CONSIDER THAT A DIVORCE: LITIGATING THE DIVORCE AFTER DEATH

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I. DETERMINING THE RIGHTS OF SPOUSES IN PROPERTY

A. JURISDICTION

1. The probate court has exclusive jurisdiction over the administration of a decedent's estate or trust. Pursuant to provisions of the Probate Code, the probate court adjudicates the rights of the estate to property, the right of heirs or beneficiaries to succeed to the estate's interest in property, the manner of administration of the property by the personal representative or trustee, and distribution of the estate property to the heirs or beneficiaries. In the exercise of that jurisdiction, the probate court may, if need be, adjudicate the rights of the surviving spouse vis-à-vis the decedent. In doing so, it will characterize property according to most of the same principles that a family law court would apply in a dissolution proceeding.

2. However, if the status of the marriage has been terminated, and one of the parties dies prior to division of the marital assets, the family law court retains jurisdiction and will divide the assets in accordance with the principles and rules of any other dissolution. If a dissolution action is pending at the time of death and before termination of the marital relationship by bifurcation, the family court action abates and the probate court acquires jurisdiction.

B. CHARACTERIZATION OF PROPERTY

1. "Characterization must take place in order to determine the rights and liabilities of the parties with respect to a particular asset…." *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291.

2. Character is based on timing. "The status of property as community or separate is normally determined at the time of its acquisition." *In re Marriage of Buol* (1985) 39 Cal.3d 751, 757.

C. SEPARATE PROPERTY

1. Separate property. "Property owned before marriage … is separate property…." Cal. Const. Art. 1, § 21.

2. Fam. Code § 770:

> Separate property of a married person includes all of the following:

(1) All property owned by the person before marriage.

(2) All property acquired by the person after marriage by gift, bequest, devise, or decent.

(3) The rents, issues and profits of the property described in this section.

3. Living separate and apart. Pursuant to Family Code section 771, earnings and accumulations of a spouse "while living separate and apart" from the other spouse constitute separate property. Living separate and apart requires a showing that at least one spouse had the intent to end the marriage, objective evidence of conduct consistent with that intent, and living physically apart. *In re Marriage of von der Nuell* (1994) 23 Cal.App.4th 730, 734.

D. COMMUNITY PROPERTY

1. Community property presumption. "Except as provided by statute, all property real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." Fam. Code § 760.

2. Probate Code § 28:

"Community property" means:

(a) Community property heretofore or hereafter acquired during marriage by a married person while domiciled in this state.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person while domiciled elsewhere, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition.

(c) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person in exchange for real or personal property, wherever situated, that is community property, or a substantially

equivalent type of marital property, under the laws of the pace where the acquiring spouse was domiciled at the time the property so exchanged was acquired.

3. Probate Code § 100, Community Property:

> (a) Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.
>
> (b) Notwithstanding subdivision (a), a husband and wife may agree in writing to divide their community property on the basis of a non pro rata division of the aggregate value of the community property or on the basis of a division of each individual item or asset of community property, or partly on each basis. Nothing in this subdivision shall be construed to require this written agreement in order to permit or recognize a non pro rata division of community property.

4. "Property that a spouse acquired during the marriage is community property ([Fam. Code] § 760) unless it is (1) traceable to a separate property source (*In re Marriage of Lucas* (1980) 27 Cal.3d 808, 815; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 610, 612), (2) acquired by gift or bequest (Fam. Code, § 770, subd. (a)(2)), or (3) earned or accumulated while the spouses are living separate and apart (*id.*, § 771, subd. (a)). *In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1400.

5. Character does not change. In order for a spouse to obtain a community property interest in separate property, there must be a valid transmutation under Family Code § 852:

> 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.

E. TRACING

1. Based upon the presumption in California law that property acquired during marriage is community property, the spouse asserting a separate property interest in property acquired during

marriage has the burden of proof by tracing the source of the assets used to acquire the property. Family Code section 2640(b); *In re Marriage of Mix* (1975) 14 Cal.3d 604, 611; *Estate of Murphy* (1976) 15 Cal.3d 907, 918, superseded by statute on other grounds as stated in *Estate of Scott* (1987) 197 Cal.App.3d 913, 919.

2. Inconsistent decisions on the standard of proof required to overcome community property presumption. Some courts apply the clear and convincing standard. *See, e.g., Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 277. Others apply preponderance of evidence. *See, e.g., In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1591. However, the California Supreme Court appears recently to have adopted the preponderance of evidence standard: "A spouse's claim that property acquired during a marriage is separate property must be proven by a preponderance of the evidence. (*In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1591; see *Estate of Murphy* (1976) 15 Cal.3d 907, 917 [a spouse asserting that property acquired by purchase during a marriage is separate property must prove that the property is not community].)" *In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1400.

3. Interesting and complex issues of tracing arise in the context of life insurance, where premiums may have been paid with community funds, while the proceeds are to be paid to a third person pursuant to a beneficiary designation. Though beyond the scope of this outline, careful attention needs to be paid to such issues. Meanwhile, see the California Supreme Court's recent decision, *In re Marriage of Valli* (2014) 58 Cal.4th 1396, in which the Court rejected wife's claim that a transaction by one spouse and a third party in which the spouse uses community funds to acquire property such as an insurance policy in the sole name of the other spouse is exempt from the transmutation express declaration requirement on the theory that it is not an interspousal transaction.

F. TITLE

1. The form in which title is taken creates a presumption that title is as is shown in the title document. Evidence Code section 662. The presumption is trumped, however, by the presumption of undue influence. *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 300.

2. Clear and convincing evidence is required to overcome Evidence Code section 662. Evidence of a contrary agreement is required; tracing is insufficient. *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 190.

3. *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 186, also held that the presumption in favor of the form of title of Evidence Code section 662 trumps the community property presumption when title is taken in the name of one spouse during marriage with the valid consent of the other spouse. This would appear to have been overruled by the Supreme Court's recent decision in *In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1406:

> As mentioned, the Court of Appeal here concluded that the transmutation statutes were "not relevant to this case" because the disputed life insurance policy "was acquired from a third party and not through an interspousal transaction." After stating that conclusion, which we have determined to be erroneous, the court added: "Moreover, [wife] did not contend in the trial court, and does not contend on appeal, that the policy is her separate property through transmutation. Instead, [wife] contends that the policy is her separate property by operation of the form of title presumption." Referring to Evidence Code section 662, which states that "[t]he owner of the legal title to property is presumed to be the owner of the full beneficial title," the Court of Appeal here asserted that "because the form of title presumption applies … a transmutation theory is not involved." [¶] This reasoning by the Court of Appeal, we also conclude, is erroneous. We need not and do not decide here whether Evidence Code section 662's form of title presumption ever applies in marital dissolution proceedings. Assuming for the sake of argument that the title presumption may sometimes apply, it does not apply when it conflicts with the transmutation statutes. (See *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 593.)

4. Note Family Code section 2581 creates a presumption of community property applicable only for purposes of dissolution or legal separation:

> For the purpose of division of property on dissolution of marriage or legal separation of the parties, 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. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
>
> (b) Proof that the parties have made a written agreement that the property is separate property.

5. In disputes over characterization of title after one spouse's death, the Family Code section 2581 presumption does not apply, and in fact the status of dissolution proceedings can have a significant impact on whether the presumption applies or not, *compare Estate of Blair* (1988) 199 Cal.App.3d 161 *with In re Marriage of Hike* (1992) 4 Cal.4th 215, 217-18.

G. EQUITABLE APPORTIONMENT

1. "[I]ncome arising from the [spouse's] skill, efforts and industry is community property." *Beam v. Bank of America* (1971) 6 Cal.3d 12, 17.

2. Nevertheless, the community is entitled to a "fair share" of profits derived from community effort:

> Nevertheless, long ago our court recognized that, since income arising from the husband's skill, efforts and industry is community property, the community should receive a fair share of the profits which derived from the husband's devotion of more than minimal time and effort to the handling of his separate property. *Beam v. Bank of America* (1971) 6 Cal.3d 12, 17.

3. While the character of property never changes, absent a valid transmutation under Family Code § 825, the community may acquire an interest in the profits of a separate property asset attributable to community efforts:

> [I]n California, property acquired prior to marriage is separate, while property acquired during the marriage is presumed community property. [Citations.] Income from separate property is separate, the intrinsic increase of separate property is separate, but the fruits of the community's expenditures of time, talent, and labor are community property. *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.

