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The Definition and Division of Marital Property in California: Towards Parity and Simplicity

Carol S. Bruch

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The Definition and Division of Marital Property in California: Towards Parity and Simplicity

By Carol S. Bruch

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The Definition and Division of Marital Property in California: Towards Parity and Simplicity†

By Carol S. Bruch*

Introduction

Recent Developments in California

With the adoption of no-fault divorce in 1970,¹ California’s rule for the division of community property at divorce² approached the

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This Article was prepared by the author for the California Law Revision Commission and is published here with the Commission’s consent. It was written to provide the Commission with background information to assist the Commission in its study of this subject. However, the opinions, conclusions, and recommendations set forth are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission. A related study by the author, Management Powers and Duties Under California’s Community Property Laws, was completed in 1980 for the Commission and will appear in Volume 34 of the Hastings Law Journal.

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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 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 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,
3. In 1923, wives were given succession and testamentary rights equal to those of their husbands. 1923 Cal. Stats. ch. 18, § 1401, at 29-30 (current version at PROBATE CODE § 201 (West 1956)).

4. CAL. CIV. CODE § 4800(b), (c) (West Supp. 1981), set forth at note 2 supra.

5. Under the former law, a divorce was granted to an innocent party on the basis of the other spouse's marital fault. CAL. CIV. CODE § 92 as amended by 1941 Cal. Stats. ch. 951, § 1, at 2547 (repealed 1969) (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 California, FAM. ADVOCATE, Spring 1979, 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. CAL. CIV. CODE § 146, enacted CAL. CIV. CODE §§ 146, 147 (1872), as amended by 1951 Cal. Stats. ch. 1700, §§ 10, 11, at 3913 (amending § 146 and repealing § 147), and finally amended by 1968 Cal. Stats. ch. 457, § 1, at 1077-78. In 1969, the grounds enumerated in § 92 were replaced by the current “irreconcilable differences” and “incurable
bands' property interests, was partially offset by the increasing precision of property valuation techniques. Gradually, it became apparent that husbands frequently had received important community assets under the old law to which either no dollar value or inaccurate values 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, until 1976 other pension rights were not. Because married men are more likely than married women to acquire valuable pension rights through employment, these unvalued assets typically went to husbands. Similarly, although the goodwill of a business or profession was invariably awarded to the spouse who received the business, the assigned values may well have been artificially low. Most importantly, until 1982, California courts were consistently unwilling to classify a spouse's enhanced earning capacity as community property. Although this rule may now be changing, the transformation is still far from complete.

This asset, the most valuable in many marriages, therefore goes to a spouse without mention in the property division. On the other hand, debts, not considered property...
and therefore treated separately at divorce before 1970,\textsuperscript{11} gradually have been incorporated into the equal division calculus.\textsuperscript{12} As a result, 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 fifteen percent of divorcing women, those few who receive awards under the new law receive smaller amounts for a shorter period.\textsuperscript{13} Child support awards also lag farther behind poverty levels,\textsuperscript{14} and since 1972, have been authorized only until a child's eighteenth birthday.\textsuperscript{15} Because children remain almost exclusively in their mother's care after divorce, inadequate child support awards have an additional negative effect on the finances 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 improved their situations while their former wives' incomes had dropped precipitously.\textsuperscript{16} 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.

The soaring real estate market, which has resulted in a home's eq-

\textsuperscript{11} 1 B. Armstrong, \textit{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. \textit{But see} C. Bruch, Management Powers and Duties Under California's Community Property Laws n.67 (Sept 19, 1980) (unpublished study completed for the California Law Revision Commission) [hereinafter cited as Bruch, Management Powers] (to be published in Volume 34 of the \textit{Hastings Law Journal}).

\textsuperscript{12} Bruch, Management Powers, supra note 11, at nn.59-60.


\textsuperscript{16} \textit{See} note 197 infra.
uity being a major community property asset for divorcing families who owned homes has also reduced the likelihood that a custodial parent will be able to maintain the home or secure comparable housing after divorce. Case law has responded to the pressure to sell homes created by the equal division mandate by developing a technique that maintains joint ownership of the house as an incident of child support in certain cases involving minor children. The remedy is not generally available and when granted, is granted only for a limited period.

Home ownership is but one example of the increasing complexity of property division under current California law. Special problems also have developed with regard to pensions: the supremacy clause of the United States Constitution sometimes divests a non-employee spouse of any interest in a federal pension, the division of other pensions is frequently troublesome, and there is confusion concerning payments that involve recompense for disabilities. Other changes in

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18. No reported case has yet extended the reasoning to a case in which spousal support or support of an adult dependent child 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).

19. 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 approach is consistent with the Marin County finding of Judith Wallenstein and Joan Kelly, who reported frequent moves by children and their custodial parents following property disposions. Within three and one-half to four and one-half 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).


22. See notes 155-56 & accompanying text infra.
the law have raised questions about the rules controlling tort recov-
eries,23 the valuation of good will,24 post-separation income,25 assets
acquired with mixed separate and community components26 (including
questions of title and the relevance of borrowed moneys27), the divorce
court's jurisdiction over separate property28 and over claims arising out
of a couple's cohabitation before marriage,29 the treatment at death30 or
divorce31 of property brought to California, and distribution by a pro-
bate court of some forms of property and debts.32

An examination of the issues posed in typical divorce and probate
cases over the past decade, and of the relative financial postures of di-
vorced men and women, indicates that the system stands in need of
reform. Marriage should entail neither convoluted doctrines, exorbi-
tant litigation costs, impoverishment of widows and widowers, nor
strikingly disparate post-divorce wealth.

Recent Developments in Other States

Sister states have shown concern for these issues by sharing in the
recent major reforms of divorce and probate law. As summarized in a
recent article by William Cantwell, Reporter for the Commissioners on
Uniform State Laws' contemplated Uniform Marital Property Act,33

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 di-
vorce] 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.34

Although willing to forego 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 states do not require a 50-50 division of marital property. Two primary reasons account for this reluctance to follow California's lead. First, most of these states have an established tradition of awarding property from one person's separate wealth, however and whenever acquired, at divorce or death. The case law and judicial practice of these states are accustomed to evaluating the equities of the parties' relative financial positions at divorce. This learning is expected to remain relevant to divisions in which only one of the former factors, marital guilt, has been removed from the equation. Second, these states are reluctant to import the complex doctrines that are considered necessary to 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 viewed as a real, albeit lesser, danger.

Five of the eight community property states have maintained flexible division rules as components of their no-fault divorce laws, en-

35. *Id.* at 45.
36. *Id.* The Governor's Commission recommended a similar rule of equitable division when it proposed no-fault divorce for California. CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT, 45-46 (1966) (hereinafter cited as GOVERNOR'S COMMISSION REPORT).
37. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT § 307 (Alternatives (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.”).
38. 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, 2341 (West 1952 & Supp. 1981), LA. CIV. CIV. PROC. ANN. art. 82 (West 1960) and N.M. STAT. 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. ANN. §§ 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 misconduct.”); IDAHO CODE § 32-712 (Supp. 1980) (“The community property must be assigned . . . as the court . . . deems just . . . Unless there are compelling reasons otherwise, there shall be a substantially equal division. . . . [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 (1979) (“[T]he court . . . shall make such disposition of . . . [the 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 ANN. 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: Campbell v. Campbell, 586 S.W.2d 162 (Tex. Civ. App. 1979));
hancing the similarities to common law property jurisdictions. Finally, both the Munts Bill in Wisconsin, which proposes a form of community property, and the submission draft of the Uniform Marital Property Act incorporate division rules that permit limited exceptions to equal division of community property and access to separate property.\(^{40}\)

**Principles for Reform**

The major differences in current marital property laws revolve around three points: prescribing property rights of the spouses during marriage, defining the 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. The first of these topics has been dealt with elsewhere.\(^{41}\) As to the latter two, Professors Verrall and Sammis have remarked that:

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 these conditions can be said to characterize the California system.\(^{42}\)

This Article suggests a number of reforms designed to bring Cali-
fornia closer to these goals. More importantly, it seeks to enhance substantive fairness by promoting three sometimes conflicting goals: comparable treatment of both spouses, protection for their children, and predictability. The discussion highlights major problems in the application of California’s definitional and dispositional rules of community property law. It suggests ways to simplify the system without sacrificing equity, in accord with the established principle of equal division, subject to carefully defined exceptions. The tension between certainty and equity often requires that the suggested solutions 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.

**Defining the Community**

**History: What Is Not Separate Is Community**

Community property is defined by negative inference under California law. Only separate property is defined in the state constitution: “Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property.” 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.44

This clause, in turn, is taken from language in the Texas Constitution that adopted the Spanish-Mexican community property system as that state’s marital property regime.45

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

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community property reflect a decision to adopt a civil law rather than a common law system of marital property. 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.

Ten years later, however, in George v. Ransom, the California Supreme Court misinterpreted this clear constitutional and legislative history, confusing the civil law regime of community property with common law property notions. As a result, the court held that the

46. See note 48 infra.

47. Professor Prager suggests that the decision to adopt a civil law marital property system was influenced by (1) a spirit of conciliation towards the Spanish-speaking natives of California, (2) 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 (3) the possibility that many of the delegates did not understand the essential elements of the civil law community of acquests and gains. Prager, Separate Property Concepts, supra note 44, at 8-24. 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 48 infra.

48. 1849-50 Cal. Stats. ch. 103, § 9, at 254. This definition was in accord with the 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 §§ 22-23, at 56-58 (1895); see also W. de Funiak & M. Vaughn, Principles of Community Property § 71 (2d ed. 1971) [hereinafter cited as de Funiak & Vaughn]; G. Schmidt, The Civil Law of Spain and Mexico art. 44, at 12-13 (1851).

49. 15 Cal. 322 (1860).

fruits of separate property remained separate property.\textsuperscript{51} 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 of separate property that are not the product of community efforts.\textsuperscript{52}

Under this "source rule" and a related presumption that property acquired during the marriage is community property,\textsuperscript{53} much of California's case law since \textit{George} has involved two factual settings. In the first, a spouse attempts to trace property that presumptively belongs to the community back to a separate property source, thereby establishing a 100\% ownership interest in the property and its fruits.\textsuperscript{54} In the second, a spouse seeks to establish a community interest in property that would otherwise be deemed the other spouse's separate property, thereby securing a 50\% ownership interest.\textsuperscript{55} Additional cases address the special problems of marriages in which separate property was the sole or predominant source of wealth, and no community assets are identified for division at divorce.\textsuperscript{56} The following sections describe

\footnotesize{
\textsuperscript{51} 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 because 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 both 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 \textit{George}. See note 48 & accompanying text \textit{supra}. 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, \textit{Apportionment of Income from a Spouse's Separately Owned Property}, 51 \textit{Calif. L. Rev.} 161, 165 n.43 (1963).

\textsuperscript{52} The rule is currently codified in \textit{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 \textit{George}. See \textit{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.


\textsuperscript{55} See, e.g., Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909); Schuyler v. Broughton, 70 Cal. 282, 11 P. 719 (1885); Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640 (2d Dist. 1926).

these difficulties and propose doctrinal simplification.

Separating Community and Separate Property Interests

Community property may become mixed or commingled with the separate property of one spouse, or occasionally both spouses, in a number of ways. Although the types are not pure, it is helpful to distinguish "commingled property," such as the balance in a bank account in which funds from various sources have been deposited and withdrawn from time to time, from "mixed assets," in which funds of different sorts have been invested and remain in identifiable proportions.

**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 funds have been removed, it is often difficult to determine the respective ownership interests in the remaining funds. To do so, both deposits, including interest, and withdrawals must be characterized. If funds have been hopelessly commingled, so that no tracing can be accomplished, community ownership is presumed unless the community investment was minimal in relationship to that of the separate property. The second problem is related. 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. If the drawer's intent can be ascertained, and sufficient funds were on hand to satisfy that intent, the appropriate funds are deemed removed. If records are not precisely kept, however, it is often difficult to establish the intent of the person who removed and applied the funds.

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

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 rather than community property rests on the person who seeks to establish the separate property character of the purchased property.\(^6\) Although this burden must ordinarily be established by adequate records,\(^6\) it is theoretically possible, under the “family expense doctrine,” to show that only separate property remained in the account at the time of purchase by showing that all community funds previously had been withdrawn to pay community living expenses.\(^6\)

Because the courts presume that living expenses, no matter how extravagant, are paid first from community property,\(^6\) this approach unfairly benefits a wealthy spouse, who may be able to establish that the family’s living expenses were greater than community property earnings. This situation occurs even though the community property earnings might have been more than adequate for reasonable living expenses had the parties not considered themselves rich.\(^6\) Because the doctrine works to the detriment of the poorer spouse, its negative effect may be felt by men as well as women. Its application seems especially

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\(^6\) Estate of Murphy, 15 Cal. 3d 911, 918, 544 P.2d 956, 965, 126 Cal. Rptr. 820, 829 (1976); In re Marriage of Mix, 14 Cal. 3d 604, 612-13, 536 P.2d 479, 484, 122 Cal. Rptr. 79, 84 (1975); See v. See, 64 Cal. 2d 778, 784, 415 P.2d 776, 780, 51 Cal. Rptr. 888, 892 (1966); see Hicks v. Hicks, 211 Cal. App. 2d 144, 154, 27 Cal. Rptr. 307, 314 (4th Dist. 1962).


\(^6\) In Hicks v. Hicks, 211 Cal. App. 2d 144, 27 Cal. Rptr. 307 (4th Dist. 1962), there had been a total income of approximately $550,000 and a community income of approximately $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).

\(^6\) The rule has been often criticized. See, e.g., Bodenheimer, Separate-Property Marriages, supra note 50, at 396-400; Bruch, Management Powers, supra note 11, at n.148 & 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's 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.”
harsh if community income has been exhausted on consumption items while durable assets were purchased with separate property.

In families of more modest means, commingling often occurs in another common, yet equally troublesome, fashion. Because community property results from the expenditure of efforts by a spouse during marriage, it is possible—through the labor of either spouse—for community property to be applied to one spouse's separate property. If the separate property is held in a business or professional practice, a community property salary may be paid that recompenses the community for a spouse's services. If no salary was taken, and there was no gift of the community property efforts that were used in the business, the community may be able to claim payment for those efforts or, alternatively, to assert an ownership interest in the property. The issue may become even more complicated. Although wages were paid for spousal services to the separate property enterprise, the salary may later be deemed an incomplete payment, and the value of the uncompensated community property wages that were not withdrawn will have become a portion of the business' capital, creating a community property interest in the concern. If the business has increased greatly in value, a court may be asked to decide to what extent the appreciation is attributable to the uncompensated, capitalized community property efforts of one or both of the spouses, creating a community property interest, and to what extent the appreciation is attributable to the original, separate property investment and therefore constitutes separate property. If loans have been repaid with earnings from the business, increasing the capital investment, the computations become even more complex.

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65. Such separate property interests may reflect a direct infusion of separate property funds or, as in the case of a professional practice established before marriage, value created by separate property efforts.


67. See, e.g., Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909).


69. 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).

