

Marital Property Outline

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1. Introduction

○ History

- 1848 US acquires CA, ending Mexican-American war.
 - Community property system had been used by settlers before acquisition, and it was adopted into the CA constitution. Became mixed with Common Law concepts from the East.
- 1849 (CA Constitution)
 - Property before marriage and anything received during marriage by gift, devise or descent is separate property. But we don't know about community property yet.
- 1850 (Legislation)
 - Community property defined: all property acquired after marriage by either the husband or the wife.
 - But, HUSBAND controls community property, his separate property, and WIFE's separate property. (Common Law attitude).
- 1975 (Legislation)
 - There is finally true equal management and control.

○ Comparisons of Community Property and Common Law

▪ Common Law

- W is treated as if unmarried
 - ◆ She owns and controls all property before marriage
 - ◆ She owns all gifts and inheritances after marriage
 - ◆ She owns all property earned during marriage
- Essentially not treated as husband and wife: They could choose to share property, but it was not imposed.

▪ Overview

	Common Law	Community Property
During Marriage	Ownership follows Title as if unmarried	Present, existing, equal interests in CP
Divorce	Equitable distribution; 50/50 is presumed to be equitable. But Judge has discretion (could be based on fault of divorce, need, etc.)	<u>Mandatory</u> 50/50 of Community Prop in CA. Separate prop excluded. Spousal support is discretionary
Death (intestate)	1/3 to all of decedent's estate (depends on if there's other heirs)	All of Community prop 1/3 to All of decedent's separate property (depending on heirs)
Death (testate)	Depends on will, at least 1/3 of the property of the decedent's estate.	Depends on will. At least 1/2 of community property.

2. Community Property Basics

○ Two types of Property:

- Community Property: belongs to both; Equally owned by H & W (sharing concept)
 - All property, wherever situated, acquired by a married person during marriage while domiciled in CA

- Includes all property which stems from the labor/effort of EITHER spouse during marriage
 - Ends once spouses begin living "separate and apart."
 - Mandatory 50/50 distribution of C.P. upon divorce (S.P. is excluded)
 - ◆ If parties do not agree on an equal value of total assets, some will need to be sold off or one spouse will need to buy the other one out using S.P.
 - Separate property: belongs to that spouse
 - Property owned before M, inherited during M, or gifted to one spouse during M
 - R.I.P. - Rents, issues, and profits of S.P. belong to S.P. spouse.
- **Characterizing Property**
 - Tracing concept - if property starts out as SP (or CP), it remains SP (or CP), unless transmuted
 - F.I.T. - Funds, intentions, titles
 - ◆ Funds - What funds were used to obtain the property? Trace back to funds
 - ◆ Intentions - Did they have an understanding as to what the property was going to be?
 - ◇ Spouses' intentions or agreements may change the character of property
 - ◇ See "Transmutation"
 - ◆ Title - Least important and not determinative.
 - ◇ Does not depend who acquired it or the title; there could be many reasons for titling a vehicle, etc. in one spouse's name that are not representative of an intent to change property ownership.
 - e.g.: Money from salary put in a bank account in one spouse's name. It is still C.P.
 - R.I.P.s - The rents, issues and profits of S.P. are S.P., and of C.P. are C.P.
 - ◆ You trace back to the origin of the property to determine if the R.I.P.s are community or separate property.
 - ◇ e.g.: Interest from salary earned during marriage gets traced back to the salary, and is C.P.
 - Apportionment - It is possible for property to be part C.P. and part S.P.
 - ◆ At divorce, the S.P. percentage will belong to S.P. spouse, and the C.P. percentage will be divided 50/50.
 - Downer v. Bremet
 - H's boss gives him 1/3 of a ranch after H & W separate.
 - H argues this was a gift from his boss, but wife argues that it was in lieu of a pension (stemming from the work he did for boss while married) and wants it to be characterized as C.P.
 - HELD: It is CP because it is from H's efforts during the marriage. No evidence that H and boss were friends so couldn't have been a gift.
 - Take away: Characterization of property has huge ramifications

3. Transmutation

- a. Transmutation can occur in many different ways:
 - a. SP to CP
 - b. CP to SP
 - c. SP to SP of other spouse
- Note: critical time is that of the transmutation, NOT the time the property was acquired
 - Pre-1985 very easy to transmute
 - Legislature enacted laws making it much more difficult to transmute property in response to the holding of *Marriage of Lucas*.

○ Pre-1985

- Oral & implied agreements permitted
 - See *Raphael* and *Lucas*
- Transmutation occurs *when agreement made*
- Can cover ALL property types
- Very informal
- More difficult to prove in division than death (at death the other spouse is not present to argue against the spouse's claim of an oral agreement).
- Intention of spouse giving up interest controls - See *Jafeman*

▪ Cases

□ Raphael - At death

- ◆ Guy tells wife they're partners now, and they should jointly file taxes and everything was 50/50. But notice this was said at tax time; at the time there was a large tax benefit. There's the possibility his intentions were not to transmute. But court accepts the transmutation anyway, effective as of the first time he said it.
- ◆ He's essentially giving up his S.P. interest and changing it to CP, which he only owns 50% of.
- ◆ Note - he was dead at the time

□ Jafeman - At division

- ◆ Wife owns house across the street. She moves in with him and keeps her house across the street, calling the husband's home "their home." This was NOT enough to transmit, because it's his intent that controls (whether he gives up his interest.) What she thinks is not enough.

□ Lucas

- ◆ Was a motor home transmuted from CP to the wife's SP by putting her name in the title? There are a lot of reasons to title in one spouses or another based on convenience.
 - ◇ The husband didn't object to it being in her name, so the court considered it a transmutation. Legislature didn't like this and passed the new transmutation statute

○ Transmutation As of 1/1/1985 - Applies only to transmutations on or after January 1, 1985

- Extreme informality to extreme formality.

- **Valid only if express declaration in writing; magic words suffice**
- **By the party whose interest is adversely affected**
- **Statement in a will not admissible in division proceeding**
- **Transmutation can be with or without consideration**

□ Which words satisfy the Express Declaration requirement?

