# The Law of Community Property

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CHAPTER 1: INTRODUCTION

I. OVERVIEW

Community Property is the system of marital property ownership recognized in eleven jurisdictions in the United States – Arizona, New Mexico, Louisiana, Texas, Nevada, California, Idaho, Washington, Wisconsin, Puerto Rico and (by option) Alaska. The original source of the community property principles recognized in the U.S. was generally the Spanish civil law system of marital property ownership.¹

The law of community property differs from the English common law approach to marital property ownership in important ways. The English common law originally developed around the notion of “coverture” – that is, that the husband and wife were not separate legal actors. Rather, coverture meant that once married, a woman lost her separate legal existence and come under the protective wing of her husband.² The historians Charles and Mary Beard crystallized the impact of coverture when they wrote that “[m]arriage under the common law system is equivalent to civil death for the wife.”³ Over many years, particularly after the late 19th century, the principle of coverture was slowly modified and rejected by the common law states. It was gradually replaced by a system of individual property ownership during marriage.⁴

In contrast, coverture was not a characteristic of civil law community property regimes.⁵ The Spanish system of community property was one of “acquets and gains.” That is, all property acquired during marriage through the labor and industry of either of the spouses was co-owned as community property. Each spouse owned an equal, present, undivided share of the community property. In their historically important treatise on the subject, deFuniak and Vaughn emphasize that “equality is the cardinal concept of the community property system”⁶ and conclude that the

⁴ Hartog describes this gradual legal and cultural shift. Man and Wife, supra note 2 at 297-308
⁵ deFuniak & Vaughn, supra note 1 at 2 (describing one of the two essential characteristics of community property law that “during the existence of the marital relationship, the spouses are joint owners, or partners, with respect to gains or losses.”); Bea Ann Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 Tex. L. Rev. 689 (1990)(arguing that the modern partnership theory of marriage was borrowed from community property jurisdictions).
⁶ deFuniak & Vaughn, supra note 1 at 2.
relationship between the spouses in a community property system is akin to a partnership. While equal rights of ownership certainly characterize the law of community property, historically, the control of marital property was inherently balanced toward the husband; under traditional Spanish law, the husband gained exclusive managerial control over all of the wife’s property by virtue of marriage. The notions of partnership and equality embedded in the law of community property have fueled the notion that community property law is more favorable to women when compared to the common law. This conclusion goes too far considering the historic commitment of community property law to exclusive male management. Rather, it would be fair to leave aside gender value judgments and conclude that community property law constitutes a different and reordered system of marital property ownership.

The traditional community property approach – that the wife had the right to own separate property and to share ownership in marital property subject to the exclusive management of the husband – was altered substantially during the 1970’s. At that time, all of the community property states concluded that exclusive male management of marital property violated emerging principles of equal protection. As a result, by the mid 1980’s all of the community property jurisdictions abandoned exclusive male management and adopted notions of shared management of marital property.

Also in the 1970’s in the wake of the no-fault divorce revolution, equitable distribution laws swept the country. These laws gave broad discretion to judges to divide the property of married couples at divorce without being limited by the individual ownership rights of the spouses. Most of the non-community property states adopted equitable distribution laws.

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7 Id. at 236.
8 Id.
9 Brocklebank sang the benefits of community property for women writing, “the law of the community property states puts the spouses in an association not only of the affairs of the heart, but also of the whole gamut of interests, both material and affectional, that are inherent in the establishment and maintenance of both the family and the family fortune. Ambition and affection are united.” BROCKLEBANK, supra at 41.
13 Arizona, Idaho, Nevada, Texas and Wisconsin all adopted equitable distribution statutes. See ARIZ.REV.STAT.ANN. § 25-318(A); IDAHO CODE § 32-712(1)(a); NEV.REV.STAT.ANN. § 125.150(1)(b); TEX.FAM.CODE ANN. § 3.63(a); WASH.REV.CODE ANN. § 26.09.080; WIS.STAT.ANN. § 767.255 (West 1993); see also, W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES 540-46 (1982) (analyzing the theory of equitable distribution). Three states, California, Louisiana and New Mexico require equal division of community property. CAL.FAM.CODE § 2550; LA.CIV.CODE ANN. art. § 2336. New Mexico has judicially mandated equal division. See Bustos v. Bustos, 673 P.2d 1289, 1291 (N.M.1983); Michelson v. Michelson, 520 P.2d 263, 266
advent of equitable distribution in the non-community property states often meant that judges had
the power to effectuate a meaningful distribution of the couple’s property where no distribution
would have been possible. Prior to such statutes, community property was divided equally at
divorce or at death.\textsuperscript{14} Equitable Distribution statutes gave courts the ability to divide community
property unequally, considering equitable factors.

The law of community property is state law. Since its inception in the United States,
substantial variations have emerged between and among the various community property
jurisdictions. Common law understandings of marriage and property have become woven into the
fabric of community property law. In some jurisdictions, such as California, this interweaving is
more pervasive than in others. While all the states share the notion that the spouses co-own all
property acquired during marriage, they differ on a number of fundamental issues such how rents
and profits of community property are treated, the scope of the respective spouses’ powers of
management over the community property, and the rights of third parties vis-à-vis community
property.

Generally, community property law is taught in a jurisdiction-specific way with little
attention to the developments of other states. This approach has contributed to a sense of
atomization in the law of community property. It has also lead to a confusing patchwork of analysis
as courts and lawyers fill gaps in the law of their particular state through reference to the approach
of other community property states, but without considering whether the larger policy framework
of the states is compatible.

This case book attempts to examine the law of community property across the various
jurisdiction. It actively considers jurisdictional differences and distinctions while challenging the
student to consider the policy ramifications of such differences.

\section*{II. DEFINITION OF COMMUNITY PROPERTY}

“Community Property” is defined similarly, but not identically, in the various community
property jurisdictions. Compare the following statutory provisions.

\begin{center}
\textbf{California}
\end{center}

\textbf{Cal. Fam. Code § 760.} Community Property. Except as otherwise provided by statute, all property, real or
personal, wherever situated, acquired by a married person during the marriage while domiciled in this state
is community property.

(a) Separate property of a married person includes all of the following:
(1) All property owned by the person before marriage.

\textsuperscript{(N.M.1974).}

\textsuperscript{14} Stephen J. Brake, Note, \textit{Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform
(2) All property acquired by the person after marriage by gift, bequest, devise, or descent.
(3) The rents, issues, and profits of the property described in this section.
(b) A married person may, without the consent of the person's spouse, convey the person's separate property.

**Idaho**

**Idaho Code § 32-903.** Separate property of husband and wife
All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property.

**Idaho Code § 32-906.** Community property -- Income from separate and community property -- Conveyance between spouses
(1) All other property acquired after marriage by either husband or wife is community property. The income, including the rents, issues and profits, of all property, separate or community, is community property . . . .

**Wisconsin**

**Wisconsin Statutes § 766.31.** Classification of property of spouses.
(1) General. All property of spouses is marital property except that which is classified otherwise by this chapter and that which is described in sub. (8)

... 

(3) Spouse’s interest in marital property. Each spouse has a present undivided one-half interest in each item of marital property...

(4) Classification of income. Except as provided under subs. (7) (a), (7p) and (10), income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

...

(7) Individual property after determination date. Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:
(a) By gift during lifetime or by a disposition at death by a 3rd person to that spouse and not to both spouses. A distribution of principal or income from a trust created by a 3rd person to one spouse is the individual property of that spouse unless the trust provides otherwise.
(b) In exchange for or with the proceeds of other individual property of the spouse.
(c) From appreciation of the spouses individual property except to the extent that the appreciation is classified as marital property under s. 766.63 (d) By a decree, marital property agreement or reclassification under sub. (10) designating it as the individual property of the spouse.
(e) As a recovery for damage to property under s. 766.70, except as specifically provided otherwise in a decree or marital property agreement.
(f) As a recovery for personal injury except for the amount of that recovery attributable to expenses

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15 In 1986, Wisconsin became the only state to adopt the Uniform Marital Property Act. The drafters of that act did not use the term “community property” in an effort to make the proposed law more politically palatable to state legislatures. It is generally agreed the UMPA embodies community property principles.
paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.

...

Note the distinctions between the statutes:

1. Emphasis in the definitions. The California and Wisconsin statutes define Community Property first and in very broad ways. Then the statutes exempt certain types of property from the definitions. The Idaho Statute does the reverse. It begins by specifically defining Separate property and then provides that all remaining property is Community property.

2. Treatment of income of separate. California specifically exempts “rents, issues & profits” of separate property from the definition of community property. The Wisconsin statute provides that “income … attributable to property of a spouse during marriage” is marital property. The Idaho statute is silent as to the treatment of income of separate property.

Early on, state courts struggled to give meaning to the ownership rights accorded by community property and work out the distinctions between the common law and community property system. These struggles often surfaced when courts attempted to harmonize community property principles with taxation, inheritance and creditors’ rights law (all of which assumed an English common law system of marital property ownership).

**Kohny v. Dunbar, 21 Idaho 258, 121 P. 544 (1912)**

AILSHIE, J. -- This appeal involves the construction of §1873 of the Rev. Codes, commonly known as the inheritance tax law. The respondent, Edna R. Kohny, is the widow of Albert B. Kohny, deceased, and is the administratrix of his estate. On the 9th of February, 1909, the administratrix duly made and returned to the probate court of Ada county an appraisement of the estate of her deceased husband, which showed the estate to be of the value of $88,962.70, of which sum $25,485 was the separate estate of Albert B. Kohny and $63,477.70 represented the community estate and property of Albert B. Kohny and Edna R. Kohny, his wife. The administratrix offered to pay the inheritance tax upon one-half of the community property less the amount of her exemption under §1877, but the probate judge refused to settle, approve or allow her final account until she first paid the inheritance tax upon the whole of the community property, less her exemption of $10,000. The administratrix appealed to the district court from the ruling and order of the probate judge, and her contention was there sustained and the probate judge thereupon appealed to this court.

Section 1873 of the Rev. Codes provides, among other things, as follows: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die,
or possessed of the same while a resident of this state. . . shall be and is subject to a tax hereinafter provided for, to be paid to the treasurer of the proper county, . . ." It necessarily follows from the plain wording of the statute that this tax is laid upon the transfer of any and all property "which shall pass by will or by the intestate laws of this state." The vital question then to be determined is whether the one-half interest which the wife has in the community property passes to her by will or by the intestate laws of the state. This proposition may be further reduced for the reason that it is not contended that she receives it by will, so the only remaining question is: Does she receive a one-half interest in the community property through or under the intestate laws of this state?

. . . Now, then, it being conceded that Albert B. Kohny did not dispose of his property and estate by will and that he therefore died intestate, the question to be determined is: Did his widow, Edna R. Kohny, come into the possession and enjoyment of one-half of the community estate under and by virtue of the intestate laws of the state? In order to intelligently determine this question, it is necessary to consider the nature and character of the estate known as "community property."

Section 3060 of the Rev. Codes defines community property as follows: "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." Chap. 3 title 2, of the Civil Code, comprising sections 2674 to 2693, inclusive, is devoted to the subject "Husband and Wife." Section 2676 defines the separate property of the wife, and 2677 gives her the "management, control and absolute power of disposition of her separate property," both real and personal, and authorizes her to sell and convey her separate property without procuring the consent or concurrence of her husband. Section 2679 defines the separate property of the husband, and §2680 is as follows:

"All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property, unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband."

Section 2686 constitutes the husband as the agent and trustee of the marital community as follows:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; but such power of disposition does not extend to the homestead or that part of the common property occupied or used by the husband and wife as a residence."

It will be seen from an examination of the chapter on "Husband and Wife," and especially the above-enumerated sections, that the law deals with the husband and wife as a kind of
partnership with reference to all their community property accumulations. It segregates all property "owned by the wife before her marriage and that acquired afterward by gift, bequest or descent, or that which she shall acquire with the proceeds of her separate property" as her "separate estate," and it likewise segregates "all property owned by the husband before marriage and that acquired by gift, bequest, devise or descent' as his "separate property." It then provides "all other property acquired after marriage by either husband or wife" shall constitute the community property. The statute therefore intends that all property acquired by either the joint effort of the two members of the community or their individual and separate effort shall constitute a community fund and estate. The lawmakers evidently thought it wise and expedient in the interest of business and commercial transactions that this community have a business and managing agent vested with the authority to manage, sell and transfer such property, and so they prescribed by § 2686, supra, that the husband should be the managing and sales agent and a kind of trustee for the community. The statute, however, has given to the husband no better or higher title to the community property than it has given to the wife. The only difference or distinction whatever the law has made between the husband and wife with reference to community property is that during the continuance of the community the husband is the managing agent, vested with absolute power of disposition of the property, and that the wife cannot sell or encumber such property except in specified instances. The receipts, however, from any disposition that may be made of the property still remain community property, and the wife's interests in the receipts from any sale of community property are just as great as they were in the original community property which was thus sold or transferred.

Section 5713 of the Rev. Codes, which was in force at the time of the death of Albert B. Kohny, provides:

"Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowances, and the charges and expenses of administration."

The foregoing section of the statute recognizes the husband and wife as equal partners in the community estate, and it authorizes each to dispose of his or her half by will. It also provides that the survivor shall continue to be the owner of half of such property subject only to the payment of the community debts. This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent or inheritance, but as survivor of the marital community or partnership. The same section provides further that in the event there be no issue of the marriage living at the time of the death of one of the spouses, and he or she leaves no will or testament, the half of the community property which belonged to the
deceased shall go to the survivor as an heir, and therefore, by descent and under and by virtue of the "intestate laws of this state." While therefore, the survivor in this case receives the entire community estate by reason of the death of her husband, half of it was already hers, and the only additional interest or right she acquires in that half by reason of the death of her husband is the right of management, control and disposition. The death of the statutory managing agent and trustee leaves the wife without such agent and reduces her to the status of a feme sole, and the law authorizes her to act in her own right. Death has worked a dissolution of the community partnership and left the surviving partner to act for herself. She also receives the other half of the community property but by an entirely different means. It comes to her likewise by reason of the death of the husband but through the means of her heirship. The statute makes her an heir of her husband, and so, in the absence of testamentary disposition of the husband's share of the community property, she inherits his half and therefore takes his share under the intestate laws of the state. It is clear however, that she does not inherit her share of the common property.

Counsel for appellant have called our attention to the case of Hall v. Johns, 17 Ida. 224, 105 Pac. 71, wherein this court said: "The title to community property is in the husband and during the existence of the community the wife's interest in the community property is a mere expectancy." That case involved the right of the wife to contract in a matter which did not have reference to her separate property and estate and to bind the community thereby, and the above observation was made in the course of a consideration of the power of the wife to bind herself or separate estate or the community estate by contract which had no reference to her separate property and estate. It was held that she could not bind the community in such manner, and in that connection it was suggested that her interest during the continuance of the marital relation was a mere expectancy.

Similar language has been frequently used by the courts, and especially in California, as will be seen from an examination of In re Burdick, 112 Cal. 387, 44 Pac. 734, Spreckels v. Spreckels, 116 Cal. 339 58 Am. St. 170, 48 Pac. 228, 36 L. R. A. 497, and Estate of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A., N. S., 207. The California court in the Estate of Moffitt, supra, held under a statute almost identical with ours that the interest of the wife in the community property during the continuance of the community is a mere expectancy, and that upon the death of the husband, the wife takes her share of the community property, not as survivor or in her own right but (in some manner not clearly disclosed) under the intestate laws of the state or the laws of descent and succession, and that she is liable to pay an inheritance tax on her half of such estate. That case apparently rests upon the authority of In re Burdick and Spreckels v. Spreckels. The Burdick case held that the "wife takes her interest in such property [community property] by way of succession from the husband, and through distribution of his estate." Mr. Justice Harrison dissented from that view and wrote a separate opinion, dealing with this phase of the statute, and Mr. Justice Garrouste concurred in this dissent. The opinion by Justice Harrison is very clear and concise and, to our minds, expresses the logical and reasonable interpretation of the statute, and is better reasoned than the opinion of the court. Among other things, he says: "She receives it [half the community property], however, not as the heir of her husband, but in her own right as her half of the property which was acquired by herself and her husband during the marriage, but freed from all restrictions in its use and enjoyment, and with the same title as if the marriage had been
dissolved by a decree of divorce."

The community property law has been in force in Washington since about 1869. It has been changed slightly from time to time with reference to the right of disposition of the property and the management and control by the husband, but the community property law in the main has been in force continuously in that state.

In *Warburton v. White*, 18 Wash. 511, 52 Pac. 233, 532, the question arose as to the necessity of the wife joining the husband in the disposition of community property. The case was carried by writ of error to the supreme court of the United States, and in *Warburton v. White*, 176, U. S. 485, 20 Sup Ct. 404, 44 L. ed 555, the supreme court of the United States, speaking through Mr. Justice (now Chief Justice) White, reviewed the Washington decisions on the subject and considered the matter at some length, and in commenting upon the right or interest of the wife in the community property said: "Property acquired during marriage with community funds became an *acquet* of the community, and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control, and power of sale of such property. This right being vested in him not because he was the exclusive owner, but because by law he was created the agent of the community. The proceeds of the property being sold by him becoming an *acquet* of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community." In *Arnett v. Reade*, 220 U. S. 311, 31 Sup. Ct. 425, 55 L. ed. 477, the Warburton case was quoted with approval and the court, speaking through Mr. Justice Holmes, said: "It is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband."

Mr. McKay, of the Seattle bar, in his work on the Law of Community Property, p. 542, says: "In Washington the question has not been expressly decided whether the wife takes her moiety by inheritance from her husband, but the decisions defining her right are so clear and decisive that but one conclusion is possible, viz., that she does not; assuming this conclusion to be true, no inheritance tax could be imposed on her moiety on the death of her husband." In a note to the same section (476) the author says: "The state board of tax commissioners expressly disclaim any power to impose an inheritance tax on the survivor's share of the common property." Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half upon death of the other and each may dispose of a one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the property upon the death of the husband, that the husband would like-wise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate.

Counsel have called our attention to a number of other authorities which consider and discuss this question, but we shall not enter upon an analysis of them here. The following are some of the cases which deal with this question: *Wright v. Hays*, 10 Tex. 130, 60 Am Dec. 220;

We conclude that upon the death of husband or wife, the survivor takes one-half of the property in his or her own right as survivor and is not liable under § 1873 to pay an inheritance tax on such interest in the community estate. The judgment is affirmed, with costs in favor of respondent.

STEWART, C. J. and SULLIVAN, J., concur.

Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930)

Alleging that the death of Joseph A. Bortle resulted from an automobile accident caused by the gross negligence of the host, the administratrix of the estate of the decedent instituted this action for the recovery of damages from the estate of the tortfeasor (who died prior to the commencement of the action) and from the tortfeasor's widow. Upon motion of the defendants, at the close of the plaintiff's case, judgment of dismissal was entered, the court holding that gross negligence creating liability under the host-guest rule was not shown and that the right of action did not survive the death of the alleged tortfeasor. From that judgment the plaintiff appealed.

About four o'clock of the morning of July 24, 1927, Russell M. Frye invited two friends named Rinehart and Lyons to accompany him from Seattle to his home on Lake Washington for a swimming party. Frye granted Rinehart's request for permission to invite Joseph A. Bortle. Bortle's wife, the appellant, joined the group by invitation of her husband. About five a. m., the automobile in which the persons named were riding and which was operated by Frye and owned by the marital community composed of Russell M. Frye and Inez G. Frye, overturned near Renton, Washington. Bortle was instantly killed. The host-driver, Frye, sustained injuries resulting in his death before the commencement of this action. The Fryes were not acquainted with the Bortles. Mrs. Frye was not in the automobile and she had not been informed of the intended visit to the Frye home. A claim presented to the estate of the deceased Frye for Bortle's death was rejected, whereupon this action ensued.

Does the right of action against a marital community for a tort committed by the husband member of the community survive against the community on the death of the tort-feasor husband? That is the decisive question in this case.

Stressing the similarity of the community relationship to that of a corporation and of a partnership, and insisting that the community is a separate entity apart from the husband and wife,
Chapter I: Introduction

counsel for appellant cite the following as sustaining authority for the rule which they seek to invoke:

"If the community as such does a wrong, it must respond, just as under the same circumstances a corporation, a partnership, or any other legal entity composed of more than one person, must respond." *Day v. Henry*, 81 Wash. 61, 142 Pac. 439.

"One of the efficient causes of the doctrine in Washington is the view taken by the supreme court of that state that the community is a sort of juristic person. In legal imagination community property is detached from the spouses and vested in a holding company, called the community, which the court thrusts in between the spouses and their community property." McKay, *Community Property* (2d ed.), § 817.

"The law of this state permits both husband and wife to each hold property separate and apart from the other and recognizes that the marriage community is a separate entity distinct from the separate estates of each." *Mattinson v. Mattinson*, 128 Wash. 328, 222 Pac. 620.

"In fixity of constitution, a community resembles a corporation. It is similar to a corporation in this, also, that the state originates it, and that its powers and liabilities are ordained by statute. In it, the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is sui generis, --a creature of the statute." *Holyoke v. Jackson*, 3 Wash. Terr. 235, 3 Pac. 841.

The applicability of the doctrine of respondeat superior is urged. It is contended that, had the car been operated by an employee of the community within the scope of his duties and the employee later died, the community would be liable for the tort which its agent committed; that, if the stockholder of a corporation were the agent-driver for the corporation, or if the agent-driver for a partnership were one of the partners, the action against the principal (the corporation or the partnership) would not abate by reason of the death of the agent. Stating that the case at bar is slightly different from the foregoing illustrations, counsel for appellant argue:

"It is not the agent with whom we are concerned. The case would be just the same were the driver of the car some third person who was not a party to the suit. The corporation's or the partnership's property is still liable for the obligation incurred by its wrongful act. Just like a partnership, a community is a separate entity from the members. It has the right to acquire property, to sell its lands, to enter into contracts, to engage in business, and to assume liabilities. When a partner dies the partnership is dissolved. Would we contend that if the tortfeasor partner died, the partnership property could not be used to compensate for a partnership tort? Whatever be the status of the community--whether it be likened to a partner-ship
or corporation or whether it be held to be a distinctive, separate entity—we believe the doctrine of respondeat superior must be applied. And while we do not ask a separate judgment against the wife or against the estate, we do believe that the community property must be available towards the satisfaction of community wrongs."

We have not receded from the rule, which we now reiterate, that the liability for the husband's tort which is committed in the management or prosecution of the community business can be enforced against the community property. *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913A 318, 36 L.R.A. (N.S.) 88; *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634. We are not unmindful of expressions of this court that a marital community is an entity and that we have likened the community to a partnership and to a corporation.

By the community property law of this state, Rem. Comp. Stat., §§ 6890-6906, the legislature did not create an entity or a juristic person separate and apart from the spouses composing the marital community. The legislature did nothing more than classify as community property—designate the character of certain property as community and other property as separate—the property acquired after marriage by the spouses. We have, for convenience of expression, employed the terms "entity" and "legal entity" in referring to a partnership and to a marital community. However, we have never held that a partnership or a marital community is a legal person separate and apart from the members composing the partnership or community, or that either the partnership or the marital community has the status of a corporation.

A marital community is in no sense a corporation; neither is it a partnership, though the community of property between the spouses is, in a restricted sense, a partnership between the husband and wife. The legislature, in defining community property, §§ 6890-6906, Rem. Comp Stat., did not change the relationship of husband and wife to the status of a corporation or declare that the property acquired during marriage was owned by a legal personality distinct from the spouses composing the community. In the community property each of the spouses has an undivided one-half interest.

"In a restricted sense the community of property between husband and wife is a partnership between the husband and wife, but, while in many respects it bears a close analogy to an ordinary partnership, the analogy is not complete, and in no exact sense can it be denominated a partnership. For the purpose of classification merely, and to keep it distinct in legal contemplation, separate from community rights and obligations, community property between husband and wife is sometimes, by a legal fiction, treated as a distinct legal entity constituting the center of certain defined rights and obligations. But strictly speaking it is not a legal entity." 31 C.J., p. 9.

"By the provisions of the husband and wife acts passed in 1879, and previously, the husband and wife are considered as constituting together a compound creature of the statute, called a community. This creature is some-times, though inaccurately,
denominated a species of partnership. It probably approaches more nearly to that kind of partnership called universal than to any other business relationship known to the civil or common law.

"A conventional community, in a state where statutes would permit, might be contrived which would be substantially a part-nership; but an ordinary legal community is, in many important particulars, quite distinct. It is like a partnership, in that some property coming from or through one or the other or both of the individuals forms for both a common stock, which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike, in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual, once in it, is incapable of disposing of his or her interest; and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution, a community resembles a corporation. It is similar to a corporation in this, also, that the state originates it, and that its powers and liabilities are ordained by statute. In it, the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis*, a creature of the statute. By virtue of the statute this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute." *Holyoke v. Jackson*, 3 Wash. Terr. 235, 3 Pac. 841.

This is an action to recover for death by wrongful act. The right of action for wrongful death is created by statute and the action abates upon the death of the wrongdoer unless statutory authority for survival of the action can be found. At common law an action for death by wrongful act abated upon the death of the injured person or upon the death of the wrongdoer. That situation obtained in England until the passage of Lord Campbell's act. By our statute, first enacted in 1854, a right of action is given for the death of a person caused by the wrongful act, neglect or default of another.

"When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; . . ." Rem. Comp. Stat., § 183.

By virtue of that statute, an action for the death of a person may be maintained against the tortfeasor. Neither the terms of that statute nor the statute on survival of actions,

"All other causes of action [than those enumerated in § 183] by one person against another, whether arising on contract or other-wise, survive to the personal representatives of the former and against the personal representatives of the latter.
Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death, against his personal representatives," Rem. Comp, Stat., § 967,
extend the right of action against the personal representatives of the deceased tortfeasor. In the event of the wrongdoer's death, the common law rule of *actio personalis moritur cum persona* prevails; that is, the right of action for the tort does not survive the death of the tortfeasor. *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687.

The authorities overwhelmingly support the view that, in the absence of a statute expressly so providing, the right of action for death by wrongful act does not survive the death of the wrongdoer. The reason for the adoption of this position is that such action, being purely statutory in its nature and being un-known to the common law, should be strictly confined within the limits of the statute creating the right.

A pure action in tort for unliquidated dam-ages is not maintainable against the administrator or executor of a deceased tortfeasor. *State ex rel. Baeder v. Blake*, 107 Wash. 294, 181 Pac. 685.

At early common law a suit abated upon the death of the plaintiff or defendant. The death of one of two or more plaintiffs pending the suit abated the action. By statute it was later provided in England that the death of one of the plaintiffs during pendency of an action did not abate the action, which could be prosecuted in the name of the survivor, if the cause of action survived. Actions against two jointly in tort did not abate by the death of one of the defendants, except as to the deceased, each of the defendants being answerable for the wrong. 1 R.C.L., 21-22. This is the rule under which an action in tort may be prosecuted against the surviving member of a firm, the partners being jointly and severally liable.

"The test of the liability is based on a de-termination of the question whether the wrong was committed in behalf of and within the reasonable scope of the business of the partnership. If it was so committed, the partners are liable as joint tortfeasors. Being liable as joint tortfeasors the party aggrieved has his election to sue the firm or to sue one or more of its members, and may even single out for suit a partner who personally was in no wise involved in the commission of the tort." 20 R.C.L., p. 914, § 126.

*See, also, Hess v. Lowery*, 122 Ind. 225, 23 N.E. 156, 7 L.R.A. 90; 1 C.J., p. 163, § 271; 47 C.J., p. 964.

It is not a survival against the partnership. The right of action survives against the surviving partner or partners for the reason that the members of the firm are jointly and severally liable. That
rule is not applicable in the case at bar, as the wife member of the marital community was not jointly and severally liable.

True, at common law all actions in tort did not die with the person. The nature of the cause of action was the test. If the tort were not connected with contract and affected the person only and not the estate, no right of action survived the death of the wrongdoer. Lee's Adm'r v. Hill, 87 Va. 497, 12 S.E. 1052; State ex rel. Baeder v. Blake; Rinker v. Hurd, supra. And, of course, where the liability was joint and several, the death of one of the tort-feasors did not release the other.

In order that a right of action arising out of a tort should survive against the personal representative of the deceased tortfeasor, it is essential that the wrongdoer should, by the wrongful act, have acquired specific property by which or by the proceeds of which the assets in the hands of his personal representative are increased. Payne's Appeal, 65 Conn. 397, 32 Atl. 948. Based upon the foregoing, we held, in Kangley v. Rogers, 85 Wash. 250, 147 Pac. 898, that, where the husband, a notary public, made a false certification, and died subsequent to the commencement of the action to recover damages therefor, the judgment was enforceable against the community property.

Actions in tort, where the tort was not connected with contract or the estate of the tortfeasor was not enriched thereby, were originally designed for the punishment of the wrongdoer. If the tortfeasor died, his personal representative, not having committed in his personal capacity any wrong, could not be prosecuted for such tort. That is the reason of the rule that an action is not maintainable, in the absence of statutory authority therefor, against the personal representative of the deceased wrongdoer, where the tort is not connected with contract or the assets of the estate were not increased by the wrongful act.

The administratrix of the estate of the deceased Bortle brought this action against the executrix of the estate of Frye, deceased, and against Inez G. Frye, the widow. The prayer of the complaint is for judgment against the estate of the deceased Frye and against his widow. It is conceded that the spouses were not jointly and severally liable for the tort, and that no recovery may be had against the estate of the deceased husband or against the separate property of the wife. Arguing that the action is against the community, counsel for appellant contend that the community is an entity separate and distinct from the spouses composing it and continues to exist, as would a corporation or partnership, for the purpose of liquidation of the estate; that the widow's one-half or community interest and the deceased husband's one-half or community interest in the community property can be made to respond to the payment of a judgment; that an action will lie against the surviving wife for the whole claim as in an action against a surviving partner for a tort committed by the other partner, but only the community property may be subjected to payment of the judgment.

This is a pure action in tort for unliquidated damages, hence cannot be maintained against the executrix of the estate of the deceased Frye. State ex rel. Baeder v. Blake, supra. If Russell M.
Frye and Inez G. Frye had been partners, instead of husband and wife, the action would have to be brought against the surviving member only.

"The rule is well settled that at law the creditors of a partnership must bring their actions against the surviving members only. There is no statute of this state changing the common law in this respect." *Brigham-Hopkins Co. v. Gross*, 30 Wash. 277, 70 Pac. 480.

The liability, if any, for the tort of which appellant complains, would be a community obligation which could not be enforced against the separate property of the wife. The separate property of the wife would not be liable for a judgment against the community (*Insley v. Webb*, 122 Wash. 98, 209 Pac. 1093), even if obtained against the community during the life of both spouses.

Plainly, the action cannot be maintained against the personal representative of the deceased Frye, as the action is for a tort not connected with contract and affects the person only. Neither is the action maintainable against the widow, as she was not jointly and severally liable. The community was dissolved by the death of the husband. There can be no community property after the community has been dissolved. All rights and incidents of an existing community relationship cease the instant one of the spouses dies. By a fiction of law the community is deemed to continue for liquidation of the estate.

"Moreover the community no longer exists after the death of one of the spouses, but its estate is simply held intact by administrative proceedings for the purpose of paying indebtedness created during its existence. The entity called the 'community,' is immediately dissolved upon the death of one of its members, and is in law as effectually dead as a deceased individual." *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482.

In *Kangley v. Rogers, supra*, the death of the notary public did not abate the action against the marital community for the negligent performance by the husband of the duties of the office. We held that the performance of the duties of a notary public was a community business of benefit to both spouses rendering the community liable for the false certification of an instrument. We followed the rule that the right of action arising out of a tort survives when the assets of the estate are increased by the wrongful act.

Accepting, for the sake of argument, the theory of appellant that the marital community is an entity separate and distinct from the spouses composing it, the community died before the action was instituted. Is there any authority for survival or revival of a cause of action against the community? As we have seen, there is neither common law or statutory authority for proceeding against the personal representative of the deceased Frye or against the widow. The community property system is a creature of statute. It is unknown to the common law. Unless there is a statute, and we find none, creating a right of action, the action, being for a pure tort, for unliquidated
damages, did not survive the death of the wrongdoer. As we have seen, the right of action against a surviving member of a firm obtains by reason of the joint and several liability of the partners. The members of the marital community in the case at bar were not jointly and severally liable.

The right of action against a corporation after dissolution is by virtue of the statute prolonging the corporate existence after dissolution. Rem. Comp. Stat., §§ 3833, 3834, 3836. At early common law the rule was that all causes of action against a corporation perished with the dissolution of the corporation. The debts of the corporation were extinguished, its real property reverted to the grantor and its personal property escheated to the crown. Prior to statutory modification of the common law rule, recourse was had to the courts of equity (which would not allow a trust to fail for want of a trustee) for protection of creditors and stockholders. *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 17 L.R.A. 375.

The judgment is affirmed.

**NOTES**

What is a marital community? A partnership? A joint venture? A tenancy in property (such as a tenancy in common)? Consider the following questions:

a. How did the husband’s exclusive male management in *Kohny* affect the nature of the wife’s community property interest? What other situations exist where “ownership” of property may be decoupled from the right to “manage” the property?

b. How did the “entity status” of the marital community impact the appellant’s theory in *Bortle*?


Baldwin, J., delivered the opinion of the Court. Field, C. J., concurring.

This question arises from the record in this case: Can a creditor of the husband subject the proceeds or dividends of the separate estate of the wife to his claim? In this case, the property sought to be subjected was the dividends of certain stock purchased by the wife with her separate funds.

By the fourteenth section of article eleven of the Constitution, it is provided: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed, more
clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed, providing for the registration of the wife's separate property."

By section nine of the act regulating the relation of husband and wife, (Wood's Dig. 488,) it is enacted: "The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate; and the rents and profits of the separate estate of either husband or wife shall be deemed common property, unless, in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised, or given to her, that the rents and profits thereof shall be applied to her sole and separate use--in which case, the entire management and disposal of the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband."

We think the Legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors. If the constitutional provision be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist, of a right of property in one, divested of all beneficial use--the barren right to hold in the wife, and the beneficial right to enjoy in the husband. One object of the provision was, to protect the wife against the improvidence of the husband; but this object would wholly fail, in many instances, if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in the contingency of her surviving her husband.

It has been seen that the provision of the Constitution is, that the property acquired by the wife by devise, bequest, etc., shall be her separate property. This term "separate property" has a fixed meaning in the common law, and had in the minds of those who framed the Constitution, the large majority of whom were familiar with, and had lived under that system. By the common law, the idea attached to separate property in the wife, and which forms a portion of its definition, is, that it is an estate, held as well in its use as in its title, for the exclusive benefit and advantage of the wife. The common law recognized no such solecism as a right in the wife to the estate, and a right in some one else to use it as he pleased, and to enjoy all the advantages of its use. It is not perceived that property can be in one, in full and separate ownership, with a right in another to control it, and enjoy all of its benefits. The sole value of property is in its use; to dissociate the right of property from the use in this class of cases, would be to preserve the name--the mere shadow--and destroy the thing itself--the substance. It would be to make the wife the trustee for the husband, holding the legal title, while he held the fruits of that title. This could no more be done, in consistency with our ideas of property, during the life-time of the wife, than for all time.

This was the view taken by the Judge below, and his judgment is affirmed.
NOTES

1. The fundamental principle is that the fruits of the labor of the members of the community are shared equally. This equality of ownership exists even where only one spouse has the practical or legal ability to manage the community property. This type of community is found in the laws of France and Spain upon which the American systems are based and is known as a ganancial community -- one of acquets and gains during the marriage. Each spouse is permitted to own separate property -- compared to the Roman/Dutch system of a general community in which all property owned by either spouse at the time of marriage becomes co-owned. See William Defuniak & Michael Vaughn, Principles of Community Property Law 15-35 (1971).

   While the theory of partnership is often cited as an underlying tenet of community property law, there are significant differences between a marital community and a partnership. The spouses’ shares are equal no matter the value of the contributions they make and although the spirit of the relationship is one of joint endeavor, "the community" is not a juridical entity.

   Community ownership could be viewed as is a method of owning property analogous to a tenancy in common, a tenancy by the entireties or a joint tenancy. The analogy to co-ownership is not perfect either, however. Co-owners can sue each other anytime during the tenancy for claims arising out of the ownership without dissolving the tenancy. And a co-owner can normally alienate his or her interest to a third party who then becomes a co-owner -- the ability to do that unilaterally in community property jurisdictions can be limited. See LaTourette v. LaTourette, 137 P. 426 (Ariz. 1914).

2. How does community property compare to the property rights of spouses in non-community property jurisdictions? In non-community property jurisdictions common ownership is possible, but only by explicit choice of the parties. That is, H and W must formally decide to hold property as tenants in common, joint tenants or tenants by the entirety. With the exception of the tenancy by the entireties and limited dower rights that may exist in some jurisdictions, the spouses are regarded for property ownership purposes as if they were two unmarried persons. The English common law treated the wife as if she was not separate juridical being from the husband -- so common ownership was not necessary -- H and W were one person under the law! The imagery wasn't totally complete, and the common law recognized some property rights such as dower and curtsy which were intended to protect the spouses from the vicissitudes of each other's acts! The English system evolved into the current non-community property system when the notion of the wife as a separate juridical being began to take hold during the late eighteenth century with the advent of married women's property acts. Today spouses in non-community property states are protected through various systems of equitable distribution at divorce and elective share at death.

3. Do you agree that the right to profits and proceeds of property cannot be separated from the ownership of the underlying capital? The California statute quoted in George was based on the traditional Spanish approach to rents and prophets on Community property – rents and profits on
separate property were considered community property. What is the rationale for such an approach?

4. The decision in *George* has been very influential. Today, community property jurisdictions can be divided into two groups on the question of the classification of rents and profits of separate property. The first group – often referred to as the “American Rule” jurisdictions, followed the California Supreme Court’s approach and treats the rents and profits of separate property as separate. These jurisdictions include Washington, Nevada, Arizona and New Mexico. The other community property states (Idaho, New Mexico, Louisiana, Texas, Wisconsin, Puerto Rico and Alaska), often referred to as “Spanish Rule” or “Civil; Rule” jurisdictions, treat the rents, issue and profits of separate property earned during the marriage, as community property.
CHAPTER 2: FORMATION OF THE MARITAL COMMUNITY

A marital community arises when the parties are validly married and are domiciled in a state that has adopted community property law. The law regarding marital formation is not explored in this text. A number of current trends in the law regarding marriage raise have community property implications. As states authorize “marriage alternatives” (e.g. same sex domestic partnership), questions may arise regarding the extent to which community property law applies in the context of such relationships. For the most part, however, the community property issues are peripheral or secondary to these marriage formation issues. For that reason, they are not covered in this text. Several aspects of marriage formation have direct implications for community property and are surveyed here.

States have approached policy questions regarding commong property rights for lesbian and gay relationships differently. Where states, such as California and Washington, have recognized full marriage, same sex couples will most likely be entitled to exactly the same marital property rights and responsibilities as different sex couples. In states that have recognized marriage alternatives, common property rights can differ significantly. Prior to recognizing same sex marriage, Washington state adopted provisions extending the state law of community property to same sex couples in officially recognized relationships. Other states, however, have not provided such comprehensive rights to individuals in a state authorized domestic partnership. States, like Idaho that have not recognized same sex relationships generally have declined to extend property rights to individuals in a domestic partnership. Even where such couples have entered an agreement, states have declined to enforce contractual terms finding them void as against public policy.

I. COMMON LAW MARRIAGE

Common law marriage, particularly when formed in a community property state, raises special issues for community property because the starting date of the marital community is often ambiguous.

Among the community property states only Texas permits common law marriage. Idaho permitted such marriages until 1996 and relationships formed prior to that year may still be considered marriages. Under prevailing principles of comity, states have recognized the validity of common law marriages formed in other states if such marriages would be valid under the law of the state of formation.16 Thus, common law marriages arising in other states will generally be recognized as valid marriages in a community property jurisdiction. Once the parties to the marriages are domiciled in a community property states, property they acquire will be subject to

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Chapter 2: Formation of the Marital Community

the law of community property.


MEMORANDUM OPINION

I. Introduction

In five points, Appellant Michael A. Remley argues that the trial court erred in its division of the community property and its award of attorney's fees and child support to Appellee Carla K. Remley in their divorce case. We affirm in part and reverse and remand in part.

II. Factual & Procedural History

Michael filed for a divorce on April 3, 2003. Carla filed a counterpetition. The divorce proceedings were not amicable. Michael represented himself at the final hearing on September 27, 2006. The trial court signed the final decree of divorce and parenting plan on February 2, 2007, and made findings of fact and conclusions of law on June 6, 2007.

Michael challenges the following findings and conclusions:

Findings of Fact-Divorce
1. Michael Anthony Remley, Petitioner, and Carla Kay Remley, Respondent, were married in December of 1996.

. . . .

This appeal followed.

III. Property Division

In his first point, Michael argues that, with regard to the proceeds from the sale of the family home, the trial court erred by awarding his separate property to Carla because there was no legally sufficient evidence of a common law marriage. He claims that the house was his separate property, purchased before marriage. . . . .

A. Standard of Review

A trial court has broad discretion in making its "just and right" division of the marital estate. Tex. Fam. Code Ann. § 7.001 (Vernon 2006); Murff v. Murff, 615 S.W.2d 696, 698-99 (Tex. 1981). Absent a clear abuse of discretion, we will not disturb that division. Bell v. Bell, 513 S.W.2d 20,

An abuse of discretion does not occur where the trial court bases its decisions on conflicting evidence. In re Barber, 982 S.W.2d 364, 366 (Tex. 1998). Furthermore, an abuse of discretion does not occur as long as some evidence of substantive and probative character exists to support the trial court's decision. See Butnaru v. Ford Motor Co., 84 S.W.3d 198, 211 (Tex. 2002).

In this case, the trial court filed its findings of fact and conclusions of law after the judgment. Findings of fact entered in a case tried to the court have the same force and dignity as a jury's answers to jury questions. Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's findings of fact are review-able for legal sufficiency of the evidence to support them by the same standards that are applied in reviewing evidence supporting a jury's answer. Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996); Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994). However, our role in reviewing cases where property is divided in a divorce action is to determine only if there is an abuse of discretion in the property division, and if there is, to remand the case to the trial court. See McKnight v. McKnight, 543 S.W.2d 863, 866 (Tex. 1976); see also Tex. Fam. Code Ann. § 7.001.

Property possessed by either spouse at the dissolution of the marriage is presumed to be community property, and a party who seeks to assert the separate character of property must prove that character by clear and convincing evidence. Tex. Fam. Code Ann. § 3.003 (Vernon 2006). Clear and convincing evidence is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. See id. § 101.007 (Vernon 2002); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994). This intermediate standard falls between the preponderance standard of civil proceedings and the reasonable doubt standard of criminal proceedings. In re G.M., 596 S.W.2d 846, 847 (Tex. 1980); State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979). While the proof must weigh heavier than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed. Addington, 588 S.W.2d at 570.

We review the trial court's conclusions of law de novo as legal questions. See In re Marriage of Royal, 107 S.W.3d 846, 850 (Tex. App.--Amarillo 2003, no pet.). A conclusion of law will not be reversed unless it is erroneous as a matter of law. Id.

B. Common Law Marriage & Community Property

A "common law" marriage may be established by evidence that the man and woman agreed to be married and after the agreement they lived together in Texas as husband and wife and represented to others that they were married. Tex. Fam. Code Ann. § 2.401(a)(2) (Vernon 2006). The existence of such a marriage is a fact question with the burden of proof, by a preponderance of the evidence, on the person seeking to establish the existence of the marriage. Jenkins v. Jenkins, 16 S.W.3d 473, 480 (Tex. App.--El Paso 2000, no pet.). The status of the property as community
or separate is to be determined by the origin of the title to the property. *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984).

Here, if the parties were married when they purchased the house, then the house was community property. *See id.; see also* Tex. Fam. Code Ann. §§ 3.002-.003. If the parties were not married when they purchased the house, but both parties contributed funds, then they each had a separate property interest in the house and had the burden to trace the amount of their separate property interests by clear and convincing evidence. *See* Tex. Fam. Code Ann. §§ 3.001(1) ("A spouse's separate property consists of the property owned or claimed by the spouse before marriage."); 3.003(a) ("Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."); *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987) (stating that, to overcome the community presumption, the burden is on the spouse claiming certain property as separate to trace and clearly identify the property claimed to be separate). Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *Boyd*, 131 S.W.3d at 612. As a general rule, however, mere testimony that property was purchased with separate funds, without any tracing of the funds, is insufficient to rebut the community presumption. *Irvin v. Parker*, 139 S.W.3d 703, 708 (Tex. App.--Fort Worth 2004, no pet.). We resolve any doubt as to the character of property in favor of the community estate. *Id.*

1. December 1996 Marriage Finding & Community Property Conclusion

The trial court found that the couple was married in December 1996, and it concluded that "[a]ll the property owned by the parties at the time of the divorce is presumed to be community assets." Carla gave the following testimony:

Q. When were we married?
A. December of 1996.
Q. And when--did we--when we purchased the house on Evers, were we married then?
A. We--
Q. When we purchased the house?
A. We were. We presented ourself--
Q. And was your name on the title? Did you help with the buying of the house?
A. What do you mean by did I help?
Q. Did you put any--
A. We bought the house together.
Q. Did you put money into the house?
A. Yes, I did.
Q. You did? What--what amount of money did you put into the house?
A. Well, I believe I came into our relationship with $15,000.
Q. But you--did you not spend the $15,000 prior to purchasing your house? Did--
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...did--did you give me the $15,000?
A. I believe that we shared it together.
Q. Do you remember how much we put down on the house together?
A. $20,000.
Q. Your name isn't on this anywhere, though, is it?
A. No. It was never put on my name. It sure wasn't.

Q. Did we not get married in March?
A. We had a wedding ceremony in March.
Q. So not December?
A. As far as I'm concerned, we were already married. We were--it was just a technicality as far as changing the last name.

Michael did not testify with regard to when the parties were married and failed to controvert Carla's testimony.

The trial court took judicial notice of the entire contents of the court's file in the case. The parties' pleadings reveal that both parties originally pleaded that the marriage occurred on March 21, 1999, and that Carla subsequently amended her counter-petition to allege that the parties were married "on or about December 1, 1999."

On this record, Carla failed to establish all three elements of a common law marriage--specifically that, on or about December 1, 1996 and thereafter until the ceremonial marriage on March 21, 1999, she and Michael agreed to be married, that they lived together as husband and wife, and that they represented to others that they were married.17 See Tex. Fam. Code Ann. § 2.401(a)(2). Therefore, the trial court abused its discretion by finding that the parties were married in December 1996.

However, because property possessed by either spouse at the dissolution of the marriage is presumed to be community property, and because neither the testimony at trial [*10] nor anything else in the record reflects when the house was purchased, other than Carla's testimony that it was purchased when they were married, the trial court did not abuse its discretion by concluding that the house was presumed community property.

Furthermore, with regard to the house, the trial court asked Michael, "Anything else you want me to know about before I make a decision?" Michael replied, "I put $26,000 down on the house myself," and claimed that he got that $26,000 "[f]rom the sale of the house on Congress that I owned prior." Michael did not elaborate about whether he meant "prior" to mean before marriage or before the purchase of the marital residence.

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17 Carla apparently started to testify to this, stating "We presented ourself--", but she was cut off by Michael.
Carla's testimony that they put $20,000 down on the house together and that at least $15,000 was hers controverted Michael's testimony as to the amount of alleged separate property that he invested in the purchase. Because the party seeking to assert the separate character of property must prove that character by clear and convincing evidence, the trial court could have reasonably concluded that because Michael did not produce sufficient evidence of having actually owned and sold a previous house that was his separate property, and because Carla's testimony controverted the characterization and the dollar amounts invested in the marital residence, that Michael did not sufficiently trace the alleged separate property funds to rebut the community property presumption. Tex. Fam. Code Ann. § 3.003; Irvin, 139 S.W.3d at 708. Therefore, we overrule Michael's first point.

NOTES

1. If a common law marriage is not proved within two years after the relationship breaks down, Texas law imposes a statutory presumption that no common law marriage exists. See Tex. Fam. Code Ann. §2.402; Joplin v. Borusheski, 244 S.W. 2d 607 (Tex. App. Dallas 2008).

2. In 1995, the Idaho Legislature amended the Idaho Code to eliminate the possibility of common law marriage. See Idaho Code §§ 32-201 and 32-301.

3. When does a common law marriage begin? Once the facts support the existence of a common law marriage does it relate back to the beginning of the relationship? Does the court have to fix a date after which all the elements of common law marriage existed?

II. THE PUTATIVE MARRIAGE DOCTRINE

As deFuniak and Vaughn explain, “[a] putative marriage, in the civil law, is a marriage which is forbidden but which has been contracted in good faith and in ignorance of the impediment on the part of at least one of the contracting parties.”18 Under Spanish law, the principles of community property apply to a putative marriage just as to a legal marriage. In the United States, the courts of Louisiana have adhered most closely to the approach of the Spanish approach. In most other community property states, a legal community is not created in a putative marriage. Rather, the innocent spouse in such a situation may be entitled to recovery based upon her or his good faith belief in the validity of the marriage. This recovery is rooted in notions of quasi-contract and unjust enrichment.

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18 deFuniak & Vaughn §56, p96
Spearman v. Spearman, 482 F.2d 1203 (5th Cir. 1973)

Roney, Circuit Judge:

This case requires us to decide which of two claimants qualifies as the "widow" under a policy of life insurance issued pursuant to the Federal Employees' Group Life Insurance Act, 5 U.S.C.A. §8701 et seq. The District Court found that, although both claimants had married the insured, the second wife did not qualify as the insured's "lawful widow" because she did not establish that insured's first marriage had been terminated by either divorce or annulment. We affirm.

At the time of his death, on October 1, 1969, Edward Spearman was insured by Metropolitan Life Insurance Company under Group Policy No. 17000-G in the amount of $10,000. The policy provided that, if no beneficiary were designated, the proceeds were to be paid to the "widow" of the insured. The parties stipulated that the policy designated no beneficiary.

After Spearman's death, both defendants claimed to be his "widow" and claimed the proceeds of his life insurance policy. The first wife, Mary Spearman, is a resident of Alabama and was married to insured on October 2, 1946, in Russell County, Alabama. Two children, twin girls, were born of this marriage, and both carry the surname of Spearman. The second wife, Viva Spearman, a resident of California, married insured on June 7, 1962, in Monterey County, California. This marriage produced no offspring.

Metropolitan filed this interpleader action and paid the proceeds of the policy into the registry of the District Court.

The Applicable Law

A. The Definition of "Widow"

The decision in this case turns on the definition of the term "widow" as used in the life insurance policy. The policy itself does not define "widow," nor does the Federal Employees' Group Life Insurance Act, supra, provide any guidance. This question is not however, one of first impression. In Tatum v. Tatum, 241 F.2d 401 (9th Cir. 1957), the Ninth Circuit, by looking to judicial interpretations of an analogous federal statute, the National Service Life Insurance Act, 38 U.S.C.A. §701 et seq., determined that the term "widow" meant "lawful widow." The Tatum court then turned to state law to provide a definition of the term "lawful widow." Other courts look to state law for a definition of "widow," apparently following the lead of De Sylva v. Ballentine, 351 U.S. 570, 76 S. Ct. 974, 100 L. Ed. 1415 (1956), which held that federal courts should look to state law in defining terms describing familial relations. "There is no federal law of domestic relations, which is primarily a matter of state concern." 351 U.S. at 580. See, e.g., Brinson v. Brinson, 334 F.2d 155 (4th Cir. 1964); Lembcke v. United States, 181 F.2d 703 (2d Cir. 1950).

This case is complicated by the fact that the widows each married Spearman, and now live,
in different states. For the validity of each marriage viewed separately, the law of the state where the marriage occurred controls. For the law to determine which of two conflicting marriages is the valid one, and therefore to determine which spouse is the "widow," we hold that California law should apply, following the Brinson case, supra, which held that the law of an insured's domicile at the time of his death should govern. See also Grove v. Metropolitan Life Insurance Co., 271 F.2d 918 (4th Cir. 1959). This holding is appropriate here since California was not only Spearman's domicile, but also he accepted Government employment in California and entered into the insurance contract while there.

California law is in accord with the general rule which provides that a second marriage cannot be validly contracted if either spouse is then married. E.g., People v. Coronado, 57 Cal. App. 2d 805, 135 P.2d 647 (1943); cf. Sohnlein v. Winchell, 230 Cal. App. 2d 508, 41 Cal. Rptr. 145 (1964).

In a contest between conflicting marriages under California law, once the first wife establishes that her marriage has not been dissolved, then the burden of persuasion shifts to the second wife to establish that her spouse's marriage to his first wife had been dissolved. Otherwise, the first wife is deemed to have established her status as the lawful wife.

According to the California rule, as in most states, the process of establishing which wife enjoys the status of lawful wife involves these shifting presumptions and burdens of persuasion:

1. Initially, when a person has contracted two successive marriages, a presumption arises in favor of the validity of the second marriage. Cal. Evid. Code §663; Tatum v. Tatum, supra; Hunter v. Hunter, 111 Cal. 261, 43 P. 756 (1896); Vargas v. Superior Court, 9 Cal. App. 3d 470, 88 Cal. Rptr. 281 (1970); Berg Estate, 225 Cal. App. 2d 423, 37 Cal. Rptr. 538 (1964). Absent any contrary evidence, the second wife is deemed to be the lawful wife.

2. The presumption of validity accorded the second marriage is, however, merely a rule of evidence. It is a rebuttable presumption, the effect of which is to cast upon the first wife the burden of establishing the continuing validity of her marriage by demonstrating that it had not been dissolved by death, divorce, or annulment at the time of the second marriage. Cal. Evid. Code §§604, 606; Tatum v. Tatum, supra, 241 F.2d at 406, citing In Re Smith's Estate, 33 Cal. 2d 279, 201 P.2d 539, 540 (1949); Hunter v. Hunter, supra; Vargas v. Superior Court, supra; Berg Estate, supra.

3. California formerly required the first wife to prove that her husband had not dissolved their marriage by showing that no record of either divorce or annulment existed in any jurisdiction in which the husband may have resided. See Nidever Estate, 181 Cal. App. 2d 367, 5 Cal. Rptr 343 (1960). This strict burden has now been somewhat relaxed. The current rule is that, to rebut the presumption of validity
inuring to the second or subsequent marriage, the first spouse need examine the records of only those jurisdictions in which either she or her husband have been in fact domiciled. See Goldberg Estate, 203 Cal. App. 2d 402, 21 Cal. Rptr. 626 (1962).

4. If the first wife shows that an examination of the pertinent records of such jurisdictions and all of the available evidence demonstrate that her marriage remains undissolved, the burden of demonstrating the invalidity of the first marriage then shifts to the party asserting its invalidity, the second wife in this case. In re Smith's Estate, supra. Unless the second wife then can establish that her husband's first marriage has been dissolved, the first wife qualifies as the "lawful widow."

B. The Putative Spouse Doctrine

Even if the second wife cannot qualify as the insured's "widow," she may nevertheless be entitled to one-half of the proceeds of the life insurance policy as insured's "putative spouse." cf. United States v. Robinson, 40 F.2d 14 (5th Cir. 1930); but see Tatum v. Tatum, supra.

A putative spouse is one whose marriage is legally invalid but who has engaged in (1 a marriage ceremony or a solemnization, or the (2 good faith belief in the validity of the marriage. According to Estate of Foy, 109 Cal. App. 2d 329, 240 P.2d 685 (1952), the term "putative marriage" is applied to a matrimonial union which has been solemnized in due form and good faith on the part of one or of both of the parties but which by reason of some legal infirmity is either void or voidable. The essential basis of such marriage is the belief that it is valid.

... . .

The theory under which the "putative spouse" is entitled to recover a share of the insurance proceeds is that, as the insured's "putative spouse" she is entitled to share in the property accumulated by the family unit during its existence. The general rule, therefore, is that the "putative spouse" is entitled to the same share in this property as would have been accorded a de jure spouse under the community property laws. See, e.g., Estate of Ricci, 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962).

In effect, the innocent putative spouse was in partnership or a joint enterprise with her spouse, contributing her [earnings and services] to the common enterprise. Thus, their accumulated property was held in effect in Sousa v. Freitas, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485, 489 (1970). See also Blache v. Blache, 69 Cal. App. 2d 616, 160 P.2d 136 (1945); but see Estate of Ricci, supra.

The California courts have uniformly held that, when the premiums on an insurance policy have been paid with community funds, the chose in action represented by the policy constitutes

Since the proportionate contribution of each spouse is immaterial in California, *Vallera v. Vallera, supra*, and assuming that all of the insurance premiums were paid during the time when the "putative spouse" believed in good faith that she had a valid marriage, then it is presumed that she contributed one-half of the premiums and is therefore entitled to one-half of the proceeds.

### The Decision

Applying these rules to the facts before it, the District Court first looked to the law of Alabama and concluded that Mary, the first wife, was validly married in Alabama in 1946. The subsequent marriage to Viva in 1962 in California was valid under California law, unless there was a preexisting marriage. At this point, the presumption in favor of the most recent marriage to Viva required Mary to show that her marriage had not been dissolved or annulled at the time of the insured's marriage to Viva. This showing she successfully made by establishing that no petition for annulment or divorce had been filed, by either herself or the insured, in any of their known domiciles since 1946, including Columbus, Georgia, Phoenix City, Alabama, and Monterey, California. . . .

After Mary had rebutted the presumption of validity initially attaching to Viva's marriage, the burden of persuasion shifted to Viva. *See In re Smith's Estate, supra*. This burden failed for want of proof: Viva introduced no credible evidence that either Mary or the insured had ever been a party to any legal proceeding that had annulled or dissolved their marriage. The District Court then correctly ruled that Mary had established the continuing validity of her marriage to the insured and that Viva had failed to establish otherwise.

Having failed to prove her claim as insured's "widow" under the policy of life insurance, Viva then pursued the theory that, as the insured's "putative spouse," she was entitled to one-half of the proceeds of the life insurance policy. The District Court found that Viva could not qualify as the insured's "putative spouse" because she could not meet the requirement of a good faith belief in the existence of a valid marriage. This finding is not clearly erroneous, and must remain undisturbed under Rule 52 (a), F.R.Civ.P. The evidence before the District Court showed that Viva knew (1) that the insured had fathered two children by Mary Spearman, (2) that Mary and both children carried the Spearman name, (3) that Mary had secured a support decree against the insured, (4) that the insured returned to Alabama each year on his vacation, and (5) that while on these vacations the insured lived in the same house with Mary and his two children. On these facts, the District Court's finding of an absence of good faith belief was amply supported. As the district Court stated in its thorough opinion, "Viva admits that she was aware of the possibility, if not the
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likelihood, of [insured's] prior marriage to Mary, and, yet, she took no steps to perfect her marital status."

Viva contends that the District Court's view of the "bona fide belief" requirement rests upon an erroneous interpretation of the California decisions. She argues that these decisions require only that the "putative spouse" have neither actual knowledge of invalidity nor a belief that the marriage was invalid. Under Viva's view, then, so long as she did not actually know of her marriage's invalidity and maintained a belief in its validity, no matter how unreasonable that belief may have been, she qualified as the insured's "putative spouse." We decline to adopt such a test of good faith. Rather, we think that the District Court correctly held that a good faith belief in the validity of the marriage must be posited on a view of the facts known to the spouse in question.

Such an objective test is perfectly consonant with the California decisions that have developed and applied the "putative spouse" doctrine. Viva argues that, since the decisions applying the good faith standard have always involved spouses who either knew or believed that their marriage was actually invalid, e.g., Tatum v. Tatum, supra; Estate of Bialy, 169 Cal. App. 2d 479, 337 P.2d 511 (1959); Vallera v. Vallera, supra; Flanagan v. Capital National Bank, supra; Schneider v. Schneider, 183 Cal. 335, 191 P. 533 (Cal. 1920), the test of good faith is satisfied by a spouse who has no actual knowledge of the marriage's invalidity and who believes in its validity. We disagree. Although no California case has been cited to us that tests good faith by examining its reasonability, the cases that have discussed good faith do not preclude such an approach. Two cases, Estate of Foy, supra, and Estate of Krone, 83 Cal. App. 2d 766, 189 P.2d 741 (1948), specifically advert to the fact that the "putative spouses" involved in each had received no information about the invalidity of their marriages. The language in all of these California "putative spouse" cases indicates that a broad approach to good faith is proper. Nowhere do these cases explicitly reject an objective test of good faith.

Costs will be taxed to appellant.

AFFIRMED.

NOTES


2. Most of the cases indicate that the remedy for the putative spouse is to put such a spouse in the position he or she would have been in had the marriage been valid. The problem with this remedy
is that it often affects the interests of innocent third parties such as the innocent actual spouse or children of the wrongdoer. How should such competing interests be balanced? In Spearman?

4. In *Haffner v. Haffner*, 229 Cal. Rptr. 676, 691 (Ct. App. 1986), the husband left W1 and his two children and moved to California. After 15 years he met and married W2. Ten years later, he was in a car accident and eventually died from injuries sustained in the accident. W2 cared for H after the car accident for two years. H’s estate consists primarily of a substantial personal injury settlement. He died without a will. How should his estate be distributed?

### III. UNMARRIED COHABITATION

Most jurisdictions have developed approaches for redressing economic injustices that may occur when non-marital relationships dissolve. Most of these approaches are rooted in quasi-contract and unjust enrichment. Some are statutory. The recognition of marriage alternatives for same sex couples may affect these remedies in some jurisdictions. Washington State’s approach is particularly interesting in light of community property. There the courts have applied community property law by analogy to long-term, marriage-like relationships

**In the Matter of the Marriage of Lindsey, 101 Wash.2d 299, 678 P.2d 328 (1984)**

DOLLIVER, Justice.

Appellant Lana M. Lindsey alleges the trial court erred in utilizing the presumption of *Creasman v. Boyle*, 31 Wash.2d 345, 196 P.2d 835 (1948) to characterize and distribute property upon dissolution of a marriage which was preceded by a nonmarital family relationship.

In October 1974 appellant and respondent Carl R. Lindsey began a meretricious relationship. The parties subsequently married in June 1976. Although they had no children during this marriage, each had a child from a previous marriage living with them. The parties separated in November 1981. Respondent filed a petition for dissolution in December 1981 which was granted in March 1982.

At trial there was a dispute over the acquisition, characterization, and valuation of property prior to and during marriage. There was also contradictory evidence as to the amount of labor expended by the parties to improve property.

Prior to marriage, appellant and respondent logged what was called the West Valley property, netting approximately $30,000 and built a barn/shop on the farm property. At the time of marriage, respondent had substantial separate property holdings, while appellant had virtually no assets. Respondent's separate property holdings included: (1) 30 acres of farm property with a
mobile home located thereupon; (2) 30 acres of West Valley property; (3) 11 acres of Arcadia property; (4) 4 horses; and (5) logging equipment and motor vehicles.

During their marriage, the parties maintained a joint checking account and basically spent what they earned. Respondent worked for the family business, Lindsey Brothers Excavating, Inc. Appellant was a homemaker, taking care of the children, horses, and farm. She did work a year for Lindsey Brothers, averaging $500 a month. Respondent had a gross income of over $45,000 in 1980 and $28,500 in 1981. In 1982, he earned $1,000, due to a slump in the excavating business and had to borrow over $25,000 from his mother, brother, and the company.

The parties also acquired and home bred horses. Some horses were trained for the racing circuit. In 1979, the parties began construction of a family home on the farm property borrowing money from respondent's mother ($20,000), the family business ($23,000), and a bank ($70,000). In June 1981, a fire destroyed the barn/shop on the farm property. Insurance proceeds totaled $85,587.37.

The trial court in characterizing respondent's property prior to marriage utilized the Creasman presumption: In regard to the [respondent's] separate property and property acquired during the meretricious relationship, the parties are presumed as a matter of law to have intended to deal with their property as they in fact did. See Creasman v. Boyle, 31 Wash.2d at 356, 196 P.2d 835. The major assets were found to be "either separate property of [respondent], or property acquired with separate funds . . . or loans." Respondent was awarded all of the real property.

The community property assets were then determined and "equitably" divided. Appellant principally received her personal effects, $1,700 car insurance proceeds, four horses (Any Special Times, Miss Dyna Chick, Three Bar Taylor, and High Times Lady), a GMC pickup, and a $3,750 cash award for community labor on the family residence. No account was taken by the trial court of any contribution appellant may have made to the construction of the barn/shop.

In addition to the real property award, respondent received the stock in his family business, personal effects, 16 horses (including the racehorse Watch Me Mama), and $1,700 car insurance proceeds.

This appeal allows us once again to reconsider the legal vitality of the Creasman presumption. In Creasman v. Boyle, supra at 351, 196 P.2d 835, we declared:

[P]roperty acquired by a man and a woman not married to each other, but living together as husband and wife, is not community property, and, in the absence of some trust relation, belongs to the one in whose name the legal title to the property stands. We further stated what has been identified as the Creasman presumption:[W]e think that, under these circumstances and in the absence of any evidence to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it.
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Creasman v. Boyle, supra at 356, 196 P.2d 835. This presumption has caused considerable difficulty in subsequent litigation, and has been criticized both by the courts, and the legal writers, but has not been expressly overruled. W. McClanahan, Community Property Law §5:26, at 315-16 (1982). See Annot., Property Rights Arising from Relationship of Couple Cohabiting Without Marriage, 3 A.L.R.4th 13 (1981); Washington State Bar Ass'n, Community Property Desk Book §2.6 (1977).

In application, the Creasman presumption has been restricted to its own particular facts—one party dead and the other silenced by the deadman's statute, RCW 5.60.030. West v. Knowles, 50 Wash.2d 311, 313, 311 P.2d 689 (1957). Creasman involved the 7-year meretricious relationship of a black man, Harvey Creasman, and a white woman, Caroline Paul, which terminated by the death of Paul in 1946. During their relationship, Creasman worked in a naval shipyard and earned over $13,000. Paul handled all the financial matters. At her death, most of the property was in Paul's name, although a substantial portion was attributable to Creasman's salary.

The trial court awarded Creasman an undivided one-half interest in the property and a like one-half interest to the decedent's administrator. On appeal, the decision was reversed.

The Creasman court found "[t]he evidence points indubitably to the conclusion that, at the time of the death of Mrs. Paul, the property stood as the parties intended to place it and have it stand." Creasman v. Boyle, supra 31 Wash.2d at 353, 196 P.2d 835. Moreover, there was "no ground or reason for invoking any equitable theory of resulting trust". Creasman v. Boyle, supra at 356, 196 P.2d 835.

Later decisions have attacked the presumption. In West v. Knowles, supra 50 Wash.2d at 316, 311 P.2d 689, Justice Finley, concurring specially, stated: The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship. Although not passing on the issue in In re Estate of Thornton, 81 Wash.2d 72, 79, 499 P.2d 864 (1972), Justice Finley, writing for the majority, noted, "[a]rguably, Creasman should be overruled and its archaic presumption invalidated."

In practice, the Creasman presumption has been avoided through various exceptions which "characterize the property relationship between the parties in a non-marital cohabitation situation." Community Property Desk Book §2.7, at 2-8. The most common means of avoidance include: (1) tracing source of funds (West v. Knowles, supra); (2) implied partnership/joint venture (In re Estate of Thornton, supra; Latham v. Hennessey, 87 Wash.2d 550, 554 P.2d 1057 (1976)); (3) resulting/constructive trust (Omer v. Omer, 11 Wash.App. 386, 523 P.2d 957 (1974)); (4) cotenancy (Shull v. Shepherd, 63 Wash.2d 503, 387 P.2d 767 (1963)); (5) contract theory (Dahlgren v. Blomeen, 49 Wash.2d 47, 298 P.2d 479 (1956); Marvin v. Marvin, 18 Cal.3d 660, 557 P.2d 106, 134 Cal.Rptr. 815 (1976)) (summarized from Community Property Desk Book §§2.8-2.12).
We find the constricting dictates of the *Creasman* presumption to have made the law unpredictable and at times onerous. While the presumption may have been justifiable in the context of the *Creasman* case, it has been expanded far beyond its intended scope. In this case we now are "presented with an appropriate set of circumstances", *Latham v. Hennessey*, supra 87 Wash.2d at 555, 554 P.2d 1057, to abandon and overrule the *Creasman* presumption and we hereby do so.


Appellant specifically argued for the adoption of this new approach. Respondent maintained, however, this alternative approach should only be used when there "exists a long-term, stable, nonmarital family relationship." *Latham v. Hennessey*, supra 87 Wash.2d at 554, 554 P.2d 1057. Here, the parties' meretricious relationship lasted less than 2 years. Clearly, prior case law has involved more enduring relationships. *Latham v. Hennessey*, supra (15 years); *In re Estate of Thornton*, supra (17 years); *West v. Knowles*, supra (10 years); *Omer v. Omer*, supra (20 years). Additional factors also have been considered--continuous cohabitation, duration of the relationship, purpose of the relationship, and the pooling of resources and services for joint projects. *Latham v. Hennessey*, supra at 554, 554 P.2d 1057.

In an analogous case involving loss of consortium with unmarried cohabitants, a California court has adopted a "stable and significant" relationship test. *Butcher v. Superior Court*, 139 Cal.App.3d 58, 70, 188 Cal.Rptr. 503 (1983).

This type of test, however, recently has been criticized as "so difficult as to be impossible in the real world of the practical." *Weaver v. G.D. Searle & Co.*, 558 F.Supp. 720, 723 (N.D.Ala.1983). Would the giving of an engagement ring qualify as creating a significant relationship? If not, how long would the engagement have to exist? Would "going steady" be sufficient? Is cohabitation sufficient? If it is, how much cohabitation? Would a simple "rent sharing" do the trick? What about a "significant" and "meaningful" homosexual relationship? *Weaver v. G.D. Searle & Co.*, supra. While these criteria may be useful in determining the existence of a meretricious relationship, we do not believe they should be adopted as a rigid set of requirements but rather that courts should examine each case on its facts. In any event, in this case the existence of a meretricious relationship was not contested by either appellant or respondent and was not an issue.

Instead, respondent argued the *Creasman* presumption was irrelevant to the property distribution. Relying on *West v. Knowles*, 50 Wash.2d 311, 311 P.2d 689 (1957), respondent claimed no presumption arose because the parties' property was traceable to its owners.
West v. Knowles involved parties living in a meretricious relationship for 10 years. After an accounting of their property, both parties appealed the trial court's award. The Creasman presumption was found not to be on point as it "arises only when there is an absence of evidence as to intention." West v. Knowles, supra at 313, 311 P.2d 689. The court found no absence of evidence as to the parties' intentions because both parties testified in extenso regarding their properties. None of the property ever lost its character as separate property, notwithstanding the mingling thereof, the resulting confusion, and the difficulty of separating it. No presumptions arise as to property which can be traced to one or the other. It belongs to the original owner. West v. Knowles, supra at 313, 311 P.2d 689. Both appellant and respondent were able to present extensive evidence and exhibits to support their positions.

The principal assets were respondent's separate real property, a number of horses, and the fire insurance proceeds. The real property was owned by the respondent before marriage and properly characterized as separate property. RCW 26.16.010. We also hold the trial court properly exercised its statutory discretion (RCW 26.09.080) in the distribution of the other assets, including the horses.

The fire insurance proceeds, however, are more difficult to characterize. Generally, such "proceeds stand in the place and stead of property insured and partake of the same character". In re Estate of Hickman, 41 Wash.2d 519, 523, 250 P.2d 524 (1952). The property insured was a barn/shop that had been constructed prior to marriage. Appellant was awarded no property interest in the barn/shop, which subsequently burned and netted $85,587.37 in insurance payments.

The record reveals the building was used as a working shop, to store company and personal tools/supplies, and as a tack room. The excavating company's insurance paid $50,000 for the consumed structure, $15,000 for shop tools, and $5,000 for personal property. An additional $15,587.37 was paid under the homeowner's policy of the couple.

Respondent contended that he built the barn/shop himself and appellant "did very little work." Appellant maintained she helped in framing, cementing, siding, and roofing the barn/shop. Additionally, she stated she did almost all the painting.

The trial court characterized the barn/shop and its subsequent proceeds as respondent's separate property because the barn was constructed prior to marriage. The trial court also relied on the Creasman presumption as the property upon which the barn/shop was built was in respondent's name. Hence, no evaluation of appellant's premarriage interest in the barn/shop was made.

Under the "just and equitable" approach we hold the trial court must consider whatever property interest appellant may have in the barn/shop. We recognize the trial court's discretion is wide and will not be interfered with except for a manifest abuse of such discretion. Baker v. Baker,
80 Wash.2d 736, 747, 498 P.2d 315 (1972). The fact that appellant's interest in the barn/shop was not evaluated rises to this level of error.

The case is remanded to the trial court for a determination, in accordance with the law set forth in this case, of what interest, if any, Lana Lindsey has in the barn/shop. We find the remaining property to have been justly and equitably determined and distributed in accordance with the rule announced herein and with the statute, RCW 26.09.080. Appellant's request for attorney fees is denied.

NOTES

1. Jurisdictions have taken vastly different approaches to the question of property rights of unmarried cohabitants. Traditionally courts refused to recognize any remedy reasoning that conferring property rights on an individual would constitute official recognition of meretricious relationship against public policy. The California Supreme Court in Marvin v. Marvin, 18 Cal.3d 660, 557 P.2d 106, 134 Cal.Rptr. 815 (1976) rejected the public policy argument and permitted one party to a cohabitational relationship to establish the existence of an oral or implied-in-fact contract. Since Marvin a number of other jurisdictions have followed suit. To date, however, Washington is the only community property state that has applied its marital property laws by analogy to non-marital relationships.
CHAPTER 3: CLASSIFYING PROPERTY AS COMMUNITY

I. EVIDENTIARY PRESUMPTIONS

As the Introduction to this book points out, most jurisdictions define community property to include all property acquired during the marriage other than by gift and inheritance. See, e.g. Idaho Code § 32-903 (“All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property.”). Historically, courts have employed a presumption that property acquired or possessed during marriage is community property. This “pro-community presumption” was part of the original Spanish law regarding community property.19

The role of the pro-community presumption in the law of community property is ambiguous. On the one hand, this presumption appears to express a public policy in favor of marital property. At some level this certainly is true since the presumption will have the effect of resolving ambiguous situations in favor of classifying property as community property. On the other hand the tone and language of the cases suggest that such a policy is weak, if it exists at all. Many courts in community property states have gone to great lengths to emphasize that separate property is as important as community property. The Washington Supreme Court has imposed a separate presumption in favor of separate property and has characterized the right to control and protect separate property as just as “sacred” as the rights of the spouses together to control and protect community property.20

The pro-community presumption also performs an evidentiary function – dictating which of the parties has the initial burden to present a prima facie case, and governing the extent and allocation of the initial burden of proof and the expected burden of responding to such proof.

In some situations, the pro-community presumption simply appears to constitute a re-telling of the basic law of the jurisdiction and, once stated, appears to have little function in the policy implemented by the courts or in the allocation of responsibilities for proof in any particular case.

The exact scope and strength of the pro-community presumption is often ambiguous and varies significantly from state to state (and even within a single state). While the pro-community

19 De Funiax & Vaughn, supra at 116. DeFuniax & Vaughn note that the pro-community presumption appears to have been part of the law of community property since visogothic times.

20 Guye v. Guye, 115 P 731 (Wash. 1911), cited in In re Estate of Borghi, 219 P. 3d 932, 934 (Wash. 2009)
presumption is usually imposed by courts as a judicial interpretation of the state’s definition of community property, a few states have codified the pro-community presumption. For example, Wisconsin Statutes § 766.31(2) provides “[a]ll property of the spouses is presumed to be marital property.”

Most versions of the presumptions focus on three categories of facts in classifying property as community. The first and most important is the time of acquisition of the property. Property acquired during the marriage is presumed to be community property. However, in addition to the time of acquisition, courts have also focused on property “possessed during the marriage.” Finally, some courts increase the strength of the pro-community presumption based on the length of the marriage. These distinctions are crucial and dictate the type of proof necessary to raise the presumption in the first place. In any given situation, it may be one thing to establish that property was possessed during the marriage and quite another to establish that it was acquired during the marriage.

The following cases explore the role of the pro-community presumption in litigation regarding the classification of property as community or separate property. Key areas of focus are a) the proof necessary to raise the pro-community presumption in the first place and b) the strength of the presumption (i.e. how persuasive does the evidence rebutting the presumption have to be).

**Fidelity and Casualty Co. v. Mahoney, 71 Cal. App. 2d 65, 161 P.2d 944 (2d Dist. 1945)**

On June 28, 1943, in Louisville, Kentucky, J. B. Mahoney, Sr., a resident of Los Angeles, purchased an airplane-travel accident insurance policy from the plaintiff insurance company and mailed it to the beneficiary named therein, J. B. Mahoney, Jr., of Los Angeles, his sixteen-year-old son by a former marriage. Soon after the policy was purchased, the insured boarded an airplane for the purpose of going to Los Angeles, and within an hour thereafter the airplane fell in Kentucky and as a result thereof he was killed.

Patricia Mahoney and the insured had been married about two months preceding the airplane accident, and at all times during their marriage they were domiciled in California. She made a demand on the insurance company for one-half the proceeds of the policy on the ground that the policy was purchased with community property.

The insurance company filed this action in interpleader, and upon stipulation an interlocutory decree was entered wherein it was ordered that upon deposit in court by the insurance company of $4,989.50 (being the amount of the policy less $10.50 for costs) it would be released from liability under the policy, and it was further ordered that J. B. Mahoney, Jr., and Patricia Mahoney litigate between themselves to determine who was entitled to receive the amount so deposited. The insurance company made the deposit.
Defendant Patricia Mahoney alleged, among other things, that she was the widow of J. B. Mahoney, deceased; that the premium on said policy was paid by J. B. Mahoney from community property funds owned by him and her; and that as his widow she was entitled to one-half of said $5,000.

Defendant J. B. Mahoney, Jr., alleged, among other things, that he was the beneficiary named in the policy; that the $5,000 was not community property; that Patricia Mahoney had no right, title or interest in said $5,000; and that the policy was purchased with the separate property of the deceased J. B. Mahoney.

The court found that the $5,000 was not community property; that Patricia Mahoney had no right, title or interest therein; and that the policy was purchased with the separate property of deceased J. B. Mahoney. The court concluded that J. B. Mahoney, Jr., was entitled to a judgment ordering that the funds deposited with the court be paid to his guardian. The judgment was that J. B. Mahoney, Jr., by his guardian, recovers judgment as against defendant Patricia Mahoney, and that he, by his guardian, was entitled to the sum of $2,494.75 deposited in court by plaintiff. Defendant Patricia Mahoney appeals from the judgment, and contends that the findings of fact are not supported by the evidence.

In the statement on appeal it is recited: "There is no evidence as to the nature or extent of the decedent's estate, whether separate or community, except that it is shown the decedent earned a gross monthly salary in an undetermined amount during the period of his second marriage and that he had a bank account in his own name. There was no evidence on behalf of either of the defendants as to whether or not the premium paid for said policy of insurance came from the separate estate or the community estate of the decedent." The record does not show what amount was paid for the policy, but since it was stated in the written opinion of the trial judge and in the briefs that the amount was $1.00, it will be assumed herein that $1.00 was the amount of the premium.

Appellant's theory is that the insurance premium was paid by the insured from community funds, that such payment was a gift by the husband of community funds, and that such gift, being without her written consent, was a nullity under the provisions of section 172 of the Civil Code as to her one-half interest in the premium money, and therefore she is entitled to one-half the proceeds of the policy.

Section 172 of the Civil Code provides: "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property . . . without the written consent of the wife." If the insurance premium was paid from the husband's separate funds the wife was not entitled to any part of the proceeds of the policy, it being provided in section 157 of the Civil Code that "Neither husband nor wife has any interest in the property of the other. . . ." In Mundt v. Connecticut Gen. Life Ins. Co., (1939), 35 Cal.App.2d 416 [95 P.2d 966], wherein the husband had paid the premiums on his
life insurance policy from community funds without the wife's consent, the question was whether the wife, who was not the named beneficiary, was entitled to one-half the proceeds of the policy. In that case the court said at page 421: "... the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the nonconsenting wife may recover an undivided one-half thereof. ..." (See, also, Bazzell v. Endriss (1940), 41 Cal.App.2d 463 [107 P.2d 49].) The court was required to find whether the money used in paying the premium was paid from community funds. As above shown, there was no oral or documentary evidence as to whether the money used in paying the premium was community property or separate property.

As to appellant's contention that the findings were not supported by the evidence, she argues that, since there was no evidence to the contrary, the presumption, under section 164 of the Civil Code that property acquired after marriage (other than by gift, devise, or descent) is community property, is determinative that the money used to pay the insurance premium was community property. (1) There is a presumption that property acquired after marriage, other than by gift, devise, or descent, is community property. (Estate of Duncan, 9 Cal.2d 207, 217 [70 P.2d 174].) (2) Where the marriage relation has existed a short period of time the presumption that property acquired after marriage is community property is of less weight than in the case of a long-continued marriage relation. (Estate of Duncan, supra, 217; Falk v. Falk, 48 Cal.App.2d 762, 767 [120 P.2d 714]; 41 C.J.S. 1031.) (3) There is no presumption, however, as to when property was acquired. (Scott v. Austin, 57 Cal.App. 553, 556 [207 P. 710]; 3 Cal.Jur. 554.) (4) The marriage relation had existed about two months. The husband had a bank account in his own name. It was not shown at the trial whether his bank account was large or small or whether the bank account had been in existence a long or short time, and it was not shown whether his monthly salary was large or small. It would seem that proof of such matters was available. Such proof would have been of material assistance to the trial court in determining whether the $1.00 used in paying the premium was acquired before or after the marriage, especially in view of the short time of marriage and in view of the small amount of the premium. The appellant had alleged in her answer that the premium was paid from community funds, but she did not allege that it was paid without her consent. Even if the premium had been paid from community funds, the gift of the $1.00 would not be invalid unless it was made without her consent. Although she was in the best position to know and to prove whether she had so consented, she offered no evidence as to whether she had consented to such payment. She was the one who was asserting an interest in the proceeds of a policy wherein she was not a named beneficiary. The $5,000 was not property which had been in actual possession of the husband or wife. In the transaction whereby the husband expended $1.00 and acquired the accident insurance policy he did not dispose of property in possession of the value of $5,000 or of any value in excess of $1.00. If the $1.00 was community property, and if the payment of it was an invalid gift because she had not consented thereto, her only interest therein during his lifetime would have been a one-half interest in the cash surrender value of the policy, namely, some amount less than fifty cents. There was no evidence that it had any surrender value. It was only upon the death of the insured that the expenditure of the $1.00 became the basis of a fixed right to recover $5,000. The appellant was not entitled to a portion of the $5,000 unless, as above stated, the premium was paid from community funds, and unless she had not consented to such payment. It was necessary therefore to determine the source of the $1.00 used in paying the
premium. The burden was upon appellant to prove that the $1.00 premium was paid from community funds. Also the burden was upon her to prove that she did not consent to the payment of the premium. She failed to carry the burden in both respects.

As above indicated, only one-half of the amount deposited in court was in dispute. Before judgment was rendered, counsel stipulated and the court ordered that the other half of the amount deposited in court be paid to defendant, J. B. Mahoney, Jr.

The judgment is affirmed.


I. BACKGROUND AND FACTS

Edward and Bonnie Worzala were married on June 10, 1977, in the State of Wisconsin. Six years earlier, Edward and John MacKenzie (Mackenzie) established a welding supply business that was eventually incorporated in Wisconsin under the name Welding Alloys, Inc. (Welding Alloys). Welding Alloys established a trademark for its line of welding supplies under the name Repair Alloy. In 1977 Edward and MacKenzie had a falling out, which resulted in a lawsuit. After the lawsuit, in which MacKenzie unsuccessfully alleged that Edward was misappropriating corporate assets, Edward and MacKenzie agreed that Edward or Welding Alloys would buy out MacKenzie's shares in the company. The record is not clear as to what assets were used to purchase MacKenzie's shares in Welding Alloys.

Shortly after Edward and Bonnie were married, Edward began winding Welding Alloys down and started a new corporation under the name Repair Alloy, Inc. (Repair Alloy). Edward and Edward's accountant testified that Repair Alloy was started with assets "appropriated" from Welding Alloys, and commissions Edward was earning at Welding Alloys. Repair Alloy was incorporated in Wisconsin in September 1977. The Wisconsin Department of Employment considered Repair Alloy to be the successor in interest to Welding Alloys. Welding Alloys continued to exist, although its operations appear to have been limited to collecting accounts receivable and using those funds to buy out MacKenzie's shares.

From the time of the marriage until they moved to Idaho in 1984, Edward and Bonnie lived in a house purchased by Edward prior to the marriage in Onomowoc, Wisconsin (the Onomowoc property). Edward and Bonnie moved to Idaho in early June 1984. In 1985, Edward sold the Onomowoc property for $150,000, using a portion of the proceeds to pay off the $51,000 balance remaining on the mortgage.

After moving to Idaho, Edward sold Repair Alloy to Gene Kasprasak (Kasprasak), one of Edward's employees at Welding Alloys and Repair Alloy. Under the contract for sale, Kasprasak paid $350,033 for the business. Kasprasak paid $34,158 down, and later paid a balance of $181,748 for the business' accounts receivable and good will. Kasprasak sold the inventory on consignment, and eventually paid Edward $124,387 for that inventory. Kasprasak and Edward
agreed that Kasprasak would hold back $10,000 to cover potential bad debts in the accounts receivable. Of that amount, $9,700 was eventually paid to Edward. Although the amount paid is not clear from the record, Edward used a portion of the proceeds from the sale of the business to pay off a line of credit Valley Bank of Hartford had extended to Repair Alloy. The credit line was apparently used to buy a Ford Bronco that was registered in the corporation's name. Although Repair Alloy listed the Bronco as an asset, it was not included in sale of the business. Bonnie testified that the car was primarily used by her for family and personal matters.

Edward created an Idaho Corporation, Ex-Repair Alloy, Inc., a/k/a Ex-RA (Ex-RA), which was used to wind down the Repair Alloy sale. Repair Alloy and Ex-RA had the same I.R.S. employer identification number. The parties agree that $60,299 of the money paid for Repair Alloy was used to pay off the mortgage on the building where Repair Alloy was located (the Ellis Street property). This building, which Edward and Bonnie purchased in 1980, was later sold for $120,000. Prior to this sale, and after Repair Alloy was sold, the Worzalas received $1,800 per month rental income from the property.

Another item of significant value and controversy in this appeal is 300 troy ounces of gold wire that was purchased by either the Worzalas or Repair Alloy during the marriage. The gold wire was later sold for $127,000. At trial Edward testified that he purchased the gold wire before the marriage. Bonnie testified that she and Edward discussed the purchase prior to making it, and that the wire was purchased by the Worzalas', not Repair Alloy. Bonnie further testified that, after they purchased the wire, Edward stored it in their house.

Edward filed a complaint seeking a decree of divorce on the grounds of irreconcilable differences on October 17, 1989. Bonnie answered the complaint and counterclaimed, seeking support for the couple's three minor children, as well as various items of personal and real property and half of the value of the investments made during marriage. The trial was bifurcated, and only issues involving the division of property and debts and child support were presented in this case. Following three days of testimony, the magistrate issued findings of fact and conclusions of law, disposing of the assets relevant to this appeal.

The magistrate found that Repair Alloy was essentially a "lock step" continuation of Welding Alloys, which was created through an appropriation of Welding Alloys' assets, and which distributed the same inventory to the same customers with the same employees. As a result, the magistrate concluded that the proceeds from the sale of Repair Alloy were Edward's separate property. The magistrate traced the assets from the sale of Repair Alloy to several securities presently held by Edward and Bonnie.

The magistrate also found that the Worzalas's 1978, 1979, 1985 and 1986 income taxes were paid out of Edward's separate property. The court further concluded that the community was adequately compensated for its contribution during the operation of Repair Alloy, except to the extent of the payment of community income taxes out of Edward's separate property, for which Edward would not be reimbursed by the community.
The magistrate found that the Onomowoc property, part of Edward's separate property, had been enhanced in value by $20,000 through community contributions. The Ellis street property was acquired as a community asset, although the magistrate concluded that Edward paid $60,000 of the purchase price out of his separate funds.

The magistrate also found that Edward was unable to establish that the gold wire was not acquired by the community with community funds. The proceeds from the sale of the gold were included in the community estate. The Ford Bronco was neither purchased by the community nor sold with the business, and the magistrate concluded that it was therefore a gift to the community.

On March 6, 1992, the magistrate issued an amended decree of divorce, which combined the findings of fact and conclusions of law entered in both parts of the bifurcated proceedings. Edward filed a notice of appeal from the magistrate division to the district court, alleging that the magistrate erred in determining that the gold wire was community property, in holding that Edward's separate estate should not be reimbursed for its payment of community debts, and in its division of other specific items of personal property. Bonnie cross-appealed.

The district court affirmed the magistrate in part, reversed the magistrate in part, and remanded the case for the magistrate to reconsider the determination that Repair Alloy was Edward's separate property. The district court concluded that "[t]he trial court's conclusion that 'the acquisition of Repair Alloy was plaintiff's sole and separate property' is not supported by its finding that 'the new corporation was created by appropriating the assets of Welding Alloys.' " C.R. 230. As a result of this holding, many of the other issues raised on appeal (whether the proceeds from the sale of Repair Alloy were properly characterized, whether Edward is entitled to reimbursement for separate tax contributions, and whether the Ford Bronco was properly characterized) were not resolved by the district court.

The district court affirmed the balance of the magistrate's holdings. Specifically, that court held that the magistrate's findings that the value of the Onomowoc house was enhanced by $20,000 through community contributions and that the gold wire was community property were not clearly erroneous. The district court held that the magistrate's valuation of certain items of personal property and the new corporation started by Edward, and the allocation of community debt were not erroneous, and that the order of child support was proper.

Edward appealed to this Court, claiming that the magistrate's finding that Repair Alloy was Edward's separate property is supported by substantial and competent evidence, the magistrate's finding that the gold wire was community property is clearly erroneous, and the magistrate erred in computing child support. Bonnie asserts that she is entitled to attorney fees on appeal.
II. THE MAGISTRATE'S FINDING THAT REPAIR ALLOY WAS EDWARD'S SEPARATE PROPERTY IS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE

The magistrate concluded that Repair Alloy was Edward's separate property because it was financed exclusively with Edward's separate property. The district court reversed, holding that the magistrate's finding, that Repair Alloy was started by appropriating assets from Welding Alloys, "is equivocal in that the meaning of the phrase 'by appropriating the assets of Welding Alloys' is unclear." C.R. 230 Edward appeals the district court's decision, contending that the record presents sufficient evidence to support the magistrate's conclusion that Repair Alloy was financed exclusively through Edward's separate property.

Under Idaho law, all property acquired during the marriage is rebuttably presumed to be community property. Smith, 124 Idaho at 436, 860 P.2d at 639; Shill v. Shill, 115 Idaho 115, 118, 765 P.2d 140, 143 (1988). Edward, as the party asserting that the property is separate, bears the burden of proving to a reasonable certainty that the property is separate. Smith, 124 Idaho at 436, 860 P.2d at 639. If an asset purchased during the marriage is purchased with separate property, that asset becomes the separate property of the acquiring spouse. Winn v. Winn, 105 Idaho 811, 813, 673 P.2d 411, 413 (1983). However, as this Court noted in Winn, "before the principle may be applied, the asset actually given in exchange for the property purchased must be identified." Id. at 814, 673 P.2d at 414. The question presented by this appeal is whether substantial and competent evidence supports the magistrate's conclusion that Edward proved to a reasonable certainty that the assets used to start Repair Alloy were Edward's separate property.

The magistrate found that Repair Alloy was created through an "appropriation" of assets from Welding Alloys, and that MacKenzie's interest in Welding Alloys was purchased with Welding Alloys' accounts receivable and Edward's commissions. Although it is undisputed that Edward's ownership interest in Welding Alloys was Edward's separate property, the record does not present substantial evidence to support the magistrate's conclusion that MacKenzie's interest in Welding Alloys was purchased exclusively through Edward's separate property. In fact, Edward's testimony that MacKenzie's interest was purchased at least partially through Edward's commissions militates against this conclusion. Commissions Edward earned during the marriage would be a community asset, see Martsch v. Martsch, 103 Idaho 142, 147, 645 P.2d 882, 887 (1982) (all salaries are community property), and nothing in the record establishes when the commissions used to purchase MacKenzie's shares were earned by Edward.

The record does not present substantial and competent evidence that Edward has met his burden of establishing to a reasonable certainty that the assets actually used to purchase MacKenzie's interest in Welding Alloys were exclusively Edward's separate property. Absent such evidence, the extent of Edward's separate interest in the proceeds from the sale of Repair Alloy cannot be reasonably ascertained. As this Court noted in Gapsch v. Gapsch, 76 Idaho 44, 277 P.2d 278 (1955), "[w]here a business is begun with both community and separate funds it generally constitutes community and separate property in the proportion or ratio in which the contributions have been made by the two estates." Id. at 56, 277 P.2d at 285.
The magistrate's amended decree of divorce is therefore vacated in part and remanded for further findings as to the source of the assets used to purchase MacKenzie's interest in Welding Alloys.

The magistrate also concluded that Edward should not be compensated for the amount of his separate property used to pay community tax debts. Because this conclusion was based on the premise that the proceeds from the sale of Repair Alloy were Edward's separate property, this portion of the magistrate's decree is also vacated and remanded for further findings.

IV. THE MAGISTRATE'S FINDING THAT THE GOLD WIRE AND THE FORD BRONCO WERE COMMUNITY PROPERTY IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE

There was conflicting testimony at trial as to when the gold wire was purchased. The magistrate found Bonnie more credible on this issue, and rejected Edward's contention that he personally purchased the wire prior to the marriage. When reviewing factual determinations on appeal, this Court will defer to the magistrate's weighing of evidence and determination of witness credibility. *Rohr v. Rohr*, 118 Idaho 689, 691, 800 P.2d 85, 87 (1990) ("[D]eference must be given to the special opportunity of the trial court to assess and weigh the credibility of the witnesses who appear before it.").

The record contains no financial records of the wire's purchase. The magistrate's finding that Edward failed to trace the source of the funds used to purchase the wire is supported by substantial, although conflicting, evidence, and will not be disturbed on appeal.

Similarly, the record supports the magistrate's findings that, although purchased by Repair Alloy, the Bronco was used by the community and that the Bronco was neither purchased from Repair Alloy nor included in the sale of Repair Alloy. The magistrate's conclusion that the Bronco was gifted to the community is also affirmed.

VI. CONCLUSION

The amended decree of divorce is vacated in part, affirmed in part, and remanded for more particularized findings as to the source of funds used to purchase MacKenzie's shares of Welding Alloys. Costs on appeal to respondent. No attorney fees are awarded on appeal.

JOHNSON, TROUT and SILAK, JJ., and LEGGETT, Justice Pro Tem, concur.
Chapter 3: Classifying Property As Community

**In re Marriage of Schwarz, 192 Wash. App. 180, 368 P.3d 173 (2016)**

Siddoway, C.J.

Susan Champagne appeals the property distribution ordered upon the dissolution of her marriage to Damian Schwarz. She challenges the trial court's characterization and distribution of several of her and Mr. Schwarz's retirement and other investment accounts. The character of the accounts is complicated by the fact that both parties entered their 13-year marriage with substantial separate assets, whose character was arguably transformed by contributions, transfers, and reinvestment during the course of the marriage.

The appeal requires us to address several tracing issues and, most significantly, to decide what constitutes clear and convincing evidence that investments that were demonstrably separate property at their inception remained so, where the party arguing their separate character offers less than exhaustive documentation of their status during the course of the marriage. We hold that here, as in other cases, evidence can be clear and convincing without being irrefutable.

We affirm one of the trial court's challenged characterizations but, with the advantage of a transcribed report of proceedings and issues that have been narrowed, we conclude that the court abused its discretion in finding that Ms. Champagne failed to overcome the community property presumption with respect to three others. We reverse the characterization of the three assets and remand for the trial court to revisit its division of assets with the corrected characterizations in mind.

**FACTS AND PROCEDURAL BACKGROUND**

Damian Schwarz and Susan Champagne were married for 13 years before separating and filing this dissolution action in 2012. Both had been married before, and they entered the marriage with separate assets. Mr. Schwarz entered the marriage with a house and an individual retirement account (IRA), and as the owner and operator of a small business. Ms. Champagne entered the marriage with substantial investments acquired through her own earnings and an inheritance from her mother.

Both parties intended in this second marriage to keep their assets and finances separate. In response to questioning from Ms. Champagne's attorney, Mr. Schwarz explained:

Q. Sir, are you aware of any community funds ever being deposited into [Ms. Champagne's] Bank of America account?
A. I have no idea what she did with her accounts.
Q. What she did with what?
A. Whatever account she had, I don't know what she had. I don't know what she did with that. That was our agreement that that—whatever is—that was her deal.
Chapter 3: Classifying Property As Community

Report of Proceedings (RP) at 137 (emphasis added). When cross-examined, Ms. Champagne agreed that the parties did not discuss their separate property:

Q. And you also testified that he never talked with you about his separate investments or assets; is that correct?
A. That's correct.

RP at 344.

The way that the couple sought to accomplish a separation of their finances was primarily by dividing household bills. While faithfully dividing household bills for 13 years, they evidently did not appreciate the value of retaining complete records or the importance of scrupulously segregating their community earnings from their separate assets.

Shortly after marriage, Ms. Champagne closed the existing savings account she maintained as “Susan Champagne,” in which she held approximately $47,900, and opened a new account. The parties now dispute whether this account and successor accounts were opened in both parties' names and were community accounts, or whether the key accounts remained separate and were merely payable on death to Mr. Schwarz. Ms. Champagne liquidated and transferred other premarital assets, including inherited assets, into this and other accounts. While she presented documentary evidence that could support the initially separate character of assets she consolidated in the early 2000's, Mr. Schwarz challenges the sufficiency of her initial documentation in a couple of instances and her documentation of all of her assets thereafter. During the marriage, both parties made contributions to preexisting IRAs; they now dispute in some instances whether those contributions were made with community funds and, in other instances, whether the trial court was presented with sufficient evidence from which to apportion the accounts as part separate and part community.

By the time of trial, the parties had resolved the relatively insignificant property division issues arising out of their marriage; at issue were the major assets. The parties' lawyers both exhibited a command of the 13 years' worth of financial evidence and presented it efficiently—perhaps too efficiently, given the number of assets involved, for any judge to track contemporaneously. At the conclusion of the trial, the court asked the lawyers to submit their closing arguments in writing and to focus on tracking separate assets, explaining to their clients that while he had done “hundreds of these cases,” their dissolution was “one of the most complex tracing cases I think I've ever had.” RP at 378.

Mr. Schwarz claimed to have demonstrated the separate character of $404,693 in separate assets, principal among them being his separate business, most of the value of his retirement accounts, and his home, in which the parties lived until separating in June 2012. The court found the entire $404,693 in value of assets to be Mr. Schwarz's separate assets.

Ms. Champagne claims to have demonstrated the separate character of $184,198 in separate assets,
principal among them being bank and investment accounts held in her individual name. The court found only $48,928 in value of these assets to be Ms. Champagne's separate assets.

The court characterized $292,403.00 of the parties' assets as community property and distributed $184,450.51 of those assets to Ms. Champagne and $107,952.50 to Mr. Schwarz. In order to give effect to the equal division of community assets, the court ordered Ms. Champagne to make an equalization payment of $38,249.00 to Mr. Schwarz.

Findings and conclusions were presented and entered based on the memorandum decision. A motion for reconsideration filed by Ms. Champagne was denied. Ms. Champagne appeals.

ANALYSIS

Ms. Champagne has assigned error to the trial court's findings and conclusions dealing with only four assets:

• The characterization of an IRA held in Mr. Schwarz's name at Charles Schwab, whose value at the time of dissolution was found to be $185,271; the court treated $159,189 in value of the property as Mr. Schwarz's separate property and the $26,082 balance as community property;
• The characterization of an IRA held in Ms. Champagne's former married name at Western National Life, whose value at the time of dissolution was found to be $15,869; the court held that Ms. Champagne had failed to overcome the presumption that it was community property;
• The characterization of an IRA held in Ms. Champagne's former married name at Bank of America, whose value at the time of dissolution was found to be $4,401; the court again held that Ms. Champagne had failed to overcome the presumption that it was community property; and
• The characterization of an investment account in Ms. Champagne's former married name at D.A. Davidson, whose value at the time of dissolution was found to be $115,000; the court treated the assets in the account as hopelessly commingled and thereby community property.

Ms. Champagne also assigns error to the court's order that she make a $38,249 equalization payment, contending both that it was based on an erroneous characterization of the foregoing assets and that it was not just and equitable. She also contends that the trial court abused its discretion in denying her motion for reconsideration.

After outlining the applicable law, we first address the challenged characterization of Mr. Schwarz's IRA. We then summarize Ms. Champagne's evidence offered to trace nine originally separate assets to assets held at the end of the marriage, before turning to the three remaining assets whose characterization she challenges, the equalization payment, and the motion for reconsideration.

