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The M Word: From Partial Coverture to Skills-Based Fiduciary Duties in Marriage

Jo Carrillo*

In 1934, fictional California resident Cora Papadakis had to decide: Should she divorce her husband, ensuring her future poverty, or should she stay with a husband whom she did not love? The answer to Cora’s dilemma can be found in James M. Cain’s *The Postman Always Rings Twice*, one of a handful of novels written about marital discord in the male-management era of community property in California.¹

Cora was in her early twenties when she married her much older spouse, Nick, a tavern owner in the Prohibition era. She no doubt recited the standard vows: *I, Cora, take thee, Nick, as my lawfully wedded spouse, to have and to hold, for richer or for poorer, in sickness and in health, till death do us part.* At the start of her marriage, Cora hardly could have imagined that her day-to-day management of the Twin Oaks Tavern, which included long hours as cook, wait staff, and dishwasher, would not translate into legal management. As her marriage progressed, Cora realized that the Twin Oaks Tavern was not hers at all. She discovered that if her marriage were to end in divorce, she would have nothing. Cora also learned that during her marriage she held nothing, that is, she controlled and managed nothing in a legal sense.

These oppressive financial realities dishearten Cora and compromise her feelings for Nick. She feels trapped, burdened by the realization that only Nick’s natural death will give her the financial recognition that she deserves. Cora finally voices her complaint: “Isn’t that business half mine? Don’t I cook? Don’t I cook good?”²

I. *TO HAVE AND TO HOLD IN THE MALE MANAGEMENT ERA: 1849 TO 1975*

Before 1975, a husband in the state of California had complete legal management over community (marital) property by virtue of his gender

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* Professor of Law at the University of California, Hastings College of the Law. I appreciate and thank Kathryn Edwards who suggested that I write an essay about the vows that I sometimes use as an end of semester review for California Community Property Law.

2. *Id.* at 16–17.
alone. Subsidiary rules benefitted him in his management rights. Transmutations—changes to the character of property—could be made by oral agreement, either express or (more ominously) implied. Thus, the law of spousal fiduciary duties, the topic of this essay, was rudimentary at best during this time period.

A. CALIFORNIA'S FIRST MARITAL PROPERTY SYSTEM

Early California was of two minds when it came to women as wives. One mind sought to lure women of means to the rough-and-tumble gold rush state. To do this, the California Constitution of 1849 enshrined protection for married women's separate property. The original Act of 1850 codified the constitutional protection by creating two categories of marital property: separate and community. The other mind, however, believed women to be frail, fragile, dependent, and therefore incapable of managing property during marriage. Ostensibly to protect married women from the rigors of property management, the original Act of 1850 gave married men absolute power to manage and control all property. This rule impaired a married woman's separate property ownership by giving her husband the legal right to control her separate property. It also impaired a married woman's management rights by giving her husband the legal right to manage her separate property. Moreover, the original Act required a married woman to obtain her husband's consent before she could execute a will. Thus, her testamentary rights were impaired until 1866, when she regained the right to devise her separate property in her will, and those rights remained constrained until 1923, when she obtained the right to devise her one-half interest in the community property.

B. TAKING BACK THE RIGHT: "FRAIL" WIVES TAKE TO THE COURTS

Marriage in California has no doubt always been an institution where love and understanding abide, but from a legal perspective, marriage is not

7. Act of Mar. 20, 1866, ch. 285, § 2, 1865–66 Cal. Stat. 316 (establishing that a married woman no longer needs her husband's consent to write a will that disposes of her separate property). See also Cal. Fam. Code § 751 (Deering 2006).
a sacred institution; it is a contractual one. As such, marriage is an
institution where practical concerns define love. A quick survey of
California community property appellate cases suggests that, despite any
perceived fragility married women of nineteenth-century California had
with respect to the rigors of property ownership, wives maintained a strong
presence in the courts to defend what was theirs.8