- "As his or her separate property"
- "Transmutation", Community Property, Separate Property
- "I give to..."
- "I convey to us as joint tenants"
- Deed "transfer my interest"
- "is converted"

□ Which don't?

- SP in one spouse's name (Title)
- "I consent" (*MacDonald* case - consenting to putting funds into an account will not work.)
- "I transfer" (*Barneson* Case - transferred stock to wife's account)
 - ◇ Cf: If he said "I transfer my interest in the stock" that might be enough, though subsequent cases prove this may not be so.

□ Extrinsic Evidence (*Benson* Case)

- 1) No partial performance or other SoF exceptions. There are no exceptions to writing requirement
 - ◇ Court DID signal there may be a remedy for breach of fiduciary duty, as neither spouse shall take unfair advantage of the other.
- **Gift exception. Section 852(c)**
 - i. You do not need an express declaration in writing if:

- 1) **Clothing, wearing apparel, jewelry, or other tangible items of a personal nature**
 - Courts don't generally find cars to be within the gift exception.
 - 2) **That is used solely or principally by the spouse to whom the gift is made**
 - 3) **That is not substantial in value taking into consideration the circumstances of the marriage.**
 - A very expensive diamond ring, even though meeting the first two criteria, could fail this prong depending on the situation

 - ◇ If any of these prongs fail, there needs to be an express declaration in writing or there is no transmutation and the gift remains C.P. or S.P. as before.
- **Wills/Trusts**
 - i. Wills
 - 1) Can serve as admissible evidence of a transmutation in probate
 - 2) HOWEVER, it is NOT admissible in a divorce proceeding, as the will does not come into effect until death.
 - ii. Trusts
 - 1) *Starkman*
 - a) Couple gets divorced. Court finds that the trust agreement did not transmute H's SP into CP.
 - b) Says neither instrument unambiguously establishes that H was affecting a change of ownership in the entirety of his estate.
 - c) Goldberg: this case is questionable.
 - 2) *Holtemann*
 - a) Difference between *Holtemann* and *Starkman*: Magic words. There is a transmutation agreement with lots of language of transmutation.
 - b) H's Argument: This was for estate planning only, and was made solely for determining how property would be disposed of upon death of the parties. (i.e. - I don't want it to be transmuted in case of dissolution)
 - c) Court: trusts are different than wills because trusts are conveying a present interest. When you transmute you're actually doing it, and you can't take it back without another agreement to do it.
 - 3) *Lund* (May 21, 2009)
 - a) Agreement to Establish Interest in Property of Earl and Anne
 - i) Community Property: "All property. . .is the community property of the parties hereto, each having a present, existing and equal **interest** therein."
 - ii) Converted Property: "All of the property. . .held in the name of Husband having its origin in his separate property no matter how received and/or earned, is hereby **converted** to community property of Husband and Wife, and shall thereafter be the community property of the parties for estate planning. . ."
 - iii) Heading: "This Agreement is intended as a document of transfer for estate planning purposes to the extent necessary to conform the record ownership of the properties of the parties to the within agreement. . ."
 - b) Was the property transmuted?

- i) H: this is only for estate planning purposes
- ii) W: this was transmuted.
- iii) Court: strictly followed Holtemann and this was transmuted.

4. Evidentiary Presumptions

- Presumptions are based on:
 - i. Probability or
 - ii. Access to Evidence or
 - iii. Policy - "Affecting the burden of proof" (Term of art)
- Use of Presumptions: Presumptions are NOT evidence!
 - i. **RAISE:** Evidence must be presented to RAISE the presumption
 - ii. **APPLY:** The CP or SP presumption is then applied
 - iii. **REBUT:** Unless evidence is presented to REBUT the presumption, the presumption becomes a conclusion

- General CP Presumption

- Property acquired or possessed during marriage is presumed to be CP
- Applies to untitled property or property in one spouse's name
- Presumption can be rebutted by tracing to S.P. funds.
 - Burden of proof is on the S.P. proponent
 - Standard of proof is preponderance of the evidence
- If the presumption is rebutted, the property will be considered S.P. or apportioned.

- Acquired or Possessed

- i. Lynam

- Husband and wife are dead after a long marriage. Estates fighting over money in the bank account. What do we do when there's a lack of evidence as to the source of the money?
- What raises the presumption?
 - ◆ **Possession** during marriage. This is based on "probability" - they've been married so long that it's a reasonable inference that it's joint money.
- Rebuttable? Yes. Burden of proof is on the separate property proponent. Needs to trace to SP funds.
- Why didn't the title on the joint account make a difference? It's not dispositive, and it wasn't a joint tenancy.

- Burden of Proof

- i. Freese: CA S.Ct. first established that the standard of proof is "Preponderance of the evidence"

- ii. Ettefagh: reaffirmation of "preponderance" standard.

- The title is in H's name as separate property. BUT, property acquired during marriage is presumed to be community property.
- Only evidence is testimony - H rebuts the presumption by tracing funds in question to a gift from H's father.
 - ◆ W argues that the standard is clear & convincing.
- Burden of proof: "Preponderance of the evidence" is sufficient, and the testimony from H's father is enough.
 - ◆ Burden of Proof is "Clear and convincing" only when there is a particular important policy interest, because it expresses a preference for one side's interests over the other. (Only applies to personal rights. Examples: Proof of equitable adoption, Withdrawal of artificial nutrition and hydration from conservatee, Commitment to mental hospital, Deportation)

- Hypo:

- W buys painting in 2004 for 1 million. Divorce in 2010. H claims CP, W claims SP.
- All husband needs to show is that it was purchased after marriage.

