

CALIFORNIA JUDGES BENCHGUIDES

**Benchguide 202**

**PROPERTY CHARACTERIZATION  
AND DIVISION**

[REVISED 2014]



ADMINISTRATIVE OFFICE  
OF THE COURTS

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JUDICIAL AND COURT OPERATIONS  
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# PROPERTY CHARACTERIZATION AND DIVISION

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#### **APPENDIX: MOORE/MARSDEN WORKSHEET**

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#### **TABLE OF CASES**

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This benchguide provides an overview of characterization of property for purposes of dividing it on marital dissolution and dissolution of registered domestic partnership.

This benchguide also provides an overview of valuation and division of community property on terminations of marriage and registered domestic partnership.

### **II. MARRIAGE AND DOMESTIC PARTNERSHIPS**

#### **A. [§202.2] Marriage Defined**

Marriage is a personal relationship arising out of a civil contract between two consenting persons. For a marriage to be legal the parties must have a valid marriage license. *Marriage of Left* (2012) 208 CA4th 1137, 146 CR3d 181.

Marriage is legal in California for both opposite and same-sex couples due to the landmark decision by the United States Supreme Court, *Hollingsworth v Perry* (2013) \_\_\_ US \_\_\_, 133 S Ct 2652, 186 L Ed 2d 768. As a result of this decision, Proposition 8, an amendment to the California Constitution passed by voters in 2008 prohibiting marriages by same-sex couples, was permanently enjoined from enforcement. As of

June 28, 2013, validly contracted same-sex marriages from other states are valid as marriages in California with all its rights, protections, benefits, and obligations.

Additionally, same-sex spouses are now recognized by federal law. *U.S. v Windsor* (2013) \_\_\_ US.\_\_\_, 133 S Ct 2675, 186 L Ed 2d 808.

### **B. [§202.3] Domestic Partners Receive Same Rights and Responsibilities as Spouses Under California Law**

The California Domestic Partner Rights and Responsibilities Act of 2003 extends to registered domestic partners the same rights, protections, benefits, and obligations that apply to spouses under California law both during and on termination of the union. Fam C §297.5. California laws governing the dissolution, nullity, or legal separation of marriage apply to the dissolution, nullity, or legal separation of a domestic partnership. Fam C §299(d).

Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring. Fam C §297(a). A domestic partnership is established by filing a Declaration of Domestic Partnership with the Secretary of State. Fam C §297(b). The following requirements must be met at the time of filing (Fam C §297(b)):

- Neither person is married to anyone else;
- Neither person is in a domestic partnership with anyone else;
- The two persons are not related by blood in a way that would prevent them from being married in this state;
- Both are at least 18 years old;
- Both persons are members of the same sex or are over 62 years of age; and
- Both persons are capable of consenting to the domestic partnership.

Any reference to the date of a marriage is deemed to refer to the date of the registration of a domestic partnership. Fam C §297.5(k)(1).

### **C. [§202.4] No Federal Recognition of Domestic Partnerships— Tax Implications**

Although California law treats domestic partners the same as married spouses in terms of their legal rights, protections, benefits, and obligations upon dissolution of partnership, federal law does not. Federal law does not recognize domestic partnerships. The following are some examples of how this discrepancy complicates characterization and division issues in dissolution cases.

In California the earnings of a domestic partner are considered to be community property and equally owned by the other domestic partner. The federal government, which does not recognize domestic partnerships, also does not recognize these earnings as community property. They remain the separate property of the earning partner. Therefore, if these earnings are turned over to the other partner, they are considered a gift by the Internal Revenue Service and are subject to the federal gift tax if over a certain amount.

Another example is seen in a situation in which long-term domestic partners, upon dissolution, present the court with a separate property house toward which payments had long been made with the earnings of the individuals during the course of the partnership. The partnership may have a community interest in the increased value of the property based on reduction of the principle. The court would allocate the appropriate portion of the increased value to the community. If, after that, the house has to be sold, the partner who owns the house as his or her separate property would be exposed to federal tax liability on all of the capital gains (the increased value of the house) plus federal gift tax on the amounts allocated to the other partner.

A final example of federal tax pitfalls upon dissolution of a state domestic partnership involves federal gift tax liability on real property transfers. California law allows domestic partners to transfer real property to each other without incurring state taxes. *Strong v State Board of Equalization* (2007) 155 CA4th 1182, 1186, 66 CR3d 657. But the transfer of equity in real property to a domestic partner may incur substantial federal gift tax exposure.

- **JUDICIAL TIP:** All of these tax consequences may be sufficiently immediate, specific, and in connection with the dissolution of the partnership so that the court can allocate the tax obligation in the division or valuation of the assets.

### III. CHECKLISTS

#### A. [§202.5] Checklist: Parties' Agreement

(1) *Determine whether there was a premarital agreement as to the status of any property owned by the spouses.* If there was, determine whether the statutory requirements for validity have been met (Fam C §§1600-1617; see §§202.58-202.67):

- Writing;
- Counsel or waiver of counsel;
- If unrepresented by counsel, written explanation of terms and basic effect; and

- Seven days between presentation of agreement with advice to seek counsel and execution.

(2) *Determine whether there was a postnuptial agreement as to the status of any property owned by the spouses.* If there was, determine whether the statutory requirement of a writing has been met. Fam C §§850–852; see §§202.59–202.60.

(3) *Determine whether the parties have agreed as to the status of property in their filed forms: Judicial Council Forms FL-142, Schedule of Assets and Debts; FL-160, Property Declaration.* Compare their characterization of assets in the filed forms to determine if they have agreed.

### **B. [§202.6] Checklist: Assets To Be Characterized**

(1) *Determine whether there is any quasi-community property.* Fam C §125; see §202.11.

(2) *Determine whether the spouses, or either of them, own real property.* If they do, determine whether the property is community or separate based on any agreement between the spouses (see §§202.58–202.67), title to the property (see §§202.14–202.15), or time of acquisition (see §202.13).

(3) *Determine what personal property is owned by the spouses, including:*

- Bank accounts and cash;
- Stocks, bonds, and secured notes;
- Accounts receivable, unsecured notes, tax refunds;
- Vehicles, boats, and trailers;
- Life insurance;
- Jewelry, antiques, art, coin collections, etc.;
- Household furniture, furnishings, and appliances; and
- Equipment, machinery, livestock.

(4) *Determine whether the personal property is community or separate based on any agreement between the spouses* (see §§202.58–202.67), *title to the property* (see §§202.14–202.15), *or time of acquisition* (see §§202.20–202.35).

(5) *Determine whether there is any property that is commingled separate and community property.* If there is, determine whether any of the property can be traced to separate property (see §§202.40–202.42).

(6) *Determine whether there are any personal injury damages.* If there are, determine whether they are community or separate property (see §202.24).

(7) *Determine whether either spouse has any employment benefits including:*

- Accrued wages;
- Accrued vacation pay;
- Pension rights;
- Disability pay;
- Workers' compensation benefits;
- Retirement accounts, including 401(k) accounts and IRAs;
- Stock options or rights;
- Medical insurance rights;
- Disability benefits; and
- Rights on termination.

(8) *Determine the respective community and separate interests in the employment benefits (see §§202.43–202.57).*

(9) *Determine whether either spouse or both spouses own a business or professional practice. If they do, determine the respective community and separate interests (see §§202.94–202.97).*

(10) *Determine whether either or both spouses have any outstanding liabilities. If there are liabilities, determine the respective community and separate interests (see §§202.151–202.157).*

### **C. [§202.7] Checklist: Characterization, Valuation, and Division**

(1) *Determine the community assets to be divided (see §§202.8–202.10). See Characterization Checklist for list of potential assets.*

(2) *Determine whether there are any community debts to be assigned (see §§202.151–202.157).*

(3) *Determine whether there is any separate property that is requested to be confirmed to either spouse as separate property (see §202.104).*

(4) *Determine whether the parties have requested that any jointly held separate property be divided (see §202.112).*

(5) *If one of the assets is a corporation or partnership, determine whether there are any other title owners within the partnership or other shareholders in the corporation.*

(6) *Determine whether the parties have agreed to the division of the assets (see §202.105).*

(7) *Determine whether any of the other exceptions to the equal division requirement are applicable (see §§202.105–202.111).*

(8) *Determine time of valuation* (see §§202.84–202.86). Date of trial is used unless the court determines that an alternative valuation date be used.

(9) *Determine whether there are any valuation issues that should be bifurcated and tried before other issues* (see §202.83).

(10) *Determine the value of each asset to be divided* (see §§202.87–202.102).

(11) *Determine the amount of each liability to be divided.*

(12) *Determine whether there were separate property contributions to community property that must be reimbursed to the party who made the contribution* (see §§202.163–202.168).

(13) *Determine whether there was separate property used for community expenses after separation that must be reimbursed to the party who made the contribution* (see §§202.174–202.175).

(14) *Determine whether there was community property used to pay separate property obligations that must be reimbursed to the community* (see §202.176).

(15) *Determine whether the parties will agree to some nonjudicial method of dividing any of the community property* (see §202.124).

(16) *Determine the total value of the community estate (assets and liabilities) and award one-half of the total to each party by in-kind distribution, asset distribution, sale and division of proceeds, or a combination thereof* (see §§202.114–202.116).

(17) *Confirm debts incurred before marriage and after separation to the party that incurred them* (see §§202.151–202.157).

## **IV. CHARACTERIZATION OF PROPERTY**

### **A. Definitions**

#### **1. [§202.8] Characterization**

Characterization of property, for the purpose of community property law, refers to the process of classifying property as community, quasi-community, or separate. Property must be characterized to determine the rights and liabilities of the parties with respect to a particular asset or obligation and as the first step toward the division of property on marital dissolution. *Marriage of Haines* (1995) 33 CA4th 277, 291, 39 CR2d 673.

#### **2. [§202.9] Community Property**

Community property is real and personal property, wherever situated, acquired by a married person during the marriage while domiciled in California. Fam C §760.

This includes property outside of the state. Cal L Rev Comment to Fam C §760.

The respective interests of a husband and wife in their community property during the marriage are present, existing, and equal interests. Fam C §751.

### **3. [§202.10] Community Property With Right of Survivorship**

A husband and wife may hold property as community property with a right of survivorship. Fam C §750. On the death of one of the spouses, such property passes to the survivor, without administration, under the terms of the instrument, subject to the same procedures as property held in joint tenancy. CC §682.1(a).

The transfer must expressly declare the document to be community property with right of survivorship, and it may be accepted in writing on the face of the document by a statement signed or initialed by the grantees. CC §682.1(a).

Before the death of either spouse, the right of survivorship may be terminated under the same procedures by which a joint tenancy may be severed. CC §682.1(a). The community property with a right of survivorship provisions is not, however, applicable to a joint account in a financial institution to which Prob C §5100 applies. CC §682.1(b).

This provision was operative on July 1, 2001, and applies to instruments created on or after that date. CC §682.1(c).

### **4. [§202.11] Quasi-Community Property**

“Quasi-community property” means all real or personal property, wherever situated, acquired in any of the following ways (Fam C §125):

- By either spouse while domiciled elsewhere that would have been community property if the spouse who acquired the property had been domiciled in California at the time of its acquisition.
- In exchange for real or personal property, wherever situated, that would have been community property if the spouse who acquired the exchanged property had been domiciled in California at the time of its acquisition.

To constitutionally apply the California quasi-community property statute to parties domiciled elsewhere, two conditions must be met (*Addison v Addison* (1965) 62 C2d 558, 567–569, 43 CR 97; *Marriage of Roesch* (1978) 83 CA3d 96, 106–107, 147 CR 586):

- (1) Both parties must have changed their domicile to California; and
- (2) Subsequent to the change of domicile, the spouses must seek legal alteration of their marital status in California.

Thus, when one party did not move to California, the court did not have jurisdiction over out-of-state property that was separate property in the other state. 83 CA3d at 106–107.

### 5. [§202.12] Separate Property

Separate property of a married person is property acquired:

- Before marriage (Fam C §770(a));
- By gift, bequest, devise, or descent (Fam C §770(a));
- After separation (Fam C §771(a)); or
- After entry of a judgment of legal separation of the parties (Fam C §772).

Except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other. Fam C §752.

## B. Presumptions From Title

### 1. [§202.13] Presumption From Acquisition During Marriage

The Fam C §760 provision that property acquired during marriage is community property creates a presumption that property acquired during marriage by either spouse other than by gift or inheritance is community property unless traceable to a separate property source. *See v See* (1966) 64 C2d 778, 783, 51 CR 888; *Marriage of Haines* (1995) 33 CA4th 277, 289–290, 39 CR2d 673. This is a rebuttable presumption affecting the burden of proof; it can be overcome by the party contesting community property status. Because it is not a title presumption, virtually any credible evidence may be used to overcome it, including (*Marriage of Haines, supra*):

- Tracing the asset to a separate property source,
- Showing an agreement or clear understanding between the parties regarding ownership status, or
- Presenting evidence that the item was acquired by a gift.

Case law is inconsistent on whether the presumption must be overcome by clear and convincing proof, or merely by a preponderance of the evidence. The court in *Marriage of Ettefagh* (2007) 150 CA4th 1578, 1584–1591, 59 CR3d 419, conducted a careful analysis of the case law and concluded that a preponderance of the evidence is all that is required.

## 2. [§202.14] Presumption From Form of Title

There is also a rebuttable common law presumption that the ownership interest in property is as stated in the title. Evid C §662; *Marriage of Lucas* (1980) 27 C3d 808, 813, 166 CR 853.

This presumption applied when a wife executed a quitclaim deed transferring all her rights in the home to her husband with full knowledge of the legal consequences. *Marriage of Broderick* (1989) 209 CA3d 489, 496, 257 CR 397.

It also applied when, during their marriage, a husband agreed that his wife would take title to a home solely in her name, triggering the presumption that the home was the wife's separate property. *Marriage of Brooks & Robinson* (2008) 169 CA4th 176, 190, 86 CR3d 624. This presumption may be rebutted only by clear and convincing proof. Evid C §662. The presumption is overcome by evidence of an agreement or understanding between the parties that the interests were to be otherwise. It cannot be overcome (*Marriage of Lucas, supra*, 27 C3d at 813–814):

- Solely by evidence as to the source of the funds used to purchase the property; or
- By testimony of a hidden intention not disclosed to the other grantee when the conveyance was executed.

If spouses separate, make an agreement to treat property as separate, and then later reconcile, that reconciliation does not annul their agreement that the property become separate. There must be a clear indication that, by reconciling, the parties intended to annul the agreement and to restore their earlier property rights. Such intent can be proven, for example, by destruction of the document containing the agreement, execution of reconveyances, or restoration of the control of the property to one whom formerly exercised it. *Marriage of Broderick* (1989) 209 CA3d 489, 497, 257 CR 397.

When an interspousal transfer advantages one spouse, there is a presumption that the transaction was induced by undue influence. Fam C §721; *Marriage of Haines* (1995) 33 CA4th 277, 301–302, 39 CR2d 673; *Marriage of Fossum* (2011) 192 CA4th 336, 345–346, 121 CR3d 195. The presumption of undue influence prevails over the presumption in favor of record title, in Evid C §662, to promote the policy of protecting spouses and also because the presumption of undue influence is more specific. *Marriage of Delaney* (2003) 111 CA4th 991, 996–998, 4 CR3d 378.

When the presumption of undue influence arises, the initial burden of proof is on the advantaged party to show that the transfer was not in violation of fiduciary duties. If the burden is not met, the presumption of undue influence prevails and the transfer is set aside. *Marriage of Haines, supra*, 33 CA4th at 297.

### 3. [§202.15] Presumption From Acquisition During Marriage Supersedes Common Law Form of Title Presumption

When in conflict, the presumption that property acquired during marriage by either spouse, other than by gift or inheritance, is community property unless traceable to a separate property source overrides the common law presumption that an ownership interest in property is as stated in the title. See *Marriage of Dekker* (1993) 17 CA4th 842, 848 n8, 21 CR2d 642 (trial court erred by not applying the statutory community property presumption, as opposed to the common law form of title presumption, to stock acquired during marriage in the name of one spouse only).

- JUDICIAL TIP: The California Supreme Court has granted review in *Marriage of Valli* (\$193990) which addresses whether the Court of Appeal erred in concluding that an insurance policy on the husband's life was the wife's separate property on dissolution of the marriage, even though the policy was purchased during the marriage and the premiums prior to the couple's separation were paid with community funds, because the policy listed the wife as the owner.

### 4. [§202.16] Presumption for Property Acquired in Joint Form During Marriage

Property acquired by the parties during marriage in joint form, including property held

- in tenancy in common,
- joint tenancy, or tenancy by the entirety, or
- as community property,

is presumed to be community property. Fam C §2581. This presumption is applicable only for the purpose of division of property or legal separation of the parties. Fam C §2581

Property is “acquired during marriage” when title to separate property is changed to a joint form during marriage, even though the title was changed to joint tenants as a lender requirement of refinancing. *Marriage of Neal* (1984) 153 CA3d 117, 123–124, 200 CR 341, disapproved on other grounds in 39 C3d 751, 763 n10 and 41 C3d 440, 451 n13.

This presumption affects the burden of proof. It may be rebutted only by either (Fam C §2581):

- A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property; or
- Proof that the parties made a written agreement that the property is separate property.

Neither tracing nor oral or implied agreements are sufficient to rebut the presumption. *Marriage of Haines* (1995) 33 CA4th 277, 291, 39 CR2d 673. However, the person contributing the separate property may be entitled to a reimbursement under Fam C §2640.

If the property was acquired in joint form before January 1, 1984, the effective date of the predecessor to Fam C §§2581, 2581 cannot be applied retroactively to property acquired before its effective date and requires a writing to overcome the presumption of community property. *Marriage of Buol* (1985) 39 C3d 751, 754, 218 CR 31.

#### **5. [§202.17] Community Property Presumption for Joint Bank Accounts**

If parties to a joint bank account are married to each other, their net contribution to the account is presumed to be and remain their community property. This presumption applies whether the deposit agreement describes the parties as married. Prob C §5305(a).

“Account” means a contract of deposit of funds between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement. Prob C §5122(a).

This presumption affects the burden of proof. It may be rebutted by proof of either of the following (Prob C §5305(b)):

- The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that the sums be their community property, or
- The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

#### **6. [§202.18] Bank Account Described as Community Property**

If the parties to an account are married to each other and the account is expressly described in the account agreement as a “community property” account, the ownership of the account during the lifetime and after the death of a spouse is governed by the law governing community property generally. Prob C §5307.

There is an exception if the terms of the account or deposit agreement expressly provide otherwise. Prob C §5307.

### **7. [§202.19] Presumptions for Property Acquired by Married Woman Before 1975**

If a married woman acquired property by a written instrument before January 1, 1975, the following presumptions apply regardless of any change in her marital status after acquiring the property (Fam C §803):

- If acquired by the married woman alone, the property is presumed to be her separate property.
- If acquired by the married woman and any other person, the married woman is presumed to take the part acquired by her as tenant in common, unless a different intention is expressed in the instrument.
- If property is acquired by a husband and wife by an instrument in which they are described as husband and wife, the presumption is that the property is the community property of the husband and wife, unless a different intention is expressed in the instrument.

As a presumption based on title to the property (Evid C §662), the presumption is overcome only by clear and convincing evidence that the parties had a contrary agreement. *Marriage of Fabian* (1986) 41 C3d 440, 446, 224 CR 333.

## **C. Time of Acquisition**

### **1. [§202.20] Property Acquired Before Marriage**

Separate property of a married person includes all property owned by the person before marriage. Fam C §770. The rents, issues, and profits of property owned by the person before marriage are also separate property. Fam C §770(a).

Property earned before marriage but received during the marriage, such as a veteran's educational benefits earned before marriage by service in the armed forces but received after leaving the service and marrying, remain that person's separate property. *Marriage of Shea* (1980) 111 CA3d 713, 716–717, 169 CR 490. See also *Marriage of Green* (2013) 56 C4th 1130, 1138, 1142, 158 CR3d 247, which held that military service credits purchased with community funds during the marriage based on pre-marriage military service are the husband's separate property because the right to the retirement benefits accrued during his military service, prior to the marriage. However, the wife was entitled to reimbursement for one-half of the community funds used to purchase the credits, plus interest.

The same is true for property purchased before the marriage, such as private disability insurance, but whose benefits were received during the marriage. Purchasing the insurance policy before the marriage fixes its character as separate property. The fact that the spouse receives the disability benefits during marriage is irrelevant. *Marriage of Rossin* (2009) 172 CA4th 725, 736–737, 91 CR3d 427.

