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## What's in a Name: A Critical Look at California's System of Characterizing Marital Property

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## What's in a Name: A Critical Look at California's System of Characterizing Marital Property

SUSAN ADLER CHANNICK\*

### WHO'S ON FIRST?<sup>1</sup>

#### *Unknown*

Costello: Hey, Abbott, tell me the names of the players on our baseball team so I can say hello to them.

Abbott: Sure. Now, Who's on first, What's on second, I-Don't-Know on third . . .

Costello: Now, wait. What's the name of the first baseman?

Abbott: No, What's the name of the second baseman.

Costello: I don't know.

Abbott: He's the third baseman.

Costello: Let's start over.

As Abbott and Costello's "Who's on First" routine so aptly illustrates, sometimes it's hard to tell the players without a scorecard. Similarly, recent California legislative and decisional law respecting the characterization of marital property has left both the bench and the bar feeling like poor Lou Costello. Just when you thought you could correctly identify community property, the rules have changed yet another time. The rules are almost as confusing as Abbott and Costello's famous routine but with much more at stake.

One of the great anomalies of the marital property area is that the current law, while appropriate in a commercial environment, is not suitable to an intrafamily setting. Individuals who would not hesitate to seek legal advice in other areas of the law where their

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1. This hard copy is an abbreviated form of the piece most commonly performed by Bud Abbott and Lou Costello as found in *Fireside Book of Baseball* 347-48 (1956).

property rights are potentially implicated generally seek no advice at all when taking title to marital property. To accommodate this anomaly, the law respecting marital property characterization should comport with the expectations of parties and, to the extent possible, yield consistent results.<sup>2</sup> Instead, the current body of law in this area is so confusing that only the most astute family law practitioner or jurist is not still wondering who's on first.

In 1983, as part of a long line of legislative attempts to bring consistency and simplicity into the arena of marital property law,<sup>3</sup> the California Legislature enacted Assembly Bill 26 which added sections 4800.1<sup>4</sup> and 4800.2<sup>5</sup> to the Civil Code. Assembly Bill 26

2. See generally Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988); Griffith, *Joint Tenancy Community Property*, 14 STAN. L. REV. 87 (1961) [hereinafter Griffith]; Knutson, *California Community Property Law: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240 (1966); H. VERRALL & A. SAMMIS, *CASES & MATERIALS ON CALIFORNIA COMMUNITY PROPERTY* 7 (2d ed. 1971); Mills, *Community Joint Tenancy—A Paradoxical Problem in Estate Administration*, 49 CAL. ST. B.J. 388 (1974) [hereinafter Mills]; Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single—Spouse Management, and Invalid Marriage*, 18 SAN DIEGO L. REV. 143 (1981) [hereinafter Reppy, *Debt Collection*]; Comment, *Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement,"* 15 U.C. DAVIS L. REV. 95 (1981) [hereinafter Comment, *Form of Title*]; Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769 (1982) [hereinafter Bruch, *California Marital Property*]; Sterling, *Joint Tenancy and Community Property in California*, 14 PAC. L.J. 927 (1983) [hereinafter Sterling]; Mennell, *Community Property with Right of Survivorship*, 20 SAN DIEGO L. REV. 779 (1983) [hereinafter Mennell]; Abney, *Impact of California Community Property Presumptions on Joint Tenancy*, 13 COMM. PROP. J. 40 (1987); Comment, *The 1986 Amendments to California Civil Code Sections 4800.1 and 4800.2: Irreconcilable Differences Between the Legislature and the Court?*, 20 PAC. L.J. 97 (1988).

3. Abney, *Joint Tenancy/Community Property Presumption and Separate Property Reimbursement: Legislative History of California Law Provides Guidance*, 11 COMM. PROP. J. 275, 276-79 (1984).

4. CAL. CIV. CODE § 4800.1, added by 1983 Cal. Stats. ch 342, § 1 (West Supp. 1986), amended by Stats 1986, ch. 539, § 1 (West Supp. 1989). Section 4800.1, added by Cal. Stats., ch. 342, § 1 states:

For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(b) Proof that the parties have made a written agreement that the property is separate property.

Section 4800.1, amended by Stats 1986, ch. 539, § 1, states:

(a) The Legislature hereby finds and declares as follows:

(1) It is the public policy of this state to provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage in joint title form, and for the allocation of community and separate interest in that property between the spouses.

(2) The methods provided by case and statutory law have not resulted in consistency in the treatment of spouses' interests in property which they hold in joint title, but rather, have created confusion as to which law applies at a particular

made a number of changes to the law governing spousal joint tenancies. For the purpose of division of property at marital dissolution or legal separation only, section 4800.1 extends the single-family residence community property presumption of California Civil Code section 5110<sup>6</sup> to all spousal joint tenancies and adds a writing requirement in order to rebut the presumption. Section 4800.2 creates a non-interest bearing<sup>7</sup> right of reimbursement in a

point in time to property, depending on the form of title, and, as a result, spouses cannot have reliable expectations as to the characterization of their property and the allocation of the interests therein, and attorneys cannot reliably advise their clients regarding applicable law.

(3) Therefore, the Legislature finds that a compelling state interest exists to provide for uniform treatment of property; thus the Legislature intends that the forms of this section and Section 4800.2 operative on January 1, 1987, shall apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property, and that the form of this section and that form of Section 4800.2 are applicable in all proceedings commenced on or after January 1, 1984. However, the form of this section and the form of Section 4800.2 operative on January 1, 1987, are not applicable to property settlement agreements executed prior to January 1, 1987, or proceedings in which judgments were rendered prior to January 1, 1987, regardless of whether those judgments have become final.

(b) For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(2) Proof that the parties have made a written agreement that the property is separate property.

5. CAL. CIV. CODE § 4800.2 (West Supp. 1986). Section 4800.2 states:

In the division of community property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division. As used in this section, "contributions to the acquisition of the property" include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

6. In addition to adding sections 4800.1 and 4800.2 to the Civil Code, A.B. 26 also amended California Civil Code section 5110 to delete the provision relating to classification for the purpose of dissolution of a joint tenancy single-family residence acquired during marriage. This presumption was first added to the Civil Code in 1965 by the addition of the provision containing the presumption to former section 164, (originally enacted 1872; amended by Stats. 1965 ch. 1710, p.3843, § 1) and replaced in 1970 by section 5110 (added by Stats. 1969, ch. 1608, p. 3339, § 8). See generally *Final Rep. of Assem. Interim Comm. on Judiciary Relating to Domestic Relations (1965)*, 2 APPEN. TO ASSEM. J. 1, 117-25 (1965) [hereinafter *Domestic Relations*].

7. This version was changed substantially from the form originally promulgated by

spouse who can trace contributions to the acquisition of community property to a separate property source. Initially, the California Law Revision Commission had proposed section 4800.1 as a replacement for the "less direct and less adequate"<sup>8</sup> 5110 community property presumption for a single-family residence acquired by husband and wife in joint tenancy form rather than extending the reach of 5110 to all property acquired by the spouses in joint tenancy form.<sup>9</sup> In its *Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage*, the Commission stated that the purpose of the addition of section 4800.1 was to give courts in dissolution or legal separation proceedings the jurisdiction to settle all of the marital

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the California Law Revision Commission in September 1982. That proposed section 4800.1 read as follows:

4800.1. Notwithstanding any other law:

(a) In a proceeding for the division of the community property and the quasi-community property the court has jurisdiction, at the request of either party, to divide the interest of the parties in real and personal property wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The division shall be made in the same manner and to the same extent and subject to the same limitations, as community property and quasi-community property.

(b) For the purpose of this section the interests of the parties in the property are presumed to be equal. This presumption is a presumption affecting the burden of proof and is rebuttable by proof of different proportionate contributions of the parties to the acquisition of the property or by proof of an agreement of the parties that their interest in the property are different.

(c) If property held in joint tenancy is divided pursuant to this section, the interlocutory judgment of dissolution of the marriage or the judgement decreeing the legal separation of the parties severs the joint tenancy.

(d) This section applies to proceedings commenced on or after January 1, 1984, regardless of whether the property was acquired before, on, or after January 1, 1984.

*Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage*, 16 Cal. L. Revision Comm'n Reports 2165, 2171-72 (1982) [hereinafter *16 Comm'n Rpts*].

The Legislative history of the section sheds little light on the reasons for its final form. See *Report of Senate Committee on Judiciary on Assembly Bill 26*, 83 Senate Journal Regular Session 4865-66 (1983) [hereinafter *1983 Sen. Rept.*] for the only language expressing the intent of the Legislature in promulgating such a drastically revised § 4800.1 and 4800.2 from the 1982 version found at *16 Comm'n Rpts supra*, at 2171-73: "Assembly Bill 26 is jointly recommended by the California Law Revision Commission and the State Bar Conference of Delegates. It is a substantially revised version of the commission's *Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage*, 16 Cal. L. Revision Comm'n Reports 2165 (1982). The revisions are designed to avoid tax and theoretical problems raised by practitioners concerning the original recommendation." By 1985, when the legislature enacted Civil Code § 4800.4, the tax problem attendant to division of separate property at dissolution had been solved. See *Recommendation Relating to Dividing Jointly Owned Property at Dissolution*, 18 CAL. L. REVISION COMM'N 149, 153 (1986). [hereinafter *18 Comm'n Rpts*]. By that time 4800.1 in its present form had already been enacted.

8. *16 Comm'n Rpts, supra* note 7, at 2172.

9. *16 Comm'n Rpts, supra* note 7, at 2172-74; *Domestic Relations, supra* note 6, at 121-25; Bruch, *California Marital Property, supra* note 2, at 831.

property rights of the parties including their respective rights in joint tenancy and tenancy-in-common property, historically separate property estates. Although joint tenancy property would be presumed to belong equally to each spouse for the purpose of division, this presumption could be rebutted by a showing of different proportionate contributions.<sup>10</sup>

Notwithstanding such legislative history, the thrust of Assembly Bill 26 was something quite different. The *Report of the Senate Committee on Judiciary on A.B. 26* states that a primary purpose of A.B. 26 is to require a writing rather than parol evidence to rebut the community property presumption of section 4800.1, as well as to reverse the gift presumption articulated by the California Supreme Court in *In re Marriage of Lucas*.<sup>11</sup> The change in

10. 16 *Comm'n Rpts supra* note 7, at 2172; note the similarity between 1982 proposed version of 4800.1 and Cal. Civ. Code § 4800.4 (West Supp. 1989) adopted in 1985 and applicable to all proceedings for divisions of marital property commenced after January 1, 1986, which states in applicable part:

(a) In a proceeding for division of the community property and the quasi-community property, the court has jurisdiction, at the request of either party, to divide the separate property interests of the parties in real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The property shall be divided together with, and in accordance with the same procedure for and limitations on, division of community property and quasi-community property.

The main difference between 4800.1, as originally proposed in 1982 and 4800.4, as enacted in 1985, is in the rebuttal standard required to rebut the presumption of the spouses' equal interests in the property. In the 1982 version of 4800.1, the presumption could be rebutted by a showing of different proportions, effectively tracing. In the 1985 version of 4800.4, the court is simply given jurisdiction to divide the jointly-held property according to the guidelines of 4800.1 and 4800.2.

Prior to the adoption of section 4800.4, Cal. Civ. Code 4800 (West Supp. 1989) gave the courts in proceedings to divide marital property jurisdiction over only the "community estate" including community and quasi-community property. Bruch, *California Marital Property, supra* note 2, at 843. The enactment of section 4800.4 extends that jurisdiction to all property held by the parties as joint tenants and tenants in common at the request of either party and specifically amends section 4800 and reverses prior case law to the contrary. 18 *Comm'n Rpts, supra* note 7.

11. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). In *Lucas*, the California Supreme Court finally addressed the issues attendant to a mixed community/separate asset: determination of the character of the property and apportionment of the fair market value of the asset between the two estates at marital dissolution. The *Lucas* court was faced with the common situation in which marital property is purchased during marriage with the separate property down payment of one of the spouses and community property contributions to the payoff of the loan.

At the advice of their real estate agent, Brenda and Gerald Lucas had taken title to their house in 1968 as joint tenants thereby invoking the community property presumption of section 164. The court held that the affirmative act of taking title removes the property from the general community property presumption which may normally be rebutted by tracing the property to a separate property source and raises the rebuttal standard to require an agreement between the spouses that the property is of different character than as set forth in the document of title. If the separate property proponent can prove such an agreement, then the court may use the apportionment formula approved in *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979). If no agreement is proved,

section 4800.1 from a division on divorce statute to one which both creates a presumption and raises the evidentiary burden of rebutting such presumption and the addition of section 4800.2 to the Civil Code has created more problems than solutions. Section 4800.1 overturns previous case law by creating a statute of frauds requirement to rebut the evidentiary presumption of form of title where one had never been required in the past. Section 4800.2 overturns the separate property gift presumption recognized by *Lucas* and creates a right of reimbursement in the separate property contributor which is inconsistent with any previous apportionment scheme.<sup>12</sup> In addition, the California Supreme Court has taken a contradictory position to the retroactive application of 4800.1 and 4800.2 on the grounds that both impair property rights which vest upon the "acquisition" of the property in joint tenancy without due process of law.<sup>13</sup>

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the separate property is deemed a gift to the community. It is this gift presumption which the legislature found unfair and the impetus for promulgating 4800.2 as remedial legislation.

For an excellent discussion of what evidence is required to rebut the various property characterization presumptions, see Justice Donald King's now depublished opinion in *Marriage of Buol*, 159 Cal. App. 3d 174 (1984) and HOGOBOOM & KING, Cal. Prac. Guide: Fam. Law I §§ 8.9-8.102 (TRG. 1987) [hereinafter HOGOBOOM & KING].

The Senate Report noted the inconsistency of allowing parol evidence to rebut presumptions regarding property where the statute of frauds would otherwise require a writing. 1983 Sen. Rept., *supra* note 9 at 4865. See also Mills, *supra* note 2, at n. 6; Reppy, *Debt Collection*, *supra* note 2, at 159-68.

12. The 4800.2 right of reimbursement ignores the concept that property acquired during marriage may be an admixture of community and separate property and therefore properly apportionable between the two estates. In so legislating, it is interesting to speculate whether California has indirectly adopted the view held by the majority of community property states that the character of the initial contributions determines the character of the property. Under either of the "inception-of-rights" or "time-of-vesting" analysis, the "out" estate may only be reimbursed for contributions to the property. BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 275-76 (1987).

If this is the case, it is arguably true only for separate contributions to community property. (See *In re Marriage of Lerversee*, 156 Cal. App. 3d 891, 203 Cal. Rptr. 481 (1984) for the rule that 4800.1 applies only to joint-titled property acquired after marriage. However, 4800.1 does apply to property acquired prior to marriage but where the joint form of title is taken after marriage.) Community contributions to separate property still appear to be governed by the apportionment of ownership rules. *In re Marriage of Frick*, 181 Cal. App. 3d 997, 226 Cal. Rptr. 766 (1986); HOGOBOOM & KING, *supra* note 11, §§ 8.76-8.78, at 8-59 -8-63.

13. *In re Marriage of Buol*, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985); *In re Marriage of Fabian*, 41 Cal. 3d 440, 715, P.2d 253, 224 Cal. Rptr. 333 (1986); *Perkal v. Perkal*, 203 Cal. App. 3d 1198, 250 Cal. Rptr. 296 (1988); *Bankovich v. Bankovich*, 203 Cal. App. 3d 49, 249 Cal. Rptr. 713 (1988); (holding amended 4800.2 inapplicable to reimburse the separate property spouse with no *Lucas* agreement for property acquired prior to 1984 although pleadings filed post-1984 and judgment entered post-1987); *In re Marriage of Hopkins & Axene*, 199 Cal. App. 3d 288, 244 Cal. Rptr. 433 (1988) (following the rule in *In re Marriage of Griffis*, 187 Cal. App. 3d 156, 231 Cal. Rptr. 510 (1986) that the *Buol/Fabian* "date" for 4800.1 is when it becomes too late for the community to get a written waiver of the automatic right to reimbursement); *In re Marriage of Cairo*, 205 Cal. App. 3d 1255, 251 Cal. Rptr. 731 (1988) (waiver of 4800.2

To exacerbate matters further in this already tumultuous area of the law, the 4800.1 and 4800.2 presumptions apply only in matters of marital dissolution or legal separation. They specifically do not apply to other situations where form of title may be relevant to the disposition of marital property such as in the disposition of marital property at the death of one of the spouses. The effect of the 4800.1 presumption is to extend the concept of the hybrid estate—community property engrafted with a right of survivorship—first created by Civil Code section 164.<sup>14</sup> While the recognition of such an estate may have been on the legislative agenda, nowhere in the scanty legislative history of A.B. 26 is it expressed.<sup>15</sup>

The purpose of this article is to critically evaluate the current and future effects of 4800.1 and 4800.2 with respect to California's current system of characterizing marital property. It is the contention of this author that the legislature, seeking simplicity in the rules governing the characterization of marital property, has formulated a rigid set of rules which are easy to apply but inflexible.<sup>16</sup> The new legislation is deficient in a number of respects.

First, it reflects the legislature's uncertainty about what

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right of reimbursement is subject to all of the same defenses as any contract); *In re Marriage of Lockman*, 204 Cal. App. 3d 782, 251 Cal. Rptr. 433 (1988); *In re Marriage of Reilly, as modified*, 196 Cal. App. 3d 1119, 242 Cal. Rptr. 302 (1987) (4800.2 does not apply to pre-1984 proceedings where the property was acquired prior to 1984); *In re Marriage of Colombo, as modified*, 197 Cal. App. 3d 572, 242 Cal. Rptr. 100 (1987); *In re Marriage of Witt*, 197 Cal. App. 3d 122, 242 Cal. Rptr. 646 (1987) (lack of a written waiver of reimbursement for a post-1984 separate property contribution triggers the application of 4800.2 regardless of the finding of a *Lucas* agreement to the contrary); Comment, *The 1986 Amendments to California Civil Code Sections 4800.1 and 4800.2: Irreconcilable Differences Between the Legislature and the Court?*, 20 PAC. L.J. 97 (1988) [hereinafter *Irreconcilable Differences*]; Flagg, *Respecting Reliance: A Standard for Due Process Review of California's Retroactive Community Property Legislation*, 14 COMM. PROP. J. 14 (1988) [hereinafter Flagg]; but see Reppy, *Applying New Law to Preenactment Acquisitions—Must Prior Law be "Rankly Unjust"? Part Two*, 15 (3) COMM. PROP. J. 1 (1989) [hereinafter Reppy, *Rankly Unjust II*]; Reppy, *Applying New Law to Preenactment Acquisitions—Must Prior Law be "Rankly Unjust"?*, 15 COMM. PROP. J. 1 (1988). [hereinafter Reppy, *Rankly Unjust I*].

14. See *supra* note 6; Griffith *supra* note 2; *Domestic Relations, supra* note 6, at 122; Reppy, *Debt Collection, supra* note 2, at 147.

15. As opposed to California's sub silentio recognition of the estate of survivorship marital property, the Uniform Marital Property Act expressly creates such an estate in order to combine the benefits of marital property at dissolution and the avoidance of probate at the death of the first spouse to die. Uniform Marital Property Act § 11 (ULA 1983) [hereinafter UMPA].

16. At least one appellate court, criticizing the supreme's court's rule in *Lucas*, has noted that the search for a simple and easily-applied solution often causes difficulties because of the inherent inflexibility of the solution. Such solutions are often inappropriate because they ignore the human conduct in marriages including the fact that the party whose rights are adversely affected usually acts without legal advice and without knowledge of the consequences of his or her actions. *Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984).



problems this reform legislation is supposed to redress. Section 4800.1 can be read as a legislative attempt to accomplish all of the following: (1) create a statutory community property presumption for all jointly-held marital property for purposes of property division at marital dissolution; (2) create indirectly a hybrid marital property estate—survivorship community property; (3) give the court, in matters of marital property division, jurisdiction over all jointly-held marital property; and (4) force married couples to treat their mixed property transactions as if they were in a commercial setting by the requirement of a writing to rebut the community property presumption.<sup>17</sup>

Section 4800.2, while expressly directed at reversing the former presumption of a separate property gift to the community, fails to recognize the concept that marital property may be wholly community, wholly separate or an admixture of both. By adopting reimbursement as a remedy for the separate property estate, it *sub silentio* adopts a form of the doctrine inception of title<sup>18</sup> heretofore unrecognized in California and creates confusion about the continued viability of the doctrine of pro rata apportionment.

Second, while a presumption in favor of the community in ambiguous situations is desirable, it is possible that the legislature has gone beyond the constraints of human conduct in a marital situation by requiring a writing to maintain a separate property pro rata interest. In order to prevent the abrogation of his property rights, the separate property contributor must obtain a writing signed by his spouse in the nature of a premarital agreement.<sup>19</sup> Absent such a writing, the separate property contributor may have simple reimbursement. While such a writing would provide a court with clear evidence of the character of such property, most spouses who enter into such mixed-character transactions do so without either legal advice or any idea of the legal consequence of making a separate property contribution to property acquired by the community. The result is not even a consistent one; when the community estate makes a contribution to a separate property asset, if the community can trace its contribution, it is entitled to full pro rata apportionment of the appreciation as well as reimbursement for its contribution.<sup>20</sup>

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17. *Id.*

18. *Creamer v. Briscoe*, 101 Tex. 490, 109 S.W. 911 (1908).

19. The difficulty with premarital agreements is that most people contemplating marriage intuitively feel that they are counter productive, that is, they discourage rather than encourage harmonious relations. Certainly the same can be said for writing requirements to preserve separate property interests during marriage.