I. APPLICABLE LAW

In a dissolution action, all property, both community and separate, is before the court for

The character of property, whether separate or community, is determined at the time of acquisition. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865, 855 P.2d 1210 (1993). Property acquired during marriage is presumptively community property. A party may rebut this presumption by offering clear and convincing evidence that the property was acquired with separate funds. *In re Marriage of Skarbek*, 100 Wn. App. 444, 449, 997 P.2d 447 (2000). “The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose.” *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950). “Separate funds used for such a purpose should be traced with some degree of particularity.” *Id.*

A presumption that an asset possessed by a married person is community property may arise even though the particular time of acquisition has not been established. Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13, 29 (1986) (citing *State ex rel. Marshall v. Superior Court*, 119 Wash. 631, 206 P. 362 (1922)). Property in the possession of a married person is presumed to be community property “‘until the contrary is shown;’” this presumption “is not a very strong presumption and is one that may be easily overcome.” *Marshall*, 119 Wash. at 637 (quoting 5 Ruling Case Law *Community Property* § 26, at 844 (1914)). Although this presumption will always yield to a preponderance of the evidence, the duration of the marriage may affect whether the trial court should apply it at all. “As a general rule, the longer the duration of the marriage the more likely the court will assume that assets in the possession of the spouses are community.” 19 Kenneth W. Weber, Washington Practice: Family and Community Property Law § 10.4, at 137 (1997).

II. MR. SCHWARZ'S CHARLES SCHWAB IRA

Mr. Schwarz's evidence on the character of his Charles Schwab IRA account number [ ]5129 consisted of two account statements (April 2003 and January 2007); tax documentation of his contributions to the account in 2006, 2007, 2010, and 2011; and his testimony that the account was

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21 “[V]arious phrasings” of the standard for overcoming the presumptions applied in community property disputes have been used in Washington cases over the years, as our Supreme Court acknowledged in *In re Estate of Borghi*, 167 Wn.2d 480, 484 n.4, 219 P.3d 932 (2009) (plurality opinion). The court took the opportunity in Borghi to “make clear that, once a presumption in favor of either community or separate property is established, the burden to overcome the presumption is by clear and convincing evidence.” *Id.*
established before the parties' marriage in 1999 and there had been only the four documented postmarriage contributions. He testified that the April 2003 statement “was the last statement I could get from Charles Schwab.” RP at 141. [Footnote omitted].

Mr. Schwarz admitted that contributions to the account between 2006 and 2011 were made with community funds. He therefore offered the testimony of a certified public accountant, Todd Carlson, who had reviewed IRS tax statements for 2006, 2007, 2010, and 2011 that reported the amounts of the annual contributions and the year-end values of the account. Based on the year-to-year percentage of the account comprising community funds and year-to-year growth, Mr. Carlson expressed the opinion that at year-end 2011 and thereafter, 85.9 percent of the account represented the value of separate contributions and 14.1 percent represented the value of community contributions. On that basis, $159,189.00 of the stipulated trial value of the account ($185,271.44) represented the present value of Mr. Schwarz's separate contributions and $26,082.00 represented the present value of community contributions. The trial court accepted Mr. Schwarz's evidence and Mr. Carlson's analysis and characterized $159,189.44 in value of the IRA as Mr. Schwarz's separate property.

Ms. Champagne argues that the trial court erred in treating Mr. Schwarz's evidence as sufficient. The earliest documentation of the IRA that Mr. Carlson had reviewed was the 2006 IRS tax form, and he was asked to assume that before 2006 the entire account was Mr. Schwarz's separate property and that the only community contributions occurred in 2006, 2007, 2010, and 2011. Ms. Champagne argues that only Mr. Schwarz's self-serving testimony supports his position that the Charles Schwab IRA existed before the marriage and that no other community contributions were made. Citing Berol, she argues that his “mere self-serving declaration” is insufficient. Br. of Appellant at 26 (quoting Berol, 37 Wn.2d at 382).

Applying the analysis required by case law, the evidence established that Mr. Schwarz possessed the assets in the Charles Schwab IRA in and before April 2003 but there was no evidence that he acquired those assets during the marriage.22

At most, then, the weak presumption that property possessed during marriage is community property applies to the IRA assets before community contributions were made beginning in 2006. Berol, which dealt with property shown to have been acquired during the marriage, does not apply. Because Mr. Schwarz entered the parties' marriage less than four years before the April 2003 date of the earliest Charles Schwab IRA statement admitted as evidence and he was in his mid-40s at the time, the presumption is particularly weak.

Mr. Schwarz's testimony that the Charles Schwab IRA existed before marriage is sufficient evidence of its initially separate character. Mr. Carlson's testimony provided a sufficient basis for

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22 While Ms. Champagne did not concede that the Charles Schwab IRA predated the marriage, she testified she was aware of the four contributions for which tax records were offered, explaining that the parties had historically made IRA contributions at tax time, in order to reduce their federal income tax liability. As Mr. Schwarz points out, Ms. Champagne had the ability to acquire copies of all of the parties' joint tax returns.
apportioning its value at dissolution into community and separate shares. The trial court did not err in its characterization of the asset.

NOTES

1. How did the presumption in favor of community property operate in Fidelity, Worzala and Schwarz. What facts or evidence were required to raise the presumption in each case? What facts or evidence was required to rebut the presumption? What burden of persuasion was required to rebut the presumption? Look back at Remley v. Remley (Chapter II, p. 1). How does the presumption in Remley compare?

2. As you have seen, there are a number of different formulations of the pro-community presumption. Texas takes the position that “all property possessed by either spouse during or on dissolution of marriage is presumed to be community property.” Tex. Fam. Code Ann. § 3.003 (West 2003). See also La. Civ. Code art. 2340 (West 2002). Particularly in some older cases, there is confusion over the scope of the pro-community presumption. In Lynan v. Vorwerk, 13 Cal. App. 507, 110 P. 355 (1910), the court appears to interpret the “acquisition” formulation of the presumption to mean all property possessed during the marriage. The longer the marriage the more likely some courts are to treat the acquisition and possession formulas as synonymous. See, e.g., Estate of Caswell, 105 Cal. App. 475, 288 P. 2d 102 (1930).

3. Why should we spend so much effort characterizing property as community property when in most community property jurisdictions the court in a divorce action is not required to make an equal division of community property, but rather may employ equitable division principals? Why not proceed directly to equitable division?

II. PROVING SEPARATE OWNERSHIP BASED ON MANNER OF ACQUISITION

The definition of community property in each state excludes property acquired by gift and inheritance. This exclusion of property acquired by gift or inheritance grows out of the original Spanish distinction between “onerous” and “lucrative” title. Under Spanish law, property acquired by either the husband or wife, during marriage through her or his labor or industry was said to be acquired by “onerous title.” Likewise property acquired through an exchange of valuable consideration, where the consideration was community property, was also said to be acquired by onerous title. All property acquired by onerous title was community property. DeFuniaq & Vaughn explain,

This is so because it is acquired by the labor and industry of members of a form of partnership, that is, a marital partnership, or is acquired by valuable consideration
which had previously been acquired by the industry and labor of the marital partnership, and whatever is earned or gained by one marital partner during the existence of the marital partnership, must accrue to the benefit of both marital partners, who share equally in such earnings and gains. Such earnings or gains even if by one spouse alone, are necessary for the maintenance and furtherance of the marital society. They are earned or gained at the expense of the community . . .

23 DEFUNIAK & VAUGHN, supra note ? at 127.

In contrast, property acquired by lucrative title under Spanish law, was acquired through gift or inheritance. Under Spanish law, these acquisitions were purely a donation to one of the spouses. In general such lucrative acquisitions were not considered community property unless the donor intended the property to be for the benefit of both spouses.

Community property statutes in the U.S. have not retained the onerous/lucrative distinction expressly. Rather each states statute excludes property acquired through gift or inheritance from community property. However, the original Spanish distinctions often can be helpful in determining whether any particular acquisition should be excluded from the community estate as a gift or inheritance.

A. Property acquired through inheritance or gift


Plaintiff Gloria Alice Bramet Downer (hereinafter referred to as former wife) appeals from a judgment of nonsuit on her complaint for the determination of her rights in certain property and for fraud. She claims a community property interest in the proceeds of sale of a one-third interest in a ranch conveyed to her former husband George Keith Bramet by his employer after the parties separated. At the close of former wife's case, former husband moved for nonsuit. . . . The motion was granted and judgment entered accordingly.

**Facts**

The parties were married in 1953, and separated in 1971. Former husband was an accountant and a tax expert. He worked for Chilcott Enterprises before, during and after the marriage, beginning in 1943. Chilcott Enterprises consisted of several businesses and corporations owned and operated by Edward Chilcott and his wife. Former husband was an officer of several of the corporations and acted as secretary-treasurer, accountant and record keeper for all of the Chilcotts' operations. Mr. Chilcott considered former husband his "right hand man."

Chilcott Enterprises had no retirement program of any kind for its employees. According
to former wife's testimony, sometime in the mid-1960's former husband told her that Mr. Chilcott was going to give to him and two other employees a ranch in Oregon in lieu of retirement benefits. Nothing further was thereafter said about the ranch.

The parties separated in November 1971. In December 1972, after some exchange of drafts between the parties and their counsel, a marital settlement agreement was executed. The agreement, which was later incorporated in the judgment of dissolution, provided that all income and earnings of former husband or former wife after March 4, 1972, should be the separate property of the acquirer and that each party released any claim to such earnings or after acquired property. However, the agreement also contained a warranty "that neither party is now possessed of any property of any kind or description whatsoever, other than the property specifically mentioned in this Agreement" and a provision reading: "If it shall hereafter be determined by a Court of competent jurisdiction that one party is now possessed of any community property not set forth herein . . . such party hereby covenants and agrees to pay to . . . the other on demand an amount equal to one-half of the then . . . or present fair market value of such property, whichever is greater."

In August 1972, before the parties executed the agreement, but after the March 4 date specified in the settlement agreement, the Chilcotts deeded the W-4 Ranch in Oregon to former husband and two other employees. Former husband did not mention his interest in the ranch at the time he executed the settlement agreement in December 1972.

Former husband continued working for Chilcott Enterprises after the dissolution until he became disabled after suffering a stroke in 1976. In 1978, the ranch was sold for over $1.35 million and former husband's interest in the sale proceeds was turned over to his conservator. This action was instituted in 1980 shortly after former wife learned of the conveyance of the ranch to former husband and the other employees.

Mr. Chilcott testified in essence that the conveyance to the three employees was a gift -- the reason he deeded the ranch to the three employees was that he did not need the money and he just felt like giving it away.

Additional facts will be included in the discussion of the propriety of the nonsuit.

Discussion of Contentions

Former wife contends the trial court erred in two particulars: it should not have granted the nonsuit, and it should have allowed her to introduce expert testimony as to whether the transfer of the ranch constituted a gift or deferred compensation. We discuss these contentions in inverse

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24 Apparently for the purpose of minimizing gift tax consequences, the transaction was cast in the form of a sale with an $18,000 cash down payment and a note and deed of trust in the amount of $254,000 calling for payments of $18,000 a year. However, the Chilcotts gave each of the three employees $6,000 for the down payment and were to give them annually an additional $6,000 each to make the annual trust deed payments.
The Nonsuit

A nonsuit may be granted only when, "...dis-regarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given." (Estate of Lances (1932) 216 Cal. 397, 400 [14 P.2d 768].) The question is thus whether there was substantial evidence that would have supported a verdict in favor of former wife on the issue of her interest in the ranch (or, more correctly, the proceeds from the sale of the ranch).

Former wife contends there was substantial evidence the transfer of the ranch interest to former husband was in lieu of pension benefits, and is therefore community property. Former husband contends there is no substantial evidence the ranch constituted a retirement benefit and argues the transfer of the ranch interest was a gift, and therefore, separate property pursuant to Civil Code section 5108. The trial court agreed with former husband that the transfer of the interest in the ranch to him was a gift and concluded therefore that it was his separate property.

We agree with the trial court and former husband that the Chilcotts' transfer of a one-third interest in the ranch to former husband was legally in the form of a gift. Civil Code section 1146 defines a gift as "a transfer of personal property, made voluntarily, and without consideration." The evidence establishes that that is precisely what was done in the case at bench. There is no evidence the ranch was transferred pursuant to a legal obligation to do so on the part of the Chilcotts. There is no evidence of any bargained-for contractual obligation nor of any detrimental reliance by former husband sufficient to invoke the doctrine of promissory estoppel. There is nothing to show, for example, that former husband was induced to stay in the Chilcotts' employ by the statement assertedly made by Mr. Chilcott that the ranch was going to be conveyed to the three employees in lieu of a pension program. There being no evidence of any legal obligation to convey the ranch, its conveyance can only have been a gift.

However, the conclusion the conveyance was legally a gift does not resolve the ultimate question of the characterization of the ranch interest or the proceeds of its sale as community or separate. Although Civil Code section 5108 provides that property acquired by the husband after marriage by gift is his separate property, the language of section 5108 must be read in the context of the entire marital property scheme. Earnings or property attributable to or acquired as a result...
of the labor, skill and effort of a spouse during marriage are community property. (Civ. Code, § 5110; cf. Civ. Code, § 5118.) Even though the transfer of the ranch interest was legally a gift, there is substantial, indeed strong, evidence the gift was made by former husband's employer in recognition of former husband's devoted and skillful services during his lifelong employment at Chilcott Enterprises.

The evidence shows former husband began working for Chilcott Enterprises in 1943. He became Mr. Chilcott's righthand man, did all the accounting for the various Chilcott operations, was responsible for all the tax planning, advice, and filing of returns, handled sales contracts and recordkeeping, served as officer in several of the corporate entities and supervised the ranch operations in California, Arizona and Oregon. For over 30 years, he was the Chilcotts' loyal and trusted employee. By contrast, there was no evidence of any social or personal relationship between former husband and the Chilcotts. The Bramets never went out socially with the Chilcotts, and former husband never played golf or other sports with Mr. Chilcott, never took a social trip, played cards or anything of that sort with the Chilcotts. The Bramets went to the Chilcotts' house once to attend the wedding of the Chilcotts' oldest daughter, and one time former husband took care of the Chilcotts' home while they were away on vacation. Otherwise, former husband never went to the Chilcotts' homesocially. Mr. Chilcott testified that, except for their business relationship, he had practically no contact with former husband.

Thus, although the conveyance of the ranch interest to former husband was in the form of a gift, the evidence would support, indeed strongly suggests, that it was in whole or part a remuneratory gift in recognition of former husband's loyal and skilled efforts for and services to his employer. (Holby v. Holby (1981) 131 Ariz. 113 [638 P.2d 1359, 1360]; de Funiak and Vaughn, Principles of Community Property (2d ed. 1971) § 70, pp. 157-160.) To the extent it was and to the extent the efforts and services were rendered during the marriage (see In re Marriage of Poppe (1979) 97 Cal.App.3d 1, 8-9 [158 Cal.Rptr. 500]; In re Marriage of Judd (1977) 68 Cal.App.3d 515, 522-523 [137 Cal.Rptr. 318]), the ranch interest conveyed to former husband and the proceeds of its sale were community property. (Holby v. Holby, supra, 131 Ariz. 113 [638 P.2d 1359, 1360]; de Funiak and Vaughn, Principles of Community Property (2d ed. 1971) § 70, pp. 157-160.)

It was error therefore to grant the nonsuit as to the cause of action to establish former wife's interest in the proceeds of sale of the ranch interest.

We conclude, however, that the nonsuit was properly granted as to the count for fraud. The existence of actual damages is an essential element of a cause of action for damages for fraud. (See 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 591, pp. 2230-2231, and cases cited.) Here, even assuming former husband's intentional concealment of the ranch interest at the time of execution of the marital settlement agreement, former wife has suffered no resulting injury. If the ranch interest is ultimately determined to have been community property in whole or part, former wife will be entitled to her share of the proceeds of sale; if it should finally be determined to have been entirely former husband's separate property, former wife was never entitled to any part of it
and has not been damaged.

The nonsuit was thus proper as to the cause of action for fraud and the judgment will be affirmed as to that cause of action.

The judgment of nonsuit is reversed as to the cause of action to establish plaintiff's interest in the proceeds of sale of the interest in the ranch property; as to the cause of action for fraud the judgment is affirmed. Plaintiff shall recover costs on appeal.


J. JONES, Justice.

Tammy Dixson and The Mark Wallace Dixson Irrevocable Trust filed competing claims to the proceeds of a term life insurance policy insuring the life of Tammy's deceased husband, Mark Dixson. The insurance company, Banner Life Insurance Company (BLI), filed a complaint for interpleader asking the district court to resolve the competing claims. Tammy and the Trust subsequently filed cross-motions for summary judgment contesting the character of the policy proceeds and Mark's designation of beneficiaries. The district court granted the Trust's motion for summary judgment, denied Tammy's motion, and awarded the Trust costs and fees. Tammy now appeals the district court's orders. We vacate and remand.

I.

Tammy Sue Dixson and Mark Wallace Dixson were married on January 1, 2000. While married to Tammy, Mark obtained an annual renewable term life insurance policy in the amount of $300,000.00 from BLI. Initially, Mark designated Tammy as the sole beneficiary of the policy.

In September 2003, Mark was diagnosed with Amyotrophic Lateral Sclerosis (ALS), or Lou Gehrig's disease. As a result of the ALS, Mark's physical condition began to deteriorate and he eventually required skilled nursing care. Consequently, Mark was admitted into the Life Care Center of Treasure Valley (LCC) in December 2004. While at LCC, Mark's health continued to decline, resulting in hampered motor and verbal communication skills.

After being diagnosed with ALS, Mark's financial situation also worsened. Eventually, Mark became unable to pay the premiums on his life insurance policy. When Mark confided his inability to pay the premiums to the Dixsons' family home teacher, Cory Armstrong, Armstrong offered his financial assistance. Armstrong subsequently paid the policy premiums for the years 2005 and 2006.

In addition to their financial problems, the Dixsons' marriage became increasingly strained. On January 31, 2005, acting without Tammy's consent, Mark signed a beneficiary change form
removing Tammy as the beneficiary of the policy. The form named Mark's mother, Jackie Young, as the primary beneficiary and his stepfather, Robert Young, as the contingent beneficiary. Mark's recreational therapist, Canyin Barnes, witnessed the execution of the beneficiary change form. Although Ms. Barnes mailed the form to BLI, it is unclear whether BLI ever received the form.

That same day, Mark also executed a durable power of attorney designating Jackie, Robert, and his brother, David Dixson, as his attorneys-in-fact. Mark granted these agents the authority "[t]o exercise or perform any act, power, duty, right or obligation whatsoever" on his behalf. He also authorized them to make gifts of his property and engage in self-dealing without such acts being considered breaches of their fiduciary duty. The power of attorney form was initialed by Mark and notarized by Kaye Baker, an employee of LCC.

Approximately eight months later, on August 18, 2005, Mark filed a complaint for divorce against Tammy. After the complaint was filed, the magistrate court issued a joint temporary re-straining order so as "to maintain the status quo" of the couple's property. Among other things, the order prohibited both parties from changing the beneficiary on any life insurance policy "held for the benefit of the parties." By its terms, the order was to remain in effect until a final order was entered on the complaint for divorce or until further order of the court. A default decree of divorce was subsequently issued on January 9, 2006, but the decree was set aside after the court determined that Tammy had not been personally served with the complaint. As a result, Tammy and Mark continued to be married and the temporary restraining order remained in effect.

On April 27, 2006, despite the existence of the temporary restraining order, Robert, acting as Mark's attorney-in-fact, executed a second beneficiary change form on Mark's behalf. The form named Jackie as the primary beneficiary of the policy and Mark's six children as contingent beneficiaries. Although the beneficiary change form indicated that spousal consent was required under Idaho law, the change of beneficiary was made without Tammy's knowledge or consent. Mark's attorney faxed the form to BLI on May 2, 2006. Shortly thereafter, on May 5, 2006, Mark died from complications associated with ALS. At the time of Mark's death, he and Tammy were still married.

After Mark's death, Jackie and Tammy both filed claims to the policy proceeds. Jackie subsequently assigned her claim to "The Mark Wallace Dixson Irrevocable Trust." As a result of the parties' inability to settle their dispute, BLI filed a complaint for interpleader asking the district court to resolve the competing claims to the policy proceeds. The Trust filed an answer and cross-claim against Tammy alleging that she had no interest in the proceeds. It requested that the proceeds be paid to the Trust as Jackie's assignee. Tammy then filed answers to both claims and a third-party complaint against the Trust. In her complaint, Tammy asserted that she was entitled to the policy proceeds because the change of beneficiary was invalid. She requested that the Trust's claim to the proceeds be dismissed and that she be awarded costs and attorney fees. Similarly, in its answer to Tammy's complaint, the Trust asked the court to dismiss Tammy's claim. It alleged that the policy premiums were paid with Mark's separate property and, therefore, that Tammy had no legitimate claim to the proceeds. It further requested an award of costs and attorney fees. Neither
party requested that the case be tried before a jury.

Tammy and the Trust subsequently filed cross-motions for summary judgment contesting the character of the policy proceeds and the validity of the designation of beneficiaries. On November 9, 2007, the district court entered an order granting the Trust's motion for summary judgment. The court reasoned that the Trust was entitled to summary judgment because the policy proceeds were Mark's separate property and Jackie was the policy beneficiary. Since Jackie had assigned her interest in the policy proceeds to the Trust, the Trust was entitled to the "entire net sum of the remaining proceeds from the life insurance policy." Accordingly, the court ordered that the proceeds and accrued interest be released to the Trust. The court subsequently granted the Trust's request for attorney fees and costs, relying on Idaho Code sections 12-120(3) and 15-8-208.

Tammy now appeals the trial court's decision granting the Trust's motion for summary judgment and denying her cross-motion for summary judgment. She also appeals the court's award of attorney fees and costs. On appeal, Tammy argues that she is entitled to the policy proceeds because the policy premiums were paid with community property, in the form of a loan from Armstrong to Tammy and Mark. She also argues that she should have been awarded the proceeds because the beneficiary changes were made without her consent and violated the joint temporary restraining order. Finally, she requests an award of costs and attorney fees on appeal. The Trust argues that the district court's orders granting its motion for summary judgment and awarding it costs and fees should be upheld. It requests an additional award of fees on appeal.

II.

We are concerned with four issues on appeal, namely, whether: (1) the district court correctly concluded that the life insurance proceeds were Mark's separate property; (2) Mark effectively changed the policy beneficiary; (3) the district court erred in awarding the Trust attorney fees and costs; and (4) either party is entitled to an award of fees and costs on appeal.

B.

Tammy makes several challenges to the district court's conclusion that the policy proceeds were Mark's separate property. Initially, she argues that the trial court misconstrued the law in concluding that the source of the last premium payment controlled the character of the policy proceeds. Alternatively, she argues that genuine issues of material fact exist regarding the characterization of the 2005 and 2006 premium payments. Finally, Tammy contends that the proceeds were her separate property under Idaho Code section 41-1830.
Next, Tammy argues that the district court erred in concluding that the 2005 and 2006 policy premiums were paid with Mark's separate property. She argues she and Mark confided to Armstrong that they were unable to make the premium payments, to which he responded he would make them with the understanding he would be repaid from the death benefit. Further, she contends that the court's conclusion was erroneous because it contravened well-established principles governing rulings on motions for summary judgment. Specifically, she argues the court failed to construe the record in the light most favorable to her, the non-moving party, and improperly engaged in a weighing of the evidence. She maintains that, had the court correctly construed the record, it would have concluded the payments were made with community funds, in the form of a loan from Armstrong to the community. Alternatively, Tammy argues that even if the premium payments were gifts, they were gifts to the marital community rather than separate gifts to Mark. Any doubt as to the character of the gifts would have to be resolved against the Trust.

The Trust, on the other hand, argues that the court did not err in concluding that the 2005 and 2006 premium payments were separate gifts to Mark. According to the Trust, the district court was free to draw probable inferences from the statements in the affidavits and conclude that the payments were not made on behalf of the community. Since Tammy did not support the contrary statements in her affidavit with any evidence, the Trust maintains that it was reasonable for the court to rely on Armstrong's affidavit, which indicated that he intended the premium payments to be separate gifts to Mark. Further, the Trust contends that Tammy's understanding of the character of the premium payments is irrelevant since the donor's intent controls whether the payments constituted gifts. Because Armstrong asserted that the final payments were made as separate property gifts to Mark, the Trust argues the court properly concluded that there was no community interest in the policy proceeds upon Mark's death.

As discussed above, the party asserting a separate property interest in assets acquired during the marriage carries the burden of proving the separate character of the property. Guy, 98 Idaho at 206, 560 P.2d at 877. Accordingly, in order to prove that the policy proceeds were Mark's separate property, the Trust was required to show that the last premium payment was made with separate funds. This, in turn, required the Trust to prove that the 2006 payment Armstrong made was not a loan or gift to the community, but was a separate gift to Mark. Only then could the district court properly conclude that the policy proceeds were Mark's separate property.

Under Idaho law, a "gift" is defined to mean "a voluntary transfer of property by one to another without consideration or compensation therefor." Stanger v. Stanger, 98 Idaho 725, 728, 571 P.2d 1126, 1129 (1977) (quoting Wood v. Harris, 201 Okla. 201, 203 P.2d 710, 712 (1949)). To effectuate a gift, a donor must deliver property to a donee, or to someone on his or her behalf, with a manifested intent to make a gift of the property. Boston Ins. Co. v. Beckett, 91 Idaho 220, 222, 419 P.2d 475, 477 (1966); Williams, 126 Idaho at 443, 885 P.2d at 1159. Delivery is accomplished when the grantor "relinquish[es] all present and future dominion over the property." Williams, 126 Idaho at 443, 885 P.2d at 1159; see also Beckett, 91 Idaho at 222, 419 P.2d at 477. Donative intent may be proven by direct evidence, including statements of donative intent, or
inferences drawn from the surrounding circumstances, such as the relationship between the donor and donee. *Williams*, 126 Idaho at 443-44, 885 P.2d at 1159-60.

Here, the district court recognized that the characterization of the policy proceeds depended on whether the final premium payment made by Armstrong constituted "a gift to the community, a gift of separate property to Mark, or ... a loan." It then determined that the premium payments were separate gifts from Armstrong to Mark. The court reached its conclusion after determining that the Trust had proven that there was no genuine issue of material fact as to delivery or donative intent. In making its decision, the court relied on Armstrong's affidavit, which stated:

In 2005, I paid the premium as a gift to my friend Mark as it was my understanding that Tammie [sic] had refused to pay the premium. At that time, all of Mark's mail was being delivered to him at the care center and it was my understanding that Tammie [sic] was not visiting him or taking care of his expenses. This gift to Mark was done with the understanding that Mark wanted to be sure the death benefit proceeds ... would be available to care for his six children.... I also paid the premium in 2006 as a gift to Mark alone.... I did not intend the premium payments to be a gift to Tammie [sic] or to their community estate. My gift was to Mark alone.

Based on these statements, the court concluded that there was "strong evidence" of Armstrong's "intent to gift to Mark alone as his separate property." Further, there was nothing to "refute[ ] the fact that ... Armstrong ... relinquished all present and future dominion and had no expectation of receiving repayment." Although Tammy's affidavit indicated that Armstrong agreed "to pay the premiums on the life insurance policy in 2005 and 2006, with the understanding that, when [Tammy] received the policy proceeds, she would repay [him]," the court dismissed Tammy's statements because they were "self-serving" and only based on Tammy's "understanding" that the payments were a loan. Since the court regarded the donor's intent as controlling in determining whether the payments constituted gifts, it concluded that it could reasonably infer that the payments made by Armstrong were separate gifts to Mark. The court then held that the Trust had proven that there was no genuine issue of material fact regarding the separate character of the policy proceeds. Any community interest in the policy had "lapsed when the community stopped making premium payments."

The district court's conclusion that there was no genuine issue of material fact as to the character of the final premium payment was erroneous. The character of the payment was a material fact that controlled the disposition of the case. Because the issue of donative intent is factual, *see Stanger*, 98 Idaho at 727, 571 P.2d at 1128, and there were conflicting statements in the affidavits submitted by the parties regarding the purpose and nature of the payments made by Armstrong, there was a genuine issue of material fact. Although the intent of the donor controls whether or not there was a gift, the trier of fact may not have accepted Armstrong's version of events-Tammy's testimony regarding the nature of the payments could have been more credible. Moreover, if, as Tammy asserts, the final payment was a loan rather than a gift, donative intent would not control the character of the payment.
While the court was permitted to draw probable inferences from the uncontradicted evidence because it would serve as the trier of fact, it was not permitted to make conclusive findings with regard to issues upon which the parties submitted conflicting evidence. See Williams v. Computer Res., Inc., 123 Idaho 671, 673, 851 P.2d 967, 969 (1993) (holding that the trial court was not permitted to draw inferences regarding the parties' intent when the parties submitted conflicting evidence on the issue); Ashby v. Hubbard, 100 Idaho 67, 70, 593 P.2d 402, 405 (1979) (holding that a question involving the "intention expressed by the acts and statements of the parties" was a factual question for the jury); Argyle v. Slemaker, 107 Idaho 668, 670-71, 691 P.2d 1283, 1285-86 (Ct.App.1984) (holding that findings based on conflicting evidence may only be made on summary judgment when "the evidence is entirely confined to a written record, there is no additional, in-court testimony to be obtained, and the trial judge alone will be responsible for choosing the evidentiary facts he deems most probable"). Nor was the court permitted to judge the credibility of the affiants. See Baxter, 135 Idaho at 172, 16 P.3d at 269 ("[I]t is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact."); Argyle, 107 Idaho at 670, 691 P.2d at 1285 (holding that even when the court will serve as trier of fact, credibility determinations "should not be made on summary judgment if credibility can be tested by testimony in court before the trier of fact"). Yet, in its decision the court clearly weighed the conflicting evidence and judged the affiants' credibility.

Only after finding Armstrong's version of events more credible did the court conclude that there was no genuine issue of material fact. The court rejected Tammy's understanding of the payment arrangement because her "only argument that such payment was a loan was that it was her 'understanding' that she would repay Mr. Armstrong." The court mischaracterized what Tammy stated in her affidavit. She stated that Armstrong offered to pay the premiums with "the" understanding that Tammy would repay him when she received the death benefit. A personal understanding of a party is different than an understanding or agreement between the parties. It would have been reasonable for the court to infer from Tammy's statement that Armstrong agreed to pay the premiums, knowing that this would preserve the policy for the benefit of the Dixsons and that, with Mark's death imminent, he would be repaid at a time in the relatively near future. It might be pointed out that neither the affidavit of Tammy nor that of Armstrong was ideal from the standpoint of specificity. Neither affiant specifically identified the time, location, or persons present, where any agreement or understanding was reached. For his part, Armstrong stated he was motivated to make a gift to Mark, based on his understandings that Tammy refused to pay the policy premiums, that Tammy was not visiting Mark or taking care of his expenses, and that Mark wanted the death benefit to be available for his children. Armstrong did not indicate the facts upon which he based these personal understandings that motivated him to make the alleged gift.

Rather than recognizing the conflicting contentions as to the basis upon which Armstrong made the premium payments, the court improperly chose to adopt Armstrong's version, apparently deeming it to be more credible. Since it was not entitled to weigh the credibility of the affiants, the court erred in concluding that there was no genuine issue of material fact regarding the character
of the policy proceeds. Because Tammy's affidavit was sufficient to create a genuine issue of material fact as to the nature of the premium payments, and hence the policy proceeds, the district court erred in granting the Trust's motion for summary judgment.

Notes

1. As you have seen, property acquired through gift or inheritance is excluded from the community property estate, by definition, in each of the community property jurisdictions. The greatest contention in the cases has arisen in the context of determining whether property was actually acquired through a gift or through inheritance, as is illustrated by Downer and Banner Life. Most of the cases raise issues regarding gifts, because of the informality and frequent ambiguity of gifts.

2. The circumstances surrounding inheritance, either through intestate succession or by will, are usually unambiguous. Inheritance requires a writing or is governed by state law, so intentions are spelled out, or, when not apparent in a will, are irrelevant to the operation of inheritance law. However, even in the inheritance context, ambiguities can arise, particularly involving will contracts and the compromise of claims against an estate.

3. Assume F dies leaving a will providing that Blackacre is devised to S (who is married). S is F’s only child. Prior to F’s death, however, S and F entered into an agreement pursuant to which, S agreed to move in with F and take care of him in his old age in exchange for F’s promise to make a will leaving Blackacre to S. F revised his will which previously left Blackacre to a local charity and, instead left it to S. When S succeeds to Blackacre after F’s death, will the property be the separate property of S or will it be the community property of S and his wife? See Andrews v. Andrews, 191 P. 981 (1921)(son’s inheritance from father was community property because it was the result of a will contract);

4. S who is unmarried and has no children, died, leaving a will providing for his estate to be split between his father, F (who is married) and his business partner, P. P introduces the will to probate. F contests the will arguing that P exercised undue influence over S. P and F settle their litigation over S’s will agreeing that F will inherit 2/3 of S’s estate and that P will inherit 1/3. Is F’s portion of the estate his separate property or is it the community property of F and his wife. In re Clark’s Estate, 271 P. 542 (1928)(father compromised his separate property right to inherit from son in settlement of son’s estate so property acquired was separate property).

III. PROVING SEPARATE OWNERSHIP BY TIME OF ACQUISITION OR SOURCE OF CONSIDERATION

The majority of community property jurisdictions seek to avoid apportioning the ownership of property among the community and separate estates of the spouses. Rather, courts in these jurisdictions usually apply rules that fix the ownership of an asset in either the community or separate estates of the spouses and that may sometimes accord the non-owning estate a claim for reimbursement based on consideration provided toward the acquisition of an asset. California
stands as a major exception to this approach. In California, the courts attempt to apportion ownership of assets based on the pro rata share of consideration provided toward the acquisition of an asset by the community and separate estates.

This section of Chapter 3 addresses the single-estate ownership approaches and the accompanying claim for reimbursement. Apportionment of ownership will be discussed separately in the next section of Chapter 3.

A. Time of acquisition Rules


Wilson, Justice.

The problem we are required to solve is whether proceeds of life insurance policies issued to the insured husband before marriage naming his estate as beneficiary (a) belong to the separate estate of the husband after his death, only in proportion to the amount of premiums paid by him before marriage; or (b) belong entirely to his separate estate, with right of reimbursement to the community based on the amount of premiums paid from community funds during marriage. Appellant urges the first solution; appellee the second, adopted by the trial court, and by us.

The facts are stipulated. Insured and his wife were married August 3, 1960, and their marriage continued until his death, March 16, 1962. Both policies of life insurance were issued to the insured husband before marriage, naming his estate beneficiary. One policy was issued May 22, 1956; the other, February 13, 1959. The 1959 policy was "converted" February 12, 1962, as authorized by the original policy. The nature of the conversion is not shown. Of the total premiums on the two policies, $1094.66 was paid by the husband before marriage; $657.60 was paid during coverture from community funds. The executor named in the husband's will listed the proceeds as a part of the husband's separate estate. The widow's action against the executor sought determination of the status of the proceeds. The trial court concluded the proceeds constituted a part of the husband's separate estate and decreed that the community estate of husband and wife should be reimbursed on the basis of the payments made out of community funds for premiums. The policies are not in evidence. No issue of fraud is suggested by the parties. There is no other evidence. The pleadings allege insured's will made specific bequests of $3000 each to his widow and their two children, of $5000 to his parents, with the rest of his estate to be held in trust for the use of his parents, his brother and his widow, who is appellant here.

The problem is directly presented for the first time in this State under these facts. In all other cases we have examined which reached the question, and where the beneficiary was insured's estate, the policies were issued during marriage. Our decision is restricted to the stated facts.

In *Brown v. Lee*, Tex., 371 S.W.2d 694, 7 Tex. Sup. J. 10, The Supreme Court said that by
amendment of the definition of "property" in Art. 23(1), Vernon's Ann.Tex.Stats., to include "life insurance policies, and the effects thereof", the Legislature has "aligned Texas with other community property states in adhering to the theory that the right to receive insurance proceeds payable at a future but uncertain date is 'property.' Such property is said to be in the nature of a chose in action which matures at the death of the insured". In that case, however, the policy was also issued during coverture.

In approaching solution to this problem we must look somewhat beyond the immediate consequences of decision in this case. A dominant factor in our conclusion is an effort, within the broad principles of dissonant precedent, to fit life insurance proceeds under the present facts to the pattern of Texas community property law as applied to other types of property. This the Legislature has apparently sought to do by amending Art. 23, Sec. 1.

That pattern, as to realty, title to which is acquired before marriage, and a portion of the consideration for which is thereafter paid from community, fixes the character of title at the time of its inception or acquisition. It "depends upon the existence or nonexistence of the marriage at the time of the incipiency of the right in virtue of which the title is finally extended." Creamer v. Briscoe, 101 Tex. 490, 109 S.W. 911, 912, 17 L.R.A., N.S., 154, 130 Am.St.Rep. 869. In such a case as this, realty is held to be the husband's separate property. Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328, 334.

. . . . The Texas pattern is not generally different as to personalty. Schmidt v. Huppmann, 73 Tex. 112, 11 S.W. 175. See Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565, 568.

. . . .

Why do we not adopt the California solution formula of proportionate premium payments suggested by the respected author of the first cited treatises? California has done what we think should here be done; it has made its solution as to life insurance proceeds consonant with its other community property law. In Modern Woodmen of America v. Gray, 113 Cal.App. 729, 299 P. 754 (1931), where it first considered the problem, the California court stated it would apply the apportionment method so as to follow the California rule as to realty: that the inception of title doctrine does not apply (citing Vieux v. Vieux, 80 Cal.App. 222, 251 P. 640, where the latter principle was reflected). In Forbes v. Forbes, 118 Cal. App. 2d 324, 257 P.2d 721, 722, the same court confirms its reason: "Contrary to the rule adopted in most community property states, under which the community has only the right of reimbursement for payments made with community funds", it is stated, "California gives to the community a pro tanto community property interest in such property in the ratio" which the separate and community payments bear to each other in the case of other types of property; and "the same rule has repeatedly been applied in the case of life insurance policies procured by the husband before marriage." Apparently Washington also has followed its general tracing rule, see Jacobs v. Hoitt, 119 Wash. 283, 205 P. 414; In re Coffey's Estate, 195 Wash. 379, 81 P.2d 283, 286.

We think our decision harmonizes with what is said to be elsewhere the general rule: "If
either spouse before marriage procures a policy of life insurance on his own or another's life, in his favor or in favor of his estate, the policy and its proceeds are his separate property. His rights to the proceeds date from the policy." McKay, Community Property (2d ed.) Sec. 479, p. 316. It is consistent with the holdings of the Supreme Court of New Mexico, In re Miller's Estate, 44 N.M. 214, 100 P.2d 908, 910 syl. 2; and of Louisiana, In re Moseman's Estate, 38 La.Ann. 219.

Two reasons for applying the tracing principle to give proportionate ownership of proceeds are suggested, II Texas Institutes, supra, 111: (a) simplicity; (b) just results. These are good reasons, and we have carefully considered others. It does not appear that the inception of title rule is less simple: each method requires computation of the amount of premiums paid out of community funds. Many incidental problems resulting from attempted application of the proportionate ownership rule are avoided. If simplicity be a virtue, we think the inception of title rule is simpler. It facilitates application of general principles of community property law. The inception of title rule is not less equitable in results. While in this case the proceeds which would be proportionately attributable to the community under the tracing theory happened to exceed the community premium payments, in another case the gross premiums so paid out might well exceed the total proceeds. To permit the nature of the property to be determined by the monetary result is not necessarily equitable; and apparent inequity may result under either method, depending on the facts in each case. (footnote omitted)

In II Texas Institutes, above, the query is presented: "How are orthodox principles to be applied when there is a change of marital status?" We believe the inception of title test applied to other forms of property, though arbitrary, is more conducive to uniformity and a degree of certainty under the present facts; and that (although there is much to be said for the proportionate method) this is the best method by which orthodox principles may be here applied.

In our opinion the proceeds of the policies constitute the separate estate of the deceased insured, and the community estate is entitled to reimbursement on the basis of premiums paid with community funds.

Affirmed.

NOTES

1. The McCurdy opinion discusses three tests for determining the character of property acquired over a period of time with mixed community and separate property consideration. All three tests are in force in most jurisdictions depending on the type of property and the nature of the acquisition. Two of the tests -- the inception of right test and the time of vesting test result in the assignment of "ownership" to one estate (either the community or the separate estate, depending on the facts), with the possibility of a reimbursement claim for the other estate. The third test -- the pro rata sharing test -- results in the apportionment of ownership between the community and separate property estates.

   a. Time of vesting. This test focuses on the time ownership rights actually vest. For
example, when real estate is acquired through a land contract, title typically does not vest until all installments of consideration are paid to the seller. Under a time of vesting approach the character of property acquired in such a manner would not be determined until the full performance of the contract. If the party acquiring the property was married at that time, the property would be presumed community. If no, the property would be treated as separate property even if the party acquiring the property was married during some of the time during which consideration was paid. See, e.g., Cosey v. Cosey, 364 So. 2d 186 (La. App. 1978). In contrast, if real property is acquired through a mortgage, title typically transfers from the seller to the buyer at the beginning of the transaction and either the seller or a third-party financee (such as a bank or mortgage company) takes back a mortgage lien. In such a situation, the time of vesting approach to community property characterization would focus on the marital status of the party acquiring the property at the time the transaction is initiated. Thus the time of vesting approach can result in different characterizations depending on the method by which the property is acquired. For example, assume that H acquires Blackacre through a land contract. He enters the contact before his is married and completes his payments after he is married. Under a time of vesting approach, the date of acquisition would be fixed at the time he completes the payments and takes delivery of the title to the real estate – the property would be presumed community property. However, if H acquired the property through use of a mortgage, all other facts remaining the same, the time of vesting approach would fix ownership at the beginning of the transaction when H took delivery of title and the property would be characterized as his separate property.

b. Inception of right. This test focuses on the time the right to acquire the property was first obtained, regardless of when title transfers. Thus, where H enters into a transaction to acquire Blackacre before his marriage. The character of the property would be established at that time as his separate property regardless of whether he acquired the property through a mortgage, land contract or through some other method or acquisition.

c. Pro rata sharing. Under this, ownership of assets acquired over a period of time is apportioned between the community and separate estates of the spouses in relation to the amount of consideration provided by each estate.

2. Most courts apply the inception of title test most of the time. And few courts have articulated a rationale for determining which test to apply. Rather, most of the community property states have engaged in a process of “pidgeon-holing” in which the characterization of different types of property is considered in isolation from other types of property.

Several over-arching observations may help, however, in making sense of these three tests. Generally speaking, courts have tended to apply the pro rata sharing test only in situations involving liquid assets that are in the form of cash or cash equivalents, or that are easily divided or apportioned – such as investment accounts or pensions. For most other less liquid assets -- insurance or real property, for example -- most courts have employed a time of vesting or inception of right approach. But see Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640 (App. 1926)(apparently
applying pro rata sharing to characterize certain real estate acquisitions where the transaction is initiated before marriage, but where the vast bulk of the consideration is community property). See also, In re Marriage of Moore, reprinted later in this book.

In contrast to the inception of right and time of vesting approaches, pro rata sharing results in the apportionment of an asset. If the asset is not easily divided, this apportionment could result in complex issues of co-ownership and partition that might actually reduce or even destroy the value of an asset. Inception of right and time of vesting, in comparison, fix the ownership interest in the asset in either the community or separate property estate, thereby avoiding the co-ownership problem. The non-ownership estate may then be entitled to a reimbursement remedy for the contribution of consideration. This reimbursement remedy will be discussed later in this chapter.

In the context of Inception of Right and time of vesting, some jurisdictions have focused on the technical legal completion of the transaction as the operative moment for characterization. Others have focused on the initiation of the transaction. These two contrasting foci emphasize different aspects of the acquisition. Inception of right, focusing as it does on the initiation of the transaction, rewards the estate that took the initial risk of acquiring an asset with title to that asset. This test thus rewards economic risk-takers. Time of vesting, with its focus on the legal completion of the transaction rewards consistency and persistence by assigning ownership rights to the estate that enables full and final performs the obligations associated with the acquisition.

The majority of states apply the inception of right approach most of the time. Louisiana most often deviates from this generalization, applying the time of vesting approach to at least some types of transactions, such as acquisitions of real estate. See Cosey v. Cosey, 364 So 2d 186 (La App. 1978), rev’d on other gds., 376 So. 2d 486 (La. 1979)(applying time of vesting to characterize real property acquired using a contract for deed).


**OPINION:**

This interpleader action involves a dispute between decedent Lawrence Wadsworth's first wife and his wife at the time of his death over the proceeds of a group term life insurance policy. The dissolution decree between the decedent and his first wife purported to transfer all of her interests in all life insurance policies on the decedent's life to him. The first wife, however, remained the named beneficiary of the term insurance at the time of his death.

This action raises two issues. First, what is the proper characterization under our community property law of the group term life insurance policy? We hold that the character should be determined by the identity of funds used to pay for the most recent term.

Second, does a dissolution decree purporting to divest a spouse of her interests in all life insurance policies also divest her of all interest as a named beneficiary? We hold that it does not.
We hold further that the former spouse named beneficiary in the policy is entitled to the proceeds unless (1) a dissolution decree specifically states that the former spouse is divested of his or her expectancy as named beneficiary and (2) the policy owner formally executes this previously stated intention to change the beneficiary within a reasonable time (but no longer than 1 year) after dissolution. After this reasonable time period, assuming no community property rights are invaded, the beneficiary named in the insurance policy is entitled to the proceeds despite a statement in the dissolution decree indicating a contrary intent.

FACTS

Joan and Lawrence Wadsworth were married in 1949. In 1952, Lawrence commenced work for the Boeing Company. In 1963, Aetna Life Insurance Company issued a group term life insurance policy covering Boeing employees, including Lawrence. The policy has no cash surrender value and each premium is paid in full on a monthly basis as a benefit of employment by the Boeing Company. Lawrence designated Joan as beneficiary.

Joan and Lawrence were divorced on August 3, 1978. The dissolution decree incorporated a separation contract in which Joan conveyed to Lawrence "as his sole and separate property, free and clear of any right, title, or interest on her part . . . [a]ll life insurance policies" insuring his life. Lawrence Wadsworth married Sharon Wadsworth on the same day. Lawrence never changed the designation of Joan as beneficiary.

Lawrence Wadsworth died intestate on January 10, 1981. Sharon, as surviving spouse and administratrix of his estate, claimed the proceeds of the group policy. Pursuant to the terms of the policy, Aetna commenced an interpleader action to determine whether Sharon or Joan should receive the policy proceeds. Joan moved for partial summary judgment, arguing that she was entitled to one-half of the policy proceeds as named beneficiary. Sharon brought a cross motion, claiming all of the proceeds.

The trial court denied Joan's motion and granted Sharon's motion for summary judgment, and awarded her the policy proceeds.

Joan appealed. The Court of Appeals found that the dissolution decree divested Joan of any interest she had in the group policy, including her right to be named as beneficiary. It further held that the dissolution of Joan and Lawrence's marriage converted the group policy into Lawrence's separate property. Thereafter, ownership of the policy or its proceeds was both separate and community property in proportion to the percentage of the total premiums paid. Thus, the Court of Appeals held that Sharon obtained a community property interest in only that portion of the proceeds attributable to the premiums paid with community funds after her marriage to Lawrence. It reversed and remanded to the trial court for resolution of two factual issues: (1) did Lawrence intend Joan to be the beneficiary of the policy, and (2) if so, what portion of the policy proceeds are attributable to premiums paid by funds of the marital community of Lawrence and Sharon. Aetna Life Ins. Co. v. Wadsworth, 36 Wn. App. 365, 675 P.2d 604 (1984).
JUDICIAL HISTORY

Application of community property principles to life insurance policies in Washington has its roots in *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27, 114 A.L.R. 531 (1937). In *Powers*, the husband changed the beneficiary of a life insurance policy purchased with community funds from his wife to his mother and secretary. This change was made without the wife's knowledge or consent. After the husband's death, the wife and the named beneficiaries made conflicting claims to the proceeds. This court held that a nonconsenting spouse could void her husband's designation of a beneficiary of a policy purchased with community funds. The court reasoned:

In this state, insurance or the proceeds of insurance are not mere expectancies or choses in action, but are property; and if the premiums are paid by the assets of the community, they constitute community property.

*Powers*, at 484. Since substantial gifts of community property may not be made without the consent of both spouses, the change of beneficiaries was held void *ab initio*. *Powers* has been consistently questioned over the years on several grounds. *E.g.*, Cross, *The Community Property Law in Washington*, 49 Wash. L. Rev. 729, 790-93 (1974); Comment, *Life Insurance Proceeds as Community Property*, 13 Wash. L. Rev. 321 (1939).

One criticism of *Powers* revolves around its characterization of the designation of a life insurance beneficiary as a present property interest rather than an expectancy. Where the policy owner has the right to change the beneficiary, the named beneficiary has no vested right in the nomination. *Occidental Life Ins. Co. v. Gannon*, 57 Wn.2d 868, 360 P.2d 350 (1961); *Massachusetts Mut. Life Ins. Co. v. Bank of Cal.*, 187 Wash. 565, 60 P.2d 675 (1936). Even if the insured cannot change the beneficiary, the beneficiary's interest is not indefeasibly vested so long as there remain premiums to be paid. *Francis v. Francis*, 89 Wn.2d 511, 573 P.2d 369 (1978). Thus, the characterization of the right to proceeds as a present property interest rather than an expectancy is wrong.

The effect of *Powers* was somewhat diminished by *In re Estate of Towey*, 22 Wn.2d 212, 155 P.2d 273 (1945) which upheld an insured husband's change of beneficiary from his wife to his executor. Under *Towey*, the wife's half interest in the proceeds was preserved but the husband could dispose of his half of the policy proceeds by will.

Finally, in *Francis v. Francis, supra*, this court overruled *Powers*, at least insofar as the *Francis* court held that the insured spouse may designate a person other than his or her spouse as beneficiary of up to one-half of the proceeds of a community-owned policy. *Francis* recognized that designation of a beneficiary is quasi-testamentary rather than a means of making a gift of community property. Since the insured spouse has the right to dispose of one-half of the community property upon his or her death, designation of a beneficiary other than his or her spouse as to one-half of the proceeds is permissible.
Chapter 3: Classifying Property As Community

RISK PAYMENT APPROACH

Powers was also the progenitor of the apportionment rule under which ownership of an insurance policy or its proceeds is separate or community property in proportion to the premiums paid by separate or community property. See Wilson v. Wilson, 35 Wn.2d 364, 212 P.2d 1022 (1949); Small v. Bartyzel, 27 Wn.2d 176, 177 P.2d 391 (1947). Critics of this apportionment rule argue that it fails to take into account the nature of life insurance, especially term life insurance.26

Although numerous variations of life insurance exist, life insurance policies generally may be divided into two broad classes: term insurance and cash value insurance. Premiums purchasing cash value insurance pay for both cash value and protection from risk of death. The cash value, somewhat akin to a savings account, is a permanent cumulative asset against which the owner may borrow, and which the owner may receive upon cancellation of the policy. On the other hand, term insurance has no cash surrender value; premiums purchase only protection from risk of death for a fixed period of time. At the end of that period, there is no asset remaining. The length of time the insured has had the policy and the number of premiums paid are irrelevant.

Based upon these differences in life insurance policies, critics of the apportionment theory argue for adoption of a risk payment theory. The risk payment theory is a functional approach which takes into account the manner in which values accrue under various types of policies. Under this theory, the proceeds of a life insurance policy are characterized by determining the source of funds which paid for the risk portion of the policy. In the case of term insurance, only the character of funds used to purchase the most recent premium is significant because term insurance premiums purchase solely protection from risk of death. Hence, the character of a term policy should depend upon whether payment for the most recent premium was made with community or separate funds.

Courts in several community property jurisdictions have adopted, at least implicitly, a risk payment approach to characterization of term life insurance policies. For example, in Lock v. Lock, 8 Ariz. App. 138, 145, 444 P.2d 163 (1968), the Arizona Court of Appeals stated:

[S]eparate funds paid for all of the coverage that resulted at the time of Mr. Lock's death. The fact that the community that had existed between [the decedent insured.] Charles Henry Lock and [his first wife,] Hazel Margaret Lock had paid a premium for a risk long since expired without loss would not give this community estate any vested interest in the proceeds of the policy.


The California courts have rejected the risk payment approach. See, e.g., *Biltoft v. Wootten*, 96 Cal. App. 3d 58, 157 Cal. Rptr. 581 (1979); *Modern Woodmen of Am. v. Gray*, 113 Cal. App. 729, 299 P. 754 (1931). These courts reason that insurability, i.e., the right of the insured to keep the policy in force past the time when he or she could obtain an identical policy from the same company, is a valuable right. According to these courts, this valuable right is derived at the inception of the contract and is, therefore, subject to apportionment.

While we recognize that insurability may have value in certain policies, we reject the approach of the California courts. This approach is based in part upon the questionable assumption that uninsurability occurs at the inception of the contract. Generally, however, uninsurability occurs as one grows older, and any value attached to insurability is, therefore, more likely to be attributable to later premium payments than to initial payments. See Comment, *Community and Separate Property Interests in Life Insurance Proceedings: A Fresh Look*, 51 Wash. L. Rev. 351, 376 (1975). Further, valuation of insurability can be complex. While the complexity of determining values alone may not be a sufficient reason to reject apportionment, we seek to adopt a rule that will add simplicity to the determination of life insurance beneficiaries. Finally, the California courts' approach does not take into account the fact that many term life insurance policies, especially group policies, do not require evidence of insurability for participation. See Comment, 51 Wash. L. Rev. at 371; 1 J. Appleman, *Insurance* §44, at 118 (1981); 19 G. Couch, *Insurance* §82:11 (2d ed. 1983).

We could adopt a rule requiring inquiry into the various aspects of each insurance policy to determine what, if any, features have present value. We prefer, however, to take a broader approach requiring inquiry only into whether the insurance policy is a term or cash value policy. The rule we adopt will, we hope, have the advantage of ease of application and thus avoid the time and expense of extensive litigation.

In the past, we have expressly reserved the question whether the risk payment theory should be applied as a method of characterizing life insurance policies. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 208, 580 P.2d 617 (1978). We now resolve that question with respect to term life insurance policies.27 We hold that the character of funds used to pay for the most recent term should determine the character of a term life insurance policy. Accordingly, insofar as *Small v. Bartyzel*, supra, *Estate of Madsen v. Commissioner*, 97 Wn.2d 792, 650 P.2d 196 (1982) and *Stephen v. Gallion*, 5 Wn. App. 747, 491 P.2d 238 (1971) indicate the characterization of a term life insurance policy should be determined by apportionment, they are overruled.

We now apply the risk payment doctrine to the *Wadsworth* policy.

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27We need not decide whether the risk payment doctrine should be applied, in whole or in part, to cash value policies.
Because the community funds of Sharon and Lawrence Wadsworth were used to purchase coverage for the most recent term, the policy was the community property of Sharon and Lawrence. Any coverage paid for by the marital community of Joan and Lawrence Wadsworth had expired without loss long before Lawrence's death. The adequacy of identification of the policy in their separation agreement is no longer material.

Upon Lawrence's death, Sharon became entitled to one-half of the proceeds from this community property source. Francis v. Francis, supra. The decedent had the power to direct the disposition of the other half of the proceeds. The disposition of the decedent's share depends upon whether his designation of Joan Wadsworth as beneficiary is valid. We turn next to this issue.

NEW RULE FOR DETERMINATION OF BENEFICIARY

In a separation agreement, incorporated into their dissolution decree, Joan Wadsworth transferred to Lawrence Wadsworth "as his sole and separate property, free and clear of any right, title, or interest on her part . . . all life insurance policies insuring his life." Joan and amicus argue that such a decree should divest the former spouse only of present ownership interests in life insurance policies, not of any expectancy interest he or she might have as named beneficiary. We agree.

Different jurisdictions have resolved, in various manners, the recurring question of the effect of dissolution upon the nomination of a former spouse as beneficiary of a life insurance policy. See generally Annot., Divorce Decree Purporting To Award Life Insurance to Husband as Terminating Wife-Beneficiary's Rights Notwithstanding Failure To Formally Change Beneficiary, 70 A.L.R.3d 348 (1976). Most courts hold that the former spouse/beneficiary's rights are not terminated solely by the fact of divorce. The rights of the former spouse/beneficiary may, however, be divested by a policy clause, statute, separation agreement or dissolution decree. Despite such divestiture, some courts have held that the former spouse's right to the proceeds as named beneficiary may be restored by subsequent gift of the insured spouse. To determine whether such a gift has been made, inquiry into the donative intent of the insured spouse is necessary. See 4 G. Couch, Insurance §27:111 (2d ed. 1960 & Supp. 1983).

Washington follows the majority rule that dissolution of a marriage does not in itself divest a former spouse of the right to be named beneficiary. Stokes v. McDowell, 70 Wn.2d 694, 424 P.2d 910 (1967). A former spouse may be divested of that right, however, by the terms of a separation agreement or dissolution decree.

This court has held that a former spouse was divested of any interest she might have had as named beneficiary of a life insurance policy by a property settlement agreement which had been approved in the divorce decree. United Benefit Life Ins. Co. v. Price, 46 Wn.2d 587, 283 P.2d 119 (1955). In Price, the property settlement agreement awarded to the husband all insurance policies on his life and all other property of the parties, other than the property awarded to the wife. Price, at 588. Relying upon Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 74 P.2d 27, 114 A.L.R.
531 (1937), the *Price* court reasoned that the interest of a beneficiary in a community-owned life insurance policy "is an asset in which the community has a very real interest". *Price*, at 589. Under the terms of the decree, the former wife gave up this interest.

*Price* was immediately criticized for keeping alive "one more aspect of the unfortunate doctrine handed down" in *Powers*. Note, *Insurance -- Effect of a Divorce Decree*, 31 Wash. L. Rev. 146 (1956). As discussed above, *Powers* is based upon the faulty reasoning that the beneficiary's expectancy is a present property interest. Likewise, *Price* is based upon an approach which fails to distinguish between present rights of ownership in a life insurance policy and the mere expectancy of the beneficiary in the proceeds.

B

The failure to distinguish properly between present property rights in insurance policies and the expectancies of beneficiaries has created confusion in interpreting property settlement agreements incorporated in dissolution decrees and made difficult the task of determining to whom insurance proceeds should be paid. *Amicus curiae* has suggested an approach which incorporates the distinction between present interests and future expectancies. We believe this approach will add clarity to this area of law and, therefore, we adopt the following rule.

In general, the beneficiary named in the policy will be entitled to the proceeds to the extent that the present spouse's community property rights are not invaded. We believe this general rule should not apply, however, where the dissolution decree clearly indicates an intent to divest the former spouse of his or her expectancy as beneficiary, so long as that intention is acted upon within a reasonable time after dissolution by formal execution of the change of beneficiary. If the intention is not acted upon within a reasonable time, the owner should be deemed to have decided to retain the named beneficiary as the one entitled to the proceeds.

Whether a reasonable time has passed should be determined by considering the circumstances of the parties and the time required to notify the insurance company of the change of beneficiary. Although a reasonable time may be less than 1 year, we hold that 1 year after dissolution, it will be conclusively presumed that the policy owner intended to retain the named beneficiary as the one entitled to the proceeds.

Thus, the rule we adopt will operate in the following manner. To the extent no community property rights are invaded, the named beneficiary will generally be entitled to the proceeds. A dissolution decree will divest the former spouse of his or her expectancy as named beneficiary, however, if (1) the dissolution decree, in clear and specific language, states that the former spouse is to be divested of his or her expectancy as beneficiary and (2) the policy owner formally executes this stated intention to change the beneficiary within a reasonable time after the dissolution decree has been entered. Thus, if the insured spouse dies within this reasonable time period without formally executing the previously stated intention to change the beneficiary, the former spouse will not be entitled to the proceeds. After a reasonable time has passed, however, the clause in the dissolution decree will be ineffective and the former spouse, if named beneficiary, will be entitled to the proceeds. In any event, 1 year after dissolution, it shall be conclusively presumed that the
policy owner intended to retain the named beneficiary as the one entitled to the proceeds.

This rule may not in all cases comport with the parties' expectations. Nevertheless, we believe the expectations of those involved will be met in most cases. Further, this rule should encourage individuals to consider carefully the disposition of life insurance policies in dissolution. Such careful consideration will clarify the intent of the parties and reduce the need, at a later point in time, to inquire into the donative intent of the deceased insured. In addition, the rule we adopt will simplify the procedure of determining to whom life insurance proceeds are to be distributed.

We overrule those cases inconsistent with this approach, including United Benefit Life Ins. Co. v. Price, supra, and In re Estate of Reynolds, 17 Wn. App. 472, 563 P.2d 1311 (1977).

We now apply our new rule to the subject case. By the terms of their dissolution decree, Joan Wadsworth conveyed to Lawrence Wadsworth, as his separate property, all life insurance policies insuring his life. The decree made no mention of Joan's expectancy as named beneficiary. The language of the decree is inconclusive. It is neither sufficiently clear nor sufficiently specific to indicate an intent to divest Joan of her expectancy.

Further, even if the decree had contained a clear and specific clause stating that Joan gave up her expectancy as named beneficiary, the clause would be ineffective. Over 3 years had passed between the date of the dissolution decree and the date of Lawrence's death. Such a clause would be effective, under our new rule, only if Lawrence had died within a reasonable time after the decree had been entered. Since Lawrence died over 3 years after the decree, the conclusive presumption that Lawrence intended to retain Joan as beneficiary applies.

CONCLUSION

In this case, Joan Wadsworth, the named beneficiary, is entitled to the life insurance proceeds to the extent that no community property rights are invaded. The policy was purchased with the community funds of Sharon and Lawrence Wadsworth. Therefore, Sharon is entitled to one-half of the proceeds. Lawrence had dispositive power over the other half of the proceeds. Consequently, his named beneficiary is entitled to his half of the proceeds.

Our resolution of this issue makes it unnecessary to decide whether Lawrence intended to make a gift to Joan by naming her beneficiary.

The case is reversed and remanded to the trial court for entry of judgment, vesting one-half of the subject life insurance proceeds in Joan Wadsworth and the remaining half in Sharon Wadsworth. We award no attorney fees to either party. Joan Wadsworth should be awarded her costs.


J. JONES, Justice.
[The facts and procedural history of the case are set forth previously in Part B.2 of Chapter III of this book]

B.

Tammy makes several challenges to the district court's conclusion that the policy proceeds were Mark's separate property. Initially, she argues that the trial court misconstrued the law in concluding that the source of the last premium payment controlled the character of the policy proceeds. Alternatively, she argues that genuine issues of material fact exist regarding the characterization of the 2005 and 2006 premium payments. Finally, Tammy contends that the proceeds were her separate property under Idaho Code section 41-1830.

1.

Tammy argues that the district court erred in concluding that the source of the last premium payment controlled the character of the policy proceeds. She maintains that the source of the last payment is irrelevant since the policy proceeds were her separate property under Idaho Code section 41-1830. The Trust argues that the district court correctly concluded that the source of the funds used to pay the last policy premium determines the character of the policy proceeds.

In Idaho, the characterization of an asset as community or separate property depends on the date and source of the property's acquisition. *Estate of Hull v. Williams*, 126 Idaho 437, 440, 885 P.2d 1153, 1156 (Ct.App.1994). Property acquired during the marriage is presumptively regarded as community property. *Stewart v. Stewart*, 143 Idaho 673, 677, 152 P.3d 544, 548 (2007). The party seeking to overcome the presumption has the burden of proving "with reasonable certainty and particularity" that an asset is his or her separate property. *Williams*, 126 Idaho at 441, 885 P.2d at 1157 (quoting *Houska v. Houska*, 95 Idaho 568, 570, 512 P.2d 1317, 1319 (1973)); see also *Guy v. Guy*, 98 Idaho 205, 206, 560 P.2d 876, 877 (1977). This may be accomplished "by establishing that the property was acquired by one spouse prior to the marriage, by tracing the funds used to acquire the asset to a separate property source, or by showing that the property was acquired by gift, bequest or devise during the marriage." *Williams*, 126 Idaho at 441, 885 P.2d at 1157; *see also* I.C. § 32-903. Absent such a showing, all property "acquired after marriage by either the husband or wife is community property." *Williams*, 126 Idaho at 440, 885 P.2d at 1156; see also I.C. § 32-906.

The classification of life insurance policies as separate or community property is somewhat more complicated. Generally, life insurance policies insuring the life of a spouse are regarded as community property when they are acquired during the marriage and the premiums are paid with community funds. *Travelers Ins. Co. v. Johnson*, 97 Idaho 336, 340, 544 P.2d 294, 298 (1975); *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 377, 292 P.2d 760, 762 (1956). The rule as applied to term life insurance policies, however, requires slight modification to account for the unique nature of such policies. *See Aetna Life Ins. Co. v. Wadsworth*, 102 Wash.2d 652, 689 P.2d 46, 49-50 (1984).
Unlike whole life insurances policies, term life insurance policies only protect against the risk of the insured's death for a fixed period of time. \textit{Id.} at 49. They do not acquire any cash surrender or loan value nor do they accumulate interest. \textit{See, Guy, 98 Idaho at 207, 560 P.2d at 878.} If the insured does not die during the covered term, the policy loses all of its value. \textit{Johnson, 97 Idaho at 340, 544 P.2d at 298; see also United Investors Life Ins. Co. v. Severson, 143 Idaho 628, 632, 151 P.3d 824, 828 (2007).} Under such circumstances "[t]he insured has had the benefit of protection for the [term] and it has been 'used up.' He must pay another premium to enjoy further protection." \textit{Guy, 98 Idaho at 207, 560 P.2d at 878} (quoting Comment, \textit{Community and Separate Property Interests in Life Insurance Proceeds: A Fresh Look}, 51 WASH. L. REV. 351, 353 (1976)). This is true regardless of the "length of time the insured has had the policy and the number of premiums previously paid." \textit{Id.; see also Wadsworth, 689 P.2d at 49.} Essentially, term life insurance policies are "a series of unilateral contracts, each beginning with the payment of a premium for a specified period ... and terminating at the expiration of that ... period." \textit{Guy, 98 Idaho at 207, 560 P.2d at 878.}

In light of the unique nature of term life insurance policies, several community property states have adopted the risk payment theory to guide the classification of such policies. \textit{See, e.g., Estate of Logan, 191 Cal.App.3d 319, 325-26, 236 Cal.Rptr. 368 (1987); In re Estate of Schleis, 97 N.M. 561, 642 P.2d 164, 164 (1982); Wadsworth, 689 P.2d at 50; see also Guy, 98 Idaho at 208, 560 P.2d at 879.} "The risk payment theory is a functional approach which takes into account the manner in which values accrue under various types of policies." \textit{Wadsworth, 689 P.2d at 49.} Under the theory, the character of life insurance policy proceeds is determined by the source of the funds used to pay the risk portion of the policy, which for a term life insurance policy is the last policy premium. \textit{Id.} at 49-50. In other words, term life insurance policy proceeds are only regarded as community property when the last premium payment was made with community funds.

Although we have not specifically held that the risk payment theory governs the classification of term life insurance policy proceeds, the theory is in accord with Idaho case law. \textit{See Guy, 98 Idaho at 207-08, 560 P.2d at 878-79 (relying on the risk payment theory in classifying a group term disability policy as a series of unilateral contracts, the proceeds of which could not be characterized based solely on the source of the initial premium payment); Johnson, 97 Idaho at 340, 544 P.2d at 298 (holding that proceeds from a term life insurance policy became vested in the surviving spouse upon the insured's death because the premiums were paid with community assets); Noyes v. Noyes, 106 Idaho 352, 356, 679 P.2d 152, 156 (Ct.App.1984) (holding that the community did not have an interest in proceeds from a term life insurance policy because the insured did not die during a "policy period covered by any prepayment of premiums from community funds").} Additionally, the theory is beneficial in that it accounts for the interest the community actually acquires when it makes premium payments on a term life insurance policy. \textit{See Guy, 98 Idaho at 207, 560 P.2d at 878 ("The risk payment doctrine correctly treats term insurance as a series of unilateral contracts, rather than as one bilateral contract." (quoting Comment, \textit{Community and Separate Property Interests in Life Insurance Proceeds: A Fresh Look}, 51 WASH. L. REV. 351, 374 (1976))). Upon the expiration of the term paid with community assets, the community interest in the policy lapses. Only if the community pays for an additional term will it retain its interest in the policy.
For the foregoing reasons, we hold that the risk payment theory is the appropriate method for determining the character of term life insurance policy proceeds. Thus, the district court did not err in concluding that, although the policy proceeds were presumptively community property since the policy was acquired during the marriage, the presumption could be overcome by a showing that the last premium was paid with Mark's separate property.

Because Tammy's affidavit was sufficient to create a genuine issue of material fact as to the nature of the premium payments, and hence the policy proceeds, the district court erred in granting the Trust's motion for summary judgment.

[Amonth other issues, the court next concluded that even if the policy was community property, Mark was entitled to make a gift of his ½ of the policy proceeds to a third party via the beneficiary designation.]

D.

If the district court determines on remand that the policy was Mark's separate property, then Tammy is not entitled to any of the proceeds. See I.C. § 32-904 (granting spouses independent control over their own separate property); see also Anderson, 77 Idaho at 380, 292 P.2d at 764. If, on the other hand, the court determines that the policy was community property, then Tammy is entitled to one-half of the proceeds. See Johnson, 97 Idaho at 340, 544 P.2d at 298 (holding that, after the death of the grantor spouse, a non-consenting spouse may void a gift of community property as to his or her one-half interest). The remaining one-half, which constituted Mark's share of the community policy, would belong to the Trust as the assignee of the policy's named beneficiary. See Severson, 143 Idaho at 632, 151 P.3d at 828.

Notes

1. How would the results in Wadsworth and Banner Life have changed if the risk payment doctrine had not been applied?

2. In both cases, the courts treat term life insurance as a series of unrelated separate periodic contracts? Given that assumption, is the risk payment doctrine a time of vesting approach or an inception of right approach? Can you make an argument that a term life insurance policy should be viewed as a continuous contract with periodic instalment payments? What policy concerns would be implicated by such an approach?.

B. Source of Consideration Rules

Even when property is acquired entirely within the confines of a marriage, issues of mixed
consideration similar to those in the preceding section may nonetheless arise. Spouses may utilize separate property for a portion as consideration for a property acquisition during marriage. One or both or the spouses may contribute their labor and industry during the marriage toward the acquisition of property, or they may engage in ambiguous conduct that suggests an intention to acquire community property even when separate property consideration is used for the acquisition.

Historically, the Spanish courts held that the pro-community presumption could be rebutted by showing that the consideration used to acquire an asset was separate property. All U.S. community property jurisdictions have permitted the pro-community presumption to be rebutted in this way. This notion, that property acquired during marriage may nonetheless be separate property based on the source of consideration for the acquisition, is sometimes referred to as the “source doctrine.”


HUNTLEY, J.

By this appeal we deal with the recurring problem of the division of property acquired during the marriage when all or substantially all payments on the debt were made from the separate property of one spouse.

Virgil and Alfreda Winn were married on June 3, 1972. A home was purchased in November of the same year for $27,346.14. Virgil paid $200 earnest money and the down payment of $3,146 from his separate funds. Title was deeded to both parties. The $24,000 balance was paid by procuring a loan secured by a deed of trust on the house. The note and deed of trust were signed by both spouses. All payments on the note, during and after the marriage, were made from Virgil's separate funds.

The Winns were separated in early 1977 and Alfreda moved out of the house. Virgil has at all times continued to live in the house. In March of 1977 Virgil filed for divorce, and a decree granting the same was subsequently entered.

Three judges have considered and ruled on this case. In proceedings in the magistrate's division of the district court, the magistrate held that the house was community property and that Virgil would be liable to Alfreda for rent for her one half interest therein should he continue to reside in the house. This decision was appealed to the district court and the district judge concluded that the property was separate because the funds used to acquire it were traceable to separate property. The district court nevertheless ordered a trial de novo. However, a third judge presided over the trial de novo and came to the same conclusion that the magistrate reached in the first proceeding, that the home was community property and that Virgil would owe Alfreda rent for the period that he had sole and exclusive possession of the house. The court further held that Virgil was entitled to reimbursement for the payments made by him from his separate funds.
The character of all property acquired by either spouse during marriage is presumed to be community. *Stanger v. Stanger*, 98 Idaho 725, 571 P.2d 1126 (1977). The party asserting that the property is separate has the burden of overcoming this presumption by proving such separate character. *Estate of Freeburn*, 97 Idaho 845, 555 P.2d 385 (1976).

Virgil asserts that he has met this burden, as he has shown conclusively that the source of all payments on the loan was his separate property. His argument is premised on an incorrect application of the rule that the property or thing acquired partakes of the same nature as the property or funds used to acquire it, de Funiaq & Vaughn, *Principles of Community Property*, §77 (2d ed. 1971), or otherwise stated: "[t]he crucial question in determining the status of... property is the source of the funds with which it was purchased." *Rose v. Rose*, 82 Idaho 395, 399, 353 P.2d 1089 (1960); Accord *Stanger v. Stanger*, supra; *In re Estate of Cook*, 96 Idaho 48, 524 P.2d 176 (1974); *Cargill v. Hancock*, 92 Idaho 460, 444 P.2d 421 (1968); *Stewart v. Weiser Lumber Co., Ltd.* 21 Idaho 340, 121 P. 775 (1912).

Accordingly, the rule proceeds, when separate property is used to acquire an asset, that asset becomes the separate property of the acquiring spouse. Idaho Code §32 903. Likewise, property gained through an exchange of community property is a community asset. See *Stanger*, supra. This principle is applied with relative ease in the case of a straight trade or purchase for cash; however the application of the rule is more difficult when classifying credit acquisitions. There is a distinct lack of consistency of approach to this area of law. Broekelbank, *Community Property Law of Idaho*, §4.3 (1982). The confusion generated by this subject is not limited to Idaho. See de Funiaq & Vaughn, *Principles of Community Property*, supra, §78.

Although it is a sound principle that property acquired takes on the same character as that of the funds or property used to acquire it, before the principle may be applied, the asset actually given in exchange for the property purchased must be identified. In the typical credit acquisition case, the proceeds of a loan are the asset by which the property is purchased, and the procurement of the loan and the application of the proceeds thereof to the purchase price are part of the acquisition process.

It is also crucial to ascertain when property purchased through credit is "acquired" for the purposes of the law of community property. The answer lies in the basic rule that "[t]he character of an item of property as community or separate vests at the time of its acquisition." *Freeburn, supra*. Applying this analysis to the home purchased by the Winns, it is clear that the character of the house vested in November 1972 when it was acquired in substantial part with the proceeds of the loan. The contention that the general presumption in favor of community property is overcome by payments subsequent to that date is thus without merit.28

We now turn to the trial court's determination of the character of the loan proceeds used to

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28Confusion has arisen in this area because some courts have allowed the source of subsequent payments to determine the character of the property. This is inconsistent with the rule that character of property vests at the time of acquisition and we reject it as having any bearing upon the nature of the property.
purchase the house, for that establishes the community or separate character of the property.29

"[A]s a rule, property purchased with money borrowed by either spouse during the existence of the community is community property." *Chaney v. The Gauld Co.*, 28 Idaho 76, 84, 152 P. 468 (1915). This follows logically from the general presumption because the borrowed money is property received during marriage and because the community is generally liable for the debt. Therefore, to rebut the presumption that the house is community property, Virgil must prove with reasonable certainty and particularity that the proceeds of the loan were his separate property.

In determining the nature of the proceeds of a loan, examination must be made of the basis of the extension of the credit. The proceeds of loans made upon the security of a spouse's separate estate are separate, *Speer v. Quinlan*, 96 Idaho 82, 456 P.2d 314 (1974); *Lepel v. Lepel*, 93 Idaho 82, 456 P.2d 249 (1969); *Shovlain v. Shovlain*, 78 Idaho 399, 305 P.2d 737 (1956), and those made upon the security of the community estate are community. *See Speer v. Quinlan, supra* 96 Idaho at 130. This rule is based upon the fact that the estate providing the security is the primary source of repayment. However, when the collateral for the loan is the very asset for which the loan was obtained, a different approach is required.

Consistent with the importance attached to interspousal agreements, if there exists between the spouses an actual, articulated intent that the obligation be separate or community in character, that intent shall control. *See, Hooker v. Hooker, supra; Shovlain v. Shovlain, supra; Stewart v. Weiser, supra*. The Winns present a more typical situation however, in that no such intent was expressed nor exists on the part of either husband or wife. In such a case trial courts look to several factors to determine the characterization of the property as a matter of policy. A review of Idaho law reveals that a variety of considerations have been found to bear on this issue.

Principally, we remain mindful of the overarching policy in favor of community property, as evidenced by the general presumption and the strong standard of proof necessary to rebut the presumption.

The liability of the community for the loan is significant, *Freeburn, supra*, 97 Idaho 845; *Chaney v. The Gauld Co., supra*, 28 Idaho 76, as is the source of repayment, *see Speer v. Quinlan, supra; Shovlain v. Shovlain, supra*. Related to these concepts is the basis of credit upon which the

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29Although it is true that the principle of transmutation allows spouses to agree inter se to convert or transmute the character of property from community to separate, or separate to community and thereby change the character of the property subsequent to its acquisition, *Hooker v. Hooker*, 95 Idaho 518, 511 P.2d 800 (1973), property cannot be converted gradually from community to separate by one spouse making payments on a community debt from his or her separate funds. That would in effect allow one spouse to "buy" the community property and thereby unilaterally transmute its character. Such reasoning is violative of the fundamental of the transmutation doctrine: that the character of property may be changed by agreement between the spouses. Therefore, in the absence of any valid agreement between Virgil and Alfreda to transmute the character of the property in issue, its nature remains unchanged.

The presence or absence of any or all of the above listed factors is relevant in determining the character of the credit by which a loan is obtained. None is conclusive. We deliberately refrain from selecting one item as dispositive. Such an approach is too rigid in light of our ultimate purpose of determining the likely intent of the spouses and in consideration of the highly individualistic and often complex fact situations presented. Judicial review therefore, must of necessity proceed on a case by case basis incorporating all relevant facts into the decision making process.

In the case at bar, the house was deeded to both husband and wife, and they each signed on the promissory note and deed of trust. In case of default the lender's first option would be to foreclose the mortgage on the house. These facts generate a strong inference that the character of the property is community. In the absence of any relevant evidence to the contrary, the district court correctly found the house to be community property.

The payments made on the community obligation from Virgil's separate funds are subject to reimbursement to Virgil in the absence of a finding that such contributions were intended as a gift to the community. Freeburn, supra. There being no proof that Virgil intended the payments made on the debt to be a gift to the community, the trial court correctly found that he is entitled to reimbursement.

Alfreda is entitled to receive rent for Virgil's occupancy of the house subsequent to the date of separation, calculated at one half the fair rental value of the property.

The decision of the trial court is affirmed, and the case is remanded for further proceedings consistent herewith. Costs to respondent.

BISTLINE, J., concurring in part in the result.


Joyce M. Grinius appeals an interlocutory judgment of dissolution awarding restaurant real

30 We specifically reject the California view that the intent of the lender conclusively determines the nature of the loan. See Gudelj v. Gudelj, 41 Cal.2d 202, 210, 259 P.2d 656 (1953). We find this approach unrealistic, for although at the time the credit was extended, the lender may have relied on the credit of either the community or separate estate, his true intent most likely is to collect the debt any way he can. He is unlikely to consider himself bound by his initial basis of extension of credit.
property to her husband Victor as his separate property and denying her claim for attorney's fees. Joyce contends there is insubstantial evidence to rebut the presumption property acquired during marriage has a community nature. (Civ. Code, . . . § 5110.) Joyce contends: (1) notwithstanding the antenuptual agreement, the restaurant real property was acquired after marriage and should be a community asset; (2) the purchase money loans were acquired or obtained with a view toward community assets and contributions and therefore are community property; and (3) the presumption arising from the title to the restaurant property is not conclusive and, on these facts, does not rebut a presumptive finding of community property. We hold the restaurant real property is community property, reversing that part of the judgment effecting the property division, with directions to determine whether Victor should be reimbursed under section 4800.2 for his separate property contributions. We also find the trial court did not abuse its discretion in denying Joyce's request for attorney's fees and affirm this part of the judgment.

Factual and Procedural Background

Victor and Joyce Grinius were married the same day they signed an antenuptual agreement31 which listed their separate assets and stated "all property owned by [either spouse] at the time of the marriage and all property coming to [either spouse] from whatever source during the effective term of this Agreement shall be the separate property of [the respective spouse.]" Victor listed common stock in two companies, $2,500 in a profit sharing plan, improved San Diego real property, and unimproved real properties in Florida. Joyce listed only her car and miscellaneous household furnishings.

The antenuptual agreement also provided: "This Agreement shall be binding upon the parties during the first six years of marriage only. Thereafter, the terms of this Agreement may be renegotiated by the mutual agreement of both parties or, in the alternative, the parties may choose not to renegotiate its terms and to allow it to entirely lapse. In such latter event, each party shall immediately have, upon expiration of said first six years of marriage, all rights and obligations with respect to each other and with respect to property which are provided by law. Such rights and obligations shall be retroactive to the date of marriage without regard to the provisions otherwise contained in this paragraph." However, even after a lapse, the parties' premarital separate property was to retain its separate character.

Shortly after marriage Victor resigned his job so he and Joyce could open a restaurant. Joyce apparently had worked in a restaurant for a number of years before marriage. They located a suitable building, costing $60,000. The purchase money was obtained from two sources: (1) a $20,000 downpayment from an $80,000 Small Business Administration (SBA) loan guaranty lent by California First Bank (hereafter referred to as SBA loan) and (2) $40,000 loaned by Home Federal Savings and Loan. Although only Victor signed the SBA loan guaranty, both Victor and

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31 Neither party contests the legality of the antenuptual agreement. Victor authorized the drafting of the agreement and proffered it to Joyce shortly before their marriage. Joyce was advised by independent counsel before signing the agreement.
Joyce signed the promissory note from California First Bank. Victor alone signed the Home Federal Savings and Loan promissory note. The SBA loan was secured by both community and separate property. Both Victor and Joyce negotiated the original purchase offer. However, without Joyce's knowledge, Victor placed title to the property in his name alone.

Victor and Joyce used the remaining $60,000 of the SBA loan to remodel the building, buy equipment, and pay their living and restaurant expenses. These funds were disbursed through the restaurant's checking account on which Victor and Joyce were the signators. Indeed, during the course of the marriage all personal and restaurant expenses were paid from this joint account.

Victor and Joyce both worked in the restaurant in several different capacities and continued to do so during the course of their marriage. Their community earnings were placed in the restaurant checking account; however, from time to time Victor also deposited funds received from his separate property into the account to prevent overdrafts.

Monthly payments on the purchase money loans were made from the joint restaurant checking account. In 1975 Victor also used $30,098.00 and $39,821.93 of his separate property funds to pay on the SBA and Home Federal loans, respectively. Again, in 1978 Victor paid $33,818 of separate property funds to retire the SBA loan. That same year, Victor and Joyce signed a $63,000 installment note in favor of San Diego Trust and Savings, secured by a trust deed on the restaurant property. From these proceeds, $42,000 was used to pay the outstanding balance on the Home Federal promissory note.

Victor and Joyce separated in April of 1980. Before trial, Victor stipulated the restaurant business was community property and the business was sold. Victor and Joyce and their respective counsels were each granted $5,000 from the sale proceeds. The trial court found all of the contested assets, except the restaurant real property, to be community property. The restaurant real property, worth $340,000, was determined to be Victor's separate property.

The Separate Property Characterization of the Restaurant Real Property is Not Supported by Substantial Evidence

I

A trial court's findings regarding a property's separate or community character is binding and conclusive on review when supported by substantial evidence (Beam v. Bank of America (1971) 6 Cal.3d 12, 25 [98 Cal.Rptr. 357, 490 P.2d 257]; Hicks v. Hicks (1962) 211 Cal.App.2d 144, 149 [27 Cal.Rptr. 307]), even though evidence conflicts or supports contrary inferences. (Beam v. Bank of America, supra, at p. 25; Mears v. Mears (1960) 180 Cal.App.2d 484, 500-501 [4 Cal.Rptr. 618], disapproved on other grounds in See v. See (1966) 64 Cal.2d 778, 785-786 [415 P.2d 776].) However, substantial evidence is not synonymous with "any" evidence. (Hall v. Department of Adoptions (1975) 47 Cal.App.3d 898, 906 [121 Cal.Rptr. 223].) It must have ponderable legal significance and "must be reasonable in nature, credible, and of solid value; it
must actually be "substantial" proof of the essentials which the law requires in a particular case.' [Citation."

"Ibid."

We review the evidence supporting the trial court's characterization of the restaurant property as Victor's separate property.

Property bought during marriage by either spouse is rebuttably presumed to be community property (§ 5110; See v. See, supra, 64 Cal.2d 778, 783; In re Marriage of Aufmuth (1979) 89 Cal.App.3d 446, 455 [152 Cal.Rptr. 668], disapproved on other grounds in In re Marriage of Lucas (1980) 27 Cal.3d 808, 815 [166 Cal.Rptr. 853, 614 P.2d 285]), and typically the spouse asserting its separate character must overcome this presumption. Victor relies on the antenuptial agreement to support his separate property claim. Such agreements can control the character of marital property and do prevail when Family Law Act presumptions are to the contrary. (§ 5133; In re Marriage of Dawley (1976) 17 Cal.3d 342, 357 [131 Cal.Rptr. 3, 551 P.2d 323]; Tompkins v. Bishop (1949) 94 Cal.App.2d 546, 549-550 [211 P.2d 14].)

Here, the antenuptial agreement is a comprehensive attempt to maintain the separate property character of assets acquired both before and during marriage, but it is time-limited. It lapsed six years after the date of marriage and reinvested the spouses with all communal rights retroactive to the date of marriage. Therefore, at trial the agreement had no effect on the presumption of community acquisition.

Victor next traces the source of payments for the restaurant property to overcome the fundamental community presumption. Specifically, he argues the purchase money loans were separate property and the restaurant real property, thus acquired, maintains the same character. (In re Marriage of Mix (1975) 14 Cal.3d 604, 610 [122 Cal.Rptr. 79, 536 P.2d 479].)

"The character of property as separate or community is determined at the time of its acquisition. [Citations.]" (See v. See, supra, 64 Cal.2d 778, 783; accord Giacomazzi v. Rowe (1952) 109 Cal.App.2d 498, 500-501 [240 P.2d 1020].) Here, the restaurant property was acquired shortly after marriage and is presumed to be community property. (§ 5110.) However, the character of credit acquisitions during marriage is "determined according to the intent of the lender to rely upon the separate property of the purchaser or upon a community asset. [Citations.]" (In re Marriage of Aufmuth, supra, 89 Cal.App.3d 446, 455.)

While the California courts have consistently and uncritically applied the intent-of-the-lender rule, they have inconsistently espoused the applicable test. (See generally Young, Community Property Classification of Credit Acquisitions in California: Law without Logic? (1981) 17 Cal. Western L.Rev. 173 (hereafter cited as Classification of Credit Acquisitions).) In early cases, the Supreme Court required a showing the lender relied entirely on the existing separate property of a spouse in extending the loan to characterize the loan proceeds as separate property. (Estate of Holbert (1881) 57 Cal. 257, 259; Estate of Ellis (1928) 203 Cal. 414, 416 [264 P. 743].) The more modern and oft-cited formulation found in Gudelj v. Gudelj (1953) 41 Cal.2d
202 [259 P. 656], apparently relaxes the standard: "In the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the [section 5110] presumption." (Id., at p. 210; italics added.) The Gudelj opinion cited no authority for this apparent change and had no opportunity to apply the standard since no evidence of lender reliance on separate property was proffered. Later cases have been decided on seemingly different standards. Courts have found evidence of lender's intent in: (1) reliance on or hypothecation of separate property (Bank of California v. Connolly (1973) 36 Cal.App.3d 350, 375 [111 Cal.Rptr. 468]; Ford v. Ford (1969) 276 Cal.App.2d 9, 13-14 [80 Cal.Rptr. 435]; Somps v. Somps (1967) 250 Cal.App.2d 328, 336-337 [58 Cal.Rptr.304]; Hicks v. Hicks, supra, 211 Cal.App.2d 144, 153); (2) sole reliance on separate property (Howard v. Howard (1954) 128 Cal.App.2d 180, 186 [275 P.2d 88]); and (3) extension of the loan on the faith of existing property belonging to the acquiring spouse (In re Marriage of Aufmuth, supra, 89 Cal.App.3d 446, 455-456; In re Marriage of Stoner (1983) 147 Cal.App.3d 858, 863-864 [195 Cal.Rptr. 351].) Nonetheless, in all of the above cases, loan proceeds were characterized as a spouse's separate property only when direct or circumstantial evidence indicated the lender relied solely on separate property in offering the loan.

With the above review in mind, we restate the applicable standard: Loan proceeds acquired during marriage are presumptively community property; however, this presumption may be overcome by showing the lender intended to rely solely upon a spouse's separate property and did in fact do so. Without satisfactory evidence of the lender's intent, the general presumption prevails.

Victor presented no direct evidence of lender intent and instead offered circumstantial evidence to prove lender reliance on his separate property. (Estate of Updegraph (1962) 199 Cal.App.2d 419, 422 [18 Cal.Rptr. 591].) He argues the "SBA loan guaranty was premised solely on [his] posting of collateral consisting of his entire separate property." However, a review of the SBA loan conditions outlined on the loan guaranty authorization refutes this contention. The SBA required nine separate conditions, only two of which necessitated hypothecation of Victor's separate property. Specifically, loan approval required: (1) a second deed of trust on the restaurant property and improvements, (2) Joyce's signature on the promissory note and all instruments of hypothecation, (3) a first lien on the restaurant machinery, equipment, furniture and fixtures presently owned and later acquired with the loan proceeds, (4) acquisition and assignment of an $80,000 life insurance policy on Victor, (5) purchase of hazard insurance on the restaurant property, (6) a third deed of trust on Victor's improved real property in San Diego, already subject to prior liens totalling $107,000, (7) assignment of 3100 shares of Victor's separate property stock, (8) the furnishing of the restaurant's quarterly balance sheets and profit and loss statements, and (9) the use of the SBA's management assistant services "as deemed necessary by SBA or Bank."

The primary collateral for the loan was the restaurant property. Alone, this hypothecation provides no inference of lender intent; to argue otherwise is to rely on circular reasoning. The requiring of Joyce's signature on the note and instruments of hypothecation does suggest the lender did look toward community assets for security. However, Joyce's signing of the documents, without more, does not compel a finding in favor of the community. (Ford v. Ford, supra, 276
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Cal.App.2d 9, 13-14; Kenney v. Kenney (1954) 128 Cal.App.2d 128, 138 [274 P.2d 951], disapproved on other grounds in See v. See, supra, 64 Cal.2d 778, 785-786.) Moreover, given the effect of the antenuptual agreement at the time of the loan, Joyce arguably had few, if any, existing community interests to pledge. Conditions three through five clearly suggest reliance on community interests. Both insurance policies and the restaurant equipment were purchased from the joint restaurant account and were presumptively community property. Indeed, Victor stipulated to the community nature of the restaurant business. Yet, some of the same loan proceeds challenged here were used for operating capital for the restaurant and were specifically earmarked for the purchase of trade fixtures and the liquor license, assets unquestioningly found to belong to the community. This inconsistency clearly contradicts Victor's contention.

Victor nonetheless relies on Hicks v. Hicks, supra, 211 Cal.App.2d 144, to bolster his argument. In Hicks, the trial court made an "implied finding that the proceeds from the loans . . . were the separate property of [husband]." (Id., at p. 153.) Affirming, the Court of Appeal stated: "The trial court was entitled to conclude that the original bank loans were made to the [husband] on the credit of his separate property as, at the time they were obtained, he had been married less than a year and his community earnings were not then of paramount significance, whereas his separate property approximated $500,000 in value." (Id., at p. 155.) However, the court in Hicks case may seem to have been reasonably and correctly decided, in truth it stands as an unfortunate example of an improper assumption regarding a critical factual issue which the Gudelj Rule addressed: Whether the lender (or credit seller) in fact primarily relied upon separate property of a spouse or upon the general credit of the spouse when credit was extended to that spouse." (Classifications of Credit Acquisitions, supra, at p. 216.)

Loan conditions eight and nine demonstrate the SBA's concern about the operation and management of the restaurant business. This interest is wholly consistent with the stated purpose of the SBA: "For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, to implement and co-ordinate all Federal department, agency, and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses." (15 U.S.C.A. § 631a(a); see also Financing Cal. Business (Cont.Ed.Bar 1976) §§ 1.8-1.9, pp. 6-8.) In granting these small business loans, the SBA is constrained by statute and policy considerations. Many of these loan guidelines are out-lined in chapter 1 of title 13 of the Code of Federal Regulations. Section 120.2(c)(1), of chapter 1 specifically provides: "No financial assistance shall be extended un-less there exists reasonable assurance the loan can and will be repaid pursuant to its terms. Reasonable assurance of repayment will exist only where the past earnings record and future prospects indicate ability to repay the loan and other obligations. It
will be deemed not to exist when the proposed loan is to accomplish an expansion which is unwarranted in light of the applicant's past experience and management ability, or when the effect of making the loan is to subsidize inferior management." (Italics added.) Accordingly, in the absence of evidence the SBA acted contrary to their official duties in this instance (Evid. Code, § 664), we find the loan was extended on both the ability of the community to repay the note and to manage the restaurant. Therefore, the SBA loan funds are a community asset, not Victor's separate property.

The second purchase money loan from Home Federal Savings and Loan was secured by a first deed of trust on the restaurant property. Victor presents no evidence to rebut the community presumption and, indeed, concedes the Home Federal loan was likely extended in reliance on the interest in the restaurant property already acquired with the SBA loan funds. Thus, this loan must also be seen as an asset of the community.

Finally, Victor asserts he solely owns the restaurant property by reason of record title. (9) While our courts presume an ownership interest in property is as stated in title (Gudelj v. Gudelj, supra, 41 Cal.2d 202, 212; Socol v. King (1950) 36 Cal.2d 342, 345 [223 P.2d 627]), this presumption may be dispelled by an agreement between the parties that the respective interest should be otherwise. (Machado v. Machado (1962) 58 Cal.2d 501, 506 [25 Cal.Rptr. 87, 375 P.2d 55]; Gudelj v. Gudelj, supra, at p. 212.) (10) Here, Victor took title in his name alone, believing he was entitled to do so under the antenuptual agreement.32 However, whatever authority the agreement may have granted Victor to take title separately,33 that authority expired before the dissolution action, and retroactively reinstated the community presumption. Therefore, the community presumption prevails and the presumption arising from the form of title is without force.

In sum, Victor has failed to present sufficient evidence to rebut the presumption property acquired during marriage is community property. Therefore, the restaurant property and all rents, issues and profits thereof are properly characterized as community property.. . .

Notes

1. The disputes in Winn and Grinius are over the characterization of property purchased with the proceeds of loans taken out during marriage. No default has occurred in either case. The Third party creditors’ are not involved in the litigation. Thus the scope of these decisions must be

32 Victor's testimony on this point conflicts. However, we are compelled to review the evidence in a light most favorable to the judgment.
33 On appeal, Joyce argues for the first time Victor breached his fiduciary duties to her in not telling her the restaurant property was recorded in his name alone. (§§ 2228-2234; Haseltine v. Haseltine (1962) 203 Cal.App.2d 48, 56-57 [21 Cal.Rptr. 238].) She further argues Victor should not now be allowed to profit from his wrongdoing by asserting a presumption based on title. While we need not reach this issue in light of the above reasoning, we do note, under the antenuptual agreement, it was reasonable, though in retrospect incorrect, for Victor to believe the restaurant property was his alone and to record title accordingly.
interpreted in context. Neither court addresses the allocation of the responsibility to repay the loans as between the spouses at the time of marital break dons. Nor do these decision address the rights of the third party creditor to levey agains community property in the case of a default on the obligations.

2. Other community property states reject the general notion that the intent of the spouses is determinative of the character of credit proceeds. For example, the supreme court of Texas, applying the pro-community presumption, has held that “property acquired on the credit of the community is community property.” *Gleich v. Bongio*, 128 Tex. 606, 99 S.W. 2d 881 (1937). However, the court then recognized that “the mere intention of the husband and wive cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse. To accomplish that purpose the vendor must have agreed with the bendee to look only to his or er separate estate for the satisfaction of the deferred payments.” *See* James W. Paulsen, *Acquiring Separate Property on Credit: A Review and Proposed Revision of Texas Marital property Doctrine*, 37 St. Mary’s L.J. 675 (2006).

3. Would the California approach have changed the outcome if applied in *Winn*? Exactly how do the two standards differ? What policy objective is embodied in each standard?

4. How would the Idaho and California standards apply in a situation involving unsecured credit such as a consumer loan? How would these precedents apply to student loans?

C. Reimbursement

As we have seen, when property is acquired through a mix of community and separate property, the dominant approach of the community property states is to assign the ownership interest to either the community or separate property estates based on the time of acquisition, the source of consideration and the intentions of the parties. The non-owning estate is sometimes accorded a right to be reimbursed for contributions to the acquisition of the asset. This concept of reimbursement is amorphous and not well defined in the community property states. The right to reimbursement has not often been separately litigated as a descreet claim in most states because such claims are often set off or otherwise calculated into the equitable distribution of the partyies’ property.

Some states have adopted legislation governing at least some reimbursement situations.

**Texas Family Code § 3.402. Claim for Reimbursement; Offsets**

(a) For purposes of this subchapter, a claim for reimbursement includes:

1. payment by one marital estate of the unsecured liabilities of another marital estate;
2. inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse;
3. the reduction of the principal amount of a debt secured by a lien on property owned
before marriage, to the extent the debt existed at the time of marriage;

(4) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;

(5) the reduction of the principal amount of that part of a debt, including a home equity loan:
   (A) incurred during a marriage;
   (B) secured by a lien on property; and
   (C) incurred for the acquisition of, or for capital improvements to, property;

(6) the reduction of the principal amount of that part of a debt:
   (A) incurred during a marriage;
   (B) secured by a lien on property owned by a spouse;
   (C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and
   (D) incurred for the acquisition of, or for capital improvements to, property;

(7) the refinancing of the principal amount described by Subdivisions (3)--(6), to the extent the refinancing reduces that principal amount in a manner described by the applicable subdivision;

(8) capital improvements to property other than by incurring debt; and

(9) the reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses.

(b) The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate.

(c) Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate.

(d) Reimbursement for funds expended by a marital estate for improvements to another marital estate shall be measured by the enhancement in value to the benefited marital estate.

(e) The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset.
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Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985)

OPINION: James P. Wallace, Justice

This will probate suit presents the sole issue of what constitutes the measure of reimbursement.

Terri L. Anderson is the surviving daughter and devisee under the will of Lawrence Gilliland, deceased. Cleo Gilliland is the widow of Lawrence Gilliland and executrix of his estate.

At the date of the Gilliland's marriage, Mrs. Gilliland owned certain real property. During the marriage the community expended $20,237.89 to build a home on the property. At the time of Mr. Gilliland's death, this home had enhanced the separate property of Mrs. Gilliland by the sum of $54,000.00.

At trial Mrs. Anderson sought to have Mrs. Gilliland include one-half of the reimbursement due the community in the inventory of the estate of Lawrence Gilliland, because of the improvements the community made to the separate estate of Mrs. Gilliland. The trial court held that the proper measure of reimbursement was the enhanced value of Mrs. Gilliland's separate property. It ordered Mrs. Gilliland to include in the inventory an amount equal to one-half of the enhancement resulting from the improvements.

The trial court also found that approximately one-third of the expenditures for the home was from Mrs. Gilliland's separate funds. The court of appeals found that Mrs. Gilliland had not properly traced any separate funds into the home. 677 S.W.2d 105 appealing after remand 624 S.W. 2d 243. Mrs. Gilliland did not appeal that finding.

The court of appeals further held that the proper measure of reimbursement to an estate which has expended funds to erect improvements on another estate is the enhancement of value to the receiving estate or the cost of the improvements, whichever is less. The court of appeals rendered judgment finding the amount of reimbursement due the community was one-half of the $20,237.89 expended, less one-half of the outstanding mortgage of $10,154.00. The community monies expended in building the home were proceeds from the mortgage. We affirm the judgment of the court of appeals in part and reverse and render in part.

The various courts of appeals of Texas are not in agreement on the issue presented here. The Dallas Court of Appeals in this case acknowledged that its decision was contrary to that of the Fort Worth Court of Appeals in Cook v. Cook, 665 S.W.2d 161, (Tex. App. -- Fort Worth 1983, Writ ref'd n.r.e.). Cook follows Harris v. Royal, 446 S.W.2d 351 (Tex. Civ. App. -- Waco 1969, writ ref'd n.r.e.). Both Cook and Royal held that enhancement alone, regardless of cost, is a proper measure of reimbursement in cases such as this.

Another view held by several courts is that the proper measure of reimbursement is enhancement or cost, whichever is less. Hale v. Hale, 557 S.W.2d 614, 615 (Tex. Civ.

The confusion among the courts of appeals is due in great part to imprecise language by this court commencing with the decision of Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935). In consecutive paragraphs Dakan held:

. . . Hence results the rule that the community estate must be reimbursed for the cost of the buildings erected by joint labors or funds upon the separate property of one of the spouses . . . . Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886) (emphasis added),

and

. . . in case of reimbursement for improvements, the amount of recovery is limited to the amount of enhancement of the property at the time of partition by virtue of the improvements placed thereon. Clift v. Clift, supra, [72 Tex. 144, 149, 10 S.W. 338 (1888).]

This court has stated in several cases that the proper measure of reimbursement is the enhanced value of the benefited estate resulting from the improvements. However, most of those statements have been dicta.

In Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777, 781 (1952), we stated:

The amount of reimbursement is not determined by the cost of improvements made, but by the enhancement in value of the estate improved by virtue of the improvements made by the other estate.

In Lindsay, no reimbursement was allowed because there were no pleadings or evidence of enhancement in value.

In Sharp v. Stacy, 535 S.W.2d 345, 351 (Tex. 1976), we stated:

The principle is well established in equity that a person who in good faith makes improvements upon property owned by another is entitled to compensation therefor. The measure of compensation to the claimant is not the original cost of the improvements, but the enhancement in value of the land by reason of the improvement.
The claimant in *Sharp* failed to secure a finding on the enhancement in value of the property by virtue of the improvements and, therefore, was also precluded from recovery.