However, if premium payments are made on the disability insurance policy during the marriage, the community may acquire an interest in the benefits. 172 CA4th at 738–739.

## **2. [§202.21] Property Acquired During Marriage**

All real or personal property, wherever situated, that is acquired by a married person during the marriage while domiciled in California is community property. Fam C §760.

Rents, issues, and profits of property acquired during marriage are considered community property. Fam C §760.

As a general rule, the character of the title depends upon whether the parties were married when the property was acquired. Property to which one spouse acquires an equitable right before marriage is separate property, even though the right is not perfected until after marriage. *Giacomazzi v Rowe* (1952) 109 CA2d 498, 500–501, 240 P2d 1020. Thus, when a lease of real property is executed before marriage, it is separate property, and renewal of the term by exercise of an option to extend during marriage does not make the property community. *Marriage of Joaquin* (1987) 193 CA3d 1529, 1532–1533, 239 CR 175.

If the parties were married more than once, the property acquired during an earlier marriage is not property acquired during marriage for purposes of division of property in the most recent marriage. *Fredericks v Fredericks* (1991) 226 CA3d 875, 878, 277 CR 107.

A community's right to partnership distributions is based on when the partner's efforts gave rise to his or her share of the profits. The focus is on when the services were performed rather than when the payment was received. *Marriage of Foley* (2010) 189 CA4th 521, 528, 117 CR3d 162.

### **a. [§202.22] Community Payments on Separate Property Acquired During Marriage**

When community funds are used to make payments to acquire separate property, the community receives a proportionate interest in the property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds. *Marriage of Moore* (1980) 28 C3d 366, 371–372, 168 CR 662.

The separate property interest is credited with any prenuptial appreciation. *Marriage of Marsden* (1982) 130 CA3d 426, 438–439, 181

CR 910. These guidelines are sometimes referred to as the “*Moore/Marsden*” rule. For a breakdown of the *Moore/Marsden* formula, see the Appendix.

Amounts paid for interest, taxes, and insurance are excluded when calculating the separate and community interests because they do not contribute to the capital. The amount of a loan taken to secure the property is a separate property contribution if it was secured by separate assets, or a community property contribution if secured by community assets. *Marriage of Moore, supra*, 28 C3d at 372–373.

**b. [§202.23] Community Efforts Toward Separate Property: Apportioning Earnings and Profits Between Separate and Community Income**

Because income arising from a spouse’s skill, efforts, and industry is community property, the community should receive a fair share of profits that derive from a spouse’s devotion of more than minimal time and effort to the handling of his or her separate property. Profits must be apportioned not only when the spouse conducts a commercial enterprise but also when he or she invests separate funds in real estate or securities. *Beam v Bank of America* (1971) 6 C3d 12, 17, 98 CR 137.

For a description of the two approaches to apportioning earnings between separate and community income, see §§202.36–202.39.

- ☛ **JUDICIAL TIP:** The court should consider the spouse’s level of activity in handling or managing the investment property, including the reasonable value of those services.

**c. [§202.24] Community Estate Personal Injury Damages Awarded to Injured Party Without Offset**

If a cause of action for damages for personal injuries arose during the marriage, money and other property received or to be received by a married person is community property if it was either (Fam C §780):

- In satisfaction of a judgment for damages for personal injuries, or
- Pursuant to an agreement for the settlement or compromise of a claim for such damages.

Such proceeds are community property even when they are received after the separation. *Marriage of Saslow* (1985) 40 C3d 848, 857, 221 CR 546.

If the cause of action, however, arose after the entry of judgment of dissolution of a marriage or legal separation of the parties, or while either spouse, if he or she is the injured person, is living separate from the other spouse, the damages are separate property (Fam C §781).

Although personal injury damages are characterized as community property, the court must assign these “community estate personal injury

damages” to the injured party unless the court determines that the interests of justice require another disposition after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case (Fam C §2603(b)). If another disposition is required, the court must assign the damages to the respective parties in such proportions as is deemed just, but the court must assign at least one-half of the damages to the injured party (Fam C §2603(b)).

The treatment of these damages is unique to the Family Law Act in that they are held as community property during marriage, but upon dissolution, they are assigned to the injured party. *Marriage of Delvin* (1982) 138 CA3d 804, 807, 189 CR 1. These damages are an exception to the equal division requirement, and no offsetting award of other community property may be made. *Marriage of Jacobson* (1984) 161 CA3d 465, 473–474, 207 CR 512.

The only time proceeds from a personal injury award lose their character as community property personal injury damages is, in the absence of an express agreement, when such proceeds have been commingled with other community property and it is impossible to trace the source of the property or funds. *Marriage of Delvin, supra*, 138 CA3d at 810; Fam C §2603(a).

### 3. [§202.25] Earnings While Living Separate and Apart

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse. Fam C §771(a). See also *Marriage of Green* (1989) 213 CA3d 14, 20–21, 261 CR 294 (the earnings on a small business after separation are typically awarded to the operator spouse as separate property).

“Earnings” is broader in scope than “wages” or “salary.” They can encompass income derived from carrying on a business as a sole proprietor when the earnings are the fruit or award for the labor and services without the aid of capital. *Marriage of Imperato* (1975) 45 CA3d 432, 437, 119 CR 590. “Accumulations” means any property that a person acquires and retains, without regard to the means by which it is obtained. *Union Oil v Stewart* (1910) 158 C 149, 156, 110 P 313.

#### a. [§202.26] Living Separate and Apart Defined

“Living separate and apart” means that the parties’ physical separation is a result of a breakdown in the marital relationship. To determine that the parties are living separate and apart, the court must find that (*Marriage of Norviel* (2002) 102 CA4th 1152, 1158–1162, 126 CR2d 148; *Marriage of Manfer* (2006) 144 CA4th 925, 928, 50 CR3d 785):

- At least one spouse entertained the subjective intent to end the marriage; and
- There is objective evidence of conduct furthering that intent, which must include living apart physically.

The question is what the parties' subjective intent was, as "objectively determined from all of the evidence reflecting the parties' words and actions during the disputed time." *Marriage of Manfer* (2006) 144 CA4th 925, 928, 50 CR3d 785, citing *Marriage of Hardin* (1995) 38 CA4th 448, 452–453, 45 CR2d 308.

The date of separation occurs when either of the parties does not intend to resume the marriage and his or her actions bespeak the finality of the marital relationship. *Marriage of Hardin* (1995) 38 CA4th 448, 451, 45 CR2d 308. The conduct must evidence a complete and final break in the marital relationship. *Marriage of von der Nuell* (1994) 23 CA4th 730, 736, 28 CR2d 447.

The fact that the husband and wife live in separate residences is not determinative if there is no evidence that the parties came to a parting of the ways with no present intention of resuming marital relations. *Marriage of Baragry* (1977) 73 CA3d 444, 448, 140 CR 779. For example, even after the husband moved out, the spouses were not "living separate and apart" when the parties' conduct did not evidence a complete and final break in the marital relationship. After he moved out, the parties maintained joint checking accounts, credit cards, and tax returns, and took title to an automobile jointly. Husband maintained close contact with wife including frequent visits to the home. He took wife on vacations, they went out socially, sent cards and gifts on special occasions and holidays, and continued having sexual relations. Husband continued to contribute financially to the community, and they attempted to reconcile. *Marriage of von der Nuell, supra*, 23 CA4th at 736. Along those same lines, parties were not "living separate and apart" after a decision to separate when they still lived in the same house while the husband took steps to prepare another house for his occupancy. *Marriage of Norviel, supra*, 102 CA4th at 1158–1162. The First District Court of Appeal, however, held that the parties were "living separate and apart" while living in the same house for five years before the wife moved out. *Marriage of Davis* (2013) 220 CA4th 1109, 163 CR3d 695. The date of separation was determined to be when strict segregation of the parties' individual finances had been imposed, and the parties "...had essentially become roommates and coparents, maintaining separate finances and cooperating only to the extent necessary to maintain the household and cover their children's expenses." 220 CA4th at 1120.

**☛ JUDICIAL TIPS:**

- The California Supreme Court has taken up on review the *Marriage of Davis* case (S215050) to determine whether, for the purpose of establishing the date of separation under Fam C §771, a couple may be “living separate and apart” when they live in the same residence.
- It may be useful to bifurcate the issue of date of separation and try the issue separately. Often, determining the date of separation clarifies the economic impact and identifies both the extent and value of the community property or separate property estate.

The burden of proof on the issue of the date of legal separation is the preponderance of evidence standard. *Marriage of Peters* (1997) 52 CA4th 1487, 1490–1492, 61 CR2d 493.

**b. [§202.27] Spouse’s Efforts to Increase Community Property After Separation**

When a spouse applies skill, efforts, and industry to increase community assets after separation, the apportionment formulas of *Pereira* and *Van Camp* must be applied in reverse. *Marriage of Imperato* (1975) 45 CA3d 432, 438, 119 CR 590.

The *Pereira* approach apportions a fair return of the increase to the community property, and the excess is the spouse’s separate property. The *Van Camp* formula determines the reasonable value of spouse’s services (less the draws or salary taken) and apportions this additional sum, if any, to spouse as his or her separate property and the balance of the increase to community property.

For more discussion of the two approaches to apportioning earnings and profits between separate and community income, see §202.37

**c. [§202.28] Personal Injury Damages**

The money and other property received or to be received by a person in satisfaction of such a judgment, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is separate property if the cause of action for the personal injury damages arose either (Fam C §781(a)):

- After the entry of a judgment of dissolution of a marriage or legal separation of the parties, or
- While either spouse, if he or she is the injured person, is living separate from the other spouse.

See *Marriage of Klug* (2005) 130 CA4th 1389, 1398–1403, 31 CR3d 327 (settlement proceeds from a legal malpractice lawsuit are injured spouse’s

separate property when the cause of action arises after separation; two elements of cause of action, duty and breach, occurred during marriage, but spouse did not sustain any loss or injury cognizable as damages until after separation).

If one spouse has a cause of action against the other spouse that arose during marriage, money or property paid or to be paid by one spouse to the party's spouse in satisfaction of a judgment of damages for personal injuries to that spouse or pursuant to a settlement agreement is the separate property of the injured spouse. Fam C §781(c).

There are special allocation rules for personal injury damages. See §202.108. For discussion of reimbursement of separate and community property used to pay expenses connected with the personal injuries, see §202.177.

#### **d. [§202.29] Causes of Action**

A cause of action filed during marriage and based on a right accrued during marriage is community property even though the proceeds may be received after separation. *Marriage of Biddle* (1997) 52 CA4th 396, 400, 60 CR2d 569.

#### **e. [§202.30] Acquired by Credit Purchase**

The character of property acquired on credit is determined by the seller's intent to rely on the separate property of the purchaser or on a community asset. *Gudelj v Gudelj* (1953) 41 C2d 202, 210, 259 P2d 656. Thus, if a purchase during marriage is secured solely by separate property, the purchased property is separate. *Estate of Abdale* (1946) 28 C2d 587, 592, 170 P2d 918. Property purchased during marriage by a loan secured by the property is community property. Property acquired by loans secured by the personal credit of either spouse during marriage is also community property. *Bank of California v Connolly* (1973) 36 CA3d 350, 375, 111 CR 468.

In the absence of evidence tending to prove that the seller "primarily relied" on the purchaser's separate property in extending credit, the presumption that property acquired during marriage is community is applicable. *Gudelj v Gudelj, supra*. A more recent case stated that the proper standard is whether the lender "solely" relied on separate property to rebut the community property presumption. *Marriage of Grinius* (1985) 166 CA3d 1179, 1186–1187, 212 CR 803.

- **JUDICIAL TIP:** Even though a loan is secured by separate property, the lender may actually be relying on the community income stream rather than the security of separate property. See *Marriage of Aufmuth* (1979) 89 CA3d 446, 455–456, 152 CR 668, disapproved on other grounds in 27 C3d 808, 813 n2.

When property is acquired by a postseparation loan secured by community property, the property is community. Only if the postseparation loan is unrelated to the community are its proceeds separate property. *Marriage of Stephenson* (1984) 162 CA3d 1057, 1085, 209 CR 383.

**f. [§202.31] Copyrights**

A copyright on a literary work produced during the marriage is divisible community property as is the underlying artistic creation. *Marriage of Worth* (1987) 195 CA3d 768, 773–775, 241 CR 135.

- **JUDICIAL TIP:** Licensing agreements and cash flow from copyright are property subject to division. The revenue from the licensing agreement will follow the characterization from the copyright or patent itself.

**g. Life Insurance**

**i. [§202.32] In General**

A life insurance policy purchased with community assets, or earned during marriage in the case of employer-provided coverage, is community property. *New York Life Ins. Co. v Bank of Italy* (1923) 60 CA 602, 214 P 61. The community interest in the proceeds is subject to the general rule that a spouse cannot make a gift of, or dispose of, community personal property without fair and reasonable compensation or the other spouse's written consent. Fam C §1100(b). See *Grimm v Grimm* (1945) 26 C2d 173, 175, 157 P2d 841.

If both community and separate funds have been used to acquire a policy, the community and separate property interests in the proceeds must be apportioned between community and separate property in the same ratio that the amount of premiums paid from community earnings bore to the amount of premiums paid from separate property. *Biltoft v Wootten* (1979) 96 CA3d 58, 60–62, 157 CR 581.

For a discussion of the characterization of proceeds from a term life insurance policy, see §202.33.

**ii. [§202.33] Term Life Insurance: Split of Authority**

Term life insurance, which has no cash surrender value, pays its specified benefits upon the death of the insured during the term of the policy. There is a split in authority regarding the community character of term life insurance.

- *No Cash Value.* The Second District Court of Appeal held that term life insurance is not property subject to division. The court reasoned that if the policy proceeds have not been paid, the term

policy has no cash value that can be divided. *Marriage of Lorenz* (1983) 146 CA3d 464, 468, 195 CR 237.

- *Economic Value Approach*. The Fourth District disagreed with the *Lorenz* case, and held that term insurance has an economic value subject to division. *Marriage of Gonzalez* (1985) 168 CA3d 1021, 1023–1026, 214 CR 634. To properly determine the value of a term life insurance policy, the trial court might examine several factors, such as (168 CA3d at 1026):
  - The face value of the policy;
  - The amount of the premium;
  - The life expectancy of the insured;
  - Whether the policy is convertible to whole life insurance;
  - Replacement cost; and
  - When, if ever, the policy “vests” and is deemed fully paid.

When apportioning community and separate interests in a group term policy, the court must decide what life insurance benefits, if any, the employed spouse would have been entitled to had the employment terminated at the date of separation. That percentage, if any, will constitute the community property portion of the life insurance proceeds. *Bowman v Bowman* (1985) 171 CA3d 148, 160, 217 CR 174.

The First District has held that term life insurance covering a spouse who remains insurable is community property only for the period beyond the date of separation for which community funds are used to pay the premium. If the insured dies during that period, the proceeds of the policy are fully community. Otherwise, if the insured remains insurable, a term policy does not constitute a divisible community asset because the policy is of no value after its expiration, and the community has fully received what it bargained for. *Estate of Logan* (1987) 191 CA3d 319, 325–326, 236 CR 368; see *Marriage of Elfmont* (1995) 9 C4th 1026, 1034, 39 CR2d 590 (dicta). If the insured becomes uninsurable during the term paid with community funds, then the right to future insurance coverage that cannot otherwise be purchased may be a community asset to be divided on dissolution. *Estate of Logan, supra*; see *Marriage of Elfmont, supra*, 9 C4th at 1034. With respect to group term policies, however, the Third District Court of Appeal held that a renewal “right” held by an uninsurable spouse was not a divisible asset but only an expectancy when the renewal right depended both on the employee’s continued employment after the dissolution and the employer continuing to offer the policy. *Marriage of Spengler* (1992) 5 CA4th 288, 297–299, 6 CR2d 764.

Citing *Estate of Logan, supra*, 191 CA3d at 321, the Fifth District Court of Appeal held that the characterization of term life insurance proceeds are entirely community when the final premium is paid solely with community property. *Marriage of Burwell* (2013) 221 CA4th 1, 23, 164 CR3d 702. It further held that in determining whether the proceeds are entirely separate property depended on several factors (221 CA4th at 23-24):

- The insured was insurable at the end of the last term paid for by community funds; and
- Either (a) the insured could have purchased a comparable policy at a comparable price, or (b) the policy did not contain a premium cap when the separate estate began paying the premiums.

When these factors do not exist the proceeds are part community and part separate and must be allocated between community and the separate estate by a formula established by the court. 221 CA4th at 24, 26.

### iii. [§202.34] Military Life Insurance

Federal law preempts state law with regard to the beneficiaries of federal military life insurance policies. Federal law gives the serviceman the absolute right to designate the policy beneficiary, and thus a beneficiary designation that does not recognize any community interest in such a policy prevails over any claims that the policy is community property because it was acquired during marriage. *Ridgway v Ridgway* (1981) 454 US 46, 102 S Ct 49, 70 L Ed 2d 39.

### 4. [§202.35] Acquired by Gift or Bequest After Marriage

Separate property of a married person includes all property acquired by the person after marriage by gift, bequest, devise, or descent. Fam C §770(a).

If a gift is in joint form, evidence that the intent of the donor was that the gift was only to be to one spouse is sufficient to make the gift separate property. *Marriage of Camire* (1980) 105 CA3d 859, 865, 164 CR 677. See also *Marriage of Gonzalez* (1981) 116 CA3d 556, 564, 172 CR 179 (no evidence that gift in joint form was to one spouse).

## D. Determining the Character of Mixed (Separate and Community) Property

### 1. [§202.36] Duty To Apportion

When a spouse owns and works in a separate property business during a marriage, which increases in value and makes profits, the increased value and profits are due to both the original separate property

and to the spouse's community labor. Upon dissolution of the marriage, the court must apportion the proper amounts of the increased value and profits to both the separate and community interests. *Beam v Bank of America* (1971) 6 C3d 12, 17, 98 CR 137.

When the value of a separate business has been increased by the community labor of the owner-spouse, two commonly used methods that courts use to apportion earnings and profit between the separate and community interests are the *Pereira* method and the *Van Camp* method.

## 2. [§202.37] Two Commonly Used Methods of Apportioning Earnings and Profits

There are two commonly used approaches to apportioning earnings and profits between separate and community income:

- *Fair return on investment.* The *Pereira* method of apportionment, which derives from *Pereira v Pereira* (1909) 156 C 1, 7, 103 P 488, apportions a fair return on the spouse's separate property investment as separate income, then apportions any excess to the community property as arising from the spouse's efforts. *Beam v Bank of America* (1971) 6 C3d 12, 21, 98 CR 137.
- *Reasonable compensation.* The *Van Camp* apportionment approach, which derives from *Van Camp v Van Camp* (1921) 53 CA 17, 27–28, 199 P 885, apportions the reasonable value of the spouse's services as community property, then treats the balance as separate property, attributable to the normal earnings of the separate estate. *Beam v Bank of America, supra*, 6 C3d at 18. Reasonable compensation is often an issue in small business valuation cases. It may be obtained by looking at what other people in the field performing the same function earn. 6 C3d at 20–21.

The court may use either of these methods alone or a combination of both methods.

### a. [§202.38] Achieving Substantial Justice Between the Parties

In making the apportionment between separate and community property, use the formula that will achieve substantial justice between the parties. *Beam v Bank of America* (1971) 6 C3d 12, 98 CR 137. *Pereira* is typically applied when business profits are principally attributed to efforts of the community. *Van Camp* is applied when community effort is more than minimally involved in a separate business, yet the business profits accrued are attributed to the character of the separate asset. *Marriage of Dekker* (1993) 17 CA4th 842, 853, 21 CR2d 642.

The fact that the spouse who made the contributions was paid a salary does not preclude reimbursement; the salary is community property and may not adequately reflect the spouse's contribution. 17 CA4th at 855 (husband turned wife's separate business worth \$1000 into million dollar business).

**b. [§202.39] The “Family Expense” Presumption**

Under either the *Pereira* or the *Van Camp* approach, once the amount of community income has been ascertained, the community's living expenses must be deducted from community income to determine the balance of the community property. *Beam v Bank of America* (1971) 6 C3d 12, 21, 98 CR 137. This is commonly called the “family expense” presumption. “[I]t is presumed that the expenses of the family are paid from community rather than separate funds and thus, in the absence of any evidence showing a different practice, the community earnings are chargeable with these expenses.” 6 C3d at 21.

**3. Commingled Property**

**a. [§202.40] Tracing**

When separate property and community property are commingled in an account, tracing issues may arise.

