Seal, supra note 5, at 13; U.S. Bureau of the Census, Marriage and Divorce 1922, at 29, table 22 (1925) (14.7%); B. Bryant, American Women Today and Tomorrow 24 (1977) (14% in 1975).

14. Weitzman and Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce, 12 UCD L. Rev. 473, 497 (1979); Seal, supra note 5, at 13.

15. 1971 Cal. Stats. ch. 1748, § 23, p. 3746 (codified as Civil Code § 25). See also 1972 Cal. Stats. ch. 38, § 4, p. 50.

their mother's care after divorce,[16] inadequate child support awards have an additional negative impact on the financial posture of California's divorced women. Taking into account all court-ordered support transfers, the California Divorce Law Research Project found sharp disparities in the household and per capita incomes of California couples one year after their 1977 divorces: in each category, former husbands had dramatically improved their situations while their former wives' incomes had dropped precipitously.[17]

The combined impact of decreased post-divorce support, equal division of recognized community property assets and debts, and inflation can be seen most graphically in changed dispositions of the family home. Although sixty-one percent of homes were awarded to wives in 1968, in 1977 this percentage had dropped to forty-six percent, and the percentage of homes being sold to accomplish an equal division of the community property had almost tripled.[18] The soaring real estate market, which resulted in a home's equity being the major community property asset for most divorcing families who owned homes in 1977,[19] also reduced the likelihood that a custodial parent would be able to secure comparable housing after divorce. Although case law has responded by developing a technique that maintains joint ownership of the house in certain cases involving minor children,[20]

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16. Weitzman, supra note 14, at 489.

17. See the data set forth at note 191 infra.

18. Weitzman, supra note 5, at table 10 (11% of the homes were sold in 1968 in Los Angeles County, 18% were sold in 1972, and 30% in 1977).

19. Weitzman, supra note 5, at table 6.

20. In re Marriage of Duke 101 Cal. App. 3d 152, 161 Cal. Rptr. 444 (4th Dist. 1980); In re Marriage of Boseman 31 Cal. App. 3d 372, 107 Cal. Rptr. 232 (2d Dist. 1973).

the remedy is not generally available[21] and, at best, is granted for a limited period.[22]

This is but one example of the increasing complexity of property divisions under current California law. Special problems have also developed as to pensions: the Supremacy Clause sometimes divests a non-employee spouse of any interest in a federal pension,[23] the division of

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21. No reported case has yet extended the reasoning to a case in which spousal support rather than child support was at issue, nor to one in which use of a separate property residence was requested. See the pre-Boseman case, Robinson v. Robinson, 65 Cal. App. 2d 118, 150 P.2d 7 (2d Dist. 1944), in which a divorcing wife was denied a life-estate in her husband's separate property realty. The court concluded that it had no jurisdiction to "dispose" of the husband's separate property but did not discuss the liability of separate property for support claims. Cf. Cal. Civ. Code §§ 4805, 4807 (West 1970 & Supp. 1981) (including separate property in lists of possible support sources).

22. Several judges at the California Center for Judicial Education and Research's 1981 California Superior Court Family Law and Procedure Institute reported to the author that their practice is to make Boseman awards in appropriate cases, but not to extend these awards for more than a few years. Three-and-one-half to four years were given as maximums, even in cases with young children. Conversations with judges in Sacramento, California (March 25, 1981). This is consistent with the Marin County findings of Wallenstein and Kelly, who reported frequent moves by children and their custodial parents following property dispositions. Within 3½ to 4½ years after their parents' separation,

> almost two-thirds of the youngsters had changed their place of residence, and a substantial number of these had moved three or more times. . . . In many cases the move was precipitated by the necessity of selling the family home as part of the final financial settlement.

J. Wallerstein & J. Kelly, Surviving the Breakup: How Children and Parents Cope with Divorce 183 (1980).

23. See Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (California powerless to apply community property principles to federal Railroad Retirement Act pension); McCarty v. McCarty, 49 U.S.L.W. 4835 (June 26, 1981) (federal military pensions also preempt California community property law).

other pensions is frequently troublesome,[24] and there is confusion concerning payments that involve recompense for disabilities.[25] Other changes have raised questions about the content or wisdom of rules controlling tort recoveries,[26] the valuation of goodwill,[27] postseparation income,[28] and assets acquired with mixed separate and community components[29] (including questions of title and the relevance of borrowed money[30]), a divorce court's jurisdiction over separate property[31] and over claims arising out of a couple's cohabitation before marriage,[32] the treatment at death[33] or divorce[34] of property brought to California, and distribution by a probate court of some forms of property and debts.[35]

A serious look at the issues posed in typical divorce and probate cases over the past decade, and at the relative post-divorce financial postures of men and women, indicates that the system stands in need of reform. Something as simply expressed as partnership in marriage should entail neither convoluted doctrines, exorbitant litigation costs, impoverishment

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24. See notes 133-143, 326-334 and 367-371 infra and accompanying text.

25. See notes 155-156 infra and accompanying text.

26. See notes 144-154 infra and accompanying text.

27. See notes 157-170 infra and accompanying text.

28. See notes 198-208 infra and accompanying text.

29. See notes 58-104 infra and accompanying text.

30. See notes 83-104 infra and accompanying text.

31. See notes 75-82 and 290-294 infra and accompanying text.

32. See note 295 infra and accompanying text.

33. See notes 380-383 infra and accompanying text.

34. See notes 222-229 infra and accompanying text.

35. See notes 367-382, 385-389, and 404 infra and accompanying text.

for widows and widowers nor strikingly disparate post-divorce wealth.

B. Recent Developments in Other States

Concern for these matters has been in evidence as sister states have shared in the major recent reforms of divorce and probate law. As summarized in a recent article by William Cantwell, Reporter for the Commissioners on Uniform State Laws' contemplated Model Marital Property Act,[36]

> All in all, the trendline shows the gradual evolution of . . . at least some acceptance of the basic theory of community property -- within a marriage there is a sharing of contribution and result which should be recognized by adoption of the sharing principle [at death or divorce] and abandonment of control by evidence of the name on paychecks and the accidental objective fact of the title on whatever assets are accompanied by title evidence.[37]

Although willing to set aside the simplicity of a pure common law rule that recognizes ownership according to title or, if there is no title, in the person who acquired the asset, most sister states do not require a 50-50 division of marital property.[38] There appear to be two primary reasons for this reluctance to follow California's lead. First, most of these states have a well-developed tradition of awarding property from one person's separate wealth, however and whenever acquired, at divorce or death. Their case law and judicial practice at divorce are accustomed to evaluating the equities of the parties' relative financial positions, and they expect this learning to remain relevant to divisions in which only one of the former factors — marital guilt -- has been removed from the

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36. The first reading of the Model Act's submission draft will take place at the Commissioners' July 1981 meeting. Two readings are required for adoption; the second reading is planned for 1982. Telephone conversation with William Cantwell, Esq., of Denver (June 19, 1981).

37. Cantwell, Man + Woman + Property = ? Pondering the Marital Equation, 1980 Prob. Law. 67.

38. Cantwell, supra note 37, at 45.

equation.[39] Second, there is considerable reluctance to import the complex doctrines that are seen as a necessary component of a strict community property system such as California's. Instead, efforts have centered on structuring and controlling the discretion of trial judges, whose freedom to make subjectively based decisions is seen as a real albeit lesser danger.[40]

At the same time, five out of eight community property states have maintained flexible division rules at divorce as components of their no-fault divorce laws,[41] bringing the rules for division in most community

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39. Cantwell, supra note 37, at 45. The Governor's Commission recommended a similar rule of equitable division when it proposed no-fault divorce for California. Report of California Governor's Commission on the Family at 45 (Dec. 1966).

40. See, e.g., Uniform Marriage and Divorce Act § 307, Alts. A, B; Foster, Equitable Distribution, N.Y.L.J., July 24, 1980, at 1, col. 2 ("The court, in its decision [under New York's new equitable distribution law], must set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel. This provision is mandated to guard against an abuse of discretion and to facilitate appeals.").

41. Only California, New Mexico and Louisiana mandate equal distribution of the community property at divorce and do not authorize any property awards from separate property. Compare Cal. Civ. Code § 4800 (West Supp. 1981); La. Civ. Code Ann. arts. 1290, 1308, 2336 (West 1973 & Supp. 1981); La. Code Civ. Pro. Ann. art. 82 (West 1960) and New Mex. Stats Ann. § 40-4-7 (1978) (equal division of community property is provided by case law: Michelson v. Michelson, 86 N.M. 107, 520 P.2d 263 (1974)) with Ariz. Rev. Stat. § 25.318 (Supp. 1980) ("[T]he Court shall assign each spouse's . . . separate property to such spouse. It shall also divide the community, joint tenancy and other property held in common equitably . . . without regard to marital conduct."); Idaho Code § 32-712 (Supp. 1980) ("The community property must be assigned as the court . . . deems just . . . (1) Unless there are compelling reasons otherwise, there shall be a substantially equal division. . . . (3) [A] homestead . . . from the separate property of either . . . must be assigned to the former owner . . . subject to the power of the court to assign it for a limited period to the other spouse."); Nev. Rev. Stat. § 125.150 (as

property and common law property jurisdictions closer together. Both the Munts Bill in Wisconsin[42] (which proposes to institute a form of community property) and the submission draft of the Model Marital Property Act incorporate division rules that permit limited exceptions to equal division of community property and access to separate property.[43]

C. Principles for Reform

As this overview indicates, the major differences in current marital property laws revolve around three points: property rights of the spouses during marriage (treated in the earlier management study), defining the

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amended 1979) ("[T]he court . . . [s]hall make such disposition of . . . [t]he community property . . . and . . . [a]ny . . . joint tenancy [property] as appears just and equitable . . . ." The court may also set aside property or place burdens on it for the benefit or support of the children.) and Tex. Fam. Code tit. 1, § 3.63 (Vernon 1975) ("[T]he court shall order a division of the estate of the parties [as] the court deems just and right . . . ." An award may be made from separate property under case law: Jackson v. Jackson, 552 S.W.2d 630 (Tex. Civ. App. 1977)); Wash. Rev. Code Ann. § 26.09.080 (Supp. 1980) ("[T]he court shall . . . make such disposition of the property and the liabilities, either community or separate, as shall appear just and equitable. . . ." Among the factors to be considered are "[t]he economic circumstances of each spouse . . . including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.").

42. The most recent version of the proposal is found in 1981 Wisconsin Assembly Bill 370 (April 16, 1981). For convenience, citations to the legislation will be made to the section numbers that will eventually appear in the statutes if the proposal is enacted, not to the section numbers of the bill itself. Because the bill presents materials in numerical order, according to the proposed statutory numbers, this citation technique will provide quick access to both the proposed language and to the statutes once enacted.

43. The Wisconsin proposal makes no suggested amendments to the state's current equitable distribution rule, which is codified at Wis. Stat. Ann. § 767.255 (West Spec. Pamph. 1980). Division rules are set forth in the Model Marital Property Act at § 16(a),(b),(c) (Submission Draft 1981) (National Conference of Commissioners on Uniform State Laws) [hereinafter cited as Model Marital Property Act (Submission Draft 1981)].

applicable pool of property that may be divided at divorce or death, and allocating the parties' respective interests in this property at the marriage's end.

According to Professors Verrall and Sammis:

> The [California community property] system is one which can be tolerated but which is in need of a comprehensive review to make it meet the minimum conditions of an acceptable marital property system. These conditions should at least be a system simple enough to be generally understood by the people, a system coordinated with the business and the governmental orders of the day, and a system quick and cheap of administration. No one of those conditions can be said to characterize the California system.[44]

The following study suggests a number of reforms designed to bring California closer to these goals. Even more importantly, it aims to enhance substantive fairness by promoting two sometimes conflicting goals: (1) that of providing comparable treatment in fact to both spouses and protection for their children, and (2) that of predictability.

The discussion highlights major problems in the application of California's definitional and dispositional rules of community property law and suggests ways that the system can be simplified without sacrificing equity. It does so within the established framework of equal division subject to carefully defined exceptions. Because the tension between certainty and equity is genuine, the suggested solutions will often have the substance as well as the appearance of compromise. They should be tested individually and collectively for the degree to which they promote sound accommodations of conflicting policies and sensible solutions to common problems.

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44. H. Verrall & A. Sammis, Cases and Materials on California Community Property 7 (2d ed. 1971).

I

DEFINING THE COMMUNITY

A. History: What is Not Separate is Community

The definition of community property arises by negative inference under California law; it is separate property that is defined in the state constitution: "Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property."[45] This language traces directly to a clause in California's first constitution that was hotly debated during the 1849 Constitutional Convention:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.[46]

The original language, in turn, is a direct copy of a clause in the Texas Constitution that adopted the Spanish-Mexican community property system as that state's marital property regime.[47]

Both the language of California's first constitution and the statutory scheme enacted by California's first legislature to implement

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45. Cal. Const. art. I, § 21.

46. Cal. Const. art. XI, § 14 (1849, amended 1879 and 1974). See generally Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A.L. Rev. 1, 9-24 (1976).

47. Tex. Const. art. VII, § 19 (1845). See Huie, The Texas Constitutional Definition of the Wife's Separate Property, 35 Tex. L. Rev. 1054, 1058-59 (1957); Prager, supra note 46, at 21 n.109.

community property[48] reflect the decision made in the constitutional debates to adopt a civil law rather than a common law system of marital property.[49] This original scheme retained as separate property the property brought to a marriage by either of the parties and property acquired during marriage by gift, descent or devise. All other property, including the "rents and profits" of separate property, was community property.[50]

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48. See note 50 infra.

49. Professor Prager suggests that the decision to adopt a civil law marital property system was influenced by a spirit of conciliation towards the Spanish-speaking natives of California, by a genuine commitment to induce women to come to California and to improve the status of married women by awarding them substantial property rights, and by the possibility that many of the delegates did not understand the essential elements of the civil law community of acquests and gains. Prager, supra note 46, at 9-24. She nevertheless emphasizes that the convention did view its choice as being between the civil law and the common law with respect to marital property. Id. at 22. Consistent with that choice, the implementing legislation adopted in 1850 was in general agreement with Spanish civil law principles, including the concept that the rents and profits of separate property were common property. See note 50 infra.

50. 1849-50 Cal. Stats. ch. 103, § 9, p. 254. This was in accord with then-prevailing civil law marital property concepts. The Spanish community or ganancial system included as common property

> the fruits of their separate property which each brings to the marriage; and of that which either acquires for himself by any lucrative title, whilst the conjugal society subsists. It is the common property of the husband and wife, and belongs the half to each of them: although the husband has more separate property than the wife or the wife more than the husband: although one, after marriage, acquires more than the other, and although it may be one alone who by commerce or toil accumulates the property.

R. Ballinger, A Treatise on the Property Rights of Husband and Wife, Under the Community or Ganancial System § 5 at p. 25 (1895). See also G. Schmidt, The Civil Law of Spain and Mexico art. 44 at pp. 12-13 (1851); W. de Funiak & M. Vaughn, Principles of Community Property § 71 (2d ed. 1971).

Ten years later, however, in George v. Ransom,[51] the California Supreme Court misinterpreted this clear constitutional and legislative history, confusing the civil law regime of community property with common law property notions.[52] The result was a holding that the fruits of separate property remained separate property.[53] Since that decision, community property in California has encompassed property that is produced by the efforts of the spouses during marriage but not the increases in the value

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51. 15 Cal. 322 (1860).

52. The decision is much criticized. See R. Ballinger, supra note 50, at 56-58; Bodenheimer, The Community Without Community Property: The Need For Legislative Attention to Separate-Property Marriages Under Community Property Laws, 8 Cal. W. L. Rev. 381, 384-85 (1972); Huie, supra note 47, at 1058-59; Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 261-66 (1966); Prager, supra note 46, at 41-43; W. Reppy & W. de Funiak, Community Property in the United States 248-49, 511 (1975); Younger, Community Property, Women and the Law School Curriculum, 48 N.Y.U. L. Rev. 211, 221-22 (1973); H. Verrall and A. Sammis, supra note 44, at 3, 36-37, 158.

53. The court reasoned that the constitutional provision focused primarily on a married woman's right to separate property. Because separate property "has a fixed meaning in the common law" that precludes the right of another to control the property or enjoy its benefits and most of the framers of the state constitution were familiar with this rule of the common law, the court concluded that the constitutional protection of a wife's separate property would be violated if the rents and profits were included in the couple's common property. 15 Cal. at 324 (emphasis added). The court's error is patent. While the common law might not recognize that the fruits of separate property could be anything but separate property, the civil law system of community property most assuredly could and did, and it was this Spanish-Mexican system that was adopted by the Constitutional Convention and implemented through the legislation that was tested in George. See note 50 supra and accompanying text. Further, one commentator has suggested that even common law principles were misapplied by the court, and could have been used instead to bolster a finding that the fruits of separate property were community property. See Comment, Apportionment of Income from a Spouse's Separately Owned Property, 51 Calif. L. Rev. 161, 165 n.43 (1963).

of separate property that are not the product of community efforts.[54] Under this "source rule" and a related presumption (codified in Civil Code section 5110) that property acquired during the marriage is community property, much of California's case law since George has dealt with a party's efforts to trace property that presumptively belongs to the community back to a separate property source (thereby establishing a 100% — rather than a 50% — ownership interest in the property and its fruits)[55] or, conversely, tracing a community's interest into property that would otherwise be deemed one spouse's separate property (thereby establishing a 50% — rather than a zero -- ownership interest in the other spouse as to the community property share).[56] Related case law has dealt with the special problems at divorce of marriages in which separate property was the sole or predominant source of wealth, and no community assets are identified for division.[57] The following sections describe these difficulties and propose doctrinal simplification.

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54. The rule is currently codified in Cal. Civ. Code §§ 5107, 5108 (West 1970). The Texas Supreme Court, confronted in 1925 with just such a statutory scheme, struck it down by applying identical state constitutional language to that which led to an opposite result in George. See Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925). In accord with the civil law tradition, the Texas court held that revenue from a wife's separate property must go to the community; it reasoned that the constitutional definition prevented the legislature from either adding to or subtracting from the wife's separate estate.

55. See, e.g., Estate of Murphy, 15 Cal. 3d 907, 126 Cal. Rptr. 820, 544 P.2d 956 (1976); In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975); See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

56. See, e.g., Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909); Schuyer v. Boughton, 70 Cal. 282, 11 P. 719 (1886); Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640 (2d Dist. 1926).

57. See, e.g., Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971), discussed at notes 75-82 infra and accompanying text.

B. Separating Community and Separate Property Interests

Community property may become mixed or commingled with the separate property of one or (less frequently) both of the spouses in a number of ways. Although the types are not pure, it is helpful to distinguish "commingled property" (for example, the balance in a bank account where funds from various sources have been deposited and perhaps withdrawn from time to time) from "mixed assets" in which funds of different sorts have been invested and remain in identifiable proportions. A series of cases has dealt with the implications of such typical situations at death or divorce.

1. Commingled Property

Commingled property is troublesome in two respects. First, if both separate and community property have been deposited to a common account, from which some removals have been made, it is often difficult to determine the respective ownership interests in the remaining fund. To do so, it is necessary to characterize both the nature of any deposits (including interest) and withdrawals from the account. Where funds have been hopelessly commingled, so that no tracing can be accomplished, a presumption of community ownership applies[58] unless the community investment was minimal in relationship to that of the separate

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58. Cal. Civ. Code § 5110 (West Supp. 1981). Although most joint savings or brokerage accounts are held in joint tenancy form, the cases on tracing generally ignore this fact and, accordingly, do not deal with the possible transmutation issues that arise when either separate or community property is deposited to such an account. Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Calif. St. B.J. 452, 452 (1979). See generally Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961); Marshall, Joint Tenancy, Taxwise and Otherwise, 40 Calif. L. Rev. 501, 520-21 (1952); Mills, Community Joint Tenancy -- A Paradoxical Problem in Estate Administration, 49 Calif. St. B.J. 38 (1974).

property.[59] The second problem is related. In order to characterize the ownership of property that was purchased with withdrawals from the commingled funds, it is necessary to know whether the withdrawals were of community or separate property. Where the drawer's intent can be ascertained and sufficient funds were on hand to satisfy that person's plan, they are deemed removed by the act, but where records are not precisely kept (as is usual), it is often difficult to establish the intention of the person who removed and applied the funds.[60] In an effort to clarify the ownership of the purchased property, the courts have established some general guidelines.

The burden of establishing that a particular item was purchased with separate, not community, property rests on the person who seeks to establish the separate property character of the purchased property.[61] Although this burden must ordinarily be established by adequate records,[62] it is theoretically possible to show that only separate property remained in the account at the time of purchase (and therefore necessarily was the source) by showing that all community funds had previously been withdrawn to pay community living expenses (the "family expense doctrine").[63]

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59. Estate of Cudworth, 133 Cal. 462, 65 P. 1041 (1901).

60. See, e.g., Estate of Murphy, 15 Cal. 3d 907, 544 P.2d 956, 126 Cal. Rptr. 820 (1976); In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975); See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

61. Freese v. Hibernia Savings & Loan Society, 139 Cal. 392, 73 P. 172 (1903).

62. Estate of Murphy, 15 Cal. 3d 911, 126 Cal. Rptr. 820 (1976); In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975), See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966); Hicks v. Hicks, 211 Cal. App. 2d 144, 27 Cal. Rptr. 307 (4th Dist. 1962).

63. See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

Because the courts presume that living expenses, no matter how extravagant, are paid first from community property,[64] this approach unfairly benefits a wealthy spouse, who may well be able to establish that the family's living expenses were greater than community property earnings. This occurs even though the community property earnings might have been more than adequate for reasonable living expenses, had the parties not considered themselves rich.[65] Such reasoning recently left a Navy Commander with no accumulated community property at the time of his divorce from a wealthy woman.[66] He remarked to his attorney that his colleagues had all acquired homes and investments with their earnings during

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64. In Hicks v. Hicks, 211 Cal. App. 2d 144, 27 Cal. Rptr. 307 (4th Dist. 1962), there had been a total income of $550,000 and a community income of $289,000 during the eight years of marriage; the community was charged with expenses for a full-time gardener and housekeeper, a monthly swimming pool maintenance charge, membership in five country clubs, and the expense of renting a summer home. See also Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971); Huber v. Huber, 27 Cal. 2d 784, 792, 167 P.2d 708, 713 (1946); Estate of Ades, 81 Cal. App. 2d 334, 184 P.2d 1 (1st Dist. 1947).

65. The rule has often been criticized. See, e.g., Bodenheimer, supra note 52, at 396-400; Bruch, supra note 11, at n.148 and accompanying text. See also Note, Community Property: Commingled Accounts and the Family-Expense Presumption, 19 Stan. L. Rev. 661, 662 (1967):

> While most expenses during marriage are incurred for the common benefit of the spouses, it is also likely that living expenses for a family with both separate and community income will be higher than they would be if the family had only the community income. When community and separate funds are commingled, the family may not differentiate between the sources of income and may feel they can afford to live at a higher level because of their larger aggregate income. The wife is thus treated unfairly when the increased living expenses are paid for entirely out of the community income, to which she must look for protection upon the husband's death or divorce. The net result is that a wife whose husband has both community and separate income will recover less community property on dissolution of the marriage than she would have been entitled to if her husband had earned only the community income.

66. Telephone conversation with George Norton, Esq., Palo Alto, California (Autumn 1979).

marriage; in his case earnings had been absorbed by the inflated standard of living that he enjoyed with his wealthy wife, who purchased their home and other assets from her separate property. Only his pension, clearly the product of his labors, remained.[67]

In families of more modest means, commingling often occurs in a second common yet troublesome fashion. Because community property results from the expenditure of efforts by a spouse during marriage, it is possible for community property efforts to be used in connection with one spouse's separate property wealth. Where the separate property is held in a business or professional practice (frequently one that was begun before marriage), a community property salary may be paid that recompenses the community for a spouse's services. Where no salary is taken yet there was no gift of the community property efforts that were used in the business, the community may be able to make a claim to payment for those efforts[68] or, alternatively, the community may have acquired an ownership interest in the property.[69] Even more complicated, although some salary is paid for the services rendered to the separate property enterprise, that salary may later be held to have been an incomplete payment, and the

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67. Had his employment benefits been controlled by normal community property principles, his pension would have been community property to be shared equally with his wife. Because federal law preempts California's community property law in this case, however, the husband will be the sole owner of his military retirement plan. See notes 6, 7 and 23 supra and accompanying text. Although this result would not be inequitable on these facts, in most cases it would be. Sharing principles are violated when either spouse's separate property interests are enhanced at the expense of the community. See generally Prager, Sharing Principles and the Future of Marital Property Law, 25 U.C.L.A.L. Rev. 1 (1978).

68. See, e.g., Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (2d Dist. 1921).

69. E.g., Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909).

portion of community property wages that were not withdrawn will have become a portion of the business' capital, also producing a community property interest in the concern.[70] If the business has increased dramatically in value, as is often the case, a court may be asked to decide to what extent the appreciation is attributable to the uncompensated (capitalized) efforts of one or both of the spouses (community property) or to the original investment (separate property).[71] Where loans are paid off by the earnings of the business, increasing the capital investment, the computations become even more complex.[72]

In a series of cases, the courts have developed polar doctrines between which trial courts are free to choose as equity prompts when capital of one source and labor of another are commingled. The first, Pereira,[73] measures a fair rate of return on the capital investment, then awards the excess (if any) to the community in payment for a spouse's efforts. The

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70. See, e.g., Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953).

71. E.g., Gilmore v. Gilmore, 45 Cal. 2d 142, 287 P.2d 769 (1955) (husband's salary held an adequate measure of the community interest in three auto dealerships; the remaining earnings were attributed to his separate property investment); Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909) (husband entitled to at least the usual interest on a long-term well-secured investment for his separate property capital in a profitable cigar and saloon business); In re Marriage of Folb, 53 Cal. App. 3d 862, 126 Cal. Rptr. 306 (2d Dist. 1975) (husband, who was allowed 12% annual rate of return on his separate commercial investments with excess to the community, argued unsuccessfully that he was a "passive investor" and deserved a higher rate of return); Tassi v. Tassi, 160 Cal. App. 2d 680, 325 P.2d 872 (1st Dist. 1958) (no part of the increase in value of a wholesale meat business allocated to the community; court concluded that the high profits were produced by the wartime market rather than the husband's services).

72. See, e.g., Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953).

73. This approach is named for the landmark case, Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909). The 7% interest figure used in that case was arrived at by agreement of the parties. Where no agreement exists, the appropriate rate is a matter for proof. See Gilmore v. Gilmore, 45 Cal. 2d 142, 150, 287 P.2d 769, 774 (1955).

other, Van Camp,[74] measures a reasonable rate of pay for the spouse's efforts, then awards the excess (if any) to the capital investment.

The potential inequities of both the family expense doctrine (as to commingled funds) and the doctrines on commingled capital and efforts (Pereira-Van Camp) are demonstrated by Beam v. Bank of America.[75] In Beam, no salary was withdrawn by a millionaire who spent his 29 married years managing his separate wealth and engaging in private ventures with those funds; these sources provided the family's support. On these facts, the trial court applied Pereira and held that interest at seven percent would fully account for the increase in Mr. Beam's separate assets, leaving no excess for the community.[76] On appeal, the California Supreme

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74. The case giving this formula its name is Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (2d Dist. 1921). Mr. Van Camp, the controlling shareholder of the Van Camp Sea Food Company, devoted his efforts exclusively to the management of the business. During the marriage, he received $141,000 as dividends on his stock in the company as well as $69,000 in salary; the latter was deemed a reasonable allowance for his services. Although the salary was community property, that amount was charged with the family support, leaving $8,573 from which the community's share of the couple's income taxes was still to be subtracted. Id. at 25-26; 199 P. at 888-89.

75. 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

76. During the marriage, Mr. Beam's separate estate had only increased from an initial worth of $1,629,129 to $1,850,507. An additional $1,458,127 had been spent over the years, for a total value of $3,308,634. Id. at 19 n.5, 490 P.2d at 262 n.5, 98 Cal. Rptr. at 142 n.5. Allowing the separate property a 7% interest growth factor would have given a total value of $4.2 million, or a net estate of $2,741,873 at the time of the trial. Id. at 19, 490 P.2d at 262, 98 Cal. Rptr. at 142. The court's conclusion that Mr. Beam was "not particularly successful in [his] efforts" may be inaccurate, however, given the realities of estate planning. Justice Brown, in his dissent in the District Court of Appeal, pointed out that during the early years of the marriage, a substantial portion of Mr. Beam's separate estate was in municipal tax free bonds earning about 1% interest. Using the Pereira formula of 7% interest thus would give a large part of his assets "seven times the income that was actually realized." Further, Mr. Beam's assets "consisted of a number of enterprises which did not realize any immediate profit but did have ultimate prospects of a greater future growth value, and thus would

Court rejected Mrs. Beam's argument that the court had abused its discretion in refusing to apply Van Camp, which would have compensated the community for the value of Mr. Beam's services. It reasoned that even under Van Camp no community property residue would have remained. Although Mr. Beam would be deemed to have earned what an investment counselor would have charged to manage the property ($17,000 per year), the entire imputed salary would have been exhausted under the family expense doctrine by the family's living expenses (which averaged $24,000 per year).[77] The result was that Mrs. Beam left the 29-year marriage almost without property, while Mr. Beam remained a millionaire.[78]

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be of a greater ultimate benefit to the respondent." Today, in contrast to the conditions prevailing in 1909 at the time of Pereira, "[t]he desire for immediate profit to one in a high income tax bracket necessarily is subordinated to considerations of growth and capital gains to minimize those taxes." Beam v. Beam, 10 Cal. App. 3d 973, 987, 89 Cal. Rptr. 280, 288, (1st Dist. 1970) (Brown, J., concurring and dissenting).

77. The total of Mr. Beam's imputed earnings over the marriage was $357,000 under the court's analysis. The estimate would appear to be extremely conservative. While the primary evidence relied upon in the valuation of an owner-spouse's services is the amount a manager of a similar business would receive as a salary, (Bodenheimer, supra note 52, at 396) the use of this evidence has been criticized: "[T]his is not realistic. The employed manager watches the clock . . . . In contrast, the husband puts his whole being into the enterprise." W. Brockelbank, The Community Property of Idaho 176 (1962). The inequity of charging the community property first with all living expenses in such cases is discussed in note 65 supra.