- Wife would then need to trace to SP funds by preponderance to rebut the presumption
 - Hypo: Apportionment
 - Painting purchased with \$6000 of the wife's SP funds and \$4000 of CP.
 - Assuming funds can be traced, wife gets 60% separate property interest
 - Remaining 40% is CP and thus split 50/50.
 - Wife = 8000 (80%)
 - Husband = 2000 (20%)
 - If painting had increased in value, additional value is divided up according to same proportion.
- **Married Woman's Special Presumption**
 - FC §803(a): Property acquired prior to 1/1/1975 by a married woman in an instrument in writing in her name [i.e. a title] is presumed to be S.P.
 - This is the only separate property presumption
 - REASON: 1975 is when equal management and control went into effect. Before this the husband managed and controlled CP funds. If he took CP money and purchased property in his wife's name, it shows he intended it to be her separate property.
 - Rebuttable by showing the contrary intention of the husband.
 - If he didn't intend to give it to her as SP, then his intentions should control the character of the property.
 - Tracing is insufficient - Husband had management and control of community property - having the wife's name on the title indicates a gift.
 - 1975 or Later
 - If a husband uses community property and puts the title in his wife's name, the general community property presumption applies, and can be rebutted by tracing to SP funds or transmutation.
 - But note that in 1985 or later, transmutation would require an express declaration in writing.

5. Joint Titles

<u>Joint Tenancy</u>	<u>Community Property</u>
Considered S.P. (Undivided 1/2 interests)	Community Property
During Marriage: - Unilateral transfer allowed. - Severance results in T.I.C.	During marriage: - Joinder required to transfer real property - Written consent required for gifts of personal property
At death: - Entire property goes to surviving joint tenant	At death: - Each spouse can will 1/2 of the C.P. - Without will, all goes to the surviving spouse
At divorce: - At request of either party, Family court will divide as if C.P. ***	At divorce: - Mandatory 1/2 to each spouse
Creditor's Rights: - Non-debtor's 1/2 may be immune. After death, completely immune.	Creditor's Rights: - Creditor can reach all CP, but generally no CP.
Tax consequence: - Disadvantage at death	Tax consequence: - Advantage at death

- Stepped up basis in 1/2 only

- Stepped up basis for all

*** At divorce, all joint titles will fall under the community property presumption, regardless of when they were acquired.

○ **"Joint Tenancy" Presumption at Divorce**

- **STEP 1 - Characterization**

▪ **Presumption: JT property is characterized as community property at divorce**

- ◆ When spouses take title in joint tenancy it indicates an agreement that you know you're holding it jointly.
- ◆ Looking at title provides certainty. Favors the sharing concept, because JT is considered CP at divorce unless they have some other intention.

▪ **Rebuttable by understanding or agreement, NOT by tracing.**

◆ **Pre 1984 - Agreement can be Oral, Written, or Implied.**

- ◇ If no agreement, characterized as CP
- ◇ If there IS an agreement, it is characterized as the SP of one spouse or part SP/part CP, per the agreement.

◆ **1984 and later - 4800.1 (2581) applies: Agreement must be in writing**

- ◇ If no agreement, characterized as CP
- ◇ If there is a clear statement in the deed or a written agreement, characterized as SP of one spouse or part SP/part CP.

- **STEP 2 - Reimbursement**

▪ **Reimbursement: You only the money you put in. Appreciation of the property belongs to the community and is split 50/50.**

▪ **Pre 1984 - Reimbursement ONLY if by agreement.**

- ◆ Agreement could be oral, written, or implied.
- ◆ If no agreements, it's all CP. (SP considered a gift to the community)

▪ **1984 and later - 4800.2 (2640) applies: A Party shall be reimbursed for the party's contributions to the CP to the extent it can be traced to a SP source, absent a written waiver of that right.**

- ◆ Before (*Lucas* era) the person had to show an agreement, now they only need to trace!
- Includes contributions for down payments, payments for improvements, and payments which reduce the principal of a loan used to finance the purchase or improvement of the property.
 - ◇ Does NOT include payments on the interest of a loan and payments for maintenance, insurance, or taxes
- Amount reimbursed shall not exceed the net value of the property at the time of division.
- Needs to have been characterized as CP under Step 1. IF it has been characterized as Sp, or part SP, part CP, you don't get to 4800.2

- **See attached flow chart**

○ **"Community Property" - Joint Deeds and Titles at Divorce**

- **STEP 1 - Characterization**

▪ **Presumption: Joint titles are presumed to be C.P. at divorce**

▪ **Rebuttable by agreement that the property is not community property**

- Agreement can state it is S.P., or part C.P. and part S.P.
- **Pre 1987 - Agreement can be Oral, Written, or Implied.**
- **1987 and later - 1987 Amendment applies: Agreement must be in writing**
 - ◇ If no agreement, characterized as CP
 - ◇ If there is a clear statement in the deed or a written agreement, characterized as SP of one spouse or part SP/part CP.

- **STEP 2 - Reimbursement - Same as Joint tenancy**

- **Pre 1984 - Reimbursement only if by agreement**

- 1984 and later - Right to reimbursement based on tracing (Absent written waiver)
- **See flow chart (E&E)**

6. Improvements to Land

- What is an improvement? See Family Code 2640
Does not include general maintenance, insurance, or taxes.
Example p.94
 - Building a cabin on land? Yes
 - Sanding and Painting? Arguable: could be an improvement, could be maintenance.
 - Insurance? No
- Possible Situations
 - a. **One spouse uses SP\$ to improve the other spouse's SP.**
 - Before 2005:
 - **Considered a gift**
 - Rationale: Choice. When someone chooses to use funds in a certain way it could be considered a gift
 - 2005 or later:
 - **Reimbursement based on tracing** unless transmutation in writing or written waiver of reimbursement.
 - Rationale: At divorce, feelings for the spouse are not the same as they were before, and they want the money back.
 - Retroactivity?
 - ◆ Fellows Case - CA S.Ct.: Amendments to family code are retroactive unless they violate due process or the legislature says otherwise.
 - ◇ Goldberg: hard to predict what the courts would do (fellows v. due process)
 - b. **One spouse used CP funds to improve the SP of the other spouse**
 - Pre 1975:
 - **CP is a gift absent an agreement** (Remember - management and control; H = manager)
 - After 1975:
 - **CP is a gift absent an agreement** (H or W can be manager, but the 'choice' rationale is the same.)
 - Wolfe Case (2001):
 - **Reimbursement to the community**
 - ◆ e.g.: \$20k of CP used to add a swimming pool to W's SP home - H gets 10k reimbursement, W gets 10k reimbursement.
 - ◆ Still do not get interest
 - Consistent with reimbursement when one spouse's SP used to improve other spouse's SP.
 - c. **CP \$ used for Spouses OWN SP**
 - **Right to reimbursement to CP, if without consent.**
 - If there is consent, there is no reimbursement.
 - Rationale: Consenting to making it a gift.
 - Amount of reimbursement: whichever is greater between amount expended or the value added.
 - ◆ Reason: so there is no benefit from the breach of trust.
 - Consistent? NO. Because once there is consent, it's just like situation #2.
 - As far as consent goes here, it needs only be in writing for real property.