If the commingled funds are used to purchase property, the party who deposited the separate funds may attempt to trace the source of the funds used to purchase the property to establish that it is separate because separate funds were used to purchase it. This may overcome the presumption that property acquired during marriage is community. *Marriage of Mix* (1975) 14 C3d 604, 611, 122 CR 79.

If separate and community property or funds are commingled in such a manner that it is impossible to trace the source of the property or funds, the whole must be treated as community property. *Marriage of Mix, supra*.

If the title to the property was taken jointly, tracing cannot be used to overcome the presumption from the form of title. *Marriage of Lucas* (1980) 27 C3d 808, 813–814, 166 CR 853; see §202.163. Direct tracing and tracing through family expenses are two independent methods of tracing to establish that property purchased with commingled funds is separate property.

**b. [§202.41] Direct Tracing**

The first method involves direct tracing. Separate funds do not lose their separate character when commingled with community funds in a bank account so long as the amount of separate funds can be ascertained. *Marriage of Mix* (1975) 14 C3d 604, 612, 122 CR 79.

If money is withdrawn to purchase specific property, questions of fact that must be determined include (*Marriage of Mix, supra*):

- Whether separate funds continue to be on deposit; and
- Whether the drawer intended to withdraw separate funds.

The party seeking to establish a separate interest in presumptive community property must keep adequate records. The party must show the exact amount of money allocable to separate property and the exact amount of money allocable to community property before it can be said that the money allocable to separate property is not so commingled that all funds in the account are community property. *Marriage of Frick* (1986) 181 CA3d 997, 1011, 226 CR 766. If the payments claimed to be separate were made periodically, each payment must have been made when separate property funds were in the account and must have been accompanied by an intent to use those funds rather than community funds. *Marriage of Higinbotham* (1988) 203 CA3d 322, 329, 249 CR 798.

### c. [§202.42] Tracing Through Family Expenses

The second method of tracing to establish that property purchased with commingled funds is separate property involves a consideration of family expenses. This tracing method is based on the presumption that family expenses are paid from community funds. If at the time the property is acquired it can be shown that all community income in a commingled account was exhausted by family expenses, then all funds remaining in the account at the time the property was purchased were necessarily separate funds. *Marriage of Mix* (1975) 14 C3d 604, 612, 122 CR 79.

This method can be used only when, through no fault of the spouse claiming separate property, it is not possible to ascertain the balance of income and expenditures at the time property was acquired. *See v See* (1966) 64 C2d 778, 784, 51 CR 888.

- **JUDICIAL TIP:** The spouse claiming separate property must keep adequate records to overcome the presumption that property acquired during marriage is community property. *See v See, supra*.

## E. Benefits of Employment

### 1. [§202.43] Professional Education

Education or training received by a spouse is not divisible property of the community. The exclusive remedies of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party are (Fam C §2641(d)):

- Reimbursement for community contributions to education and training and
- Assignment of loans pursuant to Fam C §2641.

See §§202.158–202.162.

## 2. Stock Options

### a. [§202.44] Court’s Discretion

A stock option is a right to buy a designated stock at anytime, within a specified period at a determinable price, if the holder of the option chooses. Stock options are usually granted by the holder-spouse’s employer and nontransferable, meaning that only the holder-spouse can exercise them. When the option price is lower than the market value of the stock, the option is “in the money,” meaning that it has intrinsic value because if the holder-spouse exercises the option, he or she will profit to the extent that the option price was lower than the market value.

The court has broad discretion to select an equitable method of apportioning community and separate property interests in stock options granted before the date of separation of the parties but exercisable after the date of separation. *Marriage of Hug* (1984) 154 CA3d 780, 782, 201 CR 676. These are sometimes called “intermediate” options.

Whether stock options can be characterized as compensation for future services, for past services, or for both, depends on the circumstances involved in the granting of the employee stock option. 154 CA3d at 786.

- **JUDICIAL TIP:** The First District has held that options granted after the date of separation are entirely separate property. *Marriage of Nelson* (1986) 177 CA3d 150, 157, 222 CR 790. Nevertheless, it appears that if a stock option is granted after separation in part as deferred compensation for pre-separation work, the court has discretion to apportion the community and separate interests.

### b. [§202.45] Past Services

If stock options are partially for past services, and thus a form of deferred compensation, the community portion may be based on the date of initial employment, not the date of the grant of the option. The options are community property to the extent that the work done to earn them is performed between the dates of marriage and separation. See *Marriage of Hug* (1984) 154 CA3d 780, 786, 201 CR 676.

In such a situation, a “time rule” is applicable. The number of options that are community property is a product of the following (154 CA3d at 782, 789):

- A fraction in which the numerator is the period in months between the commencement of the spouse's employment by the employer and the date of separation of the parties, and the denominator is the period in months between commencement of employment and the date when each option is first exercisable, multiplied by
  - The number of shares that can be purchased on the date that the option is first exercisable.
- ☛ **JUDICIAL TIP:** Many judges value the community interests as of the date of separation and distribute the community interests to the employee spouse, awarding other community property of equivalent value to the nonemployee spouse. To whatever extent an increase in the stock's value results from the employee's performance, or a decrease in the stock's value occurs because of the company's poor performance or the economy or because the employee terminates his or her employment, the risk of such rewards or losses is best borne by the employee spouse. 154 CA3d at 794.

The following example illustrates the "time rule":

Carolyn marries Jeffrey in May 1985. Carolyn begins to work at XYZ Corporation in May 1988, and she is granted stock options for 500 shares in May 1992 based on present and past services. Carolyn and Jeffrey separate in May 2000. She is entitled to exercise the options in May 2002.

The months from the date of commencement of work (May 1988) to the date of separation (May 2000) equals 144 months. The months from the date of employment (May 1988) to the date of right to exercise the options (May 2002) equals 168 months. First calculate the community percentage:

$$144 / 168 = 86\%$$

The total community interest equals the total options available for purchase when the option is first available multiplied by the community percentage:

$$500 \text{ total options} \times 86\% = 430 \text{ options}$$

### c. [§202.46] Future Services

If stock options are primarily an incentive for future services, the time rule may be based on the date the option was granted, rather than the date of employment. The applicable formula is the following (*Marriage of Nelson* (1986) 177 CA3d 150, 155, 222 CR 790):

- The numerator is the number of months from the date of grant of each block of options to the date of the couple's separation; and
- The denominator is the period from the time of each grant to its date when it can be exercised.

However, if the options are not vested (are subject to later divestment for leaving employment), the denominator is the time from the grant to the date that the option vests. *Marriage of Walker* (1989) 216 CA3d 644, 650-651, 265 CR 32.

The following example illustrates the time rule as defined in *Nelson*:

Eddie marries Jason in May 1985. Eddie begins to work at ABC Corporation in May 1988, and in May 1992, she is granted stock options for 500 shares based on future services. Eddie and Jason separate in May 2000. She is entitled to exercise the stock options in May 2002.

The months from the date when the options were granted (May 1992) to the date of separation (May 2000) equals 96. The months from the date of grant (May 1992) to the date of the right to exercise (May 2002) equals 120. First calculate the community percentage:

$$96 / 120 = 80\%$$

The total community interest equals the total options available for purchase when the option is first available multiplied by the community percentage:

$$500 \text{ total options} \times 80\% = 400 \text{ options}$$

#### **d. [§202.47] Tax Consequences**

Tax consequences of a distribution of stock options need only be considered when it is proven that an immediate and specific liability will accrue on the ordered division. *Marriage of Nelson* (1986) 177 CA3d 150, 156, 222 CR 790. However, it was proper for a trial court to reduce the value of stock options based on an assumed liability for taxes. The reduction was a condition on the award of the option to one spouse to equalize the overall division of property. 177 CA3d at 156-157; see *Marriage of Harrison* (1986) 179 CA3d 1216, 1224-1228, 225 CR 234 (tax liability considered in valuing options).

### **3. [§202.48] Accrued Vacation Pay**

The right to paid vacation constitutes deferred wages for services rendered. As deferred wages, vacation pay accrued during marriage is community property that may be commuted to present value and divided. *Marriage of Gonzalez* (1985) 168 CA3d 1021, 1024, 214 CR 634.

## 4. Pension Rights

### a. [§202.49] Community Interest

The community owns all pension rights attributable to employment during the marriage. A spouse's pension rights, whether vested or not vested, comprise a property interest of the community. "Vested" pension rights are those that survive the discharge or voluntary termination of the employee. *Marriage of Brown* (1976) 15 C3d 838, 842, 126 CR 633.

- **JUDICIAL TIP:** Although the federal Employment Retirement Income Security Act (ERISA) supersedes state laws insofar as they relate to *private* employee pension plans, there are different rules for *federal* pensions, as well as *state* and *municipal* pensions. Although ERISA plans are more typical, the court must not broadly apply ERISA principles to federal, state, or municipal plans, which have their own particular rules. See §202.136 for an explanation of ERISA preemption.

The apportionment of retirement benefits between the separate and community property estates must be reasonable and fairly representative of their relative contributions. *Marriage of Lehman* (1998) 18 C4th 169, 187, 74 CR2d 825; *Marriage of Poppe* (1979) 97 CA3d 1, 11, 158 CR 500.

When the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the time rule applies, and the community share equals a percentage based on (*Marriage of Gowan* (1997) 54 CA4th 80, 88, 62 CR2d 453; *Marriage of Judd* (1977) 68 CA3d 515, 522–523, 137 CR 318):

- The length of service performed during marriage but before separation, divided by
- The total length of service necessary to earn those benefits.

The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort. 68 CA3d at 522–523.

The formula is based on the total years required to earn the full retirement benefit; if the employee works for a further period, it is not counted for purposes of calculating the community share of the pension. *Marriage of Henkel* (1987) 189 CA3d 97, 99–100, 234 CR 351 (when employee earns full pension after 30 years but is employed for 32 years, formula based on 30 years).

- **JUDICIAL TIP:** The apportionment on the basis of the "time rule" is appropriate only when the amount of the retirement benefits is substantially related to the number of years of service.

If it is not, the court should use a basis that is related to the community contribution to the pension. *Marriage of Poppe, supra*, 97 CA3d at 8.

The time rule is applicable when the employee had two periods of employment with the employer if the pension amount was based on both periods. *Marriage of Gowan, supra*, 54 CA4th at 90–91.

The following example illustrates the time rule for purposes of dividing pension benefits:

Bruce begins to work for Bigge Corporation in November 1972. He marries Lara in November 1982, and they separate in November 2001. Bruce retires in November 2002 and receives a pension of \$3000 per month.

The time rule applies because the amount of retirement benefit is substantially related to the community contribution. Bruce worked 19 years during the marriage before separation, and worked a total of 30 years. First calculate the community percentage

$$19 / 30 = 63\%$$

The community share equals the monthly benefit multiplied by the community percentage:

$$\$3000 \times 63\% = \$1890$$

#### **b. [§202.50] Early Retirement**

When a spouse receives an “enhanced” pension by taking early retirement and the other spouse has a community interest in the pension, the other spouse is entitled to a share of the enhancement increase, even if the enhancement is offered after separation. This right is derivative from the spouse’s right to retirement benefits accrued during marriage. *Marriage of Lehman* (1998) 18 C4th 169, 185, 74 CR2d 825; see *Marriage of Gram* (1996) 25 CA4th 859, 866–867, 30 CR2d 792.

The relevant question is whether the right to the early retirement benefit accrued before separation; if it did, it is a community asset. *Marriage of Drapeau* (2001) 93 CA4th 1086, 114 CR2d 6.

#### **c. [§202.51] Military Retirement Benefits**

Characterization of retirement pay remains a state law question after enactment of the Federal Uniformed Services Former Spouses’ Protection Act (FUSFSPA). Under California law, a former spouse may be awarded his or her community interest in the gross amount of a military retiree’s vested pension. See *Casas v Thompson* (1986) 42 C3d 131, 136–139, 228 CR 33; *Marriage of Fithian* (1974) 10 C3d 592, 595, 111 CR 369.

FUSFSPA generally provides that a court may treat disposable retired pay payable to a service member for pay periods beginning after June 25, 1981, either as property solely of the service member or as property of the member and his or her spouse in accordance with state law. 10 USC §1408(c)(1).

Military voluntary separation incentives given as an inducement to early retirement are community property because they are enhanced retirement benefits. *Marriage of Babauto* (1998) 66 CA4th 784, 788-789, 78 CR2d 281.

Although FUSFSPA allows military “disposable retired pay payable to a service member” to be divided (10 USC §1408(c)(1)), any amounts of retirement pay waived to receive disability benefits are among the statutory deductions required to compute “disposable retired pay.” 10 USC §1408(a)(4)(B). Therefore, such amounts waived to receive disability pay are not divisible as community property. *Mansell v Mansell* (1989) 490 US 581, 104 L Ed 2d 675, 109 S Ct 2023.

- **JUDICIAL TIP:** It has been suggested that a former spouse might have an enforceable right to the amount of retirement pay even after it has been waived to receive disability pay if either the retiree had agreed to indemnify the former spouse upon election to receive disability pay in lieu of retirement, or the court had reserved jurisdiction over the issue of retirement pay. *Marriage of Krempin* (1999) 70 CA4th 1008, 1020, 83 CR2d 134; *Marriage of Smith* (2007) 148 CA4th 1115, 1126, 56 CR3d 341.

For a detailed discussion of military retirement benefits, see 1 Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure chap 21 (2d ed LexisNexis Matthew Bender 2005).

## 5. Disability Benefits

### a. [§202.52] Employer Disability Benefits

Disability payments that an employee receives because of his or her status as a disabled person are the separate property of the spouse who receives them. *Marriage of Flockhart* (1981) 119 CA3d 240, 243, 173 CR 818.

However when the employee spouse elects to receive disability benefits instead of a matured right to retirement benefits, only the net amount received over and above what would have been received as retirement benefits constitutes compensation for personal anguish and loss of earning capacity and thus, is the employee spouse’s separate property. The amount received instead of matured retirement benefits remains community property subject to division on dissolution. See *Marriage of Justice* (1984) 157 CA3d 82, 89, 204 CR 6 (police officer’s disability

pension was intended to replace his retirement benefits as well as to compensate him for the economic loss and personal suffering brought on by his disability). To divide such benefits, the court must first classify that portion of the pension attributable to employment before marriage as separate property. Of the balance of the pension, separate property is only the excess of the pension over the retirement pension that would have been received if not disabled. The remainder of the pension is divided as community property. *Marriage of Stenquist* (1978) 21 C3d 779, 788, 148 CR 9.

If the employee receives tax benefits from electing to take payments as disability rather than retirement, because the disability payments are not taxable, the comparison between retirement payments and disability payments must be made after taxes. The court must determine the net amount after taxes by which the disability payments exceed the net amount after taxes that would have been received by virtue of retirement. That net difference is separate property. *Marriage of Higinbotham* (1988) 203 CA3d 322, 332–333, 249 CR 798.

If the primary purpose of disability payments shifts to retirement support when retirement age is reached, the payments then become community property to the extent that they are based on employment while married before separation. *Marriage of Samuels* (1979) 96 CA3d 122, 128, 158 CR 38.

#### **b. [§202.53] Private Disability Benefits**

When private disability insurance was purchased with community funds, the disability benefits must be characterized as follows (*Marriage of Saslow* (1985) 40 C3d 848, 860–861, 221 CR 546; *Marriage of Elfmont* (1995) 9 C4th 1026, 1032–1033, 29 CR2d 590):

- Treat the benefits as separate property if they are intended to replace postdissolution earnings that would have been the separate-property income of the disabled spouse; and
- Treat the benefits as community property insofar as they are intended to provide retirement income.

In making the determination, testimony of the spouses' intent may be considered, both at the time the disability insurance was originally purchased and at the times that decisions were made to continue the insurance in force rather than let it lapse. Absent evidence of actual intent, the court may ascertain a normal retirement age at which the disabled spouse would have been most likely to retire had no disability occurred. *Marriage of Saslow, supra*.

In fixing that age, the court may take into account any circumstances relevant to the normal expectations in the disabled spouse's community or

former workplace about the age at which a person having the spouse's occupation, qualifications, and vocational history would retire. There may be evidence of the ages at which similarly situated workers have retired. A range of expected retirement ages may be derived from such sources as the federal schemes for social security and for individual retirement accounts, or from the provisions in governmental or institutional retirement systems for retirement of particular classes of employees. The nature of the disability policies at issue may provide evidence of the parties' intent or expectations. *Marriage of Saslow, supra*.

If disability insurance is originally purchased during the marriage but renewal premiums are paid after separation, the disability payments are entirely separate property. The renewal premium will not have been paid "during the marriage with community funds" and with the intent of providing community retirement income; it was paid after separation with no intent to benefit the community. *Marriage of Elfmont, supra*, 9 C4th at 1034–1035.

## 6. [§202.54] Employer Termination Payments

Termination payments (or "severance pay") received by a spouse employed during marriage but terminated after dissolution of marriage are community property if they were vested during the marriage and were a form of deferred compensation for services rendered during the marriage. *Marriage of Skaden* (1977) 19 C3d 679, 687, 139 CR 615. Thus, severance pay is community property even though it was received after separation when the spouse earned an absolute right to receive it during the marriage. *Estate of Horn* (1986) 181 CA3d 540, 547–548, 226 CR 666.

The termination pay is separate property, however, if the right to the pay (*Marriage of Lawson* (1989) 208 CA3d 446, 453–454, 256 CR 283):

- Did not accrue during the marriage;
- Is based on an employee's offer after dissolution of the marriage; and
- Is intended as future replacement compensation for long-term employees pursuing new jobs or professions.

Thus, when an employer makes a voluntary payment on termination, the payment is separate property when the termination occurred after separation. *Marriage of Wright* (1983) 140 CA3d 342, 344–345, 189 CR 336; *Marriage of Flockhart* (1981) 119 CA3d 240, 243, 173 CR 818.

When a termination payment is made voluntarily after separation but is based partially on years of service, the payment is community only if it is a right accrued during marriage. If the right to an additional payment on severance only accrues after separation, it is separate property. *Marriage*

of *Frahm* (1996) 45 CA4th 536, 544, 53 CR2d 31; see *Marriage of Lehman* (1998) 18 C4th 169, 183, 74 CR2d 825 (approving reasoning of *Frahm*, but stating that *Frahm*'s statement that the increased payment was based on the employer's beneficence was of no consequence).

Similarly, termination pay is separate property if the right to receive it is not based on employment during the marriage but on a new agreement after separation. Thus, a termination payment was separate property when the employee was about to be terminated for cause after separation and negotiated a termination pay agreement that released legal claims and included a future noncompetition clause. *Marriage of Steinberger* (2001) 91 CA4th 1449, 1458–1459, 111 CR2d 521.

### 7. [§202.55] Workers' Compensation Benefits

In general, workers' compensation benefits received during the marriage before separation are community property. *Northwestern R. Co. v Industrial Acc. Comm'n* (1920) 184 C 484, 486, 194 P 41. However, when a lump sum permanent disability award is received before separation, it is community property only to the extent that it is intended to compensate for the injured spouse's reduced earnings during the marriage (before separation), or for injury-related expenses paid with community funds. The remainder of any such award is the separate property of the injured spouse. *Raphael v Bloomfield* (2003) 113 CA4th 617, 624, 6 CR3d 583; *Marriage of Ruiz* (2011) 194 CA4th 348, 353, 122 CR3d 914.

Workers' compensation benefits or awards received after a marital separation are the injured party's separate property. The award is neither a form of deferred compensation for past services nor a substitute for lost wages. The purpose underlying the separate property treatment of a workers' compensation award paid after separation is that it is compensation for future loss of earnings, not payment for services previously performed. *Marriage of Fisk* (1992) 2 CA4th 1698, 1703, 4 CR2d 95; *Marriage of McDonald* (1975) 52 CA3d 509, 513, 125 CR 160.

### 8. [§202.56] Retiree Health Insurance

The right to continuation of employer subsidized health coverage is a property right accruing from employment during marriage. However, the right is not subject to valuation and division on dissolution when the retiree continues to pay for the health insurance with separate funds. In such a case, there is no community asset to divide. *Marriage of Havins* (1996) 43 CA4th 414, 423–424, 50 CR2d 763; see *Marriage of Ellis* (2002) 101 CA4th 400, 407–408, 124 CR2d 719. This rule applies even if the health care plan is wholly subsidized by the employer, and the retiree's obligation is merely to renew the policy. 101 CA4th at 408.

