

Marital Property Outline

DEFINITIONS

- **Separate Property:** The separate property of a married person includes the following:
 - (1) All **property owned before marriage**
 - (2) All property acquired **after marriage by gift or inheritance**
 - (3) The **rents, issues, and profits of separate property** (are separate property).
- **Community Property:** Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.
 - Community property is equally owned by H & W.
 - It's all property, which stems from the labor/efforts of EITHER spouse during marriage. It's about sharing, it doesn't depend on direct contributions to its acquisition or to the condition of title. You get half of it just b/c you are sharing in the community, you don't have to do anything to earn it.
 - People can opt out of the CP rule w/ premarital agreements, transmutation, etc.
- What happens to community property during:
 - **Marriage:** Both spouses have a **present, existing & equal interest in CP**.
 - **Divorce:** Most CP states require **mandatory equal 50/50 division of CP (CA)**.
 - But some CP states allow for equitable distribution based on need or fault (separate property is excluded from this).
 - **Death (w/o will-intestate):** Surviving spouse receives all of the CP & 1/3 to all of the separate property of decedent (depending on whether decedent had issue).
 - **Death (w/ will):** Depends on the will b/c decedent can will his half of the CP to someone else, but surviving spouse gets the 1/2 that already belonged to her.
- **Downer v. Bramet:** H&W married in 1953; separated in 1971; H got a ranch in 1972 from his boss. W argues ranch is CP, H argues it's SP b/c boss gave it to him as a gift. W says it was not a gift b/c it was given to H in lieu of a pension, so it was remuneration (pension earned during marriage = CP). H & his boss were not friends & had no social relationship so this couldn't be a gift. Court agreed w/ W, but said it could be part CP & part SP via apportionment (divide the part earned during marriage from the part earned after separation).
- **Things of Note**
 - SP is excluded from division at divorce.
 - **Rents, issues and profits of SP = SP** (*George v. Ransom* rule).
 - **Rents, issues & profits of CP = CP**
 - Apportionment—it is possible that property can be considered part CP/part SP.
 - Title in one spouse's name will not change the character of the property.
 - A pension is CP if it is acquired by spouses labor and efforts.
 - Once separation happens, anything acquired after that is separate property
 - Spousal support is discretionary at divorce

TRANSMUTATIONS

- **Pre January 1, 1985:** Easy rule---verbal & implied transmutations are okay.
- **Post January 1, 1985:** Hard rule---transmutation that happens on or after 1/1/85 must be in writing.

I. Transmutations before January 1, 1985

A transmutation is an agreement to change the character of property. **Pre 1985 transmutations:**

- Oral & implied agreements permitted. Very informal.
- Transmutation occurs when the agreement is made.
- Can cover ALL property (including cash).
- The **intention of the spouse giving up his/her interest is the one that controls.**

Pre-1985 Cases

- **Raphael:** Every year H told W everything you have is mine & everything I have is yours, we're 50/50 partners. Court held this is **enough for an oral transmutation.** At what point did he transmute his SP to CP?
--The first time he ever said it. Right after he said it, his SP became CP.
- **Jafeman:** Neighbors lived across street from each other, got married & moved into H's house. They called his house our home & called her house across street her house. W thought his house was CP. **Court held it was not CP, just saying "our home" is not enough,** they could have just been saying this for ease of communication. The intent of the person giving up his interest controls in this determination & H didn't think it was CP.
- **Lucas:** W's name was on the title of the house & that is how she wanted it & H didn't object to it. But his name was on the purchase agreement. One would think there was no transmutation here b/c title isn't determinative & we need to look at the funds, but **court held that it was transmuted, it was his silence & acquiescence that was enough to show a transmutation.** Legislature didn't like this b/c it was too informal to be a transmutation & so they changed the law in 1985 by passing the transmutation statute.

II. Transmutations on or after January 1, 1985

(1) For a valid transmutation after 1/1/1985 there must be an **express declaration in writing** to expressly state that the ownership of the property is being changed.

(i) Words that satisfy **express declaration** in writing requirement:

(a) ***I transmute*** my property (magic words).

(b) ***I give any interest I have*** to so and so.

(c) Putting the title in one spouse's name AND including the language "as his/her separate property."

(ii) Words that do **NOT** satisfy express declaration in writing requirement.

(a) "I consent"

(b) "I transfer": the word transfer is not sufficient to change character of property.

(c) "I transfer to spouses name": that is not enough.

•**MacDonald:** W said I hereby consent to this IRA (W was terminally ill & wanted to transfer H's IRA). Court held that is not enough to be an express declaration & no extrinsic evidence is admissible to supplement it.

(2) **Extrinsic evidence is NOT admissible** to supplement the words in a written document.

- **Benson:** H signed a grant deed stating "I hereby grant or convey my interest in the property to W." That would be enough to be an express declaration but H argues it's not b/c W orally promised to waive her right in his pension in exchange. So this was part written & part oral & W did not hold up her end of the bargain. Court says no, we do NOT look at extrinsic evidence like oral agreements. H's only option is to argue that he signed the grant deed under undue influence.

(3) It does not matter when the property was acquired, what triggers the statute is **when the transmutation itself** allegedly occurred (not the date of acquisition of the property).

(4) Statement in a **will is NOT admissible** in a divorce proceeding b/c a will can be changed & doesn't go into effect until you die

- Statement in a **trust IS admissible as long as it contains the magic words** of transmutation
 - **Starkman:** Trust says "any property transferred by either of them to the trust is the CP of both of them" unless the property is identified as SP of either one. Court held this was **not enough to transmute the husband's SP into CP** b/c purpose of a trust is to avoid probate & plan for the future, not to change ownership of property PLUS it didn't contain magic words of transmutation.
 - **Holtemann/Lund:** Trust document says H's SP is transmuted to CP using magic words of transmutation. H argues this document was executed to be more like a will & document even explicitly stated it was solely for purpose of estate planning & is not applicable in a dissolution proceeding. The court said no, a trust is not like a will b/c as soon as trust is signed it is effective. The only way to change it is to have another transmutation agreement transmuted the property back. So the transmutation in this document was effective.

(5) Gift Exception

Express declaration in writing requirement does NOT apply to gifts. But the gift must meet **all 3 of the following requirements** for the exception to apply:

(1) Must be a gift between the spouses of **clothing, wearing apparel, jewelry, or other tangible articles of a personal nature; and**

- A car is not a tangible item of a personal nature.
- A snuff box, piano, signed ball are not tangible items of a personal nature
- A pet could go either way.

(2) That is **used solely or principally by the spouse to whom the gift is made; and**

(3) That is **not substantial in value** taking into consideration the **circumstances of the marriage.**

(6) Other/Miscellaneous

- Transmutation can be with or without consideration.
- SP to CP, CP to SP, SP to SP of other spouse (cash is property & can be transmuted)
- Putting the title in one spouses name, by itself, is not enough to be an express declaration.

TITLE PRESUMPTIONS

- Presumptions are not evidence:
 - (1) Evidence must be presented to RAISE the presumption.
 - (2) General CP or SP presumption is then applied (only 1 SP presumption exists)
 - (3) Unless evidence is presented to REBUT the presumption, the presumption becomes a conclusion.
 - Separate property proponent has the **burden** to rebut the presumption.
- Untitled property & property titled in one spouses name are treated **completely differently** from jointly titled property (i.e., CP title or joint tenancy title).

I. Untitled Property AND Property Titled in One Spouses Name

(a) General Community Property Presumption Applies

General CP presumption applies to all property that is untitled or titled in 1 spouses name. General CP Presumption states that property **acquired or possessed during marriage is presumed to be CP.**

(1) How to raise?

- Bring in some evidence. Usually someone will testify that it was acquired or possessed during marriage, or bring in a receipt.
 - **Short Marriages:** For short marriages, try to use the *acquired*, not the *possessed*, formulation to raise the CP presumption. Some courts will not allow you to use the *possessed* formulation after a short marriage, as evidence, to raise the general CP presumption. E&E pg. 68 #12.

(2) How to rebut?

- **Tracing to separate property funds** (just having title in one's name isn't enough)
- Reimbursement Type = **Pro Rata Apportionment**

(3) Who bears the burden of proof?

- **Separate property proponent**

(4) What is standard of proof?

- Preponderance of the evidence.

• Cases

Lynam: H&W died & left a bank account but nobody was left to testify about it. Court used "property *possessed* during marriage is CP" presumption b/c nobody is alive to testify about *acquired*. Reasoning behind this rule is combo of both policy & probability, if they've been married for a long time then it's likely they *acquired* it during marriage.

Ettefagh: Holds that **BOP is preponderance of the evidence, not clear & convincing**. Property was all in H's name, some of it even said as his separate property. Court says all W has to do is show they were married & *acquired* the property during marriage to raise general CP presumption. Title did NOT matter here. H has burden of rebutting the general CP presumption. H did that by showing he used SP funds (given to him by his dad) to make the purchase. He & dad testified & that was enough for preponderance.

- W argued standard should be C&C (to require more proof that it was a gift, like requiring him to show receipts & paper trail-father/son testimony would not be enough for C&C). Court rejected that b/c don't want to tilt it toward one side or the other. This is just about money, its not about personal rights, so we don't want to make the burden higher. When a personal right is at stake then it makes sense to make the burden higher b/c we want to be sure we're right when we are terminating it.

Mahoney: Only case where court didn't apply general CP presumption the way it should have. It was a short marriage & H bought a life insurance policy during the marriage & died after 1 month of marriage. But it was unclear whether the money he used to buy the policy was acquired before or during marriage. Who gets the funds, new wife or son? Issue: what does W have to show to raise general CP presumption?

- Court says W has to show that the dollar he used to pay for the policy was acquired during marriage. Professor says court was wrong, W had to show that the policy was acquired during marriage to raise general CP presumption.
- **Takeaway:** When there is a short marriage you have to be careful & make sure you are able to show what was used to acquire the property itself.