A few examples illustrate early changes toward marital equity that have
become the rock solid foundation of California community property law.
In 1860, a wife of means learned that her husband had pledged the
dividends from her separate property stock to his creditors.9 The wife sued
to identify the dividends as her separate property. She successfully argued
that the California Constitution protected her right to separate property, and
by implication, to any rents, issues, and profits earned by her separate
property.10 The California Supreme Court agreed, stating, “We think the
Legislature has not the Constitutional power to say that the fruits of the
property of the wife shall be taken from her, and given to the husband or

marriage, Clara Shortridge Foltz, whose portrait hangs on my office wall at the University
of California, Hastings College of the Law, shifted her aspirations from a professional
career to “a handsome, noble husband, who would cherish her and keep her sheltered from
the unknown world in a happy little home.” Id. at 6. Later, when Clara’s sewing machine
was attached by her husband’s creditors (twice), Clara got her sewing machine back by
arguing that it was a “workman’s tool used to support the family—a separate statutory
exemption.” Id. at 7. Eventually, Clara had to shift her aspirations again because her
husband left her and she had children to care for. Clara became the first female attorney to
be sworn in on the Pacific Coast. Id. at 31. Clara’s aspirations for her law practice took her
to Hastings, the law school where I have spent my professional career. The janitor barred
Clara at the door per instructions of the school authorities, and the (male) students mocked
her in class. Clara appealed to Judge Serranus Hastings, the school’s founder and first dean,
who made no effort to hear her out, much less to assist her. Id. at 43–44. After only a few
days as a law student, Clara received a letter from the Registrar informing her that the Board
of Directors had resolved not to admit women to Hastings College of the Law, and it was
later explained to her by Dean Serranus Hastings that her presence—that is, the fact that she
was a woman, along with her rustling skirts—distracted the other scholars of law. Id. at 42–46.

I call Clara Shortridge Foltz by her first name because for two decades, I have kept
Clara’s portrait by my side, literally, as I work. Whether Clara was discretely behind my
office desk (in my first years of law teaching) or on my office wall (in later years), Clara has
been a guiding light for me at Hastings College of the Law, serving as comfort and
inspiration for those (many, many) days when I, too, have felt the pressures of being cast as
the antithesis of people’s stereotypes of what a law professor should look like, physically
speaking. Clara thought that, had she been born a man, she might have had more substantial
success in law. Some people doubt it; they think that Clara’s success came because she was
an underdog. I, however, understand exactly what Clara meant.

Clara Shortridge Foltz died before I was born, but I have stood on the strong
shoulders of Clara’s blessed memory for twenty years. For that reason and so many more, I
am pleased to be able to thank Barbara Babcock, who first told me about Clara when I was a
student, for her page-turning book, which is an important work of legal history about early
California.

10. Id. at 323–24; see also CAL. FAM. CODE § 770(a)(3) (Deering 2006).
Today, that wife's proposed reading of the California Constitution is a central part of California community property law, which defines separate property as property that is brought to a marriage, or acquired during a marriage by gift, and any rents, issues, and profits of separate property. It would not be until 1872, however, that a married woman would regain the legal authority to manage her separate property and its rents, issues, and profits.

Also in 1860, ironically, the California Supreme Court interpreted the term community property to mean a "mere expectancy." The practical effect of the court's interpretation was a setback for married women's property rights. The rule transformed a married woman from co-creator of value to the equivalent of an heir apparent waiting for a windfall from her husband. Under this rule, a married woman acquired no vested rights in marital property during her marriage. Instead, at the termination of her marriage, she held a mere expectancy in the community property, which is something less stable, legally speaking, than even a contingent interest. It took the California legislature until 1927 to recognize that community property interests are "present, existing and equal," which is to say vested at the time the property is acquired.

In yet another early case, a husband put a small down payment on a parcel of real estate before marriage, with the idea that he would pay off the installment loan with community funds. During divorce proceedings, the husband argued that the real estate was entirely his separate property, since he had purchased the land before marriage with a down payment from oil that had been extracted from the land. The wife argued that the property was partially owned by the community since community funds were used to make installment payments to purchase the property. The wife's rationale made its way into California community property law, where it holds a central place today. The use of community funds during marriage to pay for property acquired on credit by one spouse before marriage gives the community estate an equitable pro rata ownership interest in that property. Because title is inchoate until the purchase money loan is paid off.