The right of an estate to reimbursement from another estate is an equitable right and should be determined by equitable principles. *Dakan* at 627, *supra*. Therefore, it is incumbent upon the courts to insure that a benefited estate is not required to pay more in reimbursement than the amount in which it was benefited by the other estate. Likewise, it is necessary to ascertain that the benefited estate pays no less than it has been benefited.

The "cost only" rule, if followed, would provide an easy-to-apply measure since it would not require proof of enhancement. However, such a rule would, in many instances, permit the owner of the benefited estate to be enriched at the expense of the contributing estate. This is true because the estate which contributes the capital necessary to construct the improvements would not share in the increase in value resulting from the investment. The "enhancement or cost, whichever is less" rule, however, would permit the benefited estate the maximum recovery at the expense of the contributing estate in all situations. This does not comport with equity.

We hold that a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefited estate. This rule is more likely to insure equitable treatment of both the contributing and benefited estates in most situations.

The judgment of the court of appeals is affirmed insofar as it holds that Mrs. Gilliland did not properly trace any separate funds to the improvements to her separate property. The judgment is reversed insofar as it holds that reimbursement is measured by the cost or enhancement, whichever is less. We render judgment for Terri L. Anderson and require Cleo Gilliland to include the sum of $21,923.00, representing one-half of the $54,000.00 enhancement to her separate property, less one-half of the outstanding mortgage on the property, in the inventory of the estate of Lawrence Gilliland.

**Notes**

1. Reimbursement “claims” are rarely litigated as separate identifiable aspects of a divorce or probate case. Rather, most often the existence of a right to reimbursement is considered indirectly as part of the valuation of an asset, or is taken into account as a set off against other portions of the property distribution. As a result, identifying and analyzing the unique requirement for reimbursement is difficult to do.


   SILAK, Justice.

   This appeal concerns the classification and division of the parties' community and separate property estates upon their divorce. Two parts of the magistrate's order have been appealed: (1)
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the requirement that Gordon Bliss's separate estate reimburse the community $13,000 which the community spent during the marriage to satisfy Gordon's separate debts; and (2) . . . . We . . reverse the requirement that Gordon Bliss's separate estate reimburse the community $13,000.

I. BACKGROUND

Gordon Bliss (Gordon) has been a chiropractor since 1948. In 1980, Althea Bliss (Althea) (now surnamed Walker) began working as a receptionist/bookkeeper in Gordon's chiropractic offices. In November 1982, Gordon and Althea were married. Their marriage lasted until December 1990. There were no children born of the marriage.

During the parties' marriage, Gordon paid a $15,000 judgment debt to his former wife which was incurred before Gordon married Althea. Gordon paid $10,000 of this debt using his separate assets. However, he paid the remaining $5,000 out of community funds earned during the parties' marriage. He also used community funds to pay a judgment debt of $8,000 for attorneys fees incurred in Gordon's prior divorce action.

Also during the marriage, Gordon executed a "Quit Claim Deed" in which he conveyed to Althea "as her separate property" several contiguous parcels of land comprising about forty-eight acres. Althea recorded this deed with the county recorder's office on April 28, 1988. At trial, Gordon testified that on advice of counsel, he transferred such properties to Althea to prevent attachment by the Internal Revenue Service (I.R.S.). The I.R.S. reportedly denied a tax shelter Gordon claimed in the 1970's resulting in an outstanding tax liability of approximately $75,000.

On December 4, 1990, the magistrate entered a partial decree awarding the parties a over three days in January and February 1991. In May 1991, the magistrate issued findings of fact and conclusions of law. The magistrate concluded that the quitclaim deed by Gordon to Althea of the forty-eight acres was a valid conveyance as between the parties, and therefore, the forty-eight acres was Althea's separate property. The magistrate also ordered Gordon's separate estate to reimburse the community estate $13,000 for the community assets expended during the marriage to satisfy Gordon's separate debts ($5,000 judgment debt to his former wife and $8,000 in pre-marital attorney fees). The magistrate also found that both Gordon and Althea contributed some of their separate funds to the community estate, and that they sufficiently traced the source of their separate funds so as to allow reimbursement to them from the community estate. The magistrate ordered that Gordon is entitled to be reimbursed from the community $84,151.91, and that Althea is entitled to be reimbursed $34,314.28.

Gordon appealed to the district court, and the district court affirmed the magistrate on the issues of the quitclaim deed, and the reimbursement to the community for payment of his separate debts. Gordon now seeks further review of the same issues in this Court.

II. STANDARD OF REVIEW

"This Court reviews the decision of a magistrate judge independently of a district judge sitting in an appellate capacity, but with due regard to the district judge's ruling." Ireland v.
Ireland, 123 Idaho 955, 957-58, 855 P.2d 40, 42-43 (1993). "We will uphold the magistrate's findings of fact if supported by substantial and competent evidence." Id. On issues of law, we exercise free review. Ausman v. State, 124 Idaho 839, 841, 864 P.2d 1126, 1128 (1993).

The division of community property is subject to the sound discretion of the trial court, whose determination will be upheld on appeal in the absence of a clear showing of an abuse of discretion. McNett v. McNett, 95 Idaho 59, 61, 501 P.2d 1059, 1061 (1972).

III. REIMBURSEMENT TO THE COMMUNITY FOR FUNDS SPENT TO PAY SEPARATE DEBTS

Gordon claims the magistrate had no authority to order his separate estate to reimburse the community estate $13,000 which it paid for Gordon's separate debts. It is well established that when community funds are used to enhance the value of one spouse's separate property, such enhancement is community property for which the community is entitled to reimbursement, unless such funds used for enhancement are intended as a gift. E.g., Suchan v. Suchan, 106 Idaho 654, 661, 682 P.2d 607, 614 (1984); Suter v. Suter, 97 Idaho 461, 465, 546 P.2d 1169, 1173 (1976); Gapsch v. Gapsch, 76 Idaho 44, 53, 277 P.2d 278, 283 (1954). In Gapsch, this Court held that community funds spent to reduce the principal of a mortgaged indebtedness on one spouse's separate property retain their character as community property and can be reimbursed. As the Court explained, in situations where a spouse's equity in property has been increased through the application of community funds to the payment of a debt on the property, the measure of reimbursement to the community should be the amount by which such equity is enhanced. Id.

The facts of this case take it outside the direct application of the reimbursement rule as cited in Suchan, Suter, and Gapsch. The community funds were not used to enhance the value of Gordon's separate property. They were used to pay Gordon's antenuptial, unsecured debts. We can locate no Idaho statute or case allowing reimbursement under these circumstances. Indeed, we believe allowing reimbursement would be inconsistent with established precedents.

The measure of the reimbursement for community expenditures on separate property is the increase in value of the property attributable thereto, not the amount or value of the community contribution. Suter, supra; Hiatt v. Hiatt, 94 Idaho 367, 368, 487 P.2d 1121, 1122 (1971). The party seeking such reimbursement to the community carries the burden of demonstrating that the community expenditures have enhanced the value of the separate property, and the amount of the enhancement. Hooker v. Hooker, 95 Idaho 518, 521, 511 P.2d 800, 803 (1972). Althea has not shown an enhancement of the value of any of Gordon's separate property through community payments toward his separate debts.

The magistrate found Gordon's "separate estate was 'enhanced' by the elimination of those separate debts." In other words, Gordon's net worth was enhanced, not the value of any identifiable property. However, our past precedents have required enhancement of separate property. See Suchan, supra, 106 Idaho at 661, 682 P.2d at 614 (community entitled to reimbursement of $60,000 for improvements to spouse's separate land); Hooker, supra, 95 Idaho at 521, 511 P.2d at 803 (reimbursement to community denied where spouse failed to show amounts expended on
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Parties often marry with separate antenuptial debts, and those debts are payable from community property. *Holt v. Empey*, 32 Idaho 106, 110, 178 P. 703, 704 (1919) (community property is liable for separate debts of husband); *Gustin v. Byam*, 41 Idaho 538, 545, 240 P. 600, 603 (1925); *Crapo, Equal Management of Community Property: Creditors' Rights*, 13 Idaho L.Rev. 177, 178 (1977). We recognize, however, that a spouse with control of community funds should not be permitted to use such control as "a weapon ... to deplete, if not destroy, the community property and at the same time enhance the value of his separate property." *Gapsch, supra*, 76 Idaho at 53, 277 P.2d at 283. Accordingly, there may be egregious circumstances of unfair dealing which should result in reimbursement to the community, even if no separate asset was enhanced. However, absent a showing that a spouse fraudulently or selfishly depleted community property to preserve separate assets, we decline to depart from existing precedents. See *Gustin v. Byam, supra*, 41 Idaho at 545-546, 240 P. at 603 (wife seeking to set aside execution sale of community property failed to prove allegation of conspiracy to defraud her of her interest in community property).

Here, the record reveals Gordon paid $10,000 of the $15,000 judgment debt to his former wife with separate property, and contributed significantly of his separate assets toward community property. The magistrate held he was entitled to be reimbursed from the community $84,151.91. There is no claim that Gordon purposefully and unfairly sought to deplete Althea's share of community property to preserve his separate property. With no separate property of Gordon's having been enhanced, and no claim of unfair dealing, we hold the magistrate erred in ordering Gordon's separate estate to reimburse the community $13,000.

CONCLUSION

The magistrate's order requiring Gordon Bliss's separate estate to reimburse the community estate $13,000 is reversed, and the case remanded for further proceedings consistent with this opinion. . . . No costs are awarded on appeal.

McDEVITT, C.J., and JOHNSON and TROUT, JJ., concur.

V. PRO RATA APPORTIONMENT

A. California

Most California Scholars and judges take the position that California does not apply either the inception of right or time of vesting approach to the characterization of property acquired with
mixed consideration. Instead they argue that California apportions the ownership interests in such property between the separate and community estates. As Professor Grace Ganz Blumberg explains:

California Courts have long rejected the view, adopted by most other community property states, that classification is determined by the character of the initial contributions. The majority of the community property states have, in most circumstances, adopted either an ‘inception of right’ or a ‘time of vestsing’ analysis. . . . California court, in contrast, have long apportioned the title to an asset according to the relative contributions of each estate. Each estate shares in the appreciation of the asset.


In re Marriage of Moore, 28 Cal.3d 366, 618 P.2d 208, 168 Cal.Rptr. 662 (1980) (en banc)

MANUEL, Justice.

David E. Moore appeals from an interlocutory judgment dissolving his marriage to Lydie D. Moore. He contests only the trial court's determination of the community property interest in the residence located at 121 Mira Way, Menlo Park . . . .

The principal issue to be decided in this case is the proper method of calculating the interest obtained by the community as a result of payments made during marriage on the indebtedness secured by a deed of trust on a residence which had been purchased by one of the parties before marriage.

Lydie purchased the house at 121 Mira Way in Menlo Park in April 1966, about eight months before the parties' marriage. The purchase price was $56,640.57. Lydie made a down payment of $16,640.57 and secured a loan for the balance of the purchase price. She took title in her name alone as "Lydie S. Doak, a single woman." Prior to the marriage she made seven monthly payments and reduced the principal loan balance by $245.18.

The parties lived in the house during their marriage and until their separation in June 1977. They made payment during this time with community funds and reduced the loan principal by $5,986.20. Lydie remained in the house and continued to make payments, reducing the principal by an additional $581.07 up to the time of trial. At that time the total principal paid on the purchase price was $23,453.02, the balance owing was $33,187.55, the market value of the house was $160,000, and the equity therein $126,812.45.

The trial court concluded that the residence was Lydie's separate property but that the community had an interest in it by virtue of the community property payments made during the
course of the parties' marriage. The trial court further concluded that the community interest was to be determined according to the ratio that the reduction of principal resulting from community funds bears to the reduction of principal from separate funds. No credit was given for the amount paid for interest, taxes and insurance.

The community interest was calculated by multiplying the equity value of the house by the ratio of the community's reduction of principal to the total amount of principal reduction by both community and separate property ($5,986.20 divided by $23,453.02 equals 25.5242 percent). The amount of the community interest was thus determined to be $32,367.86. Lydie's separate property interest was calculated by multiplying the equity value of the house by the ratio of the separate property reduction of principal to the total amount of principal reduction ($17,466.82 divided by $23,453.02 equals 74.4758 percent). Lydie's separate property interest was thus determined to be $94,444.59.

The parties agree that the community has acquired an interest in the house by virtue of the community funds used to make the payments. They disagree, however, as to how the interest is to be determined. Appellant contends that the community property interest should be based upon the full amount of the payments made, which includes interest, taxes and insurance, rather than only on the amount by which the payments reduce the principal. He relies on Vieux v. Vieux (1926) 80 Cal.App. 222, 251 P. 640.

In Vieux, the husband contracted before marriage to buy certain property and paid $280 on account of the purchase price. After the parties' marriage they spent $553.68 of community funds for payment of principal, interest and taxes. The Court of Appeal held that the trial court erred in finding the property to be solely the husband's separate property and stated the rule as follows:

"Thus property purchased by one spouse before marriage is separate property ..., and this is true though a part of the purchase price is not paid until after marriage, in the absence of a showing that any part of the balance was paid with community funds. In any event it would be community property only to the extent and in the proportion that the purchase price is contributed by the community." (80 Cal.App. at p. 229, 251 P. 640.) The court concluded that "the community interest was entitled to share in the title to the property in the same proportion as the amount contributed to the purchase price by the community, to wit, $553.68 bore to the sum of $833.86 (sic)-the total amount paid by the respective parties therefor." (Ibid.)

Although the Vieux court included interest and taxes in its calculation, there is no indication that the issue of the propriety of doing so was presented to the court. The concern in that case was with the question of whether there should be any community interest at all. Since the Vieux court...
did not expressly consider the question of including interest and taxes in the community's interest in the property, we do not consider it to be persuasive authority on that issue.

Where community funds are used to make payments on property purchased by one of the spouses before marriage "the rule developed through decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds." (Forbes v. Forbes, supra, 118 Cal.App.2d 324, 325, 257 P.2d 721; see also Bare v. Bare (1967) 256 Cal.App.2d 684, 690, 64 Cal.Rptr. 335; In re Marriage of Jafeman (1972) 29 Cal.App.3d 244, 257, 105 Cal.Rptr. 483; Estate of Neilson (1962) 57 Cal.2d 733, 744, 22 Cal.Rptr. 1, 371 P.2d 745.) This rule has been commonly understood as excluding payments for interest and taxes. For example in Bare v. Bare, the Court of Appeal directed the trial court to determine the increase in equity in the house during marriage and the fair market value of its before and after the marriage, stating: "the community is entitled to a minimum interest in the property represented by the ratio of the community investment to the total separate and community investment in the property. In the event the fair market value has increased disproportionately to the increase in equity the wife is entitled to participate in that increment in a similar proportion." (256 Cal.App.2d at p. 690, 64 Cal.Rptr. 335; accord In re Marriage of Jafeman, supra, 29 Cal.App.3d at pp. 256-257, 105 Cal.Rptr. 483.)

Appellant argues, however, that interest and taxes should be included in the computation because they often represent a substantial part of current home purchase payments. We do not agree. Since such expenditures do not increase the equity value of the property, they should not be considered in its division upon dissolution of marriage. The value of real property is generally represented by the owners' equity in it, and the equity value does not include finance charges or other expenses incurred to maintain the investment. Amounts paid for interest, taxes and insurance do not contribute to the capital investment and are not considered part of it. A variety of expenses may be incurred in the maintenance of investment property, but such expenses are not considered in the valuation of the property except to the extent they may be relevant in determining its market value from which in turn the owners' equity is derived by subtracting the outstanding obligation. Upon dissolution, it is the court's duty to account for and divide the assets and the debts of the community. Payments previously made for interest, taxes and insurance are neither. Moreover, if these items were considered to be part of the community's interest, fairness would also require that the community be charged for its use of the property.

In summary, we find no basis for departing from the present rule which excludes amounts paid for interest, taxes, and insurance from the calculation of the respective separate and community interests. We turn to that calculation in this case.

Although many formulae have been suggested, we are not persuaded that any of them would be an improvement over a formula based on the reasoning of In re Marriage of Aufmuth
(1979) 89 Cal.App.3d 446, 152 Cal.Rptr. 668, which was approved in In re Marriage of Lucas (1980) 27 Cal.3d 808, 166 Cal.Rptr. 853, 614 P.2d 283. We were there concerned with determining the respective community and separate interests in a residence purchased during marriage with a combination of community and separate funds where the community contributed the loan and subsequent payments on it and there was an agreement or understanding that the party contributing the separate property down payment was to retain a pro rata separate property interest. (Id., at pp. 816-817, 166 Cal.Rptr. 853, 614 P.2d 283.) The formula we used there recognized the economic value of the loan taken to purchase the property. In the formula postulated in Lucas the proceeds of the loan were treated as a community property contribution on the assumption that the loan was made on the strength of the community assets. (Id., at pp. 816-817, fn. 3, 166 Cal.Rptr. 853, 614 P.2d 283.)

In the present situation, the loan was based on separate assets and was thus a separate property contribution; the down payment was also a separate property contribution. Therefore under the Lucas/Aufmuth formula the proceeds of the loan must be treated as a separate property contribution. Accordingly, the formula would be applied as follows: The separate property percentage interest is determined by crediting the separate property with the down payment and the full amount of the loan less the amount by which the community property payments reduced the principal balance of the loan ($16,640.57 plus ($40,000 minus $5,986.20) equals $50,654.37). This sum is divided by the purchase price for the separate property percentage share ($50,654.37 divided by $56,640.57 equals 89.43 percent). The separate property interest would be $109,901.16, which represents the amount of capital appreciation attributable to the separate funds (89.43 percent of $103,359.43) added to the amount of equity paid by separate funds ($17,466.82). The community property percentage interest is found by dividing the amount by which community property payments reduced the principal by the purchase price ($5,986.20 divided by $56,640.57 equals 10.57 percent). The community property share would be $16,911.29, which represents the amount of capital appreciation attributable to community funds (10.57 percent of $103,359.43) added to the amount of equity paid by community funds ($5,986.20).

In this case the trial court used a different formula which appears to have been based upon a statement in In re Marriage of Jafeman, supra, 29 Cal.App.3d 244, 256, 105 Cal.Rptr. 483, that might be interpreted to mean that the interests are to be determined according to the proportionate equity contributions only, with no credit given for the loan contribution. This formula might be appropriate when the obligation on the property has been fully paid. To apply it in the present situation, however, when the purchase price of the amount owing on the loan has not been fully paid ignores the role of the loan and produces inconsistencies with the principles of the Lucas/Aufmuth formula.

Although the trial court erred in determining the parties' interests in the residence, the error was in David's favor. Since he was not prejudiced by the error and Lydie did not appeal, reversal of this portion of the judgment is unwarranted.
Notes

1. What does it mean to say that a “pro tanto equitable lien” exists in the real estate? What is the advantage of such a lien? By according a lien interest in the underlying real estate is the California court actually applying a pro rata sharing approach to the determination of the community interest?

2. How is the value of the community property interest in the real estate calculated under the Moore test?

3. If California is an apportionment state, what is the explanation of the following statutory provision?

**California Family Code § 2640. Contributions to acquisition of property; Amount of reimbursement; Waiver**

(a) "Contributions to the acquisition of property," as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.

(c) A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.

4. Professor Blumberg states that “[s]ection 2640 adopts a remedy without a rationale.” Even if section 2640 statutorily supplants California’s apportionment rules, Professor Blumberg points out that the statute is not comprehensive: “section 2640 clearly does not cover the field. It has no application, for example, when community property is used to pay off the purchase price of separately titled property purchased by one spouse before marriage.” See Blumberg, Community Property in the United States, supra at p. 295.
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B. Pensions: Basic Rules

All the community property states employ pro rata sharing principles to characterize cash and cash-equivalent investment assets such as bank accounts, mutual funds and pensions. The most significant litigation in this area has been over the characterization and distribution of pensions. A pension is often the most valuable asset a couple owns at the time of divorce. Because pensions are generally not liquid (they usually cannot be cashed in or transferred), the post significant logistical issues for the distribution of marital property also.

Before launching into the case law, some basic background on pensions is helpful. Most pensions plans fall into two categories. The older, more traditional category of pensions is called defined benefit plans. Since the early 1970’s a second category of pension plans has emerged as a result of favorable federal tax policies, called defined contribution plans.

Defined benefit plans function as retirement savings, but also have some characteristics of insurance. The benefit a worker receives from a defined benefit plan is determined by a formula that is established in the plan documents. The name of these plans derives from this feature – the specific pension “benefit” is “defined” in the plan itself. Although formula can vary from plan to plan, they often share common characteristics. Most formulas include common variables such as the number of years of service with the company and/or the employee’s pay at the time of retirement. Generally the benefit provided by a defined contribution plan is not directly related to the financial performance of the plan’s investments.

Defined benefit plans historically required that each employee participate in the plan for a period of time before becoming eligible to participate in the benefit. This process is referred to as vesting. As a result of vesting requirements, plans would receive contributions from employees who would never become eligible to participate in the plan. These contributions helped insulate the plan from the risk that it might be obligated to provide more benefits that it could afford. In some cases, vesting periods could be quite long – twenty years, for example. In other situations vesting periods were significantly shorter – 2-5 years.

Recognizing the increasing importance of pensions to workers and employers, Congress passed legislation regulating such plans in 1974 – the Employee Retirement Income Security Act (ERISA). This statute established minimum standards for private pension plans and instituted rules regarding the federal income tax treatment of transactions relating to such plans. ERISA requires disclosure of basic financial information about the plan to plan beneficiaries and established minimum standards of conduct for the fiduciaries managing private pension plans. For example, ERISA imposed limits on the length of the employee’s vesting period.

Defined benefit plans are most common in industrial settings where workers are unionized and in government employment. Such plans are slowly becoming less common. Because the

plans guarantee a benefit, they expose employers to the risk that the plan will not be adequately funded. For this reason, many employers have sought to phase out or even abandon in bankruptcy, their defined benefit plans.

Federal provides that a defined contribution plan is a form of retirement savings in which “the plan provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.” In contrast to the defined benefit plan, defined contribution plans do not include a guaranteed benefit. Thus the investment risk associate by the plan is borne by the individual employee and not by the plan or by the employer. The precursors to today’s defined contribution plans have been around since the middle of the 20th Century. However, such plans became common after 1978 when the federal tax code was revised to clarify the tax treatment of such plans. Defined Contribution Plans also are regulated through ERISA.

Defined contribution plans are quite common today. They are desirable to employers because they impose less risk on the employer. Such plans have also been viewed as highly desirable by employees who generally may exercise more control over the investments in a defined contribution plan and who feel that they are maximizing their benefit through more direct participation in the investment markets.

From a marital property perspective, both types of plans pose difficult issues. The resolution of those issues might vary depending on the type of plan. Because pensions are often a very sizable asset compared to the rest of the marital estate, are under the control of only one of the two spouses, and cannot be liquidated at the time of divorce, special approaches are required.


BOYLE, Justice.

In this appeal from the magistrate's decision in a divorce action, we are called upon to determine whether it was error for the magistrate to award a portion of the husband-appellant's pension benefits to the wife-respondent. We must also determine whether the magistrate erred by not making a lump sum distribution of the non-employee spouse's interest in the pension benefits, and whether the community interest was calculated in a proper manner.

The appellant, Holbrook Maslen, is an airline pilot for United Airlines. Mr. Maslen and the respondent, Eileen Maslen, were married on January 19, 1985. On March 6, 1985, Mr. Maslen filed for divorce in the state of Nevada, and thereafter on August 21, 1985, Mrs. Maslen filed for divorce in Blaine County, Idaho, where the divorce was finally granted on September 8, 1987.

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The magistrate found that the only community assets were two pension plans with Mr. Maslen's employer, United Airlines. The community debts were divided equally and the magistrate ruled that all separate property of the parties remained separate property during the course of the marriage.

The first of the two pension plans is a "fixed benefit" plan (hereinafter "FB Plan"), in which Mr. Maslen is fully vested. This plan entitles him to a fixed, life-time monthly benefit upon retirement or termination of his employment with United Airlines. Under the FB Plan, the employee's benefit, funded entirely by United Airlines, is calculated as a percentage of the employee's current salary at the time of retirement, multiplied by the number of months of participation in the plan. Although normal retirement is age sixty, a participant is eligible to retire any time after attaining age fifty, however, early retirement would result in a lower retirement benefit.

The second pension plan is a "directed account" plan ("DA Plan") in which Mr. Maslen is also fully vested. Under this plan United Airlines contributes into his account an amount equal to nine percent of his monthly salary. Mr. Maslen has investment control over the funds in this directed account plan. Under this plan no guaranteed retirement benefit is promised. Rather, the retirement benefit is based on the value of the account or the accrued benefit, at the time of distribution or retirement. The total benefit accrued in this plan is the sum of the accumulated contributions plus or minus earnings or losses on the accumulations.

Relying on I.C. §32-906, the magistrate determined the community's interest in each plan by determining Mr. Maslen's entitlements as of the date of the marriage and the date of the divorce. The magistrate then subtracted the amount to which he was entitled as of the date of marriage from the amount to which he was entitled on the date of divorce. The difference between these two amounts was determined by the magistrate to be the portion of the benefits acquired during the

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37The term "vested," as it is used in relation to pension rights, "refers to a pension right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement." In re Marriage of Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633 (1976).

38Idaho Code §32-906 states:

32-906. Community property--Income from separate and community property--Conveyance between spouses.--(1) All other property acquired after marriage by either husband or wife is community property. The income of all property, separate or community, is community property unless the conveyance by which it is acquired provides or both spouses, by written agreement specifically so providing, declare that all or specifically designated property and the income from all or the specifically designated property shall be the separate property of one of the spouses or the income from all or specifically designated separate property be the separate property of the spouse to whom the property belongs. Such property shall be subject to the management of the spouse owning the property and shall not be liable for the debts of the other member of the community. (2) Property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed or other instrument of conveyance notwithstanding the provisions of section 32-912, Idaho Code; provided, however, that the income from such property shall not be the separate property of the grantee spouse unless this fact is specifically stated in the instrument of conveyance.
marriage, and therefore held the difference to be the community portion of the pension benefits.

Mrs. Maslen's one-half share of the community portion of the DA Plan benefits was offset by a prejudgment distribution of community property and her portion of the community debts. Her marital share of the DA Plan benefits was to be paid immediately in a lump sum by the plan administrator, and her share of the FB Plan benefits was to be paid in monthly payments to her directly from the plan administrator.

On appeal the district judge affirmed the magistrate's ruling. Mr. Maslen then appealed to this Court. We assigned the case to our Court of Appeals, which also affirmed. The case is now before this Court on a petition for review.

Mr. Maslen asserts that the magistrate erred in three ways. The first alleged error was that the magistrate abused his discretion by dividing the community assets, i.e., the pension benefits accrued during the length of the marriage, equally between the parties. The second alleged error is that the trial court failed to properly calculate the value of the community interest in the pension plans. The third alleged error is that the magistrate should have ordered a lump sum award of the non-employee spouse's interest in the FB Plan pension benefits.

I.

In Idaho, separate property is defined in I.C. §32-904 and §32-905. Community property is defined in I.C. §32-906 as "[a]ll other property acquired after marriage by either husband or wife is community property." See Shill v. Shill, 115 Idaho 115, 765 P.2d 140 (1988). Retirement benefits, to the extent earned during marriage, are deemed community property. Griggs v. Griggs, 107 Idaho 123, 686 P.2d 68 (1984); Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975). Generally, community property will be divided in a substantially equal manner unless there are compelling reasons which justify otherwise. I.C. s 32-712(1); Rice v. Rice, 103 Idaho 85, 645 P.2d 319 (1982). Therefore, absent compelling reasons which justify otherwise, it is settled beyond dispute that there shall be a substantially equal division of pension benefits which were acquired during the time of the marriage. I.C. §32-712; Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); accord Shill v. Shill, 115 Idaho 115, 765 P.2d 140 (1988). It is likewise well established that the trial court's decision to equally divide community property will be reviewed on an abuse of discretion standard, Hooker v. Hooker, 95 Idaho 518, 511 P.2d 800 (1973); Ripatti v. Ripatti, 94 Idaho 581, 494 P.2d 1025 (1972). Further, "[t]he disposition of community property is left to the discretion of the trial court, and unless there is evidence in the record to show an abuse of that discretion, the award of the trial court will not be disturbed." Koontz v. Koontz, 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980).

3932-712. Community property and homestead--Disposition.--In case of divorce by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows: 1. The community property must be assigned by the court in such proportions as the court, from all the facts of the case and the condition of the parties, deems just, with due consideration of the following factors: (a) Unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses. (b) Factors which may bear upon whether a division shall be equal, or the manner of division, include, but are not limited to: (1)
Mr. Maslen asserts that the parties never established the requisite "marital community" to which benefits and detriments would accrue. According to him this lack of "marital community" is demonstrated by the brevity of the marriage and the fact that it was troubled from its onset, as indicated by the initiation of divorce proceedings very early in the marriage and that the parties never established a regular pattern of living together. He contends that the trial court disregarded these compelling reasons and improperly ordered an equal division of the pension benefits. We disagree.

Mr. Maslen cites two cases in which an unequal division of community assets were upheld—Shurtliff v. Shurtliff, 112 Idaho 1031, 739 P.2d 330 (1987), and Hentges v. Hentges, 115 Idaho 192, 765 P.2d 1094 (Ct.App.1988).

It is within the discretion of the trial court to determine whether there are any compelling reasons that would justify a division of the community property that is not substantially equal. Ross v. Ross, 117 Idaho 548, 554, 789 P.2d 1139, 1145 (1990). In Hentges our Court of Appeals stated: On an issue of abuse of discretion, the appellate inquiry is multi-tiered: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any rules applicable to specific choices; and (3) whether the court made its decision by an exercise of reason. 115 Idaho at 195, 765 P.2d at 1097. See also State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989), and Sun Valley Shopping Center v. Idaho Power, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

In Shurtliff, this Court said: The disparity in the property division herein is due largely to the assignment of the community debts to Mr. Shurtliff. The question before this Court is whether, by doing so, the trial court abused its discretion. The findings of fact contain ample justification for the disparate division of property. The factors listed in I.C. §32-712 which justify disparate division in this include the duration of marriage, employability of each spouse, and the present and potential earning capability of each party. Hence, the disparate property division cannot be deemed an abuse of discretion. 112 Idaho at 1034, 739 P.2d at 333. Likewise, in Hentges, our Court of Appeals found there was no abuse of discretion. 115 Idaho at 195-96, 765 P.2d at 1098.

In dividing the community property in this case, the magistrate made findings concerning the factors contained in I.C. §32-712(1)(b), and concluded: "The court has made the foregoing distribution of the community assets and obligations considering the factors enumerated in Idaho Code Section 32-712 and concludes that it is fair and equitable division under the circumstances." The magistrate's findings and conclusion reveal that the magistrate 1) understood that the division

Duration of the marriage; (2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement; (3) The age, health,occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse; (4) The needs of each spouse; (5) Whether the apportionment is in lieu of or in addition to maintenance; (6) The present and potential earning capability of each party; and (7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits.
of the community was within the magistrate's discretion, 2) acted within the outer boundaries of the discretion and consistent with the legal standards provided in I.C. §32-712(1), and 3) reached the decision by an exercise of reason. Therefore, there was no abuse of discretion in dividing the community.

II.

Under the DA Plan, an individual account balance is maintained for each participant, and there is no guaranteed retirement benefit. Rather, the amount of the retirement benefit is based on the value of the account at the time of retirement which is equal to the sum of the contributions and the investment earnings. Upon retirement Mr. Maslen is entitled to receive the sum of the contributions, plus earnings, in the form of a joint survivor annuity or a lump sum payment.

The magistrate calculated the community interest in the DA Plan benefits by simply subtracting Mr. Maslen's account balance at the time of marriage from his account balance at the time of the divorce. This difference, the magistrate determined, was the portion of the retirement benefits accrued during marriage and therefore, as community property, Mrs. Maslen was entitled to one-half of that amount.

Mr. Maslen asserts that the magistrate improperly calculated the community portion of the DA Plan. He contends that the magistrate should have calculated the community's interest in the plan using the "time rule" rather than freezing the account balance at the time of marriage and subtracting that amount from the account balance that existed at the time of divorce--the difference being the amount acquired during marriage and therefore the community's interest in the pension benefits.

The "time rule" determines community interest in a retirement fund by computing the ratio of the time of marriage ... during which pension benefits were earned, to the total years of service during which the pension was earned. This percentage is then applied against the amount of retirement income to be received ... one half of this amount [is the non-employee spouse's] half of the community asset. Note, Distribution of Pension Benefits: Time Runs out on the Time Rule, 10 Pac.L.J. 847, 850 (1979).

Although the "time rule" method of valuation of the community interest in pension plans has been employed,40 this Court has never adopted nor held that the "time rule" is the only acceptable method. On the contrary, the trial courts have been given broad discretion in the division of marital property. Shill v. Shill, 115 Idaho 115, 765 P.2d 140 (1988); Koontz v. Koontz, 101 Idaho 51, 607 P.2d 1325 (1980); Hooker v. Hooker, 95 Idaho 518, 511 P.2d 800 (1973); Ripatti v. Ripatti, 94 Idaho 581, 494 P.2d 1025 (1972).

In the instant case, the trial court divided the DA Plan based on I.C. §32-906 which defines all property acquired during marriage, by husband or wife, as being community property. As noted, in divorce proceedings the determination of the value of community property is within the discretion of the trial court and will not be disturbed on appeal if it is supported by substantial competent evidence. See Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984); Martsch v. Martsch, 103 Idaho 142, 645 P.2d 882 (1982).

The record before us reveals that the evidence presented to the magistrate, which related to the value of the pension benefits, was in the form of account statements showing the contributions made during the marriage and the account balance at the time of marriage and at the time of divorce. Any contributions, increases or earnings in the account which occurred prior to the marriage are separate property under I.C. §32-903, and this portion of the account is reflected in the account balance at the time of marriage. By subtracting the account balance at the time of marriage from the account balance at the time of divorce, the portion of the contributions and the increases in the account which were acquired during the marriage are identified. There is a rebuttable presumption that all property acquired during marriage—-in this case, contributions and increases in the account—is community property. I.C. §32-906; Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984); Eliasen v. Fitzgerald, 105 Idaho 234, 668 P.2d 110 (1983). In the instant case the appellant does not assert that any portion of the increase in the DA plan during the marriage is separate property, and appellant did not introduce any evidence at trial concerning whether the increase in the DA plan account was the result of enhancement in value of the separate property in the account resulting from inflation or other market factors, which increase would be the separate property of the appellant, see Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), or whether the increase was from "income" from the separate property investment in the DA plan account, which under I.C. §32-906, would be community property. The magistrate's calculation of the marital portion of the benefits as the increase between the account balance at the time of marriage and that at the time of divorce, is consistent with I.C. §32-906, in view of the lack of any evidence to rebut the presumption of community property under I.C. §32-906. Hence, under the facts presented in this case, we do not find an abuse of the magistrate's discretion in determining that portion of the pension plan to be community property.

III.

A.

Mr. Maslen is fully vested in the FB Plan and had been a participant in that plan for 240 months at the time of divorce. The accrued benefit in this plan is expressed in terms of a monthly annuity commencing at normal retirement age which is defined to be age sixty. A participant is eligible to retire any time after attaining age fifty, however, retiring before attaining that age will reduce the amount of a participant's monthly retirement benefits.

The magistrate calculated the community portion of the FB Plan retirement benefits as being the difference between the monthly accrued normal retirement benefit to which Mr. Maslen would have been entitled upon the date of marriage, from that which he would have been entitled
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upon the date of divorce. The magistrate's calculation process reflected consideration of the applicable early retirement factor as provided under the FB Plan. Mrs. Maslen's portion was similarly determined by the magistrate to be one-half of the difference between the two monthly accrued benefits. In making this determination, the magistrate again stated that he relied on the definition of community property as set forth in I.C. §32-906.

In *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988) (*Shill II*), this Court partially reversed its prior decision in *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979) (*Shill I*). In Shill I, this Court noted that the non-employee spouse's portion of the retirement benefits might have to be paid at the time of the employee spouse's retirement because of lack of liquid assets to distribute at the time of divorce. However, *Shill II* made it clear that retirement benefits should be valued at the time of divorce, because to do otherwise would give the non-employee spouse a portion of the employee spouse's separate property. The Court in *Shill II* then held that the non-employee spouse's award should be based upon the monthly sum which would have been received at the time of divorce.41

Because the provisions of retirement plans vary so greatly from plan to plan, both in the manner of funding and also in the administration of the plans, and because the circumstances in each case are so varied, we decline to state a single inflexible rule for calculating the community interest or value of retirement plans. See *Rogers & Rogers*, 45 Or.App. 885, 609 P.2d 877 (1980). "For all of these reasons, it appears to us to be impractical--if not impossible--to formulate a categorical rule about the appropriate treatment of retirement accounts in dissolution of marriage cases. Because there are so many variables, individual cases will have to be largely decided on their facts." 609 P.2d 877 at 881. We conclude that it is a better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most equitable manner for determining and dividing the marital portion of pension benefits. *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988).

B.

The QDRO42 entered in this action by the trial court orders that Mrs. Maslen's share of the

41The Court stated in *Shill II* that the award should be "based upon the monthly sum which would have been received if the employee spouse had taken retirement at his first eligibility." (Citations omitted.) In the instant case that date is only six months after the decree of divorce, and hence the difference in value is not deemed significant. There may, of course, arise cases in the future in which the lapse of time between divorce and first eligibility for retirement is of substantial length, and in which therefore the problems will be exacerbated. It is sufficient to say that we do not explore those problems today, but leave them to a case-by-case resolution in the future." *Shill II*, 115 Idaho at 120, 765 P.2d at 145. In *Maslen*, the case presently at bar, Mr. Maslen was eligible for early retirement at the time of divorce, and his monthly accrued benefit was easily determined at that time.

Chapter 3: Classifying Property As Community

FB Plan benefits is to be paid in monthly payments unless she elects to receive her share in some other form. The monthly payments were ordered to begin within sixty days from the date Mr. Maslen attains earliest retirement age, regardless of whether he elects to receive early retirement benefits. Since he was fifty-three years of age at the time of divorce, he had already attained earliest retirement age, which under the plan is age fifty.

Mr. Maslen contends that the magistrate erred when he ordered Mrs. Maslen's interest under the FB Plan to be paid in monthly payments by the plan administrator. He asserts that the magistrate should have determined the present value of her interest in the FB Plan, and then ordered a lump sum award.

Under I.C. §32-712, the trial court has the power to dispose of the community property in an equitable manner, however, pursuant to I.C. §32-903, the separate property belonging to each spouse remains separate following the termination of the marriage. With regard to the disposition of community property, the general rule is that the trial court should, if possible, order the disposition of the community property so as to give each spouse sole and immediate control of his or her determined share. *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988); *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Larson v. Larson*, 95 Idaho 376, 509 P.2d 1297 (1973); *Largilliere v. Largilliere*, 50 Idaho 496, 298 P.362 (1931). However, there are times such as in the case at bar, that the pension rights represent the only significant marital asset owned by the community. Accordingly, in that situation, the trial court cannot order an immediate award of equivalent property to the non-employee spouse in exchange for his or her interest in the pension benefits simply because there is no equivalent property to award.

The QDRO concept was developed for the purpose of separating a non-employee spouse's interest in a private retirement plan upon divorce. A QDRO identifies each share of the future benefits and separates the benefits, giving each spouse that portion to which he or she is entitled when the benefits become distributable. In effect, a QDRO is a present separation of future retirement benefits. Furthermore, a QDRO generally is an acceptable and appropriate method of dividing a retirement plan and, under certain circumstances, may be preferable over a cash distribution because it does not place an undue financial strain on either party. Such a plan simplifies valuation questions and is an appropriate means of giving each spouse sole and immediate control over his or her share of the retirement benefits.


4329 U.S.C.A. §1056(d)(3)(E)(i)(III), allows payments to an alternate payee in any form in which such benefits may be paid under the plan to the participant, other than in the form of a joint and survivor annuity. Upon retirement, the FB Plan allows retirement benefits to be paid in monthly payments or, if retirement occurs before age sixty, there may be a lump sum distribution of the employee's contribution account.
In this case Mr. Maslen was prepared to make a lump sum payment to Mrs. Maslen. The magistrate should have included a provision in the QDRO that would have given him the option to make a lump sum payment to her within sixty days after judgment was entered representing the present value of her interest in the FB Plan benefits. On remand, the magistrate shall allow Mr. Maslen the option to pay Mrs. Maslen within sixty days, the present value of the remaining payments to which she is entitled from the FB Plan.

The judgment of the magistrate court is affirmed except that the case is remanded to the magistrate to allow Mr. Maslen the option of making a lump sum payment as provided in Part III. Costs to respondent. No attorney fees awarded.

JOHNSON, Justice, concurring, concurring specially, and concurring in the result.

I concur in the Court's opinion, except part II, in which I concur specially, and part III(A), in which I concur in the result.

As to part II, I write only to clarify that I view the DA Plan as, in essence, a savings account. This Court has never held that the time rule is appropriate for the division of community savings accounts. Therefore, the trial court was correct in not applying the time rule to the DA Plan.

As to part III(A), I write to point out that while I agree we should affirm the magistrate judge's division of the FB Plan, I would do so by distinguishing the cases in which it is appropriate for the trial court to employ the time rule and those such as this one where it is appropriate for the trial court to employ the accrued benefit method.

In Ramsey and Beesley, the retirement benefits at issue were vested military pensions. In Shill I and II, the benefits at issue were provided through the Idaho Firemen's Retirement Fund and had not vested during the marriage. The Court approved the use of the time rule in Ramsey and Beesley. The Court's discussion in Shill I is consistent with the approval of the use of the time rule in Ramsey. The record in Shill II indicates that the trial court on remand following this Court's decision in Shill I used the time rule to apportion the retirement benefits. The issue of the propriety of the use of the time rule was not raised on appeal in Shill II.

In my view, because of the prominent role that the length of service plays in the determination of vested military retirement benefits and in the determination of the right to benefits under retirement systems such as the Idaho Firemen's Retirement Fund, the time rule remains an appropriate means of apportioning benefits or rights in those cases. We confront a different situation, however, when we address the apportionment of defined or fixed benefits provided under private employer retirement plans. In these plans there are several variables that make the apportionment more complicated.

In this case, the magistrate used the accrued benefit method of apportioning the vested...
benefits that were earned by Mr. Maslen during his marriage to Mrs. Maslen. This method appropriately took into account not only the length of service, but also average earnings, and the calculation of benefits on early retirement at both the date of marriage and the date of divorce. Use of the time rule for apportioning the type of retirement benefits provided under the FB Plan would not have correctly identified the variables that measure the portion of the benefits earned by Mr. Maslen during the marriage.

McDEVITT, Justice, concurring in the result.

A casual reader of the Court's opinion might conclude that this opinion is precedent for methodology of apportioning retirement benefits upon the dissolution of a marital community. Such is not the case. The Court's opinion is dispositive of those issues raised in the case at issue, to wit Maslen v. Maslen.

1. D.A. Plan (Defined Contribution Plan)

The D.A. Plan is aptly described by Justice Johnson in his concurring, concurring specially, and concurring in the result opinion as a "savings account." There is no apportionment rule or methodology to be applied to such an account. The account is subject to direct proof as to the amounts contributed during the marriage; which said amount, together with the income thereon and any appreciated value in the investments made (or subtracting the declination in value of investments made), is community property which subtracted from the principal balance of the account leave that which is separate property, if separate property is claimed.

In the instant case, the trial court correctly entertained direct evidence of the account balance for stated dates to determine the contributions made during the marriage and from such direct evidence determined the interests of the community.

2. F.B. Plan (Defined Benefit Plan)

The trial court, in valuing the community's interest in the F.B. Plan (defined benefit plan), correctly applied the accrued benefit rule in apportioning the retirement benefits earned during the marriage of the Maslens.

The Court's opinion in this case, in dicta, states that this Court will review for approval or disapproval, any methodology fashioned by the trial court to fairly apportion between the community and separate estate interests in retirement benefits. This statement is not consistent with the holdings of this Court, particularly in Shill II, wherein the Court held that it was inappropriate under any circumstances to apportion a separate interest in retirement benefits to the community or although not expressly held, to apportion community benefits to the separate estate. This is the holding of Shill II and the Court simply directed that the date of divorce be used as the cutoff date to determine those benefits to avoid apportioning separate retirement benefits to the community estate in that case. The Time Rule, if applied in any instance where there are separate estate interests and community estate interests in a defined benefit plan or plans, results in
apportioning either community interests to the separate estate or separate interests to the community estate. This is so due to the fact that the Time Rule treats each day under a retirement benefit plan as equal to every other day. The fact is that this is never the case; salaries increase, benefit plans reward the covered employee for longevity, and defined benefits are enhanced. The application of the Shill II rule forbidding the apportionment of separate to community or community to separate in dividing retirement benefit plans is an express abrogation of the Time Rule.

If this Court is to overturn Shill II and prior decisions, or revisit them in subsequent cases, it should consider a direct application of the Time Rule unfettered by the cutoff period contemplated by Shill II (date of divorce) and apply a rule of total equity. The result would be the adoption of the Time Rule from date of plan inception or employee coverage to date of retirement.

**Laing v. Laing, 741 P.2d 649 (Alaska 1987)**

Compton, J.

The trial court awarded Kenneth his pension with a present value of $27,000 and awarded Marla offsetting marital assets. Kenneth challenges the award on the grounds that there was insufficient evidence to support the $27,000 figure and that Marla's share should not have been awarded in a lump sum. We first address the issue whether the trial court properly characterized Kenneth's nonvested pension as marital property.

Alaska thus follows the majority rule that "vested" pension and retirement benefits are subject to division by a divorce court. Annotation, Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses, 94 A.L.R.3d 176, 182 [hereafter Annot., Pension Rights]. Whether the majority rule can also be applied with regard to Kenneth's nonvested pension rights is a question of first impression in Alaska. Jurisdictions are split on this issue. Those in which nonvested pensions are held not to be divisible marital property rely primarily on the notion that such interests are too speculative and cannot be said to constitute a property right. See, e.g., Wilson v. Wilson, 409 N.E.2d 1169, 1178 (Ind. App. 1980); Ratcliff v. Ratcliff, 586 S.W.2d 292, 293 (Ky. App. 1979); cf. Copeland v. Copeland, 91 N.M. 409, 575 P.2d 99, 101 (1978) (although pension there at issue was vested, court stated in dicta that an unvested pension "cannot be said to constitute a property right because the benefits rest upon the whim of the employer.").

The trend, however, is to consider pensions as marital property regardless of whether they have vested.
Supporting this trend is the reasoning that the contingent nature of a nonvested pension presents simply a valuation problem, not bearing on the non-employee spouse's entitlement to a just share of the marital assets. See, e.g., In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 567, 126 Cal. Rptr. 663 (1976); Wilder v. Wilder, 534 P.2d at 1358; 1 McCahey, supra p.16, @ 18.03[3] at 18-28. Pension benefits are generally viewed as deferred compensation for services rendered and the employee spouse's right thereto is a contractual right. Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705, 708 (1981); Brown, 15 Cal. 3d 838, 544 P.2d at 565. "The fact that a contractual right is contingent upon future events does not degrade that right to an expectancy." Brown, 15 Cal. 3d 838, 544 P.2d at 566 n.8.

One commentator provides another persuasive reason for characterizing even nonvested pensions as divisible marital assets:

The non-employee spouse's contribution to the pension asset is exactly the same whether the pension be labeled a mere expectancy, or a contingent future interest.


We are persuaded that the contingencies that may prevent the employee spouse from ever collecting his or her nonvested pension should not bar the non-employee spouse from recovering a share if the pension is in fact paid out. Indeed, a contrary rule would frustrate the statutory command that Alaska courts effect a "just division of the marital assets." AS 25.24.160(a)(4). This obviously requires that the trial court consider the financial circumstances of each party. Cose, 592 P.2d at 1233 (Matthews, J., concurring), cited with approval in Monsma, 618 P.2d at 561 n.3; see generally Merrill, 368 P.2d at 547-48 n.4; Malone v. Malone, 587 P.2d 1167 (Alaska 1978). It would be wholly inconsistent with this policy to ignore the existence of so substantial an asset as a party's pension rights. In this regard, we adopt the rule representing the current trend and recognize nonvested pension rights as a marital asset.

b. Valuation and Division.

The trial court assigned a present value of $27,000 to Kenneth's pension, awarded it to him and awarded Marla offsetting assets. Kenneth asserts that there was insufficient evidence to support the present value figure adopted by the trial court. For the reasons stated below we reject generally the present value method of dividing nonvested pensions and remand the case.

Courts have used two primary methods of valuing and dividing pension benefits, whether vested or nonvested, upon divorce: the present value approach and the reserved jurisdiction approach. Johnson, 638 P.2d at 708; Brown, 15 Cal. 3d 838, 544 P.2d at 567; Deering v. Deering, 292 Md. 115, 437 A.2d 883, 891 (1981).\textsuperscript{11}

\textsuperscript{11}A third possible method of division is to award the non-employee spouse a percentage of the employee spouse's contribution to the plan plus interest. See, e.g., Deering, 437 A.2d at 891-92; Bloomer, 267 N.W.2d at 241. We reject this method because it ignores employer contributions which, to the extent they were made during marriage, ought to
In the present value approach, a court faced with a nonvested pension factors the contingencies to collection into a "reduced to present value" calculation. A similar reduction to present value can easily be obtained for a vested pension. The court determines a fraction of the present value representing the marital contribution to the accrued pension benefits. The numerator of this fraction is the number of years the pension has accrued during the marriage; the denominator is the total number of years during which the employee spouse's pension has accrued. . . .

Citing the goal that a property settlement should provide a final resolution of a divorcing couple's financial affairs, a number of courts have stated that the present value approach is preferred where a present value can be attached to the pension and where there exist other marital assets sufficient to satisfy the non-employee spouse's claim without undue hardship on the employee spouse. . . .

We nonetheless find this method unacceptable. Since the non-employee spouse receives his or her share in a lump sum at the time of the divorce, the method unfairly places all risk of possible forfeiture on the employee spouse. While the probability of forfeiture is supposedly factored in to reduce the present value amount determined at the time of the divorce, it is clear that the non-employee spouse has taken only a reduction in the amount of the award whereas the employee spouse loses the entire amount awarded to the non-employee spouse in the event of forfeiture. We find this approach to be inherently unfair.

In the other scheme used by the courts for valuation and division of a pension, the reserved jurisdiction approach, the trial court retains jurisdiction and orders the employee spouse to pay to the former spouse a fraction of each pension payment actually received. . . . This scheme more evenly allocates the risk of forfeiture between the parties, although it also runs counter to our expressed preference for finalizing a couple's financial affairs as soon as possible. . . .

However, reserving jurisdiction does not necessarily mean that a protracted pay-out to the former spouse will follow vesting. Once vesting occurs, that portion of the pension which is marital property can be calculated as of the time of the divorce. The non-employee spouse's share of this figure may, in appropriate cases, be payable in a lump sum or in installments which do not particularly have to be keyed to the time that the pension benefits are actually received.

We are persuaded that reserving jurisdiction more closely parallels the societal goals of retirement benefits generally -- that is, to provide financial security to participants. A present lump sum award to the non-employee spouse calculated on a pension which has not vested does not necessarily promote this purpose. The fact is that nonvested pensions are sometimes forfeited, be considered a marital asset. Resort to this method is usually justified on the ground that uncertainties in valuation of a particular retirement plan prevents any other method of valuation. See, e.g., Barr v. Barr, 58 Md. App. 569, 473 A.2d 1300, 1310 (1984) cert. denied, 300 Md. 794, 481 A.2d 239 (1984). But the reserved jurisdiction method, of which we approve, would appear to cover any such circumstance and would more fairly compensate the non-employee spouse for his or her contribution to this marital asset.
often for reasons which properly should be within the power of the employee to decide, and sometimes for reasons which are entirely beyond the control of the employee. There is no reliable way to factor the contingency of forfeiture into a present value calculation. Thus, we are willing to accept a degree of continued financial entanglement insofar as that may be necessary to effect a just division of nonvested pension rights.

We adopt the following approach for dividing nonvested pension rights after divorce. First, because the nonvested pension may, by definition, be forfeited in its entirety, it should not be considered when the trial court makes the initial property division at the time of the divorce. If and when the employee spouse's pension rights vest and if the parties are unable to reach an agreement on their own, the non-employee spouse may at any time thereafter seek an order dividing the pension. This is to be done in the same manner as if the pension had been vested at the time of the divorce. Realistically, there is such a variety of pension plan designs that it is impossible to develop any one detailed formula that will produce an equitable result in every instance. Once the pension has vested, the trial court can determine whether the present value or the retained jurisdiction approach is appropriate in a given case and adapt that approach to the specific circumstances presented. See, e.g., Morlan, 720 P.2d at 498.


REACT thus solves the problem of continuing financial entanglement between former spouses. Moreover, because payments are made directly by the plan, the non-employee spouse is sure to receive the payments to which he or she is entitled.12 In certain circumstances, REACT allows the non-employee spouse to convert his or her share of the benefits to pay status independently of the employee spouse. 29 U.S.C. § 1056(d)(3)(E).

We reverse and remand for a reevaluation of Kenneth's nonvested pension. If Kenneth's UNOCAL plan is not covered by ERISA, we direct the trial court to retain jurisdiction so that an appropriate division may be made if and when Kenneth's pension becomes vested.

12It is important to note that REACT affects only the method by which a non-employee spouse may collect ERISA pension benefits. The fact and amount of his or her entitlement to the former spouse's pension is determined by state law. 29 U.S.C. § 1056(d)(3)(B).
The dissenting opinion of Justice Burke concluding that the trial court's use of the present value method of distribution was proper in this case, omitted.]

NOTES

1. What type(s) of pension plan was involved in Maslen and Liang. Is there an argument that the time rule is better applied to one type of plan and the accrual method to the other?

3. In 1984, ERISA was amended by the Retirement Equity Act (REA). This amendment provided a mechanism for making deferred payments from a pension plan to the former spouse of a plan participant. The REA establishes a procedure by which the state family law court's order relating to alimony, child support or marital property can become a Qualified Domestic Relations Order (QDRO) if it meets the requirements of the REA. A QDRO must meet several requirements: 1) it must specify the name and address of the plan participant and of their former spouse (referred to in the act as the "alternate payee"); 2) the order must specify the amount of percentage of benefits to be paid to the alternate payee, or the manner in which the amount is to be determined; 3) it must specify the number of payments; and, 4) the order must specify the plan to which the order applies. The QDRO cannot require the plan to furnish a benefit not provided by the plan, to furnish increased benefits, or require payments to the alternate payee already payable to another alternate payee under another order. The effect of the QDRO is to actually make the alternate payee a plan participant on a limited basis.

The purpose of the requirements is to enable family law courts to enter orders that effectuate deferred distribution of a pension plan while at the same time severing the interests of the spouses at the time of divorce.


4. Most states have followed the approach of the federal government and have adopted state “QDRO-like” provisions for the distribution of their state public employee pensions.

5. Even if the employee's rights in a pension plan are vested, that does not mean that the employee has an immediate right to payment. Generally, plans specify the earliest date on which the employee is entitled to draw benefits from the plan. Where an employee is eligible to draw benefits the plan is said to be mature. Before that time the plan is unmatured.

6. One of the most significant changes brought by ERISA was that employees covered by qualified plans were guaranteed that even after relatively short periods of time their interests in their plans would vest. The level of protection of employee pension benefits can depend on the type of plan (defined contribution or defined benefit and other characteristics of the plan. Retirement plans can
be either contributory or non-contributory. If the plan is contributory, both the employee and the employer contribute to the plan. Only the employer contributes to a non-contributory plan. Employee contributions to a contributory plan are immediately vested under ERISA. The employee's interest in the amount the employer contributes to the plan under either a contributory or non-contributory plan may not vest until the employee has worked for a certain period of time. However, ERISA limits how long the employer can delay vesting.


SHEPARD, C.J.

This is a continuation of the proceedings in *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979), which involved a divorce and the determination of the community property interest in pension benefits. The remittitur of this Court issued October 2, 1979, and it was not until October 10, 1985, that respondent Jeanette Shill filed an amended complaint seeking a redetermination of the community property interest in the pension benefits. Thereafter the district court granted summary judgment on November 7, 1986, adjudicating the community property interest in the retirement pension benefits. We reverse and remand.

The parties hereto were married September 1957, and in early 1958 Douglas Shill was employed by the fire department of Burley, Idaho, and began contributions from his wages to the Idaho Firemen's Retirement Fund. The parties were divorced by decree entered October 1977, at which time Douglas Shill had completed 19 1/2 years of employment with the Burley Fire Department. Under the provisions of the statutes, Shill was entitled to pension rights from the Idaho Firemen's Retirement Fund, Title 72, Ch. 14, I.C., but only if he had completed 20 years of such employment. If he terminated prior to completing 20 years he would have received only the contributions he had made.

Although the divorce decree was entered in October 1977, that portion of the judgment dealing with the division of the community property was not entered until March 1 1978. In that decision the court held that since Shill possessed only the right to receive the cash surrender value of the contributions ($8,089.24), all of which had been contributed during the marriage, such was characterized as community property and ordered divided equally between the parties. Hence, Jeanette Shill was awarded one-half of the cash surrender value of Shill's rights in the Firemen's Retirement Fund.

Upon appeal to this Court the decision of the district court was reversed, Shill v. Shill, supra, and for the first time contingent non-vested pension benefits were recognized as divisible community property in Idaho. This Court there indicated that a lump sum award as of the date of divorce was the preferred method of distribution, but the Court realized that such a cash-out method might not always be feasible. It was held that where the community owns few assets, or when present value calculations were inaccurate or difficult, an apportionment to the non-retiring spouse might be made effective if as and when the actual pension benefits were received by the
retiring spouse. Therefore, the decision of the trial court was reversed, and the cause was remanded,

\[ \ldots [i]n \text{ order to effect an equitable disposition of the retirement benefits possessed by this marital community, it will be necessary to remand this matter to the trial court to allow the parties an opportunity to present such evidence as it deems proper on the issue of the disposition of the parties community property interest in the Firemen's Retirement Fund. See Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975).} \]

Inexplicably it was not until six years later, on October 10, 1985, that respondent Jeanette Shill filed an amended complaint seeking a recalculation and distribution of the retirement benefits. Following the entry of the decree of divorce in October 1977, Douglas Shill had chosen to continue his work with the Burley Fire Department, and continued to make contributions to the Firemen's Retirement Fund. After 24 years of service, Douglas Shill retired on April 14, 1982. By delaying his retirement and continuing to work past the 20-year retirement, the pension benefits increased from 40 to 60 percent of the average fireman's salary.

Upon motion therefore, the trial court on November 7, 1986, granted summary Judgment in favor of Jeanette Shill.

The principal issue on this appeal is whether the community interest in Mr. Shill's retirement benefits should be determined, valued, and divided as of the date of the divorce, or at the time the benefits are actually received. We hold that the trial court incorrectly determined the community interest and the value thereof as of the time pension benefits were actually received.

At the outset, we note that had the trial court in the original divorce proceedings determined the then present value of the community property in the pension fund, the non-employee spouse could have been awarded assets of equal value. That present value of the community in the pension fund was before the trial court, but was then rejected by the trial court by reason of its erroneous view of the law. That decision of the trial court was reversed.

Further if upon remand the matter had been diligently pursued, the then trial court may have been able to make such an equitable division without being required to enter the morass of an attempted division of the pension rights. However, by the time the matter did reach the trial court for the second time, its options were limited because of the disposition of community assets awarded under the original decree. Thus, the preferred cash-out method of pension division has been thwarted in the instant action. Such an immediate settlement would have disentangled the parties, and would have fully and finally divided the marital property without any contingency.

It is asserted that by waiting six years following the remand, respondent procrastinated in the assertion of her rights, and the cause should have been dismissed for want of prosecution. A trial court has inherent power to dismiss for want of prosecution if the plaintiff fails to prosecute with reasonable diligence. McAllister v. Erickson, 45 Idaho 211, 261 242 (1927). Such question
is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on review in the absence of an abuse of that discretion. *Ellis v. Twin Falls Canal Co.*, 109 Idaho 910, 712 P.2d 611 (1985). We hold that the trial court did not abuse its discretion in failing to dismiss for want of prosecution, nor do we find that the action is barred by any statute of limitation or the doctrine of laches.

The question presented in the instant case is whether the value of the pension benefits should be calculated as of the date of the divorce, or as of the date of actual receipt of the pension benefits. In the instant case the importance of that issue is reflected by the base value of the monthly pension benefits at the various times. Within six months of the time of divorce the pension benefits would have been calculated on a basis of forty percent of the average wage of an Idaho fireman. I.C. §72-1430(1)(a), (e) (authorizes firemen who voluntarily retire and who are entitled to benefits after twenty years of service, forty percent of the average paid fireman's salary or wage, and after twenty-four years, sixty percent of the same.) As of 1982 when Mr. Shill retired, the pension benefits had risen to sixty percent of the average fireman's wage. The award of the trial court included the increase in the pension benefits which had accrued following the date of divorce.

The question thus presented is one of first impression in Idaho. In a divorce action in Idaho the trial court has broad discretion to equitably divide the community property. However, that discretion is strictly circumscribed by our statutes which delineate separate and community property interests. All property owned by a spouse before marriage is separate property. I.C. §32-903. Property acquired during marriage is presumed to be community property. *Stanger v. Stanger*, 98 Idaho 725, 571 P.2d 1126 (1977); *Speer v. Quinlan*, 96 Idaho 119, 525 P.2d 314 (1974); *Stahl v. Stahl*, 91 Idaho 794, 430 P.2d 685 (1967).

Our statute, I.C. §32-906, defines community property as all the property acquired after marriage by either husband or wife.

I.C. §§32-601 and 32-602 provide that marriage is dissolved by death of one of the parties, or by the judgment of a court of competent jurisdiction, and the effect of such a divorce decree is to restore the parties to the state of unmarried persons.

In the instant case the trial court awarded the respondent one-half of the pension benefits, valued at the time of actual retirement in 1982. That award included increases in pension benefits accruing after the date of divorce, and hence not acquired during marriage, but during the time the appellant was an unmarried person. As such, those increases constituted the separate property of the appellant, and to the extent that an interest in those post-divorce increases was awarded to respondent, it constituted an impermissible invasion of appellant's separate property.

Although as stated, the question is of first impression in Idaho, it has been ruled upon by courts of other jurisdictions.

The Supreme Court of Arizona, in the case of *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986), had before it a factual pattern which in part was substantially similar to the case at bar in
that it presented the question of a non-employee spouse having the right to share in increased retirement benefits accrued following divorce. The Court of Appeals in Arizona had so ruled for the non-employee spouse, and the Supreme Court of Arizona reversed. The court stated:

We base our analysis on clearly established community property principles. First pension plans are a form of deferred compensation to employees for services rendered, and any portion of the plan earned during marriage is community property subject to equitable division and dissolution. (Citations). We recognize that retirement benefits are often one of a community's most valuable assets. Second, during marriage a husband and wife have an equal, immediate, present, and vested interest in the community assets. (Citation). When the community property is divided at dissolution pursuant to the mandate of ARS §25-318, each spouse receives an immediate, present, and vested separate property interest in the property awarded to him or her by the trial court. It is clear that a former spouse loses any interest in and control over that separate property. Finally, it is established law that while the fruits of labor expended during marriage are community property (citation) earnings after dissolution are separate property.

In its exhaustive opinion the court held that to permit a non-employee spouse from sharing in future increases in the pension benefits is improper.

The Court of Appeals attempted to ameliorate the risk of loss faced by the non-employee spouse by devising a formula which would permit that spouse to share in the future increases in the pension benefits. This compromise is improper for several reasons. First, it improperly allows the non-employee spouse to share in the post-dissolution separate property earnings of the employee spouse.

The court continued:

The second problem with the disposition of the retirement assets by the trial court and the court of appeals is that both formulas award a share of the employee spouse's earnings after dissolution to the non-employee spouse. If the amount of the monthly benefit at retirement is greater than the monthly benefit would have been had the employee spouse retired at the normal retirement date, any increases will be due to the separate labors of the employee spouse. The court of appeals' formula seems to adopt the proposition that two wrongs make a right. In both denying the non-employee spouse immediate right to separate property benefits and instead awarding that spouse a share of the employee spouse's separate property, the court of appeals has violated two fundamental principles of community property law. We disapprove.

The Supreme Court of Texas in *Berry v. Berry*, 647 S.W.2d 945 (1983), was presented with a similar factual pattern and issue.
The sole question presented for consideration is the value of Elna Berry's interest in the retirement benefits of her ex-husband Giles Berry. The judgment of the trial court awarded Mrs. Berry one-half of such benefits as would have existed at the time of divorce. The court of appeals reversed and held that she was entitled to receive 34.21 percent of the retirement benefits actually received. (citation). We reverse the judgment of the court of appeals and affirm the trial court's judgment.

The court, quoting *In re Marriage of Rister*, 512 S.W.2d 72 (1974), stated:

However, to the extent that the benefits do increase as a result of future increased earnings, the formula used by the trial court has the effect of awarding benefits accruing to appellant after the divorce from appellee. We hold that pension benefits accruing as compensation for services rendered after a divorce are not a part of the estate of the parties subject to division on divorce.

The court in *Berry* then stated:

It is clear from the record in this case that twelve additional years of work following divorce, which included some twelve to fourteen pay raises, plus union contract negotiations for an improved benefits plan, brought about the increase in retirement benefits paid to Mr. Berry. These post-divorce increases cannot be awarded to Mrs. Berry, for to do so would invade Mr. Berry's separate property, which cannot be done.

A similar decision was reached in *Madrid v. Madrid*, 684 P.2d 1169 (N.M.App. 1984). The court held that the community interest in pension benefits must be determined, valued and distributed as of the time of the divorce, and that increases in the pension benefits, "... coming after the date of the divorce, are the husband's separate property... At the time of the divorce the increases were not even in existence. The increases coming after the divorce, were not 'acquired' until after the divorce, and were the separate property of the husband." See also *Rogers v. Rogers*, 609 P.2d 877 (Or.Ct.App. 1980), modified, *Rogers v. Rogers*, 623 P.2d 1108 (1981); *Graham v. Graham*, 717 P.2d 655 (Or.App. 1986).

We are aware, as argued by respondent, that the courts of California have taken a different approach and arrived at different results. *In re Marriage of Freiberg*, 57 Cal. App.3d 304, 127 Cal. Rptr. 792 (Cal.Ct.App. 1976). However, it is our view that the decisions cited, particularly that of the Arizona Supreme Court in *Koelsch*, constitute the better reasoned authority, and we decline to follow the California approach.

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1To the extent that it conflicts with *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), *In re Marriage of Freiberg*, which suggests, in dictum, that the employee spouse can control the time at which the retirement payments to the non-employee will commence, is disapproved.
In the instant case the decree of divorce was entered October 1977. The employee-spouse's first eligible retirement date was April 14, 1978. His actual retirement date was April 18, 1982. As noted herein, we have held that the determination of, and the valuation of, the pension benefits should occur at the date of the decree of divorce. Since such valuation and an award of a lump sum was not made, and now appears to be not possible, an award is necessary based upon the monthly sum which would have been received if the employee spouse had taken retirement at his first eligibility, i.e., April 14, 1978. Berry v. Berry, supra; In re Marriage of Rister, supra; Rogers v. Rogers, supra; Graham v. Graham, supra; In re Marriage of Gillmore, 628 P.2d 1 (Cal. 1981). In the instant case that date is only six months after the decree of divorce, and hence the difference in value is not deemed significant. There may, of course, arise cases in the future in which the lapse of time between divorce and first eligibility for retirement is of substantial length, and in which therefore the problems will be exacerbated. It is suffice to say that we do not explore those problems today, but leave them to a case-by-case resolution in the future.

Many of the above-cited cases deal with the "risks" which will be encountered by each of the spouses under various theories of distribution of pension benefits upon divorce. It is clear that there can be no amelioration of all risks which might be presented by the enumerable possible scenarios. If, as previously stated, a lump sum cash-out method were utilized, as seems possible in the instant case, the risks to the non-employee spouse would have been eliminated. However, the risk to the employee spouse of death preventing him from receiving any benefits, would remain. Nevertheless, such solution would have the merit of disentangling the parties and their affairs at a finite point in time.

It is also argued that requiring the non-employee spouse to receive a share of the pension benefits if and when the employee-spouse chooses to retire, leaves the option solely with the employee-spouse. We need not address that assertion, since in the instant case the employee-spouse has retired, and the pension benefits have matured and are payable.

Pursuant to our discussion herein, the judgment of the district court is reversed insofar as it purports to award plaintiff Jeanette Shill a share of the pension benefits valued at a time post-April 14, 1978. Because of the lack of clarity in the record, and the adjustments which may be required by the trial court, we are unable to delineate a specific sum to be awarded by the trial court. The trial court is directed to award plaintiff Jeanette Shill, her appropriate share of the pension benefits, calculated as of April 14, 1978.

We further remand for the consideration of the trial court a possible offset to the judgment in the sum of $4,044.62. Again, the record is not clear, however it suggests that there was disbursed to the respondent on June 21, 1979, the sum of $27,898.55. It is asserted that included in that sum was $4,044.62, representing one-half of the cash surrender value of the Fireman's Retirement Fund pension. If such assertion is correct, and since the award of the cash surrender value of the pension fund has been reversed, respondent Jeanette Shill may be overcompensated in the sum of $4,044.62. The trial court on remand is directed to ascertain the facts and make appropriate adjustments, if any.
Lastly, it is asserted by respondent cross-appellant Jeanette Shill that accrued interest on her share of the pension fund should be allowed. We disagree. The trial court held, and we agree, that to so assess interest would be to penalize the appellant for the respondent's lack of diligence in timely pursuing the cause. While she has not waived a right to receive her share of the pension benefits, by her delay she has waived her right to claim any interest thereon. Although not argued by either party, the record demonstrates that an order of the trial court was issued ordering defendant (Douglas Shill) to pay to the plaintiff (Jeanette Shill) the sum of $12,000.00, and that on the payment of such amount, execution upon the judgment would be stayed pending the appeal. That matter is not discussed by the parties, and hence we assume said sum has been paid, since the appeal has gone forward.

The cause is reversed and remanded for further proceedings in accordance herewith. No costs allowed.

HUNTLEY, J., dissenting.

. . .

Under the Idaho Firemen's Retirement Fund, a fireman accumulates retirement benefits at the average rate of 2%, per year of the average state wage for the first twenty years of service (40% total), which rate increases to 5% per year for years 21 - 25 (65% total).

The issue primarily raised by this appeal is whether, when a divorce occurs near the end of the 20th year and the fireman works four more years, thereby increasing the monthly benefit by about $400,² the 3% enhancement (here amounting to about $240 per month) is separate property or whether the added $240 is 20/24 community property and 4/24 separate property.

I would affirm the ruling of the trial court that the community interest is determined by a ratio with the years service while married as the numerator and the years of total service as the denominator.

. . .

III.

Mr. Shill asserts that by waiting six years following the remand, Mrs. Shill procrastinated in the assertion of her rights, and the cause should have been dismissed for want of prosecution. However, either party could have noticed the case for trial following the remand. A trial court has

²For ease of illustration, I use an average state wage of $2,000 per month. (The actual figure at time of retirement was $1,896). Thus, the benefit accrued in the first twenty years was $800 and that accrued in the last four years was $400.
inherent power to dismiss for want of prosecution if the plaintiff fails to prosecute with reasonable
to the sound discretion of the trial court, and its ruling will not be disturbed on review in the
(1985). I would hold that the trial court did not abuse its discretion in failing to dismiss for want
of prosecution, and I further hold that the action is not barred by any statute of limitations or the
doctrine of laches.

IV.

In *Shill I*, this Court held that a pension fund, whether vested or non-vested, is a form of
deferred compensation, which is attributable to the prior employment period in which it was
accumulated, and which is a community asset to the extent that community efforts contributed to
Holdings in California cases parallel these Idaho cases and state the proposition as follows:

Where the total number of years served by an employee-spouse is a substantial
factor in computing the amount of retirement benefits to be received by that spouse,
the community is entitled to have its share based upon the length of service
performed on behalf of the community in proportion to the total length of service
necessary to earn those benefits. The relation between years of community service
to total years of service provides a fair gauge of that portion of retirement benefits
attributable to community effort.


Returning to the case at bar, in this appeal we are asked to review the ruling of the district
court which ruled:

[T]hat the plaintiff is entitled, as a matter of law, to one-half of the community
interest in the defendant's pension fund, and that such interest is to be determined
by the husband's monthly benefits received multiplied by a fraction which has as
its numerator the total number of years the defendant was employed by the Burley
Fire Department during the marriage, and as its denominator the total number of
years of the defendant's employment at the Burley Fire Department.
The formula applied by the district court operated in this case as follows to determine Jeanette's one-half of the community interest:

\[
\frac{1}{2} \times \frac{7,128 \text{ days married as fireman}}{8,176 \text{ days employed as fireman}}
\]

or

\[
\frac{1}{2} \times 0.8137 \text{ or } 40.7\%
\]

Thus, Jeanette's share was fixed at 40.7% of the total benefits each month (or approximately $488.40 per month) and Douglas' share at 59.3% (or approximately $711.60 per month). Approximately 80% of the benefits were held to be community property, with 20% being Mr. Shill's separate property. I would approve of the formula applied by the district court.

The fundamental premise of *Shill I* was that:

A firefighter's interest in the pension fund attributable to fund income from sources other than employee contributions is not a gratuity but a form of deferred compensation accrued by reason of the individual's service and is also a community property asset to the extent acquired during coverture.


When one puts the issue as deciding whether the increase (from forty percent to sixty percent of the average state wage) is earned in part during marriage or whether it is totally the product of the husband's separate efforts, it is clear that that issue has already been decided in *Shill I*. *Shill I* found that the post-divorce increase from mere cash surrender value to forty percent benefits which accrued six months after divorce, was the product of work performed during the nineteen-and-a-half years of marriage.

Similarly, it is equally clear that the higher percentage was earned only by virtue of the first nineteen-and-a-half years of work; without those first nineteen-and-a-half years during marriage, there would be no ability to accumulate benefits at the higher level for years 21 through 24. Indeed, the very contingent which we now face was anticipated in *Shill I* when Justice Bakes wrote for the court:
Factors which will affect the value of the couple's contingent community property interest in the pension fund include the possibility that the employee-spouse will die or change jobs before satisfying the time requirements for vesting; the fact that the divorced employee might defer retirement beyond the date that an optional early retirement with monthly pension is available;

599 P.2d at 1008.

In addition, Shill I states that "[t]he other method of dividing the rights is to reserve jurisdiction until retirement and divide the actual monetary benefit when received." 100 Idaho at 437 (emphasis added). The "actual monetary benefit" in this case is approximately $1,200 per month (or 60%), not $800 per month (40%). The district court correctly followed Shill I when it ruled that four-fifths was community property and subject to division, and one-fifth was Mr. Shill's separate property.

The increases in the pension fund in the instant case over the final four years of employment are not completely due to the separate efforts of the employee-spouse, but rather, the right to the increase from forty to sixty percent of the average state wage was built upon the first twenty years of work, which were during marriage. The increase from forty to sixty percent was not earned by the last four years of work alone. Sixteen percent more work did not in and of itself produce fifty percent more benefits. The increase, instead, is a deferred compensation for the aggregate of twenty-four years, not four years alone.

The issue in the instant case is straightforward: Was the enhancement in pension benefits due to postponed retirement the product of the total aggregate of service (i.e., twenty-four years) both during and after marriage, or was it solely the result of the last four years of Mr. Shill's employment? Shill I stands for the proposition that the enhancement in benefits, whether from cash surrender value to 40%, or from 2% per year to 5% per year, is the product of the aggregate of employment. The first year on the job was equally as important to the final level of benefits as is the twenty-fourth.3

3There are two ways to mathematically compute the result, the first of which demonstrates the logic of the apportionment between community and separate property, with the second and simpler formula (used by the trial court) reaching the same mathematical result.

METHOD I

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<tr>
<th></th>
<th>Community</th>
<th>Separate of H</th>
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<tbody>
<tr>
<td>The $ 800 from 1st 20 years:</td>
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<td></td>
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<tr>
<td>The $ 400 from last 4 years</td>
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<tr>
<td>(a) 2% x 4 years or 8% x $2,000 =</td>
<td>-0-</td>
<td>$160</td>
</tr>
<tr>
<td>(b) 3% x 4 years or 12% x $2,000 =</td>
<td>$240</td>
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<tr>
<td>$1,000</td>
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<td></td>
</tr>
<tr>
<td>1/2 of Community Property to each</td>
<td>$500(wife)</td>
<td>$500(husb)</td>
</tr>
<tr>
<td>Separate Property to Husband</td>
<td>-0-</td>
<td>$200</td>
</tr>
<tr>
<td>TOTAL to each</td>
<td>$500 Wife</td>
<td>$700 Husb</td>
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</table>
Accordingly, I would affirm the trial court's methodology and remand for entry of judgment in accordance therewith. However, on remand, the computation should take into consideration the extent that the increase in benefits due to a continuation of work after divorce was the result of higher income based upon more work or greater responsibility, because the portion of the enhancement in benefits would be separate property. On remand, the trial court should be directed to ascertain whether there was an increase in work or responsibility after divorce which influenced the ultimate level of benefits and calculate that portion, if any, as the separate property of the husband.

On remand, the trial court should also consider whether the sum of $4,044.62 is an offset to the judgment to be entered in favor of Jeanette. Although the court is not totally clear, it suggests that there was disbursed to the respondent on June 21, 1979, the sum of $27,898.55. Included in that sum was $4,044.62 which represented one-half of the cash surrender value of the Firemen's Retirement Fund pension. If this is correct, and since the award of the cash surrender value of the pension fund has been reversed in Shill I, Jeanette may be overcompensated in the sum of $4,044.62 unless an adjustment is made in the final order. The trial court should be directed to ascertain those facts and make the appropriate adjustments, if any.

Notes

1. The long vesting period in Shill is not common. ERISA imposed restrictions on such long vesting periods for private pension plans. However, the firefighters’ plan in Shill was not governed by ERISA because it was a public pension plan. Nonetheless, most states and non-ERISA plans have moved toward the plan requirements imposed by ERISA in order to respond to the needs of employees and better compete in the employment market for qualified individuals.

2. When a pension plan is not divided at the time of divorce, it remains under the management and control of the employed spouse until such time as a division of the plan can be effectuated. During this time, significant changes can occur that affect the value of the plan. Often the choices made by the employee affect these changes in the value of the plan. As you might imagine the interests of the former spouses in the post-divorce pension asset are not the same and may be in conflict. The following cases address how courts have resolved these post divorce conflicts over the management of the undivided pension benefit.

<table>
<thead>
<tr>
<th>Method II</th>
<th>Wife</th>
<th>Husband</th>
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<tbody>
<tr>
<td>Com. Prop. = 20/24 or 5/6 x $1,200 =</td>
<td>$1,000</td>
<td>$500</td>
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<tr>
<td>Sep. Prop. = 4/24 or 1/6 x $1,200 =</td>
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<td>$200</td>
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<td>$500</td>
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In re Marriage of Gillmore, 29 Cal.3d 418, 629 P.2d 1, 174 Cal.Rptr. 493 (1981)

BIRD, Chief Justice.

Did the trial court abuse its discretion in a dissolution action when it refused to order the immediate payment of a non-employee spouse's interest in a retirement benefit, where the employee spouse was eligible to retire and receive the benefit but had chosen not to do so?

I.

Vera and Earl Gillmore separated in 1978 after a marriage of 14 years. The trial court issued an interlocutory decree dissolving their marriage on November 27, 1978, and entered a final judgment of dissolution on January 19, 1979. The decree awarded Vera physical custody of their minor child as well as $225 per month child support and $100 per month spousal support.

The community property was divided evenly, with the exception of Earl's interest in a retirement plan managed by his employer, Pacific Telephone Company. The court found that Earl would become eligible to retire on April 11, 1979, at which time he would be entitled to a monthly benefit of $717.18. Vera's interest in that benefit was found to be approximately $177.14 per month. The court specifically reserved jurisdiction over the retirement plan.

Earl continued to work after he became eligible to retire in April 1979. He represented that he was a "healthy, active man" in his early 50's, and he intended to work for some time to come. He was not required to retire until he reached the age of 70.

In July 1979, Vera requested an order directing Earl to pay to Vera her share of the pension benefits immediately, retroactive to the date he became eligible to collect them. Earl responded with a request to modify child and spousal support. The trial court denied both requests, retained jurisdiction over the retirement benefits, and held that it had discretion to delay distribution of the benefits until Earl actually retired.

II.

Under California law, retirement benefits earned by a spouse during a marriage are community property, subject to equal division upon the dissolution of that marriage. (In re Marriage of Brown (1976) 15 Cal.3d 838, 842, 126 Cal.Rptr. 633, 544 P.2d 561, Civ.Code, §4800.)1 This is true whether the benefits are vested or nonvested, matured or immature. (Brown,
Vera and Earl agree that Earl's retirement benefits are community property to the extent they were earned during their marriage. The sole disagreement concerns the timing of the distribution of those benefits. Vera contends that the trial court abused its discretion when it refused to order Earl to begin immediate payments to her of her share. Earl claims that the trial court had discretion to postpone distribution of the benefits until he actually retired and began to receive payments from the pension plan.

Trial courts have considerable discretion to determine the value of community property and to formulate a practical way in which to divide property equally. (In re Marriage of Connolly (1979) 23 Cal.3d 590, 603, 153 Cal.Rptr. 423, 591 P.2d 911.) However, that discretion has been strictly circumscribed by the statutory requirement that all community property be divided equally between the parties. (Civ.Code, s 4800.) A trial court has been held to abuse its discretion when it improperly classifies community property as the separate property of one of the spouses or fails to arrive at an equal division of the community property. (In re Marriage of Olson (1980) 27 Cal.3d 414, 422, 165 Cal.Rptr. 820, 612 P.2d 910; In re Marriage of Brown, supra, 15 Cal.3d at p. 847, 126 Cal.Rptr. 633, 544 P.2d 561.)

Under the cases and statutory law, Earl cannot time his retirement to deprive Vera of an equal share of the community's interest in his pension. It is a "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse." (In re Marriage of Stenquist (1978) 21 Cal.3d 779, 786, 148 Cal.Rptr. 9, 582 P.2d 96. See also Waite v. Waite, supra, 6 Cal.3d at p. 472, 99 Cal.Rptr. 325, 492 P.2d 13; In re Marriage of Peterson, supra, 41 Cal.App.3d at pp. 650- 651, 115 Cal.Rptr. 184.)

Earl's retirement benefits are both vested and matured. (See ante, fn. 2.) He will not forfeit his benefits if he leaves his employment voluntarily, is terminated or retires. The only condition precedent to payment of the benefits is his retirement, a condition totally within his control. A unilateral choice to postpone retirement cannot be manipulated so as to impair a spouse's interest

2A "vested" benefit cannot be forfeited if employment ends. Rather, it "survives the discharge or voluntary termination of the employee." (In re Marriage of Brown, supra, 15 Cal.3d at p. 842, 126 Cal.Rptr. 633, 544 P.2d 561.) A retirement benefit "matures" when the employee has an unconditional right to payment, i.e., all the "conditions precedent to the payment of the benefits have taken place or are within the control of the employee. (Citations.)" (In re Marriage of Fithian, supra, 10 Cal.3d at p. 596, 111 Cal.Rptr. 369, 517 P.2d 449; Brown, supra, 15 Cal.3d at p. 842, 126 Cal.Rptr. 633, 544 P.2d 561; Smith v. Lewis, supra, 13 Cal.3d at p. 355, fn. 4, 118 Cal.Rptr. 621, 530 P.2d 589; In re Marriage of Peterson, supra, 41 Cal.App.3d at pp. 649-650, 115 Cal.Rptr. 184.) Earl's benefits have vested in that if he retires or loses his job for any reason he will be entitled to immediate benefits. They have matured in that the sole condition on his enjoyment of the benefits, his retirement, is within his control.

3Section 4800 provides in pertinent part that except in certain narrow circumstances (see §4800, subds. (b) and (c)), "the court shall ... divide the community property and the quasi-community property of the parties ... equally." (Civ.Code, §4800, subd. (a).)
in those retirement benefits.

_In re Marriage of Stenquist, supra_, 21 Cal.3d 779, 148 Cal.Rptr. 9, 582 P.2d 96, involved a husband's election to receive disability benefits (usually separate property), rather than retirement pay (usually community property). This court held that the husband could not use this election to deprive his wife of her interest in his retirement benefits. "(T)o permit the husband, by unilateral election of a 'disability' pension, to 'transmute community property into his own separate property' (_In re Marriage of Fithian, supra_, 10 Cal.3d 592, 602 (111 Cal.Rptr. 369, 517 P.2d 449)), is to negate the protective philosophy of the community property law as set out in previous decisions of this court." (_Stenquist, supra_, 21 Cal. at p. 782, 148 Cal.Rptr. 9, 582 P.2d 96.)

The result of the husband's unilateral decision in _Stenquist_ would have been to deprive the wife of any interest in his retirement benefits. In the present case, Vera is no less entitled to protection. The fact that the deprivation she faces is less than total is not decisive. Earl would deprive Vera of the immediate enjoyment of an asset earned by the community during the marriage. In so doing, he would subject Vera to the risk of losing the asset completely if Earl were to die while he was still employed. Although Earl has every right to choose to postpone the receipt of his pension and to run that risk, he should not be able to force Vera to do so as well.4

The case of _In re Marriage of Luciano_ (1980) 104 Cal.App.3d 956, 164 Cal.Rptr. 93, is directly on point. In _Luciano_, the trial court ordered that a non-employee spouse must wait until the employee spouse actually retires before receiving his or her share of the retirement benefits. The Court of Appeal held that "(t)o uphold the trial court's ruling as to the time Dorothy is to commence receiving her portion of this community asset would give Ferdinand the option of determining the receipt by Dorothy of her own property which would be basically unfair. The employee spouse cannot by election defeat the non-employee spouse's interest in the community property by relying on a condition solely within the employee spouse's control. (Citations.) ... (P) A proper order for a trial court to make in these circumstances is that the non-employee spouse is the one who has the choice as to when his or her share of the pension shall begin." (Id., at p. 960, 4Earl claims that the trial court's decision resulted in an equal division of the retirement benefits since he and Vera will receive their shares of the benefits at the same time the time that he chooses to retire. However, he overlooks the fact that both the timing of receipt and the control of an asset are important aspects of its value. "Postponement, especially late in life, is often the equivalent of complete defeat. Not only are the employee spouse's chance of dying on the job increasing with each passing year (in which case the pension rights would vanish under most plans), the present value of money is much more valuable as a person enters the last years of his life." (Note, In re Marriage of Stenquist: Tracing the Community Interest in Pension Rights Altered by Spousal Election (1979) 67 Cal.L.Rev. 856, 879, fn. 76.) A benefit which may be received at some unknown time in the future is of less value than one received immediately. (In re Marriage of Tammen (1976) 63 Cal.App.3d 927, 931, 134 Cal.Rptr. 161; see Projector, Valuation of Retirement Benefits in Marriage Dissolutions (1975) 50 L.A.Bar.Bull. 229.) Further, a benefit over which an individual has no control is of less value than a benefit that can be managed personally. Thus, Earl's decision to wait to receive his pension when it will be most profitable and most convenient for him deprives Vera of both the immediate enjoyment of her benefits and the power to manage them to her own advantage. Her financial situation may involve factors significantly different from his. Both the husband and the wife should be able to make their independent decisions about how to handle their shares of the community property.
Similar results were reached in two earlier cases. In *In re Marriage of Martin*, supra, 50 Cal.App.3d 581, 123 Cal.Rptr. 634, the appellate court held that where the only condition to receipt of the benefits by one spouse was the employee spouse's decision to retire and apply for them, the benefits should be divided as community property. The language of the court is instructive. "The only condition to the payment of the pension benefits is a condition entirely within (the husband's) control, and that is not an uncertainty precluding division of the asset upon dissolution of marriage." (*Martin*, supra, 50 Cal.App.3d at p. 584, 123 Cal.Rptr. 634.) Similarly a trial court decision to order the immediate payment of a share of a husband's vested, matured pension benefits to his wife, where the husband was eligible to retire but had not yet done so, was upheld in *Bensing v. Bensing*, supra, 25 Cal.App.3d at pages 892-893, 102 Cal.Rptr. 255.5

These cases, however, do not preclude the employee spouse from choosing among alternative retirement plans. The employee spouse retains the right (1) to change or terminate employment; (2) to agree to a modification of the retirement benefits; or (3) to elect between alternative benefits. (*In re Marriage of Brown*, supra, 15 Cal.3d at p. 849, 126 Cal.Rptr. 633, 544 P.2d 561.) "(T)he employee spouse retains the right to determine the nature of the benefits to be received." (*In re Marriage of Stenquist*, supra, 21 Cal.3d at p. 786, 148 Cal.Rptr. 9, 582 P.2d 96, fn. omitted.)

The right of the employee spouse is nonetheless limited by the fact that the non-employee spouse owns an interest in the retirement benefits. Thus, Brown notes that the employee spouse has a right to agree to "a reasonable ... nondetrimental modification of the pension system" (*In re Marriage of Brown*, supra, 15 Cal.3d at p. 849, fn. 11, 126 Cal.Rptr. 633, 544 P.2d 561, emphasis added, and Stenquist finds that the employee spouse retains the right to elect "higher than ordinary retirement benefits." (*In re Marriage of Stenquist*, supra, 21 Cal.3d at p. 786, fn. 6, 148 Cal.Rptr. 9, 582 P.2d 96, emphasis added.) If the right to choose among alternative retirement plans is exercised in a way which impairs the non-employee's interest in the benefits, the non-employee spouse must be compensated.6

5See also *In re Marriage of Adams* (1976) 64 Cal.App.3d 181, 185-186, 134 Cal.Rptr. 298, finding that a non-employee spouse had the option of taking her share of the benefits either at the time of dissolution or as the time the employee spouse retired. To the extent that the conflicts with this court's present holding, dictum in *In re Marriage of Freiberg* (1976) 57 Cal.App.3d 304, 311, 127 Cal.Rptr. 792, which suggests that the employee spouse can control the time at which the retirement payments to the non-employee will commence, is disapproved. The non-employee spouse in that case apparently did not request immediate distribution of the benefits. Further, the timing of the distribution was not before the court.

6Trial courts can limit the employee spouse's freedom to choose to the extent necessary to protect the interests of the non-employee spouse. For instance, *In re Marriage of Lionberger* (1979) 97 Cal.App.3d 56, 67-70, 158 Cal.Rptr. 535, affirmed a trial court order precluding the husband from choosing a pension plan option that would have decreased the size of his wife's interest. In *Phillipson v. Board of Administration*, supra. 3 Cal.3d 32, 48, 89 Cal.Rptr. 61, 473 P.2d 765, the court ordered the husband to choose a particular retirement benefit because such an order was the only way to protect the wife's interest. See also *Ball v. McDonnell Douglas Corp.* (1973) 30 Cal.App.3d 624, 630-631, 106 Cal.Rptr. 662, in which the appellate court noted that the trial court could have made an order limiting
Chapter 3: Classifying Property As Community

Thus, although the husband in *Stenquist* had every right to choose a disability pension rather than retirement pay, his choice did not prevent the court from ordering him to pay to the wife an amount equivalent to what her interest would have been had he chosen retirement pay. Similarly, Earl retains the right to determine what retirement benefits he will receive. He can retire now or at some time in the future. He also retains the option of choosing between the alternative pension plans offered by his employer. However, if he opts for an alternative that deprives Vera of her full share of the retirement benefits, he must compensate her for the interest she loses as a result of his decision.

Compensation is possible here because the value of Vera's interest is known to the court. Also, the only condition to the payment of the benefits, Earl's retirement, is entirely within his control. However, "if the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid." (*In re Marriage of Brown*, supra, 15 Cal.3d at p. 848, 126 Cal.Rptr. 633, 544 P.2d 561, fn. omitted.) In this case, the pension benefits have already vested and matured. There are no "uncertainties affecting ... vesting or maturation" that could lead the trial court to conclude that distribution of the pension must be delayed. Therefore, the trial court abused its discretion when it refused to order the immediate distribution of this vested and mature retirement benefit.

Earl's claim that he is being forced to retire misses the point. He is free to continue working. However, if he does so, he must reimburse Vera for the share of the community property that she loses as a result of that decision. His claim that the court lacks jurisdiction to order him to make payments to Vera because it lacks jurisdiction over his separate property also lacks merit. Earl alone will make the decision to use separate property to reimburse Vera, when and if he decides not to retire. His situation is not unlike that faced by a couple ordered to divide a house that they own as community property. If one of the spouses chooses to keep the house, he or she is free to use separate property to purchase the other's interest. Here, Earl must divide his retirement benefits with Vera. If he does not wish to retire, he must pay her an amount equivalent to her interest.7

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7One commentator argues that when an employee who is eligible to retire chooses to continue working, part of his or her salary is actually attributable to community effort. "(F)rom an economist's perspective, the employee spouse's compensation for continued employment is not the full amount of his paycheck. Rather, his compensation is only that amount above the pension benefits that he will not receive while he continues working. For example, in the matured pension situation, if the employee can receive retirement pay in the amount of X dollars without working, then his actual compensation for services rendered is not the amount of his paycheck, Y dollars, but Y minus X dollars. This is nothing more than a reapplication of the 'benefits foregone' formula of *Stenquist* (21 Cal.3d 779, 148 Cal.Rptr. 9, 582 P.2d 96). (Fn. omitted.) Therefore, rather than penalizing the spouse for not retiring, the contrary is true the community is being penalized because it is forced to subsidize the employee spouse's salary, which becomes his separate property." (*Note, In re Marriage of Stenquist: Tracing the Community Interest in Pension Rights Altered by Spousal Election*, supra, 67 Cal.L.Rev. 856, 879.) Since this court does not find any taking of separate property, it is not necessary to discuss Earl's constitutional claim.
Earl's suggestion that Vera can be adequately compensated through spousal support is contrary to current law. "As we have affirmed many times, adjustments in the amount of alimony awarded will not mitigate the hardship caused the wife by the denial of her community interest in the pension payments. Alimony lies within the discretion of the trial court and may be modified with changing circumstances: 'the spouse "should not be dependent on the discretion of the court ... to provide her with the equivalent of what should be hers as a matter of absolute right."' (In re Marriage of Brown, supra, 15 Cal.3d 838, 848, 126 Cal.Rptr. 633, 544 P.2d 561.)" (In re Marriage of Stenquist, supra, 21 Cal.3d at p. 787, fn. 8, 148 Cal.Rptr. 9, 582 P.2d 96.)

Earl asserts that Vera should be required to demonstrate a financial need to justify the immediate distribution of the retirement benefits. However, financial status is not relevant when dividing community property. The courts are statutorily required to divide community property equally. (Civ.Code, §4800.) A court may consider the equities of the parties' financial situations in determining spousal support, but only after the community property has been equitably divided. The retirement benefit must first be divided equally. Earl may then renew his motion for a modification of spousal support in light of this new distribution of the community property.8

In the past, this court has encouraged trial courts, if feasible, to award all pension rights to an employee spouse, compensating the non-employee spouse with other community property of equal value. (In re Marriage of Skaden (1977) 19 Cal.3d 679, 688-689, 139 Cal.Rptr. 615, 566 P.2d 249; In re Marriage of Brown, supra, 15 Cal.3d at p. 848, fn. 10, 126 Cal.Rptr. 633, 544 P.2d 561; Phillipson v. Board of Administration, supra, 3 Cal.3d at p. 46, 89 Cal.Rptr. 61, 473 P.2d 765.) This type of a division was not possible here since the trial court severed the issue of retirement benefits from the division of the remainder of the community property. At the time the retirement benefits were to be divided, the community property had already been distributed. As a result, there was no longer any community property which could be offset against the retirement benefits.

Frequently, parties are able to arrive at a reasonable settlement of these issues. (In re Marriage of Skaden, supra, 19 Cal.3d at pp. 688-689, 139 Cal.Rptr. 615, 566 P.2d 249.) For example, the non-employee spouse may choose to wait, preferring to receive the retirement benefits when the employee spouse actually retires. The non-employee may thereby ensure some protection for the future and may be able to share in the increased value of the pension plan. (See In re Marriage of Adams, supra, 64 Cal.App.3d at p. 186, 134 Cal.Rptr. 298.)9 However, if the

8"Of course, the (respondent) spouse may seek a prospective modification of his or her support payments in light of any new partition of an asset not previously adjudicated." (Henn v. Henn (1980) 26 Cal.3d 323,332, fn. 8, 161 Cal.Rptr. 502,605 P.2d 10.)

9The non-employee spouse, of course, cannot have it both ways. The decision to ask for distribution of the retirement benefits before the employee spouse actually retires "constitutes an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service and a higher salary." (In re Marriage of Luciano, supra, 104 Cal.App.3d at p. 961, 164 Cal.Rptr. 93, citation omitted.) Thus, if Vera chooses to receive her share of the retirement benefits immediately, she will forfeit her right to share in the increased value of those benefits
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non-employee spouse chooses to receive immediate payments, as Vera does, he or she has a right to do so. Any inequities caused by the immediate distribution of retirement benefits can be resolved through adjustments in spousal support.

There are various ways in which Earl could compensate Vera. He could "buy out" her share of the retirement benefits, paying her the present value of her share of the pension plan. (See Projector, supra, 50 L.A.Bar Bull. 229; Hardie, Pay Now or Later: Alternatives in the Disposition of Retirement Benefits on Divorce (1978) 53 State Bar J. 106). Or, he could begin to pay her a share of the retirement payments on a monthly basis. (E. g., In re Marriage of Martin, supra, 50 Cal.App.3d at p. 585, 123 Cal.Rptr. 634; Bensing v. Bensing, supra, 25 Cal.App.3d at pp. 893-894, 102 Cal.Rptr. 255.) Both of these methods of payment constitute an equal distribution of the benefits. However, the parties may have preferences based on numerous factors not presently before this court, including the tax consequences of the alternative plans. Therefore, the exact method of distribution must be left to the discretion of the trial court on remand.

III.

That portion of the trial court's order denying Vera's request for the immediate distribution of her share of Earl's retirement benefits is reversed. The cause is remanded to the trial court for further proceedings consistent with the views expressed in this opinion.

NOTES

1. How does the availability of QDRO's help resolve the problems addressed in Shill II and Gilmore? In Idaho should the court follow the rule in Shill II in cases where a QDRO is available?

C. Other Pro Rata Apportionment Situations: Stock Options & Contingency Fees

Courts in the various community property states have applied the time rule in contexts other than pensions. Typically these situations involved economically valuable employment benefits that have arguably been acquired during the marriage through the labor of the employed spouse but that have not been reduced to cash or cash equivalents during the marriage.

Beginning in the 1980’s and 1990’s, stock options began to be used more frequently as a form of compensation. This was particularly true in start-up businesses where entrepreneurs lacked the cash flow to attract talented employees through traditional forms of compensation. As segments of the economy, particularly the high-tech secto, mushroomed with growth, these options became quite valuable. A significant amount of litigation regarding the valuation and division of stock options occurred in the community property states during this period of time. Recent changes in the business accounting rules applied to stock options have made them a less desirable form of executive compensation.

in the future.
Other types of employee benefits and compensation, such as attorney contingency fees also have been classified using the time rule.


SCHWARTZMAN, Chief Judge.

Shubneesh Batra appeals from the order of the district court affirming the magistrate's decision with respect to division of property and child support in his divorce from Monica Batra. Shubneesh challenges: (1) the characterization of stock options received from his employer; (2) the tracing of assets used to purchase stock and exercise stock options; and . . . Monica cross-appeals, challenging the method of valuing stock options. We affirm in part and vacate in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to his marriage to Monica, Shubneesh, an engineer at Micron Technology, Inc. (Micron), began to receive the right to stock options beginning on September 27, 1993. The September 27 grant, as well as subsequent grants, stated that the options were to vest at a rate of 20 percent per year and expire on the anniversary date six years after the initial grant.2 Shubneesh and Monica Batra entered into an arranged marriage on July 14, 1995, in New Delhi, India. During the course of the marriage Shubneesh received additional grants of stock options. On September 10, 1996, the Batras' only child, Millan, was born. Shortly thereafter the couple separated and Shubneesh filed for divorce.

A court trial was held, at which Shubneesh and Monica testified about their assets, liabilities, and ability to care for their infant son. Shubneesh presented evidence of Micron stocks and stock options granted prior to and during his marriage to Monica. Monica testified about four sets of gold jewelry, which she personally valued at $10,000, given to her as separate property gifts at her wedding and a gold coin she purchased during her marriage to Shubneesh. Thereafter, the magistrate entered findings of fact, conclusions of law and an order. A divorce decree was issued on November 20, 1997.

Shubneesh appealed to the district court, arguing that the magistrate had erred in dividing Micron stocks and stock options; in ruling that Shubneesh had failed to adequately trace purchases of Micron stock to separate property sources; and in ordering Shubneesh to pay the value of or return to Monica the four sets of jewelry and $203, representing her share of the value of the gold coin. Monica filed a timely notice of cross-appeal. The magistrate stayed execution of the

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2These separately vesting segments of options are commonly referred to as "flights."
judgment. The district court affirmed the magistrate's decision in pertinent part and reversed and remanded the case for calculation of tax consequences. Shubneesh appeals and Monica cross-appeals.