78. The trial court concluded that the only community property existing at the time of trial was a promissory note for $38,000.00, which was awarded to Mrs. Beam upon Mr. Beam's stipulation; Mr. Beam's estate was worth $1,850,507. 6 Cal. 3d at 16, 490 P.2d at 260, 98 Cal. Rptr. at 140. Although Mrs. Beam did receive a spousal support award, it did not replace the property interest she sought. The award was to terminate on her remarriage or the death of either Mr. Beam or herself. See Cal. Civ. Code § 4801 (West Supp. 1981). If she had outlived him, her final years might have been spent in relative poverty. In fact, however, she predeceased him while the case was on appeal and her estate was the unsuccessful appellant in the California Supreme Court. See id. at 15 n.1, 490 P.2d at 259 n.1, 98 Cal. Rptr. at 139 n.1.

As noted by Professor Bodenheimer in her thoughtful discussion of marriages with separate property wealth, California's community property laws are woefully inadequate to deal with such cases.[79] First, the

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79. Bodenheimer, supra note 52, at 394:

> The apportionment process is in fact usually undertaken at great expense to the litigants and with considerable expenditure of judicial time and energy. And yet, the outcome is frequently totally negative -- that is, nothing is being apportioned -- so that the whole complex process of adducing the evidence and making the necessary computations is a futile exercise which ends where it begins, an unshared net gain in the separate estate. It is true, as has been pointed out, that the courts have in some cases apportioned the profits, and that, with or without the help of other doctrines [i.e., transmutation], they have achieved some measure of equity in certain situations. Generally speaking, however, the results are uncertain and unpredictable, often unfair to either husband or wife -- under present societal conditions more often the wife. Thus, it is probably no overstatement to say that present apportionment mechanisms are not working.

Other apportionment methods have been tried and suggested. Two tax cases have presented a mathematical scheme of apportionment. In Todd v. Commissioner, 153 F.2d 553 (9th Cir. 1945) and Todd v. McColgan, 89 Cal. App. 2d 509, 201 P.2d 414 (3d Dist. 1949), an apportionment formula was used which first estimates a fair rate of return on the capital investment and a fair salary for the owner-spouse:

> If the total surplus of the separate investment is larger than the sum of the two figures so determined, the balance is divided between the community and the separate estate in the ratio the two original figures bore to the total. If the total surplus is smaller than the sum of the "salary" and interest, the two shares would presumably be reduced proportionately.

Bodenheimer, supra note 52, at 413. Professor Bodenheimer has suggested a Specified-Share Apportionment Scheme, a Pure Equity Rule, and an Improvement Rule. Id. at 409-13.

A Wisconsin proposal attempts to avoid the California apportionment rules by instituting a marital property system which classifies the fruits of separate property as marital partnership property. 1981 Wisconsin Assembly Bill 370, § 766.31(2)(b)-(c). A discussion sheet prepared by Professor June Miller Weisberger of the University of Wisconsin Law School explains:

> This rule represents a departure from the existing practices of the community property states and a return to an earlier version of community property. The rationale supporting this policy

Pereira-Van Camp doctrine has not in fact been applied to vindicate community property interests when a spouse has pursued a separate property business during marriage.[80] Second, the community expense doctrine often vitiates what community property does exist in wealthy marriages.[81] Third, a refusal to invade separate property, where it rather than community property is the basis for a family's wealth, is often unjust.[82]

2. Mixed Assets

Couples often use both community and separate property in the acquisition of major assets, especially those that are paid for over time. If someone purchases a home or begins a business before marriage, for example, borrowed funds are often used and loans are still outstanding at the time of marriage. Typically payments on such debts during the marriage come from current income (community property). Similarly, life insurance policies or retirement coverage is often initiated before marriage with separate property funds or efforts, and continuing payments or efforts are expended during the marriage to maintain or increase the coverage. Even when a business or home is purchased during marriage, separate property acquired before the marriage or from a spouse's family is often incorporated in the

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> choice is primarily that marital partners have a "stake" in the capital appreciation of separate property because it is often the frugality and conscious choice of consumption patterns of the marital partnership which permit separate assets to be held as capital assets instead of being liquidated to meet current community living expenses.

Weisberger, Discussion Sheet 2 on 1979 Wisconsin Assembly Bill 1090 (now 1981 Wisconsin Assembly Bill 370). See notes 107-108 infra and accompanying text.

80. Bodenheimer, supra note 52, at 388.

81. Bodenheimer, supra note 52, at 396.

82. Bodenheimer, supra note 52, at 422.

down payment, as couples amass whatever assets they can to launch their career or housing plans. Here, too, current income is typically used to meet the monthly mortgage payments that are an almost inevitable part of the scheme.

Rarely will these couples have given any thought to their respective ownership interests in the home or business other than to indicate via survivorship provisions that each wishes the other spouse to retain the home after his or her death.[83] And only some of those who have given the matter thought will go on to discuss their views with their spouses. Yet, when death or divorce occurs, some allocation of the asset, including any appreciation, must be made.[84] Case law has developed several applicable doctrines.

The original theory was that a property's character as separate or community was established at the time of purchase. According to this "inception of the right" doctrine, unless the parties agreed to alter the nature of the property (i.e., transmuted it from one form to another), ownership interests in the property were fixed at the time title was acquired.[85] If property of another source was later used to improve the property, absent a gift there was a right to reimbursement for either the amount expended or the benefit to the improved property.[86] This rule, too

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83. Articles in 1952 and 1961 reported that 85% of the recorded California deeds held by husbands, wives, or both were held by spouses as joint tenants. Marshall, supra note 58, at 501 n.2; Griffith, supra note 58, at 88. There is no reason to think that this practice has changed in the years since.

84. For a discussion of the varying treatment accorded such property, see the articles by Griffith, Marshall, Mills, and Sims, supra note 58.

85. W. de Funiak & M. Vaughn, supra note 50, at § 64 at p. 130.

86. In re Marriage of Warren, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (2d Dist. 1972).

and the presumptions that accompanied it could be displaced by showing that the parties had agreed otherwise, since California freely permits spouses to alter marital property rights by agreement.[87]

Although these doctrines often operated sensibly during the era of sole management and control when only one spouse had management power over any given item of community or separate property, they did not provide satisfactory results in some cases. Gradually an exception developed to the "inception of the right with occasional reimbursement" model. Life insurance and pensions, both typically acquired with payments over many years, came to be viewed as "installment purchases" rather than as rights that were acquired at the time of an initial payment.[88] This was needed for fair account to be taken of both separate property payments before and after marriage and community property payments during marriage. Title was now seen as being acquired pro rata by all payments from whatever sources, whenever made.

It was an easy step to extend this reasoning to the purchase of a home. Faced with separate property title acquired by one party shortly before marriage, the court in Vieux v. Vieux[89] refused to hold that the home was separate property and that the community had at best a right to reimbursement for its expenditures. Instead, it reasoned that for marital property purposes the home should be viewed as one that was purchased over time, and that the respective property sources should be given pro rata

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87. Cal. Civ. Code §§ 5103, 5133-5135 (West 1970).

88. See Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (retirement plans); Gettman v. City of Los Angeles, Dept. of Water & Power, 87 Cal. App. 2d 862, 197 P.2d 817 (2d Dist. 1948) (life insurance); Modern Woodman of America v. Gray, 113 Cal. App. 729, 299 P. 254 (1st Dist. 1931) (term life insurance).

89. 80 Cal. App. 222, 251 P. 640 (2d Dist. 1926).

ownership interests in proportion to their contributions. In a rising market, where the equity contributed in payments was frequently less substantial than that which was added to the home's value by inflation, this rule gave the community a share in the home's appreciation. The doctrine was later applied to the purchase during marriage of a business, in a case involving a separate property down payment, borrowed funds, and repayment out of the business' earnings.[90]

In recent years, as interest rates have increased, taxes have been an important cost for home owners, and the appreciation in homes has skyrocketed, the details of such shared ownership interests have been litigated in many cases. Two decisions of the California Supreme Court within the past year have attempted to bring order to the case law.[91] Unfortunately, they rely on strict property notions and questionable doctrines concerning borrowed funds. The consequences are far less sensible than the Vieux case,[92] which first applied an installment purchase analysis to home ownership. Under these recent cases form of title[93] and the timing

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90. Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953).

91. In re Marriage of Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980); In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

92. Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640 (2d Dist. 1926). In Vieux, ownership came in issue after the property had been entirely paid for. Title was apportioned according to the ratio of "direct contributions made by the respective parties to the purchase price," including expenditures for taxes and interest; "funds issuing directly from the property" were ignored. Id. at 224, 229, 251 P. at 641, 643.

93. The placement of separate funds in a joint tenancy title is held to constitute a gift that cannot be avoided by demonstrating that no gift was intended. Instead, "an agreement or understanding" to hold as other than joint tenants is required. In re Marriage of Lucas, 27 Cal. 3d at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

of purchase[94] have become all-important. Relegated to a relatively minor role are the monthly payments on the loan (interest is ignored), and no credit is given for costs incurred for maintainenace, insurance, or property taxes.[95]

The consequences can best be seen in a hypothetical case.[96] Assume that Sue purchases a home (while she is still single) in 1980 for $140,000, with a $40,000 down payment, taking title in her name. The interest rate on the $100,000 mortgage is 14 1/2%. Shortly thereafter she and John, who picked the home out together, are married. During their ten-year marriage all monthly payments on the thirty-year loan ($1,205 per month) are made from the couple's current earnings (community property). Taxes, insurance and maintenance expenses are also paid from that source. By the time of their divorce, the community will have made payments totalling $144,600 for interest and principal (plus additional expenditures for tax, insurance and upkeep), and the loan balance will have been reduced to $95,480. Assuming that the house has doubled in value to $280,000, the currently controlling case law would allocate the ownership interests in the house as follows:

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94. Under the Lucas and Moore decisions, appreciation reflects the character of the loan that was used to purchase an asset. In re Marriage of Moore, 28 Cal. 3d at 372, 618 P.2d at 211, 168 Cal. Rptr. at 665; In re Marriage of Lucas, 27 Cal. 3d at 816 n.3, 614 P.2d at 290 n.3, 166 Cal. Rptr. at 858 n.3. A loan received on the basis of a person's current earning power is deemed separate property if it is taken out before marriage but community property if it is secured during marriage. See Bruch, supra note 11, at n.68; Young, Community Property Classification of Credit Acquisitions in California: Law Without Logic?, 17 Cal. W. L. Rev. 173 (1981).

95. Only the amount paid on the principal of the loan is recognized. In re Marriage of Moore, 28 Cal. 3d at 372, 618 P.2d at 211, 168 Cal. Rptr. at 665. The prior leading case on installment purchase theory had recognized payments on interest and taxes as well. See Vieux v. Vieux, 80 Cal. App. 222, 229, 251 P. 641, 643 (2d Dist. 1926).

96. The hypothetical's figures on payment costs and reduction in loan principal are taken from 1980 C.F.L.R. 1463.

Direct contributions will first be recognized, as Sue is credited with her $40,000 separate property down payment, the bank gets the outstanding loan balance of $95,480, and the community receives $4,520 (the community's "contribution" to the capital investment in the house -- i.e., the amount that the loan was reduced by the monthly community property payments). The $140,000 of appreciation in the home's market value will be shared in the proportions that are established by these three figures, and Sue (as the borrower) will be credited with the portion of the appreciation that is attributable to the still-outstanding loan that was used in the initial purchase. So, Sue's separate property share of the home's $140,000 in appreciation is based upon $40,000 (down payment) plus $95,480 (the loan balance), while the community's interest is based upon $4,520 (the "paydown").[97] Of course, she also receives her one half of the community property share. Assuming that the house is sold, the final figures are as follows:

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97. See In re Marriage of Moore, 28 Cal. 3d at 373-74, 618 P.2d at 211, 168 Cal. Rptr. at 665.

Out-of-Pocket Costs:

Sue's separate property	$40,000	
The community property (excluding 10 years of taxes, insurance and upkeep)	$144,600	
	$188,600 +	

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Distribution of the $280,000 Sales Proceeds:

Repayment of outstanding loan		$95,480
Community interest:		
Return of capital	$4,520	$9,040
Share in appreciation (from capital) . .	$4,520	
Sue's separate interest:		
Return of capital	$40,000	
Share in appreciation (from capital) . .	$40,000	$175,480
Share in appreciation (from loan) . . .	$95,450	
		$280,000

Totals to the Parties:

Bank (loan balance)		$95,480
Sue (separate property)	$175,480	$180,000
(community property)	$4,520	
John (community property)		$4,520
		$280,000

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A quite different result occurs if all of the facts are the same except that Sue purchases the house in her name one week after her marriage to John and the court concludes that a community loan was used in the purchase -- i.e., the lender's intent was to rely upon the general creditworthiness of either spouse or upon community property for repayment.[98] Assuming that Sue can show the separate property source of the down payment,[99] and that

98. See note 94 supra.

99. Although all property acquired by a spouse in his or her name during marriage is presumptively community property, this presumption may be rebutted by tracing to a separate property source. See note 233 infra.

the monthly payments were not a gift to her separate property,[100] this is the result:

Out-of-Pocket Costs:

Sue's separate property	$40,000	
The community property (excluding 10 years of taxes, insurance and upkeep)	$144,600	
	$188,600 +	

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Distribution of the $280,000 Sales Proceeds:

Repayment of outstanding loan		$95,480
Community interest:		
Return of capital	$4,520	
Share in appreciation (from capital) . .	$4,520	$104,520
Share in appreciation (from loan) . . .	$95,480	
Sue's separate interest:		
Return of capital	$40,000	
Share in appreciation (from capital) . .	$40,000	$80,000
		$280,000

Totals to the Parties:

Bank (loan balance)		$95,480
Sue (separate property)	$80,000	
(community property)	$52,260	$132,260
John (community property)		$52,260
		$280,000

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Yet another minor change can have dramatic consequences. If title to the house is taken in joint tenancy form, as is usual in California for married couples who seek a survivorship provision,[101] but the couple thereafter

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100. Under case law that predates the adoption of equal management and control, contributions made by John (but not Sue) from community property sources to Sue's separate property would have been presumed a gift. Bruch, supra note 11, at nn.114-122.

101. See note 83 supra.

divorces, Sue will have lost her separate property interest unless the parties had "an agreement or understanding" to the contrary.[102] The results, then, on the same facts as to payment sources and value, would be:

Out-of-Pocket Costs:

Sue's separate property	$40,000
The community property (excluding 10 years of taxes, insurance and upkeep)	$144,600
	$188,600 +

****

Distribution of the $280,000 Sales Proceeds:

Repayment of outstanding loan		$95,480
Community interest:		
Return of capital (down payment)	$40,000	
Return of capital ("pay-down")	$4,520	
Share in appreciation (from all capital)	$44,520	$184,520
Share in appreciation (from loan) . . .	$95,480	
Sue's separate interest		0
		$280,000

Totals to the Parties:

Bank (loan balance)		$95,480
Sue (separate property)	0	$92,260
(community property)	$92,260	
John (community property)		$92,260
		$280,000

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The three examples share several common defects. Important ownership consequences flow from the attribution of a separate or community property character to borrowed funds. Yet actual out-of-pocket costs that are incurred in repaying such funds are ignored. Finally, timing and form of

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102. In re Marriage of Lucas, 27 Cal. 3d at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

title are elevated in importance. None of the three examples produces an equitable result -- one in which ownership is allocated in some reasonable way in proportion to the actual costs incurred from varying funding sources. Instead, litigation is invited by the danger of forfeiting important community or separate interests unless an agreement or understanding that displaces these rules can be shown.

3. Summary

The difficulties posed under current law by the above examples of mixed and commingled assets can be summarized. First, the family expense doctrine, which assumes that living costs are satisfied first from community property sources, even when considerable separate property wealth is present, is unreasonable. It ignores the likelihood that a couple with both forms of wealth will choose to live at a higher standard of living than it would if the spouses realized that only separate property wealth would remain unless the family's living standard were reduced. The doctrine improperly places the burden of commingling on the community property by depriving the community of a presumption that separate property was contributed to the family's expenses.

Second, the Pereira-Van Camp formulas for the allocation of separate and community interests in businesses operated during marriage permit inconsistent results and, in practice, undervalue the community's investment. Their questionable foundations are exposed when an entrepreneur, seeking to minimize the community's interest, argues that his or her talents and efforts had little to do with the business' success[103] -- behavior that is

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103. See, e.g., Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); Gilmore v. Gilmore, 45 Cal. 2d 142, 287 P.2d 769 (1955); Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953); Millington v. Millington, 259 Cal. App. 2d 896, 67 Cal. Rptr. 128 (1st Dist. 1968); Somps v. Somps, 250 Cal. App. 2d 328, 58 Cal. Rptr.

inconsistent with common sense understanding of the involvement that an owner (as opposed to an employee) typically devotes to a family enterprise.[104]

Finally, actual contributions to the purchase of a major asset over time may not be adequately recognized, depending upon such seemingly trivial variables as the time and manner in which title is taken and funds are borrowed rather than upon the sources from which payments are actually made or the parties' probable expectations.

C. Redefining Ownership Interests: Separate Versus Community

One straightforward reform would do much to alleviate all of these problems: a return to the original definition of community property, which allocates the fruits of separate property to the community.[105] Fruits

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304 (1st Dist. 1967). Occasionally, however, the more natural exuberance of the entrepreneur overcomes his legal savvy. Mr. Pereira himself is quoted as follows from the transcript on appeal in his case:

> Q. Of course that is an enormous profit Mr. Pereira on that amount of money. I suppose it is due to your individual efforts?
> A. I judge it is . . .
> The Court. Mr. Pereira, it is due to your own efforts you made this money?
> A. Yes sir, hard labor day and night.

Comment, supra note 53, at 171 n.108. The trial court held that all of the profits were community property but the California Supreme Court held that Mr. Pereira was entitled to interest on his separate property capital. Pereira v. Pereira, 156 Cal. 1, 7, 103 P. 488, 490-91 (1909).

104. See notes 77 and 103 supra.

105. This step has been proposed by other commentators. See, e.g., Bodenheimer, supra note 52, at 408; Knutson, supra note 52, at 266 ("If we are to have a clean, simple and fair community property system, consistent with our other property, family and commercial goals, we must go to the root of the difficulty, which is the underlying classifications and assumptions."); Comment, supra note 53, at 202; Note, In re Estate of Neilson, 36 S. Cal. L. Rev. 481, 485 (1963).

This change would bring California in line with the three community property states that in one form or another have retained the civil law concept that the rents and profits of separate property are community property, and would comport with the proposed draft of the

for this purpose should be defined as including natural appreciation.[106]

Model Marital Property Act and Wisconsin's proposed marital property system. See Idaho Code § 32-906 (1963); La. Civ. Code Ann. art. 2339 (West Supp. 1981); Tex. Fam. Code Ann. tit. 1, § 501 (Vernon Supp. 1981); Model Marital Property Act §§ 3(c)(2)(v), 3(d)(1) (Submission Draft 1981); 1981 Wisconsin Assembly Bill 370 at §§ 766.31(1)(e),(h), (i),(k), 766.31(2)(c).

106. The Spanish-Mexican system distinguished natural appreciation, excluding it from fruits and profits. Matienzo, Commentary on Novisima Recopilacion, Book 10, Title 4, Law 1, at Gloss I(88) in W. de Funiak, 2 Principles of Community Property 137 (1943). The distinction is not immutable under California's constitution. The constitution of 1849, which adopted the civil law system of marital property, granted the legislature broad powers of definition and implementation. See text accompanying note 45 supra. Although the specific language of implementation was dropped in a subsequent streamlining of the constitution (see Calif. Const. art. XX, § 8 (1879, amended 1974)), the original intent to adopt a system with flexible contours has subsequently been recognized. Numerous definitional changes have been made over the years. See, e.g., the varying ownership treatment of personal injury damages: McFadden v. Santa Ana, Orange & Trustin St. Ry. Co., 87 Cal. 464, 25 P. 681 (1891); Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949); Flores v. Brown, 39 Cal.2d 622, 248 P.2d 922 (1952); former Cal. Civ. Code § 163.5, enacted by 1957 Cal. Stats. ch. 2334, § 1, p. 4065, amended by 1968 Cal. Stats. ch. 457, § 2, p. 1078, repealed by 1969 Cal. Stats. ch. 1608 § 3, p. 3313; former Cal. Civ. Code § 5109 (derived from § 163.5), enacted by 1969 Cal. Stats. ch. 1608, § 8, p. 3338, and repealed by 1979 Cal. Stats ch. 638, § 2, p. 1971; Cal. Civ. Code § 5126 (West Supp. 1981), enacted by 1969 Cal. Stats. ch. 1608, § 8, p. 3342, amended by 1970 Cal. Stats. ch. 1575, § 5, p. 3826, 1972 Cal. Stats, ch, 905, § 1, p. 1609, 1979 Cal. Stats. ch. 638, § 3, p. 1971. See also changes in ownership and management of community property: 1927 Cal. Stats. ch. 265, § 1, p. 484 (enacting former Civil Code § 161a, now Cal. Civ. Code § 5105 (West Supp. 1981) giving wife a present vested interest); Siberall v. Siberall, 214 Cal. 767, 772, 7 P.2d 1003, 1005 (1932) (listing prior changes). See generally H. Verrall, Cases and Materials on California Community Property 2 (3d ed. 1977) ("The character and extent of the statutes defining the system and a course of decisional law peculiar to California, have resulted in a community property system substantially different from that of the Mexican-Spanish parent system . . . .").

The division of natural increases is an important element in the simplification process. See note 107 infra as to protections for the community and note 108 infra as to apportionment issues.

First, this would solve the problem of a spouse who would otherwise receive no property distribution at divorce from an independently wealthy spouse. Because the income from separate property would gradually replace the original capital as the property's predominant characteristic, a spouse in a lengthy marriage would benefit to a greater degree than a spouse in a brief one. Without giving the divorce court jurisdiction to divide separate property, this automatic gradual shift to community property would do equity in most cases.[107] Second, this rule would obviate the current need for complex, costly litigation aimed at untangling commingled or mixed assets.[108] Once a separate property interest were established, only that capital would be reimbursed; all increases would

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107. Unless natural increases are subject to division, however, selective investments in growth assets that produce no income (such as jewelry, art, coins, precious metals and some forms of realty) could avoid any benefit to the community.

108. Although the problems of apportionment under the Idaho, Louisiana and Texas versions of the Spanish-Mexican system are far less onerous than those arising under California's doctrines (Huie, supra note 47, at 1059), natural appreciation must be distinguished from rents and profits. See Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974); Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974); Gapsch v. Gapsch, 76 Idaho 44, 277 P.2d 278 (1954); Hurta v. Hurta 260 So. 2d 324 (La. App. 1972); Bakken v. Bakken, 503 S.W.2d 315 (Tex. Civ. App. 1973). See generally W. Huie, Texas Cases and Materials on the Law of Marital Property Rights 271-88 (1966); W. Reppy & W. de Funiak, supra note 52, at 282-83; Annot., 29 A.L.R.2d 530 (1953). As in California, a separate property business operated by a spouse during marriage must be valued in light of market fluctuations or natural growth on one hand and undistributed income on the other. No income, however, is distributed to the separate property interest in states following the Spanish-Mexican rule. Compare Beals v. Fontenot, 111 F.2d 956 (5th Cir., La. 1940) with Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909). See also 1981 Wisconsin Assembly Bill 370 at § 766.32 (defining "mixed property"). Lucas-Moore apportionments of increased home equities would also be required under the pure Spanish-Mexican system, although within that system appropriate legislation could replace the lender's intent test for loans with the rule that any funds borrowed during marriage are community property. See text following note 126 infra. See generally W. de Funiak & M. Vaughn,

become a part of the community interest subject to equal division. The community expense doctrine, which vitiates the supposed ameliorative effects of California's apportionment doctrines, would be rendered unimportant, since income from all sources would belong to the community.[109] Finally, the inequities of the artificial "lender's intent" doctrine would be ended: rather than characterize loan proceeds according to the lender's intent to look to separate wealth or to the community for repayment, all loans taken out during marriage would produce community property, and purchases made on credit would be divided equally except for actual separate property contributions.[110] Similarly, a home purchased before marriage would be divided equally except to the extent of the separate property capital actually invested in the property. Although this rule would be far less favorable to the separate property owner than is the current case

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supra note 50, at § 78 (describing the varying case law of sister states).

These litigious matters would disappear and gradual transfers of wealth to the community would occur if all increases were made subject to equal division.

109. The family expense doctrine should be expressly overruled by statute in any event. Full protection will require the division of both separate property income and natural appreciation. See Professor Weisberger's analysis, set forth at note 79 supra. (2)

110. This would follow under the reasoning that loans, whether the fruit of separate or community property, would be community property. If separate property natural appreciation were not included in community property, separate property contributions and a pro rata share of appreciation would go to the separate property estate. In that case, the role of borrowed funds in allocating appreciation would have to be defined. Even under these circumstances, the law would be rendered more equitable and simple if credit acquisitions were treated as purchased by direct contributions only, ignoring borrowed funds and payments produced by the property itself. Payments on interest should be included in these computations as a reflection of the true purchase costs. Only if no direct contributions from outside sources were made should the property be characterized as community property on the basis of the loan itself. (3)

owner than is the current case law that controls when property is acquired before marriage and held in the sole name of the purchaser,[111] it could appropriately be combined with a rule that would return separate property contributions in all cases in which that were possible after preservation of direct community property contributions[112] -- a far more fair result than the current case law rule, which works a forfeiture of separate property interests when they are placed in jointly titled property.[113]

The compromises are these: First, rather than impose blanket divorce court jurisdiction over the separate property (the only other sensible response to the inequities of Beam[114]), a gradual shift of separate to community property would occur, a shift that would in all likelihood offer greater protection to spouses of lengthy marriages than to those of brief ones. Although the separate property interest would never entirely convert into community property (absent donative intent),[115] the passage of time and the possible workings of inflation would functionally replace the separate with community interests. Second, the current rule that ignores

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111. See In re Marriage of Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980).

112. A statute should clarify the allocation of ownership interests if property depreciates. The text recommends a scheme in which the separate property acts as the guarantor of the community on the theory that the owner of separate property permits mixing at his or her own peril. Alternatively, relative ownership interests in depreciated property could be prescribed by direct contributions including interest payments (just as for appreciated property), with losses shared accordingly. Under this approach, an exception calling for full restoration of the community's costs should be provided when restitution is in order -- for example, where community funds were invested in violation of the good faith management standard.

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

114. See notes 75-82 supra and accompanying text.

115. Compare note 124 infra.

(4)

the actual contributions of the parties to assets purchased over time such as houses and inappropriately reflects the loan would be replaced. Instead the community's direct contributions would be secured and appreciation would belong to it, although the separate property would be guaranteed the return of its investment far more frequently than at present. This scheme recognizes the importance of separate property contributions to the purchase of major assets, and the appropriateness of returning these contributions should divorce follow in fairly short order. Although forfeitures in these situations are avoided under the reform model, the community benefits in turn by receiving all of the enhanced value of the property.

Since appreciation in other mixed or commingled assets would also be divided equally as community property, the incentive to recharacterize banking transactions or agreements after the fact in order to attribute the most favorable investments to the separate property would be lessened.[116]

Several variations on this approach are possible. The Submission Draft of the Model Marital Property Act, for example, distinguishes between "appreciation" (defined as the "realized or unrealized increase in value of property")[117] and "income" ("dividend, interest, rental, or trust income, and all other kinds of benefits, payments, or other considerations derived from the investment, rental, licensing, or other non-consumptive use of property except those received on the sale or exchange of property as a return of capital or as realized appreciation").[118] At divorce income

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116. The incentive to attribute losing investments to the community would, of course, remain.

117. Model Marital Property Act § 1(2) (Submission Draft 1981).

118. Id. at § 1(9). The Wisconsin proposal provides for sole management of separate property income until "any realization or partition." 1981 Wisconsin Assembly Bill 370, at § 766.51(3).

from separate property is divided, as is all other marital property, "in equal proportions . . . unless the court finds that there are unusual and extraordinary circumstances which would cause an equal division to be repugnant to justice."[119] Appreciation, in contrast, belongs to an individual's separate property (called "individual property" under the draft),[120] and is subject to "equitable apportionment"[121] at divorce. An equal division of such individual property is presumptively equitable under the proposal.[122]

Unless appreciation may be divided, selective investments can vitiate the purposes of the fruits rule.[123] Accordingly, should California choose to distinguish between appreciation and income, it, too, should provide divorce and probate courts with authority to make awards from separate property appreciation.[124] Perhaps better would be a rule that includes (5) (6)

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119. Model Marital Property Act § 16(b) (Submission Draft 1981).

120. Id. at § 3(c)(2)(v).

121. Id. at § 16(c).

122. Id. This rule may be prompted by the fact that both appreciation and pre-Act earnings are individual property under the Act, even though acquired during marriage. See id. at §§ 3, 34.

123. See note 108 supra.

124. This system would protect a spouse who divorces or survives the separate property owner. It would not, however, include any portion of the appreciation in the non-owner's estate, should he or she die first. Other approaches are possible that would depend less on fluctuating inflation and interest rates. One could convert separate property into community property by operation of law (for example, at an annual rate of 5%) so that after a given period the parties would hold all of their property as community property. Unless this conversion were but a rule for division at death or divorce, however, serious tracing, management, and creditor access problems could arise during marriage. Since the separate property corpus would eventually be forfeited, this scheme would require a conforming constitutional amendment. See Cal. Const. art. I, § 21, set forth at p. 13 supra. Its general acceptability is doubtful, however, since a marriage that is sufficiently lengthy to justify a universal community in one person's view may seem too brief to another.

both forms of increased wealth in community property but permits unequal distribution in appropriate cases -- for example, in order to retain full title to inherited property of historical or emotional significance in the heir's name.