- **Joint Titles at Death**

- Characterization of joint titles at death follows the title.
- Joint Tenancy

- Pre 1985
 - Presumption: Joint tenancy = joint tenancy (right of survivorship)
 - Rebuttable: Oral, written, or implied agreement that it is not a joint tenancy
 - Burden: on the party arguing against JT
- 1985 or later
 - Presumption: Joint tenancy = joint tenancy (right of survivorship)
 - Rebuttable: Express written declaration only
 - Burden: same
- The Divorce/Death scenario - Does probate or family code apply (is it characterized as JT with right of survivorship, or as CP as in a divorce)
 - If person dies after dissolution was filed but before being granted
 - Presumption: JT = JT. Considered a death case
 - Practice tip - Sever the JT when dissolution is filed!
 - ◆ Blair Case
 - If person dies AFTER dissolution was granted but BEFORE property issues are determined:
 - Presumption: JT = CP. Avoids illogical windfall.
 - 2001: Legislature enacts probate code 5601
 - ◆ JT between decedent (w) and former spouse (h) is severed as to decedent's interests if, at the time of decedent's death, the former spouse is not the decedent's surviving spouse (due to dissolution or annulment of marriage)
- Community Property
 - If decedent dies intestate, all C.P. goes to the other spouse
 - If decedent dies testate, he has the right to will his 1/2 of the C.P.
 - Civ.Code 682.1 - Tax purposes
 - JT is 1/2 and 1/2 but only 1/2 will get a "stepped up basis"
 - CP is same, but all gets "stepped up basis"
 - Thus there is a tax advantage to CP over JT
 - "Community Property with right of Survivorship"
 - Is considered CP at divorce, JT at death, and enjoys the same tax benefits as CP. See E&E p. 250-51.

7. Family Expenses / Commingling

- Family Expense Presumptions
 1. Available community funds are presumed to be used for family expenses. Separate property funds are deemed to be used for family expenses only when community funds are exhausted.
 2. When SP funds are used to pay for family expenses, the separate estate has no right to reimbursement unless the parties have agreed to reimbursement.
- Expense vs. Acquisition
 - Family expenses: Food, rent, vacations, medical and dental care
 - Something personally used by one spouse are typically considered an acquisition
 - We presume SP funds will be used for family expenses without right for reimbursement because there is an obligation to support the family.

Commingling

- Commingling: SP and CP are put in the same bank account.
 - Presumed to be CP (community property presumption) but can be rebutted using below methods
- Methods for tracing acquisitions when they come from commingled funds:

i. Exhaustion Method (aka "Family expense method" or "See method")

- You can establish that property was purchased with separate funds by evidence

that community expenses exceeded community income at the time of the acquisition.

- Primary method Courts use - also extremely difficult!!

ii. **Direct Tracing** (aka Mix/Hicks)

- Separate funds do not lose their character when commingled, so long as the amount thereof can be ascertained.
 - 1) Are there SP funds in the bank account?
 - 2) Did the owner of those funds intend to use SP funds?
 - 3) Can you show actual disposition of SP funds?
 - 4) Have to show ALL transactions (CP and SP funds coming in and going out)
- Very strictly applied in later cases, leaving doubt as to level of acceptance

- If a party cannot show exhaustion, then you default to the Direct Tracing Method.
 - However, there is a tremendous burden in trying to prove it.
- Total Recapitulation Method [REJECTED by CA S.Ct. in See]
 - Aggregate type of analysis. Add up all community income over length of the marriage, subtract all family expenses, and remainder is SP.
- Difference between total recapitulation and exhaustion methods: Supp p. 95
- Hypos: Supp p.96
 - Shows Exhaustion v Direct Tracing

Joint Bank Accounts

- Special exception to normal rule re: joint titles (agreement needs to be in writing)
- Probate Code 5305:
 - At divorce, contributions to joint accounts are presumed to be CP
 - Can be rebutted by tracing to SP

8. Classification of Intangible Property

○ **Educational Degrees**

- Educational degrees are NOT property divisible at divorce
 - A degree cannot be conveyed! So it is not considered property in that respect. Thus, it cannot be divided at divorce. (Compare to goodwill or certain other intangible items such as unvested pensions)
- Family Code 2641 - Community Contributions to Education or Training (supp p.177)
 - This is the remedy for divorce soon after a professional degree is attained. Hardly any cases about this because it's not a great remedy.

• Remedies:

○ **Reimbursement for community contributions**

- Community shall be reimbursed for **contributions** to the education or training of a party that substantially enhances their earning capacity (plus interest at the legal rate)
- Contributions: Payments made for education or training, or repayment of the loan.
 - Includes: books, tuition, supplies, & transportation
 - Does **NOT** include ordinary living expenses. Expenses must be related to the educational experience itself (e.g.: No childcare)

○ **Assignment of loans**

- If you get a loan during the marriage, and you get a divorce, you get the loan.
- If you come in with a debt, you still keep it.

- Rebuttable presumption that the community has not substantially benefitted from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that it has substantially benefitted from community contributions made more than 10 years of the training.