II. STANDARD OF REVIEW

Our review of a magistrate's decision is made independently from, but with due regard for, the decision of a district court sitting in an appellate capacity. Worzala v. Worzala, 128 Idaho 408, 411, 913 P.2d 1178, 1181 (1996); Smith v. Smith, 124 Idaho 431, 436, 860 P.2d 634, 639 (1993); McAffee v. McAffee, 132 Idaho 281, 284, 971 P.2d 734, 737 (Ct.App.1999). The magistrate's findings of fact will be upheld if they are supported by substantial and competent evidence. Worzala, 128 Idaho at 411, 913 P.2d at 1181; Smith, 124 Idaho at 436, 860 P.2d at 639; McAffee, 132 Idaho at 284, 971 P.2d at 737.

The manner and method of acquisition of property, as well as the parties' treatment of that property, are questions of fact. We defer to the magistrate's findings on these issues when they are supported by substantial evidence. Krebs v. Krebs, 114 Idaho 571, 573-74, 759 P.2d 77, 79-80, (Ct.App.1988). However, characterization of an asset as separate or community, in light of the facts found, is a question of law over which we exercise free review. Id. With these principles in mind we now analyze, in turn, the character of the stock options, the assets used to exercise those stock options or to buy stock outright, and the resulting stock.

III. CHOICE OF LAW APPLICABLE TO THE CHARACTERIZATION OF THE STOCK OPTIONS

A. The Time-Rule of Hug And Short

Each party argues for the application of a competing time-rule. Monica argues for application of the time-rule set forth in Marriage of Hug, 154 Cal.App.3d 780, 201 Cal.Rptr. 676 (Cal.App.1984), under which she would be entitled to a share of every flight of the options in the grant. Shubneesh argues for application of a time-rule similar to that applied in Marriage of Short, 125 Wash.2d 865, 890 P.2d 12 (1995), under which Monica would only be entitled to a share of those flights of options in which the year of vesting coincides with a period of the marriage. The question of which time-rule to apply is a matter of first impression for the Idaho appellate courts.

The parties have assumed that the choice of time-rule is a matter within the discretion of the magistrate. We reject that assumption for a number of reasons. Foremost among them is the compelling need for a rule that is both easy to apply and produces a fair and predictable result given the prominence of stock options as a method of attracting, compensating and providing incentives to key employees in today's highly competitive and technological economy. We recognize that stock options may be intended as a reward for past work or as an incentive for future service or any combination thereof. An award of yet to be vested stock options, such as those at issue here, which requires the employee spouse to continue as an employee throughout the vesting
period, can as easily be characterized as incentive options. Thus, it makes little sense to invite the trial court to divine the intent behind the options. For these reasons, we adopt a single time-rule to be applied to the characterization of such stock options.

Under the *Hug* time-rule urged by Monica, the community's interest in the stock options is a fraction; the number of months on the job from start date to date of separation over the number of months on the job from start date to the date when the options could first be exercised, multiplied by the number of shares that could be purchased on the date of exercise. *Id.* at 783-4, 201 Cal.Rptr. at 678-79. In Idaho, the date of divorce would be substituted for the date of separation. *Desfosses v. Desfosses*, 120 Idaho 354, 360, 815 P.2d 1094, 1100 (Ct.App.1991) (citing *Suter v. Suter*, 97 Idaho 461, 546 P.2d 1169 (1976)). The *Hug* rule treats the options as continually maturing, or vesting, from the date of the grant, thus giving the community a fractional interest in every flight of the remaining unvested options. The community's full interest in the options might not vest for several years after the date of divorce. As such, the *Hug* approach may result in the parties' respective property interests being tied together for a potentially long period after divorce. In particularly acrimonious divorce cases, as the one at hand, this approach increases the opportunities for mischief, misunderstanding, and subsequent litigation. The *Hug* time-rule also runs counter to Idaho's policy of separating the parties' interests in the property as quickly as possible, giving each immediate control over their share of the community property as that interest vests, while avoiding the inequitable distribution of the assets. *See Balderson v. Balderson*, 127 Idaho 48, 53, 896 P.2d 956, 961 (1995). Thus, we are disinclined to accept *Hug*'s rationale.

The magistrate here applied a modified *Short* time-rule adopted in prior cases by Ada County Magistrate Michael Dennard, a respected jurist in the area of family law. Under this modified *Short* time-rule, the community's interest is calculated on a per flight basis, typically a year-by-year basis. The community's interest is a fraction; the number of days of the marriage during the year of vesting of the flight of the stock option in question over the number of days in a year. The fraction is then converted into a percentage—the community's interest in the stock options in that particular flight. The modified *Short* time-rule is attractive, in part, because the denominator is always the same, providing ease of application.\(^3\) This approach also has the added

\(^3\)To illustrate the modified *Short* rule, assume that the employee spouse had worked for an employer for 42 months, beginning on January 1, 1995, and had been granted 100 stock options on January 1, 1996, with the options vesting in flights at a rate of 20 percent per year on the option grant anniversary dates over the next five years, and that the couple had been married for 24 months, beginning on July 1, 1996 and ending in divorce on July 1, 1998. The community's interest in the stock options would be calculated as follows: For the first flight, those 20 options vesting on January 1, 1997, 183 days of marriage over 365 days in the year or 183/365, equal to 50.1 percent of the 20 options that vested at the end of that year, or fractionally more than 10 stock options. For the second flight, the 20 options vesting on January 1, 1998, 365 days of marriage over 365 days in the year, 365/365, equal to 100 percent of the 20 options that vested at the end of that year. For the third flight, 182 days of marriage over 365 days, equal to 49.9 percent of the 20 vested options, or fractionally less than 10 stock options. During the year of vesting of the fourth and fifth flights, the couple was not married and so the community has no interest in the options vesting at the conclusion of those years. The community would own 40 of the 100 stock options, exercisable on January 1, 1999, the date the third flight vests.
attraction of a bright-line rule. The community's interest in vesting flights of stock options is limited to those vesting in whole or in part during the years of the marriage, eliminating whole years of vesting outside of the marriage and thereby hastening separation of the parties' interests consistent with Idaho law.

Having considered the costs and benefits of these two approaches, which typify those applied across the country, we adopt the modified Short time- rule as the appropriate rule where unvested stock options are granted to the employee spouse and vesting occurs in whole or in part during marriage. Accordingly, we conclude that the magistrate applied the correct substantive law in characterizing and valuing the unvested stock options at issue in this case.

B. Shubneesh's Challenges To The Magistrate's Application Of The Modified Short Time-Rule

In his first claim of error, Shubneesh argues that the magistrate erred in finding that yet-to-vest stock options were community property in proportion to the amount of the year during which the parties were married. Specifically, Shubneesh challenges the magistrate's characterization of flights of options with anniversary dates ending within 365 days after November 20, 1997, the date of divorce. He argues that vesting of these options was contingent upon his continued employment beyond the date of divorce, and that had he chosen to quit working for Micron after November 20, 1997, all interest in these soon-to-vest options would be forfeited.

We reject Shubneesh's theory because it ignores a basic proposition of community property law--"income derived from a husband's or wife's 'efforts, labor and industry' during the marriage is community property." Hiatt v. Hiatt, 94 Idaho 367, 368, 487 P.2d 1121, 1122 (1971); Wood v. Wood, 124 Idaho 12, 15, 855 P.2d 473, 476 (Ct.App.1993). Shubneesh's labor preceding the divorce contributed to the vesting of stock options in the months following the date of divorce. Accordingly, the magistrate's application of the time- rule correctly recognized that income--here in the form of stock options--was partially earned from Shubneesh's labor during marriage and, thus, that the community had a fractional interest in the stock options vesting in the months following the Batras' divorce.

Shubneesh also claims that the magistrate erred in characterizing 1,514 stock options granted on September 27, 1993, as community rather than separate property. Shubneesh argues that proper application of the modified Short time-rule would have required a pro rata share of those options that vested during the first year of marriage to be characterized as separate property. We agree.

4The character of those flights of options challenged by Shubneesh vested on the following anniversary dates: November 25, 1997; July 29, 1998; September 9, 1998; October 2, 1998; November 1, 1998.

5These options vested at a rate of 20 percent per year on the anniversary date of the option grant--September 27.
Stock options vesting prior to the date of the marriage are properly the separate property of Shubneesh. The community's interest in stock options vesting in the first year of marriage is proportionate to the number of days of the marriage during that year of vesting. From our review of the record, we conclude that the magistrate did not properly characterize the first two flights of these options from the 1993 grant. The first flight of 504 options vested on September 27, 1994, before the marriage, and was thus Shubneesh's separate property. Therefore, the magistrate erred in characterizing this flight as community property. The second flight of 504 options vested on September 17, 1995, a little over two months after Shubneesh and Monica married. Accordingly, the community share of the second flight is in proportion to the number of days of the marriage during the second year of vesting. Proper characterization of these two flights is essential to a correct determination of the character of 1,514 shares of stock acquired through exercise of these and other stock options during the course of the marriage. Accordingly, we vacate the magistrate's determination relative to these options and remand for a re-calculation of the community interest therein.

C. The Magistrate's Decision To Award Monica The Right To Exercise Her Options As They Become Vested Rather Than Ordering A Lump Sum Payment Based Upon The Stock Price At The Date Of Divorce

Shubneesh argues that the magistrate erred in awarding Monica the right to exercise her options as they become vested rather than allowing Shubneesh to pay her the value of the shares as of the date of divorce. A stock option is a form of discount coupon. An option allows the owner to buy a share of stock for a predetermined price. The higher the market price of the stock, the greater the discount between the option price and share price. Given the nature of stock options, a lump sum payment for yet to be vested stock options at the date of divorce would not reflect the value and risk inherent in stock options. See Balderson, 127 Idaho at 52-53, 896 P.2d at 960-61.

The magistrate properly considered that the options may only be exercised as they become vested and that the value of the options is, at least in part, the right to time one's purchase of stock through the exercise of the options, the value thereof varying in proportion to the discount between the option price and the underlying stock price. The magistrate divided the soon-to-vest stock options, ordering that Monica have the right to exercise her share of the community options by paying the exercise price after the vesting date. This method is consistent with I.C. 32-712(1)(a) and furthers the policy of separating the parties' interests in the property, giving each immediate control over their interests in community property as that interest matures, while avoiding the inequitable distribution of the assets. Balderson, 127 Idaho at 53, 896 P.2d at 961. Shubneesh's claim of error is rejected.6 This Court will not disturb the magistrate's method of distribution of

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6To the extent that Shubneesh may be arguing that individual lots of stock options are not divisible, he failed to present evidence of such to the magistrate court. Accordingly, we do not address the possibility. Such a problem would only arise if Monica elected to exercise her portion of a vested block of options and Shubneesh declined to exercise the remaining portion of the vested block.
Monica's share of the community's stock options after vesting. Id. at 53-54, 896 P.2d at 961-62. Accordingly, the magistrate's order granting Monica the right to exercise her options as they become vested is affirmed.

D. Tax Consequences

Shubneesh argues that Monica's exercise of vested stock options will have tax consequences for him. Implicitly, by requiring each party to bear the cost of exercise of their stock options, the court intended that each party bear the tax consequences of that exercise. See Mulch v. Mulch, 125 Idaho 93, 100, 867 P.2d 967, 974 (1994) (affirming an order of spousal maintenance based upon implicit findings by the trial court). Accordingly, we affirm this determination.

Notes

Is the dispute in Batra over whether to apply the time rule to stock options? What is the difference between the rule adopted by the California courts in Marriage of Hug, 154 Cal.App.3d 780, 201 Cal.Rptr. 676 (Cal.App.1984), and the rule adopted by the Washington Supreme Court in Marriage of Short, 125 Wash.2d 865, 890 P.2d 12 (1995)? What is the policy justifications support the application of the two rules?


Opinion by Coffee, J.

Charles M. Oxton (husband) appeals from a post-judgment order determining that the marital community had a 60 percent interest in a contingency fee he earned from his law practice after he separated from respondent Renee L. Malloy wife). He contends the trial court erred by failing to apply the “hours worked” formula in determining the community interest in the contingency fee. We agree. We reverse and remand for a redetermination of the community interest in the fee.

Factual and Procedural Background

Husband is an attorney. After 25 years of marriage, in February of 1998, the parties separated and husband initiated a dissolution action. In June of 1999, the trial court entered a decree of dissolution. Following a trial, in August of 2002, he court entered a judgment resolving property and support issues. In pertinent part, the court valued husband’s law practice at $ 193,933, which included $ 65,000 in goodwill. Husband was awarded the value of the law practice and wife as
awarded other assets to equalize the division of property. The court reserved jurisdiction over the fee husband would potentially receive from an unresolved contingency fee case (the TWA lawsuit discussed below).

In July of 2003, husband brought a post-judgment motion, requesting that the trial court allocate the community and separate property interests in the $125,000 contingency fee he received in the TWA lawsuit. The court conducted an evidentiary hearing on the matter at which husband and wife testified. The court also considered a declaration submitted by husband with his motion explaining the TWA litigation.

In July of 1996, one of husband’s family law clients, a mother of a minor child, was killed in the TWA Flight 800 crash off of Long Island, New York. Shortly after the crash, the decedent’s former spouse (Scott Anderson) retained husband to represent decedent’s estate and to petition the probate court to have him (Anderson) appointed as the administrator of the estate. Husband testified that the decedent’s major assets were a vehicle and $250,000 in life insurance proceeds. Husband determined that the decedent died intestate and her entire estate would pass to their child as her sole beneficiary. The decedent’s ex-husband was appointed administrator of the estate in December of 1996 and a guardianship was established for the minor child.

Husband’s representation in the probate and guardianship matter overlapped because it was necessary to establish the guardianship prior to closing the probate action so that the probate assets could be distributed into the guardianship. In June of 1997, following receipt of the life insurance proceeds, a petition for final distribution of the probate estate was filed, essentially completing husband’s representation in that matter. Husband represented Anderson in the guardianship until May of 2002, when he substituted out of the guardianship matter.

During the course of husband’s involvement in the probate matter, Anderson, as administrator of the decedent’s estate, received numerous solicitations from law firms around the country offering to represent the minor child and his guardian in litigation arising out of the plane crash that killed his mother. Anderson requested that husband assist him in selecting an appropriate firm to handle the litigation. Husband sifted through the solicitations, researched the firms, and traveled to firms in Chicago and New York. Husband testified that his statutory fee for representing the estate was more than $6,000. Because the work he performed in the probate matter was very limited, he agreed to travel to New York and Chicago to interview the law firms in exchange for payment of his travel expenses. Because he had not been retained at that point to represent the minor or his guardian in the TWA litigation, he petitioned the probate court for payment of his out-of-pocket travel expenses ($4,462.64). These expenses were approved by the probate court and the disbursements were made while he was still married and living with wife.

In May of 1997, Anderson requested that husband represent him as guardian ad litem for the minor child in a wrongful death action against TWA. Anderson selected the New York firm of Kreindler & Kreindler to act as co-counsel, but requested that husband be actively involved as co-counsel in the litigation. On May 21, 1997, husband and Anderson executed a retainer agreement
confirming this arrangement. The retainer agreement stated that attorney’s fees for husband and the New York law firm would be paid on a contingency basis, with husband receiving 5 percent of the net recovery and the New York firm receiving 15 percent of the net recovery.

In July of 1997, husband filed a complaint for wrongful death against TWA and Boeing in the United States District Court for the Central District of California. In December of 1997, the federal judicial panel on multidistrict litigation transferred the case to the United States District Court for the Southern District of New York.

In February of 1998, husband and wife separated. For purposes of determining the community interest in the contingency fee husband received from the TWA litigation, however, the parties stipulated that the date of separation would be March 31, 1998.

In December of 2001, the federal district court approved an order under seal settling the minor’s claim for $2,600,000, with attorney’s fees of $125,513 payable to husband and $376,540 to New York counsel. In August of 2002, the Santa Barbara County Superior Court approved the settlement of the minor’s claim and the fees.

Husband testified that he kept no billing statements or records itemizing the time he spent on the TWA case. Nor did he maintain a trust account for the matter because it was a contingency fee case. He testified that he went through his case file and conferred with co-counsel to estimate the time he spent on the case during the various phases of the litigation. In his declaration and trial testimony, he stated that he spent 10 hours on the case prior to separation and 490 hours on the case after separation (98 percent of the time after separation).

Husband explained that, prior to the parties’ separation, all that had been accomplished from a litigation standpoint was the filing of the complaint, the transfer of the case to New York, and the consolidation of all TWA flight 800 cases. No discovery had been conducted, no depositions were taken, and the investigation into the crash had not yet been completed. He stated the defendants in the action resisted attempts at discovery until rulings were made on their claim that the plaintiffs were entitled to only nominal damages under a federal statute known as the Death on the High Seas Act (DOHSA). He maintained that the 10 hours he spent on the case prior to separation consisted of communicating with co-counsel, initiating the action, meeting with the client, gathering information, and reviewing documents brought to him by the client.

Husband estimated that from March of 1998 through March of 1999, he spent 140 hours on the case. His work focused on three main issues: (1) the applicability of the 1924 Warsaw Convention which governs liability of airlines; (2) the applicability of the DOHSA to limit damages; and (3) gaining access to the wreckage for the plaintiffs’ experts to conduct an independent examination. Husband stated that he followed these major issues, coordinated with co-counsel in New York, gathered information and investigation reports, and disseminated them to his client. He conferred with his client to explain the status of the case, the import of the discovery, and the effect of the statutes. He stated that pleadings and reports arrived in his office
weekly, which he then disseminated and explained to the client on a weekly basis in person or in frequent telephone conversations. He stated that during this period he did not spend any time representing his client in the guardianship proceeding.

Husband estimated that from March of 1999 through December of 2001, he spent 300 hours working on the case. He stated that discovery commenced during this time period, his participation in the litigation significantly increased, and they proceeded with establishing the damages incurred by the client as a result of the crash. Because the litigation proceeded on the East Coast, husband handled the bulk of the client-oriented work on the West Coast. He remained primarily responsible for contacting the client, obtaining information, and responding to discovery on behalf of the family. He traveled to and participated in depositions and meetings with counsel, reviewed deposition transcripts and discovery, and traveled to New York to participate in settlement discussions and appear at court proceedings. He stated that none of this work during this period was chargeable to the guardianship case because it related strictly to the TWA litigation.

Husband estimated that from December of 2001 through July of 2003, he spent 50 hours on the case. He stated that during this time period, the federal court approved the settlement of the minor’s claim and payment of $125,513 in fees to husband. He stated the settlement could not be concluded and the fees paid until it was approved by the Santa Barbara County Superior Court. Approval by the trial court required the filing of a petition for approval of the settlement, a petition for an accounting of the previous years of the guardianship, and a financial plan for the release of the monies to the guardian and investment of the monies for the minor. He stated the 50 hours he worked was required to resolve the TWA case.

Husband requested that the trial court prorate the TWA contingency fee award according to an “hours worked” formula based on the hours he spent on the case prior to and after separation. Using this formula, husband requested that the court allocate 2 percent of the $125,000 fee (representing 10 hours out of a total of 500 hours spent on the case) or $2,500 to the community. Under that formula, wife would be entitled to $1,250 as her share of the community interest in the fee. Alternatively, citing In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 284 Cal. Rptr. 201 (Kilbourne), husband suggested that the court use a “time elapsed” formula to calculate the community interest in the fee. Under this formula, the court would consider the time the case had been pending from start to finish (the date of the first cost to the date of recovery) and allocate a proportionate share of the proceeds to the time before and after separation. Using this formula, the case was open 8.8 months prior to separation (14 percent of the time) and 63.2 months after separation (86 percent of the time). Under this formula, 14 percent of the $125,000 fee would be allocated to the community and wife would be entitled to $8,750 as her share.

In response, wife contested the applicability of the above two formulas proposed by husband. Wife argued instead that the contingency fee should be considered a “finder’s fee,” and wife should share equally in the fee. Wife argued that husband spent months working on the TWA case prior to separation and was improperly attempting to assign time spent on the guardianship case after separation to the TWA case.
After taking the case under submission, the trial court determined that “60% of the TWA fee of $125,513.59 is community property and 40% of it is [husband’s] separate property.” The court reasoned that “this was a unique case in that it was referred to another firm for handling. [Husband] was expected to remain as a liaison with his client and handle some limited work on the case.” The court ordered that (1) wife receive 30 percent of the fee as her one-half share of the community’s portion, plus 30 percent of any interest earned on the principal sum; and (2) 30 percent of any actual costs advanced by husband, but not reimbursed to him, shall be deducted from wife’s share of the fee and retained by husband. The court declined to attribute any overhead expenses to the fee, finding that any such expenses would be speculative and minimal.

Discussion

Husband contends the trial court erred by failing to apply the hours worked or time elapsed formula in determining the community property interest in the contingency fee. He argues the court’s determination that 60 percent of the fee award was community property is not supported by legal authority or the evidence. He requests that we reverse and remand with instructions to the trial court to enter an order allocating the community and separate property interests in the contingency fee according to either the hours worked or time elapsed formula.

Wife contends the trial court essentially made a factual finding that husband referred the case to a New York law firm specializing in air crash litigation and the out-of-state firm did most of the work in bringing about the recovery. Wife contends that the apportionment arrived at by the court (60 percent community and 40 percent separate property) is a fair approximation of husband’s contribution to obtaining the fee and acknowledges husband’s efforts to maintain client confidence so he would not lose the client (and hence the fee). She argues that husband’s right to recover attorney’s fees did not depend on his own work. Rather, his entitlement to fees was fixed by his retainer agreement and “he had no legal obligation to do anything further.” She contends the trial court appropriately valued the community interest in the contingency fee as “a pure referral fee” earned primarily prior to separation. Wife’s contentions are unpersuasive.

In California, an attorney-spouse’s interest in work-in-progress contingency fees is properly included as a community property asset subject to distribution upon dissolution of the marriage if the agreement to pay the fee was entered into during the marriage. (Kilbourne, supra, 232 Cal. App. 3d 1518; Waters v. Waters (1946) 75 Cal. App. 2d 265.) This is consistent with the majority view. (See Annot., Divorce and Separation: Attorney’s Contingent Fee Contracts as Marital Property Subject to Distribution (1996) 44 A.L.R.5th 671; Christopher A. Tiso, Are Contingency Fee Cases Part of the Marital or Communal Estate? (1998) 5m.Acad.Matrim.Law 391-410.) In order to ease the task of valuing the community interest in work-in-progress contingency fee cases at dissolution, courts typically reserve jurisdiction to determine the spouses’ respective interests in the fees when they are actually received.
"When a trial court concludes that property contains both separate and community interests, the court has very broad discretion to fashion an apportionment of interests that is equitable under the circumstances of the case." (In re Marriage of Gowan (1997) 54 Cal.App.4th 80, 88; In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 791, 201 Cal. Rptr. 676 [disposition of marital property is within the trial court’s discretion, by whatever method or formula will achieve substantial justice between the parties].) We review the approach or method utilized by the trial court to allocate the community and separate property interests in the contingency fees earned by husband under an abuse of discretion standard. (See, e.g., Gowan, at p. 88.)

Few courts in California have addressed the appropriate method for valuing the community interest in contingency fees earned by an attorney spouse. Kilbourne, supra, provides some guidance. In that case, the trial court was asked to determine the community and separate property interests in the husband’s law practice, including his unpaid contingency fee cases. In valuing the community interest in contingency fees received from work in progress (cases initiated before, but completed after separation), the trial court applied a time rule formula advocated by the wife’s expert witness. This formula measured the time the case had been open (from the date of the first cost to the date of recovery) and calculated the community and separate property share of the contingency fees in proportion to the periods of time spent before and after the parties’ separation. The appellate court affirmed, holding that the time rule was appropriately applied under the circumstances. In affirming, the appellate court noted that the lower court had been hampered by the husband’s failure to present an expert witness of his own to refute the time rule or to offer an alternative method of calculation, and he had kept no time records of his own. (Kilbourne, supra, 232 Cal. App. 3d at p. 1525.)

Appellate courts in other jurisdictions have held that the community property share of work in progress contingency fee cases should be based upon the percentage of the number of hours worked during the marriage (or prior to separation) as compared to the total number of hours worked earning the fee. (See, e.g., Garrett v. Garrett (1983 Ariz.Ct.App.) 140 Ariz. 564, 683 P.2d 1166, 1171; In re Marriage of Vogt (1989 Colo.Ct.App.) 773 P.2d 631, 633; In re Marriage of Estes (1997 Wash.Ct.App.) 84 Wn. App. 586, 929 P.2d 500, 592; McDermott v. McDermott (Ark. 1999) 336 Ark. 557, 986 S.W.2d 843, 848.) This approach is the preferable method, it achieves an equitable division, and is consistent with the holding in Kilbourne. The hours worked and time rule methods are also consistent with the method utilized to value similar marital assets such as unvested pension rights, stock options, and retirement benefits. (See, e.g., In re Marriage of Gowan, supra, 54 Cal.App.4th at p. 88; In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 522, 137 Cal. Rptr. 318; In re Marriage of Steinberger (2001) 91 Cal.App.4th 1449, 1459.)

Here, the trial court valued the community interest in the contingency fee at 60 percent of $125,513. This 60/40 split was not advocated by either husband or wife, was not supported by the evidence, and is not supported by any case authority. Husband testified that he spent a total of 500 hours working on the case (10 hours before separation and 490 hours after separation), and the client expected him to be actively involved in the litigation. The court, however, appeared to assign a greater value to the community interest in the contingency fee on the assumption that the $
125,000 earned by husband was more analogous to a referral fee. Contrary to wife’s contention, under the circumstances of this case, the result reached by the trial court was not equitable and it did not represent a fair approximation of husband’s contribution to the case. Indeed, allocating 40 percent of the $125,513 fee to the husband as his separate property allows the husband $102.46 per hour for services rendered post-separation ($125,513 times 40 percent divided by 490 hours), an unreasonably low rate given the risks associated with accepting such a case, the services performed, and husband’s experience. Had the trial court applied the hours worked formula, husband would have been compensated about $250 per hour for his services, a more reasonable rate under the circumstances. There was no evidence that the services performed by the husband were worth anything less.

We conclude that in calculating the community property interest in fees earned by an attorney-spouse’s work under a contingency fee contract, trial courts should ordinarily apportion contingency fees in accordance with the hours worked on the case before and after separation, if this can be proven. In the absence of such proof, the court should then apportion in accordance with the amount of calendar time before and after separation, as the court did in Kilbourne. The evidence in this case did not support any different calculation. The evidence presented in this case was the amount of time husband worked on the case before and after separation. Consequently, the trial court abused its discretion by applying a different formula in determining the community interest in the contingency fee earned by husband. We must reverse and remand for a redetermination of the community interest in the fee and for entry of factual findings consistent with either the hours worked or time rule formula.

Accordingly, we reverse the post-judgment order and remand this case to the trial court for a redetermination of the community interest in the contingency fee. The trial court may, but is not required to, take further evidence to determine the community interest in the fee according to the hours worked formula. If it finds husband’s testimony credible as to the number of hours worked before and after separation, the hours worked formula should be employed. If not, the court should use the time rule. Husband is awarded costs on appeal.

Notes

Oxton is an unpublished California decision that provides interesting insight into the world of attorney compensation in personal injury cases. Is there an argument that the fee at issue was not compensation at all, but rather a windfall, in the nature of lottery winnings? When “compensation” is not rooted in the labor or industry of a spouse, should the community property treatment be modified?

VI. CHARACTERIZING PROPERTY THROUGH "IN LIEU OF" TRACING

So far, we have considered the classification of community property based on the time of acquisition and/or the source of the consideration used to acquire the asset. A third category of
classification rules may apply when an asset is acquired as a replacement for another (usually lost) asset. For example, such replacement happens when insurance proceeds are acquired to cover the loss of insured property, or when an individual recovers a court award in which a defendant is ordered to compensate the individual for losses. In these cases, courts do not necessarily consider the time of the acquisition of the replacement asset. Nor do they generally consider the source of consideration, if any, that made the replacement asset available.

A. Tort & Insurance Recoveries


CUTRER Judge.

[In an action to divide community property after separation, the trial court held that proceeds paid on an insurance policy were the Husband's separate property.]

Betty Trahan appealed the judgment and John Trahan answered complaining of error by the trial court for granting any credit to Betty. We affirm.

The parties were married on August 28, 1975. They had lived together for about two years before their marriage. The residence in which they lived was owned by John Trahan before his marriage to Betty Trahan. It was clearly his separate property. While living on the premises certain improvements were made to the residence. Although the extent of the improvements during the marriage is in dispute, it is agreed that a new roof was installed after the marriage.

During the marriage a homeowner's insurance policy covering the residence was purchased in the name of John Trahan. Three or four months later, the home burned and John Trahan received $46,560.00 in insurance proceeds. (An advance of $1,000.00 was received, but Trahan does not seek reimbursement for this.)

The insurance proceeds of $45,560.00 were deposited in an account. This account was one that John Trahan had prior to his marriage and was in his name only. Shortly thereafter, $10,000.00 of that money was transferred into another account held in the name of Betty Trahan. This checking account was opened after the insurance proceeds were received. John and Betty then purchased land at another location in the area and constructed a new home thereon. The funds from the "John Trahan" account ($35,560.00) were used to pay for the land, materials and labor furnished to build a new residence. A portion of the funds ($10,000.00) deposited in Betty's account was used to pay for the construction of the new home. Other community expenses were paid from Betty's account such as food, clothing, etc.

The nature of the funds used to construct the new residence is the crux of the dispute before us. Both parties agree that the new residence was constructed on property purchased during the marriage and was a community asset.
INSURANCE PROCEEDS

We conclude that the proceeds from the fire insurance policy were the separate property of John Trahan. The object of the insurance policy was the residence belonging to the separate estate of John Trahan. When that residence burned, the estate, consisting of the residence, was transformed into the insurance proceeds.

We base our conclusion on the case of *Thigpen v. Thigpen*, 91 So.2d 12 (La.1956), in which our Supreme Court faced a similar situation. In that case, the parties, Mr. and Mrs. Thigpen, had a number of disputes regarding their community property settlement which was being settled as a result of a divorce proceeding.

During the existence of a previous marriage, Mr. Thigpen and his wife purchased several buildings. Sometime later, the first wife died and the property then became jointly owned by the deceased wife's heirs and Mr. Thigpen. Later, Mr. Thigpen remarried. Clearly, the interest in the property purchased during the existence of his first marriage was separate property of the husband as to the second marriage. During the existence of the second marriage, Thigpen purchased a fire insurance policy to cover the buildings. Shortly thereafter the buildings burned and the loss was replaced with funds from the insurance proceeds. The Supreme Court held that these insurance proceeds did not become community property. The court noted that since the premiums were paid out of the community funds, there may have been a justifiable claim for reimbursement for the wife's contributions to the premiums, but this did not make the proceeds themselves community property.

The essential similarity is that the husband owned separate property which was covered in a policy purchased during the community. After the fire loss, the insurance proceeds maintained their status as separate property. We hold that the proceeds of the insurance policy in this case were John Trahan's separate property.

Counsel for Betty Trahan contends that no credit should be given to John Trahan's separate estate. It is contended that the proceeds of the insurance policy were acquired during marriage and, as such, it is presumed that such proceeds falls into the community. Counsel for Betty Trahan relies principally on the case of *Palama v. Palama*, 323 So.2d 823 (La.App. 4th Cir. 1975), writ den., 326 So.2d 381 (La.1976), as authority for his position that the proceeds of the insurance policy were a community asset. *Palama* is not applicable to this case. In *Palama*, the fire insurance was purchased during the existence of the community to cover the residence situated on the husband's separate property. The residence was insured for $25,000.00. The court concluded that the community had expended $15,000.00 on the construction of the residence and that this expenditure enhanced the value of the residence by an additional $10,000.00. The court then concluded that the proceeds of the insurance ($25,000.00) must be paid into the community and divided between the husband and wife. The case does not hold that the proceeds of the fire policy were community, but it held that such proceeds must be used to reimburse the community for the
community expenditures and the enhancement of the value of the separate property. The proceeds of the insurance policy in this case are John Trahan's separate property. *Thigpen, supra.*

An examination of the record convinces us that the trial court correctly held that John Trahan's separate estate must be credited with $34,860.00 out of the sale of the community property.

....

Affirmed.

**Notes**

1. Presumably the premiums on the policy of home owners insurance at issue in Trahan were paid with community property (at the same time that payments on the mortgage were made). Such homeowners insurance is very similar to term life insurance. No cash value is accumulated. The property insurance policy does not have an investment component. Rather, the policy could be viewed as a string of loosely-related one month contracts where the payment of a premium results in the acquisition of one month’s paid-up insurance and the right to make the next insurance payment. Given this, why did the court not consider applying the risk-payment doctrine we examined in *Wadsworth* and *Banner Life* earlier in this text? What would have been the result if the risk-payment approach had been applied?

2. Should the community have a reimbursement claim for the premiums on the home owners’ policy that were paid with community property? Should it matter whether the couple was residing in the insured property or otherwise using the insured property for the benefit of the marital community?


McFADDEN, Justice.

Betty Rogers, the plaintiff-appellant, instituted this action under the provisions of I.C. §49-1404\(^1\) seeking damages for personal injuries arising out of a one-car accident which occurred on March 29, 1970, near Ashton, Idaho.

\(^1\)§49-1404. Owner's tort liability for negligence of another - Subrogation. –

1. Responsibility of owner for negligent operation by person using vehicle with permission - Imputation of negligence. Every owner of a motor vehicle is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

2. * * *
In her complaint, appellant alleged the following facts. She was a passenger in a car owned by the Yellowstone Park Company, the defendant-respondent, and operated by Peter Rogers, her husband who was employed by the respondent company. Respondent Yellowstone Park Company gave permission to her husband to operate the vehicle on this particular business related trip from San Francisco to Yellowstone Park, and agreed that appellant and her son, an infant, could accompany her husband on this trip. Defendant Peter Rogers drove the company car continuously on the trip, without rest or relief, except for brief stops. Appellant's husband, while driving, dozed or fell asleep and the car left the highway. Appellant alleged her husband's conduct constituted gross, wanton and reckless disregard of the lives of others and his negligent acts and omissions caused the accident and seriously injured her. She alleged she sustained medical and hospital expenses in the approximate amount of $4,200, and alleges future medical expenses for her injuries will be $10,000. She alleged damages for incidental expenses, loss of earnings and pain and suffering in the amount of $50,000.

Appellant, while naming both the Yellowstone Park Company and her husband as defendants in the action, obtained service of summons and complaint on the Yellowstone Park Company, but not on her husband. The respondent in its separate answer denied all allegations of the complaint, and alleged as affirmative defenses the following. Peter Rogers was not authorized to carry passengers in the company vehicle; a necessary party, i.e., Peter Rogers, was not joined as a party plaintiff; any recovery by appellant would be community property for herself and her husband, and that her husband was an indispensable party plaintiff. Respondent by way of cross-claim against Peter Rogers alleged it was entitled to indemnification from him for any sums it might have to pay appellant by reason of this action.2

Respondent filed its motion for summary judgment, contending that a wife living and cohabitating with her husband cannot recover from her husband's employer for the husband's negligent acts, since any recovery by the wife would be community property which would inure to the benefit of the husband tortfeasor. The motion for summary judgment was based on a deposition of appellant taken by respondent, certain answers to interrogatories, admissions, and affidavits. The trial court concluded that under the present interpretation of Idaho law, any recovery by appellant would be community property of herself and her husband, thus inuring to his benefit. The trial court granted the motion for summary judgment, from which judgment appellant has taken this appeal.

3. Operator to be made party defendant - Recourse to operator's property. In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this state. Upon recovery of judgment, recourse shall first be had against the property of said operator so served.3

2No issue regarding the Idaho Guest Statute, I.C. § 49-1401, was presented, nor do the parties contend that the law of any other jurisdiction is involved.
Presented for resolution by this court is the fundamental issue of whether the appellant wife may maintain an action for personal injuries against her husband and his employer for her husband's negligence during the course and scope of the husband's employment.

Aside from a consideration of the nature of the right sought to be protected in this instant action, we find no valid reason for the retention of interspousal immunity in an action of this kind.

We now come to the critical issue concerning the nature of the interest which appellant by this action seeks to protect. If one relies on the cases previously cited by respondent involving tort claims against third party tortfeasors, it is clear that there is only one answer, i.e., appellant's recovery for damages suffered in the automobile accident would be community property and this present action would be barred. However, without exception none of those cases considered the character of the right harmed for which the damages were sought.

Separate property is defined by statute to include:

"All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property." I.C. §32-903.

Community property, on the other hand, includes:

"All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property * * *." I.C. §32-906.

The cases previously referred to herein cited by respondent relied on the concept that all property acquired during marriage was community property, and that any recovery for damages for personal injuries was "property acquired after marriage" but not acquired by "gift, bequest, devise or descent." Hence, such recovery was community property. However, we believe the correct concept is first to consider the nature of the right or interest invaded or harmed by the negligence of a defendant, and based on a determination of the nature of this right, then to characterize the damages recovered in relation to the right violated. Thus, the character of any judgment in this type of case as separate or community would take its character from the nature of the right violated. See, McKay, *Community Property*, §398, p. 286 (2d ed. 1925).

When a couple marry they bring to the marriage not only their property, but also themselves as individuals. While they enter into common bonds, still they are entitled to maintain certain
individual rights. One of those rights is that of personal security and freedom from harm to one's person from the spouse. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (N.M. 1952). Any physical injury to a spouse, and the pain and suffering therefrom is an injury to the spouse as an individual. Compensation by way of damages for such an injury would partake of the same character as that which has been injured or has suffered loss. See McKay, Community Property, §398, p. 268 (2d ed., 1925); DeFuniak & Vaughn, Principles of Community Property, §82, p. 201 (2d ed. 1971). Although not articulated in terms of personal security, nonetheless, in Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949), this court recognized the right of a wife to maintain an action against her husband for a tort committed while the parties were married. Even though at the time the action was brought the parties had separated, this court stated

"We, therefore, conclude that a cause of action for damages to the person or character of a married woman, which accrue while she is living separate and apart from her husband, is 'an accumulation,' is her separate property; that the husband is not a necessary party plaintiff and is not entitled to any of the recovery. This rule is particularly applicable where the husband is himself the wrongdoer."

69 Idaho at 446, 209 P.2d at 735.

Courts in other community property jurisdictions have similarly recognized the right of a spouse to maintain a tort action for a personal injury and to recover damages as separate property. In Soto v. Vanderventer, 56 N.M. 493, 245 P.2d 826, 832, 833 (N.M. 1952), 35 A.L.R.2d 1190 (1954) [see, Annot., 35 A.L.R.2d 1199 (1954)], the New Mexico Supreme Court held:

"We are of the opinion that reason, justice and a fair interpretation of our community statute, construed either in light of the common or Spanish law, require that we hold the cause of action for the personal injury to the wife, and for the resultant pain and suffering, belongs to the wife, and that the judgment and its proceeds are her separate property. She brought her body to the marriage and on its dissolution is entitled to take it away; she is similarly entitled to compensation from one who has wrongfully violated her right to personal security."


3In Self v. Self, supra, the Supreme Court of California allowed a recovery by a wife for an intentional tort inflicted upon her by her husband, overruling two previous cases. To a certain extent that court relied upon legislative enactments. In Klein v. Klein, supra, the Supreme Court of California allowed a recovery by a wife against her husband for a negligent tort, as opposed to an intentional tort as in Self v. Self, supra. Idaho in Lorang v. Hays, supra, reached the same conclusion concerning intentional torts as the California court but did not have to rely on a special statute.

It is the conclusion of this court that the appellant is entitled to pursue her remedy for damages arising out of the alleged accident, notwithstanding that the tortfeasor was her husband and was named as a party defendant. See, Lorang v. Hays, supra, where this court stated:

"Construing our constitution and statutes as a whole, it seems to us plainly manifest that the legislative intent to remove the shackles of the common law rules as to rights of a married woman, under the circumstances presented here, is clearly apparent.

"In Idaho a married woman has a legal status of her own. She is not submerged in the identity of her husband.

"We are unable to perceive where public policy or society or the sacred relations of marriage are in anywise protected by denying a remedy open to all persons. We, therefore, conclude that under the facts alleged, the plaintiff has a right to maintain the action against her former husband even though the tort complained of was committed during coverture."

69 Idaho at 448, 209 P.2d at 737.

One additional issue is presented by this appeal concerning what damages would be allowable to a spouse in an action such as this.

In Freehe v. Freehe, 81 Wash.2d 183, 500 P.2d 771 (1972), the Supreme Court of Washington held that a married woman could maintain an action for a personal injury caused by the negligence of her husband. Therein that court dealt with the issue of the scope and nature of damage recovery. That court stated:

"In more direct response, this argument mistakenly assumes that courts are incapable of fashioning a remedy appropriate to a newly recognized enforceable claim for relief. For the simple reason that no enforceable claim has heretofore been recognized in this area, none of our prior cases allocating personal injury recoveries can be said to be on point. That is, we are not here concerned with the established rule that recovery for injuries to a married person by a third party tortfeasor is community property. Nor does any statute expressly deal with the allocation of damages as between the spouses in such an action. In these circumstances, it is for the court to fashion an appropriate remedy. We think that justice would best be served in these cases by a rule that compensates the injured
spouse without unduly benefitting the tortfeasor spouse. See discussion 38 Wash.L.Rev. 374-379 (1963). We think that these dual considerations are best served by the following formula: (1) Special damages, including established future specials, are recoverable by the community. These are actual, out of pocket expenses which are a community liability. The fact that the tortfeasor spouse is thereby spared his or her community share of these expenses is, we think outweighed by the facts that these damages are strictly compensatory in nature, inuring directly to the benefit of the injured spouse, and that any reduction in the damages recoverable would most directly and harmfully affect the injured spouse. (2) General damages for loss of future earnings which would have constituted community property are recoverable in the fraction of one half, by the injured spouse, as his or her separate property. (3) General damages compensating for pain and suffering, emotional distress, etc., are fully recoverable and are the separate property of the injured spouse."

500 P.2d at 776, 777.4

It is our conclusion that the Washington Supreme Court has established a workable rule concerning damages in this type of case, an action for personal injuries sustained by the wife. Therefore it is the conclusion of this court that appellant in this action is entitled to pursue her remedy for damages arising out of the accident alleged notwithstanding that she has named her husband as a party defendant. Appellant seeks recovery of special damages, including established future specials. She also seeks general damages for loss of future earnings, and also general damages as compensation for pain and suffering. Appellant is entitled to recover her special damage, including established future specials, as these are actual out of pocket expenses which are a community liability. And the fact her spouse would be relieved of this financial burden is outweighed by the fact such damages are strictly compensatory in nature inuring to the benefit of the injured spouse. General damages for loss of future earnings which would be community property would be recoverable only in the fraction of one-half as the separate property of the injured spouse, and general damages for pain and suffering and emotional distress would be fully recoverable as the injured spouse's separate property.

The summary judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Costs to appellant.

SHEPARD, Chief Justice (dissenting).

... [After discussing why the Idaho Supreme Court should not have judicially abrogated the doctrine of interspousal immunity, Chief Justice Shepard makes the following arguments.]

Having disposed of the threshold question of the abolition of the doctrine of interspousal immunity in a most cavalier fashion the majority opinion then illogically leaps to a consideration of the recovery, and if it is to be characterized in terms of separate property. The majority omits any discussion as to what property is to be liable for the torts of the guilty spouse. The majority decision does not answer such questions as: If the tortious act was committed in the furtherance of the community, would the community property be liable to pay the money judgment to the wife as her separate property? Perhaps the majority opinion is to be taken as ruling that damages for the tortious acts of a spouse could be recovered only from the separate property of the tortfeasor spouse. What of the dilemma which is posed if the spouse has no separate property? If the community property is to be liable to pay the sum of money to a wife as her separate property it would appear that the mathematics of computing a fair recovery are insurmountable. If the community property is used to pay the one-half loss of future earnings of the wife to her as her separate property then she is actually paying one-half of her own damages by virtue of her one-half ownership of community property. As a result the wife has actually only gained one-fourth of the amount of her general damages for loss of future earnings. I believe it obvious that such computations soon reach the point of absurdity.

As a result of the above discussion one might be tempted to believe that the only reason for the abrogation of the doctrine of interspousal immunity is to allow one spouse to recover against an insurance carrier.


"Interspousal tort litigation can hardly be called adversary. It is more like a joint venture to collect from the insurance company.

"Married tempers often fly. So do pots, pans, fists and worse. Apologies and caresses will no longer be the only available balm. In Michigan at least, we can well envision the family donnybrook ending with the husband calling her lawyer and both entertaining visions of better days ahead."

The common law for hundreds of years has held to the doctrine that a husband and wife are a unit for certain purposes in the law. From that concept sprang the concept of interspousal immunity for tortious conduct. Other doctrines that sprang from the same unitary concept are equally important. They may not testify against each other. Under most circumstances they have a duty of support each toward the other, and even upon a divorce a part of those duties may be continued. In this state neither can alienate the real property of the community without the consent and the execution of the other. Although examples are endless, these few may suffice.
Many years ago Harlan Fisk Stone, *The Common Law in the United States*, 50 Harvard L.Rev. 4, commented:

"Law performs its function adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that the law shall at once have continuity with the past and adaptability to the present and the future.

"We are coming to realize more completely that law is not an end, but a means to an end - the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law; that end is to be attained through the reasonable accommodation of law to changing economic and social needs, weighing them against the need of continuity of our legal system and the earlier experience out of which its precedents have grown; that within the limits lying between the command of statutes of the one hand and the restraints of precedents and doctrine, by common consent regarded as binding, on the other, the judge has liberty of choice of the rule which he applies and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another."

So in the case at bar, I believe this Court is faced with the problem of determining whether the doctrine of interspousal immunity serves the need of "continuity of our legal system" or whether it no longer serves the needs of our society, admittedly vastly changed from that in existence at the time of the adoption of the doctrine.

Admittedly the relationship between husband and wife has changed and continues to undergo massive change. We are told that one out of every three marriages ends in divorce. We can only speculate of the percentage of the remainder which exist in name only. The family unit, however, is still generally considered to be the key to the survival of our society and civilization. While I do not accuse the majority of an intent to destroy the family, I believe it obvious that the decision of the majority today contributes nothing to the need for the stability of the family relationship in todays society.

I suggest that the decision of the majority today will have results and consequences which will reach far beyond those envisioned in the humorous comments of Professor Prosser regarding interspousal harmony and the bland assumption that the doctrine of interspousal immunity serves and protects only insurance carriers.

BAKES, Justice (dissenting)
Chapter 3: Classifying Property As Community

Notes

How does the apportionment of tort awards actually work in an actual case? What if the award is the result of a settlement with an insurance company that was not subdivided into its component parts? Or a jury verdict?

B. Other Wage Replacement Benefits

Lachney v. Lachney, 529 So.2d 59 (La. 1988)

KING, Judge.

The issue presented by this appeal is whether or not monthly disability benefit payments received by a former spouse after divorce, pursuant to an employer-provided disability insurance policy, should be classified as community property where the former spouse qualified for and began receiving benefits prior to the termination of the community.

Cloynise Johnson Lachney (hereinafter plaintiff), filed suit against her former husband, Joseph Lawrence Lachney, Sr. (hereinafter defendant), and Aetna Life Insurance Company (hereinafter Aetna) seeking to be recognized as the owner of an one-half interest of defendant's monthly disability benefit payment and for reimbursement of one-half of the amounts received by him since July 23, 1982, the date her suit for judicial separation was filed. After a trial on the merits, the trial court rendered judgment in favor of plaintiff, awarding her one-half of the monthly disability benefits received by defendant from July 23, 1982 to March 6, 1987, the date a judgment was signed in this suit. The judgment further provided that, from the date of the rendition of said judgment, Aetna was to withhold one-half of all of defendant's monthly disability benefit payments and to pay these amounts directly to plaintiff each month. Defendant timely appeals. We reverse and render judgment.

FACTS

The facts were stipulated to be as follows: Mr. and Mrs. Lachney were married on December 27, 1952, and during their marriage, they acquired community property and debts. On July 23, 1982 Mrs. Lachney filed suit for separation from bed and board in the Thirteenth Judicial District Court. Later, on September 20, 1982, she filed a supplemental and amending petition demanding a divorce and a partitioning of the community property along with other relief.
A judgment of divorce was rendered on October 26, 1982 ordering Mr. Lachney to pay alimony of $250.00 per month to Mrs. Lachney. The divorce judgment also ordered that a notary public be appointed to take an inventory of the community property and that it be partitioned. A document making a partial settlement and liquidation of the former community was executed by Mr. and Mrs. Lachney on December 14, 1982. The entire record in the divorce suit was filed into evidence in this suit by joint stipulation of the parties.

Prior to the filing of the original suit for separation, defendant was employed by the Cabot Corporation (hereinafter Cabot) at their plant north of Ville Platte in Evangeline Parish, Louisiana. He worked for the corporation from December 15, 1966 through October 27, 1977, when he became disabled and commenced receiving disability payments under the terms of a group long term disability insurance policy purchased by Cabot from Aetna. At trial it was stipulated that Aetna had paid under its policy monthly disability benefits direct to defendant since July 23, 1982, when the original suit for separation was instituted.

An affidavit filed by Aetna shows that on October 27, 1977, defendant began receiving long term disability payments pursuant to its policy in the amount of $641.67 per month less a workman's compensation payment offset of $281.66 per month. In December, 1977, defendant began receiving full monthly benefits of $641.67 after Aetna was notified that defendant was no longer receiving Louisiana Worker's Compensation Benefits. The monthly disability payment was increased to $660.92 in October, 1978 due to a cost of living increase provided in the policy. From October 1978 to present, defendant has received $660.92 a month from Aetna and will continue to receive the sum until age 65, the termination of his disability, or his death, whichever occurs first.

Plaintiff filed this suit on March 16, 1984, alleging that Aetna and defendant were indebted jointly, severally, and in solido unto her for one-half of all monthly disability benefits paid to defendant since July 23, 1982, which plaintiff claims as community property.

Aetna filed an answer on behalf of defendant and itself, and thereafter, filed a motion for partial summary judgment on November 12, 1985. On December 5, 1985, a consent judgment was rendered dismissing plaintiff's claim against Aetna, and reserving to plaintiff any and all rights she had against defendant. The judgment of dismissal of plaintiff's claim against Aetna was not appealed.

A trial on the merits was held on January 5, 1987 and, at its conclusion, the matter was taken under advisement. On February 25, 1987, the trial judge assigned written reasons for judgment in Open Court. The court made the following findings of fact supporting its decision:

"1. The policy was acquired during the community of acquets and gains then

5The alimony award was later reduced to $110.00 in conformity with a judgment rendered on March 5, 1985 and signed on October 17, 1985.
existing between the parties, and while it is true that no premium was paid by defendant Lachney, it was not a gratuity, but rather a benefit, an additional remuneration [sic] or compensation made to the employee, and thus community property. 2. While C.C. Arts. 2377 and 2431 were repealed in 1979, the rights herein claimed by plaintiff had vested, and since the court finds that they are substantive in nature, plaintiff cannot be deprived of property rights under the contract of insurance acquired during the existence of the community of acquets and gains existing heretofore between the parties herein. 3. In view of the foregoing reasoning, plaintiff is entitled to one-half of the amount which defendant Lachney received from July 23, 1982, to the date of the rendition of the judgment in this case. C.C. Arts. 155 and 159. 4. From and after that date Aetna Life Insurance Company is to withhold one-half of all monthly disability benefit payments that defendant is entitled to, and to transmit that amount monthly to plaintiff...."

A written judgment was rendered and signed later on March 6, 1987. From this judgment defendant timely requested and was granted a devolutive appeal.

CLASSIFICATION OF DISABILITY BENEFITS

On appeal, defendant argues that the trial court erred in classifying the monthly disability benefits received by him beyond the date of filing of the separation suit (July 23, 1982) as community property and finding they represent additional remuneration or compensation made to him as an employee. He further asserts that the benefits represent a "gratuity" because the disability policy premiums were paid exclusively by Cabot and, therefore, the policy was not obtained through the efforts or skill of either spouse. In the alternative, he argues the payments are a substitute for the wages he is unable to earn because of his injury sustained while working for his employer, Cabot. The issue presented by this appeal appears to be res nova in Louisiana. While we are of the opinion that the Louisiana jurisprudence does not support a finding that disability income payments to an employee are a "gratuity," there is support in the Louisiana jurisprudence for treating the payments as a substitute for lost income attributable to the disability and, thus, its classification as separate property of the injured spouse after the dissolution of the marriage between the parties.

CODAL ARTICLES

In 1979, Book III of the Louisiana Civil Code dealing with matrimonial regimes, consisting of Articles 2377 to 2431, was revised primarily to eliminate the head and master management system of pre-revision law; but, in the revision few changes were made to the principles of classification of property. Those changes which were made were designed to achieve more gender

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neutral articles in conformity with the newly incorporated concepts of equal management. Under current law, as well as under the pre-revision law, the property of married persons is divided into community and separate, and classification is made according to principles which are based upon the time and manner of acquisition of the property.

Under pre-revision law, LSA-C.C. Articles 2334 and 2402 were the two main articles dealing with classification of property.

LSA-C.C. Article 2334 provided in part:

"Art. 2334. The property of married persons is divided into separate and common property. Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly. The earnings of the wife when living separate and apart from her husband although not separated by judgment or court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property. Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part sufficient for separation or divorce, shall be his separate property. Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared...."

LSA-C.C. Article 2402 provided:

"This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of the community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws.'"

These articles are particularly relevant in deciding the case at hand because they were in effect during defendant's employment with Cabot from 1966 to 1977, the year in which he became
disabled and started to receive these disability payments; however, we do not believe that the result we reach would be any different under the revised classification articles.7

LOUISIANA JURISPRUDENCE

After an examination of the Louisiana jurisprudence, we have not found any cases directly resolving the issue presented by this appeal. Recent scholarly commentaries suggest that in attempting classification of disability payments an examination should be carefully made to determine whether the benefits represent deferred compensation in the nature of retirement or pension income and, if so, then under Sims v. Sims, 358 So.2d 919 (La.1978) and T.L. James & Co., Inc. v. Montgomery, 332 So.2d 834 (La.1975) the benefits should be classified as community to the extent attributable to years of service performed during the existence of the community.8 In the present case, this would result in classifying every monthly disability payment as community property, because defendant's employment with Cabot began and terminated during the existence of the community. On the other hand, if the disability payments do not qualify as deferred compensation in the nature of retirement or pension income, then they should be classified in accordance with the approach used by courts in allocating tort damage awards and worker's compensation benefits.

Under the latter approach, a pro rata method has been applied to determine time of acquisition, and hence, what part of the payments are separate or community property.9 In applying

7LSA-C.C. Articles 2338 and 2341 are the two principal property classification articles found in the current law. Community property is defined in Article 2338 as follows: "The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property." LSA-C.C. Article 2341 defines separate property as follows: "The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of voluntary partition of the community during the existence of a community property regime."


9The Louisiana Supreme Court first applied a pro rata method in T.L. James & Co., Inc. v. Montgomery, 332 So.2d 834 (La.1975), where the court held that the proceeds of pension and profit-sharing plans should be apportioned between the pre-existing community and the separate estate of the former spouse receiving them in the same proportions that the contributions made during the pre-existing community bear to the total contributions made during
the pro rata approach to classify incorporeal property rights, no one event is singled out and made dispositive of classification; instead, the focus is on the nature of the property rights over a period of time. This allows an award of tort damages or worker's compensation benefits to be classified partly community and partly separate property of the injured spouse. Using this approach, courts have classified tort damage awards and worker's compensation payments as community property to the extent attributable to community expenses or lost community earnings and as separate property to the extent they represent compensation for a particular injury. We are of the opinion this method of analysis will result in a disposition that is most consistent with the jurisprudence, codal articles, and concepts of equity.

Before we address the question of whether the payments at issue are analogous to deferred compensation in the nature of retirement or pension income or more similar to tort damages and worker's compensation payments, we must first determine whether the disability payments made to defendant by Aetna constitute pure gratuities. If the answer is in the affirmative, the disputed benefits are his separate property in their entirety and there will be no need to proceed further with our analysis.

In *T.L. James & Co., Inc. v. Montgomery*, supra, the Supreme Court specifically rejected the argument that "fringe benefits" are mere gratuities even when instituted unilaterally by the employer. Addressing this issue, the Supreme Court held that employer contributions into benefit plans are:

"[A] reward by the company to promote loyal and efficient service on the part of the employee. The plans are, moreover, an inducement to the employees to remain in the service of the company to enjoy the benefits of the plans promised. In short, the contribution of the employer is not a purely gratuitous act, but is in the nature of additional remuneration to the employee who meets the conditions of the plan. The employer expects and receives something in return for his contribution, while the employee, earns the reward. The benefits to the employee are, therefore, earned income-property within legal contemplation."


The application of this rationale to the case at hand leads us to conclude that the disability insurance policy, obtained for the employees of Cabot through union negotiations in 1972, was not a gratuity but was additional compensation designed to induce the Cabot employees to remain in the service of the company. The fact that defendant did not pay any premiums, or otherwise make any other contributions, is of no consequence. As to the finding that the disability payments were not a gratuity, we are in agreement with the trial court; nevertheless, this determination does not necessarily lead to the conclusion that the disability benefits are community property. Further
inquiry must be made to determine whether the disability insurance policy was intended to provide a source of retirement or pension income or was obtained by Cabot to compensate an injured employee for lost earnings in the event the employee was incapacitated due to a serious illness or injury.

The contract of insurance between Aetna and Cabot, bearing Policy No. LTD- 34500, was signed May 28, 1973 and took effect on January 1, 1974. Under the terms of the policy, Cabot is listed as the insured policyholder and the plant employees are classified as beneficiaries. Under the terms of the policy, an employee is entitled to receive 60% of his monthly rate of basic earnings if he becomes "totally disabled," which is defined as being "unable, solely because of disease or accidental bodily injury, to work at any gainful occupation for which he is reasonably suited because of education, training or experience." Article II, Section 2 of the policy describes in detail under what circumstances a "period of total disability" is deemed to commence and terminate. It provides as follows:

"B. A 'period of total disability' of an employee shall be deemed to commence on the later to occur of (1) the first day that the employee is totally disabled, and (2) the thirty-first day immediately preceding the date the employee was, during the period of total disability, first seen and treated personally by a physician in connection with the disease or injury which caused such disability; and the period of total disability shall be deemed to terminate, unless otherwise specifically provided for in this Article II, on the earliest to occur of (a) the date the employee is no longer 'totally disabled' as defined in Section 1 of this Article II; (b) the date upon which the employee starts work at any occupation for compensation or profit, other than work in connection with an approved rehabilitation program; (c) the date the employee fails to furnish proof of the continuance of total disability, or refuses to be examined, when required in accordance with Article VI; (d) the date the employee ceases to be under the care of a physician; (e) the end of the calendar month in which the employee attains the age of sixty-five years; and (f) the date of the employee's death."

After a review of the terms of the policy and the testimony elicited during the trial, it is evident that the monthly disability payments do not represent deferred compensation such as retirement and/or pension benefits. The policy had no cash value nor accrued or redemption value; in fact, if an employee reached the age of 65 years without suffering "total disability," he would never receive any benefits under the policy. 10 Even if an employee became eligible for benefits

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10In contrast, see Succession of Scott, 231 La. 381, 91 So.2d 574 (1956); Campbell v. Campbell, 474 So.2d 1339 (La.App. 2 Cir.1985), writ den., 478 So.2d 148 (La.1985); and Gilbert v. Gilbert, 442 So.2d 1330 (La.App. 3 Cir.1983), writ den., 445 So.2d 1231 (La.1984), where federal disability payments have been elected as a substitute for military retirement pay and the courts have held them to be community property to the extent earned by military service during the marriage.
under the terms of the policy, there still was no guarantee that payments would continue for any set length of time.

Defendant's own testimony further confirms this fact. He testified that payments for hospitalization insurance benefits and a retirement plan were deducted from his monthly paycheck on the fifteenth and last day of the month. In contrast, premiums for the disability insurance were neither deducted from his wages nor paid out of a joint community checking account by either spouse. Defendant further testified that he withdrew his accumulated retirement plan benefits after his injury and that the remainder of this sum was divided equally between him and the plaintiff pursuant to the settlement of community property ordered in the divorce suit. Defendant's testimony shows that retirement benefits were provided by Cabot in addition to the disability insurance, and that these were two distinctly different types of fringe benefits.

Before disability payments were commenced in 1977, defendant was required to undergo a complete physical examination to confirm his disability, and, in order to maintain his eligibility, was required to submit to further yearly physical examinations. If at any time during the existence of the community, the defendant had returned to work or failed to meet Aetna's definition of "total disability," the monthly disability payments would have been terminated.

For these reasons we do not find that the disability payments made by Aetna, under the Cabot policy, to defendant were deferred compensation in the nature of retirement or pension income.

Having made the determination that the disability payments in question are not deferred compensation in the nature of retirement or pension income, we will examine Louisiana jurisprudence allocating tort damage awards and worker's compensation benefits after dissolution of a community, which we find are analogous in nature to the disability benefits paid to defendant in the instant case.

The leading case in this area is West v. Ortego, 325 So.2d 242 (La.1975). In West, supra, the Louisiana Supreme Court was presented with a similar issue, but in the context of a dispute over a husband's post-dissolution worker's compensation benefits. As in the case before us, the husband sustained a disabling industrial accident during the marriage. Prior to receipt of any compensation benefits, his wife filed suit for separation from bed and board. Shortly thereafter, the husband began receiving worker's compensation benefits. His wife then filed a petition for a temporary restraining order and preliminary injunction, alleging that all of the benefits he received were community property because the injury arose during the community regime. The trial court granted the preliminary judgment and declared her entitled to one-half of her husband's benefits, but only for that portion which had accrued prior to the dissolution of the community.

On appeal, this court affirmed the trial court judgment, as did the Supreme Court after writs were sought and granted. The Louisiana Supreme Court found that the situation presented by the facts was not contemplated by the legislature when they enacted Civil Code Articles 2334 and
2402 (now repealed). The court then invoked LSA-C.C. Art. 21 and applied concepts of "natural law and reason" to decide the case. The Supreme Court held that the worker's compensation benefits were the husband's separate property to the extent that they are paid to compensate him for post-community loss of earnings.

Generally, the pro rata classification approach used by the Supreme Court in West, supra, has also been used by Louisiana courts in allocating damage awards received after dissolution of the community when the husband was tortiously injured during the marriage. In Placide v. Placide, 408 So.2d 330 (La.App. 3 Cir.1981), the husband suffered from back problems and impotency after he was involved in an accident prior to the dissolution of his marriage. As a result of these injuries, he received a substantial tort damage award in a jury trial which took place after his wife filed a petition for separation. The jury verdict did not apportion the tort damage award and the wife argued that the entire proceeds were therefore community property. This court applied the rationale set out in West, supra, and made an apportionment of the tort damage award on the basis of equity. We observed that:

"The case of West v. Ortego, supra, dictates that we resort to equity to apportion monies acquired after dissolution of the community for damages awarded in compensation for an accident which occurred before the dissolution of the community when the award covers both pre-dissolution and post-dissolution losses. We find that there is sufficient evidence before us to permit an equitable apportionment of the damages awarded to appellant."


In Hall v. Hall, 349 So.2d 1349 (La.App. 4 Cir.1977), the wife sought a declaratory judgment to determine whether the amount of a judgment in a tort suit, in favor of her husband, were part of the pre-existing community of acquets and gains. The wife contended that under Civil Code Articles 2334 and 2402 (now repealed), even though some of the damages awarded were to compensate her husband for future loss of wages, medical expenses, and pain and suffering, the entire sum was community property because the monies for settlement of the judgment was received ten days prior to the date on which she filed her divorce suit and, accordingly, prior to the dissolution of the community.

The trial judge relied on West, supra, and declared the portion of the funds representing lost wages prior to the date of the divorce judgment to be community property and the amount awarded for loss of future wages, which would have been earned after the termination of the community, was deemed to be the husband's separate property.

After the wife appealed the judgment, the Fourth Circuit reversed and held "where the actions for the husband's damages occur during the existence of the marriage, the money recovered is community property under Article 2334, unless it comes within the stated exceptions." Hall, 349 So.2d at 1352. The court apparently arrived at its decision by interpreting the solution in West,
supra, to be restricted to situations in which payment of damages is received after the dissolution of the community.\textsuperscript{11} The decision has been viewed as inconsistent with the principle in West,\textsuperscript{12} and has not been followed in any subsequent cases.\textsuperscript{13}

JURISPRUDENCE OF OTHER JURISDICTIONS

A survey of the jurisprudence of other community property states reveals that some courts in these states have also made a distinction between disability pension and retirement benefits and payments made in lieu of wages under accident and disability policies for purposes of classification as to whether or not they were community property.\textsuperscript{14} California has adopted an approach allocating benefits paid both pre-community and post-community, pursuant to a disability insurance policy, similar to that followed by the Louisiana courts in apportioning tort damage awards and worker's compensation benefits.

In the California case of \textit{In Re Marriage of Saslow}, 40 Cal.3d 848, 221 Cal.Rptr. 546, 710 P.2d 346 (Cal.1985), the California Supreme Court addressed the status of benefits from private disability insurance policies purchased with community funds. There, the parties had been married 18 years and, during the marriage, the husband purchased three insurance policies payable upon his disability. The premiums were paid with community funds. While the parties were still married, the husband became permanently disabled because of chronic psychological problems and began to receive benefits payable under the policies. The wife argued that the benefits from the disability policies were community property and had to be divided equally between the parties upon dissolution of the community because the policies were purchased with community funds.

In a footnote on page 348 of the opinion, the court summarized the jurisprudence of several other community property states relative to the issue in question and commented that other jurisdictions are not uniform in their characterization of disability benefits as community or separate property.

\textsuperscript{11}The court's holding was based on literal interpretation of the fifth paragraph in Article 2334 (now repealed), which provides as follows: "Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared."


\textsuperscript{13}Recent decisions under current Article 2344, which specifically address the classification and allocation of tort damage awards and worker's compensation benefits, have not followed the approach in \textit{Hall v. Hall, supra}, but have instead followed the pro rata method used in \textit{West v. Ortego, supra}. See e.g., \textit{Ellithorp v. Ellithorp}, 509 So.2d 178 (La.App. 1 Cir.1987); \textit{Mead v. Mead}, 442 So.2d 870 (La.App. 3 Cir.1983), writ denied, 445 So.2d 452 (La.1984).

\textsuperscript{14}See generally Annot. 94 A.L.R.3rd 176, 222-229; 41 C.J.S., Husband and Wife § 471 (1944).
The California Supreme Court applied the rationale articulated in its landmark disability case of *In Re Marriage of Stenquist*, 21 Cal.3d 779, 148 Cal.Rptr. 9, 582 P.2d 96 (1978), in which it addressed the status of a disability retirement pension, and held:

"The approach taken by this court in *Stenquist* provides for the most equitable distribution of disability insurance benefits. This approach requires that the trial court treat disability benefits as separate property insofar as they are intended to replace postdissolution earnings that would have been the separate-property income of the disabled spouse, and treat the benefits as community property insofar as they are intended to provide retirement income. As indicated, especially in cases like the instant one, the determination of the intent of the parties regarding the purpose of the benefits will not always be easy. However, trial court judges have extensive experience in making such difficult factual determinations. The task is not so formidable that a simple, but inequitable, rule would be preferable. Apportionment of the benefits need not be arbitrary or speculative. The court may consider testimony of the spouses' intent, both at the time the disability insurance was originally purchased and at the times that decisions were made to continue the insurance in force rather than let it lapse. Absent evidence of actual intent, the court may ascertain a normal retirement age at which the disabled spouse would have been most likely to retire had no disability occurred.

* * *

Although the end result may be inexact in many cases, this solution is likely to produce far less harm than a rigid holding that all proceeds from disability insurance policies are the separate property of the disabled spouse or, alternatively, that all proceeds are community property." (Footnote omitted.) *In Re Marriage of Saslow*, 40 Cal.3d 848, 221 Cal.Rptr. 546, at 551, 552, 710 P.2d 346, at 351, 352 (1978).

DECISION

Applying the principles of Louisiana law discussed above, as well as the rationale of *Saslow, supra*, and *Stenquist, supra*, we conclude that plaintiff had no vested interest in defendant's monthly disability payments received after the dissolution of their community which was stipulated by the parties to be on July 23, 1982. For this reason, all sums received by defendant subsequent to that date represent compensation for his post-community loss of earnings and are defendant's separate property. For this reason, the judgment of the trial court awarding plaintiff one-half of all sums received by defendant as disability payments from Aetna after July 23, 1982 is reversed, vacated and set aside. Aetna is hereby ordered, from the date of rendition of this

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15The court's approach in *Stenquist, supra*, was adopted by our courts in *Campbell v. Campbell*, 474 So.2d 1339 (La.App. 2 Cir.1985), writ den., 478 So.2d 148 (La.1985).
judgment, to discontinue withholding one-half of defendant's monthly disability checks, and mailing said sums to plaintiff.

All costs of this appeal are taxed to plaintiff-appellee.

REVERSED AND RENDERED.

Notes

1. Disability is a hyrbrid asset. Because most disability insurance policies are part of an employee benefit package, they resemble pensions. In fact in several prominent instances disability coverage is part of an employee’s defined benefit plan. On the other hand, considered apart from the employee benefit context, disability coverage is no different from other types of insurance. Latchney reflects the majority approach of treating disability like insurance and applying in-leiu-of tracing to its characterization. This approach has the public policy benefit of not diverting income from a disability individual who may lack the ability to manage such a diversion of income. Idaho, alone, treats disability as an employee benefit and applies source/time of consideration rules to its characterization. See Guy v. Guy, 98 Idaho 205, 560 P.2d 876 (1977).
CHAPTER 3: CLASSIFYING PROPERTY AS COMMUNITY

CHAPTER 4: SPECIAL PROBLEMS OF PROOF & VALUATION

I. TRACING PROPERTY PURCHASED FROM A COMINGLED FUND

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

TRAYNOR, C.J.

Plaintiff Laurance A. See and cross-complainant Elizabeth Lee See appeal from an interlocutory judgment that grants each a divorce. Laurance attacks the finding that he was guilty of extreme cruelty, the granting of a divorce to Elizabeth, and the award to her of permanent alimony of $5,400 per month. Elizabeth attacks the finding that there was no community property at the time of the divorce. Neither party contests the provisions regarding custody and support of the three minor children.

The parties were married on October 17, 1941, and they separated about May 10, 1962. Throughout the marriage they were residents of California, and Laurance was employed by a family-controlled corporation, See's Candies, Inc. For most of that period he also served as president of its wholly-owned subsidiary, See's Candy Shops, Inc. In the twenty-one years of the marriage he received more than $1,000,000 in salaries from the two corporations.

Nor did the trial court abuse its discretion in awarding alimony to Elizabeth. Alimony may be awarded to either party even though a divorce is granted to both. (Mueller v. Mueller, 44 Cal.2d 527, 530 [282 P.2d 869]; DeBurgh v. DeBurgh, 39 Cal.2d 858, 874 [250 P.2d 598].) We do not reach plaintiff's contention that the alimony award was excessive. Since that part of the judgment must be reversed for reasons that appear hereafter, the considerations that prompted the amount of the award may no longer be relevant. Laurance had a personal account on the books of See's Candies, Inc., denominated Account 13. Throughout the marriage his annual salary from See's Candies, Inc., which was $60,000 at the time of the divorce, was credited to this account and many family expenses were paid by checks drawn on it. To maintain a credit balance in Account 13, Laurance from time to time transferred funds to it from an account at the Security First National Bank, hereafter called the Security Account. The funds deposited in the Security Account came primarily from Laurance's separate property. On occasion he deposited his annual $15,000 salary from See's Candy Shops, Inc., in that account as a "reserve against taxes" on that salary. Thus there was a commingling of community property and separate property in both the Security Account and Account 13. Funds from the Security Account were sometimes used to pay community expenses and also to purchase some of the assets held in Laurance's name at the time of the divorce proceedings.
Over Elizabeth's objection, the trial court followed a theory advanced by Laurance that a proven excess of community expenses over community income during the marriage establishes that there has been no acquisition of property with community funds.

Such a theory, without support in either statutory or case law of this state, would disrupt the California community property system. It would transform a wife's interest in the community property from a "present, existing and equal interest" as specified by Civil Code section 161a, into an inchoate expectancy to be realized only if upon termination of the marriage the community income fortuitously exceeded community expenditures. It would engender uncertainties as to testamentary and inter vivos dispositions, income, estate and gift taxation, and claims against property.

The character of property as separate or community is determined at the time of its acquisition. (In re Miller, 31 Cal.2d 191, 197 [187 P.2d 722]; Siberell v. Siberell, 214 Cal. 767, 770 [7 P.2d 1003]; Bias v. Reed, 169 Cal. 33, 42 [145 P. 516].) If it is community property when acquired, it remains so throughout the marriage unless the spouses agree to change its nature or the spouse charged with its management makes a gift of it to the other. (Odone v. Marzocchi, 34 Cal.2d 431, 435 [211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109]; Mears v. Mears, 180 Cal.App.2d 484, 499 [4 Cal.Rptr. 618].)

Property acquired by purchase during a marriage is presumed to be community property, and the burden is on the spouse asserting its separate character to overcome the presumption. (164 Cal. 368 [129 P. 278]; Thomasset v. Thomasset, 122 Cal.App.2d 116, 123 [264 P.2d 626]. Estate of Niccolls The presumption applies when a husband purchases property during the marriage with funds from an undisclosed or disputed source, such as an account or fund in which he has commingled his separate funds with community funds. (Estate of Neilson, 57 Cal.2d 733, 742 [22 Cal.Rptr. 1, 371 P.2d 745].) He may trace the source of the property to his separate funds and overcome the presumption with evidence that community expenses exceeded community income at the time of acquisition. If he proves that at that time all community income was exhausted by family expenses, he establishes that the property was purchased with separate funds. (Estate of Neilson, supra, at p. 742; Thomasset v. Thomasset, supra, at p. 127.) Only when, through no fault of the husband, it is not possible to ascertain the balance of income and expenditures at the time property was acquired, can recapitulation of the total community expenses and income throughout the marriage be used to establish the character of the property. Thus, in Estate of Aades, 81 Cal.App.2d 334 [184 P.2d 1], relied on by plaintiff, this method of tracing was used to establish that assets discovered after the husband's death had been acquired before the marriage. The question was not presented as to the balance of income and expenditures at any specific time during the marriage. In Estate of Arstein, 56 Cal.2d 239 [14 Cal.Rptr. 809, 364 P.2d 33], relied on by plaintiff, the husband's skill and industry in managing his separate property was the source of all community income during the marriage. Not until the trial could a determination be made as to what proportion of the total income was attributable to the husband's skill and industry. In Thomasset v. Thomasset, supra, 122 Cal.App.2d 116, the court made clear that the time of
acquisition of disputed property is decisive. "An accountant testified that at the time the various items adjudged to be defendant's separate property were purchased, there were no community funds available. . . . The evidence [shows] . . . that at the time the property was purchased the community funds had been exhausted. . . ." (Id. at p. 127.) Anything to the contrary in Patterson v. Patterson, 242 Cal.App.2d [51 Cal.Rptr. 339], is disapproved. A husband who commingles the property of the community with his separate property, but fails to keep adequate records cannot invoke the burden of record keeping as a justification for a recapitulation of income and expenses at the termination of the marriage that disregards any acquisitions that may have been made during the marriage with community funds. If funds used for acquisitions during marriage cannot otherwise be traced to their source and the husband who has commingled property is unable to establish that there was a deficit in the community accounts when the assets were purchased, the presumption controls that property acquired by purchase during marriage is community property. The husband may protect his separate property by not commingling community and separate assets and income. Once he commingles, he assumes the burden of keeping records adequate to establish the balance of community income and expenditures at the time an asset is acquired with commingled property.

The trial court also followed the theory that a husband who expends his separate property for community expenses is entitled to reimbursement from community assets. This theory likewise lacks support in the statutory or case law of this state. A husband is required to support his wife and family. (Civ. Code, §§155, 196, 242). Indeed, husband and wife assume mutual obligations of support upon marriage. These obligations are not conditioned on the existence of community property or income. The duty to support imposed upon husbands by Civil Code section 155 and upon wives by Civil Code section 176 requires the use of separate property of the parties when there is no community property. There is no right to reimbursement under the statutes. Likewise a husband who elects to use his separate property instead of community property to meet community expenses cannot claim reimbursement. In the absence of an agreement to the contrary, the use of his separate property by a husband for community purposes is a gift to the community. The considerations that underlie the rule denying reimbursement to either the community or the husband's separate estate for funds expended to improve a wife's separate property (Dunn v. Mullan, 211 Cal. 583, 589 [296 P. 604, 77 A.L.R. 1015]) apply with equal force here. The husband has both management and control of the community property (Civ. Code, §§172, 172a) along with the right to select the place and mode of living. (Civ. Code, §156.) His use of separate property to maintain a standard of living that cannot be maintained with community resources alone no more entitles him to reimbursement from after-acquired community assets than it would from existing community assets.

Nor can we approve the recognition of an exception, a right to reimbursement of separate funds expended for community purposes at a time when a community bank account is exhausted. (Kenney v. Kenney, 128 Cal.App.2d 128, 136 [274 P.2d 951]; Thomasset v. Thomasset, supra, 122 Cal.App.2d 116, 126; Hill v. Hill, 82 Cal.App.2d 682, 698 [187 P.2d 28]; cf. Mears v. Mears, supra, 180 Cal.App.2d 484, 508.) Although this exception was restricted to recovery from the same community account when replenished, there is no statutory basis for it, and the court that
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first declared it cited no authority to support it. Such an exception conflicts with the longstanding rule that a wife who uses her separate funds in payment of family expenses without agreement regarding repayment cannot require her husband to reimburse her. (Ives v. Connacher, 162 Cal. 174, 177 [121 P. 394]; Blackburn v. Blackburn, 160 Cal.App.2d 301, 304 [324 P.2d 971]; Thomson v. Thomson, 81 Cal.App. 678 [254 P. 644]; cf. Haseltine v. Haseltine, 203 Cal.App.2d 48 [21 Cal.Rptr. 238].) Nor is a wife required to reimburse her husband in the converse situation, particularly since the husband has the control and management of community expenses and resources. The basic rule is that the party who uses his separate property for community purposes is entitled to reimbursement from the community or separate property of the other only if there is an agreement between the parties to that effect. To the extent that they conflict with this rule Mears v. Mears, supra, 180 Cal.App.2d 484; Kenney v. Kenney, supra, 128 Cal.App.2d 786; Thomasset v. Thomasset, supra, 122 Cal.App.2d 116; and Hill v. Hill, 82 Cal.App.2d 682 [187 P.2d 28], are disapproved.

Elizabeth makes several additional assignments of error relative to specific assets in existence on the dissolution of the marriage but not found to be community property. The record does not afford a basis for determining the nature of these assets, with the exception of Laurance's interest in the profit-sharing trusts of the two See corporations. His interest in these funds arose by virtue of his employment and was irrevocable at the time of the divorce. It was therefore unquestionably a community property asset. Plaintiff has not met his burden of proving an excess of community expenses over community income at the time the other assets purchased during the marriage were acquired. The part of the judgment finding them to be his separate property is therefore reversed. Since the property issues were tried on the theory that the nature of the property could be determined by proving total community income and expenditures and since the parties may have additional evidence that would otherwise have been presented, plaintiff's failure to overcome the presumption that the assets are community property is not conclusive. We therefore remand the case for retrial of the property issues. Since the court considered the lack of community property a significant factor in determining the amount of the alimony award, that part of the judgment is also reversed.

The judgment is affirmed in all other respects. Elizabeth shall recover her costs on both appeals.


APODACA, Judge.

Respondent-Appellant Patty Zemke (Wife) appeals the trial court's determination in a divorce action that corporate stock and certain other assets were the separate, rather than community, property of Petitioner-Appellee F. Richard Zemke (Husband). Wife argues that: . . . (3) Husband's "recapitulation" theory to prove the existence of a separate property interest in
certain assets was insufficient to trace his separate property interest; . . . We conclude that substantial evidence supports the trial court's characterization . . . [the] assets, and therefore affirm the trial court's decision.

FACTS

. . . . [The parties were married January 28, 1965, and were divorced January 2, 1990.]

III. Husband's Separate Property Interest in Certain Assets.

Wife claims that the trial court erred in holding that Husband had a separate property interest in certain assets acquired during the marriage between 1975 and 1979. First, she argues that Husband's "recapitulation" theory, relied on because he could not directly trace his separate property interest, has not and should not be adopted in New Mexico. Second, she contends that, even if the recapitulation theory is appropriate, Husband nonetheless failed to meet his burden of proving a separate property interest.

A. The Recapitulation Theory.

We first address Wife's contention that a "recapitulation" theory is per se unacceptable in New Mexico. Based on our discussion below, we conclude that the strict tracing rule for which Wife argues is not the law in New Mexico. Rather, we believe that the cases on which Wife relies indicate that the evidence required and the method used to apportion separate and community estates depend on the facts presented. Additionally, as noted below, our review of New Mexico law indicates that the "recapitulation" method has been recognized as an appropriate method for determining the existence of a separate property interest.

In Leckie v. Leckie, 101 N.M. 254, 680 P.2d 635 (Ct.App.1984), the parties owned a joint account into which they commingled community and separate funds. Funds from the account were expended on both separate property of the husband and on community property. The trial court had determined that the community had a lien on the husband's separate property equal to the amount of funds expended on such separate property. This Court reversed, holding that there was not substantial evidence to support the determination of the lien. This holding was based on our conclusion that uncontradicted evidence showed that the rent money derived from Husband's separate property, which also was deposited into the account, exceeded the amount spent on the separate property. Id. at 256, 680 P.2d at 637. Leckie stated that, assuming separate funds went into the community and community funds were expended on the husband's separate property, equity required the community to give credit to the husband for the use of separate funds. Alternatively, we stated in Leckie that, assuming that husband's separate funds retained their separate character when placed in the joint account, the expenditures on the husband's separate property were expenditures of separate funds, and no community funds were expended. Id.
Similarly, in *Corley v. Corley*, 92 N.M. 716, 594 P.2d 1172 (1979), evidence was presented that community and separate funds had been commingled. *Id.* at 720, 594 P.2d at 1176. However, because there was uncontradicted evidence that community expenditures had exceeded community income, our Supreme Court held that the trial court erred in not making a finding to that effect. *Id.* The Court held that the mere commingling of community and separate property did not change the character of the separate property to community property. *Id.* From this holding, we conclude that in *Corley*, once it had been shown that community expenditures exceeded community income, the remainder of the funds in the commingled accounts were considered separate.

In *Moore v. Moore*, 71 N.M. 495, 379 P.2d 784 (1963), the trial court had determined that there was a community lien of $9,000 against the husband's separate property because it found the husband had expended $9,000 in community funds on the separate property. Our Supreme Court upheld the judgment. It analyzed the community's income and expenses and the husband's income and expenses, and, because the husband had failed to show that $13,650.38 of community income had been spent on community expenses, concluded that substantial evidence supported the trial court's award. *Id.* at 501, 379 P.2d at 788.

In *Campbell v. Campbell*, 62 N.M. 330, 310 P.2d 266 (1957), the wife relied primarily on the presumption that property acquired during the marriage was community property. *Campbell* held that "the contestant asserting the separate character of the property has not only the burden of going forward with his evidence, but of establishing separate ownership by a preponderance of [the] evidence." *Id.* at 341, 310 P.2d at 273. The Court focused on all the circumstances and concluded that the husband had demonstrated that his interest in a partnership was acquired by gift and therefore was his separate property. *Id.* at 348, 310 P.2d at 278. *Campbell* concluded that "when it is established that community funds equal or fall short of community expenditures, property acquired by the husband, having independent funds at his disposal, should be held, by legitimate inference, to be his separate property." *Id.* at 358, 310 P.2d at 284. The Court also stated that, "in [the] absence of an arrangement or agreement to the contrary, community earnings are chargeable with community expenses." *Id.*

In *Campbell*, the husband attempted to rely on this principle to show that all of his holdings were his separate property. However, the Court rejected his contentions because there were reasons for the trial court not to rely on the husband's computations. *Id.* at 358-60, 310 P.2d at 284-86. This was not a rejection of the principle itself. In contrast, in this appeal, Husband testified that, in computing the community expenses, he relied on documents that he possessed. Wife had the opportunity to analyze those documents and to controvert Husband's determinations. She made no attempt to do so.

We do not agree with Wife that *Mitchell* rejected the recapitulation theory. In that case, the husband sought reimbursement for separate funds allegedly spent for the benefit of the community. *Id.*, 104 N.M. at 212, 719 P.2d at 439. The trial court had denied reimbursement and concluded that the separate assets had been so commingled with community assets that they had lost their separate character and were impossible to trace. *Id.* at 213, 719 P.2d at 440. The evidence
offered by the husband in that case was apparently much less than is present in this appeal. Additionally, we do not read Mitchell as rejecting documentation similar to what was presented here. Rather, although in Mitchell the husband could not trace any of the funds into any particular account or prove that funds were expended on particular assets, see id., here, Husband presented evidence of a particular investment plan for the dividends and linked the receipt of the dividends to expenditures for certain assets.

On the basis of these cases, we conclude that a "recapitulation" method (to determine whether community expenditures depleted community income, thus requiring a ruling that remaining funds are deemed one spouse's separate property) is acceptable in New Mexico. Adoption of this method does not relieve the spouse asserting the separate property interest of the burden of proving that interest by a preponderance of the evidence; it simply recognizes that generally not every piece of paper will be retained, especially in a marriage lasting a long period. Additionally, we believe that the method has essentially been approved by our Supreme Court, see Hayner v. Hayner, 91 N.M. 140, 141-42, 571 P.2d 407, 408-09 (1977); this Court is therefore bound by that determination. See Alexander v. Delgado, 84 N.M. 717, 718-19, 507 P.2d 778, 779-80 (1973). We thus will not consider Wife's policy arguments against allowing the theory.

B. Husband's Burden of Proving Separate Property Interest.

A determination that Husband's method of proving his separate property interest is acceptable in New Mexico does not dispose of Wife's second contention: that he failed to meet his burden of proof in rebutting the presumption that assets acquired during the marriage are part of the community. See NMSA 1978, §40-3-12(A) (Repl.Pamp.1989). Wife's argument specifically focuses on the admissibility of Husband's Exhibit 7, on which she claims Husband's case depended.

Exhibit 7 was prepared by Husband and represents his distillation of the parties' finances from 1974 to 1980. It purports to show (1) that community expenditures exceeded the amount Husband received as salary and bonuses, and (2) that certain investments were purchased from the cash dividends. Wife contends that the exhibit was not admissible under SCRA 1986, 11-1006 as a summary because (1) not all the underlying documents were available, (2) portions of the exhibit were speculation, and (3) the exhibit was not credible. In response, Husband contends that portions of the exhibit were admissible under different rules of evidence.

Husband's testimony regarding the investments and his intent was competent evidence to support the trial court's determination. See Corley, 92 N.M. at 718, 594 P.2d at 1174; Sparks v. Sparks, 84 N.M. 267, 268-69, 502 P.2d 292, 293-94 (1972); see also Mix v. Mix, 14 Cal.3d 604, 122 Cal.Rptr. 79, 85, 536 P.2d 479, 485 (1975) (in bank). Other evidence corroborated his testimony. Wife also had the opportunity to cross-examine Husband concerning his allocation of community expenses and the other figures used in his calculations.
Wife argues that Exhibit 7 was not credible because it was internally inconsistent. She points specifically to the fact that a portion of the dividend income was not allocated to the community as it should have been. We believe that these objections misconstrue what Husband was attempting to prove with Exhibit 7. He was not attempting to prove that certain separate property funds were used to purchase the investments; rather he was attempting to show that the investments were purchased with the cash dividends, which were admittedly both community and separate. Once Husband had proven by a preponderance of the evidence that his separate funds were used in part to buy the assets, it was Wife's burden to prove that those separate funds had been transmuted into community property. This she failed to do, relying instead on the presumption that assets purchased during the marriage are deemed community property.

Husband proved that, between 1975 and 1979, Gardner-Zemke paid out approximately $1,621,000 in dividends in his name. His compensation in wages and salary was about $721,000. He also presented evidence and testimony that community expenses were approximately $784,000 for the same period. A portion of the expenses were taxes of $488,284 actually paid. More than $400,000 of the taxes were paid on Husband's wages and bonuses alone. He concedes that a portion of the remaining $80,000 in taxes must have been paid on the cash dividends that were his separate property. Nonetheless, it appears that community expenses approximately equalled or exceeded the amount received as Husband's salary and bonuses. Additionally, there was undisputed evidence that an investment plan had been implemented to shelter the income from the dividends and that the investments were purchased at about the same time that dividends were available to purchase them. Husband also testified that he intended to keep his separate property separate. Thus, substantial evidence supported the trial court's conclusions that Husband had proved, by a preponderance of the evidence, that his separate dividends had been invested in the assets and that Wife failed to prove that those dividends were transmuted into community property.

II. CAREER AND BUSINESS ASSETS

A. Community Property Interests in Degrees or in Personal and Professional Goodwill


WREN, Chief Judge.

This appeal by the wife from a decree of dissolution questions the disposition of certain property . . . .

The parties, Harry Kern Wisner (husband) and Mary Jane Wisner (wife) were married in Omaha, Nebraska in February of 1962. At that time, wife was a nurse and husband was completing his final year of medical school. Following eight years of further training by husband in surgery and plastic surgery, the parties moved to Mesa, Arizona in 1970, where husband set up a medical
practice in plastic surgery. During their marriage, wife was not formally employed, but rather assumed responsibilities for homemaking and raising of the Wisners' family. The husband filed a petition for dissolution on May 13, 1976. A decree dissolving the marriage was ultimately entered on July 12, 1977.

MEDICAL LICENSE, BOARD CERTIFICATE AND EDUCATION VALUE

Lastly, wife advances the novel argument that husband's medical license and board certificate are property within the meaning of A.R.S. §25-211, and, hence, having been acquired by husband during marriage, are community property, as to which she should be awarded one-half the value thereof. Alternatively, she asserts that she should be compensated for her contribution in obtaining them in order to avoid unjust enrichment of husband.

This issue is one of first impression in this state. However, it is not unique and has been the subject of judicial inquiry in other jurisdictions. Most states which have considered the question have rejected the concept that such educational attainments constitute "property". In re Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978); Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980); Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972); Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975); In re Marriage of Aufmuth, 89 Cal.App.3d 446, 152 Cal.Rptr. 668 (1979); Todd v. Todd, 272 Cal.App.2d 786, 78 Cal.Rptr. 131 (1969); In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Hubbard v. Hubbard, 603 P.2d 747 (Okl.1979). Contra, Inman v. Inman, 578 S.W.2d 266 (Ky.App.1979); Lynn v. Lynn, 49 U.S.L.W. 2402 (N.J.Super.Ct., Bergen County, December 23, 1980).

In Muckleroy it had been argued that the husband's education was the product of the joint labor and industry of both parties after their marriage and was therefore community property. In turning aside this argument the court concluded: A medical license is only a permit issued by the controlling authority of the State, authorizing the individual licensee to engage in the practice of medicine. The medical license may be used and enjoyed by the licensee as a means of earning a livelihood, but it is not community property because it cannot be the subject of joint ownership. 84 N.M. at 15, 498 P.2d at 1358.

The same question arose as to an M.B.A. degree earned by the husband in Graham. Again the "property" concept was rejected: An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future
acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term. 194 Colo. at 432, 574 P.2d at 77.

The wife in *Graham* had worked full time throughout the couple's six-year marriage, and had contributed 70 percent of the family income in addition to most of the household work while her husband was acquiring his degree. The trial court found that the degree was jointly owned property and had determined that the future earning value to Dennis Graham of the M.B.A. degree was $82,836.00. Anne was awarded $33,134.00 of that amount. On appeal the supreme court affirmed the reversal of the trial court by the court of appeals. The fact that the decision left Anne with nothing to show for her six years of labor prompted a three judge dissent which strongly urged that the husband's increased earning power represented by the degree should be considered marital property, where there was no accumulated property and the spouse who subsidized the degree was ineligible for maintenance. The dissenting justices bemoaned the fact that Anne Graham walked away empty-handed when, had she been widowed by the tortious act of a third party, she would have been entitled to compensation based on her husband's projected future earning capacity.

The Supreme Court of Iowa in the *Horstmann* case, and the California Court of Appeals in *Todd*, accepted the reasoning of the majority in *Graham* in holding that a law degree was not a communal asset of the spouses for the purpose of distribution upon dissolution of the marriage. *See also* Stern v. Stern, *supra*.

Unquestionably, if we were to hold that these items are property, by statutory definition they would be community property, A.R.S. §25-211, and wife would be entitled to an equitable division of their value. A.R.S. §25-318. As to the method of valuation, wife would have us place an actuarial dollar value on the increased earning capacity of husband. As an alternate solution, she asserts her right to reimbursement because of her husband's reduced income during his education and training period, and for her part in the joint effort of the community in obtaining that education. To buttress this latter argument of reimbursement, she points to additional language in *Graham*:

A spouse who provides financial support while the other spouse acquires an education is not without remedy. Where there is marital property to be divided, such contribution to the education of the other spouse may be taken into consideration by the court. (Citations omitted) ... Further, if maintenance is sought and a need is demonstrated, the trial court may make an award based on all relevant factors. Section 14-10-114(2). Certainly, among the relevant factors to be considered is the contribution of the spouse seeking maintenance to the education of the other spouse from whom the maintenance is sought. Again, we note that in this case petitioner sought no maintenance from respondent.

194 Colo. at 433, 574 P.2d at 78.\(^{7}\)

\(^{7}\)Wife further refers us to Arizona case law holding that community contributions to separate property are
We agree with the majority opinion in *Graham* that education is an intangible property right, the value of which, because of its character, cannot properly be characterized as property subject to division between the spouses. In our opinion, the marital property concept simply "does not fit." However, while an education itself is not property subject to division, it is still a factor to be considered, in addition to others, in arriving at an equitable property division and in determining matters of spousal maintenance and child support. *Graham; Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972). *Cf., Greer v. Greer*, 32 Colo.App. 196, 510 P.2d 905 (1973) (so-called "alimony" award was actually an adjustment of property rights in consideration of wife's contribution to family expenses while husband was in medical school). Thus, while education, along with the potential for greater earning capacity which can accompany it, is doubtless a factor to be considered by the trial judge in determining what distribution of property would be "equitable", and is even more obviously relevant upon the issue of spousal maintenance, it cannot be deemed property as such within the meaning of the Arizona statute.

Obviously, also, an important factor to consider in the overall picture is the extent to which the non-license or degree holder has already or otherwise benefited financially during coverture from his or her spouse's earning capacity. The rather common situation in which one spouse puts the other through professional school, followed closely by a dissolution upon the completion of schooling, is perhaps the clearest picture of the injustice which may evolve. In that situation, the spouse who has devoted much of the product of several years of labor to an "investment" in future family prosperity is barred from any return on his or her investment, while the other spouse has received a windfall of increased earning capacity. However, the acquisition of a considerable estate obviously solves this problem. Such is the situation here. Wife shared in the fruits of husband's education for many years during their marriage, and ultimately realized a value therefrom by a substantial award to her of the community assets, plus spousal maintenance as set forth above. We find that the court did not abuse its discretion in this regard.

In conclusion, we would like to make some observations concerning wife's argument of "unjust enrichment." In our opinion, unjust enrichment, as a legal concept, is not properly applied in the setting of a marital relationship. Marriage is by nature not an arm's length transaction between two parties. If two individuals wish to define their marriage as such, they may of course do so and memorialize it in a contract that spells out the specific rights and duties of each. However, in the absence of such an agreement, we believe it is improper for a court to treat a marriage as an arm's length transaction by allowing a spouse to come into court after the fact and make legal arguments regarding unjust enrichment by reason of the other receiving further education during coverture. In the absence of a specific agreement, such legal arguments simply do not fit the context of a marital relationship. In each marriage, for example, the couple decides reimbursable upon death or dissolution. *Horton v. Horton*, 35 Ariz. 378, 278 P. 370 (1929); *Hanrahan v. Sims*, 20 Ariz.App. 313, 512 P.2d 617 (1973). We point out that, unlike here, those cases involved compensation for actual contribution of money to the separate property involved, and that in those cases, unlike here, the items in question were clearly property.
on a certain division of labor, and while there is a value to what each spouse is doing, whether it be labor for monetary compensation or homemaking, that value is consumed by the community in the on-going relationship and forms no basis for a claim of unjust enrichment upon dissolution.

We believe if the decision is made that one or both spouses shall receive further education, courts should assume, in the absence of contrary proof, that the decision was mutual and took into account what sacrifices the community needed to make in the furtherance of that decision. In this case, wife's testimony clearly illustrated that the decision as to husband's further training was mutual, consensual and made with full understanding of the sacrifices that necessarily accompanied the decision. There is nothing to support a claim of unjust enrichment. We therefore hold that the items in question are not property, and that the court did not abuse its discretion in denying further compensation to the wife.

Affirmed in part, reversed in part and remanded with instructions.

DONOFRIO, J., concurs.

Fleege v. Fleege, 91 Wash. 2d 324, 588 P.2d 1136 (1979)

Rosellini, J.

On this appeal from a decree of marriage dissolution, entered April 13, 1976, error is assigned to the Superior Court's determination that the goodwill of the husband's dental practice was not an asset subject to division as a part of the community property.

The parties, who were both 58 years of age at the time of trial, had been married for approximately 32 years. They have five children, and the appellant, trained as a dietician, has not been gainfully employed during the marriage.

The respondent is a dentist, from whose practice the net profits in 1975 were $106,452.61. At the trial, the appellant presented the testimony of two certified public accountants, both of whom served clients in the medical and dental professions, who testified that the value of the respondent's practice included a goodwill factor, which had a present value. One of these set the value of the practice (evidently including accounts receivable and tangible property) at approximately $200,000. The other gave his opinion that the value of the goodwill would be equal to the gross receipts over a 2- to 3-month period. One of the experts stated that the respondent's net annual profits exceeded those of the average practitioner by approximately $50,000.

Challenging this expert testimony, the respondent produced a dentist who declared that he had never known of a dentist selling his practice and including a factor of goodwill amounting to more than a few dollars.
Despite the overwhelming evidence of the existence of an element of goodwill in the respondent's practice, the court refused to include it as an asset subject to distribution. In this the court erred.

Goodwill is property of an intangible nature and is commonly defined as the expectation of continued public patronage. *In re Marriage of Lukens*, 16 Wn. App. 481, 558 P.2d 279 (1976); *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974). Among the elements which engender goodwill are continuity of name, location, reputation for honest and fair dealing, and individual talent and ability. *In re Estate of Glant*, 57 Wn.2d 309, 356 P.2d 707 (1960).

At the time this case was decided in the Superior Court, no appellate court in this state had ruled upon the question whether goodwill can attach to a professional practice, as well as to a commercial business. Subsequently, the well-considered opinion in *In re Marriage of Lukens*, supra, was published. In that opinion, conflicting arguments which are also presented in this case were analyzed, the authorities examined, and the conclusion reached that goodwill is indeed a factor which has value to a professional person and should be included among the assets distributed upon a marriage dissolution. We approve both the reasoning and the result reached in that case.

As the Court of Appeals pointed out, while the goodwill of a professional practice may not be readily marketable and the determination of its exact value may be difficult, that element may nevertheless be found to exist in a given professional practice. The determination of its value can be reached with the aid of expert testimony and by consideration of such factors as the practitioner's age, health, past earning power, reputation in the community for judgment, skill, and knowledge, and his comparative professional success.

A dentist who has practiced many years and established a good reputation can expect his patients to return to him and to speak of him in a manner that enhances that reputation and encourages others to seek his services. Also, he can expect a large number, if not most, of these patients to accept as their dentist a person to whom he sells his practice. These prospects are a part of goodwill, and they have a real pecuniary value.

The respondent argues that the goodwill of a dental practice is not "true" goodwill, because it cannot be successfully transferred to a purchaser without certain services being performed by the practitioner. These services consist of introductions to the seller's patients and encouragement of patients to accept the buyer as their dentist. He insists that the amount purportedly paid for "goodwill" is in fact paid for these services, and represents "future earnings" which are not subject to division as community property.

The testimony of the accountants, both of whom had large numbers of doctors and dentists among their clients, shows, however, that goodwill exists in a going practice, whether or not a sale is in the offing. Documents brought to this court by the respondent indicate that prospective
purchasers are interested in the quality of the practice--not merely a dentist's willingness to introduce them to patients. They show that subsequent to the entry of the decree below, the respondent attempted to sell his practice through ads in professional periodicals. Numerous similar advertisements appeared in these journals. Each describes the thing for sale as a dental "practice." Only one or two contain an offer to stay and introduce the purchaser to the seller's patients. But assuming such services are necessary, they are not the thing sold as "goodwill," but simply the means of transferring it.

In any event, the important consideration in this marriage dissolution case is not whether the goodwill of the practice could be sold without the personal services of the respondent to effectuate its transfer, but whether it has a value to him. This fact is well brought out in In re Marriage of Foster, supra, where it was conceded that the goodwill of the appellant's medical practice was community property subject to distribution, the only question being whether the proper method of evaluation had been used in the lower court. There had been no testimony as to what a willing buyer would pay or a willing seller would accept for the goodwill of the practice. However, a certified public accountant, declared by the court to be a proper expert in the matter, had given his opinion of the value of the goodwill in the doctor's medical practice. In sustaining a judgment adopting that value, the California appellate court said:

The value of community goodwill is not necessarily the specified amount of money that a willing buyer would pay for such goodwill. In view of exigencies that are ordinarily attendant [upon] a marriage dissolution the amount obtainable in the marketplace might well be less than the true value of the goodwill. Community goodwill is a portion of the community value of the professional practice as a going concern on the date of the dissolution of the marriage. As observed in Golden v. Golden, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969), "... in a matrimonial matter, the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. Under the principles of community property law, the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business."

(270 Cal.App.2d 401, 405) (Footnote omitted.) In re Marriage of Foster, supra at 584.