20. *Marriage of Moore*, 38 Cal. 3d 366, 618 P.2d 208, 268 Cal. Rptr. 662 (1980); *Marriage of Frick*, 181 Cal. App. 3d 997, 226 Cal. Rptr. 766 (1986); *Marriage of Mars-*

Third, the enactment of 4800.1 and 4800.2 creates confusion in a number of areas. For example, since 4800.1 is triggered only at marital dissolution or legal separation, all former presumptions are still applicable in nondissolution situations. Recently the Fourth District Court of Appeals addressed this very issue in *Estate of Blair*.<sup>21</sup>

In June 1985, Ray and Nancy Blair separated after 22 years of marriage. Nancy petitioned for legal separation listing their home, held in joint tenancy, as "community property." Ray responded by requesting dissolution of the marriage and confirmation of separate and community assets. In his 1985 deposition, Ray testified that he "believed" that the home was community property.<sup>22</sup> Thereafter, Nancy Blair executed a new will leaving her entire estate to her sister.

Nancy died prior to the trial in the dissolution action and her sister was appointed as the executrix of her estate. On the inventory and appraisal, her sister did not list the house as a part of Nancy's probate estate. In February, 1986, Ray Blair filed an affidavit of death of joint tenant with the Office of the County Recorder and subsequently sold the house to a bona fide purchaser.<sup>23</sup>

In September 1986, the executrix of Nancy's estate claimed for the estate a one-half interest in the house, or alternatively in the proceeds of sale, based on the community property character of the property.<sup>24</sup> The trial court ordered Ray to pay the estate one-

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den, 130 Cal. App. 3d 426, 282 Cal. Prtr. 910 (1982); *Vieux v. Vieux*, 80 Cal. App. 222, 251 P. 640 (1926).

21. 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988).

22. In *Blair*, the trial court found evidence of a transmutation of the property from joint tenancy to community property in Nancy Blair's Petition for Legal Separation (which would have been sufficient to sever the joint tenancy under proposed 4800.1(c), *16 Comm'n Rpts*, *supra* note 7, at 2172) and in Ray Blair's deposition in the dissolution of marriage proceedings. The appeals court held these declarations to be inadequate to constitute an agreement to transmute in that it was likely that Ray had been told by his attorney that 4800.1 was controlling in a dissolution of marriage situation essentially nullifying his declaration for purposes of death. *Estate of Blair* at 168, 244 Cal. Rptr. at 631. For what constitutes adequate transmutation in dissolution pleadings, see *Estate of Baglione*, 165 Cal. 2d 192, 195, 417 P.2d 683, 686, 53 Cal. Rptr. 139, 142 (1966).

23. Once an affidavit of death of joint tenant (California Probate Code sections 210-12) is properly recorded, a subsequent purchaser takes the property with notice of title to the whole property as vested in the surviving joint tenant. Title insurance companies, when insuring title in the surviving joint tenant, generally accept the affidavit procedure for terminating the joint tenancy. CEB, 1 CALIFORNIA DECEDENT ESTATE PRACTICE § 4.18 (1989).

24. The effect of the 4800.1 presumption is to extend the concept of the hybrid estate (community property engrafted with a right of survivorship) first created by Civil Code Section 164. See Griffith, *supra* note 2; *Domestic Relations*, *supra* note 6, at 122; Reppy, *Debt Collection*, *supra* note 2, at 147. Nowhere in the legislative history of A.B. 26 is the intent of the legislature to recognize such an estate expressed. As opposed to this sub silentio recognition of the estate, the Uniform Marital Property Act expressly creates such an estate in order to combine the benefits of marital property at dissolution and the avoidance

half of the proceeds of sale of the house plus interest finding that the house was community property based on a prior agreement between Nancy and Ray transmuting the property from joint tenancy to community property.<sup>25</sup>

The appellate court remanded the case to the trial court on a number of issues one of which was a determination of whether an agreement to transmute the house from joint tenancy to community property had occurred.<sup>26</sup> While the court agreed that the January 1, 1984 version of section 4800.1<sup>27</sup> creates a presumption that property acquired during marriage in joint tenancy form is community property, this presumption applies only for the purpose of division of property upon dissolution of marriage or legal separation.<sup>28</sup> Since the issue as to the character of property in *Blair* arose in the context of the death of one of the spouses, section 4800.1 is not applicable.

When section 4800.1 does not apply, the joint tenancy form of title presumption attaches.<sup>29</sup> A form of title presumption may only be rebutted by a *Lucas*-type agreement by the spouses to the contrary;<sup>30</sup> if such a presumption cannot be overcome by evidence of an agreement, then the surviving spouse takes the whole by right of survivorship. Absent an agreement to the contrary, the common law form of title presumption is controlling despite the fact that right of survivorship could not have been within the expectation of

of probate at the death of the first spouse to die. Uniform Marital Property Act § 11 (ULA 1983) [hereinafter UMPA]. See also Sterling, *supra* note 2, at 951 describing the right of survivorship as the "grand" and "disguising" incident of joint tenancies.

25. See cases cited *infra* note 47.

26. The transmutation issue in *Blair* revolved around whether the alleged transmutation had taken place before the effective date of Cal. Civ. Code section 5110.730 which imposes a writing requirement on transmutations made during marriage on or after January 1, 1985.

27. The *Blair* court did not have to deal with the *Buol/Fabian* retroactivity issue since it found § 4800.1 inapplicable to the facts of *Blair*.

28. See *supra* note 4.

29. Refer to *Siberell* and companion cases *infra*.

30. What exactly constitutes a *Lucas* agreement is still relevant in light of the supreme court's decisions in *Buol* and *Fabian* as to the retroactive effect of sections 4800.1 and 4800.2. See *supra* note 11 and accompanying text. For what constitutes an effective transmutation, see Adams & Sevitch, Cal. Fam. L. Rep. § D.45.1 -D.48 (7th ed. 1988) [hereinafter Adams & Sevitch]. Oral transmutations or transmutations by the conduct of the parties are effective only to transmute from spousal joint tenancies to community property; the statute of frauds requirement of Civil Code section 683 makes an oral transmutation in the other direction impossible; accord *Wheeland v. Rogers*, 20 Cal. 2d 218, 124 P.2d 816 (1942); *California Trust Co. v. Bennet*, 33 Cal. 2d 694, 204 P.2d 324 (1949). Of course, post-January 1, 1985 oral transmutations are entirely impermissible following the enactment of four new provisions added to the Civil Code in 1984 which add a writing requirement for an effective transmutation. Cal. Civ. Code §§ 5110.710-740 (West Supp. 1989). For a discussion of the probable effects of the new transmutation statutes, see *infra* notes 239-51 and accompanying text.

the parties involved in a marital dissolution proceeding.<sup>31</sup>

The *Blair* court, in dicta, noted the unevenness and unfairness resulting from a chameleon-like community property presumption which arises at marriage, continues to legal separation or dissolution of marriage, disappears at death, and potentially reappears again at intestate succession.<sup>32</sup> Whereas one of the functions of evidentiary presumptions is to inject certainty and predictability into the law by providing that certain conclusions be drawn when other facts are proved, the unevenness of the application of community property presumptions tends instead toward uncertainty and confusion.<sup>33</sup>

The historic starting point of the California system of characterizing marital property as community or separate is the presumption.<sup>34</sup> Since one of the acknowledged purposes of presumptions is to accord a certain amount of predictability to the resolution of legal disputes, it should be enlightening to explore both the legislative and judicial history which have lead instead to California's currently chaotic law respecting the characterization of marital property.

## I. HISTORIC OVERVIEW

At the 1849 constitutional convention, California officially adopted the community property concept of marital property embodied in Spanish civil law.<sup>35</sup> In doing so, California followed Texas and Louisiana in rejecting the English common law governing marital property. Notwithstanding its apparent adoption of a marital property system which recognized each spouse's interest in the community as vested upon acquisition, California's commitment to a community property system can best be described as equivocal.<sup>36</sup> California continued to retain many separate property

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31. Estate of Blair at 169, 244 Cal. Rptr. at 632.

32. *Id.* See *supra* note 2 and accompanying text.

33. The holding in *Blair* raises an interesting potential legal malpractice issue which requires lawyers representing parties in dissolution proceedings to promptly partition all community property held in joint tenancy in order to avoid the adverse and unexpected consequences of *Blair*. *Id.*; accord Adams & Sevitch, *supra* note 30, at 3629. See *supra* note 22 and *infra* note 255 for a discussion re the permissibility of unilateral severance of joint tenancies in California. See also 16 *Comm'n Rpts*, *supra* note 7, at 2172 where the California Law Revision Commission recognized the potential for this problem and attempted to solve it in proposed § 4800.1(c) by having the interlocutory judgement of dissolution effect a severance of spousal joint tenancies.

34. REPPY, COMMUNITY PROPERTY IN CALIFORNIA 64 (2d ed. 1988) [hereinafter cited as REPPY].

35. Cal. Const. art. XI, § 14 (1849).

36. See generally, Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849 - 1975*, 24 UCLA L. REV. 1 (1976) [hereinafter Prager]. See notes *infra* and accompanying text.

concepts as part of its community property framework including the recognition of spouses' legal ability to hold title to property in joint tenancy.<sup>37</sup>

One consequence of adopting a marital property system is the need to properly characterize property acquired during marriage as either community<sup>38</sup> or separate.<sup>39</sup> This requirement is more compelling when the marital property system evolves in tandem with a system for separate property ownership between spouses.<sup>40</sup>

37. See text accompanying notes 59-61 *infra*.

38. Community property is defined by negative inference in California. Bruch, *California Marital Property*, *supra* note 2, at 779. Only separate property is defined in the constitution. Cal. Const. art. I, § 21. Community property is defined in Cal. Civ. Code § 5110 (West Supp. 1989) as follows:

Except as provided in Sections 5107, 5108 and 5126, all real property situation in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state . . . is community property

. . .

39. The Cal. Civ. Code §§ 5107 and 5108 (West 1983) define separate property as: All property of the wife (husband), owned by her (him) before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her (his) separate property. The wife (husband) may, without the consent of her husband (his wife), convey her (his) separate property.

40. Although courts have held that the same property may not be both joint tenancy and community property (*Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003, 1005 (1932)), it is quite possible that because of the different rebuttal standards at dissolution and death, both estates can exist in the same property. Joint tenancy historically is a separate property estate which may exist between and among related or unrelated parties wherein the joint tenants are said to have an undivided interest in the whole. Joint tenancies are unilaterally severable in California. *See Riddle v. Harmon*, 102 Cal. App. 3d 524, 162 Cal Rptr. 530 (1980) and text accompanying notes 257-264 *infra* (unilateral severance of joint tenancy permissible for real property); *but see Estate of Propst*, 201 Cal. App. 3d 512, 247 Cal. Rptr. 917 (1988) and note 255 *infra* (unilateral severance of joint tenancy personal property not permitted); *see also Fetters*, (*An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 *FORDHAM L. REV.* 173 (1986) [hereinafter Fetters]) (spousal joint tenancies are an invitation for one spouse to commit fraud on the other by the use of unilateral severance). The most compelling incident of the joint tenancy estate is the right of survivorship among the tenants; because of the right of survivorship, joint tenancy property is not alienable at the death of a joint tenant.

Community property is an estate recognized in only eight jurisdictions: California, Texas, Arizona, Nevada, Washington, New Mexico, Idaho and Louisiana. *See Weisberger*, *The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience in Developing a Model for Comprehensive Common Law Property Reform*, 1 *WISCONSIN WOMEN'S L.J.* 6 (1985); Taylor & Raabe, *Wisconsin's Uniform Marital Property Act: Community Property Moves East*, 12 *COMM. PROP. J.* 83 (1985); Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 *UCLA L. REV.* 1269 (1981) [hereinafter Comment, *Sharing Principles*]. Compare Oldham, *Is the Concept of Marital Property Outdated*, 22 *J. FAM. L.* 263 (1983-84) [hereinafter Oldham]; Glendon, *Family Law Reform in the 1980's*, 44 *LA. L. REV.* 1553 (1984) [hereinafter Glendon]. It is a form of property ownership that may exist only between spouses for property acquired while domiciled in California with earnings of the community. Each spouse has a vested one-half interest in the property regardless of which spouse furnished the consideration. Community property is not severable during the joint lifetimes of the spouses. At death, community property is freely alienable by either spouse.

*See generally Spitzer*, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 *TEX. TECH. L. REV.* 629 (1985); Sterling, *supra* note 2, at 940-

To that end, certain presumptions regarding the character of property have evolved to assist courts in resolving legal disputes surrounding the character of property.

California Civil Code section 5110 defines community property as “[A]ll 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.”<sup>41</sup> It specifically excepts from this definition all property and any rents, issues, and profits thereof of either spouse that was owned prior to marriage or acquired afterwards by gift, bequest, devise or descent; everything that is not community property is separate property. Section 5110 is commonly known as the “time of acquisition” or the “general community property” presumption and is usually the starting point from which courts characterize the property of the spouses at such adjudications as marital dissolution, death of one of the spouses, and transactions with third parties.

California law has not been clear or consistent about whether 5110 creates an evidentiary presumption or merely states the definition of community property.<sup>42</sup> However, the vast majority of courts find a presumption in 5110 based on the time that the property was acquired. There are basically three approaches that the courts take in applying the 5110 presumption to the determination of the character of property. The first approach is represented by cases which have found a pro-community property presumption to arise only after the community property proponent has sustained the burden of proving that the property at issue was acquired during marriage.<sup>43</sup> The presumption that arises is rebuttable by the separate property opponent, but if the presumption cannot be rebutted, then the property at issue, having met the definitional requirements of section 5110, is community property.

57; Bruch, *California Marital Property*, *supra* note 2, at 828-42; Prager, *supra* note 36.

41. Cal. Civ. Code § 5110 (West Supp. 1989).

42. At least one recent appellate court has stated that although the general community property or time of acquisition presumption has been associated with section 5110, such presumption is not mandated by statute but is instead a creation of the courts. *In re Marriage of Lusk*, 86 Cal. App. 3d 228, 234, 150 Cal. Rptr. 63, 67-68 (1978); *accord* Blumberg *supra* note 12, at 144; REPPY, COMMUNITY PROPERTY IN CALIFORNIA 64 (2nd ed. 1988) [hereinafter REPPY, COMMUNITY PROPERTY] Professor Reppy points out that 5110 as it currently reads is no more than a definition and that “[F]or the courts to say a presumption arises upon proof of the basic element of the definition of a legal category is illogical.” *Id.* at 65. See also *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. L. REVISION COMM’N REPORTS 205 (1984) [hereinafter 17 *Comm’n Rpts*] for the California Law Revision Commission’s recommendation of the adoption of proposed sections 5110.110 - 5110.699 in order to mandate such presumptions and their evidentiary requirements by statute.

43. See, e.g., *Fidelity & Casualty Company v. Mahoney*, 71 Cal. App. 2d 65, 161 P.2d 944 (1945).

The second approach provides that a presumption of community property arises if either husband or wife was in possession of the property during their marriage.<sup>44</sup> Clearly, this analysis eases the burden of the pro-community spouse who is no longer required to prove time of acquisition but has the advantage of the presumption simply by proving possession during marriage. Under one version of this approach, the evidence must show possession after a long marriage in order to trigger the general presumption.<sup>45</sup>

Under the third and most favorable approach to the community property proponent, courts have accorded the separate property proponent the burden of proving the fact that the property at issue is separate.<sup>46</sup> Such an approach essentially turns the 5110 definition into a true presumption and gives the party alleging the community character of the property the full benefit of the presumption. While such a line of reasoning seems to occur in only a minority of cases, one might speculate whether a policy favoring a marital property system isn't best served by such an approach.

As an integral part of the dual marital property system in California, the courts have also recognized a so-called common law presumption which arises in favor of form of title.<sup>47</sup> This doctrine was first articulated by the California Supreme Court<sup>48</sup> in 1934 where the court held that the actual taking title in joint tenancy created a binding agreement between the spouses the property was to have the characteristics of joint tenancy rather than community property.<sup>49</sup> In later cases, the court backtracked from its former

44. See, e.g., *Lynam v. Vorwerk*, 13 Cal. App. 507, 110 P. 355 (1910).

45. *Fidelity & Casualty Company v. Mahoney* at 68, 161 P. 2d. at 946; *Estate of Duncan*, 9 Cal. 2d 207, 217, 70 P.2d 174, 179 (1937); *Falk v. Falk*, 48 Cal. App.2d 762, 767, 120 P.2d 714, 717 (1941).

46. See, e.g., *Wilson v. Wilson*, 76 Cal. App. 2d 119, 172 P.2d 568 (1946); *Smith v. Smith*, 12 Cal. 216 (1859); *Estate of Jolly*, 196 Cal. 547, 238 P.353 (1925); *Meyer v. Kinzer*, 12 Cal. 247 (1859).

47. The form of title presumption arises in both under Civil Code section 5110 ("... when any... property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that the property is... community property...") and at common law when title to spousal property is taken in joint tenancy. (*In re Marriage of Lucas* at 814, 614 at 288, 166 Cal. Rptr. at 857; *Machado v. Machado*, 58 Cal. 2d 501, 506, 375 P.2d 55, 58, 25 Cal. Rptr. 87, 90 (1962). See Comment, *Form of Title*, *supra* note 2, at 96.

48. For the first time, the supreme court stated that "... as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate." *Siberell* at 773, 7 P.2d at 1005 (1932).

49. Prior to the enactment of the new post-1985 transmutation statutes, a transmutation of the character of property from separate to community and community to separate could occur by a writing, oral agreement, conduct of the spouses, or merely by the facts of

irrefutable position by holding that the joint tenancy form of title created a rebuttable presumption that the character of the property is as stated on the deed.<sup>50</sup>

In a jurisdiction like California, where common law and community property principles have developed in tandem, spousal joint tenancies create a unique problem with regard to conflicting presumptions.<sup>51</sup> For example, property acquired during marriage which is not otherwise separate property but is titled in joint tenancy with a right of survivorship may be properly characterized as community having been acquired during marriage as required by the 5110 definition, or may be characterized as separate, having given rise to the form of title presumption which is often said to supersede the 5110 community property presumption.<sup>52</sup> May such property be characterized as both community and separate? Certainly, such a hybrid form of property has been recognized implicitly since 1965 when the California legislature, in response to a growing segment of the married population who continued to take title to their homes in joint tenancy form,<sup>53</sup> added to section 164 language which created a presumption for purposes of division of the property at divorce in favor of characterizing as community property a single-family residence titled in joint tenancy.<sup>54</sup>

While the recognition of a survivorship community property estate has been advocated by commentators for a long time,<sup>55</sup> the legislature's treatment of such an estate has been less than express. Until the 1983 enactment of 4800.1 and 4800.2, the whole area of statutory marital property presumptions in California had been woefully underdeveloped. Both community property and common law marital property presumptions, which had developed

the situation. See generally Mills, *supra* note 2; Reppy, *Debt Collection*, *supra* note 2; Sterling, *supra* note 2, at 959-60, notes 239-40.

50. This presumption may be overcome by evidence of an agreement between the spouses that the joint tenancy form of title has not transmuted the property from a community character. *Machado v. Machado*, 58 Cal. 2d 501, 375 P.2d 55, 25 Cal. Rptr. 87 (1962); *Gudelj v. Gudelj*, 41 Cal. 2d 202, 259 P.2d 656 (1953) (tracing to separate property source insufficient); *Socol v. King*, 36 Cal. 2d 342, 223 P.2d 627 (1950) (hidden or undisclosed interest insufficient); *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P.2d 905 (1944).

51. Sterling, *supra* note 2, at 958.

52. *In re Marriage of Buol*, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985); *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); *Gudelj v. Gudelj*, 41 Cal. 2d 202, 259 P.2d 656 (1953); *Socol v. King*, 36 Cal. 2d 342, 223 P.2d 627 (1950); *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P.2d 905 (1944); *Estate of Blair*, 199 Cal. App. 3d 199, 244 Cal. Rptr. 627 (1988); *Schindler v. Schindler*, 126 Cal. App.2d 597, 272 P.2d 566 (1954); see Comment, *Form of Title*, *supra* note 2, at n. 7.

53. See *supra* note 19 and accompanying text.

54. See *Domestic Relations*, *supra* note 6, at 121-24; Griffith, *supra* note 2, at 88-90; Sterling, *supra* note 2, at 964.

55. *Id.*



over the approximately 130 years that community property doctrine has been recognized in California, bore little relationship to the framework of the California Evidence Code, particularly in assigning the benefit of the presumption.<sup>56</sup> Efforts at reform have tended to create ad hoc rather than comprehensive solutions.

The situation in *Estate of Blair* is illustrative of the unpredictable results that can occur in a system of property ownership which has made little provision for reconciling two such contradictory interspousal estates as community property and joint tenancy. It is important to understand how these two systems developed concurrently and to note that despite approximately 140 years of existence, there is still not a complete reconciliation of these estates as they apply to characterizing marital property. As will be seen in the following historical section, the commitment to a community property system has been anything but unequivocal with the result that the California community property system still retains much of the English common-law separate property system.

## II. COMPARISON OF JOINT TENANCY AND COMMUNITY PROPERTY

### A. History of Joint Tenancy

Joint tenancy developed as a technical feudal estate founded on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons.<sup>57</sup> At common law, the creation of a joint tenancy required the "four unities": the unity of interest, the unity of title, the unity of time and the unity of possession; "or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."<sup>58</sup>

At common law, husband and wife could not hold property in joint tenancy since they were considered as one person for the purpose of the ownership of property. Rather, both were seized of the

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56. See *supra* note 27. Although cases frequently assign the benefit of the community property presumption to the community property proponent leaving the burden of rebuttal to the separate property proponent (See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966); *Estate of Niccolls*, 164 Cal. 368, 129 P. 278 (1912); *In re Marriage of Lusk* at 234, 150 Cal. Rptr. at 67-68), it is often both unclear how the court decides which of the parties will have the benefit of the time presumption and what facts must first be proved in order to give rise to the presumption. See *supra* notes 28-31 and accompanying text.