- However, even if within 10 years, can be rebutted by showing they have benefitted.
 - Hypos - Supp. p. 100-101
 - Graham case - Need to have actually substantially enhanced. Not just plan on it substantially enhancing.
 - If loan from before marriage is paid with community funds, the community will be reimbursed at divorce.
- **Goodwill**
 - Business Goodwill: Expectation of continued public patronage
 - If someone decided to buy a store they would value all the assets (book value), and they will offer an additional amount (goodwill) to make the market value.
 - **Professional Goodwill**
 - **CA has said there IS professional goodwill divisible at divorce if it was earned during the marriage.**
 - In valuing it, courts are not allowed to take future income into account.
 - Accountants are allowed to consider:
 - ◆ The age of the earner
 - ◆ Nature and duration of the business
 - ◆ Past earning power
 - ◆ Reputation in the community
 - ◆ Success compared to other professionals
 - It attaches to the office, NOT the person.
 - Comes from the practice itself, even if it is a sole practitioner (See Celebrity goodwill)
 - What at divorce might convince a court that there should be professional goodwill?
 - There is some equity in saying the spouse that stayed at home should share in the success of the individual.
 - If there is no professional goodwill, the professional comes out better, because they have increased earning potential built up over the years, while the supporting spouse has sacrificed a career.
- **Celebrity Goodwill? No**
 - McTiernan Case (supp. p.103) - Is celebrity goodwill similar to professional goodwill?
 - TC found goodwill worth 1.5 mil, and thus wife got \$750k.
 - Court of Appeal found there is NO celebrity goodwill.
 - There is no tangible business when you're talking about an individual. It cannot be bought and sold like a medical practice. (No office, no tangible assets)

9. **Separate Property Businesses**

- Premise: SP business created before marriage, or during marriage with SP funds, will remain the SP and go with the SP owner.
- But what if the SP business increases in value during the marriage. Should it be shared somehow?
 - If the increase in value is the result of CP efforts, the increase can be split 50/50.
- Two approaches (See Supp .114)
 - i. **Pereira Approach** (chief contributor to the increase in value is **community efforts**)
 - 1) SP Business is treated as a bank account; either spouses efforts are considered efforts of the community
 - In this case, SP owner gets a fair return, as if the value of the business had been in a bank account and earned simple interest each year. The remainder of any increase in value goes to the community
 - 2) Used when the chief contributor to the increase in value is community effort
 - ii. **Van Camp Approach** (Increase due to **economic conditions**)
 - 1) The community receives the actual salary or the reasonable value of the SP owner's services during the marriage. From that, deduct community expenses. Remainder

- goes to S.P. owner.
- 2) Favors SP spouse.

- Gilmore case

- Husband had 3 separate property car dealerships, but it was during WWII so there were no cars being produced. Once the war was over there was a huge demand for cars. The dealerships' value increased dramatically.
- Court applied Van Camp approach - Community got a salary, and they spent it all, thus the community got what it deserved and the husband gets the increase in value.
 - ◆ Wife argued for Pereira, but this is the paradigm case for unusual economic conditions supporting application of Van Camp.
 - ◆ Interesting dynamic: Wife needs to argue it was due to the husband's efforts that the business increased in value, and husband needs to argue that he didn't do crap and just benefitted from the demand for cars.

- How to determine which approach to use

- Factors:

- Amount of time spent
 - ◆ More time favors the community - community effort
- Growth in similar industry
 - ◆ High growth - Favors SP, because it suggests the economy as the cause.
 - ◆ Low growth but this business took off - Favors the community, suggesting community effort.
- Unusual economic Conditions
 - ◆ Favors SP
- Business can operate on its own
 - ◆ Favors SP
- Skill, talent, personality of spouse
 - ◆ Favors community effort

10. Management and Control

- Equal, but there are exceptions:

- CP Real Property - Joinder

- Spouses must join in the sale/assignment/encumbrance on real property. Applies to leases longer than a year

- CP Business - Primary

- Primary manager of the CP business has the control to make sure the business runs.
- Must give written notice before major actions, such as selling the business

- CP Personal Property - Either/Or

- Either spouse has the power to manage and control personal property
- Written consent required for gifts or encumbrances of furniture etc.
 - ◆ Mostly comes up in the context of charitable contributions

- Fiduciary Duties

- Fiduciary duties between spouses continue "until such time as the assets and liabilities have been divided by the parties or the court" [FC §1100(e)]
- Financial Code §851
 - NO access to bank accounts in one spouse's name
 - Possible remedy: Add a name
- Family Code §721: The fiduciary duties owed is:
 - "highest good faith and fair dealing"
 - "neither shall take any unfair advantage of the other"
 - "same rights and duties as nonmarital business partners"
- Those duties mean the spouse must be provided with:

- ◆ Access to books
 - ◆ “True and full” Information, upon request
 - ◆ Accounting
 - ◆ Duty of care: refraining from grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law [Corp. Code §16404(c)]
- FC §1100(e) - Community Personal Property
 - -- Incorporates §721
 - -- Full disclosure and access to information, upon request
- **REMEDIES** - FC §1101 (a) (b) (c)(g)(h)
 - Breach of Fiduciary Duty
 - Accounting
 - Add a name
 - 50% of asset plus attorney’s fees & court costs
 - 100% of asset undisclosed or transferred in breach of fiduciary duty
- **Violations of Fiduciary Duty**
 - Plain negligence is not a breach of fiduciary duty– *Shultz*
 - Gross negligence or reckless conduct – *Duffy*
 - Husband took all their IRAs and invested in a dot com. Lost everything. Legislature got involved and said gross negligence or reckless conduct of this type would be a breach of fiduciary duty
 - Intentional misconduct/knowing violation of law – *Beltran, Stitt*
 - Unfair advantage – *Lucero, Soms*
 - Lucero - Spouse got an investment opportunity from his employer. He invested SP funds instead of CP.
 - ◆ Court: using SP funds when CP funds are available to exercise an investment opportunity at work is an unfair advantage.
 - Soms - Investment opportunity came about (NOT from work) and spouse used SP funds.
 - ◆ Court: This is ok and does not violate fiduciary duty. It did not come from something community in nature (like an employer).
 - Presumption of undue influence – *Haines, Delaney, Mathews*
 - ◆ Based on FC §721, a spouse must not take “unfair advantage of the other.”
 - ◆ If one spouse is ADVANTAGED by a transaction, a presumption arises that the advantaged spouse exercised UNDUE INFLUENCE over the other spouse
 - ◆ Burden of proof to rebut the presumption of undue influence:
 - ◆ On Advantaged Spouse
 - ◆ To Rebut, the Advantaged Spouse must establish
 - ◆ Transaction was freely and voluntarily entered into
 - ◆ With full knowledge of all the facts
 - ◆ With a complete understanding of its effect
 - ◆ Presumption of Undue Influence Applied to Mathews Case.
 - ◆ CP transmuted into H's SP. But both spouses thought it was still CP (wife thought her name would be added to title later)
 - ◇ Who was advantaged by transaction? - Husband
 - ▶ Thus there is a presumption of undue influence.
 - ◇ To rebut, Was there substantial evidence that wife's actions were:
 - ▶ Voluntary
 - ▶ With knowledge