## 9. [§202.57] Social Security

Federal social security benefits are not treated as community property. They are retirement benefits that are immune from division by state courts in marital dissolution proceedings by reason of federal preemption. *Marriage of Hillerman* (1980) 109 CA3d 334, 338-342, 167 CR 240.

## F. Transmutation by Premarital Agreements

### 1. [§202.58] Right To Make Premarital Agreement

The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement. Fam C §1500.

The Uniform Premarital Agreement Act (Fam C §§1600-1617) applies to any premarital agreement executed on or after January 1, 1986. Fam C §1601.

The validity and effect of premarital agreements made before January 1, 1986, is determined by the law applicable to the agreements before that date. Fam C §1503. In general, prior law requires a writing. Former CC §5134.

A minor may make a valid premarital agreement or other marital property agreement if the minor is emancipated or is otherwise capable of contracting marriage. Fam C §1501.

### 2. [§202.59] Writing Requirement

A premarital agreement must be in writing and signed by both parties. Fam C §1611. See *Hall v Hall* (1990) 222 CA3d 578, 584-585, 271 CR 773 (the act is a statute of frauds law requiring that the agreement be in writing to be enforceable).

### 3. [§202.60] Exceptions to Writing Requirement

Under the prior writing requirement, former CC §5134, there were exceptions to the writing requirement when the party seeking to enforce the oral agreement performed his or her part of the bargain and in so doing irretrievably changed his or her position. *Hall v Hall* (1990) 222 CA3d 578, 585-586, 271 CR 773. The exceptions to the statute recognized under the former law are equally applicable to the Uniform Premarital Agreement Act. It is true that the act does not specifically reference any of the traditional exceptions to the statute of frauds. Equally true, however, is that the act does not preclude them. Also, nothing in any of the legislative materials nor in the reports of the Commissioners on Uniform State Laws makes any reference to the exclusion of traditional exceptions. To the contrary, the report of the executive secretary of the California Law

Revision Commission recognized the continued viability of exceptions to the statute of frauds. 222 CA3d at 587.

Under former law applicable to the Uniform Premarital Agreement Act, marriage itself or mere payment of money was not sufficient performance to take an oral prenuptial agreement out of the writing requirement of the statute, because these acts could reasonably be expected in any marriage. However, relief because of the partial or full performance of the contract was usually granted in equity on the ground that the party who has so performed has been induced by the other party to irretrievably change his or her position and that to refuse relief according to the terms of the contract would otherwise amount to a fraud on his or her rights. For relief to be granted because of partial performance of an oral prenuptial contract, the acts relied on must be unequivocally referable to the contract. Although done in performance of the contract, acts which, admit to an explanation other than the contract (such as the performance of husbandly or wifely duties) are not generally acts of partial performance that will take the agreement out of the statute of frauds. 222 CA3d at 586.

When a wife relied on an oral premarital agreement by quitting her job and applying for early social security, such partial performance was sufficient detrimental reliance to allow enforcement of the contract. However, entering into the marriage and paying \$10,000 to the other spouse would not have been sufficient partial performance because these acts could reasonably be expected in any marriage. 222 CA3d at 586-587.

#### **4. [§202.61] Consideration and Effectiveness**

A premarital agreement is enforceable without consideration. Fam C §1611.

A premarital agreement becomes effective on marriage. Fam C §1613.

#### **5. [§202.62] Subjects of Agreement**

Parties to a premarital agreement may contract with respect to all of the following (Fam C §1612(a)):

- The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.
- The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.
- The disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.

- The making of a will, trust, or other arrangement to carry out the provisions of the agreement.
- The ownership rights in and disposition of the death benefit from a life insurance policy.
- The choice of law governing the construction of the agreement.
- Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

## **6. [§202.63] Amendment**

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration. Fam C §1614.

## **7. Enforceability**

### **a. [§202.64] In General**

A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following (Fam C §1615(a)):

- That party did not execute the agreement voluntarily. See §202.65.
- The agreement was unconscionable when it was executed, and before execution of the agreement, the factors set forth in §202.66 applied to that party.

### **b. [§202.65] Voluntariness**

A premarital agreement is not enforceable if the party against whom enforcement is sought proves that the party did not execute the agreement voluntarily. Fam C §1615(a).

The court must find that a premarital agreement was not executed voluntarily unless it finds in writing or on the record all of the following (Fam C §1615(c)):

- The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel. See also *Marriage of Cadwell-Faso & Faso* (2011) 191 CA4th 945, 956-957, 119 CR3d 818.
- The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented

with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

- The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement, as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished must be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party must, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.
- 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.
- Any other factors the court deems relevant.

**c. [§202.66] Unconscionability**

A premarital agreement is not enforceable if the party against whom enforcement is sought proves that the agreement was unconscionable when it was executed, and before execution of the agreement, all of the following applied to that party (Fam C §1615(a)):

- That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.
- That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.
- That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

An issue of unconscionability of a premarital agreement must be decided by the court as a matter of law. Fam C §1615(b).

**8. [§202.67] Parole Evidence**

Parole evidence, such as an oral statement, is extraneous to a written agreement. Although parole evidence may be used to interpret a term in the agreement, the statute of frauds requires that the contract itself not be the product of parole evidence. The whole object of the statute would be

frustrated if any substantive portion of the agreement could be established by parole evidence. Thus, parole evidence was not admissible to establish a premarital agreement when the writing only indirectly indicated a desire to be governed by the rules of the Islamic religion. *Marriage of Shaban* (2001) 88 CA4th 398, 405–407, 105 CR2d 863.

## **G. Transmutation by Postnuptial Agreement**

### **1. [§202.68] Right To Transfer Property**

Either husband or wife may enter into any transaction with the other, respecting property, that either spouse might enter if unmarried. Fam C §721(a).

Married persons may by agreement or transfer, with or without consideration, do any of the following (Fam C §850):

- Transmute community property to separate property of either spouse.
- Transmute separate property of either spouse to community property.
- Transmute separate property of one spouse to separate property of the other spouse.

Such an agreement or transaction is sometimes called a postnuptial agreement.

A transmutation is subject to the laws governing fraudulent transfers. Fam C §851.

Furthermore, a postnuptial agreement that transmutes separate property to community property for estate planning purposes also transmutes the property for characterization purposes on a dissolution. Property is either transmuted, or it is not; property cannot be “conditionally” transmuted. *Marriage of Lund* (2009) 174 CA4th 40, 52, 94 CR3d 84.

### **2. [§202.69] Writing Requirement**

A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Fam C §852(a).

A writing signed by an adversely affected spouse is not an “express declaration” unless it contains language that expressly states that the characterization or ownership of property is being changed, independent of any extrinsic evidence. The statute does not require use of the term “transmutation” or any particular language. A provision that the grantor gives any interest he or she may hold in the asset to the grantee is

sufficient. *Estate of MacDonald* (1990) 51 C3d 262, 273, 272 CR 153 (signing consent portion of an IRA beneficiary designation did not change the community nature of the deposits into the account). See also *Marriage of Barneson* (1999) 69 CA4th 583, 590, 81 CR2d 726 (an instruction to stock broker to “transfer” stock into the name of the spouse, without more, was not sufficient to be an express declaration of change of ownership); *Estate of Bibb* (2001) 87 CA4th 461, 468–469, 104 CR2d 415 (deed granting separate property from a husband to the husband and wife as joint tenants was a sufficient writing to transmute the property to joint tenancy community property); *Marriage of Starkman* (2005) 129 CA4th 659, 28 CR3d 639 (documents conveying a spouse’s separate property assets to a family revocable trust were not sufficient to create a transmutation of the separate property into community property).

Unlike a conventional statute of frauds, Fam C §852(a) is not subject to the traditional exceptions to the requirement of a writing. *Marriage of Benson* (2005) 36 C4th 1096, 1100, 32 CR3d 471. For example, a spouse may not introduce extrinsic evidence under the doctrine of equitable estoppel to prove an oral transmutation of property. *Marriage of Campbell* (1999) 74 CA4th 1058, 1062–1064, 88 CR2d 580. See also *Marriage of Benson, supra*, 36 C4th at 1104–1111 (part performance of an oral agreement to transmute marital property is not an adequate substitute for an express written declaration).

This specific rule governing transmutations of property requiring an express declaration prevails over the more general presumption of Evid C §662 of ownership from title. *Marriage of Barneson, supra*, 69 CA4th at 593. See also *Estate of Bibb, supra*, 87 CA4th at 470 (Fam C §852(a) prevails over more general presumption of Veh C §§4150.5 and 5600.5 that a vehicle registered in the name of two co-owners is held in joint tenancy).

### **3. [§202.70] Writing Not Required for Agreement Prior to 1985**

The requirement of an express declaration does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation continues to apply. Fam C §852(e). Prior to that date, a transmutation agreement could be oral. *Estate of Wieling* (1951) 37 C2d 106, 108, 230 P2d 808. Thus, despite the statute of frauds, a party could orally transmute separate real property into community property. *Marriage of Schoettgen* (1986) 183 CA3d 1, 5–9, 227 CR 758.

#### 4. [§202.71] No Effect on Commingled Property

The written transmutation requirement in Fam C §852(a) is inapplicable when separate property and community property are commingled or otherwise combined. Fam C §852(d); *Marriage of Weaver* (2005) 127 CA4th 858, 470–471, 26 CR3d 121. See §§202.40–202.42.

#### 5. [§202.72] Notice to Third Parties

A transmutation of real property is not effective as to third parties without notice thereof unless the transmutation is recorded. Fam C §852(b).

#### 6. [§202.73] Gifts of Personal Nature

The writing requirement does not apply to a gift between the spouses of:

- clothing,
- wearing apparel,
- jewelry, or
- other tangible articles of a personal nature

that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value, taking into account the circumstances of the marriage. Fam C §852(c). See *Marriage of Steinberger* (2001) 91 CA4th 1449, 1464–1466, 111 CR2d 521 (fifth anniversary ring valued at over \$13,000 was of substantial value); *Marriage of Buie* (2010) 179 CA4th 1170, 102 CR3d 387 (automobile is not an article of personal nature).

#### 7. [§202.74] Waiver of Right to Annuity or Benefits

A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 (Pub L 98–397) is not a transmutation of the community property rights of the person executing the waiver. Fam C §853(b).

#### 8. [§202.75] General Fiduciary Duty of Spouses

Each spouse must act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships that control the actions of persons having relationships of personal confidence as specified in Fam C §721. See also *Marriage of Prentis-Margulis & Margulis* (2011) 198 CA4th 1252, 1257, 130 CR3d 327 (where non-managing spouse has prima facie evidence that community assets have

disappeared while under the control of the managing spouse post-separation, the managing spouse has the burden of proof to account for the missing assets); Fam C §1100(e).

The duty continues until such time as the assets and liabilities have been divided by the parties or by a court. Fam C §1100(e).

This duty includes the obligation to do the following on the request of the other spouse (Fam C §1100(e); *Marriage of Walker* (2006) 138 CA4th 1408, 1420-1421, 42 CR3d 325):

- Make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable; and
- Provide equal access to all information, records, and books that pertain to the value and character of those assets and debts.

#### **9. [§202.76] Fiduciary Duty With Regard to Interspousal Transactions**

In transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. Fam C §721(b). See *Marriage of Walker* (2006) 138 CA4th 1408, 1416-1419, 42 CR3d 325 (duty applies to transactions involving separate and community property).

This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Corp C §§16403, 16404, and 16503, including, but not limited to, the following (Fam C §721(b)):

- To provide each spouse with access at all times to any books kept regarding a transaction for the purposes of inspection and copying.
- To render on request, true and full information of all things affecting any transaction that concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.
- To account to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse that concerns the community property.

## 10. [§202.77] Presumption of Undue Influence

When an interspousal transfer unfairly advantages one spouse, there is a presumption that the transaction was induced by undue influence. *Marriage of Burkle* (2006) 139 CA4th 712, 730–734, 43 CR3d 181 (presumption of undue influence in a postmarital agreement did not arise when both spouses enjoyed advantages). The burden of rebutting the presumption of undue influence is on the spouse who acquired an advantage or benefit from the transaction. And that spouse must overcome the presumption by a preponderance of the evidence establishing that the disadvantaged spouse’s action was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of the transaction. *Marriage of Mathews* (2005) 133 CA4th 624, 628–632, 35 CR3d 1 (wife signed a quitclaim deed of all interest in the marital property to the husband; husband rebutted the presumption by establishing that the quitclaim deed was executed freely and voluntarily, and in good faith, and for the purpose of obtaining a more favorable mortgage interest rate); *Marriage of Balcof* (2006) 141 CA4th 1509, 1519–1522, 47 CR3d 183.

This presumption prevails over the presumption in favor of record title in Evid C §662 because of the policy of protecting spouses and because the presumption of undue influence is more specific. *Marriage of Delaney* (2003) 111 CA4th 991, 996–998, 4 CR3d 378. See *Marriage of Fossum* (2011) 192 CA4th 336, 121 CR3d 195 (husband did not rebut presumption).

The presumption may not be invoked to establish a transmutation that fails to comply with Fam C §852(a). Absent a transmutation by an express declaration, there is no basis for applying the presumption of undue influence. *Marriage of Benson* (2005) 36 C4th 1096, 1111–1112, 32 CR3d 471.

## 11. [§202.78] Effect of Will

A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in a proceeding commenced before the death of the person who made the will. Fam C §853(a).

## 12. [§202.79] Written Joinder or Consent to Nonprobate Transfer

A written joinder or written consent to a nonprobate transfer of community property on death that satisfies Fam C §852 is a transmutation and is governed by the law applicable to transmutions and not Prob C §§5010–5032. Fam C §853(c); Prob C §5022(b).

## V. PROPERTY VALUATION

### A. [§202.80] Definition of Value

The value of a marketable asset in marital dissolution cases is the “fair market value,” the highest price on the date of valuation that would be agreed to by (*Marriage of Cream* (1993) 13 CA4th 81, 89, 16 CR2d 575):

- A seller, being willing to sell but under no obligation or urgent necessity to do so, and
- A buyer, being ready, willing, and able to buy but under no particular necessity for so doing.

### B. [§202.81] Valuation as a Question of Fact

In general, the court must undertake to value the parties’ community estate as part of its responsibility to equally divide the estate when the parties have not otherwise agreed to a division in writing or by oral stipulation in open court. See Fam C §2550. Valuation of items of community property in a dissolution proceeding is a question of fact for the court to decide. *Marriage of Asbury* (1983) 144 CA3d 918, 921, 923, 193 CR 562. As long as the determination is within the evidence presented, it will be upheld on appeal. *Marriage of Duncan* (2001) 90 CA4th 617, 632, 108 CR2d 833.

### C. [§202.82] Valuation Experts

If necessary, the court can appoint its own expert to value property. Evid C §§460, 730. The parties can also present expert testimony as to valuation. Evid C §813(a)(1).

If the court has ordered a family centered case resolution plan, an expert witness may be selected by the parties jointly or by the court. However, if in the court’s determination, the issues for which experts are required cannot be settled under these conditions, the court shall permit each party to employ his or her own expert. Fam C §2451(a)(6).

However, in the exercise of discretion, the trial court makes an independent determination based on the evidence presented on the factors to be considered and weight to be given to each. The court is not required to accept the opinion of any expert as to the value of an asset. *Marriage of Rosen* (2002) 105 CA4th 808, 820, 130 CR2d 1; *Marriage of Duncan* (2001) 90 CA4th 617, 632, 108 CR2d 833.

### D. [§202.83] Bifurcation of Issues

The court may try certain issues separately before trial of other issues if resolution of the bifurcated issue is likely to simplify the determination

of the other issues. Issues that may be appropriate to try separately in advance include (Cal Rules of Ct 390(b)):

- The validity of a postnuptial or premarital agreement;
- The date of separation;
- The date to use for valuation of assets;
- Whether property is separate or community;
- How to apportion an increase in the value of a business;
- The existence or value of a business or professional goodwill;
- The termination of the status of a marriage or domestic partnership;
- Child custody and visitation (parenting time);
- Child, spousal, or domestic partner support;
- Attorney’s fees and costs;
- Division of property and debts;
- Reimbursement claims; or
- Other issues specific to a family law case.

➤ **JUDICIAL TIP:** Bifurcation may be used to try a hotly disputed issue, such as valuation of a family business, before other issues. Resolution of that issue may facilitate the parties’ agreement on the remaining issues. *Marriage of Wolfe* (1985) 173 CA3d 889, 894, 219 CR 337.

## **E. Time for Valuation**

### **1. [§202.84] Assets and Liabilities Valued at Time of Trial**

In order to divide the community estate, the assets and liabilities must be valued as near as practicable to the time of trial. Fam C §2552(a). The word “trial” refers to the trial on the division of property. *Marriage of Walters* (1979) 91 CA3d 535, 539, 154 CR 180.

In using the language “as near as practical to the time of trial,” the Legislature has recognized that there may be situations in which both the nature and value of community property cannot be fixed or ascertained at the precise time of trial. Under these circumstances, trial courts are permitted a reasonable degree of flexibility. *Marriage of Olson* (1980) 27 C3d 414, 422, 165 CR 820. Thus when there has been a foreclosure and forfeiture of a substantial community asset after trial but before entry of the interlocutory decree, the court should have reopened the case to recalculate the community property valuations and indebtedness. 27 C3d at 422. However, a substantial rise in the value of stock after its award to one spouse in an interlocutory judgment is not a basis for reopening the

judgment. *Marriage of Connolly* (1979) 23 C3d 590, 603, 153 CR 423. Nor is the passage of more than ten years from the time of separation until the time of trial a reason to change the valuation date of a passive asset, such as residential real estate, to the date of separation. *Marriage of Priddis* (1982) 132 CA3d 349, 355, 183 CR 37 (when an asset increases in value from nonpersonal factors, such as inflation or market fluctuations, generally it is fair that both parties share in that increased value).

## 2. [§202.85] Alternative Valuation Date: Valuation at Time of Separation for Good Cause Shown

For good cause shown, the court may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner. Fam C §2552(b). The alternative valuation date should not be used unless it is the only way to accomplish an equitable division of the property. *Marriage of Rueling* (1994) 23 CA4th 1428, 1435, 28 CR2d 726.

Factors that may constitute a finding of good cause for an alternative valuation date include the following:

- Obstructionist conduct, such as a party's refusal to deliver necessary documents for valuation of a community asset. *Marriage of Stallcup* (1979) 97 CA3d 294, 301, 158 CR 679.
- A party's dissipation of community assets after separation. *Marriage of Barnert* (1978) 85 CA3d 413, 423, 149 CR 616.
- A party's waste or mismanagement of community assets, or other breach of his or her fiduciary duty to the community. *Marriage of Koppelman* (1984) 159 CA3d 627, 635, 205 CR 629, disapproved on other grounds in 41 C3d 440, 451 n13.
- A party's lone hard work and actions after separation that greatly increases value of the community estate. *Marriage of Duncan* (2001) 90 CA4th 617, 624-625, 108 CR2d 833.

A party's commingling of separate and community funds and assets after separation that makes it impossible to value an asset at the time of trial. *Marriage of Koppelman, supra*, 90 CA4th at 634-635; but see *Marriage of Fink* (1979) 25 C3d 877, 888, 160 CR 516 (law practice valued at date of trial when, after separation, operating spouse so commingled pre-separation and post-separation accounts that it was impossible to value at separation).

The good cause exception of Fam C §2552(a) generally comes into play when the court must value the small business or professional practice of one spouse. Good cause generally exists for a small business or professional practice to be valued as of the date of separation. This

exception to trial date valuation applies because the value of the business, including goodwill, is primarily a reflection of personal skill, industry, and guidance of the operating spouse, rather than the business's capital assets. *Marriage of Stevenson* (1993) 20 CA4th 250, 253–254, 24 CR2d 411; *Marriage of Green* (1989) 213 CA3d 14, 21, 261 CR 294. Because earnings and accumulations following separation are the spouse's separate property, it follows that the community interest should be valued as of the date of separation. Valuing a business as of the date of separation also relieves the concern that the operating spouse might deliberately destroy or otherwise devalue the business before the trial date. *Marriage of Stevenson, supra*, 20 CA4th at 254; *Marriage of Green, supra*, 213 CA3d at 21.