57. Sterling, *supra* note 2, at 929-30; see generally Spitzer, *supra* note 25 for an excellent discussion of the evolution of the joint tenancy estate; see also Inst. on Estate Planning §§ 600-603 (1982).

58. Sterling, *supra* note 2, at 930.

entirety, which gave rise to the common law tenancy by the entirety.<sup>59</sup> Although tenancy by the entirety encompasses the same right of survivorship as joint tenancy, the crucial difference is that as tenants by the entirety, neither tenant may sever the tenancy during the lifetime of both since each is deemed to hold an undivided right to the whole.<sup>60</sup> In a joint tenancy situation, each joint tenant is deemed to own his or her undivided interest and as such, could sever the joint tenancy during the lifetime of the joint tenants.

In California, tenancy by the entirety has never existed. Its function has been subsumed by the adoption of a community property system wherein a married woman could hold property and contract.<sup>61</sup> However, as early as 1872, the legislature recognized the right of a husband and wife to hold title to assets in joint tenancy as well as tenants in common and in community property.<sup>62</sup>

As has been noted by at least one commentator, California's treatment of joint tenancies has had a long and tortuous history.<sup>63</sup> The early cases dealing with spousal joint tenancies held that as between spouses, "a community estate and a joint tenancy cannot exist at the same time in the same property."<sup>64</sup> The reasoning behind such a decision is that while joint tenancy is a form of separate property ownership wherein the parties may unilaterally convey, encumber and otherwise deal with the property interest limited only by the right of survivorship, the rights of spouses in community property are "present, existing and equal" and do not amount to an effective one-half interest except at dissolution and

59. *Id.* at 930-31, where the author notes the difference between joint tenancies wherein each tenant has a right to an undivided one-half interest, and tenancies by the entirety wherein each spouse is said to hold an undivided right to the whole. An indisputable right of each joint tenant is the power to convey his or her separate estate of way of gift or otherwise. *Riddle v. Harmon* at 527, 162 Cal. Rptr. at 531 (citing the rule articulated by the California Supreme Court in *Delaney v. Delaney*, 216 Cal. 23, 26, 13 P.2d 513, 514 (1932)). See *Fetters*, *supra* note 40, at n. 1 (Although some commentators have noted that in at least 22 jurisdictions which recognize tenancy by the entirety husband and wife may not take title as joint tenants, the author finds both direct and indirect evidence to the contrary.)

60. *Sterling*, *supra* note 2, at 930-31.

61. *But see* sec. IIA discussing the evolution of the California community property system toward a male-dominated model rather than system of property ownership and management.

62. Cal. Civ. Code § 683 (West Supp. 1989) (enacted in 1872 and specifically recognizing the right of husband and wife to hold title as joint tenants).

63. *Blumberg*, *supra* note 12, at 157; *accord Sterling*, *supra* note 2, at notes 3-6 and accompanying text.

64. *Siberell v. Siberell* at 773, 7 P.2d at 1005 (1932). In *Siberell*, the supreme court prophetically noted that concurrent operation of a common law system and community property law system means that ". . . at times there will appear to be difficulty in harmonizing these systems." *Id.* at 214 Cal. 771, 7 P.2d 1004.

death.<sup>66</sup> In the leading case in this area, the court held that "use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate."<sup>66</sup>

Later cases established the rule that such presumptions could be rebutted by a showing that husband and wife who take property as joint tenants actually intend it to be community property. Such parol evidence could be in the form of an oral or written agreement.<sup>67</sup> Although there was some disagreement among the courts about what was sufficient to constitute agreement between the spouses, it was clear that the mere fact that the joint tenancy property was purchased with community property funds in itself was not sufficient to rebut the joint tenancy form of title presumption.<sup>68</sup> The policy consideration for such a requirement is to provide a fair and equitable result to spouses who in taking title to marital property in joint form expect that they will share the resulting appreciation equally. Without an understanding or agreement, marital dissolution might be the first opportunity for the noncontributing spouse to discover the unequal distribution of the asset. At that point, it is too late to remedy the situation.<sup>69</sup>

### B. *Development of California Community Property*

California community property law, which is patterned on the Spanish ganancial system, establishes two categories of marital property: community property and separate property.<sup>70</sup> Community property is all property acquired from the labors of either spouse during the marriage.<sup>71</sup> Separate property is defined as property acquired prior to marriage by any means, and all property acquired gratuitously during marriage, that is, by gift, devise,

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65. Cal. Civ. Code § 5105 (West 1983).

66. *Siberell v. Siberell* at 773, 7 P.2d at 1005.

67. See *Mills*, *supra* note 2, at 43-44 for the kind of parol evidence sufficient to rebut the joint tenancy form of title presumption. See also *Sterling*, *supra* note 2, at 958-59 (*Siberell* initially laid down the joint tenancy form of title rule as almost a conclusive presumption of an agreement between the spouses as to the character of the property.).

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

69. *Form of Title*, *supra* note 2, at 101-02. But question what the noncontributing spouse might have done to insure equality at the time of the acquisition of the property. It is certainly possible that he or she might have insisted on securing a loan rather than making use of the separate property contribution, but such a possibility is not always economically feasible.

70. Act of April 17, 1850, ch. 103 (1849-50) Cal. Stat. 254-55.

71. Cal. Civ. Code § 5110 (West Supp. 1989); see *supra* note 23 and accompanying text.

or inheritance.<sup>72</sup>

The unique feature of this system is that each spouse is said to have contributed equally to the acquisition of the property regardless of the actual division of labor. Such a system inherently recognizes the existence of the community as a partnership with respect to property rights of the spouses.<sup>73</sup> Property which has the character of community property is not severable during the marriage of the spouses since each spouse is deemed to have a vested one-half interest in the whole at the time that the property is acquired. The community property estate differs from both the joint tenancy estate and tenancy by the entirety in that there is no right of survivorship.<sup>74</sup>

Although California community property is not severable unilaterally during marriage,<sup>75</sup> such property is freely alienable by each spouse at his or her death.<sup>76</sup> Each spouse is free to leave his

72. Cal. Civ. Code §§ 5107 and 5108 (West Supp. 1989).

73. Prager, *supra* note 36, at 6; *See generally*, Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977); Comment, *Sharing Principles*, *supra* note 25; Oldham, *supra* note 25; Glendon, *supra* note 25. The drafters of the Uniform Marital Property Act also recognized marriage as a partnership with respect to property rights. The Prefatory Note that precedes the official text of the Uniform Marital Property Act speaks to the root concepts of the Act. "Rather than an evanescent hope, the idea of sharing implicit in viewing property as 'ours' becomes reality as a result to a present, vested ownership right which each spouse has in all property acquired by the personal efforts of either during the marriage." Uniform Marital Property Act (ULA) Prefatory Note (1987).

74. *But see* sources cited *supra* note 2 for the proposition that a hybrid estate—community property with a right of survivorship—has existed indirectly in California beginning in 1934 when the California Supreme Court ruled in *Siberell* that community property could be transmuted to joint tenancy by form-of-title, but only if the spouses so intended.

75. *But see* Fetters, *supra* note 40 for the proposition that unilateral severance of joint tenancies can be used to perpetrate fraud on the other joint tenant; *accord*, *Burke v. Stevens*, 264 Cal. App.2d 30, 264 Cal. Rptr. 87 (1968); *Recommendation Relating to Recording Severance of Joint Tenancy*, 18 Cal. L. Revision Comm'n Reports 249 (1986) (requiring that a severance of a real property joint tenancy be recorded prior to the death of that joint tenancy in order to be effective to destroy the right of survivorship in the non-severing joint tenant). The problems of unilateral severance are further exacerbated if the property at issue is community property held in joint tenancy form. In order to prevent or void the severance, the community property proponent has the burden of proving that the property at issue was community rather than separate property. In a non-dissolution situation it seems that a *Lucas* agreement will be required. *See also* HOGOBOOM & KING, *supra* note 11, at §§ 8:163-8:163.3 for cases which hold that transfers in contravention of Cal. Civ. Code § 5127 (West Supp. 1989) are voidable during marriage only as to the nonconsenting spouse's one-half interest thereby permitting a severance of the community property.

76. Contrast this incident of free alienability at death with the joint tenancy right of survivorship which many commentators agree is the main reason why most married couples tend to take title to marital property in joint tenancy form. As has been noted in note 75 *supra*, the survivorship incident can be defeated by the intervivos right to unilaterally sever the joint tenancy. For comments regarding the necessity of probate and the rights of decedent spouse's creditors to marital property, see *infra* notes 256-60 and accompanying text.

or her one-half interest in the community property to whomever he or she chooses.<sup>77</sup> Since, at the death of the first spouse to die, the community itself is deemed over, the concept of unilateral inalienability of community property is also terminated. Although more commonly the deceased spouse elects to leave his or her interest in the community property to the surviving spouse, it is possible that the surviving spouse will hold title to former marital property as a tenant in common with a stranger. While this peculiar result does not seem to comport with the underlying concept of the community, it is in strict compliance with the concept that during lifetime each spouse is deemed to be indefeasibly vested with a one-half interest in any marital property.

In spite of the intent of the 1849 Constitutional Convention to adopt the Spanish system wholesale, the marital property provision of the California constitution appeared to address itself primarily to the married woman's right to separate property.<sup>78</sup> In that respect, some of the convention's delegates likened the provisions to other married women's property acts which were then coming into favor in the United States guaranteeing women the right to own property and enter into contracts.<sup>79</sup>

Although the implementing legislation<sup>80</sup> initially created a system of both separate and community property, certain provisions in the statutes severely undercut the "vested property" nature of the marital property system. For example, the 1850 Legislature almost immediately severely restricted the wife's newly-acquired property rights by according to the husband the exclusive right to manage and control not only the community property but also his wife's separate property. The husband's control was qualified only negatively by giving the wife the right to curtail her husband's exclusive control but not giving her the ability to make affirmative decisions regarding the property herself.<sup>81</sup> The overall effect of the 1850 legislation was to create a community property system in name and a separate property system in effect. The husband was soon seen as the full and complete owner of the community property. Stephen Field, then a California Supreme Court Justice, characterized the wife's interest as a "mere expectancy," a label which was to linger for over 60 years.<sup>82</sup>

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77. If the first spouse to die is intestate, 100% of his or her community property passes to the surviving spouse. Cal. Prob. Code § 6401(a) (West Supp. 1989).

78. Prager, *supra* note 36, at 21.

79. *Id.* at 22.

80. Act of April 17, 1850, ch. 103 [1849-50] Cal. Stat. 254-55.

81. Act of April 17, 1850, ch. 103, § 6, [1849-50] Cal. Stat. 254; Prager, *supra* note 36, at 26.

82. Van Maren v. Johnson, 15 Cal. 308, 311 (1860), followed in Packard v. Arel-

The original concept of community property, as envisioned in the Spanish system and originally adopted by the 1859 convention, inured to all property acquired by earnings during marriage.<sup>83</sup> However, the scope of the separate property system inherent in California's community property system was broadened considerably by the California Supreme Court decision in *George v. Ransom*.<sup>84</sup> The *George* court reversed prior law regarding the community property character of all earnings and held that "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 his creditors."<sup>85</sup> The court explained its holding by stating that the purpose of the constitutional provision protecting the wife's separate property would be nullified if husband or his creditors were permitted to benefit from the use of such property.

Although the court in *George v. Ransom* stated a feminist purpose, the consensus among the commentators seems to be that women would have fared better financially by a contrary decision in *George*.<sup>86</sup> The Supreme Court of Texas reached the opposite result in *Arnold v. Leonard*, a case construing a Texas statute holding that income from a spouse's separate property retained its character as separate property.<sup>87</sup> This difference in outcome may have been due to the sixty-five year time span between the two decisions. *George* was decided during the heyday of the Married Women's Property Acts which swept the country during the middle of the nineteenth century and was influenced by its common law concepts which are incompatible with community property principles.<sup>88</sup>

Eventually, the California legislature and courts began to recognize the wife's rights, if not in the community property, then in her separate property.<sup>89</sup> This movement slowly eroded a system which purported to give equal rights to spouses in marital property but which in truth gave the husband almost unfettered rights not only in the community property but also in his wife's separate

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lanes, 17 Cal. 525, 539-40 (1861).

83. Bruch, *California Marital Property*, *supra* note 2, at 780, n. 48.

84. 15 Cal. 322 (1860). The holding in *George* is codified at Cal. Civ. Code 5107 and 5108.

85. *Id.* at 32.

86. REPPY, *supra* note 34, at 17.

87. 114 Tex. 535 (1925); ironically, *Arnold* held unconstitutional a Texas statute that defined as separate property the fruits of separate property. Ch. 194, [1917] Tex. Laws.

88. Bodenheimer, *The Community Without Community Property: The Need for Legislative Attention to Separate-Property Marriages Under Community Property Law*, 8 CAL. W.L. REV. 381, 384, (1972) [hereinafter cited as Bodenheimer].

89. Prager, *supra* note 36, at 39.

property, The adoption of the civil code in 1872 finally accomplished the 1849 convention's avowed purpose of guaranteeing ownership of separate property to married women.<sup>90</sup> In addition to giving to women the management of their own property, in 1866 a statute was enacted which gave to a woman the right to freely transfer her property at death without the consent of her husband.<sup>91</sup>

Despite a diminution of the husband's exclusive management of the community property, the California Supreme Court continued to reinforce the doctrine that a married woman had no greater than an inchoate right in the community property which the court continued to refer to as a "mere expectancy." Only if wife survived her husband did she receive a one-half interest in the community property, not as her vested interest, but comparable to a forced share in common law states.<sup>92</sup> If husband survived, wife's interest in the community, which had never ripened into a vested property right, simply disappeared.

Explicit legislation, in the form of statutory amendments, was required to finally recognize wife's interest in the community as one fully vested from the moment of acquisition of the property.<sup>93</sup> A major impetus for this legislative recognition was the adoption of a federal income tax in 1913.<sup>94</sup> The effects of this progressive tax could be ameliorated by splitting a married couple's income into husband's and wife's. As this was permissible only if state law recognized a vested right in the property in each spouse,<sup>95</sup> such income-splitting gave California the motivation to recognize wife's vested interest in the community property. In 1927, the California

90. *Id.* at 40.

91. While these legislative changes were occurring with respect to a married woman's separate property, her interest in the common or community property was still considered an expectancy as articulated in *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897) and progeny. See Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 47 S. CAL. L. REV. 977, 1060-70 (1975). [hereinafter Reppy, *Retroactivity*].

92. See Reppy, *Retroactivity*, *supra* note 91, at 1059-86 for a discussion of the Supreme Court's holdings in *Spreckels* and its progeny that husband was the complete owner of all community property and wife's interest was in the nature of a forced heir; Prager, *supra* note 36, at 47.

93. The first amendment, enacted in 1923, gave wife testamentary power over her one-half of the community. Act of April 16, 1923, ch. 19, [1923] Cal. Stat. 29. In 1927, the Legislature declared that the spouses' interests in the community property were "present, existing and equal" interests subject to the management of the husband. Act of April 28, 1927, ch. 265 § 1, [1927] Cal. Stat. 484.

94. See Reppy, *Retroactivity*, *supra* note 91, at 1086.

95. In 1921 an opinion of the United States Attorney General to the Secretary of the Treasury declared that splitting of community income by spouses in all community property states except California was permissible since only California failed to recognize husband and wife as equal owners of the income of both spouses. 32 Op. Att'y Gen. 435, 458-61 (1920).

legislature finally enacted Civil Code 161 giving wife co-equal ownership with husband of all community property.<sup>96</sup>

Since 1975, the general management rule in California has given each spouse the power to manage and control both that spouse's separate property and the community property.<sup>97</sup> Under the California combination of unilateral management and joint control of community property, personal property may be managed by each spouse acting alone.<sup>98</sup> The same is true of real property with certain restrictions requiring the consent of both spouses for major actions such as transferring, encumbering and leasing for more than one year.<sup>99</sup> With the enactment of joint and equal management rules<sup>100</sup> which did not follow earnings, the California community property system was infused with new life. A spouse who may not have contributed to the acquisition in any direct sense now had decision-making power and could bind the community.<sup>101</sup>

In 1965, at the urging of various commentators, the legislature added a community property presumption for a single-family residence held in joint tenancy, creating for the first time a new hybrid estate for marital property—community property with a right

96. Cal. Civ. Code § 161a stated:

The respective interest of husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interest and rights of husband and wife in community property.

*But see* Prager, *supra* note 36, at 63, note 318 for comments on the significance of 162 beyond its tax significance.

97. 1973 Cal. Stat. ch. 987, §§ 14, 15 (amended Cal. Civ. Code §§ 5125, 5127 (West 1970), current version at *id.* §§ 5125, 5127 (West Supp. 1989).

98. Cal. Civ. Code § 5125 (West Supp. 1989). Section 5125 gives either spouse the right to management and control of the community personal property with certain exceptions. This unilateral and co-equal right is subject to the § 5125(e) duty of interspousal good faith. Hogoboom and King point out that because the duty of good faith is that imposed on those in confidential relationships as opposed to Cal. Prob. Code section 15000 highest good faith standard governing the actions of trustees, inquire whether the Legislature intended to forgive minor breaches of the duty. *Id.*, *supra* note 12, at § 8:150.2.

99. Cal. Civ. Code § 5125 (West Supp. 1989).

100. Notwithstanding this joint and equal system, there are still carved out exceptions to the equal management rule that are carryovers from the essentially separate property system that existed in California for more than a century. For example, because of concerns for certainty in banking transactions, a spouse who banks earnings in an account held solely in his or her name only need not be concerned that the other spouse will have access to those funds. In order to have access to such an account, a dissolution order is often required in order to establish the rights of the parties in the community property and to give the non-earning spouse relief from mismanagement. Sole management is also dictated for a community property business, allegedly to give the business spouse full autonomy over the running of the business. Notwithstanding the § 5125(d) business exception, § 5110.120 would appear to intrude on the business spouse's autonomy by subjecting the community business property to the nonbusiness spouse's creditors.

101. Prager, *supra* note 36, at 79.



of survivorship. In so doing, the legislature expressly articulated its position in favor of a community rather than a separate property characterization for marital property. Since 1965, the legislature has substantially strengthened its position in favor of finding property to be community rather than separate by enacting Civil Code sections 4800.1 and 4800.2 in 1983.<sup>102</sup>

Before exploring the impact of these recent change in marital property characterization on current California law, it is important to explore in some depth the prevailing evidentiary presumptions regarding the characterization of such property. It is equally important and, as we shall see difficult, to put these presumptions in their proper context in the framework of the California Evidence Code.

### III. THE ROLE OF PRESUMPTIONS IN THE CALIFORNIA COMMUNITY PROPERTY SYSTEM

#### A. *Defining Presumptions under the California Evidence Code*

Historically, presumptions have played an important role in defining the character of marital property as community or separate. A presumption is defined as a standardized practice under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.<sup>103</sup> In other words, the party who has the benefit of the presumption has satisfied his or her burden of producing evidence sufficient to make out a prima facie case. Most legal scholars agree that the effect of a presumption not only satisfies that party's burden of producing evidence, but also shifts the burden to the opposing party.<sup>104</sup> If the presumption in question is a rebuttable one, the introduction of a presumption

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102. As noted earlier, California's statutory community property presumptions for jointly-held property impliedly create a new estate—community property with a right of survivorship—without expressly so stating. It is this author's contention that many of the difficulties in the area of marital property characterization that have arisen and will continue to arise are directly due to the legislature's failure of accountability. The situation will be further aggravated by the fact that California domiciliaries are presumed to have knowledge of this "secret" hybrid estate of which they have no notice whatsoever. Compare Uniform Marital Property Act § 11(e) specifically recognizing "survivorship marital property." See also Mennell, *supra* note 2, at 792-800.

103. MCCORMICK, EVIDENCE 965 (3d ed. 1984). For example, a common presumption dictates a presumed conclusion that a letter was properly received if the party asserting the claim can prove the basic facts that the letter was properly addressed and mailed. The advantage of the presumption is that the moving party need not actually prove either directly or circumstantially that the letter was received.

104. As Dean McCormick states, "prima facie" case is an ambiguous term which can mean as little as sufficient evidence to withstand a directed verdict or it may mean as much as evidence sufficient to shift the burden of producing evidence. McCormick takes the former position and finds the latter position to be the effect of a presumption. See McCormick, *supra* note 103, at 965.

will have one of two effects: either the presumption will affect the burden of producing evidence<sup>105</sup> or it will affect the burden of proof or persuasion.<sup>106</sup>

There are two dominant views regarding the general effect of presumptions. The majority view associated with Professor James Bradley Thayer, a 19th century evidence scholar,<sup>107</sup> holds that the only procedural effect of presumption is to shift the burden of producing evidence to the opposing party.<sup>108</sup> A presumption that affects the burden of producing evidence is "established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied."<sup>109</sup> These presumptions are not based on any public policy extrinsic to the action in which they are invoked. They merely reflect a judicial determination that the same conclusionary fact exists so frequently when the preliminary fact exists that, once the preliminary fact is established, proof of the conclusionary fact may be disposed with unless there is actually contrary evidence.<sup>110</sup>

A growing minority of states have adopted the so-called Morgan-view<sup>111</sup> which holds that the procedural effect of a presumption is to shift the burden of persuasion or proof. A presumption that affects the burden of proof is one that is established to implement some public policy other than simply to facilitate the determination of the particular action in which the presumption is applied. It places great weight both on the probative link between basic and presumed facts and on the supposed ability of presump-

105. The party who has the burden of producing evidence must present evidence sufficient to withstand a directed verdict, i.e. evidence when viewed in a manner most favorable to the moving party is at least adequate to permit a reasonable jury to find that the existence of the essential elements of the claim is more probable than their nonexistence. LILLY, EVIDENCE 48 (2nd. ed. 1987) [hereinafter LILLY]. This burden is usually cast first on the party who has pleaded the existence of a fact who in most cases is the plaintiff trying to make out a prima facie case. Query in a typical case where the character of marital property is at issue who is the plaintiff and who is the defendant for purposes of deciding which party should be assigned the burden of producing evidence. The burden of producing evidence can shift to the opposing party when the moving party has satisfied his or her burden. *Id.* at 47-48; *McCormick*, *supra* note 103, at 947.