(b) Prop Rata Apportionment for Any Increase in Value

- If **both separate & community funds are used** to purchase the property, then when you are tracing to funds to rebut the general CP presumption, the property will be characterized as part separate & part community.
 - Each spouse will get reimbursed with the portion they contributed.
 - If the property has increased in value then, the **increase is also apportioned according to the proportions of the original contributions**. This is **pro rata apportionment**.
- **Example:** H & W buy a \$10,000 lamp during marriage using \$6000 from W's inheritance & \$4000 from H's earnings. Lamp is untitled property & increases in value to \$30,000. At divorce
 - Lamp is first characterized as CP b/c general CP presumption applies to untitled property & it was acquired during marriage.
 - Burden is on W, the separate property proponent, to rebut the presumption by tracing to her separate property inheritance funds that were used for part of the purchase price (\$6000).
 - From the original \$10,000: W = \$6000 SP (+\$2000 her half of the CP) = \$8000; H = \$2000
 - For the \$20,000 increase in value, do pro rata apportionment, so 60% of \$20,000 = \$12,000 & 40% of \$20,000 = \$8000.
 - W = \$12,000 SP + (\$4000 her half of CP) = \$16,000; H = \$4000
 - Final Answer: W = (\$8000 + \$16,000) = \$24,000; H = (\$2000 + \$4000) = \$6000

(c) **Married Women's Special Presumption [this is the only SP presumption--FC §803(a)]**

Married women's special presumption says that **if property was acquired prior to January 1, 1975 by a married woman in an instrument in writing, it is presumed to be her separate property.**

(1) What property is covered?

- Any **real or personal property**, or **interest therein**, or **incumbrance** that is titled in the wife's name.

(2) How?

- We must find it in a **written** instrument (like a title to the house).

(3) When?

- Acquisitions before January 1, 1975. For married women's presumption the **date of acquisition** of property controls but in the transmutation statute it's the **date of the transmutation** that matters.
- If it was acquired on or after 1/1/75, then the general CP presumption applies.
- The funds used to acquire it can be **either separate or community**, doesn't matter.

- **Example:** If H uses his *separate* property funds to acquire property before 1/1/75 & puts the title in W's name, the married women's presumption still applies and the only way for H to rebut it is to show that he did not intend to give it to W as a gift. E&E pg. 65 #5.

(4) How to rebut married women's presumption?

- Show the **husband's intention** to not give it to her. Tracing will NOT rebut this presumption b/c husband controlled all the community property back then.
- Husband's **testimony** that he did not intend it as a gift or he did not intend to change the nature of the property is enough to rebut the married women's presumption.

How does Transmutation Statute affect the Married Women's Presumption?

- If H uses CP funds to acquire property & puts title in wife's name in 1975 or after, the general CP presumption will apply. How can that presumption be rebutted to show that it is W's separate property?
 - By showing an **agreement between the spouses or by showing H's intention** to transmute the CP into her separate property (**i.e., by showing a transmutation**).
 - **BUT**, if the same events occur in **1985 or after**, then the general CP presumption can be rebutted by showing the same agreement or intention mentioned above, but it has to be **in an express declaration in writing** (b/c of the transmutation statute).
 - See E&E pg. 62 #6 for good overview.

II. Property Titled as Joint Tenancy

- Joint tenancy comes w/ right of survivorship, meaning when one tenant dies, the other tenant gets the whole thing (you can't will it away like you can w/ CP).

(a) Presumption that Applies to Joint Tenancy at Divorce

All joint tenancy property **acquired during marriage** will be **presumed to be community property** at divorce, **unless there is another agreement to rebut the CP presumption.**

- If JT property was **acquired before 1984** = Rebut by **oral, written, or implied agreement** (this is the *Lucas* rule but *Lucas* only applied to single family residences).
- If JT property was **acquired on or after 1/1/1984** = Rebut by **agreement in writing only** (this can be another agreement in writing OR a clear statement in a deed or title).
- This presumption can NOT be rebutted by tracing to the funds used to acquire the property.

(b) Right to Reimbursement if one spouse Contributed SP Funds AND the property is Characterized as Community Property

(1) JT property acquired before 1984: If there is no reimbursement agreement, then the spouse who contributed SP funds can NOT get his separate fund contribution reimbursed (and his SP fund contribution is treated as a gift to the community).

- Reimbursement agreement can be either oral, implied, or written.

(2) JT property acquired on or after 1/1/1984: Right to reimbursement of SP funds if party can **trace** to SP funds used to acquire the property (**unless you waive your right to reimbursement in writing**).

- Reimbursement of SP contributions based on tracing applies to acquisitions of property on 1/1/84 or after no matter when the SP contribution to it happened.
 - But you **do not get reimbursed for interest or appreciation in value**, those are split 50/50 as CP (so it is pure reimbursement not pro rata apportionment).
 - Reimbursement can't exceed the net value of the property at the time of division.
- Types of funds that can be reimbursed include:
 - (1) funds used to purchase the property
 - (2) down payments
 - (3) payments for improvements
 - (4) payments to reduce the principal of a loan used to finance the purchase or improvements of the property.
 - Types of funds that can NOT be reimbursed include:
 - (1) payments of interest on a loan
 - (2) payments for maintenance, insurance on, or taxation of the property.

III. Property Titled as Community Property

(a) Presumption that Applies to CP Title at Divorce

All CP property **acquired during marriage** will be **presumed to be community property** at divorce, **unless there is another agreement to rebut the CP presumption**.

- If CP property was **acquired before 1987** = Rebut by **oral, written, or implied agreement**
- If CP property was **acquired on or after 1/1/1987** = Rebut by **agreement in writing only** (this can be another agreement in writing OR a clear statement in a deed or title).

(b) Right to Reimbursement if one spouse Contributed SP Funds AND the property is Characterized as Community Property

(1) CP property acquired before 1984: If there is no reimbursement agreement, then the spouse who contributed SP funds can NOT get his separate fund contribution reimbursed.

- Reimbursement agreement can be either oral, implied, or written.

(2) CP property acquired between 1/1/1984 and 1986: Right to reimbursement of SP funds if party can **trace** to SP funds used to acquire the property (unless you waive your right to reimbursement in writing).

- Appreciation goes to the community (not reimbursed for interest or appreciation)

(3) CP property acquired on or after 1/1/1987: Right to reimbursement of SP funds if party can **trace** to SP funds used to acquire the property (unless you waive your right to reimbursement in writing). SAME as #2.

- Appreciation goes to the community (not reimbursed for interest or appreciation)

Types of Funds that Can & Can't be Reimbursed (same as for JT above)

- Types of funds that can be reimbursed include:

- (1) funds used to purchase the property
- (2) down payments
- (3) payments for improvements
- (4) payments to reduce the principal of a loan used to finance the purchase or improvements of the property.
- Types of funds that can NOT be reimbursed include:
 - (1) payments of interest on a loan
 - (2) payments for maintenance, insurance on, or taxation of the property.

IV. General Notes re Joint Tenancy & Community Property Title + Overview

- For jointly titled property, do 2 step analysis:
 - Step 1 Characterization:** Can CP presumption be rebutted or not?
 - Step 2 Reimbursement:** Go on to step 2 only if answer in step 1 was CP.

Step 1: Joint Title Presumptions & Characterization Overview

OLD

- **Lucas** – applies to acquisitions pre-1984
- JT = CP at divorce
- Rebut by oral, written, implied agreement
- If no agreement, CP
- If agreement, SP of one spouse or part SP/part CP

NEW

- **1984** 4800.1 (2581) – applies to acquisitions as of 1984
- JT = CP at divorce
- Rebut by agreement in writing only
- If no agreement, CP
- If agreement in writing, SP of one spouse or part SP/part CP

Step 2: Reimbursement of Separate Property Funds Overview

OLD

- **Lucas** – applies to acquisitions pre-1984 characterized as CP at Step 1
- Reimbursement only if a reimbursement agreement
- If no reimbursement agreement, SP \$ is gift to community
- If reimbursement agreement, SP \$ is reimbursed
- Appreciation split 50/50

NEW

- **1984** 4800. 2 – applies to acquisitions as of 1984 characterized as CP at Step 1
- Right to reimbursement based on tracing to SP \$
- Absent a written waiver
- If traced, SP \$ is reimbursed
- Appreciation split 50/50

- On or after 1984, during divorce, **all jointly titled property** (not just SFD's) will be presumed to be CP (includes tenancy in common, JT & CP). It does not matter when the property was purchased & what the law was at that time, if the divorce is happening after 1984, jointly titled property will be presumed to be CP. So the presumption is always the same, it is the rebuttal that differs based on date and type of joint title.
- **Do Supp pg. 40-45 + Titles at Divorce Worksheet (supp pg. 64-66) + Supp pg. 185-89**

V. Property Titled as Community Property With Right of Survivorship

As of **July 1, 2001**, H&W may hold title as CP w/ right of survivorship.

- At **divorce, this title is treated just like CP** and all the same presumption apply,
- See joint titles at death section below for more on this.

IMPROVEMENTS to SEPARATE PROPERTY

I. SP Funds of One Spouse used to Improve Other Spouses Separate Property

• **Before January 1, 2005:** Spouse who used their SP funds to improve the other spouses SP, had **neither an interest in the improved property nor a right to reimbursement**. The contribution was presumed to be a gift & could only be rebutted w/ evidence that the separate property was not a gift (i.e., an agreement for reimbursement).

• **On or after January 1, 2005:** New FC 2640(c) says there **IS a right to reimbursement of SP funds** contributed to improvements to the SP of another spouse (w/o appreciation).

- **Retroactivity:** Does the right to reimbursement apply retroactively to separate property *contributions* for improvements *made* before January 1, 2005?
 - Court has not ruled on this yet. General rule is that it does apply retroactively as long as it does not violate due process (right to rely on the law as it was at the time of X). The spouse who benefitted from the improvement will argue that the statute should not apply retroactively b/c their due process will be violated b/c they had a vested right as this was a gift to them. **Professor says statute will probably not be applied retroactively.**
- The thing it applies to is **contributions on or after 1/1/05**, not acquisitions.
- There is no right to reimbursement if there is a written waiver or a transmutation in writing (it would have to meet the requirements of the transmutation statute).

II. Community Property Funds used to Improve Other Spouse's Separate Property

There is a **right to reimbursement for CP contributions to the other spouses SP, without interest or appreciation.**

- *Wolfe* established this in 2001 & said there is reimbursement to the *community* & it is retroactive, so this rule applies always.

III. Community Property Funds Used to Improve Your OWN Separate Property

- **Old Cases:** If either spouse appropriated CP funds for his own benefit, w/o consent of the other spouse, then the community should be reimbursed. If the other spouse consented, then no reimbursement.