Conversely, a trial date valuation may be appropriate when the postseparation efforts of the operating spouse have minimal impact on any increase in the value of the business. 213 CA3d at 21. For example, a partnership interest in a large law firm may be so relatively small that the lawyer spouse's postseparation efforts cannot be considered a significant factor in any increase in the value of the partnership between the date of separation and time of trial. *Marriage of Aufmuth* (1979) 89 CA3d 446, 463–465, 152 CR 668, disapproved on other grounds in 27 C3d 808, 813 n2. See also *Marriage of Sherman* (2005) 133 CA4th 795, 800–801, 35 CR3d 137 (proper valuation date of marital residence is date of trial when increase in property value after separation was not due to spouse's efforts, but to market fluctuations).

For a discussion of apportioning gain in an asset after separation, see §§202.36–202.39.

### **3. [§202.86] Notice Requirement for Alternative Valuation Date**

The moving party must give 30 days' written notice to the other party of the request for an alternative valuation date. Fam C §2552(b).

A Request for Separate Trial (Judicial Council Form FL-315) must be used when a party requests a separate trial regarding a proposed alternate valuation date under Fam C §2552(b). Cal Rules of Ct 5.390(c).

Judicial Council Form FL-315 must be accompanied by a declaration stating the following (Cal Rules of Ct 5.390(c)):

- The proposed alternative valuation date
- Whether the proposed alternative valuation date applies to all or only a portion of the assets, and if the motion is directed to only a portion of the assets, the declaration must separately identify each such asset; and
- The reasons supporting the alternative valuation date.

## F. Valuation of Real Property

### 1. [§202.87] Applicable Law

Except when another rule is provided by statute, proof of the value of real property, including real and personal property valued as a unit, is governed by Evid C §§810–824. Evid C §§810–811.

### 2. [§202.88] Valuation Only by Experts or Owners

The value of real property may be shown only by the opinions of any of the following (Evid C §813(a)):

- An expert qualified to express such opinions, or
- The owner or the spouse of the owner of the property or property interest being valued.

The opinion of a witness as to the value of property is limited to an opinion based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible. The basis for the opinion must be of a type that reasonably may be relied on by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Evid C §§815–821, unless a witness is precluded by law from using such matter as a basis for an opinion. Evid C §814.

### 3. [§202.89] Valuation Methods

There are three basic methods of determining the value of real property (*Marriage of Folb* (1975) 53 CA3d 862, 868, 126 CR 306, disapproved on other grounds in 17 C3d 738, 749 n5):

- Market approach (Evid C §§815, 816; see §202.90);
- Income approach (Evid C §819; see §202.91); and
- Cost approach (Evid C §820; see §202.92).

➤ **JUDICIAL TIP:** Although the court may not have to actually calculate the value of real property based on one of these approaches, the court should be acquainted with the terminology and methods used by expert witnesses.

#### a. [§202.90] Market Approach

*Sale Price.* When relevant to the determination of the value of property, a witness may take into account, as a basis for his or her opinion, the price and other terms and circumstances of any sale or contract to sell and purchase the property or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. Evid C §815.

*Sale price of comparable property.* When relevant to the determination of the value of property, a witness may take into account, as a basis for his or her opinion, the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. Evid C §816. In order to be considered comparable

- The sale or contract must have been made sufficiently near in time to the date of valuation;
- The property sold must be located sufficiently near the property being valued; and
- The property must be sufficiently alike with respect to character, size, situation, usability, and improvements to make it clear that the property sold and the property being valued are comparable in value, and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued. Evid C §816.

**b. [§202.91] Income Approach**

*Rental value.* When relevant to the determination of the value of property, a witness may take into account, as a basis for his or her opinion, the rent reserved and other terms and circumstances of any lease that included the property that was in effect within a reasonable time before or after the date of valuation. Evid C §817(a). A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the lease property only for the purpose of arriving at an opinion as to the reasonable net rental value attributable to the property being valued under Evid C §819 (see below) or determining the value of a leasehold interest. Evid C §817(b).

*Rental value of comparable property.* For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property being valued under Evid C §819 (see below) or determining the value of a leasehold interest, a witness may take into account, as a basis for his or her opinion, the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation. Evid C §818.

*Capitalized value of reasonable net rental value.* When relevant to the determination of the value of property, a witness may take into account, as a basis for his or her opinion, the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the

income or profits attributable to the business conducted thereon). Evid C §819.

**c. [§202.92] Cost Approach**

When relevant to the determination of the value of property, a witness may take into account, as a basis for his or her opinion, the value of the property or property interest being valued as indicated by (Evid C §820):

- the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use,
- less whatever depreciation or obsolescence the improvements have suffered.

**G. [§202.93] Valuation of Personal Property**

The opinion of an owner of personal property is in itself competent evidence of the value of the property. *Schroder v Auto Driveaway Co.* (1974) 11 C3d 908, 921, 114 CR 622. Expert testimony may also be used. Evid C §§730–733.

**H. Valuation of Businesses and Professional Practices**

**1. [§202.94] Small Businesses and Professional Practices**

In valuing a small business or professional practice, the court should consider expert testimony of the following (*Marriage of Lopez* (1974) 38 CA3d 93, 110, 113 CR 58, disapproved on other grounds in 20 C3d 437, 453):

- Fixed assets;
- Other assets, including properly aged accounts receivable, work in progress partially completed but not billed as a receivable, and work completed but not billed;
- Goodwill of the business as a going concern; and
- Liabilities.

For a law practice, accounts receivable, work in progress, and work completed but unbilled are very significant to proper valuation because they usually represent the law firm's major assets. *Marriage of Nichols* (1994) 27 CA4th 661, 670–671, 33 CR2d 13.

## 2. [§202.95] Co-Owned Businesses

If the community interest is co-owned, such as a partnership interest, one measure of its value may be a provision of the co-ownership or buy-sell agreement fixing the value of the interest on withdrawal or death. *Marriage of Fonstein* (1976) 17 C3d 738, 745–746, 131 CR 873. However, the value set by such an agreement is not controlling. For example, a professional’s goodwill that indirectly creates excess income must be considered even if it is not included in the termination rights of the partnership agreement. *Marriage of Fenton* (1982) 134 CA3d 451, 461–462, 184 CR 597.

In assessing whether to use a formula set forth in a buy-sell agreement, the court should consider (*Marriage of Nichols* (1994) 27 CA4th 661, 672, 33 CR2d 13):

- The proximity of the date of the agreement to the date of separation to ensure that the agreement was not entered into in contemplation of marital dissolution;
- The existence of an independent motive for entering into the buy-sell agreement, such as a desire to protect all partners against the effect of a partnership dissolution; and
- Whether the value resulting from the agreement’s purchase price formula is similar to the value produced by other approaches.

## 3. [§202.96] Goodwill

Goodwill is the advantage or benefit acquired by an establishment beyond the mere value of stock, funds, or property, as a consequence of general public patronage and encouragement it receives from constant or habitual customers on account of its local position, skill, and reputation. See *Marriage of Fenton* (1982) 134 CA3d 451, 460–461, 184 CR 597. If goodwill exists in a professional practice or business, it must be valued and taken into consideration in dividing the property. *Marriage of Watts* (1985) 171 CA3d 366, 370, 217 CR 301. A proper method of valuing goodwill contemplates any legitimate method of evaluation that measures its present value by taking into account some past result. It cannot take into account any postmarital efforts of the spouse. *Marriage of Foster* (1974) 42 CA3d 577, 584, 117 CR 49; *Marriage of Rosen* (2002) 105 CA4th 808, 819, 130 CR2d 1. See *Marriage of McTiernan & Dubrow* (2005) 133 CA4th 1090, 1094–1101, 35 CR3d 287 (case contains thorough overview of professional goodwill; court held that no goodwill existed in a spouse’s career as a motion picture director; goodwill must exist in a business, not solely the individual skill, reputation, and experience of a spouse); *Marriage of Ackerman* (2006) 146 CA4th 191, 200–204, 52 CR3d 744 (valuation of goodwill of medical practice).

Certain factors merit consideration in determining the intangible value of professional goodwill at the time of dissolution. Some of the factors are the practitioner's age, health, past demonstrated earning power, professional reputation in the community, comparative professional success, and the nature and duration of his or her business as a sole practitioner or member of a partnership or professional corporation. *Marriage of Lopez* (1974) 38 CA3d 93, 109–110, 113 CR 58. See also *Marriage of Slivka* (1986) 183 CA3d 159, 163–164, 228 CR 76 (partner in Kaiser Permanente who had no assets to take with him on withdrawal from the partnership is similar to employee, thus, has no individual goodwill in the partnership); *Marriage of Iredale* (2004) 121 CA4th 321, 328–330, 16 CR3d 505 (partner in large law firm may have individual goodwill, but no goodwill in the larger firm, as partnership contract explicitly stated that partners do not own any of the firm's goodwill).

No rigid or unvarying rule has been enunciated by the courts for determining the goodwill of a law practice or other profession as a going business. *Marriage of Rosen, supra*, 105 CA4th at 818. However, the excess earnings method is commonly used to determine the value of the goodwill in a professional practice. The excess earnings method is predicated on a comparison of the professional in question with that of a peer whose performance is “average.” See *Marriage of McTiernan & Dubrow, supra*, 133 CA4th at 1095 n1, for a detailed description of the computation.

#### **4. [§202.97] Closely Held Corporations**

A “close” or “closely held” corporation is a corporation that has few shareholders and whose shares are not generally traded in the securities market. *Marriage of Hewitson* (1983) 142 CA3d 874, 881 n2, 191 CR 392. There is no one applicable formula for valuing the interests in closely held corporations. Because of the differences between publicly held and closely held corporations, however, the court may not rely solely on an expert opinion based on the price-earnings ratio of publicly traded corporations. 142 CA3d at 885–886.

Given the myriad factual situations calling for the valuation of closely held stock, it is important that the court faced with such an issue review each factor that might have a bearing on the worth of the corporation and hence on the value of the shares. The following factors set forth in Rev Rul 59–60, 1959–1 Cum Bull 237 should be considered in valuing closely held stock (142 CA3d at 888; *Marriage of Micalizio* (1988) 199 CA3d 662, 673, 245 CR 673):

- The nature of the business and the history of the enterprise from its inception;

- The economic outlook in general and the condition and outlook of the specific industry in particular;
- The book value of the stock and the financial condition of the business;
- The earning capacity of the company;
- The dividend-paying capacity;
- Whether the enterprise has goodwill or other intangible value;
- Sales of stock and the size of the block of stock to be valued; and
- The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over the counter.

The court may set the value of closely held shares at either their hypothetical market value or their investment value. To establish a hypothetical market value for close corporation shares, two approaches are used (*Marriage of Hewitson, supra*, 142 CA3d at 882):

- *Recent-sales approach*. Use of recent sales of the unlisted stock that were made in good faith and at arm's length, within a reasonable period either before or after the valuation date, or
- *The price-earnings ratio approach*. Multiply the price-earnings ratios of comparable actively traded corporations listed on an exchange by the earnings per share of the closely held corporation.

To determine the investment value of closely held shares, three approaches are used (142 CA3d at 881–882):

- *Capitalization of earnings*. Multiply the corporation's normal earnings by a capitalization rate (multiplier) that reflects the stability of the past and the predictability of future corporate earnings.
- *Capitalization of dividends*. Based on the corporation's dividend paying capacity, which in application is identical to the capitalization of earnings approach.
- *Book value* (prorate value of the underlying assets as shown on the company's balance sheet to the number of outstanding shares) (book value) *or net asset value* (adjust the balance sheet accounts (book value) as of the valuation date to reflect the actual economic value of the assets and genuine liabilities; deduct the adjusted liabilities from the adjusted assets; and divide the result, which is the net asset value, by the number of outstanding shares).

## I. Valuation of Pension Plans

### 1. [§202.98] Defined Benefit Pension Plans

In a defined benefit pension plan, the benefit does not depend on the dollars contributed by employee or employer, but is based on a combination of factors, including (*Marriage of Bergman* (1985) 168 CA3d 742, 748 n4, 214 CR 661):

- Highest income level achieved,
- Years of service at retirement, and
- Age at retirement.

To determine the present value of such a plan, it is necessary that expert testimony, normally from actuaries, be presented. This testimony includes not only the expert's opinion as to present value, but what factors, *e.g.*, economic, health, and otherwise, the expert considered in reaching the opinion. *Marriage of Bergman, supra*.

The valuation of a participant's interest in a defined benefit plan is calculated by (*Marriage of Stephenson* (1984) 162 CA3d 1057, 1083, 209 CR 383):

- Determining the value of the pension measured at the future retirement date, then
- Discounting that value back to the present date of valuation.

The discounting procedure usually involves discounting for three separate factors, with the final present values reflecting the cumulative effect of the three factors taken into consideration. These three factors are (*Marriage of Stephenson, supra*):

- (1) Discounting for interest;
- (2) Discounting for mortality; and
- (3) Discounting for vesting.

### 2. [§202.99] Defined Contribution Pension Plans

A defined contribution pension plan is a plan where the employer's obligation is related to its annual contribution. The benefit for the employee on retirement depends on the value of the employee's account at that time. There is no need for expert testimony to determine the present value of a defined contribution plan at dissolution because its value is (*Marriage of Bergman* (1985) 168 CA3d 742, 748 n4, 214 CR 661):

- The amount of contributions made between the marriage and separation, plus accruals thereon, and
- All accruals thereon between the date of separation and trial of the issue.

**J. [§202.100] Valuation of Listed Stock**

The market value of publicly held stock that is actively traded on an exchange is the price at which the stock was traded on the valuation date. *Marriage of Hewitson* (1983) 142 CA3d 874, 882, 191 CR 392.

**K. [§202.101] Valuation of Promissory Notes**

The value of a promissory note is its “market value,” which means the price or value of the note as established or shown by sales in the course of ordinary business. *Marriage of Tammen* (1976) 63 CA3d 927, 930, 134 CR 161.

In some instances, a promissory note may be worth substantially less than its face value. The following factors may discount the face value of a note for division purposes

- Long deferment of payment (*e.g.*, 10 years). 63 CA3d at 931.
- Interest rate below prevailing rate. *Marriage of Hopkins* (1977) 74 CA3d 591, 598, 141 CR 597.
- Inferiority of security (*e.g.*, second deed of trust). *Marriage of Tammen, supra*.
- Note does not provide for acceleration on sale. *Marriage of Hopkins, supra*.
- Note subject to numerous conditions *Marriage of Herrmann* (1978) 84 CA3d 361, 366, 148 CR 550.
- Any combination of the above factors. See *Marriage of Hopkins, supra*.

However, a secured short-term note at a reasonable interest rate may be worth its face value. See, *e.g.*, *Marriage of Bergman* (1985) 168 CA3d 742, 761, 214 CR 661 (note for the value of the family home at 10 percent compounded interest secured by the family residence and payable no later than three years was worth face value); *Marriage of Slater* (1979) 100 CA3d 241, 248, 160 CR 686 (note payable in five years at 10 percent interest payable annually and secured by a lien on the other spouse’s business interest with a due on sale clause is worth face value).

**L. [§202.102] Valuation of Life Insurance**

Whole life is valued at its cash surrender value. *Marriage of Holmgren* (1976) 60 CA3d 869, 871, 139 CR 440.

Whether term life insurance is divisible property is discussed in §202.33.

## VI. DIVISION OF PROPERTY

### A. Equal Division Requirement

#### 1. [§202.103] Community Property Must Be Divided Equally

The community estate must be divided equally among the spouses (Fam C §2550) unless one of the exceptions discussed in §§202.105–202.111 applies. The “community estate” includes both community property and quasi-community property. Fam C §63.

In dividing the property equally, the court must distribute the assets and the obligations of the community equally so that the residual assets awarded to each party after the deduction of obligations are equal. *Marriage of Walrath* (1998) 17 C4th 907, 924, 72 CR2d 856; *Marriage of Olson* (1980) 27 C3d 414, 421, 165 CR 820. The court has broad discretion to determine the manner of division. *Marriage of Duncan* (2001) 90 CA4th 617, 631, 108 CR2d 833.

When dividing a community estate, the court may not make adjustments for future tax consequences of the property division, unless the consequences are “immediate and specific.” “Immediate and specific” tax consequences include those that have already occurred or those that will occur in conjunction with the division. *Marriage of Fonstein* (1976) 17 C3d 738, 747–750, 131 CR 873 (after making equal division, court may not speculate about what either or both of the spouses may possibly do with his or her equal share and engraft on the division further adjustments reflecting situations based on theory rather than fact).

#### 2. [§202.104] Authority To Confirm Separate Property

The court does not have jurisdiction to dispose of either spouse’s separate property, but it has authority to confirm separate property to the owner spouse. *Marriage of Hebring* (1989) 207 CA3d 1260, 1275, 255 CR 488.

#### 3. Exceptions to Equal Division Requirement

##### a. [§202.105] Agreement of the Parties

The parties may agree in writing or by oral stipulation in open court to divide the property, and the division is not required to be equal. Fam C §2550. Thus, the parties are free to divide their community assets in any fashion they wish and need not divide it equally. *Meha v Reed* (2003) 31 C4th 657, 666, 3 CR3d 390; *Marriage of Cream* (1993) 13 CA4th 81, 87, 16 CR2d 575.

- **JUDICIAL TIP:** The best practice is to obtain the consent of both clients as well as their counsel on the record in open court.

An executed, private oral agreement to divide the community property is not enforceable in a dissolution proceeding. *Marriage of Maricle* (1990) 220 CA3d 55, 58, 269 CR 244; see *Marriage of Elkins* (1972) 28 CA3d 899, 903, 105 CR 59 (undisclosed, oral side agreement constitutes a deception on the court and violates public policy). A party may ratify such an agreement even after being advised by his or her attorney not to do so, but the court must be satisfied that the decision is knowingly and intelligently made. *Marriage of Maricle, supra*.

The fact that a single attorney prepared the agreement as a scrivener after disclosing the potential conflict of interest did not make the agreement invalid in the absence of any showing of fraud, duress, undue influence, or breach of confidential relationship. *Marriage of Egedi* (2001) 88 CA4th 17, 22-24, 105 CR2d 518.

Each party must serve the other with a preliminary declaration of disclosure unless one of the parties waives the other's noncompliance. Fam C §§2104, 2107(b). See Judicial Council Form FL-140 (Declaration of Disclosure). This preliminary declaration is not filed with the court except on court order. Fam C §2104. However, the parties must file proof of service of the preliminary declaration of disclosure with the court. Fam C §2104(b). The preliminary declaration must identify all assets owned by the party, as well as his or her percentage ownership in each, and must state his or her income and expenses. Fam C §2104(c), (e). See Judicial Council Forms FL-140 (Declaration of Disclosure), FL-142 (Schedule of Assets and Debts) or FL-160 (Property Declaration), and FL-150 (Income and Expense Declaration). Before or at the time the parties enter into an agreement for the resolution of property issues, each party or attorney must serve on the other party a final declaration of disclosure and a current income and expense declaration, unless the parties mutually waive the final declaration of disclosure. Fam C §2105. See Judicial Council Forms FL-140 (Declaration of Disclosure), FL-142 (Schedule of Assets and Debts) or FL-160 (Property Declaration), and FL-150 (Income and Expense Statement).

#### **b. [§202.106] Deliberate Misappropriation**

If one party deliberately misappropriated community assets to the exclusion of the interest of the other party in the community estate, the court may divide the community unequally to the extent necessary to reimburse the other party. This award is an additional award or offset against existing property. Fam C §2602.

The negligent mishandling of community assets and debts does not constitute "deliberate misappropriation." *Marriage of Schultz* (1980) 105 CA3d 846, 855, 164 CR 653 (negligence in failing to defend debt collection action was not deliberate misappropriation); *Marriage of Partridge* (1990) 226 CA3d 120, 125-126, 276 CR 8 (negligent failure to

keep adequate business records and to pay estimated income taxes was not deliberate misappropriation). Rather, such actions may constitute breaches of the fiduciary duty between spouses to manage and control marital property. See §202.75.

**c. [§202.107] Community Less Than \$5000 and Party Cannot Be Located**

The court may award all the community estate to one party on conditions it deems proper if (Fam C §2604):

- The net value of the community estate is less than five thousand dollars (\$5000), and
- The other party cannot be located through the exercise of reasonable diligence.

☛ **JUDICIAL TIP:** The party relying on this exception should have to make some showing of unavailability, such as an affidavit by a process server that it was unable to effect service of process, which specifies the sources of information consulted in an attempt to learn the missing party's location.

**d. [§202.108] Community Property Personal Injury Damages**

“Community estate personal injury damages” must be assigned to the party who suffered the injuries unless the court determines that the interests of justice require another disposition after taking the following into account (Fam C §2603(b)):

- The economic condition and needs of each party;
- The time that has elapsed since the recovery of the damages or the accrual of the cause of action; and
- All other facts of the case.