106. The party who is allocated the burden of proof or persuasion must persuade the trier of fact of the existence of the elements of his claim according to a standard or degree of certainty mandated by the type of proceeding; in a typical civil case, a party must prove the elements of his claim by a preponderance of the evidence or by "clear and convincing" proof. LILLY, *supra* note 105, at 48.

107. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) [hereinafter THAYER].

108. *Id.* at 59. As Professor Lilly points, the effect of a presumption may be nullified by proving the nonexistence of the basic facts.

109. Cal. Evid. Code. § 603 (Deering 1986).

110. THAYER, *supra* note 107, at 326.

111. This view is named after the late Professor Edmund Morgan because of his advocacy of it.

tions in advancing desirable social policy.<sup>112</sup> These presumptions require a finding of the presumed fact not only when there is no contrary evidence but also when the mind of the trier of fact is in equilibrium or when the trier of fact does not believe the contrary evidence.

Traditionally, neither the California Evidence nor Civil Codes have spoken to or classified community property presumptions.<sup>113</sup> Therefore, the courts are left with little guidance as to how to apply the presumptions even to the extent of knowing which party, the community or separate property proponent, has the benefit of the presumption.<sup>114</sup> In the following sections the more common presumptions which arise in marital property characterization situations are discussed.

### B. Community Property Presumptions

California Civil Code section 5110 (formally section 164) *defines* community property as all real property located in California and all personal property wherever located acquired by a married person while domiciled in California. Nowhere does the language of this statute expressly create an evidentiary presumption; 5110 simply articulates the elements which must be present in order that certain marital property be characterized as community rather than separate.<sup>115</sup>

The legislature and the judiciary have repeatedly articulated a policy of advancing the California community property system through the use of presumptions favoring the community estate.<sup>116</sup>

112. MORGAN, SOME PROBLEMS OF PROOF 74-81 (1956); Professor Morgan advanced this theory of the effect of a presumption as a universal one, i.e., applicable to all presumptions. The California Evidence Code has adopted both the Thayer theory of presumptions (*Id.* at § 603) and the Morgan view of presumptions (at *Id.* § 605) (Deering 1986); *See also supra* note 103 and accompanying text.

113. As noted in at least one case, statutorily § 5110, commonly known as the "general community property" presumption, does not mandate a presumption but only provides a definition of community property by negative implication. *See supra* note 27. *See, however, supra* note 4 wherein section 4800.1 is specifically defined as a presumption affecting the burden of proof. *See also 17 Comm'n Rpts, supra* note 42, at 220-23 for proposed legislation defining community property presumptions, their evidentiary effect and the standards required for rebuttal.

114. Under section 4 of UMPA, all property of spouses is presumed to be marital property. The Comment to this section states that the bias of the general presumption favors classifying spousal assets as marital property and only when there is adequate proof to overcome the presumption will the classification be otherwise.

115. Since 5110 does not expressly create a presumption, it has been the function of the courts to both mandate the presumption, its evidentiary effect and the standard for rebuttal.

116. *Recommendation Relating to Civil Code Sections 4800.1 and 4800.2*, 18 Cal. L. Revision Comm'n Reports 383, 389 at No 10 (1986) [hereinafter *Recommendation on 4800.1 and 4800.2*]; *Wilson v. Wilson*, 76 Cal. App.2d 119, 172 P.2d 568 (1946);

Since the statute defining community property does not expressly create such a presumption, finding a pro-community property presumption to exist in the language of 5110 has been a matter of judicial decision. The first California cases to interpret the 1850 statute<sup>117</sup> as creating a presumption in favor of community property for all property acquired during the existence of the community were *Smith v. Smith*<sup>118</sup> and *Meyer v. Kinzer*.<sup>119</sup> Justice Field, speaking for the court in both cases, stated the rule that all property in the possession of either spouse during the existence of the community is presumed to be community property and such presumption "can be overcome by clear and certain proof that it was owned by the claimant before marriage or acquired afterwards in one of the particular ways specified in the statute. . . ."<sup>120</sup> Despite Justice Field's otherwise harsh interpretation of community property systems,<sup>121</sup> these early cases made the community property presumption readily available to the pro-community spouse who had to prove only possession during marriage to shift the burden of proof to the separate property proponent.<sup>122</sup> Even these early cases, however, presumed the initial claimant to be the community property proponent who was required to make out a prima facie case in favor of a community property characterization.<sup>123</sup>

As the system developed, the basic facts which had to be proved in order to have the advantage of the presumption have not always been so clear. The three basic approaches<sup>124</sup> taken by the courts in assigning the presumption present substantially different proof requirements to the party attempting to claim the benefit of the presumption. In approximately 90% of the reported cases, the community property presumption is not available until the claimant has proved that the property at issue was acquired during the marriage.<sup>125</sup> Since it is often very difficult to prove time of acquisition, such a policy seems to be inapposite to the underlying policy of the 5110 presumption: to favor a community rather than a separate property characterization for marital property. The follow-

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Ashodian v. Ashodian, 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979).

117. Act of April 17, 1850, ch. 103, [1849-50] Cal. Stat. 254-55.

118. 12 Cal. 216 (1859).

119. 12 Cal. 247 (1859).

120. *Id.* at 253.

121. See *supra* note 81 and accompanying text.

122. *Meyer v. Kinzer* at 253-54. See *supra* notes 113-15 and accompanying text.

123. From the perspective of promoting a policy which favors the characterization of marital property as community whenever possible, it makes most sense to assign to the separate property proponent the burden of establishing that the property in question is separate. If such spouse cannot so establish, the property is characterized as community.

124. See *supra* notes 42-46 and accompanying text.

125. See REPPY, *supra* note 34, at 64.

ing case exemplifies such an approach.

In *Fidelity & Casualty Company v. Mahoney*,<sup>126</sup> husband purchased an airplane-travel accident insurance policy for \$1 naming his son as beneficiary of the policy. Husband's airplane crashed and he was killed. His wife of two months claimed one-half of the proceeds of policy as her community property interest in an asset acquired during marriage while domiciled in California, the insurance policy. The court refused to grant her the benefit of the general community property presumption as to the insurance policy unless she was able to prove that the one dollar used to purchase the policy was community property. Since she was unable to prove the time of acquisition of the one dollar, the separate property proponent, husband's son, prevailed.

*Mahoney* raises a number of issues regarding the role of presumptions in the characterization of marital property. First, while recognizing that the function of the general community property presumptions is to reflect the probability that most property acquired during marriage is community,<sup>127</sup> the court insisted that the presumption attach only in cases of marriages of long duration. "Where the marriage relation has existed a short period of time the presumption that property acquired after marriage is community property is of less weight than in the case of a long continued relationship."<sup>128</sup>

Second, by insisting that wife prove each and every element of the community property definition in order to prevail,<sup>129</sup> the court effectively assigned to her the burden of proving the community character of the property without the benefit of any presumption.<sup>130</sup> To accord to her the presumption only after she proves each element gives her no benefit and is logically inconsistent. Effectively, the court in *Mahoney* assigned the role of plaintiff to the wife who then had the burden of proof as to each fact the existence or nonexistence of which was essential to her claim for relief.<sup>131</sup> Had the *Mahoney* court instead allocated the burden of proving that the insurance policy was separate to the son, he too would have failed to make out a prima facie case and wife would

126. 71 Cal. App.2d 65, 161 P.2d 944 (1945).

127. *Accord. Recommendation on 4800.1 and 4800.2, supra* note 116.

128. *Fidelity & Casualty Company v. Mahoney* at 68, 161 P.2d at 946; *accord. Estate of Duncan* at 217, 70 P.2d at 179; *Falk v. Falk* at 762, 767, 120 P.2d at 717.

129. The court stated that although a presumption exists that all property acquired during marriage is community property, "[t]here is no presumption, however, as to when property was acquired." *Id.* at 68, 161 P.2d at 944.

130. One might inquire why the court's focus was the time of acquisition of the \$1 consideration rather than the time of acquisition of the asset in question, the insurance policy.

131. Cal. Evid. Code § 500 (Deering 1986).

have prevailed by default.

The *Mahoney* court did not attempt to justify its position vis-a-vis a pro-community public policy.<sup>132</sup> If anything, the court seemed more anxious to promote a policy in favor of finding the property of short marriages to be separate. While the result in *Mahoney* may have been sound, the case does not provide many guidelines for the allocation of the presumption.

In light of the foregoing discussion about the inconsistencies among the courts in assigning the burden of proof in community property inter se disputes, it seems somewhat paradoxical that the 1965 addition to Cal. Civ. Code section 164 and the 1983 version of Cal. Civ. Code section 4800.1 create a presumption in favor of community property which requires no more proof of basic facts than the existence of an interspousal joint tenancy. There seems to be some logical inconsistency in affording the benefit of the community property presumption to an otherwise separate property estate based merely on form of title while requiring proof of time of acquisition in other situations where the character of marital property is at issue.<sup>133</sup>

The type of community property presumption, "time of acquisition"<sup>134</sup> or "form of title"<sup>135</sup> dictates the type of evidence required to successfully rebut the presumption. It has long been the law in California that form of title may be overcome by parol evidence showing a common interspousal understanding or agreement that

132. Compare the results in cases where "possession" during marriage equals "acquisition." *Lyman v. Vorwerk* at 509, 110 P. at 355.

133. California community property cases have found the presumptions mandated by 5110 to be presumptions affecting the burden of proof rather than the burden of producing evidence. *Baron v. Baron*, 9 Cal. App. 3d 933, 88 Cal. Rptr. 404 (1970); *Hansford v. Lassar*, 53 Cal. App. 3d 364, 125 Cal. Rptr. 804 (1975); *Ashodian v. Ashodian*, 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979).

Because the thrust of 4800.1 is to apply the community property presumptions to situations where spouses have taken title to community property in joint tenancy form, it is particularly paradoxical that the first four cases interpreting the 4800.1 community property presumption were all situations where the property at issue had been the separate property of one of the spouses that had been transmuted to joint tenancy-community property during the marriage. *In re Marriage of Martinez*, 156 Cal. App. 3d 20, 202 Cal. Rptr. 646 (1984); *In re Marriage of Anderson*, 154 Cal. App. 3d 572, 201 Cal. Rptr. 498 (1984); *In re Marriage of Neal*, 153 Cal. App. 3d 117, 200 Cal. Rptr. 341 (1984); *In re Marriage of Buol*, 15 Cal. App. 3d 174 (1984), *rev'd* 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985).

134. See *supra* notes 43-45 and accompanying text.

135. See *supra* note 47. A form of title presumption *does not* arise when the title to property is taken in the name of one of the spouses alone. This form of title will not defeat or supersede the general community property presumption. The general presumption may be overcome by the separate property proponent by tracing the asset to a separate property source. *Hicks v. Hicks*, 211 Cal. App.2d 144, 27 Cal. Rptr. 307 (1962); *In re Marriage of Mix*, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975). See also, de Funiak and Vaughn, *Principles of Community Property* 199-120 (2nd. ed. 1971).

the character of property is other than expressed by title.<sup>136</sup> The threshold issue in this form of rebuttal is whether the understanding as to the character or transmutation of character is a mutual one<sup>137</sup>. If the community property presumption arises because of time of acquisition<sup>138</sup>, then the proof required for overcoming the presumption is less onerous and may be accomplished by the separate property proponent by mere tracing to a separate property source.<sup>139</sup>

### C. Joint Tenancy Presumption

Until amended by statute in 1965,<sup>140</sup> the "form of title" or common law presumption controlled the character of marital property. The specific act of taking title in joint tenancy affirmatively transmuted the character of the property by mutual agreement notwithstanding the character of the property used to acquire the joint tenancy property.

This rule, first articulated in the now famous case, *Siberell v. Siberell*, stated:

First, from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in

136. *Tomaier v. Tomaier* at 759, 146 P.2d at 907; *In re Marriage of Lucas* at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857; see *Mills*, *supra* note 2 at 43; Comment, *Form of Title*, *supra* note 2, at 97; *Hogoboom & King*, *supra* note 11, at §§ 8:9-8:37. The language of these cases calls for an agreement in order to rebut form of title because of the affirmative act of designating ownership. It seems more consistent to say that the reason for requiring an agreement is not really to rebut form of title but to effect a transmutation from character as expressed in title to that otherwise agreed to by the parties.

137. The mutuality requirement certainly seems to bolster the argument in the preceding footnote that what the court is really looking for vis-a-vis the agreement is a transmutation.

138. The time of acquisition or general community property presumption of Cal. Civ. Code section 5110 attaches when two conditions are met: (1) the property was acquired during the marriage; and (2) there is no contradictory form of title or common law presumption. In such cases tracing is sufficient to overcome the presumption because there has been no transmutation by agreement from community property as with form of title.

139. In *Lucas*, the supreme court, citing their earlier decision in *Socol v. King*, 36 Cal. 2d 342, 223 P.2d 627 (1950), specifically stated that it was the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption of 5110. The court in *Socol* reiterated the rule that to rebut joint tenancy form of title, a showing of a common understanding or agreement is necessary; mere tracing is insufficient. From the time that *Siberell* was decided, knowledge of the consequences of marital property characterization has been imputed to spouses. Intent of the spouses at the time of the transaction, although relevant to disprove form of title, has never been informed intent. *In re Marriage of Lucas* at 815, 614 P.2d at 288, 166 Cal. Rptr. at 857; *Estate of Murphy*, 15 Cal. 3d 907, 917-19, 544 P.2d 956, 963-65, 126 Cal. Rptr. 820, 827-29 (1976); See v. See at 783, 415 P.2d at 779-80, 51 Cal. Rptr. at 891-92 (1966).

140. Cal. Civ. Code § 164 amended by 1965 Cal. Stats. c. 1710, p. 3843, § 1.

the name of the spouses as joint tenants is *tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate.*<sup>141</sup> (emphasis added)

The inflexible rule of *Siberell* has been modified over the years by cases which recognize that although form of title creates a presumption of transmutation from community property to joint tenancy, “[t]hat form of conveyance . . . raises the rebuttable presumption that the property is as described in the deed, and places the burden on the party claiming the property to be community to prove the fact.”<sup>142</sup> Rebuttal requires demonstration of the existence of an mutual agreement between the parties contrary to form of title.<sup>143</sup> Such mutual agreement serves as a second transmutation from the character of the property as indicated by title to community property.<sup>144</sup>

According to the *Lucas* court, the policy underlying the requirement of an agreement to rebut form of title is a sound one. When title to property to which one of the spouses has made a separate property contribution is taken in joint form, the usual expectation of the noncontributing spouse is that the contributing spouse does not anticipate either reimbursement or pro rata apportionment of any future appreciation. In other words, the spouse contributing the separate property has made a gift to the community. If the non-contributing spouse had an expectation that the separate property contribution would be treated as buying into title, he or she might have attempted to preserve the joint nature of the property by making other financing arrangements such as securing a loan to the community. This line of reasoning fails to recognize that the reason for taking title in joint form may have very little to do with the expectation of the parties and much more to do with the advice of real estate agents or the desire to avoid a probate at the death of the first spouse to die.

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141. *Siberell v. Siberell* at 773, 7 P.2d at 1005 (1932).

142. *Edwards v. Dietrich*, 118 Cal. App. 2d 254, 260, 257 P.2d 750, 754 (1953).

143. *Schindler v. Schindler*, 126 Cal. App. 2d 597, 272 P.2d 566 (1954); *see generally Form of Title, supra* note 2.

144. Query the necessity of finding a transmutation from community property to joint tenancy simply because title was taken in joint tenancy (if the requisite intent to transmute is not present). *Bowman v. Bowman*, 149 Cal. App. 2d 773, 308 P.2d 906 (1957).



#### D. *The Hybrid Estate Presumption*<sup>145</sup>

In 1965, the legislature, recognizing the widespread use of spousal joint tenancies, articulated its perception of California's fundamental public policy regarding jointly-held marital property. The legislature recognized that traditionally the law has favored the existence of a community property system under the management of husband in which husband and wife each have a present, existing and equal interest; that creditors of either husband or wife may look to the community for satisfaction of debts; that such a system provides the courts with the latitude to divide the marital property unequally, when necessary; and that at the death of the first spouse to die, in default of testamentary disposition, the surviving spouse takes the deceased spouse's one-half of the community property subject to the claims of creditors.<sup>146</sup>

Disappointing the result in cases like *Siberell* and *Schindler*, the legislature added language to Civil Code 164 which imposed a rebuttable presumption, applicable in dissolution cases only, that a single-family residence held in joint tenancy is community property. In 1969, the Family Law Act<sup>147</sup> repealed section 164 and incorporated an almost identical provision in section 5110. Since section 5110 was silent on the type of proof necessary to rebut the joint tenancy form of title presumption,<sup>148</sup> the presumption could be overcome by any traditional means.<sup>149</sup> While the adoption of the community property presumption for single-family residences satisfied the legislature's desire to negate the adverse effect of spousal joint tenancies on the division of property at dissolution, the ability to use parol evidence to rebut the 5110 single-family principal residence presumption continued to present an unsatisfactory situation.<sup>150</sup>

In 1983, in order to reverse the effect of the *Lucas* court's reaffirmation of the use of parol evidence, the legislature enacted Cal.

145. The concept of this estate was first recognized and articulated by Yale Griffith in his much-cited and widely-followed 1961 Stanford Law Review article. See Griffith, *supra* note 2.

146. See *Domestic Relations*, *supra* note 6, at 121-24.

147. 1969 Cal. Stat., ch. 1608, sec. 8. at 3339 (enacting Cal. Civ. Code §§ 4800-4812.)

148. The *Lucas* court, referencing the *Final Report of the Assembly Interim Committee on Judiciary Relating to Domestic Relations*, stated that "[t]here is no indication that the Legislature intended in any way to change the rules regarding the strength and type of evidence necessary to overcome the presumption arising from the form of title." *In re Marriage of Lucas* at 813-14, 614 P.2d at 287-88, 166 Cal. Rptr. at 856 (1980). See *supra* note 11.

149. The *Lucas* court then went on to restate and reaffirm prior case law regarding the form of title rebuttal standards. See *supra* note 47 and accompanying text.

150. See *Recommendation in 4800.1 and 4800.2*, *supra* note 116 and accompanying text.

Civ. Code section 4800.1 as part of Assembly Bill 26.<sup>151</sup> While 4800.1 extended the reach of the 5110 single-family residence presumption to all property held by husband and wife in joint tenancy form for the purpose of the division of marital property at dissolution or legal separation, it more importantly abolished the use of parol evidence for rebuttal purposes by creating a statute of frauds rebuttal requirement. Spouses who take title to assets in joint tenancy form would not be permitted to rebut the 4800.1 community property presumption without a written showing of their intent to the contrary either on the deed or in a separate writing.<sup>152</sup> The effect of the 4800.1 statute of frauds requirement is to preserve a separate property pro rata interest in an asset which is an admixture of both community and separate property only if, at the time the property is acquired in joint tenancy form, the parties also execute a written agreement to that effect. The 4800.1 writing requirement was made retroactive to all proceedings commenced either on or after January 1, 1984, or before January 1, 1984, to the extent proceedings as to the division of property were not yet final on January 1, 1984.<sup>153</sup>

The difficulty with 4800.1 is not with regards to its community property presumption since it is merely an extension of the 5110 single-family residence to all interspousal property held in joint title. It is the statute of frauds requirement and particularly its retroactive application that has met with great resistance in the courts. Whether the retroactive application of a stricter evidentiary burden on the separate property proponent is constitutionally defective because of a failure of due process is an issue which has been addressed by the California Supreme Court only once. In *Marriage of Buol*,<sup>154</sup> Justice Reynoso, speaking for the court, stated:

Legislative intent . . . is only one prerequisite to retroactive application of a statute. Having identified such intent, it remains

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151. Cal. Civ. Code § 4800.1 (West Supp. 1986). See 1983 Sen. Rept., *supra* note 7, at 864.

152. In *Recommendation on 4800.1 and 4800.2*, *supra* note 116, note 10, the California Law Revision Commission states that "[t]he requirement of a writing is important to help ensure that a party waives his or her community property rights only upon a mature consideration." Query what percentage of the lay public affected by the 4800.1 writing requirement has even heard of it so that a spouse contributing separate property or converting his or her separate property to joint tenancy for whatever reason is on notice of such requirement. Such a spouse waives his or her separate property rights without benefit of either notice or "mature consideration." *Accord*, *supra* note 148 and accompanying text.