-If there is consent, there is no right to reimbursement to the community.

-If there is no consent, then there is a right to reimbursement to the community.

- **New Cases:** Under *Wolfe*, it seems like there should be an absolute right to reimbursement of community property funds even if the other spouse consented.
- **Reimbursement:** The community would only get reimbursement (i.e., the original amount put in) and **no share in the appreciation.**
- **Prof. Says:** Pre-*Wolfe*, reimbursement depended on consent (no consent = reimburse; consent = no reimbursement). Its uncertain whether that will hold up in a case now. If I had a question on the exam, it would be framed like this: X would argue . . .

JOINT TITLES AT DEATH

I. Community Property With Right of Survivorship (*aka* survivorship community property)

(a) **As of July 1, 2001** H&W may hold title like this. It is created by the civil code.

(b) Title is created **when expressly declared in the transfer document** that the title is CP with right of survivorship.

- A deed or title will likely qualify as a transfer document.
- It is likely that any document claiming to create this type of title must contain those exact words “CP with right of survivorship.”

(c) This title is treated as **CP at divorce & JT at death.**

- If marriage ends in **divorce = property will be treated as CP** (treated just like any other type of joint title regarding stuff needed to rebut the CP presumption).
- If marriage ends in **death = property will be treated as joint tenancy & surviving spouse gains the whole property by right of survivorship.**

(d) This type of title has tax advantages at death b/c at death the property passes to the surviving spouse & there is a stepped up tax basis, so if the spouse sells the property after the other spouses death, that spouse does not pay capital gains taxes on the sale.

II. Community Property & Joint Tenancy Title at Death

- **At death, presumption follows title.** CP title is presumed to be CP, and joint tenancy title is presumed to be joint tenancy.

Joint Tenancy Presumption at Death

(a) At death, the **presumption that title held in joint tenancy is joint tenancy can be rebutted only by an agreement that the property is other than joint tenancy.**

- It cannot be rebutted by tracing to SP funds used to acquire the JT property.
- Burden of proof is on the **party trying to rebut the presumption.**

(b) If the agreement is made **on or after January 1, 1985** then it must be in an **express declaration in writing** by the spouse whose interest is adversely affected by the transmutation (indicating the spouse understood character of the property was changing)

- Oral or implied transmutions are enough to rebut the presumption if the transmutation happened before 1985.

--What Happens If One Spouse Dies Before Divorce is Finalized?

- **Blair:** A couple owns a house in JT & starts divorce proceedings. **Before divorce is finalized**, one spouse dies. In this scenario, the **death presumption applies** & title in JT is presumed to be joint tenancy, so the surviving spouse gets the whole thing via survivorship.
 - **Solution:** When you start a divorce, sever all joint tenancies immediately & change them to tenancy in common with no right of survivorship.

--What if the spouse dies **after the Court had dissolved their marriage but before the Court had considered division** of the joint tenancy property?

- **Hilke:** Now, b/c the divorce is already finalized, the **divorce presumption applies** & property held in JT is presumed to be CP (like our normal joint title presumption).
- **Alternative Approach Under Probate Code:** PC applies where marriage has been dissolved but property issues haven't been resolved yet: **JT is automatically severed** when the court dissolves a marriage. It turns into a **tenancy in common**, which passes to your heirs if you die intestate.
 - **PC controls in this area not Hilke, so on an exam PC is the right answer.**

--Do Supplement pg. 83-85.

COMMINGLING

Commingling is when **both CP and SP funds have been deposited into a bank account**. Special rules apply when tracing to funds in those commingled accounts.

I. Bank Account in One Spouses Name

(1) Family Expenses

- (a) Family expenses are funds used for **food, rent, vacations & medical&dental care**
 - Clothes are a toss up, we look to the value of the clothes & ask whether they are something that people would fight over during divorce.
- (b) When commingled funds are used to pay for family expenses, the following special rules apply:
 - (1) Available CP funds are presumed to be used to pay for family expenses. SP funds are deemed to be used for family expenses *only* when community funds are exhausted; **and**
 - (2) When separate property funds are used to pay for family expenses, the separate estate has no right to reimbursement unless the parties have agreed to reimbursement.

(2) Non-Family Expenses (i.e., Other Acquisitions) coming from Commingled accounts

- (a) When property is **acquired using funds from a commingled bank account, the general CP presumption applies**.

- (b) To rebut that presumption, the separate property proponent must **trace to separate property funds**. Two ways SP proponent can trace to a commingled account:

(1) Exhaustion Method (See v. See) Preferred Rule: SP proponent can rebut the CP presumption if he can show that, **at the time of acquisition, all community income was exhausted by family expenses**, then, clearly the property must have been purchased with SP funds.

- However, it can be hard to show that all CP funds in the commingled account were exhausted, especially if it happened a long time ago. But the court is not sympathetic to people who commingle so court says tough luck, if you commingle, then you SP proponent have the burden of tracing & must keep records that show that at the time of acquisition there are no CP funds left in the account, they are exhausted & therefore, the acquisition must have been acquired by SP funds. In that situation, some people have tried to argue that the total recapitulation method should be used to show exhaustion, but court rejected that argument except for in one scenario described below.
- **Total Recapitulation:** When you try to prove something was purchased using SP from a commingled account, **by showing an excess of community expenses over community income over the entire length of the marriage.** H said look at whole marriage, during that marriage I had a tiny CP salary & huge SP salary, so that little CP money went to family expenses & everything else that was purchased had to be bought w/ SP funds.
 - Court rejects that argument & says total recapitulation is NOT a sufficient method of tracing except for one scenario.
 - **Total Recapitulation is acceptable only when**, through no fault of the spouse (i.e. fire destroying records) its not possible to ascertain the balance of income & expenditures at the time property was acquired, so recapitulation of the total community expenses & income throughout the marriage can be used to establish the character of property.

OR

(2) Direct Tracing Method (Mix/Murphy): To rebut the general CP presumption, the SP proponent need only show that:

- (1) SP funds were in the account; and
 - (2) SP proponent intended to to use the SP funds to acquire the property.
- This method is not favored by the court & later cases made it even harder to trace under this method, b/c they required an additional **showing of disposition of the funds.**
 - This requires **(1) documentary evidence (keeping adequate records---very heavy burden on SP proponent)** and **(2) often testimony** as well.
 - To satisfy it, you have to show everything that goes in and out of the bank account, including family expenses.

II. Jointly Titled Bank Accounts

Regarding jointly titled commingled bank accounts, PC 5305 says that **at divorce, the contributions to bank accounts of married persons are presumed to be community property & can be rebutted by tracing to separate property.**

- Can trace using either Exhaustion or Direct Tracing (depending on which one court wants)
- **SEE Supp pg. 98 to see how the appreciation is split up. *******

EDUCATIONAL DEGREES

Professional educational degrees are not community property divisible at divorce.

I. Reimbursement of Community Contributions

(a) FC 2641 says the remedy for the non-student spouse is **reimbursement of community contributions**. Community contributions are payments made w/ **CP funds for education or training or for repayment of a loan** incurred for education or training. These payments include:

- Direct tuition payments
- Fees
- Books
- Supplies
- Transportation
- Special living expenses related to the educational experience itself (not regular living expenses).

(b) Amount reimbursed **includes interest at the legal rate**, starting from the end of the calendar year in which the contributions were made.

(c) **Enhancement of Earning Capacity**: To allow for reimbursement of community contributions, the person seeking the **degree must** have been doing it to **substantially enhance his earning capacity** (and not out of just interest or pleasure).

- Look to the **subjective intent of the person** seeking the degree.
 - However, some cases look to whether it actually objectively enhanced earning capacity and not to the student's intention in pursuing the degree.
- Judge on case by case basis

(d) **Student Loans**: The rule in the Family Code is that a loan incurred during marriage for education is assigned to the student spouse & the non-student spouse gets reimbursed for loan payments made during marriage (i.e., community gets reimbursed).

- If the loan was taken out **before marriage** and CP funds were used during the marriage to pay the loan, then after divorce, the entire loan is assigned to the student spouse b/c of the debt statutes (not the Family Code) & non-student spouse gets reimbursed for the loan payments made during marriage (i.e., community gets reimbursed).

II. Reimbursement to Community can be Modified or Reduced if it would be Unjust

FC 2641(c): “Reimbursement of community contributions & assignment of the student loan” may be reduced or modified if unjust. The main reason to reduce reimbursement is when the community has substantially benefitted from the education, training, or loan incurred.

- There is a **rebuttable presumption** that the **community has substantially benefitted from community contributions made more than 10 years before commencement of the proceeding.**
 - “There is a rebuttable presumption that the community has not substantially benefitted from community contributions to the education made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education made more than 10 years before the commencement of the proceeding.”
 - **Hypo:** H has \$45K outstanding law school loan. H graduated 20 years ago & is presently unemployed. H&W used CP earnings to pay off higher interest credit card bills instead of the student loan. Now they are getting divorced & H doesn’t think it’s fair that he should get stuck with the whole student loan.
 - H can argue it would be unjust b/c community benefitted (under 2641(c)), so the assignment of the loan should be modified so as not to be unjust.

GOODWILL

I. What is Goodwill

Goodwill is the expectation of continuing public patronage. For businesses, goodwill is the value the purchaser is willing to pay above the actual, tangible value of the business. CA law recognizes goodwill as a divisible asset for cases of:

- (1) Businesses
- (2) Professional practices (doctors, lawyers, etc)
 - **But NO celebrity goodwill as attached to an individual person.**
 - **McTiernan:** Individuals like artists, entertainers or athletes who command high compensation are not considered to have professional practices to which goodwill attaches (so celebrity goodwill is not properly divisible at divorce). There must be some other tangible thing that the goodwill attaches to.

II. How to Calculate Goodwill

There are different methods experts use to calculate goodwill, some of them are:

- (1) **Market Value Analysis:** this is what a willing buyer would pay for the business if it were sold at the time of the divorce; or
- (2) **Capitalization Method:** This looks at the net income of a professional practice for one year, then subtracts from it what a reasonable salary would be for a professional of comparable experience, and then multiplies it by a multiplier of some value.
 - BUT goodwill may NOT be valued by any method that takes into account post-marital efforts of either spouse (**no use of projected future earnings of spouse after divorce to calculate goodwill**).