12. CAL. FAM. CODE § 770(a) (Deering 2006).
13. 1 THEODORE H. HITTELL, THE CODES AND STATUTES OF THE STATE OF CALIFORNIA Marriage § 1516, at 595 (1876) (providing that a married woman can convey her separate property). See also CAL. FAM. CODE § 770(b) (Deering 2006).
14. Van Maren v. Johnson, 15 Cal. 308, 311 (1860) ("[T]he title to [community] property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor.")
15. CAL. FAM. CODE § 751 (Deering 2006).
17. Id. at 225.
off, a community’s contributions to a purchase loan, out of fairness, earns the community estate an ownership right.18

C. AN EARLY PUSH TOWARD DUAL CONTROL

A few important restrictions on a husband’s legal right to manage community property made their way into California law by statute at the beginning of the twentieth century. First, in 1891, the California legislature restricted the husband’s power to make gifts of community personal property without the wife’s written consent.19 Today, a slightly expanded version of this protection appears in gender-neutral form at California Family Code section 1100(b).20 Second, in 1901, the legislature restricted the husband’s power to convey or encumber home furnishings or wearing apparel without the wife’s written consent.21 Today, this protection appears in gender-neutral form at California Family Code section 1100(c).22 Third, in 1917, the legislature restricted the husband’s power to sell, encumber, or lease community real estate without the wife’s signature.23 Today, this restriction is gender-neutral and appears at California Family Code section 1102.24

In 1951, building on the Grolemund principle, which allows creditors to reach only those assets which a spouse has the legal right to manage and control, the legislature granted a wife the power to manage her own community property earnings and personal injury awards.25 To do this, however, a married woman had to open a separate bank account into which she deposited such funds. The married woman could manage the funds in her work earnings account, but if she commingled them with any other community property funds, then her account, like Cinderella’s lovely coach, would turn into a pumpkin: The shield would drop, the woman would lose her legal right to manage the funds in her work earnings account, the husband would regain the legal right to manage those same funds, and the funds would be reachable (again) by the husband’s creditors. Today, this shield provision appears in gender-neutral form as California Family Code section 911, but the shield only protects the spouse who relies on it from certain of the other spouse’s premarital creditors.26

Before 1970, a spouse seeking a divorce was required to establish that at least one of the several grounds for divorce existed. These grounds

20. CAL. FAM. CODE § 1100(b) (Deering 2006).
22. CAL. FAM. CODE § 1100(c) (Deering 2006).
24. CAL. FAM. CODE § 1102 (Deering 2006).
26. CAL. FAM. CODE § 911 (Deering 2006).
included adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, and conviction of a felony.\textsuperscript{27} Proof of fault had economic consequences—namely, that the wronged spouse was entitled to more than half of the community property. The greater the fault, the larger the share of community property the wronged spouse took from the marriage. In 1970, California moved to no-fault divorce, and today under the California Family Code, there are only two grounds for dissolution: incurable insanity and irreconcilable differences.\textsuperscript{28} Just as the presence of fault had economic consequences before 1970, the absence of fault has economic consequences—the primary one being that the no-fault system fortifies a fifty-fifty split of community property at dissolution or death.\textsuperscript{29}

D. \textit{Postman's Alternate Ending: What if Cora Divorced?}

The following is an inventory of what Cora Papadakis, our accidental femme fatale, would \textit{have and hold} by virtue of her marriage in California in the late 1920s or early 1930s.

Since Cora came to her marriage with no property of her own, she would have no separate property to take with her upon divorce. Nick, by contrast, owned the Twin Oaks Tavern before his marriage to Cora, so the Twin Oaks Tavern would be designated as Nick's separate property at divorce, with any excess profits possibly defined as community property.\textsuperscript{30} Cora was not paid for her labor at the Twin Oaks Tavern, so she would have no cash savings. Had Cora been paid, Nick would have nevertheless retained the legal right to manage and control Cora's earnings and tips, and any property, real or personal, Cora might have purchased with her earnings and tips.

Cora could argue that both her labor and Nick's labor gave their community estate an equitable \textit{pro rata} ownership share in the Twin Oaks Tavern as a business. This would be correct.\textsuperscript{31} Cora did own a vested right to one half of any community property identified in the Twin Oaks Tavern business as of 1927, a plus for her. But, given the short length of Cora and Nick's marriage, the community property share of the Twin Oaks Tavern business would be \textit{de minimus}, at best. Cora's share of that \textit{de minimus} community property interest would be fifty percent. Therefore, Nick would capture most of the Twin Oaks Tavern's business value at divorce, and likely all of the underlying value of the real estate upon which the


\textsuperscript{28} CAL. FAM. CODE § 2310 (Deering 2006).

\textsuperscript{29} CAL. FAM. CODE § 750 (Deering 2006).