- ▶ With understanding
 - ◆ Court found substantial evidence wife knew, understood, and acted voluntarily.
- **Duty to Disclose**
 - It seems there is a duty to disclose. (Statutes kind of unclear)
- **Rossi Case**
 - Marriage coming to an end, she puts money into lottery pool at work and wins. She tells commission to send the money to her mother and not to tell her soon to be ex.
 - Husband ends up getting 100% because it was intentional fraud!
 - Take Aways
 - Duty to disclose exists even when marriage is coming to an end
 - It's possible that court can award 100% of the asset to the nonbreaching spouse!
- **Family Code 2040 - What happens after filing petition for dissolution**
 - "ATRO" - Automatic temporary restraining order
 - Restrains both parties from transferring, encumbering, concealing, etc of any property whether community, quasi community, or separate!
 - Hypo: After ATRO goes into effect, ill husband wants to change his will so sister receives property, and he wants to sever the couple's joint tenancy. Allowed or not?
 - Will - Yes.
 - Joint tenancy - Yes
 - ◆ Estate of Mitchell - Court said he was able to sever JT. It was not a transfer and thus it was approved.
 - McTiernan Case (supp. P 102)
 - H sold CP funds (stocks) while ATRO was in effect. Didn't tell wife and didn't seek court approval. Then the value of the stocks shot up.
 - Court: a violation of the ATRO which causes a loss would be considered parallel to breach of fiduciary duty. Spouse is entitled to at least 1/2 of the loss.

11. **Creditor's Rights**

- Policy:
 - Assure that creditors get paid therefore in some cases both community and separate property are liable for debts.
 - Liability for debts follow principles of management and control. Since either spouse can control community personal property, that property is liable for debts incurred during marriage.
- Creditors' Rights Vocabulary
 - Personally liable: all of a person's property is liable for debts personally undertaken
 - Necessaries: all living expenses appropriate to one's station in life
 - e.g.: Couple belongs to a country club. Most would say this is not a necessary, but depending on your social status maybe it IS a necessary
 - Common necessities: item required to sustain life—food, clothing, housing, medical expenses
 - Ksp: Goldberg's abbreviation for "contracting spouse"
 - The spouse who incurred the debt
 - Nsp: Goldberg's abbreviation for "non-contracting spouse"
 - The spouse who did NOT incur the debt
- What determines liability? When, What, Which
 - WHEN was the debt incurred
 - Before or during marriage, or after separation

- WHAT property is liable for the debt
 - CP, H's SP, W's SP
- WHICH kind of debt was incurred—
 - Contract, necessities, common necessities, pre-marital spousal or child support, tort judgment, criminal
- Contract Debt
 - Contract debt incurred **before marriage** (including necessities)
 - ◆ Community estate liable
 - ◆ Exception: Earnings of Nsp are held in an account in Nsp's name & uncommingled
 - ◆ Ksp's SP liable
 - ◆ Nsp's SP not liable
 - Incurred **during marriage**
 - ◆ Community estate liable (no sheltering of earnings)
 - ◆ Ksp SP liable
 - ◆ Nsp SP not liable
 - Incurred **during marriage for necessities**
 - ◆ Community estate liable
 - ◆ Ksp SP liable
 - ◆ Nsp SP liable (right to reimbursement possible)
- Tort Debt
 - Same as Contract Debt EXCEPT when based on death or personal injury or property damage THEN order of satisfaction varies depending on whether liability is based on Ksp's activity—**for the benefit of the community or not**
 - ◆ If yes, CP first, Ksp's SP second
 - ◆ If No, Ksp's SP first, CP second
 - For the benefit of the community:
 - ◆ Judgment against a Spouse who dropped a bucket of paint on the plaintiff while fixing up a building belonging to the community.
 - ◆ Yes; The activity is fixing up a community building. CP first, Ksp's SP second.
 - ◆ Judgment against a Spouse for conversion of property of the employer
 - ◆ There is a split as to whether an intentional tort can ever be for the benefit of the community. But assuming not, Ksp's SP first, and CP second.
 - ◆ Unclear area of law
 - Criminal Attorney's Fees
 - ◆ Not for the benefit of the community - remains with the spouse that incurred it.
- Debt incurred after separation but before divorce
 - K debt: CP not liable, Ksp's SP liable
 - Necessaries: CP not liable, Ksp's SP liable
 - Common necessities of life: CP liable, Ksp's SP liable, Nsp's SP liable
 - Tort debt: CP not liable, Ksp's SP liable

12. Division at Divorce

- Equal division at divorce, including debts
 - Exceptions:
 - Educational loans
 - Tort liability
 - When community debts exceed community assets