- Court can adopt one spouse's expert's analysis over the other as long as there is a reasonable basis for the calculation, but court cannot just pick an arbitrary number in the middle of the two with no reasoning.
- When one spouse's goodwill payout is contractually pre-set (like stated in a partnership agreement), that is not the final word on the value of the goodwill in a divorce proceeding, so court must look beyond just that payout value.

SEPARATE PROPERTY BUSINESS

- If a spouse owns a business prior to marriage or starts a business during marriage using funds received from a gift or inheritance, then that business is separate property. The rents, issues, and profits of that business are also separate property.
- But if there was a long marriage, the other spouse might feel like the community expended efforts to make that business successful so they should get a share in it. Two methods available depending on what the success of the business is attributed to:

(1) *Pereira Method* (if increase in value is attributed to community effort use this):

Spouse who made the separate property investment is entitled to a **reasonable rate of return on that investment** as her separate property.

- Reasonable rate of return is the rate of "legal interest" which is 10% unless a different rate is proven appropriate. The community interest is anything over that reasonable rate of return.
- In short, the separate property owner get some rate of return on his initial investment (if the business has greatly increased in value) and the remainder is split 50/50 among the community.
- This approach **favors the community**.

OR

(2) *Van Camp Method* (if increase in value is attributed to something other than community effort use this).

(i) If the separate property owner spouse **received a salary** then that is considered to be what the community deserved from the separate property business. That salary is CP.

(ii) If the separate property owner spouse **did not receive a salary**, then court will use the reasonable salary that someone in that spouse's position would've received

- This approach subtracts the community expenses from the community income to calculate the community share of the profits from the separate property business.
 - If all the income was spent during the marriage, the remainder is separate property that belongs to the separate property business owning spouse.
 - If their expenses were less than their income, then the community will split whatever remains.
 - Under this approach, the **separate property owner is favored**.

- Factors that help sway the court in one way or another:
 - *Van Camp*
 - If all similar types of businesses in the area were growing.
 - If there is an unusual economic event (like oil embargo putting gas in high demand)
 - If the business can operate without any special talent or skills.
 - *Pereira*
 - If one spouse spends a lot of time in the business.

- **What Happens After Separation?**

After the date that spouses have **separated** (not date when divorce is granted), earnings of a spouse become his SP. If a community business increases in value after the date of separation, courts use a **reverse Pereira/Van Camp** approach. That means:

- If the increase in value can be attributed to a spouses efforts during separation, that effort is considered separate effort and in the increase in value is considered separate property.
- If the increase in value can be attributed to other factors, then the increase in value is considered community property.

- See E&E pg.174 #26 & 28; Supp pg. 114

MANAGEMENT & CONTROL

I. Community Personal Property

Either spouse has **equal right to the management & control of community *personal* property**, and can use it like his separate property, regardless of whether the personal property was acquired before or after 1/1/1975 (when equal M&C statute was passed), analysis is always the same. That means both spouses have the right to use the ***community personal property***. But there are certain exceptions to this general rule:

(1) Access to a bank account in one spouses name is limited to that spouse. The other spouse cannot gain access to it even though the funds in it are CP. From Financial Code.

- The spouse whose name is not on the account can obtain a court order that her name be added to the account.

(2) Written consent of the other spouse is required before a spouse **sells, conveys, or encumbers community personal property used as the “**family dwelling, or the furniture, or fittings of the home, or the clothing of the other spouse or minor children** which is community personal property.”**

- **Example:** W obtains a loan & uses the furniture in their home as collateral. W then defaults on the loan & creditor takes the furniture. The encumbrance on the furniture would be void & creditor would have to return the furniture b/c H did not give his written consent. *Matthews v. Hamburger*

(3) Gifts: FC prohibits **gifts or disposal of community personal property for less than fair and reasonable value unless the other spouse has given written consent**. This statute was passed in **1891** and does NOT apply retroactively to CP acquired prior to the

date of the statute (meaning one spouse can give away community personal property acquired before 1981 w/o written consent of the other spouse). *Spreckles*.

(i) This section does not cover gifts between the spouses--that is covered by the transmutation statute, which allows a spouse to transmute SP to CP.

(ii) If a spouse violates the statute and gives away community personal property without consent of the other spouse, then:

(a) **During marriage:** Non-consenting spouse has the right either to ratify the gift OR revoke the gift & sue to recover the property for community

(b) **After the death of the donor spouse:** Non-consenting spouse has the right to ratify the gift OR void the gift up to one-half the value of the gift.

- This means that the spouse's gift, given w/o consent of the other spouse, was not void, but it was voidable after the husband's death.

(iii) Who Can be Sued to Recover Gifts Made w/o Other Spouses Consent?

--Both the **donor spouse's estate & recipients** of the gifts can be sued to recover the gifts (non-consenting spouse is entitled to pursue whatever course is best calculated to give her relief).

(iv) Was the transferred community personal property really a gift or was it given in return for fair & reasonable value?

- *Bray*: W questioned accounts that were in the name of her former H & his son from previous marriage. Son claimed them as joint tenant. W claimed the \$ in the account was a gift given w/o her written consent, son said they were in exchange for work he did for dad. Son lost b/c the entire time H was putting his name on the accounts, son did not know about it AND son was getting a salary from H. Court held there was not enough evidence to show that accounts were for services rendered, instead they were gifts, & W was entitled to half of those gifts made w/o her consent.

(4) **Community Businesses:** FC gives **primary management & control** rights to the **managing spouse**, even though the business is all community personal property.

(i) Managing spouse may act alone in all transactions.

(ii) BUT managing spouse must give **prior written notice** to the other spouse for major actions like **sale, lease, exchange, encumbrance, or other disposition of all or substantially all personal property** used in the business.

- **NOTE:** This does not require the other spouse's consent (or joinder), it just requires the managing spouse to give prior written notice.

- If the managing spouse fails to give prior written notice, the validity of the transaction will not be affected, instead, the remedies of the non-managing spouse are limited to (1) making claim for **breach of fiduciary duty** or (2) the **ordering of an accounting**.

- The reason is b/c the managing spouse needs freedom to run the business w/o interference from the other spouse.

- But even if the uninformed spouse sues for breach of fiduciary duty, the managing spouses actions may not rise to the level of breach of fiduciary duty.

II. Community Real Property

(a) Either spouse also has management & control of community real property. BUT **both spouses must join in executing any instrument** by which the community real property or any interest therein is **sold, conveyed, or encumbered**.

- Joinder is also required for **leases of real CP for longer than 1 year**.

(b) When the community real property is in **one spouses name** & that spouse sells the property to a good faith purchaser who did not know that he was married, FC 1102(c)(2) creates a **presumption of validity of the sale**.

- BUT the **innocent spouse has the right to void the instrument** that the conniving spouse executed without her (void the sale). However, the community (i.e. the innocent spouse) must repay the purchase price to the bona fide purchaser.
 - **Takeaway:** The community receives the property back b/c the encumbrance or sale is void, but the community still owes the debt/proceeds of the purchase.
- **Statute of Limitations:** An innocent spouse has **1 year to file an action** to avoid a unilateral transfer of community real property in violation of the joinder provision.

III. Fiduciary Duties

(a) **General Fiduciary Duty (Family Code 721):** Each spouse shall act in good faith w/ respect to the other in management & control of CP. Specifically, this includes:

- (1) Highest **good faith** and fair dealing
- (2) Neither shall take any **unfair advantage** of the other.
- (2) Same rights and duties as non-marital business partners.

- Spouse may bring a claim of breach of fiduciary duty against other spouse during marriage
- The fiduciary duty continues until the assets & liabilities have been divided by the parties or the court.

(b) **Duty to Disclose CP Transactions to Other Spouse**

- **Before January 1, 2003:** There is a duty to disclose **upon request** (in family code).
 - If spouse doesn't ask to see it, you have no duty/are not required to tell them.
- **On or after Jan 1, 2003:** There is a duty to disclose **without demand** (corporation code)

--BUT **failure to disclose is a breach of fiduciary duty IF it results in impairment** of a spouse's one half interest in the community property.

--Also, for **community personal property**, the duty includes allowing the other spouse full access to the books (all the info about community assets & debts).

(c) **Conduct that Would be a Breach of Fiduciary Duty**

- (1) **Grossly negligent conduct** (from corporations code); or
 - Mere negligence is not enough.
- (2) **Reckless conduct** (from corporations code); or

- (3) **Intentional misconduct/a knowing violation of the law** (from corporations code); or
- (4) Taking **Unfair Advantage** of the other spouse (from family code); or
- (5) **Undue Influence** (taking unfair advantage w/ the presumption of undue influence)

Knowing Violation of Law/Intentional Misconduct

- **Schultz:** Mere negligence in failing to collect a debt owed to the community.
- **Beltran:** Forfeiture of a pension b/c of a criminal conviction

Grossly Negligent/Reckless Conduct

Duffy: H liquidated entire retirement savings & invested it in 5 volatile risky stocks. Court said H was not grossly negligent but legislature acted in response & said H WAS grossly negligent & breached his fiduciary duty.

Unfair Advantage

Lucero: H reinstates his pension using SP funds instead of CP funds so that pension would be his SP. Court held it was taking unfair advantage of other spouse & breach of duty b/c it deprived W of CP by using SP funds (b/c pension came from his employment).

- **Somps:** H used SP funds instead of CP funds to buy investment. Court held that a decision to invest using SP funds is not a breach of duty. But using SP funds to invest in an attempt to deprive the other spouse of CP differs from a simple choice of which funds to invest.

Undue Influence

Undue Influence Rule: If one spouse is ADVANTAGED by a CP transaction, a **rebuttable presumption** arises that the advantaged spouse exercised undue influence over the other spouse.