\textsuperscript{30} See Pereira v. Pereira, 156 Cal. 1, 7 (1909).

\textsuperscript{31} \textit{Id.}
Twin Oaks Tavern was located. Moreover, under the fault system of divorce, if Nick could prove that Cora had engaged in extramarital sex with Frank Chambers, he might capture all of the Twin Oak Tavern’s value, based on the theory that Cora was at fault for the dissolution of the community and thus that she should pay an economic penalty for her sexual infidelity.

Would Cora’s financial situation be better if her marriage to Nick ended by his death? *The Postman Always Rings Twice* is a crime novel, and I can reveal without spoiling the plot that Cora is charged with the murder of Nick. This potentially defines Cora as a felonious spouse whose rights to take Nick’s property by devise or intestacy would be barred by statute, again on the theory that no person can take advantage from his or her wrong. But, if Nick were to die of natural causes, then Cora could inherit Nick’s property through intestacy, and her financial future might take a turn for the better.

To sum up, at the end of Cora and Nick’s marriage by divorce, chances are that Cora would walk away with nothing but her clothing and personal effects. At one point, Cora decides to leave her marriage. She puts her personal effects into a hatbox and takes them to the car. Frank Chambers, her lover, asks, “The car?” She responds, “Aren’t we taking the car?” He says, “Not unless you want to spend the first night in jail, we’re not. Stealing a man’s wife, that’s nothing, but stealing his car, that’s larceny.” Cora says, “Oh.” She starts to walk to the bus stop with Frank, but within a quarter of a mile, she stops. “Frank, I can’t go on. Goodbye.” She turns around and walks back to the Twin Oaks Tavern in tears.

By her early twenties, Cora had had enough experience with gender relations to realize that her lover’s perspective was as troublesome to her financial future as her husband’s legal power. With her lover, Cora’s future would consist of getting a job, and thus of working for an employer for hourly wages. At least with her husband, Cora had the day-to-day fulfillment of managing a business. It may not have been her business in the legal sense (unless Nick were to die of natural causes), but in a psychological sense, Cora came to regard the Twin Oaks Tavern as half hers; thus, she assumed its management as a valuable expression of her personal identity. For Cora, marriage was not defined by romantic love for her husband. Rather, it was defined in rational terms as a way for her to engage in a project that gave her a sense of personal accomplishment and hope for her financial future.

As *The Postman Always Rings Twice* draws to a close, legal questions about Nick’s death resolve. It turns out that Nick purchased a life
insurance policy with a double indemnity clause just before he died. Cora walks away on probation, with $10,000 of cash from Nick’s policy, and full legal ownership of the Twin Oaks Tavern. Under Cora’s capable management, the Twin Oaks Tavern flourishes. In fact, Cora is far more skilled and determined to succeed at what is now her business than her deceased husband Nick ever was. As a widow, Cora is able to escape some of the limitations placed upon her legal rights and financial prospects by the male management system.

II. TO HAVE AND TO HOLD TODAY: EQUAL MANAGEMENT AND SKILLS-BASED FIDUCIARY DUTIES

Had Cora married Nick just half a century later, the community property laws of California would have better borne out her point of view that the Twin Oaks Tavern was half hers in a legal sense. Equal management went into effect in California in 1975, when the legislature passed a statute providing that “either spouse has the management and control of community personal property.”34 This transition to de jure equality between the spouses was mostly recorded in a process of legislative change that showed how marriage was evolving from an institution of legal coverture for women, as in the early days of the original Act, to one of equal rights for both spouses. Nevertheless, equal management rights did not immediately change the subsidiary laws of male management, and the law defining interspousal duties remained rudimentary at best.

The first statute imposing fiduciary duties on a spouse was passed in 1992, and updated in 2002.35 Today, the law of spousal fiduciary duties is developing at a rapid pace; it provides California community property law with a foundation for marriage that puts skills-based financial duties somewhere at the center of day-to-day married life. The duties are skills-based because they require formalized knowledge of concepts such as accounting, disclosure, access, financial loyalty, good faith, care, and holding in trust any benefits or profits derived from a transaction in which one spouse acted without the consent of the other. Either spouse acting alone can manage and control the community property, but the acting spouse should also know that he or she will be held to general and specific fiduciary duties, the breach of which give rise to an actionable claim by the non-acting spouse.36