4. When more than minimal efforts are involved, the court must apportion profits derived from community efforts to the community:

> Where community efforts increase the value of a separate property business, it becomes necessary to quantify the contributions of the separate capital and community effort to its increase. *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 851.

> [T]he necessity of apportionment arises when, during marriage, more than minimal community effort is devoted to a separate property business. [Citations.] The community is entitled to the increase in profits attributable to community endeavor. [Citations.] Accordingly, courts must apportion profits derived from community effort to the community, and profits derived from separate capital are apportioned to separate property. *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 851-52.

5. "As pointed out in *Cozzi vs. Cozzi* (1947) 81 Cal.App.2d 229, 232, it is not the increase during the marriage and the value of husband's separate property and the proceeds from that property that may become community property, but only that portion of such increase and proceeds as is directly attributable to the husband's skill and ability. *In re Marriage of Ney* (1963) 212 Cal.App.2d 891, 899.

6. Thus, the first inquiry is whether a spouse devoted more than minimal skill and effort to his or her separate property during the marriage. The next inquiry is whether those efforts resulted in an increase in value of the separate property. If so, the court must apportion the increased value to its appropriate source: separate property earnings versus community efforts.

7. There are two distinct methods commonly employed by the courts to apportion the separate versus community interests in the increase in the value of separate property during marriage: *Pereira v. Pereira* (1909) 156 Cal. 1 and *Van Camp v. Van Camp* (1921) 53 Cal.App. 17.

> Once the court is satisfied that it should apportion business profits, the question arises which method to apply. California courts have developed two alternative approaches to allocating business profits. The *Pereira* approach is to allocate a fair return to the separate property investment and allocate the balance of the increased value to community property as arising from community efforts. [Citations.] The *Van Camp* approach is to determine the reasonable value of the community's services, allocate that amount to community property and the balance to separate property. *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 852-53.

8. *Pereira*.

> Step 1: value the separate property asset or business at date of separation (or death) (or trial).
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> Step 2: value the asset or business as of the date of marriage.
>
> Step 3: subtract the rate of return on the asset of business during that period of time using the rate for long-term, well secured investments.
>
> Step 4: the balance is community property.

9. *Van Camp*.

> Step 1: determine the reasonable compensation of another with "equal capacity".
>
> Step 2: subtract the actual compensation of the spouse contributing community effort.
>
> Step 3: the balance is community property.

10. The court is not obligated to use either formula, or to use one or the other in certain specified circumstances, but "may select whatever method of determination will achieve substantial justice." *In re Marriage of Haldeman* (1962) 202 Cal.App.2d 498, 505.

> [C]ourts have not developed a precise standard in choosing between *Pereira* or *Van Camp*, but have endeavored to adopt that formula which is most appropriate and equitable under the circumstances. [Citation.] The court is not bound to adopt a predetermined percentage as a fair return on separate business capital, nor need it limit the community interest to a salary as reward for a spouse's efforts, but may select whichever formula will effect substantial justice between the parties. [Citation.] *Pereira* is typically applied where business profits are principally attributed to efforts of the community. [Citations.] Conversely, *Van Camp* is applied where 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. [Citations.] The court has discretion to choose whichever formula will effect substantial justice. *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 853.

11. The fact that the spouse contributing community efforts to separate property may have received a market-rate salary for doing so during the marriage does not preclude the court from apportioning profits of the business to the community:

> The court need not "limit the community interest to a salary as reward for a spouse's efforts…." [*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 853] "To limit the community to compensation received by way of salary during the marriage would ignore California's egalitarian marriage model and the apportionment formula of *Pereira*…." (*Id.* at p. 854.) "[Defendants'] point, that the community received market value compensation, does not affect our inquiry. Whether or not the community received salary, a court must determine to what extent the increased value

> of the separate property business is attributable to community effort." (*Id.* at p. 852.) Nor was plaintiff obligated to show the precise percentage of growth attributable to [decedent's] efforts. Under *Pereira*, the community property award itself is essentially an implied finding of that. (see *Dekker, at p. 854*. ["Implicit in the trial court's finding that [the husband] was responsible for the increase [in business value] is a finding the [separate property] capital investment would not have returned its 927 percent increase without his efforts."].) *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1341.

12. *Van Camp*: What is reasonable compensation? "Annual salary of the average salaried person" or "cost of hiring a non-owner outsider to perform the same services" or "similarly situated professional". *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 823. Is there goodwill in a law partner's

13. *Pereira*: Simple or compound rate of return on investment? *Pereira* applied the legal rate of interest based upon agreement of the parties, and the legal rate of interest is applied as a simple interest rate. CCP § 685.010. But the court holding is that the rate applicable to long-term, well secured investments is to be applied. Does that militate in favor of using a compound rate of interest?

14. Is the value of the separate asset determined at the time of death or the time of trial? Family Code § 2552(a) provides that the court shall value assets and liabilities at the time of trial for purposes of dividing community property upon dissolution, rather than a date of separation value, even though the efforts of the community ceased upon separation. That rule is of no moment in an estate case:

> "Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent." (*Prob. Code § 100, subd. (a)*.) So plaintiff was entitled to one-half of the community's interest in Alacer's increased value "[u]pon the death of" Jay. (*Ibid.*) Thereafetr, Alacer itself and any increase in its value continued to be Jay's separate property. (*§ 770, subds. (a)(1), (3), (b)*.) Plaintiff, contending Alacer must be valued at the time of trial, relies heavily upon *section 2552* and

> cases applying it. But its plain language renders it inapplicable here: "For the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties … the court shall value the assets and liabilities as near as practicable to the time of trial." (*§ 2552, subd. (a).*) The appointment here was not made "upon dissolution of marriage or legal separation of the parties…." *(Ibid.)* And valuing Alacer's increased growth at the time of trial would essentially transform plaintiff's one-half interest in Jay's community efforts into a one-half interest in Alacer itself. That would affect an unwarranted transmutation of Jay's separate property into community property. (Cf. *§ 852* [transmutation requirements].) *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1342.

15. Prejudgment interest (to the date of judgment) on the amount owed to the spouse claiming a community property interest in the growth of a separate property business may be "equitable and appropriate" in the discretion of the court. *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1342.

16. Commingling community funds or assets with a separate property asset or business will not cause a transmutation. For example, contributing community funds to a separate business does not transmute the stock in the corporation into community property. Instead, it is a factor to be taken into account in arriving at an appropriate equitable apportionment of the profits of the business. *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1343-44.

17. Applying *Moore/Marsden* to determine a pro tanto interest in a separate property business "would conflict with the prevailing approach used when a separate property business is improved by the devotion of community efforts—equitable apportionment using *Pereira* or *Van Camp*. [Citation.] *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1344.

H. MOORE/MARSDEN

1. *In re Marriage of Moore* (1980) 28 Cal.3d 366. Wife acquired property 8 months before marriage. The couple lived in the home for 10 years before separation. Community funds were used to pay the mortgage obtained by wife when she acquired the property. Held the community acquires pro tanto interest in separate property

when community funds are used to pay mortgage. The formula is intended to credit the community with a share of the appreciation based upon the percentage by which the community contributed to reducing the indebtedness plus the actual amounts by which the community reduced the principal balance of the debt:

a) First, to determine the community's percentage interest (CPI), divide the amount by which the community payments reduced principal by the purchase price. $5,986.20/$56,640.57 = 10.57%.

b) Second, to determine the community share of the equity, multiply the appreciation by the CPI, then add to it the amount of principal reduction from community funds. $103,359.43 x. 10.57% + $5,986.20 = $16,911.29..

c) Third, to determine the separate property percentage interest (SPI), add the down payment and initial principal amount of the mortgage, then subtract the amount by which community funds reduced the principal balance, then divide by the purchase price. ($16,640.57 + $40,000 - $5,986.20)/$56,640.57 = 89.43%.

d) Fourth, to determine the separate property share in the equity, multiply the appreciation by the SPI, then add the amount of principal reduction attributable to separate property funds. $103,359.43 x 89.43% + $17,466.82 = $109,901.16.