California courts have developed polar apportionment doctrines by which trial courts may choose as equity prompts when capital of one source and labor of another are commingled. The Pereira doctrine first measures a fair rate of return on the capital investment, and then awards the excess, if any, to the community in payment for a spouse's efforts. Conversely, the Van Camp doctrine first measures a reasonable rate of pay for the spouse's efforts, and then awards the excess, if any, to the capital investment.

The potential inequities of both the family expense doctrine as it relates to commingled funds and the Pereira-VanCamp doctrines on commingled capital and efforts are demonstrated by Beam v. Bank of America. In Beam, no salary was withdrawn by a millionaire who spent his twenty-nine married years managing his separate wealth and engaging in private ventures with those funds; these sources provided the family's support. The trial court applied Pereira to these facts 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.

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71. 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. When 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).

72. Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (2d Dist. 1921), gives this formula its name. 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 $69,203 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.

73. 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

74. During the marriage, Mr. Beam's separate estate had increased from an initial worth of $1,629,129 to only $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] effort to manage the separate estate," id. at 16, 490 P.2d at 260, 98 Cal. Rptr. at 140, may be inaccurate, however, given the realities of estate planning. Justice Brown, in his partial dissent in the court of appeal, noted that during the early years of the marriage, a substantial portion of Mr. Beam's separate estate was invested in municipal tax free bonds earning about 1% interest. Beam v. Beam, 89 Cal. Rptr. 280, 288 (1st Dist. 1970) (Brown, J., concurring in part and dissenting in part). Using the Pereira formula of 7% interest thus would give a large part of his assets "seven times the income that was actually realized . . ." Id. Furthermore, 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 be of a greater ultimate benefit to the respondent." Id. Today, in contrast to the conditions prevailing in 1909, at the time of Pereira, "[t]he desire
On appeal, the California Supreme Court rejected Mrs. Beam's argument that the court had abused its discretion in refusing to apply the Van Camp doctrine, 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. Mrs. Beam thus left the lengthy marriage almost without property, while Mr. Beam remained a millionaire.

As noted by Professor Bodenheimer, California's community property laws are woefully inadequate in such cases. First, the Per-
doctrines in fact have not been applied to vindicate community property interests when a spouse has pursued a separate property business during marriage. Second, the community expense doctrine often vitiates that community property which does exist in wealthy marriages. Third, a refusal to invade separate property, when it is the basis of a family’s wealth, is often unjust.

Mixed Assets

Couples often use both community and separate property in the acquisition of major assets, especially those paid for overtime. One who purchases a home or begins a business before marriage, for example, may use borrowed funds and have loans still outstanding at the time of marriage. Typically, payments on such debts during marriage are made from current income, community property. Similarly, life insurance policies or retirement plans are 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 mar-

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 that first estimates a fair rate of return on the capital investment and a fair salary for the owner-spouse. Then, “[i]f 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 ‘salary’ and interest, the two shares would presumably be reduced proportionately.” Bodenheimer, Separate-Property Marriages, supra note 50, 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 that classifies the fruits of separate property as marital partnership property. Wisc. A.B. 370 § 766.31(2)(b)-(c) (1981). 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 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 Wisc. A.B. 1090 (1979) (later Wisc. A.B. 370 (1981)). See notes 105-06 & accompanying text infra.

78. Bodenheimer, Separate-Property Marriages, supra note 50, at 388: “The apportionment doctrine has been involved many times in California litigation, but it has seldom resulted in the allocation of a sizeable share of separate property profits to the community under either of the two tests.”


80. Id. at 422.
riage, separate property acquired before the marriage or from a spouse's family is often incorporated in the down payment. Current income is typically used to meet the monthly mortgage payments that are an almost inevitable part of the scheme. Rarely do couples give any thought to their respective ownership interests in the home or business, other than to indicate with survivorship provisions that each wishes the other spouse to retain the home after his or her death. Indeed, only some of those who have given the matter thought will have actually discussed their views with their spouses. Yet, when death or divorce occurs, some allocation of the asset, including any appreciation, must be made.

Case law has developed several applicable doctrines. Originally, a property's character as separate or community theoretically 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, ownership interests were fixed at the time title was acquired. If property of another source was later used to improve the property, absent a gift, the owner of the property had a right to reimbursement for either the amount expended or the benefit to the improved property. This rule, too, and its accompanying presumptions could be displaced by showing that the parties had agreed otherwise, because California freely permits spouses to alter marital property rights by agreement.

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 all cases. An exception gradually developed. Life insurance and pensions, which were typically acquired with payments over many years, came to be considered "installment purchases" rather than rights acquired at the time of an initial payment. This treatment permitted a fair accounting of both separate property payments before and after marriage and community property.

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81. 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, Joint Tenancy, supra note 57, at 501 n.2; Griffith, Community Property, supra note 57, at 88. There is no reason to think that this practice has changed in the years since.

82. For a discussion of the varying treatment accorded such property, see Griffith, Community Property; Marshall, Joint Tenancy; Mills, Community Joint Tenancy; and Sims, Joint Bank Accounts, supra note 57.

83. DE FUNIAK & VAUGHN, supra note 48, § 64, at 130.


86. 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,
payments during marriage. Title was accordingly treated as having been acquired pro rata by all payments from whatever sources, whenever made.

This reasoning was readily extended to the purchase of a home. Faced with separate property title acquired by one party shortly before marriage, the court in *Vieux v. Vieux*\(^87\) 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 an asset that was purchased over time, and that the respective property sources should be given pro rata 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 appreciation, this rule gave the community a share in the home's increased value. The doctrine was later extended to the purchase during marriage of a business in a case involving a separate property down payment, borrowed funds, and repayment from the business' earnings.\(^88\)

In recent years, interest rates have increased, taxes have become a major expense for home owners, and the appreciation in home values has risen dramatically. As a result, the details of shared ownership interests have been the subject of frequent litigation. Two recent decisions of the California Supreme Court have attempted to bring order to the case law.\(^89\) Unfortunately, these opinions rely on strict property notions and questionable doctrines concerning borrowed funds. The consequences are far less sensible than those prompted by the *Vieux* case,\(^90\) which first applied an installment purchase analysis to home ownership. Under these recent cases, form of title\(^91\) and timing of the

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\(^88\) 80 Cal. App. 222, 251 P. 640 (2d Dist. 1926).

\(^89\) Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953) (separate property down payment, borrowed funds, repayment out of the business' earnings).

\(^90\) 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).

\(^91\) 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 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980).
purchase\textsuperscript{92} have become determinative. Monthly payments on the loan are relegated to a relatively minor role because payments of interest are ignored, and no credit is given for costs incurred for maintenance, insurance, or property taxes.\textsuperscript{93}

The effects of these decisions on a couple's property interests are illustrated by the following hypothetical case.\textsuperscript{94} While she is single, Susan purchases a home in 1980 for $140,000, making a $40,000 down payment and taking title in her name. The interest rate on the $100,000 mortgage is 14\%\%\%. Shortly thereafter, she and John, who chose the home together, are married. During their ten-year marriage, monthly payments of $1,205 on the loan 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 in interest and principal, plus additional expenditures for taxes, insurance, and upkeep. 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. Direct contributions are apportioned first. Susan is credited with her $40,000 separate property down payment, the bank is entitled to the outstanding loan balance of $95,480, and the community receives $4,520. This last amount is the community's "contribution" to the capital investment in the house—that is, the amount that the loan principal was reduced by the monthly community property payments. The $140,000 of appreciation in the home's market value is then shared in the proportions that are established by these three figures, and Susan, as the borrower, is credited with the portion of the appreciation that is attributable to the loan amount still outstanding from the initial purchase. Accordingly, Susan's separate property share

\textsuperscript{92} Under the \textit{Lucas} and \textit{Moore} decisions, appreciation reflects the character of the loan that was used to purchase the asset. \textit{In re Marriage of Moore}, 28 Cal. 3d 366, 372, 618 P.2d 208, 211, 168 Cal. Rptr. 662, 665 (1980); \textit{In re Marriage of Lucas}, 27 Cal. 3d 808, 816 n.3, 614 P.2d 285, 290 n.3, 166 Cal. Rptr. 853, 858 n.3 (1980). 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 is deemed community property if it is secured during marriage. \textit{See} Bruch, Management Powers, supra note 11, at n.68; Young, \textit{Community Property Classification of Credit Acquisitions in California: Law Without Logic?}, 17 Cal. W.L. Rev. 173 (1981).

\textsuperscript{93} Only the amount paid on the principal of the loan is recognized. \textit{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. \textit{See} Vieux v. Vieux, 80 Cal. App. 222, 229, 251 P. 641, 643 (3d Dist. 1926).

\textsuperscript{94} The hypothetical figures on payment costs and reduction in loan principal are taken from \textit{Cal. Fam. L. Rep.} 1463 (1980).
of the home's $140,000 in appreciation is based upon $40,000 (the down payment) plus $95,480 (the loan balance), while the community's interest is based upon $4,520 (the "paydown"). Of course, Susan also receives her one-half of the community property share. If the house is sold, the final figures are as follows:

Out-of-Pocket Costs:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Susan's separate property (down payment)</td>
<td>$40,000</td>
</tr>
<tr>
<td>Community property:</td>
<td></td>
</tr>
<tr>
<td>interest (monthly payments)</td>
<td>$140,080</td>
</tr>
<tr>
<td>capital (monthly payments)</td>
<td>$4,520</td>
</tr>
<tr>
<td>insurance, taxes, maintenance</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>$184,600+</td>
</tr>
</tbody>
</table>

Distribution of the $280,000 Sales Proceeds:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repayment of the outstanding loan</td>
<td>$95,480</td>
</tr>
<tr>
<td>Community interest:</td>
<td></td>
</tr>
<tr>
<td>return of capital</td>
<td>$4,520</td>
</tr>
<tr>
<td>share in appreciation (from capital)</td>
<td>$4,520</td>
</tr>
<tr>
<td></td>
<td>$9,040</td>
</tr>
<tr>
<td>Susan's separate interest:</td>
<td></td>
</tr>
<tr>
<td>return of capital</td>
<td>$40,000</td>
</tr>
<tr>
<td>share in appreciation (from capital)</td>
<td>$40,000</td>
</tr>
<tr>
<td>share in appreciation (from loan)</td>
<td>$95,000</td>
</tr>
<tr>
<td></td>
<td>$280,000</td>
</tr>
</tbody>
</table>

Totals to the Parties:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank (loan balance)</td>
<td>$95,480</td>
</tr>
<tr>
<td>Susan (separate property)</td>
<td>$175,480</td>
</tr>
<tr>
<td>(community property)</td>
<td>$4,520</td>
</tr>
<tr>
<td></td>
<td>$180,000</td>
</tr>
<tr>
<td>John (community property)</td>
<td>$4,520</td>
</tr>
<tr>
<td></td>
<td>$280,000</td>
</tr>
</tbody>
</table>

A quite different result occurs if all the facts are the same except that Susan 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—that is, the lender intended to rely upon the general creditworthiness of either spouse, or upon community property,

95. See In re Marriage of Moore, 28 Cal. 3d at 373-74, 618 P.2d at 211, 168 Cal. Rptr. at 665.
for repayment. Assuming that Susan can show the separate property source of her $40,000 down payment, and that the monthly payments were not a gift to her separate property, the result would be as follows:

Out-of-Pocket Costs:

Susan's separate property (down payment) ............... $ 40,000
Community property:
  interest (monthly payments) ............... $140,080
  capital (monthly payments) ............... $ 4,520
  insurance, taxes, maintenance ........... ______
  ______ $144,600+

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
  share in appreciation (from loan) ...... $95,480
Susan's separate interest:
  return of capital ....................... $40,000
  share in appreciation (from capital) .... $40,000

Totals to the Parties:

Bank (loan balance) .............. $ 95,000
Susan (separate property) ............ $80,000
  (community property) ............... $52,260
  ______ $132,260
John (community property) ............ $ 52,260
  ______ $280,000

Yet another minor change produces dramatic consequences. If title to the house is taken in joint tenancy form, as is usual in California

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96. See note 92 supra.
97. 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 236 infra.
98. Under case law that predates the adoption of equal management and control, contributions made by John, but not Susan, from community property sources to Susan's separate property would have been presumed a gift. Bruch, Management Powers, supra note 11, at nn.114-22.
for married couples who seek a survivorship provision, but the couple thereafter divorces, Susan will have lost her separate property interest unless the parties had “an agreement or understanding” to the contrary. The results, then, on the same facts as to payment sources and value, would be:

Out-of-pocket Costs:

Susan’s separate property (down payment) ............ $ 40,000
Community property:
   interest (monthly payments) ............... $140,080
   capital (monthly payments) ............ $ 4,520
   insurance, taxes, maintenance ........... ?

$144,600+

$184,600+

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
   share in appreciation (from loan) ...... $95,480
   Susan’s separate interest .................... 0

$280,000

Totals to the Parties:

Bank (loan balance) ......................... $ 95,480
Susan (separate property) ................. 0
      (community property) ................. $92,260
John (community property) ................. $ 92,260

$280,000

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 incurred in repaying such funds are ignored. Furthermore, timing and form of title are elevated in importance.

99. See note 81 supra.
None of the three examples produces an equitable result, 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.

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. The doctrine ignores the likelihood that spouses with both forms of wealth will maintain a higher standard of living than they would if they 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 meet the family’s expenses.

Second, the Pereira-Van Camp approach to the allocation of separate and community interests in businesses operated during marriage permits inconsistent results and, in practice, undervalues the community’s investment. Its questionable foundations are apparent 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. This behavior is inconsistent with a common sense understanding of the involvement that an owner, as opposed to an employee, typically devotes to a family enterprise.

101. 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); Somp v. Somp, 250 Cal. App. 2d 328, 58 Cal. Rptr. 304 (1st Dist. 1967). Occasionally, however, the more natural exuberance of the entrepreneur overcomes his or her 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, Apportionment of Income from a Spouse’s Separately Owned Property, 51 Calif. L. Rev. 161, 171 n.108 (1963). The trial court held that all 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).

102. See notes 75 & 101 supra.
Finally, actual contributions to the purchase of a major asset over time may or may not be adequately recognized. The results turn upon such seemingly trivial variables as the time and manner in which title is taken and funds are borrowed, rather than upon the parties' probable expectations or the sources from which payments are made.

Redefining Ownership Interests: Separate versus Community

One straightforward reform would do much to alleviate these problems: a return to the original definition of community property, which allocates the fruits of separate property to the community.103 For this purpose, the fruits of separate property should be defined to include natural appreciation.104 First, this reform would solve the

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103. This step has been proposed by other commentators. See, e.g., Bodenheimer, Separate-Property Marriages, supra note 50, at 408; Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 266 (1966) (“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, Apportionment of Income from a Spouse's Separately Owned Property, 51 Calif. L. Rev. 161, 202 (1963); Note, In re Estate of Neilson, 36 S. Cal. L. Rev. 481, 485 (1963).