The respondent's ads in professional journals proclaimed that his practice grossed over $225,000 per year, a fact which would have been of no interest to a prospective buyer if all that was being purchased was the respondent's equipment and accounts receivable (the only aspects of the practice to which the trial court attributed value). This and other advertisements appearing in the journals constitute convincing evidence that there is a market for the sale of dental practices, and that such practices include more than equipment and accounts receivable.
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The respondent sold his practice to his son within a year after the decree was entered, thus relieving himself of the obligation to make support payments under the decree. The purchase price was $80,000, which was approximately $32,000 more than the value of the equipment and accounts receivable which was found by the trial court. Furthermore, the accounts receivable had been reduced by $5,000 at the time of the sale. While the respondent avers and the contract of sale recited that none of this $37,000 was attributable to goodwill, he offers no other explanation for it. Not only does the selling price reflect an amount paid for the intangible value of goodwill, but it can be assumed that a father, selling to his son, would be less inclined to demand the full value than he would be if he were selling to a stranger.

While there have been a number of courts which have refused to assign a value to the goodwill of a professional practice in a divorce proceeding, the modern tendency is to acknowledge the economic facts and take such goodwill into account. See Annot., Accountability for Good Will of Professional Practice in Actions Arising from Divorce or Separation, 52 A.L.R.3d 1344 (1973). 38 Am. Jur. 2d Good Will §8 (1968); 38 C.J.S. Good Will §3 (1943) and §3 n.41 (Supp. 1978). California, a jurisdiction whose liberal approach with respect to community property we adopted in Wilder v. Wilder, 85 Wn.2d 364, 534 P.2d 1355 (1975), is firmly committed to this view. That the goodwill of a profession is a salable asset has long been recognized in Oregon. See Thompson Optical Inst. v. Thompson, 237 P. 965 (Ore. 1925), wherein many cases involving the sale of medical practices are cited. The New Mexico Supreme Court has recently said that the better rule is that goodwill exists in a professional practice and is salable. Durio v. Johnson, 68 N.M. 82, 358 P.2d 703 (1961).

Another persuasive case is Rees v. United States, 187 F. Supp. 924 (D. Ore. 1960), aff’d 295 F.2d 817 (9th Cir. 1961). That was an action for the refund of certain income taxes. The taxpayer, an orthodontist, had entered into a partnership with other dentists, who had paid him $35,000 for the interest which they thereby acquired in the goodwill of his previous practice. It was argued that since the dentist's professional skill and reputation were taken into account in arriving at the purchase price, the entire amount could not be classed as a capital asset. This proposition was rejected, the court remarking that such factors were of the kind that any practical businessman would have considered in determining what he would pay for the goodwill of a business or profession.

The value of goodwill to the professional spouse, enabling him to continue to enjoy the patronage engendered by that goodwill, constitutes a community asset and should be considered by the court in distributing the community property. That value is real, and the mere fact that it cannot be precisely determined should not deter the court from assigning it a reasonable value within the evidence. Just as in other areas of the law where precise proof cannot be made, such difficulty does not constitute an insurmountable obstacle. Where, as was the case here at the time

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6We held there that a retirement pension, although it had not vested at the time of a marriage dissolution, should be taken into consideration in making the community property distribution.
of trial, a professional man is approaching retirement age, the salable value of his practice should also be approximately determinable and is a factor to be taken into account.

The cause is remanded to the Superior Court with directions to determine the value of the goodwill of the respondent's practice, as it existed at the date of dissolution, taking into account the testimony of the experts and the other factors which we have mentioned. The court may call for additional evidence if that is deemed desirable. The property distribution should be revised accordingly.

STAFFORD, J.

I dissent. In the instant case the majority has over-simplified important facts on the subject of goodwill. For example, it has down-played the fact that the goodwill in question is not similar to commercial goodwill in general. It is connected with a dental practice which is covered by specific laws governing the use of one's name. Also, the role of the sole dental practitioner is all but ignored.

Further, the majority has chosen to place its reliance upon the testimony of two experts obviously rejected by the trial court and has rejected the testimony of a third expert which the trial court clearly accepted on the subject of goodwill. The majority preferred and used the expert testimony with which it chose to agree rather than that which was accepted by the trial court. This is not a proper appellate function when there is conflicting testimony, the trial court has seen and heard the experts and clearly has given greater weight to the one it felt had the most credibility, and where there is substantial evidence to support the trial court's finding. Under these circumstances the constitution does not authorize an appellate court to substitute its judgment for that of the trial court. *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 343 P.2d 183 (1959). In this case the trial court chose to believe an expert who was a dentist with over 40 years of practice in this state, who had himself sold his sole dental practice, who had assisted attorneys and widows of dentists to liquidate dental practices and who had assisted young dentists to acquire existing practices.

Usually it is not necessary to restate the facts, but in this case I must do it so the issue of goodwill actually involved herein may be viewed in its correct setting.

The Fleeges were married in 1943. During the marriage Dr. Fleege established a substantial dental practice. In 1975 he netted approximately $106,000 as a sole practitioner specializing in children's dentistry.

In 1976, Dr. Fleege filed for a dissolution of the marriage. At trial the only dispute was concerned with whether the goodwill of Dr. Fleege's dental practice was an asset subject to division. Three experts testified on the issue. Each based his opinion upon experience with sales of dental practices in which the selling dentist retired following a short-term association with the purchasing dentist. One expert, a dentist, testified that any goodwill associated with such sales
had only minimal value and is paid to the retiring dentist to maintain that dentist's goodwill. The other two experts, certified public accountants, placed widely disparate values upon the goodwill of Dr. Fleege's practice. All experts agreed, however, that if a dentist should fail to dispose of his practice prior to death any goodwill simply "evaporated" and would have no value as an asset.

The trial court valued the fixed assets of the practice at $47,373 and awarded them to Dr. Fleege. It assigned no value to goodwill and deemed it an asset incapable of division upon dissolution. After the decree of dissolution was entered Dr. Fleege sold his practice to his son and received nothing for goodwill.

Mrs. Fleege appealed the property division claiming that goodwill is a valuable asset which should have been considered in the division of property. It should be noted that after the notice of appeal was filed herein, Division II of the Court of Appeals held that professional goodwill is an asset to be considered in a division of property. *In re Marriage of Lukens*, 16 Wn. App. 481, 558 P.2d 279 (1976). Division I of the Court of Appeals certified the instant appeal to this court.

The issue before this court is whether the goodwill of a sole professional practitioner of dentistry is a valuable asset subject to division in a dissolution of marriage. Initially, however, it is necessary to consider the general nature of goodwill.

Goodwill is most frequently associated with ongoing commercial ventures. *In re Estate of Glant*, 57 Wn.2d 309, 356 P.2d 707 (1960); *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 113 P.2d 845 (1941); *Stanton v. Zercher*, 101 Wash. 383, 172 P. 559 (1918). In the commercial setting, goodwill includes the name, location, reputation for honesty and fair dealing, individual talents and abilities of the members of the organization. *In re Estate of Glant*, supra at 312; *J. L. Cooper & Co. v. Anchor Sec. Co.*, supra at 54; *Stanton v. Zercher*, supra at 391-92. Goodwill comprises those advantages which may inure to a purchaser from holding himself out to the public as the successor in an enterprise which had been conducted in the past with the name and repute of his predecessor. *Stanton v. Zercher*, supra at 391. Because of its very nature the goodwill of an ongoing commercial venture inures in the business and is inseparable from the whole. *In re Estate of Glant*, supra at 312; *Stanton v. Zercher*, supra at 392; *In re Marriage of Lukens*, supra at 483-84.

Goodwill may also be generated in a professional venture such as the practice of dentistry, law, or medicine. But, such goodwill is personal in nature and is not a readily marketable commodity. *See Lockhart v. Lockhart*, 145 Wash. 210, 259 P. 385 (1927); *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *Golden v. Golden*, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969). Factors contributing to a professional practitioner's goodwill include his name, age, health, past earning power, reputation for skill, judgment, and knowledge as well as his comparative success. *In re Marriage of Lukens*, supra at 484; *In re Marriage of Lopez*, supra at 68. The individual labor and individual attention of the professional practitioner are critical to establishing and maintaining goodwill. *Lockhart v. Lockhart*, supra at 213; *Nail v. Nail*, 486 S.W.2d 761, 763 (Tex. 1972).
Goodwill, whether generated by a commercial business or by a professional venture, is clearly "property" in a legal sense. See J. L. Cooper & Co. v. Anchor Sec. Co., supra at 53. However, to be true goodwill in the sense of a commodity with a salable value, it must have an existence separate from the continued presence of those who generated it. Goodwill of this nature may be sold precisely as other personal property may be sold. See, J. L. Cooper & Co. v. Anchor Sec. Co., supra at 53. It follows that if goodwill of a professional practice exists, it will be an asset subject to division on dissolution of marriage if an appropriate value may be assigned to it as a salable commodity.

The next question is whether any goodwill exists, in connection with Dr. Fleege's sole practice of dentistry, which may be valued in this dissolution proceeding.

Each expert testified that the "goodwill" associated with Dr. Fleege's sole practice of dentistry would have a value only if he had associated with a dental successor for a period of time and then retired. Thus, according to the only testimony on the subject, both the existence and value of that kind of "goodwill" are dependent upon a short-term association followed by Dr. Fleege's retirement. The trial court properly rejected this evidence and refused to distribute this so-called "goodwill" of Dr. Fleege's sole dental practice.

Clearly, the value assigned by the experts to Dr. Fleege's so-called "goodwill" represents a value assigned to a service for which a successor would be willing to pay Dr. Fleege for a temporary association prior to retirement. This concept and its value is not goodwill as the term is commonly used. Rather, it represents compensation to Dr. Fleege in exchange for a short-term association (i.e., his continued presence) followed by retirement. True goodwill must not depend upon the continued presence of the one who originally created it. It derives from the ability of a successor to enjoy the predecessor's name and reputation.

Further, considering the type of "goodwill" and allied valuation testified to by the experts herein it is important to note that in the profession of dentistry a successor could not lawfully enjoy Dr. Fleege's name and reputation without his continued active professional association. RCW 18.32.360 provides:

It shall be unlawful for any person to practice dentistry under any name, except his own, which shall be that used in his license issued by the director: Provided, That this shall not apply to any person who was practicing dentistry in this state on March 20, 1935, under an association or trade name. It shall be unlawful for any person to conduct a dental office in his name, or to advertise his name in connection with any dental offices, unless he is personally present therein operating as a dentist, or personally overseeing the operations performed in any office, during most of the time that office is being operated: Provided, That this section shall not prohibit any person from continuing to conduct any offices legally conducted in this state on March 20, 1935.
Any violation of the provisions of this section shall constitute improper, unprofessional and dishonorable conduct; it shall also constitute grounds for injunction proceedings as provided by this chapter, and in addition shall constitute a gross misdemeanor.

Consequently, neither the existence nor the value of "goodwill" discussed by the experts represents goodwill in its true sense. The trial court properly refused to consider such evidence as establishing either the existence of or the value of the goodwill of Dr. Fleege's sole dental practice.

I am also unable to find any evidence demonstrating the existence or value of the kind of "goodwill" here in question. The deficiency is understandable, however. Given the accepted understanding of goodwill, the nature of the dental profession, and RCW 18.32.360, the existence and value of a sole dental practitioner's goodwill, at the time of marriage dissolution, would be the same as its value if he should simply abandon it without more. *Lockhart v. Lockhart, supra* at 213. Total abandonment of a sole dental practice, while unusual, is analogous to the situation in which a dentist dies prior to selling the practice. In such an event, the three experts agreed any goodwill would simply "evaporate." It would no longer exist and would have no value.

If Dr. Fleege were to die or abandon his practice, any person thereafter using his name would be guilty of a gross misdemeanor. Since the very existence of professional goodwill derives from a successor's ability to enjoy the reputation associated with his predecessor and because another dentist could not enjoy Dr. Fleege's reputation without his continued presence, no true goodwill exists in connection with Dr. Fleege's sole practice to be valued in the marriage dissolution setting. Consequently, the trial court properly determined that the professional "goodwill" of Dr. Fleege's sole dental practice was not an asset capable of division in a marriage dissolution proceeding.

In resolving the issue at hand this court is not concerned with possible goodwill as an asset incident to sale of other types of professional practices, or goodwill that may exist in the setting of a professional partnership. We are concerned solely with a marital dissolution and the existence and valuation of goodwill generated by a dentist who is a sole practitioner.

The trial court should be affirmed.

**B. Valuation Issues involving Community Owned Businesses**


SCHROEDER, Justice.
This is an appeal from a district court order that affirmed the findings of a magistrate court regarding the valuation of the parties' community business . . .

I. FACTS AND PROCEDURAL BACKGROUND

Susan and Rex Chandler were married on September 22, 1981. They had one child during the marriage, Tyler Rex Chandler, born February 9, 1988.

The Chandlers have been involved in the restaurant industry, on varying levels, for several years. Susan has held lower level positions, while Rex has acted as director and overall manager in several fine-dining establishments in Hawaii and California. The Chandlers acquired ownership interest in several of these restaurants. Although the restaurants experienced periods of substantial expansion and success, the parties suffered a business and personal bankruptcy in 1991.

The Chandlers moved to Honolulu, Hawaii, in 1992, where Rex was employed as general manager of a restaurant and nightclub, earning $100,000 per year. In 1993, Rex accepted a position as director of operations of a resort in South Lake Tahoe, California, where he was paid a salary of $60,000 per year, plus housing and benefits.

In June of 1994, Rex was contacted by a friend living in Ketchum, Idaho, and was told of the opportunity to rent a small restaurant space in Ketchum that had been vacated by another restaurant. Rex investigated the opportunity and concluded he could create a fine-dining restaurant there. Because of their financial difficulties, the Chandlers could not qualify for a conventional loan. Rex's mother, Radie Chandler, refinanced her home and loaned the parties approximately $105,000 to open the restaurant.

The parties moved to Ketchum in August of 1994. Chandler's Restaurant opened in November of 1994 as a sole proprietorship. The business was incorporated in February of 1995, as Chandler's Restaurant, Inc. Rex manages every aspect of the restaurant and works ten or more hours a day and often works on his days off, commonly up to sixty hours per week.

Rex filed a complaint for divorce in July of 1998. The parties stipulated to joint custody of Tyler and to the allocation of personal property but went to trial on other issues.

The trial court awarded the community property business (the restaurant) to Rex and ordered Susan to transfer her fifty-percent interest in the business to Rex in exchange for one-half of the value of the business, determined by the trial court to be $21,000. The trial court ordered Susan to use those funds to pay her attorney fees. In addition, the trial court fixed child support pursuant to the child support guidelines based upon the trial court's determination that Rex's total income is $65,000 per year. The trial court awarded Susan eight months of alimony of $1,800 per month.
Susan appealed to the district court, alleging that the trial court undervalued the community property business. The district court affirmed the magistrate court's findings. Susan appealed to this Court.

II. STANDARD OF REVIEW

"The disposition of community property is left to the discretion of the trial court, and unless there is evidence in the record to show an abuse of that discretion, the award of the trial court will not be disturbed." Maslen v. Maslen, 121 Idaho 85, 88, 822 P.2d 982, 985, citing Koontz v. Koontz, 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980). In reviewing an exercise of discretion, this Court conducts a multi-tiered inquiry: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989), citing Associates Northwest, Inc. v. Beets, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct.App.1987); Sun Valley Shopping Center, Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Encompassed in the disposition of community property is the determination of the value of that property. The Court has held that in "divorce proceedings the determination of the value of community property is within the discretion of the trial court and will not be disturbed on appeal if it is supported by substantial competent evidence." Maslen, 121 Idaho at 90, 822 P.2d at 987, citing Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984); Martsch v. Martsch, 103 Idaho 142, 645 P.2d 882 (1982). The trial court, "not this Court on appeal, resolves the conflicting evidence and determines the weight, credibility and inferences to be drawn" from the evidence. McAfee v. McAfee, 132 Idaho 281, 287, 971 P.2d 734, 740 (Ct.App.1999), citing Weilmunster v. Weilmunster, 124 Idaho 227, 238, 858 P.2d 766, 777 (Ct.App.1993).

III. THE TRIAL COURT INCORRECTLY CALCULATED THE VALUE OF THE COMMUNITY PROPERTY BUSINESS.

The core of the arguments surrounding this issue revolves around the "goodwill" value, if any, of the community business. It is important to note that the trial court found that Rex's expertise in the restaurant business is not community property, thus cannot be valued as goodwill. The goodwill value at issue in this case is the goodwill of the community business itself, Chandler's Restaurant, Inc. Despite the business' negative asset to debt ratio, the trial court stated "the Court cannot conclude that the corporation has a negative value, or that it should be valued at less than zero (0) for purposes of property division." The trial court found that the community business had some "value" distinguishable from Rex's personal goodwill. That value can only be categorized as the goodwill of the community business itself.
Two values must be considered when determining the overall value of a business: intangible assets and tangible assets. The value of the business is determined when the two factors are combined. "Goodwill" (an intangible asset) is an appropriate factor in determining the value of a business. *Olsen v. Olsen*, 125 Idaho 603, 606, 873 P.2d 857, 860 (1994). Goodwill represents "the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence...." *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 555, 113 S.Ct. 1670, 1675, 123 L.Ed.2d 288, 299 (1993); see also *Harshbarger v. Eby*, 28 Idaho 753, 761, 156 P. 619, 621 (1916); *Loveland v. Loveland*, 91 Idaho 400, 402, 422 P.2d 67, 69 (1967). Goodwill is not the equivalent of future earnings. *See In re marriage of Bookout*, 833 P.2d 800, 804 (Colo.App.1991), citing *In re Marriage of Lukens*, 16 Wash.App. 481, 558 P.2d 279 (1976); *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983) (other citation omitted); see also *In re Marriage of Hall*, 103 Wash.2d 236, 692 P.2d 175 (1984) ("Goodwill is a property or asset which supplements the earning capacity of another asset, a business, or a profession, and, therefore, it is not the earning capacity itself."). Rather, "relative to marital dissolution, goodwill represents the ability of a business to earn money after the divorce based on efforts made during the marriage ... to the extent future profits are likely due to circumstances that exist at the time of the dissolution, they should be reflected in the value of the business." Richard E. Poley, *Valuing Business Goodwill in a Divorce*, 26 APR COLO. LAW. 53 (1997).

Determining a value to assign to the goodwill of a business is the most complex aspect of a court's determining a business's overall value. There are many accepted methods that experts use to estimate a business' goodwill value. The goal of utilizing these various methods is to enable the trial court to accurately approximate a business's true "value," that is, what a willing buyer would pay a willing seller for the business, in this case, what a willing buyer would pay for Chandler's Restaurant, Inc., based on its community reputation, established patronage, and other factors based on efforts made during the marriage that exist at the time of dissolution.

How the trial court assesses and weighs each method and variable with it, in each particular case, is within that court's discretion. This Court and the Court of Appeals have recognized the validity of several of these valuation "methods." *See Olsen, supra*. In *Olsen* and *McAfee, supra*, the Court addressed the excess earnings method and net asset value method and in *McAfee*, the Court of Appeals addressed the capitalized excess earnings method and the straight capitalization of earnings method. Other widely used methods utilized in determining the goodwill value of a business that have been used by other courts include the market value or fair market value method, the buy sell agreement method and the IRS method. *See In re Marriage of Hall*, 103 Wash.2d 236, 244, 692 P.2d 175, 180 (1984); *Hoefi v. Hoefi*, 74 Ohio App.3d 809, 600 N.E.2d 746 (1991); *Ritz v. Ritz*, 166 A.D.2d 568, 560 N.Y.S.2d 853 (1990); *Mocnik v. Mocnik*, 838 P.2d 500 (Okla.1992). These valuation methods are not the exclusive methods available to a trial court in determining the value of a community business. The Court has repeatedly stated that the valuation of community property is within the discretion of the trial court. *See Maslen*, 121 Idaho at 90,
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822 P.2d at 987. However, if a trial court purports to use a specific valuation method in determining the value of a community property business and misapplies the formula associated with that method, the case will be remanded back to the trial court for proper application of the valuation formula. See Olsen, supra.

In this case the trial court discussed various valuation methods in determining the value of Chandler's Restaurant, Inc. Both parties agree that the trial court applied a capitalized earning formula to determine the value of the community business. However, the parties disagree as to whether the trial court properly applied the formula. "Under the capitalized excess earnings method, the value of a business is determined by multiplying the net excess earnings of the business by a predetermined capitalization rate...." McAffee, 132 Idaho at 287, 971 P.2d at 740. First, the average net income is determined. Next, the appropriate salary equal to the amount it would take to attract a new employee to replace the owner or operator, accounting for skill, experience and reputation, is subtracted from the earnings. Id. The result is the excess earnings of the business. The figure is then multiplied by the capitalization rate and the resulting amount is considered goodwill. Id. "This amount is added to the adjusted net tangible assets to arrive at the total value of the business." Id.

Using the capitalized excess earnings method, goodwill (the intangible asset) should be added to the net tangible assets (tangible assets less liabilities) to arrive at the total value of the business. Id.

The trial court used Rex's expert, Mr. Lallman's figure of $42,000 as net income figure and multiplied it by an agreed upon capitalization rate of 20%, resulting in a goodwill value figure of $210,000. See McAffee, 132 Idaho at 287, 971 P.2d at 740 (A business' goodwill value is calculated by multiplying the excess earnings or net income of the business by the capitalization rate.). From that figure, the trial court subtracted the debt of the corporation estimated by Mr. Lallman to be $188,000. The trial court arrived at the value of the business by subtracting the business's liabilities from the business's goodwill without accounting for the business's assets, therefore the significance of the business debts is exaggerated. However, following the capitalized excess earnings method, the goodwill value of the business, determined by the trial court to be $210,000, needs to be added to the net tangible assets of the business (tangible assets minus liabilities) in order to reach a reasonable value figure. If the trial court finds that liabilities exceed tangible assets, then the appropriate amount needs to be deducted from the $210,000.4 The fact

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3Net assets are defined by Black's Law Dictionary as the excess of total assets over total liabilities. Similarly, book value is the value of the business's tangible assets depreciated, as allowed by the I.R.S. less liabilities. 8 AM.JUR. PROOF OF FACTS 3d 215 at 228 n. 25 (Goodwill Valuation).

4The trial court uses the terms "income method", "return on investment" and "capitalized excess earnings" method interchangeably throughout the opinion. However, even if the trial court applied a valuation method that is not memorialized, the method used does not adhere to the fundamental underpinning of business valuation that is, intangible assets added to net tangible assets equals the value of a business.
that liabilities may exceed tangible assets is irrelevant in application of the formula. The assets must be included in the calculation for proper application of the formula.

Rex argues that the trial court found no goodwill value in the business, that the judge was simply trying to "reach out" to Susan in setting the value of the business at $21,000. The record does not support this argument. The trial court carefully assessed the testimony of all of the expert witnesses regarding the value of the business. The trial court found "that profits have taken hold and there is no reason to believe that they will suddenly discontinue unless some significant shakeup occurs, such as a poor ski year, or a change in management or key personnel." The trial court found that the "business does generate cash flow each year, and will likely continue to do so so long as Rex operates it." (Emphasis in original). Accordingly, the trial court stated that the "Court cannot conclude that the corporation has a negative value, or that it should be valued at less than zero (0) for purposes of property division."

In this case the trial court properly perceived the issue as one of discretion and acted consistently with the applicable legal standards and reached its decision by an exercise of reason. See Hedger, 115 Idaho at 600, 768 P.2d at 1333. However, in its valuation of the community business, the trial court did not follow the valuation method/formula it purported to apply and pursuant to Olsen, supra, the case must be remanded to the trial court to recalculate the value of the Chandlers' community property and business, either utilizing the capitalized excess earnings formula as outlined in this opinion or another that reflects the value of the business.

VI. CONCLUSION

Based on the foregoing discussion, the case is remanded to the magistrate court for the recalculation of the value of the community business. . . .

Justice EISMANN concurring in the result.

THE TRIAL COURT INCORRECTLY CALCULATED THE VALUE OF THE COMMUNITY PROPERTY BUSINESS.

I agree that the trial court incorrectly calculated the value of the community property business. I cannot agree with the majority's statement that the trial court found there was any value in the business' goodwill. Likewise, I cannot agree with statements in the majority opinion which, in effect, will transform a spouse's ability to earn above-average income after the divorce into community property by calling it business goodwill.

1. The majority opinion misstates the trial court's finding as to the value of the business' good will.
The majority states that the trial court found the goodwill value of the community restaurant to be $210,000.\(^5\) In actuality, the trial court found that the goodwill value of the business was zero, as shown by the following quotations from the trial court's findings of fact:

109. The court recognizes a distinction between "goodwill" which may be attributable to the business alone (assuming competent but interchangeable management) and goodwill which is specifically related to the reputation and the public's experience with an individual, such as Rex.

134... In Mr. Lallman's opinion, Chandler Restaurant does not have goodwill which is distinguishable from Rex's personal goodwill.

139. Lallman's [sic] also analyzed the value of the goodwill under the "Rule of Thumb Method", whereby you take the cash flow and use a multiplier. In analyzing value under this method Mr. Lallman identified several reasons why he felt no "goodwill" existed, all of which appeared valid to the Court. Mr. Lallman has applied various methods and arrived at similar results from each method. The Court finds Mr. Lallman's analysis and testimony persuasive.

In its conclusions of law, the trial court stated:

7. Rex's skill and expertise in the restaurant business is not community property nor can it [be] valued as goodwill in the corporation, and is not subject to division in the divorce.

8. The Court has concluded that most of the corporation's success and continued ability to remain successful are due to Rex's personal efforts and expertise.

The trial court made several findings as to why there was no value to the restaurant's goodwill.

134. In addition, Mr. Lallman looked at the various traditional indicia of a "goodwill" value independent of the owner-operator's personal reputation. Mr. Lallman found the Lease to be good, but of only a five (5) year duration before it moves to "fair market rental" and therefore has no special value. The location is a cozy structure, but such atmosphere is not unique in Ketchum and the building is old, small, not located on a main traffic thoroughfare, and not subject to expansion under current zoning. The employee work force is competent and stable, but no

\(^5\)The majority states, "The trial court used Rex's expert, Mr. Lallman's figure of $42,000 as net income figure and multiplied it by an agreed upon capitalization rate of 20%, resulting in a goodwill value figure of $210,000."
long-term employment contracts exist; significantly, one (1) employee, Keith Otter, left his employment with Chandler's Restaurant to open a competing restaurant in Ketchum. Mr. Lallman cited many examples of restaurants in the Ketchum/Sun Valley area which have simply closed and liquidated equipment rather than selling as going concerns. Historically, in and around the Ketchum area, the Court finds that to be the general rule. In Mr. Lallman's opinion, Chandler's Restaurant does not have goodwill which is distinguishable from Rex's personal goodwill.

138. This restaurant, like most in Ketchum, also presented several special high risk factors to a hypothetical investor: (1) ease of entry into the market, particularly for someone of Rex's qualifications; (2) difficulty of attracting and keeping good employees; (3) the fact that a resort community does not have a good long term customer base; (4) if Sun Valley experiences a poor ski year all the restaurants in the valley suffer. The Court finds the restaurant competition in the Ketchum/Sun Valley area is extreme.

140. The business of Chandlers is seasonal and relies heavily on tourists. Heavy "slack" periods occur for at least three (3) months, business is probably marginal for at least another three (3) months, and good for only six (6) months out of each particular year. The restaurant, therefore, does not have constant or habitual customers in the sense that a restaurant in downtown Boise might. Undoubtedly, there is some local trade, and there are some repeat customers that do not live in town (part-time residents). However, this heavy reliance on tourism means that goodwill (the propensity of old customers to return) is limited, and that keeping the restaurant profitable is a constant exercise in attracting new customers. Any new restaurant can do that.

145. The Court also finds Rex's personal attention to the detail of the operation of the business has developed a good reputation for the business, but that reputation is not something which would be saleable if Rex were not to continue in his employment in the business. *Rex has no non-competition agreement with the corporation.* (Citation and footnote omitted; emphasis in the original.)

It is clear from reading the trial court's findings of fact that the trial court found that the business goodwill had no value.

2. The trial court incorrectly calculated the value of the community property business.

The trial court found, "A factor essential to the creation of Chandler's Restaurant was the owner/manager's willingness to take on personal debt to start the restaurant." To do so, Rex
obtained two loans from his mother in the sums of $10,000.00 and $105,508.69. She obtained money to make the loans by refinancing her home. At the time of the divorce, the principal owing on these loans was approximately $105,000. In addition, the trial court found that the restaurant (and the parties) owed approximately $26,000 in bank loans and $31,500 to $35,000 to the Internal Revenue Service.

The trial court did not make any finding as to the value of the restaurant's physical assets, but the opinions offered during trial all placed that value at less than the amount of the debts. If someone were to purchase the restaurant for an amount sufficient to pay the debts, the purchaser would, in essence, simply be purchasing the physical assets for more than they are worth. As found by the trial court, "There is no reason for a potential restaurateur [sic] to pay a premium to purchase Chandler's Restaurant, Inc., including payment of significant existing debts, when he or she could open a restaurant for less."

Because Rex is able to generate income while operating the restaurant, however, the trial court found that it had a value of $21,200 based upon the "Return on Investment Method (Income Approach)" for valuing the corporation.

141. The business does generate cash flow each year, and will [be] likely to continue to do so long as Rex operates it. In Rex's hands, the restaurant will likely continue to generate cash flow sufficient to meet the needs of the business and satisfy its creditors over the long term. Indeed, during the separation of the parties, the restaurant has generated sufficient cash flow to support both parties in two households. Accordingly, the Court cannot conclude that the corporation has a negative value, or that it should be valued at less than zero (0) for purposes of property division.

146. In using the Return on Investment Method (Income Approach) favored by Mr. Hecker, but also done by Mr. Lallman as a check against his other calculations, both Mr. Hecker and Mr. Lallman concluded a discount rate of twenty percent (20%) to be appropriate. At that rate, under Lallman's calculations, the business would have a value of Twenty-one Thousand Two Hundred Dollars ($21,200).

147. The Court concludes that the value of the stock in Chandlers is, at the most, Twenty-one Thousand Two Hundred Dollars ($21,200). The overall debt of the parties, independent of business debt, exceeds this value of the corporation. The business still has the ability to generate cash (and "perks") separate and distinct from the valuation of the business for community division purposes. The Court will consider this, together with the limited value of the corporation, in allocating the payment of the debts between the parties and in considering support. (Emphasis in the original.) As the majority acknowledges, the "value" of a business is "what
a willing buyer would pay a willing seller for the business." The trial court, however, found a value based upon Rex's ability to earn income in the business after the divorce based upon Rex's personal attributes.

The trial court found that the restaurant had a value to Rex based upon his ability, due to his own personal attributes, to generate income after the divorce by operating the restaurant. That calculation of value is not "what a willing buyer would pay a willing seller for the business." A willing buyer could not purchase Rex's personal attributes. Therefore, the trial court erred in its finding of value. I agree that the trial court must re-determine the value of the restaurant.

3. The majority opinion transforms a spouse's ability to earn above-average income after the divorce into community property by calling it business goodwill.

The majority states that business goodwill is calculated as follows:

First, the average net income is determined. Next, the appropriate salary equal to the amount it would take to attract a new employee to replace the owner or operator, accounting for skill, experience and reputation, is subtracted from the earnings. The result is the excess earnings of the business. The figure is then multiplied by the capitalization rate and the resulting amount is considered goodwill. (Citations omitted.)

In support of its view that the trial court found there was goodwill value in the business, the majority then states:

The trial court found "that profits have taken hold and there is no reason to believe that they will suddenly discontinue unless some significant shakeup occurs, such as a poor ski year, or a change in management or key personnel." The trial court found that the "business does generate cash flow each year, and will likely continue to do so so long as Rex operates it." (Emphasis in original).

The majority concludes that as long as Rex continues to operate the restaurant after the divorce, it will make money, and therefore it has goodwill valued at $210,000. By basing the value of business goodwill upon a spouse's ability to earn above-average income after the divorce, the majority has converted post-divorce, separate property earnings into community property.

The majority's calculation of "goodwill" is based upon the business' projected future ability to earn above-average income. The majority first would calculate the business' "excess earnings" by deducting from its net income an amount necessary to hire someone to replace the owner/operator. Such calculation is based upon the assumptions that you could find an employee who is willing to do everything that the owner/operator does, that such employee would operate the business just as competently as the owner/operator, and that such employee would be willing to work for less than the owner/operator was making. The salary of this hypothetical employee is simply the average amount earned by someone who holds that same position, in this case a
Chapter 3: Classifying Property As Community

restaurant manager. Thus, the "excess earnings" are simply the above-average income earned by the owner/operator.

A spouse's personal attributes are not property, and they therefore cannot be classified as community property or apportioned between spouses upon divorce. Wolford v. Wolford, 117 Idaho 61, 785 P.2d 625 (1990). A spouse's knowledge, background, talents, abilities, reputation, work ethic, and so forth are not community property, even if they were enhanced during the marriage. Income earned after the divorce is separate property. Thus, income earned by a spouse after the divorce due to his or her knowledge, background, talents, abilities, reputation, work ethic, or other personal attributes is not community property. It is separate property. Discounting estimated post-divorce income to a present value does not convert it into community property.

"The goodwill of a business is the custom which it attracts, and the benefits or advantages it receives from constant or habitual customers, and the probability that old customers will continue to come to the place." Harshbarger v. Eby, 28 Idaho 753, 761, 156 P. 619, 621 (1916). As the majority states, a business' "value" is "what a willing buyer would pay a willing seller for the business." The definition of value presupposes a sale. It is an estimate of the price for which the asset could be sold. As stated in Harshbarger v. Eby, id., "It is well settled that the 'goodwill' of a business, like a trademark, is a species of property subject to sale by the proprietor."

For a business to have any value in "goodwill," that goodwill must be something that can be sold. It must be something for which the buyer is willing to pay money and could acquire upon purchasing the business, such as location or brand name. The purchaser of the business cannot acquire the knowledge, background, talents, abilities, reputation, work ethic, or other personal attributes of the seller. Therefore, for a business to have "goodwill," such value must be based upon the business' ability to attract repeat customers independent of the personal attributes of the seller. The trial court realized this when stating in its findings of fact, "The court recognizes a distinction between 'goodwill' which may be attributable to the business alone (assuming competent but interchangeable management) and goodwill which is specifically related to the reputation and the public's experience with an individual, such as Rex."

Although the majority states, "Goodwill is not the equivalent of future earnings," it supports its finding that the business goodwill has a value of $210,000 by quoting the trial court's statement that the "business does generate cash flow each year, and will likely continue to do so so long as Rex operates it." (Emphasis in original.) These two statements are logically inconsistent. The emphasis on the words "so long as Rex operates it" obviously means that the restaurant will continue to generate cash flow only if Rex continues to operate it. Its ability to generate cash flow in the future is based entirely upon Rex's ability to earn income due to his knowledge, background, talents, abilities, reputation, work ethic, and other personal attributes. If, as in this case, goodwill is based entirely upon a spouse's ability to earn money in the future due to the spouse's personal attributes, then goodwill is the equivalent of that spouse's future earnings. It is simply discounting those future earnings to a present value. The trial court did not find, nor did the majority in its decision, that there was anything about Chandler's Restaurant, such as
location or a loyal customer base, that would cause the restaurant to have repeat customers if Rex were not operating it.

The trial court did not find that an employee could replace Rex if the business were sold. As the trial court found, restaurants in the Ketchum area are primarily owner-operated because they cannot afford to hire someone to manage the restaurant. The trial court's description of what Rex does shows why.

50. Rex works in the restaurant approximately ten (10) or more hours per day and frequently stops in on the days which are scheduled as his "days off." Rex personally manages the overall operation of the restaurant consulting with the chef over food ordering, menus and cost, returning calls for reservations, banking, conceiving and implementing promotion of the restaurant, establishing and maintaining relationships with suppliers, supervising the book-keeping service, constant supervision of the business's performance on items such as food and wine costs, developing the wine list, developing and maintaining an inventory and ordering system of "just in time" ordering so as to have the minimum amount of capital tied up in inventory, directing the timing of the payment of vendors (immediately when cash is available in peak seasons and extended during slack), hiring and supervising employees, supervising the floor during meal service and interacting with customers, making sure that he and the staff make personal contact with the customers and remember names of customers and their food and wine preferences, and maintaining constant vigilance over the business's cash position. Rex's hours vary with the season, but he can and does commonly work up to sixty (60) hours a week.

The trial court found as a general rule that restaurants in the Ketchum area simply close and liquidate equipment rather than sell as going concerns.

The majority's calculation of business goodwill simply is not accurate when the ability to generate "excess earnings" is based upon the personal characteristics of the owner/operator. Under the majority's method of calculating business goodwill, a well-known artist would have goodwill in his or her business even though the only items that could be sold to a buyer would be an easel and some brushes, paints, and blank canvases.

C. Community Claims Arising from Separately Owned Businesses

1. American Rule Jurisdictions

Beam v. Bank of America, 6 Cal. 3d 12, 490 P. 2d 257, 98 Cal. Rptr. 137 (1971)

TOBRINER, J.
Mrs. Mary Beam, defendant in this divorce action, appeals from an interlocutory judgment awarding a divorce to both husband and wife on grounds of extreme cruelty. The trial court determined that the only community property existing at the time of trial was a promissory note for $38,000, and, upon the husband's stipulation, awarded this note to the wife; the court found all other property to be the separate property of the party possessing it. The court additionally awarded Mrs. Beam $1,500 per month as alimony and granted custody of the Beam's two minor children to both parents, instructing the husband to pay $250 per month for the support of each child so long as the child remained within the wife's care.

On this appeal, Mrs. Beam attacks the judgment primarily on the grounds that the trial court (1) failed adequately to compensate the community for income attributable to the husband's skill, efforts and labors expended in the handling of his sizable separate estate during the marriage, . . . . For the reasons discussed below, we have concluded that substantial precedent and evidence support the various conclusions under attack; thus we conclude that the judgment must be affirmed.

I. The Facts.

Mr. and Mrs. Beam were married on January 31, 1939; the instant divorce was granted in 1968, after 29 years of marriage. Prior to and during the early years of the marriage, Mr. Beam inherited a total of $1,629,129 in cash and securities, and, except for brief and insignificant intervals in the early 1940's, he was not employed at all during the marriage but instead devoted his time to handling the separate estate and engaging in private ventures with his own capital. Mr. Beam spent the major part of his time studying the stock market and actively trading in stocks and bonds; he also undertook several real estate ventures, including the construction of two hotel resorts, Cabana Holiday I at Piercy, California, and Cabana Holiday II at Prunedale, California. Apparently, Mr. Beam was not particularly successful in these efforts, however, for, according to Mrs. Beam's own calculations, over the lengthy marriage her husband's total estate enjoyed only a very modest increase to $1,850,507.33.

Evidence introduced at trial clearly demonstrated that the only moneys received and spent by the parties during their marriage were derived from the husband's separate estate; throughout the 29 years of marriage Mrs. Beam's sole occupation was that of housewife and mother (the Beams have four children). According to the testimony of both parties, the ordinary living expenses of the family throughout the marriage amounted to $2,000 per month and, in addition, after 1960, the family incurred extraordinary expenses (for travel, weddings, gifts) of $22,000 per year. Since the family's income derived solely from Mr. Beam's separate estate, all of these household and extraordinary expenses were naturally paid from that source.

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Mrs. Beam died subsequent to the filing of this appeal and the Bank of America, executor of her estate, has been substituted in her place. For convenience and clarity, however, we refer to the wife as the appellant.
During the greater part of the marriage (1946 to 1963) the Beams resided in a home on Spencer Lane in Atherton, California. In 1963 the family sold the Spencer Lane house and acquired a smaller residence in Atherton, on Selby Lane. This home was sold in 1966 for a cash down payment, which was apparently divided between the parties, and for a promissory note in the sum of $38,000, payable in monthly installments of $262.56. The trial court concluded that this note was community property but, upon Mr. Beam's stipulation, awarded the entire proceeds of the note to the wife.

On this appeal, Mrs. Beam of course does not question the disposition of the promissory note, but does attack the trial court's conclusion that this asset was the only community property existing at the time of the divorce. Initially, and most importantly, the wife contends that the trial court erred in failing to find any community property resulting from the industry, efforts and skill expended by her husband over the 29 years of marriage. We address this issue first.

The trial court did not err in concluding that there was no net community property accumulated during the marriage from the earnings of Mr. Beam's separate property.

Section 5108 of the Civil Code provides generally that the profits accruing from a husband's separate property are also separate property. Nevertheless, long ago our courts 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 derive from the husband's devotion of more than minimal time and effort to the handling of his separate property. (Pereira v. Pereira (1909) 156 Cal. 1, 7 [103 P. 488]; see Millington v. Millington (1968) 259 Cal.App.2d 896, 907-908 [67 Cal.Rptr. 128] and cases cited therein.) Furthermore, while this principle first took root in cases involving a husband's efforts expended in connection with a separately owned farm or business (e.g., Pereira v. Pereira (1909) 156 Cal. 1 [103 P. 488]; Huber v. Huber (1946) 27 Cal.2d 784, 792 [167 P.2d 708]; Van Camp v. Van Camp (1921) 53 Cal.App. 17, 29 [199 P. 885]; Stice v. Stice (1947) 81 Cal.App.2d 792, 796 [185 P.2d 402]) our courts now uniformly hold that "[an] apportionment of profits is required not only when the husband conducts a commercial enterprise but also when he invests separate funds in real estate or securities. [Citations.]") (Estate of Neilson (1962) 57 Cal.2d 733, 740 [22 Cal.Rptr. 1, 371 P.2d 745]; see Margolis v. Margolis (1952) 115 Cal.App.2d 131, 135 [251 P.2d 396].) Without question, Mr. Beam's efforts in managing his separate property throughout the marriage were more than minimal (cf. Weinberg v. Weinberg (1967) 67 Cal.2d 557, 567-568 [63 Cal.Rptr. 13, 432 P.2d 709]; Cozzi v. Cozzi (1947) 81 Cal.App.2d 229, 232 [183 P.2d 739]; Estate of Barnes (1933) 128 Cal.App. 489, 492 [17 P.2d 1046]), and thus the trial court was compelled to determine what proportion of the total profits should properly be apportioned as community income.

Section 5108 (formerly § 163) provides in relevant part: "All property owned by the husband before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property."
Over the years our courts have evolved two quite distinct, alternative approaches to allocating earnings between separate and community income in such cases. One method of apportionment, first applied in *Pereira v. Pereira* (1909) 156 Cal. 1, 7 [103 P. 488] and commonly referred to as the *Pereira* approach, "is to allocate a fair return on the [husband's separate property] investment [as separate income] and to allocate any excess to the community property as arising from the husband's efforts." (*Estate of Neilson* (1962) 57 Cal.2d 733, 740 [22 Cal.Rptr. 1, 371 P.2d 745].) The alternative apportionment approach, which traces its derivation to *Van Camp v. Van Camp* (1921) 53 Cal.App. 17, 27-28 [199 P. 885], is "to determine the reasonable value of the husband's services ..., allocate that amount as community property, and treat the balance as separate property attributable to the normal earnings of the [separate estate]." (*Tassi v. Tassi* (1958) 160 Cal.App.2d 680, 690 [325 P.2d 872].)

"In making such apportionment between separate and community property our courts have developed no precise criterion or fixed standard, but have endeavored to adopt that yardstick which is most appropriate and equitable in a particular situation ... depending on whether the character of the capital investment in the separate property or the personal activity, ability, and capacity of the spouse is the chief contributing factor in the realization of income and profits [citations] ... [Par.] In applying this principle of apportionment the court is not bound either to adopt a predetermined percentage as a fair return on business capital which is separate property [the *Pereira* approach] nor need it limit the community interest only to [a] salary fixed as the reward for a spouse's service [the *Van Camp* method] but may select [whichever] formula will achieve substantial justice between the parties. [Citations.]" (*Logan v. Forster* (1952) 114 Cal.App.2d 587, 599-600 [250 P.2d 730]; see *Millington v. Millington* (1968) 259 Cal.App.2d 896, 910 [67 Cal.Rptr. 128]; *Haldeman v. Haldeman* (1962) 202 Cal.App.2d 498, 505 [21 Cal.Rptr. 75]; *Tassi v. Tassi* (1958) 160 Cal.App.2d 680, 691 [325 P.2d 872].)

The trial court in the instant case was well aware of these apportionment formulas and concluded from all the circumstances that the *Pereira* approach should be utilized. As stated above, under the *Pereira* test, community income is defined as the amount by which the actual income of the separate estate exceeds the return which the initial capital investment could have been expected to earn absent the spouse's personal management. In applying the *Pereira* formula the trial court adopted the legal interest rate of 7 percent simple interest as the "reasonable rate of return" on Mr. Beam's separate property; although the wife now attacks this 7 percent simple interest figure as unrealistically high, at trial she introduced no evidence in support of any other more "realistic" rate of return and, as we stated explicitly in *Weinberg v. Weinberg* (1967) 67 Cal.2d 557, 565 [63 Cal.Rptr. 13, 432 P.2d 709], in the absence of such evidence "the trial court correctly adopted the

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rate of legal interest." (See also Pereira v. Pereira (1909) 156 Cal. 1, 11-12 [103 P. 488]; Haldeman v. Haldeman (1962) 202 Cal.App.2d 498, 505, fn. 1 [21 Cal.Rptr. 75].)

Testimony at trial indicated that, based upon this 7 percent simple interest growth factor, Mr. Beam's separate property would have been worth approximately 4.2 million dollars at the time of trial if no expenditures had been made during the marriage since Mrs. Beam's own calculations indicate that the present estate, plus all expenditures during marriage, would not amount to even 4 million dollars, it appears that, under Pereira, the entire increase in the estate's value over the 29-year period would be attributable to the normal growth factor of the property itself and, thus, using this formula, all income would be designated as separate property. (See Estate of Ney (1963) 212 Cal.App.2d 891, 895 [28 Cal.Rptr. 442]; Strohm v. Strohm (1960) 182 Cal.App.2d 53, 61 [5 Cal.Rptr. 884]; cf. Weinberg v. Weinberg (1967) 67 Cal.2d 557, 567-568 [63 Cal.Rptr. 13, 432 P.2d 709].) In other words, under the Pereira analysis, none of the increased valuation of the husband's separate property during the marriage would be attributable to Mr. Beam's efforts, time or skill and, as a result, no community income would have been received and, consequently, no community property could presently be in existence.

The wife concedes that the use of the Pereira formula does sustain the trial court's conclusion that the present remainder of the husband's estate is entirely his separate property, but she contends that, under the circumstances, the Pereira test cannot be said to "achieve substantial justice between the parties" (Logan v. Forester (1952) 114 Cal.App.2d 587, 600 [250 P.2d 730]) and thus that the trial court erred in not utilizing the Van Camp approach. Although the trial judge did not explicitly articulate his reasons for employing the Pereira rather than the Van Camp analysis, we cannot under the facts before us condemn as unreasonable the judge's implicit decision that the modest increment of Mr. Beam's estate was more probably attributable to the "character of the capital investment" than to the "personal activity, ability and capacity of the spouse." (Cf. Estate of Ney (1963) 212 Cal.App.2d 891, 898 [28 Cal.Rptr. 442].) In any event, however, we need not decide whether the court erred in applying the Pereira test because we conclude, as did the trial court, that even under the Van Camp approach, the evidence sufficiently demonstrates that all the remaining assets in the estate constitute separate property.

Under the Van Camp test community income is determined by designating a reasonable value to the services performed by the husband in connection with his separate property. At trial Mrs. Beam introduced evidence that a professional investment manager, performing similar functions as those undertaken by Mr. Beam during the marriage, would have charged an annual fee of 1 percent of the corpus of the funds he was managing; Mrs. Beam contends that such a fee would amount to $17,000 per year (1 percent of the 1.7 million dollar corpus) and that, computed over the full term of their marriage, this annual "salary" would amount to $357,000 of community

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21 According to defendant's figures, the value of Mr. Beam's estate at the time of trial was $1,850,507.33, ordinary living expenses over the marriage totalled $672,000, extraordinary expenses during this period equalled $176,000, and $610,126.93 was expended on "gifts." These calculations produce a gross total of $3,308,634.26.
Mrs. Beam asserts that under the Van Camp approach she is now entitled to one-half of this $357,000.

Mrs. Beam's contention, however, overlooks the fundamental distinction between the total community income of the marriage, i.e., the figure derived from the Van Camp formula, and the community estate existing at the dissolution of the marriage. The resulting community estate is not equivalent to total community income so long as there are any community expenditures to be charged against the community income. A long line of California decisions has established that "it is presumed that the expenses of the family are paid from community rather than separate funds [citations] [and] thus, in the absence of any evidence showing a different practice, the community earnings are chargeable with these expenses. [Citations.]" (Estate of Neilson (1962) 57 Cal.2d 733, 742 [22 Cal.Rptr. 1, 371 P.2d 745]; see e.g., Title Ins. and Trust Co. v. Ingersoll (1910) 158 Cal. 474, 492 [111 P. 360]; Estate of Cudworth (1901) 133 Cal. 462, 468 [65 P. 1041]; Estate of Tompkins (1932) 123 Cal.App. 670, 675 [11 P.2d 886].) This "family expense presumption" has been universally invoked by prior California decisions applying either the Pereira or Van Camp formula. (See, e.g., Estate of Neilson (1962) 57 Cal.2d 733, 742 [22 Cal.Rptr. 1, 371 P.2d 745]; Estate of Arstein (1961) 56 Cal.2d 239 [14 Cal.Rptr. 809, 364 P.2d 33]; Huber v. Huber (1946) 27 Cal.2d 784, 792 [167 P.2d 708]; Millington v. Millington (1968) 259 Cal.App.2d 896, 909 [67 Cal.Rptr. 128]; Haldeman v. Haldeman (1962) 202 Cal.App.2d 498, 504-505 [21 Cal.Rptr. 75]; Tassi v. Tassi (1958) 160 Cal.App.2d 680, 692 [325 P.2d 872]; Logan v. Forster (1952) 114 Cal.App.2d 587, 601-602 [250 P.2d 730]; Van Camp v. Van Camp (1921) 53 Cal.App. 17, 25 [199 P. 885].) Under these precedents, once a court ascertains the amount of community income, through either the Pereira or the Van Camp approach, it deducts the community's living expenses from community income to determine the balance of the community property.

If the "family expense" presumption is applied in the present case, clearly no part of the remaining estate can be considered to be community property. Both parties testified at trial that the family's normal living expenses were $2,000 per month, or $24,000 per year, and if those expenditures are charged against the annual community income, $17,000 under the Van Camp accounting approach, quite obviously there was never any positive balance of community property which could have been built up throughout the marriage.22 "When a husband devotes his services

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22The trial court determined that no net community property could be established under the Van Camp formula by deducting total community expenses over the course of the entire marriage from total community income, i.e., by using a "total recapitulation" approach. Although Mrs. Beam has not challenged this total recapitulation approach on appeal, some suggestion has arisen that the trial court's resort to this accounting method is contrary to this court's decision in See v. See (1966) 64 Cal.2d 778 [51 Cal.Rptr. 888, 415 P.2d 776]. Given the facts of the instant case, however, we need not decide whether the See decision, barring a husband's resort to a total recapitulation accounting in a case in which he has voluntarily commingled separate and community income in a single account, would also preclude total recapitulation under the instant circumstances, involving no conscious commingling. In the present case, so long as the family expense presumption is applicable, there could be no positive balance in the community estate even if the accounting procedures prescribed by See were utilized. The uncontradicted evidence of both parties establishes that even if the balance of the community estate were determined on a yearly, or indeed monthly, basis, rather than over the entire marriage, there was never a positive balance in the estate since community living expenses regularly exceeded the community earnings as computed under Van Camp. Thus, on this record, the application of
to and invests his separate property in an economic enterprise, the part of the profits or increment in value attributable to the husband's services must be apportioned to the community. If the amount apportioned to the community is less than the amount expended for family purposes, and if the presumption that family expenses are paid from community funds applies, all assets traceable to the investment are deemed to be the husband's separate property." (Estate of Neilson (1962) 57 Cal.2d 733, 742 [22 Cal.Rptr. 1, 371 P.2d 745].) . . . .

The judgment is affirmed.


This is an appeal and cross-appeal from a decree awarding a divorce to each party, settling their property rights, providing for alimony to the wife, and awarding her an attorney's fee and costs.

Plaintiff, Elden D. Pollock, a widower 53 years old, and his wife, Margaret, a divorcée about 50 years of age, were married in February 1953. Plaintiff was a resident of Mount Vernon, Washington, where he maintained a home for himself and two of his children, 6 and 4 years of age. Plaintiff apparently had a separate estate valued at over $200,000, which he managed from Mount Vernon. Defendant, a resident of San Francisco, California, was employed as a successful home economist at a monthly salary of $400 to $425, plus fringe benefits. She was the mother of a grown daughter from her prior marriage. Her separate estate was a modest one valued at a little over $10,600.

Upon marriage, defendant left her employment and the parties made their home in Mount Vernon for the ensuing 17 years of their marriage. Defendant proved a good housekeeper and hostess, active in Mount Vernon social life. She did an excellent job in looking after the physical needs of the children. The latter grew to maturity during that marriage. In the later years of the marriage, the children became somewhat estranged from the defendant, and perhaps for this and other reasons the marriage became an unhappy one.

Plaintiff had informed defendant prior to marriage of his substantial estate. In the earlier years of the marriage, defendant became concerned with her economic security. Plaintiff recognized this and attempted by means of his will and provision for joint accounts to allay her fears. He did not entirely succeed.

About 1960-1961, defendant became alarmed about her husband's intention to go into a property deal with Safeway Stores, Inc. She felt that in view of his age and ill health, plaintiff was

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See's accounting procedure would not alter the trial court's conclusion.
getting into an unduly large and risky lease transaction. To make the deal, plaintiff planned to withdraw the balances of the joint accounts he had provided for her protection, as he testified, “in case something happened to me.” In fact, without asking defendant about the matter, he withdrew $7,000. Defendant felt she had to protect the security promised her. She withdrew approximately $35,000 from the accounts and redeposited the funds in another account in her own name. She then refused to reveal the whereabouts of the funds. Later she invested most of the money so deposited in United States savings bonds. Plaintiff then made other arrangements to raise funds needed for the deal.

In August 1969, defendant, then 65 years of age, separated from plaintiff, then 69 years of age. Following separation, plaintiff sued defendant for divorce. She counterclaimed for like relief. On December 28, 1970, the court awarded a divorce to each party. He divided approximately $383,000 of real and personal marital property. The plaintiff husband was awarded $310,206.42, and the defendant wife was awarded $72,882.90. The latter’s property award included cash and securities totaling $51,405.13, part of which she had inherited from her mother. The court also awarded to the wife $300 per month alimony for a 5-year period, and $4,000 attorney’s fees and costs.

Defendant appeals and plaintiff cross-appeals. Defendant’s assignments of error deal with the propriety of entering the divorce decree in plaintiff’s favor, and with the claimed gross insufficiency of the property and alimony awarded to defendant. Plaintiff’s sole cross-assignment of error is that defendant should not have been allowed any attorney’s fee.

[This case was decided under Washington’s fault-based divorce system. The court first found that any error in granting a divorce to both the Plaintiff and the Defendant was harmless error.]

Defendant’s principal assignments of error rest on her contention that the property division made is grossly inequitable to her. RCW 26.08.110 empowers the divorce court to make “such disposition of the property of the parties, either community or separate, as shall appear just and equitable . . .” *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 433 P.2d 209 (1967), a divorce case, states the following applicable principles concerning property division:

Although the division of community property need not be exact, but just and equitable (*Robuck v. Robuck*, 62 Wn.2d 917, 385 P.2d 50 (1963)), with a wide latitude resting in the trial court’s discretion to make the division (*Bodine v. Bodine*, 34 Wn.2d 33, 207 P.2d 1213 (1949)), more specific principles are available to aid the court in arriving at a just and equitable division in particular cases. First, the court must consider the necessities of the wife and the financial ability of the husband. *Hogberg v. Hogberg*, 64 Wn.2d 617, 393 P.2d 291 (1964). Then, it should take into consideration the age, health, education and employment history of the parties and their children, and the future earning prospects of all of them. The court should, likewise, give thought to the sources and dates of acquisition of all properties accumulated by the parties during marriage and what properties each
brought into or contributed to the community property, along with the amounts and kinds of property left to be divided at the divorce. Even when regard is had for the fault of the parties and the wrong inflicted by the one upon the other, it is the economic condition in which the decree will leave the parties that engenders the paramount concern in providing for child support and alimony and in making a property division. *Stacy v. Stacy*, 68 Wn.2d 573, 414 P.2d 791 (1966).

Although this court will not substitute its judgment for that of the trial court in questions of child support, custody, alimony and division of property except where there has been a manifest abuse of discretion in one particular or another (*Root v. Root*, 64 Wn.2d 360, 391 P.2d 962 (1964)), we will, if shown some abuse of discretion, correct the decree to ameliorate or remove if possible the inequities fostered by it. *Hogberg v. Hogberg*, supra; *Dickison v. Dickison*, 65 Wn.2d 585, 399 P.2d 5 (1965); *Stacy v. Stacy*, supra.


Following marriage, plaintiff continued to manage his separate property successfully. He derived substantial income from the combined use of his separate property and his services. However, the community was entitled to the economic benefit of his services. The rule is that if plaintiff seeks to retain the separate character of income derived from a combination of his separate business and his postmarital personal services with respect thereto, he is required to make a contemporaneous segregation of the income so derived as between the community and his separate estate. This can be accomplished by the allocation to the community of what in effect would be a reasonable salary for his services. The allocation in the nature of a salary is then considered community income, and the balance of his income remains his separate property. As stated in *In re Estate of Smith*, 73 Wn.2d 629, 440 P.2d 179 (1968):

The rule is well settled that, where the separate property in question is an unincorporated business with which personal services ostensibly belonging to the community have been combined, all of the income or increase will be considered as community property in the absence of a contemporaneous segregation of the income between the community and the separate estates. *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954); *In re Witte’s Estate*, 21 Wn.2d 112, 150 P.2d 595 (1944); *Salisbury v. Meeker*, 152 Wash. 146, 227 Pac. 376 (1929).
In the instant case, as defendant points out, at no time was there an allocation in the nature of salary for plaintiff’s services made to the marital community, nor did plaintiff offer any evidence as to what such a reasonable salary would have been during each of the years of the marriage.

The evidence is not too clear on the matter of plaintiff’s business accounts, which in certain instances he claimed to be the source of claimed separate property. As nearly as we can determine from the evidence concerning his bank accounts, he had a “regular business account.” It is not clear whether the business account is also what he called a “control account,” or an “operating account” or “theater account.” In any case, some or all of his operating revenues were placed in one or more of the bank accounts described, and he drew on the business account or accounts for business and personal expenditures, including household expenditures. Plaintiff made no attempt to trace with “some degree of particularity” or by “clear and satisfactory evidence” the individual deposits and expenditures from his business account or accounts into the items of property previously listed in the margin and claimed by the defendant to be community property. Furthermore, because of “the absence of a contemporaneous segregation of the income between the community and the separate estates” (In re Estate of Smith, supra at 31), the acquisition of assets after marriage, even if from the proceeds of his unsegregated business or control account, must be deemed made from community income.

[The appellate court reversed the trial court. Because the husband had the burden of introducing evidence of the separate character of the property and failed to do so, the court increased the Wife’s property settlement by a total of $46,000.]

**Notes**

1. What is the justification in Beam for calculating the community property interests in a business as a share of the capital growth of the business?

2. How does the Washington approach differ from that of California?

**2. Civil Rule Jurisdictions**

*Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973)*

McQUADE, Justice.
Raymond G. Speer, appellant and petitioner for the writ of prohibition, and Olive J. Speer, respondent, were married in Seattle, Washington, in April, 1949. Four children were born of the marriage: Gary, born September 24, 1951; Paul, born October 10, 1952; Neal, born November 21, 1953 (now married) and Lorraine, born July 5, 1957. Because of increasing marital difficulties, the parties separated in November, 1970. In January, 1971, Raymond Speer commenced an action against Mrs. Speer for divorce. She counter-claimed requesting a divorce and an equitable division of the parties' community property. After trial, which was held January 11-14, 1972, the district judge awarded Olive Speer a divorce on the ground of extreme mental cruelty. He also made findings in regard to community property, and, based on these findings, awarded Mrs. Speer a money judgment against Mr. Speer in the amount of $371,200 secured by an equitable lien on his stock in two closely held corporations - Speer, Inc., and Westec, Inc. Before Mrs. Speer could execute her judgment by a levy sale of the stock, Raymond obtained an alternative writ of prohibition from this Court which prevented the sale of the stock pending this appeal. This appeal is taken by Raymond Speer primarily from those portions of the judgment and findings of fact and conclusions of law which deal with the amount and division of community property. The hearing on the motion to quash the alternative writ of prohibition was consolidated with the presentation on the merits of this appeal.

At the time of the marriage Raymond Speer was working in the restaurant business at a salary of $350 to $400 per month. Mrs. Speer was employed as a billing clerk. In 1951, appellant began working in his father's ammunition manufacturing business, Speer Products, in Lewiston, Idaho. There is some conflict as to the circumstances under which appellant began his employment in Lewiston. The district court found that there was an understanding between appellant and his father, Vernon Speer, that if appellant did well he would eventually succeed to management of the business. Appellant argues that there was no such agreement.

At the time Raymond Speer began working at Speer Products, the company was an unincorporated proprietorship. Raymond began as a general laborer in the company, worked in several different capacities, and gradually increased his responsibilities and salary. Respondent contends that from 1954 Raymond shared management responsibilities with his father. The district court found that Raymond became a co-manager with his father in 1963. In that year, Vernon Speer decided to incorporate his business for estate planning purposes. Speer, Inc., was incorporated in June, 1963, and began functioning as a corporation on January 1, 1964. As part of the incorporation procedures, Vernon and Dorothy Speer (his wife) transferred all the equipment and assets of Speer Products Company, except the land and the buildings, to the new corporation. They have continued to lease the land and buildings to Speer, Inc.

The corporation initially issued 500 shares of $100 par value stock (which remain the total number of shares outstanding at the present time). The district court found that Vernon and Dorothy Speer received 498 of these shares and promissory notes in the amount of $49,520 in exchange for the assets of the proprietorship and that appellant subscribed to the other two shares. Appellant claims that Vernon and Dorothy received all 500 shares of stock.
It appears from the record that when the firm was incorporated, Raymond subscribed to two shares, but that such subscription was cancelled on December 31, 1963, and those shares were subsequently acquired by his parents who then owned all 500 shares. On that same day, Vernon and Dorothy Speer made gifts of most of the shares to Raymond and his sister, Virginia Luthy. Raymond received 320 shares and Virginia received 160 shares. Vernon Speer testified that their reason for giving Raymond twice as many shares as Virginia was that Raymond had been "active in the business" and Virginia had not. Forrest Luthy, Virginia's husband, received 10 shares and Mr. and Mrs. Speer, Sr., retained 10 shares. The latter 10 shares were divided equally between Raymond and Virginia in 1970 and 1971. Raymond now owns 325 shares or 65% of the total Speer, Inc. stock.

The original board of directors consisted of Vernon, Dorothy and Raymond. From 1966 until the present time, Vernon, Raymond, Virginia and Forrest Luthy have been the directors. As of December 31, 1963, the officers were Vernon, president; Dorothy, vice-president; Virginia, secretary and Raymond, treasurer. From 1966, until the present time, Raymond has been president; Vernon, vice-president; Virginia, secretary; and Forrest Luthy, treasurer. It was also in 1966, that Raymond began to be referred to in the minutes of the directors' meetings as general manager of the corporation. At the end of that same year Vernon officially withdrew from active management of the corporation and informed the Social Security Administration that he was working no more than twenty hours per month, which made him eligible for social security benefits. Appellant claims, however, that Vernon continues to participate actively in company affairs in his roles as officer, director, and landlord, as well as in the area of machine design.

From 1965-1971, the number of employees in the company increased from approximately thirty to approximately sixty. The district court found that the book value of the stock per share had increased from $100.00 to $818.43. The court further found that as of August 31, 1971, the market value of the corporation had increased from no more than $400,000 in January of 1964, to $1,560,000 at the time of the trial, a net increase of $1,160,000. These findings of the district court are disputed by the appellant, but appellant apparently does not deny that there has been substantial increase in both the value of the stock and the fair market value of the corporation. In all its years of incorporation, Speer, Inc. never declared any dividends on its stock nor issued any stock dividends.

During Raymond Speer's tenure as president of Speer, Inc., the company has expanded, introducing new products, increasing sales outlets, and hiring factory representatives to market the products nationwide. In addition, the corporation has developed new accounting and marketing techniques. By the time of trial, the company had accumulated undistributed after tax earnings of $339,493. Raymond Speer devoted much time to his job, including some evening and weekend work. Olive Speer made some contributions to the conduct of the business by the entertaining of business guests.

During the period from October, 1964 to June, 1968, the corporation paid off the long term notes held by Vernon Speer in the amount of $49,520, at a rate of $3,000 per quarter. During this
same period the base salaries of Raymond Speer and his brother-in-law, Forrest Luthy were reduced in the combined amount of $12,000 per year. Although Raymond received bonuses during this period, which augmented his total income, the district court found that the reduction of his salary during the period of the payment of the notes constituted a community contribution to the growth of Speer, Inc.

During this same period of the payout of the notes, Raymond Speer received regular cash gifts from his parents which amounted to approximately $24,000 according to the finding of the district court. These gifts together with community income were deposited in Raymond and Olive Speer's joint checking account in the Valley Commercial Bank. Out of this account, the parties paid for their living expenses. In addition, money from this account was expended in the acquisition of certain securities and an interest in an aircraft hangar. Title to certain of the securities was taken in the form of a joint tenancy between Raymond and Olive Speer. The district court concluded that community income and the separate property cash gifts had been commingled beyond the possibility of tracing which money was expended for which purpose. Therefore, applying the presumption that all property acquired by spouses during the marriage is community property, the trial court determined that the securities and the interest in the hangar were community property.

Among the stocks acquired during this period are 3,000 shares of Westec, Inc., a close corporation which commenced the manufacture of pistol ammunition in 1969. Raymond Speer is president and 60% stockholder in that corporation. The district court apparently found all 3,000 shares of Westec stock (worth $3,000) to be community property although they were awarded to Raymond.

Central to this appeal are the findings of the trial judge to the effect that the enhancement in value of Raymond's stock in Speer, Inc. and of the corporation itself was predominately due to the community efforts of Raymond and Olive Speer. He cited the fact that Raymond had devoted his "*** full attention, efforts, industry, skill [and] business acumen ***" to the business. He also relied on the evidence of the decrease in Raymond's base salary during the period of the payout of the corporate notes and on certain credit transactions involving the corporation and the Raymond Speer Community. He noted Olive's contributions as wife and mother and hostess to business clients. The district judge concluded that justice required him to disregard the corporate form and to award Olive Speer a share in the enhanced value of the corporation. Since Raymond Speer had owned 64% of the stock in Speer, Inc., during the greater part of the period from January, 1964, until the time of trial, the district court found the community interest in the enhanced value of the corporation amounted to 64% of the net increase in fair market value, or $742,400. The court awarded Mrs. Speer a money judgment of $371,200, representing one-half of this community interest. This judgment was secured by an equitable lien on Raymond's 325 shares in Speer, Inc., as well as his 3,000 shares in Westec, Inc. As noted earlier, she was prevented from executing the judgment when this Court issued an alternative writ of prohibition forbidding the sale of the stock, pending this appeal.
The Speer, Inc., stock itself was declared to be Raymond Speer's separate property. Other securities and property, including the Westec stock and the family home, which were either conceded by the parties, or found by the court, to be community property, were divided between Raymond and Olive Speer. The court ordered Raymond Speer to pay various debts found to be community obligations, including debts incurred by Mrs. Speer after the separation. The district court found no present need to make an award of alimony to Mrs. Speer, in light of her substantial money judgment. Finally, the court ordered Raymond to pay Mrs. Speer $150 support per month plus health expenses for their minor daughter and to pay support, college tuition, and health expenses for Gary and Paul, then nineteen and twenty years of age, until their twenty-first birthdays.

Appellant makes thirty-one assignments of error. His major contentions are: 1) that the court erred when it determined that the increase in the value of the stock and the corporation itself was due to the community efforts of Raymond and Olive Speer, including community guarantees of corporate indebtedness and salary cut-backs during payoff of corporate notes. 2) That the court erred when it "pierced the corporate veil" to determine who was responsible for the increase in the corporation's value and to award Mrs. Speer a share in such increase. . . . .

The principal issue in this case is whether Mrs. Speer is entitled to share in the increase in value of Speer, Inc., a close corporation, in which her husband was a majority stockholder and important employee during part of their marriage, on the ground that such increase resulted from community efforts, industry and other contributions. The authority from the other community property states on the subject of the enhancement in value of separate property business is conflicting. No pattern predominates even if the states are grouped according to the important criterion of whether they treat the rents and profits of separate property as separate or community property.

Texas and Louisiana generally consider the rents and profits of separate property to be community property as does Idaho. In Texas, the rule relating to the enhancement in value of separate property shares of corporate stock appears to be the following:

"[An] original issue of corporate stock, which was separate property when issued to the husband, retains its separate character, no matter how much it increases in value as a result of surplus accumulated out of the earnings of the corporation. **  
* And this is so, though the increased value is largely due to the efforts and activities of the husband as managing officer of the corporation."\(^{23}\)

\(^{23}\)Scofield v. Weiss, 131 F.2d 631, 632 (5th Cir. 1942).
This rule, which was enunciated by the Federal Court of Appeals, was followed in the Texas case of Johnson v. First National Bank of Fort Worth, but not, however, in the case of Dillingham v. Dillingham, where the court found that a corporation formed by a husband to manage his separate estate was in reality his "alter ego."

In Louisiana, the general rule on the enhancement in value of separate property during coverture is embodied in a statute:

"When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or the ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade."

In Beals v. Fontenot, an early federal tax case applying Louisiana law, the court refused to consider any part of the enhancement in value of the separate property stock in a close corporation to be community property, even though the deceased owner-spouse had been president and general manager of the corporation for twenty-six years. Part of the rationale of the decision was that the community had been adequately compensated for the husband's efforts by salary and dividends throughout the marriage. However, dictum in the more recent Louisiana state court case of Abraham v. Abraham suggests that were such a fact situation to arise in Louisiana in the future, the corporate form of ownership would not prevent the Louisiana court from finding a community interest in the enhanced value of corporate stock under some circumstances. "The legal status of the business has no relevancy whatever; the only inquiry is whether the value of the separate property of a spouse, whether be in the form of stock or otherwise, has been enhanced by the labor or industry of the community." In the Abraham case, the court found a community interest in the enhanced value of the wife's separate property interest in an unincorporated furniture store of which she had been general manager, credit manager, cashier and chief saleswoman during the marriage.

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27111 F.2d 956 (5th Cir. 1940).
28230 La. 78, 87 So.2d 735 (1956).
29Id., at 739.
Chapter 3: Classifying Property As Community

Turning to the states of Washington and California, where the rents and profits of separate property accrue to the separate estate of the owner-spouse, we find divergent approaches, in the theory at least, to the issue of enhancement in value of separate property businesses during coverture. In Washington, if the form of ownership of a separate property business is that of corporate shares, the courts do not endeavor to determine the extent of community contributions to an enhancement in value of the business but instead limit themselves to an inquiry as to the adequacy of community compensation for its labor in the business. However, the Washington court attempts to ascertain whether community efforts or extrinsic factors are predominately responsible for enhancement in value of separate property during coverture when the property in question is real estate or an unincorporated business.

In California, where the rents and profits of separate property remain separate, two major formulas have evolved for determining whether, at the time of dissolution of a marriage, the marital community has acquired an interest in a separate property business in which the owner-spouse is employed. The rationale behind these formulas is that although the "natural" enhancement in value of separate property remains separate.

"The time, efforts, and skill of the husband [and/or wife] are assets of the community and when they are used for the enrichment of the separate property of the husband, the community must be compensated. Where the husband expends time, effort, and skill in the affairs of a corporation in which he holds corporate stock as his separate property, there arises the question of apportionment of the resulting benefits reflected in any increase in the value of the stock *

In theory, this reasoning applies with equal force in California to both incorporated and unincorporated separate property businesses which have enhanced in value during coverture, and to the apportionment of the rents and profits of separate property businesses in which the owner-spouse is actively engaged.

The first California formula which originated in the case of Pereira v. Pereira allocated a reasonable rate of return to the husband's separate property investment and designated the rest of the increase as attributable to community efforts, and thus community property. The other approach, first applied in Van Camp v. Van Camp ascertained the reasonable value of the

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31 Id., at 129.
33 156 Cal. 1, 103 P. 488 (1909).
34 53 Cal.App. 17, 199 P. 885 (1921).
husband's services to the business, designated that amount as community property (if it had not already been withdrawn in the form of salary) and allocated the remainder of the increase to the husband's separate property. The Pereira approach implies a decision that community efforts bear the predominative responsibility for the increase in value of the business. The Van Camp approach signals the court's determination that community efforts were not so essential to the growth of the business as to merit compensation beyond a just and reasonable salary. In practice, the California courts appear to be reluctant to disregard the corporate form and apply the Pereira approach to cases involving the enhancement in value of separate property stock in close corporations to which the community has contributed labor.

The overall impression we have derived of the state of the law in the other community property jurisdictions on the subject of the enhancement in value of separate property businesses during coverture is one of conflict and contradiction, sometimes resulting in ad hoc, arbitrary, or inconsistent decisions. We find especially unsatisfactory the artificial distinction made between a separate property business organized in the form of a close corporation and an unincorporated sole proprietorship or partnership.

Unlike Louisiana, Idaho does not have a statute specifically governing the enhancement in value of separate property. The two code sections which are most closely related to this problem are I.C. § 32-903 and 32-906.

In 1954 in the case of Gapsch v. Gapsch this Court promulgated rules relating to enhancement in value of separate property. The pertinent parts of the Gapsch case follow:

"As a general rule, the natural enhancement in value of separate property during coverture does not constitute community property; however, to the extent an enhancement in value is due to community efforts, labor, industry or funds, it falls into the community. 41 C.J.S., Husband and Wife, §479, b., p. 1015. Again, as a general rule, though not absolute, a so-called profit or gain from the sale of separate property occasioned by a natural enhancement in the value of such property, constitutes a part of the separate estate. 41 C.J.S., Husband and Wife, §479, d., p. 1016. See also In re Barnes' Estate, 128 Cal.App. 489, 17 P.2d 1046; Hill v. Hill,


In the *Gapsch* case, this rule was applied to the profit gained from the sale of a separate property automobile. The Court in *Gapsch* then applied the following rule to the use of community funds to increase the equity in the husband's separate property real estate:

"As a general rule where the separate property of the husband is improved or his equity therein enhanced by community funds the community is entitled to be reimbursed from such separate estate unless such funds used for improvement or enhancement are intended as a gift. The claim for reimbursement has been held to be in the nature of a charge or an equitable lien against such separate property so improved or the equity of the husband therein enlarged. It would appear that the measure of the compensation generally is the increased value of the property due to the improvement; in instances where his equity therein has been increased through the application of community funds to the payment of the debt thereon the measure should be the amount by which such equity is enhanced." (Citing cases from California and Washington).

In the instant case, we are dealing with the employment of one spouse in a separate property business in which he held an ownership interest and from which he received compensation in the form of salary, bonuses, and fringe benefits. Accordingly, we must ascertain the legislative intent regarding such a situation, keeping in mind the language of the statutes.

The community property system conceives of marriage as a cooperative enterprise in which assets acquired during the union are owned by both spouses in common. Besides tangible assets which a couple may acquire during a marriage, the marital community also possesses an important, though intangible, asset: the capability of both spouses to contribute to the material betterment of the community through their labor. It follows, therefore, that to the extent that either spouse is rewarded for his or her labor during the marriage, such reward is community property. Corollary to this doctrine is the assumption recognized by all the community property states that, broadly speaking, community effort which benefits the separate estate of one of the spouses should not go unrewarded. However, the community property statutes in Idaho do not contemplate that upon marriage the interests of each spouse in his or her separate property be assimilated by the community.

Accordingly, if community efforts and ability have been expended in the conduct of a separate property business, a proper inquiry upon the dissolution of the marriage is whether the

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38 76 Idaho at 52, 277 P.2d at 282.

39 Id., at 53, 277 P.2d at 283.

community has received fair and adequate compensation for its labor. Such a rule strikes a balance between the legitimate claims of both the separate and community estates.

In determining whether the community has been adequately compensated for its labor over the period of the marriage, the trial court should take the following factors into consideration: the nature of the business, the size of the business, the number of employees, the nature and extent of community involvement in the conduct of the business, the growth pattern of the business. (Did it steadily enhance in value? Did periods of prosperity alternate with periods of decline?) Once these questions are answered, the proper inquiry is whether the over-all compensation received by the community for its contribution to the conduct of the business was equivalent to the compensation which the business would have had to pay to secure a non-owner employee to perform the same services which were rendered by the community. A relevant type of evidence for determining the adequacy of community compensation for its efforts would be evidence relating to the salaries of non-owner employees at the same level of responsibility in comparable types of businesses in the same area of the county. If it is found that the community has been deprived of adequate compensation for its services, the community would be entitled to a judgment against the owner-spouse equivalent to the difference between the income actually received by the community in the form of compensation from the business, and the income which the community would have received had the owner-spouse been justly compensated.

In the present case we look to the adequacy of compensation paid to Raymond Speer. We are dealing here only with the period of time subsequent to January 1, 1964, to the date of trial. Before January 1, 1964, Raymond Speer did not have an owner interest in the corporation. The only finding of the fact made by the district court relative to the adequacy of Raymond Speer's salary, bonuses, and fringe benefits was that: "The value of community contributions of plaintiff and defendant to Speer, Inc. during the period of January 1, 1964 to date of trial greatly exceeded the value of the compensation paid by Speer, Inc. to the community during that period." The district court made no finding as to whether Raymond Speer's salary and other emoluments would have secured an equally able employee to fill his position. The only evidence as to how Raymond Speer's compensation compared with that of similar employees on an industry-wide basis was his father's statement that Raymond's pay was "above the norm."

A determination of whether Raymond Speer received compensation comparable to that of a similar employee in his position is needed for a final resolution of this case. Ordinarily, this Court would remand the cause for further findings of fact and conclusions of law on this issue. However, in the case before us, we take judicial notice of the fact that former District Judge Daniel A. Quinlan, who tried this matter, has since died. Because of this fact, we must remand the cause for a new trial41 limited to this issue and to four other issues to be discussed infra.

In regard to the issue of Raymond Speer's compensation, we note that the salary cut-backs during the payoff of corporate notes do not, by themselves warrant a conclusion that community compensation was inadequate during that period of time. Instead the court should examine the overall amount of compensation to the community during those years, including bonuses and fringe benefits.

RETENTION AND REINVESTMENT OF EARNED SURPLUS

By the time of the trial, Speer, Inc., had accumulated net after-tax earnings of $339,493, thus substantially increasing the "shareholders' equity" in the corporation. No cash dividends were ever distributed by the corporation, nor were any stock dividends issued. Raymond Speer testified that the $339,493 retained by Speer, Inc., was represented by "[various] assets such as [accounts] [receivable,] raw materials inventory, finished goods inventory, machinery, furniture and fixtures and the like." It is true, as respondent points out, that Raymond Speer's position as majority stockholder as well as president and general manager of Speer, Inc., gave him substantial influence over the decision to retain the net earnings or to disburse them in the form of cash dividends. However, no contention is made that retention of the net earnings was unreasonable from a business point of view or that the earnings were retained to defraud the Raymond Speer community.

Had part or all of the earned surplus been distributed by the corporation in the form of cash dividends, such dividends as were attributable to Raymond Speer's stock would have been community property under I.C. §32-906, which provides that the rents and profits of separate property are community property. Presumably, the Speer community would have received 65% of the hypothetical dividend distribution, in proportion to Raymond Speer's ownership of 65% of the corporate stock. Because the net earnings were never disbursed by the corporation, they cannot be considered to be "income" or "rents and profits" as contemplated in I.C. §32-906. Therefore, the retention of the earnings in the business does not present a case of community funds being invested in a separate property business. Nevertheless, the fact remains that, because of business exigencies, monies that might otherwise have been distributed to the community as cash dividends, instead remained in the business in which Raymond Speer holds a separate property ownership interest.

Discretionary division of community property pursuant to I.C. §32-712 is one mechanism by which any inequities may be remedied. As part of its re-examination of the amount of community property to be divided between Mr. and Mrs. Speer, the district court should determine the extent to which the community would have been benefited, had 65% of the distributable earnings of the corporation been received by the community in the form of dividends. At least two factors must be taken into consideration in determining what proportion of the retained earnings would have been available for distribution in the form of cash dividends. First, on remand it is possible that the district court may determine that Raymond Speer was under-compensated for his labor in the corporation. To the extent that the district court finds that the Speer community was entitled to additional compensation for Raymond's labor, the amount of potentially distributable
Chapter 3: Classifying Property As Community

earnings here under consideration must be reduced. This is because any salary payments to Raymond Speer would have been deducted from the income of the corporation in the process of arriving at the figure for net earnings. The amount of retained net earnings under consideration should also be reduced to the extent that the salary of the other employee stockholder, Forrest Luthy, was inadequate. Consideration should be given toward the maintenance of the corporate solvency.

Any attempt to compensate Mrs. Speer for detriment that the community may have experienced because of the retention of the earned surplus must, of necessity, be inexact. Nevertheless, such a procedure would be no more lacking in precision than awarding damages for pain and suffering, which has been accomplished satisfactorily by the courts for many years. Because of its decision regarding the distribution of property, the district court denied an award of alimony to Mrs. Speer. In view of this opinion, the district court on remand may reconsider the issue of alimony.

COMMUNITY GUARANTEES OF CORPORATE CREDIT

In April, 1969, appellant and respondent delivered to the Bank of Idaho a "continuing guarantee" which purported to bind their community and separate property up to a liability limit of $200,000, as security for a line of credit extended by that bank to Speer, Inc. Virginia and Forrest Luthy signed a similar guarantee with a similar liability limit at that time. Formerly, Vernon and Dorothy Speer had been guarantors for the line of credit. On December 31, 1969, the Valley Commercial Bank of Clarkston, Washington, made a commercial loan of $15,000 to Speer, Inc., and a personal loan to Raymond Speer in the amount of $45,000. Raymond reloaned this sum to Speer, Inc. The community thereafter subordinated its $45,000 claim against Speer, Inc., to the claims of the Bank of Idaho against the corporation. The $45,000 loan was subsequently assumed by Speer, Inc., and apparently repaid in full. The district court designated these two transactions as contributions of the community to the growth of Speer, Inc. Appellant contends that the continuing guarantee was a mere formality, which was required because of his position with the company, rather than in reliance on community assets. He further notes that the guarantee had been in effect only a short time at the time of trial and that, in any event, the Luthys were equally bound and not merely the Raymond Speer community. In regard to the $45,000 loan he directs our attention to the Idaho case Shovlain v. Shovlain42 for authority on the question of the classification of credit acquisitions during marriage. In Shovlain, this Court held that borrowed funds should be classified as separate or community property, depending on whether the separate or community estate "continues to be the primary source of future repayment."43 We are asked to apply this reasoning to the $45,000 loan for which Speer, Inc. was allegedly the "primary source of future repayment."

4278 Idaho 399, 305 P.2d 737 (1956).

43Id., at 403, 305 P.2d at 739.
We agree with appellant. The Speers and the Luthys divided the responsibility and in addition the guarantee was not in effect through the greater part of the time period we are considering. In regard to the $45,000 loan, it appears that a formal pledge of collateral by Mr. Speer was never executed. Apparently, the deposit by Raymond Speer of a certain stock certificate with the bank was primarily to secure other personal loans to Mr. Speer, rather than the $45,000 loan. The fact that the loan was a personal one to Mr. Speer appears to have been merely a device to avoid exceeding the legal limit in extending credit to Speer, Inc. Therefore, use by the corporation of the funds acquired in the two credit transactions did not create a community interest in the corporation.

. . . .

In view of the foregoing, we reverse that part of the judgment and decree of divorce awarding Olive Speer a money judgment against Raymond Speer in the amount of $371,200.

. . . .

Reversed and remanded for further proceedings. No costs allowed.


BAKES, Justice.

This is an appeal from a property distribution in a divorce action. Isabel Swope (Isabel) appeals from a district court decision which affirmed in part, reversed in part and remanded a magistrate's order which had divided the property of Isabel and her former husband Charles Swope (Charles), respondent.

Isabel and Charles were married on July 31, 1976, and separated during the fall of 1980. The divorce was initiated by Charles on November 17, 1980. . . . .

. . . .

Following trial, the magistrate entered his findings of fact and memorandum decision on February 6, 1984, in which he divided the property of the parties. On the issues which are raised on this appeal, the magistrate ruled that . . . Charles' undistributed earnings from a one-fourth interest in a separate property partnership, and the retained earnings attributable to his separate property stock in a Subchapter "S" corporation were not community property; . . . .

. . . .

II.
The second issue deals with the district court's characterization of the Pepsi Cola Bottling Company property (Pepsi) owned by Charles prior to marriage. At the time of marriage, Charles owned an undivided 1/4 interest in a partnership which owned both the real and personal property associated with the operation of the Pepsi Cola Bottling Company of Twin Falls. The business was incorporated on March 1, 1979, but the real property remained in the partnership and was leased to the corporation. Charles received stock in the corporation and retained his same percentage ownership in the partnership. The corporation made a Subchapter "S" election to be taxed as a partnership pursuant to the Internal Revenue Code and the Idaho Income Tax Act.

During the years that the parties were married, income taxes on the undistributed earnings from both his separate property interest in the partnership and from the retained earnings of the Subchapter "S" corporation were paid with community funds by Charles.

Charles's interest in the bottling company was sold on June 6, 1980, for $840,000, with $125,000 paid down and monthly payments of $10,007.06 at 15% per annum on the unpaid principal balance. This sale included all of Charles' corporate stock and debentures in the corporation as well as his partnership interest in the real property. The magistrate found that the property involved in the sale was in all respects the separate property of Charles, and the district court affirmed the finding. On appeal to this Court, Isabel alleges that the ruling was error. We agree, in part.

(a) Retained earnings in the partnership

Regarding the characterization of the retained earnings of the partnership property, Isabel contends that the magistrate and the district court erred in determining that the Pepsi Cola Bottling partnership retained earnings were the separate property of Charles. The record reflects, and the magistrate found, that while a substantial amount of the earnings of the partnership were distributed to Charles and deposited into the parties' joint bank account which was initially his separate account, some $75,765.00 of the earnings of the partnership were retained and not distributed. Isabel argues that these partnership retained earnings, being income of separate

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4The magistrate did find that during the marriage the partnership did earn the following profits which were partially distributed on four different occasions. The chart below summarizes those findings:

**Partnership profit distribution**

<table>
<thead>
<tr>
<th>Date</th>
<th>Charles' Profits</th>
<th>Charles' Withdrawals</th>
<th>Accumulated Profits</th>
</tr>
</thead>
<tbody>
<tr>
<td>8/1/76</td>
<td>$24,197</td>
<td>$10,000</td>
<td>$14,197</td>
</tr>
<tr>
<td>12/1/76</td>
<td>93,732</td>
<td>77,272</td>
<td>26,460</td>
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<tr>
<td>12/1/77</td>
<td>108,025</td>
<td>89,893</td>
<td>18,132</td>
</tr>
<tr>
<td>12/1/78</td>
<td>16,976</td>
<td>-0-</td>
<td>16,976</td>
</tr>
</tbody>
</table>
property, were by statute community property, and that, being retained and commingled in the partnership business, Charles' interest in the business was also converted into community property. We agree with Isabel's position that the retained earnings of the separate property partnership interest were community property and that the lower courts erred in failing to so recognize.

The starting point in this analysis is the relevant statutes. While I.C. §32-903 states that "[a]ll property of either the husband or the wife owned by him or her before marriage ... shall remain his or her sole and separate property," I.C. §32-906 provides that "[t]he income of all property, separate or community, is community property...." Thus, even though Charles' interest in the Pepsi partnership was owned by him before marriage and thus was initially separate property, all income distributed from the Pepsi partnership was community property. I.C. §32-906. The issue which we must decide is whether the retained earnings of a partnership constitute income within the scope of I.C. §32-906.

Such earnings can be analogized to the accrued income of a separate property Certificate of Deposit owned by a spouse before marriage, but not redeemable until after marriage. The interest income on such a certificate would clearly constitute community property under I.C. §32-906, even though it accumulates and is not distributed to the owner/spouse. Earnings from a separate property partnership are essentially no different. To hold otherwise would allow a spouse to place separate income-producing property in a partnership and shelter the income from the community by retaining the income in the partnership, contrary to the legislative policy set out in I.C. §32-906.

Charles nevertheless argues that his retained earnings in the Pepsi partnership should be given the same treatment as corporate retained earnings receive in Idaho under our decisions in Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), and Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974). Both cases held that the retained earnings of a corporation were neither income nor rents and profits of the separate property stock owned by the spouse, within the meaning of I.C. §§32-903 and 32-906 and, therefore, the separate property stock remained the husband's

Total Accumulated Profits $75,765

The magistrate failed to make findings as to any partnership profits earned between December 1, 1978, and March 1, 1979, when all the partnership's assets, except the real property, were transferred to the corporation.

5”32-903. Separate property of husband and wife.--All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, byway of moneys or other property, shall remain his or her sole and separate property." (Emphasis added.) "32-906. Community property--Income from separate and community property--Conveyance between spouses.--(1) All other property acquired after marriage by either husband or wife is community property. The income of all property, separate or community, is community property...." (Emphasis added.)

6"Retained earnings are the "portion of profits which has not been paid out...." Black's Law Dictionary (1979).
separate property upon divorce. However, the fundamental differences between corporations and partnership undercut Charles' arguments. While both are designed to carry out business for profit, a corporation is a separate legal entity distinct from its shareholders; a partnership is not a separate entity, but instead is the sum of the owners' interests.

The fundamental ownership and control differences between partnerships and corporations were highlighted by the rationale behind the Simplot decision that: "Corporate earnings and profits remain the property of the company, until severed from the assets and distributed as dividends among the stockholders entitled thereto. A stockholder has no property rights in the accumulated earnings and surplus of the corporation, and any right that he may have to cumulated undeclared dividends is not a vested property or constitutional right but is subject to change or cancellation by proper corporate law. It is the declaration of the dividend which creates both the dividend itself and the right of the stockholder to demand and receive it." 96 Idaho at 242, 526 P.2d at 847, citing 11 W.Fletcher, Encyclopedia of the Law of Private Corporations, §5321 at 613 (1971).

A partner, on the other hand, has a right to direct the payment of earnings or, if the other partners disagree, to dissolve the partnership and thereby obtain any retained earnings. I.C. §53-331(1)(b). A stockholder has no equivalent right since all corporate powers are exercised by the board of directors. I.C. §30-1-35. A partnership interest "is his share of the profits and surplus, and the same is personal property." I.C. §53-326 (emphasis added). A shareholder in a corporation owns stock that only represents his voting and monetary interest. Stockholders are not agents of the corporation and do not make business decisions, but partners are "agent[s] of the partnership for the purpose of its business, and the act of every partner, including the execution and partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority." I.C. §53-309 (emphasis added). A partnership, then, is a contract of mutual agency, where each partner acts as a principal in his own behalf and as an agent for his co-partners, State v. Cosgrove, 36 Idaho 278, 285, 210 P. 393 (1922), while the corporation is a separate and distinct entity, apart from the owners. The partner can exercise direct control over the business, while the stockholder exercises only limited and indirect control over the corporation.

It is clear that unlike Simplot, where the husband was a stockholder and "the decision of the directors to reinvest the earnings [was] a matter of business judgment," outside of the husband's control, 96 Idaho at 242, 526 P.2d at 847, a partner is an integral part of a business with the ability to affect the flow of profits and distributions or to retain them within the business. Based on these fundamental differences between corporations and partnerships regarding control and

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7In fact, minority stockholders in closely held corporations have little or no right to influence the management of the corporation. I.C. §30-1-80 does give a shareholder of a corporation the right to obtain payment for his shares in a corporation when certain events enumerated in the statute take place. This section does not impact a shareholder's inability to control distributions from earned surplus.
management of the business, we hold that the earnings of a separate property partnership, whether retained or distributed, are community property within the scope of I.C. §32-906.

Our decision today is in conflict with the Idaho Court of Appeals decision in *Brazier v. Brazier*, 111 Idaho 692, 726 P.2d 1143 (1986). Brazier addressed the same partnership retained earnings issue raised in this case, but came to an opposite conclusion based on a belief that, because the facts in that case showed that the wife's separate property partnership interest was managed by a "manager (the wife's father) exercising a power conferred by the partnership agreement," *Brazier v. Brazier, supra* at 695, 726 P.2d at 1146, that the retained earnings could be analogized to the corporate setting. However, based on the foregoing discussion it is clear that most of the considerations underlying *Simplot v. Simplot, supra*, do not carry over to the partnership setting. The underlying tenets of partnership law allow a partner direct and immediate control over the partnership assets and income. To the extent that *Brazier* is inconsistent with our decision in this case, it is overruled.

(b) Charles' stock interest in the Pepsi Cola Bottling Corporation.

From the date of the marriage until February 28, 1979, Charles owned a one-fourth partnership interest in the Pepsi Cola Bottling Company of Twin Falls. However, on March 1, 1979, the assets in the partnership, except the real property, were transferred to a corporation known as the Pepsi Cola Bottling Company of Twin Falls, a corporation. For his one-fourth share of the partnership assets transferred to the corporation, Charles received 4000 shares of stock and $100,000 in 12% debenture notes. The trial court found that following this transfer Charles performed no services for the corporation, but nevertheless received a salary from the corporation, together with dividend payments on his stock interest. The trial court made no finding of the market value of the assets transferred in exchange for the 4000 shares of stock and the $100,000 in debenture notes.

On June 6, 1980, approximately fifteen months later, Charles sold all of his stock and the debenture notes of the Pepsi Cola bottling corporation, and his 25% interest in the partnership for the sum of $840,000, payable $125,000 down and the balance in installments.\(^8\)

At the time that Charles sold his 4000 shares of corporate stock on June 6, 1980, Charles' share of the undistributed taxable income as defined by 26 U.S.C. §1373, which had been retained by the corporation, was the sum of $39,171. That income was reported on Charles' joint income tax return and he paid income tax on that undistributed taxable income, apparently with community funds.\(^9\) Isabel contends that the magistrate erred in not finding that Charles' share of the

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\(^8\)There is an apparent typographical error in the trial court's findings regarding the sale. The findings listed the sale price as $840,000.00, with $125,000 down payment and a deferred balance of $750,000.00. This latter figure should have been listed as $715,000.

\(^9\)The Pepsi Cola bottling corporation had made a Subchapter "S" election under Sec. 1372 of the Internal Revenue Code (26 U.S.C. §1372). Subchapter "S" is an alternative accounting practice authorized by the Internal Revenue
undistributed profits of the corporation in the sum of $39,171, which the corporation had accumulated and retained between March 1, 1979, and June 6, 1980, was community income. Isabel argues that when the stock was sold on June 6, 1980, increased value of the stock reflected this "investment" of retained earnings, and therefore the community should be reimbursed for those retained earnings. Charles argues, on the other hand, that under our prior cases of Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974), and Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), retained earnings of a corporation in which a spouse has a non-controlling separate property stock interest is not income from that separate property.

While the legal principles enunciated in Speer and Simplot are applicable here, this case is factually distinguishable from Speer and Simplot. In Simplot the husband, prior to marriage, had acquired a non-controlling separate property stock interest in the Apex Corporation, the parent corporation of the J.R. Simplot Company, which he retained during the marriage and after the marriage was terminated. The issue in that case was whether or not the community acquired an interest in the separate property stock as a result of both the Apex Corporation and the J.R. Simplot Company retaining as working capital all profits earned during the marriage. In Speer the husband acquired a controlling amount of stock in Speer, Inc., by gift from his parents during the marriage. Under I.C. §32-903 the stock was clearly separate property when acquired. During the marriage Speer, Inc., never distributed any earnings as dividends. All earnings were retained as working capital and invested in inventory, equipment and raw materials. This Court held in both cases that the divorced spouse gained no interest in the husband's separate property stock as the result of the corporation retaining its profits as working capital rather than distributing them as dividends.

In the present case Charles acquired both stock and debentures in the corporation during the marriage from what had originally been his separate property partnership interest. However, as we have held in Part II(a), that partnership interest was enhanced as the result of approximately $75,760.00 of undistributed profits of the partnership which, contrary to the holding of the trial court, we have concluded to be income from the husband's separate partnership property within the meaning of I.C. §32-906, and thus community property. The property transferred by Charles in exchange for both the stock and debentures partook of both his original separate property interest in the partnership and the retained earnings which we have held in Part II(a) to be community property. In situations such as this, the measure of the community's reimbursement was first set out in Gapsch v. Gapsch, 76 Idaho 44, 277 P.2d 278 (1954) as follows:

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Code which permits a qualifying corporation to avoid double taxation of profits by electing to have the corporate income taxed solely to the stockholders rather than first at the corporate level, and then subsequently to the stockholders if and when any profit is actually distributed as dividends. Income of corporations which make the election is taxed to the stockholders in the year earned whether or not the income is distributed to the stockholders or retained by the corporation. The "Idaho Business Corporation Act," I.C. ss 30-1-1 et seq., is not affected or preempted by a federal Subchapter "S" election. Shareholders gain no new control over the management of a corporation which has made a Subchapter "S" election. Requirements for the distribution of dividends are still left in the control of the Board of Directors under I.C. §30-1-45. See Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974).
"As a general rule where the separate property of the husband is improved or his equity therein enhanced by community funds the community is entitled to be reimbursed from such separate estate unless such funds used for improvement or enhancement are intended as a gift. The claim for reimbursement has been held to be in the nature of a charge or an equitable lien against such separate property so improved or the equity of the husband therein enlarged. It would appear that the measure of the compensation generally is the increased value of the property due to the improvement; in instances where his equity therein has been increased through the application of community funds to the payment of the debt thereon the measure should be the amount by which such equity is enhanced."

76 Idaho at 53, 277 P.2d at 283.

Later, in Suter v. Suter, 97 Idaho 461, 546 P.2d 1169 (1976), we stated, as quoted by the trial court herein:

"The measure of reimbursement for community expenditure on separate property is the increase in value of the property attributed thereto, not the amount of value of the community's contributions. In addition, the party claiming reimbursement for community expenditure has the burden of demonstrating that there has been an enhancement of separate property due to those efforts or expenditures and the value of that increase." 97 Idaho at 465, 546 P.2d at 1173. Since the trial court believed that the retained earnings of the partnership were separate rather than community property, it made no finding as to the amount of the community property interest in the retained earnings of the partnership, or any "increase in the value of the [separate partnership] property attributed thereto. . . ."

97 Idaho at 465, 546 P.2d at 1173.

Additionally, the trial court made no findings as to the market value of the partnership interest which Charles transferred to the corporation on March 1, 1979, in order to determine whether or not there was any increase in the value of the 4000 shares of stock and the $100,000 in debenture notes during the approximately fifteen months that Charles owned them. Furthermore, the trial court made no findings on whether or not any income which accrued on the $100,000 debenture notes owed by the corporation was paid to Charles. The income from such notes, whether paid or accrued, like income from the partnership whether paid or accrued, would constitute community property under I.C. §32-906. The trial court in its decision did not address the issue of whether there was any interest income from the debenture notes.

Accordingly, on remand the trial court should first determine the interest of the community in Charles' otherwise separate property stock and debentures, resulting from the community interest in the partnership retained earnings which were invested in the stock and debentures along with Charles' separate property interest in that partnership, as set out in II(a) above. The trial court
should then determine the interest of the community in the proceeds of the June 6, 1980, sale of the corporate stock and debenture notes. Also, the court should determine the community interest in the interest income accruing on the $100,000 debentures.

HUNTLEY, Justice, concurring specially.

I concur in the majority opinion as authored by Justice Bakes, but write to address one of the issues on appeal which his opinion totally fails to address or comment upon, that being Issue No. II(b) which urges that the trial court erred in failing to hold that $39,171 in undistributed earnings of the Subchapter S Corporation constituted income to which the wife was entitled to a one-half interest as community property.

The record clearly establishes, and the trial court so found, that as of the date of the execution of the contract of sale of Mr. Swope's one-fourth interest in the corporation, there were undistributed earnings in that corporation of $39,171, upon which the parties had paid income tax.

That sale was made approximately seven months before the decree of divorce and the record establishes through Exhibit 15, the corporate tax return for the period from March 1, 1980 to February 28, 1981 (which period overlaps both the date of sale and the date of divorce) that there were cash assets in the corporation at the beginning of that fiscal year of $66,454.57 and at the end of that fiscal year of $212,741.95.

Although the parties presented that issue before the trial court, the district court on appeal and ultimately this Court on the basis of being an issue of how to treat undistributed corporate income in light of Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), and Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974), a closer analysis indicates that neither those cases nor the concept of "retained corporate earnings" are german to this case.

The real issue is what, if any, interest does the wife have in the contract of sale of the stock for $184,000, not what interest she has in the undistributed earnings of a corporation. This is true because at the time of the divorce, the husband did not own the stock, but rather, all he owned was a contract. When the husband sold his 25% of the corporate stock and debenture notes on June 6, 1980, he in effect exchanged all of his interest in the corporation, including the retained earnings, for the contract price of $840,000. Thus, as to Charles Swope, the execution of the contract in effect distributed the undistributed corporate earnings to him, that is, his one-fourth share thereof. Thus, the issue is not whether the wife has a right to undistributed earnings in a corporation, but whether the wife has a right to her one-half of the accumulated income in a corporation which has already been distributed by virtue of a sale of the husband's stock.
Accordingly, the trial court on remand should award the wife a one-half interest in the $39,171\textsuperscript{10} which the record clearly establishes was no longer retained earnings, because it became distributed earnings at the time of the execution of the contract of sale.