2. *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426. Modified the *Moore* formula in order to credit the separate property with pre-marriage appreciation and the community with appreciation occurring during marriage. The Court concluded that the formula needed to be modified given that the property appreciated for a period of years before the marriage. The facts: Sullivan acquired a long-term ground lease for $6,300 and obtained a $30,000 construction loan with $2,000 down in order to build a home. Thus, total cost was $38,300. Nine years later, Sullivan married Nancy. Sullivan had reduced principal balance by $7,000 by the time of marriage. FMV of home and leasehold was $65,000 at time of marriage. During marriage, the couple reduced the loan principal by $9,200 with community funds. Between separate and time of trial, Sullivan reduced loan balance by $655. Loan balance at time of trial was $13,145. FMV was $182,500. Thus, appreciation pre-marriage was $26,700 and during marriage was $117,500. Held that formula should be modified so that Sullivan was entitled to pre-marital appreciation, his percentage share of post-marriage

appreciation and credit for reduction of principal of the loan with separate funds:

a) CPI determined by *Moore* formula, i.e., $9,200/$38,300 = 24.02%.

b) CP share: add CPI in post-date of marriage appreciation to amount of principal reduction from CP funds, i.e., $117,500 x 24.02 + $9,200 = $37,423.50.

c) SPI determined by *Moore* formula, i.e., ($2,000 + $6,300 + $30,000 - $9,200)/$38,300 = 75.98%.

d) SP share: pre-date of marriage appreciation plus SPI in post-date of marriage appreciation plus contribution of SP funds to purchase and reduction of loan principal, i.e., $26,700 + ($117,500 x 75.98%) + ($8,300 + $7,000 + $655) = $131,931.50.

3. *In re Marriage of Branco* (1996) 47 Cal.App.4th 1621. Court confronted with situation in which community obtained a loan to refinance the loan obtained by the spouse before marriage to acquire the property. Formula:

a) CPI equals sum of amount of principal reduction with CP funds and amount of principal balance refinanced divided by original purchase price.

b) CP share is based on *Marsden*.

c) SPI equals SP down payment + (original principal balance – CP principal reduction – principal balance refinanced) / original purchase price.

d) SP share is based on *Marsden*.

II. FIDUCIARY DUTIES BETWEEN SPOUSES

A. FIDUCIARY DUTY AND UNDUE INFLUENCE

1. Family Code section 721:

> (a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.

> (b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which 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. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:
>
> (1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.
>
> (2) Rendering upon request, true and full information of all things affecting any transaction which 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.
>
> (3) Accounting 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 which concerns the community property.

2. Although Family Code section 721 does not expressly mention undue influence, courts have found that whenever one spouse gains an unfair advantage over the other, a rebuttable presumption of undue influence arises. *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996. Some courts have held that any advantage gained by a spouse, whether fair or unfair, gives rise to a presumption of undue influence. *See, e.g., In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1519; but *see In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 717 (no presumption arose in respect of marital agreement where both spouses obtained advantages, both were represented by independent counsel, wife offered full

access to husband's business records and both acknowledged in agreement neither obtained unfair advantage).

3. When the burden of proof shifts based upon the presumption, the advantaged spouse has the burden to rebut the presumption by a preponderance of the evidence. *See, e.g., In re Marriage of Fossum* (2011) 192 Cal.App.4th 336.

4. If undue influence is proven, or the advantaged spouse cannot rebut the presumption, the finding will overcome the record title presumption of Evidence Code section 662 and the community property presumption of Family Code section 2581. *See, e.g., In re Marriage of Starr* (2010) 189 Cal.App.4th 277; *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996; *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 297.

5. *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346.

   a) Background Facts: Decedent and defendant wife were married in 1999, divorced six months later, and remarried in 2005. Decedent died in 2009. Decedent had three children from previous marriages; defendant has two children from a previous marriage. Decedent's assets were held in a trust amended multiple times over the years by his EP lawyers. Ninth amendment in effect at the time of decedent's remarriage to defendant provided for decedent's children and grandchildren. Shortly after remarriage, decedent executed the 10th amendment, providing defendant with 50 percent of decedent's assets with the remaining 50 percent to be distributed to decedent's children and grandchildren. Decedent executed several amendments after the 10th amendment increasing the amount of assets for defendant and disinheriting decedent's eldest two children. In June 2008, decedent and defendant executed a joint revocable trust, purportedly designating all of decedent's property as community property, providing defendant an exclusive life interest in decedent's estate, and giving defendant the right to disinherit decedent's youngest child and leaving residue to defendant's children.

   b) Procedural Posture: Decedent's older children filed a second amended complaint asserting causes of action for financial abuse of an elder, breach of fiduciary duty, conversion, constructive trust and undue influence. Following a bench trial, probate court in Monterey County issued its statement of decision finding defendant liable for elder abuse, breach of fiduciary duty, conversion of separate

property, and imposing a constructive trust over the converted funds and property. The court found that decedent did have testamentary capacity, but found defendant liable for undue influence in procuring the estate planning documents. The court voided all trusts and trust amendments subsequent to the 10th amendment, invalidated real property deeds and sought to enforce the terms of the 10th amendment. The court also awarded attorneys' fees and costs to the plaintiffs.

c) Rulings on Appeal:

(1) Probate court improperly applied Probate Code section 6100.5 testamentary capacity rather than sliding scale contractual capacity standard in sections 810 through 812, because the trust instruments were more complex than a will or codicil.

(2) Undue influence presumption arises upon *any* advantage in any transaction between spouses:

> In property-related transactions between spouses, Family Code section 721, subdivision (b) "imposes a duty of the highest good faith and fair dealing on each spouse … ." This duty stems from the "general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other," prohibiting each spouse from taking "any unfair advantage of the other." (Ibid.) Thus, "'[i]f one spouse secures an advantage from the transaction, a statutory presumption arises under section 721 that the advantaged spouse exercised undue influence and the transaction will be set aside.'" (In re Marriage of Fossum (2011) 192 Cal.App.4th 336, 344 [121 Cal. Rptr. 3d 195].) An advantage results to one spouse when that spouse gains or when the other spouse is hurt by the transaction. (Gaines v. California Trust Co. (1941) 48 Cal.App.2d 709, 714 [121 P.2d 28].) A spouse obtains an advantage when the "spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits. [Citation.]" (In re Marriage of Mathews (2005) 133 Cal.App.4th 624, 629 [35 Cal. Rptr. 3d 1].) The presumption

is rebuttable; the spouse advantaged by the transaction must establish that the disadvantaged spouse acted freely and voluntarily, with """"full knowledge of all the facts, and with a complete understanding of the effect of' the transaction."""" (In re Marriage of Fossum, supra, 192 Cal.App.4th at p. 344.)

(3) Facts upon which court found undue influence:

The probate court described decedent as "helpless[] and susceptible[] to [defendant's] wishes and influence beyond the susceptibility which is normal incident of [sic] a marital relationship." According to the statement of decision, decedent was fearful of defendant and unable to exercise his free will over her when it came to his money. Defendant took an increasingly active role in procuring decedent's estate plans following the 10th amendment, increasingly benefiting from the later amendments. Defendant misinformed decedent's lawyers of decedent's testamentary wishes and ultimately discontinued the services of decedent's long-standing estate planning lawyers under the pretext of a fee dispute. The probate court also noted that decedent signed the Lintz Family Revocable Trust—the most recent estate plan prepared by defendant's lawyer—outside the presence of his new counsel and against new counsel's advice. That document provided for unspent residue to be left to defendant's children, and it gave defendant the power to disinherit decedent's youngest child whom he adored. Decedent's execution of that estate plan was inconsistent with the statement he made to his lawyer ("Why shouldn't we leave the property to [decedent's youngest child]?") on the same day defendant insisted to the lawyer that decedent wanted everything left to her. It was also inconsistent with decedent's great dislike for one of defendant's children. (Hagen v. Hickenbottom, supra, 41 Cal.App.4th at p. 182 [undue influence in testamentary act requires showing that proven circumstances are inconsistent with voluntary action of testator].)

We conclude the probate court applied the proper undue influence standard to void the trust documents.

B. FINANCIAL ELDER ABUSE

1. In 2014, the Legislature amended Welfare and Institutions Code section 15610.30(a)(3), replacing "by undue influence, as defined in Section 1575 of the Civil Code" with "by undue influence, as defined in Section 15610.70." The Legislature added a new section 15610.70 to the Welfare and Institutions Code:

> (a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:
>
> (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.
>
> (2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.
>
> (3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
>
> (A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.
>
> (B) Use of affection, intimidation, or coercion.
>
> (C) Initiation of changes in personal or property rights, use of haste or secrecy in

effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

2. Probate Code section 86:

> "Undue influence" has the same meaning as defined Section 15610.70 of the Welfare and Institutions Code. It is the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.

3. Disinheritance of Undue Influencer. Pursuant to Probate Code section 259, a person who committed financial elder abuse may be deemed to have predeceased the decedent for all purposes, whether or not the gifts that would be forfeited were the subject of the undue influence or elder abuse. Section 259 provides:

> (a) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) where all of the following apply:
>
> (1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or financial abuse of the decedent, who was an elder or dependent adult.
>
> (2) The person is found to have acted in bad faith.