Alternatively, California could institute a number of more limited reforms, each designed to rectify one facet of the problems outlined above. For example, as discussed below in the section on property division, a special rule could be written to control the division of the matrimonial home.[125] Or, more generally, authority to award separate property, or at least divide certain forms of separate property (such as joint tenancy or all jointly held property), could be given.[126] The family expense doctrine could be legislatively abrogated, as could the doctrines that characterize loan proceeds by the "lender's intent" and then credit the appreciation of property purchased with borrowed funds according to that characterization. Finally, a formula could replace discretion in valuing interests in businesses and professions that contain both separate and community components.[127] This more piecemeal approach is not the preferred model for reform. It would be more complicated, less satisfactory, and inconsistent with both the historical basis for California's marital property regime and the model that is currently being proposed for adoption in common law states. It could, nevertheless, institute important improvements.

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125. See notes 314-322 infra and accompanying text.

126. See note 41 supra (listing the rules for jurisdiction and division at divorce in the community property states) and notes 310-311 and 397-400 infra (describing separate property awards at death).

127. See notes 77 and 103-104 infra and accompanying text.

D. Mixed Assets that Require Special Ownership Rules

For various reasons, some forms of property will deserve special treatment under any system. These assets, current rules controlling the definition of ownership interests in them, and needed reforms are discussed below, both in the context of California's current rule that earnings of separate property are separate, and in the context of a reform that would characterize such earnings as community. Problems related to division are reserved for Part II below.

1. Life Insurance Policies and Pensions

Because pensions and life insurance are typically acquired over the entire span of adult work years, they often are purchased with prenuptial, marital, and postmarital assets. The installment purchase doctrine that developed to allocate proportionate ownership interests to the sources of funds or efforts with which such policies were purchased[128] has worked well on the whole and should be retained. Several specific ownership problems, however, deserve attention.

(10)

a. beneficiary provisions

A spouse is not ordinarily permitted to destroy the other spouse's ownership interest in a policy or plan by naming a third party as beneficiary. This attempted gift of community property assets without the consent of the other spouse may be set aside as to the portion of the benefit

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128. Modern Woodman of America v. Gray, 113 Cal. App. 729, 299 P. 25 (1st Dist. 1931) (term life insurance); Gettman v. City of Los Angeles, Dept. of Water and Power, 87 Cal. App. 2d 862, 197 P.2d 817 (2d Dist. 1948) (whole life insurance); Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (retirement plan); Patillo v. Norris, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976) (employee group life insurance and pension death benefits).

that is owned by the wronged spouse.[129] Where a spouse has innocently assumed that a policy on his or her life could be left to a third party and has made estate plans that incorporate this disposition, the ability of the nonconsenting spouse to set aside part of the plan without contesting other parts of it may create injustice. Assume, for example, that a couple owns community property assets worth $200,000 and that the wife makes plans to dispose of one half that amount ($100,000), effective at her death. Wishing to divide her assets equally between her father and her husband, she names her father beneficiary of a $50,000 policy that insures her life and leaves the residue of her estate to her husband by will. As the policy was purchased with community funds, however, her husband may challenge her attempted unilateral gift of the proceeds after her death and recover his community share ($25,000). Should he do so, only $25,000 of her share of the community property will pass to her father via the policy; the residue (worth $75,000 rather than the $50,000 that she expected) will pass to her husband under her will.[130] Had she made a $50,000 bequest to her father instead and named her husband as both

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129. Cal. Civ. Code § 5125(b) (West Supp. 1981); Sieroty v. Silver, 58 Cal. 2d 799, 376 P.2d 563, 26 Cal. Rptr. 635 (1962) (wife's one-half interest in policy proceeds recognized as against named beneficiaries although subject to administration in husband's estate under then-existing Probate Code provisions); Patillo v. Norris, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976); New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61 (1st Dist. 1923). If no challenge is made, the survivor becomes liable for gift tax as to his or her share, which passes to the beneficiary. Jones, Transfers of Community Property Insurance Proceeds to Third-Party Beneficiaries: The Federal Gift Tax Consequences, 5 Community Prop. J. 258 (1978).

130. His decision to stand on his community property rights as to the policy does not operate as an election to take against the will. See E. Scoles & E. Halbach, Problems and Materials on Decedents' Estates and Trusts 170 (1965) ("the proceeds . . . are not part of his estate for purposes of the forced share of a surviving spouse").

the beneficiary of the policy and the residual beneficiary under her will, her overall plan would have been fulfilled: her father would have received the amount she had intended for him and her husband, too, would have received a total of $50,000 ($25,000 under her will and $25,000 as her one half interest in the policy).[131]

These disparities should be removed. The current system can be improved by insisting that beneficiary designations of community property assets be made jointly, avoiding unanticipated gift challenges.[132] To the (11)
extent that problems persist, challenges to gifts or bequests that take effect upon the death of the donor should be permitted only if the total of the decedent's assets that would go to third parties under such instruments exceeds the total amount available to the decedent for disposition. In
other words, all joint tenancies, insurance or pension benefits, or other (12)
dispositions or transfers occurring upon death would be considered together with the assets passing through the decedent's estate in determining whether the surviving spouse should be permitted to set aside any of the transfers as improperly impinging on community property rights.[133]

A second problem currently exists if a person whose pension plan was acquired with community funds from a former marriage dies, leaving death benefits or a survivor's annuity to a third party (most commonly a subsequent spouse). Normal community property ownership principles and tracing techniques indicate that one half of all such benefits should belong to the nonemployee former spouse and be subject to that spouse's set aside

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131. Her husband would have no reason to challenge the gift to himself.

132. This was recommendation number 8 of the management study. See Bruch, supra note 11, at n.42.

133. This is a modification of the augmented estate concept found in the Uniform Probate Code. See notes 402-403 infra and accompanying text.

if no consent was given to the naming of the third party. Benson v. City of Los Angeles,[134] however, does not recognize the former spouse's claim if the plan specifies that the survivorship benefit may only go to named parties and the former spouse is not one of those so listed. In Benson, the second Mrs. Benson married Mr. Benson after he had retired, outlived him, and became eligible for a widow's pension. The first Mrs. Benson, who had been married to Mr. Benson during almost all of his employed life, claimed one half of the pension payments, asserting her community ownership interest. Her suit was denied on the ground that she was not his "widow."[135] The reasoning, of course, is inapt. If community property life insurance proceeds are left to a third party, a surviving spouse is similarly not that person. The survivor's community property claim is based upon ownership principles, not upon the plan's scheme for distribution of benefits. Benson should be legislatively overruled, and an employee's opportunity to disadvantage a former spouse by a unilateral choice of options should be restricted.[136] Further, such plans should be

(13) (14) (15)

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134. 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963).

135. Id. at 359, 384 P.2d at 651, 33 Cal. Rptr. at 259.

136. This was recommendation number 7 of the management study. See Bruch, supra note 11, at n.42. Others have identified the same problem. The U.S. Department of Justice Task Force on Sex Discrimination, for example, reports that the Employere Retirement Income Security Act (Pub. L. No. 93-406, "ERISA") requires that

> any plan which provides benefits in the form of an annuity (which includes almost all private pension plans) must offer an optional "joint and survivor annuity". However, ERISA also provides that, before retirement, the worker must be given an explanation of the joint and survivor option, and an opportunity to reject it in favor of a single annuity on his own life, with no benefits to his survivor [29 U.S.C. § 1055]. There is no requirement that his spouse be informed of the option or of his decision, and no provision for her to make the election. This is significant because the standard form of the benefit is still considered the single life annuity for the worker, and if the worker elects to

required to include former spouses in the class of authorized beneficiaries for death or survivor's benefits.[137]

b. death of the nonemployee spouse before that of the employee

Another peculiar rule was promulgated by the California Supreme Court in Waite v. Waite,[138] which involved the termination of a 33-year marriage. Although the court held that Mrs. Waite owned a one-half interest in her husband's pension, it also held that, should she predecease him, her interest in the payments he would receive after her death would not pass to her estate. However, noting in a footnote that this rule would vitiate the mandated equal division of community property at divorce, the court suggested that Mrs. Waite could be compensated for her lost ownership interest if the trial court on remand should see "fit" to do so.[139] This remarkable substitute of equitable distribution (and the court's accompanying remarks on evaluating the damage that its holding had

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> have a portion of his benefits paid to his spouse after his death, the "joint" benefit he will receive during his life will be lower than his individual benefit because of "actuarial reduction" to reflect the "cost" of the survivor's annuity. This aspect of the system has been criticized on the grounds that many workers will elect the higher immediate benefit because of need if the amount is barely adequate to begin with, or because of lack of foresight or just plain selfishness, and that the spouse, who is obviously vitally interested in the decision, need not even be informed of it.

Civil Rights Division Task Force on Sex Discrimination, U.S. Dep't of Justice, The Pension Game: The American Pension System from the Viewpoint of the Average Woman 27-28 (1979) (footnote omitted).

137. See also Task Force Report, supra note 136, at 47.

138. 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).

139. Id. at 474 n.9, 492 P.2d at 22 n.9, 99 Cal. Rptr. at 334 n.9.

inflicted on Mrs. Waite's property rights)[140] are as unsound as they are baffling. The court's holding forces a divorce court that seeks to accomplish an equal division to consult actuarial tables yet ignore the likelihood of future changes in Mr. Waite's pension, and then requires that Mr. Waite buy out Mrs. Waite's interest in these future amounts. The case removes from the court the sensible option of waiting to see if in fact Mr. Waite will outlive Mrs. Waite and, if so, how much money Mr. Waite will thereafter receive from his pension.

In practice, of course, because most wives are younger than their husbands and women outlive men in any event, it is relatively unlikely that Mrs. Waite or any other wife will be able to establish that she is apt to predecease her former husband, and therefore is entitled to significant present compensation for the interest that she may be denied by the court's "terminable interest" rule. Of course, if she later -- contrary to statistical predictions -- predeceases him, it will be too late to request additional compensation because the property division will have already been made final.[141] Instead, since wives can be expected to outlive their husbands in most cases, the Waite "terminable interest" rule will almost always require that a working wife pay her husband with current

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140. In making the computation of actuarial value, the trial court may disregard the possibility that defendant's pension benefits may be affected by legislative amendment to the Judge's Retirement Law, by an increase in the salary paid to the judge holding defendant's former office, or by the defendant's accepting temporary judicial assignment.

Id.

141. Property divisions are non-modifiable under California law. Carlson v. Carlson, 221 Cal. App. 2d 47, 50, 34 Cal. Rptr. 195, 199 (2d Dist. 1963); Wunch v. Wunch, 184 Cal. App. 2d 527, 531, 7 Cal. Rptr. 551, 554 (2d Dist. 1960); Bradley v. Superior Court 48 Cal. 2d 509, 518, 310 P.2d 634, 640 (1957).

dollars for the predicted future value of her pension after his death, while her estate will receive little should she predecease him contrary to actuarial expectations.

Although couples should remain free to buy out one another's pension interests where it is mutually agreeable, the forced forfeiture or buy-out of possible future benefits under the Waite rule is an oddity that should be legislatively overruled.[142] Benson and Waite were designed to curtail a woman's community property ownership interest in her former husband's employment benefits; they are gender-biased in both conception and operation, and have a negative impact on the already poor financial status of elderly women.[143] Pension interests are an increasingly important asset in many families. As such they should be treated consistently as property and the interests of both spouses should be fully protected. (16)

2. Disability and Tort Recoveries that Include Compensation for Lost Wages

A spouse may be compensated for personal injuries with a damage recovery, public or private disability benefits, or worker's compensation. To what extent should ownership of these funds reflect that which was lost? To what extent, when insurance coverage was purchased with community property assets or efforts, should ownership principles control? These issues have been incompletely treated in the cases and statutes, although the rules that currently govern a divorce court's distribution of recoveries from third parties for personal injury are generally satisfactory.

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142. See In re Marriage of Peterson, 41 Cal. App. 3d 642, 656, 115 Cal. Rptr. 184, 194 (2d Dist. 1974) ("We do not believe the rule which we must follow is fair.").

143. See note 334 infra.

There are two statutory directives. One concerns recoveries from third parties: The timing of the injury rather than the nature of the tort recovery controls, and recoveries (whenever received) for personal injuries (of whatever nature) that were incurred during cohabitation are community property,[144] subject to a special rule of division at divorce.[145] Under this rule, recoveries that were commingled with other community property will be divided equally between the parties without regard to the nature of the losses that were recompensed. Uncommingled recoveries, however, will go entirely to the injured spouse unless "the interests of justice" require that some amount (but in no event more than one half) be awarded to the uninjured spouse. Once again, there is no mention of the nature of the losses that were sustained, but the court is directed to consider "the economic condition and needs of each party, the

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144. (a) All money or other property received or to be received by a person in satisfaction of a judgment for damages for personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if the cause of action for such damages arose as follows:

(1) After the rendition of a decree of legal separation or a final judgment of dissolution of a marriage.

(2) While either spouse, if he or she is the injured person, is living separate from the other spouse.

(3) After the rendition of an interlocutory decree of dissolution of a marriage.

This subdivision shall apply retroactively to any case where the property rights of the marriage have not been adjudicated by a decree of dissolution or separation which has become final.

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of his spouse's personal injuries from his separate property or from the community property subject to his management and control, he is entitled to reimbursement of his separate property or the community property subject to his management and control for such expenses from the separate property received by his spouse under subdivision (a).

Cal. Civ. Code § 5126(a),(b) (West Supp. 1981).

145. Id. § 4800(c), set forth at note 2 supra.

time that has elapsed since the recovery of the damages of the accrual of the cause of action, and all other facets of the case . . . ." Thus, the court will undoubtedly consider to what extent the damages incurred were peculiarly personal, whether wages in the past or the future were lost, and whether continuing support needs for either spouse should be met through the division. Under no circumstances will the injured party receive less than one half of the award, and frequently the total amount will go to him or her.

The rule probably works well in most cases.[146] However, commingling (17) alone should not remove damage recoveries from the court's discretionary powers of division if normal tracing principles can be used to identify their presence in the commingled fund. The current contrary rule encourages hoarding of the recovery by the injured spouse, with possible detriment to the family's welfare during the continuing marriage. Section 4800(c) should be amended by removing the language that restricts its (18) operation to uncommingled damage recoveries. And, to lessen untoward tax impacts, minor rewording is needed to indicate that the court's award (17)

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146. Settlements and jury verdicts alike often fail to indicate the precise breakdown of a damage recovery. Such allocations would not bind a non-party spouse in any event. Accordingly, § 4800(c) sensibly permits a divorce court to exercise discretion in dividing personal injury tort recoveries. Although the statutory language does not refer to the nature of the recompense (for example, whether for lost wages, disfigurement, pain and suffering, medical expenses or as punitive damages), it directs the court's attention to several factors that suggest the relevance of these concerns. During the ongoing marriage, community property treatment permits appropriate creditor access. To retain this feature without prejudicing the tax-free allocation of separate and community interests at divorce, the community property treatment during marriage should be achieved by a presumption that (17) operates conclusively except between the spouses or their representatives at the marriage's termination. But see Akers, Separate or Community Character of Personal Injury Recovery, 5 Community Prop. J. 107, 121 & n.122, 147 (1978) (arguing that recoveries should be apportioned between separate and community components despite administrative inconvenience, but endorsing a community characterization "[i]f a jurisdiction insists on the recovery being all separate or all community . . . ."). See note 153 infra.

establishes the spouses' relative community and separate interests in the property.[147] Finally, as discussed below in the section on rules for division at death, the provision should be duplicated in the Probate Code so that the same considerations will be relevant if the marriage continues instead until the death of one of the spouses.[148] (19)

The second statutory provision[149] defines personal injury damages received by one spouse from the other as the separate property of the injured spouse. There is no express right to reimbursement for expenses previously paid out of community property or the separate property of the tortfeasor[150]

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147. If community property damages recoveries are divided unequally, the overall division of the couple's community property will also be unequal, and will therefore be taxed to the extent of the disparity. See U.S. v. Davis, 370 U.S. 65 (1962); Carrieres v. Commissioner, 64 T.C. 959 (1975), aff'd 552 F.2d 1350 (9th Cir. 1977). But see Anglea and Chomsky, Property Divisions -- Income Tax Aspects in Calif. C.E.B., Tax Aspects of Marital Dissolutions: A Basic Guide for General Practitioners § 3.5 (Walker ed. 1979) (questioning authority for Carrieres dictum).

148. See notes 372-373 infra and accompanying text.

149. Cal. Civ. Code § 5126(c) (West Supp. 1981) reads:

> Notwithstanding subdivision (a), if one spouse has a cause of action against the other spouse which arose during the marriage of the parties, money or property paid or to be paid by or on behalf of a party to his or her spouse of that marriage in satisfaction of a judgment for damages for personal injuries to such spouse or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured spouse.

Distinctive treatment for interspousal torts first resulted when the Law Revision Commission recommended that community property ownership for personal injury damage recoveries be restored, but only as to recoveries from third parties. See California Law Revision Commission, California Personal Injury Damage Awards to Married Persons, Parts II & IV (Recommendations), 13 U.C.L.A. L. Rev. 608, 610, 620 (1966); 1968 Cal. Stats. ch. 457, § 2, p. 1078.

150. Cf. Cal. Civ. Code § 5126(b), set forth at note 144 supra (authorizing such reimbursement from other separate property recoveries for personal injuries).

and no special rule controls the disposition of the recovery at marital termination.[151] An express right to reimbursement should be enacted.[152] (20)
And, for the same reasons that the Law Revision Commission recommended in 1966 that recoveries from third parties be restored to community property treatment,[153] recoveries for interspousal torts should also become (21)

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151. Cf. id. § 4800(c), set forth at note 2 supra.

152. Absent express language, it is possible that no reimbursement would be permitted as a result of statutory construction, since an express right does exist as to other separate property recoveries. See id. § 5126(b). This was the intent of the Commission, although no explanation for its recommendation was given. California Law Revision Commission, supra note 149, at 630. The section should also be amended to make clear that damages recovered for prenuptial injuries are also subject to the reimbursement rule of § 5126(b). (20)

153. See California Law Revision Commission, supra note 149, at 609-10. The Commission noted that it is incongruous to make recoveries for future earnings or medical expenses separate property, since earnings are often the chief source of community property and community funds are usually used to meet injury-related expenses. The Commission apparently assumed that these two damage elements were sufficiently important to justify treating the whole recovery according to their characterization. Neither their Tentative Recommendation nor their consultant's background study (Brunn, California Personal Injury Damage Awards to Married Persons, Part I (A Study of the Effects of California Civil Code Section 163.5), 13 U.C.L.A. L. Rev. 586 (1966)) discusses other elements of recovery or the possibility of apportioning damages. Cf. La. Civ. Code art. 2344 (West Supp. 1981) (providing separate property treatment except for community earnings and injuryrelated expenses paid by the community); note 146 supra. Further, the Commission reasoned that separate property characterization unadvisedly placed recoveries beyond the jurisdiction of a divorce court, led to undesirable consequences at the death of an injured spouse, and could impose inadvertant gift tax liabilities on spouses who commingled recoveries with community property. Most of these reasons apply with equal force to recoveries by one spouse from the other. Although it is clearly appropriate to require that such damages be paid to the extent possible from insurance proceeds or the separate property of the tortfeasor, it does not follow that the recovery should be other than community property. See generally Bruch, supra note 11, at nn.43-53. Exclusive management by the injured spouse should be available if there is wasteful conduct by the other spouse. See recommendation 40 of the management study. Id. at nn.179-182.

also become community property subject to a special rule of division at the marriage's termination.[154]

More troublesome questions are posed by recoveries under employment-related schemes, or under disability insurance policies purchased with community funds. In either situation, an argument can be made under the reasoning of the life insurance cases that the parties are equally entitled to the plan's proceeds because of their equal contributions to its purchase. Had no injury occurred, however, wages earned after divorce would have been the separate property of the injured spouse.

There seems no policy reason to alter ownership of substitute income payments that will be received for postdivorce unemployment simply because

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154. The Commission's only explanation for proposing a distinctive rule for interspousal torts was cryptic:

> If damages paid by one spouse to the other in compensation for a tortious injury were regarded as community property, the payment would be somewhat circular in that the tortfeasor spouse would be compensating himself to the extent of his interest in the community property.

California Law Revision Commission, supra note 149, at 610. Its concern seems not to have been for imputed negligence, as the Commission recommended that this doctrine be legislatively overruled. Id. at 612, 620-21. See generally Lantis v. Condon, 93 Cal. App. 3d 152, 157 Cal. Rptr. 22 (1st Dist. 1979); Jones, Toward a Theory of Comparative Contribution, ___ Ariz. St. L.J. ___ (forthcoming). The suggestion that there is something circular overlooks both the appropriate damage measurement and the requirement that recompense be made from the tortfeasor's separate property. The tortfeasor, too, is injured when the spouse loses community income. Replacing the community's loss, accordingly, also restores the tortfeasor's share in the loss. If damages are paid instead to the injured spouse's separate property, only the injured spouse's one half is restored. So long as correct damage measures are employed, no unjust enrichment to the tortfeasor occurs. See Bruch, supra note 11, at nn.210-211. The special division rule that currently applies to community property personal injury damages at divorce would automatically apply to damages for interspousal torts if they were recharacterized as community property.

injury occurred during the marriage.[155] It is unlikely that the spouses contemplated any such result when coverage was obtained. One could reach an appropriate result by the fiction of an implied gift of coverage to the injured spouse. A more direct analysis would conclude that recovery for damage that will continue into the postdivorce period should normally go to the injured spouse, subject to the uninjured spouse's right to support where appropriate and to community property claims to reimbursed premiums, displaced retirement benefits or payments in excess of lost earnings and expenses. Here, as with installment purchase of homes and term insurance, strict ownership concepts disserve rather than further the legitimate purposes of community property law, and should be disregarded to the extent that sensible policy requires.[156] Section 4800(c) should be broadened to include all forms of recovery for personal injuries, but qualified to (22)

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155. In contrast to tort recoveries, these forms of compensation are attributed to specific damage elements at the time of payment.

156. Worker's compensation, for example, consists of periodic payments in lieu of salary (measured as a percentage of lost wages and degree of disability), payments for actual medical expenses, and survivor's benefits. Cal. Lab. Code §§ 4653-4660 (West 1971 & Supp. 1981); but see id. § 4662 (providing conclusive presumption of total disability in some cases). See generally W. Hanna, 2 California Law of Employee Injuries and Workmen's Compensation chs. 12-17 (2d ed. 1981); B. Witkin, 2 Summary of California Law, Workmen's Compensation §§ 158-197 (8th ed. 1973 & Supp. 1980) [hereinafter cited as 2 Witkin, Workmen's Compensation]. Only rarely is a lump sum paid in advance for anticipated losses. 2 Witkin, Workmen's Compensation § 160. Such lump sums should be treated as community property personal injury damages subject to division under Cal. Civ. Code § 4800(c) (West Supp. 1981). Survivor's benefits, in contrast, go to those who were dependents of the worker at the time of injury, not death. Id. § 192. Accordingly, worker's compensation law appropriately reflects community property principles to a far greater degree than does public pension law. See the discussion of Benson, in the text accompanying notes 134-137 supra. Detailed review of the presumptions and distribution patterns of the Labor Code would be appropriate, in order to ascertain to what degree

provide that pension benefits which accrued during marriage should be recognized to the extent they are displaced by injury receoveries, with excess

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a social insurance scheme and to what degree a private insurance plan is the appropriate model for benefit distributions.

Social security disability benefits, in contrast, need not be considered, as they seem clearly beyond the reach of California's community property laws. See Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

The third major source of work-related compensation schemes, private disability plans, vary greatly but generally provide benefits that are measured by the insured's salary level, actual medical or rehabilitative costs, or the nature of permanent physical impairment (such as loss of an eye). M. Maisel, How to Use Disability Planning to Guarantee Your Business Interest and Income, ch. III (1973). Monthly benefits may provide the insured with greater income than he or she had at the time of the injury (see id. at III-20) and may be payable in addition to wages (id. at III-12, III-24). Some policies include death benefits (id. at III-17) and provisions for return of premiums if disability does not occur within a specified period (id. at III-27) or if coverage is less than the insured originally contemplated (id. at III-22). These variations and continuing innovations in coverage make generalized treatment difficult. The provisions of § 4800(c) may, however, provide a model for a new or revised section that would direct attention to the degree to which wages or retirement benefits are replaced or exceeded by payments or reimbursements under the policy or plan. (22)

This would be consistent with California's common law rule, which holds that disability recoveries after separation or divorce are the separate property of the injured spouse except to the extent that they replace accrued community property rights. In re Marriage of Stenquist 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978); Marriage of Jones 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

Codification of these cases is advisable, since their analogy to personal injury damages does not survive recent amendments to the Civil Code, and the rule they establish may therefore be subject to question. When Stenquist and Jones were decided, the ownership of personal injury damages depended on the date of their receipt; damages recovered at times when earnings were separate property were also separate property. Compare 1972 Cal. Stats. ch. 905, § 1, p. 1609 with Cal. Civil Code §§ 5118, 5119 (West Supp. 1981). Civil Code § 5126(a) (set forth in note 144 supra) now provides that damage recoveries are separate property only if the cause of action arises after separation -- i.e., at a time when earnings would be separate property (cf. Cal. Civ. Code §§ 5118, 5119 (West Supp. 1981)); the date of recovery is irrelevant. Recoveries after separation or

payments only being made subject to the court's discretionary division.

E. Defining the Current Value of Increased Capacity to Earn

1. Goodwill of a Business or Professional Practice (Business Capital)

The buyer of a going concern expects the enterprise's income after acquisition to be greater than it would have been if the business had been first organized on the purchase date. Because of this advantage (which is the product of the clientele and reputation that were built up by the former owner), the buyer will pay more than the inventory and accounts receivable would justify. This important extra is "goodwill" — an intangible yet valuable asset of most businesses and professions that entail skill and reputation.[157]

Community property businesses are involved in 11% of California divorces; many additional cases involve professional practices.[158] As a result, California appellate courts have frequently considered goodwill

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divorce for personal injuries incurred during marital cohabitation are therefore community property under the new rule, subject to the special rule of Civil Code § 4800(c) for division at divorce.

No reported case has tested Jones since the amended treatment for personal injury damages became effective. Because Jones pronounced a common law rule, however, it may remain intact despite revisions to the statutory scheme that originally provided support for its conceptual approach. Uncertainty would be removed by the recommended codification.

157. In re Marriage of Foster, 42 Cal. App. 3d 577, 581, 582, 117 Cal. Rptr. 49, 52 (1st Dist. 1974); Golden v. Golden 270 Cal. App. 2d 401, 405, 75 Cal. Rptr. 735, 737 (2d Dist. 1969) (sole medical practice); Mueller v. Mueller 144 Cal. App. 2d 245, 251, 252, 301 P.2d 90, 94 (3d Dist. 1956) (goodwill attaches not only to a trade or business, but also to a professional practice that depends on the "personal skill and confidence in a particular person"); Cal. Bus. & Prof. Code § 14100 (West 1964); 24 Am. Jur. 2d, Good Will §§ 1-11 (1968). Accord Cal. Code Civ. Pro. § 1263.510(b) (West Supp. 1981) (definition for purposes of eminent domain).

158. Weitzman, supra note 5, at table 4.

valuation questions in recent years.[159] The case law is confused and internally inconsistent, however,[160] and no California Supreme Court opinion yet deals with the topic.

The current value of goodwill to a purchaser, as the explanation above indicates, is a reflection of the expected future income or opportunity for income that results from the owner's past efforts.[161] Yet California courts have sometimes become confused, even stating in one divorce case that one may not determine the present value of goodwill by

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159. See In re Marriage of Slater, 100 Cal. App. 3d 241, 160 Cal. Rptr. 686 (1st Dist. 1979); In re Marriage of Webb, 94 Cal. App. 3d 335, 156 Cal. Rptr. 334 (1st Dist. 1979); In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1st Dist. 1979); In re Marriage of Barnert, 85 Cal. App. 3d 413, 149 Cal. Rptr. 616 (2d Dist. 1978); In re Marriage of Foster, 42 Cal. App. 3d 557, 117 Cal. Rptr. 49 (1st Dist. 1974); In re Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (3d Dist. 1974); In re Marriage of Fortier, 34 Cal. App. 3d 384, 109 Cal. Rptr. 915 (2d Dist. 1973); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969); Golden v. Golden, 270 Cal. App. 2d 401; 75 Cal. Rptr. 735 (2d Dist. 1969); Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106 (3d Dist. 1962); Burton v. Burton, 161 Cal. App. 2d 572, 326 P.2d 855 (4th Dist. 1958); Mueller v. Mueller, 144 Cal. App. 2d 245, 301 P.2d 90 (3d Dist. 1956); In re Lyons, 27 Cal. App. 2d 293, 81 P.2d 190 (4th Dist. 1938).

160. California courts have arrived at alarmingly disparate valuations of goodwill for practices that would at least appear to be similar, and the Courts of Appeal have uniformly found these valuations not to be abuses of discretion. See, e.g., Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969) (law practice's goodwill valued at $1000 where annual net income was $23,412); Golden v. Golden 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (2d Dist. 1969) (medical practice's goodwill valued at $32,500 where net annual income was approximately $45,000). Cf. In re Marriage of Aufmuth, 89 Cal. App. 3d 461, 463-64, 152 Cal. Rptr. 668, 678-79 (1st Dist. 1979) (no goodwill in law practice where husband's saleable interest exceeded $35,000 and husband's gross salary was $63,000 plus four annual bonuses; court confuses husband's contribution to goodwill with community ownership in firm's goodwill).

161. Cal. Bus. & Prof. Code § 14100 (1964); Miller, Valuing the Goodwill of a Professional Practice, 50 Cal. St. B.J. 107 (1975).

looking to the expected amount of future income.[162] This non sequitur loses sight of the fact that future earnings in any business with goodwill will be a combination of earnings produced by postdivorce efforts and earnings that stem from the predivorce efforts that established the goodwill.[163]

Approved valuation techniques, therefore, often take into account the business' recent earnings in assessing a current value for the expectation that future earnings will exceed those that future effort alone would produce.[164] Because many factors affect goodwill, there appear to be

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162. See In re Marriage of Fortier, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915, 918 (2d Dist. 1973). See also In re Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (3d Dist. 1974); Lurvey, Professional Goodwill on Marital Dissolution: Is It Property or Another Name for Alimony? 52 Cal. St. B.J. 27 (1977); Walzer, Divorce and the Professional Man, 4 Fam. L.Q. 363 (1970).