153. Stats. 1983, ch. 342, § 4.

154. 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985). In *Buol*, a house bought with funds which husband and wife had previously orally agreed were separate, was placed in joint tenancy at the advice of a real estate agent. While the trial court's decision was being appealed, the Legislature passed 4800.1.

for us to determine whether retroactivity is barred by constitutional constraints. We have long held that the retrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law . . . .<sup>155</sup>

It is clear from the opinion in *Buol* that the Supreme Court found the retroactive application of 4800.1 to have a substantive effect on substantial and vested property rights of the separate property contributor. From the legislature's perspective, however, the effect of 4800.1 is merely evidentiary. One reason for the enactment of 4800.1 advanced by the legislature is to strengthen the community property system and insure an equitable division of marital property at dissolution.<sup>156</sup> The community property presumption of 4800.1 gives statutory recognition to the well-documented fact that much interspousal joint tenancy property is more often than not community property.<sup>157</sup> The legislature may also have desired to alter spousal conduct by encouraging the spouses to memorialize their property-related agreements in a writing.<sup>158</sup>

The final form of 4800.1 is substantially different from that initially proposed by the Law Revision Commission which resembled much more closely a true division-at-divorce statute.<sup>159</sup> The pro-

155. *Id.* at 756, 705 P.2d at 357, 218 Cal. Rptr. at 34. The issue of retroactive application of community property legislation was first addressed by the California Supreme Court in *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228, 231 (1897), which held such retroactive application unconstitutional if its effects would be to impair vested property rights. This was the state of the law vis-a-vis retroactivity until 1965 when the supreme court again addressed the issue on *Addison v. Addison*, 62 Cal. 2d 558, 339 P.2d 897, 43 Cal. Rptr. 97 (1965) and held that the retroactive application of legislation could impair vested property rights when a significant public purpose was served thereby. This balancing test was continued by the court until its recent decisions on *Buol* and *Fabian*. The doctrine that the court established in *Buol* and *Fabian* would permit retroactive application to impair a vested property right only if the state interest rectifies a former rank injustice. *Id.* at 39 Cal. 3d 761, 705 P.2d 360, 218 Cal. Rptr. 37. See *Flagg*, *supra* note 13, at 15 for the proposition that the holdings in *Buol* and *Fabian* essentially preclude any retroactive changes in community property law. *Id.* at 47. Compare the argument of Professor Reppy in Reppy, *Rankly Unjust I*, *supra* note 13.

156. See 1983 *Sen. Rept.*, *supra* note 7, at 863-64; *Domestic Relations*, *supra* note 6, at 122-25; 16 *Comm'n Rpts.*, *supra* note 7 at 2169-71; *Recommendation on 4800.1 and 4800.2*, *supra* note 116, at 387; *In re Marriage of Buol*, 39 Cal. 3d 751, 762, 705 P.2d 354, 361 218 Cal. Rptr. 31, 37 (1985).

157. See *Domestic Relations*, *supra* note 6, at 121-22; 16 *Comm'n Rpts.*, *supra* note 7, at 2170; Griffith, *supra* note 2; Bruch, *California Marital Property*, *supra* note 2.

158. See Reppy, *Rankly Unjust II*, *supra* note 13, at 3. While it is true that written evidence of intent is inherently more reliable than parol evidence, it is still questionable whether the statute of frauds requirement of 4800.1 and the written waiver of 4800.2 is within the expectation of most parties who are without knowledge of its existence and consequences. Even if the consequences of the statutory scheme are within the expectations of most married couples, would not notice on deeds and other instruments of title make these statutes both more reliable and more equitable.

159. A typical division-on-divorce statute either shuffles the parties' interests in marital property leaving them in the same relative positions as prior to dissolution; or it puts

posed version neither created a community property presumption nor altered the rebuttal standard; it simply extended the courts' jurisdiction over marital property by granting them jurisdiction to divide not only the community estate but also any jointly-titled property of the spouses. For the purpose of the application of the proposed version of 4800.1, the interests of the parties were presumed to be equal; this presumption could be overcome by proof of an agreement between the parties to the contrary or by tracing.<sup>160</sup>

It seems clear that if the supreme court had been presented with such a statute, it would have had little difficulty applying it to property and proceedings commenced prior to its enactment. Such a statute has the effect of conceding the existence of the separate property interest while at the same time recognizing the equities which make it subject to division at dissolution.<sup>161</sup>

This was not the situation that was presented to the court in *Buol*. The statute of frauds requirement of 4800.1 had the effect of "barring recognition of the vested separate property interest" by retroactively imposing a condition on the separate property spouse with which it was impossible to comply.<sup>162</sup> Even in a situation where the application of 4800.1 is not constitutionally defective, the writing requirement puts the separate property contributor in a position of having to secure a marital property agreement with his or her spouse in order to be entitled to share in the appreciation of the asset. If securing such an agreement is not possible for any reason, the contributing spouse is deemed to have made an interest-free loan to the community.

In *Marriage of Buol*, Esther purchased a house with earnings that husband and wife had orally agreed were her separate property. She took title to the house in joint tenancy at the advice of her real estate agent. Notwithstanding title, Esther received numerous assurances from her husband that the house was her separate property. At dissolution, the trial court found that the parties had an agreement sufficient to rebut the 5110 community property presumption and awarded the home to Esther. While the judgment was pending appeal, the legislature enacted 4800.1.

In analyzing the retroactive applicability of the writing requirement of 4800.1 to cases pending before its effective date, the court

one spouse in a better position than he or she was in prior to the dissolution. California quasi-community property statutes and equitable distribution laws enacted in separate property states are such statutes. *Id.* at 2 & 8.

160. See *supra* notes 7 & 10. In this respect, proposed section 4800.1 most closely resembles CAL. PROB. CODE § 5305.

161. See Reppy, *Rankly Unjust*, *supra* note 13, at 4; Flagg, *supra* note 13, at 40.

162. *In re Marriage of Buol* at 759, 705 P.2d at 359, 218 Cal. Rptr. at 35 (1985).

expressly disapproved previous holdings that the effect of such a requirement was not substantive but merely evidentiary. The court held that "[b]y eliminating the means by which one might prove the existence of the vested property right, imposing instead an evidentiary requirement with which it is impossible to comply, section 4800.1 affects the vested property right itself . . ."<sup>163</sup> In California, property is characterized as separate or community according to the law in effect at the time of acquisition.<sup>164</sup> At the time of acquisition, the Buols fixed the character of the house as Esther's separate property by entering into an oral agreement to that effect.<sup>165</sup> At all relevant times thereafter, proof of a separate agreement was all that was required to protect Esther's vested separate property agreement.<sup>166</sup> The writing requirement of 4800.1 substantially impaired that interest. To the extent that the statute restructures already existing transactions, it is not a division-at-divorce statute and is therefore subject to constitutional scrutiny.

Since 4800.1 was enacted after the Buols' dissolution proceedings had commenced, the time had long passed for Esther Buol to satisfy the writing requirement. It seems clear that at least as to all proceedings pending at the time 4800.1 was enacted, it is impossible to comply with its statute of frauds requirement. When exactly in the timeline of transactions that occur from the time marital property is acquired in joint form to the time a dissolution proceeding is commenced the constitutional bar to the application of 4800.1 applies is still unclear and the supreme court has not ruled. However, at least one family law commentator has stated that the final point at which the separate property contributor can protect his or her rights within the constraints of 4800.1 is at the time of the transaction in which property is taken in joint form.<sup>167</sup>

In support of the above supposition, post-*Buol* appellate court decisions have consistently held that the *Buol* constitutionality restraint makes the section 4800.1 presumption currently applicable only to post-1984 proceedings in which marital property was acquired or *converted* into joint tenancy form after January 1, 1984.<sup>168</sup> Therefore, it appears that the form of title rebuttal stan-

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163. *Id.*

164. *Trimble v. Trimble*, 219 Cal. 340, 343, 26 P.2d 477, 479 (1933).

165. Prior to the new post-1985 transmutation statutes calling for a writing, transmutation from community to separate property could be accomplished by any means including an oral agreement between the spouses.

166. *In re Marriage of Buol* at 30, 755, 705 P.2d at 358, 218 Cal. Rptr. at 34.

167. See *Adams & Sevitch*, *supra* note 30, at §§ D.11.5.0.2-11.5.3.

168. *In re Marriage of Lockman*, 204 Cal. App. 3d 782, 251 Cal. Rptr. 434 (1988); *In re Marriage of Cairo*, 205 Cal. App. 3d 1255, 251 Cal. Rptr. 731 (1988); *Bankovich v. Bankovich*, 203 Cal. App. 3d 49, 249 Cal. Rptr. 73 (1988); *In re Marriage of Hopkins &*

dard of *Lucas* is still relevant in situations where *Buol* would find retroactive application of the new evidentiary standard to be unconstitutional.<sup>169</sup>

In 1986, the Legislature amended 4800.1 effective January 1, 1987, to find the retroactive application of the statute constitutionally permissible because it serves a compelling state interest: the uniform treatment of jointly-held marital property.<sup>170</sup> The Supreme Court has not addressed the constitutionality of the retroactive application of amended 4800.1; however in *Bankovich v. Bankovich*,<sup>171</sup> the Fourth District Court of Appeal found the same failure of due process in amended 4800.1 and refused to apply 4800.2 to reimburse a separate property contribution to joint tenancy property acquired prior to January 1, 1984.<sup>172</sup> Of course, 4800.1, even amended, does not apply either to untitled community property or community property acquired in the name of one spouse alone; in such cases, prevailing case law would dictate the evidentiary standard.<sup>173</sup>

The enactment of A.B. 26 potentially impacts on a number of venerable community property doctrines. For example, how the 4800.1 presumption will effect the tracing of assets in a commingled fund at marital dissolution is a yet to be addressed issue.<sup>174</sup> In *In re Marriage of Mix*,<sup>175</sup> the California Supreme Court restated the rule that although a bank account established and used

Axene, 199 Cal. App. 3d 288, 244 Cal. Rptr. 433 (1987) (agreeing with *Griffis*); *In re Marriage of Griffis*, 187 Cal. App. 3d 156, 231 Cal. Rptr. 510 (1986); *In re Marriage of Delgado*, 176 Cal. App. 3d, 222 Cal. Rptr. 119 (1986) (in dicta).

169. HOGBOOM & KING, *supra* note 11, at § 8:101.20. It is interesting to note that the 1983 version of 4800.1 spoke only to joint tenancies, not all jointly-held property. This created a anomalous situation where the evidentiary standard for rebutting a community property presumption for joint was more difficult than the evidentiary standard for rebutting the community property presumption when property was titled "to husband and wife, as community property." The 1986 version of 4800.1 has corrected this oversight by requiring a writing to rebut the community property presumption for all jointly-titled property including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property. CAL. CIV. CODE § 4800.1 enacted by 1986 Cal. Stat., ch. 539.

170. See *supra* note 4. Amended 4800.1 creates a community property presumption and statute of frauds rebuttal requirement for all jointly-held property acquired during marriage thereby providing uniform treatment for characterizing marital property whether titled as tenancy-in-common, community property or joint tenancy.

171. 203 Cal. App. 3d 49, 248 Cal. Rptr. 296 (1988).

172. In *Bankovich*, the parties had not agreed either orally or in writing to maintain husband's separate property interest as was required under pre-4800.1 law; therefore, husband's only possible recovery was pursuant to the reimbursement section of 4800.2.

173. See *supra* note 153 and accompanying text.

174. It appears that at issue as well is whether a jointly-titled commingled fund can still exist or whether the 4800.1 and 4800.2 have impliedly overruled all law pertaining to tracing to a jointly-titled commingled fund. Of course, if the commingled account is held in the name of either spouse, then exhaustion or direct tracing should still be available to identify the separate and community property.

175. 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).

during marriage is presumptively community property, if separate property contributions can be traced, the separate property proponent will have met his or her burden of overcoming the community property presumption. However, in *In re Marriage of Hayden*,<sup>176</sup> the court refused to allow tracing. In *Hayden*, wife sold her undisputed separate property and placed the proceeds in a bank account which she later transmuted by changing title to joint tenancy with her spouse. The *Hayden* court, applying the logic of *Lucas*,<sup>177</sup> refused to allow *Mix*-type tracing to rebut the joint tenancy form of title presumption requiring instead evidence of an agreement that the property was to be characterized as other than joint tenancy.<sup>178</sup> If the *Hayden* analysis is sound, then 4800.1 would similarly impose a community property presumption as to the account. A writing would be required to rebut the community property presumption which, if overcome, would allow the separator to trace his or her property from a commingled account using the doctrines of either *See v. See*<sup>179</sup> or *Hicks v. Hicks*.<sup>180</sup> If the separate property spouse could not sustain the 4800.1 statute of frauds rebuttal burden, then 4800.2 gives a right of reimbursement for traceable separate property without regard to interest for her separate property contributions. It appears that the division of a commingled account may well turn on the form of title of the account.<sup>181</sup>

California has recently enacted legislation which speaks directly to the *See* and *Mix* commingled bank account. California Probate Code section 5305, enacted in 1983,<sup>182</sup> creates a presumption that contributions to a joint bank account of married persons are presumed to be community property, thereby reversing the common law presumption of form of title.<sup>183</sup> This presumption, which is similar to the one created by 4800.1, may be rebutted either by the showing of a written agreement to the contrary, creating a statute of frauds rebuttal burden similar to that of 4800.1,<sup>184</sup> or by tracing such contributions to a separate property source.<sup>185</sup> The

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176. 124 Cal. App. 3d 72, 177 Cal. Rptr. 183 (1981).

177. *Id.* at 77, 177 Cal. Rptr. at 185-86 (1981).

178. *Id.*

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

180. *Hicks v. Hicks*, 211 Cal. App. 2d 144, 27 Cal. Rptr. 307 (1962).

181. *See* BLUMBERG *supra* note 12, at 228.

182. CAL. PROB. CODE § 5305 (West Supp. 1989). Since 5305 had not been enacted at the time of the *Hayden* decision, the court could not rely on its community property presumption and rebuttal standard. The Multiple-Accounts sections of the California Probate code are modeled after similar sections in the Uniform Probate Code.

183. *See generally* Griffith, *supra* note 2, at 93-94 for results reached by courts straining to overcome the joint tenancy presumption.

184. CAL. PROB. CODE § 5305(b)(2) (West Supp. 1989).

185. CAL. PROB. CODE § 5305(b)(1) (West Supp. 1989). Note the similarity in re-

tracing rebuttal burden of 5305, which should be an easier one for the separate property proponent to sustain than a writing requirement, puts section 5305 in line with the rebuttal burdens required of a separate property proponent trying to overcome the general or time of acquisition community property presumption and prove separate contributions to a commingled account.

Although the sections dealing with multiple-party accounts are modeled after similar sections in the Uniform Probate Code, certain adaptations were required to deal with community property. Section 5305, creating the community property presumption, has no counterpart in the UPC.<sup>186</sup> The California Law Revision Commission Comment to this section specifically states that tracing shall suffice to overcome the community property presumption for a commingled account.<sup>187</sup> This expression of legislative intent seems to clarify the position that, at least as to multiple-party accounts, Probate Code section 5305 is intended to supercede Civil Code section 4800.1.<sup>188</sup> Since 5305 speaks specifically to tracing separate property in commingled accounts, one would have to conclude that the tracing doctrines of *Hicks* and *See* are still alive. The Comment specifically reiterates the California judicial doctrine that if community and separate property or funds are commingled in such a manner that it is impossible to trace the source of the property or funds, the whole will be treated as community property.<sup>189</sup>

#### IV. CURRENT STATE OF THE LAW OR "WHO'S ON FIRST?"

##### A. California Civil Code Sections 4800.1 and 4800.2

Assembly Bill 26 enacted not only section 4800.1 but also section 4800.2.<sup>190</sup> This section, which applies only to community property, reverses the gift presumption which historically has pervaded marital property law.<sup>191</sup> Prior to 4800.2, if one of the

buttal standards between 5305 and 4800.1 as originally proposed. *See supra* note 7.

186. *Recommendation Relating to Nonprobate Transfers*, 16 CAL. L. REVISION COMM'N REPORTS 129, 171 (1982) [hereinafter *Nonprobate Transfers*].

187. *Id.* at 174.

188. Proposed legislation would explicitly amend CAL. PROB. CODE § 5305(b) to override CAL. CIV. CODE §§ 4800.1 and 4800.2. Senate Bill 985 (1989)

189. *Patterson v. Patterson*, 242 Cal. App. 2d 333, 341, 51 Cal. Rptr. 339, 345 (1966).

190. CAL. CIV. CODE § 4800.2 (West Supp. 1986); *see supra* note 5.

191. The presumption of a gift of community property to the separate estate absent an agreement to the contrary may well have its origins in the pre-1975 community property system in which all community property was exclusively managed by the husband. Because husband had exclusive control over the community property, any time that he used community property to enhance his wife's separate property or took title to community assets in her name alone, a gift was presumed. If either husband or wife made a separate property



spouses contributed his or her separate property to the community, absent an agreement to the contrary, a gift to the community was presumed.<sup>192</sup> The legislature, recognizing an inherent unfairness in potentially depriving the separate property spouse of his or her contribution, enacted section 4800.2 as remedial legislation; this section gives the separate property estate a creditor's interest free right of reimbursement in the property<sup>193</sup> absent a written waiver to the contrary.<sup>194</sup>

In *In re Marriage of Fabian*,<sup>195</sup> the California Supreme Court addressed the constitutionality of the retroactive application of 4800.2. Kathleen and James Fabian purchased a motel, taking title as husband and wife, as community property. Prior to marital separation, James invested \$275,000 of his separate property in the motel. The trial court, finding no *Lucas* agreement or understanding of reimbursement or repayment, held that James had made a gift of his separate property to the community.<sup>196</sup> James

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contribution to community property, a gift was presumed absent an agreement to the contrary since the contributing spouse had exclusive management and control of his or her separate property.

192. *Machado v. Machado*, 58 Cal. 2d 501, 375 P.2d 55, 25 Cal Rptr. 87 (1962) (joint tenancy deed for real property); *In re Marriage of Frapwell*, 49 Cal. App. 3d 597, 122 Cal Rptr. 718 (1975) (conversion of separate property bank accounts to joint tenancy); *In re Marriage of Bjornestad*, 38 Cal. App. 3d 801, 113 Cal. Rptr. 576 (1974) (5110 single-family residence community property presumption); *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. (1980) (approving of *In re Marriage of Bjornestad*); *In re Marriage of Cademartori*, 119 Cal. App. 3d 970, 174 Cal. Rptr. 292 (1981) (extending the joint tenancy form of title rebuttal standard of *Lucas* to property titled as community property).

193. Note that the right of reimbursement in 4800.2 is doctrinally unsound in light of California's long history of recognizing that marital property can be an admixture of both community and separate with a right of pro rata apportionment in each estate. See e.g. *Vieux v. Vieux*, 80 Cal. App. 222, 251 P. 640 (1926) (approving apportionment between the community and separate property estate in an installment contract); *Forbes v. Forbes*, 118 Cal. App. 2d 324, 257 P.2d 721 (1953) (recognizing a pro tanto community property interest in mixed property); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (set out the apportionment scheme for the pro tanto interests of the estates which was approved by the supreme court in *Lucas*); *In re Marriage of Moore*, 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980) (defining the proper method of calculating community interest in a separate property estate). The 4800.2 approach to mixed property seems more similar to the view adopted by other community property states that the character of property is fixed by the character of the initial contributions and that, at best, the out-estate may have a mere right of reimbursement. At least as to "community property," the legislature seems to have impliedly overruled the well-established doctrine of buying into title. See generally, W. REPPY, JR., & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 77-83 (2d ed. 1982). It seems clear, however, that if 4800.2 does not apply, either because the property is not community, the community property presumption is rebutted, or because of the *Fabian* unconstitutionality constraint, pro rata apportionment is still applicable. *Accord.*, *Hogoboom & King*, *supra* note 11 at §§ 8:70-8:80.2.

194. For what constitutes a waiver, see *infra* notes 221-32 and accompanying text.

195. 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986).

196. Since title to the property had been expressed affirmatively as husband and wife, the *Lucas* and *Cademartori* rebuttal requirements pertained. *Id.* at 445-46, 714 P.2d

appealed and while the appeal was pending, section 4800.2 was enacted as part of Assembly Bill 26.

The California Supreme Court found that the retroactive application of 4800.2 impaired Kathleen's property right in the motel which had vested at the time title was taken in community property with no agreement or understanding that James would be reimbursed for his investment.<sup>197</sup> Using the identical due process analysis as in *Buol*, the court found no significant state interest that cured a "rank injustice" and held the application of the statute in *Fabian* unconstitutional.<sup>198</sup>

In response to the decisions of *Buol* and *Fabian*, the Legislature enacted urgency legislation<sup>199</sup> to repeal the retroactive application of 4800.1 and 4800.2 to all proceedings commenced prior to January 1, 1984.<sup>200</sup> The 1986 legislation also affirmed the legislature's intent to have 4800.1 and 4800.2 apply to all property, regardless of date of acquisition, in cases where the proceeding was filed after January 1, 1984. In two statements of intent, currently incorporated in the 1987 version of 4800.1,<sup>201</sup> the legislation cites both confusion of the bar and bench and frustration of legislative intent caused by *Buol* as well as a compelling state interest in the provision of uniform treatment of property as the reasons for the applicability of A.B. 26 to preenactment property.<sup>202</sup> Additionally, section 4800.1 was amended to apply to all property held in joint

at 256, 224 Cal. Rptr. at 336.

197. Since 4800.2 was enacted some one and one-half years after the trial court rendered its judgment in the Fabians' dissolution matter, compliance with the waiver requirement of 4800.2 was impossible. For a similar analysis in *Buol*, see *supra* notes 162-63 and accompanying text.

198. *In re Marriage of Fabian* at 449, 715 P.2d at 258, 224 Cal. Rptr. at 338 (1986). See *supra* note 155 for analysis of California's long-established retroactivity balancing test.