(3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.

(4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.

(b) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) if that person has been convicted of a violation of Section 236 of the Penal Code or any offense described in Section 368 of the Penal Code.

(c) Any person found liable under subdivision (a) or convicted under subdivision (b) shall not (1) receive any property, damages, or costs that are awarded to the decedent's estate in an action described in subdivision (a) or (b), whether that person's entitlement is under a will, a trust, or the laws of intestacy; or (2) serve as a fiduciary as defined in Section 39, if the instrument nominating or appointing that person was executed during the period when the decedent was substantially unable to manage his or her financial resources or resist fraud or undue influence. This section shall not apply to a decedent who, at any time following the act or acts described in paragraph (1) of subdivision (a), or the act or acts described in subdivision (b), was substantially able to manage his or her financial resources and to resist fraud or undue influence within the meaning of subdivision (b) of Section 1801 of the Probate Code and subdivision (b) of Section 39 of the Civil Code.

(d) For purposes of this section, the following definitions shall apply:

(1) "Physical abuse" as defined in Section 15610.63 of the Welfare and Institutions Code.

(2) "Neglect" as defined in Section 15610.57 of the Welfare and Institutions Code.

(3) "False imprisonment" as defined in Section 368 of the Penal Code.

(4) "Financial abuse" as defined in Section 15610.30 of the Welfare and Institutions Code.

(e) Nothing in this section shall be construed to prohibit the severance and transfer of an action or proceeding to a separate civil action pursuant to Section 801.

C. SPOUSAL WAIVERS OF RIGHTS IN ESTATE

1. Notwithstanding Family Code section 721, a spouse may waive rights in the other spouse's estate pursuant to Probate Code sections 141 et seq.

2. Probate Code section 141:

(a) The right of a surviving spouse to any of the following may be waived in whole or in part by a waiver under this chapter:

(1) Property that would pass from the decedent by intestate succession.

(2) Property that would pass from the decedent by testamentary disposition in a will executed before the waiver.

(3) A probate homestead.

(4) The right to have exempt property set aside.

(5) Family allowance.

(6) The right to have an estate set aside under Chapter 6 (commencing with Section 6600) of Part 3 of Division 6.

(7) The right to elect to take community or quasi-community property against the decedent's will.

(8) The right to take the statutory share of an omitted spouse.

(9) The right to be appointed as the personal representative of the decedent's estate.

(10) An interest in property that is the subject of a nonprobate transfer on death under Part 1 (commencing with Section 5000) of Division 5.

(b) Nothing in this chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a), including, but not limited to, the right to property that would pass from the decedent to the surviving spouse by nonprobate transfer upon the death of the decedent, such as the survivorship interest under a joint tenancy, a Totten trust account, or a pay-on-death account.

3. Probate Code section 142:

(a) A waiver under this chapter shall be in writing and shall be signed by the surviving spouse.

(b) Subject to subdivision (c), a waiver under this chapter is enforceable only if it satisfies the requirements of subdivision (a) and is enforceable under either Section 143 or Section 144.

(c) Enforcement of the waiver against the surviving spouse is subject to the same defenses as enforcement of a contract, except that:

(1) Lack of consideration is not a defense to enforcement of the waiver.

(2) A minor intending to marry may make a waiver under this chapter as if married, but the waiver becomes effective only upon the marriage.

4. Probate Code section 143:

(a) Subject to Section 142, a waiver is enforceable under this section unless the surviving spouse proves either of the following:

(1) A fair and reasonable disclosure of the property or financial obligations of the decedent was not provided to the surviving spouse prior to the signing of the waiver unless the surviving spouse waived such a fair and reasonable disclosure after advice by independent legal counsel.

(2) The surviving spouse was not represented by independent legal counsel at the time of signing of the waiver.

(b) Subdivision (b) of Section 721 of the Family Code does not apply if the waiver is enforceable under this section.

5. Probate Code section 144:

(a) Except as provided in subdivision (b), subject to Section 142, a waiver is enforceable under this section if the court determines either of the following:

(1) The waiver at the time of signing made a fair and reasonable disposition of the rights of the surviving spouse.

(2) The surviving spouse had, or reasonably should have had, an adequate knowledge of the property and financial obligations of the decedent and the decedent did not violate the duty imposed by subdivision (b) of Section 721 of the Family Code.

(b) If, after considering all relevant facts and circumstances, the court finds that enforcement of the waiver pursuant to subdivision (a) would be unconscionable under the circumstances existing at the time enforcement is sought, the court may refuse to enforce the waiver, enforce the remainder of the waiver without the unconscionable provisions, or limit the application of the

unconscionable provisions to avoid an unconscionable result.

(c) Except as provided in paragraph (2) of subdivision (a), subdivision (b) of Section 721 of the Family Code does not apply if the waiver is enforceable under this section.

III. TRANSFERS AND TRANSMUTATIONS

A. SETTING ASIDE TRANSFERS TO THIRD PARTIES

1. Family Code section 751: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests."

2. "In other words, each spouse has a vested undivided one-half interest in the community property." *Estate of Wilson* (1986) 183 Cal.App.3d 67, 72.

3. A spouse may unilaterally transfer community property without the consent of the other spouse (Family Code § 1100(a)), subject to the spouse's fiduciary duties under Family Code § 721, **except**:

> A spouse may not make a **gift** of community personal property, or dispose of community personal property **for less than fair and reasonable value**, without the written consent of the other spouse. Fam. Code § 1100(b)
>
> A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse. Fam. Code § 1100(c).
>
> [A] spouse who is operating or managing **a business or an interest in a business** that is all or substantially all community personal property has the primary management and control of the business or interest. Primary management and control means that the managing spouse may act alone in all transactions but **shall give prior written notice** to the other spouse of any sale, lease,

> exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business (including personal property used for agricultural purposes), whether or not title to that property is held in the name of only one spouse. Written notice is not, however, required when prohibited by the law otherwise applicable to the transaction... A **failure to give prior written notice shall not adversely affect the validity of a transaction nor of any interest transferred**. Fam. Code § 1100(d).
>
> [B]oth spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community **real property** or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered. Fam. Code § 1102(a).

4. When both spouses are alive, and the community is still in existence, the aggrieved spouse is entitled to set aside the transfer in its entirety. *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 46-47. However, after death, the surviving spouse may only set aside the transaction as to her one-half of the community property; the disposition of the decedent's one-half is deemed tantamount to the decedent's exercise of a testamentary power. *Id.* at 32-35.

5. The rule that the surviving spouse may seek to set aside the transfer as to her share of the community property is explained in *Estate of Wilson* (1986) 183 Cal.App.3d 67, 72-73, as follows:

> A general rule emerges from these cases. If a spouse, after the death of the decedent, proves a lack of consent to a gift, it will be avoided to the extent of the nonconsenting spouse's one-half interest in community property transferred. (*In re Marriage of Stephenson* (1984) 162 Cal.App.3d 1057, 1070-1071 [209 Cal.Rptr. 383]; see also *Trimble v. Trimble, supra*, 219 Cal. at p. 347.)
>
> The rationale of this rule is founded in the nature of community property. "The respective interests of the husband and wife in community

property during continuance of the marriage relation are present, existing and equal interests." (Civ. Code, § 5105.) In other words, each spouse has a vested undivided one-half interest in the community property. Death of a spouse only dissolves the community; it does not affect the character of the property acquired or rights vested before the spouse's death. (*Solko v. Jones* (1931) 117 Cal.App. 372, 376 [3 P.2d 1028], disapproved on other grounds in *Flores v. Brown* (1952) 39 Cal.2d 622, 632 [248 P.2d 922].)

Because each asset is only half his or hers to give, a spouse cannot make a testamentary disposition to a third party of any specific item of community property except by a "forced election" requiring the surviving spouse to elect either to take under the testamentary scheme or to take his or her community property share. To give an example, one spouse cannot devise the family residence to a third party even if there are sufficient other community assets to counterbalance the gift's value, because each spouse only owns an undivided one-half interest in the residence. Obviously, the decedent cannot give away more than he or she owns. Indeed, it would be quite unfair to allow either spouse to give away an asset that both spouses treasure based merely on the contingency of who dies first. The mere existence of a Totten trust at the time of the death of one spouse does not put the surviving spouse to a forced election.