104. The Spanish-Mexican system distinguished natural appreciation, excluding it from fruits and profits. Marienzo, Commentary on Növisima Recopilacion, Book 10, Title 4, Law 1, at Gloss I (88) in W. De Funial, 2 Principles of Community Property 137 (1943). The distinction is not immutable under the California 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 44 supra. Although the specific language of implementation was dropped in a subsequent streamlining of the constitution, see Cal. Const. of 1879 art. XX, § 8, the original intent to adopt a system with flexible contours has subsequently been recognized. Numerous definitional changes have been made over the years. Consider, for example, the development of varying ownership rules for personal injury damages: McFadden v. Santa Ana, O. & T. St. Ry., 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 at 4065, amended by 1968 Cal. Stats. ch. 457, § 2 at 1078, repealed by 1969 Cal. Stats. ch. 1608, § 3 at 3313); former Cal. Civ. Code § 5109 (derived from § 163.5) (enacted by 1969 Cal. Stats. ch. 1608, tit. 8 at 3338, and repealed by 1979 Cal. Stats. ch. 638, § 2 at 1971); Cal. Civ. Code § 5126 (West Supp. 1981), (enacted by 1969 Cal. Stats. ch. 1608, tit. 8 at 3342, amended by 1970 Cal. Stats. ch. 1575, § 5 at 3286, 1972 Cal. Stats. ch. 905, § 1, at 1609, 1979 Cal. Stats. ch. 638, § 3 at 1971). See also changes in the general community property ownership and management rules, Siberall v. Siberall, 214 Cal. 767, 772, 7 P.2d 1003, 1005 (1932) (listing changes); 1927 Cal. Stats. ch. 265, § 1, at 484 (enacting former
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 would a spouse in a brief marriage. Without giving the divorce court jurisdiction to divide separate property, this automatic and gradual shift to community property would provide equitable results in most cases.\(^{105}\) Second, this rule would obviate the current need for complex, costly litigation to untangle commingled or mixed assets.\(^{106}\) Once a separate property interest was established, only that capital would be reimbursed; all increases would become a part of the community interest, subject to equal division. The community expense doctrine, which vitiates the

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\(^{105}\) 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.

\(^{106}\) 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. See Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 Tex. L. Rev. 1054, 1059 (1957). Natural appreciation, however, 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 Funiaq, *Community Property in the United States* 282-83 (1975); 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. Foutenot, 111 F.2d 956 (5th Cir. 1940) (Louisiana rule) with Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909) (California rule). See also Wisc. A.B. 370 § 766.32 (1981) (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 the marriage are community property. See text following note 123 infra. See generally de Funiaq & Vaughn, *supra* note 48, 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.
supposed ameliorative effects of California's apportionment doctrines, would be rendered unimportant, because income from all sources would belong to the community. Finally, the inequities of the artificial "lender's intent" doctrine would be ended: rather than characterize loan proceeds according to whether the lender expected repayment from separate wealth or from the community, all loans obtained during marriage would produce community property, and purchases made on credit would be divided equally, except for actual separate property contributions. Similarly, a home purchased before marriage would be divided equally, except to the extent of separate property actually invested in the property. Although this rule would be less favorable to the separate property owner than is the current case law that controls when property is acquired before marriage and held in the sole name of the purchaser, it could appropriately be combined with a rule that would return separate property contributions whenever possible after preservation of direct community property contributions. This result would be far more just than that imposed by the current case law rule, which works a forfeiture of separate property interests when they are placed in jointly titled property.

107. 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 77 supra.

108. This result 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.


110. 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, when community funds were invested in violation of the good faith management standard.

The compromises are these: First, rather than impose blanket divorce court jurisdiction over the separate property, the only other plausible response to the inequities of Beam,112 a gradual shift of separate to community property would ordinarily occur, affording greater protection to spouses in lengthy marriages than to those in brief ones. Although the separate property interest would never convert entirely into community property absent donative intent,113 the passage of time and the working of inflation would effectively replace separate with community interests. Second, the current rule that ignores actual contributions to assets purchased over time and inappropriately credits appreciation to the loan would be replaced. Instead, the community’s direct contributions would be secured, and all appreciation would belong to it. At the same time, the separate property would be guaranteed the return of its investment far more frequently than at present, a rule of special importance in short marriages.

The appreciation in other mixed or commingled assets would also be divided equally as community property, reducing the current incentive to recharacterize banking transactions or agreements after the fact to attribute the most favorable investments to the separate property.114

Several variations of this approach are possible. For example, the 1981 Submission Draft of the Uniform Marital Property Act distinguishes between “appreciation”115 and “income.”116 At divorce, income 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.”117 In contrast, appreciation belongs to an individual’s separate property,118 and is subject to “equitable apportionment”119 at divorce.

Unless appreciation may be divided, selective investments could

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112. See notes 73-80 & accompanying text supra.
113. Compare note 121 infra.
114. The incentive to attribute losing investments to the community would remain.
115. Appreciation is defined as the “realized or unrealized increase in value of property.” Uniform Marital Property Act § 1(2) (Submission Draft 1981).
116. Income, under the Draft, consists of “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.” Id. § 1(9). The Wisconsin proposal provides for sole management of separate property income until “any realization or partition.” Wis. A.B. 370 § 766.51(3) (1981).
117. Uniform Marital Property Act § 16(b) (Submission Draft 1981).
118. The Draft uses the term “individual property.” Id. § 3(c)(2)(v).
119. Id. § 16(c).
vitiate the purposes of the "fruits" rule. Accordingly, should California, too, choose to distinguish between appreciation and income, it should provide divorce and probate courts with authority to make awards from separate property appreciation. A perhaps better rule would include both forms of increased wealth in community property but permit unequal distribution in appropriate cases, such as to retain full title to inherited property of historical or emotional significance in the heir's name.

Instead of adopting this major reform, California could institute a number of more limited reforms, each designed to rectify one facet of the problems outlined above. Thus, a special rule could be enacted to control the division of the matrimonial home. More generally, the court could be given authority to award separate property, or at least divide certain forms of separate property, such as joint tenancy or all jointly held property. The family expense doctrine could be abrogated by legislation, as could the doctrines that characterize loan proceeds by the "lender's intent" and credit the appreciation of property purchased with borrowed funds according to that characterization. Finally, a single formula could replace judicial discretion in valuing interests in businesses and professions that contain both separate and community components. This piecemeal approach is a less preferable 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. Nevertheless, it could institute important improvements.

120. See note 105 supra.
121. 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. Because the separate property corpus would eventually be forfeited, this scheme would require a conforming constitutional amendment. See Cal. Const. art. I, § 21, quoted in text accompanying note 93 supra. The general acceptability of this conversion scheme is doubtful, however, because a marriage that is sufficiently lengthy to justify a universal community in one person's view may seem too brief to another.
122. See notes 319-27 & accompanying text infra.
123. See note 38 supra (listing the rules for jurisdiction and division at divorce in the community property states) and notes 315-16 and 404-07 infra (describing separate property awards at death).
124. See notes 77, 101-02 & accompanying text supra.
Mixed Assets that Require Special Ownership Rules

Some forms of property merit special treatment under any system. In this section, these assets, the current definitions of ownership interests in them, and needed reforms are discussed, 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.

Life Insurance Policies and Pensions

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

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 that is owned by the wronged spouse. If 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,


126. CAL. CIV. CODE § 5125(b) (West Supp. 1981); see also 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).
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) at
her death. Wishing to divide her assets equally between her father and
her husband, she names her father beneficiary of a $50,000 community
property life insurance policy, and leaves the residue of her estate to
her husband by will. Her husband, however, may challenge her at-
ttempted unilateral gift of the insurance proceeds after her death and
recover his community share ($25,000).127 Should he do so, only
$25,000 of her $100,000 share in the couple’s community property will
pass to her father via the policy. The remaining $75,000 of her share
will pass to her husband under her will,128 to be added to his own
$25,000 community share of the insurance policy and $75,000 share of
the couple’s other community assets. Had she made a $50,000 bequest
to her father instead and named her husband as both 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 ($50,000), and her husband would also have
received a total of $50,000 from her share of their assets ($25,000 under
her will and $25,000 as the beneficiary of the policy).129 As before, he
would also retain his $100,000 ownership share in the couple’s property
($25,000 in policy benefits and $75,000 in other assets).

These disparities should be eliminated. The current system can be
improved by insisting that beneficiary designations of community
property assets be made jointly, avoiding unanticipated gift chal-
lenges.130 To the extent that problems persist, challenges to gifts or be-
quests 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 dece-
dent for disposition. Thus, all joint tenancies, insurance or pension
benefits, or other 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

127. CAL. PROB. CODE § 201 (West 1956) provides: “Upon the death of either husband
or wife, one-half of the community property belongs to the surviving spouse; the other half is
subject to the testamentary disposition of the decedent, and in the absence thereof goes to
the surviving spouse . . .”

128. 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 186 (2d ed. 1973): “[T]hese [insur-
ance] proceeds . . . are not part of [the] estate for purposes of the forced share of a surviving
spouse.”

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

130. Bruch, Management Powers, supra note 11, at n.42 (recommendation 8).
to set aside any of the transfers as improperly impinging on community property rights.\textsuperscript{131}

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 should be subject to that spouse's set-aside if the former spouse did not give consent to the naming of the third party. The rule of Benson v. City of Los Angeles,\textsuperscript{132} 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.\textsuperscript{133} 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 the pension payments, asserting her community ownership interest. Her suit was denied by the California Supreme Court on the ground that she was not his "widow."\textsuperscript{134} This reasoning collapses under careful analysis. For example, if community property life insurance proceeds are left to a third party, a surviving spouse who challenges the disposition does not claim to be that third person. In either situation, 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.\textsuperscript{135} Furthermore, such plans

\textsuperscript{131} This is a modification of the augmented estate concept found in the Uniform Probate Code. See notes 409-10 & accompanying text infra.

\textsuperscript{132} 60 Cal. 2d 355, 394 P.2d 649, 33 Cal. Rptr. 257 (1963).

\textsuperscript{133} Id. at 359, 384 P.2d at 651, 33 Cal. Rptr. at 259.

\textsuperscript{134} Id.

\textsuperscript{135} See Bruch, Management Powers, supra note 11, at n.42 (recommendation 7). Others have identified the same problem. The United States Department of Justice Task Force on Sex Discrimination, for example, reports that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001-1381 (1976), 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 have a portion of his benefits paid to his spouse after his
should be required to include former spouses in the class of authorized beneficiaries for death or survivor's benefits.\textsuperscript{136}

Death of the Nonemployee Spouse Before Death of the Employee

The California Supreme Court promulgated another peculiar rule in \textit{Waite v. Waite},\textsuperscript{137} which involved the termination of a thirty-three 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. Noting that this rule would vitiate the mandated equal division of community property at divorce, however, 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.\textsuperscript{138} This remarkable substitute of equitable distribution, and the court's accompanying remarks on evaluating the damage that its holding had inflicted on Mrs. Waite's property rights,\textsuperscript{139} are as unsound as they are baffling. The opinion forces a divorce court seeking an equal division to consult actuarial tables, but to 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, 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 husband and therefore is entitled to significant present compensation for the interest that she may be denied by the court's 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." \textit{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).

\textsuperscript{136}. \textit{See also id.} at 47.
\textsuperscript{137}. 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).
\textsuperscript{138}. \textit{Id.} at 474 n.9, 492 P.2d at 22 n.9, 99 Cal. Rptr. at 334 n.9.
\textsuperscript{139}. "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 defendant's accepting temporary judicial assignment." \textit{Id.}
"terminable interest" rule. If, contrary to statistical predictions, she ultimately predeceases him, it will be too late to request additional compensation because the property division will have been made final.\textsuperscript{140} Instead, because of the spouses' relative life expectancies, the \textit{Waite} "terminable interest" rule will almost always require that a working wife pay her husband with current dollars for the predicted future value of her pension after his death, while her estate will receive little should she predecease him.

Although couples should remain free to buy one another's pension interests when the sale is mutually agreeable, the forced forfeiture or sale of possible future benefits under the \textit{Waite} rule is an oddity that should be legislatively overruled.\textsuperscript{141} Benson and \textit{Waite} were designed to curtail a woman's community property ownership interests in her former husband's employment benefits; they are gender-biased both in conception and in operation, and have a negative impact on the already poor financial status of elderly women.\textsuperscript{142} Pension interests are an increasingly important asset in many families. As such, they should be consistently treated as property, and the interests of both spouses should be fully protected.

\textbf{Disability and Tort Recoveries that Include Compensation for Lost Wages}

A spouse may be compensated for personal injuries by a damage recovery, public or private disability benefits, or workers' compensation. The cases and statutes have inadequately considered to what extent characterization of these funds should reflect that which was lost, and to what extent the source of premium payments should govern under tracing principles. Nevertheless, the rules that currently govern a divorce court's distribution of recoveries from third parties for personal injury are generally satisfactory.

There are two statutory directives. The first concerns recoveries from third parties: the timing of the injury rather than the nature or timing of the tort recovery controls, and recoveries, whenever received,


\textsuperscript{141} See \textit{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."). Economic considerations justify deferred division in such cases. \textit{Cf.} \textsc{Cal. Civ. Code} § 4800(b)(1) (West Supp. 1981), set forth at note 2 \textit{supra} (award of asset to one party on conditions in lieu of immediate division); notes 304-12 & accompanying text \textit{infra} (deferred division cases involving homes and businesses).

\textsuperscript{142} See note 339 \textit{infra}.
for personal injuries that were suffered during cohabitation are community property, subject to a special rule of division at divorce. Under this rule, recoveries that have been 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 not more than one half, be awarded to the uninjured spouse. Again, the kinds of losses that were sustained are not mentioned, but the court is directed to consider "the economic condition and needs of each party, the time that has elapsed since the recovery of the damages of the accrual of the cause of action, and all other facts 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 the award, and frequently he or she will be awarded the total amount.

The rule probably works well in most cases. Commingling

143. "(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).

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

145. Id.

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. Section 4800 is set forth at note 2 supra. 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
alone, however, 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 operation to uncommingled damage recoveries.

Next, to lessen untoward tax effects, minor rewording is also needed to indicate that the court's award establishes the spouses' relative community and separate interests in the property. Finally, the provision should be duplicated in the Probate Code so that the same considerations will be relevant if the marriage continues until the death of one of the spouses.

The second relevant statute defines personal injury damages that are received by one spouse from the other as the separate property of the injured spouse. There is no express right to reimbursement from the injured party's recovery for expenses paid from either the commu-
nity property or the separate property of the tortfeasor, and no special rule controls the disposition of the recovery at the termination of marriage. An express right to reimbursement should be enacted, requiring the injured spouse, upon recovery of judgment against the tortfeasor spouse, to repay amounts advanced from the community or from the tortfeasor's separate property, to the extent that a damages offset has not already accomplished this result. In addition, for the same reasons that the Law Revision Commission recommended in 1966 that recoveries from third parties be restored to community property treatment, recoveries for interspousal torts should also become community property, subject to a special rule of division at the marriage's termination.

150. Cf. CAL. CIV. CODE § 5126(b) (authorizing such reimbursement from other separate property recoveries for personal injuries), set forth at note 143 supra.

151. Cf. id. § 4800(c) (directing that at least one-half of uncommingled community property personal injury damages be assigned to the party who suffered the injuries). Section 4800 is 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, because 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).