199. See 1986 Cal. Stat. ch. 49, sec 2, at 91-92 (specifically refers to *Buol* in the text of the statute).

200. *Id.*, sec 1, at 91.

201. See *supra* note 4; see also *Recommendation on 4800.1 and 4800.2*, *supra* note 116, at 389 where the Law Revision Commission recommends that the new legislation should apply to all proceedings commenced on or after January 1, 1984 regardless of when the property was acquired, an approach which is consistent with a reasonable reading of *Buol*. Such an approach, the Commission goes on to say, treats fairly those parties who have relied on an oral agreement; oral agreements in other than dissolution matters are still a valid rebuttal standard. Casual statements made during marriage affecting interspousal property rights are not made with full knowledge of their consequences or with the intention of the parties that they change the rights of the parties if the marriage is dissolved. *Id.* at note 10. Query how a spouse who brings separate property into a marriage, converts it to joint tenancy for whatever reason but based on an understanding that said property will remain his or her separate property, would respond to such a statement.

202. Preenactment property is all interspousal property acquired in or converted into joint title prior to January 1, 1984 in cases where the proceeding was not filed prior to January 1, 1984. See *Flagg*, *supra* note 13, at 55, n. 201.

title.<sup>203</sup>

More than one appellate court has spoken to the retroactive application of amended 4800.1 and 4800.2. *In re Marriage of Griffis*<sup>204</sup> was the first case to address the applicability of 4800.1 and 4800.2 as amended by the urgency legislation making these sections applicable to all proceedings commenced on or after January 1 1984, regardless of when the property was acquired. The *Griffis* court stated the rule, approved by the court *In re Marriage of Hopkins and Axene*,<sup>205</sup> that even when the date of the proceeding falls squarely within the constraints of the amended statute, it is still constitutionally defective to apply 4800.1 and 4800.2 to pre-enactment property. The vested property right identified in *Buol* attaches at the time during the marriage that the property is acquired or converted into joint form. It is then that it is too late for the separate property contributor to get a writing rebutting the community property presumption of 4800.1 and for the community to obtain a 4800.2 waiver of reimbursement.<sup>206</sup>

*Bankovich v. Bankovich*<sup>207</sup> is the first case to address the issue of retroactive application of 4800.1 and 4800.2, as amended. The Fourth District court held that notwithstanding a more comprehensive explication of the state's interest in the retroactive application of the statutes, "[w]here it has been firmly established by the courts these provisions cannot be applied to *property rights acquired before January 1, 1984*, the constitutional defect cannot be erased by mere legislative announcement." (emphasis added)<sup>208</sup> Simply an announcement that a state interest is compelling is not sufficient to make it so. Since *Bankovich*, a number of appellate courts have spoken to the statute as amended and have rendered substantially similar decisions.<sup>209</sup>

To date, the supreme court has not spoken to the amended leg-

203. Amended 4800.1 now applies to all jointly-titled interspousal property including joint tenancy, tenancy in common, tenancy by the entireties and community property. This change takes care of the anomaly created by a statute which established a more difficult burden to rebut the community property presumption for joint tenancy community property than for titled community property. See *Bankovich v. Bankovich*, 203 Cal. App. 3d 49, 249 Cal. Rptr. 713 (1988) (referring to the objection of the *Buol* court to this lack of uniformity); *In re Marriage of Buol*, 29 Cal. 3d 751, 762, 705 P.2d 354, 361, 218 Cal. Rptr. 31, 38 (1985).

204. 187 Cal. App. 3d 156, 231 Cal. Rptr. 510 (1986).

205. 199 Cal. App. 3d 288, 244 Cal. Rptr. 433 (1988).

206. *In re Marriage of Griffis* at 165, 231 Cal. Rptr. at 515 citing *Adams & Sevitch*, *supra* note 30, § D.11.5.3a at D-12 - D-13.

207. 203 Cal. App. 3d 49, 249 Cal. Rptr. 296 (1988).

208. *Id.* at 55, 249 Cal. Rptr. at 298.

209. See *In re Marriage of Lockman*, 204 Cal. App. 3d 782, 251 Cal. Rptr. 433 (1988); *In re Marriage of Cairo*, 205 Cal. App. 3d 1255, 251 Cal. Rptr. 731 (1988); *In re Marriage of Reilly*, as modified, 197 Cal. App. 3d 1119, 242 Cal. Rptr. 302 (1987); *In re Marriage of Columbo*, as modified, 197 Cal. App. 3d 572, 242 Cal. Rptr. 100 (1987).

isolation. There has been a flurry of speculation about the probability of the supreme court granting review of the amended legislation. Stephen Adams and Nancy Sevitch, well-known commentators in the family law area and editors of California Family Law Practice, have speculated that *Bankovich* is likely to be the last word that we hear on the application of sections 4800.1 and 4800.2. When the appellate court declined to publish its opinion in the case of *In re Marriage of Hopkins and Axene*, the California Supreme Court ordered it published. At a subsequent conference of judges and attorneys, a number of justices were overheard to say that the Supreme Court virtually never orders publication contrary to the recommendation of an appellate court. "We believe then that the justices were trying to tell us they are finished with the issue, and that this probably is as close to a final decision as we're going to get."<sup>210</sup>

Section 4800.2 permits the separate property contributors to claim a reimbursement from the community for separate property contributions to a community property based on mere tracing unless the contributor has signed a waiver of the right of reimbursement or signed a writing that has the effect of a waiver. What constitutes an effective waiver is an issue which has been addressed by at least two courts of appeal with regard to cases where the transaction creating the community property fell squarely within the requirements of 4800.2 with no *Fabian* constitutional defect.<sup>211</sup>

In *In re Marriage of Witt*,<sup>212</sup> the wife converted a separate property farm to community property with an acknowledged oral intent of making a gift to the community. The sixth district, noting the similarity of these facts to *Fabian*,<sup>213</sup> upheld the trial court's ruling that absent a written waiver of the right of reimbursement, wife was entitled to reimbursement for her separate property contribution.

The holding in *Witt*, while certainly in compliance with the language of 4800.2, demonstrates some logical inconsistencies in the spirit of the statute. If an express legislative purpose of A.B. 26 is

210. See Adams & Sevitch, *supra* note 30, at 3514 (1988).

211. To be constitutional under the guidelines of Buol/*Fabian* and their progeny, the proceeding at issue must have commenced on or after January 1, 1984 and the property at issue must have been acquired at the same date.

212. 197 Cal. App. 3d 103, 242 Cal. Rptr. 649 (1987).

213. In *Fabian*, the court found no evidence of an agreement to maintain husband's separate property interest which would have been required to rebut the objective gift presumption of pre-4800.2 law. In *Witt*, while there was also no evidence of an agreement to maintain wife's separate property interest, wife acknowledged her subjective intent to make a gift.

to strengthen the community,<sup>214</sup> permitting a spouse to abrogate his or her express intent to make a gift to the community after the fact is inapposite. The requirement of a written waiver to rebut the presumption of reimbursement creates a sword for the separate property spouse who, in light of the crumbling marriage, gets the benefit of a second look at his gift. Furthermore, since the courts will not look behind the community's failure to obtain a 4800.2 waiver, the separate property contributor may always assert the 4800.2 right of reimbursement which has been fixed from the time of acquisition or conversion of the property in presumptively community form.<sup>215</sup> That the community relied on the contributing spouse's expression of intent to make a gift is apparently irrelevant;<sup>216</sup> knowledge of the new evidentiary standard of 4800.2 is imputed to the community.

The 4800.2 right of reimbursement was intended specifically to mitigate the potentially harsh results to the contributing spouse of the abrogation of oral agreements by the 4800.1 statute of frauds.<sup>217</sup> It is indeed anomalous that 4800.2 reimburses a spouse who, like Mrs. Witt, intended to make a gift to the community and communicated that intent to her spouse in the same manner as a spouse whose oral agreement to be reimbursed has been abrogated by the 4800.1 writing requirement.<sup>218</sup> While it appears that the legislature intended the 4800.2 writing requirement to encourage spouses to memorialize all of their mixed property transactions,<sup>219</sup> it is equally true that Mrs. Witt's failure to execute a written waiver in statutory compliance with her intent to make a gift or Mr. Witt's failure to request one is empirical evidence that knowledge of marital property law is outside the purview of most married couples.<sup>220</sup>

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214. See *Recommendation on 4800.1 and 4800.2*, *supra* note 116, at 387.

215. See *supra* note 165 and accompanying text.

216. *In re Marriage of Witt* at 107-08, 242 Cal. Rptr. at 649 (1987).

217. See *Recommendation on 4800.1 and 4800.2*, *supra* note 116, at 388.

218. This is the exact situation of *Witt* where wife acknowledged her intent to make a gift to the community at the time that the conveyance to the community was made; at marital dissolution, she was able to have reimbursement by asserting the 4800.2 written waiver requirement. Query whether the court in *Witt* is inadvertently articulating a conditional gift doctrine. Traditionally, a completed gift requires donative intent and delivery, both of which were present in *Witt*. What the court is saying is that the gift is conditional upon the marriage staying intact.

219. See *supra* note 158 and accompanying text.

220. See *supra* note 158. Imputing knowledge of the law is not the exclusive province of the legislature. In *Buol* and *Fabian*, the supreme court imputed knowledge the vesting of property rights to both Esther Buol and Kathleen Fabian in order to make reliance arguments on behalf of both of them against the retroactive application of 4800.1 and 4800.2. While the imputed knowledge was easier to show in the case of Esther Buol, the court had no trouble finding that Kathleen must have relied because of the "legitimacy of such reliance" notwithstanding that there was almost no evidence of reliance. *Marriage of Fabian*

In *Perkal v. Perkal*,<sup>221</sup> the court found that husband had not made an effective waiver of his right of reimbursement by the act of interlineating the words "For a Valuable Consideration the Receipt of Which is Hereby Acknowledged" on the grant deed converting his separate property into joint tenancy with his wife and substituting thereto the words "For a Gift."<sup>222</sup> The court held that since the waiver is a voluntary act it requires actual or constructive knowledge of the right being waived. In *Perkal*, testimony had shown that husband's intent in using the words "For a Gift" was to avoid payment of the documentary transfer tax and to obviate the possibility of a property tax reassessment. The court found that although husband's motives were not laudatory, they did not show any intent to make a gift.<sup>223</sup>

It is difficult to reconcile the rules of *Witt* and *Perkal* regarding the role that parol evidence of intent plays in the waiver requirement of 4800.1. In *Witt*, parol evidence of intent was not sufficient to waive reimbursement absent a writing. In *Perkal*, a writing was insufficient because parol evidence demonstrated a lack of intent to make a gift.

Since the 4800.2 presumption of nongift runs in favor of the separate estate, the courts impute knowledge of the waiver requirement to the community which must obtain a written waiver in order to protect its interest. Such knowledge need not be imputed to the separate estate which has the benefit of the nongift presumption. The presumption that a nongift was intended has different consequences depending on whether the intent to make a gift was actually present at the time of the transaction. Mrs. Witt's lack of knowledge of the waiver requirement acted as a sword, allowing her to assert the 4800.2 right of reimbursement notwithstanding her prior intent to make a gift. Mr. Perkal's lack of knowledge, on the other hand, acted as a shield which protected his right of reimbursement notwithstanding having executed a writing. It seems only a knowledgeable waiver will suffice to nullify 4800.2's right of reimbursement.<sup>224</sup> Since it is unlikely that most couples will have any real knowledge of 4800.2, the doctrine of separate property gifts to the community is at risk.<sup>225</sup>

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at 449, 715 P.2d at 258-59, 224 Cal. Rptr. at 338-39 (1986).

221. 203 Cal. App. 3d 1198, 250 Cal. Rptr. 296 (1988).

222. *Id.* at 1203, 250 Cal. Rptr. at 298.

223. How the writing requirement of 4800.2 will square with the writing requirement of section 5110.730 is not at all clear particularly with regard to the 5110.730(d) exception for property which is an admixture of both community and separate. Whereas 4800.2 does not recognize the admixture concept ("In the division of community property. . ."), apparently 5110.730 does.

224. *Id.* at 1204, 250 Cal. Rptr. at 299.

225. It appears that the legislature is attempting to completely discourage inter-

Both the language of 4800.2 and the judicial restrictions of its applicability create confusion and uncertainty. To the extent that the 4800.2 has not entirely co-opted the area of separate property reimbursement, California's only recently-settled doctrine of pro rata apportionment still applies.<sup>226</sup> Clearly an asset which is not community property falls without the reach of 4800.2 which speaks only to the division of community property.<sup>227</sup>

Any separate property of either spouse acquired prior to marriage or acquired onerously during marriage which has not been converted to community property by a change in form of title or has not been transmuted to community property, to which the community has made a contribution, is still subject to division by the pro rata apportionment rules.<sup>228</sup> As to such property, mere tracing to the source of funds will suffice as proof of the character of the contribution. It seems clear that the pro rata apportionment doctrine of *Moore/Marsden* lives on for community contributions to separate property.<sup>229</sup>

For property which is acquired by one spouse in his or her name during marriage with a combination of community and separate property, the effect, if any, of 4800.2 is not at all clear.<sup>230</sup> Such a situation should not cause a form of title presumption to arise in favor of a separate property characterization.<sup>231</sup> Since the property was acquired during the marriage, the general community property presumption which attach. If the acquiring spouse can

spousal gifts. The newly enacted interspousal transmutation writing requirements effectively make all interspousal gifts, except those specifically excepted by CAL. CIV. CODE § 5110.730(c), revocable at the termination of the marriage by dissolution or death absent a writing to the contrary.

226. It was not until 1980 that the California Supreme Court finally ruled on how the community and separate interest in mixed property should be handled. In *In re Marriage of Lucas* at 816, note 3, 614 P.2d at 290 at note 3, 166 Cal. Rptr. at 858 note 3 (1980), the court, resolving a long-standing conflict among the districts as to how to treat property acquired during marriage which was an admixture of community and separate, approved the apportionment formula set out in *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979). In *In re Marriage of Moore*, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980), the court approved the pro rata apportionment formula for calculating community contributions to separate property.

227. CAL. CIV. CODE 4800.2 (West Supp. 1986).

228. See *In re Marriage of Leversee*, 156 Cal. App. 3d 891, 203 Cal. Rptr. 481 (1984).

229. See *supra* note 20.

230. Blumberg, *supra* note 12, at 194. Professor Blumberg notes that apart from the policy served by the content of 4800.2, the articulation of this content is fundamentally misconceived and "reveals a critical ignorance of California community property doctrine" which has always recognized that property which is purchased with community and separate property gives rise to an asset which is both community and separate in nature.

231. Since title is in the name of the spouse who used community property to acquire the property, it would be self-serving to assign the benefit of a separate property presumption to such a spouse since it cannot be presumed that the nonacquiring spouse has given his or her consent to the attempted transmutation of community property.

trace to a separate property source, the community property presumption will be rebutted and 4800.2 will not apply. In such a situation, the division of the property presumably will be governed by the law as articulated in *Lucas* and *Aufmuth*.

Any postenactment property acquired during marriage or converted during marriage into joint title is subject to the community property presumption of 4800.1 and its written proof of rebuttal.<sup>232</sup> If the presumption cannot be successfully rebutted,<sup>233</sup> the separatizer will have a 4800.2 right of reimbursement assuming no waiver has been made. Under this theory, the separate property contribution to community property (which may indeed have been separate property in the first instance),<sup>234</sup> is treated like an interest-free loan to the community.<sup>235</sup> Title has fixed the character of property in the community which gets the benefit of all post-acquisition or post-conversion appreciation.<sup>236</sup> Therefore, as to separate contributions to 4800.1 community property, the pro rata apportionment doctrine of *Lucas/Aufmuth* is gone. As to preenactment titled community or spousal joint tenancy property, the *Lucas/Aufmuth* doctrine is still viable.<sup>237</sup>

If the 4800.1 presumption, as applied to post-enactment property, can be overcome by the showing of a writing, then the asset or some part of it is not presumptively community property and therefore not subject to the reimbursement right of 4800.2. If the property is an admixture of community and separate property and either estate can trace its contributions, pro rata apportionment will not only reimburse such estate for its contributions but also allocate the appreciation.

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232. See *supra* notes 164-72 and accompanying text.

233. If the 4800.1 statute of frauds requirement is met, the community property presumption is overcome and the separate property contributor may have pro rata apportionment as to any separate property contribution which can be traced.

234. In *In re Marriage of Neal*, 153 Cal. App. 3d 117, 200 Cal. Rptr. 341 (1984), Mrs. Neal had converted title of her separate property residence into joint tenancy at the demand of a financial institution. Had this situation been constitutionally proper, a court would have been compelled to characterize the property as community since 4800.1 has no provision for looking behind the transaction to the reason for form of title. To the extent of the situation in *Neal*, it is the intent-of-the-lender, not the intent of the contributing spouse, that was controlling. The value of the 4800.2 right of reimbursement is the value of the property at the time of its conversion to joint tenancy form. See *83 Sen. Rept, supra* note 7, at 3865-66.

235. CAL. CIV. CODE 4800.2 (West Supp. 1986).

236. See *supra* note 189. It has been noted that the judiciary has strongly criticized the inequity of this rule when the separate property spouse has made essentially all contributions to the 4800.1 presumptively community property and is unable to rebut successfully. See HOGOBOOM & KING, *supra* note 11, § 8:102.15 and Comment.

237. Buol/Fabian and progeny have apparently concluded that 4800.1 and 4800.2 are inapplicable to any preenactment property and the supreme court has not again spoken in this issue. See *supra* 204-16 and accompanying text.



If property acquired during marriage is untitled or taken in the name of one spouse, any credible evidence will be sufficient to rebut the general community property assumption.<sup>238</sup> Again, if such property is an admixture of community and separate, pro rata apportionment will be applicable. Property acquired in joint form prior to marriage does not raise either the 4800.1 community property presumption or the general community property presumption.

## B. Death of a Spouse

### 1. Character of Property

The consequences of form of title are quite different at the death of the first spouse to die. If title to the property is as joint tenants, then the surviving spouse will take the whole by right of survivorship.<sup>239</sup> Since form of title creates only a rebuttable presumption that the character of the property is as indicated by title,<sup>240</sup> a devisee of the property under the will of the deceased spouse may test the surviving spouse's claim by proof that the spousal joint tenancy is really community property.<sup>241</sup> Prior to 1985, parol evidence was sufficient to prove that the character of the property was other than as indicated by title.<sup>242</sup> Such evidence was respected with regard to proceedings to administer the estate of the deceased spouse. Therefore, the one-half of the community property belonging to the deceased spouse would have been transferred either to such devisees named in the will of the decedent or to his intestate heirs.<sup>243</sup>

In 1985, the California Legislature overturned a long history of oral transmutations of marital property with the codification of statutes requiring a writing to effect a transmutation.<sup>244</sup> Prior to

238. Such evidence includes tracing to a separate property source, an oral agreement as to the character of the property, an antenuptial agreement, agreement that the property was acquired as a gift.

239. CAL. CIV. CODE § 683 (West Supp. 1989). Since 4800.1 and 4800.2 do not apply at death, no presumption of community property arises. Unless the joint tenancy property can be shown to be community property, it is not subject to administration in the estate of the decedent. *Estate of Zaring*, 93 Cal. 2d 577, 209 P.2d 642 (1949). True joint tenancy property also is not available to satisfy the claims of decedent's creditors.

240. See *supra* notes 40, 42, 47 and accompanying text.

241. *Sandrini v. Ambrosetti*, 111 Cal. App. 2d 439, 447-51, 244 P.2d 742, 748-50 (1952).

242. *Estate of Blair* at 167, 244 Cal. Rptr. at 631; *Estate of Levine*, 125 Cal. App. 3d 701, 705, 178 Cal. Rptr. 275, 277 (1981); *Estate of Baglione*, 165 Cal. 2d 192, 195, 417, P.2d 683, 686, 53 Cal. Rptr. 139, 142 (1966).

243. Cal. Prob. Code §§ 6101(b), 6401(a), & 6402 (West Supp. 1989).

244. Cal. Civ. Code §§ 5110.710-740 (West Supp. 1989); See *Recommendation Re-*

the effective date of this legislation, courts had recognized oral transmutations; after January 1, 1985, only a section 5110.730 writing will effect a transmutation.<sup>245</sup> Since section 4800.1 is not applicable to death situations, an attempt by one spouse to devise post-1984 joint tenancy community property to someone other than the surviving spouse will be a nullity unless the presumptively joint tenancy property has been transmuted to community property by a 5110.730 writing.<sup>246</sup> The viability of the form of title joint tenancy presumption at the death of one spouse coupled with the requirement for a writing to effect a transmutation is precisely the opposite of the prevailing presumption in dissolution cases. Through the combined effects of sections 4800.1, 4800.2 and 5110.730, the legislature has given life but no official recognition to the community property with right of survivorship hybrid estate.

How the 5110.730 writing requirement will affect other situations where oral transmutations have been respected in the past is yet to be seen. Spouses frequently rely on post-death confirmations

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*lating to Marital Property Presumption and Transmutations*, 17 CAL. L. REVISION COMM'N 207 (1984); *Woods v. Security Nat'l Bank*, 46 Cal. 2d 697, 701, 199 P.2d 657, 659 (1956).