Although this rule makes less practical sense in the context of fungible assets like money, as we have here, the same rule applies. (See *Odone v. Marzocchi, supra*, 34 Cal.2d 431.) Thus while the decedent cannot leave a third party the entire balance of an account which has $ 10,000 of community property in it and is held as trustee for the third party, the decedent can, by will, leave a legacy of $ 10,000 to the third party from his one-half share of the community property.

6. Of course, the surviving spouse may also seek to pursue an action against the estate, rather than seeking to set aside the transfer as to one half of the unconsented to transfer (for one, the surviving spouse may not wish to be partners or co-owners with the third party transferee). The surviving spouse could seek damages against the estate for the decedent's breach of fiduciary duty. Some commentators posit that the surviving spouse could file a petition under Probate Code section 850 to obtain, in essence, a non-pro rata division of community property (or offset). As discussed below, this would have the elegant result of avoiding any statute of limitations problems. However, the reasoning of *Estate of Wilson, supra,* would suggest otherwise. If the principle that a person cannot devise more than she owns, and she owns only one half of each community property asset, then seeking to establish that the estate is in possession of an asset that belongs to the surviving spouse is inapposite. The estate no longer owns her one-half of the particular asset transferred to the third party. The surviving spouse is left with seeking damages.

B. CHALLENGING NON-PROBATE TRANSFERS

1. A testamentary instrument for a non-probate transfer of community property requires "written consent" which may include a "written joinder" in such a provision. Prob. Code section 5010.

2. Probate Code section 5000 et seq. is relevant only in controversies between spouses or their successors and does not relieve the holder of community property from the obligation to hold, receive or transfer the property in accordance with a provision for non-probate transfer on death. Prob. Code section 5012.

3. Principles of fraud, undue influence, mistake or otherwise still apply notwithstanding the provisions of section 5000 et seq. Prob. Code section 5015.

4. Written consent requirement, Probate Code section 5020:

> A provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse (1) is not effective as to the nonconsenting spouse's interest in the property and (2) does not affect the nonconsenting spouse's disposition on death of the nonconsenting spouse's interest in the community property by will, intestate succession, or nonprobate transfer.

5. Proceeding to set aside transfer without consent, Probate Code section 5021:

> (a) In a proceeding to set aside a nonprobate transfer of community property on death made pursuant to a provision for transfer of the property executed by a married person without the written consent of the person's spouse, the court shall set aside the transfer as to the nonconsenting spouse's interest in the property, subject to terms and conditions or other remedies that appear equitable under the circumstances of the case, taking into account the rights of all interested persons.
>
> (b) Nothing in subdivision (a) affects any additional remedy the nonconsenting spouse may have against the person's estate for a nonprobate transfer of community property on death without the spouse's written consent.

6. A spouse's written consent is revocable during marriage. On termination of marriage by dissolution or legal separation, the written consent is revocable and the community property is subject to division under the Family Code. Prob. Code section 5030.

C. TRANSMUTATIONS

1. Select sections of the Family Code:

> § 850. Transmutation of property by agreement or transfer
>
> Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following:
>
> (a) Transmute community property to separate property of either spouse.
>
> (b) Transmute separate property of either spouse to community property.
>
> (c) Transmute separate property of one spouse to separate property of the other spouse.
>
> § 852. Form of transmutation.

(a) 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.

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

(c) This section 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.

(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.

(e) This section 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 shall continue to apply.

§ 853. Effect of will statement, waiver of specified benefits, or written joinder or consent to nonprobate transfer of property on transmutation of property

(a) 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.

(b) A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 (Public Law 98-397) is not a transmutation of the community

> property rights of the person executing the waiver.
>
> (c) A written joinder or written consent to a nonprobate transfer of community property on death that satisfies Section 852 is a transmutation and is governed by the law applicable to transmutations and not by Chapter 2 (commencing with Section 5010) of Part 1 of Division 5 of the Probate Code.

2. *Estate of MacDonald* (1990) 51 Cal.3d 262. Disbursement from husband's pension plan, which constituted community property, and deposited into IRA accounts in husband's name. Husband designated his revocable trust as the beneficiary of the IRAs. Husband's revocable trust benefited his children from a prior marriage at husband's death. IRA account agreements required signature by wife under "consent paragraphs". Wife signed. Undisputed that the account agreements constituted a writing "made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected" per § 852(a). Only issue was whether this constituted an "express declaration" under 852(a). Tracing legislative history of changes to § 852 in 1984, Supreme Court noted that previously oral transmutations were viable if proven, and the "prior rule of 'easy transmutation' was found to have caused extensive litigation in dissolution proceedings and to encourage spouses to 'commit perjury by manufacturing an oral or implied transmutation." The Supreme Court inferred that the changes to 852 were intended "to create a writing requirement which enables courts to validate transmutations without resort to extrinsic evidence and, thus, without encouraging perjury and the proliferation of litigation." The Court held that a writing signed by the adversely affected spouse is not an "express declaration" under § 852 "unless it contains language which expressly states that the characterization or ownership of the property is being changed." While it is not necessary for the writing to state that it is intended to be an "express declaration" or use any particular words, the consent paragraphs in the IRA account agreements did not contain language characterizing the property assertedly being transmuted, and it was impossible to tell whether Mrs. MacDonald was "aware that the legal effect of her signature might be to alter the character of ownership of her interest in the pension funds". Therefore, the consent by Mrs. MacDonald was not an "express declaration." The Supreme Court did indicate that had the consent paragraphs added a sentence that said "I give to the account holder any interest I have …" that they would have been sufficient.

3. *Estate of Bibb* (2001) 87 Cal.App.4th 461. Everett applied for a loan to be secured by real property constituting his separate property. He was, however, unable to qualify on his own for the loan even with the promise of the security in the real property. In order to benefit from his wife's good credit, Everett executed a grant deed conveying the real property to himself and his wife as joint tenants. Following Everett's death, his son from a prior marriage claimed the grant deed did not constitute an "express declaration" because it did not contain language "expressly stating that the characterization or ownership of the property [was] being changed." The court, relying on the Supreme Court's statement in MacDonald that the IRA consent paragraphs would have constituted an express declaration had they said "I give" my interest to my husband, held that the deed's language "I grant" my interest to myself and my wife as joint tenants satisfied the express declaration requirement.

4. *In re Marriage of Starkman* (2005) 129 Cal.App.4th 659. Husband transfers all of his separate property into revocable trust established by husband and wife. Trust provides that all property transferred to the trust is community property unless husband or wife, as transferor, identifies it as separate property. Husband did not identify his property as separate. Husband executed a general assignment of property that did not indicate the character of property. Husband also executed stock brokerage transfer documents that also did not identify the character of the property. The trust is intended to provide tax benefits for community property upon the death of a settlor. Drafting attorney's letter to husband and wife transmitting execution copies of the trust warns them of the language that property transferred to the trust is intended to be community property and that they should be very careful to specify any property they intend to retain a different character. Held, the documents individually or taken together do not constitute an express declaration to change character or ownership. Court held that the attorney's letter was inadmissible extrinsic evidence having no bearing upon any asserted transmutation. The trust provision itself did not unambiguously state that husband was effecting a change of ownership in his property. Court rejected wife's argument that husband's interpretation would have undermined the alleged purpose of the trust by preventing the parties from obtaining a step up in basis upon the death of a settlor. The court explained that whether that was true or not was beside the point, that the court's role was merely to decide whether the language used was sufficient to constitute a transmutation. Court explained that it would have reached a different result if the language stated that any property transferred to the trust "becomes" or is "changed into" community property.

5. *In re Marriage of Holtermann* (2008) 166 Cal.App.4th 1166. Married couple executed a "Spousal Property Transmutation Agreement" and a trust one year before their separation. Agreement provided that Husband agrees that the character of the property would be transmuted from separate to community, "upon the express condition that the disposition of the trust estate of said Trust, upon the death of Husband and Wife … shall remain in effect, and not be amended, modified or changed by Wife…." Husband asserted that the transmutation was conditional on the effectiveness of the trust, and that the couple's dissolution effectively revoked the trust. The court affirmed the trial court's ruling that the agreement constituted an unambiguous transmutation, and rejected the idea "that a transmutation, once effected, can be limited in purpose or otherwise rendered conditional or temporary…." The court was particularly disturbed by the husband's desire "to have his cake and eat it too": "He argues that, in the event of either his or [wife's] death, the survivor would be able to use the Transmutation Agreement to claim the property as community property, thus obtaining a full step up in basis to the fair market value of the property at date of death, while at the same time denying the validity of the Transmutation Agreement as an instrument which created community property." *See also In re Marriage of Lund* (2009) 174 Cal.App.4th 40 for same result with similar facts.