153. See California Law Revision Commission, supra note 149, at 609-10. The Commission noted that it is incongruous to characterize recoveries for future earnings or medical expenses as separate property because 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 ANN. art. 2344 (West Supp. 1981) (providing separate property treatment except for community earnings and injury-related expenses paid by the community). See note 146 supra. Furthermore, 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 inadvertent 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, Management Powers, 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. Id. at nn.179-82 (recommendation 40).

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
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, as equal owners, are equally entitled to the plan's proceeds.

Had no injury occurred, however, wages earned after divorce would have been the separate property of the injured spouse. There seems to be no policy reason for a different ownership rule for substituted income payments that will be received for postdivorce unemployment simply because the injury occurred during marriage. It is unlikely that the spouses contemplated any such result when coverage was obtained. One could reach an appropriate result through the fiction of an implied gift of coverage to the injured spouse. A more direct analysis would conclude that recovery for injuries that will continue into the postdivorce period should normally go to the injured spouse, subject to the uninjured spouse's right to support, when appropriate, and to community property claims for reimbursed premium costs, displaced retirement benefits, and receipts in excess of lost earnings and expenses. As with the 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. Section 4800(c),

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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 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION chs. 12-17 (2d ed. 1981); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Workmen's Compensation §§ 158-197 (8th ed. 1973 & Supp. 1980). Only rarely is a lump
which governs the division of personal injury damages that are presumptively community property, should be broadened to include all forms of recovery for personal injuries. The new rule should be qualified, however, to ensure normal community property treatment for any portion of an injury recovery that replaces community property retirement paid in advance for anticipated losses. *Id.* § 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 text accompanying notes 132-36 supra. Detailed review of the presumptions and distribution patterns of the Labor Code would be appropriate to ascertain to what degree a social insurance scheme or 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. See note 2 supra. 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); *In re Marriage of Jones*, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

Codification of these cases is advisable, because 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 when earnings were separate property were also separate property. Compare 1972 Cal. Stats. ch. 905, § 1, at 1609 with CAL. CIV. CODE §§ 5118, 5119 (West Supp. 1981). Civil Code § 5126(a), set forth in note 143 supra, now provides that damage recoveries are separate property only if the cause of action arises after separation, that is, at a time when earnings would be separate property; the date of recovery is irrelevant. Recoveries after separation or 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. See note 2 supra. 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.
ment benefits. Excess payments alone should be subject to the court's discretionary division.

Defining the Current Value of Increased Capacity to Earn

*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 alone would justify. This important extra is "goodwill," an intangible yet valuable asset of most businesses and professions that entail skill and reputation.157

Because cases involving community property businesses or professional practices are common, California appellate courts have frequently considered goodwill valuation questions in recent years.158 The case law is confused and internally inconsistent, however,159 and


159. 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 when 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 when net annual income was approximately $45,000). Cf. *In re Marriage of Aufmuth,* 89 Cal. App. 3d 446, 463-64, 152 Cal. Rptr. 668, 678-79 (1st Dist. 1979) (no goodwill in law practice when husband's salable interest exceeded $35,000 and husband's gross salary was $65,000 plus four annual bonuses; court confused husband's contribution to goodwill with community ownership in firm's goodwill).
the California Supreme Court has not yet addressed the issue.

The current value of goodwill to a purchaser, as indicated, is a reflection of the expected future income or opportunity for income that results from the owner's past efforts. Yet California courts have sometimes become confused, even stating in one divorce case that one may not determine the present value of goodwill by considering the expected amount of future income. These decisions lose 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.

Approved valuation techniques, therefore, often take into account a business' recent earnings in assessing a current value for the expectation that future earnings will exceed those that future efforts alone would produce. Because many factors affect goodwill, there appear to be almost as many formulas as there are accountants, and the case

160. CAL. BUS. & PROF. CODE § 14100 (West 1964); Miller, Valuing the Goodwill of a Professional Practice, 50 CAL. ST. B.J. 107, 151 (1975).


162. Some courts and commentators argue that double payment is required if one must both purchase goodwill and 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 CAL. TRIAL LAW. ASS'N F., October 1979, at 15.


164. 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 of a Professional Practice, in AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, FOURTH ANNUAL BAY AREA COUNTIES REGIONAL FAMILY LAW SYMPOSIUM 233 (1978). 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 four categories: (1) gross income, (2) net income, (3) excess earnings capitalization, or (4) 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.
law displays the resulting confusion.\textsuperscript{165} Appellate courts, reluctant to curb trial court discretion in this relatively new area, have approved sharply disparate values for seemingly comparable practices or businesses.\textsuperscript{166}

The current practice may also be embraced by the bench and bar for pragmatic, rather than doctrinal, reasons. Many attorneys have remarked, "We know how much the goodwill is worth; it's worth the equity in the house." If, as this comment suggests, mismeasurement of goodwill serves to permit equitable results in some cases, the problem is that comparable flexibility is unavailable to those without professions or businesses.\textsuperscript{167} A reasoned reform of community property should consider the problems that motivate such manipulation, while also seeking a principled method of valuing goodwill.

That the asset does exist is clear; both case law and statutory de-

\begin{itemize}
\item \textsuperscript{166} See note 159 supra.
\item \textsuperscript{167} Accountants consider goodwill to represent the value of a practice over and above a reasonable salary. Adams, \textit{Professional Goodwill as Community Property: How Should Idaho Rule?}, 14 IDAHO L. REV. 473 (1978). It follows that salaried professionals such as staff attorneys ordinarily will not possess goodwill. To the extent that a spouse's reasonable salary 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 170-203 & accompanying text infra. This measure of human capital complements the measure of business capital called goodwill.
\end{itemize}
Developments in other areas are consistent on this point. Some greater certainty regarding valuation, however, is needed. In cooperation with members of the accounting profession, an effort should be made to develop statutory formulas to value the goodwill of major classes of business. The legislated test should be designed to control absent a showing of extraordinary circumstances. The benefits in reduced costs of litigation and increased uniformity would outweigh the theoretical possibility of less precise results in individual cases.

Enhanced Personal Earning Capacity (Human Capital)

Recent divorce cases in several states have recognized financial claims by one spouse based on an education, degree, or license that was obtained by the other spouse during the couple's marriage. The rea-

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169. For example, one such formula might measure three months' accounts receivable or multiply one year's net income by a given factor.

170. Wilcox v. Wilcox, 173 Ind. App. 661, 365 N.E.2d 792 (1977) (court was constrained by statute prohibiting alimony absent incapacitation, but awarded wife virtually all the traditional marital assets); Horstmann v. Horstmann, 263 N.W.2d 885 (Iowa 1978) (court held that 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, 578 S.W.2d 266 (Ky. 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 DeLa Rosa, 390 N.W.2d 755 (Minn. 1981) (reimbursement of husband's living expenses and direct educational costs awarded to wife who was capable of self-support and therefore ineligible for support); In re Marriage of Cropp, 48 U.S.L.W. 2286 (D. Minn. Sept. 26, 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. 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 in which 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 also In re Marriage of Sullivan, 127 Cal. App. 3d 656 (4th Dist. 1982) (opinion [later withdrawn] that would have permitted
soning parallels that of the goodwill cases: efforts during the marriage have produced an asset that can be expected to provide future returns beyond those that would have been generated in its absence. Although various methods have been applied to value this asset, the theories and rules for compensating the nonstudent spouse differ from state to state, there is a striking similarity in the facts that have initially prompted judicial relief: "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


171. See, e.g., Inman v. Inman, 578 S.W.2d 266 (Ky. 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); note 190 infra. See also Krauskopf, Recompense, supra note 170, at 382-84 (deducting investment costs such as out-of-pocket expenses, tuition and books from expected total earnings in determining discounted differential earnings).

172. 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 170, at 18; Krauskopf, Recompense, supra note 170, at 389-90. (2) Partnership. Comment, Property Theory, supra note 170, at 283. (3) Restitution, reimbursement, unjust enrichment, or return on investment. In re Marriage of DeLa Rosa, 390 N.W.2d 755 (Minn. 1981); Sullivan Brief, supra note 170, at 17-18, 20; Krauskopf, Recompense, supra note 170, at 392; Comment, Property Theory, supra note 170, at 283; 4 A.L.R. 4th 1294, 1298-99 (1981). (4) Asset (education, professional license or increased earning capacity) is marital property subject to property distribution. Sullivan Brief, supra note 170, at 21-22; Comment, Property Theory, supra, note 170, at 283; 4 A.L.R. 4th 1294, 1295-96 (1981).

In some instances the courts have refused to consider the education, a professional license, or increased earning capacity itself as being subject to division. Many of these same courts, however, have tried to mitigate the resulting injustice through other awards made to the claimant spouse. Stern v. Stern, 66 N.J. 340, 345, 331 A.2d 257, 260 (1975) (earning capacity held a factor to be considered in equitably distributing property and setting alimony); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979); Diment v. Diment, 531 P.2d 1071, 1073 (Okla. Ct. App. 1975) ("permanent alimony" awarded in lieu of property division). See also cases cited in note 170 supra. In 1947, a California court awarded $7500 to a woman who had put her husband through medical school "for compensation therefor . . . and by reason of [her husband's] extreme cruelty to [her] and in view of the potential earning power now and in the 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).
leaves the marriage with an education and increased earning potential, while the other spouse is given nothing for her efforts.\textsuperscript{173} A New Jersey judge, recently recognized the property interests of a wife in the medical education of her husband, noting: "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."\textsuperscript{174}

In California, where recognition of a property interest would seemingly require that its value be subjected to equal division, the characterization issue is not yet settled. Neither the California Supreme Court nor the legislature has addressed the issue.\textsuperscript{175} Although one trial court's restitutionary award was later interpreted as an enforceable award of lump sum alimony,\textsuperscript{176} the \textit{Todd} and \textit{Aufmuth} cases suggest that nothing more is required than a traditional division of other community assets or a modifiable award of spousal support.\textsuperscript{177} Most recently, these latter cases were distinguished in \textit{In re Marriage of Sullivan}\textsuperscript{178} by the first California appellate opinion to direct property relief on such facts. The \textit{Sullivan} court, however, refrained from order-

\textsuperscript{173} Comment, \textit{Property Theory}, supra note 170, at 282-83.


\textsuperscript{175} 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. \textit{Compare} CAL. CIV. CODE \S 4800(b)(4) (West Supp. 1981) \textit{with In re Marriage of Aufmuth}, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668, 677 (1st Dist. 1979).

\textsuperscript{176} 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 172 supra.

\textsuperscript{177} In Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969), 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 manifestly is of such a character that a value for division [purposes] cannot be placed upon it." \textit{Id.} at 791, 78 Cal. Rptr. at 134. 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 . . . ." \textit{Id.} Ten years later, another appellate panel followed \textit{Todd}, refusing to reconsider the characterization and valuation issues. \textit{In re Marriage of Aufmuth}, 89 Cal. App. 3d 446, 460-61, 152 Cal. Rptr. 668, 677-78 (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 that "the trial court must have considered husband's earning capacity in awarding spousal and child support." \textit{Id.}

ing equal division in all cases, suggesting instead that reimbursement principles might sometimes apply. Because this opinion subsequently was withdrawn pending a rehearing, California law remains as before.

Todd and Aufmuth 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. Furthermore, assertions that modifiable spousal support can redress property division inequities, once offered to avoid ownership treatment of goodwill and pensions, have proved false. First, significant support awards are rarely entered. Second, they are infrequently enforced. Third, support may terminate long before recompense has been made, because court-awarded support ends upon the death of either spouse or the remarriage of the supported spouse. Fourth, and perhaps most importantly, the nonstudent spouse is often capable of self-support, although at a much more modest standard of living than that anticipated by the educated spouse. If so, no “support,” hence no recompense at all for the lost ownership interest, may be received.

Facts that were assumed to preclude a support remedy are involved in In re Marriage of Sullivan, prompting the fourth district

179. Id. at 681-83. See note 190 infra for a discussion of the court’s suggested valuation approaches.


183. 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, U.S. National Commission on the Observance of International Women’s Year (1977). 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).

184. 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.”


186. 4th Civ. No. 23634 (Cal. Ct. App. 4th Dist. 1981). The Sullivans were married in 1967, as she was completing her third year of college and he his fourth. Except for a four-
court of appeal, in its initial opinion, to distinguish Todd and Aufmuth and provide a form of property relief. The court correctly reasoned that the community can hold a financial interest in an intangible asset that necessarily goes to one spouse after divorce. It also recognized that such a community interest arises if any portion of a spouse’s enhanced earning capacity is acquired during marriage. However, the court’s suggested valuation and recompense techniques were inadequately reasoned. Perhaps their inconsistencies were prompted by

In the month 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 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 170, at 1-2, 20. Had the loan been community property, Mrs. Sullivan would have been equally responsible for its repayment. See notes 280-84 & accompanying text infra. The court concluded that Mrs. Sullivan’s established ability to support herself prevented an award of spousal support under CAL. CIV. CODE § 4801 (West Supp. 1981). 127 Cal. App. 3d at 664-68. Its discussion was, however, incomplete. Although the court’s opinion listed the subsections of § 4801, it did not discuss subdivision (9), which specifically authorizes spousal support based upon “any . . . factors which [the court] deems just and equitable.” Instead, it focused on the impropriety of awarding support as a substitute for a foregone or lost property right. In this context, the discussion was somewhat circular. If enhanced earning capacity did not constitute property for divorce purposes, an award of spousal support in recognition of the equities need not constitute a disguised property award. The result would turn on the method used by the court in establishing the amount of its award. In re Marriage of Cobb, 68 Cal. App. 3d 855, 137 Cal. Rptr. 670 (4th Dist. 1977), discussed by the court, is a modification case that is simply not on point.


188. Id. at 672, 675, 678-80.

189. The court recognized that any portion of an education can be viewed independently. Thus, it remarked that the trial court would be free on remand to consider Mrs. Sullivan’s education and bachelor’s degree, although only one year of her college studies were completed during the marriage. Although this dictum was illuminating in this regard, it also was somewhat puzzling because Dr. Sullivan apparently made no claim to Mrs. Sullivan’s education or degree, and the matter therefore seemingly was not before the appellate court.

190. The court confused California’s installment sale cases with restitutionary principles. Installment sales analysis requires that the respective shares of the purchase price be identified, and that excess value, or profit, be distributed according to the ratio established by the respective cost figures. In the case of enhanced earning capacity, it would be virtually impossible to reconstruct the lifetime educational costs that were incurred prior to marriage, and without this figure, no pro rata approach is possible. In contrast, restitution to avoid unjust enrichment may be accomplished by either (a) reimbursement of the costs incurred, or (b) a damages award that measures the benefits received. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.5 (1973). In cases like Sullivan, it may be possible (a) to assess the costs incurred by the community, providing a basis for a reimbursement damages measure, or (b) to measure one’s lifetime earning capacity at the time of divorce and subtract the lifetime earnings that would have been expected if the spouse had retained only the knowledge and skills that were present when the couple
the court's reluctance either to leave Mrs. Sullivan without a remedy or to provide her the full proportionate community interest in Dr. Sullivan's enhanced earning capacity that a rigorous application of California's community property doctrines might be thought to dictate. The court's valuation remarks would have authorized a broad range of trial court dispositions. Although flexibility may well be desirable, unjust enrichment principles or a legislative solution might better serve the court's concerns.