- Burden to rebut the presumption of undue influence is on the **Advantaged Spouse**
- To rebut, the Advantaged Spouse must show that:
 - (1) Transaction was freely and voluntarily entered into; and
 - (2) With full knowledge of all the facts; and
 - (3) With a complete understanding of the effects of the transaction.
- **Matthews:** W executed deed transferring her SP to CP. Claimed H took unfair advantage & unduly influenced her to do it. Court held no undue influence b/c W understood what she was doing & did it to get a better interest rate on the mortgage.
- **Delaney:** H executed deed conveying his SP to him & his wife as joint tenants. At divorce H claimed W took unfair advantage. W could not rebut that presumption & was held to have taken unfair advantage of H b/c he had cognitive impairments & entrusted all financial issues to her. H signed the deed w/o questioning her. Court held deed was void b/c of undue influence & H took it as his SP.
- **Fossum:** H&W put house in H's name to get better interest rate & H promised to quitclaim it back to them & he did. Years later, they did it again for a refi, but now H refused to put house in both of their names again. Under transmutation statute, H would get it as his SP b/c it meets the requirements of the transmutation statute. W sues for breach of fiduciary duty. Court holds H acted in bad faith & took unfair advantage of W by promising he would put her name back on it & didn't.
 - H is advantaged by the transaction so burden is on him to rebut the presumption of undue influence. W's actions were voluntary, she knew what she was doing & had understanding of it, so she meets the 3 elements & H might be able to rebut. **But court says he breached her confidence** (they had a confidential relationship), W had confidence H would follow through on his promise & he didn't.

- If this were the first time it happened (& she didn't have his prior promise to rely on), court would probably still find breach of fiduciary duty b/c H broke promise (just like *Benson*--transmutations).
- W also took a large cash advance on a credit card w/o telling H. She had a duty to disclose to H upon his request (but she did not need his consent, just needed to disclose). If W did this in 2003 or after, then she had duty to disclose w/o demand & failure to tell H would be breach of duty.

IV. Remedies

(a) If spouse breaches fiduciary duty, FC 1101 provides the following remedies, but the breach of fiduciary duty **must involve impairment of the claimant's interest in the community estate.**

(1) **FC 1101(b) & (c):** A court ordered accounting or or a court order to add a name to the community property held in one spouse's name.

- These are all available during marriage or at divorce or upon death of a spouse

(2) **FC 1101(g):** A remedy for breach of fiduciary duty shall include, but not be limited to, an award to 50% of an undisclosed or transferred asset plus attorney's fees and costs.

- The **award of attorneys fees&costs** to the aggrieved spouse is **MANDATORY**

(3) **FC 1101(h):** When the breach involves **oppression, fraud or malice** the remedy shall include, but not be limited to, an award of 100% of an undisclosed or transferred asset.

- **Attorney's fees are NOT mandatory here b/c the spouse is getting 100%.**

(b) **Deliberate Misappropriation:** Another statutory remedy is available if spouse deliberately misappropriates CP. Statute gives court **discretion to assess an additional award from or an offset against existing property.** But this provision lacks teeth b/c most courts just deduct the amount that was deliberately misappropriated from the offending spouses share rather than award additional property to the innocent spouse.

- **Williams:** H withdrew \$110,000 in CP funds from their bank account as divorce became imminent. This was deliberate misappropriation. Rest of their CP estate was worth \$200,000. The \$200,000 would be split evenly between H & W.
 - Under the misappropriation statute, H would have to reimburse W for \$55,000 (her half of the misappropriated \$110,000). The statute says court can award W more than 50%, but courts usually only stick to her rightful half share of whatever the amount is. In the end, W walks away w/ \$155,000 & H w/ \$45,000
- **FC 1101(g):** Analyzing *Williams* under this, W would also get attorney fees&court cost
- **FC 1101(h):** Analyzing *Williams* under this, (if court finds fraud on part of H), W would receive an amount equal to 100%.
- Therefore, the remedies in FC 1101(g) & (h) penalize a spouse who transfers an asset to a much greater extent than the misappropriation statute.

V. Restraints During Divorce Proceedings

(a) Once petition for dissolution is filed, there is an **automatic TRO** that restrains both parties from **doing anything to real & personal property** (cant transfer, encumber, conceal or dispose) **whether community or separate, without written consent of the other party.** 3 Exceptions:

(1) **In the usual course of business**

(2) **Necessities of life** (i.e., rent)

(3) **Extraordinary Expenditures:** For these expenditures, a spouse must notify the other spouse of any proposed extraordinary expenditure at least 5 days before incurring such an expenditure AND account to the court for all extraordinary expenditures.

- **But attorneys can still get paid** b/c TRO does not preclude a party from using community, quasi community, or separate property to pay attorney's fees & costs.
 - A spouse can also **encumber her one half of the community REAL property** w/o the other spouses consent to pay reasonable attorney fees in dissolution proceedings

(b) Fiduciary Duty that spouses owe to each other does not end when the spouses separate, it continues **UNTIL the assets & liabilities have been divided by the parties or by the court.**

- **Mitchell:** TRO was issued & then H severs CP held in joint tenancy. H dies before divorce is finalized. Court held that his severing of the JT was neither a transfer (b/c it didn't pass to someone else) nor a disposition of property, therefore his severing it did not violate TRO
- **McTiernan:** TRO was in place & H sold CP stocks w/o informing W or the court. He was short on cash & used the money to pay community expenses. Between the time of sale & time of trial, the stock price increased substantially. Court held that although the stock sale was not malicious, his actions still violated the TRO and W was entitled to her share of lost profits from the stock sale.
 - *McTiernan* stands for the proposition that **violations of the TRO, even if not malicious, will be treated like a breach of fiduciary duty.**
 - Court held his action was a non-malicious breach & appropriate remedy was FC 1101(g) which allows an award of 50% of any asset undisclosed or transferred in breach of the duty.
- **Rossi:** W concealed from H that she won lottery. H found out & sued for breach of duty for failure to disclose. Court held W acted w/ fraud, so under FC 1101(h), H was entitled to ALL the winnings.

VI. Summary

-CP **Personal Property** – Either Spouse has M&C.

-Written consent required for gifts or encumbrance of furniture & personal effects.

-CP **Real Property** – Requires Joinder to sell, get a loan, or lease for more than 1 year.

-CP **Business** – Primary Managing Spouse. Makes all day to day decisions & even big decisions like selling it, as long as he gives the other spouse written notice.

Conduct that is Breach of Fiduciary Duty

- Investing all retirement savings into one volatile stock.
- Forfeiture of pension b/c of criminal conviction.
- Using SP to deprive spouse of CP opportunity such as a pension.
- Using undue influence to obtain an unfair advantage over one spouse such as forcing a spouse to quitclaim community property.
- Abuse of confidence to obtain an unfair advantage over one's spouse by failing to carry out a promise to add the spouse's name to a deed.
- Failure to disclose CP assets gained during marriage.
- Failure to disclose existence, valuation and disposition of all community assets from date of separation through final property division.
- After TRO in effect, selling stock without consent of other spouse or court.

Conduct That is NOT a Breach of Fiduciary Duty

- Negligence in failing to collect a debt owed to the community.
- Choosing to invest SP rather than CP.
- Severing a joint tenancy, even after TRO is in effect.

CREDITORS RIGHTS

Policy

- Assure that creditors get paid therefore in some cases both CP & SP are liable for debts.
- Liability for debts follow principles of management & control. Since either spouse can control community personal property, that CP is liable for debts incurred during marriage.

Definitions

- **Personally liable:** Means that all of a person's property, both community & separate, is liable for debts personally undertaken.
- **Necessaries of Life:** All living expenses appropriate to one's station in life (i.e., furniture & even a country club membership).
- **Common Necessaries of Life:** Items required to sustain life—food, clothing, housing, medical expenses.
- **Debt:** An obligation incurred by a married person either **before or during marriage**, it includes **contract, tort&other obligations** like child/spousal support from prior marriage
 - Debt is **incurred** at the time a K is made or a tort occurs or the obligation arises.
- **Ksp:** Contracting spouse—the spouse **who incurred** the debt
- **Nsp:** Non-contracting spouse—the spouse **who did NOT incur** the debt

I. Community

(a) **Community estate** is liable for debts incurred by **either spouse before or during** marriage.

(i) It does not matter which spouse controls the community property or whether one or both spouses are party to the debt.

(ii) BUT this liability of the community estate **ends when the spouses separate.**

- **Exception:** A spouse is still **personally liable** [meaning their SP is liable too] for **common necessities of life** incurred by the **other spouse** while living **separate & apart.**

(b) But a spouse **can shield his earnings during marriage (CP) from liability for the other spouses premarital debt.** To protect his earning, the spouse who wants to shield must:

(1) Keep his earnings in an account where other spouse has no right of withdrawal; **AND**

(2) Not commingle those earnings with any other CP (only put earnings in here).

- Note the shielding spouses SP would not be liable for the other spouses premarital debt even if the spouse doesn't shield.

(c) **Child & Spousal Support Obligations:** A child or spousal support obligation from a prior marriage is treated as a debt incurred before marriage. This means the **community estate is liable for a spouses support obligation unless a shielding spouse shield his earnings.**

(i) If a spouse does not shield his earnings, then his earnings (i.e, the community estate) can be liable to pay the other spouses family support obligations.

- But there is a **right to reimbursement to the community** from the obligated spouses separate income or SP.

(ii) The shielding spouses SP is not liable for the other spouses support obligations.

II. Separate

A spouse's **separate property** is liable for **debts he incurred before or during marriage but not for the other spouses debts.**

(i) That means a creditor can reach CP for a debt incurred by one spouse, and if there is no CP the creditor can also reach the SP of the spouse who incurred the debt.

-**EXCEPTION**: A married person **IS** personally liable (meaning SP too) for a debt incurred for the:

- **Necessaries of life while spouses are living together** (not before marriage); &
- **Common necessities of life while the spouses are living apart.**

(ii) **Example**: H&W marry & buy furniture on credit. H works outside the home (CP) and W has a trust fund (SP). Both H's community income & W's trust fund can be used to pay the debt, no matter who incurred it, b/c furniture is a necessary of life. Even though a spouse's SP is shielded from debts incurred by the other spouse, a spouse's SP is liable for necessities of life incurred by the other spouse.

III. Tort Debts & Obligations

(a) Tort debt is treated just like contract debt, meaning the **community estate is liable for the debt incurred before or during marriage.**

- A spouse can shield [same way to shield as above] **his earnings from a tort debt incurred before marriage by the other spouse.**
- **SP of the tortfeasor spouse is liable**; the SP of the other spouse is not liable.

(b) **Order of Satisfaction**: There is an order of satisfaction for tort debts involving **death, personal injury, or property damage.**

- Order of satisfaction depends on **whether the liability of the married person (tortfeasor) is or is not based on an act or omission which occurred while the married person was performing an activity for the benefit of the community.**
 - If liability happened while doing activity for benefit of community = CP first, tortfeasor spouses SP second.
 - If liability happened while NOT doing activity for benefit of community = tortfeasor spouses SP first, CP second.