6. *In re Marriage of Benson* (2005) 36 Cal.4th 1096. Husband allege he conveyed to wife his community property interest in their home after she orally promised to waive, in writing, her community interest in husband's retirement accounts. Wife did not make any such written waiver. Courts below held that husband's performance of his part of the bargain, evidenced by the deed he signed in wife's favor, served as an adequate substitute for wife's express written statement changing the retirement accounts into husband's separate property. Supreme Court reversed. Explained that § 852 does not operate like the general statute of frauds in which the requirement of a writing is subject to an exception for "part performance" of the contract's terms. Section 852 was designed to prevent just the type of situation as was present in this case in which one spouse claimed an oral transmutation.

7. *In re Marriage of Valli* (2014) 58 Cal.4th 1396. Supreme Court rejected wife's argument that a transaction between husband and a third party (in that case, husband's use of community funds to purchase a life insurance policy with wife as sole owner and beneficiary) was exempt from transmutation statute. Wife argued that the transmutation statute should apply only to an inter-spousal transaction. Supreme Court further concluded that nothing in the

record evidenced an express declaration in writing by husband to relinquish his community property interest in the policy.

8. The party alleging a transmutation has the burden of proof by clear and convincing evidence. *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 486.

IV. READY, AIM AND FIRE

A. PROBATE CODE SECTION 850

1. Probate Code section 850 is a procedural statute. It is not itself a substantive cause of action.

2. Section 850(a)(2) authorizes the following persons to petition the court to make an order:

> (2) The personal representative or any interested person in any of the following cases:
>
> (A) Where the decedent while living is bound by a contract in writing to convey real property or to transfer personal property and dies before making the conveyance or transfer and the decedent, if living, could have been compelled to make the conveyance or transfer.
>
> (B) Where the decedent while living binds himself or herself or his or her personal representative by a contract in writing to convey real property or to transfer personal property upon or after his or her death and the contract is one which can be specifically enforced.
>
> (C) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another.
>
> (D) Where the decedent died having a claim to real or personal property, title to or possession of which is held by another.

3. Section 850(a)(3) applies to trusts:

> (3) The trustee or any interested person in any of the following cases:

(A) Where the trustee is in possession of, or holds title to, real or personal property, and the property or some interest, is claimed to belong to another.

(B) Where the trustee has a claim to real or personal property, title to or possession of which is held by another.

(C) Where the property of the trust is claimed to be subject to a creditor of the settlor of the trust.

4. Other procedural aspects.

a) Section 851 provides specific notice requirements.

b) Section 854 requires the court to abate an 850 petition if a civil action is pending relating to the same subject matter.

c) Section 855 authorizes the petition to include claims in an 850 petition that might normally be raised in a civil action to the extent they are related factually to the subject matter of the 850 petition.

d) Section 856 authorizes the court to order a party to make a conveyance or transfer of property.

e) Section 856.5 prevents the court from granting an 850 petition if the court believes the matter should be determined by a civil action.

f) Section 857 provides that if a court grants an 850 petition and orders a conveyance or transfer, the party has an immediate right of possession as if the conveyance or transfer had already occurred (but see section 1310).

g) Section 859:

If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30

> of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.

5. The court can resolve community property claims between the surviving spouse and the estate pursuant to Probate Code section 850(a)(2). *Heiser v. Superior Court* (1979) 88 Cal.App.3d 276 (holding no jury trial permissible under former PC 851.5 to adjudicate rights of surviving spouse to community property held by estate). But the court cannot resolve claims between the surviving spouse as to her share of the community and a third party, since the estate has no claim to the surviving spouse's property. *Estate of Scott* (1987) 197 Cal.App.3d 913, 918.

   Rutter Guide on Probate comment says it does not think *Scott* is good law any longer because the probate court is now a court of general jurisdiction. That seems to be wrong. The case did not turn on whether the probate court was a court of limited or general jurisdiction; it turned on the lack of interest in the estate in the property claim at issue. Moreover, the probate court was a court of general jurisdiction when *Scott* was decided and the Court of Appeal expressly held that this did not matter (at 918-19):

   > "The rule is that 'while the superior court, sitting in probate, is a court of general jurisdiction, "the proceedings being statutory in their nature, the court has no other powers than those given by statute and such incidental powers as pertain to it and enable the court to exercise the jurisdiction conferred upon it, and can only determine those questions or matters arising in the estate which it is authorized to do. . . ."' [Citations.]" (Estate of Bissinger (1964) 60 Cal.2d 756, 764 [36 Cal.Rptr. 450, 388 P.2d 682, 19 A.L.R.3d 506].) Unless the personal property in question belonged in the decedent's estate, neither the executrix nor the probate court had authority to proceed."

Note that *Estate of Myers* (2006) 139 Cal.App.4th 434, distinguishes *Scott* on the ground that under PC 851.5, only the personal representative or "claimant" had standing to petition the court. But PC 850 now confers standing on any interested person. This does not mean that *Scott* is any less controlling in its holding that there must be a claim which involves the estate's interest in property.

Note further that had the surviving spouse in *Scott* elected to have her share of the community administered in the estate, the result would presumably be different.

B. CAUSES OF ACTION

1. Breach of fiduciary duty

2. Undue influence

3. Financial elder abuse

4. Fraud

5. Conversion

C. REMEDIES

1. Probate Code section 850 orders including compelling conveyance or transfer.

2. Orders setting aside transfers.

3. Constructive trusts.

4. Damages.

5. Probate Code section 859 double damages.

6. Punitive damages.

7. Attorneys' fees.

   a) Family Code section 1101(g)

   b) Welfare & Institutions Code section 15610.30.

8. Prejudgment interest. The court has discretion in an action not based upon contract to award prejudgment interest to compensate a party for loss of use of her property. *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1344.

D. NO CONTEST CLAUSES [Although beyond the scope of this presentation, careful consideration must always be given to no contest clauses which may force a surviving spouse into an election to assert her property rights or take under an instrument.]

V. LIMITATIONS ON ACTIONS

A. STATUTES OF LIMITATION

1. There is **no** statute of limitations that would bar a spouse from seeking to establish his or her rights in marital property after death. The only time bar is the equitable doctrine of laches.

> The court correctly found plaintiff's declaratory cause of action was timely. That cause of action essentially derives from *section 1101, subdivision (b)*, as the court noted, which provides: "A court may order an accounting of the property and obligations of the parties to a marriage and may determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties to a marriage." The question is what limitations period applies to claims arising from *section 1101, subdivision (b)*.
>
> The answer lies in *section 1101, subdivision (d)*. It provides: "(1) Except as provided in paragraph (2), any action under subdivision (a) [allowing claims for breach of fiduciary duty] shall be commenced within three years of the date a petitioning spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred. [¶] (2) An action may be commenced under this section upon the death of a spouse or in conjunction with an action for legal separation, dissolution of marriage, or nullity without regard to the time limitations set forth in paragraph (1). [¶] (3) The defense of laches may be raised in any action brought under this section."
>
> Thus, no limitations period applies to claims brought pursuant to *section 1101, subdivision (b)*, except for laches, when the marriage ends through litigation or death. The Legislature

took pains in *subdivision (d)(1)* to set forth a three-year limitations period for claims arising under *subdivision (a)*. The Legislature made no effort in *subdivision (d)(2)* to set forth a corresponding limitations period for claims arising under *subdivision (b)*. As the court aptly noted below, "Having evidenced a concern with statute of limitation issues, and having just provided a 3-year limitations period in *section 1101[, subdivision] (d)(1)*, had the legislature intended a particular statute of limitations to apply upon death, it would have so stated." But instead, the plain language of *subdivision (d)(2)* provides that "[a]n action may be commenced within this section upon the death of a spouse … without regard to the time limitations set forth in paragraph (1)." In other words, the Legislature set forth a limitations period and immediately clarified that period's own limit. *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1338 (footnotes omitted).

B. CREDITOR CLAIMS

1. Before an action can be pursued on a "claim" against the estate, a "creditor" must file a timely creditor's claim. This outline is not intended to explain or analyze the creditor claim statutes, but instead, to identify when an action involving community property rights of a spouse in a decedent's estate or trust proceeding requires or does not require compliance with those statutes.