“Community estate personal injury damages” means all money or other property received or to be received by a person (Fam C §2603(a))

- in satisfaction of a judgment for damages for the person's personal injuries, or
- pursuant to an agreement for the settlement or compromise of a claim for the damages,

if the cause of action for the damages arose during the marriage but is not separate property as described in Fam C §781 (see §202.24).

This provision assigning personal injury damages to the injured party is an exception to the equal division requirement, and no offsetting award of other community property may be made. *Marriage of Jacobson* (1984)

161 CA3d 465, 473–474, 207 CR 512; *Marriage of Morris* (1983) 139 CA3d 823, 826, 189 CR 80.

If another disposition is required, the community estate personal injury damages must be assigned to the respective parties in such proportions as is determined to be just, except that at least one-half of the damages must be assigned to the injured party. Fam C §2603(b). Thus, the court has discretion in exceptional circumstances to assign community property personal injury damages in such proportions as the court determines to be just, as long as the injured spouse receives at least half. 139 CA3d at 827. Factors that the court might consider include the duration of marriage after injuries occurred, the effect of injuries on the noninjured spouse, and whether a major portion if not the entirety of the award is necessary to make the injured spouse whole. *Marriage of Jacobson, supra*, 161 CA3d at 474.

Money or other property is not “community estate personal injury damages” if it has been commingled with other assets of the community estate. Fam C §2603(a). See *Marriage of Devlin* (1982) 138 CA3d 804, 810, 189 CR 1 (property retained its character as “community estate personal injury damages” when it was not commingled and was used to purchase land and mobile home for residence of injured spouse).

**e. [§202.109] Civil Damages for Act of Domestic Violence  
by One Spouse Against the Other**

If there is a judgment for civil damages for an act of domestic violence perpetrated by one spouse against the other spouse, the court may enforce that judgment against the abusive spouse’s share of community property. Fam C §2603.5.

**f. [§202.110] Attempted Murder of Spouse**

When a spouse is convicted of either attempting to murder the other spouse, or of soliciting the murder of the other spouse, the victim spouse is entitled to an award of 100 percent of the community property interest in his or her retirement and pension benefits. Fam C §782.5.

**g. [§202.111] Debts in Excess of Assets**

When community debts exceed community assets, the community estate does not have to be divided equally. The court can assign the excess of debt as it deems just and equitable, taking into account factors such as the parties’ ability to pay. Fam C §2622(b); see §202.154.

**4. [§202.112] Division of Jointly Held Separate Property**

At the request of either party, the court may divide the separate property interests of the parties in real and personal property held by the

parties as joint tenants or tenants in common. This authority extends to such property wherever situated and whenever acquired and thus to out-of-state property. The property must be divided together with, and in accordance with the same procedure for and limitations on, division of community estate. Fam C §2650.

The power to divide the interests includes the power to inquire into the extent of the interests and divide the property accordingly. Thus, when jointly owned property was acquired prior to the marriage with a loan from one spouse to the other, the court had the right to order the loan repaid as a part of the division of the property. *Marriage of Gagne* (1990) 225 CA3d 277, 283-285, 274 CR 750.

## **B. Methods of Division**

### **1. [§202.113] Court's Duty and Discretion to Value and Divide Community Property Equally**

Determination of the value and division of community property is a nondelegable judicial function. *Marriage of Cream* (1993) 13 CA4th 81, 84, 16 CR2d 575. When dividing community property, the court is vested with the discretion to choose a method of division that is not only mathematically equal, but practical and equitable as well. *Marriage of Fink* (1979) 25 C3d 877, 885, 160 CR 516.

The court may make any orders it considers necessary to carry out the purposes of the Family Code governing the division of community property. Fam C §2553.

### **2. Types of Division**

#### **a. [§202.114] In-Kind Division**

When feasible, community property assets may be divided by awarding one half to each party. *Marriage of Cream* (1993) 13 CA4th 81, 88, 16 CR2d 575. This is called an "in-kind" division.

An equal in-kind division avoids valuation problems. It eliminates the need to place a disproportionate risk of loss on either party, is impervious to charges of favoritism, and apportions the risk of future tax liabilities equally. *Marriage of Brigden* (1978) 80 CA3d 380, 391, 145 CR 716.

#### **b. [§202.115] Asset Distribution or Cash Out**

Community property may be divided by assigning some assets to one party and other assets of equal value (which may include an equalizing promissory note) to the other party. This method of division is sometimes called "asset distribution" or "cash-out." *Marriage of Cream* (1993) 13 CA4th 81, 88, 16 CR2d 575.

The court has discretion to use a secured promissory note to equalize the division of property if it is for a relatively short period at a reasonable interest rate. *Marriage of Bergman* (1985) 168 CA3d 742, 761, 214 CR 661. Valuation of promissory notes is discussed in §202.101.

### c. [§202.116] Sale and Division of Proceeds

The court may order that community property be sold and the proceeds divided. *Marriage of Cream* (1993) 13 CA4th 81, 88, 16 CR2d 575.

- JUDICIAL TIP: Sale and division of proceeds may be preferable for hard to value property.

### 3. [§202.117] Division of Family Business

When the asset at issue is a family business that either party is capable of operating, and each seeks its award and can purchase the other's share, a sale to a third party should not be ordered. Although the business may be difficult to value, and it may be even more difficult to decide the spouse to whom it should be awarded when both have been operating the business and both want it and can purchase it, it will usually be an abuse of discretion not to award it to one of the spouses. *Marriage of Cream* (1993) 13 CA4th 81, 89–90, 16 CR2d 575.

If only one spouse has the ability to run the business, however, the business must be awarded to that spouse. See *Marriage of Burlini* (1983) 143 CA3d 65, 70, 191 CR 541 (coin laundry business); *Marriage of Smith* (1978) 79 CA3d 725, 751, 145 CR 205 (sign-making business). But a nonoperating spouse may be awarded a business if no special expertise is required to operate it. *Marriage of Kozon* (1986) 185 CA3d 1258, 1262–1263, 230 CR 304 (award of fast food franchise upheld when nonoperating spouse would be able to run franchise after attending training program run by franchisor; other spouse did not have any special training when he began to run the franchise and he did not establish that his years of experience were necessary to its operation).

A business should not be ordered sold if the business has no saleable value and its only asset is the goodwill value of the operator spouse. *Marriage of Winn* (1979) 98 CA3d 363, 365–367, 159 CR 554.

If the business requires a professional license, such as a contractor, attorney, or accountant, it must be awarded to the licensee.

### 4. [§202.118] Conversion to Tenancy in Common

The court may order conversion of community property to tenancy in common, such as when the sale of the family home is deferred. *Marriage of Cream* (1993) 13 CA4th 81, 88, 16 CR2d 575. The court may not,

however, order the property to be held in joint tenancy. *Marriage of Stallworth* (1987) 192 CA3d 742, 747 n2, 237 CR 829.

### 5. [§202.119] Division of Out-of-State Real Property

If the property subject to division includes real property situated in another state, the court must, if possible, divide the community property and quasi-community property in such a manner that it is not necessary to change the nature of the interests held in the real property situated in the other state. Fam C §2660(a). The reference to not changing “the nature of the interests held” pertains to the manner in which record title is held. *Marriage of Fink* (1979) 25 C3d 877, 884, 160 CR 516.

If it is not possible to divide the property without changing the nature of the interests, the court may do any of the following in order to effect a division of the property (Fam C §2660(b)):

- Require the parties to execute conveyances or take other actions with respect to the real property situated in the other state as are necessary.
- Award to the party who would have been benefited by the conveyances or other actions the money value of the interest in the property that the party would have received if the conveyances had been executed or other actions taken.

A court of one state cannot directly affect or determine the title to land in another. However, a court, with the parties before it, can compel the execution of a conveyance in the form required by the law where the property is located and where such a conveyance will be recognized. *Rozan v Rozan* (1957) 49 C2d 322, 330, 317 P2d 11; see *Marriage of Ben-Yehoshua* (1979) 91 CA3d 259, 269-270, 154 CR 80 (judgment awarding undivided interest in foreign property as declaration of entitlement to property with no direct effect on the title to the property in the foreign country).

### 6. [§202.120] Awarding Single Assets to One Party

When economic circumstances warrant, the court may award an asset of the community estate to one party on such conditions as the court deems proper to effect a substantially equal division of the community estate. Fam C §2601. The economic circumstances that would warrant an award of an asset to one spouse are limited to circumstances when the asset is not subject to division without impairment. *Marriage of Brigden* (1978) 80 CA3d 380, 392, 145 CR 716. For example, it was proper to award all of the community interest in stock in a closely held corporation to the spouse who was employed by the corporation when there was evidence that the other owners would dissolve the corporation if the

nonemployee spouse was awarded any of its stock. *Marriage of Clark* (1978) 80 CA3d 417, 420–421, 145 CR 602.

Impairment may also be found when trying to split an ongoing family business, or trying to divide a family residence used by the custodial spouse when there is no adequate replacement, or when trying to split shares of a close corporation that is essential to one party's ability to earn a living. *Marriage of Burlini* (1983) 143 CA3d 65, 70–71, 191 CR 541; *Marriage of Brigden, supra*, 80 CA3d at 392–393.

It is within the court's discretion to award a single asset, such as a painting, to a spouse who has a special attachment to it. See *Marriage of Fink* (1979) 25 C3d 877, 886, 160 CR 516.

But when a stock is traded on a national exchange and its possession is merely helpful to one spouse, economic circumstances do not warrant awarding the entire block to that spouse. *Marriage of Brigden, supra*, 80 CA3d at 393.

High-risk assets, such as uncertain, nonincome producing stock, may be awarded to the spouse who is better able to bear the risk. *Marriage of Connolly* (1979) 23 C3d 590, 603, 153 CR 423.

When a major asset is not divided but awarded to one party, the other party must be compensated in some manner so as to maintain the required equal division. If there are not sufficient other assets, notes from the spouse awarded the asset to the other spouse may be used, but the note must be valued at its "market value," which value may be less than its face value. *Marriage of Tammen* (1976) 63 CA3d 927, 930, 134 CR 161; see §202.90.

- **JUDICIAL TIP:** If the major asset is the family home, a better alternative to using a note may be the deferred sale of the family home, if the statutory requirements for such deferred sale can be met. See §§202.15–202.150. Deferred sales of family homes are more popular in a rapidly appreciating market and are much less attractive in a market that is flat or declining.

## **7. [§202.121] Liquidation to Avoid Risk**

At any time during the proceeding, the court has the authority, on application of a party and for good cause, to order the liquidation of community or quasi-community assets so as to avoid unreasonable market or investment risks, given the relative nature, scope, and extent of the community estate. Fam C §2108. The application cannot be granted unless the appropriate declaration of disclosure has been served by the moving party. Fam C §2108. See Judicial Council Form FL-140.

The court does not have the authority to order an asset sold and the proceeds released to one party to pay the debts of the other party's business without determining the rights of the other party or protecting his

or her community property interest in the asset that was sold. *Lee v Superior Court* (1976) 63 CA3d 705, 711, 134 CR 43.

### 8. [§202.122] Omitted Community Property

The court has continuing jurisdiction to award community estate assets or community estate liabilities that have not been previously adjudicated by a judgment in the proceeding to the parties. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court must equally divide the omitted or unadjudicated community estate asset or liability, unless it finds on good cause shown that the interests of justice require an unequal division of the asset or liability. Fam C §2556.

#### ➤ JUDICIAL TIPS:

- A party may move to set aside a judgment entered on or after January 1, 1993, on various statutory grounds with specific time limitations within which to bring an action. Such grounds include actual fraud, perjury on a declaration of disclosure or income statement, or failure to comply with disclosure requirements. See Fam C §§2122, 2129.
- Strict penalties apply for breach of the fiduciary duty between spouses in managing community assets. See Fam C §1101(g), (h). See, e.g., *Marriage of Rossi* (2001) 90 CA4th 34, 40–42, 108 CR2d 270 (spouse forfeited 100 percent of lottery winnings because she fraudulently failed to disclose them during dissolution proceedings). However, *Marriage of Georgiou & Leslie* (2013) 218 CA4th 561, 160 CR3d 254 (decided on technical statutory grounds), nevertheless is an example of a case where Fam C §1101(g) and (h) was not held to be applicable when an agreement, in retrospect, simply did not turn out to be as equitable as it originally appeared.

### 9. [§202.123] Reservation of Jurisdiction

The court has the authority to expressly reserve jurisdiction to make a property division at a time after the judgment of dissolution or legal separation. Fam C §2550. For instance, this may be done to supervise the distribution of an asset, such as pension rights. See §202.129. It should also be done when the value of certain property depends on a future event, such as whether a lease would be renewed (*Marriage of Munguia* (1983) 146 CA3d 853, 858–859, 195 CR 199) or whether contingency fees would be paid (*Marriage of Kilbourne* (1991) 232 CA3d 1518, 1524–1525, 284 CR 201).

## 10. [§202.124] Methods Other Than by Judicial Decision

Although valuation and division of community property is a nondelegable duty of the court, parties may stipulate to alternative methods of division. *Marriage of Cream* (1993) 13 CA4th 81, 91, 16 CR2d 575. Thus, the court in *Marriage of Cream* explains that “[t]he court has no role in approving or disapproving property divisions agreed to by the parties. . . . [its] only role with regard to a proper stipulated disposition of marital property is to accept the stipulation and, if requested, to incorporate the disposition into the judgment.” 13 CA4th 91. Moreover the date that the “division” of property occurs is the date the agreement is made and not the date the agreement is subsequently incorporated into the judgment. *Litke O’Farrell v Tipton* (2012) 204 CA4th 1178, 139 CR3d 548.

The *Marriage of Cream* case lists alternative methods of resolving property division and valuation disputes frequently suggested by family law judges and lawyers, and stipulated to by parties. See 13 CA4th at 86–89 n5. These methods may only be used as a substitute for a judicial determination if both parties stipulate to their use. Alternative methods of valuation and division include:

- In-Kind Division
- Trade-off Division
- Piece-of-Cake Division
- One Values, the Other Chooses
- You Take It or I Will Take It
- Appraisal and Alternate Selection
- Sale
- Sealed Bid
- Interspousal Auction
- Arbitration
- Mediation
- Real Property
- Combination

See *Marriage of Cream, supra*, 13 CA4th at 94–95, for descriptions of the above-listed methods. Also note that the *Cream* court explicitly rejected the use of an interspousal auction in that particular case because one of parties repeatedly objected to it and because the trial court erred in laying the ground rules for the conduct of the auction. See 13 CA4th at 86–89 n5.

☛ JUDICIAL TIP: Remember that nearly all of the techniques suggested in *Marriage of Cream* are limited to settlement

negotiations. Such techniques used in a trial setting can be reversible error. Of the methods listed, only *in-kind division* and *sale* are tools available to a judge in trial.

### **11. [§202.125] Arbitration**

The issue of the character, the value, and the division of the community estate may be submitted to arbitration for resolution under CCP §§1141.10 et seq if (Fam C §2554(a)):

- The parties do not agree in writing to a voluntary division of the community estate of the parties; and
- The total value of the community and quasi-community property in controversy in the opinion of the court does not exceed fifty thousand dollars (\$50,000).

The decision of the court regarding the value of the community and quasi-community property to be arbitrated is not appealable. Fam C §2554(a).

The court may submit the matter to arbitration at any time it believes that the parties are unable to agree on a division of the property. Fam C §2554(b).

## **C. Division of Retirement Benefits**

### **1. [§202.126] Both Parties Must Receive Full Community Share**

The court must make whatever orders are necessary or appropriate to ensure that each party receives his or her full community property share in any retirement plan, whether public or private, including all survivor and death benefits. Fam C §2610(a).

### **2. [§202.127] Order for Direct Payments**

The court may order a retirement plan to make payments directly to a nonmember party of his or her community property interest in retirement benefits. Fam C §2610(a)(4).

Federal ERISA requirements for an order to private employee pension plans are discussed in §§202.136–202.141.

### **3. [§202.128] Limits on Court's Authority**

The court may not make any order that requires a retirement plan to do either of the following (Fam C §2610(b)):

- Make payments in any manner that will result in an increase in the amount of benefits provided by the plan, or

- Make the payment of benefits to any party at any time before the member retires, except as provided in §202.143 unless the plan so provides.

Fam C §2610 may not be applied retroactively (Fam C §2610(c)):

- To payments made by a retirement plan to any person who retired or died prior to January 1, 1987, or
- To payments made to any person who retired or died prior to June 1, 1988, for plans subject to Fam C §2610(a)(3) (state public employee pensions).

#### 4. [§202.129] Methods of Division

The court has broad discretion in the division of the community property interest in a spouse's defined benefit retirement plan and can exercise the discretion in either of two ways (*Marriage of Bergman* (1985) 168 CA3d 742, 749, 755, 214 CR 661):

- *Cash-out method.* The court determines the present value of the pension based on actuarial evidence presented by the parties. It then determines the community property interest in the present value based on the percentage of the party's employment while married and before separation. Finally, the court awards the pension right to the employee and awards offsetting assets, an equalizing payment, or both to the other spouse.

☛ **JUDICIAL TIP:** A cash-out division may be preferable when the value of the pension rights is relatively small, such as when the spouse has not been employed for a substantial period of time. An in-kind division avoids valuation problems but may require the court to retain jurisdiction to supervise future payouts.

- *In-kind division.* The court determines the percentage of the pension that is community based on the spouse's employment during marriage and before separation. It orders one-half of the community portion paid to the nonemployee spouse as it is received. The court may reserve jurisdiction to supervise payments as they become due.

The Supreme Court has expressly stated that it did not intend to specify any preference between the two methods and that the trial court retains discretion to choose the method. *Marriage of Brown* (1976) 15 C3d 838, 848, 126 CR 633; see *Marriage of Bergman, supra*.

- *Postponing Division.* There is a split in authority as to whether a court has the option of a third method of division—reserve jurisdiction to divide the pension until the retiree is actually receiving it. *Marriage of Bergman, supra*, 168 CA3d at 749, held

that a court does not have jurisdiction to postpone division in this way. It found that Fam C §2550, authorizing property division at a later time, only authorizes bifurcation of issues and does not allow the court to reserve jurisdiction indefinitely to divide a community asset.

*Marriage of Ramer* (1986) 187 CA3d 263, 275, 231 CR 647, and *Marriage of Carl* (1977) 67 CA3d 542, 546, 136 CR 703, approved a trial court's reserving jurisdiction to divide a pension.

- **JUDICIAL TIP:** It is a good idea for the court to require parties to obtain their plan's preapproval of a qualified domestic relations order. Most plans will have an advisory statement that if they are presented with an entered order consistent with a draft order previously approved by the plan, the plan will qualify the order under the provisions of ERISA or other statutes governing a federal, state, or municipal plan.

## **5. Dividing Benefits When Spouse Could Retire**

### **a. [§202.130] Spouses' Rights and Elections**

If a nonemployee spouse is entitled to receive the community portion of the employee spouse's pension benefits when the employee spouse retires, the nonemployee spouse is entitled to the benefits at retirement age whether the employee spouse actually retires and receives benefits. Postponing would deprive the nonemployee spouse of the immediate enjoyment of an asset earned by the community during the marriage. In so doing, the employee spouse would subject the nonemployee spouse to the risk of losing the asset completely if the employee spouse were to die while still employed. Although the employee spouse has every right to choose to postpone the receipt of the pension and to run that risk, he or she should not be able to force the nonemployee spouse to do so as well. *Marriage of Gillmore* (1981) 29 C3d 418, 424, 174 CR 493.

When jurisdiction has been reserved to divide the retirement benefits and the employee spouse becomes eligible for retirement, he or she may (*Marriage of Cornejo* (1996) 13 C4th 381, 383, 53 CR2d 81):

- Retire and thereby commence drawing from the stream of income that then begins to flow, with the result that the nonemployee spouse may start to draw his or her share of the community property interest as well; or
- Continue to work and thereby forgo the income he or she would have drawn, with the result that the nonemployee spouse is compelled to forgo what would have been his or her share as well.

If the employee spouse continues to work, the nonemployee spouse may (*Marriage of Cornejo, supra*):

- Wait to draw his or her share when the employee spouse commences to receive benefits (with the possibility of increase as a result of a greater age, longer service, and/or higher salary); or
- Demand immediate payment to compensate for what would have been his or her share (without such possibility of increase). This choice is sometimes called a “*Gillmore* election.”

If the nonemployee spouse decides on immediate payment, the employee spouse is given another choice. He or she may (13 C4th at 383):

- Make arrangements to meet the demand for immediate payment; or
- Simply retire and allow the nonemployee spouse to draw his or her share.