245. Query what will be sufficient to satisfy the 5110.730 writing requirement. 5110.730 specifically calls for a written express declaration that is made, joined in, consented to or accepted by the spouse whose interest is adversely affected. A quitclaim deed converting community property to the separate property of one of the spouses has been held sufficient to work a transmutation. *See e.g. Kennedy v. Taylor*, 155 Cal. App. 3d 126, 210 Cal. Rptr. 770 (1984); *Marriage of Stoner*, 147 Cal. App. 3d 858, 195 Cal. Rptr. 351 (1983). If a quitclaim deed is sufficient to work a transmutation for the purpose of fulfilling the writing requirement of 5110.730 (note that both cited case were pre-1985, the effective date of the statute), will a transfer by deed from separate property to joint tenancy create a binding transmutation on the separate property spouse regardless of the reason for such a transfer. Such a transmutation, although having the advantage of eliminating inherently unreliable parol evidence has as little to do with the intent of the transmuting party as the community property presumption of 4800.1. Although there is no express language in 5110.730, parol evidence will not be permitted to show that the joint tenancy property is really the separate property of one of the spouses. (But see possible substitutes for a writing as articulated in *Freitas and Sheldon*.) To that extent, 5110.730 creates the same evidentiary burden as 4800.1.

The writing requirement for antenuptial agreements found at Cal. Civ. Code § 5311 (West Supp. 1989) has been found to be otherwise satisfied. In *Freitas v. Freitas*, 31 Cal. App. 16, 159 P. 611 (1916), the court found that an oral antenuptial agreement which was fully executed by performance on the part of the parties was no longer subject to the statute of frauds requirement. In *Estate of Sheldon*, 75 Cal. App. 3d 364, 142 Cal. Rptr. 199 (1977), the doctrine of estoppel was held to prohibit the party denying the existence of antenuptial agreement from raising the statute of frauds as an affirmative defense.

246. *See Estate of Blair* at 167-68, 244 at 631 (1988); *See also CAL. CIV. CODE* § 5110.740 (West Supp. 1989) which codifies the rule that prior to the death of the decedent spouse, statements in his or her will regarding the character of the property are ineffective to work a transmutation. This statute recognizes the revocability of wills and their ambulatory nature; wills are ineffective until the death of the decedent since he or she may modify or revoke the will at any time prior to death.

that marital property held in joint tenancy is really community property for purposes of securing the Internal Revenue Code Section 1014(b)(6) step-up in income tax basis for both halves of the community at the death of the first spouse to die.<sup>247</sup> Under IRS construction of its rules, if the property held in a common law estate is community property under state law, it is community property for the purposes of applying I.R.C. 1014(b)(6).<sup>248</sup> Prior California law has made clear that if an agreement to transmute could be demonstrated by the surviving spouse, then the character of the property was as the parties had agreed notwithstanding title; the law of oral transmutation made the application of I.R.C. 1014(a)(6) relatively easy. For post-January 1, 1985 transactions, however, the 5110.730 writing requirement makes parol evidence inadmissible to prove that marital property held in joint tenancy is really community property. The surviving spouse, alleging the community character of the property, will be required to produce a writing which satisfies 5110.730<sup>249</sup> since neither the community property presumptions of section 4800.1 or section 5305 are applicable at death.

An interesting situation arises when joint tenancy property is unilaterally severed by one of the joint tenants during the lifetime of the joint tenants. California has long recognized the right of unilateral severance of joint tenancy real property.<sup>250</sup> Since 1980, this right of unilateral severance may be accomplished by direct transfer from the joint tenant desiring a severance to himself, as a tenant in common.<sup>251</sup>

247. Int. Rev. Code § 1014(b)(6) (CCH 1988).

248. Rev. Rul. 87-98 (1987-2 C.B.).

249. The California Probate Code, at CAL. PROB. CODE § 13650 (West Supp. 1989), allows community property of the decedent that is passing to the surviving spouse to be transferred without the necessity of an administration. As a part of this community property set-aside, the surviving spouse may request confirmation of the property as community. Under this section, joint tenancy marital property could be confirmed as community property. Whether section 13650 will require a 5110.730 writing to so confirm is not yet clear. Whether the Internal Revenue Service will look to the probate code's community property confirmation proceeding or to the civil code's writing requirement as the law regarding the community property character of joint tenancy property for the purposes of satisfying I.R.C. Rev. Ruling 87098 is also not clear. *Id.*

250. *Hammon v. McArthur*, 30 Cal. 2d 512, 183 P.2d 1 (1947); *Clark v. Carter*, 265 Cal. App. 2d 291, 70 Cal. Rptr. 923 (1968); *Burke v. Stevens*, 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968).

251. *Riddle v. Harmon*, 102 Cal. App. 3d 525, 162 Cal. Rptr. 530 (1980). This right of unilateral severance without necessity of a third-party strawman is currently codified at CAL. CIV. CODE § 683.2 (West Supp. 1989). Prior to the codification of the holding of *Riddle v. Harmon*, unilateral severance by the use of an intermediary had long been recognized. *But see Estate of Propst*, 201 Cal. App. 3d 512, 247 Cal. Rptr. 917 (1988) for the holding that a joint tenancy in personal property may not be unilaterally severed without the consent of all of the joint tenants. Although the *Propst* court recognized the inherent inconsistency of permitting unilateral severances of joint tenancies in real property but not

This substantive property right attendant to joint tenancies does not apply to community property; it is an estate which may not be unilaterally terminated during the joint lifetimes of the spouses.<sup>252</sup> However, under the holding of *Riddle v. Harmon*, a community joint tenancy in real property may be unilaterally severed.<sup>253</sup> In 1984 and 1985, legislation was added to the civil code limiting the application of *Riddle*.<sup>254</sup> Effective January 1, 1986, a unilateral severance of a joint tenancy is ineffective against the surviving joint tenant unless the severance was recorded by the severing joint tenant prior to his death. The purpose of this section is to discourage a secret or fraudulent unilateral severance which destroys the right of survivorship expectation of the surviving joint tenants.<sup>255</sup>

The Comment to the Law Revision Commission Report states an exception to the recordation rule: if the joint tenancy is held between husband and wife and can be shown to be community property, a lack of recordation mandated by 683.2 will not destroy the effect of a testamentary disposition of the deceased spouse's one-half interest.<sup>256</sup> Presumably, with the addition of 5110.730 to

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in personal property, it stated that the reason for the different rule lies in two much-misunderstood California Supreme Court cases: *Estate of Harris*, 169 Cal. 725, 147 P. 967 (1915) [known as *Harris I*] and *Estate of Harris*, 9 Cal. 2d 649, 71 P.2d 873 (1937) [known as *Harris II*]. *Estate of Propst* at 519. These cases have stood for the rule that a unilateral severance of joint bank account is impermissible. The court in *Propst* distinguished the two cases because of the existence of an interspousal agreement in *Harris* to transmute the property to joint tenancy and no such agreement in *Propst*. Although the *Propst* court felt that the holding in *Harris* should have been limited to the facts of that case, it felt constrained to follow the precedent of *Harris*. *Id.* at 525. On October 27, 1988, granted review to *Estate of Propst*.

252. See *supra* note 76 and accompanying text.

253. Since the court in *Riddle* does not distinguish between spousal and nonspousal joint tenancies, there is no inquiry at the time that one of the spouses performs an act which results in an effective severance of the community property. Arguably, if the spouses had a side agreement that the property was to remain joint tenancy, then the logic of *Harris* might attach.

254. CAL. CIV. CODE § 683.2(c) (West Supp. 1989).

255. This fraudulent intent had been the subject of at least one California case. *Burke v. Stevens*, 264 Cal. App. 2d 30, 70 Cal. Rptr. 87 (1968) in which wife unilaterally severed a joint tenancy in real property which had been purchased by her husband with title taken in joint tenancy. There are other cases where the secret intent of the severing spouse had not so clearly looked like fraud. *Estate of Carpenter*, 140 Cal. App. 3d 709, 189 Cal. Rptr. 651 (1983); *Estate of Dean*, 109 Cal. App. 3d 156, 167 Cal. Rptr. 138 (1980). See *Recommendation Relating to Recording Severance of Joint Tenancy*, 18 CAL. L. REVISION COMM'N, 253-54 (1986) [hereinafter cited as *Severance of Joint Tenancy*]; see also Fetters, *supra* note 40 for the proposition that although secret unilateral severances are problematic, recordation of the severance is not necessarily the answer.

256. See *Severance of Joint Tenancy*, *supra* note 255, at 256; accord *Sandrine v. Ambrosetti*, 111 Cal. App. 2d 439, 244 P.2d 742 (1952); *Estate of Wilson*, 64 Cal. App. 3d 786, 134 Cal. Rptr. 749 (1976). It is interesting to note that most of the reported cases of secret or fraudulent severances of joint tenancies have been interspousal. Since spousal joint tenancies where form of title can be rebutted by the showing of a writing are an

the Civil Code such evidence will have to be in writing.<sup>257</sup> If there is no writing and no recordation of the severance, the surviving spouse takes the whole by right of survivorship.<sup>258</sup> While 683.2 recognizes the community property incident of testamentary disposition, 5110.730 makes the incident impossible to execute without a writing.<sup>259</sup> For purposes of establishing that a spousal joint tenancy is really community property at the death of one of the spouses, the community property incident of unrestricted alienability is anything but unrestricted. This policy has the tendency to recognize that spousal joint tenancies are often used as will substitutes and to discourage spouses from holding title to community property as husband and wife and availing themselves of the community property set-aside provisions of the California Probate Code.<sup>260</sup>

## 2. Rights of Third-Party Creditors

Joint tenancy property has long been recognized as unavailable to the deceased's creditors although such property would surely have been available to such a creditor during the decedent's lifetime<sup>261</sup> unless the creditor can show that the parties placed the property in joint tenancy in fraud of creditors.<sup>262</sup>

It is the incident of right of survivorship which extinguishes the decedent's interest immediately upon death.<sup>263</sup> Such rules regarding spousal joint tenancies tend to favor the surviving joint tenant

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exception to the recording requirements of 683.2, its scope is probably limited.

257. CAL. CIV. CODE § 5110.740 (West Supp. 1989) specifically excludes statements in the will of decedent made prior to his or her death as a writing sufficient to transmute. However, to the extent that a devise in a will may be effective to satisfy the 5110.730 writing requirement, the effect of the *Sandrini* challenge of a devisee of community joint tenancy property may be even broader.

258. In *Sandrini*, husband and wife held their property in joint tenancy and had agreed that the survivor would take all of the marital property. Husband and wife each executed wills; husband's left his property to wife and wife's left husband \$1. Wife died first, and husband contested the testamentary disposition of her property. The court extended the doctrine that evidence of an agreement between the spouse could rebut form of title from dissolution matters to spousal death matters as well. The community property exception, found only in the Comment to the Law Revision Commission's recommendation, comports with the holding in *Sandrini* and progeny. Query how the recordation requirement of 683.2 and theory underlying the *Sandrini* parol agreement exception should affect the Supreme Court's decision in *Propst*.

259. See *supra* note 244 and accompanying text.

260. See *infra* notes 255-59 and accompanying text.

261. *Zeigler v. Bonnell*, 52 Cal. App.2d 217, 126 P.2d 118 (1942); *King v. King*, 107 Cal. App. 2d 257, 236 P.2d 912 (1951); *Tenhut v. Boswell*, 18 Cal. 3d 150, 157, 133 Cal. Rptr. 10, 554 P.2d 330 (1976).

262. *Rupp v. Kahn*, 246 Cal. App. 2d 188, 55 Cal. Rptr. 108 (1966).

263. Courts have found, for example, that neither the creation of a lien nor the execution of a long-term lease vis-a-vis the joint tenancy property effects a severance.

at the expense of third parties.<sup>264</sup> Community property, on the other hand, is available to the creditors of the decedent. Since one of the incidents of true community property is free alienability at death, community property is generally subject to administration.<sup>265</sup> If decedent's community property is administered, not only is his property subject to the claims of his creditors, but his surviving spouse's share of the community property may also be available to the claims of his creditors. This is true whether or not the surviving spouse actually receives any or all of the decedent's share of the community property. The probate code makes it clear that the debts of the decedent should be allocated to community and separate property of both of the decedent and surviving spouse based on the rules that apply to debt liability during marriage.<sup>266</sup> Therefore, payment of decedent's debts is governed by the debt liability scheme set out in the civil code.<sup>267</sup>

If the surviving spouse receives any or all of the decedent's property and does not make an election to administer such property, the surviving spouse simply steps into the shoes of the decedent.<sup>268</sup> To that extent, the probate code states that the surviving

264. As has been pointed out previously, this preference of the surviving joint tenant recognizes the fact that joint tenant are primarily used in California as a will substitute. Sterling, *supra*, note 2, at 940.

265. CAL. PROB. CODE § 6401 (West Supp. 1989).

266. CAL. PROB. CODE § 11444 (West Supp. 1989) which states in pertinent part that if the surviving spouse and the personal representative of the decedent cannot agree on debt allocation, then:

In the absence of an agreement, each debt of the decedent shall be apportioned based on all of the property of the spouses liable for the debt at the date of the death. . .adjusted to take into account any right of reimbursement that would have been available if the property were applied to the debt at the date of death, and the debt shall be allocated accordingly.

267. CAL. CIV. CODE § 5120.010-330 & 5122. Prior to the enactment of section 11444, the allocation of "community debts" between the estate of the deceased and the surviving spouse was never very clear. Estate of Coffee, 19 Cal. 2d 248, 120 P.2d 661 (1941), the leading case in the area, held that debts of the decedent should be allocated between the separate and community property on a pro rata or "value" basis. The alternative theory, proposed first in dictum by the court in Estate of Haselbud, 26 Cal. App.2d 375, 383, 70 P.2d 443 (1938), allocated the debt according to the nature of the debt. This is the method the legislature has chosen in promulgating section 11444.

268. CAL. PROB. CODE § 13500. This is a universal succession statute that was enacted to try to bring community property in line with spousal joint tenancies by eliminating the need for an administration. However, the surviving spouse may elect to probate any or all of the decedent's community, quasi-community and separate property passing to the surviving spouse and any of the surviving spouse's community or quasi-community property. CAL. CIV. CODE § 13502 (West Supp. 1989). If the decedent leaves a substantial amount of property to legatees other than the surviving spouse, the 13502 election will afford the surviving spouse the debt apportionment protection of 11444.

If the surviving spouse does not elect, there may be no administration of the estate against which a creditor of the decedent can file a claim. However, 13550 makes the surviving spouse personally liable for the debts of the decedent up to the value of all of the decedent's property which passes to the surviving spouse without administration and the

spouse is personally liable for the debts of the decedent to the extent of any community, quasi-community or separate property that passes to the surviving spouse without administration. Whether this separate property of Cal. Prob. Code section 13551(c) is intended to include the one-half of the joint tenancy property belonging to the decedent is not clear. If so, 13551(c) has impliedly overruled case law exempting such property from the claims of creditors.<sup>269</sup>

Since Cal. Civ. Code Section 4800.1 and Cal. Prob. Code Section 5305 are inoperative at death, there is no community property presumption as to spousal joint tenancies. As to decedent's property which is administered, creditors of the deceased spouse should have the same ability to challenge the joint tenancy form of title by demonstrating the property's community character as a devisee of such property under decedent's will.<sup>270</sup> Unless section 13551(c) gives creditors of the decedent an express right to satisfy claim out of joint tenancy property, there is no such right absent a writing to rebut form of title. In support of that proposition, the provisions of the probate code that deal with multiple-party accounts specifically find a right of survivorship in the surviving party or parties as against the estate of the decedent.<sup>271</sup> In spite of the urging of the Law Revision Commission and various commentators to change the rule which gives the surviving joint tenant a windfall at the expense of the creditors of the deceased joint tenant,<sup>272</sup> the legislature has declined to so act. Notwithstanding the move toward integration of community property and common law concepts, California's law still looks to form of title of marital property rather than to its substantive character to determine the treatment of creditors of a deceased spouse.

### C. *The Ancestral Property Succession Statutes: California Code Section 6402.5*

As this article has demonstrated the 4800.1 community property presumption which attaches to joint tenancy property at marital dissolution fades away almost completely at the termination of the marriage at the death of one of the spouses. This is by no means the end of the story. Like the cheshire cat in Lewis Car-

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surviving spouse's community and quasi-community property to the extent that it is not administered pursuant to 13502. In addition, a community property set-aside is not protected by the statutory claim limitation period of a formal administration.

269. See *supra* notes 265-66 and accompanying text.

270. See *supra* note 246 for cases extending the doctrine of rebutting form of title to death cases. But see 5110.730 writing requirement to effect a transmutation.

271. CAL. PROB. CODE § 5305 (West Supp. 1989).

272. See *Nonprobate Transfers*, *supra* note 186, at 1620-21.

roll's *Alice in Wonderland*, the community property presumption materializes again in the characterization of marital property for the purpose of applying California's so-called ancestral property succession statute.<sup>273</sup> Recently, the Second District Court of Appeals addressed the question of applying the ancestral property succession statute to spousal joint tenancy property acquired in a foreign jurisdiction.<sup>274</sup>

The ancestral property succession statute is triggered when a California domiciliary dies wholly or partially intestate leaving no surviving spouse or issue. It was originally enacted to prevent an escheat when decedent died leaving no surviving spouse or blood kin.<sup>275</sup> If there is property in the decedent's estate attributable to the decedent's predeceased spouse and the time and value requirements of 6402.5 are met,<sup>276</sup> such property of the decedent attributable to a predeceased spouse will be distributed to heirs at law of the predeceased spouse rather than to the heirs at law of the decedent.<sup>277</sup> If the ancestral property is the separate property of the predeceased spouse, such property goes back "in its entirety to the relatives of said predeceased spouse, and . . . the community property of the spouses should . . . [is] equally by the relatives of the predeceased spouse and the relatives of the surviving spouse since both spouses are deemed to have contributed equally to its acquisition."<sup>278</sup> In deciding what property is properly attributable to the predeceased spouse, the court is charged to look beyond the character of the property immediately preceding its transfer to the surviving spouse, and instead focus on the underlying fundamental principle of the ancestral property succession statute—"that the

273. CAL. PROB. CODE § 6402.5 (West Supp. 1989). Section 6402.5 replaces former CAL. PROB. CODE § 228 and 229.

274. Estate of Luke, 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987).

275. In 1880, the legislature amended the civil code to provide that as to common property of the decedent and a predeceased spouse, it would pass to the parents of siblings of the predeceased spouse who survived the decedent. The statute was later amended to include the separate property of the predeceased spouse which had come to the decedent by "gift, devise or inheritance." See generally Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-Laws*, 8 COMM. PROP. J. 107 (1981). [hereinafter Reppy, CPC § 229].

276. These time requirements which were added with the enactment of 6402.5 as a replacement section for 229 make 6402.5 applicable to ancestral property only if the predeceased spouse died no more than 15 years prior to the decedent for the purpose of distributing real property and no more than 5 years prior to the decedent for personal property.

277. Section 6402.5 is inapposite all other intestate succession statutes in California which posit a scheme of inheritance based on the decedent's own closest relatives; the scheme of 6402.5 mandates succession by persons related to the decedent only by marriage and is founded on feudal principles of "ancestral property." See Reppy, CPC §229, *supra* note 275.

278. Estate of Abdale, 28 Cal. 2d 587, 590, 170 P.2d 918, (1946).



origin or source of the property should determine its distribution."<sup>279</sup> To that extent, it is illuminating to examine the history of this so-called "source" rule.

In *Estate of Abdale*, husband, who had originally acquired the property prior to marriage, converted his separate property to joint tenancy with his wife after his marriage, thereby making a separate property gift to her of one-half of his separate property. At his wife's death, he took title to the whole of the joint tenancy property by right of survivorship. He subsequently died intestate and his predeceased wife's son claimed an interest in his estate under California Probate Code section 229<sup>280</sup> based on his mother's separate property interest in the joint tenancy property which had passed back to the decedent at his wife's death by right of survivorship. The court held that section 229 was inapplicable in this case since the original source of the property at issue was decedent husband's separate property and that if the husband had predeceased his wife, at wife's death section 229 clearly would have been triggered to distribute the predeceased spouse's separate property to his kin. "It would be a strange anomaly if, should he survive her and thereby reacquire the property, on his death intestate leaving neither spouse nor issue, not his kin but his wife's would inherit the property under section 229."<sup>281</sup>

The so-called "source" rule in *Abdale* had been extensively followed by California courts throughout the checkered history of the ancestral property succession statutes.<sup>282</sup> However, it is not always so simple to determine the origin or source of property in order to correctly apply succession statutes.<sup>283</sup> In *Abdale*, Justice Traynor, writing for the court, held that the proper application of

279. *Id.* citing *Estate of Rattray*, 13 Cal. 2d 702, 713, 91 P.2d 1042, 1048 (1939). The doctrine stated in *Estate of Rattray* is judicial recognition of favoring substance, that is the true character of the property, over form of title.

280. Former CPC § 229 read as follows:

If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation.

281. *Id.*

282. *Id.*

283. Former Cal. Prob. Code § 228, which has been replaced by 6402.5, defines any community property attributable to the predeceased spouse as ancestral property; former Cal. Prob. Code § 229 defines any separate property attributable to the predeceased spouse as ancestral property.

the source rule dictated that California Probate Code Section 228<sup>284</sup> apply when any portion of the decedent's estate was the community property of the decedent and previously deceased spouse and became vested in the decedent at the death of such spouse by right of survivorship in a joint tenancy between such spouse and decedent. Traynor reasoned that the legislature intended to look beyond the separate property estate created by a joint tenancy form of title to the character of its property at its time of acquisition. In applying the ancestral property succession the legislature seems to have intended for the time of acquisition presumption to preempt the joint tenancy form of title presumption. In 1987, this doctrine was again tested by the second district's decision in *Estate of Luke*.