**Swope v. Swope, 834 P.2d 298 (Idaho 1992)(Swope II)**

BAKES, Chief Justice.

This is a second appeal in a divorce action arising from a decision of the magistrate court following remand from this Court in *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987) (Swope I). Both parties appealed to the district court from the magistrate's distribution of the property. The district court affirmed in part and reversed in part the magistrate court's decision. Both parties again appealed the district court's decision to this Court. A summary of the facts are as follows.

....

In *Swope I*, this Court held that the retained earnings in the separate property partnership were community property and remanded to the trial court to "determine the interest of the community in Charles' otherwise separate property stock and debentures, resulting from the community interest in the partnership retained earnings which were invested in the stock and debentures. . ." 112 Idaho at 984, 739 P.2d 273. We held that if the retained earnings of the partnership had enhanced the value of the partnership assets transferred to the corporation, then the community would be entitled to an interest in the corporate stock and debenture notes and in the proceeds of the June 6, 1980, sale of those stocks and notes. We also directed the trial court to determine the community interest in the interest income accruing on the $100,000 of debentures.

On remand, the magistrate concluded that the community was not entitled to any reimbursement for the retained earnings in the partnership because Isabel had not shown any enhancement in the value of the partnership assets or business as a result of the retained partnership earnings. Therefore, the magistrate concluded that the community had no interest in Charles' separate property stock and debenture notes of the corporation as a result of the retained earnings in the partnership. However, the magistrate did hold that the $39,171 of retained earnings of the corporation was community property or, at least that Isabel was entitled to one-half of those corporate retained earnings because the court deemed those retained earnings to have been distributed to Charles as of the date that Charles sold his stock, apparently on the assumption that the sale price of the stock was $39,171 higher than it would have been without the retained earnings

\textsuperscript{10}Whether $39,171 is the precise figure or not must be the subject of further hearings on remand because the parties have not had opportunity to focus on the issue in the context of this concurring opinion. There is one factor which would tend to increase that number, that being the effect of the ultimate findings as to the interest the community already obtained in the corporation by virtue of the retained earnings of the partnership, which earnings were used in part to fund the acquisition of the corporation.
in the corporation. The magistrate refused to award Isabel judgment interest on the interest earned on bonds which the magistrate had awarded to her in the divorce decree but which Charles retained and controlled from August, 1983, to April, 1988, holding that Isabel was only entitled to "the interest applicable to the particular bond or certificate of deposit according to its terms."

Isabel appealed the magistrate's decision regarding the valuation of the partnership, the failure to award her a portion of the contract of sale proceeds, and the amount of interest which had accrued on the interest earned by the bonds. Charles cross appealed the magistrate's decision to award Isabel one-half of the retained earnings in the corporation.

On appeal, the district court reversed the magistrate's decision not to award Isabel one-half of the partnership retained earnings, which the district court valued at $65,765.00, entitling Isabel to $32,882.50. The district court affirmed the magistrate's decision to award Isabel one-half the retained earnings in the corporation and awarded Isabel prejudgment interest on her share of the partnership and corporate retained earnings. The district court reversed the trial court's determination that Isabel was not entitled to judgment interest on the interest which had accrued on the bonds that were awarded to Isabel. The district court held that Isabel was entitled to judgment interest at 18%, pursuant to I.C. s 28-22-104. Charles appealed the district court's decision; Isabel cross appealed.

I.

First, we consider the magistrate's determination that the community is not entitled to reimbursement for the earnings retained in the partnership. In its findings of fact and conclusions of law, the magistrate found that the partnership retained $75,765.00\(^1\) of undistributed profits between the date of the marriage and the date of incorporation. The magistrate on remand considered the partnership retained earnings as community property, but concluded that the community was not entitled to reimbursement because Isabel had not made any showing that those earnings contributed to the enhancement in value of the partnership business. The magistrate found that, while the value of the business increased during the years of the marriage, it could have been due to any or all of the following factors:

(a) Socioeconomic trends of the consuming population
(b) Climatic conditions
(c) Trends in national popularity
(d) National and local advertising
(e) Capital invested in the business

\(^1\)As the district court noted in its decision, the $75,765 figure, used by the magistrate in the first decision and by this court in Swope I, includes an arithmetic error. The actual amount should be $65,765. The district court stated in its decision that both parties agreed to the $65,765 figure in oral argument.
(f) Ability to finance
(g) Ability to provide product to meet demand
(h) Business management
(i) Value of the franchise
(j) Value of the tangible assets of the business
(k) Amount of liability

The magistrate explained its decision as follows:

There is no question that the value of the plaintiff's interest in the Pepsi Cola Bottling Company of Twin Falls, Inc. increased over the years of the marriage. The real question to be answered by the defendant was why did the value of the plaintiff's interest in the Pepsi Cola Bottling Company of Twin Falls, Inc. increase. If this increase is due solely to the use of the [$65,765.00] community property, the defendant would be entitled to one-half of the value of the increase. The exact reason for the increase in value of the plaintiff's interest in the Pepsi Cola Bottling Company of Twin Falls, Inc. has not been answered by the defendant. It is the conclusion of this court that the increase in value could have been attributable to any or all of the factors numerated in Finding of Fact No. 1. To determine that any or all of the increase in valuation of the plaintiff's interest in a nationally franchised bottling company is attributable solely to the [$65,765.00] of undistributed profits is pure speculation. Accordingly, the defendant has failed in her burden to show the value of the enhancement of the plaintiff's interest in the Pepsi Cola bottling Company of Twin Falls, Inc. and is not entitled to reimbursement.

In Swope I, we held that the right of the community for reimbursement from the separate partnership property was based on the enhancement in value rule, stating: In situations such as this, the measure of the community's reimbursement was first set out in Gapsch v. Gapsch, 76 Idaho 44, 277 P.2d 278 (1954) as follows:

"As a general rule where the separate property of the husband is improved or his equity therein enhanced by community funds the community is entitled to be reimbursed from such separate estate unless such funds used for improvement or enhancement are intended as a gift. The claim for reimbursement has been held to be in the nature of a charge or an equitable lien against such separate property so improved or the equity of the husband therein enlarged. It would appear that the measure of the compensation generally is the increased value of the property due to the improvement; in instances where his equity therein has been increased through the application of community funds to the payment of the debt thereon the measure should be the amount by which such equity is enhanced."

76 Idaho at 53, 277 P.2d at 283.
Later, in *Suter v. Suter*, 97 Idaho 461, 546 P.2d 1169 (1976), we stated, as quoted by the trial court herein: "The measure of reimbursement for community expenditure on separate property is the increase in value of the property attributed thereto, not the amount of value of the community's contributions. In addition, the party claiming reimbursement for community expenditure has the burden of demonstrating that there has been an enhancement of separate property due to those efforts or expenditures and the value of that increase." 97 Idaho at 465, 546 P.2d at 1173. 112 Idaho at 983 (emphasis in original).

Isabel argues that, under *Gapsch*, supra, the community is entitled to either a dollar-for-dollar reimbursement, or the amount to which the value of the separate property was enhanced by the community contribution. However, in our *Swope I* opinion we directed the magistrate on remand to apply the enhancement in value rule set forth in *Gapsch* and *Suter* supra. That is the law of the case and is binding on the magistrate court, the district court, and on this appeal. See, *Airstream, Inc. v. CIT Financial Servs.*, 115 Idaho 569, 575, 768 P.2d 1302, 1308 (1988) ("[W]here, upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to through its subsequent progress, both in the trial court and upon subsequent appeal.... *Suits v. First Security Bank of Idaho*, 110 Idaho 15, 713 P.2d 1374 (1985) (quoting from *Carlson v. Northern Pacific Rail Co.*, 86 Mont. 78, 281 P. 913, 914 (Mont.1929)); *Matter of Barker*, 110 Idaho 871, 719 P.2d 1131 (1986). Accordingly, the magistrate correctly applied the enhancement in value rule.

There was substantial evidence to support the trial court's finding of no enhancement in the value of Charles' separate partnership interest. Experts for both sides testified that the factors contributing to an increase in value of a business such as the bottling company in this case could not be separately identified.2

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2Charles' expert, James Stoddard, a certified public accountant, testified as follows:

Q. Specifically relating to the business in this case are we able to look at the increase in value of the business and say whether or not the retention of earnings resulted in any of that increase in value?  
A. I don't believe we're able to say that.

Q. Or assuming for the moment for argument that the increase in retention of earnings or increase in partners' capital account was a factor in the increase of value of a business are we able to assign any proportionate amount of the increase in value to that retention of earnings factor?  
A. I don't believe we are.

* * * * * *

Q. ...define for the court what a retained earning is.  
A. Retained earnings, in accounting terms that we use in any kind of a profession, is an amount that represents the difference between the book value of the assets and the book value of the liabilities....

Q. Does the book value necessarily reflect the fair market value of an asset?  
A. No.
Defendant's Exhibit # 7 indicates that $186,988 of capital remained in the partnership immediately after the transfer of the other partnership personal property assets to the corporation. Also, other testimony indicates that the cash retained in the partnership after the transfer of the bottling business, which was enhanced by the monthly payments received pursuant to the lease of the real property to the corporation, was distributed to the partners subsequent to the transfer of the personal property to the corporation. From this record the magistrate had no way of determining

Q. Generally speaking, in your experience in dealing with accounting in businesses, does it ordinarily represent the fair market value of an asset?
A. Ordinarily it does not.

* * * * *

Q. Does [an] increase in retained earnings result in any identifiable asset?
A. Nothing that you can specifically identify with any one asset.

Q. Does it necessarily reflect any increase in the value of the business?
A. Not necessarily.

Additionally, Isabel's expert provided the following testimony:

Q. Is it possible in a production based industry such as this one to, at any point in time, say that a given dollar of retained capital can be traced into a given dollar of value in the business?
A. I think what you're asking is can a specific dollar of capital be placed in any specific asset of the business?
Q. Yes.
A. No, it can't.

* * * * *

A. Well, as I stated, when the equity was withdrawn from the partnership there's no way to tell which dollar was withdrawn, whether it was the first dollar that went in or was the last dollar that went in.

* * * * *

Q. And I think you've already answered my question that there's no way that we can take, isolate one of those factors and say that that particular factor resulted in X number of dollars increase in our business, it's a composite, I believe you said earlier.
A. That's the word I used.

* * * * *

Q. And when we talk about retained earnings in a business am I correct that we're not talking about some sum that sits in a savings account or that sits in an identifiable bank account. We're not talking about something like that are we? Necessarily.
A. No.

Q. It may or may not be reflected in cash, is that also correct?
A. It's impossible to tell you where it's reflected.
whether the capital remaining in the partnership contained the retained earnings or whether the retained earnings were transferred with the other assets to the corporation. Furthermore, there was no way of determining whether the sale proceeds included payment for any earnings retained in the partnership. As the magistrate stated, "this court is unable to determine by anything but speculation what contribution the [$65,765.00] had in the transaction involving the partial transfer by the plaintiff of his partnership interest in the ... partnership for debentures and stock in the [corporation] and the eventual sale of those debentures and stock for $840,000.00." The magistrate was in the best position to evaluate the conflicting testimony and the supporting exhibits. Accordingly, we affirm the magistrate's conclusion that Isabel "failed in her burden to show the value of the enhancement of the plaintiff's stock interest in the Pepsi Cola Bottling Company of Twin Falls, Inc. and is not entitled to reimbursement."

II.

Next we consider whether the community was entitled to a share of the $39,171 in retained earnings in the corporation. The magistrate awarded Isabel $19,585.50, half of the retained corporate earnings, apparently concluding that those retained earnings were community property.

Our earlier opinion in Swope I, pointed out that Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974) and Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), held that the community has no interest in the retained earnings of a corporation, the stock of which is held as separate property by one of the stockholders, unless the stockholder has sufficient control of the corporation to be able to cause the earnings to be retained. In this case, Mr. Swope had only a 25% interest in the corporation. No community interest was created in his separate stock as the result of the retained corporate earnings, and the magistrate erred by holding otherwise. Swope v. Swope, supra; Simplot v. Simplot, supra; Speer v. Quinlan, supra.

....

V.

In conclusion, we affirm the magistrate's finding that the community is not entitled to reimbursement because Isabel did not prove that the value of Charles' separate property business was enhanced by the partnership retained earnings. We further hold that the community had no interest in Charles' separate property stock as the result of earnings retained in the corporation and thus had no interest in the proceeds of the contract of sale of that stock. ....

This case is remanded to the magistrate to enter a final judgment consistent with this opinion.
1. In 1998, after the two *Swope* decisions, Idaho has adopted the Revised Uniform Partnership Act. That act provides that “[a] partnership is an entity distinct from its partners.” Idaho Code § 53-3-201. Does the new partnership statute cast doubt on the result in those cases?


LANSING, Chief Judge.

This appeal challenges the distribution of property in a divorce action. The husband appeals from a district court decision affirming the magistrate’s finding that the marital community has a right to reimbursement in the amount of $750,000 from the husband's separately held corporation. The husband contends that the corporation is his separate property and that the magistrate erred in concluding that the community was entitled to a reimbursement for community efforts that increased the value of the corporation. We vacate and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Steve and Penny Neibaur married in 1982. At that time, Steve was the sole shareholder in Steve Neibaur Farms, Inc., which was formed by Steve approximately one year before the marriage. All shares of stock have always been held in Steve's name. To the date of divorce, Steve had directed all of the farming operations and management of the corporation, and all corporate decisions were made solely by him. Penny, who had outside employment (primarily as a school teacher), provided virtually no services to the corporate farming operation. Under Steve's direction, the corporation farmed about 2,100 acres of land and had one full-time employee and several seasonal employees. The value of the corporation increased from approximately $146,466 at the time of incorporation to $1,050,000 at the time of divorce.

In 2001, Steve filed a petition for divorce from Penny. At trial, Penny argued that the corporation was the alter ego of Steve and therefore the court should "pierce the corporate veil" and recharacterize the corporate assets as community property. In findings and conclusions rendered after a trial, the magistrate concluded that the corporation was Steve's separate property but also found that $750,000 of the increase in the value of the corporation during the marriage was due to community effort, namely Steve's services, expended for the benefit of the corporation. The magistrate further found that evidence presented at trial did not establish that the community was adequately compensated for Steve's work. As a result, the magistrate held that the community was entitled to reimbursement in the amount of $750,000 for community efforts that enhanced the value of the corporation, and the magistrate granted the community a lien in that amount against Steve's shares of stock.
Steve appealed to the district court, which affirmed the magistrate's order with regard to the corporation. Steve now further appeals.

II. ANALYSIS

On review of a decision of the district court, rendered in its appellate capacity, we examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision. *Hentges v. Hentges*, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct.App.1988). The trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous, meaning that they are not based upon substantial and competent evidence. *Reed v. Reed*, 137 Idaho 53, 56, 44 P.3d 1108, 1111 (2002); *Hunt v. Hunt*, 137 Idaho 18, 20, 43 P.3d 777, 779 (2002). However, when reviewing the court's conclusions of law, this Court exercises free review of the trial court's decision. *Id.*

Under this state's community property laws, all property owned by either spouse prior to marriage remains the separate property of that spouse. Idaho Code § 32-903; *Suchan v. Suchan*, 106 Idaho 654, 657, 682 P.2d 607, 610 (1984); *Pringle v. Pringle*, 109 Idaho 1026, 1027, 712 P.2d 727, 728 (Ct.App.1985). If a spouse's separate property has been improved or enhanced by the community, however, the community is entitled to a reimbursement from the separate estate unless the community contribution was intended as a gift. *Swope v. Swope*, 112 Idaho 974, 983, 739 P.2d 273, 282 (1987); *Gapsch v. Gapsch*, 76 Idaho 44, 53, 277 P.2d 278, 283 (1954). Such a claim for reimbursement is in the nature of an equitable lien against the separate property that was improved or enhanced in value. *Id.* at 53, 277 P.2d at 283. Generally speaking, the measure of compensation for community expenditures made on separate property is the increase in value of the separate property that can be attributed to the community contribution. *Swope*, 112 Idaho at 983, 739 P.2d at 282; *Suter v. Suter*, 97 Idaho 461, 465, 546 P.2d 1169, 1173 (1976).

When the separate property at issue is a spouse's corporation, however, the right of reimbursement does not follow the general rule stated above. The Idaho Supreme Court has recognized two circumstances in which the marital community may obtain a right of reimbursement from a corporation separately owned by one spouse. First, the community may be entitled to reimbursement if the community was not adequately compensated for a spouse's labor devoted to the corporation. See *Wolford v. Wolford*, 117 Idaho 61, 68-69, 785 P.2d 625, 632-33 (1990); *Speer v. Quinlan*, 96 Idaho 119, 128, 525 P.2d 314, 323 (1973). Second, the community may claim compensation if the separately owned corporation unreasonably or fraudulently retained earnings instead of distributing profits as dividends, which would have been community property. *Simplot v. Simplot*, 96 Idaho 239, 242-43, 526 P.2d 844, 847 (1974); *Speer*, 96 Idaho at 129-30, 525 P.2d at 324-25.

In the trial court and on appeal, Penny has asserted that there is a third basis upon which the marital community may acquire an interest in a separately owned corporation--by piercing the
corporate veil. Penny asserts that in his operation of the farm, Steve did not observe corporate formalities or distinguish between the corporation and himself in handling corporate assets, profits and liabilities, and therefore the corporation has been converted to community property. Because it appears that the magistrate court based its award at least in part on this theory, we will begin our analysis by addressing Penny's corporate veil argument.

A. Piercing the Corporate Veil

We find no support in Idaho law for Penny's contention that piercing the corporate veil is a means by which the community may gain an interest in one spouse's separately owned corporation. The doctrine of piercing the corporate veil allows a court to disregard the status of a corporation as a distinct legal entity, thereby making a shareholder liable for debts of the corporation or making corporate assets reachable to satisfy obligations of the shareholder. See I.C. § 30-1-622; Hutchison v. Anderson, 130 Idaho 936, 940, 950 P.2d 1275, 1279 (Ct.App.1997); Davidson v. Beco Corp., 112 Idaho 560, 568, 733 P.2d 781, 789 (Ct.App.1986).

Penny relies upon Sherry v. Sherry, 108 Idaho 645, 701 P.2d 265 (Ct.App.1985), to support her argument that in marital dissolution proceedings, the court may pierce the veil of a separate property corporation and award a share of the corporation as community property. Penny misinterprets Sherry, however, for that case did not involve any community claim to stock or assets of a separately owned corporation. Rather, the issue presented in Sherry was whether the husband's pre-divorce sale of community-owned stock should be set aside as having been conducted in fraud of the wife, who had not consented to the sale. This Court held that because the trial court had made no adequate factual findings regarding the fraud allegations, the case must be remanded for factual determinations. We noted that if the sale was fraudulent, the wife would be entitled to her share of the community interest in the stock. For clarity, we emphasized that the community's claim would be to the shares of stock, not to assets owned by the corporation:

Absent a finding that the corporate status of the business should be disregarded, she is not entitled to an award of corporate assets. See Duke v. Duke, 605 S.W.2d 408 (Tex.Civ.App.1980) (corporate identity should not be disregarded in property distribution absent a showing of a sham, fraud, or injustice to the non-employee spouse).

Id. at 649, 701 P.2d at 269. Thus, in Sherry we merely reiterated the general rule that ownership of corporate stock does not equate to ownership of assets belonging to the corporation, and that a corporate form may not be disregarded without justification.

The magistrate in the present case concluded that the above-quoted language in Sherry concerning the Texas court's Duke decision established three circumstances in which a court could award one spouse's separate property corporation as community property. The magistrate opined that under Sherry a non-owner spouse could pierce the corporate veil to reach the other spouse's
corporation if: (1) the corporation was a sham; (2) the owner spouse acted fraudulently against the community interests; or (3) the non-owner spouse would suffer an injustice if the court did not reach through the corporate entity to make an award of the corporation. The magistrate concluded that the first and second circumstances were inapplicable but that, as to the third factor, a substantial injustice would occur if Penny were not awarded a share of the corporation because the community had been inadequately compensated for Steve's work as a corporate employee. On that basis, the magistrate held that the community had a right to reimbursement for the increase in the value of the corporation attributable to Steve's services. The magistrate's interpretation and application of *Sherry* was incorrect. The *Sherry* decision does not address a community claim to separate property, much less announce a doctrine or legal theory by which piercing the corporate veil allows a marital community to gain an interest in a separately held corporation.

We turn therefore to consideration of the two circumstances in which the community may be entitled to reimbursement from a separate corporation--when the community has been inadequately compensated for a spouse's labor in the employ of a separate corporation and where the corporation has unreasonably retained earnings.

**B. Adequacy of Steve's Compensation from the Corporation**

If community efforts and ability have been expended in conducting a separate property business, "a proper inquiry upon the dissolution of that marriage is whether the community has received fair and adequate compensation for its labor." *Speer*, 96 Idaho at 128, 525 P.2d at 323. In determining whether the community was adequately compensated during the marriage, the trial court should look to a number of factors, including the size and nature of the business, the number of employees, the nature and extent of community involvement in the conduct of the business and the growth pattern of the business. *Id.; Wolford*, 117 Idaho at 68-69, 785 P.2d at 632-33; *Josephson v. Josephson*, 115 Idaho 1142, 1148, 772 P.2d 1236, 1242 (Ct.App.1989). Once these business factors have been considered, the court must determine whether the overall compensation received by the community was equivalent to the compensation that would be necessary to compensate a non-owner employee to perform the same services that were provided by the community. *Speer*, 96 Idaho at 128, 525 P.2d at 323. If the court finds that the separate property business has under-compensated the community for its efforts, the community is entitled to compensation from the owner spouse in the amount of the deficiency. *Id.*

In the present case, the magistrate made a finding that "[t]he evidence did not objectively establish that the corporation in fact adequately compensated Mr. Neibaur for his services," but also found that the evidence "simply does not provide a substantial enough factual basis for the court to determine a deficiency amount." On the basis of these findings, the magistrate concluded that the community had been inadequately compensated for Steve's labors, creating an injustice that gave the community a right to a portion of the increased value of the corporation.

Although we agree with the magistrate's initial findings that the evidence does not establish whether Steve was adequately compensated nor the amount of any deficiency in compensation,
we for that very reason disagree with the magistrate's ultimate finding that the community was not adequately compensated for Steve's efforts. The spouse who is making the claim bears the burden of demonstrating that the community is entitled to reimbursement for community expenditures or work efforts benefiting separate property. Swope, 112 Idaho at 983, 739 P.2d at 282; Suter, 97 Idaho at 465, 546 P.2d at 1173. In the present case, the evidence as to the total value of compensation received by the community for Steve's labor is incomplete in that there was no effort to quantify the value of many of the forms of compensation that were received, and the record is devoid of any evidence concerning the amount of compensation that would have been adequate for a non-owner employee providing the same services. Penny not only produced no evidence to demonstrate what adequate compensation would be--she successfully objected on grounds of irrelevance when Steve proffered such evidence.

The evidence that was presented at trial shows that the community was compensated for Steve's labor in many ways. The corporation paid Steve approximately $2,000 per month and, additionally throughout the marriage, paid for various community personal expenses such as family vacations, ski trips, grocery and medical bills, health and auto insurance, utility payments, and an extensive remodel of the family home. The cars driven by the Neibaur family members were purchased by the corporation and titled in its name. No evidence was presented at trial as to the overall value of this compensation "package," nor was there evidence of the salary that would have to be paid for comparable work. Without such evidence, there is no basis for a finding that the community was under-compensated for Steve's labor. Accordingly, the magistrate erred in finding that the corporation under-compensated Steve and in holding that the community was entitled to reimbursement as a result of the inadequate compensation.

C. Retained Earnings

The other potential avenue for community compensation from one spouse's separately owned corporation is through consideration of the corporation's retained earnings. The earnings and profits of a corporation remain the property of the company, and shareholders have no property rights in a corporation's retained earnings until the earnings are distributed to shareholders as dividends. Swope, 112 Idaho at 981, 739 P.2d at 280; Simplot, 96 Idaho at 242, 526 P.2d at 847. Once distributed as dividends, however, the income to the shareholder is community property because under I.C. § 32-906, the income from separate property is community property. See Speer, 96 Idaho at 129, 525 P.2d at 324; Josephson, 115 Idaho at 1148, 772 P.2d at 1242. The Idaho Supreme Court has recognized that a shareholder spouse with sufficient control of a separately held corporation could cause earnings to be inappropriately retained rather than distributed as dividends, to the detriment of the community. Swope v. Swope, 122 Idaho 296, 301, 834 P.2d 298, 303 (1992); Simplot, 96 Idaho at 243, 526 P.2d at 848; Speer, 96 Idaho at 129, 525 P.2d at 324. Although no reported Idaho decision has directly so held, two Idaho Supreme Court opinions suggest that in such a circumstance, the community would be entitled to reimbursement to the extent that the retention of the net earnings of the corporation was unreasonable from a business
In the present case, as the sole shareholder and chief executive officer of the corporation, Steve was in a position to control the retention of corporate earnings. The magistrate found that Steve had not defrauded the community in his operation of the corporation, but the question whether any retention of earnings was unreasonable from a business standpoint was not addressed in the magistrate's findings and conclusions. Therefore, this matter will be remanded to the magistrate to make appropriate findings regarding any possible community interest based upon retained earnings of Steve's corporation.

III. CONCLUSION

The magistrate court erred in concluding that the reference to piercing the corporate veil in the *Sherry* decision established a basis for creation of a community property interest in a corporation that is the separate property of one spouse. The magistrate also erred in finding that the community was under-compensated for Steve's labor as a corporate employee, for the trial evidence is insufficient to establish the value of the compensation that Steve received or to establish the level of compensation that would be adequate for such services. Therefore, that portion of the divorce decree awarding the community a $750,000 reimbursement and a lien against the stock of Steve's corporation is vacated. The case is remanded for the magistrate court to address whether there was an unreasonable retention of earnings in the corporation, which would entitle the community to compensation for dividend income that it otherwise would have received. Penny's request for attorney fees on appeal is denied because she is not the prevailing party. Costs on appeal to appellant.
CHAPTER 5: CLASSIFYING PROPERTY BASED ON AGREEMENT

I. FORMAL TRANSMUTATION

A. Premarital Agreements

In re Estate of Crawford, 107 Wn.2d 493, 730 P.2d 675 (1986)

This case involves a prenuptial agreement and a petition for an award in lieu of homestead by a wife following the death of her husband.

A prenuptial agreement is one entered into by prospective spouses prior to marriage but in contemplation and in consideration thereof. By it, the property rights of one or both of the prospective spouses are determined or are secured to one or both of them or to their children.

Friedlander v. Friedlander, 80 Wn.2d 293, 298-99, 494 P.2d 208 (1972). It is an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

Uniform Premarital Agreement Act § 1(1), 9A U.L.A. 334 (Supp. 1985). The trial court denied the petition for an award in lieu of homestead concluding that the agreement appeared to be fair on its face and in its effect. We reverse the trial court.

Robert J. Crawford (hereinafter decedent) had been married once before his marriage to the petitioner Genevieve M. Crawford (hereinafter Mrs. Crawford). He had owned and operated a successful automobile dealership. His first wife died in 1968 leaving one child, Robert H. Crawford. The first wife left her interest in the property which had been owned as community property to her son, Robert H. Crawford. The present Mrs. Crawford testified that she married the decedent on December 8, 1968. She was substantially younger than he was. Three days before their marriage, the decedent and Mrs. Crawford went to the office of the decedent’s attorney and executed an “Agreement” wherein arrangements were made relative to the separate property which each had acquired as the result of their previous marriages.

The Agreement specified that the decedent owned as his separate property: three parcels of land located in Bremerton, Washington, 10 shares of stock of American Motors Corporation, 110 shares of stock of Crawford Motors, Inc., household goods and furnishings located at the couple’s residence in Bremerton, and a 1969 automobile. The decedent also retained complete control and use of all of the revenues, income, interest, improvements, and appreciation in the value of the listed property. The Agreement, however, did not disclose the value of the decedent’s
property. Mrs. Crawford’s separate property consisted only of furniture, furnishings and personal effects.

The Agreement also stated that “[t]here shall be a community of properties and gains between the contracting parties from the date of their contemplated marriage to each other, which said community of properties and gains shall embrace all future acquisitions and shall embrace only said future acquisitions”. It further provided that other than such provision as was made in the Agreement for the other party, neither party would assert any claim against the estate of the other by way of inheritance, homestead allowances or family allowances. No provision was made for Mrs. Crawford upon the eventuality of death or divorce. She was not given a copy of the Agreement. They spent less than 10 minutes at the decedent’s attorney’s office.

On February 23, 1971, the decedent executed his will in which he nominated his son Robert H. Crawford as his personal representative. In this will he left all of his separate property to his son with provision for disposition of his property to his two grandchildren provided that his son should die first. The only provision in his will for Mrs. Crawford was the sum of $1. Mrs. Crawford was employed for nearly 13 years during the marriage. He had retired prior to the marriage and did not work at any time during the marriage.

He died May 8, 1982. We must answer whether a spouse is bound by a prenuptial agreement signed by her in the presence of the decedent’s attorney, 3 days before the marriage, when (a) no provision was made for her in the case of divorce or death; (b) she was not given a full disclosure of the value of the property of the decedent; and (c) she was not afforded an opportunity to review the agreement with the assistance of independent counsel. We must also answer whether the statute of limitations has run from the time of the execution of the premarital agreement to bar any claim by the objecting spouse that the agreement was invalid.

The prenuptial agreement in question is unfair on its face. It made no provision for Mrs. Crawford in the event of divorce or the death of the decedent. When the effect of a prenuptial agreement is to leave the economically subservient spouse with nothing, it can only be upheld by a showing that (1) there was a full and frank disclosure of all the other spouse’s property and its value and (2) the agreement was signed freely and voluntarily on competent independent advice with full knowledge of rights. Whitney v. Seattle-First Nat’l Bank, 90 Wn.2d 105, 579 P.2d 937 (1978). A prenuptial agreement still may be valid in the absence of a fair and reasonable provision for the less advantaged spouse if there was a full and fair disclosure of all material facts relating to the amount, character, and value of the property involved, Friedlander, at 302-03; Hamlin v. Merlino, 44 Wn.2d 851, 864, 272 P.2d 125 (1954), and it was entered into voluntarily with full understanding upon the advice of competent independent counsel. Whitney v. Seattle-First Nat’l Bank, supra. The burden of establishing these prerequisites is upon the party asserting the agreement. Friedlander, at 300; Hamlin, at 862; In re Marriage of Cohn, 18 Wn. App. 502, 505, 569 P.2d 79 (1977); In re Marriage of Sanchez, 33 Wn. App. 215, 218, 654 P.2d 702 (1982). The objective is to prevent abuse and overreaching by the dominant party. Friedlander, at 301. As observed by In re Marriage of Matson, 107 Wn.2d 479, 730 P.2d 668 (1986), (1) if the agreement
makes a fair and reasonable provision for the party not seeking its enforcement, the agreement may be upheld, but, (2) if the agreement does not make a fair and reasonable provision for the economically subservient spouse, then it will not be upheld unless (a) there was full disclosure of the amount, character and value of the property involved and (b) it was entered into voluntarily upon the advice of independent counsel with full awareness of the economic and legal ramifications of the agreement.

There is no absolute requirement of independent counsel. Whitney, at 111. Whitney, however, did not require the advice of independent counsel because the agreement was fair and reasonable, and there was no showing of fraud or overreaching. Here the agreement was patently unreasonable. Independent counsel was required.

A clear and important distinction certainly exists between saying that in particular circumstances a transaction could not be supported in the absence of independent advice, and saying that a general rule of equity exists which makes independent advice indispensable to the validity of transactions between persons occupying a fiduciary relationship.

Where it is plainly shown that a transaction was fair and free from objectionable influence, and especially where the person supposed to have been at a disadvantage is shown to have been of strong and independent mind and in a position to form an intelligent judgment, a requirement that in addition he must have had independent advice “would seem to be arbitrary and unnecessary.”

(Footnotes omitted.) Whitney, at 109 (quoting Annot., Independent Advice as Essential to Validity of Transaction Between Persons Occupying a Confidential or Fiduciary Relationship, 23 A.L.R. 1505, 1512-13 (1939)).

“Parties to an [prenuptial] agreement do not deal at arm’s length with each other. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement.”


Applying these considerations to the circumstances, we find: (1) that Mrs. Crawford was unaware that an agreement had been drafted and was first advised of its existence on her arrival at the office of the decedent’s attorney; (2) the decedent’s attorney had drafted the agreement and the decedent was in the dominant bargaining position; (3) the agreement did not disclose the value of the decedent’s property; (4) Mrs. Crawford spent less than 10 minutes at the attorney’s office; (5) the agreement was first seen and signed only 3 days before the wedding; (6) Mrs. raw-
ford indicated that she did not understand the agreement; (7) she was not given a copy of the agreement; (8) she did not discuss the document with independent counsel until after she had discovered that she had been effectively disinherited; and (9) she had not seen the agreement from the date it was signed in 1968 until a copy was demanded by her present counsel.

Where an agreement attempts to eliminate or restrict property rights of a member of the marital community, it must be scrupulously examined for fairness. While the Uniform Premarital Agreement Act, 9A U.L.A. 333 (Supp. 1985) has not been adopted by our Legislature, the considerations set forth in section 6 thereof cogently express many of the same concerns that have been expressed in our cases, as follows:

(a) A prenuptial agreement is not enforceable if the party against whom enforcement is sought proves that:
   (1) that party did not execute the agreement voluntarily; or
   (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
      (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
      (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
      (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

We find the agreement invalid and void because of the grossly inequitable distribution of property and the circumstances surrounding the execution of the agreement.

Friedlander v. Friedlander, supra, found the prenuptial agreement there in issue void under similar circumstances. In Friedlander the husband’s attorney had drafted the prenuptial agreement, the agreement was signed only a few days before the wedding, the couple was married a substantial period of years, the general effect and structure of the agreement was unfair leaving the economically subservient spouse without a reasonable provision for support or otherwise provided for, the wife had not received independent legal advice, and there was no disclosure made of the nature and value of the property of the economically dominant spouse. Under such circumstances, this agreement is void, as was that before the court in Friedlander.

The respondent, the personal representative of the estate asserts the defense of the statute of limitations. The estate maintains that the action accrues at the moment of the execution of the prenuptial agreement. Mrs. Crawford maintains that the action did not accrue until the prenuptial agreement was asserted. The prenuptial agreement is a written contract subject to the provisions of RCW 4.16.040 requiring that actions upon a contract in writing or liability arising out of a written agreement must be commenced within 6 years. The 6-year period starts to run at the time that there is an assertion of rights under the agreement or an attempt to reform it. See Chebalgoity
v. Branum, 16 Wn.2d 251, 133 P.2d 288 (1943). There can be no running of the statute of limitations during marriage. The confidential relationship of the parties excuses the subservient spouse in not suspecting or discovering an inequity exercised by the other in a prenuptial agreement. Morrish v. Morrish, 262 Pa. 192, 105 A. 83 (1918).

We find the appropriate rule expressed in section 8 of the Uniform Premarital Agreement Act which states:

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

Were the parties to a prenuptial agreement shackled to a holding that the statute of limitations began to run from the date of the signing of the agreement, the result would lead to the disruption of marriages and compel often useless litigation to test the validity of the agreement. We decline to adopt such a rule.

We are cited to Morgan v. Morgan, 10 Wash. 99, 38 P. 1054 (1894). In that case the husband had separated from the wife and moved to the state of Washington in 1879. The husband, shortly after he had moved to Spokane, Washington, had purchased real property which had increased in value to a worth of $80,000. Thereafter the wife obtained a divorce in Oregon in 1888. She also commenced a divorce action in Spokane County seeking a Washington divorce and part of the property the husband had acquired. She abandoned the Spokane action and pursued the Oregon divorce which valued the Spokane property at only $25,000. In 1888 the husband acquired a quitclaim deed to the property from the wife and in 1892 she brought another action seeking to set the quitclaim deed aside on the ground of fraud. The husband asserted the 3-year statute of limitations as having run from the time of the discovery of the fraud. The opinion upholds the statute of limitations as a bar, the statute running from the date of the discovery of the fraud. The Morgan case does not conflict with our holding that the statute of limitations does not run on the enforcement of or a challenge to a prenuptial agreement during the marriage since a spouse is not expected to seek or discover fraud by the other spouse during marriage.

Likewise Peste v. Peste, 1 Wn. App. 19, 459 P.2d 70 (1969) involved an action commenced following the entry of the decree of divorce seeking to set aside the decree on the basis of fraud some 7 years after its entry. The trial court had found that the wife had freely and voluntarily entered into the property settlement agreement, had waived her interest in the community property without there being any fraud by the husband, duress or any advantage taken of her. The 3-year statute of limitations was held to bar the suit to set aside the decree of divorce. The circumstances in Peste as in Morgan involve actions commenced following the entry of a decree of divorce seeking to set aside allegedly fraudulently obtained results achieved by a husband concurrently with or as part of the divorce proceedings. Neither case holds that the statute of
limitations runs during marriage to preclude a challenge to the validity of a prenuptial agreement when its terms are asserted as controlling.

We hold that until a spouse asserts rights under a prenuptial agreement during a dissolution action the statute of limitations is tolled. We also hold that when the provisions of a prenuptial agreement are claimed to control the rights of the surviving spouse following the death of the other, the statute of limitations has been tolled during the lifetime of the decedent while married to the surviving party.

The personal representative also asserts that the wife should be barred by laches from challenging the prenuptial agreement. The failure to attack a contract for a period of time does not constitute laches. There must also be injury resulting to one party from the other’s delay in order for laches to bar the challenge to the prenuptial agreement. *Jones v. McGonigle*, 327 Mo. 457, 37 S.W.2d 892 (1931). *In re Estate of Flannery*, 315 Pa. 576, 173 A. 303 (1934) involved the repudiation by the survivor of a prenuptial agreement after a 14-year marriage where the agreement eliminated all rights of the wife in the decedent’s estate. It was held that laches could not prevail as a defense to the survivor’s challenge since the economically subservient spouse could not be expected to challenge the dominant spouse during his lifetime. By adopting the rule of the Flannery case we do not wish to encourage post-death challenges to prenuptial agreements. They are valid and binding if entered into fairly, freely and intelligently under the criteria we have set forth. *In re Marriage of Matson*, *supra*. However, the passage of time during a marriage, standing alone, will not support laches as a defense to a challenge to an agreement.

In addition the considerations which avoid leaving a surviving spouse destitute are served by upholding the award in lieu of homestead. The time limit for filing a petition for an award in lieu of homestead is addressed by RCW 11.52.010, which reads as follows:

> If it is made to appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, then the court, . . . upon petition for that purpose, shall award and set off to the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of twenty-five thousand dollars at the time of death, . . . provided that the court shall have no jurisdiction to make such award unless the petition therefor is filed with the clerk within six years from the date of the death of the person whose estate is being administered.

(Italics ours.) Mrs. Crawford’s petition was filed within 6 years of the date of the death of the decedent. He died May 8, 1982, and Mrs. Crawford’s petition for an order setting aside property in lieu of homestead was filed with the Kitsap County clerk on June 17, 1983.

“Awards in lieu of homestead are *favored by law* and the statutes permitting them should be liberally construed in favor of those who are entitled to benefit from the award.” (Italics ours.) See

The prenuptial agreement is set aside and is declared void. The petitioner, Mrs. Crawford, is entitled to an award in lieu of homestead pursuant to the provisions of RCW 11.02.070 and chapter 11.52 of the Revised Code of Washington. The denial of the petition for award in lieu of homestead is reversed and the cause is remanded to the trial court for the entry of an order in the probate making such an award to the petitioner.

NOTES


2. As adopted in Idaho the key enforcement provision of the UPAA provides:

Idaho Code § 32-925 Enforcement.

(1) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(a) That party did not execute the agreement voluntarily; or

(b) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(2) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under
a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(3) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

COMMENT TO OFFICIAL TEXT

This section sets forth the conditions which must be proven to avoid the enforcement of a premarital agreement. If prospective spouses enter into a premarital agreement and their subsequent marriage is determined to be void, the enforceability of the agreement is governed by Section 7.

The conditions stated under subsection (a) are comparable to concepts which are expressed in the statutory and decisional law of many jurisdictions. Enforcement based on disclosure and voluntary execution is perhaps most common (see, e.g., Ark. Stats. § 55-309; Minn.Stats.Ann. § 519.11; In re Kaufmann's Estate, 171 A.2d 48 (Pa.1961) (alternate holding)). However, knowledge or reason to know, together with voluntary execution, may also be sufficient (see, e.g., Tenn. Code Ann. § 36-606; Barnhill v. Barnhill, 386 So.2d 479 (Ala. Civ. App.1980); Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962); Coward and Coward, 582 P.2d 834 (Or.App. 1978); but see Matter of Estate of Lebsock, 618 P.2d 683 (Colo.App. 1980)) and so may a voluntary, knowing waiver (see Hafner v. Hafner, 295 N.W.2d 567 (Minn.1980)). In each of these situations, it should be underscored that execution must have been voluntary (see Lutgert v. Lutgert, 338 So.2d 1111 (Fla.1976); see also 13 Dela.Code 1974 § 301 (10 day waiting period)). Finally, a premarital agreement is enforceable if enforcement would not have been unconscionable at the time the agreement was executed (cf. Hartz v. Hartz, 234 A.2d 865 (Md.1967) (premarital agreement upheld if no disclosure but agreement was fair and equitable under the circumstances)).

The test of "unconscionability" is drawn from Section 30 of the Uniform Marriage and Divorce Act (UMDA) (see Ferry v. Ferry, 586 S.W.2d 782 (Mo.1979); see also Newman v. Newman, 653 P.2d 728 (Colo.Sup.Ct.1982) maintenance provisions of premarital agreement tested for unconscionability at time of marriage termination)). The following discussion set forth in the Commissioner's Note to Section 306 of the UMDA is equally appropriate here:

"Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against onesideness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in
contract law, *Scott v. U.S.*, 12 Wall (U.S.) 443 (1870) ('contract is unreasonable and unconscionable but not void for fraud'); *Stiefler v. McCullough*, 174 N.E.823, 97 Ind.App. 123 (1931); *Terre Haute Cooperative v. Branscome*, 35 So.2d 537, 203 Miss. 493 (1948); *Carter v. Boone County Trust Co.*, 92 S.W.2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. *Bell v. Bell*, 371 P.2d 773, 150 Colo. 174 (1962) ('this division of property is manifestly unfair, inequitable and unconscionable'). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

"In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing."

(Commissioner's Note, Sec. 306, Uniform Marriage and Divorce Act.)

Nothing in Section 6 makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed (see e.g., *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962)). Even if the conditions stated in subsection (a) are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, subsection (b) authorizes a court to provide very limited relief to a party who would otherwise be eligible for public welfare (see, e.g., *Osborne v. Osborne*, 428 N.E.2d 810 (Mass.1981) (dictum); *Unander v. Unander*, 506 P.2d 719 (Ore.1973) (dictum)).

No special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations. However, a premarital agreement is a contract and these provisions may be enforced to the extent that they are enforceable are under otherwise applicable law (see *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (Ct.App.).

Section 6 is framed in a manner to require the party who alleges that a premarital agreement is not enforceable to bear the burden of proof as to that allegation. The statutory law conflicts on the issue of where the burden of proof lies
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(contrast Ark.Stats. § 55-313; 31 Minn.Stats.Ann. § 519.11 with Vernon's Texas Codes Ann. § 5.45). Similarly, some courts have placed the burden on the attacking spouse to prove the invalidity of the agreement. *Linker v. Linker*, 470 P.2d 921 (Colo.1970); *Matter of Estate of Benker*, 296 N.W.2d 167 (Mich.App.1980); *In re Kauffmann's Estate*, 171 A.2d 48 (Pa.1961). Some have placed the burden upon those relying upon the agreement to prove its validity. *Hartz v. Hartz*, 234 A.2d 865 (Md.1967). Finally, several have adopted a middle ground by stating that a premarital agreement is presumptively valid but if a disproportionate disposition is made for the wife, the husband bears the burden of proof of showing adequate disclosure. (*Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962); *Christians v. Christians*, 44 N.W.2d 431 (Iowa 1950); *In re Neis' Estate*, 225 P.2d 110 (Kans.1950); *Truitt v. Truitt's Adm'r*, 162 S.W.2d 31 (Ky.1942); *In re Estate of Strickland*, 149 N.W.2d 344 (Nev.1967); *Kosik v. George*, 452 P.2d 560 (Or.1969); *Friedlander v. Friedlander*, 494 P.2d 208 (Wash.1972).

**B. Marriage Settlement Agreements**

Idaho Code 32-916. **Property rights governed by chapter.** – The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement agreement entered into during marriage containing stipulations contrary thereto.

Idaho Code 32-917. **Formalities required of marriage settlements.** – All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved.

Idaho Code 32-918. **Marriage settlements – Record.**

(1) When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

(2) (a) A summary of the contract may be recorded in lieu of the contract, under this chapter or the laws of this state, if the requirements of this section are substantially met.

(b) A summary of the contract shall be signed and acknowledged by all parties to the original contract. The summary of the contract shall clearly state:

(i) The names of the parties to the original contract;
(ii) The complete mailing address of all parties;
(iii) The title and date of the contract;
(iv) A description of the interest or interests in real property created by the contract; and
(v) The legal description of the property.
(c) Other elements of the contract may be stated in the summary.

(3) If the requirements of this section are met, the summary of the contract may be recorded under the provisions of this chapter and, as to the contents of the summary only, it shall have the same force and effect as if the original contract had been recorded, and constructive notice shall be deemed to be given concerning the contents of the summary and the existence of the contract to any subsequent purchasers, mortgagees, or other persons or entities that acquire an interest in the real property.


KIDWELL, Justice

Larry Stevens appeals from the magistrate judge’s order in a divorce proceeding against Deborah Stevens. The magistrate judge held that an oral settlement agreement between Larry and Deborah was unenforceable because it was not written, pursuant to I.C. § 32-917. The magistrate judge’s order was affirmed by the district court acting in its appellate capacity.

I. FACTS AND PROCEDURAL HISTORY

Larry and Deborah were married on August 17, 1973 in Bonita, California. Larry was in the military at the time. Their two children were born in 1981 and 1982. Larry retired after serving twenty years in the military and subsequently worked for Pillsbury and Lockheed Martin. Deborah, who had two years of college in the early 1970s, suffered from various ailments including progressive myopia, flat feet, and debilitating headaches; she did not work outside the home. By 1988, Larry and Deborah lived in Idaho.

In February 1998, Deborah filed for divorce, citing irreconcilable differences. She asked for spousal support and proposed a property division in her complaint. In early May 1998, Larry answered and requested judgment on the pleadings. He agreed that the couple had irreconcilable differences, but alleged that he and Deborah had entered into an agreement covering all issues of property division, child support, and spousal support. On May 18, Larry moved for summary judgment based on his oral agreement with Deborah. He supported the motion with affidavits from himself and Joel Tingey, the attorney representing him at the settlement conference.

In their affidavits, Larry and Tingey averred the following. They had met with Deborah and her then-attorney, Royce Lee, on April 17, 1998 for a settlement conference. After approximately two hours of discussion, they reached a final agreement resolving all property and support issues. Lee dictated the terms of the agreement into a tape recorder so the agreement could be committed to paper. The dictated agreement constituted the entire agreement and the only work left to do was the clerical work of committing it to paper.

Larry and his attorney provided identical accounts of the agreement. Deborah was to
receive the house and its furnishings and “the Prudential funds.” She would receive $900 a month in child support, dropping to $600 a month once the older child reached 18. For spousal support, Deborah would receive 45% of Larry’s military retirement and $300 a month in spousal support for two years, with an ability to seek a continuation of spousal support subject to several conditions.

On May 8, Tingey faxed Lee, wanting to know if he objected to Tingey meeting with Deborah without Lee present to discuss the issues. Lee faxed back an objection to the proposed meeting. On the same day, Lee sent Deborah a draft of the discussed settlement, writing, “We need to do a thorough review on the property settlement issues so that we are certain about the values and balances on the settlement.”

On May 19, Prudential processed Larry’s request for a $7,000 withdrawal out of the $24,000 cash value of the Prudential life insurance policy assigned to Deborah in the settlement conference.

At a hearing on May 20, Larry asked the magistrate court to enter judgment on the pleadings and issue a final decree. Through her new attorney, Marc Weinapel, Deborah objected to Larry’s motion and moved to amend her complaint to include adultery and extreme cruelty as grounds for divorce. The magistrate judge granted Deborah’s motion to amend and denied Larry’s request for a divorce decree.

In an affidavit in opposition to summary judgment filed on June 16, Deborah disagreed that the parties had resolved all issues. She agreed that Larry’s affidavit showed the general outlines of an agreement, but she stated that she never received the verification of the actual values of the various items of property necessary for the agreement to become final. Deborah stated that Larry had misstated the value of several assets and debts during the settlement conference. She noted that both attorneys contacted her after the conference to discuss the proposed settlement. Deborah also stated that the child support figures reached at the settlement meeting did not conform to the Idaho child support guidelines.

The magistrate judge denied summary judgment on June 18, 1998. On October 13, 1998, the magistrate judge held a court trial on the issue of whether there was an agreement between the parties reached on April 17.

At trial, Larry testified that since the settlement meeting he had complied with the agreement reached on that day. On cross-examination, he testified that he had not provided documents to verify the value of various items at the settlement conference. He testified that he had withdrawn $7,000 from the Prudential life insurance policy to pay for attorney fees, medical insurance for the children, and a vacation.

Tingey testified that at the settlement meeting, he listed the assets and debts going to each spouse in columns on a chalkboard and that Deborah’s attorney, Lee, made a final offer, which he and Larry accepted. Eventually Tingey sent a letter asking Lee to save the tape of the dictated agreement, but Lee indicated that the tape was erased in the normal course of doing dictation.
Tingey opined that Larry’s withdrawal of $7,000 from the Prudential policy did not breach the settlement agreement because Larry was “running out of money” and invaded the account in response to Deborah’s refusal to honor the April agreement. Tingey “assumed” that Deborah had access to the financial records. He did not remember Lee making the agreement contingent on verifying the values set on the chalkboard. Tingey also stated that he sought the May 8 meeting with Deborah “to find out where she stood on the agreement” because he had heard that Deborah had fired Lee.

At trial, Deborah testified that she disputed some of Larry’s valuations at the settlement meeting but that Lee had seemed “to accept most of the things that they were saying.” She reiterated that she never saw any paperwork at or before the meeting which confirmed the value of any asset or debt. She claimed that she was “heavily doped up” on muscle relaxants and tranquilizers at the meeting. She vacillated between testifying that Lee agreed to things and that there was no agreement between the parties. After the meeting, she said, she told Lee to stop working on the paperwork because she was unhappy with the proposed agreement, called Marc Weinpel (her current attorney) to begin the process of changing counsel, and started actively investigating the values of the assets and debts discussed at the meeting. When specifically asked if she accepted the agreement on April 17, she replied, “I really didn’t say any way or another. Larry said something about, ‘Is there anything else blocking us from getting this decree, and, you know, holding up the decree?’ And I think I said that I couldn’t think of anything.”

The magistrate judge issued Findings of Fact and Conclusions of Law from the bench. It found that there was an agreement on April 17, because both counsel accepted the agreement and Deborah, who was present, did not protest when Lee was accepting the agreement. The magistrate judge concluded that there was no fraud, duress, or undue influence, and that the Statute of Frauds did not apply. It also indicated that it believed that the spouses should be free to reach their own settlements, even if this resulted in an unequal division of community property, and that it did not believe that the agreement was unfair. The judge ordered Larry’s attorney to prepare a proposed order for a divorce decree incorporating the terms of the April 17, agreement as set forth in Larry’s affidavit.

On October 16, the magistrate judge, *sua sponte*, reopened the matter for additional evidence and argument on the enforceability of the oral settlement agreement. On December 3, 1998, the magistrate judge issued a memorandum decision and order concluding that Idaho Code § 32-917 prohibited enforcement of the spouses’ oral agreement.

After the magistrate judge issued a Rule 54(b) certificate, the district court granted Larry permission to appeal. Subsequently, over Larry’s objection, the district court allowed Deborah to augment the record with the affidavit of Royce Lee. After a hearing, the district court issued an appellate decision and order affirming the magistrate judge’s decision. Because it ruled that the agreement was unenforceable, the district court did not address Larry’s issue of whether the appellate record could be augmented by the Lee affidavit.

II.
STANDARD OF REVIEW

This Court reviews the decisions of a magistrate division independently, with due regard for the decision of a district court acting in its appellate capacity. Keller v. Keller, 130 Idaho 661, 663, 946 P.2d 623, 625 (1997). The Court upholds a magistrate judge’s findings of fact if they are supported by substantial and competent evidence, but exercises free review over questions of law. Id. The Court is free to draw its own conclusions from the facts presented. Id.

III.
ANALYSIS

A. Idaho Code § 32-917 Requires That Divorce Settlement Agreements Be In Writing.

The magistrate judge made a factual finding that Larry and Deborah had reached an agreement on April 17, 1998. However, the magistrate held that the agreement was unenforceable because it was not in writing and not acknowledged, and so did not conform to the requirements of I.C. § 32-917. Larry asserts that settlement agreements made in contemplation of divorce are not “marriage settlement agreements” and thus are not covered by the requirements of I.C. § 32-917.

Section 32-917 of the Idaho Code provides:

All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved.

Section 32-917 is one of six sections in Chapter 9 of Title 32 (which governs the separate and community property of spouses) that mentions marriage settlements. 1 The other relevant provision is I.C. § 32-916, which provides:

The property rights of husband and wife are governed by this chapter [Chapter 9], unless there is a marriage settlement agreement entered into during marriage containing stipulations contrary thereto.

1. Definition of “Marriage Settlement Agreement.”

Black’s Law Dictionary, Sixth Edition, defines a marriage settlement as: “an agreement in contemplation of marriage in which each party agrees to release or modify property rights which would otherwise arise from the marriage.” Although the primary definition relates to a prenuptial agreement, Black’s suggests that a postnuptial agreement would also be a marriage settlement. A rather confining definition of a marriage settlement is used by W. J. Brockelbank in his treatise on Idaho community property law. Dr. Brockelbank wrote:

While the term “marriage settlement” may here include a contract that is in fact made after the marriage is concluded, it would seem proper to say that it is probably
confined to those postnuptial contracts which purport to change antenuptial contracts or which, at least, attempt to regulate property relations of the spouses as a going marital concern. It does not include separation agreements or any sort of agreement which attempts to liquidate the property relations of spouses about to separate or already separated.


Idaho appellate courts, however, have repeatedly used the term “marriage settlement” to refer not only to prenuptial agreements, but also to agreements made with an eye towards separation and/or divorce.

In a 1924 case, the husband and wife entered into “a written agreement called a marriage settlement, by which they purported to divide the community property.” Hay v. Hay, 40 Idaho 159, 165, 232 P. 895, 896 (1924). In this agreement, the husband received certain real estate and the wife received real estate, an automobile, and $9,000. The agreement contained a provision awarding custody of the couple’s child to the husband in case of divorce. Id. “Each party agreed that the share of property received by him or her should be in full satisfaction of all rights in the community property, and defendant agreed to release plaintiff from all future claims for support and maintenance. It was further agreed that this contract should be incorporated into any decree of divorce.” Id. Within a few months of the marriage settlement, the husband filed for a divorce. Id. The Court later referred to the agreement as “the property settlement.” Id. at 169, 232 P. at 897. Although (as Larry argues) Hay did not involve the application of I.C. § 32-917, it clearly treated an agreement in contemplation of divorce as a marriage settlement.

Likewise, in 1959 this Court referred to a settlement agreement made in contemplation of divorce as a “marriage settlement contract.” See McRoberts v. McRoberts, 80 Idaho 511, 513, 514, 335 P.2d 342, 343 (1959). The Court recited the provisions of “a written marriage settlement contract included in the decree and made a part thereof.” Id. at 513, 335 P.2d at 343. It again noted that the marriage settlement contract...was incorporated into the decree.” Id. at 514, 335 P.2d at 344.

In a 1966 case, a husband and wife entered into a “marriage settlement agreement” in April 1945, which divided the community property and made provisions for the wife’s support and maintenance. Turner v. Turner, 90 Idaho 308, 310, 410 P.2d 648, 649 (1966). They divorced in June 1945. Id. at 309, 410 P.2d at 648. This same understanding of “marriage settlement” is found in a recent case, Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997). The issue in Quiring was whether an agreement and quitclaim deed entered into by a couple in contemplation of divorce was valid and enforceable. Id. at 561, 944 P.2d at 696. The Court found the couple’s agreement unenforceable on public policy grounds. Id. at 568, 944 P.2d at 703. In discussing a court’s duty to raise the issue of a contract’s illegality sua sponte, this Court approvingly noted that the trial court had discussed “whether contracts between spouses in contemplation of divorce are illegal” and had concluded that they were not because I.C. § 32-916 and § 32-917 allowed “marriage settlement agreements.” Id. at 567, 944 P.2d at 702. See also Badell v. Badell, 122 Idaho 442,
443, 835 P.2d 677, 678 (Ct. App. 1992) (spouses “executed a Marriage Settlement Agreement in anticipation of the dissolution of their marriage.”).

Because agreements made in contemplation of divorce are “marriage settlements” under this Court’s case law, they are subject to I.C. § 32-917’s requirement that they be in writing and acknowledged. 2

2. The Requirement of a Writing for Agreements Involving Real Property.

The settlement agreement reached by Larry and Deborah settled rights in real property, among other things. This Court has clearly stated that agreements settling real property rights between spouses must be in writing: “Under Idaho’s community property system, any agreement settling the real property rights of husband and wife entered into prior to or during marriage must be in writing, executed and acknowledged in the same manner as conveyances of land.” Keeven v. Wakley, 110 Idaho 452, 460, 716 P.2d 1224, 1232 (1986) (emphasis added). Therefore, to be enforceable as to real property, the couple’s settlement agreement had to be in writing and acknowledged or proved.

3. Policy Implications.

Public policy favors requiring divorce settlement agreements to be in writing. One of the major purposes for requiring life-changing documents to be written and executed is to impress upon the parties the importance of the legal consequences of the document. For example, prenuptial agreements and wills must be written, signed, executed, and acknowledged. See I.C. § 32-922; I.C. § 15-2-502. Dividing the property of a community that may have lasted for decades has consequences at least as important as distributing the assets of the deceased. Indeed, the process of drafting an agreement often shows the parties they omitted major issues or made hasty assumptions while negotiating. In addition, the requirement of a writing and execution substantiates that the parties actually did come to a meeting of the minds in vitally important area. This case is a perfect example: Larry left the meeting believing that all issues of the divorce were totally settled. On the other hand, Deborah left the two-hour meeting viewing that dictated agreement as a working proposal subject to revision after verifying the values of the community’s assets and debts and thus confirming that the agreement was fair.

It is noteworthy that the dictated agreement itself was never transcribed or reduced to writing.

Requiring a writing will not do violence to dispute resolution. Family mediators routinely reduce agreements to writing. The essence of mediation or negotiation is that the parties themselves come to mutually satisfactory agreements. Oral “agreements” disputed between the [***17] parties as soon as they leave the conference room are not mutually satisfactory agreements. In addition, mediators are pledged to neutrality and confidentiality. Recognizing oral agreements could conceivably put mediators in the undesirable situation of being subpoenaed to testify in favor of one party to the mediation.
Finally, requiring a writing will not harm the practice of taking oral stipulations in open
court in divorce cases. Stipulations taken by oath are of a different character than self-serving
testimony by one spouse, contested by the other spouse, that the parties at a former time reached
an oral agreement. Courts accept stipulations as evidence when they are satisfied that the parties
currently understand and acknowledge the agreement.

Therefore, for the reasons stated above, we hold that I.C. § 32-917 requires that marriage
settlement in contemplation of divorce be in writing to be valid and enforceable.

IV.
CONCLUSION

A settlement agreement made in contemplation of divorce is a marriage settlement
agreement subject to the requirements of I.C. § 32-917. Neither party is entitled to attorney fees
on appeal. Costs to appellants.

Chief Justice TROUT, Justices SILAK, SCHROEDER, and WALTERS CONCUR.

NOTES

1. The Idaho Supreme Court has recently reinforced its adherence to the formalities for the
execution of marriage settlement agreements. In Dunagan v. Dunagan, 147 Idaho 599, 213 P. 3d
384 (2009), the Court declined to adopt a rule that would have permitted part performance to take
an agreement out of the writing requirement. In Dunagan, the wife argued that an oral agreement
between the spouses to keep their property separate should be enforceable because they had
partially performed by maintaining separate financial holdings during the marriage.

2. Generally community property states have recognized a presumption in favor of the form of
title on a deed. This is particularly true in litigation between either or both of the spouses on one
hand and a third party on the other. Recently the court has held that evidence extrinsic to a deed
may be admitted to establish that no transmutation of the property was intended by the spouses.
Barrett v. Barrett, 149 Idaho 21, 232 P. 3d 799 (2010). In Barrett, the wife executed a quitclaim
deed from herself to she and her husband as wife and husband. The deed was part of a sale and
refinancing arrangement. The trial court held that the property was community property based on
the quitclaim deed and declined to permit the admission of extrinsic evidence to show that a
transmutation was not intended. The Supreme Court reversed reasoning that a variety of factors
should be examined in determining the intent to transmute property.
B. Informal Transmutation


BAKES, Chief Justice

Plaintiff/appellant sued defendant/respondent, requesting a divorce and division of assets. The magistrate, J. William Hart, granted the divorce and divided the community assets, and awarded one-third of the value of defendant's major separate property asset, his stock in CommTek, Inc., to the community, finding that one-third of CommTek's increase in value was due to community efforts. On appeal, the district court generally affirmed the magistrate's findings of fact and the divorce; however, it reversed the magistrate's award of one-third of the value of the husband's separate stock in CommTek to the community, ruling that under Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974), the community had already been adequately compensated for its effort. Plaintiff/appellant appeals from the district court's appellate decision. We affirm the district court's order.

I. The facts as found by the magistrate's court, and as affirmed by the district court in its appellate opinion, are as follows. Kathryn Anne Myers and David Wolford first met in June of 1977. They were subsequently married on October 15, 1978.

Two weeks prior to the marriage, David had his attorney prepare an ante-nuptial agreement which he presented to Kathryn. He also made arrangements for her to consult with Mr. George Kneeland, another attorney in the Wood River Valley. Kathryn met privately with Mr. Kneeland at his office in Ketchum, Idaho, and had every opportunity to discuss with him the nature of the document. She was advised by Mr. Kneeland of the exact consequences of the agreement, i.e., that while the income from her salaries and personal earnings would remain her own separate property, together with any income or increase in the value of her own separate property, that David's "salaries and personal earnings" would be community property, but that any income or increase in his separate property, including any enhancement in the value of the separate property, would remain his separate property. The ante-nuptial agreement listed in a schedule both David's
and Kathryn's separate property, including the stock of CommTek, Inc., which was listed as David's separate property asset. The agreement was apparently signed in Mr. Kneeland's office, having been notarized by his office staff and having been signed in addition by Mr. Kneeland. There was no fraud, coercion, undue influence or overreaching on the part of David in the presentation, negotiations or signing of the ante-nuptial agreement.

After a six-week honeymoon in Europe, and after a stay at the University of Hawaii, the parties returned to the Wood River Valley nine months later in the summer of 1979. With his extensive knowledge, experience and expertise in the electronics and television communications industry, David then conceived the idea of publishing a magazine that would provide scheduling service to TV cable operators and which was eventually marketed to satellite dish owners. Among other things, David traveled to the east coast in furtherance of the idea. The magazine became known as SATGUIDE.

. . . .

Further, Kathryn conducted herself in a way which showed that she did not believe she had a community property ownership right in the publication. She continually demanded that she be granted stock in the corporation or an interest in the publication. She continually asked David questions about an ownership interest and asserted that she ought to have a right to an ownership interest in either the publishing company or the corporation. On June 25, 1982, a Friday night after a long and hard week, the parties were having cocktails and dinner at a bar/restaurant in Hailey. Kathryn again brought up the subject of a community property interest in these assets. In an attempt to calm a potential disturbance, and in order to have a tranquil evening, David wrote a note on a napkin, admitted in evidence as Plaintiff's Exhibit 7, which reads in full as follows:

06/25/82 --I David G. Wolford, being of I hope somewhat sound mind but of broken body acknowledge that Idaho being a community property state, that Kathryn A. Wolford, common known as Fetch, has an equal community property interest in the assets and liabilities of CommTek Publishing.

David G. Wolford

I also acknowledge that I love her and half loss debt is hers.

David

After a trial on the issue, the magistrate found that it was David's intention in signing the note to merely acknowledge that the community property laws of Idaho were in effect and that he did not intend to create any greater rights in Kathryn than otherwise existed by law. He made his intention in any manner whatsoever.
finding in part on the fact that Kathryn made no effort thereafter to have stock formally transferred into her name and, in fact, did not mention the note again until this divorce proceeding was started. Furthermore, Kathryn did not thereafter act like an owner. She continued to act and speak as though David were the owner in many respects, including acquiescing in his election of directors and continually requesting him to transfer an interest in the business.

After suit was instituted, a preliminary hearing was held to determine whether the stock in CommTek, Inc., was the parties' community property or David's separate property. The magistrate found that the stock was David Woldorf's separate property. He also found (1) that the ante-nuptial agreement was valid and enforceable, (2) that the agreement was not modified, nor was separate property transmuted into community property, by the "napkin note" of June 25, 1982, and (3) that Kathryn should not prevail on her claims of estoppel. . . .

Both parties appealed from the magistrate's decision. Acting in its appellate capacity, the district court (1) affirmed for the most part the magistrate's findings of fact and incorporated them into its appellate decision because they were supported by substantial competent evidence, . . . .

As to the other issues raised on appeal, the district court affirmed the magistrate court's finding, inter alia: (1) that the "napkin note" did not transmute David's separate property into community property . . . .

II. The parties had a comprehensive ante-nuptial agreement which they entered into prior to the marriage. Therefore, their property rights are determined by that agreement and not by I.C. § 32-901 et seq. As stated in I.C. § 32-916, "The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement agreement entered into prior to or during marriage containing stipulations contrary thereto." (Emphasis added.) Therefore, since David and Kathryn had a comprehensive ante-nuptial agreement, their respective property rights addressed therein are governed by the agreement. In essence, then, this becomes a contract interpretation case rather than a statutory interpretation case. The contract between the parties varied their respective rights as compared to those contained in the Idaho statutes, as expressly permitted by I.C. §32-916. For instance, the parties' agreement provided that "any salaries or personal earnings of Kathy derived during their marriage" would remain her separate property, and that "David hereby waives, releases, and renounces, under the laws of any jurisdiction that may be applicable, all right and interest, statutory or otherwise," in Kathy's salaries or personal earnings. However, the parties contracted that the "salaries and personal earnings of David shall be community property." As to the separate property of the spouses, the agreement provided that "each party shall separately retain all rights and have complete control of his or her own separate property, whether now owned or hereafter acquired, and the rents, profits, and increase thereon, ... with the same effect as if no marriage had been consummated between them." (Emphasis added.) Since David and Kathryn entered into that comprehensive ante-nuptial agreement, which the courts below found to have been voluntarily entered into without any fraud or duress, our analysis of the issues in this case will be made with that contractual property regime in mind.
Chapter 4: Classifying Property Based on Agreement

A. NAPKIN NOTE

Appellant Kathryn first contends that the district court erred in finding that the June 25, 1982, "napkin note" did not transmute David's separate property interest in CommTek Publishing into community property. Both the magistrate and the district court found that the "napkin note" did not transfer any interest in CommTek Publishing to Kathryn. There was substantial evidence introduced by both parties as to the circumstances and intent surrounding the execution of the "napkin note."

The lower courts' findings were based on four grounds: (1) the note was ambiguous and unclear on its face and did not appear to be a bona fide attempt to formally transmute any interest in CommTek Publishing or its assets; (2) the note was not acknowledged or proved as required by I.C. §32-917; (3) the note was written in terms of "the assets and liabilities of CommTek Publishing," but David did not own the assets of CommTek; he owned the stock. David could not have transferred an interest in assets and liabilities without formal approval of CommTek, Inc.'s, board of directors following proper notice; and (4) there was a "severe lack of evidence" showing that David intended a gift by the note.

The district court affirmed the magistrate's determination that the "napkin note" was an attempt to quiet marital discord, rather than an attempt to transmute a multimillion dollar separate property asset into community property, in the face of a valid ante-nuptial agreement expressly preventing such a transmutation. Although there is conflicting evidence, the magistrate's findings are supported by substantial competent evidence, as the district court found, and are not clearly erroneous. I.R.C.P. 52(a); Golder v. Golder, 110 Idaho 57, 714 P.2d 26 (1986). Further, the Idaho community property laws contain strict and explicit ways for property to be transmuted from separate status to community property status. As stated in Stockdale v. Stockdale, 102 Idaho 870, 873, 643 P.2d 82, 85 (Ct.App.1982), "[A]lthough husband and wife may elect at any time to change their property rights, they must engage in certain formalities." Moreover, the party alleging the transmutation has the burden of proving the transmutation. Hooker v. Hooker, 95 Idaho 518, 511 P.2d 800 (1973). Here, the magistrate court found that Kathryn failed to sustain her burden of proving a transmutation; neither had she shown that the formalities required in I.C. §§ 32-917 through -919 had been followed. The magistrate's findings are supported by substantial competent evidence, and we affirm those findings.

B. QUASI-ESTOPPEL

Kathryn next contends that the lower courts erred in failing to apply the doctrine of quasi-estoppel against David based upon his representations contained in the "napkin note." We disagree. The doctrine of quasi-estoppel is a method whereby an aggrieved party can obtain relief through the court's equitable powers from what appears, at first glance, to be an oppressive result at law. This Court set down the rules for the application of quasi-estoppel in Dawson v. Mead, 98 Idaho 1, 557 P.2d 595 (1976). There we stated:

To constitute quasi-estoppel [a person against whom estoppel is sought] must have
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gained some advantage for [him]self, produced some disadvantage to [the person seeking estoppel], or induced him to change his position. It must be unconscionable to allow [a person against whom estoppel is sought] to maintain a position which is inconsistent with one of which [he] accepted a benefit.

98 Idaho at 4, 557 P.2d at 598. The magistrate here, however, found none of the requisite elements. Instead, he found, as a matter of fact, that: (1) "There is no evidence that Kathryn would have done anything different had the note never been written"; (2) "Kathryn was well aware that David did not consider CommTek, Inc., half hers, and she did not act upon David's note or any of his alleged representations to her detriment"; and (3) "Kathryn did not . . . [after the napkin note was penned] act like an owner. She continued to act and speak as though David were the owner in many respects. . . ." Based on these factual findings, and based on the antenuptial agreement's express reservation of CommTek, Inc., as David's separate property, the magistrate found that "it is not unconscionable for David to retain all of CommTek, Inc."

These specific factual findings were affirmed by the district court on appeal because, as the district court noted, under I.R.C.P. 52(a) "[f]indings of fact shall not be set aside unless clearly erroneous." The district court concluded that there was a great deal of evidence supporting the magistrate's factual findings, and therefore they were not clearly erroneous. We agree and affirm.


BURNETT, Judge.

This is an appeal from a judgment dividing property in a divorce proceeding. We are asked to decide two issues. First, did the magistrate err in refusing to recognize an oral or informal change ("transmutation") of the wife's separate real property into community property during the marriage? Second, did the magistrate abuse her discretion by making an unequal division of community property favoring the wife? On appeal to the district court, the judgment was affirmed. In this appeal, we affirm in part, but vacate a portion of the judgment and remand for reconsideration of the value placed on one of the community assets.

I. The transmutation issue focuses upon residential real property. When the parties were married in 1975, the wife owned a house acquired in a prior marriage. The parties made payments from community property on a mortgage loan against the residence. The husband testified at trial that in 1977 they orally agreed to treat the property as "our house." The wife denied it. However, she conceded that she had written a letter to the mortgagee stating, "I would now like my mortgage loan and new coupon book to read Steven L. and Dianne H. Stockdale." She testified that she did so because her husband refused "to make payments or be any part of something that had somebody else's name on it." She did not execute an instrument of conveyance transferring any of her separate interest to the husband.
In 1978 the house was sold. Both parties signed the contract for sale and the closing statement. Proceeds from the sale were used to buy a second house. Both parties signed the purchase contract and closing statement on the second house. Later, in the divorce proceedings, the husband claimed that the second house was entirely a community asset because the wife's separate interest in the first house had been transmuted, by oral agreement and conduct of the parties, into community property. He argued that Idaho should adopt a doctrine of oral or informal transmutation of the rights of husband and wife to real property.

The magistrate found that, even if such a doctrine existed in Idaho, the husband had failed to sustain the burden of proving that a transmutation actually occurred. The district court entered a similar finding. Such findings will not be disturbed unless clearly erroneous. I.R.C.P. 52(a). However, where the doctrine of oral or informal transmutation is recognized, "[a]ll that is required to show an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property. . . . [T]he agreement of transmutation may be of the most informal character." Raphael v. Raphael, 91 Cal.App.2d 931, 206 P.2d 391, 395-396 (1949). If such a test were applied to the instant case, we could not readily uphold the lower courts' findings. Consequently, we feel compelled to address the transmutation issue directly.

"Transmutation is a broad term used to describe arrangements between spouses which change the character of property from separate to community and vice versa." W. Reppy & W. DeFuniak, Community Property in the United States 421 (1975).

California has been a leader in recognizing transmutation by oral agreement or informal conduct of the parties. In Wren v. Wren, 100 Cal. 276, 34 P. 775 (1893), the California Supreme Court upheld an oral transmutation of earnings from community property to separate property. The court anchored its opinion in former sections 158 and 159 of the California Civil Code, (reen. §§ 4802, 5103), authorizing spouses to contract with each other as though unmarried and allowing them to alter their respective property rights by mutual consent. 34 P. at 776. In Yoakam v. Kingery, 126 Cal. 30, 58 P. 324 (1899), these statutes were employed to uphold a transmutation of land from separate property to community property, under a written interspousal contract that otherwise would have been of doubtful validity due to defects in the document. The increasingly broad import of the statutes was emphasized in Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190 (1909), where the court said that ". . . the utmost freedom of contract exists in California between husband and wife. . . ." 103 P. at 194. Ultimately, the doctrine of oral or informal transmutation became so familiar in California that it was applied without specific reference to its statutory origins. E.g., Pruyn v. Waterman, 172 Cal.App.2d 133, 342 P.2d 87 (1959).

Several other community property states, with statutes deemed comparable to or compatible with California law, have adopted this doctrine. E.g., Jones v. Rigdon, 32 Ariz. 286, 257 P. 639 (1927); Mullikin v. Jones, 71 Nev. 14, 278 P.2d 876 (1955); Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952). It does not necessarily follow that we should do so in Idaho. We do not have the broad statutes found in California.
Our community property system is set forth in Title 32, Chapter 9, Idaho Code. Section 32-916 presently provides that "[t]he property rights of husband and wife are governed by this chapter, unless there is a marriage settlement agreement entered into prior to or during marriage containing stipulations contrary thereto." See also I.C. §32-905. Section 32-917 requires that "marriage settlements" be in writing, executed and acknowledged in the same manner as conveyances of land. Section 32-918 further requires that such agreements be recorded; but section 32-919 provides that if no recording occurs, the effect is the same as that of nonrecording upon a conveyance of real property. The agreement is still binding between the parties, absent intervening rights. See Hartley v. Stibor, 96 Idaho 157, 525 P.2d 352 (1974).

In 1980, the Legislature amended I.C. §32-916, by adding the language, "agreement entered into prior to or during marriage," quoted above. This amendment made it clear that agreements changing the property rights of husband and wife could be executed either before or during marriage. However, the Legislature saw fit to leave intact the formal execution requirements of I.C. §§32-917 through 32-919. In a companion bill, the Legislature also amended I.C. §32-906, dealing with rents and profits of separate property. This statute formerly had permitted rents and profits to be treated as separate property, rather than as community property, if so provided in the instrument by which the property was acquired. The amendment expanded the statute to allow spouses to make such an agreement between themselves, but it required the agreement to be in writing. We interpret the Legislature's actions to mean that, although husband and wife may elect at any time to change their property rights, they must engage in certain formalities.

This statutory framework sets our state apart from the other jurisdictions where the courts have embraced oral or informal transmutation. Idaho Code §32-916, before amendment, and sections 32-917 through 32-919, have California counter-parts in former California Civil Code §§178-181 (reen. §§5133-36). However, these California statutes have been tempered by former sections 158 and 159, discussed above, from which the doctrine of oral or informal transmutation was derived. In Idaho, our restrictive statutes have not been tempered by other provisions. They stand alone, and the policy they embody has been reaffirmed by the 1980 amendments to I.C. §§32-906 and 32-916. We defer to this recent reaffirmation of Idaho legislative policy. We hold that the separate or community character of real property may be altered only in the manner provided or permitted by statute.

Our holding does not displace existing rules permitting the character of personal property to change without written agreement. For example, our decision does not alter the general presumption in favor of community property, under which separate personal property may lose its character through commingling with community property. E.g., Lepel v. Lepel, 93 Idaho 82, 456 P.2d 249 (1969). Nor does it disturb the recognition of inter-spousal gifts of personal property, where proven by clear and convincing evidence. E.g., Freeburn v. Freeburn, 97 Idaho 845, 555 P.2d 385 (1976). We simply decline to establish in Idaho a doctrine of oral or informal transmutation of real property, by judicial fiat.

The issue in the present case is limited to real property. The marriage extended from 1975 to 1979. The transmutation is alleged to have occurred before the 1980 amendments to I.C. §§32-
906 and 32-916. However, these amendments clarified and expanded the scope of permissible agreements between spouses concerning their property. They did not infringe upon any pre-existing statutory right to transmute property by oral agreement or informal conduct. Idaho Code §§32-917 through 32-919, prescribing the formalities, have been in effect since 1867. Moreover, in Hooker v. Hooker, 95 Idaho 518, 511 P.2d 800 (1972), our Supreme Court described the issue of oral or informal transmutation as one "of first impression in this jurisdiction." 95 Idaho at 523, 511 P.2d at 805. The court disposed of Hooker on factual grounds, and declined to rule on the transmutation concept. Consequently, during the marriage in the instant case, there was no provision for oral or informal transmutation in Idaho statutory or case law. We conclude that no such transmutation occurred, as a matter of law.

Kern v. United States, 491 F. 2d 436 (9th Cir. 1974)

SNEED, Circuit Judge:

This is an estate tax case involving the interaction between the community property law of the State of Washington as it relates to the proceeds of life insurance policies and Section 2042(2) of the Internal Revenue Code of 1954. The facts are not disputed; the problem consists of the legal consequences of these facts under Washington law and Section 2042(2).

Albert R. Kern and his wife, Arline G. Kern, were married on January 22, 1928. On January 15, 1958 there was issued by the Northern Life Insurance Company of Seattle, Washington, Policy No. 467-750 in the face amount of twenty thousand dollars naming Albert as the insured and Arline as the beneficiary. The application for this policy reflects that Albert signed as a proposed "insured" and Arline as the "applicant." The following provision also appeared in the application:

IT IS FURTHER AGREED that the Proposed Insured consents to the insurance herein being applied for and agrees that any policy or policies that may be issued hereunder shall belong to and be subject to the exclusive control and disposition of the applicant or applicants hereunder without further action or consent on the part of the Proposed Insured for any purpose whatsoever.

491 F.2d 436; 74-1 U.S. Tax Cas. (CCH) P12,979; 33 A.F.T.R.2d (P-H) 1466

In addition, Policy No. 467-750 contained a typed endorsement in the policy stating:

It is understood and agreed that application for this policy was made by Arline G. Kern, wife of the Insured, designated as the applicant. It is further understood and
agreed that the said applicant is the sole owner of this policy and may receive and 
exercise every right and privilege thereunder, if she be living, otherwise the 
Executors, Administrators or Assigns of the said applicant. Under this agreement, 
it is understood that neither the Insured nor his estate shall have any interest in this 
policy.

A second policy, Policy No. 505389, on the life of Albert was issued on March 3, 1965, by 
Northern Life in the full amount of ten thousand dollars. The application also reflects that Albert 
signed as the proposed "insured" and Arline as the "applicant." The application contains the same 
language set out above that appears in the application for Policy No. 467-750. However, no typed 
endorsement, such as was placed on Policy No. 467-750, appears on this 1965 policy.

All the premiums with respect to both policies were paid from community funds. Arline 
was designated the beneficiary under both policies. The proceeds of both policies were paid to 
Arline following Albert's death on July 15, 1967. The estate tax return prepared with respect to 
Albert's estate included one half of the proceeds of each policy in the gross estate, presumably on 
the ground that the policies were the community property of Albert and Arline. Thereafter, a 
timely claim for refund was filed seeking to exclude from Albert's gross estate any amount with 
respect to these two policies. This claim was disallowed by the Commissioner of Internal Revenue 
and this suit for the refund was initiated by the executor of Albert's estate.

The trial court dismissed the complaint of the executors with prejudice on the ground that 
the policies were community property. We reverse and render judgment with respect to policy 
No. 467-750 and reverse and remand for further proceedings with respect to Policy No. 505389. 
Neither action is intended to preclude further proceedings regarding the extent to which the 
premiums paid with respect to Policy No. 467-750 and the premiums paid with respect to, or 
proceeds of, Policy No. 505389 should be included in Albert's gross estate by reason of Section 
2035 of the Internal Revenue Code of 1954. These issues were not reached by the trial court and 
our action here should not foreclose their consideration on remand.

The proper characterization of each policy is governed by Washington law. Recently this 
court had the opportunity to describe in general terms the structure of Washington's community 
property law. See United States v. Overman, 424 F.2d 1142 (9th Cir. 1970). We recognized that 
property acquired during marriage was, subject to certain exceptions, community property. The 
interest of each spouse is an equal, present, and vested right in the community property which is 
protected from certain acts by the other that would impair it. Each can sell or give his interest to 
the other during the existence of the community and, upon its termination by the death of a spouse, 
the interest of such spouse may be subject to testamentary disposition.

More particularly, under Washington law, to establish that property acquired during 
marriage is not community property it is necessary to show that it was obtained by the acquiring 
spouse by gift, devise or descent. Any such demonstration must overcome a strong presumption 
in favor of the community and the burden is upon the party who asserts separate property status to 
establish it. R.C.W.A. 26.16.010, 26.16.020, 26.16.030; In re Estate of Smith, 73 Wn.2d 629, 440
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P.2d 179 (1968); Stokes v. McDowell, 70 Wn. 2d 694, 424 P.2d 910 (1967); California-Western States Life Ins. Co. v. Jarman, 29 Wn. 2d 98, 185 P.2d 494 (1947). While the magnitude of this burden has been described variously, a fair statement is that the evidence sufficient to overcome the presumption must be clear, definite and convincing. State v. Miller, 32 Wn. 2d 149, 201 P.2d 136 (1948); In re Slocum's Estate, 83 Wn. 158, 145 P. 204 (1915). We agree with the trial court's view that the above-quoted provision appearing in the application for each policy, standing alone, does not meet this standard. A provision on a printed form applicable to any applicant and insured, without regard to their marital status, does not constitute the clear, definite, and convincing evidence necessary to overcome the presumption.

In our view the typewritten endorsement on Policy No. 467-750 is a different matter. While it does not explicitly state that that policy "was intended to be the separate property of Arline G. Kern" and that "all the rights, privileges, and incidents of ownership thereunder are the separate property of Arline G. Kern," it does describe Mrs. Kern as "the sole owner of this policy," and expressly precludes any interest in the policy on the part of the Insured or his estate. This, when accompanied by the testimony of Mrs. Kern and the insurance agent who sold the policies, clearly, definitely, and convincingly demonstrates that it was intended that this policy be the separate property of Mrs. Kern.

The contrary conclusion of the trial court was based on the belief that under Washington law the presumption favoring the community in these circumstances could be overcome only by a "separate instrument with the recitation that the property was separate property and not community property, and provision for the specific gifts of the premiums. . . ." We do not believe this is an accurate description of the requirements of Washington law. Evidence sufficient to rebut the presumption must be clear, definite, and convincing, but it need not in these circumstances be evidenced by an instrument separate and apart from the insurance policy. No Washington case has been found imposing such a requirement. The cases cited by the trial court do not do so. Under these circumstances the trial court's conclusion is not entitled to the deference to which findings of fact are entitled and which we extended to such findings in Kroloff v. United States, 487 F.2d 334 (9th Cir., 1973), a case somewhat similar to this one involving the Arizona community property laws.

This brings us to the Washington statute, R.C.W.A. 48.18.440, first brought to the attention of the court shortly before oral argument. Subsection (1) provides, inter alia, that policies made payable to or for the benefit of the spouse of the insured "shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse."5 The possible effect of this language

548.18.440, Spouse's rights in life insurance policy. (1) Every life insurance policy heretofore or hereafter made payable to or for the benefit of the spouse of the insured, and every life insurance policy heretofore or hereafter assigned, transferred, or in any way made payable to a spouse or to a trustee for the benefit of a spouse, regardless of how such assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse: Provided, That the beneficial interest of a spouse in a policy upon the life of a child of the spouses, however such interest is created, shall be deemed to be a community interest
on the facts of this case was not considered by the trial court nor did the briefs of the parties on this appeal deal with it. In our view it is necessary to remand to the trial court for the purpose of determining the effect, if any, of this statute on the status of Policy No. 505389. We, of course, express no opinion on this matter at this time.

Reversed and rendered as to the proceeds of Policy No. 467-750.

Reversed and remanded for further proceedings as to the proceeds of Policy No. 505389.

C. Unilateral Transmutation—Inter-spousal Gifts

**Powell v. Powell, 822 S.W.2d 181 (Tex. App. 1991)**

COHEN, Justice.

Robert W. Powell (Bob) and Jo Lynn Powell (Jo) were married in 1986, separated in 1987, and divorced in 1989. Bob appeals from the divorce judgment, attacking the legal and factual sufficiency of the court's findings pertinent to the property division. We must decide whether the trial court abused its discretion in dividing the property. Vallone v. Vallone, 644 S.W.2d 455, 460 (Tex.1982).

In his first point of error, Bob contends the evidence is legally and factually insufficient to support the court's findings that 1000 shares of corporate stock are Jo's separate property that she acquired by gift from Bob.

There is a presumption that all property possessed by either spouse during, or on dissolution of, marriage is community property. TEX.FAM. CODE ANN. § 5.02 (Vernon Supp.1991). This presumption can be overcome by "clear and convincing evidence" that a specific asset is separate property. Id. All property acquired during marriage by gift is the separate property of that spouse. TEX.CONST. art. XVI, § 15; TEX.FAM. CODE ANN. § 5.01(a) (Vernon 1975).

Robert W. Powell & Associates, Inc. ("the company") was incorporated by Bob in 1979, before this marriage and before a previous marriage. The present divorce decree provides that all shares of stock in the company in Bob's name is [sic] Bob's separate property. The decree also states that Jo separately owned 1,000 shares of stock in the company, because Bob gave them to her during the marriage. Bob claims he merely "transferred" his stock to Jo for convenience, without conveying ownership.

There is ample evidence the stock was a gift to Jo and was thus her separate property. Bob transferred 500 shares of stock to Jo early in 1986, shortly after the marriage. Bob's secretary, Sallye Tucker, testified Bob intended to give these shares to Jo as a wedding present, without conditions. Bob transferred an additional 500 shares of stock to Jo in December 1986 by endorsing the shares in the presence of Sallye Tucker. Jo paid nothing for the stock. Bob contends he did not intend to give the stock to Jo on either occasion—the first 500 shares were "transferred" shortly after the wedding in order to promote the new marriage; the second 500 shares were temporarily transferred as a conditional gift to protect them from a former wife, who was a judgment creditor. However, there was no evidence that Bob tried to rescind the second gift after the disputes with his creditors were resolved. Bob did not ask Jo to return the stock until he commenced divorce proceedings. The share certificate conveying the second 500 shares is signed by Bob, and it "sells, assigns, and transfers unto Jo Lynn Powell" the shares without any conditions stated. Although Bob claims he expected Jo to return the shares after he disposed of his creditors, there was no evidence Jo agreed to that. The trial judge was not required to believe Bob's self-serving testimony regarding his intentions, especially when such testimony was not supported by the written documentation on the share certificate. The testimony of Jo and Sallye Tucker, plus Jo's possession of stock certificates in her name, signed and delivered to her by Bob, supports the finding. The finding of a gift is not against the great weight and preponderance of the evidence. See Vallone, 644 S.W.2d at 460.

Point of error one is overruled.

NOTES

1. Powell involved a gift of one spouse's separate property to the other spouse. The same principals would apply, however, to a gift of one spouse's interest in community property to the other spouse.
CHAPTER 6: MANAGEMENT OF COMMUNITY PROPERTY

I. EQUAL MANAGEMENT

Until the early 1970’s the husband was the exclusive manager of community property. All of the community property jurisdictions abandoned male management because it discriminated against women on the basis of gender. The general rule of equal management with respect to community property is that the spouses have simultaneous, co-extensive power to manage community personal property. The New Mexico statutory provisions are typical. In important part they provide: “either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property.” N. M. Stat. Ann. §40-3-14(A).

Similarly, the Idaho Code provides, “[e]ither the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract . . . .”

Theoretically, the equal management rules mean that, for example, if H and W own a coin collection as community property and H sells the collection before W hides it, the unilateral sale by H is effective. Essentially, equal management institutes a race to manage between H and W. In addition, generally speaking, one spouse does not have a cause of action against the other spouse for mismanagement of the community property during the marriage.

A number of exceptions to the equal management rule exist. The most common exception is that all of the community property jurisdictions required the consent of both spouses for the sale or encumbrance of community real estate. Many of the states also require the consent of both spouses for some gifts of community property.

These equal management rules have caused concern that marital disagreements may lead to economically undesirable transactions or outright immobilize spousal management decisions. Some of this concern is rooted in reality. Some of it is speculative and driven by the concerns of creditors who wish to easily secure the liability of both spouses for obligations arising during marriage.

A number of the community property jurisdictions have adopted statutes attempting to mediate the real and theoretical concerns. Consider the following provisions:

Wisconsin Statutes Annotated § 766.51. Management and control of property of spouses. 44

(1) A spouse acting alone may manage and control:
   (a) That spouses property that is not marital property.
   (am) Except as provided in subs. (2) and (3), marital property held in that spouses name alone or not held in the name of either spouse.

44 The odd numbering of this section is consistent with the original.
(b) Marital property held in the names of both spouses in the alternative, including marital property held in a form designating the holder by the words "(name of one spouse) or (name of other spouse)".
(d) A policy of insurance if that spouse is designated as the owner on the records of the policy issuer.
(e) Any right of an employee under a deferred employment benefit plan that accrues as a result of that spouse's employment.
(f) A claim for relief vested in that spouse by other law.
(1m)
(a) Notwithstanding any provision in this section except par. (b), for the purpose of obtaining an extension of credit for an obligation described under §766.55 (2) (b), a spouse acting alone may manage and control all of the marital property.
(b) Unless the spouse acting alone may otherwise under this section manage and control the property, the right to manage and control marital property under this subsection does not include the right to manage and control marital property described in §766.70 (3) (a) to (d) or the right to assign, create a security interest in, mortgage or otherwise encumber marital property.

(2) Spouses may manage and control marital property held in the names of both spouses other than in the alternative only if they act together.
(3) The right to manage and control marital property transferred to a trust is determined by the terms of the trust.
(4) The right to manage and control marital property permits gifts of that property, subject to remedies under this chapter.
(5) The right to manage and control marital property does not determine the classification of property of the spouses and does not rebut the presumption under §766.31 (2)
(6) The enactment of this chapter does not affect the right to manage and control any property of either or both spouses acquired before the determination date.
(7) A court may appoint a conservator or guardian under ch. 54 to exercise a disabled spouse's right to manage and control marital property.
(8) This section does not affect §706.02 (1) (f)
(9) If an executory contract for the sale of property is entered into by a person having the right of management and control of the property, the rights of all persons then having or thereafter acquiring an interest in the property under this chapter are subject to the terms of the executory contract. This subsection applies to contracts entered into before or after the determination date.
(10) At the death of a spouse if property described under §766.70 (3) (a), (b) or (d) is held by either spouse, but not in the names of both spouses, such property may be subject to the management and control of the holding spouse as provided under §857.015

California Family Code §1100. Community personal property; management and control; restrictions on disposition
(a) Except as provided in subdivisions (b), (c), and (d) and Sections 761 and 1103, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) 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. This subdivision does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse.

(c) 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.

(d) Except as provided in subdivisions (b) and (c), and in Section 1102, 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.

Remedies for the failure by a managing spouse to give prior written notice as required by this subdivision are only as specified in Section 1101. A failure to give prior written notice shall not adversely affect the validity of a transaction nor of any interest transferred.

(e) Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.
NOTES

1. In a jurisdiction such as Idaho, which has no statutory exceptions to the equal management rule, can one spouse assert dissenting shareholder’s rights on behalf of the other spouse? See Waters v. Double L, Inc., 114 Idaho 256, 755 P. 2d 1294 (Ct. App. 1987), affirmed, 115 Idaho 705, 769 P. 2d 582 (1989).

2. In states such as California and Wisconsin, what would prevent a spouse from defeating equal management by simply placing property in his or her name alone, for example, depositing his or her paycheck into a bank account in his or her name alone, or investing in stocks in only his or her name?

3. May third parties rely in these management statutes in refusing attempts by the other spouse to seize management control of assets that are in only one spouse’s name. Must an employer respond to attempts by W to defeat H’s direct deposit of his paycheck into an account in only his name. Must the bank honor attempts by W to withdraw funds from the account in H’s name alone? Does the answer to these questions depend on whether the jurisdiction has adopted legislation similar to that of California and Wisconsin, above?

4. Several jurisdictions have adopted exceptions to equal management for community owned business property. For example, Louisiana has adopted the following provisions:

**Louisiana Civil Code Article 2350**
The spouse who is the manager of a community enterprise has the exclusive right to alienate encumber, or lease its movables unless the movables are issues in the name of the other spouse of the concurrence of the other spouse is require by law.

Comment. This provision establishes an exception to the principle of equal management in the interest of commerce. A spouse may act alone, that is, to the exclusion of the other spouse, when the other spouse does not participate in the management of a community business.

**Louisiana Civil Code Article 2352**
A spouse who is a partner has the exclusive right to manage, alienate, encumber, or lease the partnership interest.

**Louisiana Civil Code Article 2348**
[A spouse] may renounce the right to participate in the management of a community enterprise.

5. Why are these statutes necessary? Short of a renunciation, how does one spouse become the manager of the community enterprise? In Carr v. Carr, 108 Idaho 684, 701 P. 2d 304 (Ct. App. 1984), the couple owned a truck stop as community property. The wife managed the retail and restaurant operations and husband did everything else. Who was the manager of the business?
8. Consider Washington’s approach to the community enterprise issue:

**Washington Revised Code §26.16.030(6)**

Neither spouse shall acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other; Provided, however. That where only one spouse participates in such management, the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.

Does the Washington approach of requiring dual consent on participation instead of permitting unilateral action based on sole management change the focus or result of business management questions?

**II. DUAL MANAGEMENT**

**A. Transactions Involving Real Estate**

**Morgan v. Firestone Tire & Rubber Co., 68 Idaho 506, 201 P.2d 976 (1948)**

HYATT, Justice.

In July, 1943, appellant, a married man, contemplating an investment with community funds, and The Firestone Tire and Rubber Company (Ohio corporation), desiring to dispose of its business real estate in Pocatello but retain possession and use of the same by lease for a period of years, entered into the following agreement (being the latter's standard form but deletion and italics ours), without appellant's wife joining therein:

. . . .

After title was found satisfactory to appellant, the company submitted its standard printed form of lease, which he rejected as containing matters not in the agreement and therefore detrimental to his interests. Thereafter, appellant's attorney and the company's agent satisfactorily revised another of the latter's printed lease forms except that appellant, through his attorney, requested the company to carry "outside" insurance for fire or other casualty instead of him accepting the company's responsibility therefor as provided by the contract.

Appellant and the agent then met, personally, on this matter and the latter wired appellant's attorney that it was tentatively agreed Firestone would carry "outside" insurance and he was making such recommendation to the home office at Akron. Shortly thereafter the agent notified appellant's attorney by wire that the company would not obtain such insurance, that it had gone as far as it could in attempting to reach mutually satisfactory terms and conditions on the lease, and was terminating negotiations and cancelling the contract. It refused thereafter to negotiate
further and appellant then brought this suit in his name alone for specific performance of the agreement.

The vendor by its answer admitted the execution of the agreement and by way of defenses set up that it submitted a standard form of lease, but by reason of plaintiff's demands, conclusion of the agreement was impossible, and it cancelled negotiations and declared the transaction at an end; further, that the agreement being entire and indivisible was not specifically enforceable because of its indefiniteness and uncertainty as to the terms of the lease and the invalidity of the lease provision for failure of appellant and wife to join in the execution and acknowledgement of the agreement.

The trial court found: Appellant was financially able to pay the purchase price; the parties never came to an agreement as to the terms of the lease, particularly upon the matter of restoration of said premises in the event of fire or other casualty or the type and character of insurance that was to be carried or by whom the same was to be insured; plaintiff had not performed the covenants on his part to be performed; the lease was an integral part of the contract; the terms thereof as to the lease were indefinite and uncertain and the minds of the parties never met upon the same; the purchase was to be made with community funds and since the lease was to be for more than one year, the entire agreement was void for failure of appellant and wife to join in signing and acknowledging the contract.

The trial court accordingly entered its decree denying plaintiff any relief, from which this appeal is taken.

Assignments of error attack these findings and the decree as being contrary to the evidence and the law.

Whether a contract is entire or severable depends on the intention of the parties which is to be ascertained and determined, when the contract is unambiguous, from the subject matter of the agreement and the language used therein, taking the agreement as a whole and not its separate parts without regard to one another. Durant v. Snyder, 65 Idaho 678, at page 685, 151 P.2d 776; Shaw Supply Co., Inc. v. Morgan, 48 Idaho 412, 282 P. 492; 13 C.J. 562; 17 C.J.S., contracts, §332; Page on Contracts, 2nd ed., Vol. 4, page 3609, Sec. 2085; 12 Am. Jur. 870. See also Utah Construction Co. v. McIlwee, 45 Idaho 707, at page 718, 266 P. 1094.

Tests for determination of divisibility or indivisibility have been stated as follows:

"The test chiefly relied upon is whether the parties have apportioned the consideration on the one side to the different covenants on the other. If the consideration is apportioned, so that for each covenant there is a corresponding consideration, the contract is severable. If, on the other hand, the consideration is not apportioned, and the same consideration supports all the covenants and agreements, the contract is entire. 3 Page on Contracts, §1484. A contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent. On the other hand, it is the general rule that a severable contract is
one which in its nature and purpose is susceptible of division and apportionment."


"As a general rule, it may be said that a contract is entire when by its terms, nature and purpose it contemplates and intends that each and all of its parts and the consideration shall be common each to the other and interdependent".

13 C.J. 561; 17 C.J.S., Contracts, §331.

"We think that perhaps the best test is whether all of the things, as a whole, are of the essence of the contract. That is, if it appeared that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable."

_Waddell v. White_, 51 Ariz. 526, 78 P.2d 490, 496.

"One of the most certain of the single tests for determining the intention of the parties is whether the consideration on the one side is apportioned to each of the different covenants on the other, or whether the consideration on the one side is the entire consideration for all the covenants upon the other side. * * * If the consideration is not apportioned to the various covenants on the part of the adversary party, the contract is prima facie entire".

Page on Contracts, 2d Ed., Vol. 4, Sec. 2088, page 3611.

"The essential test to determine whether a number of promises constitute one contract or more than one, is simple. It can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out."


The contract is entire. For a single money consideration the purchaser was buying property and "as an inducement" to him "to purchase this property and as a part of the consideration therefor" the seller agreed to lease the property. (Emphasis added.) _See Spokane Cattle Loan Co. v. Crane Creek Sheep Co._, 39 Idaho 801, 230 P. 772.

Further, the lease should "be entered into contemporaneously with the passing of title". This made the covenants for purchase and sale and for leasing dependent. See 14 Am. Juris. 487; 55 Am. Jur. 579.

Finally, the vendor could forfeit the purchaser's down payment if the latter failed to carry out the contract in accordance with "all" of its provisions; also, the agreement was to be void if
title could not be made marketable within a certain time. See Orenstein v. Kahn, 13 Del. Ch. 376, 119 A. 444.

Since the contract is indivisible, it must stand or fall in its entirety, depending upon whether the provisions thereof with reference to the lease are void as a conveyance or encumbrance of community property or are too incomplete and uncertain to constitute an enforceable agreement. We shall consider these two matters in the order named.

Section 31-913, I.C.A., prior to 1945 amendment, effective when the transaction was made, provided:

"Husband's control of community property. -- The husband has the management and control of the community property, except the earnings of the wife for her personal services and the rents and profits of her separate estate. But he cannot sell, convey or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered."

The provision relative to the husband's management and control makes him the agent and trustee for the marital community. Kohny v. Dunbar, 21 Idaho 258, 121 P. 544, 39 L.R.A., N.S., 1107, Ann. Cas. 1913D, 492. As such manager he may purchase with community funds, property which upon acquisition is community property under Sec. 31-907, I.C.A.

It is unnecessary for the wife to join with her husband in the execution of an instrument by which community real property is acquired. Intermountain Realty Co. v. Allen, 60 Idaho 228, 90 P.2d 704, 122 A.L.R. 647.