34. CAL. FAM. CODE § 1100(a) (Deering 2006).
35. CAL. FAM. CODE § 721(b) (Deering 2006).
36. See, e.g., CAL. FAM. CODE § 1101(a) (Deering 2006).
A. CHANGES TO THE SUBSIDIARY RULES FURTHER SUPPORT THE TRANSITION TO EQUAL MANAGEMENT

After the passage of equal management, fissures in the subsidiary rules that had supported the male management regime began to show up in disputes over marital property. To address some of those fissures, legislators made important changes to California community property law beginning in the early 1980s. First, the legislature formalized transmutation, meaning changes in character of property.\(^{37}\) Second, The Uniform Premarital Agreement Act was enacted in 1985, and important additions to that Act were made in 2001, codifying California Supreme Court interpretations of voluntariness and fairness.\(^{38}\) Third, spouses won a statutory right to reimbursement for separate property contributions to community property acquisitions.\(^{39}\) Fourth, the legislature expanded the rule that all joint form property is presumptively community property at divorce, and enumerated formalities for rebutting that presumption.\(^{40}\) Fifth, the community won a right, in certain cases, to reimbursement for contributions to the direct educational expenses of one spouse.\(^{41}\)

In the aggregate, the 1980s changes made an important statement about the law's economic aspirations for marriage. These changes clarified legal rights, formalities, and reimbursements between spouses, but they left the definition of interspousal fiduciary duties undefined. More to the point, the changes of the 1980s stressed the importance of the interspousal agreement to California community property law. The concept of agreement was no longer based on a loose sense of obligation implied from factual circumstances or from unmemorialized intentions, as under the prior law.\(^{42}\) Rather, it was based on a documented two-way communication, negotiated on the basis of voluntariness, disclosure, and demonstrated mutual understanding between the spouses.

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37. CAL. FAM. CODE § 852(a) (Deering 2006).
39. CAL. FAM. CODE § 2640 (Deering 2006).
40. CAL. FAM. CODE § 2581 (Deering 2006).
41. CAL. FAM. CODE § 2641 (Deering 2006).
42. See, e.g., In re Marriage of Buol, 39 Cal. 3d 751 (1985) (holding that two-way communication disputed at divorce where spouses entered into an oral agreement resulted in the transmutation of the family residence); In re Marriage of Moore, 28 Cal. 3d 366 (1980) (considering a dispute, in which one-way communication disputed at divorce where spouses had no oral agreement, but contributing spouse intended to use separate property funds as a way for that spouse to purchase separate property rather than as a contribution to the purchase of community property).
B. MARRYING IN GOOD FAITH: ABIDING BY THE SPECTRUM OF FIDUCIARY DUTIES

By the 1990s, the nature of the spousal relationship was re-imagined again. In the past, the law recognized that spouses were in a confidential relationship, but there was little understanding of their mutual fiduciary duties.43 Today, spouses are still in a confidential relationship, and they also explicitly owe each other duties of loyalty, good faith, access, and disclosure.44 Such interspousal duties seem basic, yet they can act as powerful checks on financial mismanagement given that they are derived from the law governing nonmarital business partners.45 In a day-to-day context, the general duties of good faith, loyalty, and care, coupled with the more specific duties of access and disclosure, play out along a spectrum. At the practical end are the duties to provide access to books, records, accounts, and other financial information. At the judgment end of the spectrum, the duties include not dealing with the community partnership adversely or competitively and not engaging in a knowing violation of the law, intentional misconduct, or grossly negligent or reckless conduct.46

Either spouse can control and manage the community property, but there are limits to that right. For instance, fraudulent acts affecting the rights of the other spouse,47 or acts of gross mismanagement amounting to constructive fraud,48 are not within a spouse’s management and control rights. Actions that constitute breaches of fiduciary duty that impair the other spouse’s community property interest give rise to a cause of action.49 Impairment is defined statutorily as an act that can arise from one or more transactions—including a series or pattern of transactions—that have or will cause a detrimental impact to the claimant spouse’s undivided one-half interest in the community estate.50 In addition, general interspousal