163. Some courts and commentators argue that double payment is required if one must both purchase goodwill and then pay spousal support on the basis of income derived from the business. This argument confuses the differing issues that arise in the support context. Income actually received is relevant both to ability to pay and to need for support. Other community assets such as bonds, apartment complexes and commercial buildings will also reflect expected future income in their fair market values at divorce. Yet no one would suggest that post-divorce income from these sources is irrelevant in determining whether the owner is subsequently able to pay or in need of support. See Cal. Civ. Code § 4806 (West 1970) ("When either party . . . has . . . a separate estate . . . or there is community property or quasi-community property sufficient to give him or her proper support . . . the court may withhold any allowance . . . out of the separate property of the other party. . . ."); Fain, The Effect of Property Distribution on Spousal Support in California, 5 Community Prop. J. 187 (1978); Propper, Goodwill and the Family Business: Why the Confusion? 9 CTLA Forum, October 1979, at 15.

164. In re Marriage of Foster, 42 Cal. App. 3d 577, 581, 117 Cal. Rptr. 49, 52 (1st Dist. 1974).

almost as many formulas as there are accountants,[165] and the case law

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165. See Oatway, Allocation of Purchase Price: Goodwill the Major Problem; Generally Accepted Accounting Principles and Correct Tax Accounting, 29 N.Y.U. Inst. Fed. Tax 511 (1971); Freeman, Valuation of Goodwill in a Professional Practice, in American Academy of Matrimonial Lawyers, 1978 Fourth Annual Bay Area Counties Regional Family Law Symposium.

For businesses that are frequently bought and sold, there are accepted formulas. Bergman, The Valuation of Goodwill, 53 L.A.B.J. 87, 93-94 (1977). Absent such a formula, the methods that are employed fall roughly into one of five categories: (1) gross income, (2) net income, (3) excess earnings, (4) capitalization, or (5) residual approach.

The gross income approach values goodwill at all or some percentage of one year's gross income. See, e.g., In re Marriage of Barnert, 85 Cal. App. 3d 413, 417, 149 Cal. Rptr. 616, 623, (2d Dist. 1978). The net income method multiplies (or capitalizes) one year's net income by some factor from 2 to 10. (This approach was suggested and rejected in Fortier, discussed in the text accompanying note 162 supra, as utilizing "future earnings.")

The excess earnings method takes the difference between the gross income of the practitioner and a reasonable salary, and capitalizes it over some number of years. Freeman, supra this note. The capitalization approach determines the amount of principal which, if invested at a reasonable rate of interest, would yield interest and principal over the professional's remaining career equal to the difference between his or her earnings and those of similar professionals. Bergman, supra this note, at 92 quoting In re Marriage of Fortier, 34 Cal. App. 3d at 387, 109 Cal. Rptr. at 917.

The residual approach utilizes some fixed value, such as that contained in a partnership agreement, or in a recent or proposed sale. The "residual" value of goodwill, then, is that remaining after allowance has been made for capital assets, accounts receivable, etc., in the contract or market value. Oatway, supra this note. (This value will frequently be of questionable relevance in dissolution cases, because the price set for contract or sale purposes rarely embodies the same considerations that a value for community property purposes would require. A sale of a professional practice, for example, contemplates the termination of the practice as it presently exists; in contrast, following dissolution the practice will ordinarily continue unchanged. Also, the parties to a contract may seek to minimize the value of a business of practice for tax reasons or to avoid the consequences of dissolution, as was apparently done in Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969).)

displays the resulting confusion.[166] Appellate courts, reluctant to curb the trial court's discretion in this relatively new area, have approved sharply disparate values for seemingly comparable practices or businesses.[167]

There is reason to believe that the current ad hoc practice is also embraced by the bench and bar for pragmatic rather than doctrinal reasons. One often hears, "We know how much the goodwill is worth; it's worth the equity in the house." If, as this comment suggests, goodwill serves as a safety valve that permits equitable results in some cases, the problem appears to be that the valve is not equally available to those without professions or businesses.[168] A reasoned reform of community property law should deal directly with the problems that motivate such manipulation, seeking at the same time a principled method of valuing goodwill.

That the asset does exist is clear. Both case law and statutory developments in other areas are consistent on this point.[169] Some greater certainty as to valuation, however, is called for. In a cooperative (23)

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166. See In re Marriage of Barnert, 85 Cal. App. 3d 413, 417, 149 Cal. Rptr. 616, 623, (2d Dist. 1978); In re Marriage of Fortier, 34 Cal. App. 3d 384, 387, 109 Cal. Rptr. 915 (2d Dist. 1973); Todd v. Todd 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969).

167. See note 160 supra.

168. Accountants consider goodwill to represent the value of a practice over and above a reasonable salary. Adams, Professional Goodwill as Community Property: How Should Idaho Rule? 14 Idaho L. Rev. 473 (1978). It follows that salaried professionals such as staff attorneys will not ordinarily possess goodwill. To the extent that a spouse's reasonable salary itself is the product of training and efforts that were undertaken during marriage, the broader concept of enhanced earning capacity is available to measure the community's interest. See notes 171-196 infra and accompanying text. This measure of human capital complements the measure of business capital called goodwill.

169. See Cal. Code Civil Pro. § 1263.510 (West Supp. 1981) (eminent domain); Bergman, supra note 165.

effort with members of the accounting profession, statutory formulas for major classes of business should be developed that would control absent a showing of extraordinary circumstances.[170] The benefits in reduced litigational expenses and increased uniformity would outweigh the theoretical possibility of less precise results in individual cases.

2. Enhanced Personal Earning Capacity (Human Capital)

Recent divorce cases from sister states have recognized financial claims by one spouse based on an educational degree that was obtained by the other spouse during the couple's marriage.[171] The reasoning parallels

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170. For example, one such formula might measure three months' accounts receivable or net income capitalized over three years.

171. Wilcox v. Wilcox, ___ Ind. App. ___, 365 N.E.2d 792 (1977) (court was constrained by statute prohibiting alimony absent incapacitation but awarded wife virtually all of the traditional marital assets); Horstmann v. Horstmann, ___ Iowa ___, 263 N.W.2d 885 (1978) (court held future earning capacity of both parties (including education, skill and talent) may be considered by trial court in making equitable distribution of marital assets and in determining whether alimony award should be made and in what amount); Inman v. Inman, ___ Ky. ___, 578 S.W.2d 266 (1979) (court treated professional license of dentist husband as marital property in an attempt to reach an equitable result; remanded with directions to find the approximate dollar value of wife's contribution to her husband's acquisition of license to practice, the approximate dollar value of husband's increased earning capacity, and the approximate dollar value, if any, of wife's contribution to worth of husband's dental practice); Moss v. Moss, 80 Mich. App. 693, 264 N.W.2d 97 (1978) (court awarded "alimony in gross," $15,000 in future payments, which it said "fairly represents the wife's contribution to the acquisition of the asset" (husband's medical education)); In re Marriage of Cropp, 48 U.S.L.W. 2286 (Minn. D. Ct. 1979) (in unpublished opinion court found value of wife's contribution to husband's medical education and awarded her $24,684 lump sum payable periodically, ceasing on death of either spouse; "maintenance" of approximately $8,000 was also awarded, payable if wife attended graduate school); Lynn v. Lynn, 49 U.S.L.W. 2402 (N.J. Super. Ct., Bergen County, Dec. 5, 1980) (court found husband's medical education, valued at $306,886, the only marital asset subject to equitable distribution and awarded wife 20%, payable over a period of five years, plus alimony); Daniels v. Daniels, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961) (court held medical practice property in the nature of a franchise, and held trial court had a right to consider it in making alimony award); Hubbard v. Hubbard, 603 P.2d 747 (Okla.

that of the goodwill cases: efforts during the marriage have produced an asset (the education) that can be expected to provide returns in the future beyond those that would have been available in its absence. Although various methods have been applied to value this asset,[172] and the theories and rules for compensating the nonstudent spouse differ from state to state,[173] there is a striking similarity in the facts that have initially prompted judicial relief:

1979) (court held wife who supported family during husband's training to become neurosurgeon entitled to lump sum alimony in lieu of property award; distinguished situation where wife, too, has enhanced earning capacity or has received financial benefit from investment, or equity can be achieved through division of conventional community property). See generally Brief for Appellant, In re Marriage of Sullivan, 4th Civ. No. 23634 (Cal. Ct. App. 4th Dist. 1980); Brief for Defendant, Lynn v. Lynn, No. M-9842-77 (N.J. Super. Ct. Bergen County 1980); Krauskopf, Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital, 28 Kan. L. Rev. 380 (1980); Comment, The Interest of the Community in a Professional Education, 10 Cal. W. L. Rev. 590 (1974); Comment, A Property Theory of Future Earning Potential in Dissolution Proceedings, 56 Wash. L. Rev. 277 (1981); Annot., 4 A.L.R. 4th 1294 (1981).

172. See, e.g., Inman v. Inman, ___ Ky. ___, 578 S.W.2d 266 (1979) (costs incurred with allowance for interest and inflation); Lynn v. Lynn, M-9842-77 (N.J. Super. Ct. Bergen County, filed Dec. 5, 1980) (capitalized, discounted value of the differential earning capacity of a male with a four-year college degree and a specialist in internal medicine, the husband having received his medical education and license to practice during marriage). See also Krauskopf, supra note 171, at 382-84 (deducting investment costs such as out-of-pocket expenses, tuition and books from expected total earnings in determining discounted differential earnings).

173. Litigants, courts and commentators have reasoned that compensation of one spouse for contributions made to the education of the other is appropriate under several property theories: (1) **Implied or express contract.** Sullivan Brief, supra note 171, at 18; Krauskopf, supra note 171, at 389-90. (2) **Partnership.** Comment, supra note 171, 56 Wash. L. Rev. at 283. (3) **Restitution, reimbursement, unjust enrichment, or return on investment.** Sullivan Brief, supra note 171, at 17-18, 20; Krauskopf, supra note 171, at 392; Comment, supra note 171, 56 Wash. L. Rev. at 283; 4 A.L.R. 4th, supra note 171, at 1298-99 (1981). (4) **Asset (education, professional license or increased earning capacity) is marital property subject to property**

> Typically, one spouse attains a degree while the other provides support; then a divorce occurs soon after graduation. Usually there are few assets immediately available, but one spouse leaves the marriage with an education and increased earning potential, while the other spouse is given nothing for her efforts.[174]

A New Jersey judge who recently recognized the property interests of a wife in the medical education of her husband pointed out:

> Either a professional degree and/or license is or is not property. . . . To find that a non-licensed spouse in one case is entitled to [a property] distribution and a non-licensed spouse in another case is not, is to substitute legal mumbo-jumbo for legal analysis and application.[175]

In California, where recognition of a property interest would require that its value be subjected to equal division, the characterization issue

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distribution. Sullivan Brief, supra note 171, at 21-22; Comment, supra note 171, 56 Wash. L. Rev. at 283 (1981); 4 A.L.R. 4th, supra increased earning capacity) as marital property subject to property distribution. Sullivan Brief, supra note 171, at 21-22; Comment, supra note 171, 56 Wash L. Rev. at 283 (1981); 4 A.L.R. 4th, supra note 171, at 1295-96.

Note that in some instances the courts have refused to consider the education, a professional license, or increased earning capacity itself as being subject to division. However, many of these same courts have tried to mitigate the resulting injustice through other awards made to the claimant spouse. Hubbard v. Hubbard, ___ Okla. ___, 603 P.2d 747 (1979); Diment v. Diment, 531 P.2d 1071, 1073 (Okla. Ct. App. 1975) ("permanent alimony" awarded in lieu of property division); Stern v. Stern, 66 N.J. 340, 345, 331 A.2d 257 (1975) (earning capacity held a factor to be considered in equitably distributing property and setting alimony. See also case cited in note 171 supra. In 1947, a California court awarded a woman who had put her husband through medical school $7,500 "for compensation therefore . . . and by reason of [her husband's] extreme cruelty to [her] and in view of the potential earning power now and in hte future to be possessed and enjoyed by the defendant by reason of [her] efforts in his behalf . . . ." Aarons v. Brasch, 229 Cal. App. 2d 197, 200 n.1, 40 Cal. Rptr. 153, 156 n.1 (1st Dist. 1964) (quoting the parties' 1947 interlocutory divorce judgment).

174. Comment, supra note 171, 56 Wash. L. Rev. at 282-83.

175. Lynn v. Lynn, No. M-9842-77, slip opinion at 21 (N.J. Super. Ct. Bergen County, Dec. 5, 1980).

is not yet settled. Neither the California Supreme Court nor the legislature has addressed the issue.[176] One trial court's restitutionary award was later interpreted as an enforceable award of lump sum alimony.[177] Other appellate opinions suggest, however, that nothing more is required than a traditionalal division of other community assets or an award of modifiable spousal support.[178]

These latter appellate cases are poorly reasoned. Past indicia of enhanced earnings support rather than negate the claim that one spouse will reap continuing benefits from increased earnings after divorce. And, assertions previously made to avoid ownership treatment of goodwill and

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176. The legislature has, however, provided some relief. The spouse of a former student need no longer bear one half of the burden of repaying related educational loans. Compare Cal. Civ. Code § 4800(b)(4) (West Supp. 1981) with In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 461-62, 152 Cal. Rptr. 668, 677-78 (1st Dist. 1979).

177. The trial court did not characterize its $7,500 award. When the husband later resisted enforcement on the grounds that it was a property award and hence dischargeable in his pending bankruptcy action, the Court of Appeal held it enforceable as lump sum alimony. Aarons v. Brasch, 229 Cal. App. 2d 197, 40 Cal. Rptr. 153 (1st Dist. 1964); see note 173 supra.

178. In Todd v. Todd, the court reasoned that the husband's legal education was probably not community property (reasoning by analogy to personal injury claims, which have since been given community property status); even if it were, the court continued, "it is manifestly of such character that a value for division [purposes] cannot be placed upon it." 272 Cal. App. 2d 786, 791, 79 Cal. Rptr. 131, 134 (3d Dist. 1969). The court then noted that the wife's share of the couple's other community assets "were the results of [her husband's] legal education and that in a sense [she] realized the value [of the education] in [their] award to her . . . ." Id. Ten years later, another appellate panel followed Todd, refusing to reconsider the characterization and valuation issues. In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 462, 152 Cal. Rptr. 668, 677 (1st Dist. 1979). It, too, reasoned that community property "does not encompass every property right," that, "to the extent community assets were the product of the husband's legal education, wife has realized their value," and added that "the trial court must have considered husband's earning capacity in awarding spousal and child support." Id.

pensions,[179] that modifiable spousal support can redress property division inequities, have proven false. First, significant support awards are rarely made.[180] Second, they are infrequently enforced.[181] Third, support may terminate long before recompense has been made, since court-awarded support ends upon the death of either spouse or the remarriage of the supported spouse.[182] Perhaps most importantly, the nonstudent spouse is often capable of self-support, although at a much more modest standard of living than that in store for the educated spouse. If so, no ownership recompense at all may be received.[183] Just such a case is currently

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179. See In re Marriage of Gillmore, 29 Cal. 3d 418, 427, ___ P.2d ___, ___, 174 Cal. Rptr. 493, 499 (1981) (pension). See generally Lurvey, supra note 162; Walzer, supra note 162 (goodwill).

180. Weitzman and Dixon, supra note 13, at 154-59, 179-82.

181. Forty-six percent of the 14% of divorcees awarded spousal support regularly collect or receive their spousal support. B. Bryant, American Women Today and Tomorrow 24 (March 1977) (written for the U.S. National Commission on the Observance of International Women's Year). Out of 4.5 million divorced or separated women, only 4 percent reported that they had received alimony in 1975. U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 84, Divorce, Child Custody and Child Support, at table 10 (June 1979).

182. Cal. Civ. Code § 4801(b) (West Supp. 1981); accord Hubbard v. Hubbard, 603 P.2d 747, 751-52 (Okla. 1979) (awarding lump sum alimony):

> Equity would not be served by holding, as appellant [Dr. Hubbard] suggests, that Mrs. Hubbard's recovery be limited to alimony for support and maintenance. To do so would force her to forego remarriage and perhaps even be celibate [citing Oklahoma's statute on spousal support and cohabitation] for many years simply to realize a return on her investments and sacrifices of the past twelve years.

183. See Weitzman and Dixon, supra note 13, at 168-70.

pending in California's fourth district Court of Appeal.[184]

Although the special difficulties of dividing such assets may require special treatment at divorce, these problems do not support a blanket refusal to recognize economic reality. Important rights to future income are in fact disposed of by marital property division, whether they are acknowledged and measured or are awarded sub silentio.

Taking the clearest example, Professor Krauskopf has analyzed the economic factors that operate in a marriage where one spouse studies while the other works.[185] She lists the costs that are incurred by the couple in exchange for the increased human capital (including the enhanced earning capacity) of the student spouse. First, there are the foregone wages of the student spouse (and the foregone living standard that the couple sacrifices), a form of "opportunity cost".[186] Next, there is the direct monetary contribution of the working spouse.[187] Finally, there may be opportunity costs to the working spouse if that person thereby foregoes

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184. In re Marriage of Sullivan, 4th Civ. No. 23634 (Cal. Ct. App. 4th Dist. 1980). The Sullivans were married in 1967, as she was completing her third year of college and he his fourth. Except for a fourteen-month period following the birth of a child in 1974, Janet Sullivan was employed from 1969 until 1978, while Mark Sullivan attended medical school and completed his training. In 1978, as Dr. Sullivan opened his medical practice with borrowed funds (stipulated to be separate property), he filed for dissolution of the marriage. Mrs. Sullivan received $500, some of the couple's furniture and an automobile, including the obligation for its payments. The court awarded her no spousal support, but reserved support jurisdiction for five years. Sullivan Brief, supra note 171, at 1-2, 20. Had the loan been community property, Mrs. Sullivan would have been equally responsible for its repayment. See notes 276-280 infra and accompanying text.

185. Krauskopf, supra note 171, at 384-388.

186. Id. at 384.

187. Id. at 387.

further education that might enhance his or her own lifetime earning capacity.[188] All of these costs are shared by the spouses; each is willing to endure them because of the anticipated increase in the human capital of the student spouse and the assumption that this benefit will redound to both of them.[189] If the marriage remains intact, the investment decision may prove to have been a wise one. But if divorce occurs, the human capital increase leaves the marriage with the student spouse, while the other continues to bear the opportunity losses.[190] What was an economically sound investment has been transformed into a windfall for one spouse and a serious loss to the other.

Dr. Weitzman's statistics on the postdivorce wealth of California men and women emphasize the immediate and dramatic consequences of disparate

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188. Id.

189. The economic concept of human capital views education as an investment producing a return in the form of more effective producers and consumers. Id. at 381 and sources cited; Schultz, Optimal Investment in College Instruction, 80 J. Polit. Econ. 52 (1972).

190. The only current relief occurs to the extent that costs were met with educational loans that are still outstanding at the time of divorce. See Cal. Civ. Code § 4800(b)(4) (West Supp. 1981), set forth at note 2 supra. See generally Cal. Civ. Code § 4801(a)(1) (West Supp. 1981) (impaired earning capacity through unemployment relevant to spousal support), set forth at note 219 infra.

earning capacities in the postdivorce period.[191] To the extent that these

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TABLE 8

Post-Divorce Incomes of Couples Married 18 Years or More

From interviews with divorced men and women—Los Angeles County, 1978

Pre-Divorce Yearly Family Income	Mean Yearly Support Awarded to Wife*	Median Post-Divorce Income		Median Post-Divorce Income As Percentage of Pre-Divorce Family Income	
		Wife's (*Adjusted*)†	Husband's (*Adjusted*)‡	Wife (*Adjusted*)	Husband (*Adjusted*)
under $20,000 (n=12)**	$ 2,460	$ 7,500	$14,940	54%	90%
$20-29,000 (n=13)	$ 4,200	$ 6,300	$20,000	24%	87%
$30-39,000 (n=16)	$ 5,400	$14,500	$29,004	46%	83%
$40,000 or more (n=22)	$13,700	$16,875	$33,700	26%	68%

*Alimony and child support, including zero and one dollar awards.

†Wife's adjusted income calculated by adding wife's earnings plus alimony and child support awarded plus income from any other source (such as welfare).

‡Husband's adjusted income calculated by subtracting alimony and child support ordered paid from husband's total income.

**n refers to the number of cases on which the percentages are based.

TABLE 9

Median Post-Divorce Per Capita Incomes of Couples Married 18 Years or More

From interviews with divorced men and women, Los Angeles County, 1978

Pre-Divorce Yearly Family Income	Per Capita Family Income	Post-Divorce Per Capita Income		Post-Divorce Per Capita Income as % of Old Family Per Capita Income	
		Wife (*Adjusted*)*	Husband (*Adjusted*)† ‡	Wife (*Adjusted*)	Husband (*Adjusted*)
Under $20,000 (n=12)**	$ 5,750	$6,500	$11,950	102%	160%
$20-29,000 (n=13)	$11,500	$6,100	$11,500	48%	97%
$30-39,000 (n=16)	$12,306	$9,100	$18,000	60%	158%
$40,000 or more (n=22)	$20,162	$8,500	$28,640	42%	175%

*Wife's post-divorce adjusted per capita family income was calculated by taking the wife's total income (from all sources including alimony and child support) and dividing by the number of people in her post-divorce family (including children in her custody).

†Husband's post-divorce adjusted per capita income was calculated by taking the husband's total income, subtracting any alimony and child support awarded to his ex-wife, and dividing the remaining amount by the number of people in his post-divorce family (including new spouses, permanent cohabitants and children in his custody).

‡These figures do *not* include any additional income provided by the new spouse for the 36 percent of the divorced men and the 6 percent of the divorced women who had remarried by the time of the interview (approximately one year after the legal divorce).

**n refers to the number of cases on which the percentages are based.

Weitzman and Dixon, supra note 13, at 174, 176. See note 319 infra.

differences have been exacerbated because the earning potential of one spouse was enhanced while that of the other either was not or was harmed, the concept of enhanced earning capacity could relieve the inequity. As a recent law review comment noted, the theory, which developed in cases involving formal education and professional licenses, applies equally where earning potential has been increased through other community efforts.[192]

The proposals of Equity in the Family, a membership organization based in Northern California, have encompassed this broader definition of enhanced earning capacity.[193] Because the concept is akin to those that may be relevant in wrongful death or tort cases,[194] and is familiar to

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192. Comment, supra note 171, 56 Wash. L. Rev. at 284-85.

193. The organization proposes the adoption of the following statutory language

> Notwithstanding any other provision of law, in any judgment decreeing the dissolution of a marriage or a legal separation, the court shall regard the interests in the increase achieved in the gainful-employment earning capacity of each spouse during the marriage as community property. In determining such interests, the court shall regard the spouse's earning capacity on the date of the marriage, and at all times subsequent to said date, as reduced by the percentage comprising the interests which are property from a previous marriage.

See Letter from Elaine Elwell, Legislative Chairman of Equity in the Family, to the author, April 22, 1981 (on file with the author). This proposal differs from others in contemplating that one former spouse would be awarded a percentage ownership interest in the other's future earnings, to be paid out as realized. See Letter of Elaine Elwell to the author, Enclosure at pp. 5-7, Feb. 18, 1981 (on file with the author).

194. See, e.g., Gall v. Union Ice Co., 108 Cal. App. 2d 303, 320, 239 P.2d 48, 60 (1st Dist. 1952) (wrongful death case capitalizing lost lifetime earnings).

economists who study career and educational decisions,[195] a body of measurement knowledge already exists.

For most families the ability to earn is the sole significant financial asset at divorce.[196] To recognize accrued property rights in accounts receivable, pensions and goodwill but in no other form of future income provides protection to the relatively affluent without comparable benefits to those who depend on wages alone for sustenance. The most pressing need in California divorce reform is to find a way that can more fairly distribute the true community wealth of former spouses. Recognition of enhanced earning capacity as a property interest is an important avenue to that end. (24)

F. Removing Special Treatment for Some Forms of Marital Wealth

Doctrinal simplification and fairer treatment for spouses and creditors can be accomplished by incorporating three forms of wealth that now receive special treatment into the parent definition of community property: earnings after separation, earnings during a marriage in which there is a putative spouse, and earnings acquired before a couple moves to

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195. See G. Becker, Human Capital (2d ed. 1975); Investment in Human Capital xi (B. Kiker ed. 1971); G. Mumey, Personal Economic Planning (1972); T. Schultz, Investment in Human Capital (1971); T. Schultz, The Economic Value of Education (1963); L. Thurow, Investment in Human Capital (1970); Hansen, Total and Private Rates of Return to Investment in Schooling, in Kiker supra this note, at 211; Comment, The Interest of the Community in a Professional Education, 10 Cal. W. L. Rev. 590 (1974). See generally, Krauskopf, supra note 171, at 381-85.

196. Weitzman and Dixon, supra note 13, at 169 ("[M]ost divorc[ing] couples are young, and have little property at the time of the divorce . . . ."). See also Weitzman, supra note 5, at text accompanying footnotes 17-20 and 27-29; Weitzman and Dixon, supra note 13, at 184-85; note 191 supra.

California. As to each, the historical basis for distinctive rules has disappeared.

1. Postseparation Earnings

Prior to 1972, California law provided that a married man's earnings were community property unless the parties agreed otherwise or obtained a decree of legal separation or an interlocutory decree of dissolution.[197] His wife's earnings, in contrast, reverted to separate property once the couple lived "separate and apart".[198] The ambiguities of this language created case law only infrequently[199] until Civil Code section 5118 was amended in 1971 to extend the separate property rule to husbands as well.[200]

Because husbands' earnings are much greater than wives' earnings for most families, the new rule has major implications.[201] First, it changes the ownership of current earnings even though the spouses have taken no

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197. Former Cal. Civ. Code § 5119, 1969 Cal. Stats. ch. 1608, § 8, p. 3340 (amended 1971). The rule was originally enacted as Cal. Civ. Code §§ 169.1 and 169.2. 1951 Cal. Stats. ch. 1700, § 12, p. 3913, amended by 1971 Cal. Stats. ch. 1699, §§ 1, 2, p. 3640 (amending Civil Code §§ 5118, 5119).

198. 1869-70 Cal. Stats. ch. 161, § 2, p. 226; former Cal. Civ. Code § 169, An Act to Establish a Civil Code ch. 3, § 169, p. 57 (1872); former Cal. Civ. Code § 5118, 1969 Cal. Stats. ch. 1608, § 8, p. 3340.

199. Bruch, The Legal Import of Informal Marital Separation: A Survey of California Law and a Call for Change, 65 Calif. L. Rev. 1015, 1020-21 (1977).

200. 1971 Cal. Stats. ch. 1699, §§ 1, 2, p. 3640 (amending Civil Code §§ 5118, 5119). Cal. Civ. Code § 5518 (West Supp. 1981) now reads:

> The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.

201. See note 207 infra.

legal steps to alter their relationship, frequently catching one, the other, both, or their creditors without notice. Second, it forces litigation or negotiation to preserve legal rights at a time when the spouses might better focus on their marital problems:

> [T]hose who . . . obtain professional advice will find themselves engaged in potentially selfish or defensive maneuvering. An already strained relationship may be exacerbated and property rights may be jeopardized. Frequently, for example, an earning spouse will suggest to a nonearner that the nonearner's expenses be met out of the couple's savings and that the earner use current income for self-support. This will produce a dissipation of the community property, including the one-half interest that belongs to the nonearning spouse, rather than payment of current living expenses out of current income, as would be the case if a support order were sought. Relieved of such responsibilities, the wage earner will acquire as separate property whatever current earnings are not consumed.[202]

Finally, should the couple later divorce, the vague test invites litigation as the parties argue over the all-important date at which their

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202. Bruch, supra note 198, at 1024 (footnotes omitted). The treatment of ongoing obligations and current support needs is poorly rationalized by current law. Although the code now directs that court-ordered support be paid with current separate property earnings (Cal. Civ. Code § 4805 (West Supp. 1981)), informal arrangements may seriously prejudice the community. A spouse who uses current earnings to meet ongoing needs will be entitled to claim reimbursement from the community for whatever payments a court later decides were not a gift or in the nature of support or rent. In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979). If accrued community property assets are used for support, however, the community will have no right to reimbursement from separate property earnings, even if the spouse who depleted the community was employed at the time. In re Marriage of Cohen, 105 Cal. App. 3d 836, 844, 164 Cal. Rptr. 672, 676-77 (2d Dist. 1980) (employed husband cashed in pension, sold community furniture, cashed refund checks, and withdrew funds from community bank accounts to use for support for himself and cohabiting woman; court found no misappropriation since amounts "could" all have been spent on his necessities of life).

informal separation evidenced a final marital rupture.[203]

Except for this abberational rule as to earnings, California's family law has consistently recognized marriages and the incidents of marital status until a divorce or the death of one spouse.[204] Indeed, even now, after the community has ceased to benefit from earnings under section 5118, it nevertheless is implicated for whatever new obligations either spouse incurs -- not only when creditors seek satisfaction, but also as between the parties upon dissolution.[205]

Although couples are free to consensually alter their property rights during marriage,[206] only section 5118 imposes important property changes

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203. See, e.g., In re Marriage of Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (2d Dist. 1977); Patillo v. Norris, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976). Hindsight seems elevated over foreseeability in some cases. See Bruch, supra note 198, at 1021 n.13, 1023 & n.16. The problem was exacerbated in 1976 when the California Supreme Court held that the 1971 amendment to §§ 5118 and 5119 applies retroactively. See In re Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

204. Only death or a final judgment of dissolution or nullity terminates marriage. Cal. Civ. Code § 4350 (West Supp. 1981). Accordingly, an informal separation, an interlocutory judgment of dissolution or a decree of legal separation does not affect a party's status as a spouse. See, e.g., In re Estate of Dargie, 162 Cal. 51, 121 P.320 (1912) (woman held entitled to family allowance from a decedent's estate as his widow despite earlier entry of an interlocutory decree of divorce).

205. Cal. Civ. Code §§ 5116, 5122 (West Supp. 1981); Bruch, supra note 200, at 1067-68. But see In re Marriage of Hopkins, 74 Cal. App. 3d 591, 601, 141 Cal. Rptr. 597, 602 (2d Dist. 1977) ("That an unpaid [postseparation] creditor of [wife's] might have been entitled to recover against the community under Civil Code section 5116 should not mean that the trial court is disabled from requiring a spouse after separation to pay his or her post-separation bills.").