Although the equities may support special rules for division at divorce, they do not support a blanket refusal to recognize economic reality of the sort seen in Todd and Aufmuth. Important rights to future income are disposed of by marital property divisions, 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 in which one spouse studies while the other works. 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." Next, there is the direct monetary contribution of the working spouse. Finally, there may be opportunity costs to the working spouse if that person thereby foregoes further education that might enhance his or her own lifetime earning capacity. All 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 reound to both of them.

married. This latter measure was perhaps misunderstood by the Sullivan court. Although Dr. Sullivan had obtained the final year of his undergraduate education plus all of his medical education and training during marriage, the valuation examples given by the court addressed only the much more limited question of valuing a license to practice. See 127 Cal. App. 3d at 660-61, 682-83 & n.17.

Because unjust enrichment is an established equitable doctrine, ample precedent exists to guide the courts in choosing appropriate measurement standards. It is even possible that no unjust enrichment will occur in some cases if a spouse retains the asset free of community claims. See note 350 infra. Contrary to the Sullivan court's suggestion, reimbursement principles are an acceptable mode of adjusting property interests at divorce. Compare In re Marriage of Sullivan, 127 Cal. App. 3d at 683-84 & n.18, with In re Marriage of Warren, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (2d Dist. 1972).

192. Id. at 384.
193. Id. at 387.
194. Id.
195. The economic concept of human capital views education as an investment produc-
If the marriage remains intact, the investment decision may prove to have been a wise one. If divorce occurs, however, the human capital increase leaves the marriage with the student spouse, while the other continues to bear a share of the opportunity costs.\(^{196}\) What was an economically sound investment is thus transformed into a windfall for one spouse and a serious loss to the other.

Statistics on the postdivorce wealth of California men and women emphasize the immediate and dramatic consequences of disparate earning capacities in the postdivorce period.\(^{197}\) To the extent that these 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 as a form of property could relieve the inequity. Developed in cases involving formal education and professional licenses, the theory applies equally when earning potential has been increased through other community

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### Post-Divorce Incomes of Couples Married 18 Years or More

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

<table>
<thead>
<tr>
<th>Pre-Divorce Family Income</th>
<th>Mean Yearly Support Awarded to Wife*</th>
<th>Median Post-Divorce Income</th>
<th>Median Post-Divorce Income As Percentage of Pre-Divorce Family Income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Wife's (Adjusted)†</td>
<td>Husband's (Adjusted)‡</td>
<td>Wife (Adjusted)‡</td>
</tr>
<tr>
<td>under $20,000 (n=12)**</td>
<td>$2,460</td>
<td>$7,500</td>
<td>$14,940</td>
</tr>
<tr>
<td>$20-29,000 (n=13)</td>
<td>$4,200</td>
<td>$6,500</td>
<td>$20,000</td>
</tr>
<tr>
<td>$30-39,000 (n=16)</td>
<td>$5,400</td>
<td>$14,500</td>
<td>$29,004</td>
</tr>
<tr>
<td>$40,000 or more (n=22)</td>
<td>$13,700</td>
<td>$16,875</td>
<td>$33,700</td>
</tr>
</tbody>
</table>

*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.
efforts. 198

The proposals of Equity in the Family, a membership organization based in Northern California, have encompassed this broader definition of enhanced earning capacity. 199 Because the concept is akin to those that may be relevant in wrongful death or tort cases, 200 and is familiar to economists who study career and educational decisions, 201 a

<table>
<thead>
<tr>
<th>PRE-DIVORCE YEARLY FAMILY INCOME</th>
<th>PER CAPITA FAMILY INCOME</th>
<th>POST-DIVORCE PER CAPITA INCOME</th>
<th>POST-DIVORCE PER CAPITA INCOME AS % OF OLD FAMILY PER CAPITA INCOME</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>WIFE (Adjusted)*</td>
<td>HUSBAND (Adjusted)†</td>
<td>WIFE (Adjusted)</td>
</tr>
<tr>
<td>Under 20,000</td>
<td>$ 5,750</td>
<td>$6,500</td>
<td>$11,950</td>
</tr>
<tr>
<td>(n=12)**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$20-29,000</td>
<td>$11,500</td>
<td>$6,100</td>
<td>$11,500</td>
</tr>
<tr>
<td>(n=13)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$30-39,000</td>
<td>$12,306</td>
<td>$9,100</td>
<td>$18,000</td>
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<td>(n=16)</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>$40,000 or more</td>
<td>$20,162</td>
<td>$8,500</td>
<td>$28,640</td>
</tr>
<tr>
<td>(n=22)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* 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 in which the percentages are based.

199. 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).
body of measurement knowledge already exists.

For most couples, the ability to earn is the sole significant financial asset at divorce.\textsuperscript{202} 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 providing comparable benefits to those who depend on wages alone for sustenance. The most pressing need in California divorce reform is to find a way to distribute more fairly the true community wealth of former spouses. Recognition of enhanced earning capacity, either as a property interest or in some other significant fashion, is an important avenue to that end.\textsuperscript{203}

Removing Special Treatment for Some Forms of Marital Wealth

Doctrinal simplification and fairer treatment of 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 California. As to each, the historical basis for distinctive rules has disappeared.

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.\textsuperscript{204} His wife’s earnings, in contrast, reverted to separate property once the couple lived “separate and apart.”\textsuperscript{205} The ambiguities of

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\textsuperscript{202} Weitzman & Dixon, \textit{Alimony Myth}, supra note 13, at 169 (“[M]ost divorcing couples are young, and have little property at the time of the divorce . . . .”); see also Weitzman & Dixon, \textit{Alimony Myth}, supra note 13, at 184-85; note 197 supra.

\textsuperscript{203} Because of the differing equities on various facts, some flexibility in dispositions is needed. See note 350 infra. In the absence of legislative reform, unjust enrichment principles should be applied to measure the community’s interest in a spouse’s capacity, as suggested in note 190 supra. A better ultimate resolution might be achieved either by providing a special rule directing equitable division of this asset, if it is confirmed as a property interest, or by authorizing an equitable award on some other theory, such as lump sum support.


\textsuperscript{205} 1869-70 Cal. Stats. ch. 161, § 2, at 226; former CAL. CIV. CODE § 169, AN ACT TO
this language created controversy only infrequently until Civil Code section 5118 was amended in 1971 to extend to husbands the rule that makes earnings separate property while spouses live separate and apart.

Because husbands’ earnings are much greater than wives’ earnings for most families, the new rule has major implications. First, it changes the ownership of current earnings even though the spouses have taken no legal steps to alter their relationship, frequently catching one or both spouses 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. Finally, should the couple later divorce, the vague test invites litigation as the parties argue over the date at which their informal separation evis-

ESTABLISH A CIVIL CODE ch. 3, § 169, at 57 (1872); former CAL. CIV. CODE § 5118, 1969 Cal. Stats. ch. 1608, § 8, at 3340.


207. 1971 Cal. Stats. ch. 1699, §§ 1, 2, at 3640 (amending Civil Code §§ 5118, 5119). CAL. CIV. CODE § 5118 (West Supp. 1981), now provides: “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.”

208. See generally Bruch, Informal Marital Separations, supra note 206.

209. “[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 non-earner that the non-earner’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 non-earning 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.” Bruch, Informal Marital Separations, supra note 206, 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 because amounts “could” all have been spent on his necessities of life).
denced a final marital rupture.\textsuperscript{210}

Except for this aberrational rule on earnings, California's family law has consistently recognized marriages and the incidents of marital status until divorce or the death of one spouse.\textsuperscript{211} Even today, after the community has ceased to benefit from earnings under section 5118, the community is nevertheless implicated for whatever new obligations either spouse incurs—not only when creditors seek satisfaction, but also between the parties upon dissolution.\textsuperscript{212}

Although couples are free to agree to alter their property rights during marriage,\textsuperscript{213} only section 5118 imposes important property changes on them absent an agreement or court order.\textsuperscript{214} The inequities of a rule that gives legal effect to informal separations and seriously depletes community resources are apparent. Section 5118 should be repealed.\textsuperscript{215} As a result, balance would be restored, a litigious question would be removed, and jockeying for financial advantage would be lessened.


\textsuperscript{211} Only death or a final judgment of dissolution or nullity terminates marriage. \textit{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).

\textsuperscript{212} \textit{CAL. CIV. CODE} §§ 5116, 5122 (West Supp. 1981); Bruch, \textit{Informal Marital Separation}, supra note 206, at 1067-68. But see In re Marriage of Hopkins, 74 Cal. App. 3d 591, 600, 141 Cal. Rptr. 597, 602 (2d Dist. 1977) ("That an unpaid [post-separation] 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.").

\textsuperscript{213} \textit{CAL. CIV. CODE} § 5103 (West 1970).

\textsuperscript{214} Bruch, \textit{Informal Marital Separations}, supra note 206, 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.

\textsuperscript{215} 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. \textit{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, Recommendation ID (Final Report 1979). The Family Law Section's Executive Committee reversed its position in 1981, however.}
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 a "putative spouse." 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 if the marriage had been valid. Although the section's language implies that the couple's property will be divided equally in all cases, legislative history makes clear that in cases of void marriages, which entail bigamy or incest, the drafters intended equal divisions only when it would operate to the protection of "an innocent spouse." As to voidable marriages, however, the Governor's Commission on the Family recommended equating the rules for marital termination with those for other marriages:

[I]f 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 so 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.

This recommendation was not followed, however, and voidable marriages are also governed by section 4452.

The section needs to be amended. 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 specify the results for situations involving 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

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217. "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 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).
218. GOVERNOR'S COMMISSION REPORT, supra note 36, at 36-37.
219. Id. at 36.
220. See note 217 supra.
should be prescribed.  

There is good reason to eliminate special rules for void and voidable marriages, both during the relationship and upon termination. Whether innocent or guilty, these spouses have entered into 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 have notice that this purported marriage is flawed. If the fraudulent spouse is forbidden any share in the marital gains, the injured spouse may receive a windfall that is unrelated to the degree of emotional damage incurred, especially if the relationship has lasted many years. A rule that permits an unequal property award or a suit for damages 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 nevertheless may have worked at home or for wages as a partner in the building of the couple’s financial welfare. Absorbing property treatment for those spouses into the normal marital property regime simplifies management, creditor access, and probate law, and seems more likely than any other rule to comport with the parties’ expectations.

Similarly, Civil Code section 4455, which authorizes support awards to putative spouses, should be extended to any spouse in a void or voidable marriage in which at least one spouse initially held a good-faith belief in the validity of the marriage. To the extent that a

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223. 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.

224. 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 should be permitted to take as legal spouses in both respects. Only cases with surviving nonputative spouses or multiple surviving “spouses” need special rules. See notes 383-86 & accompanying text infra.

225. “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).
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."  

No statutory scheme can adequately anticipate the variety of problems created by bigamous marriages. Special questions that arise when there are conflicting claims by legal and putative spouses should, therefore, continue to be handled in equity, as prescribed by current case law. Consideration should also be given to extending this equitable rule by statute to cases in which marital property interests of legal or putative spouses conflict with property claims of third parties that are based upon nonmarital relationships.

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

"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."

227. 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, Informal Marital Separations, supra note 206, at 1021 n.13 (discussing Togliatti v. Robertson, 29 Wash. 2d 844, 190 P.2d 575 (1948)).

228. In two recent cases, possible conflicts were avoided because the legal spouses had
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 acquire 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 is most dramatic.229

Beginning more than fifty years ago, one distinguished scholar after another 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.230 Although in 1964 the California Supreme Court invited this legislative reform,231 none has been attempted. The misconceived

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 at 672-73, 557 P.2d at 115, 134 Cal. Rptr. at 824; CAL. CIV. CODE §§ 4800(b)(2), 5125(a), (e) (West Supp. 1981).

229. 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, 573 P.2d 1194 (1978). The germinal work is H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS (1952); see also In re Marriage of Roesch, 83 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).


property and constitutional law assumptions that marred an earlier judicial response to such a legislative effort have long since been laid to rest.\footnote{232} Doctrinal simplification supports the complete absorption of quasi-community property principles into community property law.

**The Implications of Title**

*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, commentators have advocated fundamental changes in the treatment of joint tenancies,\footnote{233} and efforts to resolve related problems with tenancy in common title date back an additional twenty years.\footnote{234}

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\footnote{232} In 1965, 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 in In re Marriage of Bouquet, 16 Cal. 3d 583, 592, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976), in which 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 a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?, 33 Calif. L. Rev. 476, 495-96 (1945) (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, Justice Peters' Contribution to Family and Community Property Law, 57 Calif. L. Rev. 577, 584-87 (1969) (discussing the privileges and immunities question).

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\footnote{233} See, e.g., Griffith, Community Property, Marshall, Joint Tenancy, and Mills, Community Joint Tenancy, supra note 57.

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\footnote{234} 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: "[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." 1935 Cal. Stats. ch. 707, § 1, at 1912 (amending former Cal. Civ. Code § 164 (the language is now found in Civil Code}
Current statutory and case law concerning title focuses on Civil Code section 5110, which establishes the general presumption that property acquired during marriage is community property.\textsuperscript{235} Unless one of the special rules described below applies, this presumption may easily be rebutted. Thus, tracing the purchase price of untitled property, or property held in the name of one spouse, to separate property will replace the community property presumption with a presumption that the property is of the same character as its source.\textsuperscript{236} 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

\textsuperscript{235} CAL. CIV. CODE § 5110 (West Supp. 1981) provides: "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, or such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

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

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 no longer exists. CAL. CIV. CODE § 5109 (West 1970) (repealed 1979). Sections 5118, 5119, and 5126(a), (c) also currently concern separate property. Id. §§ 5118, 5119, 5126(a), (c) (West Supp. 1981).

\textsuperscript{236} This is California's "source" or "tracing" rule. See Freese v. Hibernia Sav. & Loan Soc'y, 139 Cal. 392, 73 P. 172 (1903).
agreement into property of another character. 237

Joint tenancy title, in contrast, has been held to signify a married couple's intent to hold equal separate property interests. 238 Because most couples hold their realty, bank accounts, and brokerage accounts as joint tenants, 239 the treatment of this title form has major implica-


238. 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, 211 Cal. 583, 296 P. 604 (1931), 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. For a discussion of Dunn, see note 234 supra. One year after Dunn, to avoid similar inequity as to joint tenancy property, 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 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 spouse's] 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 234-35 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, Community Property, supra note 57, at 95, 105, would presume community property interests instead. Accord Mills, Community Joint Tenancy, supra note 57, at 89. See text accompanying note 250 infra.