43. Prior case law indicated that although the spouse exercising management and control over community property may “act like an owner,” he was an owner with quasi-fiduciary obligations. See, e.g., Vai v. Bank of Am., 56 Cal. 2d 329 (1961); Fields v. Michael, 91 Cal. App. 2d 443 (1949).
44. CAL. FAM. CODE § 721 (Deering 2006).
45. See CAL. FAM. CODE § 721 (Deering 2006), which incorporates by reference CAL. CORP. CODE §§ 16403, 16404 and 16503.
46. CAL. FAM. CODE § 1101(a), (g), (h) (Deering 2006).
47. “She has . . . rights therein which have been always safeguarded against the fraudulent or inconsiderate acts of her husband with relation thereto and for the assertion and safeguarding of which she has been given access to appropriate judicial remedies both before and after the time when her said rights and interests would ripen and become vested . . . whenever such rights and ultimate interests were affected by or threatened with such forms of invasion.” Stewart v. Stewart, 199 Cal. 318, 342–43 (1926).
49. CAL. FAM. CODE § 1101(a) (Deering 2006).
50. Id. (stating that a spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse’s present undivided one-half
fiduciary duties encompass all specific statutory restrictions against unconsented transfers of community personal property that were enacted at the turn of the twentieth century. In cases where there is a breach of fiduciary duty that results in impairment, damages are set by statute. Because the impairment cause of action is a tort, depending on the circumstances of the breach, the claimant spouse can recover damages from fifty percent to one-hundred percent of the impairment, plus court costs and attorney’s fees. Moreover, should there be a harm to the community estate without a specific statutory remedy under the California Family Code, the bare fact that the spouses own community property concurrently will give rise to a remedy under the California Civil Code. Additionally, a spouse can recapture personal property transferred out of the community estate without the other’s written consent and avoid certain real estate transactions that lack both spouses’ signatures.

Furthermore, a particular act that falls within the sphere of a spouse’s legitimate management and control authority may still be actionable if that action constitutes a breach of an interspousal fiduciary duty. An example is the use of community funds to pay one spouse’s separate debts. The timely payment of debt is conduct that falls well within a spouse’s right to manage and control, and debt repayment protects the community’s financial position generally. However, the use of community funds to pay for separate debt impairs the nondebtor spouse’s interest in the community property, giving the nondebtor spouse a right to petition for an accounting during marriage.

In other words, California permits interspousal lawsuits. Divorce or death are not prerequisites for suing one’s spouse (or a decedent spouse’s estate) for breach of interspousal fiduciary duties (though issues of financial loyalty, good faith, and disclosure frequently come up during the interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse’s undivided one-half interest in the community estate).

52. CAL. FAM. CODE § 1101(a), (g), (h) (Deering 2006).
53. CAL. FAM. CODE § 1101(g), (h) (Deering 2006).
54. Wilcox v. Wilcox, 21 Cal. App. 3d 457, 459 (1971) (holding that a spouse’s right to maintain an action against the other spouse is not dependent upon statutory authority, as for every wrong, there is a remedy per California Civil Code section 3523).
55. CAL. FAM. CODE §§ 1100–1101 (Deering 2006); Britton v. Hammell, 4 Cal. 2d 690 (1935).
56. CAL. FAM. CODE § 1102 (Deering 2006).
57. CAL. FAM. CODE § 1101(a) (Deering 2006).
58. CAL. FAM. CODE § 1101 (Deering 2006).
routine accounting that occurs as part of a dissolution proceeding or the administration of a decedent spouse's estate). As such, California community property law recognizes that spouses may address property issues and allegations of community property impairment from within the context of an intact marriage. While this might decrease the spouses' present emotional happiness, it can increase their utility curve for wealth, as one spouse signals to the other that personal finances, investment opportunities, and opportunity costs are, and will be, closely monitored during marriage.

C. PROMISES, PROMISES: A FINANCIAL PERSPECTIVE ON TO HAVE AND TO HOLD

So, how do prospective spouses learn about and honor the duties of loyalty, good faith, and disclosure (record keeping), which are clearly part of the legal basis of marriage in California today? Are the skills-based fiduciary duties envisioned by community property law part of the cultural and social foundation of marriage? If we marry for love, what exactly does that mean in terms of our legal rights and duties towards our spouses?

Before the transition to equal management—in the community property regime under which Cora Papadakis "lived"—to have and to hold meant something physical and tangible. To have meant to bring another person into one's life; to hold meant to keep another person in one's life in a physical sense. The legal regime reflected this understanding of marriage by empowering one spouse to control and manage the marital property at the expense of the other spouse. One spouse was protector; the other (theoretically) protected.