(c) **What is an activity for the "benefit of the community?"**

- Judgment against a Spouse who dropped a bucket of paint on the plaintiff while fixing up a community building.
 - Creditor goes after CP first, & then the tortfeasor spouses SP b/c he was performing an activity for the benefit of the community.
- Judgment against a Spouse for conversion of property of the employer (i.e., husband took him some of his employer's files that he was not allowed to do).
 - Professor thinks it would be liability from the community first b/c it was committed while working, which is an activity done for the benefit of the community. But we don't know the real answer b/c no case law on it.

- Ultimately, the creditor will get paid by one or the other, what we are trying to figure out is order of satisfaction.

IV. Summary

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 or W's SP
- WHICH kind of debt was incurred—contract, necessities, common necessities, pre-marital spousal or child support, tort judgment.

Contract Debt

- **Contract debt incurred before marriage (including necessities)**
 - Community estate liable unless earnings of Nsp is held in 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)

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

SEPARATE & APART and DIVISION AT DIVORCE

I. Separate and Apart

(a) Earnings & accumulations of a spouse, while living separate & apart from the other spouse, are the SP of that spouse. **Once they start living separate & apart, the CP earnings change into their SP.**

(b) What is Separate & Apart

--*Baragry* says the test is when the **couples no longer have a present intention to continue the marriage**: to make this determination we have to look at the **parties conduct** to see if there is a complete & final break in the relationship and it is a **very fact intensive inquiry** (so compare to facts of cases to decide). Factors to take into consideration include:

- Moving out
- No sexual relations

- Separating financial arrangements
- Filing a petition for dissolution
- But neither moving out of the house nor filing dissolution petition is determinative of living separate & apart. Instead look **at all the conduct of the spouses to determine actual date.**

--Cases

- **Baragry:** H moved out & lived on his boat w/ his girlfriend, but he kept up social appearances w/ W, went to social events w/ her, W did his laundry, etc. W wanted to keep the marriage going which is why she still did his laundry. They maintained the facade of a marital relationship. Court said they were not living separate & apart during the time where they preserved the appearance of marriage b/c they both reap its benefits & their earnings remain community property.
- **Hardin:** 14 years passed before H moved out & filed divorce papers. Court held separate & apart started when H moved out b/c they both dated other people, did not attend social events together.
- **Manfer:** Spouses privately decided they were going to get divorced but they kept up social appearances & kept it a secret from their family until after the holidays. Court says we have to look at their words and actions: the question is not what society at large would have perceived, but what the parties subjective intent was as objectively determined from all of the evidence reflecting the parties words and actions during the disputed time.

(c) Separate & Apart Under One Roof: It is possible to be considered living separate & apart while still living under the same roof.

- **Norviel:** Spouses had been sleeping in separate rooms for 4 years but one day H stated his intent to end marriage. H stayed in house for another month. Court said living apart physically is a threshold requirement to separation, but its possible to be physically separated while still living under one roof, but it would take **unambiguous, objectively ascertainable conduct amounting to a physical separation**, just sleeping in separate rooms is not enough.
- **Popescu:** These spouses were deemed to live separate & apart while living under one roof: W sought an order evicting H from the house, she occupied locked separate rooms, didn't speak to him, and called the police when he entered her rooms.
- **Olson:** In March 2000 W filed petition for dissolution. W said date of separation was in Aug.1999, H said it was Sept. 1993. W argued we still live in the same house, but that is not dispositive. Court held that date of separation was Jan 1994 b/c that is when they came to a meeting of the minds to end their relationship: he started to close their joint bank accounts, she moved out of bedroom & slept on couch, they were not speaking & didn't go to social events together. All determined based on their conduct.
- **Neidermann:** W was bipolar but H sticks on & talks to W constantly b/c of their son. He didn't cut the financial ties until much later, even after he told her for the first time that it was over. H was really concerned about the son & was just trying to help W, but he was punished for that to a certain extent.

II. Division at Divorce

(a) At divorce, debts that are unpaid must be divided equally or confirmed to one of the spouses. Court must characterize the liabilities of the parties as either separate or community & then divide them.

- (i) Community debts are divided equally
- (ii) Separate debts are confirmed without offset to the spouse who incurred the debt.
 - A **separate debt** can be incurred during marriage & before separation if the debt was **not incurred for the benefit of the community.**
- (iii) Some debts are excluded from division, like educational loans (assigned to student spouse) and spouse found liable for a tort when not acting for benefit of community (liability is assigned to the tortfeasor spouse without offset).

(b) Debts incurred before marriage belong to the spouse who incurred the debt.

- It is confirmed without offset to the spouse who incurred the premarital debt.

(c) If Debts Exceed Assets: If community debts exceed total community assets, the **excess of debt shall be assigned as the court deems just and equitable**, taking into account factors like the parties' relative ability to pay. This is a deviation from the rule of mandatory equal division.

(d) Debts After Separation: 3 types of debt that can be incurred after spouses separate but before entry of judgement dissolving their marriage is entered:

(1) Common Necessaries-items necessary to sustain life like food, clothing, housing & medical care.

(2) Necessaries-items that are necessary to the spouse's station in life.

(3) Non Necessaries-this is everything else.

- If debt was for the:
 - **Common necessities** of life of **either spouse; OR**
 - **Necessaries** of life of the **children of the marriage,**
= Debt shall be confirmed to **either spouse according to the parties respective needs & abilities to pay** at the time the debt was incurred.
- Debts for **non-necessaries** are confirmed **without offset to the spouse** who incurred the it.
- **After entry of judgement of dissolution but before the divorce is final**, each spouse is **responsible for his or her own debts**, no matter what they are for. Any debt incurred during that time is confirmed without offset to the spouse who incurred it.

PREMARITAL AGREEMENTS

- Premarital agreement must be executed before marriage. If they are executed after marriage, then its a marital agreement & subject to transmutation statue (not PMA Act)
- There is no fiduciary duty owed to each other in a premarital agreement. It's an arm's length transaction, fiduciary duties start w/ the start of marriage.
- **Child support & child custody can NOT** be part of a premarital agreement.
- Agreement should not have provisions that create incentive for one spouse to divorce (like H will give W his house & \$500K OR half of his assets, whichever is greater).

I. PMA's executed BEFORE 1/1/1986 (common law)

(a) PMA must be in writing, except in the following two scenarios:

(1) Modifications or Retractions to PMA: Prior to 1986, evidence of implied modifications or retraction based on oral agreement or conduct are allowed.

(2) Exceptions to Statute of Frauds Requirement

(1) Promissory Estoppel where spouse irretrievably changed her position in reliance on the other spouses promise (*Hall*).

(2) **Fully executed oral agreement** (for example, H orally promised W he would make her the beneficiary on his life insurance, but after marriage he changed the beneficiary to be his children. W argued they had an oral PMA).

(b) Criteria for Valid & Enforceable PMA

(1) Terms do 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 subjective contemplation of the parties.

(3) PMA may deal w/ property rights, **but may NOT waive or limit spousal support.** Spousal support waivers executed before 1986 are not enforceable.

(4) PMA agreement was **entered into freely (voluntarily) without fraud, duress, coercion, or undue influence.**

- Undue influence = taking a grossly oppressive & unfair advantage of another's necessities or distress.

- **Factors RE fraud, duress, coercion, or undue influence**

- (1) **Timing of Signing of PMA**--Immediately before wedding; discussion about it beforehand; atmosphere surrounding signing.

- (2) **Understanding of the PMA**--Age; education; sophistication; prior experience w/ divorce; consultation w/ counsel or opportunity for consultation; vagueness.

- **Cases:**

- **Nelson:** Rich 50 year old real estate broker H extracts one sided PMA from 22 year old pregnant secretary (who faced stigma of having a child out of wedlock). She waived spousal support. Court held yes, there was undue influence.

- **Dawley:** PMA was about mutual separate property clauses & at divorce wife claimed undue influence b/c she was also pregnant. Court held no undue influence b/c she was educated person who sought legal counsel before executing agreement

II. PMA's Executed ON or AFTER 1/1/1986 (Premarital Agreement Act)

(a) General Requirements

(1) PMA must be **in writing AND signed by both parties; and**

(i) Writing requirement is subject to Statute of Frauds exceptions, like estoppel

- **Hall:** H orally promised that if W married him she could live in his house until she died if she gave up job & signed up for social security. She did what he wanted but H died before he gave her life estate. Court held that W's partial performance of the oral agreement was an exception to the SOF (& under promissory estoppel exception to writing requirement W won).

- Scope of *Hall* is limited to where the party performed her part of the bargain and in so doing **irretrievably changed her position.**

- Partial performance of acts typically common in marriage (i.e., just moving to another state w/ spouse) is not enough to be considered irretrievably changing position.

(ii) PMA may be **amended or revoked** only by a written agreement signed by both parties.

(2) PMA must abide by contract law.

- **Parol evidence is not allowed to insert missing terms** in order to make the agreement enforceable, although it is allowed in to interpret existing terms.
- **Shaban**: Parties married in Egypt & divorced in US. H said they had written PMA & submitted 1 page written in Arabic that was about dowry. H unsuccessfully tried to introduce evidence in the form of an expert witness who said the document was enough to show that the marriage was intended to be interpreted by Islamic law, not US law. Court rejected H's argument & said b/c Statute of Frauds applies, the parol evidence is excluded b/c it was offered to establish the substance of the agreement.

(b) Subject Matter of PMA: Proper subjects include:

- (1) **Property** (including all rights thereto)
- (2) **Choice of Law** (separate property versus community property principles)
- (3) Any other matter, including **personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty** (catch all provision).
 - This means **spousal support waivers, executed on or after 1986 are NOT per se unenforceable.**
 - **Pendleton**: Educated H & educated W execute PMA waiving spousal support, both have counsel. Court held that spousal support waivers executed by **intelligent, well educated** persons, each of whom appears to be **self sufficient in property & earning ability**, and both of whom have **advice of counsel** regarding their rights & obligations as marital partners at the time they execute the waiver--**are deemed to not violate public policy and are not per se unenforceable.**

(c) Enforceability of PMA

Two ways to invalidate PMA executed on or after 1/1/86 by the party **against whom enforcement is sought** (i.e., the spouse who is disadvantaged by the PMA & challenges it):

(1) Prove that the PMA was not executed voluntarily. This requires a showing of fraud, coercion or lack of knowledge.