239. 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, Joint Tenancy, supra note 57, 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 (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
tions. To preserve the automatic survivorship feature, but permit a divorce court to dispose of a family home held in joint tenancy, section 5110 was amended to provide a special rebuttable community property presumption that applies despite the form of title. The presumption applies only to a couple’s single family residence in actions for divorce or legal separation; in other contexts and for other assets, the presump-

other joint accounts. See also Mills, Community Joint Tenancy, supra note 57, 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 because of the unlimited marital deduction. I.R.C. §§ 2040, 2056. For state income tax purposes, there does not appear to be any step-up or step-down in basis for joint tenancy property passing to a surviving spouse. Cal. Rev. & Tax. Code § 18045(h) (West Supp. 1981); H. Halstead & M. Siedorf, California Inheritance Tax Practice § 5.1, at 32 (C.E.B. Supp. 1981). The death-related transfer of community property passing to the survivor 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 both spouses’ interests in the community property will acquire a new basis. 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 the federal gift tax laws has occurred but the unlimited gift tax marital deduction prevents the imposition of any tax. Compare C. Lowndes, R. Kramer & J. McCord, Federal Estate and Gift Taxes § 30.13, at pp. 726, 766 (3d ed. 1974) with I.R.C. § 2523. The same rules apply to some joint tenancies, but not to joint tenancy brokerage and savings accounts, which receive more advantageous treatment under the income tax laws controlling basis. Separate funds placed into a joint tenancy brokerage account may be given distinctive treatment under the income tax laws regarding basis. Under the former gift tax laws, these accounts were not treated as true joint tenancies, but rather as revocable transfers. See C. Lowndes, R. Kramer & J. McCord, Federal Estate & Gift Taxes at § 3011. If this argument is accepted under the new estate tax laws, a step-up or step-down in basis will apply to the entire amount in the account at the time of the decedent-transferor’s death. See I.R.C. § 2038. If, to the contrary, a true joint tenancy is deemed established during the decedent’s lifetime, only one-half will receive a step-up or step-down under the reasoning set forth above. This argument is, of course, irrelevant to savings accounts because the concept of basis does not apply—that is, there is no previously untaxed appreciation or depreciation. Under state law, neither gift is taxable. Cal. Rev. & Tax. Code § 15310 (West Supp. 1981). See generally Uniform Probate Code § 6-103.

240. 1965 Cal. Stats. ch. 1710, § 1, at 3843.
Nevertheless, because the tax treatment of community property is often more advantageous than that of joint tenancy property, at the death of one spouse the survivor frequently asserts that the property was community property held in joint tenancy form for convenience alone. Special problems also arise when separate property is held in this form, whether in realty or in a savings, checking, or brokerage account.

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, Community Joint Tenancy, supra note 57, 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, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 122 (2d ed. 1971).

"[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, Community Property, supra note 57, 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 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 239 supra for another stockbroker's misleading caution against community property accounts.

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, 119 Cal. App. 3d 970, 174 Cal. Rptr. 292 (1st Dist. 1981); CAL. FIN. CODE § 852 (West 1968). Sims, Joint Bank Accounts, supra note 57, 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 ac-
True joint tenancy title often disserves parties' needs. It is the survivorship feature alone that most married couples seek, and it is this feature that in fact sometimes serves their purposes. In other re-

244. 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, 805, 141 Cal. Rptr. 59, 66 (1st Dist. 1977) (court also has jurisdiction if parties "invite" it to hear the issue). Furthermore, joint tenancy property is not subject to the community property management protections of Civil Code §§ 5125 and 5127. Unilateral severance is possible; the co-tenant need not be notified. Burke v. Stevens, 264 Cal. App. 2d 30, 34-35, 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 grant to himself or herself 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. Furthermore, the tax treatment of joint tenancy property at the death of one party may be less advantageous than that of community property. See note 239 supra. Finally, if one secretly deeds to himself or herself, then outlives the co-tenant, it would be a simple matter to destroy the unrecorded deed and fraudulently take the property as a 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, Joint Tenancy, supra note 57, at 525.

spects, if the purchase funds are community property, their interests would be as well or better served by community property title.246

For decades, suggestions have been offered that would assure married couples both the advantages of community property and a survivorship feature without the strained yet workable current doctrines and practices that have sought this result.247 First, true joint tenancy title should be affirmed as a form of common law ownership.248 It should signify equal, undivided separate property interests subject to a right of survivorship, unless one party converts the property into tenancy in

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, Community Property, supra note 57, at 108 (citation omitted). Beginning in 1987, such “modest” estates will include families whose total wealth does not exceed $600,000, which is the exemption equivalent of the unified credit. See I.R.C. § 2010.

246. See note 239 supra.


248. This recommendation is made with some hesitation. Marshall, Joint Tenancy, supra note 57, 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 & W. VAUGHN, supra note 48, § 134 (describing the laws of all the community property states except Louisiana, and reporting the newer Washington rule abolishing most joint tenancies). The uneven ability of parties to alter the survivorship feature sometimes creates inequities. Compare Socl 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 ensure distribution to them) and First Nat‘l Bank 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. Conversation with Professor Rabin, Davis, California (Summer, 1981). Because parties’ needs and intentions may change over time, however, the recommendation of this study would instead permit unilateral action with notice, relying on estoppel and damages doctrines to protect one who would thereby be unfairly prejudiced.
common property, thereby destroying the survivorship feature. To ensure 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 should be required to state that the parties hold their interests as separate property, to negate expressly other forms of title, particularly community property, and to describe how survivorship interests may be altered. Absent such express language, the property should be presumed to be community property.

True joint tenancy property under this scheme 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 tenancies, and would be subject to conversion to tenancy in common property by the unilateral act of one joint tenant. Under present California law, a co-tenant who wishes to retain ownership, but not as a joint tenant, may grant the joint tenancy interest directly to himself or herself as tenant in common thereby destroying the survivorship feature. No notice of the transfer need be given to the other joint tenant, who may therefore be misled into believing that a mutual estate plan remains in effect. To prevent fraud, notice should be required: registration and service to the joint tenant of changed ownership intent.

249. 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, 73, 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, Community Property, supra note 57, at 107-08. See generally W. Reppy & W. de Funiak, Community Property in the United States 120-22 (1975). The termination-of-mutual-survivorship explanation would help prevent ineffective efforts to alter survivorship by will and inappropriate reliance by one party on the provision's unalterability. See note 248 supra.

250. This presumption could be rebutted by tracing or by proof of an agreement to hold in some other fashion. See notes 263, 265 & accompanying text infra. 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 248 supra.

251. No strawman is required. 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 co-tenant'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) (pre-Riddle case holding attempted testamentary disposition inoperative to terminate joint tenancy). For a discussion of Socol, see note 248 supra.

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

A married couple's other tenancy in common property should be presumptively community property.\(^{253}\) 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.\(^{254}\)

Finally, a new form of title is needed that would preserve the ownership characteristics of the purchasing funds and permit but not require mutual survivorship rights. For example, if title were to read “John and Susan” or “John and Susan, 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.\(^{255}\) Inclusion of the words “with right of survivorship” would provide automatic transfer of title upon the death of one of the spouses.\(^{256}\) To the extent that the underlying property is community 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,\(^{257}\) taxation,\(^{258}\) management, alienation,\(^{259}\) and property division at

\(^{253}\) See notes 234, 238 supra.

\(^{254}\) 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.

\(^{255}\) This currently occurs when title is taken in one spouse's name or there is no title at all.

\(^{256}\) 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); 4A R. Powell & P. Rohan, The Law of Real Property (Powell on Real Property) ¶¶ 621, 623 (1979).

\(^{257}\) 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).

\(^{258}\) 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 when 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, Com-
divorce, but an analogy to joint tenancy doctrine would provide automatic transfer of ownership at death.260

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.261 Relative ownership interests, for example, would be established according to the source of acquiring funds, subject 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 to the transferred community interests, and the law of revocable trusts would control transfers of separate property interests.262

Finally, should a transmutation of past and future contributions be desired, the form of title could indicate this expressly. For example, the title might state that ownership is to be held by “John and Susan as community property, and not as mixed property, with right of survivorship.” Here, tracing alone would not rebut community ownership; the recital should serve as evidence that any separate property contributions were gifts to the community.263 Thus, title should be available in a form that accurately expresses the parties’ true desires concerning ownership, if they have given the matter thought.264 If they have not expressed their contrary intent, community property ownership should be presumed, with tracing to separate funds producing ownership that reflects these sources.265 If survivorship rights are desired, they should

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259. *Community and Joint Tenancy, supra* note 57, 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.”

259. 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, *Management Powers, supra* note 11, recommendation 42.

260. 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 267 infra.

261. 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.

262. 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 cancel the survivorship feature unilaterally.

263. 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.

264. See note 263 *supra*.

265. This mixed property presumption would be rebuttable upon showing of a contrary agreement or understanding.
be permitted, 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 tenancy property. Additionally, 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. With or without survivorship provisions, taxation and creditor access should be dictated by the actual character of the underlying property, whether 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.

266. See text accompanying notes 251-52 supra.

267. 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 affidavit 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 not used because it is considered unnecessary. Griffith, Community Property, supra note 57, 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 privileges 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 (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 with Roger Gambatese, Esq., in Davis, California (July 13, 1981). 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. See, e.g., Estate of Watkins, 16 Cal. 2d 793, 796, 108 P.2d 417, 418-19 (1940); Marshall, Joint Tenancy, supra note 57, at 521 (bank accounts); Mills, Community Joint Tenancy, supra note 57, at 44. Because title will express the survivor's right to take under the proposed new property form, the current joint tenancy model seems 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 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 when the probate estate is insufficient to satisfy the decedent's creditors.
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. As discussed above, California has adopted a pro rata ownership rationale for purchases of real property, life insurance, and pensions under these circumstances. The same reasoning that permits a rebuttal of presumptive community property ownership during marriage by tracing to separate property sources supports 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. Whatever rules are adopted for the allocation of separate and community interests in mixed assets should be applied to these cases as well.

Debts

Since the introduction of no-fault divorce, California treatment of debts incurred by spouses has become increasingly confused. Although most of the rules concerning creditor access during marriage have been clarified by statute, 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. . . . [T]he 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 . . . conduct unrelated to the finances of the marriage should not properly influence the division of the marital property. . . .

268. Griffith, Community Property, supra note 57, 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.
269. See notes 86-88 & accompanying text supra.
270. See note 84 & accompanying text supra.
272. Governor’s Commission Report, supra note 36, at 46; see also id. at 111.
The Commission's report concerned only assets; no express recommendation concerning the definition or division of debts was made. An equal division of assets would not have been mandated under their proposal, however, and it appears that the Commission found no difficulty with unequal divisions of either debt or property that were designed to serve the parties' post-divorce financial needs.

Although the Commission's recommendation for the division of marital assets was rejected, no prescription for the treatment of debts was made. Consistent with the long-standing theory that debts standing alone are not property, some courts continued to allocate debts unequally even after the Family Law Act went into effect. Following a change in the forms used for dissolution, however, it gradually became the practice to make an equal division of overall net assets—that is, total assets minus total liabilities. Still later the code section controlling the division of community property was amended to incorporate an ambiguous reference to liabilities.

Never clarified were the questions of precisely what the rules for division should be, or even 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. In others, debts 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

273. See note 272 & accompanying text supra.
274. See note 2 supra.
277. 1976 Cal. Stats. ch. 762, § 1, at 1801 (adding sentence to Civil Code § 4800 that directs the court "for 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.
278. 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 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.
treated as separate debts. The only recent California Supreme Court case giving guidance, however, states that all debts for which the community property is liable are subject to the equal division command. This unlikely formula would subject even antenuptial debts to division, because community property may also be reached for the satisfaction of these obligations.

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. Debts that have benefited the separate property of one spouse should be allocated accordingly. Postseparation debts and debts for support should be allocated as is appropriate, given the nature of the expenditure and the receipt of any benefits, as well as the parties' relative ability to pay. Tort debts should be assigned according to the availability of assets to satisfy the appropriate order of satisfaction.

Since the change in ownership of postseparation earnings, the courts have become increasingly involved in assessing the propriety of debt payments out of separate and community funds. The courts will retain their ability to make such judgments, no matter what treatment given to post separation earnings. Greater consistency is needed.

279. 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, at 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 CAL. FAM. L. REP. 1213 (1979) (requesting information concerning such cases).


282. Support obligations to third parties that fall due during the marriage should receive community debt treatment. Any other rule would reward the other spouse for discouraging their payment.

283. The allocation should be in part or in full, as appropriate.

284. Some of these expenses are in the nature of support, such as 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).


286. See text accompanying notes 204-07 supra.

in the standards for allocating some debts to the community and some
to the separate property at divorce or death. A statute should be en-
acted that would permit a court to distinguish separate and community
debts for dissolution purposes, including the authorization to make
partial allocations.\textsuperscript{288}

\textbf{Dividing the Community}

\textit{At Divorce}

\textit{Date of Valuation}

Current law provides that the community property shall be valued
as close to trial as practicable, but permits the use of some other date
upon a motion and showing of good cause.\textsuperscript{289} Such a motion has been
granted when, for example, one spouse frustrated discovery for several
years and permitted community assets to deteriorate during the in-
term.\textsuperscript{290} To prevent the spouse from benefiting by this behavior, valuation
at an earlier date, for which information was available, was
permitted.\textsuperscript{291}

In other contexts, the court must take into account an asset's value
both at separation and at trial. This frequently occurs because separate
and community property have become mixed during a separation in
which earnings were separate property. When this happens, the court
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.\textsuperscript{292} If Civil Code section 5118 is
repealed, as is recommended,\textsuperscript{293} this difficulty will disappear. In any
case, the valuation provision works well in practice and should be re-

\textsuperscript{288} See generally N.M. STAT. ANN. § 40-3-9 (1978) (definition of separate debt for both creditor access and division purposes). Furthermore, community debts should be expressly removed from the equal division requirement in recognition of the fact that the relative postdivorce wealth of the spouses may otherwise be inequitably distributed. Bruch, Management Powers, supra note 11, at n.78. See notes 358-60 & accompanying text infra.

\textsuperscript{289} CAL. CIV. CODE § 4800(a) (West Supp. 1981), set forth at note 2 supra.

\textsuperscript{290} In re Marriage of Stallcup, 97 Cal. App. 3d 294, 158 Cal. Rptr. 679 (3d Dist. 1979).

\textsuperscript{291} Id.

\textsuperscript{292} 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 increase in value of 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 that reimbursement rather than ownership is the correct remedy for payments in excess of rental value or support).

\textsuperscript{293} See text accompanying notes 204-15 supra.
tained in its current form.\textsuperscript{294}

\textit{Jurisdiction}

The divorce court currently has jurisdiction over community property, but not over separate property except to the extent that support is at issue.\textsuperscript{295} This limitation has hampered the court’s ability to achieve equity if a couple’s wealth is exclusively or primarily separate in nature.\textsuperscript{296} If the fruits of separate property are redefined as community property, the need for further recourse to separate property wealth will be infrequent. Even under these conditions, however, a home or business that most appropriately would be awarded to one spouse may contain some element of separate property that was contributed by the other spouse. To permit a forced sale of the separate property component, the divorce court should be given jurisdiction to reach separate property in appropriate cases. If the fruits of separate property remain separate, even broader recourse to separate property at dissolution should be authorized.