**b. [§202.131] Methods of Awarding Retirement Benefit Rights**

If the nonemployee spouse elects to receive the retirement benefits when the employee could have retired, the court can order that the community interest be bought out by valuing it and awarding half in cash. Or it can order that the employee spouse begin to pay the other spouse a share of the retirement payments on a monthly basis. *Marriage of Gillmore* (1981) 29 C3d 418, 429, 174 CR 493.

When the nonemployee spouse elects to receive the retirement benefits, the nonemployee spouse forfeits any right to share in the increased value of those benefits in the future based on further employment or wage increases. 29 C3d at 428 n9; *Marriage of Castle* (1986) 180 CA3d 206, 215–216, 225 CR 382. The nonemployee spouse is entitled, however, to share in any increase in benefits that would have been received had the employee spouse actually retired on the date he or she elected to receive the interest, such as automatic cost-of-living adjustments. *Marriage of Scott* (1984) 156 CA3d 251, 254–255, 202 CR 716.

**c. [§202.132] When the Right to Payment Accrues**

If the retirement date occurs and the election is made after the dissolution proceeding, the nonemployee spouse is entitled to receive payment from the date on which he or she files a motion seeking immediate payment. *Marriage of Cornejo* (1996) 13 C4th 381, 385, 53 CR2d 81.

If the employee spouse is entitled to retire at the time of trial, the nonemployee spouse may, if he or she chooses, elect to receive immediately his or her community interest in the benefit that would have

been paid had the spouse actually retired at time of trial. Or, the nonemployee spouse may choose to wait until the actual retirement and share at that time in the retirement benefits, based on the community's interest in the plan calculated as of the date of the parties' separation. *Marriage of Castle* (1986) 180 CA3d 206, 216, 255 CR 382.

**d. [§202.133] Waiver of Right To Make Election**

The rights to make a pension election may be waived in a marital settlement agreement as long as the intention to do so is express and unequivocal. However, the agreement on its face must manifest a clear intention of the parties that the employee spouse has full control over the date that payments to the nonemployee spouse begin. *Marriage of Crook* (1992) 2 CA4th 1606, 1611, 3 CR2d 905.

**6. Death and Survivor Benefits**

**a. [§202.134] Right to Community Share**

The court must make whatever orders are necessary or appropriate to ensure that each party receives his or her full community property share of all survivor and death benefits, including any of the following (Fam C §2610(a)(1), (2)):

- Order the disposition of any retirement benefits payable on or after the death of either party in a manner consistent with the equal division requirement of Fam C §2550.
- Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election. However, no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value.

Even if the pension plan does not provide for survivor benefits to a divorced spouse, a divorced spouse is entitled to be compensated for his or her half of the community of which he or she was a member, which could be a prorated share of death and survivor benefits (*Marriage of Carnall* (1989) 216 CA3d 1010, 1024-1026, 265 CR 271), or a valuation of the pension to be divided that includes the value of any death and survivor benefits. *Marriage of Nice* (1991) 230 CA3d 444, 452, 281 CR 415.

- **JUDICIAL TIP:** Most pensions cease upon the death of an employee. This means that, on an actuarial basis, the employee will receive an amount in excess of what would be received by the spouse. There are three methods of compensating the spouse for this potential unequal division of the pension: (1) The survivor's benefit is paid to spouse after employee's death, (2) a

life insurance policy on the employee is made payable to the spouse upon employee's death, and (3) an unequal percentage (higher than 50 percent) of each payment goes to the spouse during the joint lives to account for the possible effect of the terminable interest rule.

Note also that community property interests are ordinarily inheritable. Prob C §100; *Sousa v Freitas* (1970) 10 CA3d 660, 665, 89 CR 485. Thus, the estate of the deceased spouse, or of the deceased former spouse, is also entitled to its community share of survivor benefits. A surviving spouse and a decedent-spouse's estate share an interest in the decedent-spouse's pension benefits, which upon his or her death, become survivor benefits. See *Marriage of Powers* (1990) 218 CA3d 626, 642, 267 CR 350. Courts must protect both the rights of the surviving spouse as well as the rights of the deceased spouse's estate.

- **JUDICIAL TIP:** Courts may employ a constructive trust against the survivor benefits that are then payable to the deceased spouse's heirs.

#### **b. [§202.135] Federal Military Service Members and Federal Employees**

Federal law allows former and current military service members to elect a survivor annuity for a former spouse or former spouse and children. 10 USC §1450. A court may order the election to be made. 10 USC §1450(f)(4). If the service member fails to make the election as required by court order, it is deemed made if the former spouse makes a written request within one year of the date of the court order. 10 USC §1450(f)(3). The election cannot be changed without a further court order or agreement of the former spouse. 10 USC §1450(f)(2). The annuity terminates if the former spouse remarries before age 55. 10 USC §1450(b)

A former spouse of a federal civil service employee is entitled to a survivor annuity to the extent provided for in (5 USC §8341(h)(1)):

- An election by the civil service member spouse (see 5 USC §8339(j)(3)); and
- The terms of any decree of divorce or annulment or any court order or any court-approved property settlement.

The survivor annuity terminates if the former spouse remarries before age 55. 5 USC §8341(h)(3)(B).

## 7. ERISA and QDROs

### a. [§202.136] ERISA Preemption of Private Pension Plans

The Employment Retirement Income Security Act (ERISA) supersedes any and all state laws insofar as they relate to any *private* employee pension plan. 29 USC §1144(a), (b)(7); *Marriage of Baker* (1988) 204 CA3d 206, 218, 251 CR 126; See also *Schwab v Debickero* (2010) 593 F3d 916 (surviving spouse protections in ERISA do not apply to individual retirement accounts (IRAs) even if the IRA funds originated from an ERISA-protected pension plan). ERISA provides that a private employee pension plan may not be assigned or alienated except by a “qualified domestic relations order” (QDRO). 29 USC §1056(d).

State courts have concurrent jurisdiction with the federal courts to enforce rights under ERISA. *Marriage of Pilatti* (1979) 96 CA3d 63, 67, 157 CR 594; *Marriage of Lionberger* (1979) 97 CA3d 56, 64, 66, 158 CR 535; *Marriage of Mantor* (1980) 104 CA3d 981, 985, 164 CR 121.

If a court order to an ERISA pension plan does not meet QDRO requirements, the court order may give rights to a spouse that may be enforced on meeting QDRO requirements. A QDRO may thus render enforceable an already-existing interest, such as rights accrued against a plan before benefits become payable. *Trustees of Directors Guild of America v Tice* (9th Cir 2000) 234 F3d 415, 421.

ERISA also preempts any state law that allows a former spouse to make a testamentary transfer of any pension plan benefits that are undistributed on the death of the former spouse. *Boggs v Boggs* (1997) 520 US 833, 117 S Ct 1754, 138 L Ed 2d 45; *Branco v UFCW-Northern California Employers* (9th Cir 2002) 279 F3d 1154, 1157-1158.

When any domestic relations order is received by a plan, the plan administrator must promptly notify the participant and each alternate payee of the receipt of such order and the plan’s procedures for determining the qualified status of domestic relations orders. The plan administrator must also, within a reasonable period after receipt of such order, determine whether such order is a QDRO and notify the participant and each alternate payee of such determination. 29 USC §1056(d)(3)(G)(i).

The administrator of the plan must wait 18 months after receiving a domestic relations order that does not qualify as a QDRO before it can pay the benefits to the person or persons who would have been entitled if there were no order. During the 18 months, the plan must separately account for the benefits. 29 USC §1056(d)(3)(H).

During the 18 months, the order can be amended by the court that issued it to qualify as a QDRO. 29 USC §1056(d)(3)(H). The state court has concurrent jurisdiction with the federal court to determine whether an

order is a QDRO. *Marriage of Livingston* (1993) 12 CA4th 1303, 1306-1307, 16 CR2d 100.

- JUDICIAL TIP: ERISA only provides for the division of retirement plans between spouses. In domestic partner situations, it is not clear what alternatives are available until the appellate courts address the issue of dividing a registered domestic partner's retirement plan.

#### b. [§202.137] QDRO Definition

A QDRO means a domestic relations order which (29 USC §1056(d)(3)(B)(i)):

- Creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
- Meets the statutory requirements (see §202.138).

The term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) that (29 USC §1056(d)(3)(B)(ii)):

- Relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant; and
- Is made pursuant to a state domestic relations law (including a community property law).

An order enforcing a spouse's right to have the other party pay federal income tax liability was not enforcing "marital property rights" and thus was not the proper basis for a QDRO. *Marriage of Marshall* (1995) 36 CA4th 1170, 1175, 43 CR2d 38.

The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant. 29 USC §1056(d)(3)(K). It does not encompass a deceased former spouse or his or her estate or heirs. *Branco v UFCW-Northern California Employers* (9th Cir 2002) 279 F3d 1154, 1157-1158. An order requiring a pension plan to pay to a deceased spouse's "designated successor" is not valid because the successor might be a person who is not a qualified "alternate payee," such as a person who is not a child or dependent. *Marriage of Shelstead* (1998) 66 CA4th 893, 902-904, 78 CR2d 893.

However, a plan participant and his long-time cohabitant, with whom he shared two children and real and other property, were held to have a

quasi-marital relationship, qualifying the cohabitant as an “other dependent” and an “alternate payee” under ERISA. Therefore, an order regarding distribution of the plan participant’s retirement benefits related to “marital property rights,” qualifying it as a QDRO. *Owens v Automotive Machinists Pension Trust* (9th Cir 2009) 551 F3d 1138, 1146–1147.

### c. [§202.138] QDRO Statutory Requirements

An order or judgment meets the QDRO statutory requirements only if the order clearly specifies (29 USC §1056(d)(3)(C)):

- The name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order;
- The amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined;
- The number of payments or period to which such order applies; and
- Each plan to which such order applies.

An order meets QDRO requirements only if such order (29 USC §1056(d)(3)(D)):

- Does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan;
- Does not require the plan to provide increased benefits (determined on the basis of actuarial value); and
- Does not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

There is a Judicial Council form of QDRO order. Judicial Council Form FL-460, Qualified Domestic Relations Order for Support (Earnings Assignment Order for Support).

Another Judicial Council form relating to pension benefits is FL-348, Pension Benefits—Attachment to Judgment. This form serves as a provisional QDRO if no other arrangements have been made for the pension.

- **JUDICIAL TIP:** Many plans will cooperate with courts that seek plan approval before entry of the order.

**d. [§202.139] Joint and Survivor Benefits**

To the extent provided by a QDRO, the former spouse of a participant is treated as a surviving spouse of such participant for purposes of joint and survivor annuity provisions, and any surviving spouse is not treated as a spouse of the participant. 29 USC §1056(d)(3)(F)(i). If married for one year to the participant, the surviving spouse is treated as meeting the married-one-year-before-the-death requirement. 29 USC §1056(d)(3)(F)(ii).

**e. [§202.140] Order for Payment on Earliest Retirement Age**

A domestic relations order may not be treated as failing to meet the requirement for providing benefits not provided under the plan solely because such order requires that payment of benefits be made to an alternate payee (29 USC §1056(d)(3)(E)(i)):

- In the case of any payment before a participant has separated from service, on or after the date on which participant attains or would have attained the earliest retirement age;
- As if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement); and
- In any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

The earliest retirement age means the earlier of (29 USC §1056(d)(3)(E)(ii)):

- The date on which the participant is entitled to distribution under the plan; or
- The later of the date the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

Thus, a QDRO can be ordered to comply with a *Marriage of Gillmore* (1981) 29 C3d 418, 424, 174 CR 493, election to receive benefits when the other spouse could have retired. See §202.130.

### **f. [§202.141] Interplay Between QDROs and QPSAs**

Under ERISA, a QDRO can divest a pension plan participant's surviving spouse of his or her right to a Qualified Preretirement Survivor Annuity (QPSA) only if the QDRO expressly assigns the surviving-spouse benefit to a former spouse under 29 USC §1056(d)(3)(F). *Hamilton v Washington State Plumbing & Pipefitting Industry Pension Plan* (9th Cir 2006) 433 F3d 1091, 1098–1104.

### **8. [§202.142] Federal Pension Requirements**

There are federal requirements for orders dividing federal civil service pensions (5 USC §8345(j)) and military pensions. 10 USC §1408.

### **9. [§202.143] California Public Employee Benefits**

California public employee retirement plans have provisions for division of pension rights. On the agreement of the nonemployee spouse, the court must order the division of accumulated community property contributions and service credit as provided in the following or similar enactments (Fam C §2610(a)):

- Government Code §§21215 et seq (Public Employees' Retirement System);
- Education Code §§22650 et seq (State Teachers' Retirement System Defined Benefit Program);
- Government Code §§31685 et seq (County Employees' Retirement System);
- Government Code §§75050 et seq (Judges' Retirement System); and
- Education Code §§27400 et seq (State Teachers' Retirement System Cash Balance Benefit Program).

➤ **JUDICIAL TIP:** The ERISA requirements for a QDRO do not apply to federal, state, or municipal plans. These government plans each have unique provisions and rules with respect to the type, scope, and method of division that differ substantially from private employer, or ERISA, plans.

## **D. Deferred Sale of Family Residence**

### **1. [§202.144] Deferred Sale of Home Order Defined**

“Deferred sale of home order” means an order that temporarily delays the sale and awards the temporary exclusive use and possession of the family home to a custodial parent of a minor child or child for whom support is authorized under Fam C §§3900, 3901, 3910. The order is

authorized whether the custodial parent has sole or joint custody. It is made in order to minimize the adverse impact of dissolution of marriage or legal separation of the parties on the welfare of the child. Fam C §3800(b).

## **2. [§202.145] Economic Feasibility Determination Required**

If one of the parties requests a deferred sale of home order, the court must first determine whether it is economically feasible to maintain (Fam C §3801(a)):

- The payments of any note secured by a deed of trust, property taxes, insurance for the home during the period the sale of the home is deferred; and
- The condition of the home comparable to that at the time of trial.

In making this determination, the court must consider all of the following (Fam C §3801(b)):

- The resident parent's income;
- The availability of spousal support, child support, or both spousal and child support; and
- Any other sources of funds available to make those payments.

It was the intent of the Legislature, by requiring this determination, to do all of the following (Fam C §3801(c)):

- Avoid the likelihood of possible defaults on the payments of notes and resulting foreclosures,
- Avoid inadequate insurance coverage,
- Prevent deterioration of the condition of the family home, and
- Prevent any other circumstance that would jeopardize both parents' equity in the home.

## **3. [§202.146] Factors To Be Considered in Ordering Deferred Sale**

If the court determines that it is economically feasible to consider ordering a deferred sale of the family home, it may grant a deferred sale of home order to a custodial parent if the court determines that the order is necessary in order to minimize the adverse impact of dissolution of marriage or legal separation of the parties on the child. Fam C §3802(a).

In exercising discretion to grant or deny a deferred sale of home order, the court must consider all of the following (Fam C §3802(b)):

- The length of time the child has resided in the home.
- The child's placement or grade in school.

- The accessibility and convenience of the home to the child's school and other services or facilities used by and available to the child, including child care.
- Whether the home has been adapted or modified to accommodate any physical disabilities of a child or a resident parent in a manner that a change in residence may adversely affect the ability of the resident parent to meet the needs of the child.
- The emotional detriment to the child associated with a change in residence.
- The extent to which the location of the home permits the resident parent to continue employment.
- The financial ability of each parent to obtain suitable housing.
- The tax consequences to the parents.
- The economic detriment to the nonresident parent in the event of a deferred sale of home order.
- Any other factors the court deems just and equitable.

Title should be changed to a tenancy-in-common between the spouses. *Marriage of Stallworth* (1987) 192 CA3d 742, 747 n2, 237 CR 829.

- **JUDICIAL TIP:** A deferred sale may be ordered even when one spouse has a substantial separate interest in the home. Such an order is authorized by Fam C §3800 and the spouse's child support obligation. *Marriage of Braud* (1996) 45 CA4th 797, 812–813, 53 CR2d 179.

#### **4. [§202.147] Order Deferring Sale of Family Home**

When the court makes a deferred sale of home order, it must state the duration of the order and may include the legal description and assessor's parcel number of the real property that is subject to the order. Fam C §3803.

The court may make an order specifying the parties' respective responsibilities for the payment of the costs of routine maintenance and capital improvements. Fam C §3806.

A deferred sale of home order may be recorded in the office of the county recorder of the county in which the real property is located. Fam C §3804.

- **JUDICIAL TIP:** The custodial parent is usually made responsible for mortgage payments, taxes, and insurance. *Marriage of Horowitz* (1984) 159 CA3d 368, 373 n5, 205 CR 874.

### **5. [§202.148] Modification or Termination**

Except as otherwise agreed to by the parties in writing, a deferred sale of home order may be modified or terminated at any time at the discretion of the court. Fam C §3807.

### **6. [§202.149] Reservation of Jurisdiction Required**

In making a deferred sale order, the court must reserve jurisdiction to determine any issues that arise with respect to the deferred sale of home order including, but not limited to, the maintenance of the home and the tax consequences to each party. Fam C §3809.

### **7. [§202.150] Change in Circumstances**

A rebuttable presumption, affecting the burden of proof, is created that further deferral of the sale is no longer an equitable method of minimizing the adverse impact of a dissolution of marriage or of a legal separation of the parties on the children, in the following two circumstances (Fam C §3808):

(1) When the party awarded the deferred sale remarries, or

(2) When there is otherwise a change in circumstances affecting the determination of economic feasibility (Fam C §3801), mandatory factors that the court should consider when determining whether to grant a deferred sale, or a change in circumstances affecting the economic status of the parties or the children on which the award is based.

## **E. Assignment of Debts**

### **1. [§202.151] Debts Incurred Before Marriage**

Debts incurred by either spouse before the date of marriage must be confirmed without offset to the spouse who incurred the debt. Fam C §2621.

### **2. [§202.152] Debts Incurred During Marriage**

The court must divide debts incurred by either spouse after the date of marriage but before the date of separation. They must be divided as set forth in Fam C §§2550–2552 and §§2601 to 2604. Fam C §2622(a). Those provisions require equal division of the community estate with certain exceptions set forth in §§202.105–202.111.

A contract debt is incurred when the contract is made; if the contract was made during the marriage, the community is liable even if performance was due or a breach occurred after separation. *Marriage of Feldner* (1995) 40 CA4th 617, 622–623, 47 CR2d 312 (there may be reimbursement rights for postseparation performance or breach).

**a. [§202.153] Separate Debts**

All separate debts, including those debts incurred by a spouse during marriage and before the date of separation that were not incurred for the benefit of the community, must be confirmed to the spouse who incurred the debt without offset. Fam C §2625.

**b. [§202.154] Debts Exceed Assets**

To the extent that community debts exceed total community and quasi-community assets, the court must assign the excess of debt as it deems just and equitable, taking into account factors such as the parties' relative ability to pay. Fam C §2622(b). Thus, it was not an abuse of discretion to award most of the community assets to one spouse when the community liabilities assigned to that spouse exceeded the community assets. *Marriage of Vanderbeek* (1986) 177 CA3d 224, 233-234, 222 CR 832.

- ☛ **JUDICIAL TIP:** If there is a reasonable probability of bankruptcy, an award of all assets and all debts to one spouse can be risky and can result in an unfair division. A party that is awarded both assets and debts could declare bankruptcy, discharge the debts, and keep all exempt assets. The remaining party could then be saddled with all the debts but without any corresponding assets to offset those debts.

**c. [§202.155] Tort Liability Not Acting for Community**

Liability of the married person that is not based on an act or omission that occurred while the married person was performing an activity for the benefit of the community must be confirmed to the spouse whose act or omission provided the basis for the liability, without offset. Fam C §§1000(b)(1), 2627.

**3. [§202.156] Debts Incurred After Separation**

Debts incurred by either spouse after the date of separation but before entry of a judgment of dissolution or legal separation must be confirmed as follows (Fam C §2623):

- Debts incurred by either spouse for the common necessities of life of either spouse or the necessities of life of the children of the marriage for whom support may be ordered must be confirmed to either spouse according to the parties' respective needs and abilities to pay at the time the debt was incurred. This provision is applicable in the absence of a court order or written agreement for support or for the payment of these debts.

- Debts incurred by either spouse for nonnecessaries of that spouse or children of the marriage for whom support may be ordered must be confirmed without offset to the spouse who incurred the debt.