--To determine whether PMA was entered into voluntarily, must consider **Bonds** factors:

- (1) Proximity of execution of the agreement to the wedding
- (2) Surprise from the presentation of the agreement
- (3) Presence or absence of independent counsel or opportunity to consult independent counsel
- (4) Inequality of bargaining power (look at age & sophistication of parties)
- (5) Disclosure of assets
- (6) Understanding & awareness of the intent of the agreement

- **Bonds**: H was pro ball player, W was uneducated Swedish immigrant. Executed PMA waiving interest in earnings of the other party & got married same day. W claimed PMA was not entered into voluntarily. Court held it was voluntary b/c she had reasonable opportunity to retain legal counsel & executed it w/o fraud, coercion or undue influence.

OR

(2) Prove both of the following:

- (1) The agreement was **unconscionable when it was entered into**; **AND**
(2) Before execution, the spouse was not provided with fair & reasonable disclosure of the property or financial obligations of the other party.

- If there was fair & reasonable disclosure, the PMA will be enforced even if it is unconscionable.
- **Note:** Party must not have voluntarily waived in writing his/her right to disclosure of the property or financial obligations AND the party did not have actual or reasonably could not have had adequate knowledge of the property or financial obligations.

III. PMA's Executed on or after 1/1/2002 (amendments to Premarital Agreement Act)

(a) Changes to the Law: Spousal Support Provisions

(1) Spousal support provisions in PMA's will NOT be enforceable unless the party against whom enforcement is sought was **represented by independent counsel at the time the premarital agreement was signed**.

- This will probably not apply retroactively, but it depends on the facts, see below on retroactivity.

(2) **Even if represented by counsel**, spousal support provisions can still be held unenforceable if they are **unconscionable at the time of enforcement** (not the time they are entered into).

- Dismissal of *Rosendale* suggests that the **section about spousal support waivers will apply retroactively to PMA's prior to 1/1/2002** that include a spousal support waiver. See below on retroactivity.

(b) Enforceability of PMA's

Amendments added **new voluntariness factors** (factors 1 & 2 are new w/ 2002 amendment but 3 & 4 are old). Now, a PMA is not deemed to be voluntarily executed unless the **party against whom enforcement is sought**:

(1) **Must have had not less than 7 calendar days** between the time the party was first presented with the agreement & advised to seek independent counsel, and the time the agreement was signed; **and**

(i) But *Cadwell-Faso* suggests **7 day rule applies ONLY to parties that are not represented by counsel**. If both are represented by counsel & you get presented w/ the one & only draft of the PMA 5 days before the wedding & you sign it, then it is voluntary & valid.

(ii) Is 7 day rule retroactive?

- Probably not. If 7 day requirement were applied retroactively, that would mean it was impossible to comply w/ the law in any agreement prior to 2002 b/c the law was not even in existence. So the party who wants to enforce the PMA can argue that he is being deprived of a vested property right (of whatever he was protecting in the PMA) without due process.

(2) Was represented by legal counsel at the time the PMA was signed **OR** after being advised to seek independent legal counsel, **expressly waived representation in a separate writing; and**

- If the party expressly waives their right to counsel in a separate writing, then there are additional requirements for the PMA to be enforceable such as:

(1) The party must be fully informed, IN WRITING, of the terms & basic effect of the premarital agreement, and the rights & obligations she would be giving up by executing it; and

(2) The party must be proficient in the language of the explanation of rights & obligations AND the language of the PMA; and

(3) The party must execute in writing a document declaring that she received the explanation of rights & indicate who provided the information; and

(4) The PMA & all other writings, including the explanation of rights, must NOT have been executed under duress, fraud, or undue influence.

(3) The agreement and the writings were not executed under duress, fraud or undue influence and the parties did not lack capacity to enter into the agreement; **and**

(4) Any other factors the court deems relevant.

- **Cadwell-Faso:** W wanted to sign PMA saying within 10 years of the marriage H would pay off mortgage on her house even if marriage ended, restricted his right to alienate some of his own property, H was to provide for her health care needs for life even if they divorced or he died first, & a spousal support provision. H signed it b/c his attorney told him it would not be enforceable since it would violate 7 day rule (the final draft was signed with less than 7 days before wedding) for voluntariness. Court held it was a valid agreement b/c both parties were *represented* by counsel.

(c) Are the 2002 Amendments Retroactive?

Fellows & FC Section 4(c) say **legislation is considered retroactive unless Legislature makes it prospective** (so when legislature is silent on something, that means it applies retroactively).

- Legislature was silent on issue of retroactivity for 2002 Amendments, so amendments should apply retroactively to PMA's executed before 1/1/2002.

(i) **Rosendale:** Pre-2002 PMA that waived spousal support. Both parties were represented by counsel & PMA was signed shortly before wedding. At time of divorce, W had been gravely injured in accident & argued spousal support waiver was not valid b/c it would be unconscionable at the time of enforcement due to her injuries (this is the rule post-2002, but the rule pre-2002 looked at unconscionability only at time of execution not enforcement). H has 2 arguments (court dismissed the case w/o decision indicating that H would lose):

(1) The 2002 amendments are not retroactive & don't apply to their PMA.

- Court would probably say FC 4(c) (+ *Fellows*) applies, and since legislature was silent, the 2002 amendments are retroactive & apply.

(2) Even if amendments are retroactive, application to their PMA would deprive him of a vested right without due process (b/c he had right to rely on the law as it was when he signed the PMA).

• For due process analysis, court takes into consideration the following:

(1) Significance of the state interest served by the law & the importance of applying the law retroactively to effectuate that interest; and

- State interest is to assure that ex-spouses will receive support if unexpected catastrophic circumstances render them unable to be self sufficient.
- Public policy is that an ex-spouse, not the state should support the spouse who no longer has reasonable means of support.
- Importance of applying law retroactively is that spouses need to be assured that when catastrophe occurs, a PMA will be open to reconsideration at time of divorce.

(2) Extent of the parties' reliance on the former law, the legitimacy of that reliance, the extent of actions taken based on that reliance, & extent that retroactive application of the new law would disrupt those actions.

- Although H has a right to rely on the law as it was, the state policy of supporting incapacitated spouses is so important that he would not be justified in relying on a PMA that waived that right.

(ii) Howell: H agreed to marry only if W signed PMA. H told W she should get a lawyer. W did not get a lawyer & talked it over w/ mom & signed it. At divorce, W argues PMA was not voluntarily signed b/c she did not have legal counsel & the 2002 amendment says she must have had legal counsel for it to be valid. So W argues the 2002 amendment should apply retroactively to her. Court says it does not apply retroactively b/c it was a change in the law & those are usually prospective. But how do we reconcile this w/ *Fellows* which says amendments should be retroactive?

- Court tried to distinguish *Fellows* by saying H in *Fellows* always had the duty to pay child support, they didn't change that, so that's why *Fellows* could apply retroactively.
- On the issue of voluntariness, court in *Howell* seems to be going back & applying *Bonds*. The facts of this case would not be deemed involuntary under *Bonds*.

RIGHTS OF THE UNMARRIED

I. Cohabitants

• *Marvin* is the landmark case for rights of unmarried cohabitants. It decided the following:

(a) No common law marriage in CA.

(b) Unmarried cohabitants' property rights are controlled by judicial decision not statutes.

(c) There are **Property Rights among cohabitants IF (i.e., shared property):**

(1) **There is an Express Contract;** or

- K can be **oral or written** (oral ones are hard to prove)
- K must not be based on meretricious sexual services (i.e. prostitution)

(2) **Implied in Fact Contract/Agreement;** or

(a) Court will examine **conduct of the parties** (their *intentions*) to determine whether they had an **implied contract, agreement of partnership or joint venture, or some other tacit understanding**

(i) Showing a **long-term marital-like relationship** is the best way to prove this (i.e., living together for long time, holding yourselves out as married, having kids, taking joint property, conducting business together); AND

(ii) Courts also require **additional sharing conduct** (like working/doing business together).

Takeaway: If they have no business sharing but they have kids & woman raises kids then that will probably be enough for 'additional sharing conduct'

- But if they have no kids (like the gay couple) then there has to be some additional business conduct between them, just the social aspect of being a confidant will likely not be enough.

(3) **Other Equitable Remedies (like quantum meruit)**

- But these have proven to be a dead end b/c they just don't work.
- Equitable Remedies = Dead End
 - No implied in *law* contracts
 - Constructive/resulting trust require contract.
 - **Quantum Meruit:** QM permits recovery of the **reasonable value of the services rendered minus the reasonable value of the support received.**
 - Most courts reject QM claims b/c party seeking value of services has already received the benefit of the relationship that she was entitled to b/c she lived at higher standard of living when she was w/ him.

- Marvin doctrine applies to same sex couples.
 - Generally, to prove a Marvin claim, try to emphasize the business relationship (not the lover part). In the same sex couple case, one partner alleged he was business partner, chauffeur & lover. He should not have included lover in there b/c that sounds like meretricious sexual services. But the lover part can be **severed out from the rest of the allegations**, so if the rest was an agreement then it is possible to have a Marvin claim.
- Cohabitants are **NEVER entitled to get monetary support** (& will almost never be able to prove an agreement for \$ support) from the other after relationship is over (no spousal support).
 - Even if one partner supports the other partner for a year after they break up, that support does not necessarily indicate an agreement to support for a longer period of time.

Cases

Marvin: Woman alleged they had an oral agreement to share property b/c she gave up her career & became his homemaker. Guy said their relationship was illicit b/c they had sex outside of marriage. **Court held that was not enough to invalidate an agreement relating to property, if the sex can be severed from other considerations, the agreement would stand.** However, the wife could not prove facts about her oral agreement to share property b/c oral K hard to prove.

Cary: Lived together for 8 years, had kids, guy worked woman stayed at home, conducted all business as husband & wife, bought a house. Even if the guy testified that he did not agree to share the property, his conduct contradicted that so court would likely find an implied contract to share all property acquired during marriage (it would be based on conduct separate from their sexual relations).