206. Cal. Civ. Code § 5103 (West 1970).

on them absent an agreement or court order.[207] The inequities of a rule that gives legal effect to informal separations and seriously depletes community resources are apparent; section 5118 should be repealed.[208] (25) Balance will be restored, a litigious question will have been removed, and jockeying for financial advantage will be lessened.

2. Quasi-Marital Property

A second special rule that should be abandoned affects void or voidable marriages that one or both of the spouses believe to be valid.

One who in good faith but mistakenly believes himself or herself to be married is called a "putative spouse".[209] At the end of a void or voidable marriage in which one or both parties are putative spouses, Civil Code section 4452 directs that the marital property be divided as it would be if the marriage had been valid.[210] Although the language implies that

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207. Bruch, supra note 199, discusses the legal effects of § 5118 in the areas of marital property, spousal support, child custody, child support, personal income tax, contract creditors, insurance and retirement plans, torts, public benefits, and probate.

208. This proposed change was endorsed by the Executive Committee of the State Bar's Family Law Section in 1977 and by the Advisory Commission on Family Law to the Senate Subcommittee on Administration of Justice. Advisory Commission on Family Law to the Senate Subcommittee on Administration of Justice, California Legislature, Substantive Family Law Proposals and Recommendations for Further Study 7 (Final Report 1979) (Recommendation 1D).

209. E.g., Estate of Krone, 83 Cal. App. 2d 776, 189 P.2d 741 (2d Dist. 1948).

210. Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of the property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not

the couple's property will be divided equally in all cases, legislative history makes clear that in cases of void marriages (i.e., bigamous or incestuous marriages) the drafters intended this result only when it would operate to the protection of "an innocent spouse".[211] As to voidable marriages, however, the Governor's Commission on the Family recommended equating marital termination with that of other marriages:

> To oversimply state the case, if the parties can live and function with the alleged impediment, then the marriage is viable and should not be dissolved. If they cannot, then the marriage has broken down in fact and should be ended at law. . . . [W]e recommend . . . the coalescence of all dissolution proceedings (save for declarations of nullity in the case of void marriages) into a single form of action governed by a single standard.[212]

This recommendation was not followed, however, and voidable marriages, too, are governed by section 4452.[213]

The section needs amendment. It should either make clear that normal community property and quasi-community property principles apply during and at the termination of all void and voidable marriages or it should explain what results obtain when there is only one putative spouse. Finally, the rules for property management and ownership following a discovery of the marriage's defect by a former putative spouse should be

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> been void or voidable. Such property shall be termed "quasi-marital property". If the court expressly reserves jurisdiction, it may make the property division at a time subsequent to the judgment.

Cal. Civ. Code § 4452 (West Supp. 1981).

211. Governor's Commission, supra note 39, at 37.

212. Id. at 36.

213. See note 210 supra.

prescribed.[214]

There is good reason to do away with specific rules for void and voidable marriages both during the relationship and upon termination.[215] Whether innocent or guilty, these spouses will have entered and remained in the relationship expecting their earnings and acquisitions to be shared. That one spouse knows, for example, that he or she has not validly ended an earlier marriage is unlikely to affect either person's property expectations or "marital" behavior. Nor will creditors be on notice that this purported marriage is flawed. (26)

If the fraudulent spouse is forbidden any share in the marital gains, the injured spouse may receive a windfall that has no relationship to the degree of emotional damage incurred, especially if the relationship has lasted many years. A rule that permits a damage suit or unequal property award to compensate the deceived spouse's emotional injury would be preferable to the current rule, which upsets creditors' expectations and denies financial rights to an admittedly guilty spouse, who may nevertheless have worked at home or for wages as a partner in the building of the couple's financial welfare.[216] (27)

Absorbing property treatment for these spouses into the normal marital property regime simplifies management, creditor access and probate

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214. Under Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (2d Dist. 1949), the rules of nonmarital cohabitation apply once a putative spouse learns of the marriage's invalidity.

215. Professor Reppy agrees. Reppy, Debt Collection from Married Persons in California 82 & n.138 (January 7, 1980) (unpublished study for the California Law Revision Commission).

216. The absence of a bright-line rule would entail some costs, but the number of affected cases is small, and equitable considerations justify the exception.

law,[217] and seems more likely to comport with the parties' expectations than does any other rule.

Similar attention should be given to Civil Code section 4455,[218] which authorizes support awards to putative spouses. It is recommended that this section, too, be extended to any spouse in a void or voidable marriage where at least one spouse initially held a good-faith belief in the validity of the marriage. To the extent that a nonputative spouse's behavior would render support inequitable, statutory language is already present that directs the court's attention to "[a]ny . . . factors which it deems just and equitable."[219]

(28)

No statutory scheme can adequately anticipate the variety of problems created by bigamous marriages. Special questions that arise when there

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217. Case law recognizes a putative spouse as a surviving spouse under Probate Code § 201, which controls descent of the couple's quasi-marital property, but refuses such status as to the decedent's separate property. Estate of Levie, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1st Dist. 1975). Levie should be overruled and putative spouses permitted to take as legal spouses in both respects. Only cases with surviving nonputative spouses or multiple surviving "spouses" need special rules. See notes 376-379 infra and accompanying text.

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

Cal. Civ. Code § 4455 (West Supp. 1981).

219. (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(1) The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to

are conflicting claims by legal and putative spouses should, therefore, continue to be handled in equity, as prescribed by current case law.[220] Although it is beyond the scope of this study, consideration should also be given to statutorily extending this equitable rule to cases in which marital property interests of legal or putative spouses conflict with property claims of third parties that are based upon nonmarital

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devote time to domestic duties.
(2) The needs of each party.
(3) The obligations and assets, including the separate property, of each.
(4) The duration of the marriage.
(5) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.
(6) The time required for the supported spouse to acquire appropriate education, training, and employment.
(7) The age and health of the parties.
(8) The standard of living of the parties.
(9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make such payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include findings of fact and may be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

Cal. Civ. Code § 4801(a) (West Supp. 1981).

220. See, e.g., In re Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (2d Dist. 1974) (husband maintained two households and reared two families over 24- year period). Most bigamy is technical in nature; the bigamous spouse lives monogamously with the putative spouse. In such cases it is possible to treat the property interests arising out of the subsequent relationship as distinct from those arising from the former. The recommended repeal of Civil Code § 5118 would not preclude this result, as the bigamist's earnings would become separate property as to the first spouse by implied agreement once their ties had been severed and each had gone his or her own way. See Bruch, supra note 199, at 1021 n.13, discussing Togliatti v. Robertson, 29 Wash. 2d 844, 190 P.2d 575 (1948).

relationships.[221]

3. Quasi-Community Property

Similar questions concerning management and creditor rights during marriage and probate rules upon the death of one spouse arise in a second context: the property rights of couples who move to California after they have begun to aquire marital assets. Because the marital property rules of California are unique, the property regimes to which these couples have previously been subject will not track California's in any case; when a couple moves to California from a non-community property jurisdiction, the change will be most dramatic.[222]

An appropriate response is needed. Beginning more than fifty years ago, one distinguished scholar after another (Justice Peters [1927],[223]

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221. In two recent cases, possible conflicts were avoided because the legal spouses had received full recovery in divorce actions before property claims were asserted by their husbands' cohabiting partners. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); In re Marriage of Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (2d Dist. 1977). Because a cohabitant would claim as the husband's creditor, however, current case law suggests that her claim, if pressed during the continuing marriage, would be honored in full, leaving the legal spouse with a right against her husband for mismanagement or deliberate misappropriation. See Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Cal. Civ. Code §§ 4800(b)(2), 5125(a),(e) (West Supp. 1981).

222. For a recent discussion of the substantive and choice of law problems that arise when no provisions have been made to accommodate these couples' needs, see Hughes v. Hughes, 91 N.M. 339, 537 P.2d 1194 (1978). The germinal work is H. Marsh, Marital Property in Conflict of Laws (1952). See also In re Marriage of Roesch, 93 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1st Dist. 1978) (husband moved to California alone and later filed for divorce); Leflar, Community Property and Conflict of Laws, 21 Calif. L. Rev. 221, 226 (1933).

223. Comment, 15 Calif. L. Rev. 399 (1927) (Gardner observes that the comment's author, R.E.P., was in fact Justice Peters; Gardner, Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi-Community Property" Legislation 54 Calif. L. Rev. 252, 259 n.47 (1966)).

Professor Armstrong [1945],[224] Professor Kay [1961][225] and Professor Bodenheimer [1969][226]) has advocated the abandonment of quasi-community property concepts and the forthright application of community property laws to property acquired elsewhere that would have been community property if the couple had been domiciled in California at the time of acquisition.[227] Unfortunately, no attempted legislative reform has since been made, although in 1964 the California Supreme Court invited this step.[228] The misconceived property and Constitutional law assumptions that had marred an earlier judicial response to such a legislative effort have long since been laid to rest.[229] Doctrinal simplification supports (30)

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224. Armstrong, "Prospective" Application of Changes in Community Property Control — Rule of Property or Constitutional Necessity?, 33 Calif. L. Rev. 476, 505 (1945).

225. Schreter (now Kay), "Quasi-Community Property" in the Conflict of Laws, 50 Calif. L. Rev. 206, 244-46 (1962).

226. Bodenheimer, Justice Peters' Contribution to Family and Community Property Law, 57 Calif. L. Rev. 577, 587 (1969).

227. Accord, Gardner, supra note 223, at 269-80; Lay, Marital Property Rights of the Non-Native in a Community Property State, 18 Hastings L.J. 295, 307-17 (1967); Note, Retroactive Application of California's Community Property Statutes, 18 Stan. L. Rev. 514 (1966). See also Knutson, supra note 52, at 266; Leflar, supra note 222, at 237 & n.67, 238.

228. See Addison v. Addison, 62 Cal. 2d 558, 339 P.2d 897, 43 Cal. Rptr. 97 (1965).

229. In 1964, the court questioned but did not overrule Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934). Addison v. Addison, 62 Cal. 2d at 565-66, 339 P.2d at 901-02, 43 Cal. Rptr. at 101-02. Thornton had held invalid an amendment to former Civil Code § 164 that recharacterized a couple's marital acquisitions as community property once they became California domiciliaries. 1 Cal. 2d 1, 33 P.2d 1 (1934) (reversing on rehearing In re Thornton's Estate, 19 P.2d 778 (1933)). Thornton reasoned that because California could not alter the rights of Californians in their already acquired marital property, it could not impose such changes on those arriving from other states. 1 Cal. 2d at 5, 33 P.2d at 3. California's power to make such changes as to its own citizens has since been affirmed by In re Marriage of Bouquet, 16 Cal. 3d 583, 592, 546

the complete absorption of quasi-community property principles into community property law.

G. The Implications of Title

1. Property Purchased During Marriage

Central to the simplification of community property law is the need for more satisfactory title rules. For at least twenty-five years, articles have advocated fundamental changes in the treatment of joint tenancy,[230] and efforts to resolve related problems with tenancy in common title date back an additional twenty years.[231]

P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976), where the court quoted Professor Armstrong:

> Vested rights, of course, may be impaired "with due process of law" under many circumstances. The state's inherent sovereign power includes the so-called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well-being of the people. . . . The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.

Armstrong, supra note 224, at 495-96 (citations omitted). The same test was cited with approval in Addison. 62 Cal. 2d at 566, 399 P.2d at 902, 43 Cal. Rptr. at 102. With this point firmly established, the legislature's right to enact appropriate provisions for the newly arrived is sustained. See Bodenheimer, supra note 226, at 584-87 (discussing the privileges and immunities question).

230. See, e.g., the articles by Griffith, Marshall, and Mills, cited at note 58 supra.

231. In 1931, the California Supreme Court held that a married couple's tenancy in common property presumptively belonged one half to the wife and one half to the community. Dunn v. Mullen, 211 Cal. 583, 296 P.604 (1931). This result followed from the rule that a husband's acquisitions were presumptively community property, but those of his wife, taken in writing, were presumptively her separate property. Dunn v. Mullen was legislatively overruled in 1935, when the Civil Code was amended to provide:

Current statutory and case law that deals with title focuses on Civil Code section 5110, which established the baseline presumption that property acquired during marriage is community property.[232] Unless one of the

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> [W]hen . . . property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife.

Stats. 1935, ch. 707, § 1, p. 1912, amending former Cal. Civ. Code § 164 (the language is now found in Civil Code § 5110, but restricted to pre-1975 acquisitions). See note 232 infra. Because the policies are the same, the presumption should apply equally to titles that do not reflect the marital relationship, whenever acquired. See note 235 and text accompanying note 250 infra.

232. Cal. Civ. Code § 5110 (West Supp. 1981) reads:

> Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by the husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.
>
> In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to

special rules that follows applies, this presumption may be rebutted quite readily. For example, tracing of the purchase price of untitled property or property held in the name of one spouse to one spouse's separate property will replace the community property presumption with a new presumption that the property is of the same character as its source.[233] This presumption, in turn, can be displaced (as can any rule of community property law) by showing that the property was transmuted by gift or agreement into property of another character.[234]

Joint tenancy title, in contrast, has been held to signify a married couple's intent to hold equal separate property interests.[235] Because

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show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

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

The section is incomplete, out-of-date, and unclear. It should be broadened to include all property, real or personal, wherever situated, and simplified to state clearly and conclusively the presumptions for all titled and untitled property and the burdens that must be met to rebut them. The references to separate property code sections should be revised, as is appropriate once revisions to these sections are complete. (Section 5109 is no longer in the Code; §§ 5118, 5119 and 5126(a),(c) also currently concern separate property.)

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233. This is California's "source" or "tracing" rule. See Freese v. Hibernia Savings and Loan Society, 139 Cal. 392, 73 P.172 (1903).

234. See Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956); Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1st Dist. 1964).

235. Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932). Siberell still controls despite important changes that have destroyed its logic. It can be understood in historical context as a reaction to Dunn v. Mullen, discussed in note 231 supra, which held that a married couple's tenancy in common property signified a one-half separate property interest of the wife and a one-half community property interest. To avoid similar inequity as to joint tenancy property, one year after Dunn the Siberell court seized upon the rule that joint tenancy requires equal ownership interests. Taking title as joint tenants, it held, is "tantamount to a binding agreement

most couples hold their realty and bank and brokerage accounts as joint tenants,[236] the treatment of this title form has major implications.

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between [the spouses] that the [property] shall not thereafter be held as community property, but instead as joint tenancy with all the characteristics of such an estate. . . .[I]n it the rights of the spouses are identical and coextensive." 214 Cal. at 773, 7 P.2d at 1005. The court concluded that joint tenancy property "must therefore be classed as [the spouses'] separate but joint estate in the property." Id.

Since the 1975 change to equal management and control, title taken by a married woman has the same import as title taken by a married man: it raises a community property, not a separate property, presumption. It would therefore be possible to reason that spouses who take joint title, whether tenancy in common or joint tenancy, presumptively hold equal community property interests. The legislature seems to have taken this view as to tenancy in common property -- the special statutory community property presumption that was needed to overrule Dunn's rule of unequal tenancy in common interests was not retained for acquisitions occurring after 1975, when the new general community presumption took effect. See notes 231 and 232 supra. As to joint tenancy title, however, the legislature appears to have reasoned differently. It did not assume the obsolescence of the statutory community property presumption at divorce or separation for a single-family home held in joint tenancy. Rather, by extending the presumption to post-1975 acquisitions as well, it signaled its understanding that Siberell's presumption of equal separate property interests remains. Griffith, supra note 58, at 95, 105, would presume community property interests instead. Accord, Mills, supra note 58, at 89; text accompanying note 247 infra.

236. Three widely held but largely inaccurate beliefs explain this practice. (1) There are tax advantages. (2) This is the way married people do it; therefore this is the way it should be done. (3) The survivorship feature is needed to avoid the expense and delay of probate when one spouse dies. See Marshall, supra note 58, at 501 & n.2, 505; Mills, Joint Ownership: A Review of Joint Tenancy and Community Property, in California Continuing Education of the Bar, Joint Ownership: Marital and Nonmarital Property 1, 27-28 (Program Materials Sept.-Oct. 1978). These beliefs are perpetuated by warnings such as the following, taken from the top of a community property joint account agreement:

> NOTICE: Use of this form by a husband and wife who are subject to the community property laws may result in certain adverse tax consequences, and they should consult their own attorney or tax advisor prior to signing this form.

Merrill Lynch, Pierce, Fenner & Smith Inc., Community Property Joint Account Agreement, Code 1016 (May 1976). No similar warning is contained on the company's forms for other joint accounts. See also

In order to preserve the automatic survivorship feature yet permit a divorce court to dispose of a home held in joint tenancy, section 5110 was amended to provide a rebuttable presumption that the home is community property.[237] The presumption applies only in actions for divorce or legal

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Mills, supra note 58, at 40 n.4 (quoting cautionary statement on standard form of deposit). In fact, community property ownership of such an account, if it is funded with community assets, is probably the more advantageous title form from a tax perspective. A death-related transfer to the surviving spouse (by virtue of title for joint tenancy; by will or intestacy for community property) will result in no state inheritance tax. Cal. Rev. & Tax. Code § 13805 (West Supp. 1981). The federal estate tax imposed on the two kinds of property will be identical. I.R.C. §§ 2040, 2056(c)(2)(C). For state income tax purposes, the two forms will again receive equal treatment: the death-related transfer will provide a new basis for the decedent's one-half interest, but no new basis for the surviving spouse's original one-half interest. Cal. Rev. & Tax. Code § 18045 (a),(h) (West Supp. 1981). For federal income tax purposes, however, the treatment differs. As to joint tenancy property, only the decedent's one-half interest will acquire a new basis, although the basis of both spouses' interests in the community property will be adjusted. I.R.C. § 1014(a),(b)(6),(b)(9). Whether this is advantageous will depend on whether the assets in the account are worth more than their original basis at the time of death (and therefore receive an advantageous stepped-up basis) or have declined in value (thereby receiving a disadvantageous stepped-down basis). Although a blanket statement as to the relative advantages of the two title forms is therefore impossible, the general trend of the market suggests that community property step-ups will occur with greater frequency than step-downs; if so, community property accounts, on the average, will be more beneficial.

If separate funds, in contrast, are placed in a community property account, a present transfer potentially subject to federal gift tax has occurred. C. Lowndes, R. Kramer & J. McCord, Federal Estate and Gift Taxes § 30.13 at p. 766 (3d ed. 1974). The same rule applies to some joint tenancies, but not to joint tenancy brokerage and savings accounts, which receive more advantageous treatment. Deposits into these favored forms are ignored for gift tax purposes until the party receiving the gift in fact exercises dominion over the assets, or the donor elects to treat the gift as occurring at the time of deposit. See id. § 30.11; I.R.C. § 2515. Under state law, neither gift is taxable. Cal. Rev. & Tax. Code § 15310 (West Supp. 1981). See generally Uniform Probate Code § 6-103.

237. 1965 Cal. Stats. ch. 1710, § 1, p. 3843.

separation; in other contexts the presumption of joint tenancy controls.[238] Nevertheless, because the tax treatment of community property is often more advantageous than that of joint tenacy property, at the death of one spouse assertions are common that the property was indeed community property held in joint tenancy form for convenience alone.[239] And, special problems arise when separate property is held in this form, whether in

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238. Both the community property presumption and the joint tenancy presumption are rebuttable. Cal. Civ. Code § 5110 (West Supp. 1981); Estate of Watkins, 16 Cal. 2d 793, 796, 108 P.2d 417, 418-19 (1940); Mills, supra note 58, at 43. The section's restrictions have been questioned:

> It would seem there is even more need for statutory assistance in the death case where only one of the parties remains to testify. And why should it be limited to one type of property?

H. Verrall & A. Sammis, supra note 44, at 122.

239. [I]t is a very common practice in California for spouses to hold their community property as joint tenants. It is so common that the Inheritance Tax Department of the State of California has a printed form of affidavit for the surviving spouse to sign, wherein the survivor may claim the property as community property, notwithstanding the legal title may be in the parties' names as joint tenants.

Griffith, supra note 58, at 90 n.9 (quoting Pierotti v. United States, 33 Am. Fed. Tax. Rep. 1662, 1662 (S.D. Cal. 1944), aff'd, 154 F.2d 758 (9th Cir. 1946)). The ease with which joint tenancy title may be taken and the contrasting hurdles that are placed in the way of couples who seek community property title forms promote the excessive use of joint tenancy title. Transfer agents, for example, sometimes have strange notions about the impact of title, and discourage the taking of title in a joint form that will raise a presumption of community property.

> [S]pouses who intend to buy stocks or bonds with community funds . . . will find that transfer agents will not necessarily issue the security in the manner requested. . . . [T]here will be a reluctance to register the security "John Doe and Mary Doe, husband and wife" (which would raise the presumption of community property).

Bateman Eichler, Hill Richards, Inc., Your Securities and the Community Property Law: Factors Married People in California Should Consider in Deciding the Form of Ownership of Securities 8 (June

realty or in a savings, checking or brokerage account.[240] In fact, true joint tenancy title often disserves parties' needs.[241] It is the survivorship feature alone that most married couples seek, and it is this feature

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1980). To obtain ownership in community property form, the pamphlet advises taking title in one spouse's name alone, or in both spouses' names,

> followed by the words "as community property." The transfer agent, however, may require a copy of a community property agreement executed by both spouses and also require that the signatures be guaranteed by a bank or broker. . . . When either spouse dies, however, some transfer agents may question whether probate is required where a security is issued in the name of either spouse alone, or in the names of the husband and wife, as community property, although the California law provides that the security need not be probated if a spouse dies without a will or dies with a will leaving the security outright to the surviving spouse.

Id. at 8-9. In contrast, "it is a simple matter to create true joint tenancy," for example, by jointly signing a letter to the broker requesting that title be held in that form and not as community property. Id. at 22. See note 236 supra for another stockbroker's misleading caution against community property accounts.

240. A mutual agreement or understanding of the parties may be required to rebut the presumption of equal ownership raised by the joint title. In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); In re Marriage of Cademartori, ___ Cal. App. 3d ___, 174 Cal. Rptr. 292 (1st Dist. 1981); Cal. Fin. Code § 852 (West 1968). Sims, supra note 58, questions whether the joint tenancy realty cases that require a mutual agreement or understanding should control savings and checking accounts, and notes that a line of cases permits the tracing of separate property through commingled accounts without mentioning the joint tenancy presumption. See, e.g., Beckman v. Mayhew, 49 Cal. App. 3d 529, 534, 122 Cal. Rptr. 604, 607 (3d Dist. 1975).

241. True joint tenancy property may not be divided by a divorce court. See Cal. Civ. Code § 4800 (West Supp. 1981). Instead, if division is not accomplished by agreement, an independent partition action will be required. But see Porter v. Superior Court, 73 Cal. App. 3d 793, 803-04, 141 Cal. Rptr. 59,66 (1st Dist. 1977) (court also has jurisdiction if parties "invite" it to hear issue). Further, joint tenancy property is not subject to the community property management protections of Civil Code §§ 5125 and 5127. Indeed, unilateral severance is possible; the co-tenant need not be notified. Burke v. Stevens,

feature that in fact sometimes serves their purposes.[242] In other respects,

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264 Cal. App. 2d 30, 34, 70 Cal. Rptr. 87, 91 (5th Dist. 1968):

> While the [secret] actions of the wife [to destroy the joint tenancy by use of a strawman], from the standpoint of a theoretically perfect marriage, are subject to ethical criticism . . . the question before this court is not what should have been done . . . but whether the decedent and her attorneys acted in a legally permissible manner.

Cf. Mademann v. Sexauer, 117 Cal. App. 2d 400, 256 P.2d 34 (2d Dist. 1953) (refusing to recognize attempted severance and holding that husband inherited property as community property). Once a divorce action has been filed, one spouse sometimes uses a grants to herself or himself to terminate the joint tenancy in the couple's home, then uses the tenancy in common interest as collateral for a loan. Conversation with Joan Poulos, Esq., in Davis, California (July 6, 1981). Whether this is permissible, given the Civil Code § 5110 community property presumption and the § 5127 joinder requirements for hypothecation of community realty, is open to serious question. Cf. Mademann v. Sexauer, supra this note. Further, the tax treatment of joint tenancy property at the death of one party may be less advantageous than that of community property. See note 236 supra. Finally, if one secretely deeds to himself or herself, then outlives the cotenant, it would be a simple matter to destroy the unrecorded deed and fraudulently take the property as surviving joint tenant. See Burke v. Stevens, 264 Cal. App. 2d at 35-36, 70 Cal. Rptr. at 91. Joint tenancy property will, however, be unavailable to the decedent's creditors, an advantage over community property. Marshall, supra note 58, at 525.

242. Griffith, supra note 58, at 90, 94 n.31. Contra, Mills, supra note 236, at 28 ("The principal advantage of joint tenancy . . . i.e., the right of the survivor to take the decedent's interest without estate administration, has been eliminated by the 1975 amendments to the Probate Code [citing §§ 202-205 on exempting community property passing to a surviving spouse from administration]."). The new probate provisions, unlike the rules for joint tenancy, however, do not cut off access by the decedent's creditors. Compare Cal. Prob. Code § 205 (West Supp. 1981) with Marshall, supra note 58, at 525. Further, there may be unfavorable ultimate tax consequences if assets pass outright (whether by operation of title, intestacy law, or bequest) to a surviving spouse and are later included in the surviving spouse's estate. For families with moderate to large estates, probate planners often use trusts as tax-avoidance devices. Halstead, The Marital Deduction §§ 9.1-9.71, in California Continuing Education of the Bar, California Will Drafting (D. Briggs ed. Supp. 1981); Kalik and Kartiganer, Planning for Minimization of the Impact of the Generation-Skipping Tax §§ 3.1-3.9, in University of California at Los Angeles &

if the purchase funds are community property their interests would be as well or better served with community property title.[243]

For decades, suggestions have been made that would assure both the advantages of community property and the survivorship feature to married couples without the strained yet workable current doctrines and practices that have sought this result.[244] First, true joint tenancy title should be restored and preserved as a common law ownership form.[245] It should (32)

California Continuing Education of the Bar, Estate Planning 1980; Sacks, Inter Vivos and Testamentary Trusts § 4.17, in California Continuing Education of the Bar, Estate Planning for the General Practitioner (C. Archer ed. 1979). As to small estates, however, Yale Griffith's remarks made twenty years ago remain valid:

> [I]n spite of all the arguments against joint tenancy, the people want it. They want it because in most instances they want the survivor to get all the property in the event of death. It is the poor man's will; it is faster and, in "no-tax" cases, it is cheaper. It works well in practice for people of modest means.

Griffith, supra note 58, at 108 (footnote omitted).

243. See note 236 supra.

244. See sources cited at note 58 supra. The 1975 amendments to Probate Code §§ 202-205, which now permit community property to pass without administration, were prompted by these concerns. See Mills, supra note 236, at 28; California Continuing Education of the Bar, The New Probate Legislation 114 (Program Materials 1975).

245. This recommendation is made with some hesitation. Marshall, supra note 58, at 501 n.7 reports:

> It is to be noted that despite its popularity, joint tenancy has been modified and restricted in many jurisdictions. 48 C.J.S. 912 (1947); 33 C.J. 901 (1924); 14 Am. Jur. 84 (1938). Washington (Rev. Stat. § 1344, 1951) has abolished the right of survivorship[;] Louisiana (Rev. Stat. 1950) does not recognize joint tenancy.

See also W. de Funiak & M. Vaughn, supra note 50, at § 134 (describing the laws of all the community property states except Louisiana, and reporting the newer Washington rule abolishing most

signify equal undivided separate property interests subject to a right of survivorship unless one party converts the property into tenancy in common property, thereby destroying the survivorship feature. To insure that separate property interests are in fact intended by the parties and to clarify the consequences of this ownership form, a signed confirmation of title should be required to establish such true joint tenancy property: the instrument would be required to state that the parties hold their interests as separate property, to expressly negate other forms of title (particularly community property), and to describe how survivorship interests may be altered.[246] Absent such express language, the property (33)

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joint tenancies). The uneven ability of parties to alter the survivorship feature sometimes creates inequities. Compare Socol v. King, 36 Cal. 2d 342, 223 P.2d 627 (1950) (attempted devise of one half interest by woman who had purchased property in her and her husband's names as joint tenants, with intent to leave her one half to her children from prior marriage, held ineffective absent agreement of spouses; husband was not present in California at time of purchase and no discussion concerning form of title had occurred) with Estate of Aiello, 106 Cal. App. 3d 669, 165 Cal. Rptr. 207 (2d Dist. 1980) (constructive trust in favor of beneficiaries under deceased's will imposed on funds in surviving joint tenant's possession because court concluded decedent believed that joint tenancy was appropriate way to assure distribution to them), and First Nat'l Bank of Denver v. Groussman, 29 Colo. App. 215, 483 P.2d 398 (1971) (octogenarian mother bought home with daughter in joint tenancy; mother provided down payment and daughter assumed mortgage payments, but mother secretly conveyed her interest to grandchildren seven years later, reserving life estate to herself). To prevent cases like Groussman, Professor Edward Rabin recommends that joint action be required to terminate the survivorship feature. Because parties' needs and intentions may fairly change over time, however, the recommendation of this study would instead permit unilateral action with notice, relying on estoppel and damage doctrines to protect one who would thereby be unfairly prejudiced.

246. See Collier v. Collier, 73 Ariz. 405, 242 P.2d 537 (1952) (signed acceptance of deed expressly negated community property or tenancy in common ownership); In re Trimble's Estate, 57 N.M. 51, ___, 253 P.2d 805, 819 (1953) (Sadler, C.J., dissenting from decision permitting rebuttal of joint tenancy title and suggesting that express language detailing intent to hold in joint tenancy may be required to forestall such challenges); Griffith, supra note 58, at 107-08. See

should be presumptively community property.[247]

True joint tenancy property would carry all the incidents of such property for creditor access purposes, would be subject to the tax liabilities and treatment appropriate to true joint tenancy, and would be subject to conversion to tenancy in common property by the unilateral act of one joint tenant. A co-tenant who wishes to retain ownership but not as a joint tenant need no longer employ a strawman under California law, but may grant the joint tenancy interest directly to himself or herself as tenant in common.[248] No notice of the transfer presently need be given the other joint tenant, who may therefore be misled into believing that a mutual estate plan remains in effect.[249] To prevent fraud, notice to the other joint tenant should be required. Indeed, registration and service (34)

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generally W. Reppy & W. de Funiak, supra note 52, at 120-22. The termination of mutual survivorship explanation would help to prevent ineffective efforts to alter survivorship by will and inappropriate reliance by one party on the provision's unalterability. See the cases described in note 245 supra.