Today, marriage is a contractual concept that affords equal property management, allows formal contracting between spouses, and imposes skills-based fiduciary duties upon each spouse. To have still means to bring another person into one's life, but it also means to have that person's financial strengths and weaknesses affect one's financial future. To hold still means to keep another person in one's life in a physical sense, but it also means to hold that person's trust when it comes to issues of finances. We live in a culture where it is considered more taboo for two people to talk intimately about money than it is to talk about sex. And yet, talk we

59. California Family Code section 1101 expressly provides that a court may order an accounting of the property and obligations of the parties to a marriage and may determine the rights of ownership in or access to the community property; such relief may be sought without filing an action for dissolution. See also Fields, 91 Cal. App. 2d at 451–52; Wilcox, 21 Cal. App. 3d at 458–59. See generally Carol S. Bruch, Management Powers and Duties Under California’s Community Property Laws, 34 Hastings L.J. 227 (1982).

60. This is my opinion based on twenty years of teaching property law, and a half-decade of specifically teaching a course on personal finance issues at the University of California, Hastings College of the Law.
must. In this era of skills-based fiduciary duties, today's spouses create complicated records of potentially actionable financial transactions, many of which are poorly documented amidst the day-to-day stresses of dealing with children, careers, commutes, and so on. When marital unhappiness leads to marital dissolution, spouses are forced to talk finances. These discussions must clarify past, present, and future finances, as seen through the lens of past, present, and future actions that had, have, or will have an effect on one or both parties' financial future.

Prospective spouses who are contemplating marriage must understand that fiscal realities and duties play a bigger role in the legal definition of marriage today than they did in the past. Graduates enter the workforce indebted. Employment prospects can be uncertain. Socioeconomic class lines are pronounced and intractable. Consumer debt remains high. Spouses have and hold equally, at least in the legal sense; yet the aggregate effect of a negative dowry (coming to a marriage with debt in the form of car loans, credit cards, students debt, medical debt, a compromised credit score, dim job prospects, and so forth) can create financial inequalities in a relationship. This in turn takes a toll on a spouse's trust and fidelity with respect to joint financial interests, which may compromise marital satisfaction over all. Accordingly, prospective spouses are advised to disclose to their future spouse as much as possible in terms of what they own and what they owe, and to take seriously the need to learn basic accounting, relationship, and emotional skills that might facilitate their practice of skills-based fiduciary duties. Increasingly, this is what the law of marriage requires.

61. See, e.g., TAMARA DRAVUT, STRAPPED: WHY AMERICA'S 20- AND 30-SOMETHINGS CAN'T GET AHEAD (2007) (suggesting legislative policy to counteract the financial obstacles that young adults of different educational backgrounds face in the United States today).

62. See, e.g., ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO INCOME TRAP: WHY MIDDLE CLASS PARENTS ARE GOING BROKE (2004) (discussing how today's middle class parents with children at home are financially more vulnerable to financial distress than their parents' generation because today both parents cannot afford not to work and yet, given child and home care costs, both parents cannot afford to work).

63. See, e.g., BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2008) (detailing the educated author's efforts to join the low-wage work force as a waitress, hotel maid, house cleaner, nursing-home aide, and Wal-Mart salesperson in Florida, Maine, and Minnesota to report on how plausible it is to survive on minimum-wage jobs).

64. See, e.g., ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT (2001) (analyzing the macroeconomic and microeconomic consequences of excessive reliance on national and personal debt).


Perhaps this requirement could be reflected in marriage vows as a secular blessing for the couple. I offer this template:

I, take you, __________ as my partner and spouse, to have and to hold my physical, emotional, and financial hopes, dreams, and trust.

I take you, _______, for richer or for poorer, understanding that I am entrusted, as are you, to create security for our family. I promise you to base whatever security we may enjoy on honesty, loyalty, truth, sharing, and equal partnership between us, in all matters, including financial.

I take you, __________, in sickness and in health. I understand that by honoring the trust that you place in me, I will contribute to your health and happiness; I will contribute to my own health and happiness; and I will contribute to our health and happiness together.

I honor the love and trust that we share as our most valuable form of wealth.

May I place my vows upon your lips as a kiss, and my hopes for us—as individuals and as partners—on your hand as a ring, both symbols of my love for you.

[kiss and ring]

With my words, my kiss, and this ring, I, __________, take you, __________, as beloved partner and spouse from this day forward.