2. Select sections of Probate Code:

> § 9000. "Claim" defined
>
> As used in this division:
>
> (a) "Claim" means a demand for payment for any of the following, whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated:
>
> (1) Liability of the decedent, whether arising in contract, tort, or otherwise.
>
> ***

(b) “Claim” does not include a dispute regarding title of a decedent to specific property alleged to be included in the decedent’s estate.

(c) “Creditor” means a person who may have a claim against estate property.

§ 9002. Filing of claims; claims barred

(a) All claims shall be filed in the manner and within the time provided in this part.

(b) A claim that is not filed as provided in this part is barred.

§ 9100. Expiration date for filing

(a) A creditor shall file a claim before expiration of the later of the following times:

(1) Four months after the date letters are first issued to a general personal representative.

(2) Sixty days after the date notice of administration is mailed or personally delivered to the creditor. Nothing in this paragraph extends the time provided in Section 366.2 of the Code of Civil Procedure.

(b) A reference in another statute to the time for filing a claim means the time provided in paragraph (1) of subdivision (a).

(c) Nothing in this section shall be interpreted to extend or toll any other statute of limitations or to revive a claim that is barred by any statute of limitations. The reference in this subdivision to a “statute of limitations” includes Section 366.2 of the Code of Civil Procedure.

§ 19000. Definitions

As used in this part:

(a) “Claim” means a demand for payment for any of the following, whether due, not due,

accrued or not accrued, or contingent, and whether liquidated or unliquidated:

(1) Liability of the deceased settlor, whether arising in contract, tort, or otherwise.

***

(b) "Claim" does not include a dispute regarding title to specific property alleged to be included in the trust estate.

(c) "Creditor" means a person who may have a claim against the trust property.

(d) "Trust" means a trust described in Section 18200, or, if a portion of a trust, that portion that remained subject to the power of revocation at the deceased settlor's death.

(e) "Deceased settlor" means a deceased person who, at the time of his or her death, held the power to revoke the trust in whole or in part.

(f) "Debts" means all claims, as defined in subdivision (a), all expenses of administration, and all other proper charges against the trust estate, including taxes.

§ 19001. Property subject to claims of creditors' priority of payment

(a) Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses.

(b) The deceased settlor, by appropriate direction in the trust instrument, may direct the priority of sources of payment of debts among subtrusts or other gifts established by the trust at the deceased settlor's death. Notwithstanding this subdivision, no direction

by the settlor shall alter the priority of payment, from whatever source, of the matters set forth in Section 11420 which shall be applied to the trust as it applies to a probate estate.

§ 19003. Notice to creditors; publication and service; filing: notice or request to public entities

(a) At any time following the death of the settlor, and during the time that there has been no filing of a petition to administer the estate of the deceased settlor in this state of which the trustee has actual knowledge, the trustee may file with the court a proposed notice to creditors. Upon the court's assignment of a proceeding number to the proposed notice, the trustee shall publish and serve notice to creditors of the deceased settlor in the form and within the time prescribed in Chapter 3 (commencing with Section 19040) and 4 (commencing with Section 19050). That action shall constitute notice to creditors of the requirements of this part.

****

§ 19004. Effect of filing, publishing, and serving notice

If the trustee files, publishes, and serves notice as set forth in Section 19003, then:

(a) All claims against the trust shall be filed in the manner and within the time provided in this part.

(b) A claim that is not filed as provided in this part is barred from collection from trust assets.

(c) The holder of a claim may not maintain an action on the claim against the trust unless the claim is first filed as provided in this part.

§ 19100. Claims; time for filing; statute of limitations

> (a) A creditor shall file a claim before expiration of the later of the following times:
>
> (1) Four months after the first publication of notice to creditors under Section 19040.
>
> (2) Sixty days after the date actual notice is mailed or personally delivered to the creditor. This paragraph does not extend the time provided in Section 366.2 of the Code of Civil Procedure.
>
> (b) A reference in another statute to the time for filing a claim means the time provided in paragraph (1) of subdivision (a).
>
> (c) This section shall not be interpreted to extend or toll any other statute of limitations, including that provided by Section 366.2 of the Code of Civil Procedure.

3. Claims based on liability of decedent for breach of fiduciary duty require the timely filing of a creditor's claim. Thus, for example, a claim against the estate based upon the decedent's unconsented to transfer of community property, in violation of his or her fiduciary duties, is a "claim" for purposes of Probate Code § 9000.

4. On the other hand, actions to determine the rights of a spouse in marital property is not a "claim" for purposes of Probate Code § 9000:

> Nor was the declaratory relief cause of action barred by plaintiff's failure to file a timely creditor's claim in probate. (*Prob. Code, § 9100, subd. (a)*.) Creditor's claims must be filed for "'debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered.'" (*Newberger v. Rifkind* (1972) 28 Cal.App.3d 1070, 1077 [104 Cal. Rptr. 663] [optionees need not file creditor claims to enforce options exercised after optionor's death].) Pending dissolution, plaintiff could not enforce her community property interest against Jay before his death. Moreover, a spouse has a "present

> existing interest" in community property, "not a mere money claim." (*Kenworthy v. Hadden* (1978) 87 Cal.App.3d 696, 702 [151 Cal. Rptr. 169].) Thus, the community property interest in a spouse's partnership interest may be pursued without first filing a creditor's claim. (*Id. at p. 703*.) Similarly here, no creditor's claim was necessary for plaintiff to pursue her community property interest. *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1338-39 (footnotes omitted).

VI. LIABILITY FOR DEBTS

A. DIVORCE

1. In 1984, the Legislature materially changed the post-marital liability of spouses by adopting what is now Family Code section 916. Pursuant to Section 916, property received from one spouse in divorce is not subject to the debts of that spouse, unless the debt is specifically assigned to the recipient spouse:

> (a)(2) The separate property owned by a married person at the time of the division and the property received by the person in the division is not liable for a debt incurred by the person's spouse before or during marriage, and the person is not personally liable for the debt, unless the debt was assigned for payment by the person in the division of the property. Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property.

B. ALLOCATING DEBTS BETWEEN ESTATE AND SURVIVING SPOUSE

1. When a community estate is terminated by death of a spouse, community debts are treated differently. Under Probate Code section 11440, the surviving spouse, personal representative or an interested person may petition the court of an allocation of debts between the surviving spouse and the estate.

    a) Pursuant to Probate Code section 11444(b), absent agreement, the debts "subject to allocation must be characterized by the court as separate or community, in accordance with the laws of the state applicable to marital dissolution proceedings."

b) The Law Revision Commission Comment Provides: “This section makes clear that allocation of liability is to be based on rules applicable to liability of marital property for debts during marriage. See Civil Code Sections 5120.010-5122.”

c) Family Code section 900 et seq. replaced Civil Code section 5120.010 et seq. without substantive change.

d) Family Code section 910(a):

> Except as otherwise provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.

e) Family Code section 913:

> (a) The separate property of a married person is liable for a debt incurred by the person before or during marriage.
>
> (b) Except as otherwise provided by statute:
>
> (1) The separate property of a married person is not liable for a debt incurred by the person’s spouse before or during marriage.
>
> (2) The joinder or consent of a married person to an encumbrance of community estate property to secure payment of a debt incurred by the person’s spouse does not subject the person’s separate property to liability for the debt unless the person also incurred the debt.

f) Following characterization, the debts are allocated as set forth in Probate Code section 11444(b)(1) through (5).

> (1) Separate debts of either spouse shall be allocated to that spouse's separate property assets, and community debts shall be allocated to the spouses' community property assets.
>
> (2) If a separate property asset of either spouse is subject to a secured debt that is characterized as that spouse's separate debt,

and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt shall be treated as an unsecured separate debt of that spouse and allocated to the net value of that spouse's other separate property assets.

(3) If the net value of either spouse's separate property assets is less than that spouse's unsecured separate debt or debts, the unsatisfied portion of the debt or debts shall be allocated to the net value of that spouse's one-half share of the community property assets. If the net value of that spouse's one-half share of the community property assets is less than that spouse's unsatisfied unsecured separate debt or debts, the remaining unsatisfied portion of the debt or debts shall be allocated to the net value of the other spouse's one-half share of the community property assets.

(4) If a community property asset is subject to a secured debt that is characterized as a community debt, and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt shall be treated as an unsecured community debt and allocated to the net value of the other community property assets.

(5) If the net value of the community property assets is less than the unsecured community debt or debts, the unsatisfied portion of the debt or debts shall be allocated equally between the separate property assets of the decedent and the surviving spouse. If the net value of either spouse's separate property assets is less than that spouse's share of the unsatisfied portion of the unsecured community debt or debts, the remaining unsatisfied portion of the debt or debts shall be allocated to the net value of the other spouse's separate property assets.