247. This presumption could be rebutted by tracing or by proof of an agreement to hold in some other fashion. See notes 259 and 261 infra and accompanying text. If information on termination of the survivorship provision had not been set forth, survivorship could be challenged by showing a party's good faith effort to designate another beneficiary or to terminate the joint tenancy. See note 245 supra.

248. Riddle v. Harmon, 102 Cal. App. 3d 524, 530-31, 162 Cal. Rptr. 530, 534 (1st Dist. 1980). The opinion reasons that a co-tenant should be able to do directly (by grant to oneself) that which can be accomplished indirectly (by use of a strawman). This logic suggests that a cotenant's attempted devise of his or her interest to a third party should be similarly effective: what one can accomplish by the formality of conveyance to oneself and a subsequent devise should be possible by direct testamentary statement. Cf. Socol v. King, 36 Cal. 2d 342, 223 P.2d 627 (1950), discussed in note 245 supra (pre-Riddle case holding attempted testamentary disposition inoperative to terminate joint tenancy).

249. Burke v. Stevens, 264 Cal. App. 2d 30, 34, 70 Cal. Rptr. 87, 91 (5th Dist. 1968), discussed in note 241 supra.

of notice alone should replace the formality of a conveyance to oneself or another as the operative legal act.

A married couple's other tenancy in common property should be presumptively community property.[250] Here, too, if separate property interests are desired, a statement of that intent and formal disclaimer of intent to hold as community property should be required. Only if tenancy in common results from the severance of a joint tenancy should equal separate property interests be presumed.[251] (32)

Finally, a new form of title is needed that preserves the ownership characteristics of the purchasing funds and permits but does not require mutual survivorship rights. So, for example, if title were to read "John and Sue" or "John and Sue, as mixed property" (and the couple were married at the time), community property would be presumed, but tracing would be permitted to establish other ownership interests in the asset (just as currently occurs when title is taken in one spouse's name or there is no title at all). Inclusion of the words "with right of survivorship" would provide automatic transfer of title upon the death of one of the spouses.[252] To the extent that the underlying property is community (35)

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250. See notes 231 and 235 supra.

251. Conversions to tenancy in common by operation of law upon destruction of a joint tenancy survivorship provision would not alter the parties' equal separate property interests that were established by the joint tenancy title. Transmutation by gift or agreement would be required.

252. Because the survivorship feature would be terminable at will with proper notice, and creditor access would be maintained as for other community property, this new form of property would not take on the disfavored characteristics of tenancy by the entireties, in which a co-tenant is precluded from unilaterally alienating his or her share either during marriage or upon death. See Swan v. Walden, 156 Cal. 195, 103 P. 931 (1909); R. Powell & P. Rohan, 4A The Law of Real Property (Powell on Real Property) ¶¶ 621, 623 (1979).

property, this new title form would accomplish what case and statutory law has sought for joint tenancy property purchased with community funds: community property law would control creditor access,[253] taxation,[254] management, alienation,[255] and property division at divorce, but an analogy to joint tenancy doctrine would provide automatic transfer of ownership at death.[256]

As to mixed property, the same analytical steps would be taken: the true nature of the property would be ascertained and the legal consequences then determined accordingly.[257] Relative ownership interests, for example, would be established according to the source of acquiring funds, subject

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253. See, e.g., In re McNair & Ryan, 95 F. Supp. 434 (S.D. Cal. 1951); Hulse v. Lawson, 212 Cal. 614, 299 P. 525 (1931).

254. Uniform community property treatment for state tax purposes should be guaranteed by statute. There is reason to believe that this affirmation of the property's community character would be recognized by federal taxing authorities. See United States v. Pierotti, 154 F.2d 758, 762 (9th Cir. 1946) ("state law governs in . . . determining the nature of the tenancy by which property is held by married persons in California"). Although the federal cases are not entirely consistent, some display a willingness to accord favorable community property treatment even where state law might not so provide. Pierotti, for example, found property to be community property even though it had been held in joint tenancy title and proceedings had been undertaken in state court to clear title accordingly. See Mills, supra note 58, at 86 ("If, as Emerson said, foolish consistency is the hobgoblin of little minds, then this area of the law is one where lawyers and judges think big.").

255. Partition, available upon demand to a joint tenant, would be possible only to the extent that new provisions for community property would so authorize. See Bruch, supra note 11, at Recommendation 42.

256. The same mode of terminating survivorship rights should be provided as to this new form of property. The analogy would not control creditor access at death, however, which would be according to community property, not joint tenancy, rules. As to procedures, see note 263 infra.

257. Any new title forms should be added to the lists in Cal. Civ. Code §§ 682, 5104 (West 1954 & 1970), which should be conformed to one another in any event.

to general rules controlling the allocation of fruits and profits. The consequences of survivorship rights in mixed property would also reflect the character of the underlying ownership interests: community property treatment would be accorded the transferred community interests, and the law of revocable trusts would control tranfers of separate property interests.[258]

Finally, should a transmutation of past and future contributions be desired, the form of title could expressly so indicate, for example, by stating that ownership is to be held by "John and Sue as community property, and not as mixed property, with right of survivorship." Here, tracing alone would not rebut community ownership; proof of transmutation would be required.[259] In other words, title should be available in a form that accurately expresses the parties' true desires as to ownership if they have given the matter thought.[260] Where they have not done so, community property ownership should be presumed, with tracing to separate or mixed funds producing ownership that reflects those sources.[261] Where survivorship rights are desired, they should be permitted, quite independently of the ownership of the underlying property. Either spouse alone should be permitted to destroy the survivorship feature by recording and giving notice to the other spouse, precisely as is recommended for true joint

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258. Revocable trust doctrine applies because the spouse who has contributed separate funds retains both sole ownership rights to the separate property interest during his or her lifetime, and the power to unilaterally cancel the survivorship feature.

259. A transmutation agreement would be required to rebut forms of title that both affirmatively state the form in which title is to be held and expressly negate other ownership interests. (37)

260. See note 259 supra.

261. This mixed property presumption would be rebuttable upon showing of a contrary agreement or understanding.

tenancy property.[262] And, the current procedures for clearing title expeditiously following the death of one of the co-owners of joint tenancy property or community property should be extended to all survivorship forms.[263] With or without survivorship provisions, taxation and creditor (38)

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262. See text accompanying notes 248-249 supra.

263. The quickest and cheapest title procedures are those available for joint tenancy property. Ordinarily no court proceeding is held; instead the surviving spouse completes an affadavit and it, together with a copy of the death certificate and a certificate releasing the inheritance tax lien, is filed with the Recorder. Although a proceeding to establish the fact of death is available under Cal. Prob. Code §§ 1170-1174 (West Supp. 1981), it is generally bypassed as unnecessary. Griffith, supra note 58, at 96 & n.31; Conversation with Roger Gambatese, Esq., in Davis, California (July 13, 1981). Release of joint bank, credit union, and savings accounts is even easier; the savings institution will honor the withdrawal previleges of the survivor according to the account's terms. Cal. Fin. Code §§ 852, 7603, 11204, 14854 (West 1968 & 1981). Any account providing for survivorship is deemed a joint tenancy account under the provision governing banks and savings and loan associations. Id. §§ 852, 7602, 11204. Cf. Uniform Probate Code §§ 6-103 to 6-105 & Comments ("joint accounts").

As to community property that passes to the surviving spouse, streamlined set-aside procedures are available that do not require administration. Cal. Prob. Code §§ 650-657 (West Supp. 1981); Lindgren, Senate Bill 341: The Community Property Set Aside Law, in California Continuing Education of the Bar, The New Probate Legislation (Program Material Sept.-Oct. 1975). These procedures, however, entail a filing fee if probate has not been commenced, notice to heirs and beneficiaries, inheritance tax clearance, and a hearing that leads to an order transferring the deceased spouse's interest and confirming the surviving spouse's interest. The order is thereafter recorded as appropriate. Because of the additional steps, attorneys' fees may be somewhat higher than in joint tenancy cases. Conversation, supra this note. If the spouse who takes community property wishes to avoid personal liability for the decedent's debts, administration is required. Cal. Prob. Code § 205 (West Supp. 1981). In contrast, joint tenancy passes on no responsibility for debts of the decedent that are not reflected in the title. Creditors, however, are free to challenge the property's joint tenancy character. Estate of Watkins, 16 Cal. 2d 793, 796, 108 P.2d 417, 418-19 (1940). Marshall, supra note 58, at 521 (bank accounts); Mills, supra note 58, at 44.

Because title will express the survivor's right to take under the proposed new property form, the current joint tenancy model seems

access should be dictated by the actual character of the underlying property, be it community property, separate property, or some combination of separate and community interests. Management powers and duties should also be determined by the property's character, except that community property standards should control mixed assets.

2. Property Purchased Before Marriage

Title that was acquired before marriage is often not reformed after marriage, even though community property assets are used to make payments on the property.[264] As discussed above, California has adopted a pro rata ownership rationale as to purchases of real property, life insurance, and pensions under these circumstances.[265] The same ability to rebut presumptive community property ownership during marriage by tracing to separate property sources should permit a rebuttal of the separate property ownership presumption that applies to prenuptial purchases by tracing to community property sources. As has been historically recognized, any other rule would permit the holder of separate property title to disadvantage the community by unilateral action.[266] Whatever rules are adopted for the allocation of separate and community interests in mixed assets should be applied to these cases as well.

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best suited to the transfer of this property at death. There would be no need to adjudicate the separate or community character of the underlying property in order to determine to whom it passes. Creditor access, however, should not be cut off by the transfer absent probate. Indeed, a conforming rule for joint tenancy law might be appropriate, at least where the probate estate is insufficient to satisfy the decedent's creditors.

264. Griffith, supra note 58, at 88 & n.5 reports that 83% of all titles in escrow are encumbered and notes that current earnings are the usual payment source for these loans.

265. See notes 88-90 supra and accompanying text.

266. See note 86 supra and accompanying text.

H. Debts

Since the introduction of no-fault divorce, California treatment of debts incurred by spouses has become increasingly confused. Although most of the rules on creditor access during marriage have been clarified by statute,[267] treatment of debts as between the spouses and as to creditors at divorce or death has been inconsistent.

The Governor's Commission on the Family, whose report led to the adoption of the Family Law Act and no-fault divorce in California, recommended that

> the law provide for division of the community and quasi-community property equally between the parties where possible, except that if the Court should find that the economic circumstances of the parties require it, an unequal division may be ordered. It is the sense of the Commission that the Court should have resort to conduct affecting the financial status and assets of the marriage, and should make inquiry into the prior economic dislocation of any community assets. However, we believe that conduct unrelated to the finances of the marriage should not properly influence the division of the marital property . . . .[268]

The Commission's report dealt only with assets; no express recommendation concerning the definition or division of debts was made. However, since equal division of assets would not have been mandated under their proposal,[269] it appears that the Commission was equally comfortable with unequal divisions of debt that would serve the parties' post-divorce financial needs.

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267. A notable exception is the liability of a community property business under the sole management of one spouse. Reppy, supra note 215, at nn.81-88.

268. Governor's Commission, supra note 39, at 46; see also id. at 111.

269. See note 268 supra and accompanying text.

Although the Commission's recommendation for the division of marital assets was rejected,[270] no prescription for the treatment of debts was made. Consistent with the long-standing theory that debts standing alone are not assets, some courts continued to allocate debts unequally even after the Family Law Act went into effect.[271] Through a change in the forms used for dissolution, however, practice gradually evolved into an equal division of overall net assets (i.e., all assets minus all liabilities),[272] and eventually the code section controlling the division of community property was amended to incorporate an ambiguous reference to liabilities.[273]

Never clarified were the questions of precisely what the rules for division should be or, indeed, which liabilities are subject to division. In some courts, antenuptial debts are treated as separate debts, but all debts incurred during marriage by either spouse are divided, even though the benefits accrue to one party's separate estate.[274] In others, debts

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270. See note 2 supra.

271. See, e.g., In re Marriage of Eastis, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (4th Dist. 1975).

272. See Cal. Rules of Ct., Rule 1285.55 (West 1981). But see In re Marriage of Eastis, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (4th Dist. 1975) (refusing to divide debts equally to the extent that they exceed the value of the couple's property).

273. 1976 Cal. Stats. ch. 762, § 1, p. 1801 (adding sentence directing the court "[f]or purposes of . . . division" to "value the assets and liabilities as near as practicable to the time of trial . . . ."). This is not inconsistent with measuring liabilities in relationship to assets. The statute still orders the equal division of property. Cal Civ. Code § 4800 (West Supp. 1981), set forth at note 2 supra.

274. See, e.g., Garfein v. Garfein, 16 Cal. App. 3d 155, 93 Cal. Rptr. 714, (2d Dist. 1971). The actress Carroll Baker brought suit during her marriage on a motion picture "play or pay" contract, incurring attorneys' fees and costs of more than $126,000. After her divorce, recovery was had on the contract for a period beginning during marriage and extending into the postmarital period. Her former husband requested that the attorneys' fees and costs be allocated

that are clearly for the benefit of one of the spouses alone, either directly or for the benefit of that spouse's separate property, are also treated as separate debts.[275] However, the only recent California Supreme Court case to give guidance states that all debts for which the community property is liable are subject to the equal division command.[276] This unlikely formula would subject even antenuptial debts to division, since community property may also be reached for the satisfaction of these obligations.[277]

The rule cannot, or at least should not, reach so broadly. Antenuptial debts should be solely the separate debt of the spouse who incurred them unless the community has been benefited.[278] Debts that have benefited the separate property of one spouse should be allocated accordingly.[279] Postseparation debts and debts for support should be allocated

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between the community property and separate property salary recoveries. The court denied the request, holding that a debt "is community or separate at the time it is incurred; it does not change its character merely because the beneficial effect of the consideration received may survive the marital cohabitation." Id. at 160, 93 Cal. Rptr. at 717.

275. See, e.g., In re Marriage of Hopkins, 74 Cal. App. 3d 591, 600, 141 Cal. Rptr. 597, 602 (2d Dist. 1977) (holding wife's postseparation department store charges her separate debts). Because some courts treated debts incurred for the education of one spouse as the student's separate debts and others did not, Civil Code § 4800(b)(4) was enacted, directing the court to assign such debts to the student. 1978 Cal. Stats. ch. 1323, § 2, p. 4324. See note 2 supra. Some courts resist even this modest step and persist in offsetting with other property or debts. Cf. Letter from Assemblywoman Waters (requesting information concerning such cases), 1979 C.F.L.R. 1213.

276. In re Marriage of Fonstein, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976).

277. See Cal. Civ. Code § 5120 (West Supp. 1981).

278. Support obligations to third parties that fell due during the marriage should receive community debt treatment. Any other rule would reward the other spouse for discouraging their payment.

279. The allocation should be in part or in full, as appropriate.

as is appropriate, given the nature of the expenditure and the receipt of any benefits, as well as the parties' relative abilities to pay.[280] Tort debts should be assigned according to the availability of assets to satisfy the appropriate order of satisfaction.[281]

Since the change in ownership of postseparation earnings,[282] the courts have become increasingly involved in assessing the propriety of debt payments out of separate and community funds.[283] Their ability to make such judgments will doubtless remain, regardless of the treatment given to such earnings. Greater consistency is needed in the standards for allocating some debts to the community and some to the separate property at divorce or death. A statute should be enacted that would permit the court to distinguish separate and community debts for dissolution purposes, including authorization to make partial allocations.[284]

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280. Some of these expenses are in the nature of support (e.g., bills for medical care, food, rent, and clothing). See In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979). Others, however, are in breach of the good faith management duty. See In re Marriage of Cohen, 105 Cal. App. 3d 836, 164 Cal. Rptr. 672 (2d Dist. 1980) (assume, however, that husband had incurred debts to support his lover instead of dissipating community assets).

281. See Cal. Civ. Code § 5122 (West Supp. 1981).

282. See text accompanying notes 197-200, supra.

283. See, e.g., In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979); In re Marriage of Hopkins, 74 Cal. App. 3d 591, 600, 141 Cal. Rptr. 597, 602 (2d Dist. 1977); In re Marriage of Smith, 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (4th Dist. 1978).

284. See generally N.M. Stat. Ann. § 40-3-9 (1978) (definition of separate debt for both creditor access and division purposes). Further, community debts should be expressly removed from the equal division requirement in frank recognition that the relative post-divorce wealth of the spouses may otherwise be inequitably distributed. Bruch, supra note 11, at n.78. See notes 351-353 infra and accompanying text.

II

DIVIDING THE COMMUNITY

A. At Divorce

1. Date of Valuation

Current law provides that the community property shall be valued as close to trial as practicable, but permits the setting of some other date upon a motion and showing of good cause.[285] Such a motion has been granted when, for example, one spouse frustrated discovery for several years and permitted community assets to deteriorate during the interim.[286] To prevent the spouse from benefiting by this behavior, valuation at an earlier date, for which information was available, was permitted.

In other contexts, the section takes into account an asset's value both at separation and at trial. This arises because separate and community property frequently become mixed during separations in which earnings are separate property. When they are, courts must determine the extent to which appreciation during separation was produced by the original community property capital base as opposed to the separate property component.[287] If Civil Code section 5118 is repealed, as is recommended,[288] this

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285. Cal. Civ. Code § 4800 (West Supp. 1981), set forth at note 2 supra.

286. In re Marriage of Stallcup, 97 Cal. App. 3d 294, 158 Cal. Rptr. 679 (3d Dist. 1979).

287. See, e.g., In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (2d Dist. 1975) (Pereira-Van Camp applied in reverse to apportion increasing community property business through postseparation separate property efforts). Similar concerns currently arise if separate property payments are made on a community property house. See In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979) (assuming reimbursement rather than ownership the correct remedy for payments in excess of rental value or support).

288. See text accompanying notes 197-208 supra.

difficulty will disappear.

In any case, the valuation provision works well in practice and should be retained in its current form.[289] (40)

2. Jurisdiction

Currently, the divorce court has jurisdiction over community property, but not over separate property except to the extent that support is at issue.[290] As outlined above, this has hampered the court's ability to do equity if a couple's wealth is exclusively or primarily separate in nature.[291] If the fruits of separate property are redefined as community property, the need for further recourse to separate property wealth will be infrequent. However, even under these conditions, it is possible that a home or business that most appropriately would be awarded to one spouse will contain some element of separate property that was contributed by the other spouse. To permit a forced sale of the separate property component, (41) the divorce court should be given jurisdiction to reach separate property in appropriate cases. If fruits of the separate property instead remain separate, a broader recourse to separate property at dissolution is in order.

In any event, all jointly held property of the spouses should be subject to the court's jurisdiction, without regard to its separate or (8)

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289. California Legislature, 1981-82 Regular Session, A.B. 1584 (Elder) would amend § 4800 to require valuation as near as practicable to the time of separation. The power of the court upon motion to permit valuation at another time would be removed. The proposal is unworkable, as it does not apparently account for appreciation or depreciation occurring between the dates of separation and trial. Fighting would be exacerbated if the party to be awarded an asset at trial would thereby be advantaged or disadvantaged by unmeasured but significant postseparation changes in value.

290. Cal. Civ. Code §§ 4800, 4801, 4805-4807 (West Supp. 1981).

291. See notes 75-82 supra and accompanying text.

community character.[292] This rule should control not only joint tenancy, tenancy in common, and mixed property held at the time of divorce, but also omitted property, including former community property that has become tenancy in common property by operation of law.[293] Recourse to the superior court for partition should not be required.[294]

Finally, the court should be given jurisdiction to hear claims based upon cohabitation, at least when such claims are related to marital property claims otherwise before the court. This may occur if spouses who cohabited prior to marriage later engage in litigation involving both their marital property and claims arising from the period of cohabitation. Or, it may occur if conflicting property claims are made by one spouse and a person who cohabited with the other spouse.[295] (42)

3. Division Techniques

California authorizes three types of financial orders at divorce: property division,[296] spousal support,[297] and child support.[298] Except in unusual circumstances, an immediate equal division of community property

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292. Compare the laws of Arizona and Nevada, described in note 41 supra.

293. Although courts do not discuss the point, a bifurcated divorce (i.e., a divorce in which the final judgment of dissolution is entered before the property trial is held) entails dividing tenancy in common, not community, property. See In re Marriage of Fink, 54 Cal. App. 3d 357, 126 Cal. Rptr. 626 (2d Dist. 1976).

294. Cf. Henn v. Henn, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980) (omitted pension must be divided in partition suit because divorce court without jurisdiction).

295. See note 221 supra and accompanying text.

296. Cal. Civ. Code § 4800 (West Supp. 1981).

297. Id. § 4801.

298. Id. § 4700.

is made.[299]

This rule has been especially troublesome when a current division must be made of an asset that will not be realized until some time in the future.[300] So, for example, cash flow problems may result when one spouse is awarded an entire pension or the interest in an ongoing business and the other spouse must be compensated with current property.[301] Should enhanced earning capacity be included in the list of community property assets that are to be divided at divorce, similar practical problems can be anticipated.[302]

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299. See In re Marriage of Connolly, 23 Cal. 3d 590, 596, 602-603, 591 P.2d 911, 913, 917-18, 153 Cal. Rptr. 423, 425, 429-30 (1979); In re Marriage of Fink, 54 Cal. App. 3d 357, 126 Cal. Rptr. 626 (2d Dist. 1976); In re Marriage of Boseman, 31 Cal. App. 3d 372, 107 Cal. Rptr. 232 (2d Dist. 1973); Cal. Civ. Code § 4800 (West Supp. 1981), set forth at note 2 supra.

300. See, e.g., In re Marriage of Slater, 100 Cal. App. 3d 241, 160 Cal. Rptr. 686 (1st Dist. 1979) (interest in ongoing medical partnership); In re Marriage of Judd, 68 Cal. App. 3d 515, 137 Cal. Rptr. 318 (1st Dist. 1977) (retirement and contingent stock plans).

301. See In re Marriage of Connolly, 23 Cal. 3d 590, 591 P.2d 911, 153 Cal. Rptr. 423 (1979) (corporate stock awarded to company director husband); In re Marriage of Stallcup, 97 Cal. App. 3d 294, 299, 158 Cal. Rptr. 679, 681 (3d Dist. 1979) (business interests).

302. See, e.g., Lynn v. Lynn, No. M-9842-77, Decision letter, at 4 (N.J. Super. Ct. Bergen County, Dec. 5, 1980) (wife's $61,377.20 interest (20%) in husband's enhanced earning capacity as surgeon to be purchased in graduated semi-annual installments, set in anticipation of husband's increasing earnings: payments of $3,000 and $5,000 in first year, $3,500 each in second year, $5,000 each in third year, $7,500 and $8,500 in fourth year, and $10,000 and $10,377.20 in final year; interest payable quarterly at 8% on the unpaid balance).

New York, in its recently enacted divorce reform, provides for a new property division form: a distributive award.[303] Although payable in installments, the award is not in the nature of spousal support. This technique is similar to that developed under California case law to permit the buy-out of a home or business over time when an immediate division is impossible and there are economic reasons justifying one party's retention of the asset.[304]

In addition, California courts sometimes retain jurisdiction for postponed divisions. This frequently occurs to avoid the dislocation of an immediate division -- for example, if there are insufficient assets to make an outright award of a community property home to the custodial parent, yet it is important to the couple's children that they remain in

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303. N.Y. Dom. Rel. Law § 236 (Part B)(5)(e) (McKinney Supp. 1981):

> In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to the law, the court, in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

Cf. Model Marital Property Act § 16(e) (Submission Draft 1981):

> Division of both marital and individual property into proportions for the spouses may be accomplished by a physical division of properties, a division of properties based upon their respective values, a judgment for present or future payments, a judgment for future property transfers, or by a combination of those methods.

304. See Cal. Civ. Code § 4800(b)(1) (West Supp. 1981), set forth at note 2 supra, and the cases cited in notes 300 and 301 supra. See also In re Marriage of Herrmann, 84 Cal. App. 3d 361, 148 Cal. Rptr. 550 (2d Dist. 1978); In re Marriage of Tammen, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1st Dist. 1976).

stable and relatively inexpensive housing.[305] In the case of pensions, the postponed division may result from either a difficulty in providing an immediate division due to insufficient assets or problems in establishing the asset's current value.[306] Related difficulties have occurred when courts have been asked to ascertain the costs of division, especially those that reflect tax liabilities.[307]

As the following discussion of division standards indicates, the courts need a variety of dispositional tools so that these problems and others can be resolved efficiently and fairly. (43)

4. Standards for Division

The baseline for division should continue to require that the couple's shared assets be divided immediately and equally and that separate property not be invaded.[308] (44) Several qualifications, however, are appropriate.

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305. E.g., In re Marriage of Duke, 101 Cal. App. 3d 152, 161 Cal. Rptr. 444 (4th Dist. 1980); In re Marriage of Boseman, 31 Cal. App. 3d 372, 107 Cal. Rptr. 232 (2d Dist. 1973).

306. See, e.g., In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978); In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970).

307. See, e.g., In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979) (court ordered jurisdiction reserved to assess possible capital gains taxes resulting from sale of home in event that new home was not purchased within 18 months of sale); In re Marriage of Clark, 80 Cal. App. 3d 417, 422-424, 145 Cal. Rptr. 602, 605-607 (2d Dist. 1978) (court ordered division of capital gains tax owed by wife on husband's installment purchase of her interest in stock; authorized retention of jurisdiction for yearly computations as payments were received and taxed, if necessary to accomplish equal division).

308. Separate property for this purpose excludes jointly held separate property interests. See notes 292-293 supra and accompanying text.

a. separate property marriages

Special problems may affect parties' separate property, no matter which community property definition is adopted. If the current law is maintained, a provision should be added permitting an unequal division of community assets or an award out of one party's separate assets when the presence of separate wealth by one spouse would render an equal division of community property fundamentally unfair. (45)

This standard could be phrased as suggested by certain features of Idaaho and Louisiana law. Idaho calls for an equal division of the community property "[u]nless there are compelling reasons otherwise" and lists factors to be considered in reaching that decision.[309] In a somewhat

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309. Although the Idaho statute's introductory language sounds like a directive for equitable distribution, it is so strongly qualified that it instead provides equal division with limited exceptions. Of special interest are its rules concerning separate property matrimonial homes and its reference to federal retirement and social security benefits:

> In case of divorce by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows:
> 1. The community property must be assigned by the court in such proportions as the court, from all the facts of the case and the condition of the parties, deems just, with due consideration of the following factors:
> (a) Unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses.
> (b) Factors which may bear upon whether a division shall be equal, or the manner of division, include, but are not limited to:
> (1) Duration of the marriage;
> (2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement;
> (3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;
> (4) The needs of each spouse;
> (5) Whether the apportionment is in lieu of or in addition to maintenance;
> (6) The present and potential earning capability of each party; and
> (7) Retirement benefits, including, but not limited to, social

different but relevant context, Louisiana awards the surviving spouse a

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security, civil service, military and railroad retirement benefits.

2. If a homestead has been selected from the community property, it may be assigned to either party, either absolutely, provided such assignment is considered in distribution of the community property, or for a limited period, subject in the latter case to the future disposition of the court; or it may be divided or be sold and the proceeds divided.

3. If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the other spouse.

Idaho Code § 32-712 (Supp. 1980). Cf. Model Marital Property Act § 16(c)(1)-(13) (Submission Draft 1981). The Model Act prescribes an equitable distribution of separate property and lists factors that the court must take into account in making its decision. This rule is provided because in common law property states all marital assets acquired before the Act's effective date would be treated as separate property. This problem, of course, does not exist in California. Although California's presumption should therefore be that retention by the original owner of separate property is proper in all but extreme cases, the Model Act's factors for consideration are of interest:

(1) duration of the marriage;
(2) any prior marriage of either spouse;
(3) any relevant agreement of the spouses;
(4) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the spouses;
(5) the contribution by one spouse to the education, training, or increased earning power of the other;
(6) custodial provisions;
(7) whether the apportionment is in lieu of or in addition to maintenance;
(8) the opportunity of each for future acquisition of capital assets and income;
(9) the contribution or dissipation of each spouse in the acquisition, preservation, depreciation, or appreciation in value of the respective estates;
(10) the contribution of a spouse as a homemaker or to the family unit;
(11) whether one of the spouses has substantial assets not subject to division by the court;
(12) whether any alteration in the division is required to adjust the interests of the spouses on account of a substantial expenditure of personal effort by one spouse on individual property of that spouse which resulted in a deprivation of the marital property of that personal effort.
(13) the desirability of awarding the marital home or the right

"marital portion"[310] if the decedent died "rich in comparison to the surviving spouse."[311]

If, however, all fruits of separate property are deemed community property, access to the separate property base would seem largely unnecessary. However, the equal division of separate property fruits should not be required if it would deprive a spouse of inherited property or (6)

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to live in it for a reasonable period to the spouse having custody of the children.

Id. Now that certain federal benefits have been held the employee's separate property, there will be a new kind of separate property marriage -- one in which the only important wealth will have been earned and of a much more modest scale than that of the historical separate property marriage. See McCarty v. McCarty, 49 U.S.L.W. 4850 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). Compare the family's assets in Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) with those in Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

The extent to which a property division may take into account one party's separate wealth when it was earned in a form that is preempted from inconsistent state treatment is unclear. See Hisquierdo v. Hisquierdo, 439 U.S. at 588-90. Although a dollar-for-dollar offset is clearly impermissible, it is unlikely that a provision speaking generally to relative wealth would be similarly flawed. See notes 310-311 infra.

310. La. Civ. Code art. 2434 (West Supp. 1981) defines the marital portion as an outright one-fourth interest in the decedent's estate if the decedent died without children, the same proportion as a life estate instead if the decedent is survived by three or fewer children, and a life estate in the same proportion as a child's share if there are more than three surviving children. A commentary is printed at 1979 La. Acts, Act No. 10, § 1, art. 2434, p. 1890.