Here the husband as agent of the community was in process of acquiring, as he had the right to do, certain property with community funds. Before acquisition, and as a condition thereto, he agreed that title, when it passed should be instantaneously subjected to the lease. Title could not rest in the community for a single moment without the lease attaching. Delivery of the deed and lease had to be simultaneous. From a practical standpoint, the situation is no different than one where the vendor by the contract provides for a reservation of the possession and use of, or an estate in, the property, for a term of years, and that the deed contain such reservation. The husband, as manager of or agent for, the community, can purchase real property which is subject to liens, reservations and exceptions. See Munger v. Boardman, 53 Ariz. 271, 88 P.2d 536, at page 538. Such dealings are not prohibited by the statute. It is only after the community once acquires title that he cannot under Sec. 31-913, I.C.A., supra, convey or encumber the community property without the wife joining with him in the execution and acknowledgment of the instrument of conveyance or encumbrance. While the rule is well settled that the character of community property is fixed at the time of its acquisition and the wife's interest vests at that time (Pendleton v. Brown, 25 Ariz. 604, 221 P. 213; McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250; In re Woodburn's Estate, 190 Wash. 141, 66 P.2d 1138), it is not so fixed, nor does the wife have any interest therein, until the time of acquisition.

In the case at bar, the husband in order to acquire property for the community agreed, as
agent for the community, by an indivisible contract with dependent covenants, that the property, at the very moment of acquisition, should be subject to a lease in favor of the vendor.

The principle here involved has been recognized in connection with purchase money mortgages. There is no question that a lease for more than one year is a conveyance or encumbrance and this court has also recognized a mortgage to be a conveyance and encumbrance. *Abbl v. Morrison*, 64 Idaho 489, 134 P.2d 94; *Intermountain Realty Co. v. Allen*, 60 Idaho 228, 232, 90 P.2d 704, 122 A.L.R. 647; *Hancock v. Elkington*, 67 Idaho 542, 186 P.2d 494; *John Hancock Mutual Life Ins. Co. v. Girard*, 57 Idaho 198, 64 P.2d 254; Sec. 54-813, I.C.A.

In *Munro v. McAllister*, 34 Idaho 638, 203 P. 286, it was contended that a purchase money mortgage was void because the wife was not named as a grantor therein (although she did sign and acknowledge it). We said:

"Since the note and mortgage given to respondent was for the balance of the purchase price, the lien created thereby was *prior to any right* which may have been acquired by the community, and it was therefore immaterial whether the wife was named as a grantor in the mortgage or not." (Emphasis added.)

In *Davidson v. Click*, 31 N.M. 543, 249 P. 100, 105, 47 A.L.R. 1016, the New Mexico Supreme Court, under a statute similar to Section 31-913, I.C.A., *supra*, held that when a husband acting as agent for the community, purchases real property in his own name for the benefit of the community and, at the time, as a part of the transaction, delivers to the vendor a purchase money mortgage executed by him alone, for all or part of the purchase price, the mortgage is not void or within the ban of the statute.

That court pointed out that the New Mexico community property statute uses the word "acquired" and that the property has to be owned and possessed by the community before the statute relating to conveyances, mortgages, and encumbrances applies. It went on to say:

"Assuming that the husband has purchased real property on credit for the community and agreed to give a purchase money mortgage* * *, and the vendor delivered deed* * * in consideration of such promise, then it is the high duty of the said vendee to comply with that condition of the bargain, and, if he fails or refuses to do so, a court of equity would doubtless compel him to discharge this trust obligation. * * * Having executed and delivered the mortgage, the trust ends, and then, and only then, does the beneficial title inure to the community. The result is that the property comes to the community in the state of the affairs of the community as conducted by the husband, that is, charged with the lien of the purchase-money mortgage validly executed by the husband alone as trustee for that very purpose. * * *"

Other language of the New Mexico court in that case is also applicable here:
"We come then to consider the process by which, and the condition in which, the beneficial estate vests in the members of the community a community property interest in real estate under the circumstances of this case. That the husband is the agent of the community and the manager of the community property, although he no longer has the absolute power of disposition of the real property of the community, was declared in Baca v. Village of Belen, 30 N.M. 541, 240 P. 803, and Beals v. Ares, 25 N.M. 459, 185 P. 780. We know of no legal restraint upon the power of the husband as such agent of the community to acquire in his own name real property for the community benefit, which property may be at the time of the purchase known to be incumbered with a lien. It would likely not be asserted that the real property so acquired would be discharged of the lien merely because of the acquisition by the wife of an interest therein by operation of law. As was said in Thygesen v. Neufelder, 9 Wash. 455, 37 P. 672, cited in McKay on Community Property, 2d Ed. Paragraph 688: "* * * The interest of the wife in the community property is contingent upon the state of the affairs of the community as conducted by the husband."

"It is not doubted that the husband may purchase real property for the community on credit. In El Paso Cattle Loan Co. v. Stephens & Gardner, 30 N.M. 154, 228 P. 1076, we said that community property is subject to community debts created by the husband alone, and in Brown v. Lockhart, 12 N.M. [10], 16, 71 P. 1086, that it is a presumption of law that any debt created during coverture is a community debt. The purchase price for community property acquired by the husband for the benefit of the community is a community debt, and as was said in Nutter v. Fouch, 86 Ind. 451, treating of a vendor's lien: 'It is unpaid purchase money that creates and sustains the lien.' Davidson v. Click, supra, 31 N.M. 543, 249 P. at page 105, 47 A.L.R. at page 1024.

Applying the principle of the foregoing cases, the agreement is not void, under Sec. 31-913, I.C.A., supra, because executed by the husband alone. A decree of specific performance can operate effectively against both parties here and give to each the benefit of a mutual obligation, thereby satisfying the rule of mutuality of obligation and remedy. 49 Am. Jur. 49.

This case is one of first impression in this state on the proposition here involved and our ruling is controlled by the particular facts thereof. We are dealing with whether the transaction falls within the ban of Sec. 31-913, I.C.A., supra, and decide that it does not. Hancock v. Elkington, supra; Intermountain Realty Co. v. Allen, supra, and authorities cited in those decisions, are not on point here since in those cases the purported lease or conveyance was made by the husband after acquisition of the property by the community.
Chapter 5: Management of Community Property

The decree of the trial court is reversed and the cause remanded with instructions to make and enter findings of fact, conclusions of law and a decree in accordance with this opinion. The decree shall grant specific performance of the contract in accordance with its terms, disregarding the following provision, to wit:

"Said lease as to form, taxes, and assessments, restoration in event of fire and other casualty, and other terms and conditions shall be subject to the approval of both parties hereto".

Costs to appellant.

GIVENS, C.J., HOLDEN, J., and BAKER, District Judge, concur.

MILLER, J., sat but did not participate in the decision.


OPINION: McInturff, J.

Mr. Klaas obtained a judgment against Roy Haueter individually, but not against the community, for a real estate commission under an exclusive listing agreement. Mr. Klaas appeals claiming a basis for community liability exists. We disagree and affirm.

Because Roy and Billee Haueter's apartment building was operating at a loss, they decided to sell it. Mrs. Haueter had given Mr. Haueter her power of attorney. She stated the purpose of giving him the power of attorney was "strictly for convenience sake, because with our six children it wasn't always practical for me to come down to the office, or wherever he was, to sign papers." She said they had an understanding that Roy Haueter would not sign her name unless they had discussed it prior to the signing. Mrs. Haueter testified that by giving Mr. Haueter her power of attorney, she did not intend to be bound by contracts to which Mr. Haueter did not sign her name.

On August 16, 1982, Mr. Haueter signed their names to an exclusive listing agreement with Roger Kreimeyer, a real estate broker, authorizing a 6 percent realtor's commission. Roger Kreimeyer released Mr. and Mrs. Haueter from the exclusive listing contract. Mrs. Haueter testified she was aware of the terms of this contract and had authorized its execution.

On October 3, 1982, Mr. Haueter executed an exclusive listing contract with Larry Klaas. The contract was to expire on March 31, 1983, and contained an exclusion in favor of Dennis Weybright, Tomlinson Agency, which was to expire on midnight, November 5, 1982.45 Mrs. Haueter did not sign this exclusive listing contract, nor did Mr. Haueter sign her name under the power of attorney. At trial, Mrs. Haueter stated she had no knowledge of the listing agreement with Mr. Klaas until they were sued. She stated the listing agreement was something she would expect Mr. Haueter to discuss with her if he had signed her name to it.

45No listing agreement was ever entered into between the Haueters and Mr. Weybright.
The Haueters sold the apartment house through Mr. Weybright and Steve Gill on November 29, 1982, for $252,706. Under this agreement, Mr. Weybright received a 6 percent commission on the sale. The court concluded the sale through Mr. Weybright breached the exclusive listing agreement with Mr. Klaas and that Mr. Klaas had damages of $16,946.

The court entered a judgment against Mr. Haueter individually for the commission, interest and attorney fees. No judgment was entered against the community because the court found Mrs. Haueter did not expressly or impliedly authorize the listing with Mr. Klaas and did not ratify the contract.

The only issue is whether the court erred in holding that the exclusive listing contract for community real property signed only by Mr. Haueter is not binding on the marital community.

Generally, the signatures of both spouses are required to transfer community real property. The joinder requirement extends to an agreement to list community real property for sale with a broker. Whiting v. Johnson, 64 Wn.2d 135, 141, 390 P.2d 985 (1964).

If one spouse enters into a contract to sell, lease, or list for sale community realty without the other spouse joining, and the nonjoining spouse either (1) authorizes such or consents thereto, or (2) subsequently sanctions or ratifies the signing spouse's act, neither the nonsigning spouse nor the community may thereafter disaffirm it. Whiting, at 141.

Under RCW 26.16.030(4), which requires joinder by both spouses to purchase community real property, it has been held the requirement is met when there are sufficient facts from which an estoppel may be found. Colorado Nat'l Bank v. Merlino, 35 Wn. App. 610, 616, 668 P.2d 1304, review denied, 100 Wn.2d 1032 (1983). "A community is estopped to deny liability due to the failure of one spouse to join a transaction when one spouse permits the other to conduct the transaction, both have a general knowledge of the transaction, and both are ready to accept the benefits which may come from it." Colorado Nat'l Bank, at 616. Therefore, estoppel is a third exception to the requirement that both spouses sign the listing agreement.

Mr. Klaas first contends the requirement of joinder should not apply where both parties desire that the property be sold, because the purpose of the rule, to prevent a unilateral disposition of community property, is not served under these circumstances. Colorado Nat'l Bank, at 616. However, that case stated "Washington courts have held that RCW 26.16.030(4) [dealing with the joinder requirement to purchase community real property] should be construed strictly to shield the marital community from liability for the acts of one spouse acting alone." Colorado Nat'l Bank, at 619. We find this argument unpersuasive. Because community liability for the unilateral act of one spouse under the listing agreement would be the result of an exception to the joinder rule in this case, strict construction of the joinder rule furthers its purpose.

46RCW 26.16.030(3) provides:

"Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses."
Second, Mr. Klaas argues that the exceptions of authorization, ratification or estoppel meet the requirement of joinder in this case despite the fact that Mrs. Haueter did not sign the listing agreement, nor did Mr. Haueter sign her name under the general power of attorney he possessed.

The trial court made the following findings of fact relevant to whether application of the authorization, ratification or estoppel theories constitutes joinder in this case:

XX. Billee Haueter wanted to sell the apartment house as early as August 16, 1982, and did not change her mind in that regard up to and including the date the apartment house was sold on November 29, 1982.

XXI. At all times material hereto, Roy Haueter had authorization from Billee Haueter to sign documents for Billee Haueter as attorney-in-fact concerning all real estate matters, including the apartment house which is the subject of this lawsuit. Sometimes Roy Haueter signed Billee Haueter's name with the attorney-in-fact notation, and sometimes he signed her name without that notation. Billee Haueter had no objection to this.

XXII. Billee Haueter was not aware of the specific Exclusive Listing Contract signed by plaintiff and Roy Haueter on October 3, 1982 (plaintiff's Exhibit 1). Roy Haueter did not sign Billee Haueter's name to Plaintiff's Exhibit #1 either with or without the attorney-in-fact designation.

XXIII. Billee Haueter did not expressly or by implication authorize or consent to listing the apartment house in question for sale through plaintiff prior to October 3, 1982, when Roy Haueter signed the Exclusive Listing Contract with plaintiff (plaintiff's Exhibit 1).

XXIV. Billee Haueter did not, by her acts and conduct, subsequent to October 3, 1982, sanction or ratify the Exclusive Listing Contract signed by plaintiff and Roy Haueter (plaintiff's Exhibit 1).

A. Did Mrs. Haueter authorize Mr. Haueter to list the property with Mr. Klaas?

Authorization occurs when one spouse, prior to initiation of a transaction, indicates a willingness to allow the other to enter into a transaction. Nichols Hills Bank v. McCool, 104 Wn.2d 78, 83, 701 P.2d 1114 (1985). Authorization to purchase community real property may be found from conduct disclosing knowledge and approval of the transaction, the subject property and the financial impact on the community. Daily v. Warren, 16 Wn. App. 726, 731, 558 P.2d 1374, review denied, 88 Wn.2d 1017 (1977). In Daily, at 731, the nonsigning spouse, Mrs. Warren, was found to have joined in the purchase of a tavern when:

(1) Mrs. Warren knew her husband was interested in purchasing the tavern; (2) she inspected the tavern with an eye to exercising her right to approve or disapprove, as she had done in the past; (3) she expressed approval to Mr. Warren after she had
seen the tavern; (4) she permitted Mr. Warren to proceed without her in further negotiations for its purchase; (5) she knew of and approved the use of community funds for the original money deposit; (6) she knew Mr. Warren had actually signed a new agreement to purchase for $200,000 or more and believed he had put an additional $30,000 of community funds into a partial down payment and had agreed to pay a substantial additional sum in January; (7) she knew she had been listed as a "partner" on liquor license applications; (8) she knew of the arrangement under which the two men started working at the tavern, and (9) she acknowledged the purchase would have been consummated had Jessiman not become ill.

Finding of fact 22 states Mrs. Haueter did not know of the listing agreement; finding of fact 23 states Mrs. Haueter did not authorize the listing of the property with Mr. Klaas. These findings are supported by substantial evidence in the form of Mr. and Mrs. Haueter's testimony at trial, thus they will not be disturbed on appeal. Group Health Coop. of Puget Sound, Inc. v. Department of Rev., 106 Wn.2d 391, 397, 722 P.2d 787 (1986); Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959).\(^{47}\) Mr. Haueter stated he never discussed the Klaas listing agreement with Mrs. Haueter. Mrs. Haueter also denies Mr. Haueter ever discussed it with her and asserts she had no knowledge of the listing agreement until she was sued. Substantial evidence supports the trial court's finding that Mrs. Haueter did not expressly authorize the Klaas listing agreement.

Here, Mr. Klaas argues for a broader interpretation of authorization. He argues Mrs. Haueter's authorization to Mr. Haueter to sell the community real property gave Mr. Haueter authority, under agency principles, to list the property with Mr. Klaas. He asserts the principles of agency apply to husband and wife, and that an agent given authority to sell real property also has the authority to employ a real estate broker. Makousky, Inc. v. Stern, 285 Minn. 202, 172 N.W.2d 317 (1969). Washington courts have relied on agency law in developing the concept of ratification in community property law and found the analogy appropriate. Nichols Hills Bank, at 84.

The Haueters counter that our Supreme Court has rejected the theory that general authorization is sufficient to create a community obligation. Nichols Hills Bank v. McCool, supra, held a wife did not consent to her husband's signing of a guaranty when she knew about the

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\(^{47}\)The only evidence in the record to the contrary is a statement by Mr. Haueter when he was testifying on his belief that Mr. Klaas wanted to purchase the apartment building and his confusion over whether the offer of Mr. Klaas was an offer to purchase. The portion of the record referred to reads:

"Q When you received this offer on October 7, 1982, was there any question in your mind that Mr. Klaas wanted to purchase the apartment building?"

"A [Mr. Haueter] I was positive he was buying our apartment building."

"Q What was the next step in accomplishing the sale of the apartment building to Mr. Klaas?"

"A [Mr. Haueter] After this, after he had presented me with this offer I discussed it with my wife. I discussed it [with] Roger Kreimeyer, and Roger Kreimeyer was concerned that this offer was not on a regular type of sale agreement."
guaranty but expressed her objection to the agreement. The court further stated delegation of authority to manage community property does not cloak the managing spouse with authority to enter into a transaction that specifically requires the involvement of both parties; that authority to manage community assets did not give the husband authority to enter into a guaranty agreement. *Nichols Hills Bank*, at 82-83.

Here, Mrs. Haueter gave her husband a general power of attorney to eliminate the necessity of her physical presence to sign documents, but, she stated Mr. Haueter was not to sign her name unless he discussed it with her prior to signing. Although Mr. Haueter did discuss the Kreimeyer exclusive listing agreement with Mrs. Haueter before he signed Mrs. Haueter's name, he did not discuss the Klaas exclusive listing agreement with Mrs. Haueter and he did not sign her name to it.

Mr. Klaas would have the court extend Mrs. Haueter's specific authorization to Mr. Haueter to sign her name to the Kreimeyer listing to cover authorization to bind the community to the Klaas listing. *Nichols Hills Bank* v. *McCool*, *supra*, precludes such a broad interpretation of authorization constituting joinder under RCW 26.16.030(4) especially in view of the policy from *Colorado Nat'l Bank* v. *Merlino*, *supra*, to construe the joinder requirement strictly to protect the marital community.

B. Did Mrs. Haueter ratify the Klaas listing agreement?

A spouse who does not initially consent to a transaction is prohibited from disaffirming it if the spouse subsequently ratifies the transaction. *Nichols Hills Bank*, at 84. Ratification is affirmance by a person of a prior act which did not bind him but which was done on his account. *Nichols Hills Bank*, at 85. Knowing that the other spouse entered a guaranty agreement yet failing to repudiate it is not sufficient affirmance to constitute ratification. *Nichols Hills Bank*, at 85.

Mr. Klaas argues that Mrs. Haueter ratified the Klaas listing agreement when she agreed to sell the community real property, authorized signature on the Kreimeyer listing agreement and agreed to the Weybright broker commission in the purchase and sale agreement which was also provided for in the Klaas listing agreement.

The Haueters argue that Mrs. Haueter did not know of the Klaas listing agreement or her husband's unauthorized signing of the agreement, and had no contact with Mr. Klaas which would amount to affirmance of Mr. Haueter's unauthorized act. The Haueters argue *Smith v. Stout*, 40 Wn. App. 646, 700 P.2d 343, *review denied*, 104 Wn.2d 1009 (1985) controls on this issue.

In *Smith v. Stout*, *supra* at 650, the court said:

While such a defense is judicially recognized [estoppel based on ratification or acquiescence], it requires participation by the nonsigning spouse in the transaction or evidence of a willingness on the part of the spouse to accept the transaction with all its terms, thus leading the purchasers to believe the nonsigning spouse approves the transaction.
Where the nonsigning spouse did not know of or join in the purchase agreement, merely knowing it was necessary to sell the land was not sufficient evidence that the nonsigning spouse was ready to accept the benefits of an agreement entered into by the other spouse. *Smith v. Stout, supra* at 650. The court noted this was particularly true when the nonsigning spouse had already signed another agreement to sell to different purchasers.

Here the fact that Mrs. Haueter did not know of the Klaas listing agreement indicates she did not affirm it. Also, signing the purchase and sale agreement giving Mr. Weybright a broker's commission would not indicate Mrs. Haueter was willing to accept the benefits of the Klaas listing agreement. The Klaas listing agreement was not referenced in the purchase and sales agreement and since Mr. Klaas did not procure the sellers, there was nothing in the agreement or sales transaction to inform Mrs. Haueter that there was a Klaas listing agreement.

We hold Mrs. Haueter did not ratify the Klaas listing agreement.

C. Is Mrs. Haueter estopped to deny the Klaas listing agreement?

The legal test for estoppel is that estoppel may be successfully argued against a nonsigning spouse if the nonsigner, by his or her acts, leads the purchasers into a false position, to their detriment. *Nichols Hills Bank*, at 85; *Campbell v. Webber*, 29 Wn.2d 516, 522, 188 P.2d 130 (1947). In *Campbell*, at 524, one spouse had not signed the earnest money agreement but had attended the sale negotiations and indicated willingness to abide by the other spouse's decision to sell.

Here, Mrs. Haueter had no contact with or knowledge of Mr. Klaas during the listing or the sale of the property by another realtor. Therefore, her acts cannot be the basis of estoppel. No exception to the joinder requirement has been proven, hence there is no community liability on the Klaas listing agreement.

D. The Haueters' request for attorney fees.

Under RAP 18.1, the Haueters request attorney fees of $3,640 and costs on appeal. Mr. Klaas argues the Haueters have cited no authority for such an award and were not the prevailing party at the trial court level. Mr. Klaas asserts that an argument unsupported by cited authority and relevant parts of the record should not be considered on appeal. He cites RAP 10.3(a)(5) and *State v. Van Auken*, 77 Wn.2d 136, 142, 460 P.2d 277 (1969) as his authority.

RAP 18.1(a) provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party should request the fees or expenses as provided in this rule." Absent a contractual provision, statutory provision or well recognized principle of equity to the contrary, a court has no authority to award attorney fees to the prevailing party. *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941); *Herzog Aluminum, Inc. v. General Am. Window Corp.*., 39 Wn. App. 188, 191, 692 P.2d 867 (1984).

The Klaas exclusive listing contract provided that Mr. Haueter would pay Mr. Klaas reasonable attorney fees and all costs of collection in the event Mr. Klaas employed an attorney to
enforce the contract. Mr. Klaas received a judgment against Roy Haueter for $8,604.58 for Mr. Klaas' attorney fees and collection costs.

In *Meenach v. Triple "E" Meats, Inc.*, 39 Wn. App. 635, 640, 694 P.2d 1125, *review denied*, 103 Wn.2d 1031 (1985), the court applied RCW 4.84.330. In *Meenach*, at 640, defined a prevailing party as one who receives a favorable final judgment. Where there is an action based on a contract, RCW 4.84.330 provides that the prevailing party shall be entitled to attorney fees whether he is the party specified in the contract or not. *Meenach*, at 640. The fact that the respondents argued at trial that there was no contract and consequently no breach did not prevent their recovery of attorney fees on appeal. *Meenach*, at 640-41. The court held the statute does not distinguish between those who sue and those who are sued on the contract. *Meenach*, at 641.

Mr. Klaas argues the Haueters are not prevailing parties because at trial Mr. Haueter was found separately liable and his separate liability is not contested in this appeal. However, the community of Mr. and Mrs. Haueter prevailed at trial and has prevailed on this appeal. Were we to hold otherwise, Mr. Klaas would be entitled to attorney fees on appeal. We hold the community of Mr. and Mrs. Haueter is entitled to an award of $3,640 attorney fees on appeal, which we find reasonable.

The trial court's judgment that the Klaas listing agreement is not binding against the community is affirmed.

B. Exceptions to the Dual Consent Requirement

**Calvin v. Salmon River Sheep Ranch, 104 Idaho 301, 658 P.2d 972 (1983)**

HUNTLEY, Justice.

This is an appeal from an order granting a directed verdict for the defendants in an action on a timber purchase agreement. The basic issue before this Court is whether the trial court properly ruled that the plaintiff-appellant Calvin failed to introduce substantial competent evidence of such quantity and probative value that a reasonable jury could have found in his favor. The facts relevant to our inquiry in this case are as follows:

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48RCW 4.84.330 provides:

"In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

"Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

"As used in this section 'prevailing party' means the party in whose favor final judgment is rendered."
The property known as the Salmon River Sheep Ranch near Riggins, Idaho, was acquired by brothers Fawn and Jim Rupp pursuant to a contract dated December 28, 1976. Although both men were married at the time of purchase, only their names -- and not the names of their wives -- were listed as purchasers on the contract.

Fawn Rupp testified at trial that during 1978 the Salmon River Sheep Ranch was operated as a partnership composed of Fawn and Rosa Rupp, husband and wife, and Jim and Ilene Rupp, husband and wife. In the spring of 1978, plaintiff-appellant, George Calvin, contacted Fawn Rupp regarding the possibility of purchasing timber located on the ranch. Several meetings were subsequently held between Calvin and the Rupps. It is undisputed that although Ilene and Rosa Rupp were in attendance at some of these meetings, they did not take part in the negotiations.

The meetings between the parties culminated in a timber purchase agreement dated July 15, 1978. The agreement stated it was between "Salmon River Sheep Ranch,... 'seller' and George R. Calvin... 'buyer," and was signed by Calvin and Fawn Rupp. The agreement provided that the seller agreed "to sell all merchantable timber" on the land described and that the buyer agreed "to try to move" 750,000 board feet of timber during the two-year term of the contract. The agreement further provided that the purchase price of the timber was to be $60 per thousand board feet, to be paid on mill scale.

In June of 1978 Calvin went onto the land and commenced his logging operations pursuant to an alleged oral agreement. He hired a crew, obtained easements, built and renovated logging roads and began logging. On June 19, 1978, Calvin entered into an agreement with J.B. Lumber Company to deliver logs cut on the ranch to its mill in Clarkston, Washington.

Calvin, or others at his direction, carried on the logging operations between June of 1978 and March 10, 1979, cutting and delivering approximately 800,000 board feet of logs. The logs were delivered to J. B. Lumber until February of 1979, at which time J. B. Lumber terminated its log delivery agreement with Calvin. Thereafter, the logs were delivered to Wickes Forest Industries in Grangeville, Idaho. Salmon River Sheep Ranch was paid for all logs cut and delivered according to the rate established in the agreement of July 15, 1978.

On March 10, 1979, Calvin was personally informed by Fawn and Jim Rupp that his agreement with the Salmon River Sheep Ranch was void and that therefore it was terminated. On the same day Calvin received a letter from the Rupps' attorney informing him that the agreement had involved the sale of community property and that since the agreement had not been signed and acknowledged by the wives of Fawn and Jim Rupp, it was void. The letter continued on to state: "You should not undertake to cut any more trees for if you do we will sue to recover treble damages for timber removed from and after the date of your receipt of this letter."

Calvin testified that as of March 10, 1979, he had cut down on the defendants' property 127,040 board feet of pine and 197,820 board feet of fir. He further testified that he discontinued his operations as of that date and the cut timber was left on the ranch property.

On May 3, 1979, Calvin filed his complaint in this case, naming Salmon River Sheep
Ranch, the Rupps (individually and as partners of the Salmon River Sheep Ranch) and J. B. Lumber as defendants. Calvin sought specific performance of the July 15, 1978, agreement and damages, or, in the alternative, damages alone. He set forth several causes of action, including: breach of a valid contract by the partnership, estoppel against the Rupps to deny the validity of the partnership or the contract (contract by estoppel), conspiracy by the Rupps and J. B. Lumber, misrepresentation and fraud on the part of the Rupps, and unwarranted interference with the contract by J. B. Lumber. After the defendants' motion to dismiss the complaint was denied by the trial court, their answer was filed and the case was set for trial.

A jury trial was commenced and at the conclusion of the plaintiff's case, the defendants moved for a directed verdict. As stated in the judgment, the trial court considered the motion as alleging

"[T]hat said contract had not been signed or separately acknowledged by either of said wives, Rosa Rupp or Ilene V. Rupp; that the plaintiff had failed to prove that either wife had at any time engaged in any conversation with the plaintiff concerning the timber or the contract therefor, nor had they in any way misrepresented or misled the plaintiff concerning the timber or its ownership, and that the plaintiff had failed to prove that said wives had benefitted from said purported timber sale contract other than to the extent of deposits of money in payment therefore in an account of the partnership which defendants contended was of no benefit to defendants inasmuch as the timber was worth the price paid, that there was no showing of any act on the part of either wife which would in any way estop them from asserting invalidity of the contract in question."

The trial court found the defendants' allegations to be true and also found that since there was "no evidence of a valid contract," there was "no evidence of a conspiracy to interfere with such contract." Thus, the trial court concluded that *Fairchild v. Wiggins*, 85 Idaho 402, 380 P.2d 6 (1963), was controlling, and directed a verdict in favor of the defendants. The present appeal was perfected from the order granting the directed verdict.

The rules applicable to review of an order granting a directed verdict are well-established:

49In *Fairchild v. Wiggins*, 85 Idaho 402, 380 P.2d 6 (1963), the Court held that the wife of a seller of timber was not estopped from claiming the protection of I.C. §32-912. Fairchild is discussed more fully in the text, infra.

50The fact that the trial court included findings of fact in the judgment entered in this case does not modify our standard of review. If a motion for a directed verdict is granted and such findings are made, they are merely superfluous and the task of this Court remains the same. *Gmeiner v. Yacte*, 100 Idaho 1, 5, 592 P.2d 57, 61 (1979).
"A directed verdict should only be granted when the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion.... On a motion for a directed verdict pursuant to I.R.C.P. 50(a), the moving party admits the truth of the adverse evidence and every inference that may be legitimately drawn from it.... Where there is substantial competent evidence tending to establish plaintiff's case, or where reasonable minds may differ as to the conclusion to be reached from the evidence, the cause should be submitted to the jury." *Shields & Co. v. Green*, 100 Idaho 879, 882, 606 P.2d 983, 986 (1980) (citations omitted).

After reviewing the record in this case, we agree with the trial court that the record does not contain substantial competent evidence from which a jury could have found the existence of a conspiracy between the Rupps and J. B. Lumber. Similarly, no such evidence was produced from which a jury could have found that J. B. Lumber was guilty of unlawful interference with contract. Therefore, we hold that the trial court did not err in directing a verdict in favor of J. B. Lumber.

However, we cannot say the same thing as to the Rupps and the Salmon River Sheep Ranch. We find substantial competent evidence in the record which, when taken as true and when every legitimate inference is drawn in favor of Calvin, tends to establish Calvin's case at least with respect to some of his causes of action. Consequently, we hold that the trial court erred in directing a verdict in favor of the Rupps and the Salmon River Sheep Ranch.

The primary issue on appeal is whether Rosa and Ilene Rupp are estopped from claiming the protection provided by I.C. §32-912,51 which provides in part:

"Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered...."

The trial court concluded and the respondents contend that the question of estoppel in this case is controlled by this Court's decision in *Fairchild v. Wiggins*, 85 Idaho 402, 380 P.2d 6 (1963). We cannot agree.

In *Fairchild*, the wife of the seller was present during a portion of the conversations that occurred on one day and led to an agreement to sell timber the next day. Although the opinion does not disclose the amount of time which elapsed from the execution of the bill of sale until the Wiggins denied the validity of the contract, it does disclose that Fairchild was never allowed to go on the land and begin cutting timber. The Court found that there had been "no proof of any affirmative action on the part of the wife, no proof of false representation or concealment of

51It is clear that this statute is subject to the rules of equitable estoppel. *See Grice v. Woodworth*, 10 Idaho 459, 466, 80 P. 912 (1904) (statutes for protection of married women "are in the nature of rules of evidence, and are subject to the same legal principles as are conveyances falling under the statute of frauds, and the rules of equitable estoppel and waiver.").
material fact, and no proof of any material improvement on the real property." 85 Idaho at 406, 380 P.2d at 8. In addition, the Court noted, "Nowhere does it appear that Mrs. Wiggins made any affirmative representations concerning her acquiescence in the sale of the timber." Id. Thus, the Court in Fairchild held that the wife was not estopped from claiming the protection of I.C. §32-912.

In this case, clearly the conduct of the buyer in reliance upon the agreement is distinguishable from that in Fairchild, as is the conduct of the wives. The record demonstrates that the negotiations leading up to the agreement were carried on over a period of weeks and that one or both of the wives were present on several occasions. Respondents candidly admit "that Rosa and Ilene Rupp knew that their husbands were negotiating with the plaintiff." They also admit "that [the wives] knew the plaintiff was logging their property and that payments were being received for their timber." The payments to the respondents began in September of 1978 and continued through March of 1979. In addition, the record demonstrates that Calvin built and renovated logging roads on the property, cleared skid trails, purchased equipment to carry on his operations, and cut and hauled timber pursuant to the agreement over the course of nine months.

The respondents argue that in order to establish an estoppel against them, Calvin had to prove that Ilene and Rosa Rupp falsely represented or concealed a material fact. They argue that because Ilene and Rosa Rupp did not take part in the negotiations leading up to the agreement (although they were present), there is no evidence from which a reasonable jury could conclude that they were guilty of any misrepresentation or concealment. Thus, the respondents contend that the trial court did not err in directing a verdict in their favor. The argument made by the respondents is precisely that made by the dissent and rejected by the majority in Grice v. Woodworth, 10 Idaho 459, 80 P. 912 (1904). In Grice, the wife of the seller had apparently made no representations to the buyer of the property. However, the Court held that she was estopped to invoke the statutory protections because she knew of the sale and improvements on the property, yet made no objection. Upon rehearing, the majority addressed the argument of the dissent more specifically and reasoned: "Equity does not permit her to remain silent as to her claims and by her conversation encourage appellants to continue their payments and improvements on the property," and then to deny the validity of the contract. 10 Idaho at 472, 80 P. at 916. Thus, the Court in Grice recognized that conduct from which acquiescence can be inferred may be sufficient to establish an estoppel.

More recently in Brown v. Burnside, 94 Idaho 363, 366, 487 P.2d 957, 960 (1971), this Court held that the trial court properly found a wife estopped to invoke the protections of I.C. §32-912 because the evidence disclosed the wife was either "actually aware of the contract" to convey the property in question or "actually participated [in] and benefited from the contract during its duration." The Court reasoned: "[I.C. §32-912] exists for the protection of the wife's interest in the community and cannot be invoked to defeat a worthy claim against it where the wife has been

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52Calvin borrowed money in September of 1978 from J. B. Lumber for a down payment on equipment for use in his logging operations, giving an assignment of monies receivable for the logs he was to deliver. That equipment was repossessed after Calvin was forced to terminate his logging operation.

53I.C. §32-912 was amended in 1974 to provide protection for both spouses for their interest in the community property. 1974 Idaho Sess. Laws ch. 194, §2, p. 1502.
a party to the contract and has received benefits therefrom." *Id.* See Finalyson v. Waller, 64 Idaho 618, 626, 134 P.2d 1069, 1072 (1943).

Our decisions demonstrate that the wives' failure to participate in the negotiations is not determinative of the issue of estoppel. Viewing the facts most favorably to Calvin, as we must, we find sufficient evidence from which a reasonable jury could conclude that Ilene and Rosa Rupp are estopped to invoke the protections of I.C. §32-912. Thus, the trial court erred in directing a verdict in favor of the Rupps on the issue of estoppel.

Calvin argues that he is entitled to recover regardless of whether there is sufficient evidence to establish an estoppel since the property in question was partnership property as opposed to community real property. We cannot agree. The property in question was acquired in the names of Fawn and Jim Rupp at a time when both were married. Thus, the property was presumptively community property and the burden of proving otherwise was upon Calvin. *See Cook v. Cook*, 102 Idaho 651, 654, 637 P.2d 799, 802 (1981). The record is devoid of any evidence that the property was "acquired by purchase or otherwise on account of the partnership." *See I.C. §50-308* (defining "partnership property"). Similarly, there is no evidence of a valid conveyance of the property to the partnership after its original acquisition. Thus, we hold that the property in question was community property at all times relevant to this appeal. As a result, unless Calvin can establish an estoppel, Ilene and Rosa Rupp are entitled to invoke the protections of I.C. @ 32-912. This does not mean, however, that Calvin's claims against the Salmon River Sheep Ranch (as a partnership) and Fawn Rupp as an individual fail.

The agreement in this case provided:

"Seller warrants that he has good title to the above described timber and represents that he has good right to sell and dispose of such timber; and does hereby agree to warrant and defend such title and right against all persons claiming adversely to him."

Calvin's complaint expressly states a cause of action against the Salmon River Sheep Ranch for breach of contract. The fact that the property in question is community property and not partnership property in no way defeats this claim. There is evidence in the record from which a reasonable jury could conclude that the partnership was bound by the agreement although only Fawn Rupp signed it. *See I.C. §53-309*. Thus, upon remand Calvin is entitled to pursue his claim for damages (as distinguished from specific performance) against the partnership. Similarly, he is entitled to pursue his damage claim against Fawn Rupp as an individual, since there is sufficient evidence that he has good title to the timber.

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54I.C. §53-309 provides in part:

"1. Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."
evidence in the record to support the allegations in the complaint that Fawn Rupp was guilty of misrepresentation or breach of warranty.

The respondents contend that Calvin is not entitled to be reimbursed for the services he performed in cutting the timber that was left on the property. They argue:

"Though the plaintiff contends that he was prevented from removing the down timber, the record shows that he was only prevented from cutting further timber, not removing the timber already cut. Accordingly, even if the Rupps were benefited in some way by the efforts involving cutting the timber, they received that benefit because the plaintiff abandoned the timber."

We cannot agree. Although Calvin's testimony suggests that when Fawn and Jim Rupp told him the contract was void the parties contemplated that Calvin could remove the timber already cut, the letter received later that day by Calvin from the Rupps' attorney suggests otherwise. Thus, it is for the jury to determine whether Calvin is entitled to damages for his expenses in cutting the timber left on the property or whether he abandoned the timber as alleged by the Rupps.

J. B. Lumber argues that it is entitled to attorney's fees on appeal. Although Calvin appealed from the directed verdict in favor of J. B. Lumber, on appeal he has not presented any argument to support his original claim that J. B. Lumber was guilty of interfering with the contract or of participation in a conspiracy. Accordingly, we hold that the appeal against J. B. Lumber was unreasonably pursued and that it is entitled to its reasonable attorney's fees. I.R.C.P. 54(e)(1).

The judgment is affirmed as to respondents J. B. Lumber and reversed as to respondents Salmon River Sheep Ranch and the Rupps. The case is remanded for a new trial against the Salmon River Sheep Ranch and the Rupps, individually and as partners of the Salmon River Sheep Ranch.

Costs to the appellant.

DONALDSON, C.J., BAKES, J., and SCOGGIN, J. Pro Tem., concur. SHEPARD, J., concurs in the result.

BAKES, Chief Justice, concurring:

I agree with the majority in reversing the directed verdict granted to the defendants. However, I do feel that, since this case is being returned to the lower court for jury trial, it should be pointed out that, under the facts of this case, plaintiff might prevail on his specific performance claims through application of the doctrine of part performance.

The doctrine of part performance is an equitable doctrine which, though not applicable in an action for damages, would apply in an action for specific performance. Allen v. Moyle, 84 Idaho 18, 367 P.2d 579 (1961). Idaho courts have long held that where certain factors amounting to part performance are present, an oral assent to convey real property may be enforced absent compliance with the statute of frauds. Accordingly, if the appellant can prove at trial that the Rupp spouses
did assent to sell the timber, and also show part performance through factors such as possession of the real property (timber, in this case), the making of substantial improvements, and partial payment, then he would be entitled to specific performance of the contract involved. See McMahon v. Auger, 83 Idaho 27, 357 P.2d 374 (1960); Boesiger v. Freer, 85 Idaho 551, 381 P.2d 802 (1963); Wood v. Hill, 70 Idaho 93, 212 P.2d 391 (1949).

C. Gifts


COULSON, J

This is an appeal from a final decree of divorce. The principal issue is whether the court's property division is just and right.

Dorothy Gray Horlock, appellant, thirty-five years of age, and Roy M. Horlock, appellee, forty-one years of age, were married on November 22, 1966. Dorothy Gray Horlock had not been previously married. Roy M. Horlock was married to Margaret Boudreaux Horlock until her death on August 1, 1965. She bequeathed her entire estate to Roy M. Horlock. Three daughters were born to Margaret Boudreaux Horlock and Roy M. Horlock. One child, a son, was born to Dorothy Gray Horlock and Roy M. Horlock.

The parties separated on or about July 1, 1973. . . .

. . . .

Appellant's points of error concern four major issues. First, the appellant contends that certain gifts made during their marriage by Roy M. Horlock to his three daughters constituted fraud on the appellant's community estate. . . .

THE GIFTS TO THE CHILDREN

During the marriage, the appellee made gifts to his mother, who was blind and confined to a nursing home. He also made gifts to his three daughters and to his son. On appeal, the appellant has challenged only the gifts to the three daughters as being a fraud on her rights. The gifts ranged in value from $3,000 to $6,000 per year plus an amount equal to the lifetime federal gift tax exclusion for both the appellee and the appellant. The total value of the gifts to the three daughters was $131,517.

Appellant's contention that community property was used in making the gifts is not challenged by appellee. He did not tell the appellant that he was making the gifts to his three daughters, and admitted that the appellant would have strenuously protested had she known of the gifts. In 1972, appellee filed a gift tax return on which the appellant's name appeared. A third party signed the appellant's name to the return at the request of the appellee, who acted without the knowledge and consent of the appellant. The appellee and his accountant testified that the resulting
income tax advantage generated by the gifts to his children was the motivation for the gifts. The appellee testified that in making the gifts he intended no deprivation of the appellant's rights. The trial court found that the appellee had not perpetrated an actual or constructive fraud upon the appellant by making the gifts to his three daughters.

To sustain a cause of action for actual fraud, the appellant has the burden of showing that the gifts were made with the primary purpose of depriving her from having the use and enjoyment of the assets comprising the gifts. Actual fraud involves dishonesty of purpose or intent to deceive. Land v. Marshall, 426 S.W.2d 841, 846 (Tex.Sup. 1968); Archer v. Griffith, 390 S.W.2d 735, 740 (Tex.Sup. 1964). Here, the appellant has failed to sustain her burden of showing an actual fraud. The evidence in support of appellant's position is conflicting. The appellee admitted that he made the gifts knowing that the appellant would not approve of them, however, there is ample evidence that the appellee's intention in making the gifts was to benefit both the community estate and the parties' individual estates upon the death of each or both of them.

The trial court found that at the time of the marriage, appellee owned property having a net value of approximately $1,000,000. Most, if not all of the community estate, would be classified as the special community of the husband under Texas Family Code Annotated, § 5.22. There may be a fraud on a spouse's community interest where the special community property of the other spouse is involved. However, the fact that it is a spouse's special community is important in considering the rights of disposition which accrue to that spouse given the special nature of that community property. It is not necessary that one spouse approve or agree with the dispositions made by the other spouse of that other spouse's special community property. Murphy v. Metropolitan Life Insurance Company, 498 S.W.2d 278 (Tex.Civ.App. -- Houston [14th Dist.] 1973, writ ref'd n.r.e.). The single fact that the appellee intentionally prevented the appellant from finding out about the gifts which he made to his daughters does not constitute actual fraud.

In the instance of constructive fraud, a gift of one spouse's share of the community property will be set aside where the gift is unfair to that spouse. It was the appellee's burden to prove that the gifts were fair. Murphy v. Metropolitan Life Ins. Co., supra; Givens v. Girard Life Insurance Company of America, 480 S.W.2d 421 (Tex.Civ.App. -- Dallas 1972, writ ref'd n.r.e.).

In considering the wife's claim of a constructive fraud against her share of the community property the courts have considered three primary factors. Those factors are the size of the gift in relation to the total size of the community estate, the adequacy of the estate remaining to support the wife in spite of the gift, and the relationship of the donor to the donee. Givens v. Girard Life Insurance Company of America, supra; Hartman v. Crain, 398 S.W.2d 387 (Tex.Civ.App. -- Houston 1966, no writ).

Significant to the disposition of the issue of constructive fraud in this case are the findings of fact filed by the trial court. Among other things, the trial court found that Roy M. Horlock had three daughters by his prior marriage. At the time of the parties' separation the girls' ages were fourteen, seventeen and eighteen. The daughters inherited nothing from their deceased mother, whose will named Roy M. Horlock as her sole beneficiary of her substantial estate. The trial court further found that during their marriage, Dorothy Gray Horlock and Roy M. Horlock quarreled over Dorothy Gray Horlock's demands that Roy M. Horlock's daughters not share with her in his
properties. She also demanded an interest in the properties owned by Roy M. Horlock prior to the marriage.

Roy M. Horlock's daughters are the natural objects of his bounty. The total value of the gifts to the daughters was $131,517. The trial court found as a fact that the appellee at the time of the marriage owned properties having a net value of approximately $1,000,000, and that at the time of the dissolution of the marriage appellant and appellee owned properties having a net value of approximately $3,000,000 to $4,000,000. It is evident that throughout the marriage the value of the estate was in excess of $1,000,000. Assuming the lower value of $1,000,000, the appellee's gifts to his three daughters constituted no more than 13.1517% of the total estate. The remaining minimum figure of approximately $870,000 in community funds would be sufficient to provide for the needs of the wife. The foregoing facts and considerations coupled with the tax advantages sought by the appellee removes the gifts by the appellee to his daughters from the pale of a constructive fraud upon the wife's portion of the community estate.

The appellant's first four points of error are overruled.


McCLOSKEY, J.

Petitioner below Beth Stephenson (Beth) appeals and respondent Roy Stephenson (Roy) and claimant Ronald Stephenson (Ron) cross-appeal from the further judgment of dissolution of marriage.

Roy and Beth were married on August 23, 1948. On April 27, 1979, they separated. Thereafter, Beth filed a petition for the dissolution of their marriage and also filed complaints to quiet title to community property in name of joined parties.

Through these complaints Beth claimed the community had an interest in properties which Roy had purported to transfer to [certain named claimants]. Those claimants were the couple's children and the children's spouses. All claimants filed answers.

Acting pursuant to a stipulation of the parties, the trial court appointed Judge Parks Stillwell, retired, to act as referee over the remaining issues of the petition for dissolution. (Code Civ. Proc., §638.) After hearing, the referee issued his findings of facts and conclusions of law which findings the trial court adopted in rendering its "Further Judgment Upon Reserved Issues After Judgment of Dissolution of Marriage Following Findings of Facts and Conclusions of Law of Referee." From this judgment Beth appeals and Roy and Ron each cross-appeal.

II.
Beth next contends that "the absence of written consent by appellant entitled her to set aside the 'gifts' to Respondent-Claimants." The referee found, and Roy does not dispute, that community property funds were utilized in opening the 16 savings accounts.

Since 1978, section 5125, subdivision (b) has provided: "A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse."  

A gift made by one spouse in violation of this section is voidable by the other spouse in its entirety during the donor spouse's lifetime if the community has not yet been dissolved but if action is taken after the donor spouse's death or after the community has been dissolved, it is voidable only to the extent of one-half. (Bank of California v. Connolly (1973) 36 Cal.App.3d 350, 377 [111 Cal.Rptr. 468]; Harris v. Harris (1962) 57 Cal.2d 367, 369 [19 Cal.Rptr. 793, 369 P.2d 481].)

We deal first with those UGMA accounts opened by Roy. The record is devoid of evidence that Beth gave her written consent to the opening of those accounts with community property funds.

The referee concluded, however, that Beth "will not now be heard to allege that the UGMA Accounts were opened without her written consent and said gifts made with the consent and approval of both Petitioner and Respondent, are irrevocable and, when made, conveyed to the minor children indefeasibly vested legal title."

In urging the correctness of this conclusion, Roy relies on the provisions of section 1157, subdivision (b) which states that a gift made pursuant to the UGMA is "irrevocable and conveys to the minor indefeasibly vested legal title to the custodial property . . . ." We conclude that this subdivision does not preclude a spouse from voiding a gift of community property that is otherwise voidable. (See In re Marriage of Hopkins (1977) 74 Cal.App.3d 591, 602, fn. 7 [141 Cal.Rptr. 597]; cf. Estate of Bray (1964) 230 Cal.App.2d 136 [40 Cal.Rptr. 750].)

In Bray, the husband purchased savings bonds with community funds without the knowledge or consent of his wife. He registered those bonds jointly in the names of himself and his son. Husband subsequently died and the son contended that pursuant to statutory and case authority he was entitled to full ownership of the bonds, regardless of the community property laws. The court rejected this contention, concluding that this would result in an impermissible conversion of the wife's assets. Accordingly, the court held that the purchase of the savings bonds by husband could not defeat the community property interest of the wife.

We, too, conclude that one spouse cannot defeat the interest of the other spouse in the community property by unilaterally purporting to make a gift of it pursuant to the UGMA. Consequently, absent written consent, written ratification, waiver or estoppel, the nondonor spouse is not precluded from voiding the gift.

55 Both parties' discussion of this contention is premised upon the application of the current version of this subdivision. Accordingly, we, too, proceed on that basis.

The referee apparently concluded that Beth is estopped or has waived her right to void the subject gifts. "Questions of waiver and estoppel involve issues of fact for the trial court." (Los Angeles Fire & Police Protective League v. City of Los Angeles (1972) 23 Cal.App.3d 67, 75 [99 Cal.Rptr. 908].) "Estoppel applies to prevent a person from asserting a right where his conduct or silence makes it unconscionable for him to assert it." (In re Marriage of Recknor (1982) 138 Cal.App.3d 539, 546 [187 Cal.Rptr. 887, 34 A.L.R.4th 805].) Either unjust enrichment or a change in position may be the basis of an unconscionable injury which will estop a person from asserting the requirement of a writing. (Mintz v. Rowitz (1970) 13 Cal.App.3d 216, 224-225 [91 Cal.Rptr. 435].)

"Waiver requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. [Citation.] There must be actual or constructive knowledge of the existence of the right to which the person is entitled. [Citation.] The burden is on the party claiming a waiver to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation. [Citation.] This rule particularly applies to cases involving a right favored in law such as . . . the right to retain lawful property entitlement . . . ." (In re Marriage of Moore (1980) 113 Cal.App.3d 22, 27 [169 Cal.Rptr. 619].)

In support of the trial court's conclusion, claimants refer to evidence demonstrating that Beth had knowledge and participated in the couple's program of opening up savings accounts for their children pursuant to the UGMA.

This evidence is insufficient to support a finding of either estoppel or waiver. With regard to estoppel, the record contains neither evidence that the claimant children changed their position in a manner that will cause them to suffer an unconscionable injury should Beth void the gifts, nor evidence that Beth will be unjustly enriched in such an event. Accordingly, there is insufficient evidence to support a finding that Beth is estopped to void the subject gifts.

With regard to waiver, the evidence to which Roy refers is insufficient to demonstrate that Beth knowingly and voluntarily waived her property interest in the UGMA accounts set up by Roy or that she knowingly and voluntarily waived her right to veto such transactions by withholding her written consent.

The cases to which claimants refer in support of their assertion are distinguishable. Those cases involve situations in which a wife's participation or acquiescence in the disposition of community property to third parties induced those parties to deal with the property as if she had consented to that disposition, to the detriment of the third parties. (See MacKay v. Darusmont (1941) 46 Cal.App.2d 21, 26 [115 P.2d 221]; Bush v. Rogers (1941) 42 Cal.App.2d 477, 479-480 [109 Cal.Rptr. 379].) The record contains no such evidence of detrimental reliance in this case.

The amendments to section 5125, subdivision (b) clearly demonstrate the Legislature's desire to strictly regulate one spouse's ability to give away community property. This is evidenced by the 1975-1978 version of that subdivision under which a spouse was precluded from making
any gift of community personal property. The reenactment of the provision allowing for gifts of community personal property with the written consent of the other spouse in 1978 must be interpreted to require something more than the tacit approval of the gift by the nondonor spouse. A different interpretation would entirely vitiate the writing requirement. We decline to engage in such "doctrinal machinations." (See Bruch, Management Powers and Duties Under California's Community Property Law: Recommendations For Reform (1982) 34 Hastings L.J. 227, 239-240.) While the application of this rule may be harsh in the case at bench, any change in this scheme is for the Legislature and not this court to make.

Claimants next urge that section 5125, subdivision (b) is not applicable because the tax benefits Beth received from the UGMA accounts constituted adequate consideration and therefore were not "gifts" within the meaning of that subdivision. We disagree. If Beth received tax benefits from the UGMA accounts it was because of their status as "gifts." Claimants cannot successfully urge that benefits received by a donor as a result of making gifts destroys their status as a gift.

We, therefore, conclude that Beth was entitled to void the purported gifts made by Roy.

With respect to the UGMA accounts opened by Beth, we reach a different result. Beth is precluded from voiding any of the transfers of the subject property to the extent they are traceable to those accounts. (See Dahne v. Dahne (1920) 49 Cal.App. 501, 506 [193 P. 785].)

The judgment is affirmed in part and reversed in part. The matter is remanded to the trial court with directions to:

1. Award to claimants only that community property which is traceable to those UGMA accounts of which Beth was custodian. In making this award only the named donee of each of the accounts is entitled to that property traced to his or her account. It shall be Beth's burden to trace property to the custodial accounts of which Roy was custodian in order for the court to void those transactions.

Each party to bear their own costs on appeal.

III. FIDUCIARY DUTY OF THE MANAGER Souse

Cal Fam. Code §721 (1995) Transactions with each other and third parties; Fiduciary relationship of husband and wife

(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, and 16040 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 15019, 15020, 15021, and 15022 of the Corporations Code, including 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.

**Schnabel v. Superior Court, 5 Cal. 4th 704, 854 P.2d 1117, 21 Cal. Rptr. 2d 200 (1993)**

In a divorce action, the wife sought corporate and business records of a close corporation in which the husband was employed and owned 30% of the stock and in which the shares were community property. The trial court refused to quash a subpoena requesting the corporate documents.

II. DISCUSSION

The courts below ordered the corporation to produce both business records and tax returns. We discuss each category of documents separately.

A. BUSINESS RECORDS

Orange Container [the corporation] voluntarily produced its profit and loss and financial statements and all records relating to Terry [the husband] personally. The trial court ordered production of much more—a wide range of other business records for specified time periods, such as bank activity statements, accounts receivable and payable listings, ledgers, cash receipts and disbursement records, and sales and purchase registers. . . . .
From these cases and statutes, the general rule can be distilled that when one spouse in a marriage dissolution proceeding seeks discovery from a third party, the court is required to balance the spouse's need for discovery against the privacy interests of the third party. In weighing the need of the spouse, the court should consider all relevant factors, including how the requested information would help resolve the issues that remain between the spouses; any relationship between either spouse and the third party; the information that the other spouse or third party has already provided or agreed to provide; and any specific reasons to distrust the adequacy or reliability of the information already obtained or offered.

In weighing the privacy interests of the third party, the court should consider the nature of the information sought, its inherent intrusiveness, and any specific showing of a need for privacy, including any specific harm that disclosure of the information might cause. For example, the third party may demonstrate that public disclosure of confidential information would damage its competitive position or embarrass persons not involved in the litigation. Upon request, the court should review the information in camera before production to assess its value to the requesting spouse and the harm disclosure might cause to the third party. Any discovery order should be carefully tailored to protect the interests of the requesting spouse in obtaining a fair resolution of the issues while not unnecessarily invading the privacy of the third party. Also upon request, the court should consider appropriate protective orders. (Code Civ. Proc., § 2025, subd. (i); Harris v. Superior Court, supra, 3 Cal.App.4th at p. 668.)

Applying these principles to this case, two factors are paramount -- the need for the requested information to help resolve the issues that remain between the spouses, and the relationship between the spouses and Orange Container. Terry is a shareholder of record, and has all the rights of such a shareholder, including the right to inspect records. (Corp. Code, § 1601.) Since the stock is community property, Marilyn has an equal interest in that stock. (Civ. Code, § 5105.) Indeed, with specified exceptions not relevant here, the court "may order that the name of a spouse shall be added to community property held in the name of the other spouse alone . . . ." (Civ. Code, § 5125.1, subd. (c).) Thus, although Marilyn is not the "holder of record" under Corporations Code section 185, she is, for this purpose, entitled to the same information as Terry.

Furthermore, each spouse has a fiduciary duty to the other in managing community property, which "duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest . . . , and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request." (Civ. Code, § 5125, subd. (e), italics added.)

The italicized language makes clear that each spouse is entitled to complete disclosure of all relevant information to allow an independent review of the marital property and financial status of the spouses. (See also Civ. Code, § 4800.10, 4800.11, subd. (a)(1), and 5103, subd. (b).) Whatever right Terry has to inspect records of the corporation, Marilyn also has, either indirectly through Terry, or directly, as in this case, by means of third party discovery. It follows that if Terry has a right to inspect any corporate records, he cannot, consistent with his fiduciary duty, refuse to cooperate in obtaining for Marilyn those records that are relevant to this proceeding. We therefore
conclude that in this proceeding, Marilyn has at least as great a right of discovery from the corporation as any shareholder.

We next consider the inspection rights of a shareholder. Corporations Code section 1601, subdivision (a), provides in pertinent part: "The accounting books and records . . . shall be open to inspection upon the written demand on the corporation of any shareholder . . . at any reasonable time during usual business hours, for a purpose reasonably related to such holder's interests as a shareholder . . . ."

There can be no doubt that Marilyn's purpose in seeking the corporate records -- to ascertain the value of the stock and the community's and Terry's financial status -- is reasonably related to her interest as a shareholder. (See Civ. Code, § 4800.10 and 4800.11.) CA(6) (6) This court long ago held that "a stockholder has an interest in the assets and business of the corporation and that such inspection [of the books of the corporation] may be necessary or proper for the protection of his interest or for his information as to the condition of the corporation and the value of his interests therein." (Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501 [129 P. 781]; see also Tatko v. Tatko Bros. Slate Co., Inc. (1991) 173 App.Div.2d 917 [569 N.Y.S.2d 783, 784] [discussing the common law right of a shareholder]; Friedman v. Altoona Pipe and Steel Supply Company (3d Cir. 1972) 460 F.2d 1212, 1213 [interpreting a similar Pennsylvania statute].)

. . . . [The court determined that under corporate law, the right of a shareholder to inspect the books and records of a corporation extends to “records reasonably related to the purpose for which the record is sought.” The court then held that the company must produce its business records and its corporate tax return and quarterly payroll tax returns regarding the husband but that it could not be compelled to disclose payroll tax returns identifying third parties.]


This appeal stems from an independent action by a former wife to reopen a judgment and decree of divorce in order to obtain equitable relief from the property settlement agreement incorporated in the decree. James and Diane Golder were married on September 5, 1970. They subsequently adopted one child, Tara, on April 9, 1975. James Golder is a stockbroker and was elected to the Idaho Legislature in 1976. He continued as a legislator throughout the course of proceedings in the present action. Diane is currently employed as a secretary and was so employed throughout most of the marriage.

During their marriage, the parties owned and managed various rental properties. In 1978 they purchased a chrome plating business which was subsequently sold on June 1, 1979.

The marriage began to deteriorate in 1978 and by early 1979, the Golders decided that divorce was inevitable and began to discuss a division of their community property. On July 5, 1979, Diane signed her interest in eight deeds of trust in community real property over to James. On July 6, 1979 the parties entered into a property settlement agreement. The agreement provided that Diane was to receive one-half of the household furniture (stipulated value $2,500), a 1971
Plymouth automobile (stipulated value $800), the funds in their joint checking account ($77 on July 6, 1979), and the funds in her credit union account ($441 on July 6, 1979). In addition, James agreed to give Diane $20,000, payable in $100 monthly installments without interest. The remainder of the community property was declared to be James’s sole and separate property. Such remainder was not itemized except to state that it included “certain stocks and bonds and real property which husband has acquired.”

The agreement gave Diane custody of Tara, allowing James visitation two nights a week, every other weekend and every other holiday and summer. James agreed to pay Diane $75 per month as child support.

James filed for divorce the same day the agreement was signed. A hearing was held on August 9, 1979. Diane did not appear at the hearing and a default judgment granting the divorce and incorporating the property settlement agreement was entered on that date.

The property settlement agreement was drafted by James’s attorney. Diane was not represented by counsel at the property negotiations nor at the time of the granting of the divorce. In the action to reopen the divorce, the parties stipulated that the value of the Golders’ community property was $352,675.00 on July 6, 1979, the date the property settlement agreement was signed, and $355,566.00 on August 9, 1979, the date the divorce was granted. The present value of the property Diane received in the divorce settlement was $13,536.04.

On August 8, 1980, Diane initiated an independent action seeking to reopen the judgment and decree of divorce. On September 24, 1980, she filed a motion in the original divorce action seeking to increase the amount of child support and to revise the visitation agreement. On November 7, 1980, James moved for custody of Tara. A hearing was held on the custody motions on December 2, 1980. At that hearing, the parties informally agreed to modify the visitation provisions and to increase the amount of child support.

The two actions were consolidated on May 26, 1981. On September 24, 1982, the parties stipulated to the custody and support of Tara. Diane retained primary custody and the amount of child support was raised to $200 per month. The court ordered the judgment and decree modified in accordance with the stipulations on September 27, 1982.

Trial on the property issues was held on September 19-23, 1983. The district court determined that the property agreement had merged into the divorce decree and therefore that the action was before the court as an equitable independent action to relieve a party from judgment pursuant to I.R.C.P. 60(b). The court found James guilty of fraud and overreaching and ordered equitable redivision of the community property. The court determined that the community property had a value in excess of $355,000.00 at the date of divorce of which Diane had already received $10,875. It therefore awarded her an additional $166,125.00. James appeals from this award. Diane has cross-appealed asserting that the trial court erred in refusing to award her attorney fees and punitive damages.
We begin our analysis by noting that an independent action to relieve a party from a judgment is a most unusual remedy. It is available only rarely, under the most exceptional circumstances. *Compton v. Compton*, 101 Idaho 328, 335, 612 P.2d 1175, 1182 (1980). Such an action will lie only in the presence of extreme fraud. Absent overreaching, the burden is on the claimant to prove each element of fraud by clear and convincing evidence. *Id.* The presence of overreaching, however, “automatically shifts the burden to the party benefited by the unequal agreement to show that the community should not be reapportioned.” *Id.* at 336, 612 P.2d at 1183.

In the instant case, the trial court, applying the standards set out in *Compton*, found that James Golder was guilty of both fraud and overreaching in negotiating the property settlement agreement. On appeal, James asserts that these findings are not supported by the record.

The determination of whether the degree of fraud in a particular case rises to the level justifying relief from a judgment requires an assessment of both the relationship between the parties and the actual conduct involved. *Compton*, supra at 335, 612 P.2d at 1182. The courts must strike a balance between competing interests. On one side rests the need for finality of judgments. On the other lies justice -- the courts’ reluctance to serve as a shield in the perpetration of a fraud.

The marital relationship imposes the high duty of care of a fiduciary on each of the parties. This duty continues until the moment of the marriage’s termination.

"This fiduciary duty extends to the parties’ negotiations leading to the formation of the property settlement agreement during marriage, and requires, at least, a disclosure by both parties of all information within their knowledge regarding the existence of community property and of pertinent facts necessary to arrive at a reasonable valuation of the property. Like a business partner, each spouse is free to adopt a position favorable to himself or herself regarding the property’s valuation, its inclusion in the community, or other such issues. They are not free, however, to resolve such issues unilaterally by concealing the very existence of particular items or amounts of property." *Id.* at 336, 612 P.2d at 1183.

In the instant case, the trial court found that James had concealed the equity values of the parties’ property.

"James made false representations to Diane as to the value of community assets and liabilities. His concealment of the substantial equity values of the parties’ property to the degree indicated here constituted an extreme degree of fraud. He further represented to her that they were on the verge of bankruptcy; that Wallace Plating was not ‘making it’ and all their assets were tied to that company so that if it failed they could lose everything; that additional equipment was being required by the E.P.A. which would cause great financial problems; that her fair share of the community was not worth $ 40,000.00; that he had no money and would be unable to pay more than $ 100.00 per month for 200 months as a property settlement, and $ 75.00 per month child support; and furthermore, that she did not need legal representation during the settlement and subsequent divorce."
“All of these representations were material to the division of their community.

“James knew they were false. He had $26,000.00 in a money market fund that he never disclosed to Diane, which should have been included in the division, and which could have been utilized to make his monthly obligations to Diane more equitable. He was fully aware of their approximate financial status; and that the value of their equities was increasing. On June 1, 1977 he gave a financial statement to First Federal Savings and Loan showing assets valued at $179,000.00; and in December, 1977 a financial statement to Idaho First National Bank showing a net worth of $271,260.00; lastly, in loan documents at IdahoFirst as of September 1, 1978 a net worth of $313,030.00 was shown -- current assets of $41,700.00, current liabilities of $19,560.00, working capital of $22,140.00 and real estate equities of $241,300.00. . . . Clearly he knew they were nowhere near the verge of bankruptcy, that her ‘share’ was worth considerably more than $40,000.00, that he was capable of paying more than $175.00 per month to her and their child and that Diane needed financial counseling and legal representation to assist her throughout the settlement agreement in divorce proceedings.”

Diane was without legal representation throughout the course of the property settlement negotiations and divorce. The district court found that James had threatened Diane with custody litigation if she secured legal representation or disputed the property settlement agreement, and concluded that James was guilty of overreaching. This Court noted in Compton that “[o]verreaching often appears where one of the parties is not represented by independent counsel.” Id. at 336, 612 P.2d at 1183.

The district court carefully followed the mandate of Compton and in a well-reasoned memorandum decision found that Diane had proven both fraud and overreaching under the strict standards set out in that opinion. Findings of fact by a trial court will not be disturbed on appeal unless they are clearly erroneous. I.R.C.P. 52(a). Clear error, in turn, will not be deemed to exist if the findings are supported by substantial and competent, albeit conflicting, evidence. Rasmussen v. Martin, 104 Idaho 401, 404, 659 P.2d 155, 158 (Ct.App.1983). We have carefully reviewed the record in this case and we conclude that it supports the trial court’s findings that James Golder was guilty of both fraud and overreaching. Accordingly, we affirm the trial court’s decision reopening the judgment and decree of divorce and equitably redividing the parties’ community property.

II.

Diane has cross-appealed asserting that the trial court erred in denying her motions for punitive damages and attorney fees.

Punitive damages are not favored in the law and should be awarded only in the most unusual and compelling circumstances. Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 904-05, 665 P.2d 661, 668-69 (1983). In the instant case, the trial court concluded that the harsh remedy of punitive damages was inappropriate. An award of punitive damages is within the province of the trier of fact and the trial court is granted wide discretion in determining when
such an award is appropriate. *Id.* at 904, 665 P.2d at 668. Absent an abuse of discretion, the trial court’s decision will not be disturbed on appeal. We hold that the trial court did not abuse its discretion in denying an award of punitive damages in the present case.

Similarly, we hold that the trial court did not abuse its discretion in refusing to award attorney fees. As mentioned above, this case is a consolidation of two separate actions: Case No. 72550 and Case No. 68195. Case No. 72550 was an action in equity for relief from a judgment and was completely independent of the original divorce action. Consequently, the trial court was correct in concluding that the attorney fees provisions contained in Title 32 of the Idaho Code (Domestic Relations) were inapplicable. In order to award attorney fees, the trial court would have had to find that the action was defended frivolously, unreasonably or without foundation. I.R.C.P. 54(e)(1); I.C. § 12-121. The trial judge specifically declined to make such a finding. In view of the fact -- noted above -- that an action of this sort is an unusual remedy, available only in the most compelling instances, we cannot say that the trial court abused its discretion in declining to make such a finding.

The proceedings in Case No. 68195 involved a motion to modify the divorce decree to increase the amount of child support and to clarify James’s visitation rights. All the issues in that action, except Diane’s motion for costs and attorney fees, were resolved by stipulation prior to trial. It appears from the record that Diane failed to renew her claim for attorney fees at trial. In any event, the trial court, by omission, declined to award attorney fees in Case No. 68195.

I.C. § 32-704 authorizes the trial court to award attorney fees in an action to modify a divorce decree where the financial resources of the parties so dictate. See *Ross v. Ross*, 103 Idaho 406, 409-10, 648 P.2d 1119, 1121-22 (1982). Such an award is not appropriate where a party has the financial resources necessary to prosecute or defend the action. *Id.* at 410, 648 P.2d at 1121. In the instant case, Diane was awarded an additional $166,000 as her share of the parties’ community property. In light of this award, it cannot be said that Diane was without sufficient funds to pay her attorney fees. We therefore hold that the trial court did not abuse its discretion in failing to award attorney fees in Case No. 68195.

Although we do not find the trial court abused its discretion in declining to award attorney fees below, we are not constrained thereby in the exercise of our own independent discretion in deciding whether to award attorney fees on appeal. An award of attorney fees on appeal is appropriate “when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.” *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979); I.R.C.P. 54(e)(1).

The basic philosophy underlying Idaho’s statutory divorce scheme is that the community estate will be divided equally between the parties absent compelling reasons for an unequal division. I.C. § 32-712(1)(a). In the instant case, the property settlement agreement, paralleling this philosophy, recited that it was intended to be as equal a division as possible under the circumstances, and that it provided for a fair and equitable division of the community estate. Relying on these recitations, the magistrate ratified the agreement and incorporated it into the divorce decree. However, in spite of its assertions to the contrary, the division set forth in the agreement was manifestly unequal. James received more than $300,000 in community assets...
while Diane received less than $14,000. The district court found that the unequal division was procured through James’s fraud and overreaching and redivided the property in an effort to achieve substantial equality. Diane was ultimately awarded only that amount to which she was lawfully entitled to from the very beginning of these proceedings. For James to pursue an appeal under such circumstances was, in our view, totally unreasonable. We therefore hold that Diane is entitled to attorney fees on appeal.

The judgment of the district court is affirmed. Costs and attorney fees to respondent.


QUINN-BRINTNALL, J.

In this case we are asked to decide whether partnership law or community property law controls the distribution of assets in a family business. We agree with the trial court that community property law applies and that profits due the community were improperly diverted to the husband’s separate estate without compensation to the community. Thus, we affirm the award of $152,660 for the improperly distributed profits. We also remand for the court to calculate damages due the community for the uncompensated loss of half its ownership interest in Goldberg Furniture Company (GFC).

Jay and Patricia Goldberg were married for 54 years until Jay’s death in 1997. As the personal representative of Jay Goldberg’s community property estate, Patricia learned that in 1970 Jay had diverted community assets through the family business to create a separate property interest, and that the separate property trust he created in 1987 included these funds. Patricia’s children, Larry Goldberg and Diane Goldberg Cohen, are the executors and sole beneficiaries of Jay Goldberg’s separate property trust. In 1987, Jay also created a community property trust for Patricia’s benefit and included real estate, family heirlooms, and 25 percent of the family business in its assets.

As personal representative of the community property trust, Patricia sued the separate property trust to recover the community assets improperly diverted without her knowledge or consent. The trial court found that the assets had been improperly diverted and awarded her $152,660 in damages.

The children appeal the trial court’s judgment and its decision to award them only five percent of their attorney fees. Patricia cross-appeals the judgment, claiming that the court erred in awarding her only a fraction of the multi-million dollar separate property trust she claims was created with the aid of the diverted community funds. She also challenges the court’s decision to award her only 20 percent of the attorney fees incurred.

FACTS

57 This court will not consider record excerpts presented as appendices unless the excerpts have been properly
OWNERSHIP INTERESTS IN FAMILY PARTNERSHIP

Goldberg Furniture Company ("GFC") was organized as a partnership owned by the marital communities of two brothers, Lou and Cy Goldberg. Lou was Jay’s father. Jay began working for the store in the 1940s. In 1946, Cy Goldberg died and left his partnership interest to his wife and daughter. Jay and Patricia bought their interests in the 1950s, giving his marital community with Patricia a 50 percent partnership interest in GFC. At this time, Jay’s parents (Lou and Ann Goldberg) owned the other 50 percent.

Jay inherited a 25 percent interest in GFC from each of his parents upon their deaths in the 1960s. After acquiring the interests of his parents, Jay owned a separate 50 percent interest and he and Patricia owned a community 50 percent interest in GFC. The family and business accounts were identical; even groceries for the family were purchased through the GFC business account. For accounting and tax purposes, the business continued as a “partnership,” although Jay Goldberg was the only functioning member of the partnership.

In September 1966, Jay sold the 25 percent separate interest he had inherited from his mother to his children, Larry and Diane, for $269,075.90. In May 1968, he sold them the 25 percent separate interest he had inherited from his father for $387,000. At this point, Larry and Diane each owned a 25 percent interest, and Jay and Patricia’s community owned a 50 percent interest in GFC. Jay no longer had a separate property interest in the business.

To pay off the purchase of their GFC interests, Larry and Diane transferred their annual partnership profit allocations to Jay’s separate capital account in GFC. The parties stipulated that these payments were Jay’s separate property. Jay left these payments in a separate capital account. Between fiscal year 1967 and fiscal year 1969, no additional portion of GFC’s profits were [sic] allocated to Jay’s separate capital account. Thus the account contained only proceeds from the sale of Jay’s separate property.

The “partnership” met in June of 1970 to reallocate the company profits. At that meeting Jay represented a “separate” interest and his and Patricia’s community interest, and Larry represented his interest. Also present was Harold Preszler, the company’s certified public accountant who was also the trustee for Diane’s interest.

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58 Diane was a minor, and her interest was bought on her behalf by a trust in her name.
In recognition of Jay’s contributions to the partnership (through leaving the proceeds of the “sale” to his children in his separate capital account), the three men agreed to reallocate GFC profits. Under the agreement, Larry would receive 25 percent of GFC’s distributed profits; Diane, 25 percent; Jay and Patricia’s community, 25 percent; and Jay separately, 25 percent. The community’s right to profits thus dropped from 50 percent to 25 percent while Larry and Diane’s interests were unaffected.

In 1973, GFC redeemed Diane’s partnership interest by transferring securities and cash from GFC to Diane. Although the securities and cash contained community assets and belonged to the business as a whole, Diane’s entire 25 percent interest went to Larry. After this transaction, Larry had a 50 percent interest, Jay had a 25 percent separate interest, and Jay and Patricia had a 25 percent community interest in GFC.

In 1973, Jay and Larry entered into a new partnership agreement, specifying equal profit distribution between Jay and Larry. From 1974 through 1994, 25 percent of the profits of GFC were allocated to Jay Goldberg’s separate property capital account, 25 percent to the community property capital account, and 50 percent to Larry Goldberg.

In 1987, Jay executed a Separate Property Agreement and placed his separate assets (including his GFC separate capital account) into a Separate Property Trust. Larry and Diane are the sole trustees and beneficiaries of Jay’s Separate Property Trust. Also in 1987, Jay created the Community Property Revocable Living Trust of Jay Goldberg. Jay and Larry also executed an Amendment to Partnership Agreement, transferring Jay’s separate 25 percent interest in GFC to his Separate Property Trust and transferring Jay’s community interest in GFC to his Community Property Revocable Living Trust.

In 1995, Larry purchased Jay’s 25 percent separate interest in GFC from the Separate Property Trust. He also purchased Jay and Patricia’s 25 percent community interest in GFC for a combined total of $237,517. With this transaction, Larry became the sole proprietor of GFC.

PROcedural facts

When Jay died in 1997, his 1996 will was admitted to probate. Patricia was named as Personal Representative of Jay’s community estate. Larry and Diane were named Personal Representatives of Jay’s separate estate.

On May 18, 1998, Patricia, in her capacity as Personal Representative of Jay’s community estate, commenced this action against Larry and Diane in their capacities as trustees of Jay’s separate estate. Patricia requested that the court issue an order determining that the property and assets in Jay’s Separate Property Trust were community property, and she requested that her share of those community assets be turned over to her, with interest.

A long and complicated procedural history ensued, most of which is not relevant to the issues on appeal before this court. Of particular note, however, is Patricia’s motion in limine in

59 For ease of reference, the combined party of Larry and Diane is often referred to as "Larry" in this opinion
which she successfully sought exclusion of accounting documents not provided in discovery. After much wrangling, the court gave Patricia a choice: Forgo requiring the separate property trust to trace the source of its funds or ask for a continuance. Patricia’s counsel opted to proceed to trial without tracing and to allow the court to use a formula to extrapolate damages.

After several pretrial hearings on various matters, the case was tried to the court for five days in September and October 1999. After trial, the parties continued to dispute several remaining issues.

On December 17, 2000, the court issued a Memorandum Regarding Attorney Fees and Increase in Value/Prejudgment Interest. On January 4, 2000, Larry moved the court to reconsider its memorandum decision, which fixed the interest rate at 10 percent and awarded the defendants only five percent of their attorney fees. The court denied this motion.

On March 17, 2000, the trial court issued its Findings of Fact and Conclusions of Law. In summary, the court found that because the balance of Jay’s capital account did not equal that of the community account, a portion of the GFC profits allocated to Jay’s separate property account between 1970 and 1973 was actually community property and that Patricia should be reimbursed for her share of that small amount, plus interest. The court calculated the community’s lost profits at $300,705 through December 31, 1999, and awarded Patricia half. The court failed to address Jay’s acquisition of 25 percent ownership of the company solely from the community’s share without compensating the community.

The court also issued a Judgment and Lien on March 17, 2000, in favor of the community estate of Patricia in the principal amount of $152,660, which included interest. The judgment also awarded $88,840 in attorney fees to Patricia.

On March 23, 2000, Larry moved for reconsideration of the judgment under CR 59. It appears that the basis for the motion was Larry’s counsel’s inability to attend the March 17, 2000 hearing by telephone.

Larry filed a notice of appeal to this court on March 27, 2000. Patricia filed a notice of cross-appeal on March 30, 2000. At about the same time, Larry moved the trial court to rule on his motion for summary judgment. On March 31, 2000 (filed April 13, 2000), the trial court granted partial summary judgment, dismissing with prejudice the following of Patricia’s claims:

-- for Larry’s breach of fiduciary duty as a GFC partner;

-- for a statutory partnership accounting of GFC;

-- for rescission of the sale of GFC to Larry;

60 It appears that the Findings and Conclusions were amended and the amendments are attached to the original document in the Clerk’s Papers.
61 The summary judgment motion is not in the record before this court and it is unclear when it was filed. Several other documents in the record refer to the motion.
-- for turnover of community property, except as to property which may have passed from GFC to Jay’s separate trust.

On April 13, 2000, Patricia moved for reconsideration of the partial summary judgment under CR 59. On April 14, 2000, the trial court issued a Decision Re: Defendant’s Motion for Reconsideration modifying the judgment.

The court issued an Amended Judgment and Lien on May 2, 2000. The amended judgment awarded $152,660 to Patricia as a principal amount. Again, the court arrived at this amount by finding that a small portion of the profits allocated to Jay’s separate property interest in GFC after 1970 was actually community property, then calculating the present-day value of that portion, and awarding half of that amount to Patricia. To determine present day value, the court applied 10 percent per annum interest, compounded annually, to the profits allegedly mischaracterized as Jay’s separate property.

The trial court also reaffirmed its award to Patricia of $88,840 in attorney fees, which was 20 percent of the attorney fees she had incurred. But the court failed to address the uncompensated loss of the community’s share of the ownership of GFC itself.


ANALYSIS

The primary issue before us is whether Jay breached his fiduciary duty to the community when he unilaterally created a separate property interest in GFC and reduced the community share by half but left the other family members’ interests unaffected. We agree with the trial court that he did.

DIVERTING COMMUNITY ASSETS

The trial court found, and neither party challenges, that in 1970 the partners of GFC agreed to reallocate the profits equally between Jay’s separate account, Jay and Patricia’s community account, Larry’s account, and Diane’s account. Larry and Diane contend this was a permissible allocation of profits under the existing partnership law. Patricia argues that partnership law does not control and that this reallocation really diverted income and assets from the marital community to Jay’s separate account. We agree with Patricia. GFC was a paper partnership controlled by Jay Goldberg. Jay used the company in such a manner that he unilaterally directed community assets away from his wife and to his children without benefitting or compensating the community for its loss.

Management of community property.

A community property interest in a corporation or business, like GFC, is personal property. Former RCW 25.04.260 (1970), repealed by Laws of 1998, ch. 103, § 1308. In 1970, the husband was entitled to manage and control all community personal property. Former RCW 26.16.030
This power was community interest. *Hanley v. Most*, 9 Wn.2d 429, 457-58, 115 P.2d 933 (1941). See also *In re Estate of McCoy*, 189 Wash. 103, 63 P.2d 522 (1937) (the husband may not, without the knowledge or consent of his wife make a gift to his children of corporate stock belonging to the community).

As manager of the community property, Jay could also conduct partnership business on behalf of the community. See *Fields v. Andrus*, 20 Wn.2d 452, 454, 148 P.2d 313 (1944). And Jay’s involvement on behalf of the community in the reallocation of profits of the partnership were within his rights so long as he acted for the benefit of the community and in the community interest.

By reallocating the partnership interest to create a separate estate solely from the community’s share of GFC, Jay effectively segregated his “share” of the community property while maintaining a community interest with Patricia in the remaining 25 percent share as well. In addition, he moved profits due the community to this newly created separate account.

This reallocation of profits in 1970 improperly diverted profits from the community account only to Jay’s separate account. Over the years Jay continued to divert the assets of GFC and his separate property trust to form Wynooche Sand and Gravel, a $3,000,000 business owned by Jay’s separate property trust in which Patricia purportedly had no interest.

In this way Jay diverted community assets and income through GFC directly to his children and away from his wife.

Court’s award of assets.

Larry assigns error to the trial court’s judgment, which awarded Patricia a portion of the assets acquired with the profits allocated to Jay’s separate property trust. Patricia argues that through the 1970 reallocation of profits (income) to the family members, Jay breached his fiduciary duties to the marital community. This breach, she argues, rendered the reallocation of profits wrongful and reduced her community asset while leaving Larry and Diane’s shares untouched.

Patricia asserts that all the profits allocated to Jay’s “separate” partnership interest were actually community property. She argues that any other separate funds (the children’s payments from sale of his inherited shares) that were placed in Jay’s Separate Property Trust were commingled with the community funds and converted into community property. She argues that under community property law, she should be entitled to one-half of all assets acquired with funds from Jay’s “separate” partnership account. The trial court found that Jay’s separate property trust contained both separate and community funds but it ruled that Patricia was only entitled to half the

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62 “Husband” was replaced by “either spouse” when this statute was amended by Laws of 1972, ex.s.ch. 108, § 3. RCW 26.16.030.

63 In 1970, as now, each member of a marital community owns an undivided half interest in the indivisible whole. *Bortle v. Osborne*, 155 Wash. 585, 589, 285 Pac. 425 (1930). To determine the diminution in the value of the community asset, however, it is helpful to characterize the interest as if it were divisible at the time of the misappropriation.

64 That Patricia had no interest in Wynooche further demonstrates that the community was never compensated for the loss of its ownership interest in GFC.
profits misappropriated from the community account between 1970 and 1973. Thus it awarded her $152,660.


Patricia stipulated that the funds that Jay acquired from the sale of his separate (inherited) property to his children were separate property. Due to her successful motion in limine, the documents required to trace assets were inadmissible. Through counsel, Patricia agreed to waive the tracing requirement in favor of a formula. Patricia agreed the court should calculate the value of the diverted assets to the date of death.

The loss to the community, however, was greater than the differential in the percentage of profits paid between 1970 and 1973 that the trial court awarded. The actual loss due the community includes the uncompensated loss of 25 percent of the assets of GFC itself. Even if we assume for the sake of illustration that the value of 50 percent of GFC in 1995 was $227,517, the half of that denominated as Jay’s separate estate was acquired from the community estate without compensation being paid to the community. Thus, the community was also improperly deprived of half its ownership interest in GFC. In 1970 the value of that interest was somewhere in the neighborhood of $273,000 (the amount paid Diane for her 25 percent in 1973).

Because Patricia never agreed to Jay’s conversion of community assets and because the court’s judgment of $152,660 does not accurately reflect the value of the community’s share of GFC or the value of that misappropriated asset on the date of Jay’s death, we remand for recalculation of the value of the misappropriated community asset: its ownership interest in GFC.

Because we remand the matter to the trial court, we turn now to the remaining issues the parties raise.

THE COURT’S FINDINGS

Larry assigns error to the court’s finding that the risks in the partnership were very minimal. He provides no argument or authority to support his assignment of error. Without argument or authority to support it, an assignment of error is waived. Smith v. King, 106 Wn.2d 443, 451-52, 65

We are unable to determine from this record the value of the ownership interest Jay acquired by segregating the community’s share of GFC without compensation. The record suggests, however, that GFC’s value was substantially reduced by the transfer of GFC assets to Wynooche Sand and Gravel. Whatever its actual value, the ownership interest was obtained without any compensation being paid to the community.
722 P.2d 796 (1986). This court need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(5) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record).


Even if Larry had supported his assignment of error with argument, the trial court did not err in entering this finding. There was a great deal of testimonial and documentary evidence that GFC was a financially sound, thriving business and that Jay’s decision to leave funds in his capital account was a tax tactic rather than a business necessity. Additionally, there was little testimony about the risks inherent in the business.

Larry also assigns error to the court’s finding that Jay dealt unfairly with the community in some transactions.66 He again provides no argument or authority to support his assignment of error. But once again, the record supports this finding.

His challenge to Finding 21, however, is before us for review. It provides:

In the GFC fiscal year ending on April 30, 1970 and for all future years, Jay Goldberg, with the knowledge and consent of Harold Preszler and Larry Goldberg, reduced the community’s share of the company’s profits from 50% to 25%. The other 25% of the community’s interest was paid to Jay Goldberg’s separate account.

Clerk’s Papers at 1213.

As discussed above, the first part of this finding is correct. Jay reduced the community’s share of the partnership’s profits from 50 percent to 25 percent. The evidence likewise supports the second part of the finding that “[t]he other 25% of the community’s interest was paid to Jay Goldberg’s separate account.” Clerk’s Papers at 1213. The community’s ownership interest was never “purchased,” however; it was merely transferred to Jay’s separate property account. The community’s ownership interest was depleted by 50 percent without compensation and the

66 The court’s Finding of Fact No. 18 provides: “By all accounts, Jay Goldberg attempted to deal fairly with the allocation of profits between his separate and community properties. Except as set forth herein, Jay Goldberg dealt fairly with the community in all transactions relevant to this litigation. The unfairness may simply be due to the complexity of Jay Goldberg’s plans to transfer GFC to his children.” Clerk’s Papers at 1212-13.
percentage of profits allocated to it was cut in half while the assets of the remaining partners, Larry and Diane, were unaffected. This evidence amply supports the court’s Finding No. 21.

Larry also challenges the court’s findings that Jay commingled separate and community assets in his separate property account. The record establishes that, beginning in 1970, Jay acquired community assets and treated them as if they were his separate property without Patricia’s knowledge. The record supports the trial court’s finding that Jay commingled separate and community assets in his separate property account.

Furthermore, assets of Wynooche Sand and Gravel were acquired with assets originating with commingled funds from Jay’s separate property account, and Jay and his separate trust gave the partners of Wynooche their partnership interest. Patricia was not included as a partner of Wynooche and was not compensated for her share of the community’s interest used to establish Wynooche.

These findings also were predicated on the trial court’s finding that community funds were commingled with Jay’s separate property account at GFC. As discussed above, community funds were commingled with this account. Therefore, the assets acquired with the proceeds of Jay’s separate account were acquired, at least in part, with community funds. This includes the Wynooche Sand and Gravel Company into which Jay transferred the GFC assets. The trial court properly found that assets acquired with commingled funds were used to acquire the assets of the Wynooche partnership in which Patricia had no interest. Through this mechanism, Jay diminished the community property estate in favor of his separate property estate. In so doing he breached his duty to manage community property for the community benefit.

WAIVER

Larry claims Patricia waived any objection to the reallocated GFC profits.

There was conflicting evidence presented to the trial court about Patricia’s knowledge of the allocation of profits of the partnership. Patricia testified at trial, and asserts on appeal, that until after Jay’s death in 1997, she did not know that the community’s interest in the partnership was reduced from 50 percent to 25 percent to form Jay’s separate property interest in GFC. Although there was evidence concerning the percentage of GFC she was told the community owned, the trial court concluded that Patricia did not know that Jay’s separate property was created solely from the community’s asset until after Jay’s death. The trier of fact makes findings regarding credibility of witnesses (i.e., a party’s knowledge), and we will not substitute our judgment from the cold record for that of the trial court. In Re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234, review denied, 129 Wn.2d 1030 (1996).

CONTRACTUAL WAIVER

Larry argued at trial, and on appeal, that Patricia waived her right to challenge any aspect of the 1995 sale when she signed the 1995 Agreement. The 1995 Agreement provided:
Chapter 5: Management of Community Property

B. Buyer [Larry] desires to purchase from Sellers [Jay and Patricia] a forty-nine percent (49%) partnership interest in the [GFC] Partnership (the "Transferred Partnership Interest"), twenty-four percent (24%) from the Jay Goldberg Separate Property Trust and twenty-five percent (25%) from the community of Jay Goldberg and Patricia Pollock Goldberg

4. Representation and Warranties of Sellers. Sellers hereby represent and warrant to Buyer that Sellers are the lawful owners of the Transferred Partnership Interest, free and clear of any lien, pledge, security interest or encumbrance of any kind

5. Indemnification. Sellers hereby agree to indemnify and hold harmless Buyer from and against any and all claims, losses, costs, expenses and liabilities (including, but not limited to, reasonable attorneys’ fees and accountants’ fees and expenses and court costs) arising out of any of the warranties, representations or covenants of Sellers contained in this Agreement being untrue, incorrect or breached. . .

Clerk’s Papers at 123-24.

Neither party provided adequate argument regarding this issue. Nonetheless, it appears that the language of the 1995 Agreement provides that Patricia waived her rights only as to claims “arising out of any of the warranties, representations or covenants” in the 1995 Agreement “being untrue, incorrect or breached.” Clerk’s Papers at 124. Patricia’s lawsuit does not claim that anything contained in the 1995 Agreement is “untrue, incorrect or breached.” This is an action by Jay’s community property estate against Jay’s separate property estate, concerning assets misappropriated by the separate estate. It is not an action against GFC or Larry and Diane personally. The trial court did not err in rejecting the defense of waiver in the present case.

LACHES

The equitable doctrine of laches applies if the defendant establishes that (1) the plaintiff knew, or had a reasonable opportunity to discover, the facts constituting a cause of action; (2) the plaintiff unreasonably delayed commencing an action; and (3) the defendant was materially prejudiced by the delay in bringing the action. Davidson v. State, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991).

As discussed above, there was substantial evidence that Patricia knew that Jay held a separate interest in GFC, but that she did not know until after Jay’s death that his new "separate" interest was created by dividing only the community interest without her knowledge or consent. Her delay in bringing the action was reasonable under these circumstances. Moreover, the record belies Larry’s claim that he is prejudiced because the accountant who handled the transaction is of advanced years and does not clearly recall the events. Preszler testified with great clarity and specificity about the events in question. The trial court did not err in finding that the doctrine of laches did not bar Patricia’s claims.

PRESENT VALUE CALCULATION
Both parties allege that the trial court erred in granting prejudgment interest of 10 percent per annum on the award to Patricia. Larry claims there are no liquidated damages and, thus, no interest is allowed. Patricia asserts the 10 percent was merely a calculation to determine the present value of that which was wrongfully obtained and that the proper calculation should have been made at 15.5 percent.

In his Reply Brief, Larry argues that “[a]warding interest was a legal error, but there was substantial evidence to support this [10 percent] percentage.” Reply Br. at 26. He further argues that “prejudgment interest -- if any -- must be 12% simple interest pursuant to RCW 4.56.110(3) and RCW 19.52.020(1).” Reply Br. at 28-29.

Evidence showed that the community’s portion of the profits and its ownership interest was mischaracterized as Jay’s separate property. The community interest would have increased in value annually by, variously, 5.283 percent, in excess of 12 percent, or in excess of 14.5 percent. Given her motion in limine, Patricia invited the calculation method for ascertaining damages. Moreover, Patricia does not provide any legal authority that the court abuses its discretion when it chooses a figure that is within the range of percentages presented as evidence to calculate present value. The court did not abuse its discretion in using 10 percent to calculate present value of the assets wrongfully diverted.

ATTORNEY FEES

Larry claims he is entitled to fees under the contract in which he purchased his mother’s interest in GFC. He misunderstands the nature of Patricia’s suit. The portion of the action concerning GFC and Larry’s duties was dismissed on summary judgment. By granting him five percent of the fees requested, the court awarded him fees for that portion of the suit. The remainder of the action is a lawsuit by Jay’s community property estate against Jay’s separate property estate, neither of which are parties to the contract Larry relies on.

This court reviews the reasonableness of attorney fees awards under an abuse of discretion standard. Progressive Animal Welfare Society v. University of Wash., 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). We will reverse an award of attorney fees only if we are able to determine that the trial court’s exercise of its discretion was “manifestly unreasonable or based upon untenable grounds or reasons.” Brand v. Dep’t of Labor & Indus., 139 Wn.2d 659, 674, 989 P.2d 1111 (1999) (quoting Progressive Animal Welfare Society, 114 Wn.2d at 689).

Although the trial court here entered no findings of fact regarding the award of attorney fees to Patricia, it specified the amount and percentage of attorney fees to be awarded. The trial court did not abuse its discretion in awarding Patricia 20 percent of the attorney fees she requested.

67 “Interest on judgments shall accrue as follows: . . . judgments shall bear interest . . . at the maximum rate permitted under RCW 19.52.020 . . . .” RCW 4.56.110.
68 RCW 19.52.020(1) provides for a maximum interest rate of 12 percent per annum.
69 It appears from the record that the court found Patricia’s attorneys performed $444,201 in reasonable fees but that only 20 percent of these fees were directly attributable to work necessary to meet Patricia’s specific needs for the litigation.
ATTORNEY FEES ON APPEAL

Patricia claims she is entitled to attorney fees on appeal because she is “the prevailing party in the underlying action.” Br. of Respondent at 44-45.

Patricia includes a request for attorney fees in the last line of the conclusion of her Response Brief, but she does not include a separate section in its brief devoted to the fees issue as RAP 18.1(b)) requires. This requirement is mandatory. Phillips Bldg. Co. v. An, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). The rule requires more than a bald request for attorney fees on appeal. Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992). Argument and citation to authority are required under the rule to advise this court of the appropriate grounds for an award of attorney fees as costs. Austin v. U.S. Bank of Wash., 73 Wn. App. 293, 313, 869 P.2d 404 (1994). There is no basis presented to support a waiver of this requirement. Thus, we award no attorney fees for this appeal.

We affirm the judgment for lost profits but remand to the court for a determination of the damages due the community estate for its uncompensated loss of 25 percent ownership interest in GFC.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III. CREDITOR'S RIGHTS UNDER EQUAL MANAGEMENT

A. Managerial Jurisdictions

Shel-Boze, Inc. v. Melton, 509 So. 2d 106 (La. 1987)

WATKINS, J.

This case arises from the garnishment of a wife's wages to enforce an obligation incurred by her husband during the existence of the community property regime. Because the wages were community property when the garnishment judgment was rendered, the trial court's award of general damages and attorney's fees for wrongful garnishment was inappropriate. However, because the community was subsequently terminated by a judgment of separation, the former wife is entitled to reimbursement of those wages garnished after the filing of the petition for separation. The judgment of the trial court is therefore reversed in part and affirmed in part.

In early 1983, David Melton personally guaranteed payment of his corporation's open account with Shel-Boze, Inc., a supplier of building materials. Upon default, Shel-Boze sued the corporation, and Melton individually. David Melton was served with process at the residence he shared with his wife, Mildred Melton, but failed to answer, and a default judgment for $ 1219.34
plus attorney's fees was rendered on November 28, 1984, against him and the corporation. Mildred Melton was not a party to this judgment.\(^1\)

Shel-Boze subsequently filed a petition to garnish Mildred Melton's wages from the East Baton Rouge School Board, on February 13, 1985. A *writ of fieri facias* was issued on March 1, 1985; a judgment of garnishment was rendered on March 21, 1985 and served on the School Board on March 25, 1985. Mildred Melton was not served with prior judicial notice of the garnishment.

After the garnishment commenced, Mrs. Melton filed a petition for separation, on May 8, 1985, and a judgment of separation from her husband was rendered on June 14, 1985. The effect of the judgment was to terminate the community regime retroactive to the filing of the separation petition. On the date of the judgment, Mrs. Melton filed a motion to dissolve the garnishment, and prayed for damages, attorney's fees and reimbursement of her wages. After learning of the separation, Shel-Boze itself moved to dissolve the garnishment, on June 28, 1985, and an order to that effect was signed by the trial court on July 2, 1985. The court subsequently ordered that all of Mrs. Melton's wages garnished after May 8, 1985 (the date of termination of the community) be returned to her, and awarded Mrs. Melton $400 in general damages and $200 as attorney's fees. Shel-Boze appealed.

Prior to the filing of her petition for separation on May 8, 1985, Mildred Melton's wages were community property. See LSA-C.C. art. 2338. The garnishment was effective upon service of the petition, citation, and interrogatories to the School Board, LSA-C.C.P. art. 2411, on March 25, 1985, over a month earlier. Mrs. Melton's wages were therefore community property when the garnishment became effective. Shel-Boze, as a creditor, was entitled to satisfy the obligation incurred by David Melton from Mrs. Melton's wages, LSA-C.C. art. 2345, by garnishment, LSA-C.C.P. art. 2411; LSA-R.S. 13:3921.

Mrs. Melton refers to LSA-C.C.P. art. 3506 as support for the trial court's award of damages and attorney's fees. Assuming that an award of damages and attorney's fees for a wrongful garnishment under a writ of fieri facias is permitted, we find no evidence that the writ was wrongfully issued, that Mrs. Melton's wages were wrongfully seized, or that the garnishment was wrongfully continued.

Mrs. Melton notes that she was a necessary, though not indispensable, party to Shel-Boze's action to enforce the obligation against her community wages. LSA-C.C.P. art. 735. Compare LSA-C.C.P. art 642 (necessary parties) with LSA-C.C.P. art. 641 (indispensable parties). She contends that the failure to serve her individually with prior notice of the original judgment or the garnishment proceedings deprived her of the procedural due process rights guaranteed her by the United States and Louisiana Constitutions.

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\(^1\)The record is not clear as to whether this debt was a community obligation incurred by David Melton or his separate obligation. Our result is the same in either case.
We do not believe that, under the circumstances, the failure to join Mrs. Melton as a necessary party deprived her of any constitutionally-protected right.

The failure to join a necessary party is a dilatory exception, LSA-C.C.P. art. 926 (8), which must be pleaded prior to answer or judgment by default. LSA-C.C.P. art. 928. In addition, where non-joinder may result in injustice, the trial court may, on its own motion, order joinder of the other spouse in a suit to enforce a community obligation. LSA-C.C.P. art. 735. This exception was not pleaded, nor was joinder ordered by the trial court, before judgment of default. Here, either Mr. Melton or Mrs. Melton was the proper party defendant in the suit to enforce the obligation against community property. LSA-C.C.P. art. 735. An adjudication of an action may be made even if all necessary parties are not joined. LSA-C.C.P. art. 642.

Each spouse, acting alone, may generally manage, control, or dispose of community property, LSA-C.C. art. 2346, although the other may have an action for reimbursement of community funds used to pay a separate obligation, LSA-C.C. art. 2364, or for bad faith management, LSA-C.C. art. 2354. In the instant case, Mr. Melton obligated the community property by guaranteeing payment of the business loan. He acted for the community in accepting service of notice of the original suit and, apparently, made a decision not to expose the community to the expense of defending it or the subsequent garnishment of the community income. A default judgment was rendered against Mrs. Melton's husband during the community regime after service upon him at the community residence. Three demand letters threatening the garnishment of Mrs. Melton's community wages were thereafter sent to the community residence. At the time the writ of fieri facias was issued (March 1, 1985), when the judgment of garnishment was rendered, and until the community was finally dissolved by the judgment of separation on June 14, 1985, plaintiff Shel-Boze had a right to execute upon Mrs. Melton's wages.

We believe that, if at all possible, both spouses should be made parties to any suit to enforce an obligation against community property. However, where, as here, the spouses reside together at the time, service of prior notice on one spouse alone does not offend the due process rights of the other with respect to the enforcement of an obligation against community property. As such, Mrs. Melton is not entitled to damages and attorney's fees for wrongful garnishment.

Although Mrs. Melton may not recover damages for wrongful garnishment, we believe that she is entitled to reimbursement of all of her wages garnished after May 8, 1985, the date the community was terminated and her wages became her separate property.

The judgment of separation, rendered June 14, 1985, terminated the community retroactively to the date the original petition for separation was filed, May 8, 1985. LSA-C.C. art. 155(A). This retroactivity is without prejudice to rights validly acquired by third parties, such as Shel-Boze, in the interim. LSA-C.C. art. 155(A); Aime v. Hebert, 254 So.2d 299, 300 (La. App. 4th Cir. 1971).

We do not believe that any rights validly acquired by Shel-Boze after the filing of the petition for separation are prejudiced by giving retroactive effect to the judgment of separation. Shel-Boze's right to execute against future community property was acquired when its judgment became final, in late 1984, and was necessarily contingent upon a continuation of the community
property regime. After termination, Shel-Boze had the right to execute against the property of the former community and David Melton’s separate property, LSA-C.C. art. 2357, but it was not entitled to retain Mrs. Melton’s wages after they became her separate property. As such, Mrs. Melton is entitled to the reimbursement of all wages garnished after the termination of the community property regime on May 8, 1985.

Accordingly, the judgment of the trial court is reversed in part insofar as it awarded damages and attorney's fees for wrongful garnishment, and affirmed in part, insofar as it reimbursed Mrs. Melton for wages garnished after May 8, 1985, and awarded legal interest from that date.

Costs of this appeal are assessed against appellant and appellee equally.

**Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941)**

CURTIS, J.

Lena Grolemund and Caesaer Grolemund, her husband, instituted this action against Emilio Cafferata and the respective sheriffs of the city and county of San Francisco and the county of San Mateo, for the purpose of procuring a permanent injunction restraining defendants from proceeding with the sale of certain personal property in San Francisco and certain real property in San Mateo County pursuant to executions issued on a judgment in favor of defendant Emilio Cafferata and others, as plaintiffs, and against plaintiff Caesar Grolemund, as defendant. From a final judgment in favor of defendants, plaintiff Lena Grolemund appeals.