- ◆ 2622(b) - Debts assigned in a manner which is just and equitable, taking into account the parties' relative ability to pay
 - 3 periods of time
 - Debts before marriage
 - Spouse who incurred the debt keeps the debt.
 - Debts during marriage
 - Equal, but needs to be characterized.
 - 2625 - All separate debts that were not incurred for the benefit of the community shall be confirmed without offset to the spouse who incurred the debt. [Occurs with debts for attorney's fees]
 - ◆ Attorneys fees arising out of employment
 - ◆ If it's a crime or intentional tort, the spouse who had to incur those attorneys fees will get it, but if it's negligence on the part of the spouse, the activity is for the benefit of the community
 - ◇ Embezzled money - Separate
 - ◇ Negligence in accounting - Community
 - Debts occurring after separation (See below)
 - 2623 - Debts incurred by either spouse for non necessities go to the spouse who incurred it.
 - Necessaries -
 - Common necessities of life - shall be confirmed according to the respective spouses' respective needs and abilities to pay at the time the debt was incurred.
 - ◆ e.g.: Unemployed spouse's debt for food, clothing, and rent would be paid by the spouse with a job.
 - **When does separation occur? - Living separate and apart**
 - FC 771: The earnings and accumulations of a spouse...**while living separate and apart** from the other spouse, are the separate property of that spouse."
 - This means:
 - No intentions to resume marital relationship (on BOTH sides). Determined by looking to evidence of a parting of ways (actions which indicate no intention to resume marital relationship)
 - When one spouse moves out?
 - ◆ This is almost always necessary, but need not be sufficient. (e.g.: living apart but maintaining an outward appearance of marriage. See *Neiderman*)
 - When sexual relations end?
 - Separating financial arrangements?
 - Filing dissolution petition?
 - Court looks at all the facts - there is no bright line.
 - However, separating financial arrangements is one of the most influential deciding factors.
 - *Niederman* case (was depublished)
 - Stopped living together in 1993. Husband paid retainer to divorce attorney.
 - But they still filed joint tax returns, they went to school meetings together, financially supported her, etc.
 - He didn't tell her until 2004 that he was going to file for divorce
 - Court: not separated until 2004.

13. **Premarital Agreements**

- Essentially, we are talking about opting out of the community property system.
- Who wants to do this?

- People who have lots of money and are worried about gold diggers. Lack of trust that the person marrying is doing so for the right reasons.
- Second marriage where each have children from a prior marriage. Want to make sure the property they come in with will remain separate property (Premarital allows you to waive community contributions to SP businesses, for example).
- People so stung by divorce that they want everything spelled out in case of divorce.

○ **Prior to 1986**

- Philosophy: Protect economically inferior spouse
- **Criteria for Valid and Enforceable PMA (From *Dawley Case*)**
 - **Ensures economically superior spouse does not take advantage**
 - 1) Does not promote, encourage, or facilitate divorce by giving a large monetary benefit to the economically inferior spouse
 - 2) Objective terms of the PMA control, not the subjective contemplation of the parties
 - ◆ Difficulties of proof and people have changes of heart. Look to the agreement instead.
 - 3) Entered into freely (**voluntarily**) without fraud, duress, coercion, or undue influence
 - 4) May deal with property rights of spouses, but may not waive or limit spousal support
 - **Factors re: fraud, duress, coercion, or undue influence**
 - Timing of signing the PMA
 - ◆ Immediately before wedding? Discussions before? Atmosphere surrounding signing?
 - Understanding of the PMA
 - ◆ Age, education, sophistication, prior experience with divorce, consultation w/ counsel or opportunity for consultation, vagueness
 - **Exceptions to SoF Requirements**
 - Promissory estoppel where spouse irretrievably changed position in reliance on the spouse's promise (*Hall case*).
 - Fully executed oral agreement
 - ◆ e.g.: 'I'll marry you if you make me a beneficiary in your life insurance policy. Husband does so, but then changes it back.

○ **1986 Premarital Agreement Act (1/1/1986)**

- Philosophy: Women do not need protection as men and women are equal, and if there is an agreement, it should be enforced: avoid disputes at divorce.
- **Prospective change**

SUBJECT MATTER - 1612: All subjects can be a part of the PMA EXCEPT:

- ◇ **Child support (but spousal support CAN, if *Pendleton* holding met)**
 - ◆ *Pendleton Case* - CA S. Ct.: Narrow holding - spousal support waivers do not violate public policy when executed by intelligent, well educated persons, each of whom appears to be self sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they executed the waivers.
- ◇ **Things in violation of public policy**

ENFORCEABILITY - 1615: PMA is NOT enforceable if person challenging the PMA proves **either**:

- ◇ **Not voluntary** (coercion and/or lack of knowledge). FACTORS:
 - ◆ Proximity to wedding,
 - ◆ Surprise in presentation of the agreement,
 - ◆ Presence or absence of independent counsel,

- ◆ Inequity of bargaining power [age/sophistication]
- ◆ Disclosure of assets
- ◆ Understanding or awareness of intent of the agreement

◇ Unconscionable at the time of the execution AND Spouse was NOT provided with fair and reasonable disclosure of the property or financial obligations

- ◇ Note: If there was fair and reasonable disclosure, etc., it seems that the PMA will be enforced even if unconscionable. Reason: spouse must prove both unconscionability AND inadequate disclosure.
- ◇ Exceptions to SoF still apply.

○ **PMA Amendments - 1/1/2002 (RETROACTIVE, unless Due Process)**

- Enacted in response to *Bonds* and *Pendleton* cases. Pendulum swings back a little bit providing a bit more protection to economically inferior spouse
- Differences:

Spousal support agreements [1612(c)]

- ◇ Not enforceable unless there is independent counsel
- ◇ Even if there is independent counsel, it will not be enforceable if the provision is unconscionable at the **time of enforcement**.

What does "voluntary" mean? [1615(c)]

- ◇ Represented by independent legal counsel at the signing, or a separate written waiver of legal counsel.
- ◇ More than 7 calendar day requirement between the time the party was presented with the agreement and advised to seek independent legal counsel, and the time it was signed
- ◇ Not executed under duress, fraud, or undue influence, and did not lack capacity.

□ **Retroactivity of New Requirements**

- ◆ Legislature did not state it was prospective or retroactive. They were silent.
- ◆ *Fellows Case* - Family code section 4 says amendments to the family code are retroactive.
- ◆ *Rosendale Case*
 - ◇ PMA entered into prior to 2002. Waived spousal support, both being represented by independent legal counsel. Wife was in horrible auto accident. Subsequently get a divorce. Wife challenges spousal support waiver under the 2002 amendment, because at the time of enforcement it is unconscionable (the effects of the automobile accident couldn't have been known back then).
 - ◇ Court: applied it retroactively and wife could void the spousal support waiver. It IS **Retroactive**
- ◆ Hypo: Say prior to 2002, the 7 day requirement wasn't complied with in a divorce after 2002
 - ◇ This is a complete change of the law. There was no 7 day requirement when the PMA was executed. Probably unfair to apply it retroactively. (Due process concerns).