311. La. Civ. Code art. 2432 (West Supp. 1981) ("When a spouse dies rich in comparison with a surviving spouse, the surviving spouse is entitled to claim the marital portion from the succession of the deceased spouse.") See Comments to Article 2432, 1979 La. Acts, Act. No. 10, § 1, art. 2432, p. 1887 at 1888 ("while no concrete test has ever been devised by the Louisiana courts, the survivor will ordinarily be awarded the marital portion when the comparison of patrimonial assets shows a ratio of five to one or more."). Only in cases of sharply disparate separate and community estates should unequal division be authorized.

gifts that are of important emotional or familial significance to that person.[312]

Finally, if rents and profits are deemed community property but natural appreciation is not, an equal division of appreciated value should be presumptively equitable, as provided by the Model Marital Property Act.[313] (46)

b. the family home

Greater flexibility concerning disposition of the family home is needed. The first step should be a codification and extension of the case law that has developed a method for preserving the home for one spouse's use during the children's minority.[314] (7) The provision should make clear that use can appropriately extend throughout the children's minority[315] and similar use awards should be available in appropriate cases without regard to the presence of minor children.[316] The statute should also

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312. Although other assets or distributive awards would permit buy-outs in many such cases, it is possible that inherited art, jewelry, antiques or a family home might appreciate sufficiently to place even a buy-out of one spouse's share in the community property appreciation beyond the means of the separate property owner. Rather than force a sale of such assets to permit equal divison in all cases, the court should be permitted to make an unequal division of community property appreciation where equity so requires.

313. See Model Marital Property Act §§ 3(c)(2)(v), (d)(1) (Submission Draft 1981). Note, however, that the Model Act's sharing provisions are not recommended for unappreciated separate property interests. See note 309 supra. Further, the same qualification protecting property of familial or personal significance would be required for this model as well. See note 312 supra and accompanying text.

314. In re Marriage of Duke, 101 Cal. App. 3d 152, 161 Cal. Rptr. 444 (4th Dist. 1980); In re Marriage of Herrmann, 84 Cal. App. 3d 361, 148 Cal. Rptr. 550 (2d Dist. 1978); In re Marriage of Boseman, 31 Cal. App. 3d 372, 107 Cal. Rptr. 232 (2d Dist. 1973).

315. See note 22 supra.

316. See note 21 supra. This provision would be especially important following lengthy marriages or when the home has been especially adapted for a handicapped spouse's special physical needs.

apply to family homes that are partially or totally separate property.[317] Finally, the section should permit the buy-out by one spouse of the other spouse's interest at less than commercial interest rates, recognizing that the use-of-capital concept applies in this context as well.[318] Theoretically, each of these techniques is but an application of support concepts.[319] Howewver, given problematical California case law, legislative clarification is needed. The Model Act and provisions in force in several sister

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317. See note 21 supra.

318. See In re Marriage of Herrmann, 84 Cal. App. 3d 361, 148 Cal. Rptr. 550 (2d Dist. 1978) (applying Boseman delayed division rather than Tammen buy-out because wife could not afford to remain in home with child at commercial rates if note were subject to 40-50% discount); In re Marriage of Tammen, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1st Dist. 1976), hearing denied (note given to husband to compensate for award of house to wife must have face value sufficiently high so that it could be sold in market at time of divorce for value of transferred community property interest: [I]ts face value would most certainly be discounted by the inferiority of its security, the long and uncertain deferment of its enjoyment, the probable effect of inflation upon it, and the concerns of its ownership. We . . . take judicial notice . . . that it would at least be substantially less than its face value."); In re Marriage of Boseman, 31 Cal. App. 3d 372, 107 Cal. Rptr. 232 (2d Dist. 1973) (use of house pending delayed property division awarded as child support).

319. Boseman quotes the Journal of the Assembly at length to demonstrate that the legislature contemplated conditional awards of property as exceptions to equal division when it adopted Civil Code § 4800. 31 Cal. App. 3d at 375-76, 107 Cal. Rptr. at 234-35. See also id. at 375 n.1, 107 Cal. Rptr. at 234 n.1, quoting the Report of the Assembly Committee of Judiciary:

> 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 . . . would, certainly, be unnecessarily destructive of the economic and social circumstances of the parties and their children.

Unless sale of the home would free sufficient after-tax capital to provide large enough after-tax support payments to secure comparable housing (while permitting the capital to appreciate at the same rate that it would in the home), using the capital to provide housing is economically more sound. Beyond economics are important issues of

states suggest possible approaches.[320]

The Governor's Commission on the Family recommended that an unequal division of community be permitted where the couple's assets are nominal, in order to preserve economical housing for at least one of the

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familial well-being. See J. Wallerstein & J. Kelly, supra note 22, at 182-83, 230-31.

> Overall, a relatively good standard of living and the positive effects of economic stability were very evident in the mother-child relationship, and reflected in the child's good adjustment.
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> . . . .
>
> An important aspect of the ambiance of the divorced family is that the economic status of mother and children does not stand alone, but is . . . compared with the standard of living which the family had enjoyed earlier . . . . Where there was little change . . . the mother and children were able to deal with the situation. . . .
>
> When [a] downward change . . . followed the divorce and the discrepancy between the father's standard of living and that of the mother and children was striking, this discrepancy was often central to the life of the family and remained as a festering source of anger and bitter preoccupation [that] over the years generated continuing bitterness between the parents. Mother and children were likely to share in their anger at the father and to sense a pervasive sense of deprivation, sometimes depression, accompanied by a feeling that life was unrewarding and unjust.

Id. at 231. Wallerstein and Kelly report that "the women in our study were affected by severe economic changes more substantially and more permanently than were the men. This was especially true in the middle- and lower-class families where . . . there was little, if any, shared property to divide." Id. at 22-23. See note 191 supra.

320. See Model Marital Property Act § 16(b), (c)(13), (e) (Submission Draft 1981); Md. Cts. & Jud. Proc. §§ 3-6A-01(b),(c), 3-6A-06 (1980), N.Y. Dom. Rel. Law §§ 234, 236 (Part B)(5)(f); notes 41 (Nevada and Washington provisions quoted) and 309 (setting forth Idaho statute) supra. See also the laws of community property states cited at note 41 supra that permit an equitable distribution of property or an award from separate property.

spouses.[321] If no other provisions to assure a more equitable distribution of other family assets (such as enhanced earning capacity) are adopted, it would be sensible to provide more than a use rule for the family home. This option would candidly recognize that the outright award of family housing to one party would in some measure compensate for other financial disadvantages about to be incurred by that spouse in the postdivorce period.[322]

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c. the family business

As to businesses, too, there are sometimes problems in financing an immediate division. Where this is so, case law has permitted a buy-out over time of one spouse's interests.[323] Although immediate division should continue to be preferred in these cases, a distributive award with

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321. Governor's Commission, supra note 39. The Commission was also concerned that needs ordinarily met through support awards might in fact not be met in some cases unless a deviation from equal division were permitted. "The obligor may simply stop earning sufficient money, or more likely, may simply disappear, leaving the wife and children with no property." Id. at 45-46. These fears were based on facts that remain largely unchanged. See B. Bryant, supra note 181 (reporting data from 1975 survey: "44 percent of divorced mothers were awarded child support. . . . and only 47 percent [of those who received awards] were able to collect . . . regularly"); Weitzman and Dixon, supra note 14, at 494-99 (reporting 1968 and 1972 California awards to 80-85% of divorced mothers, slightly less than the percentage receiving custody, and the filing of contempt actions within one year of the order for nonpayment in 8-26% of the cases). Use or an outright award of a home would assure important continuing support in cases where abandonment is threatened or has occurred by the time of property division. Here the concepts of lump sum support (an almost forgotten but permissible support form in California) and property division approach one another. See 6 Witkin, Husband and Wife § 159; note 346 infra and accompanying text.

322. On relative post-divorce wealth, see Weitzman and Dixon, supra note 13, at 177-178; notes 191, 319 and 321 supra. See also note 343 infra.

323. See, e.g., cases cited in notes 300-301 supra.

appropriate interest will sometimes be in order.[324] Additionally, as has been recognized by case law, additional spousal support may be appropriate where the delayed access to capital produces economic hardship for the spouse whose interest is being purchased.[325] (43)

d. pensions

Increased sophistication about pension division has been slow in coming. Because of the pressure to amass assets at divorce in order to offset the inflated equity in the family home, many women have gladly traded important interests in their spouses' pensions for the ability to stay in the home.[326] The wisdom of robbing Peter to pay Paul in this context may be questioned. In many cases, no sufficient basis for making an accurate appraisal of the current value of a pension is available. Members of the bench and bar, who seek simplicity in most matters mathematical, have sometimes leapt at seriously incorrect division formulas.[327]

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324. In contrast to the house cases, there would ordinarily be no need to provide support for the party retaining the business by way of interest-free use of the other spouse's capital.

325. In re Marriage of Stallcup, 97 Cal. App. 3d 294, 158 Cal. Rptr. 679 (3d Dist. 1979).

326. See, e.g., In re Marriage of Marx, 97 Cal. App. 3d 552, 159 Cal. Rptr. 215 (2d Dist. 1979). Cf. Hisquierdo v. Hisquierdo, 439 U.S. 572, 588 (1979) (wife unsuccessfully asserted interest in husband's pension because "As [husband's] counsel bluntly put it, [wife] wants the house.").

327. See, e.g., In re Marriage of Poppe, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (4th Dist. 1979); In re Marriage of Adams, 64 Cal. App. 3d 26, 134 Cal. Rptr. 298 (2d Dist. 1976). Not surprisingly, there has been a tendency to apply, even inappropriately, a simple "time rule", which allocates ownership interests by comparing covered time during marital cohabitation (when earnings are community property) with covered separate property periods, rather than measuring the actual community and separate property monetary contributions. See In re Marriage of Poppe, supra this note; DiFranza and Parkyn, Dividing Pensions on Marital Dissolution, 55 Cal. St. B.J. 464, 466, 468 (1980) (failing to indicate that the rule developed in defined benefit cases and may be irrelevant to defined contribution plans); Hardie, Pay Now or Later:

And those who turn to actuaries for appraisals may not recognize questionable legal assumptions that may be incorporated into an actuary's analysis.[328]

The amounts involved, even in middle-class divorces, can be large. The margin for error, given assumptions about longevity, salaries and inflation, is great. Both spouses in most cases would be better served in the long run with an approach that preserves old-age security to each of them and separates this issue from a search for current liquidity. More than one avenue is available. First, retention of jurisdiction with (47)

Alternatives in the Disposition of Retirement Benefits on Divorce, 53 Cal. St. B.J. 106, 111 (1978) (pointing out that uncertainties affecting vesting or maturation do not exist in valuing a defined contribution plan, in contrast to a defined benefit plan); Hardie and Reisman, Employee Benefit Plans and Divorce: Type of Plan, Date of Retirement, and Income Tax Consequences as Factors in Dispositions, 5 Community Prop. J. 179, 180-81 (1978). The time rule is useful as to defined benefit plans, where benefits reflect some factor (such as final earnings) that does not correspond directly to cash contributions to the fund. Hardie, supra this note, at 107-08. It is, however, unnecessary and inappropriate where more precise valuation can easily be achieved, for example, as to defined contribution plans, where past and future growth is based on a specific dollar fund that may be traced directly to community and separate earnings. Id. at 107. For a discussion of the relevance of nonliquidity and tax benefits in determining present value, see Stanley, Financial Theory and the Valuation of Defined Contribution Retirement Accounts in a Community Property Divorce, 5 Community Prop. J. 57 (1978).

328. In one article, for example, a lawyer and an actuary, concerned that an employee may quit or be fired before retirement rights vest, suggest a formula to account for the danger of nonvesting that makes no reference to either job turnover statistics or the employee's possible guarantee of job security. DiFranza and Parkyn, supra note 327, at 466. They then extend their reasoning to the case of a person who has a vested right but may or may not choose to stay with the employer until the first available retirement date. Id. Cf. In re Marriage of Gillmore, 29 Cal. 3d 418, 423, ___ P.2d ___, ___, 174 Cal. Rptr. 493, 496 (1981) (spouse cannot, by invoking condition wholly within his control, defeat community interest of other spouse in pension); In re Marriage of Stenquist, 21 Cal. 3d 779, 786, 582 P.2d 96, 100, 148 Cal. Rptr. 9, 13 (1978); Waite v. Waite, 6 Cal. 3d 461, 472, 492 P.2d 13, 20, 99 Cal. Rptr. 325, 332 (1972).

division if and when payments are received or entitled to be received should become the norm.[329] If pension plans can be encouraged to permit an immediate splitting of pension interests, so that each spouse immediately becomes the owner of a smaller indiviual pension, the process will be simplified.[330] Efforts should be made to standardize valuations in any event.[331]

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329. In re Marriage of Skadden, 19 Cal. 3d 679, 139 Cal. Rptr. 615, 566 P.2d 249 (1977) holds that whether or not to retain jurisdiction lies within the trial court's discretion. Courts have often chosen to maintain jurisdiction. See, e.g., In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1878); In re Marriage of Wilson, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974); In re Marriage of Poppe, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (4th Dist. 1979); In re Marriage of Judd, 68 Cal. App. 3d 515, 137 Cal. Rptr. 318 (1st Dist. 1977); In re Marriage of Adams, 64 Cal. App. 3d 181, 134 Cal. Rptr. 298 (2d Dist. 1976); In re Marriage of Anderson, 64 Cal. App. 3d 36, 134 Cal. Rptr. 252 (2d Dist. 1976); In re Marriage of Freiberg, 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (4th Dist. 1976).

    The nonemployee spouse's right to elect payment when the retirement benefit matures has been recognized by case law. In re Marriage of Gillmore, 29 Cal. 3d 418, ___ P.2d ___, 174 Cal. Rptr. 493 (1981); In re Marriage of Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (5th Dist. 1980). The rule is sound and should be retained.

330. This comports with the recommendation of the President's Commission on Pension Policy. President's Commission on Pension Policy, Coming of Age: Toward a National Retirement Income Policy 2 (1981) ("In cases of separation or divorce, the pension entitlement earned during the marriage should be divisible."). This solution has been instituted as to all civil service pensions in Germany. § 1587bI,II BGB. See note 331 infra.

331. Splitting in kind would require decisions as to the guidelines that would govern each of the resulting individual pensions. In the case of defined benefit plans, the role of the employee spouse's subsequent work history in determining benefits to the nonemployee spouse's plan would have to be articulated. Should a negotiated buy-out occur, the present value of the purchased interest would have to be determined, as under current law. The amount would be best ascertained according to a formula developed for the particular pension scheme that accurately reflects the plan's insurance principles. As to large pension plans, the Commission should investigate the possibility of developing plan-specific computer programs to value the interests of employees at the time of divorce, the costs to be borne

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Ownership principles should control, and no forfeiture of interests as currently prescribed by the Benson[332] and Waite[333] cases should be permitted. The problems of the elderly poor will be exacerbated in the coming decades as the "baby boom" approaches old age and the Social Security System is under ever-increasing stress. Those who have taken unduly small returns on community property pension rights (the inevitable result of an inherently conservative valuation process) can be expected to rue the day as old age approaches.[334] And the public will share in the costs of their unfortunate choice.

e. life insurance

The current rules on life insurance are workable and should be retained.[335] A correction of a Judicial Council form, however, is in order. (50) Information on cash value is requested, implying that it is the appropriate measure for division (a rule that excludes term insurance from division

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by the plan or its divorcing members, as seems appropriate. It is possible that satisfactory valuation tools could be developed that would entail dramatically less total cost yet provide more sophisticated and consistent results than the individual, varying estimates currently provided by private experts.

332. See notes 134-137 supra and accompanying text.

333. See notes 138-143 supra and accompanying text.

334. See generally President's Commission on Pension Policy, supra note 333, at 21-38; Lapkoff, Working Women, Marriage, and Retirement ix (August 1980) (Working paper for the President's Commission on Pension Policy):

> [A]n alarmingly high proportion of elderly poor are women, either single, divorced, or widowed. Roughly three-fourths of aged units with incomes below the poverty line are unmarried women. These elderly poor represent over one-third of all aged widows and divorced women. As their age increases, even a higher proportion of women, 42 percent over age 72, live in poverty. (citations omitted)

335. See note 88 supra and accompanying text.

and may not accurately reflect the sensible disposition of whole life insurance).[336] The form should call instead for information as to face value and premium costs. Retention of ownership interests is the only reasonable disposition possible as to term insurance unless replacement coverage is purchased; a statute might appropriately indicate this fact. (51)

f. tort recoveries, disability pay, and worker's compensation

As suggested above, the basic rule of section 4800(c) should be retained,[337] but amended to remove forfeitures and to incorporate other forms of injury recompense. (18) (21) (22)

g. enhanced earning capacity

Several methods of division are possible once the value of enhanced earning capacity has been recognized. Although some California judges have indicated that they are prepared to hear testimony and divide this asset 50-50 (as any other element of community property), no court has yet taken this step.[338] Instead, progress has come in states that are free to award less than one half of the ascertained value or to base an award on some measure other than the increased capacity itself, such as restitution of costs incurred.[339]

In some equitable division states, for example, the contribution of a spouse to the career or career potential of the other spouse is by statute a factor to be considered in the division of marital

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336. See Cal. Rules of Court, Rule 1285.55 (West 1981).

337. See text following note 143 supra.

338. Conversations with judges, supra note 22; see notes 171-178 and 184 supra and accompanying text.

339. See note 173 supra and accompanying text.

assets.[340] Because the overall division must be equitable and not necessarily equal, this scheme permits great latitude in the impact of a decision to value the property interest.

It is difficult to gauge the depth of resistance to a property division of spouses' enhanced earning capacities. To the extent that it exists, a rule that would not require equal division seems more likely to gain legislative approval. (52)

How this valuation and division decision is struck will have major financial impacts, especially on women, who continue their traditional deference to their husbands' career needs.[341] Professor Krauskopf endorses unjust enrichment as a measurement tool, noting that this standard sometime reimburses costs incurred and sometimes compensates for the value of benefits conferred.[342] If an equal division is not to be mandated,

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340. E.g., N.Y. Dom. Rel. Law § 236 (Part B)(5)(d)(6).

> As of 1979, some 22 states have recognized the validity of [the] argument [in favor of valuing homemakers' services] and by statute or court decision anthorize the divorce court to consider contributions as a homemaker, or parent, to the career of the other party, and to the well-being of the family, in determining property distribution or setting the amount of alimony or maintenance. Those states are Colorado, Delaware, District of Columbia, Florida, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oregon, Rhode Island, Virginia and Wisconsin.
>
> Foster and Freed, Law and the Family, N.Y.L.J., October __, 1979, at 1, col. 1.

341. Professor Prager has pointed out that even in a world where men and women have equal career opportunities it will often be necessary for one spouse to make career sacrifices to promote the other's advancement, for example, when a promotion requires relocation. See generally Prager, supra note 67, at 7-11.

342. Krauskopf, supra note 171, at 391-92.

unjust enrichment principles should be articulated and codified.[343] In either case distributive awards should become the normal form of recovery for this interest if divorce occurs before substantial assets have been acquired.

h. abandonment

Civil Code section 4800(b)(3) permits the court to award all of the couple's community and quasi-community property to one spouse when the other spouse cannot be located and the property is worth less than $5,000.[344] The section appears to be a response to the need for protection of abandoned spouses identified by the Governor's Commission on the Family.[345] More consistent with property and support theory would be the deletion of this provision and an express grant of authority to the court to make lump sum spousal and child support awards out of a spouse's

(43) (53)

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343. It may, for example, sometimes be thought relevant that both spouses have freely continued their educations for a similar period during marriage, although in differing fields. If one spouse completes a doctorate in political science and obtains employment as a college professor while the other becomes a veterinarian, there may be no inequity in allowing the parties to go forth without equalizing their enhanced earning capacities. The equities would be different, however, if the costs incurred in securing the educations were disparate, or a potential computer engineer decided to study or work in a non-lucrative field such as art history or elementary education because the couple agreed that the other spouse's well-paid legal career would provide the family's financial security.

(52)

It should be emphasized, however, that such equitable considerations are concededly irrelevant to other questions of property definition and division, where the equal ownership and division concept has been uniformly adhered to since 1970. If no equitable considerations are to be entertained in other areas where 50-50 division harms women's interests, it would be difficult to justify their adoption here, since the overall financial impact would once again be to the significant detriment of women. See note 322 supra and accompanying text.

344. Cal. Civ. Code § 4800(b)(3) (West Supp. 1981), set forth at note 2 supra.

345. See note 321 supra.

community or separate property, as a supplement to periodic support payments.[346]

1. deliberate misappropriation

As an offset or award "from a party's share," the divorce court is authorized to compensate the other spouse for deliberate misappropriation from the community and quasi-community property.[347] This subsection requires minor amendments. First, it should be reworded to make clear that the wrong to be compensated is improper management behavior.[348] Next, jurisdiction should be granted to determine the issues and enter a damages award that may be satisfied with property before the court.[349] Finally, (54)

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346. See Cal. Civ. Code §§ 4700, 4801, 4806, 4807 (West 1970 and Supp. 1981); 6 Witkin, Husband and Wife §§ 156(3), 159(3). Lump sum spousal support, like child support and property awards such as those authorized by § 4800(b)(3), is neither deductible by the payor on a federal income tax return nor includable to the recipient. I.R.C. §§ 71, 215. Child support, when combined with spousal support and not specifically "fixed", is treated in the same fashion as spousal support. Commissioner v. Lester, 366 U.S. 299 (1961). In contrast to property awards, however, lump sum support awards cannot be discharged in bankruptcy. 11 U.S.C. §§ 101(4), 523(a)(4).

A specific dollar limit on such awards would be inappropriate, as families' needs and circumstances will differ. Property beyond that needed for support should be subject to the sole management of the abandoned spouse under provisions generally available for management when one spouse in unavailable. See Bruch, supra note 11, at n.175. (53)

347. Cal. Civ. Code § 4800(b)(2) (West Supp. 1981), set forth at note 2 supra.

348. Bruch, supra note 11, at nn.28-31.

349. The current language is ambiguous and capable of being misread to preclude a money judgment if community assets are insufficient to fully compensate the harm. To permit an efficient judicial process, the court's jurisdiction should be extended to permit enforcement against separate property in the same action.

the reference to quasi-marital property should be removed or clarified.[350]

j. debts

The rules for division of debt require three major reforms. First, debts should be classified as separate or community for division purposes. Second, the mode of division should reflect the parties' relative responsibilities for payment. Third, it should be possible to bind creditors as well as the parties to a nonfraudulent division.

The first step, that of distinguishing separate and community debts, would implement the definition of debt system proposed above.[351] Debts that have been of peculiar benefit to one spouse's separate property or were incurred in breach of the good faith management obligation should be assigned to that spouse as separate debts. In contrast to the separate-versus-community debt rules of some community property states,[352] this distinction would have no impact on creditor access during marriage, but would be relevant only for the purposes of division at divorce or upon the death of one spouse. (39)

Second, separate debts would not be offset against the community property in determining an equal division of the couple's assets. Community debts, in contrast, would ordinarily be charged against the property, but those incurred for family support would be divided according to the (55)

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350. If, as is recommended, quasi-community property is absorbed into community property, the reference should be deleted. See notes 222-229 supra and accompanying text. If quasi-community property remains a distinct property form, thought needs to be given as to what restrictions on its management and alienation may appropriately be imposed prior to dissolution; quasi-community property is technically the separate property of the spouse who acquired it until that time. (54)

351. See notes 278-284 supra and accompanying text.

352. See e.g., N.M. Stat. Ann. § 40-3-9 (1978).

parties' relative abilities to pay.[353]

The final reform would protect the legitimate concerns of creditors, yet replace the provisions of current law that sometimes provide a creditor

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353. The details of allocation should be worked out once the underlying definitions of community and separate property have been determined. Areas of special concern include postseparation debts, debts for family support, and educational debts. In the context of current law, the following proposed amendment to Civil Code § 4800 is suggestive:

> (b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:
>
> . . . .
>
> (4) Debts incurred during marriage for which the community property is liable shall be divided according to the provisions of this paragraph. In so doing the court may order that individual items of debt be satisfied out of the community property or assigned to one party or the other, in whole or in part, to accomplish the overall division prescribed by this paragraph. Such allocation shall be without prejudice to the rights of third parties.
>
> (i) Debts incurred for the support of the parties' children shall be allocated according to the parties' relative abilities to pay;
>
> (ii) Educational loans shall be assigned to the spouse receiving the education, in the absence of extraordinary circumstances rendering such disposition unjust;
>
> (iii) Liabilities subject to Section 5122(b)(2) shall be assigned to the spouse whose act or omission provided the basis for the liability;
>
> (iv) Debts incurred following the parties' separation that are not allocated under subparagraph (i) shall be apportioned between the parties as the court deems just and equitable, taking into account the nature of the expenditure and the distribution of any related assets;
>
> (v) Debts not distributed under subparagraphs (i)-(iv) of this paragraph shall be divided equally.
>
> (vi) Notwithstanding subparagraph (v), to the extent that the total of the debts to be distributed under subparagraph (v) exceeds the total value of the community property, the excess of debt shall be allocated between the parties as the court deems just and equitable, taking into account the parties' relative abilities to pay and the distribution of any related assets.

See California Legislature, 1977-78 Regular Session, A.B. 3621 (Waters and Fazio) (authors' amendments offered in committee). The educational loan provision was enacted. Cal. Civ. Code § 4800(b)(4) (West Supp. 1981), set forth at note 2 supra.

windfall. If a divorce decree assigns a debt to a spouse who did not initially incur it, current law permits a general creditor[354] to demand postdivorce payment from the assets of either spouse: the spouse who incurred the debt is liable as a matter of contract or tort law, the other spouse according to the provisions of the decree.[355] Even if the debt is assigned to the spouse who originally incurred it, however, the creditor is permitted to proceed against former community property in the hands of the other spouse, up to the value that it had at the time of property

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354. For the purposes of this discussion, creditors will be referred to as either lien creditors or general creditors. Lien creditors are creditors with interests in specific items of property whose claims are based upon statutory, consensual or judicial liens. Statutory liens, such as mechanics liens, arise by operation of law. Consensual liens, either secured transactions or mortgages, arise by agreement of the parties. Judicial liens, such as those arising upon the filing of abstracts of judgment, entail formal legal proceedings. Creditors who do not enjoy the protection of such formalized interests in specific items of property are, by contrast, general creditors. Absent a transfer in fraud of creditors, these creditors ordinarily may not follow property that once belonged to the debtor into the hands of a transferee, but rather must satisfy their claims from property owned by the debtor at the time that collection on the debt is made. California, however, has developed a special rule that benefits creditors after divorce. See note 356 infra and accompanying text.

355. Although the creditor, as a nonparty, is not bound by the decree, the spouse is. But cf. Cal. Civ. Code § 4358 (West Supp. 1981). The textual discussion concerns debts incurred by only one spouse. If both spouses are responsible out of separate property because they both dealt directly with the creditor, the creditor should retain access to the assets of both after divorce, but the spouse who was not assigned the debt in the divorce should be permitted to insist that the creditor first seek satisfaction from the other spouse's assets. Cf. Mayberry v. Whittier, 144 Cal. 322, 78 P.16 (1904) (former wife who was liable out of community but not separate property after divorce could insist that former husband's creditor resort first to his assets). It would be possible to analogize purchases of necessaries to this rule, since the separate property of the non-acting spouse is also implicated as a matter of law by the transaction that incurred the debt. However, since debt allocation at divorce should reflect the parties' relative abilities to pay for such support needs, and the creditor dealt with only one spouse, policy supports analogizing these cases to others in which only one spouse directly assumed liability.

division.[356] This rule has two undesirable features. First, where the debt has been reassigned at divorce,[357] the creditor receives two primary debtors in place of one.[358] Second, permitting access to all former

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356. During marriage a general creditor may seek satisfaction from the community property and the debtor spouse's separate property. After divorce, although normal creditor-debtor principles would require that the creditor seek satisfaction only from the debtor spouse, California law permits the creditor to additionally pursue former community property that is now the separate property of the nondebtor spouse. See Frankel v. Boyd, 106 Cal. 608, 39 P. 939 (1895) (husband's creditor permitted to demand payment from former community property owned by wife; wife had received 100% of the community assets at divorce and husband had no separate property); Ryan v. Souza, 155 Cal. App. 2d 213, 317 P.2d 655 (3d Dist. 1957) (dictum that recovery is limited to the value of the property at the time of divorce). See also Kinney v. Vallentyne, 15 Cal. 3d 475, 541 P.2d 537, 124 Cal. Rptr. 897 (1975) (distinguishing Ryan as concerning a judgment lien that attached after the division of community property, without reaching the question of proper creditor access on such facts. This doctrine originated under fault-based divorce in Frankel, where community property went to only one spouse at divorce, leaving the other spouse without assets. Although Frankel should be read as a fraudulent conveyance case (the court having analogized to that concept), later cases have assumed that it would always be appropriate for the creditors to follow property into a former spouse's hands. Compare Frankel v. Boyd, 106 Cal. 608, 39 P. 939 (1885) with Bank of America v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935); Harley v. Whitmore, 242 Cal. App. 2d 461, 51 Cal. Rptr. 468 (1st Dist. 1966); Greene v. Wilson, 208 Cal. App. 2d 852, 25 Cal. Rptr. 630 (2d Dist. 1962); Ryan v. Sousa, 155 Cal. App. 2d 213, 317 P.2d 655 (3d Dist. 1957); Vest v. Superior Ct., 104 Cal. App. 2d 91, 294 P.2d 988 (1st Dist. 1956). But see Gould v. Fuller, 249 Cal. App. 2d 18, 57 Cal. Rptr. 23 (2d Dist 1967) (holding property settlement that transferred community property to wife and left husband with debts rendering him insolvent constituted fraudulent conveyance).

357. This may happen frequently, for example, because one spouse handled most of the couple's dealings with creditors, or because an asset that was purchased on credit by one spouse was awarded to the other, together with the balance due.