*Luke* involved a couple who had been domiciled in Illinois and Iowa during their entire marriage. During the marriage they had acquired a certain amount of property, some of which they held title to as joint tenants with right of survivorship. After the wife died in Iowa in 1978, the husband moved to California where he was domiciled until his death intestate in 1984. After the husband's death, some of wife's intestate heirs tried to claim a portion of husband's estate attributable to wife's share of the "community property" as ancestral property. In classifying the marital property, the *Luke* court found no difficulty in applying the source rule articulated in *Estate of Rattray*<sup>285</sup> and *Abdale* to the facts of *Luke*. Relying on the holding in *Estate of Brenneman*<sup>286</sup> that the general community property presumption is satisfied by a showing that the property was "acquired" during marriage, the court in

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284. Former CPC § 228 read as follows:

If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent on equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation.

285. 13 Cal. 2d 702, 170 P.2d 1042 (1946).

286. 157 Cal. App.2d 474, 321 P.2d 86 (1958). In *Brenneman*, husband and wife were married and domiciled in Pennsylvania for the first 15 years of their marriage where they acquired the intestate property at issue. They moved to California in 1923 where they continued to be domiciled until wife's death in 1953 and husband's death in 1956. There was no evidence of any additional earnings of either spouse while domiciled in California.

*Luke* found no trouble in reclassifying previously joint tenancy property as community since it had been acquired during marriage.<sup>287</sup>

The real issue in *Luke* is one barely alluded to: the applicability of the community property presumption to joint tenancy property acquired in a common-law state and brought to California by the surviving spouse who then dies intestate. Relying on the majority opinion in *Estate of Perkins*,<sup>288</sup> the *Luke* court simply stated that the parties had agreed for the purposes of succession that the courts can reclassify personal property brought into California as separate or community as if it had been acquired in California.<sup>289</sup>

In *Perkins*, husband and wife resided their entire 42-year marriage in New York. Husband was a successful banker who made gifts to his wife of certain securities and life insurance. After his death in 1931, Mrs. Perkins moved to California bringing with her the personal property that she had received as intervivos and testamentary transfers from her husband. At her death intestate without surviving spouse or issue, Mr. Perkins' son from a former marriage claimed the decedent's entire estate under Probate Code section 229. Decedent's three sisters claimed an interest in the estate based on a reclassification of the estate as the community property of the decedent and her predeceased spouse. The California Supreme Court, in a four-three decision, overturned precedent established in *Estate of Allshouse*<sup>290</sup> and held the *Allshouse* restriction on reclassifying marital property inapplicable to sections 228 and 229 since it was inconsistent with the legislative intent of these sections. "As those statutes affect succession only, their purpose is fully carried out if the probate court distributes the property upon the basis of its classification had it been acquired in California."<sup>291</sup>

In a strong dissent, Justice Traynor pointed out the logical gap in the analysis of the *Perkins* court; that while it was certainly true that the proper application of sections 228 and 229 required reclassification of property, there existed no statutory authority for reclassifying property from a foreign jurisdiction under the

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287. The "source" rule inherent in the ancestral property succession statutes dictates the application of time of acquisition presumption rather than form of title. See *supra* notes 278-79 and accompanying text.

288. 21 Cal. 2d 561, 134 P.2d 231 (1943).

289. Estate of *Luke* at 1012, 240 Cal. Rptr. at 87.

290. 13 Cal. 2d 691, 91 P.2d 887 (1939). The *Allshouse* court had previously held that property acquired in a foreign jurisdiction and brought into California by a surviving spouse could not be reclassified under the California system unless the nature of the foreign ownership was substantially the same as that which the property would have had if acquired in California.

291. Estate of *Perkins* at 571, 134 P.2d at 237.

California ancestral property succession scheme; and that the majority, in their desire to apply the ancestral property succession statutes to the facts of *Perkins* had filled "the gap by the declaration that such a reclassification is implicit in its own construction of the scope of the legislative purpose."<sup>292</sup> As Justice Traynor pointed out, if the legislature had intended the reach of the ancestral property succession statute to include out-of-state property not otherwise recharacterized as community,<sup>293</sup> it would explicitly have so provided. Absent an express statement, the legislative silence on reclassification should be respected.<sup>294</sup>

In criticizing the majority's reasoning, Justice Traynor analogized to California's quasi-community property statutes.<sup>295</sup> Prior to the enactment of the predecessor provisions to sections 66 and 101, the California Supreme Court had refused to recognize a surviving spouse's rights of succession in property acquired during marriage by spouses domiciled in a foreign jurisdiction.<sup>296</sup> However, Justice Langdon, dissenting in *Thornton*, invited the legislature to act by noting the almost universal rule that testamentary disposition and succession are wholly subject to statutory control and may be enlarged without constitutional scrutiny.<sup>297</sup> In response, the legislature immediately enacted the predecessor provisions to current Probate Code sections 66 and 101. As a result of such legislative action, community property characterization attached at the death of the acquiring spouse to property acquired in a foreign jurisdiction which would have been community property had

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292. *Id.* at 572, 134 P.2d at 237-38. Although CAL. PROB. CODE § 101 (West 1989) (Formerly CAL. PROB. CODE § 201.5) establishes a constitutionally permissible legislative provision for the reclassification of one-half of the quasi-community property at the death of the decedent, section 101. CAL. PROB. CODE § 101 (West Supp. 1989) is such a statute. Applies only in the case of a surviving spouse and does not extend to involving heirs other than a surviving spouse. Estate of Perkins at 575, 134 P.2d at 239. Section 101 is constitutionally permissible since the state of domicile of the decedent has full power to control rights of succession; no one has a vested right to succeed to another's property rights and no one has a vested right in the distribution of his estate which may be reordered by the state for reasons which serve a legitimate state purpose such as protection of family.

In *Luke*, not only has the statutory gap not been filled, but Mrs. Luke neither resided nor died in California. The character of the property she accumulated as well as the devolution of such property was controlled by the laws governing characterization and succession of property of the states of her domicile and death. It was not until after her death and the succession of her property that her husband moved to California.

293. In *Brenneman*, husband and wife had both changed their domicile to California prior to wife predeceasing husband. Therefore, under California quasi-community property laws, Mrs. Brenneman's property would have been recharacterized at the time of her death.

294. Estate of Perkins at 572-73, 134 P.2d at 238.

295. Quasi-community property is defined at CPC § 66 and its succession is determined legislatively by CPC § 101 (West Supp. 1989)

296. Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934).

297. *Id.*

it been acquired while the spouses were domiciled in California.

While probate code sections 66 and 101 legislatively determine the character of property acquired in a foreign jurisdiction for purposes of succession to a surviving spouse, they do not either explicitly or implicitly apply to anyone other than a surviving spouse. In addition, section 101 requires that the decedent die domiciled in California. In *Luke*, wife died domiciled in Iowa, a separate property state, and all of her separate property succeeded to her spouse by the terms of her will or by operation of law. Therefore, neither of the statutory requirements of section 101 were satisfied. Since California has no additional statutory provisions which speak to the reclassification of foreign property to community property, the source rule of the ancestral property succession statute should be inapplicable here. As the *Blair* court observed, having essentially disappeared at the death of a spouse, the sudden reappearance of the community property presumption for the purpose of applying the ancestral property succession statute is confusing enough; extending its reach to out-of-state separate property simply because it was acquired during marriage is truly *Alice in Wonderland* logic.

#### CONCLUSION

In this article, I have attempted a critical look at California's system for characterizing property acquired during a marriage. Any system that purports to define the property rights of the parties during marriage must necessarily look to the impact that such characterization will have in the event that the marriage is dissolved, either by death or divorce. In light of the formidable number of marriages that end in divorce and the fact that, to date, death is inevitable, it is very important that the parties' rights in property accumulated during marriage be very clear. To that end, a marital property system "should at least be a system simple enough to be generally understood by the people, a system coordinated with the business and governmental orders of the day, and a system quick and cheap of administration."<sup>298</sup> It should also be a system which is sufficiently flexible to take into consideration normal human conduct in marriages.<sup>299</sup>

California has been committed since 1850 to a community property system which has been at least equivocal as to its focus on marriage creating an equal partnership. It is only within the

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298. H. VERRAL & A. SAMMIS, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 7 (2d ed. 1971).

299. Marriage of Hug, 154 Cal. App. 3d 780, 793, fn 5, 201 Cal. Rptr. 676, 686, fn 5 (1984).

last two decades, since the adoption of a system of no-fault divorce in 1970, that the commitment to an equal division of marital property has become clear.<sup>300</sup> Although the evolution of the system has been a rocky one, the concept that marriage is an immediate sharing mode which creates ownership rights already in existence at the end of the marriage comports more readily with the concept of marriage as a partnership than the equitable distribution and forced share common law systems.<sup>301</sup>

A particularly thorny area in California has been the in-tandem evolution of community property and common law concepts. Spousal joint tenancies have caused considerable difficulty for both the legislature and the judiciary. When the concept was first recognized jurisprudentially in the early part of the twentieth century, California's commitment to a community property system was decidedly equivocal; as a result the marital property characterization presumption ran in favor of the common law rather than the community property estate. As both the legislature and the courts solidified their commitment to a true sharing system, the marital property characterization presumption shifted in favor of the community property estate.

Having resolved prior equivocations regarding its substantive commitment to the community property system, California's legislature and judiciary must make a similar procedural commitment. As this article has demonstrated, the state of the law in this area is woefully confusing and complex, making it unlikely that it can be understood by the parties whose property interests may be adversely affected. As has been noted by one commentator, "[T]he real difficulty lies in the fact that, except at the level of the very wealthy who have competent legal advice. . . , most married persons do not give careful thought to the legal consequences. . ." of their marital property transactions.<sup>302</sup> Since this is inevitably true, a system of marital property classification should be consistent, easily comprehended by lay people and embody the expectations of the majority of parties affected by the system.

This is not an easy task but, at least recently, the California legislature has shown a commitment to the unraveling of the procedural complexities of its system. Unfortunately, this commitment has tended to be remedial rather than comprehensive so that solutions to old problems tend to create new problems. No one piece of legislation demonstrates this more completely than As-

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300. Bruch, *California Marital Property*, *supra* note 2, at 771-76.

301. Uniform Marital Property Act (ULA) Prefatory Note (1987).

302. Effland, *Arizona Community Property Law: Time for Review and Revision*, 1982(1) ARIZ. ST. L.J. 1, 4 (1982).

sembly Bill 26. While the express purpose of this legislation was to simplify and bring consistency to the legal consequences of spousal joint tenancies, the resulting legislative-judicial brouhaha has created years of continued, albeit new, complications. The focus for the foreseeable future will be the determination of whether the 4800.1 statute of frauds rather than parol evidence should be applied to the determination of the character of jointly-held marital property. The unfortunate and certainly unplanned-for result of A.B. 26 will be to inject less rather than more consistency in the characterization of marital property and the parties' attendant rights in the property; the inconsistent treatment of spousal joint tenancies will inevitably lead to more litigation and a costlier system of equitable apportionment of property at the end of marriage.

One possible remedy would be to repeal 4800.1 and 4800.2 outright and substitute thereto a statute similar to California Probate Code section 5305. Under the terms of section 5305, if parties to a multiple-party account are husband and wife, the presumption arises in favor of treating contributions to the account as community property.<sup>303</sup> This presumption may be rebutted either by a writing to the contrary *or by tracing to a separate property source*.<sup>304</sup> The community property presumption which arises under such a statute would not effect a transmutation unless the parties so agreed.<sup>305</sup> If such express agreement is found, then the transmutation has occurred and only another writing will suffice to effect a second transmutation.

Absent an express agreement to transmute, the function of this proposed statute would be an evidentiary one to comport with the intent of the majority of spouses who take title to their marital assets in joint form. Such a statute would have the effect of favoring the community by treating all jointly-held property, whether

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303. The Law Revision Commission Comment to this section states that the legislative purpose in enacting section 5305 is to comport with the belief of spouses that funds deposited in a joint account retain their character as community property. A transmutation does not occur simply by taking title in joint tenancy form. This section also expressly states that notwithstanding the 5305 community property presumption, at the death of one of the joint tenants, the surviving joint tenants take the whole by operation of law. CAL. PROB. CODE § 5305 (West Supp. 1989).

304. For forms of tracing acceptable in California, *see* *See v. See*, 64 Cal. 2d 778, 415 P. 2d 776, 51 Cal. Rptr. 888 (1966); *Marriage of Hicks*, 211 Cal. App. 2d 144, 27 Cal. Rptr. 307 (1962).

305. Whether or not a writing constitutes a transmutation of the character of property or not is a difficult issue to resolve. In order to facilitate the proof of this issue, all indicia of ownership such as grant deeds should contain language indicating the requirements for effecting a transmutation versus simply taking title to property in one form over another. This would satisfy the "notice" requirement of section 5110.730 and the legislature's desire to encourage spouses to memorialize their inter se transactions.

mixed in character or not, as community property. Only if the separate property contributor can successfully trace to a separate property source will such an interest be maintained. Since tracing requires that the separate property spouse rely on something more than parol evidence of an agreement to maintain a separate property interest, the legislature's objection to the use of parol evidence is satisfied.<sup>306</sup> The requirement of the separate property contributor to trace is also consistent with the express language of 4800.2 which gives a right of reimbursement to the separate property contributor who can successfully trace the contribution to a separate property source.

The requirement that a separate property contributor trace in order to rebut the community property presumption seems more likely to comport with normal conduct during marriage than the requirement of a separate written agreement. Whereas the requirement to obtain a marital property agreement from one's spouse seems inimical to the whole notion of the community, the requirement to maintain records of a separate property contribution to community property does not seem so onerous. In addition, the doctrine of tracing in California is so well established that it is one that spouses can be said to properly rely on. The drafters of the Uniform Marital Property Act, with the advantage of hindsight, adopted a system which permits the maintenance of a separate property interest in mixed community and separate property if the separate property contributor can "unmix" the property by tracing.<sup>307</sup>

Under such a proposed statute, the separate property contributor who successfully traces should be entitled to pro rata apportionment consistent with the policy that gives pro rata apportionment to the community for contributions to the separate property of one spouse. Such a system would immediately clarify all the confusion that has arisen over the legislature's *sub silentio* adop-

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306. *Lucas* restated what a number of courts had previously held: that a showing of an agreement to the contrary is necessary to rebut form of title. Although *Lucas* concerned a situation of a spousal joint tenancy, the holding of *Lucas* regarding an agreement seems to extend to all titled marital property. Evidence of an agreement to rebut form of title arises from the rationale that affirmatively taking title in a particular form equals a transmutation of the character of the property; therefore, an agreement is necessary in order to show an intent to transmute to a form other than indicated by title. It seems just as likely that form of title does not show any intent to transmute but only reflects advice given to the property owners or a desire to have the advantage of certain incidents of ownership attendant to particular estates. *Bowman v. Bowman*, 149 Cal. App. 2d 773, 308 P.2d 906 (1957) If the issue is not transmutation, then the necessity of an agreement to the contrary is obviated. If the spouse claiming a separate property interest is able to trace, a condition precedent to relief under section 4800.2 in any case, such spouse should be able to get pro rata apportionment of his or her contribution.

307. Uniform Marital Property Act (ULA) § 14 (1987).



tion of an inception of title doctrine as applied to mixed community and separate property; it would also provide much needed consistency regarding reimbursement of each estate in cases of mixed community and separate marital property.

The adoption of such a statute would also be more consistent than current law with the intent of the recently adopted transmutation statute which requires a writing to effect a transmutation but specifically excepts from its purview mixed community and separate property transactions.<sup>308</sup> Such mixed property transactions continue to be governed by current law which speaks directly to presumptions regarding mixed property transactions. For example, the community property presumption of section 4800.1 applies to jointly-held property regardless of whether such jointly-held property is wholly community property or an admixture of community and separate property. This statute raises a conclusive presumption of transmutation to community property based on title alone which may be rebutted only with a writing demonstrating either no intent to transmute or a subsequent transmutation to another form.

On the other hand, section 5110.730, requiring a writing in order to effect a transmutation, is not satisfied unless the spouse whose interest in the property is adversely affected consents or agrees to the transmutation. Although not clear from the statute, such consent or agreement seems to require that the writing be in such a form that knowledge of the transmutation can rationally be imputed to the parties. Therefore, the writing must be something more than merely taking title to marital property in a certain form; otherwise, the statute is no more than a codification of the rule articulated in *Lucas*.<sup>309</sup>

Assuming that only a knowledgeable writing will effect a transmutation pursuant to section 5110.730,<sup>310</sup> a writing which does is not a knowledgeable writing does not effect a transmutation; therefore, parol evidence, and particularly a tracing, should be sufficient to prove the character of property. Where spouses have specified form of title contrary to character of title but have shown no intent to transmute,<sup>311</sup> permitting tracing to rebut form

308. CAL. CIV. CODE § 5110.730 (West Supp. 1989).

309. Query whether the section 5110.730 writing requirement must be accompanied by a showing that the transmuter knowingly gave up an interest in his or her property or whether taking title to property purchased with separate funds as husband and wife is sufficient to satisfy the writing requirement.

310. See *Estate of MacDonald*, 213 Cal. App. 3d 456 (1989) where wife's intentional transmutation of her community property interest in husband's IRA was not sufficient to work a transmutation since a standard form was used to effectuate the transmutation.

311. See note 309 and accompanying text.

of title seems analytically correct and logically consistent.

Consistent with the intent of section 5110.730, the mere act of taking title to property jointly should not raise a conclusive presumption of transmutation but rather a rebuttable presumption of the character of the property which may be overcome by tracing to a separate property source. If, however, the writing is knowledgeable and section 5110.730 has been satisfied, a transmutation of the character of property has occurred and only another section 5110.730 writing will effect a subsequent transmutation. In the such a situation, permitting rebuttal of character by tracing is inconsistent with the legislative intent of abolishing the use of any evidence other than a writing to transmute the character of marital property.

Such a change to the law would also comport with both the expectation of most spouses respecting the character of marital property and the intent of the legislature in promulgating sections 4800.1 and 5110.730. If it can be assumed that a gift to the community of separate property is not likely to be within the contemplation of the parties at marital dissolution, then the statutory permissibility of tracing to a separate property source to get pro rata apportionment makes sense from the spouses' point of view. The twin legislative purposes of reversing the *Lucas* gift presumption and encouraging spouses to memorialize in a writing their transactions respecting marital property are both satisfied as well but only if the section 5110.730 requires a knowing transmutation. If simply taking title in a form different from character satisfies the section 5110.730 writing requirement, then the purpose of the new transmutation statute is simply to require spouses to memorialize all of their property transactions in writing.<sup>312</sup>

If the legislature is not prepared to repeal 4800.1 outright and replace it with a statute like Cal. Prob. Code Section 5305, perhaps an alternative interpretation of section 4800.1 is in order. Professor Blumberg has suggested that the courts' previous readings of 4800.1 might be overly broad. Instead of effectively rendering the 4800.1 presumption a conclusive one if the statute of frauds requirement cannot be satisfied to rebut the community property presumption, a rebuttable presumption of titled community property would instead arise. The separate property contributor would be permitted to rebut such form of title by the showing of either an oral or written agreement to the contrary.<sup>313</sup>

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312. The writing requirement of 4800.1 is clearly intended to encourage spouses to memorialize their intentional transmutions of property in a writing; otherwise the presumption of community property is conclusive.

313. Blumberg, *supra* note 12, at 171.

Such a reading of 4800.1 comports with the legislative intent underlying both 4800.1 and Cal. Prob. Code Section 5305: that a writing be required to actually effect a transmutation and that that writing be a knowledgeable one. Under such a statutory construction, the 4800.1 community property presumption for jointly titled marital property is not sufficient in itself to work a transmutation of the character of the marital property. Satisfaction of the 4800.1 writing requirement demonstrates the parties' intent that the 4800.1 community property presumption not work a transmutation but that the character of the property be as the parties knowingly agreed to in a writing. Alternatively, if no 4800.1 writing exists, the 4800.1 community property presumption attaches but does not work a transmutation; instead the separate property contributor may rebut the presumption by the showing of an oral or written agreement to maintain a separate property interest a la *Lucas*. If an agreement can be shown, the separate property contributor gets pro rata apportionment if he or she can trace to a separate source. If no agreement can be demonstrated and the community property presumption cannot be rebutted, then 4800.2 attaches to give to the separate property spouse reimbursement for traceable separate property.

Even if the legislature adopts one of above suggestions for legislative change, the potential difficulties attendant to survivorship joint tenancy must still be dealt with.<sup>314</sup> Under the Multiple Party Accounts section of the California Probate Code, the legislature has specifically recognized that form of title will be respected for purposes of distribution of the assets in such accounts at the death of one of the joint tenants notwithstanding the community property presumption that attaches for all other purposes.<sup>315</sup> A similar recognition of survivorship community property seems appropriate for all other treatment of marital property as well. Spouses should be made aware of the statutory recognition of this estate. Notice of the consequences of electing survivorship community property could be appended to grant deeds and other indicia of title so that the parties are on aware of the consequences of taking title in such a manner. This notice should include the fact that although joint tenancy form of title will be respected at death, for all lifetime purposes, the community property presumption attaches.

Should the legislature decline to adopt either of the above suggested changes to the current statutes respecting the characterization of marital property, the proposed notice should also apprise spouses of the consequences of taking title to marital property in a

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314. Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988).

315. CAL. PROB. CODE §§ 5302(a), 5303(a) & 5305(c) (West Supp. 1989).

way that does not necessarily reflect the character of the property and which puts separate property contributions to community property at risk at marital dissolution since such knowledge is currently presumed to be within the purview of the parties. As has been shown repeatedly, knowledge of the consequences of holding title is without the scope of knowledge of the vast majority of parties whose rights in marital property should be protected rather than abrogated by the system they opt into. To hold otherwise is not only to encourage complexity, inconsistency and costly litigation but inequitable results as well.