14. Rights of Unmarried Spouses

○ **Unmarried Cohabitants**

- No common law marriage in CA
- Unmarried cohabitants' property rights controlled by judicial decision

Marvin Doctrine - Property rights IF:

- a. Express Contracts = Oral/Written but not based on meretricious sexual services (prostitution)
 - Aka: There are shared property rights if there is a contract.

- b. Implied in fact Contracts
- c. Equitable remedies (quantum meruit)
 - Even though the Marvin court did say there are equitable remedies allowed, it's really a dead end b/c no equitable remedies have been given.

- To Prove:
 - Oral agreements are hard to prove – it's a he said/she said
 - Implied in fact agreements
 - **Purpose:** solve inequitable situation that can result after long term relationship.
 - Long-term marital-like relationship is the best scenario, BUT insufficient on its own
 - Courts require additional sharing conduct (e.g., she paid the bills, she took care of children or she was involved in his business)
 - Marvin Doctrine applies to same-sex couples
 - This was decided in 1988.
 - Same sex couples need this b/c they can't get married.
 - Equitable Remedies = Dead End
 - Quantum Meruit usually not available because party seeking value of services has received benefit of relationship
- **Putative Spouse Doctrine**
 - Applies when a marriage is void or voidable:
 - Void – bigamous, incestuous, marriage defect (sometimes, as a matter of equity)
 - Voidable – fraud, underage, physical incapacity
 - Can either be annulled or ratified
 - Requires that the spouse seeking recovery has a Good Faith Belief in a Valid California Marriage:
 - Objective Test
 - A good faith belief **usually** involves getting a license, having a ceremony, etc. But see below:
 - Santos
 - ◆ Couple did not speak English, got a marriage license, but never had a ceremony. Court was lenient and said they DID have a good faith belief. Almost applied a kind of subjective test.
 - Wagner
 - ◆ Outlier - Were "married" using private marital vows to each other - no license or ceremony. They had a child and later he died in an automobile accident. She sued the county for his wrongful death. Court said she was a putative spouse - but this is REALLY pushing it.
 - ◆ Later limited by Centinela/Vyronis
 - Centinela/Vyronis
 - ◆ Subjective is not enough. It must be objective good faith.
 - Can “bad faith spouse” share in earnings of “good faith spouse”?
 - Tejada (2009) - When a marriage is void or voidable, and either party maintains good faith in the validity of the marriage, the putative spouse doctrine applies regardless of guilt or innocence.
 - Could be because couple twice tried to marry and were together for 15 yrs.
 - Putative spouse status ends when the defect in marriage is discovered because there is no longer a good faith belief in the validity of the marriage
 - If the couple continues to live together after the defect in the marriage is discovered:
 - Cannot claim they are putative spouses
 - Will be treated as unmarried cohabitants
 - Putative Spouse Doctrine Applies at Death – equitable doctrine
 - Putative surviving spouse has the same rights as a legal surviving spouse
 - ◆ Review: When spouse dies intestate, the surviving spouse receives 1/2 of the CP

as the surviving spouse as well as the decedent's 1/2 (thus all of it). Surviving spouse gets either 1/3, 1/2, or all of the S.P. depending on other heirs.

◆ Leslie Case:

- ◇ Fight between putative spouse and children of the wife (decedent). (Couple's marriage in Mexico was invalid, thus it was invalid in CA)
 - ◇ Couple lived together for 9 years as husband and wife; some in JT, some in TIC. Court had to determine whether the husband was a putative spouse. Would he be treated as a surviving spouse if he was?
 - ◇ Court: he did have a good faith belief, thus he is a putative spouse, and putative spouse's get same rights to S.P. as a legal spouse at death
- What if there are two putative surviving spouses?
- ◆ Vargas - Court divided the S.P. equally.

• **Domestic Partnerships**

- "Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship or mutual caring"

Requirements:

- Both persons have a common residence
 - It is still a common residence if one leaves but intends to return
 - Both persons are not married to someone else or in another domestic partnership
 - Not related by blood that would prevent them from being married
 - First cousins can marry (gross)
 - 18 or older
 - Same sex, (or opposite sex if one or both is over the age of 62)
- Putative spouses do not apply to domestic partnerships (?)
- Velez v. Smith (p.295)
 - ◆ Goldberg thought this concept was wrong, and the concept should apply.
 - ◆ May have been an anti-same sex couples ruling.
 - Ellis and Arriega
 - ◆ Court: Putative spouse doctrine DOES apply to domestic spouses
 - ◆ Couple went through most of the motions to register it, but it was never filed.
- Hypo: Jan and Leslie same sex couple living together since 1995. During those years they have always shared learning expenses and pooled their earnings to buy stock (some are in one name, some in the others). Portfolios are of equal value. In 2005 they registered with the state as domestic partners. In 2006 Leslie receives 100k inheritance. Used it for the down payment for a house. Title: Joint tenants. Condo appreciated. Jan moved out.
- What are Leslie's rights to the stock and condo?
 - ◆ Condo
 - ◇ JT = CP
 - ◇ Leslie has right to reimbursement, but appreciation is CP and split 1/2.
 - ◆ Stocks
 - ◇ They acquired stocks before the domestic partnership, so their earnings would be S.P. But they were unmarried cohabitants, so Marvin applies and we look to see if there was an implied in fact relationship.
 - ▶ They shared living expenses, pooled earnings to buy stock... looks like an implied in fact agreement to share.
 - Does the change in the family law apply retroactively?
 - ◆ Yes, unless it violates due process.
 - ◆ If we apply this, it would still split 50/50, so there would be no deprivation
 - ◆ Courts have not decided if Domestic Partnership is retroactive yet.