All jointly held property of the spouse should be subject to the court’s jurisdiction in any event, without regard to its separate or community character.\textsuperscript{297} 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.\textsuperscript{298} Recourse to the superior court for partition should not be required.\textsuperscript{299}

Finally, the court should be given jurisdiction to hear claims based upon cohabitation, at least when such claims are related to marital

\textsuperscript{294} Legislation introduced in 1981 would have amended § 4800 to require valuation as near as practicable to the time of separation. Cal. A.B. 1584 (Elder) (1981). The power of the court upon motion to permit valuation at another time would have been removed. Such proposals are unworkable, because they apparently do not 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.


\textsuperscript{296} See notes 73-80 & accompanying text supra.


\textsuperscript{298} Although courts do not discuss the point, a bifurcated divorce, that is, 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).

\textsuperscript{299} Cf. Henn v. Henn, 26 Cal. 3d 323, 332, 605 P.2d 10, 14, 161 Cal. Rptr. 502, 506 (1980) (omitted pension must be divided in partition suit because divorce court without jurisdiction).
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. It may also occur if conflicting property claims are made by one spouse and a person who cohabited with the other spouse.  

Division Techniques

California authorizes three types of financial orders at divorce: property division, spousal support, and child support. Except in unusual circumstances, an immediate equal division of community property is made. This division 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. 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. The division of enhanced earning capacity may entail similar practical problems.

New York, in its recent divorce reform, provides a new property division form, a distributive award. Although payable in install-

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300. See note 228 & accompanying text supra.
302. Id. § 4801.
303. Id. § 4700.
305. 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).
307. 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 a 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).
308. 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 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. UNIFORM MARITAL PROPERTY ACT § 16(e) (Submission
ments, the award is not for spousal support. It is instead similar to the technique developed under California case law to permit one spouse to buy a home or business over time from the other when an immediate division is impossible and there are economic reasons that justify one party's retention of the asset.309

In addition, California courts sometimes retain jurisdiction for postponed divisions. This usually 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 that the couple's children remain in stable and relatively inexpensive housing.310 In the case of pensions, the postponed division may result either from a difficulty in providing an immediate division due to insufficient assets or from problems in establishing the asset's current value.311 Courts have also retained jurisdiction when time was required to ascertain the costs of division, especially tax liabilities.312 As the following discussion of standards for division indicates, the courts need a variety of dispositional tools to resolve these and similar problems efficiently and fairly.

Standards for Division

The baseline for division should remain that the couple's shared assets be divided immediately and equally and that separate property

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 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.” Should California institute lump sum support awards, the option of distributive awards should also be made available. See notes 346, 353 infra.


312. See, e.g., In re Marriage of Epstein, 24 Cal. 3d 76, 86-89, 592 P.2d 1165, 1171-73, 154 Cal. Rptr. 413, 419-21 (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, 422-24, 145 Cal. Rptr. 602, 605-07 (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).
not be invaded. Several qualifications, however, are appropriate.

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 one spouse's separate wealth would render an equal division of community property fundamentally unfair. This standard could be phrased as suggested by certain features of Idaho and Louisiana law. Idaho calls for an equal division of the community property "unless there are compelling reasons otherwise" and lists factors to be considered in reaching that decision. In a somewhat

313. Separate property for this purpose excludes jointly held separate property interests. See notes 297-98 & accompanying text supra.

314. 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 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 later 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. 1981). Cf. Uniform Marital Property Act § 16(c)(1)-(13) (Submission Draft 1981). The draft Uniform Act
different but relevant context, Louisiana awards a surviving spouse a
"marital portion"\textsuperscript{315} if the decedent died "rich in comparison to the
surviving spouse."\textsuperscript{316}

prescribes an equitable distribution of separate property and lists factors that the court must
take into account in making its decision. The 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 Califor-
nia's presumption should therefore be that retention by the original owner of separate prop-
erty 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 to live in it for a rea-
sonable period to the spouse having custody of the children." \textit{Id.}

Now that certain federal benefits have been held the employee's separate property,
there will be a new kind of separate property marriage, in which the only important wealth
will have been earned and will be of a much more modest scale than that in the historical
Hisquierdo, 439 U.S. 572 (1979). \textit{Compare} the family's assets in Smith v. Lewis, 13 Cal. 3d
349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) \textit{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. \textit{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
directed generally to relative wealth would be similarly flawed. See notes 315-16 \textit{infra}.

\textsuperscript{315.} \textsc{La. Civ. Code Ann.} 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

\textsuperscript{316.} \textsc{La. Civ. Code Ann.} art. 2432 (West Supp. 1981) ("When a spouse dies rich in
comparison with the surviving spouse, the surviving spouse is entitled to claim the marital
portion from the succession of the deceased spouse."). \textit{See} 1979 La. Acts, Act. No. 710, § 1,
art. 2432, Comment at 1888: ("While no concrete test has ever been devised by the Louisi-
If all fruits of separate property were redefined to be community property, access to the separate property base would seem largely unnecessary. An equal division of separate property fruits should not be required, however, if it would deprive a spouse of inherited property or gifts that are of important emotional or familial significance.\(^\text{[317]}\)

Finally, if rents and profits are deemed community property, but natural appreciation is not, an equal division of appreciated value should be presumptively equitable.\(^\text{[318]}\)

The Family Home

Greater flexibility concerning dispositions 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.\(^\text{[319]}\) The provision should make clear that use can appropriately extend throughout the children’s minority,\(^\text{[320]}\) and similar use awards should be available in appropriate cases without regard to the presence of minor children.\(^\text{[321]}\) The statute should also apply to family homes that are partially or completely separate property.\(^\text{[322]}\) 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 con-
Theoretically, each of these techniques is but an application of support concepts. Because of problematical California case law, however, legislative clarification is needed. The draft Uniform Act and provisions now in force in several sister states suggest possible approaches.

323. 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 if note were subject to 40-50% discount at commercial rates); In re Marriage of Tammen, 63 Cal. App. 3d 927, 936, 134 Cal. Rptr. 161, 163 (1st Dist. 1976) (note given to husband to compensate for award of house to wife must have face value high enough to 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 awarded as child support pending delayed property division).

324. 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. Apart from economics are important issues of familial well-being. See J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 182-83, 230-31 (1980). "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.

. . . .

"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 experience 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 197 supra.

325. See UNIFORM MARITAL PROPERTY ACT § 16(b), (e)(13), (e) (Submission Draft 1981); Md. CTS. & JUD. PROC. CODE ANN. §§ 3-6A-01(b), (e), 3-6A-06 (1980); N.Y. DOM.
The Governor's Commission on the Family recommended that an unequal division of the community be permitted when the couple's assets are nominal to preserve economical housing for at least one of the spouses. If the other reforms proposed here to ensure a more equitable distribution of other family assets, such as enhanced earning capacity, are not adopted, it would be sensible to provide more than a use rule for the family home. This option would candidly recognize that an outright award of family housing to one party might in some measure compensate for other financial disadvantages to be incurred by that spouse in the postdivorce period.

The Family Business

Problems may also arise in financing the immediate division of a business. When this occurs, courts have permitted a purchase over time of one spouse's interest. Although immediate division should continue to be preferred in these cases, a distributive award with appropriate interest will sometimes be in order. Additionally, as is recognized by case law, additional spousal support may be appropriate if the delayed access to capital produces economic hardship for the spouse.
whose interest is being purchased.330

Pensions

Serious problems exist concerning the treatment of pensions. Because of the pressure to amass assets at divorce to offset the inflated equity in the family home, many women have traded important interests in their spouses’ pensions for the ability to stay in the home.331 The wisdom of robbing Peter to pay Paul in this context is doubtful. In many cases, no sufficient basis for making an accurate appraisal of the current value of a pension is available, and seriously incorrect division formulas have been used and espoused.332 Those who turn to actuaries for appraisals may not recognize questionable legal assumptions that may be incorporated into an actuary’s analysis.333


332. 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 181, 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*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (4th Dist. 1979); DiFranza & 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: Alternatives in the Disposition of Retirement Benefits on Divorce*, 53 CAL. ST. B.J. 106, 111 (1978) (noting that uncertainties affecting vesting or maturation do not exist in valuing a defined contribution plan, in contrast to a defined benefit plan); Hardie & 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 with respect to defined benefit plans, in which benefits reflect some factor (such as final earnings) that does not correspond directly to cash contributions to the fund. Hardie, *supra*, at 107-08. It is, however, unnecessary and inappropriate when more precise valuation can easily be achieved, for example, with respect to defined contribution plans, in which 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).

333. 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 & Parkyn, *Dividing Pensions on Marital Dissolution*, 55 CAL. ST. B.J. 464, 466 (1980). 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, 629 P.2d 1, 5, 174 Cal. Rptr. 493, 496 (1981) (spouse cannot, by invoking condition wholly within
The amounts involved, even in middle-class divorces, can be large. The margin for error, given assumptions about longevity, salaries, and inflation, is great. In most cases, both spouses would be better served in the long run with an approach that preserves old-age security for each, and separates this issue from a search for current liquidity. More than one solution is available. First, the court should normally retain jurisdiction for division if and when payments are received or are entitled to be received. 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 individual pension, the process will be simplified. In any event, efforts should be made to standardize valuations.

Ownership principles should control, and no forfeiture of interests,
as currently prescribed by the Benson\textsuperscript{337} and Waite\textsuperscript{338} 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 subjected to increasing stress. Those who have taken unduly small returns on community property pension rights, the inevitable result of an inherently conservative valuation process, may well regret this step as they approach old age,\textsuperscript{339} and the taxpaying public will share in the costs of their unfortunate choice.

Life Insurance

The current rules on life insurance are workable and should be retained.\textsuperscript{340} Correction of a Judicial Council form, however, is in order. This form requests information on cash value, implying that cash value is the appropriate measure for division—a rule that excludes term insurance from division and may inaccurately reflect the sensible disposition of whole life insurance.\textsuperscript{341} The form instead should require information about face value and premium costs. Retention of ownership interests is the only reasonable disposition possible for term insurance unless replacement coverage is purchased; a statute might appropriately indicate this fact.

Tort Recoveries, Disability Pay, and Workers' Compensation

The basic rule of Civil Code section 4800(c) should be retained, but should be amended to remove forfeitures and to incorporate other forms of injury recompense, as discussed above.\textsuperscript{342}

Enhanced Earning Capacity

Once the value of enhanced earning capacity has been recognized, several possible remedies are available. The willingness of trial courts

\textsuperscript{337} See notes 132-36 & accompanying text supra.
\textsuperscript{338} See notes 137-42 & accompanying text supra.
\textsuperscript{339} See generally President's Commission on Pension Policy, Coming of Age: Toward a National Retirement Income Policy 21-38 (1981); 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.)
\textsuperscript{340} See note 86 & accompanying text supra.
\textsuperscript{342} See text following note 142 supra.
to value and divide this asset equally cannot yet be assessed. 343 Even if In re Marriage of Sullivan is reaffirmed following rehearing, there is reason to believe that courts will frequently opt for reimbursement rather than equal division and that purported division cases will display valuation disparities of the sort currently found in the goodwill cases. This view is supported by the fact that all progress prior to Sullivan occurred in states that are free to award less than one half of the asset's ascertained value, or to base an award on some measure other than the increased capacity itself, such as lump sum support or restitution of costs incurred. 344

In some equitable division states, 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 assets. 345 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. An alternate remedy such as nonmodifiable lump sum support could provide both flexibility and certain practical advantages, 346 but should be considered only if structured to promote adequate, enforceable awards. 347

343. See notes 175-90 & accompanying text supra.
344. See note 172 & accompanying text supra.
345. E.g., N.Y. DOM. REL. LAW § 236 (Part B)(5)(d)(6) (McKinney Supp. 1981). “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 authorize 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 & Freed, Law and the Family, N.Y.L.J., October 31, 1979, at 1, col. 1.
346. Support awards are eligible for a greater variety of enforcement techniques. See, e.g., 42 U.S.C. §§ 658, 662(c) (Supp. 1981) (garnishment of federal pay); CAL. CIV. CODE § 4801.6 (West Supp. 1982) (assignment of wages). Although lump-sum spousal support ordinarily is not deductible to the payor and includable by the payee for federal income tax purposes, if payment were ordered over a period exceeding ten years under a distributive award similar to that recommended for property dispositions, deductibility and includability should be available under I.R.C. §§ 71 and 215. Finally, support orders survive the obligor’s bankruptcy; obligations under property awards do not. 11 U.S.C. §§ 101(4), 523(a) (Supp. III 1979). But see notes 326 supra & 350 infra.
347. Clearly, there is little in traditional practice to support optimism about the court’s willingness to make adequate spousal support orders. See Weitzman & Dixon, Alimony Myth, supra note 13. See also notes 324, 326, and 327 supra. Accordingly, if a lump sum
How this decision on valuation and disposition is struck will have major financial effects, especially for women, who—with only few exceptions—continue their traditional deference to their husbands’ career needs. Professor Krauskopf endorses unjust enrichment as a measurement tool, noting that this standard sometimes reimburses costs incurred and sometimes compensates for the value of benefits conferred. Unjust enrichment principles should be articulated and codified, either as principles of property law or as factors to control the setting of lump sum support awards. In either case, distributive awards should become the normal form of recovery for this interest if divorce occurs before substantial assets have been acquired.

Abandonment

Civil Code section 4800(b)(3) permits the court to award all 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. The section is apparently a response to the need to pro-sure a specific section should be drafted, drawing the court’s attention to the relevant equitable principles, in order that this relief does not become subsumed and trivialized in the more traditional awards that are customary under Civil Code § 4801.

Professor Prager has noted that even in a world in which 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, Sharing Principles and the Future of Marital Property Law, 25 U.C.L.A. L. Rev. 1, 7-11 (1977). “Although most husbands and wives [in two-career families] said that their careers were equally important, in practice they tended to reflect traditional patterns. Couples most frequently chose their current location because of the husband’s job opportunities, and about twice as many husbands as wives had relocated for their own careers.” CATALYST CAREER AND FAMILY CENTER, CORPORATIONS AND TWO-CAREER FAMILIES: DIRECTIONS FOR THE FUTURE 4 (1981).

Krauskopf, Recompense, supra note 170, at 391-92.

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.

It should be emphasized, however, that such equitable considerations are concededly irrelevant to most 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 in which 50-50 division harms women’s interests, it would be difficult to justify their adoption here, as the overall financial impact would once again be to the significant detriment of women. See note 327 & accompanying text supra.

tect abandoned spouses that was identified by the Governor's Commiss-
ion on the Family. 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 from an abandoning spouse's community or separate property
to supplement or replace periodic support payments that are likely to
be unenforceable.

Deliberate Misappropriation

As an offset or award "from a party's share," the divorce court is
authorized to compensate the other spouse for deliberate misappropri-
ation from the community and quasi-community property. This sub-
section requires minor amendments. First, it should be reworded to
make clear that the wrong to be compensated is improper management
behavior. Next, jurisdiction should be granted to determine mis-
management issues and enter a damages award that may be satisfied
with property before the court. Finally, the reference to quasi-mar-
tial property should be removed or clarified.

352. See note 326 supra.
1974). 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 unless the amount is paid over a period exceeding 10 years.
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

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 manage-
ment when one spouse is unavailable. See Bruch, Management Powers, supra note 11, at
n.175.

356. The current language is ambiguous and capable of being misread to preclude a
money judgment if community assets are insufficient to compensate the harm fully. To per-
mit an efficient judicial process, the court's jurisdiction should be extended to permit en-
forcement against separate property in the same action.