358. A credit collection agency manager reports that the majority of their postdivorce collections are for unpaid medical bills and bad checks, and that it is common for the person from whom they are seeking payment to initially resist, arguing that the debt was assigned to the other spouse in the divorce settlement. Telephone conversation with Martin Marion, General Manager, Northwest Creditors Service, Sacramento, California (Aug. 1, 1980). The distress caused those who later learn that the divorce decree did not end their obligations to creditors has been common enough to prompt legislative

community property, absent a lien[359] against the property, elevates the position of general creditors to a status akin to that ordinarily reserved to lien creditors.[360]

The reform model should analogize the ending of a marriage to the winding up of a corporation:[361] absent a fraudulent conveyance,[362] a divorce decree should be capable of substituting one spouse for the other as the person to whom the creditor may turn following divorce. All of the (56)

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action. Divorcing spouses must now be informed that their continuing liabilities to third parites may be inconsistent with their interspousal rights as established by the divorce decree. Cal. Civ. Code § 4800.6 (West Supp. 1981).

359. Lien for purposes of this discussion is defined in note 354 supra.

360. A lien creditor may obtain satisfaction to the extent possible from subject property, including access to appreciated value. Kinney v. Vallentyne, 15 Cal. 3d 475, 541 P.2d 537, 124 Cal. Rptr. 897 (1975). Contrast the "market value at divorce" restriction articulated for general creditors by Ryan v. Souza, 155 Cal. App. 2d 213, 317 P.2d 655 (3d Dist. 1957).

361. Cf. Cal. Corp. Code §§ 2004, 2005, 2009 (West 1977). Section 2004 authorizes the distribution of remaining corporate assets to shareholders "after determining that all the known debts and liabilities . . . have been paid or adequately provided for . . . ." Section 2005 explains "adequate provision" as follows:

> The payment of a debt or liability, whether the whereabouts of the creditor is known or unknown, has been adequately provided for if the payment has been provided for by either of the following means:
> (a) Payment thereof has been assumed or guaranteed in good faith by one or more financially responsible corporations or other persons or by the United States government or any agency thereof, and the provision (including the financial responsibility of such corporations or other persons) was determined in good faith and with reasonable care by the board to be adequate at the time of any distribution of the assets by the board pursuant to this chapter.
> (b) The amount of the debt or liability has been deposited as provided in Section 2008.
> This section does not prescribe the exclusive means of making adequate provision for debts and liabilities.

362. See note 365 infra.

property in that spouse's possession, however and whenever acquired, would become liable to the creditor's suit and the original debtor spouse would be totally relieved of responsibility for the debt.[363] Provisions for notifying and binding creditors to such nonfraudulent agreements should be patterned after those now in use as to pension plans and the division of pensions.[364] Creditors would thereby become parties to the adjudication and bound by it, except that they would remain free to litigate questions of fraudulent conveyance.[365] If a debt is assigned to the spouse who initially incurred it, normal creditor access rules should control: the debtor should remain liable from all property sources, but property in the hands of the other spouse should be free of all creditor access, unless a lien was present at the time of division or the divorce agreement was in fraud of the creditor's rights.

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363. Mr. Marion estimates that 90% of his office's collections are by execution against wages, with another 5% involving levies against savings accounts, checking accounts and safety deposits. Although some automobile levies are made, the lengthy delay in collecting against realty is so disadvantageous that this collection avenue is rarely employed. Telephone conversation with Martin Marion, supra note 358. The firm's current practice is to pursue both former spouses as to any debts incurred during marriage. Because of the problems they have encountered with collections that are inconsistent with the terms of a divorce agreement, he is receptive to a system that would provide the creditor with the clear naming of one liable spouse and an opportunity to pursue fraudulently conveyed assets in the other spouse's possession.

364. See Cal. Civ. Code §§ 4363-4363.2 (West Supp. 1981).

365. If the debt allocation rules proposed above were adopted, it would be unusual for a property settlement agreement or court order to bring about insolvency where it did not already exist. Fraudulent intent would accordingly remain the primary ground for a later creditor challenge to division. If the creditor chose to appear and participate in the divorce hearing in response to the notice of intended substitution of debtors, no later attack would be available. A reasonable statute of limitations should be provided for challenges to fraudulent conveyances.

B. At Death

To the extent feasible, the policies that control ownership and division of community property in the divorce context should apply to the distribution of community assets upon the death of one spouse. Clearly a surviving spouse should not be treated more poorly than a divorced one. Yet current law permits such disparity.[366] The following discussion highlights current problems in the treatment of interfamilial property interests at death and makes suggestions for their rationalization with the definition and division proposals outlined above in the divorce context. (59)

1. Conforming Ownership Principles

a. pensions and death benefits

If a nonemployee spouse dies, survived by a spouse who will receive community property retirement benefits, the Waite terminable interest doctrine[367] has been held to mean that no interest in those payments belongs to the estate of the decedent.[368] This contrasts with the right of a divorced spouse to receive a lump sum in compensation for his or her lost interest.[369] The terminable interest rule should be legislatively overruled, and the decedent's community share in the yet-to-be-received (16)

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366. See, e.g., the following discussion of the terminable interest rule, quasi-community property, support rights, debts, and the item theory of property division.

367. See notes 138-142 supra and accompanying text.

368. Estate of Allen, 108 Cal. App. 3d 614, 166 Cal. Rptr. 653 (1st Dist. 1980).

369. Waite v. Waite, 6 Cal. 3d 461, 474 n.9, 492 P.2d 13, 22 n.9, 99 Cal. Rptr. 325, 334 n.9 (1972).

retirement benefits[370] should be subject to the testamentary disposition of the nonemployee spouse.[371]

b. disability and tort recoveries

Community property personal injury recoveries result in equal ownership interests at the time of either spouse's death.[372] Although this is acceptable if the injured spouse dies first, it can produce serious injustice if that person is the surviving spouse, with continuing special needs. Ownership at death should be conformed to that at divorce, where the rules of division assume that the recovery will go entirely to the injured spouse, subject to the court's authority to award as much as one half to the other spouse in the interests of justice.[373] (19)

c. enhanced earning capacity

If a spouse whose earning capacity was enhanced during marriage outlives his or her partner, the community investment in the survivor's human capital will of necessity go to that person.[374] Although strict ownership

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370. The ownership interest should extend to benefits payable upon the death of the retired spouse as well as those to be received during that person's lifetime. See the discussion of Benson v. City of Los Angeles in the text following note 133 supra. (13)

371. This would parallel the rule that applies to a deceased spouse's ownership interest in a life insurance policy held on the life of the surviving spouse. See Scott v. Commissioner, 374 F.2d 154 (9th Cir. 1967) (wife's testamentary beneficiary held her interest in policy until insured died). Because the nonemployee's interest would be community property, in case of intestacy it would pass automatically to the surviving spouse. Cal. Prob. Code § 201 (West 1956).

372. The rule currently applies to recoveries from third parties; it is recommended that it be extended to interspousal recoveries and to certain disability and worker's compensation benefits as well. See notes 148, 154 and 156 supra and accompanying text.

373. Cf. Cal. Civ. Code § 4800(c) (West Supp. 1981), set forth at note 2 supra.

374. See notes 171-195 supra and accompanying text.

principles would suggest that the estate should have a claim for its interest, the result seems strained. It would be more reasonable to assume instead that the spouses contemplated sharing the benefits of this investment only during their lifetimes, and that it was subject to an implied survivorship right in its possessor.[375] (60)

d. quasi-marital property

If the marital property and support rights of putative spouses are equated with those of legal spouses,[376] the probate implications of their ownership rights will have been clarified automatically.[377] If they are not, specific language should be adopted, equating the treatment of a surviving putative spouse with that of a legal spouse in all respects,[378] and clarifying the rights of a meretricious spouse following the death of the putative spouse to whom he or she was "married".[379] (61)

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375. Cf. the reasoning concerning disability insurance recoveries in the text accompanying notes 155-156 supra.

376. See notes 209-219 supra and accompanying text, making this recommendation.

377. Implementation would nevertheless require conforming amendments in the Probate Code. See note 378 infra.

378. Specifically, the putative spouse's right to inherit separate property as a surviving spouse needs to be affirmed, overruling the contrary decision in Estate of Levie, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1st Dist. 1975). Bigamy cases are adequately treated by case law and should remain subject to equitable rather than statutory authority. See notes 220-221 supra and accompanying text. (61)

379. The treatment provided at divorce should be paralleled in the probate setting. See notes 215-219 supra and accompanying text, arguing that marital property rights should be distinguished from damage claims that might be asserted by the deceived spouse. Equitable considerations that might affect support rights at divorce should be made applicable to family allowance and probate homestead rights. A formerly putative spouse should not be held to have forfeited rights by continued cohabitation with the decedent after learning of the defect in their marriage. See notes 214-216 supra and accompanying text. (26) (27) (28) (29)

e. quasi-community property

Only the full absorption of quasi-community property into community property will provide completely satisfactory results.[380] If that goal is not achieved, certain more limited reforms are recommended. First, survivor's election provisions should be conformed to those for community property estates.[381] Second, and more importantly, the ability of a spouse to devise one half of all quasi-community property, without regard to which spouse first acquired it, should be affirmed.[382] Finally, the debt allocation provisions applicable to the estates of other married persons should be framed in a way that equally serves the needs of these families.[383]

f. bifurcated divorces in which there has been no property division

The family allowance and probate homestead provisions should be expanded to permit reasonable treatment for a surviving spouse whose divorce was final, but who had not yet received a property division at the

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380. See notes 222-229 supra and accompanying text.

381. This would entail the repeal of Probate Code § 201.7 and the amendment of § 201.8, which force elections more readily than does the law of community property. In either case, the requirement of an election should only be imposed where the testator's intent to require an election is clearly indicated. Compare Cal. Prob. Code, §§ 201.7, 201.8 (West Supp. 1981) with In re Cowell's Estate, 164 Cal. 636, 130 P. 209 (1913). Section 201.8, which restricts the surviving spouse's ability to set aside gifts to third parties of quasi-community property over which the decedent had substantial ownership or control at the time of death, should be expanded. Cf. Cal. Civ. Code §§ 5125 and 5127 (West Supp. 1981), which regulate gifts to third parties during marriage.

382. The statute had provided this result but was amended, apparently because of outdated concerns traceable to Estate of Thornton. See Paley v. Bank of America, 159 Cal. App. 2d 500, 324 P.2d 35 (2d Dist. 1958); note 229 supra.

383. See notes 388-389 infra and accompanying text.

time of the decedent's death.[384]

2. Rules for Division

a. item versus aggregate theory

A divorce court is permitted to make an overall equal division of the community property and need not attempt to divide each item equally, even when the asset is readily divisible.[385] In contrast, if the decedent leaves his or her community property interest to a third party, the surviving spouse and that person become tenants in common as to each asset.[386] (66) Reform is needed to authorize the probate court, or the surviving spouse, to designate equally valued shares in the aggregate estate.[387] The resulting rule should articulate how it is to operate if a specific item

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384. See Cal. Prob. Code §§ 660-665, 680 (West Supp. 1981); Letters from Gerald Lichtig, Esq., Los Angeles, to the California Law Revision Commission (Oct. 23, 1979; Feb. 25, 1980) (on file with the author). The decedent frequently will have remarried in such cases, requiring that either the code or equity provide rules for multiple spouses. Cf. note 220 supra and accompanying text, discussing property division in cases of bigamy.

385. See generally Cal. Civ. Code § 4800(b)(1) (West Supp. 1981), set forth at note 2 supra; In re Marriage of Brigden, 80 Cal. App. 3d 380, 145 Cal. Rptr. 716 (2d Dist. 1978).

386. Dargie v. Patterson, 176 Cal. 714, 169 P. 360 (1917).

387. Cf. 1981 Wisconsin Assembly Bill 370, § 861.03(3) (April 16, 1981):

> PROPERTY RIGHTS OF SURVIVING SPOUSE: CHOICE OF PROPERTY. As an alternative to retaining an undivided 50% interest in each item of marital property under sub. (1), a surviving spouse may elect his or her one-half share of the marital property from the aggregate of marital property except as to specific property from the decedent's share which has been otherwise disposed of by will.

The use of the term "elect" is troublesome. Apparently this choice is available to the spouse without electing against a will, since an election against the will would provide the spouse with a 50% ownership interest in each asset, including those "disposed of" by the will. See id. § 861.01(1). See also note 402 infra (use of will substitutes).

of community property has been devised or given via a will substitute to a third party, so that it does not force elections in inappropriate cases.

b. debts

The current probate rule for debt division, which purports to allocate responsibility according to creditor access rules rather than rules of interspousal responsibility, is unfortunate.[388] It should be amended to track the debt division rules for divorce, to the extent practicable.[389] (59)

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388. Cal. Prob. Code § 980(e) (West Supp. Pamph. 1981) provides:

> . . . In the absence of an agreement [between the personal representative of the estate and the surviving spouse that has been approved by the court], each debt shall be apportioned to all of the property of the spouse liable for the debt, as determined by the laws of this state, in the proportion determined by the value of the property . . . at the date of death, and the responsibility to pay the debt shall be allocated accordingly.

Id. (emphasis provided). Max Gutierrez has provided a sensible albeit somewhat forced interpretation of the section that permits the probate court to take into account debt satisfaction rules (such as those imposed for torts by Cal. Civ. Code § 5122 (West Supp. 1981)). See Gutierrez, Apportionment of Debts, in California Continuing Education of the Bar, Handling Disputes in Probate 11 (1976). One hypothetical case will demonstrate the deficiencies of the current law. Assume that the decedent, while married, incurred charge account debts totalling $9,000 for a trip to Europe with a lover shortly before death. As debts incurred during marriage, both the community property and the decedent's separate property were liable for their repayment during the decedent's lifetime. At death, assume that the decedent's estate includes $100,000 of separate assets and the decedent's $100,000 share of community property assets totalling $200,000 in value. Under Probate Code § 980(e), the $9,000 debt would be allocated as follows: one third to the decedent's separate property, one third to the decedent's share of the community property, and one third to the surviving spouse's share of the community property (also worth $100,000). If the surviving spouse were also a signator on the charge account, his or her separate property would also have been liable, and therefore assigned a pro rata repayment obligation. On these facts the surviving spouse should have an offsetting claim against the estate for the decedent's mismanagement of the community. In other cases the offset might be less clear although the liability was not.

389. See notes 267-284 supra and accompanying text.

c. intestate succession

If a spouse dies without a will, California law provides that the decedent's share of the community property will pass to the surviving spouse.[390] Descent of separate property will depend on the presence of surviving children: the surviving spouse will receive at least one third of the separate property, and will receive one half if there is no issue of the decedent, or if there is but one child or the issue of a deceased child.[391]

The community property rule is supported by surveys that report the expectations and preferences of married people concerning the intestate distribution of their property,[392] and may work well in most cases. It is, however, of questionable soundness following a second marriage, should the decedent have children from a prior relationship. No longer does it seem likely that the deceased would assume that the surviving spouse would care for these children, or that the property not needed by the surviving spouse during his or her lifetime would eventually pass to

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390. Cal. Prob. Code § 201 (West 1956).

391. Id. §§ 221, 223. If the decedent leaves no issue, parents, siblings, or issue of siblings, the entire separate estate goes to the surviving spouse. Id. § 224.

392. Fellows, Simon and Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J., 319, 355-64. See generally, Dunham, The Method, Process and Frequency of Wealth Transmission at Death, 30 U. Chi. L. Rev. 241 (1963); Fellows, Simon, Snapp and Snapp, An Empirical Study of the Illinois Statutory Estate Plan, 1976 U. Ill. L. Forum 717 (1976); Price, The Transmission of Wealth at Death in a Community Property Jurisdiction, 50 Wash. L. Rev. 277 (1975); Note, A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes, 63 Iowa L. Rev. 1041 (1978).

them.[393] An intestate rule that would provide for such children is needed[394] unless general authority is given the probate court to provide for those who equitably deserve a share in the decedent's wealth.[395] If no such rule is adopted, the probate court should at least be empowered to make an award out of the estate for the support of the decedent's minor children.[396]

(67) (68) (69)

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393. Fellows, Simon and Rau, supra note 392, at 364-68. Responses to the following question are tabulated below:

> How would you like your property distributed if you are survived only by your (wife/husband) and a minor child of your previous marriage who lives with your former spouse?

TABLE 18

Distribution of Estate Between Spouse and Child of a Prior Marriage (Percent)[a]

Distribution Pattern by Percent of Estate to: Spouse	Child of Prior Marriage	Percent of Respondents in Pattern	*N*
100	0	23.0	171
51-99	1-49	28.9	215
50	50	37.2	277
0-49	51-99	11.0	82
Total		100.1	745

[a]5 missing cases.

Id. at 366 (reporting responses from Alabama, California, Massachusetts, Ohio, and Texas).

394. See, e.g., Ariz Rev. Stat. §§ 14-2102, 14-2103 (West 1975) (providing that one half of the separate property and all of the decedent's share of the community property passes to the decedent's issue in such cases). Cf. Uniform Probate Code §§ 2-102, 2-103 (providing that one half of the separate property and one half of the decedent's share of the community property passes to the children).

395. See notes 397-398 infra and accompanying text.

396. Final Report of the American Assembly on Death, Taxes and Family Property, in A.B.A., Section of Real Property, Probate and Trust Law, Death, Taxes and Family Property 188 (E. Halbach ed. 1977) ("Some support obligation should be imposed to provide for minor children of a decedent where an obligation of support existed during life.").

The rule for separate property also deserves reform. Although it, too, may be acceptable as a starting point, it provides no flexibility and therefore may often produce inequitable results.

Several common law countries have long since improved their rules of both intestate and testate succession, by granting powers comparable to those accorded a divorce court to the probate court. Special awards may be made where the welfare of one who was dependent on the decedent or is a member of a protected class would be unfairly prejudiced by the normal probate rules.[397] Because the relative and absolute sizes of community and

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397. Dower and curtesy originated in Britain, but those devices have disappeared from its system. Great Britain and several commonwealth countries have substituted a form of forced provision which is very different from that which developed in this country. Instead of providing a fixed fraction of the decedent spouse's estate, they have provided that the disinherited surviving spouse is entitled to some portion of the estate if he or she is in need. The share that will be given will be determined in accordance with his or her need, and it may take the form of periodic payments or a lump sum payment, whichever fits the circumstances. If no need can be shown, the disinherited spouse has no claim against the estate. It should also be noted that minor children, and even those of age, who can show need are similarly protected.

Haskell, Restraints Upon the Disinheritance of Family Members, in A.B.A., Section of Real Property, Probate and Trust Law, supra note 396, at 105, 108.

> Under the [English Administration of Estates Act 1925], if the decedent leaves no relatives to whom his estate will pass, the Crown is authorized to grant an ex gratia payment to dependents and others "for whom the intestate might reasonably have been expected to make provision." [The Inheritance (Provision for Family and Dependents) Act 1975] goes further, authorizing any person who was dependent on the decedent at the time of death to request a portion of the estate for maintenance either in case of intestacy or if the survivor was not adequately provided for by the decedent's will. These provisions . . . do not match the Act's solicitude for . . . legal spouses, who are entitled to a "reasonable" award, whether or not it is required for support purposes.

Bruch, Nonmarital Cohabitation in the Common Law Countries: A Study

separate property estates will vary widely, it is impossible for a blanket rule to provide adequately for all cases.[398] Especially in an era of multiple marriages and increasing nonmarital unions, greater fine-tuning is needed than current statutes provide.

d. testate succession

For the same reasons that intestacy laws will not always operate sensibly, the current rules that grant only limited rights to challenge a will to a surviving spouse and pretermitted heirs are inadequate. The ability of a spouse whose wealth is predominantly separate property to functionally or totally disinherit a surviving spouse has been sharply and soundly criticized.[399] Here too, it is unlikely that an arbitrary rule will provide sensible results. The success of Louisiana and foreign countries with discretionary relief recommends its adoption here.[400]

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in Judicial-Legislative Interaction, 29 Amer. J. Comp. L. 217, 231 (1981). See generally as to the laws of Ontario, New Zealand, Western Australia, South Australia, and New South Wales, id. at 231-32.

398. Most jurisdictions assure the surviving spouse a specific fraction (typically, one-third) of the estate, regardless of the donor's expressed wishes and regardless of the spouse's need, the size and sources of the estate, or the duration of the marriage. Particularly to be considered are flexible provisions rather than fixed percentages. (Incidentally, it also was noted that the rights of the surviving spouse, in the event of death without a will, are generally too little to reflect what most property-owners wish to make for spouses, as shown by empirical studies.)

Final Report of the American Assembly on Death, Taxes and Family Property, supra note 396, at 188.

399. See, e.g., Bodenheimer, supra note 52, at 414-418; Niles, Probate Reform in California, 31 Hastings L.J. 185, 191 ("With respect to separate property, the rights of a surviving spouse in California are wholly inadequate by standards prevailing in most states.").

400. See notes 310-311 supra and accompanying text (Louisiana law); notes 397-398 supra (other countries).

Even though a spouse has been amply remembered in a will, he or she may nonetheless wish to challenge certain of the decedent's attempted dispositions. Attention is required to the rules controlling survivors' elections. If an aggregate theory of probate administration replaces the current item theory, it would be possible to permit a spouse to request certain community property assets that the decedent had left to another without forcing an election.[401] At the same time, the court could also be authorized, for good cause, to deny such a request if the surviving spouse's overall rights had been secured. In this connection, the adoption of an "augmented estate" concept is recommended.[402] Where totally

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401. See the Wisconsin proposal, quoted at note 387 supra.

402. The recently promulgated Uniform Probate Code, which has been adopted in a minority of states, contains forced share provisions which go far to protect the spouse from disinheritance. It provides that the surviving spouse is entitled to one-third of an augmented estate, which includes the probate estate plus living transfers such as revocable trusts, irrevocable trusts with retained life income, joint and survivorship property, and large outright gifts made within two years of death. It is interesting that life insurance and pension benefits payable to someone other than the surviving spouse are not part of the augmented estate, and consequently remain available as a means to disinherit. Also under the Code, the outright living gift without strings or retained benefits genrally remains available as a means of disinheriting the spouse, with the limited exception noted above, but such transfers are a large price to pay to accomplish the objective of disinheritance. The Code also provides that property owned by the surviving spouse at the decedent's death which was received by living gift from the decedent is, in effect, credited against the surviving spouse's forced share rights.

Haskell, supra note 396, at 108. In accord with Haskell's suggestion, it would seem that the augmented estate for election purposes should include those assets included in the Uniform Probate Code's definition, plus life insurance and pension benefits payable upon the decedent's death. Outright gifts to third parties during the decedent's lifetime, however, should not be included, since the surviving spouse has an independent remedy to force recapture in such cases if the gift was inconsistent with management constraints. Gifts received by the surviving spouse should be relevant only to the extent that the decedent intended them as will substitutes, to provide for the surviving spouse's future financial well-being. See generally

fungible assets (such as money) have been left by will substitute to a third party, a spouse should not be permitted to assert a community interest in the asset if the total portion of the community estate passing to the survivor by will substitute, intestacy, or testate devise equals in value that portion of the "augmented estate" to which the spouse would be entitled under intestate law.[403] Intestate, testate, and discretionary or forced share provisions should be formulated in light of the final definitions of separate and community property, and should be rationalized both within the Probate Code and with the Family Law Act rules for property and support at divorce.

e. Probate Code § 229

One final oddity deserves correction. Through a series of well intended but poorly drafted statutes, California has developed an almost incomprehensible rule for intestate succession if a widow or widower dies without either children of his or her own, or a new spouse.[404] On these facts, the apparent intent of Probate Code section 229 is to benefit

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Uniform Probate Code, Part 2, General Comment, §§ 2-201, 2-202; Kurtz, The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share, 62 Iowa L. Rev. 981 (1977).

403. This rule should alleviate the surviving spouse's current exposure to gift tax if no challenge is made. See note 129 supra.

404. See Cal. Prob. Code § 229 (West Supp. 1981). The original intent of former Probate Code §§ 228 and 229 (now combined in § 229) was to insure that relatives of a predeceased spouse would share in the property in which that spouse had an interest when he or she died, and which passed to the then-surviving spouse. The legislation was considered an expression of the presumed intent of the predeceased spouse, and preferable to permitting all of the property to pass to the relatives of the last spouse to die. See Ferrier, Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments, 25 Calif. L. Rev. 261 (1937). This presumed interest may be questioned. It appears that surviving spouses are usually left all of a decedent's property, even where there are children. See Price, supra note 392, at 283-316.

children of the widow(er)'s former spouse, but if there are none, to divide assets that came to the widow(er) from the former spouse equally between the two spouses' families. This admirable goal should be provided by a statute aptly drafted to accomplish that result. (70)

CONCLUSION

The promise of equality offered by the adoption of no-fault divorce and equal division of community property has proved hollow. Like the family car that has begun to cost so much in repairs that its failings, however familiar, have become more costly than a new model, California's marital property law has been patched and tolerated until it no longer functions efficiently. To provide a simple, equitable property scheme will require a new start.

Doctrines should be articulated that preserve important separate property interests during short marriages, yet avoid complex tracing doctrines and emphasize sharing principles in lengthy ones. Statutory forumulas and economical valuation techniques should replace the expense and uncertainty of expert testimony in all but the most unusual cases. Economically similar households should receive comparable treatment: community property concepts should be applied to parties who have immigrated to California, and to those who mistakenly believed themselves to be married. Most important, financial reality rather than doctrinal purity should shape the import of credit transactions and attempts to achieve economic parity at a marriage's end. Fairness and simplicity should be implemented; compromise and balance should be restored.

DEFINITION AND DIVISION

Summary of Recommendations

No.	Recommendation	Page	Topics
(1)	Define community property to include appreciation, rents, and profits of separate property	35-36	A
(2)	Abrogate family expense doctrine and provide rule allocating expenses to all sources of family's wealth	38, 42	B, D, F
(3)	Abrogate lender's intent doctrine and provide that all borrowed funds are community property.	38, 42	B, D, F
(4)	Clarify ownership interests in depreciated property	39	B, F
(5)	Include rents and profits of separate property in the community, even if fruits are not defined as recommended, and provide divorce and probate courts with jurisdiction over appreciation	41	C, F
(6)	Authorize unequal division of appreciated separate property to preserve inherited assets.	41, 110	D
(7)	Permit use or award of family home from any assets	42, 111-14	C, D, F
(8)	Provide divorce court jurisdiction and authority to dispose of jointly held separate property interests on same terms as community property, including authority to partition after-discovered and forgotten property.	42, 103	C, D F, K
(9)	Provide formula to aid allocation of interests in businesses with mixed ownership sources.	42	F
(10)	Retain installment purchase for insurance and pensions	43	G
(11)	Require joinder for designation of beneficiaries.	45	G
(12)	Provide augmented estate concept for use in testing set-aside of death-related transfers	45, 139	E, G
(13)	Honor community ownership interests in pension death benefits	46, 130	A, G
(14)	Require joinder for choice of pension options	46	G
(15)	Require that plans include former spouses as persons eligible for pension plan death benefits	46	G
(16)	Honor community ownership interest of nonemployee spouse in employee's pension benefits that will be received after nonemployee's death.	49, 129	A, G
(17)	Provide community property presumption for personal injury recoveries that is conclusive except between spouses at marital termination	51	B, H
(18)	Extend personal injury division rule to commingled but traceable recoveries	51, 119	D, H
(19)	Extend personal injury recovery division rule to probate setting.	52, 130	H
(20)	Extend reimbursement rule for injury-related expenses to recoveries for prenuptial and interspousal injuries.	53	H

(39)	Distinguish separate from community debts for divorce and probate purposes	101	B, D, E
(40)	Retain current provisions for valuation date.	103	C
(41)	Provide divorce court jurisdiction over separate property to permit limited recourse to such property	103	C
(42)	Provide divorce court with jurisdiction to hear claims based on cohabitation when related to marital property claims before the court.	104	C
(43)	Clarify divorce court's dispositional alternatives; include distributive awards, lump sum support, delayed division, use-of-capital awards, purchase of substitute insurance	107, 112 114, 115 121	C
(44)	Retain rule of equal division of community property subject to specific exemptions.	107	D
(45)	Authorize award out of separate property in cases of sharply disparate wealth.	108	D
(46)	Provide that equal division of natural appreciation is presumptively equitable if such appreciation is not included in the definition of community property	111	F
(47)	Provide that retention of jurisdiction is normal means of dividing pension interests absent contrary stipulation	116	C, D, G
(48)	Encourage pension plans to develop ability to split pension interests at divorce	117	C, D, G
(49)	Investigate possibility of plan-specific computer programs to efficiently value pension interests. .	117	B, G
(50)	Direct that divorce forms request face value and premium costs for life insurance	118	B, C, G
(51)	Direct retention of shared ownership or purchase of substitute coverage for term life insurance . .	119	C, D, G
(52)	Provide rule for division of enhanced earning capacity acquired during marriage.	120-21	D
(53)	Repeal Civil Code § 4800(b)(3) and replace with express grant of authority to make lump sum support awards in addition to modifiable orders. .	121	C, D
(54)	Amend Civil Code § 4800(b)(2) on misappropriation to clarify section and affirm court's jurisdiction to make and enforce damages award.	122, 123	C, D, I
(55)	Provide division rule for debts that reflects parties' relative responsibilities for repayment. . .	123	D
(56)	Preclude general creditors' access to original debtor's assets if debt was assigned to other spouse in nonfraudulent divorce division	127	D
(57)	Pattern procedures for binding creditors to debt division after those in use for pension plans. . .	128	C
(58)	Preclude general creditors' access to property in the hands of nondebtor spouse if debt was assigned to original debtor at divorce	128	D
(59)	Conform rules of ownership and division at death to those at divorce to extent feasible	129, 134	E, F, G, H, I, J, K
(60)	Provide rule that enhanced earning capacity will not be valued at death of nonpossessor spouse. . .	131	E

Topical Summary of Recommendations

A. DEFINITION OF COMMUNITY PROPERTY

B. DEFINITIONAL AIDS

C. DIVORCE COURT JURISDICTION AND PROCEDURES

D. RULES FOR DIVISION AT DIVORCE

E. RULES FOR DIVISION AT DEATH

F. ALTERNATIVES IF COMMUNITY PROPERTY IS NOT DEFINED AS ABOVE

G. INSURANCE AND PENSION PLANS

H. PERSONAL INJURY RECOVERIES

I. COUPLES WHO MOVE TO CALIFORNIA

J. PUTATIVE SPOUSES

K. TITLE FORMS AND IMPLICATIONS