#### 4. [§202.157] Debts Incurred After Entry of Judgment

Debts incurred by either spouse after entry of a judgment of dissolution of marriage but before termination of the parties' marital status must be confirmed to the spouse who incurred the debt without offset. Fam C §2624.

The court has jurisdiction to order reimbursement in cases deemed appropriate for debts paid after separation but before trial. Fam C §2626. See §202.178.

### F. Education Loans

#### 1. [§202.158] Reimbursement

The court must order that the community be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party. "Community contributions to education or training" means payments made with community or quasi-community property for education or training or for the repayment of a loan incurred for education or training, whether the payments were made while the parties were residents in this state or residents outside this state. Fam C §2641(a).

The amount reimbursed must be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made. Fam C §2641(b)(1). Earning a degree does not necessarily enhance the earning capacity, such as when the spouse who earned a law degree did not intend to practice law and intended to remain a police officer. *Marriage of Graham* (2003) 109 CA4th 1321, 1325–1326, 135 CR2d 685.

The court must require reimbursement for expenses that are related to the education experience itself, not ordinary living expenses that would be incurred regardless of whether one spouse is attending school, staying home, or working. *Marriage of Watt* (1989) 214 CA3d 340, 354, 262 CR 783.

- JUDICIAL TIP: Family Code §2641 was intended to include educational loans received before marriage but repaid during marriage with community funds. The educational loan recipient may be required to reimburse the community for such payments. *Marriage of Weiner* (2003) 105 CA4th 235, 239–241, 129 CR2d 288.

## **2. [§202.159] Reimbursement Exclusive Remedy**

Reimbursement for community contributions and assignment of loans pursuant to Fam C §2641 is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party. However, this does not limit consideration of the effect of the education, training, or enhancement, or the amount reimbursed, on the circumstances of the parties for the purpose of an order for spousal support. Fam C §2641(d).

## **3. [§202.160] Assignment to Educated Party**

A loan incurred during marriage for the education or training of a party must not be included among the liabilities of the community for the purpose of division. The loan must be assigned for payment by the party who was educated or trained. Fam C §2641(b)(2).

## **4. [§202.161] Express Written Agreement to the Contrary**

The reimbursement and loan assignment provisions for education loans are subject to an express written agreement of the parties to the contrary. Fam C §2641(e).

## **5. [§202.162] Reduction or Modification When Unjust**

The court must reduce or modify the reimbursement and assignment of educational loans to the extent that circumstances render such a disposition unjust, including, but not limited to, any of the following (Fam C §2641(c)):

- The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding. There is a similar presumption that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.
- The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.
- The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

## G. Reimbursement

### 1. Separate Property Contributions to the Acquisition of Community Property

#### a. [§202.163] Right to Reimbursement

Absent a written waiver of the right to reimbursement, the court must order reimbursement for a party's contributions to the acquisition of community property to the extent that the party traces those contributions to a separate property source. Fam C §2640(b). The amount reimbursed is without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division. Fam C §2640(b). Thus, when a spouse converted a separate property residence to community property, the value of the separate property was a contribution to the acquisition of community property. *Marriage of Stoll* (1998) 63 CA4th 837, 841–842, 74 CR2d 506. However, incorporation of a separate property business during marriage was not an acquisition of community property so as to make Fam C §2640 applicable. *Marriage of Koester* (1999) 73 CA4th 1032, 1036, 87 CR2d 76.

The applicability of the requirement of Fam C §2640 requiring reimbursement for separate property contributions to the acquisition of any property that the court divides as community property is limited by the due process clause to property acquired on or after January 1, 1984. *Marriage of Heikes* (1995) 10 C4th 1211, 1225, 44 CR2d 155. For property acquired before January 1, 1984, a spouse was entitled to reimbursement only if the parties had so agreed; otherwise, any contribution of separate property to the property being divided as community property was deemed an outright gift. *Marriage of Heikes, supra*, 10 C4th at 1213; *Marriage of Lucas* (1980) 27 C3d 808, 815, 166 CR 853.

The right to reimbursement applies to contributions to quasi-community property. See *Marriage of Craig* (1990) 219 CA3d 683, 685–686, 268 CR 396.

Reimbursement under Fam C §2640 is applicable to situations when a spouse conveys to the married couple title in joint tenancy to property acquired by the spouse before the marriage. *Marriage of Weaver* (2005) 127 CA4th 858, 864–870, 26 CR3d 121 (spouse entitled to equity value contribution to the other spouse's community property share of a residence held in joint tenancy; court discussed inherent tensions between the Fam C §2581 community property presumption and Fam C §2640).

Reimbursement is only applicable when the property acquired is community, not when the contributions are to the other spouse's separate property. *Marriage of Cross* (2001) 94 CA4th 1143, 1146–1147, 114 CR2d 839.

Reimbursement under Fam C §2640 is not applicable when there is a deferred sale of a home under Fam C §§3801–3810. See §202.144. The contributing spouse is entitled to an increased interest in the family home based on his or her contribution. *Marriage of Braud* (1996) 45 CA4th 797, 819–820, 53 CR2d 179.

Family Code §2640 is not applicable to postseparation use of separate property to pay community debts. *Marriage of Hebring* (1989) 207 CA3d 1260, 1272, 255 CR 488; see §202.175.

#### **b. [§202.164] Separate Property Contributions Defined**

Contributions to the acquisition of the property include down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property. They do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property. Fam C §2640(a). A school fee paid as a requirement to a building permit was reimbursable because it was not a property tax. *Marriage of Cochran* (2001) 87 CA4th 1050, 1062, 104 CR2d 920. However, use of separate property to pay community property credit card debts so that the community could qualify for a loan to purchase property was not a reimbursable contribution to the acquisition of the property. *Marriage of Nicholson & Sparks* (2002) 104 CA4th 289, 296–297, 127 CR2d 852. If the contribution is separate property converted to community property, the contribution is the equity value of the separate property at the time of the conversion. *Marriage of Perkal* (1988) 203 CA3d 1198, 1202, 250 CR 296. The *Moore-Marsden* formula (see Appendix) is applicable to determine the community's pro tanto share of equity appreciation after the conversion. *Marriage of Kahan* (1985) 174 CA3d 63, 72, 219 CR 700.

If both parties contributed to the separate property that was converted to community, both parties must be reimbursed in proportion to their separate property contributions. *Marriage of Rico* (1992) 10 CA4th 706, 710–711, 12 CR2d 659. See *Marriage of Weaver* (2005) 127 CA4th 858, 870–871, 26 CR3d 121 (husband entitled to reimbursement for down payment on a family residence that was purchased by husband and wife as joint tenants before marriage; residence became community property during marriage as a result of commingling of separate property interests with community property funds used to pay mortgage and to finance home improvements).

If the value of the community property that resulted from a contribution of separate property is less than it was when it was contributed, the reimbursement is the property itself. *Marriage of Witt* (1987) 197 CA3d 103, 108–109, 242 CR 646.

### c. [§202.165] Reimbursement Based on Tracing

There are two methods to trace whether property purchased with commingled funds is separate and overcomes the presumption that property acquired during marriage is community. *Marriage of Mix* (1975) 14 C3d 604, 610, 122 CR 79. The first method is direct tracing. Separate funds do not lose their separate character when commingled with community funds in a bank account if the amount of separate funds can be ascertained. 14 C3d at 612. The party seeking to establish a separate interest in presumptive community property must keep adequate records and show the exact amount of money allocable to separate and community property. *Marriage of Frick* (1986) 181 CA3d 997, 1011, 226 CR 766. The second method involves tracing through family expenses. This method is based on the presumption that family expenses are paid from community funds. If it can be shown at the time property is acquired that all community income in a commingled account was exhausted to pay family expenses, then all funds remaining in the account were necessarily separate funds. *Marriage of Mix, supra*, 14 C3d at 612. If separate and community property or funds are commingled in such a manner that it is impossible to trace the source of the property or funds, the whole must be treated as community property. *Marriage of Mix, supra*, 14 C3d at 610–611 n6.

Family Code §2640 specifically provides that reimbursement is based on “tracing” to a separate property source. However, when the original community property acquisition to which a separate property contribution was made is not sold or refinanced, there is little tracing involved. The contributing spouse simply has to establish that a contribution was made and the amount thereof. He or she then gets reimbursed before the division of any community property. Neither “direct” nor “family expense” tracing method is necessary. *Marriage of Walrath* (1998) 17 C4th 907, 920, 72 CR2d 856.

The strict recordkeeping requirement imposed for tracing in commingled bank account cases (see *See v See* (1966) 64 C2d 778, 784, 51 CR 888) is not applicable to tracing based on separate real property contributions to community, such as when a separate residence is converted to community after marriage. The amount of reimbursement may be based on the separate property owner’s estimate of the value at the time of conversion. There is no question that the property was separate when converted, and strict recordkeeping is not possible in the case of a real property contribution. Finally, requiring strict tracing would be contrary to the intent of the Legislature in enacting Fam C §2640, which was to provide for reimbursement when separate real property is contributed to the community. *Marriage of Stoll* (1998) 63 CA4th 837, 841–843, 74 CR2d 506.

**d. [§202.166] Conditions on Right of Reimbursement**

A right of reimbursement provided by Fam C §§900–1000 is subject to the following provisions (Fam C §920):

- The right arises regardless of:
  - Which spouse applies the property to the satisfaction of the debt,
  - Whether the property is applied to the satisfaction of the debt voluntarily or involuntarily, and
  - Whether the debt to which the property is applied is satisfied in whole or in part.
- The right is subject to an express written waiver of the right by the spouse in whose favor the right arises.
- The measure of reimbursement is the value of the property or interest in property at the time the right arises.
- The right must be exercised not later than the earlier of the following times:
  - Within three years after the spouse in whose favor the right arises has actual knowledge of the application of the property to the satisfaction of the debt.
  - In proceedings for division of community and quasi-community property pursuant to dissolution or legal separation proceedings or in proceedings on the death of a spouse.

**e. [§202.167] Waiver**

Reimbursement is required unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver. Fam C §2640. To constitute a waiver, there must be an actual intention to relinquish it or there must be conduct so inconsistent with the intent to enforce that right in question that it induces a reasonable belief that the right to reimbursement has been relinquished. *Marriage of Perkal* (1988) 203 CA3d 1198, 1203, 250 CR 296. There must be an intentional act with knowledge of the right being waived. *Marriage of Carpenter* (2002) 100 CA4th 424, 428, 122 CR2d 526.

Writing “for a gift” on the deed was not sufficient for waiver when the spouse testified that it was done to avoid payment of a documentary transfer tax, and he was unaware of the statute requiring reimbursement. *Marriage of Perkal, supra*. Nor was a premarital agreement that separate property would remain separate sufficient for a waiver when separate property was used to purchase a community asset after the marriage. An

agreement silent on the right to reimbursement cannot constitute a waiver. *Marriage of Carpenter, supra*, 100 CA4th at 427–428.

**f. [§202.168] Subsequent Acquisition**

The phrase “the property” includes not only the specific community property to which the separate property was originally contributed, but also any other community property that is subsequently acquired from the proceeds of the initial property, and to which the separate property contribution can be traced. *Marriage of Walrath* (1998) 17 C4th 907, 918, 72 CR2d 856. When the original property to which the contribution is made is refinanced and additional property is purchased from the proceeds of the refinancing, tracing is applicable to ascertain what portion of the amount contributed was transferred to the new asset or remains in the original asset. The trial court must ascertain what percentage of the loan proceeds is based on each party’s separate contribution. 17 C4th at 921–922.

Tracing may also be applicable to determine whether separate property contributed to the purchase of the subsequent community property. *Marriage of Braud* (1996) 45 CA4th 797, 822, 53 CR2d 179.

**2. [§202.169] Separate Property Contributions to the Acquisition of the Other Spouse’s Separate Property**

In the division of community property, the court must order reimbursement of a party’s separate property contributions to the acquisition of separate property of the other party that are made during marriage, absent a written transmutation or written waiver of the right to reimbursement. Fam C §2640(c). The amount reimbursed is without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division. Fam C §2640(c).

**3. [§202.170] Separate Property Used To Pay for Necessaries**

A married person and his or her separate property are liable for (Fam C §914(a)):

- A debt incurred for necessities of life of the person’s spouse while the spouses are living together.
- Except as provided in Fam C §4302, a debt incurred for common necessities of life of the person’s spouse while the spouses are living separately.

If separate property is applied to satisfy such a debt at a time when nonexempt property in the community estate or separate property of the person’s spouse is available but is not applied to the satisfaction of the

debt, the married person is entitled to reimbursement to the extent such property was available. Fam C §914(b).

#### **4. [§202.171] Community Property Used To Pay Child or Spousal Support Not From Marriage**

Child or spousal support obligations of a married person that do not arise out of the current marriage are treated as debt incurred before marriage. Fam C §915(a). A married person's earnings are exempt from the debts of his or her spouse incurred before their marriage. If property in the community estate is applied to satisfy a support obligation of a married person that does not arise out of the marriage, the community estate is entitled to reimbursement from the obligor in the amount of the obligor's nonexempt separate income, not exceeding the property in the community estate so applied. This provision is only applicable if nonexempt separate income of the obligor was available but was not applied to the satisfaction of the obligation. Fam C §915(b). Thus, the court ordered a husband to reimburse the community when he paid a premarital child support obligation after separation from community funds. *Marriage of Williams* (1989) 213 CA3d 1239, 1244-1247, 262 CR 317. See also *Marriage of Sherman* (2005) 133 CA4th 795, 804-805, 35 CR3d 137 (the community was not entitled to reimbursement for support payments that the husband made using his community property salary because the wife showed only that the husband had nonexempt separate income at some point during the marriage, not that the income was available at the time the spouse made specific support payments).

#### **5. [§202.172] Tort Liability**

If a spouse's tort liability while acting for the community is satisfied from separate property when community property is available, the party is entitled to reimbursement from community property. Fam C §1000(b)(1).

If a spouse's tort liability while acting other than for the community is satisfied from community property when separate property is available, the community is entitled to reimbursement from separate property. Fam C §1000(b)(2).

This reimbursement right does not apply to the extent the liability is satisfied out of proceeds of insurance for the liability, whether the proceeds are from property in the community estate or from separate property. Fam C §1000(c).

Notwithstanding the three-year limitation period of Fam C §920 (see §202.166), no right of reimbursement under Fam C §1000 may be exercised more than seven years after the spouse, in whose favor the right arises, has actual knowledge of the application of the property to the satisfaction of the debt. Fam C §1000(c).

## 6. [§202.173] Reimbursement for Exclusive Use of Community Asset

After separation, when one spouse has exclusive use of a community asset, such as a residence, the court can order that the spouse reimburse the community for the value of the exclusive use. *Marriage of Watts* (1985) 171 CA3d 366, 373–374, 217 CR 301; see *Marriage of Jeffries* (1991) 228 CA3d 548, 552–553, 278 CR 830 (husband entitled to both *Watts* reimbursement for wife’s use and *Epstein* reimbursement for making postseparation loan payments from separate property). The right to reimbursement assumes that the right to exclusive use was not made a part of a support order.

## 7. Separate Property Used for Community Expenses After Separation

### a. [§202.174] Right to Reimbursement

As a general rule, the court must order reimbursement out of the community property on dissolution to a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations of the community property. *Marriage of Epstein* (1979) 24 C3d 76, 84–85, 154 CR 413. Thus, when a husband made payments on the community residence with separate funds after separation, he was entitled to reimbursement. *Marriage of Jeffries* (1991) 228 CA3d 548, 552–553, 278 CR 830.

However, the court must not order reimbursement if payment was made under circumstances in which it would have been unreasonable to expect reimbursement when (*Marriage of Epstein, supra*):

- There was an agreement between the parties that the payment would not be reimbursed.
- The paying spouse truly intended the payment to constitute a gift.
- The payment was made on account of a debt for the acquisition or preservation of an asset that the paying spouse was using, and the amount paid was not substantially in excess of the value of the use.

Likewise, reimbursement should not be ordered when the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse’s duty to support the other spouse or a dependent child of the parties. *Marriage of Epstein, supra*.

If separate property is used for improvements to community property, the amount of reimbursement is not necessarily the cost of the improvements, especially if the improvements did not increase the value of the property. In such a case, reimbursement for the increase in value might be appropriate unless the parties had agreed on the improvements or

they were required to maintain the value of the property. *Marriage of Reilley* (1987) 196 CA3d 1119, 1123-1124, 242 CR 302.

➤ JUDICIAL TIPS:

- *Marriage of Smith* (1978) 79 CA3d 725, 748, 145 CR 205, encourages courts to allocate responsibility for payment of debts in a court order so that the issue of granting reimbursement rights is clear.
- A working understanding of the effect of *Epstein* credits can be invaluable in determining temporary child and spousal support. Frequently, paying spouses request a reduction in support because they claim that they must make separate property payments on community property debts. If the court permits such a reduction, the paying spouse may receive an unfair benefit of a reduction in support while still reserving the right to obtain a full *Epstein* reimbursement from the community property at the end of the case. Judicial inquiry at the temporary support hearing can commit the paying spouse to choose either a reduction in support or an *Epstein* credit but not both. Because of the need for support by the children and spouse, the better method is to order full support with no reduction for debts and to award *Epsteins*, as appropriate, at the end of the case.

**b. [§202.175] Not Limited to Reduction of Principal**

The rule that parties are to be reimbursed to the extent that their separate property was used to acquire community property, under Fam C §2640, is not applicable to postseparation use of separate property to pay community debts. Its limitation of reimbursement to principal payments does not limit the court in making an order under *Epstein* requiring reimbursement for payment of community debts. Family Code §2640 was not intended to limit such *Epstein* reimbursement to principal reduction payments only or to limit the broad discretion possessed by the trial court pursuant to *Epstein* to order reimbursement of postseparation separate property income that has been used to pay community property obligations existing at separation. The court has discretion to order reimbursement in an amount that is equitable. *Marriage of Hebring* (1989) 207 CA3d 1260, 1272, 255 CR 488.

**8. [§202.176] Community Property Used To Pay Separate Obligations**

Reimbursement to the community must be ordered when community property is used to pay separate obligations. *Marriage of Epstein* (1979) 24 C3d 76, 89, 154 CR 413 (quarterly tax payments on separate income);

*Marriage of Frick* (1986) 181 CA3d 997, 1014, 226 CR 766 (community funds used to make payments on separate indebtedness).

Community improvements to separate real property are discussed in §202.22.

#### **9. [§202.177] Separate and Community Property Payments in Connection With Separate Property Personal Injury Claim**

When personal injury damages are the separate property of the injured spouse under Fam C §781(a), and expenses connected with the injuries have been paid from the other spouse's separate property or from community property, the other spouse is entitled to reimbursement of the separate property or the community property for those expenses from the damages received. Fam C §781(c).

#### **10. [§202.178] Debts Paid After Separation Before Trial**

The court has jurisdiction to order reimbursement in cases deemed appropriate for debts paid after separation but before trial. Fam C §2626.

#### **H. [§202.179] Use of Computer Software**

Some software packages for calculating child support include a “propertizer” or other tools to help the court divide community estates. For example, see

- DissoMaster™ (Thomson Reuters/West).
- SupporTax™ (Thomson Reuters/West).
- Xspouse™ (Tolapa, Inc.).

Note, however, that all California courts must use the California Guideline Child Support Calculator to calculate child support in cases where one of the parties is seeking the assistance of the local child support agency to establish or enforce a child support order. To access the calculator, visit the California Department of Child Support Services website: <http://www.childsup.ca.gov>

The community estate includes the assets and debts of registered domestic partners. See §202.3.

## **Appendix: Moore/Marsden Worksheet**

The following is a worksheet that might be used to make *Moore/Marsden* calculations:

1. Enter purchase price. \_\_\_\_\_
2. Enter amount of down payment. \_\_\_\_\_
3. Enter amount of payments on loan principal made with separate funds. \_\_\_\_\_
4. Enter fair market value at date of marriage. \_\_\_\_\_
5. Enter amount of payments on loan principal made with community funds. \_\_\_\_\_
6. Enter fair market value at time of division. \_\_\_\_\_
7. Subtract line 1 from line 4. \_\_\_\_\_
8. Subtract line 4 from line 6. \_\_\_\_\_
9. Divide line 5 by line 1. \_\_\_\_\_
10. Multiply line 8 by line 9. \_\_\_\_\_
11. Subtract line 10 from line 8. \_\_\_\_\_
12. Add lines 2, 3, 7, and 11. This is the separate property interest. \_\_\_\_\_
13. Add lines 5 and 10. This is the community property interest. \_\_\_\_\_

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