2. When property passes to the surviving spouse without administration, section 13550 et seq. apply. Section 13550 provides that the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in section 13551 to the extent provided in that section.

C. ALLOCATING DEBTS BETWEEN TRUST AND SURVIVING SPOUSE

1. Probate Code section 19320:

> If it appears that a debt of the deceased settlor has been paid or is payable in whole or in part from property in the deceased settlor's trust, then the trustee, the surviving spouse, the personal representative, if any, or a deceased settlor's probate estate, or a beneficiary may petition for an order to allocate the debt.

2. If there is no agreement, the court allocates debts as between the trust and the surviving spouse in the same manner as in decedent's estates, see Probate Code section 11444 quoted above, pursuant to Probate Code section 19324.

D. REIMBURSEMENT FOR MISUSE OF COMMUNITY ASSETS

1. Even though the community is responsible for the debts of a spouse incurred before or during marriage, regardless of who has control or management or who is responsible for the debt, the community may be entitled to be reimbursed by a spouse who incurs a debt in violation of her fiduciary duties. Family Code section 1101, 2602; *Lezine v. Security Pac. Fin. Servs. Inc.* (1996) 14 Cal.4th 56, 64.

VII. PALIMONY

1. *Marvin v. Marvin* (1976) 18 Cal.3d 660, 674. Michelle brought an action against Lee alleging that the two lived together for six years and he agreed to support Michelle for the rest of her life. The trial court granted judgment on the pleadings. The Supreme Court reversed holding that the complaint stated a cause of action for breach of an express contract, and absent an express agreement, the courts may look to the conduct of the parties, and the Court suggested other remedies may be appropriate to protect the parties' expectations:

> [W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as

> competent as any other persons to contract respecting their earnings and property rights…. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose….
>
> ****
>
> [The court may look to whether the conduct of the parties demonstrates] an implied contract, agreement or partnership or joint venture, or some other tacit understanding between the parties….
>
> ****
>
> [These remedies are not exclusive and] additional equitable remedies [may evolve] to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate … in light of the factual setting in which they arise.

2. *Taylor v. Fields* (1986) 178 Cal.App.3d 653. Leo was married to Jean. During the marriage, Leo maintained a 42-year relationship with Flossie, and during the first 20 years of the relationship Flossie was married to another man. When Leo died, Flossie sued claiming that Leo promised to provide financial support to Flossie for her life in exchange for Flossie's promise to serve as Leo's companion and confidante. The Court of Appeal affirmed summary judgment against Flossie, explaining that in *Marvin* and its progeny, the parties had lived together in a stable non-marital relationship. The Court held that cohabitation was an essential element of a palimony claim and Leo and Flossie never lived together.

3. *Bergen v. Wood* (1993) 14 Cal.App.4th 854, *rev. denied*. Wood, a former president of Lockheed and widower, met Bergen, a German actress, while in Monte Carlo in the summer of 1981. They never cohabitated: Bergen continued to live in Munich and stayed at a hotel in Beverly Hills when visiting Wood, a Bel-Air resident. They traveled together and attended social events. Wood provided Bergen with money and paid her travel expenses. The relationship ended seven years later. Bergen alleged in a complaint against Wood an express contract by Wood to provide financial support on an ongoing basis based upon Bergen's agreement to act has companion, confidante, homemaker and social hostess. After a

bench trial, the court found that there was an agreement for financial support supported by consideration but no discussion of a specific duration or amount or whether it would continue after the relationship terminated. Nevertheless, the court inferred from the circumstances that Bergen was entitled to $3,500 a month for 48 months. The Court of Appeal reversed. The Court relied on *Taylor* that cohabitation is an essential element, because "from cohabitation flows the rendition of domestic services, which services amount to lawful consideration for a contract between the parties. We make the additional observation that if cohabitation were not a prerequisite to recovery, every dating relationship would have the potential for giving rise to such claims, a result no one favors."

4. *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, *rev. denied*.

a) Procedural posture. Gladys Byrne ("Flo") sued the administrator and heirs of the estate of Donald Lavezzo ("Skip"). The trial court granted summary adjudication as to Flo's claims for, among other thing, breach of oral agreement (for support) and damages for breach of an alleged property agreement, and the case proceeded to trial solely on quantum meruit. After trial, the court found that there was no agreement between Skip and Flo to enforce, and even if there had been, Flo received adequate compensation during the relationship for her services. The Court of Appeal reversed the summary adjudication order.

b) Facts. The facts alleged and supported by declarations were as follows: Skip and Flo were childhood sweethearts and were engaged when Flo was 18, but the relationship ended and Skip and Flo married other people. Skip divorced in 1974 and Flo's husband died in 1987. Skip again proposed, but Flo declined because her handicapped children would lose insurance coverage from her deceased husband's employer if Flo remarried. Skip and Flo instead lived together beginning in January 1988 until Skip's death in 1993. They commingled belongings and purchased new furniture and furnishings together. They opened a joint savings account. Flo provided homemaker services. Flo and other witnesses testified that Skip often said what's mine is hers and Flo often said the same about Skip. Flo testified that Skip often promised that he would take care of Flo for the rest of her life in exchange for her services as a homemaker, that she would never have to worry and would always have a roof over her head. Flo contributed all of her earnings toward the household and Skip paid Flo's living

expenses. Skip paid to establish a conservatorship for Flo's handicapped daughters and made Flo the beneficiary of Skip's retirement benefits. Skip retired in 1992. Flo continued to work. She then underwent double bypass surgery and after returning to work for a short time retired in 1993. Flo said she retired because Skip wanted Flo to retire and spend more time together as a couple. Skip died in 1993. Skip left an estate of more than $1.2 million and a will from 1975 devising his property to his parents, or if they predeceased Skip, to a Claire Suy (who is otherwise not identified in the opinion except that she predeceased Skip). Flo filed a creditor's claim in Skip's estate.

c) Holdings. The Court of Appeal held that the facts alleged supported a cause of action for breach of contract for support and for damages based on the property agreement (the I'll give you mine and you give me yours claim) including that the facts alleged were adequate to support an equitable estoppel to a statute of frauds defense:

> A trier of fact could conclude that Skip had agreed to support Flo apart from any understanding about payment for her household services. Skip's promises to take care of Flo were likewise distinct from his statements about giving her his property, and those promises could be construed by a trier of fact as an agreement for support apart from any entitlement Flo might have to specific assets. Support and property division are separate issues in marital dissolutions (Fam.Code §§ 2500 et seq., 4300 et seq.), and they are also separate issues for cohabitants. [citing *Marvin*.] In granting summary adjudication, the court focused entirely on the evidence of Skip and Flo's property arrangement, and improperly ignored the evidence of a contract for Flo's support.
>
> ****
>
> The Estate contends that Skip's promises to Flo are too uncertain to enforce. However, "the modern trend of the law favors carrying out the parties' intention through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty."

[Citation.] *Marvin* endorsed "a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship." [Citation.] If Flo's evidence is credited, as it must be for purposes of summary adjudication [citation], then it is certain that Skip expected to provide for Flo's support. Denial of that expectation as a matter of law would be contrary to the policy enunciated in *Marvin*. Moreover, as Flo observes, her understandings with Skip were no more uncertain that the "general and nonspecific" *Marvin* agreement which was enforced in *Alderson v. Alderson* (1986) 180 Cal.App.3d 450, 463, 225 Cal.Rptr. 610, where "[t]he parties never bothered to actually spell out the terms of their agreement or the consideration therefore."

It is unclear how *much* support Skip intended by his promises to take care of Flo, but uncertainty about "'the precise act … to be done'" may be resolved in light of extrinsic evidence. [Citation.] ….

****

Property agreements between cohabitants are enforceable under *Marvin*. [Citation.] Skip told Flo and others that all of his assets would "someday" be hers, and he repeatedly promised Flo that he would "change everything into [her] name" to insure that she obtained all of his property…..

There were various means by which Skip could have provided for the transfer of all of his property to Flo in the event of his death, including placement of his property in joint tenancy with Flo, execution of a will, or entry into a revocable "living" trust. [Citation.]….

Each of the possible arrangements was subject to a statute of frauds (Civ.Code, § 683 joint tenancy]; Prob.Code, § 150 [will or devise]; Prob.Code § 15206 [trust for real property]), and there was no written agreement….

Equitable estoppel may preclude the use of a statute of frauds defense. In the leading case on the subject, Justice Traynor wrote: "The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract…." [Citation.]