Alderson: Guy was abusive to woman. She kept saying I was just like his wife. Things they did: buying property & putting it in both names, pooling finances in joint bank account, doing bookkeeping services, etc which are all “additional sharing conduct.” This probably would have been a successful Marvin claim.

Maglica: Man was president of corporation & woman was the secretary (board member) & they were both getting equal salaries. They split & she files a claim for quantum meruit (QM) & implied in fact K. She got \$84 million in trial court for QM but COA overturned it. QM is about compensation for the value of the services, assuming the service was beneficial to the recipient in the first place. And the woman already got the value of her services, through her salary.

II. Putative Spouses

(a) A **proper marriage** in California requires obtaining a marriage license, having a ceremony (to solemnize the marriage), and complying w/ all technical requirements of California law.

(b) A **defect** may render a marriage void or voidable:

(i) **Void Marriage: Incest & Bigamy** (X marrying B while still married to A).

- The second marriage is void even though they complied w/ all requirements b/c it is bigamous.
- No property rights arise from a void marriage.

(ii) **Voidable Marriage:** This is when the marriage has a defect but can become valid by one spouse ratifying the marriage. **If the marriage is voided (i.e., annulled), no property rights arise. If it is ratified, then property rights attach.** Defects that make a marriage voidable are:

- **Fraud:** Being a convicted felon & telling your prison guard wife you're an upstanding citizen. The defrauded spouse can have the marriage annulled (voided) or continue to live w/ you and thereby ratify the marriage.
 - Kind of fraud we're talking about usually has to deal w/ sexual relationship of the parties or something else that goes to core of relationship. The way to look at it is: there will be an annulment if the defrauded spouse says, "if I had known this fact I never would have married this person."
- **Being under the age of consent**
- **Being of unsound mind**
- **Physical Incapacity**

• **Ramirez:** Both void & voidable marriage. There was 1999 marriage & 2000 confidential secret marriage. First marriage happened in CA w/ a Mexican priest & license said it happened in Mexico, so for this reason court held it was VOID. This was a procedural requirement that wasn't followed, & it made it void. In second marriage, it was found that the husband "remarried" the wife for a green card but was having affair w/ her sister. Court said this marriage was voidable for fraud b/c he was sexually dishonest.

(c) Putative Spouse Doctrine (Family Code 2251)

If a marriage is void or voidable & court finds that **either party or both parties believed in good faith that the marriage was valid CA marriage**, court shall declare them putative spouse

(1) Quasi-Marital Property: if they are declared putative spouses, any property that would have been CP if they had been validly married will be treated as CP, but it will be called **quasi marital property**.

(2) Good Faith: The test for good faith is an **Objective Test** which asks **would a reasonable person in that situation think they are validly married**.

(i) To show good faith, there must usually be:

- (1) Attempted compliance w/ procedural requirements** of marriage; and
- (2) Indicia and conduct consistent with marriage;** and
- (3) Belief** in a lawful California marriage.

(ii) But sometimes based on the equities of the case, courts have been willing to grant putative status when the couple didn't comply w/all formal requirements:

• **Santos:** They got just a marriage license, didn't solemnize ceremony & didn't speak english & thought that was enough. Court says their effort was enough.

• **Wagner:** Young couple exchanged personal vows, lived together, had a kid & in one year H was killed. W sued the county as a putative spouse. A reasonable person in her situation (under the objective test) would have known she was not really married b/c there was no attempt to comply w/ procedures of marriage. But court said she had subjective belief in good faith that she was married & she was able to sue county. This is NOT how this case would have come out today b/c not reasonable for her to think she was really married to him (i.e., would fail prongs 1 & 3 above).

• **Centinela/Vyronis:** In both cases they just lived together & made no attempt to get married. Court held they are not putative spouses. Private wedding vows,

change of names, shared bank account, & other conduct as H&W in the absence of some effort to comply w/ formal requirements was insufficient for good faith.

- *Ceja*: Robert filed for divorce from wife 1 in 2001 & Nancy (new girl) knew all about it. In 2003, Nancy & Robert got a marriage license & stated they were never married (lied). Had big wedding. In Nov 2003, Robert signed a declaration re his first divorce. In Dec 2003 judgement of dissolution was finalized & Nancy saw these papers. So Robert & Nancy's marriage was void b/c he was still married when it happened. In 2007 Robert was killed & Nancy argued she was putative spouse. Court said it was an objective test & person in her situation who knew about the prior marriage could not possibly believe she was validly married

(3) Can the *bad faith spouse* share in the earnings of *good faith spouse* & benefit from putative status?

- **Probably Not** b/c purpose of putative spouse doctrine is to protect the innocent spouse.

- *Tejeda*: Answer was yes. All you needed is one spouse to be in good faith to be a putative spouse. Pablo & Petra got married but Petra didn't know Pablo was still married to Margarita (Pablo knew). At dissolution Petra argued that all property acquired was her SP b/c Pablo could not show good faith belief in validity of their marriage. Court held that if either party maintains a good faith belief in the validity of the marriage, putative spouse doctrine applies, regardless of guilt or innocence. Pablo is entitled to half of all quasi-marital property.

- *Guo/Sun*: Seems to say the opposite. Holds that a **party who seeks to be a putative spouse must have an objective good faith belief in the validity of the marriage** (so if you are a bad guilty spouse you don't get to benefit from putative spouse status). The guy is the one in bad faith b/c he knew the prior marriage was not dissolved. But wife didn't claim to be a putative spouse so that the guy wouldn't benefit from her putative spouse status. Court wanted to protect innocent spouse & held that the bad faith spouse couldn't benefit from the good faith spouses putative status. **BUT this is not a general clear cut rule, it is a factual analysis** (must compare & contrast the facts of *Tejeda* & *Guo*).

(4) Putative spouse status ends when the **defect in marriage is discovered** b/c there is **no longer a good faith belief** in the validity of the marriage.

- Property acquired by a spouse after putative status is over belongs to that spouse
- If couple continues to live together after the defect in the marriage is discovered, putative spouse doctrine would apply to the time before they find out about the defect (so there would be quasi marital property during this time). But after they find out about the defect they will be treated like unmarried cohabitants & *Marvin* doctrine will apply to them (& under *Marvin* they will probably be able to show an implied in fact agreement to share property).

(d) Putative Spouses at Death

At death, if a spouse has a **good faith** belief in the validity of the marriage, that spouse attains putative spouse status and **has a right to both quasi-marital property** (her half if it) **and separate property** (part of it if decedent has other heirs) of the decedent.

(i) **Putative surviving spouse has the same rights as a legal spouse** (to both quasi-marital & separate property).

- **Leslie:** H & W have invalid marriage but both in good faith think it's valid. W dies & W's prior kids fight w/ new H over W's property. Court holds H is putative spouse & gets everything her legal H would be entitled to (so both quasi-marital property & separate property of decedent).

(ii) **What if two putative surviving spouses?**

Vargas: Guy leads double life & all his property was accumulated during his time w/ Josephine (the potential putative wife). Mildred was the legal spouse. He dies & wives start fighting over property. Josephine had putative status b/c she thought they were validly married (they had a ceremony, she didn't know anything was wrong, etc). Court in *equity* must do what is **fair in the situation where both legal spouse & putative spouse are innocent parties**, which is to **split the property between them**.

- But as soon as putative spouse loses good faith & finds out about the other wife, she loses putative status & has no more rights to property acquired w/ his earnings after the date she found out.

III. Domestic Partnerships

(a) California Domestic Partner Act (January 1, 2005)

(1) Act should be construed liberally to give DP's same rights as married people to the extent possible by law.

(2) W/ this act domestic partners are now subject to community property laws at both death & dissolution of DP. It is just like marriage.

- **Death:** Upon death of a registered DP, the surviving partner has the same rights, protections, & benefits as a surviving spouse.
- **Termination of Domestic Partnership:** To terminate a DP, must go to court & same court proceedings are applicable as would be to married people.
- **Spousal Support:** DPs have the right to receive & obligation to pay spousal support

(b) **Retroactivity:** Retroactivity issue is whether community property law will apply to property acquired by domestic partners before 1/1/2005.

- **Most likely yes.** It will apply retroactively to **property acquired as of the date of registration of the domestic partnership**, even if it was before 2005, unless it violates due process. Since notice letters were mailed to all domestic partnerships before the 2005 law went into effect, most will argue they were not justified in relying on the old law, so retroactive application does not violate due process.

(c) Requirements for a Valid DP

- (1) File declaration with CA secretary of state.
- (2) Neither person is married to someone else or in a DP w/ someone else.
- (3) They are not related by blood in a way that would prevent them from getting married.
- (4) Both are at least 18 years old.
- (5) Either one of the following:
 - (a) Both persons are members of the same sex; or
 - (b) [If opposite sex] then one or both of them is over the age of 62.

• **Amendments passed in 2012:**

- They are NOT required to have a common residence.
- If under 18, you need to get consent of a parent or an order of the court.

(d) Putative Domestic Partnership Status

Domestic Partners **can get putative status** as long as one of the partners has a reasonable, good faith belief in the validity of the registered DP.

- **Ellis:** Couple signed & notarized the paperwork but it was never filed w/ secretary of state. One partner thought it was valid & filed w/ state. Court held that he should be entitled to putative status as long as he had reasonable, good faith belief in the validity of the DP b/c purpose of the statute is to make DP's have the same rights as married couples.
- **Velez:** Same sex couple registered DP w/city but not w/ state of CA. Court held no putative status is available to them. This is not the law today, *Ellis* is.

List of Dates

- (1) Transmutations---**January 1, 1985**
- (2) Married Women's Special Presumption---**January 1, 1975** (general CP presumption applies to anything on or after 1/1/75).
- (3) Joint Tenancy (Characterization & Reimbursement)---**January 1, 1984**
- (4) Community Property (Characterization Agreement to Rebut)---**January 1, 1987**
 - Reimbursement: 1984 OR 1984-1986 OR after 1987
- (5) CP with right of survivorship---**July 1, 2001**
- (6) Improvements to SP & reimbursement---**January 1, 2005**
- (7) Duty to Disclose CP transactions to Other spouse w/o demand---**January 1, 2003**
- (8) Premarital Agreement Act---**January 1, 1986**
- (9) Amendment to PMA Act---**January 1, 2002**
- (10) Domestic Partnership Act---**January 1, 2005**