357. If, as is recommended, quasi-community property is absorbed into community
property, the reference should be deleted. See notes 229-32 & accompanying text supra. If
quasi-community property remains a distinct property form, thought should be given to
what restrictions on its management and alienation may appropriately be imposed prior to
dissolution. Until dissolution, quasi-community property is technically the separate prop-
erty of the spouse who acquired it.
Debts

The rules for division of debt require three major reforms: debts should be classified as separate or community for division purposes, the mode of division should reflect the parties' relative responsibilities for payment, and it should be possible to bind creditors as well as the parties to a nonfraudulent division.

The first step, distinguishing separate and community debts, would implement the definition of the debt system proposed above. Debts that have been of special 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, this distinction would have no impact on creditor access during marriage, but would be relevant only for the purpose of division at divorce or upon the death of one spouse.

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 parties' relative abilities to pay.

358. See notes 282-88 & accompanying text supra.
360. 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 suggests appropriate rules:

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

"(d) 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.

"(f) Debts incurred for the support of the parties' children shall be allocated according to the parties' relative abilities to pay.

"(i) Educational loans shall be assigned to the spouse receiving the education, in the absence of extraordinary circumstances rendering such disposition unjust.

"(ii) Liabilities subject to paragraph (2) of subdivision (b) of section 5122 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.

"(v) Debts not distributed under subparagraphs (i) to (iv), inclusive, shall be divided equally.

"(vii) Notwithstanding subparagraph (v), to the extent that the total of the debts to be
The final reform would protect the legitimate concerns of creditors, yet replace the provisions of current law that sometimes provide a creditor windfall. If a divorce decree assigns a debt to a spouse who did not initially incur it, current law permits a general creditor 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. 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 either spouse, up to the value that it had at the time of property division. This rule has two undesirable features. First,
when the debt has been reassigned at divorce,\textsuperscript{364} the creditor receives two primary debtors in place of one.\textsuperscript{365} Second, permitting access to all former community property, absent a lien\textsuperscript{366} against the property, elevates the position of general creditors to a status akin to that ordinarily reserved to lien creditors.\textsuperscript{367}

The reform model should analogize the ending of a marriage to the winding up of a corporation:\textsuperscript{368} absent a fraudulent conveyance,\textsuperscript{369} a divorce decree should be capable of substituting one spouse for the other spouse 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, in which 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 on its facts and because the court 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. Souza, 155 Cal. App. 2d 213, 317 P.2d 655 (3d Dist. 1957); Vest v. Superior Ct., 140 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).

364. 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.

365. 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 resist initially, 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 action. Divorcing spouses must now be informed that their continuing liabilities to third parties may be inconsistent with their interspousal rights as established by the divorce decree. \textsc{cal. civ. code} § 4800.6 (West Supp. 1981).

366. "Lien" for purposes of this discussion is defined in note 361 \textit{supra}.


368. \textit{Cf. cal. corp. code} §§ 2004, 2005, 2009 (West 1977) (protecting creditors when distributing corporate assets upon dissolution). Section 2004 authorizes the distribution of remaining corporate assets to shareholders "[a]fter 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
other as the person to whom the creditor may turn following divorce. All the 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 completely relieved of responsibility for the debt. Provisions for notifying and binding creditors to such non-fraudulent agreements should be patterned after those now in use for pension plans and the division of pensions. Creditors would thereby become parties to and bound by the adjudication, except that they would remain free to litigate questions of fraudulent conveyance. If a debt is assigned to the spouse who initially incurred it, normal creditor access rules should control: the debtor should remain liable for payment 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.

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."

369. See note 372 infra.

370. 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, General Manager, Northwest Creditors Service, Sacramento, California (Aug. 1, 1980). The firm's current practice is to pursue both former spouses with respect to any debts incurred during marriage. Because of the problems the firm has encountered with collections that are inconsistent with the terms of a divorce agreement, Mr. Marion is receptive to a system that would provide the creditor with the clear designation of one liable spouse and an opportunity to pursue fraudulently conveyed assets in the other spouse's possession.


372. 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 when it did not already exist. Fraudulent intent would accordingly remain the primary basis 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.
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. Surely a surviving spouse should not receive less favorable treatment than a divorced spouse. Current law, however, permits such disparity. The following discussion identifies current problems in the treatment of intrafamilial property interests at death and makes suggestions to conform this treatment to the proposals for definition and division outlined above in the divorce context.

Conforming Ownership Principles

Pensions and Death Benefits

If a nonemployee spouse dies survived by a spouse who will receive community property retirement benefits, the decedent's estate has no interest in those future payments under an application of the Waite terminable interest doctrine. This contrasts with a divorced spouse's right to receive a lump sum in compensation for his or her lost interest. The terminable interest rule should be legislatively overruled, and the decedent's community share in the yet-to-be-received retirement benefits should be subject to the testamentary disposition of the nonemployee spouse.

Disability and Tort Recoveries

Community property personal injury recoveries result in equal ownership interests at the time of either spouse's death. Although

373. See the discussion of the terminable interest rule in notes 137-41 & accompanying text supra, and the discussions of quasi-community property, the item theory of property division, debts, and support rights in notes 387-90, 392-96, 401-07 & accompanying text infra.


375. See notes 137-41 & accompanying text supra.

376. 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).

377. The ownership interest should extend to benefits payable upon the death of the retired spouse as well as to those to be received during that person's lifetime. See text accompanying notes 132-36 supra.

378. 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, 202 (West 1956 & Supp. 1981).

379. The rule currently applies to recoveries from third parties; it is recommended that it
this result is acceptable if the injured spouse dies first, it can produce serious injustice if that person is the surviving spouse, and has continuing special needs. Ownership at death should conform to ownership at divorce, when 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.

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. Although strict ownership principles would suggest that the estate should have a claim for its interest, the result seems strained. Instead, it would be more reasonable to assume that the spouses contemplated sharing the benefits of this investment only during their lifetimes, and that the asset is subject to an implied survivorship right in its possessor.

Quasi-Marital Property

If the marital property and support rights of putative spouses are equated with those of legal spouses, the probate implications of their ownership rights will be clarified automatically. If they are not, specific language should be adopted to equate the treatment of a surviving putative spouse with that of a legal spouse in all respects, and to clarify the rights of a meretricious spouse following the death of the putative spouse to whom he or she was "married."

be extended to interspousal recoveries and to certain disability and worker's compensation benefits as well. See notes 146, 154-55 & accompanying text supra.


381. See notes 170-201 & accompanying text supra.

382. Cf. the reasoning concerning disability insurance recoveries in the text accompanying notes 155-56 supra.

383. See notes 216-26 & accompanying text supra, making this recommendation.


385. 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 Levy, 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 227-28 & accompanying text supra.

386. The treatment provided at divorce should be paralleled in the probate setting. See notes 222-26 & accompanying text supra, 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
Quasi-Community Property

Only the full absorption of quasi-community property into community property will provide completely satisfactory results.\(^{387}\) If that goal is not achieved, certain more limited reforms are recommended. First, survivor's election provisions should be modified to conform to those for community property estates.\(^{388}\) 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.\(^{389}\) 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.\(^{390}\)

Bifurcated Divorces in Which There has been no Property Division

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 time of the decedent's death.\(^{391}\)

Rules for Division

Item Versus Aggregate Theory

A divorce court may make an overall equal division of the community property and need not attempt to divide each item equally, to have forfeited rights by continued cohabitation with the decedent after learning of the defect in their marriage. See notes 221-23 & accompanying text supra.\(^{387}\) See notes 230-32 & accompanying text supra.\(^{388}\) This would entail the repeal of Probate Code \(\S\) 201.7 and the amendment of \(\S\) 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 if the testator's intent to require an election is clearly indicated. \Compare CAL. PROB. CODE \(\S\) 201.7, 201.8 (West Supp. 1981) with \textit{In re} Cowell's Estate, 164 Cal. 636, 130 P. 209 (1913) (forcing election pursuant to testator's intent). 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 \(\S\S\) 5125, 5127 (West Supp. 1981) (regulation of gifts to third parties during marriage).\(^{389}\) The statute had provided this result but was amended, apparently because of outdated concerns traceable to \textit{Estate of Thorton}. See Paley v. Bank of America, 159 Cal. App. 2d 500, 324 P.2d 35 (2d Dist. 1958). See note 232 supra.\(^{390}\) See notes 395-96 & accompanying text infra.\(^{391}\) See CAL. PROB. CODE \(\S\S\) 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). Decedents frequently will have remarried in such cases, requiring that either the code or equity provide rules for multiple spouses. \Cf. note 225 & accompanying text supra, discussing property division in cases of bigamy.
even if the asset is readily divisible. In contrast, if the decedent leaves his or her community property interest to a third party, the surviving spouse and the third party become tenants in common in each asset. Reform is needed to authorize the probate court, or the surviving spouse, to designate equally valued shares in the aggregate estate. The resulting rule should articulate how it is to operate if a specific item of community property has been devised or given by means of a will substitute to a third party so that it does not force elections in inappropriate cases.

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. It should be amended to

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393. Dargie v. Patterson, 176 Cal. 714, 169 P. 360 (1917).

394. Cf. Wisc. A.B. 370, § 861.03(3) (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, because 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 409 infra (use of will substitutes).

395. CAL. PROB. CODE § 980(e) (West Supp. 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.” (Emphasis added.) 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 demonstrates 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
parallel to the extent practicable the debt division rules for divorce.\textsuperscript{396}

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.\textsuperscript{397} 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.\textsuperscript{398}

The community property rule is supported by studies that report the expectations and preferences of married people concerning the intestate distribution of their property,\textsuperscript{399} and may work well in most cases. Its soundness, however, is questionable following a second marriage, if the decedent had children from a prior relationship. It is no longer 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 them.\textsuperscript{400} An intestate rule that would provide for such children is

\begin{itemize}
\item estate for the decedent's mismanagement of the community. In other cases the offset might be less clear, although the liability was not.
\item See notes 271-88 & accompanying text supra.
\item Id. §§ 221, 223. If the decedent leaves no issue, parents, siblings, or issue of siblings, the entire estate goes to the surviving spouse. Id. § 224.
\end{itemize}
needed\textsuperscript{401} unless general authority is given to the probate court to provide for those who equitably deserve a share in the decedent’s wealth.\textsuperscript{402} If no such rule is adopted, at least the probate court should be empowered to make an award out of the estate for the support of the decedent’s minor children.\textsuperscript{403}

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 improved their rules of both intestate and testate succession by granting the probate court powers comparable to those accorded a divorce court. Special awards may be made when 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.\textsuperscript{404} Because the relative and absolute sizes of community and sep-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{Spouse} & \textbf{Child of Prior Marriage} & \textbf{Percent of Estate to} & \textbf{Percent of Respondents} \\
\hline
100 & 0 & 23.0 & 171 \\
51-99 & 1-49 & 28.9 & 215 \\
50 & 50 & 37.2 & 277 \\
0-49 & 51-99 & 11.0 & 82 \\
\hline
Total & & 100.1 & 745 \\
\hline
\end{tabular}
\caption{Distribution of Estate Between Spouse and Child of a Prior Marriage (Percent)\textsuperscript{a}}

\textsuperscript{a}5 missing cases.
\end{table}

\textit{Id.} at 366 (reporting responses from Alabama, California, Massachusetts, Ohio, and Texas).

\textsuperscript{401} See, e.g., ARIZ. REV. STAT. ANN. §§ 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). \textit{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).

\textsuperscript{402} See notes 404-05 & accompanying text infra.

\textsuperscript{403} Final Report of the American Assembly on Death, Taxes and Family Property, in \textit{DEATH, TAXES AND FAMILY PROPERTY} 183, 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.”

\textsuperscript{404} “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
arate property estates will vary widely, it is impossible for a blanket rule to provide adequately for all cases. Especially in an era of multiple marriages and increasing nonmarital unions, greater precision is needed than current statutes provide.

Testate Succession

For the same reasons that current intestacy laws do not always operate sensibly, the present rules that grant only limited rights to a surviving spouse and pretermitted heirs to challenge a will are inadequate. The ability of a spouse whose wealth is predominantly separate property to disinherit a surviving spouse completely has been soundly criticized. 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 in California.

Even if a spouse has been amply provided for by will, he or she may wish to challenge certain of the decedent's attempted dispositions. The rules controlling survivors' elections require attention. If an aggregate theory of probate administration replaces the current item theory, it would be possible to permit a spouse to request certain community

similarly protected." Haskell, Restraints Upon the Disinheritance of Family Members, in DEATH, TAXES AND FAMILY PROPERTY 105, 108 (E. Halbach ed. 1977). "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 in Judicial-Legislative Interaction, 29 AMER. J. Comp. L. 217, 231 (1981) (footnotes omitted). See generally id. at 231-32 regarding the laws of Ontario, New Zealand, Western Australia, South Australia, and New South Wales.

405. "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, in DEATH, TAXES AND FAMILY PROPERTY 183, 187-88 (E. Halbach ed. 1977).

406. See, e.g., Bodenheimer, Separate-Property Marriages, supra note 50, at 414-18; Niles, Probate Reform in California, 31 HASTINGS L.J. 185, 191 (1979): "With respect to separate property, the rights of a surviving spouse in California are wholly inadequate by standards prevailing in most states."

407. See notes 315-16 & accompanying text supra (Louisiana law); notes 404-05 supra (other countries).
property assets that the decedent had left to another without forcing an election. Simultaneously, the court could be authorized, for good cause, to deny such a request if the surviving spouse's overall rights had been secured. In this connection, an "augmented estate" concept should be adopted. If completely 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 those assets if the total portion of the community estate passing to the survivor by will substitute, intestacy, and testate devise equals in value that portion of the augmented estate to which the spouse would be entitled under intestate law. Intestate, testate, and discretionary or forced share provisions should be formulated in light of the final definitions of separate and community property that are adopted, and should be rationalized both within the Probate Code and with the Family Law Act rules for property and support at divorce.

Probate Code Section 229

Through a series of poorly drafted statutes, California has developed an almost incomprehensible rule for intestate succession if a

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408. See the Wisconsin proposal, set forth at note 394 supra.

409. "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 disinherance. 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 disinher. Also under the Code, the outright living gift without strings or retained benefits generally 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 disinherance. 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, Restraints Upon the Disinheritance of Family Members, in Death, Taxes and Family Property 105, 108 (E. Halbach ed. 1977). 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, because 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 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).

410. This rule should alleviate the surviving spouse's current exposure to gift tax if no challenge is made. See note 126 supra.
widow or widower dies without either children or a new spouse. In such cases, the apparent intent of Probate Code section 229 is to benefit children of the survivor's former spouse, but, if there are none, to divide assets that came to the survivor from the former spouse equally between the two spouses' families. A statute should be aptly drafted to accomplish this result.

**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 formulas 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 importantly, 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.

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411. See Cal. Prob. Code § 229 (West Supp. 1981). The original intent of former Probate Code §§ 228 and 229, now combined in § 229, was to ensure 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 when there are children. See Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 Wash. L. Rev. 277, 283-316 (1975).