On April 17, 1935, Emilio Cafferata and others recovered a judgment in an action prosecuted in the Superior Court of San Francisco against Caesaer Grolemund because of damages sustained on August 6, 1933, in an automobile collision, wherein the defendant was adjudged negligent in the operation of his car. In accordance with executions issued by the trial court on April 18, 1935, for the satisfaction of this judgment, levies were made by the respective sheriffs of the city and county of San Francisco and of San Mateo County on the above-mentioned property of plaintiffs in these counties. On May 31, 1935, third party claims as to each of these properties were filed with the respective sheriffs, Lena Grolemund asserting ownership of the San Francisco personal property and one Herman Weibel asserting ownership of the realty in San Mateo County by virtue of a deed executed in his favor by plaintiffs, who received no consideration therefor. After hearing on a petition to determine title on June 13, 1935, the trial court in the above-mentioned tort action made its order declaring this real and personal property to be community property of Caesaer Grolemund, the judgment debtor, and Lena Grolemund, his wife.

On July 2, 1935, plaintiffs filed in the present proceeding their first amended complaint, wherein, as basis for issuance of the desired injunction, appeared the following allegations: that this real and personal property was acquired by them subsequent to the year 1927 and their
community ownership of it was declared by the court order of June 13, 1935; that the tort judgment was entered against Caesar Grolemund alone. . . .

The principal question to be decided on this appeal is whether community property may be subjected to the satisfaction of a judgment against the husband for his tort. Fundamental to our determination of this basic issue is consideration of the change wrought in our community system by enactment in 1927 of section 161a of the Civil Code. The general rule that community property in California acquired prior to 1927, has always been held liable for the husband's debts (Cal. Jur. Supp., vol. 3, p. 663, sec. 146) was given unqualified recognition by this court in the celebrated case of Spreckels v. Spreckels, 116 Cal. 339, 343 [48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497], wherein it is stated that the creditor of the husband could, at his option, sell under execution either the husband's separate property or the community property. The rule announced in that case has never been departed from by any decision of this court to which our attention has been called. Appellant claims, however, that by virtue of the enactment in 1927 of section 161a of the Civil Code, the wife now has a vested interest in the community property, of which she cannot be deprived because of the debt of the husband alone.

Section 172 of the Civil Code, while it does not specifically create a liability or an exemption for any particular type of community property, gives to the husband "the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate". It reasonably follows from the express language above quoted that this section in effect subjects the entire community personality (with the exception of the wife's earnings, Civ. Code, sec. 168) to any and all contracts of the husband, as well as to judgments arising out of his tort. Furthermore, since the only limitation upon the husband is to refrain from making a gift of such property without consideration, he is not prevented from paying it out in compromise or satisfaction of a tort claim, for payment of a tort claim is not payment without consideration.

Section 172a of the Civil Code gives the husband "the management and control of the community real property," subject to the proviso that in regard to conveyances the wife must join with him in executing the necessary instruments. Since this restriction concerns only voluntary transfers, it has no application to the instant case involving the satisfaction of a judgment by levy of execution, so that for all practical purposes herein the husband's power of management and control of the community real property involved here is as absolute and complete as it is with respect to community personal property, as outlined in section 172. That the addition in 1927 of section 161a, defining the interests of the spouses in community property, did not change the rule vesting in the husband the entire management and control of the community property is manifest by the express recognition accorded sections 172 and 172a in the later statute. . . .

With reference to California legislation on the question of liability or exemption of property of the spouses for payment of obligations arising out of the husband's tort, the sole enactments are section 168, which exempts the wife's earnings (community property) from liability for debts of the husband, and section 171, which extends the same exemption in respect to the wife's separate property. It is significant to note that nothing is said in regard to the liability of the husband's separate property, the husband's earnings, or the balance of the community property (the wife's earnings excepted by Civ. Code, sec. 168) in regard to an obligation created by the husband's tort.
From this silence of the legislature it logically can be inferred that it was thereby intended that the husband, as agent of the community, should retain the power to divest the parties of their community property by his own act in the same manner that he might divest himself of his separate property, so long as he did not make a gift of the former without consideration. To hold that the husband could not subject the community property to liability for his tort would be to hold that he could not manage and control the same. To illustrate, suppose that the tort action had never been instituted by Emilio Cafferata and his co-plaintiffs, but that Caesaer Grolemund, after injuring these parties, had made a voluntary settlement of his liability. It cannot be said that the husband would be without power to use common funds to pay for the damages sustained by the injured persons because of his negligent act. Or let us suppose that the damage suit was brought and judgment had gone against Caesaer Grolemund, as here, but that no execution had been levied, it is obvious that the husband could satisfy such judgment voluntarily from a bank account under his control but which consisted of community funds. The foregoing analysis compels us to conclude that there is no logical distinction to be drawn between satisfaction of a judgment against the husband by levy of execution against the community property and satisfaction of a like judgment by the husband's voluntary payment from community funds.

Appellant advances the argument that the statutes of Washington and the statutes of California regarding community property are the same, and, therefore, the rules announced in decisions of the Washington courts interpreting their code sections should be followed here. This contention is singularly devoid of merit in view of the fact that the underlying theories of the community system in the two states are entirely distinct. The Washington statutes are based on the theory of tenancy by entireties, with its fundamental concept of "community debts," and in that state the community property is not liable for the separate debts of the husband, much less of the wife, but is liable only for so-called "community debts". (Cal. Jur. Supp., vol. 3, p. 665, sec. 147, and cases there cited.) For example, in Sun Life Assur. Co. v. Outler, 172 Wash. 540 [20 Pac. (2d) 1110], the Washington court said at page 544: "The test of a community obligation is: 'Was the transaction carried on for the material benefit of the community?'" Thus, in Washington where the system makes the community property responsible only for "community debts" or "community liabilities," the community property cannot be reached for the individual tort of either the husband or wife. But in California there is no like concept of "community debts," though occasionally the courts in this state refer to such, overlooking the fact that the phrase is not appropriate to the California system (Cal. Jur. Supp., vol. 3, p. 666, sec. 147). A complete reading of all our code sections on community property clearly demonstrates that our community system is based upon the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property (with the single exception of the wife's earnings, which are exempted from certain types of debt, Civ. Code, sec. 168). This proposition was confirmed in Street v. Bertolone, 193 Cal. 751, 753 [226 Pac. 913]: "The term 'the debts of the husband,' unless otherwise qualified, includes debts incurred by the husband for the benefit of the community as well as his own separate debts." Since in this state there is strictly no such thing as "community debts" in the sense in which they existing Washington, the decisions of the latter state lose force as a precedent here.

It would serve no useful purpose to extend this opinion with prolonged discussion of the many income tax and inheritance tax authorities cited by appellant to uphold her theory. As example of these, we take occasion to make brief comment on the leading case of United States v.
Malcolm, 282 U.S. 792 [51 Sup. Ct. 184, 75 L. Ed. 714], which expresses the prevailing view of the federal courts in its holding that the wife in California has such a present and vested interest in the community property that she may file a separate income tax return. We do not dispute the controlling effect of the rule announced in that decision on taxation questions involving like legal principles, but it has no bearing on the totally different situation presented here requiring determination of whether the wife's interest is such as will exclude the theory that the husband may manage and control, as well as create a liability against community property. (Sampson v. Welch, supra; Hirsch v. United States, 62 Fed. (2d) 128.)

Likewise, there is no merit in appellant's emphasis on the comparable operation of the homestead and community property laws. True, by the express language of our code, the most important exemption from execution is that of the homestead (Civ. Code, secs. 1240, 1241), but in the absence of such a specific limitation in the community property statutes, we fail to see the analogy advanced by appellant. The point is too clear for extended discussion.

Since it is our opinion that the enactment of section 161a of the Civil Code, defining the interests of the spouses in community property, has not altered the situation with respect to the wife's interest remaining subject to the husband's power of management and control, all community property, whether acquired prior to or subsequent to July 29, 1927 (the effective date of this statute), is liable for satisfaction of the husband's debts. As the date of acquisition is immaterial here, the preceding discussion applies with equal force to the personal property in San Francisco purchased by the Grolemunds in 1926 and eliminates any necessity for separate treatment of that phase of this proceeding.

Our conclusion in the instant case is not only in conformity with legal principles, but is consonant with practical considerations and public policy as well, for otherwise a person injured by the separate act of the husband would fail to gain redress for his damage in such case where the only property of the spouses is community. This obviously unfair and unjust result would have a disastrous effect on the very foundation of our community system and would be entirely out of harmony with the general rule that the community property is liable for the husband's debts. The trial court properly held that respondents may proceed to levy execution upon both the community real and personal property of the Grolemunds, and sell the same in satisfaction of the tort judgment obtained against the husband alone.

The judgment appealed from is accordingly affirmed.


PERRY, Judge.

Shelly L. Seele appeals from the district court's intermediate appellate decision affirming the magistrate's denial of her motion to vacate and set aside a judgment and to quash a continuing garnishment of her wages. We affirm.
FACTS AND PROCEDURE

On March 12, 1992, Action Collection Service, Inc. filed a complaint against Seele and her former husband seeking monetary judgment on a number of uncollected debts that had been incurred by Seele and her husband during their marriage and which were assigned to Action by various creditors. On May 5, an answer was filed bearing the typewritten signature of Shelly L. Calkins. Action thereafter moved for and was granted summary judgment after a hearing at which Seele failed to appear. A judgment was entered in favor of Action in the amount of $1,957.46. Action subsequently attempted to locate Seele in order to collect on the judgment but was unsuccessful. Five years later, on June 18, 1997, Action filed a motion to renew the judgment, which was granted. After the judgment had been renewed, Action located Seele and sent her several notices in an attempt to collect on the judgment to no avail.

In the early part of 2000, Action sought to enforce its judgment by garnishing Seele's wages. Seele, who had remarried since entry of the judgment, presented a claim of exemption. Action thereafter filed a motion to contest Seele's claim of exemption, and Seele filed a motion to vacate and set aside the judgment and to quash the continuing garnishment of her wages. On June 8, the magistrate denied Seele's motion and granted Action's motion to contest Seele's claim of exemption. Seele appealed and the district court affirmed. The district court also awarded costs and attorney fees to Action. Seele now appeals to this Court, asserting that: (1) the original judgment is void because the magistrate did not have personal jurisdiction over her; (2) her motion to vacate and set aside the judgment was timely; (3) the magistrate erred by concluding that her wages could be garnished to satisfy Action's judgment, which consisted of her separate, antenuptial debt; (4) Action unlawfully brought the underlying action against her; (5) her right to due process has been violated; and (5) the award of attorney fees to Action on the intermediate appeal was improper.

II.
STANDARD OF REVIEW

On review of a decision of the district court, rendered in its appellate capacity, we examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision. Hentges v. Hentges, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct.App.1988).

III.
ANALYSIS

A. Motion for Relief From Judgment Under I.R.C.P. 60(b)

Seele's former husband was not a party to the underlying proceedings and is not a party to the present appeal.
[The Court of Appeals found that the trial court had jurisdiction because the evidence established that the summons was properly served on Seele although the return of service was not properly filed in the court file.]

2. Effect of divorce decree on judgment creditor

In the proceedings before the magistrate, Seele asserted that when she divorced her former husband, he was allocated and ordered to pay the debts encompassed by the judgment obtained by Action. Seele argued that Action was bound by the decree of divorce and, consequently, precluded from obtaining a judgment against her. The magistrate did not address the merits of this issue. On appeal, Seele asserts that Action's suit against her to collect the unpaid debts was unlawful.

After reviewing the record before us, we decline to address the merits of Seele's argument. When a party is seeking to vacate or set aside a judgment pursuant to Rule 60(b)(1), it is incumbent upon that party not only to meet the requirements of Rule 60(b), but also to show, plead, or present evidence of facts which, if established, would constitute a meritorious defense to the action. See Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct.App.1994). In the present case, it is unclear precisely what grounds for relief, other than the judgment being void, Seele asserted in her motion to set aside the judgment and to quash continuing garnishment of her wages because that motion has not been included in the record on appeal. We note that it is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. Powell v. Sellers, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct.App.1997).

The magistrate observed at a hearing on Seele's motion that she was challenging Action's ability to proceed against her by virtue of the division of the community obligations in Seele's previous divorce decree. Such a challenge could conceivably pertain to grounds for relief under Rule 60(b)(1) or (b)(6). However, a motion for relief from a judgment pursuant to these subsections must be made not more than six months after entry of the judgment in question. Rule 60(b). Here, Seele did not seek relief from the judgment until approximately eight years after its entry. Therefore, to the extent Seele asserted a ground for relief under Rule 60(b)(1) or (b)(6) in her motion to vacate and set aside the judgment and to quash continuing garnishment of her wages, such grounds were time-barred. Accordingly, the merits of Seele's defense to Action's motion for summary judgment and the ensuing entry of the judgment against her are not properly before us and will not be considered.

B. Motion to Quash Garnishment of Wages

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3 Idaho Rule of Civil Procedure 60(b) provides, in relevant part:
On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (6) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.
In its order denying Seele's motion to vacate and set aside the judgment and quash the continuing garnishment of her wages, the magistrate found that although Seele's wages were community property relative to her remarriage, they were not exempt from execution upon Action's judgment. On appeal, Seele argues that the magistrate erred by concluding that her wages could be used to satisfy Action's judgment because the judgment constituted her separate antenuptial debt.

All property of either a husband or a wife owned before marriage, and that acquired afterward either by gift, bequest, devise or descent, or that which either acquires with the proceeds of his or her separate property, remains his or her sole and separate property. I.C. § 32-903. All other property acquired after marriage by either the husband or the wife, including his or her salary, is community property. I.C. § 32-906; see Martsch v. Martsch, 103 Idaho 142, 147, 645 P.2d 882, 887 (1982). The statutes dealing with Idaho's community property system do not directly address the question we are asked to decide. Idaho Code Section 32-910 provides that the separate property of the husband is not liable for the debts of the wife contracted before the marriage. Section 32-911 provides that the separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before or after marriage. However, these statutes provide minimal guidance for the issue presented by Seele because they concern the liability of the separate property of the spouses for debts incurred by the husband or the wife. Conversely, the issue we face here concerns the liability of one spouse's community property upon remarriage for the separate antenuptial debts of that spouse.

Likewise, few Idaho cases have dealt with this particular issue. In Holt v. Empey, 32 Idaho 106, 178 P. 703 (1919), the real property of Empey's husband was attached by Holt to satisfy a debt that the husband had incurred as a surety for a third party. Empey intervened in the action, alleging that the property attached was community property and not subject to levy for the separate debt of her husband. The Idaho Supreme Court disagreed, holding that the community property was liable for the separate debts, obligations, and liabilities of the husband and that the community real estate was liable to attachment and execution for the debts of the husband, whether incurred for his own use or for the benefit of the community. It is unclear from the Court's opinion whether the husband's debt was incurred before or during the marriage but, presumably, the community property was liable regardless of whether the debt was antenuptial or postnuptial. See Joann Henderson, Idaho Law Foundation, Community Property Law of Idaho ch. 9, at 15 (1982).

In Gustin v. Byam, 31 Idaho 538, 240 P. 600 (1925), Gustin and her husband lived on land owned by Gustin's father under an arrangement whereby the husband was to farm the land during the year and give one-half of the crops to the father for use of the land. During the marriage, the husband gave a note to his brother secured by a chattel mortgage covering the whole of the crops, including the share of Gustin's father. At the father's insistence, the mortgage was subsequently released by the brother. At around the same time, the brother indorsed the note to a hardware company, which then brought suit to collect on the note. A default judgment was obtained, and the husband's share of the crops was levied upon and sold in order to satisfy the judgment. Gustin filed an action seeking to set aside the judgment and to recover the value of the crops, claiming that the crops were community property and exempt from execution. On appeal from a judgment entered in favor of the defendants, the Idaho Supreme Court noted that at that time, I.C. § 32-912 gave the husband the management and control of the community property, with full power of
alienation except as provided in the statute. Among the powers the husband could exercise alone was the sale of community personal property, whether it was exempt from execution or not. Relying on the holding in *Holt*, the Court held that the community property was liable for the separate debts of the husband as well as for community debts. The Court held that in order to defeat the threatened alienation of the community personal property, Gustin was required to prove that her husband's alienation of the community property was done for the sole purpose of depriving her of her rights in the community property, which she failed to do. Consequently, Gustin was unable to recover the property sold.

Both *Holt* and *Gustin* were decided at a time when the husband was given sole power to manage and control the community property by statute. In 1974, the legislature amended I.C. § 32-912, giving the husband and the wife equal management and control of the community property. See 1974 Idaho Sess. Laws ch. 194, § 2. Despite the change in the management and control of the community property and in spite of any doubt concerning the continued vitality of *Holt* and *Gustin*, those cases were cited with approval by our Supreme Court in *Bliss v. Bliss*, 127 Idaho 170, 898 P.2d 1081 (1995). In that case, the Court recognized that parties often marry with separate antenuptial debts. Citing *Holt* and *Gustin*, the Court observed in dicta that the separate antenuptial debts of a husband or wife are payable from community property.

Although the Court in *Bliss* was not presented with the situation facing us in this case, where a judgment creditor is attempting to garnish one spouse's community property wages to satisfy that spouse's separate antenuptial debt, the Court's holding was not limited to the facts of that case and we perceive no reason to do so. To prevent Action from levying against Seele's wages to collect on its judgment and allow Seele to avoid her responsibility for the debts encompassed by Action's judgment would result in marital bankruptcy, particularly if Seele has insufficient separate property to satisfy the judgment. Hence, although Seele argues to the contrary, she remains responsible for the unpaid debts constituting Action's judgment and her community property wages should not be placed beyond Action's reach to satisfy its judgment.

Further, we must assume that when I.C. § 32-912 was amended in 1974, the legislature had full knowledge of the existing judicial decisions construing that statute's meaning. See *Ultrawall, Inc.* v. *Washington Mutual Bank*, 135 Idaho 832, 836, 25 P.3d 855, 859 (2001). The elevation of the status of wives to equal managers of the community property by virtue of the amendment, without a specific exemption of the liability of the community property for each spouse's separate debts, suggests that the legislature intended for the rules of law enunciated in *Holt* and *Gustin* to apply equally to the husband and the wife after amendment of the statute. Therefore, just as the community property in those cases was liable for the separate debts of the husband, whether antenuptial or postnuptial, so are Seele's community property wages liable to satisfy Action's judgment. For these reasons, we conclude that Action was entitled to garnish Seele's community property wages in order to collect on its judgment against her and that the magistrate did not err by denying Seele's motion to quash continuing garnishment of her wages.4

4 Seele relies on *Twin Falls Bank & Trust Co. v. Holley*, 111 Idaho 349, 723 P.2d 893 (1986), to support her argument that Action cannot garnish her community property wages. That case is inapposite to the case at bar, however. In that case, the promissory note to the bank was signed only by the husband and, therefore, the husband alone was contractually liable for the debt. Here, Seele does not dispute that she was contractually liable for the debts encompassed by Action's judgment. In addition, the issue in Holley was whether the bank could reach former
IV. CONCLUSION

We conclude that Seele was served with the summons and complaint in the proceedings brought by Action against her. Therefore, we hold that the magistrate had personal jurisdiction over Seele at the time the judgment against her was entered and that Seele has failed to demonstrate that Action's judgment is void. Due to our resolution of this issue, we need not address Seele's alternative contention that she did not voluntarily appear before the magistrate by virtue of the answer filed bearing only her typewritten signature. It is also unnecessary to consider Seele's second contention on appeal concerning the timeliness of her motion to vacate and set aside the judgment pursuant to I.R.C.P. 60(b)(4). We also do not address the merits of Seele's defense to Action's motion for summary judgment and the ensuing entry of the judgment against her because that issue is not properly before us. We further conclude that Action is entitled to garnish Seele's community property wages in order to satisfy its judgment against her. Therefore, we hold that the magistrate did not err by denying Seele's motion to quash continuing garnishment of her wages.

Chief Judge LANSING and Judge GUTIERREZ concur.


TAYLOR, Chief Justice.

On the afternoon of May 27, 1958, plaintiff (respondent), while a patron in a bar, owned and operated by defendant (appellant), became involved in an argument with another patron. The defendant, who was tending bar at the time, testified to the altercation as follows:

A. So, they kept on, and they started cussing, see, so Mr. Hansen started cussing Babe [the other patron], see, and called him names, so I said, Here. We can't have that in my place, you see, so I asked them to, you know, to quieten down, so they quietened down, and the first thing I knew they started up again, and the first thing I know Bill Hansen got Babe by the shirt collar and undertake to choke him, and the first thing I know why they got together, and there was a few licks passed, you know, about the body, and the first thing I know why I noticed the place appeared that Babe had hit Bill up at the side of the eye, and it was bleeding down the side-

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community property awarded to the wife during the parties' divorce to satisfy the husband's unsecured debt. In this case, Action is not seeking to collect on former community property awarded to Seele. Rather, Action is attempting to garnish Seele's wages which are the community property of Seele and her new husband.
Q. Blood was running down the side of his face?

A. Yes. And by the time I got across the bar they had run into my tables and chairs on the far side of the bar, so when I got over there I said, 'Here, boys. We can't have no trouble in my place of business.' So, then I undertake to part them, see, separate them. So, Bill Hansen got mad over it, you know, and so then I said, 'Well, there's no use having any trouble. Look here, Bill. You're jumping onto a man sixty-one years old.' And, I said, 'It's all uncalled for to have any trouble.' So, I said, 'You boys go over and sit on the stool, and you can remain in the place if you will be a gentleman and if you can't you will have to get out.' So, they started taking two or three steps in there, and they started in again, see.

Q. Started in fighting again?

A. Yes.

Q. All right.

A. So, they went together and Babe got a-hold of Bill, oh, in about the neck, you know, and had him back and still Bill was hitting him underneath in the cheek here, so I separated them again. I turned them around and thought we had it all settled, and they were going to their stools, so, in the meantime, Bill Hansen accused me of Babe and I, in other words, doubling up on him, so I said, 'No. I don't show no partiality or take no sides.' In the meantime he says, 'I'm going across the street and get an evener, and I will wipe you sons-of-bitches out.' I said, 'Listen, Bill. We can't have that in our place.' * * * I said, 'Now, Bill, listen. We are both in business.' I said, 'There's no use having any trouble.' I says, 'Please be quiet or leave the premises.'

Defendant further testified that plaintiff then went across the street to a cafe owned and operated by plaintiff and his wife, and returned in about three minutes; and,

A. When he came back he entered the door, I would say, about four feet.

Q. What did you do?

A. I met him. I said, 'Bill, I warned you when you left to not come back and please get out.' And he got out in front. I went along behind him, see, you know, getting him on out away. And he turned on me, and he ups and takes to go in with his right hand about so far like he was going after a weapon, so I pleaded with him, you know, to not give me any trouble, and I was working to get him away, so I had to shoot him, it looked like, for self defense. [Defendant discharged a tear gas gun in the face of the plaintiff.] * * *

Q. Did you think he had a gun?
A. Yes. In other words, it showed he was not ready to quit in the place, and when he come back he was ready. When he came in the door he said, 'Jay, come out.' He said, 'I'm ready for you now.' * * * That's why I taken the gas gun and tried to plead with him to leave my place. In case he did pull a weapon on me I did have a chance to keep him from coming back in. In other words, I didn't want him to give any more trouble in my place or kill anybody. * * * He stumbled back and fell off the sidewalk right at the edge of the sidewalk. That was right in front of my door, pretty close to my door when all the trouble was performing.'

As a result of the tear gas, plaintiff's eyes were injured. This action brought by plaintiff for damages, resulted in a verdict and judgment in his favor against the defendant Blevins.

The bar being operated by the defendant Blevins was the community property of himself and wife. Mrs. Blevins was not made a party to the damage action. Execution, issued for the satisfaction of the judgment, was levied upon certain community real property belonging to Blevins and his wife. Defendant Blevins then moved to quash the levy upon the ground that the judgment was based upon his intentional tort, and that the community property belonging to himself and wife was not subject to execution for the payment of such a liability. This appeal is prosecuted from the order denying the motion to quash. Defendant urges that the judgment, being a liability incurred by the husband, as the result of an intentional or malicious tort, is a separate debt of the husband, and that the community property is not liable therefor. The applicable provision of our community property law is as follows:

The husband has the management and control of the community property, except the earnings of the wife for her personal services and the rents and profits of her separate estate. But he can not sell, convey or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered: * * *. I.C. §32-912.

In *Holt v. Empey*, 32 Idaho 106, 178 P. 703, this court was concerned with the validity of a levy made upon community real property for the satisfaction of a judgment entered against the husband as a surety for a third party. The appellant in that case contended that if the court should hold the community property subject to the payment of the separate debt of the husband, it would be allowing the husband to do indirectly what he could not do directly. The court said:

* * * We therefore hold that community real estate is liable to attachment and execution for the debts of the husband, whether incurred for his own use or for the benefit of the community. *Holt v. Empey*, 32 Idaho 106, at 110, 178 P. 703, 704. *See also Gustin v. Byam*, 41 Idaho 538, 240 P. 600.

Defendant urges a distinction between this case and *Holt v. Empey*, contending that a contractual obligation, in theory at least, involves some benefit to the community and is subject to some degree of control by the wife; whereas, an intentional tort confers no benefit and cannot be subject to control by the innocent spouse.
Defendant relies upon decisions from Arizona and Washington and cites *Shaw v. Greer*, 67 Ariz. 223, 194 P.2d 430; *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312; *Smith v. Retallick*, 48 Wash.2d 360, 293 P.2d 745. The Washington statute, however, contains a provision, not found in our law, as follows:

Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and material furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sales on execution issued thereon. (Emphasis added.) Rev.Code of Wash. §26.16.040.

Arizona follows Washington precedents because of the similarity of the statutes of the two states. *Cosper v. Valley Bank* (Ariz.) 237 P. 175. In those jurisdictions the community property is immune from obligations resulting from a tortious act of one of the spouses not concurred in or ratified by the other, unless the wrongful act was committed for the benefit or protection of the community property, or was so intended. In cases where the tort was intended as a benefit to, or for the protection of, the community, the liability arising therefrom becomes a 'community debt.'

Quoting from an earlier case, the Washington court in *Newbury v. Remington, et ux.*, *supra*, said:

"The controlling consideration is, was the tortious act of Neslin, the husband, committed by him in the management of the community property or for the benefit of the community? If so committed, the community must be regarded as having committed the act, and thereby rendered itself liable therefor." 52 P.2d 313.

In *La Framboise v. Schmidt*, 42 Wash.2d 198, 254 P.2d 485, the Washington court held the community liable, under the doctrine of respondeat superior, for damages resulting from a tort committed by the husband in taking indecent liberties with a six year old girl temporarily placed in custody of the community for pay. The decision was based upon the ground that the husband's acts were committed in prosecution of the business of the community, i.e., the care of the child. The court said:

Both parties are agreed that the liability of a community for the torts of the spouses is placed upon the theory of respondeat superior, and that it is the law of this state that the community is not liable for the torts of the husband, unless the act constituting the wrong either (1) results or is intended to result in a benefit to the community or (2) is committed in the prosecution of the business of the community.' 254 P.2d at 486.

In a later decision, *Mortensen v. Knight*, 81 Ariz. 325, 305 P.2d 463, the Arizona court held, three to two, that the husband's interest in community property was liable for the negligent operation of a community automobile by the wife. This conclusion was arrived at by application of the family purpose doctrine, under which the wife became the agent of the husband and he was required to respond as her superior. The doctrine and its application was predicated on the husband's management and control of the community property. As such manager he was charged
with complete control of the use of the family car. The wife was killed in the accident, and the court went on to say:

Under the circumstances, where the wife is not deceased or her personal representative can be joined in the action, the whole of the community property is, of course, subject to the satisfaction of the judgment. 305 P.2d at 469.

In the Mortensen case the Arizona court reviewed the history of the community property law in the western states (including Idaho) and concluded that the Arizona system came from Texas by way of California, and that the decisions of Washington "while informative, are not necessarily more persuasive than either of those of the states of California or Texas."

Defendant also calls attention to the rule obtaining in this jurisdiction that the interest of the wife in community property is a present vested interest, equal in degree, nature and extent to that of the husband. Willes v. Palmer, 78 Idaho 104, 298 P.2d 972; Anderson v. Idaho Mutual Benefit Association, 77 Idaho 373, 292 P.2d 760. It is urged that the decisions of the Washington and Arizona courts are more persuasive because in those jurisdictions the interest of the wife in the community estate is also recognized as a present, existing, vested interest (Grimditch v. Grimditch, 71 Ariz. 198, 225 P.2d 489; Schwartz v. Schwartz, 52 Ariz. 105, 79 P.2d 760, 116 A.L.R. 633; Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 74 P.2d 27, 114 A.L.R. 531); whereas in the states adopting the rule that the community is liable for obligations incurred through the tort of the husband, the interest of the wife in the community property was regarded as a mere expectancy. Prior to 1927 the California court had held that the wife had no present, vested right in the community property, and that her interest was a mere expectancy. In 1927 the legislature added section 161a to the Civil Code. This section provided that,

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband. California Civil Code, §161a.

In Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641, the husband had suffered a judgment for damages arising out of his negligence in the operation of his car. Inter alia the court said:

Section 172a of the Civil Code gives the husband 'the management and control of the community real property', subject to the proviso that in regard to conveyances the wife must join with him in executing the necessary instruments. Since this restriction concerns only voluntary transfers, it has no application to the instant case involving the satisfaction of a judgment by levy of execution, so that for all practical purposes herein the husband's power of management and control of the community real property involved here is as absolute and complete as it is with respect to community personal property, as outlined in section 172. That the addition in 1927 of section 161a, defining the interests of the spouses in community property, did not change the rule vesting in the husband the entire management and control of the community property is manifest by the express recognition accorded sections 172 and 172a in the later statute. **
With reference to California legislation on the question of liability or exemption of property of the spouses for payment of obligations arising out of the husband's tort, the sole enactments are section 168, which exempts the wife's earnings (community property) from liability for debts of the husband, and section 171, which extends the same exemption in respect to the wife's separate property. [Same as our I.C. §32--911.] It is significant to note that nothing is said in regard to the liability of the husband's separate property, the husband's earnings, or the balance of the community property (the wife's earnings excepted by Civ. Code, sec. 168) in regard to an obligation created by the husband's tort. From this silence of the legislature it logically can be inferred that it was thereby intended that the husband, as agent of the community, should retain the power to divest the parties of their community property by his own act in the same manner that he might divest himself of his separate property, so long as he did not make a gift of the former without consideration. To hold that the husband could not subject the community property to liability for his tort would be to hold that he could not manage and control the same. To illustrate, suppose that the tort action had never been instituted by Emilio Cafferata and his co-plaintiffs, but that Caesaer Grolemund, after injuring these parties, had made a voluntary settlement of his liability. It cannot be said that the husband would be without power to use common funds to pay for the damages sustained by the injured persons because of his negligent act. Or let us suppose that the damage suit was brought and judgment had gone against Caesaer Grolemund, as here, but that no execution had been levied, it is obvious that the husband could satisfy such judgment voluntarily from a bank account under his control but which consisted of community funds. The foregoing analysis compels us to conclude that there is no logical distinction to be drawn between satisfaction of a judgment against the husband by levy of execution against the community property and satisfaction of a like judgment by the husband's voluntary payment from community funds.' 111 P.2d at pp. 643, 644.

After making reference to the Washington concept of 'community debts' and noting the absence of such concept in California law, the court said:

our community system is based upon the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property ***. This proposition was confirmed in Street v. Bertolone, 193 Cal. 751, 753, 226 P.913: 'The term 'the debts of the husband,' unless otherwise qualified, includes debts incurred by the husband for the benefit of the community as well as his own separate debts." 111 P.2d at pp. 645, 646.

In New Mexico the wife's interest in community property is regarded as segregable and subject to the satisfaction of a judgment against her for her personal tort. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966. In Texas the community property is liable for the tort of either spouse. The separate property of the husband is not liable for the tort of the wife. The separate property of the wife and the income from her separate property and her personal earnings, are not liable for the tort of the husband. Annotation 10 A.L.R.2d §9, pp. 997, 998.
It is not necessary to a decision in this case to determine whether community property is liable in all cases for the payment of obligations incurred by the tort of the husband. Here the record shows that the defendant committed the battery while he was actively and actually engaged in the management of the community business, and that what he did was intended to be for the protection of community property and in the interest of the community business. Under such circumstances the community is responsible for his acts. *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 1181; *McHenry v. Short*, 29 Wash.2d 263, 186 P.2d 900; 41 C.J.S. Husband and Wife §523.

The order is affirmed.

**B. Community Debt Jurisdictions**


SWANSON, J

Bank of Washington appeals from a judgment dismissing its claim against the marital community of Robert and Elaine Starry.

In 1977 and 1978, Bank of Washington made four loans totaling $73,531.59 to Hilltop Shakemill, Inc., a Washington corporation formed by Mark Starry and D. H. Buckenmeyer. Before the loans were issued, Robert Starry, Mark Starry's father, executed a "General Guaranty" in which he promised on behalf of himself and his marital community to guarantee payment of all of Hilltop's obligations to the Bank of Washington. Neither Robert Starry nor the bank informed Starry's wife of the guaranty. The bank's records indicate that Robert Starry told the bank that he executed this guaranty "to help his son."

Earlier in 1977, Robert Starry had executed his personal guaranty on a $5,000 loan from Seattle-First National Bank to Hilltop, also without informing his wife. Again, the bank's records indicate that Robert Starry executed this guaranty intending to help his son. This loan became delinquent in September 1977, and Hilltop sought the first loan from Bank of Washington in part to repay the Seattle-First National loan.

Robert Starry was a partner in Alpine Excavating, an apparently prosperous road construction and logging business. In 1977 and 1978, Alpine did occasional business with Hilltop. Alpine hauled cedar logs for Hilltop for a fee of $360 and sold cedar blocks worth some $12,000 to Hilltop, for which it was never paid. Robert Starry at times gave business advice to Hilltop through Buckenmeyer.

Hilltop defaulted on the loans from Bank of Washington, and the bank filed suit against Hilltop, Mark Starry, Buckenmeyer, Robert Starry, and against the Starrys' and Buckenmeyers' marital communities. Summary judgment was granted against Hilltop, the Mark Starrys, and the Buckenmeyers. At trial against the remaining defendants, Robert Starry and his wife Elaine, Bank
of Washington contended that Robert Starry executed the general guaranty intending to benefit his marital community economically and that, therefore, his marital community should be liable for the defaulted loans.

The trial court disagreed, dismissed the claim against the marital community, and entered judgment against Robert Starry individually. The court found that the hauling business Alpine did for Hilltop "was casual and inconsequential" and that the business advice Robert Starry gave to Buckenmeyer "was fatherly advice to help his son." The court concluded that the community of Robert and Elaine Starry "did not expect to receive any economic benefit as a result of Robert Starry's execution [of] the general guarantee" and that the community was not liable for Hilltop's obligations to the Bank of Washington.

Bank of Washington argues on appeal primarily that the trial court erred by (1) failing to apply a presumption that the community was liable for the debt and (2) concluding that the community did not expect to benefit economically from the loan guaranty. The bank also argues that the community is estopped from denying community liability.

A suretyship debt or obligation of one of the spouses creates a presumption of a community obligation. Warren v. Washington Trust Bank, 19 Wn. App. 348, 575 P.2d 1077, modified, 92 Wn.2d 381, 598 P.2d 701 (1978). The party seeking to avoid the obligation has the burden of rebutting this presumption by clear and convincing evidence. Warren v. Washington Trust Bank, supra. The presumption may be rebutted by a showing that the spouse incurring the debt or obligation did so without "the intention or expectation, at the inception of the transaction, . . . that a material economic benefit would accrue to the community." (Footnote omitted.) Warren v. Washington Trust Bank, supra at 360. See Sun Life Assurance Co. of Canada v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933).

Bank of Washington argues that the trial court failed to apply the presumption of a community obligation. The bank points out that the court never referred to the presumption and that the court said in its oral opinion:

It seems to me that the testimony of Mr. Wagner and Mr. Lusby and what was said in the bank's statement at [Seattle-First National Bank] and everything that Mr. Starry was doing, doing what he thought was the right thing, he was trying to help his boy get a start, and there's certainly nothing that I could ever infer from the evidence, or deduce therefrom, not even a scintilla, that this was at all meant where there might be any economic advantage for the community of Mr. Starry.

The bank contends that this quotation showed that the court looked for evidence from the bank of an economic benefit rather than evidence from the Robert Starrys of a lack of economic benefit to dispel the presumption of community liability.

The bank's arguments are ill-founded. The court's references to the testimony of Wagner and Lusby and to the "bank's statement" show that the court initially looked to testimony adduced by the Starrys to overcome the presumption of community liability. Wagner was president of Bank of Washington at the time of trial and was head of the bank's loan committee when the loans
to Hilltop were made. Wagner testified under cross-examination by the Starrys' counsel that the bank knew Robert Starry "was not in Alpine Excavating to financially gain out of . . . Hilltop . . . ." Lusby was president of the bank when the loans to Hilltop were made. Under cross-examination by the Starrys' counsel, he testified that he understood Robert Starry had no personal income from Hilltop and, by guaranteeing the loans, was just trying to help his son. Both men testified under cross-examination that they had no knowledge of any contact between the bank and Robert Starry's wife about the guaranty. The "bank's statement" was a Seattle-First National Bank memorandum regarding Robert Starry's guaranty of the Seattle-First loan to Hilltop. There the Seattle-First loan officer noted, "I talked with Bob [Robert Starry] about this advance, and he feels that it is his duty as a father to try and help Mark [Starry] get started on something productive." This statement was corroborated by Robert Starry, who also testified that he did not expect to benefit economically from his loan guaranties. In considering this evidence, all adduced by the Starrys, the court showed that it had correctly looked to the Starrys to overcome the presumption of community liability. A presumption is not evidence; its purpose is only to establish which party has the burden of first producing evidence on a matter in issue. Amend v. Bell, 89 Wn.2d 124, 570 P.2d 138 (1977); Bradley v. S.L. Savidge, Inc., 13 Wn.2d 28, 123 P.2d 780 (1942). Once the Starrys had presented evidence to overcome the presumption of community liability, the presumption had served its function. See Amend v. Bell, supra. The trial court was then required to disregard the presumption, evaluate the evidence presented by both sides, and reach its conclusion. Our review of the record shows the court did just that.

The appellant argues, however, that the evidence does not support the court's findings of fact and its conclusion that the Starrys did not incur community liability. We disagree. Our review is limited to ascertaining whether substantial evidence supports the court's findings of fact and, if so, whether the findings support the conclusions of law and the judgment. Enterprise Timber, Inc. v. Washington Title Ins. Co., 76 Wn.2d 479, 457 P.2d 600 (1969). The bank argues that the community of Robert and Elaine Starry received a material economic benefit from the guaranty to Bank of Washington because Bank of Washington's loan to Hilltop enabled Hilltop to repay its loan from Seattle-First National Bank, also guaranteed by Robert Starry. This argument overlooks the separate nature of Robert Starry's guaranty to Seattle-First. The trial court found that Robert Starry executed the guaranty to Seattle-First without informing his wife. The Seattle-First

\[5\]Wagner also testified under recross-examination:
Q. [from the Starrys' counsel] Well, do you have anything to indicate that Bob Starry could have profited by this [loan to Hilltop]?  
A. No. At the time the loan was consummated?  
Q. Sure.  
A. No.  
Q. And you have no independent knowledge now that he was going to personally profit by this?  
A. Not at all, not at all.

\[6\]Q. [from the Starrys' counsel] Did you ever understand that Bob Starry had any personal income from the Hilltop Shakemill?  
A. [from Lusby] Father-son relationship is the only thing.  
Q. He was just trying to help Mark?  
A. (Nods head.)  
Q. You didn't think he was a part owner of Hilltop?  
A. No. Only thing Hilltop was buying some of their blocks from Bob, Bob's business occasionally.
memorandum and Starry's own testimony showed that Starry executed the guaranty to help his son without expecting to benefit economically. Therefore, by guaranteeing the Seattle-First loan, Robert Starry incurred separate liability only. See Warren v. Washington Trust Bank, supra. Hilltop's repayment of the Seattle-First loan, then, relieved Robert Starry of his responsibility for the loan but did not benefit the Starry community. Appellant argues that Seattle-First may have brought suit against the Starry community to enforce the guaranty and that, therefore, repayment of the loan saved the Starry community litigation expenses. We cannot presume, however, that Seattle-First would have brought a wrongful suit against the Starry community. Nor was evidence presented that Robert Starry executed the Bank of Washington guaranty expecting to avert such a suit. In any case, attorney fees incurred in defending a suit on a separate obligation of one of the spouses are a responsibility of that spouse and not of the marital community. See Vanderveer v. Hillman, 122 Wash. 684, 211 P. 722 (1923).

Bank of Washington next argues that Robert Starry expected to incur a material economic benefit from the Bank of Washington guaranty because his company, Alpine Excavating, did business with Hilltop Shake. Substantial evidence, however, supports the trial court's findings that such business was "casual and inconsequential" and that Starry was motivated by paternalistic rather than economic considerations in guaranteeing the loan to his son. This case contrasts sharply with Warren v. Washington Trust Bank, supra. There the court found community liability for the suretyship obligation of a husband on behalf of his son-in-law upon evidence of significant financial involvement between the two marital communities over a period of some 20 years. Rather, the instant case is akin to Sun Life Assurance Co. of Canada v. Outler, supra. There the court found that a husband's endorsement of a son-in-law's note created separate liability only, the community successfully having rebutted the presumption of community liability by a showing that the husband was motivated by "the promptings of a generous paternal impulse" rather than by expectations of economic benefit to the community. Sun Life, at 548.

We hold that substantial evidence supports the court's findings of fact and that the findings support the court's conclusions of law that the Starrys did not expect to benefit economically from the guaranty and, thus, did not incur community liability.

Bank of Washington argues finally that the Starrys should be estopped from denying community liability. The bank did not raise the issue at trial, and we will not consider it on appeal. See Fuqua v. Fuqua, 88 Wn.2d 100, 558 P.2d 801 (1977). We wish to make some observations, however, about what appears to be at the heart of this issue: the bank's belief that the Starrry community should be held liable for Hilltop's obligations because of Robert Starry's promises of community liability. The bank's feeling of betrayal by Robert Starry, evidently a respected businessman in his community, is understandable. Because Starry at present has no separate property, he may escape liability altogether for Hilltop's obligations. See Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892); Aichlmayr v. Lynch, 6 Wn. App. 434, 493 P.2d 1026 (1972). The bank, however, should know the State's community property laws as they relate to banking. The bank knew that Robert Starry did not execute the guaranty for business reasons, yet relied on Starry's assurances of community liability without requiring his wife to sign the guaranty. For the protection of community assets, the law requires both spouses to join in the gratuitous lending of
community credit. *Sun Life Assurance Co. of Canada v. Outler, supra.*\(^7\) Otherwise, through the actions of one spouse acting independently, "the community estate may be depleted by transactions in which it can have no possible chance to benefit." *Sun Life Assurance Co. of Canada v. Outler, supra* at 548.

The judgment is affirmed.


STAFFORD, J

The facts in this case are not disputed upon appeal. Mrs. deElche, her ex-husband and Mr. Jacobsen and his wife were socializing aboard the latter's 36-foot community-owned sailboat. Mrs. deElche decided to leave when the other three started drinking heavily. She went to bed aboard her ex-husband's boat which was tied up alongside the Jacobsens'. The others continued partying, which the trial court found to be community recreation. Later that night Mr. Jacobsen left his community-owned boat in an intoxicated state, went aboard the other vessel, and forcibly raped Mrs. deElche.

In the resulting civil case Mrs. deElche was awarded a judgment against Mr. Jacobsen separately. Since prior to the incident the Jacobsens had validly executed a community property agreement which converted all of their property to community property, Mr. Jacobsen had no separate property. The judgment was thus uncollectible since under then-existing law community property was deemed exempt from judgments arising from separate torts. Mrs. deElche appealed, asking us to overturn the rule which immunizes Mr. Jacobsen's community property and to follow the trend announced in *Werker v. Knox*, 197 Wash. 453, 456, 85 P.2d 1041 (1938):

>[O]f recent years, the trend of the law has not been toward relieving the community from liability for the torts of its individual members, but has been quite definitely in the direction of finding ways and means of imposing such liabilities upon the community.

We feel her position has merit.

The history of the exemption of community property from separate tort judgments is informative. Initially *Brotton v. Langert*, 1 Wash. 73, 78, 23 P. 688 (1890), held community owned real property was exempt from a judgment arising from a tort "not incurred for the benefit of the community." *Stockand v. Bartlett*, 4 Wash. 730, 31 P. 24 (1892), made it clear a separate debt creditor could not sell community real estate to reach the debtor's one-half interest, but *Powell v. Pugh*, 13 Wash. 577, 43 P. 879 (1896), did allow recovery from community personal property.

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Powell was overruled, however, by *Schramm v. Steele*, 97 Wash. 309, 166 P. 634 (1917), and from that time on all community property has been exempt from separate tort judgments.

The community "benefit" necessary to impose liability has been broadly interpreted. Torts arising out of the management of community property may lead to community liability. *See, e.g.*, *Benson v. Bush*, 3 Wn. App. 777, 477 P.2d 929 (1970). Purely personal recreation has been held to be a benefit to the community. *See, e.g.*, *Moffitt v. Krueger*, 11 Wn.2d 658, 120 P.2d 512 (1941) (wife drinking with friends); *see also King v. Williams*, 188 Wash. 350, 62 P.2d 710 (1936). Driving the family car yielded community liability, *Birch v. Abercrombie*, 74 Wash. 486, 133 P. 1020 (1913), particularly when it involved a community errand, buying "necessaries" such as a sweater, *Werker v. Knox*, supra. The combination of the management rule, benefit rule, family purpose doctrine, and imposition of liability when one of the spouses has been engaged in legitimate recreational activity has meant that, in practice, the community with few exceptions has been found liable for all torts except "purely personal altercation" and alienation of affection-type suits. Cross, Community Property Law in Washington, 49 Wash. L. Rev. 720, 836 (1974) (hereinafter Cross). Normally only a slight connection with the community has been required. *But see Bergman v. State*, 187 Wash. 622, 60 P.2d 699, 106 A.L.R. 1007 (1936), where the husband burned down a community-owned business in an attempt to collect insurance money and liability was found to be separate only.

Too often the determination of whether the tort is separate or community has been based on distinctions without a difference. Originally there was a distinction between torts committed in public versus private employment, the former producing only separate liability. *See, e.g.*, *Brotton v. Langert*, supra. This distinction was abolished in *Kilcup v. McManus*, 64 Wn.2d 771, 394 P.2d 375 (1964), however. Now distinctions more often are based on the ownership of property involved in the tort, which seldom has anything to do with the motivation of the defendant or injury to the plaintiff. *See, e.g.*, *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312 (1935), in which an assault was held to be separate although it arose out of driving the community automobile while returning from recreational activities. Defendant and plaintiff were driving in the same direction; when plaintiff attempted to pass, defendant repeatedly blocked him, all the while making various gestures. Eventually defendant forced plaintiff off the road, left his automobile, and struck plaintiff with his fist. This was held to be a separate tort based on the following rationale.

[T]he automobile was not used by respondent husband in striking and beating the appellant, nor was it in use at all by him at the time the assault and battery was inflicted by the respondent husband. He was away from the automobile at that time.

The uncontested finding of fact is "that said defendant [A. D. Remington] alighted from the automobile and went back to plaintiff's automobile, etc.," striking and beating the appellant.

Newbury, at 668. Clearly, if defendant had struck plaintiff with the automobile, rather than with his fist, the community would have been held liable. The same result would have been reached

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1Some commentators appear to think the concept of "community benefit" has been stretched too far. *See, e.g.*, *W. DeFuniak & M. Vaughn*, Community Property §182 (2d ed. 1971).
had he stayed inside his auto rather than alighting. Yet, neither distinction is so great that they should ultimately determine whether plaintiff should or should not recover.

An analogous case decided the opposite way is Benson v. Bush, supra. There, defendant broke up a dog fight between his community-owned dog and that of his neighbors by spraying a chemical in the face of the neighbors' dog. Thereafter defendant became angered by the neighbor and, when the latter started to walk away, sprayed some chemical in his face also. This was held to be a community tort since defendant had not "launched upon an individual enterprise of his own which had no relationship to the community . . ." Bush, at 780. See also McHenry v. Short, 29 Wn.2d 263, 186 P.2d 900 (1947) (community held liable for deadly assault arising from defense of community property); Blais v. Phillips, 7 Wn. App. 815, 502 P.2d 1245 (1972) (community held liable for assault occurring after a trial concerning community property).

On the other hand, the tortious act in Edmonds v. Ashe, 13 Wn. App. 690, 537 P.2d 812 (1975), was done expressly to benefit the community but only separate liability was found. There, the husband held some close friends hostage in an attempt to force a reconciliation with his wife. In a scuffle one of the friends was killed as was the husband. Although the Court of Appeals clearly had a difficult time distinguishing other cases, they felt they could not hold that the husband was acting in a way designed to benefit the community. There, however, there was no compelling reason to hold the wife's half interest in the community property liable. Since the husband had died, his half of the property was liable for any separate judgment and plaintiff was able to recover.

Other cases which found community liability upon tenuous contacts with the community, distinguished by Edmonds, include LaFramboise v. Schmidt, 42 Wn.2d 198, 254 P.2d 485 (1953), where the husband committed indecent liberties upon a child staying in their home, and Moffitt v. Krueger, supra, where a wife permitted a male friend with whom she had been drinking to drive the community automobile and his negligent driving caused an accident. In the cited cases the only way plaintiff could recover was a determination that the community was liable.

Clearly the current rule has yielded illogical, inconsistent and unjust results. When logically and equitably it was the tort-feasor alone who should bear the costs of his actions, the courts have been given only two choices -- either impose one-half of the liability upon the property of the nontortfeasing spouse, even though that spouse had nothing to do with the tort, or force the innocent victim to bear all damages produced by an acknowledged tort-feasor if that tort-feasor, even though solvent, had only community property. The tort-feasor could hardly lose; absent the ownership of separate property he or she could be held liable to pay either only half the judgment or nothing at all.

The avowed purpose of this rule was to protect the community entity from the "misdeeds, improvidence or mismanagement" of the miscreant spouse. See Brotton v. Langert, supra at 80. Clearly the early cases were based on the "entity" theory of the community. They speak of the community property statutes "breath[ing] into legal existence a distinct and original creation . . . termed a 'community.'" Brotton, at 78. The property was said to be "not the property of either of the parties, but of the community . . ." Stockand v. Bartlett, supra at 731. As said in Schramm v. Steele, supra at 315, "it is the statutory entity -- the community as such -- which owns the property."
Later cases have made it clear, however, that the community does not exist as a separate and distinct juristic entity, and that the property of the community is under the ownership of the husband and wife. *Household Fin. Corp. v. Smith*, 70 Wn.2d 401, 403, 423 P.2d 621 (1967). As stated in *Bortle v. Osborne*, 155 Wash. 585, 589-90, 285 P. 425, 67 A.L.R. 1152 (1930). . . .See also *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970) (spouses own an equal, present, and vested undivided half interest in the couple's community property in Washington); *In re Estate of Towey*, 22 Wn.2d 212, 218, 155 P.2d 273 (1945) ("vested" property right; "owned by both spouses equally"). See generally H. Marsh, *Marital Property in Conflict of Laws* 23-24 (1952).

The logical basis for the exemption of community property from separate tort liabilities (i.e., that the entity and not the spouses owned the property) has thus been eroded. Without the entity theory the question becomes why property owned by a person should be exempt from tort judgments. We can see no sufficient reason, given the harm which results therefrom.

Certainly statutory law does not support this exemption. Rather, it lends implicit support to the position we take here. The only statute dealing with recovery from a married tort-feasor, RCW 26.16.190, provides that the separate property of a spouse who is not the active tort-feasor is immune from recovery "except in cases where there would be joint responsibility if the marriage did not exist." Since this statute concerns separate property only, it does not necessarily immunize the nontort-feasor spouse's one-half interest in community property. It certainly cannot be read to immunize the tort-feasor's one-half interest in the community property.

Further, the historical background of community property does not support this exemption. Our system of community property evolved from the Spanish law, and although Spanish statutes are in no way binding upon us, they may at times aid in making difficult decisions. *In re Estate of Salvini*, 65 Wn.2d 442, 447, 397 P.2d 811 (1964). Spanish law allowed tort victims of married persons to recover from the wrongdoer's one-half interest in the community property. Novisma Recopilacion, 1805 A.D., Book 10, Title 4, De los Bienes Ganaciales o Adquiridos en el Matrimonio, Law 10 quoted at 2 W. deFuniak, Community Property, 20 app. I (1943). See W. deFuniak & M. Vaughn, Community Property §181 (2d ed. 1971).

As we see it, the best rule for dealing with tort recoveries from married persons is one which will impose liability on the community when a tort is done for the community's benefit, protect the property of the innocent spouse if the tort was separate, and at the same time allow recovery by the victim of a solvent tort-feasor. Our present concept of the law fulfills none of these goals. Innocent spouses' interests in community property are made liable upon the most tenuous considerations of "benefit" by the community in order to allow victims to recover; when this cannot be done the tort-feasor is often granted complete immunity. The system which we now establish balances these competing legal and societal considerations. It is supported logically, historically, and by fairness.

The system which we now consider is a combination of the better features of those employed by other community property states. New Mexico has allowed recovery from the tort-feasor's half interest in community property for over 30 years with no apparent problems, *McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990 (1949); N.M. Stat. Ann. §40-3-10 (1978). California imposes liability first upon community property when the tortious act is for the benefit
of the community, and first upon separate property if the tort was separate, but allows recovery from the other category of property once the property primarily liable is exhausted. Cal. Civ. Code §5122 (West Supp. 1980). In Louisiana a separate or community obligation may be initially satisfied out of either the offending spouse's separate property or community property, but there is a statutory right of reimbursement. La. Civ. Code Ann., arts. 2345, 2364, 2365 (West Supp. 1980). See generally Lay, Tort Liability of Community Property, 13 Wayne L. Rev. 706, 720 (1967).

Torts which can properly be said to be done in the management of community business, or for the benefit of the community, will remain community torts with the community and the tort-feasor separately liable. It may be that some torts which have in the past been classified as community (possibly as a result of "significant emotional factors or overtones" as suggested by Justice Finley's dissent in Smith v. Retallick, 48 Wn.2d 360, 365, 293 P.2d 745 (1956)) may now be properly considered separate.

For torts not in the management of community business or for its benefit, such as the tort in the present case, the separate property of the tort-feasor should be primarily liable. If there is insufficient separate property, however, then the tort-feasor's half interest in community personal property shall first become liable, RCW 6.04.040(1), n2 subject of course to the exemptions in RCW Title 6, Enforcement of Judgments. Since it is undisputed that the defendant in this case owns sufficient personal property held as community property to satisfy the liability in this case, we need decide no more.

The question then arises how we characterize that which remains of what was formerly community property. The logical answer to this, especially with the prevalence of community property agreements, is that the property remains community. The non-tort-feasor spouse will be protected however. If community property is used to satisfy a separate judgment, there will arise a right to reimbursement protected by an equitable lien, the same as in other cases where community property is used to improve a separate estate. See, e.g., In re Marriage of Harshman, 18 Wn. App. 116, 567 P.2d 667 (1977), where the community was given a right of reimbursement when community funds were used to pay the principal on a separate mortgage. See generally Cross, at 776-82. Due to this equitable lien, upon termination of the community relationship the non-tort-feasor spouse will hold as separate property the same amount as he or she would have received if the separate tort judgment had not been satisfied out of community property. This equitable lien will also protect the community pro tanto from subsequent separate judgment creditors attempting to levy on the remaining half of the property.

Respondent suggests that we should follow the rule of stare decisis, and that if the rule exempting community property is to be changed it should be done by the legislature. However, as this court stated in Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917) at page 318 (which we now expressly overrule):

"Much as we respect the principle of stare decisis, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none."
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Paul v. Davis, 100 Ind. 422, 428 [(1884)].

See also Freehe v. Freehe, 81 Wn.2d 183, 192, 500 P.2d 771 (1972) (abolishing interspousal tort immunity); Francis v. Francis, 89 Wn.2d 511, 516-17, 573 P.2d 369 (1978) (overruling cases concerning designation of nonspouse as beneficiary of one half of the proceeds of life insurance policy). Once again it is appropriate to echo the words quoted in Borst v. Borst, 41 Wn.2d 642, 657, 251 P.2d 149 (1952):

"Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." [Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).]

Plaintiff is therefore entitled to recover from defendant's one-half interest in his community personal property. It is so ordered.

Horowitz, J. (dissenting)

I dissent from the majority's imposition of liability for the separate tort of one spouse upon the property of the marital community. The extension of community liability is inconsistent with the concept of community property in this state and further is unjustified and unwise without explicit statutory authority.

In interpreting the law of community property in this state, we deal with an undefined concept:

[T]he exact nature of a community has been somewhat less than crystal clear. . . . The community, like the Kingdom of Heaven, is "like unto" a number of things (see Matthew 13:24-33), but seems to defy precise definition.

Household Fin. Corp. v. Smith, 70 Wn.2d 401, 403, 423 P.2d 621 (1967). However, an examination of our cases concerning the nature and disposition of community property interest demonstrates with "crystal clarity" that the majority's conclusions today are inconsistent with the protection of the marital community implicit in the concept of community property.

Each spouse in a marriage has an undivided half interest in each item of community property, In re Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972), a property right in the community property equal to that of the other spouse. In re Estate of Towey, 22 Wn.2d 212, 155 P.2d 273 (1945).

It is on the basis that community property is thus "owned" by the spouses that the majority concludes that there is "no sufficient reason" for the rule that community property should not be liable for the separate torts n5 of a spouse. Majority opinion, at 244. See also McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949) (reasoning that because the spouses' interests in community property are vested, there is no legal impediment to segregation and execution upon the tort-feasor spouse's community property interest).
This analysis confuses the concept of ownership with the availability of property for immediate possessory satisfaction of a tort judgment. The two do not go hand in hand. For instance, a future interest, such as a noncontingent remainder interest after an existing life estate is vested, the remainderman "owns" the future interest. The property is not, however, subject to immediate and total possession or sale for payment of a tort judgment against the remainderman. Although the vested interest can be sold or otherwise encumbered, the remainderman's creditor is not entitled to immediate possession because of the life tenant's interest. See McKenna v. Seattle-First Nat'l Bank, 35 Wn.2d 662, 214 P.2d 664, 16 A.L.R.2d 679 (1950). Just as in this example the life tenant's interest is not impaired by allowing immediate sale and possession on the remainder that will become a fee simple after the life tenant's estate expires, the undivided interest of the innocent spouse in the whole of the marital community's property should prevent encroachment upon the community property to pay the other spouse's separate tort debt.

The majority's holding effectively treats community property as a mere species of common law cotenancy, when it is in fact a type of property ownership intrinsically part of, dependent upon and overtly protective of the marital relationship. RCW 26.16.030; In re Estate of Olson, 87 Wn.2d 855, 557 P.2d 302 (1976); Poole v. Schrichte, 39 Wn.2d 558, 236 P.2d 1044 (1951). Implicit in the majority's analysis is the conclusion that, because each spouse owns a portion of the community property, the property can be partitioned and removed from the community at the will of one spouse or involuntarily on the behest of the separate creditor of one spouse.

This is inconsistent with a long line of cases preventing one spouse from making a gift of community property for noncommunity purposes. See, e.g., Nimey v. Nimey, 182 Wash. 194, 45 P.2d 949 (1935) (purported gift of community property made by one spouse void); Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 459 P.2d 32 (1969) (spouse not empowered to encumber community property for purposes not in community interest). Because the concept and existence of community property depends on the marital relationship, it is only the end of that relationship -- through dissolution or death -- or the agreement of both spouses that their property, or a portion of it, will not be community that provides an opportunity for partition of the spouses' otherwise indivisible interests in the community property.

Indicative of the unique nature of ownership of community property is the fact that it need not be divided in precise "halves" at dissolution. RCW 26.09.080; In re Marriage of Hadley, 88 Wn.2d 649, 565 P.2d 790 (1977). In fact, so protective are the courts of this state of the concept of community property that a separate property agreement must be proved by clear and convincing evidence. State v. Miller, 32 Wn.2d 149, 201 P.2d 136 (1948). A separate property agreement will not be enforced by the courts if it believes it to be unfair, Hamlin v. Merlino, 44 Wn.2d 851, 272 P.2d 125 (1954), or upon relatively slight evidence that the separate property agreement has not been strictly observed by both parties. Kolmorgan v. Schaller, 51 Wn.2d 94, 316 P.2d 111, 67 A.L.R.2d 704 (1957).

Marriage is essential to the characterization of property as community in nature, and marriage itself raises the presumption that property acquired by the spouses is community. RCW 26.16.030; Poole v. Schrichte, supra; Cross, The Community Property Law in Washington, 49 Wash. L. Rev. 729, 746 (1974). Former spouses become tenants in common in property owned as
community property during marriage only when their marriage is dissolved without disposing of the property, *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 580 P.2d 617 (1978), thus demonstrating the unique nature of the community property system.

Community property, enjoying such a protected position in our scheme of marital community ownership, cannot be subjected to the individual spouse's separate debt simply because it in some sense "belongs" to him:

The interest of the respective spouses in community property is separate and distinct from the separate estate of each. . . . Neither the husband nor the wife can alienate or convey his or her interest in community real estate during the lifetime of the community, and, if neither of them has the right to sell or convey to any third person, creditors have no greater right.


I therefore object to the majority's extension of separate liability to community property, not only because the majority's analysis in itself unfairly subjects community property to a separate tort debt, but because it must be based on a reasoning that could eventually eviscerate the concept of community property as a superior form of marital property ownership enjoyed by the people of this state. Under the majority's analysis, there is no reason why this concept of individual ownership of a portion of the marital community's property cannot be extended to separate contract debts, to encumbrances intended for noncommunity benefits, and finally to gratuitous transfers. Only by complying in a consistent manner with the indivisible nature of community property in this instance can we insure that the community property concept will not become merely another form of common law cotenancy, partitionable, at will or involuntarily, with no regard for the marital relationship itself.

. . . .

I therefore respectfully dissent.

**NOTES**

1. Arizona, Washington, New Mexico and Wisconsin adopt the various versions of the community debt system requiring classification of debts as community or separate at the time the creditor seeks to execute against one or both of the spouses. The approach of these jurisdictions differs in important particulars however. The key question is whether a creditor on a separate debt can look to the debtor-spouse's interest in the community property or whether such a creditor will be limited to the debtor's separate property. As you can see from *deElche* Washington has held that tort creditors may look to the debtor spouse's interest in the community property to satisfy the obligation. Washington has, however, refused to extend that approach to contract creditors. *See Nichols Hills Bank v. McCool*, 104 Wash 2d 78, 701 P. 2d 1114 (1985). New Mexico and Washington have, by statute, adopted the approach that the debtor spouse's interest in the community property is liable for his or her separate debts. N.M. Stat. Ann §40-3-10; Wis. Stat. Ann. §766.55(2)(d).
2. Premarital Debts. What happens when a single person who is deeply in debt marries? Can the pre-marital creditor of that person garnish the debtor's post-marriage wages? Consider the following provision of the Wisconsin Uniform Marital Property Act:

Wis. Stat. @ 766.55 (1994)

(2) (c) 1. An obligation incurred by a spouse before or during marriage that is attributable to an obligation arising before marriage or to an act or omission occurring before marriage may be satisfied only from property of that spouse that is not marital property and from that part of marital property which would have been the property of that spouse but for the marriage.

C. Pre-Divorce Creditors, Post-Divorce Execution


BAKES, Justice.

Twin Falls Bank & Trust Company (bank) appeals a decision of the district court granting summary judgment in favor of defendant Joan F. Holley in the bank's action to collect on a debt arising from a promissory note executed by Mrs. Holley's husband prior to their divorce. The bank also appeals the district court's decision awarding attorney fees to defendant Joan Holley. Appellant bank contends that the debt arising from the promissory note is a community obligation and collectable from the community assets which Mrs. Holley received in the divorce settlement.

Respondent Joan F. Holley and her husband John E. Holley were married for a period of 23 years, terminating in divorce on August 28, 1981, in Twin Falls. John Holley operated a construction business (J. Holley Construction) both during the time of marriage and thereafter. During the period of their marriage the construction company was a community asset.

John Holley began borrowing money for his construction business from the bank in December, 1980. He borrowed $25,000 to pay off loans from other banks and for operating expenses of the construction business. In March, 1981, Mr. Holley was granted a general line of credit for the operation of the construction company. By April, 1981, Mr. Holley had borrowed $65,000 on that line of credit. Mr. Holley failed to timely repay the loans on the line of credit; nevertheless, the bank "renewed" the obligations on June 26, 1981. At that time, Mr. Holley signed an unsecured promissory note for $125,000. The note consisted of a renewal of the $65,000 previously owed plus an advancement of an additional $60,000. The note called for payment of the principal plus interest on September 28, 1981. The bank issued the note in reliance on a financial statement submitted by Mr. Holley on December 30, 1980. That financial statement showed that Mr. Holley was married to respondent Joan F. Holley, but other than her name and Social Security number the statement provided no information about Joan. Questions regarding Joan's finances were left unanswered, based on the following specific language found on the
statement, "Information regarding your spouse need not be revealed unless such spouse will be contractually liable upon the loan or you are relying upon such spouse's income as a basis for the credit request." Mr. Holley alone signed the financial statement.

At the time the $125,000 promissory note was signed, Mr. Holley and his wife were separated and living apart. Like the financial statement, the promissory note was signed by Mr. Holley alone. Following the signing of the June 26, 1981, promissory note, the bank maintained close contact with Mr. Holley and ultimately became aware of his marital problems and that a divorce had been filed.

As part of the divorce decree entered on August 28, 1981, Mr. Holley was awarded the construction business and certain other real and personal property, and he assumed the June 26, 1981, promissory note obligation. Mr. Holley subsequently failed to repay the note when it came due on September 28, 1981. The bank, however, chose not to proceed to collect from Mr. Holley's assets or from any other community assets divided as a result of the divorce decree. Instead, the bank and Holley renegotiated the terms of the note and executed an "extension agreement" on October 9, 1981. The bank agreed to extend the due date on the June 26th promissory note to November 22, 1981, in exchange for a security interest in all of Mr. Holley's real and personal property, including a mortgage on Mr. Holley's commercial property. The deed of trust executed in favor of the bank by Mr. Holley specifically indicated that Mr. Holley was "a divorced man, d/b/a J. Holley Construction Co." Joan Holley was neither informed nor consulted about the extension agreement, nor did she sign the agreement. Additionally, the renegotiated or "renewed" note was based on a financial statement dated October 6, 1981, under the name of John E. Holley. The financial statement specifically lists Mr. Holley as unmarried and the statement recites that the reduction in value of the real estate previously listed in the 1980 financial statement was the result of a property settlement made with Mrs. Holley.

Though solvent at the time the extension agreement was entered into, Mr. Holley eventually defaulted on the renegotiated promissory note. On February 19, 1982, he filed for bankruptcy and was discharged the following year. The bank failed or neglected to either promptly or properly record its deed of trust on Holley's real property and, as a result, the real property securing the promissory note was lost to the trustee in bankruptcy. The bank was, however, successful in taking possession of various equipment prior to the filing of bankruptcy and received some payments from Mr. Holley as a result of the bankruptcy proceedings. However, the bank was left substantially unsatisfied on the $125,000 note with a principal balance still owing of $65,000 and interest due in excess of $50,000. Unable to collect from Mr. Holley, the bank commenced the present action against Joan Holley on January 26, 1984. Apparently, this was the first time Mrs. Holley had any contact with the bank regarding the loan.

The district court found that while normally the bank could look to community property distributed pursuant to a divorce decree to satisfy community obligations, the bank's action in executing the "extension agreement" effectively removed the obligation from any community assets distributed to Joan pursuant to the divorce decree. The district court found that the "extension agreement" was a new agreement between the bank and Mr. Holley and, as such, extinguished the June 26, 1981, promissory note. The court specifically found that the intent of the bank and Mr. Holley in executing the extension agreement was "to rely solely on the assets of
John E. Holley and his construction business in satisfaction of the debt." The district court granted summary judgment in favor of Joan, as well as awarding her costs plus $4,500 in attorney fees, based on its finding that the bank's action was without foundation and frivolous (I.R.C.P. 54(c)). We affirm the district court, albeit on different grounds.

I.

This case can be resolved based on fundamental principles governing the debtor-creditor relationship. Generally speaking, a creditor must obtain a judgment to collect on a debt whether it is based on contract, tort or other obligations. The exception would be if the obligation was secured by a mortgage or some other form of security interest. Once a creditor obtains a judgment he is able to collect on his debt by execution on the debtor's assets. "These judicial procedures do not change whether dealing with a single or married debtor. The difference is the type of property that is subject to execution or attachment for the debt involved." J. Henderson, Creditors Rights under a Community Property System, Idaho Law Foundation, Idaho Community Property Law, §9.4 (1983). Under the facts of this case, a debtor-creditor relationship existed only between the bank and respondent's ex-husband John Holley. The debt evidenced by the June 26, 1981, promissory note was incurred by John Holley for the benefit of the marital community. However, respondent Joan Holley, not having signed the note, was not contractually liable for the debt evidenced by the promissory note; only John Holley signed and is liable for the note.

The bank contends that since the debt incurred by John Holley was for the benefit of the community it is properly characterized as a "community debt." The phrase "community debt" is correct terminology insofar as it is used to signify a debt incurred for the benefit of the marital community. However, to the extent the phrase is used to imply the existence of a "community debtor," the phrase is imprecise and misleading. The marital community is not a legal entity such as a business partnership or corporation. de Elche v. Jacobsen, 95 Wash.2d 237, 622 P.2d 835, 838 (1980); Bortle v. Osborne, 155 Wash.2d 585, 285 P. 425 (1930); 15A Am.Jur.2d, Community Property, §5 (1976). While one may properly speak of a "corporate debtor," there is no such entity as a "community debtor." See Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1977); J. Henderson, Creditors Rights Under a Community Property System, supra. To the extent a lending institution enters into a creditor-debtor relationship with either member of the marital community or with both members, it does so on a purely individual basis. Thus, the lending institution may have a creditor-debtor relationship with either spouse separately or with both jointly. As stated earlier, the community property system does not affect the fundamental principles governing such a relationship and the procedures required of a creditor in order to collect upon his debt. Rather, the community property system merely affects the type or kinds of property to which the creditor may look for satisfaction of his unpaid debt. J. Henderson, Creditors Rights Under a Community Property System, supra. Essentially, the community property system merely makes additional resources (community property) available to a creditor from which to seek satisfaction of unpaid debt. Thus, under the community property system in Idaho and I.C. §32-912, which has established a rule of co-equal management of community property. --Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered, and any
assets or property, when either member of the community incurs a debt for the benefit of the community, the property held by the marital community becomes liable for such a debt and the creditor may seek satisfaction of his unpaid debt from such property. *Simplot v. Simplot*, 96 Idaho 239, 526 P.2d 844 (1974); W. deFuniak & M. Vaughn, *Principles of Community Property*, §159 (2d ed. 1971).

The debt upon which the bank is asserting this claim against Mrs. Holley was evidenced by the promissory note executed solely by Mr. Holley on June 26, 1981, which had renewed an earlier note. At that time the bank had a claim against Mr. Holley which it could satisfy by judgment and execution against either Mr. Holley and any separate property which he may have had, or against the community property of Mr. and Mrs. Holley. Mr. and Mrs. Holley were subsequently divorced and the community property was equitably divided between them and became the separate property of each. When the June 26, 1981, note became due in September of 1981, the bank could have immediately proceeded to judgment against John Holley and levied against the property of John Holley, including any community property which was distributed to John Holley. If that community property distributed to John Holley was insufficient to satisfy the obligation, the bank could have proceeded by execution against the community property which had been awarded to Mrs. Holley and which was now her separate property, as hereinafter discussed. However, the bank chose not to do this. Rather, when the note became due in September, 1981, the bank extended the note and additionally took a security interest in property held by John Holley. Mr. Holley subsequently defaulted on the extension agreement and later filed for bankruptcy. The bank was successful in taking possession of several pieces of property under its security agreement with Mr. Holley. However, the bank failed to perfect its security interest in real property held by Mr. Holley, losing it to the bankruptcy trustee. In short, the bank's inability to obtain satisfaction for its unpaid obligation was in large part attributable to the bank's failure to perfect its security interest in real property held by John Holley. After bankruptcy and Mr. Holley's discharge from the obligation to the bank, when the bank had not received sufficient satisfaction from Mr. Holley's assets to satisfy his obligation to the bank, this proceeding was brought against Mrs. Holley. However, Mrs. Holley had not signed the June 26, 1981, note and thus was not personally liable for that obligation. *See Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1977).

Absent allegations of such contractual liability, a creditor may not, with one exception, proceed against community assets distributed to Mrs. Holley pursuant to a divorce decree. The sole exception to this rule was set forth in our case of *Spokane Merchants Ass'n v. Olmstead*, 80 Idaho 166, 327 P.2d 385 (1958). In that case we held that where, pursuant to divorce proceedings, one member of the marital community is responsible for a community obligation but is not awarded sufficient community assets to satisfy such a debt, a creditor may properly seek satisfaction for the debt from community property distributed to the other spouse. Essentially, the holding of *Spokane Merchants Ass'n v. Olmstead*, supra, is that members of the marital community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent; provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal. All deeds, conveyances, bills of sale, or evidences of debt heretofore made in conformity herewith are hereby validated."
community may not utilize divorce proceedings to perpetrate a fraud on creditors of the community. In order for the bank in the present case to avail itself of the exception set forth by the *Olmstead* case, it must allege and prove that Mr. Holley was not awarded sufficient community assets which would enable him to satisfy the community debt which he assumed pursuant to the property settlement agreement. This the bank has failed to do in the present case. Indeed, the bank does not even allege facts to bring it within the *Olmstead* exception. Instead, the record indicates that sufficient assets were distributed to Mr. Holley as part of the divorce proceedings which would have enabled him to satisfy the community obligation which he assumed pursuant to the property settlement agreement.

We conclude that the bank was without any basis in law or fact to sue Joan Holley or otherwise execute on former community property now in her possession. Because of our disposition of this issue, we need not reach the issue upon which the district court relied in awarding summary judgment to respondent, namely, that the extension agreement constituted a new agreement between the bank and John Holley, effectively extinguishing the June 26, 1981, promissory note.

II.

On appeal, the bank additionally contends that it was error for the district court to award attorney fees to respondent Joan Holley. We disagree. In its order awarding attorney fees, the district court specifically found that the bank's actions were without foundation and, as we have discussed in the preceding section, we agree. The award of attorney fees is a matter committed to the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of discretion. We find no such abuse of discretion in the present case and affirm the district court's order awarding attorney fees.

The order of the district court awarding summary judgment and attorney fees to respondent is affirmed. On appeal, costs and attorney fees to respondent.
CHAPTER 7: DISSOLUTION OF THE COMMUNITY

I. BY DEATH

A. The Statutory Scheme


§15-2-102. Share of the spouse

The intestate share of the surviving spouse is as follows:

(a) As to separate property
   (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
   (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first fifty thousand dollars ($50,000), plus one-half (1/2) of the balance of the intestate estate;
   (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first fifty thousand dollars ($50,000), plus one-half (1/2) of the balance of the intestate estate;
   (4) if there are surviving issue one (1) or more of whom are not issue of the surviving spouse, one-half (1/2) of the intestate estate.

(b) As to community property
   (1) the one-half (1/2) of community property which belongs to the decedent passes to the surviving spouse.

COMMENT TO OFFICIAL TEXT

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share of one-third under Part 2 of this Article [Chapter]. Moreover, in the small estate (less than $50,000 after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children. See Section 2-802 for the definition of spouse which controls for purposes of intestate succession.
B. Widow’s Election

In re Estate of Patton, 494 P.2d 238 (Wash. 1972)

Does Washington community property law prohibit a husband from devising the whole interest in any specific item of community property, notwithstanding that by the terms of his will his surviving spouse receives one-half or more of the community estate when it is considered in the aggregate? That is the primary question presented in this appeal. We answer it in the affirmative.

The respondent Mildred Patton and John George Patton were married January 6, 1937, in Vancouver, B.C., and remained husband and wife until the death of John George Patton on February 26, 1969. No children were born to this marriage. Appellants Ronald G. Patton and Eileen Patton Clark, children of the decedent by a previous marriage, appeal from the trial court's decision construing a disputed provision in their father's will and determining the validity of a gift of certain stock certificates adversely to them and in favor of respondent Mildred Patton. 1 This appeal followed.

The dispute over the proper construction to be given the decedent's will centers upon the meaning of clauses 3 and 4 which provide as follows:

(3) I give, devise and bequeath all items of property which bear both my name and my wife's name, MILDRED M. PATTON, such as stock certificates, Government bonds, bank accounts, savings certificates, insurance policies, retirement fund proceeds, real estate contracts, interest in the family home, to my wife, MILDRED M. PATTON, provided that she survives me by a period of four months. In the event that my wife predeceases me, or dies in the same accident or other calamity that shall cause my death, or fails to survive me by a period of four months. I then give, devise and bequeath my entire estate, without exception to my children, RONALD G. PATTON and EILEEN PATTON CLARK, share and share alike.

(4) I give, devise and bequeath All other property to my children, RONALD G. PATTON and EILEEN PATTON CLARK, per stripes (sic) and not per capita, share and share alike. (Italics ours.) The essential point of contention is the meaning to be assigned to the phrase 'all other property' in clause 4. The trial court carefully analyzed this language in connection with the presumption that any testator intends to limit his disposition to his own property, and held that this phrase was intended to include only the deceased husband's one-half community property share of 'all other property' and that, accordingly, Mildred Patton is entitled to her one-half

1An earlier hearing had resulted in an oral decision in favor of appellants. Following the grant of respondent's petition to reopen the proceedings for introduction of further testimony and evidence, a second hearing was held before a different judge who rendered his decision in favor of respondent.
community property share in 'all other property.' In addition to the property she is entitled to receive pursuant to clause 3. Appellants Ronald Patton and Eileen Patton Clark contend that the presumption relied upon by the trial court is rebutted, and argue that the intent expressed in the will is to dispose of all community property assets and that the phrase 'all other property' refers to the Whole interest in all community property assets not disposed of in clause 3.  

In the construction of a will the fundamental rule is that the intent of the testator is paramount and is to be determined from the four corners of the will when read as a whole. In re Estate of Hamilton, 73 Wash.2d 865, 441 P.2d 768 (1968); In re Estate of Douglas, 65 Wash.2d 495, 398 P.2d 7 (1965); In re Estate of Seaton, 4 Wash. App. 380, 481 P.2d 567 (1971). See RCW 11.12.230. The intention of the testator is to be determined, if possible, from the terms of the will itself, although in determining the meaning of language employed by the testator in his will to accomplish that intent, the court may consider extrinsic evidence of the facts and circumstances surrounding the writing of the will. In re Estate of Price, 75 Wash.2d 884, 454 P.2d 411 (1969); In re Estate of Lidston, 32 Wash.2d 408, 202 P.2d 259 (1949); Old Nat'l Bank v. Damon, 3 Wash.App. 721, 477 P.2d 29 (1970). This latter proposition was well stated by the court in In re Estate of Lidston, Supra at 418, 202 P.2d at 265:

In determining the meaning to be given to the language used in a will, extrinsic evidence of the surrounding facts and circumstances may be considered by the court, not for the purpose of proving intention as an independent fact, or of importing into the will an intention not expressed therein, but rather as an aid to a right understanding of the language used and for the purpose of enabling the court to discern what the testator meant by such language.

(Citations omitted.) Words used in a will are to be understood in their ordinary sense if there is nothing to indicate a contrary intent. In re Estate of Price, Supra; In re Estate of Levas, 33 Wash.2d 530, 206 P.2d 482 (1949). Nevertheless, if there is an ambiguity in the language of a will, the court is justified in applying reasonable rules of construction, including ejusdem generis, to determine the testator's intent with respect to the ambiguous provision. In re Estate of Weissenborn, 1 Wash.App. 844, 466 P.2d 536 (1970). The testator's intention is to be determined as of the date of execution of the will. In re Estate of Hamilton, 73 Wash.2d 865, 441 P.2d 768 (1968).

In order for this court to determine the intent of John George Patton as testator in the instant case, it is necessary to consider the provisions of his will previously set forth herein in the light of the foregoing principles. When clause 3 is considered, it is striking that the testator thereby purported to devise 'all Items of property which bear both my name and my wife's name' (Italics ours) to his wife, the respondent Mildred Patton. The testator then listed certain specific items of

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70 In the instant case there has been a partial distribution consistent with the decedent's will--that is, property specifically described in clause 3 of the will valued at $72,343.88 was distributed to Mildred Patton. Certain additional property in the joint names of decedent and Mildred Patton with an appraised value of $28,749.32 is not in dispute but has not yet been distributed. The undisputed property is 'all other property.' I.e., community assets not held jointly in the names of the decedent and his respondent wife. The trial court found that this property which includes the attempted gifts of Safeway stock to appellants has a total value of $53,447.91
property, i.e., 'stock certificates, Government bonds, bank accounts,' etc. Considering only the provisions of the will itself and giving the words used therein their ordinary meaning, it is apparent that the testator purported to devise to his wife the whole interest in the specified items, namely, those items in his and his wife's names jointly. In this regard, it is significant that he did not provide in his will that he was devising his property which happened to also be held in his wife's name; rather, he referred to 'property' in the general sense, meaning that he purported to devise the whole interest therein to his wife, notwithstanding any interest which his wife already might have had in such property.

In clause 4, having previously devised specific items of property to his wife in clause 3, the testator purports to devise 'all other property' to his children, the appellants Ronald G. Patton and Eileen Patton Clark. That there is an ambiguity in the phrase 'all other property' when considered in the context of the entire will appears undeniable, and it is notable that it was interpreted differently by two judges prior to this appeal, and it constitutes the core of the present controversy. Consequently, the will may properly be termed 'ambiguous,' which simply means that it is capable of being understood in more than one sense, and under such circumstances we are justified in employing reasonable rules of construction to determine the testator's intent. *In re Estate of Torando*, 38 Wash.2d 642, 228 P.2d 142 (1951); *In re Estate of Weissenborn*, supra.

Under the rule of construction provided by the maxim of *ejusdem generis*, namely, that a general description of things which is in the same context as a specific enumeration of certain items will be limited to refer only to things of the same kind enumerated, it is apparent that the general reference to 'all other property' in clause 4 should be considered to refer to the same kind of property enumerated in clause 3. In other words, 'all other property' is to be construed to refer to the whole interest in specific items of property because that was the kind of 'property' referred to in clause 3. The only distinguishing feature of the property devised in clause 3 from that devised in clause 4 is the fact that it was held jointly in the names of the testator and his wife. It therefore appears that the testator had in mind an estate plan which called for the devise to his wife of the whole interest in community property held in both his and her names, and the devise to his children of the whole interest in 'all other property' held in his name alone or otherwise held without the joinder of his wife's name.

Our understanding that such was the nature of the testator's intent is aided further by a consideration of the facts and circumstances surrounding the writing of the will. *In re Estate of Lidston*, supra. Every item of property held in the names of the testator and his wife jointly was mentioned by the testator in clause 3, and all such items, with the sole exception of 'insurance policies' were found in the inventory of his estate. In addition, prior to writing his will, the testator put certain certificates for shares of stock in Safeway Stores, Inc., jointly in his name and the names of each of his children, respectively. 3 Certain additional stock certificates remained either in his name alone or were held jointly by him with his wife. He wrote a letter of intent dated June 13, 1967, purporting to satisfy a mortgage loan in the amount of $21,000 to Ronald Patton, with the proviso that the loan be repaid by Ronald until the testator's death, after which the unpaid balance

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3 These shares of Safeway stock are the subject of the disputed gift by the testator to his children. This issue is resolved elsewhere in this opinion.
Chapter 6: Dissolution of the Marital Community

was to be shared equally between Ronald and Eileen, with Ronald to make payments to his sister until her half was paid in full.\(^4\) Significantly, in April of 1969, the testator placed a major asset, a lessor's interest in a fire engine contract valued at more than $21,000, in his name alone, although an earlier investment in a fire engine contract had been held jointly by him with his wife. After completing all the foregoing transactions, each of which is indicative that he was accustomed to dealing with whole interests in community property and was fully aware which assets were held jointly with his wife, the testator, on November 19, 1968, signed the will which is the subject of this appeal.

Having considered the terms of the will as a whole, as well as extrinsic evidence of the surrounding facts and circumstances, we hold that it was the intent of the testator to devise to his wife, the respondent, the whole interest in community property held jointly by him with her, and to devise to the children, the appellants, the whole interest in all other community property. In reaching this conclusion, we are mindful of the presumption that a testator must be presumed to have known the law and that he can dispose of only his half of the community property, so that such disposition must relate to his own property only. \textit{Collins v. Collins}, 152 Wash. 499, 278 P. 186 (1929). But such presumption\(^5\) is rebutted by our interpretation of the will and the undisputed evidence. Having so held as to the intent of the testator, such intent must be carried out if it is lawful. \textit{Holmes v. Holmes}, 65 Wash.2d 230, 396 P.2d 633 (1964); \textit{In re Estate of Lidston}, Supra.

In the instant case it is necessary to decide whether the testator's intent may be carried out under the community property law of this state.

It is well settled that neither spouse has testamentary power over more than his or her half of the community property. \textit{In re Estate of Wegley}, 65 Wash.2d 689, 399 P.2d 326 (1965); \textit{Stafford v. Stafford}, 10 Wash.2d 649, 117 P.2d 753 (1941); \textit{Collins v. Collins}, supra. See RCW 11.02.070; RCW 26.16.030. It is also clear that each spouse has an undivided one-half interest in the

\(^4\)The trial court held that the gift of the mortgage loan constituted an invalid testamentary disposition. No appeal is taken from that ruling. In any event, the mortgage loan is not in the joint names of the testator and his wife, which would be consistent with his attempt to give the proceeds thereof to his children.

\(^5\)The validity of the oft-repeated presumption that the testator is presumed to have known the law and that he could dispose of only one-half of the community property is open to question in the context of the facts of this case and in view of the uncertainty in the law with regard to 'aggregate' versus 'item' theory of testamentary disposition. If the aggregate theory were to be adopted (which it is not) the testator's disposition of community property in this case would be consistent with the presumed intention of the testator to limit his disposition to his own property— that is, by his plan the surviving wife was given her half of the community property when considered in the aggregate, plus a substantial portion of his half of the community estate. The uncertainty in the law the testator is presumed to know is highlighted by the apparent difficulty encountered by the United States Supreme Court in \textit{Yiatchos v. Yiatchos}, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964), in determining whether such a testamentary disposition is valid. It would therefore appear that testator Patton ought not by presumption be held to a higher standard as to knowledge of the law than the United States Supreme Court.
community property. *In re Estate of Towey*, 22 Wash.2d 212, 155 P.2d 273 (1945); *In re Estate of Coffey*, 195 Wash. 379, 81 P.2d 283 (1938). The concept is well stated in *In re Estate of Towey*, *Supra* at 214, 155 P.2d at 275: All community property, both real and personal, is owned by both spouses equally. *Bortle v. Osborne*, 155 Wash. 585, 285 Pac. 425 (67 A.L.R. 1152). While the husband is a statutory agent for the community, there is an absolute equality of ownership and rights in all community property, there being no distinction whatever so far as concerns the equal property interests of husband and wife. *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634.

What has never been made explicit, however, is whether under our community property law the equal interests of husband and wife in the community property must always be manifested as a collection of undivided half interests in each specific item of community property, or whether it is sufficient to protect the equal interests of the spouses if each is guaranteed at least an undivided one-half interest in the community property when viewed in the Aggregate. *In re Estate of Yiatchos*, 60 Wash.2d 179, 373 P.2d 125 (1962); *Yiatchos v. Yiatchos*, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964).

In the *Yiatchos* litigation, a husband used community funds to purchase federal savings bonds payable to him alone or, after his death, payable exclusively to his brother. Our state Supreme Court held that the fact the bonds were payable on death not to the wife, but to a third party alone, constituted a fraud on the community property rights of the wife as a unilateral attempt to convert community property into separate property, and was therefore void *Ab initio*. The court concluded that the wife had a vested one-half interest in the bond proceeds and that the decedent's one-half interest should be distributed according to the terms of his will. *In re Estate of Yiatchos, Supra*.

On appeal, the United States Supreme Court said that any fraud on the wife must be measured by federal standards. Although under state law the fraud could be established by showing that community funds were used to purchase bonds payable on death to a third party, the reviewing court held that fraud must be demonstrated on remand by additional proof by the wife that she did not consent or otherwise acquiesce in the purchase of the bonds in the name of the husband's brother. The court also reversed the state Supreme Court insofar as it had concluded that the Husband's half interest in the bonds could not go to the designated beneficiary, the husband's brother. The brother argues that he was also entitled to the other half inasmuch as the bonds represented less than one-half of the entire community estate and therefore the husband was not giving away property belonging to his wife. The court said, *Yiatchos*, 376 U.S. at 310, 84 S.Ct. at 745:

The validity of this contention turns on a question of state law about which we are not entirely clear and which may be resolved upon remand. According to the court below, the widow had a 'vested one-half interest' in the bonds, which may mean that under Washington law the wife before and after death has a half interest in each item of the community estate, including the particular bonds involved in this case, and cannot be forced to take cash or something else of equal value upon a division of the community
property between herself and those entitled to take her husband's half.

and concluded at 311, 84 S.Ct. at 746:

On the assumption, then, that the wife is entitled to half of the estate, but not half of each particular item of property, the bonds have not been used as an instrument of fraud; . . . It is notable that in the dissenting opinion, Justices Clark and Douglas commented upon the same problem in the following language at 314, 84 S.Ct. at 747: The opinion of the Court conjectures that it might be the law of Washington that a surviving spouse has a one-half interest in each item of the community estate and that if this be so, then allowing all of the bonds to pass to the designated beneficiary would work an involuntary conversion of the spouse's one-half interest in those bonds. The proposition that a spouse has such an interest in each item is of doubtful validity and there is no Washington authority to support it.

Our research has disclosed no Washington case which explicitly indicates that our state Supreme Court has adopted what may be characterized as either an 'aggregate' or an 'item' theory of the testamentary disposition of community property by one of the spouses, nor have counsel in the instant case referred us to such authority, each asserting instead that there is no authority to support the theory favoring his opponent.

Counsel for respondent Mildred Patton relies upon the well-established rule in the case of inter vivos gifts that a husband may not give away substantial community property without the consent or acquiescence of his wife. *Marston v. Rue*, 92 Wash. 129, 159 P. 111 (1916); *Nimey v. Nimey*, 182 Wash. 194, 45 P.2d 949 (1935); *Hanley v. Most*, 9 Wash.2d 429, 115 P.2d 933 (1941). The argument is essentially that inasmuch as Washington has an 'item' theory for gifts during life, it must also have an 'item' theory for gifts at death through testamentary disposition.

The underlying rationale of our community property system is that a husband and wife are deemed to be equal contributors to the fortunes of marriage, and therefore both husband and wife are entitled to an equal interest in all of the assets acquired during that marriage. Personal property is involved in the case at bar, and the applicable statute is RCW 26.16.030 which provides in part: The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof. Notwithstanding the statutory language that the husband has 'a like power of disposition' with reference to community property as he has with reference to his separate property, it has been established that the husband must act for the benefit of the community, at least in an economic sense. *Jarrett v. Arnerich*, 44 Wash.2d 55, 265 P.2d 282 (1954). Consistent with this rule is the corollary rule that a husband cannot make enforceable gifts of community personal property without the consent of the wife. *Marston v. Rue*, supra. If one spouse could make inter vivos gifts of community property without the consent of the other, the whole of the community property would be lessened in violation of the rights of the non-giving spouse to one-half thereof. In the case of an inter vivos gift, a husband cannot know how large his half is, and, accordingly, since he does not know what he has to give, his gift may not be given effect. On the other hand, as appellants contend, such an objection may not be raised when a husband purports to give away half of the whole community property by Testamentary disposition, because at the
death of the husband the extent of his interest could be determined, with the result that, at least under an 'aggregate' theory, his wife's one-half interest would be protected.

The primary concern in the gift cases generally has been couched in terms of depletion of the whole estate and the non-giving spouse's one-half interest therein, and not in terms of the fate of any specific item of the community whole. At the same time, the subject of an inter vivos gift is usually a specific item of community property, with the result that broad language in the case law, declaring void the gift of a specific item, strongly implies an 'item' theory of community property. It could be persuasively argued, however, that the inter vivos gift of an item of community property is void because of its effect upon the whole community estate, not because it is an item of that estate. 6

The foregoing distinctions notwithstanding, we believe an 'item' theory result is compelled, even in a case of testamentary disposition, by what is said in In re Estate of Wegley, 65 Wash.2d at 690, 399 P.2d at 327, wherein the testator, an Oregon resident, devised by a holographic will executed in Oregon, certain real property located in King County, Washington, as follows: “Our South Seattle estate, Located between Seattle & Kent near Riverton Heights. If sold is to be divided equally (after all costs are deducted,) between my Wife Gertrude Edna Wegley and my Daughter Joanna Colleen Wegley. This property may be equally divided if it is agreeable my Wife, having first choice of her half of this real estate.” Our state Supreme Court, while recognizing that its holding was contrary to the testator's intent, held that this disposition must be deemed to operate only on the decedent's half of the community property represented by the King County property, “because, under our community property law, a husband cannot dispose by will of his wife's half of the community property.” In re Estate of Wegley, supra at 692, 399 P.2d at 328. Accordingly, the property, part of which was represented by the proceeds of a condemnation award, was divided in such a manner that the wife received a three-fourths interest and the daughter a one-fourth

6In this context, see the language in Marston v. Rue, Supra at 131, 159 P. 111. Further support for the proposition that the primary concern of our community property law is the protection of each spouse's interest in the whole community estate, as distinguished from each item of that estate, may be found in Parker v. Parker, 121 Wash. 24, 207 P. 1062 (1922). The court in Parker concluded that an inter vivos gift was invalid in the following language at 28, 207 P. at 1064:

Not having the consent of his wife--the record, in fact, disclosing that she would not consent thereto--the rule established in Marston v. Rue, 92 Wash. 129, 159 Pac. 111, is applicable, and the gift must be held to have been void. If the testimony had shown that this sum of $2,000 which was attempted to be given by Joseph H. Parker to his sister Could have been deducted from his share of the community property a different situation might be presented. However, there is no testimony in this case showing what the value of Parker's community interest was, and, it being necessary to decide this action upon the facts presented in this record, we cannot supply this deficiency and must hold that the gift was void.

(Italics ours.)
interest.

Despite the failure of the court in *Wegley* to explicitly discuss an 'item' versus an 'aggregate' theory,7 the cases cited concerning the husband's power of testamentary disposition (*In re Estate of Coffey, Supra; Collins v. Collins, supra*) and the court's reasoning indicate to us that the Wegley court was following an 'item' theory without specifically calling it such.

We hold that one spouse may not designate whole interests in community property to pass by testamentary disposition to named beneficiaries, and therefore we must reject appellants' contention that such devises of whole interests in community property may be enforced so long as the other spouse's community interest is not impaired—that is, as long as it can be shown that the other spouse is guaranteed at least a one-half interest in the community estate when it is viewed in the aggregate.

Having determined that the testator purported to dispose of more than his share of community property by including the entire community estate in his plan of testamentary disposition, we are faced with the troublesome question of whether the widow must, in such circumstances, elect either to renounce her community property right in each item of property and assent to the will, or to insist upon her community interest and take independently of the will.8

The trial court recognized the election problem and stated in its conclusions of law: That the surviving spouse is not presented with the necessity of any election to take under the Will or to take her community one-half interest under the facts in this case and (sic) unless the court should hold that he attempted to dispose of the entire community estate. Conclusion 3.

To create the necessity for a widow's election upon the husband's death, there must appear on the face of the husband's will a clear and unmistakable intention to dispose of property which is not in fact his own and which was not within his power of disposition. *Herrick v. Miller*, 69 Wash. 456, 125 P. 974 (1912); *Andrews v. Kelleher*, 124 Wash. 517, 214 P. 1056 (1923); *Collins v. Collins, supra*. It has been determined that it is immaterial whether the testator knew the property he purported to dispose of in his will was not within his power of disposition, or whether he erroneously believed it to be, because, in either case, if the intention to dispose of it specifically appears, the necessity for an election exists. *Andrews v. Kelleher, supra*. See *In re Estate of*

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7In fairness to the court, it appears that the issue was not directly before it. Moreover, although we believe the language in Wegley supports an 'item' theory of testamentary disposition, we note that the court necessarily had to speak in terms of a single community asset because the real property in question apparently was the only community property before the court; other property in the decedent's estate was located in Oregon and had been distributed in accordance with the will some 15 years prior to the Wegley decision.

8For a discussion of a widow's election as an estate planning device to avoid some of the limitations of an 'item' theory and permit unified control of the community estate, see 43 Wash.L.Rev. 455 (1967--68).
It is of no consequence that the testator here may have improperly interpreted the law or otherwise erroneously conceived it to permit disposition of whole interests in community assets if such disposition would not violate his wife's interest in the community estate when viewed in the aggregate, because so long as his intention to make such disposition appears, as we have found it does, the necessity for an election exists. The doctrine of election was succinctly described in *Tacoma Sav. & Loan Ass'n v. Nadham*, 14 Wash.2d 576, 596, 128 P.2d 982, 991 (1942):

The doctrine of 'election,' as applied to the law of wills, means simply that one who takes under a will must conform to all its provisions, and if he accepts a benefit thereunder, he must renounce every right inconsistent therewith.

(Citations omitted.) We conclude that the respondent widow must elect to take either under the will, or independently of it.9

....

Affirmed in part; reversed in part.

FARRIS, Acting C.J., and JAMES, J., concur.

II. AT DIVORCE

A. Equitable Distribution

*Idaho Code §32-712*

Idaho Code §32-712. Community property and homestead -- Disposition. In case of divorce by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows:

1) The community property must be assigned by the court in such proportions as the court, from all the facts of the case and the condition of the parties, deems just, with due consideration of the following factors:
   (a) Unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses.
   (b) Factors which may bear upon whether a division shall be equal, or the manner of

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9Appellants do not argue that respondent has already made an election. For cases holding an election may be inferred from a widow's conduct in accepting benefits of the will, and discussing an estoppel theory, *See Andrews v. Kelleher*, Supra; *Prince v. Prince*, 64 Wash. 552, 117 P. 255 (1911); *In re Estate of Goss*, 73 Wash. 330, 132 P. 409 (1913); *In re Estate of Parkes*, 101 Wash. 659, 172 P. 908 (1918). *See also Herrick v. Miller*, Supra; *In re Estate of Curtis*, 116 Wash. 237, 199 P. 309 (1921); and *In re Estate of Williams*, 145 Wash. 19, 258 P. 851 (1927).
division, include, but are not limited to:

1) Duration of the marriage;
2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement;
3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;
4) The needs of each spouse;
5) Whether the apportionment is in lieu of or in addition to maintenance;
6) The present and potential earning capability of each party; and
7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits.

2) If a homestead has been selected from the community property, it may be assigned to either party, either absolutely, provided such assignment is considered in distribution of the community property, or for a limited period, subject in the latter case to the future disposition of the court; or it may be divided or be sold and the proceeds divided.

3) If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the other spouse.


DONALDSON, Justice.

These are appeals and cross-appeals from various rulings of the trial court in a divorce proceeding. We affirm in part, reverse in part, and remand for further proceedings.

Lucy Hay Ross (hereinafter plaintiff) and John D. Ross (hereinafter defendant) were married in 1953 and had three children, one of whom was fifteen years old at the time of the divorce and was in the custody of the plaintiff.

Defendant is a physician with a specialty in ophthalmology and had so practiced for approximately ten years at the date of the divorce. In 1975, defendant earned approximately $100,000 from his medical practice. The parties had accumulated community property valued at approximately $617,000. Plaintiff filed for divorce in March, 1976, on the grounds of adultery and extreme cruelty. Defendant admitted the allegation of extreme cruelty but denied the allegation of adultery and filed a counterclaim for divorce on the grounds of irreconcilable differences.

Defendant then moved for partial summary judgment on the divorce issue only. At the hearing plaintiff did not resist the granting of divorce, but rather argued that a partial summary judgment for divorce should be granted to her, rather than the husband, on her grounds of adultery or extreme cruelty. The court entered what was denominated "Order for Partial Summary Judgment and Judgment of Divorce." The court ordered that the marriage be dissolved, but that
additional questions concerning alimony, the division of property, and the custody and support of the minor child, be reserved for trial. The court first granted the divorce on grounds of irreconcilable differences, but on plaintiff's motion and after further argument changed the grounds to extreme cruelty.

Plaintiff later moved to vacate the partial summary judgment and also moved for a new trial on the basis of mistake, inadvertence, surprise, or excusable neglect in failing to file affidavits or authorities in opposition to the motion for summary judgment. On October 15, 1976, defendant, by way of opposition to plaintiff's motion to vacate the summary judgment, filed an affidavit stating that he had remarried. On that same date a hearing was held and the motions were denied.

Trial began upon the remaining issues on March 14, 1977, following which the trial court entered its findings of fact, conclusions of law, and decree. The court found inter alia that defendant had inflicted extreme cruelty on plaintiff; that the evidence was not sufficiently clear and convincing to constitute proof of adultery by defendant; that the net community property value was $617,120, and that an equal division of the property was fair, reasonable and just, and would result in the least adverse tax consequences to the parties; that defendant must pay $30,000 per year to plaintiff as alimony for her lifetime (that alimony provision was later modified to require alimony at $30,000 per year for five years, $24,000 for the sixth year, $18,000 for the seventh year, $12,000 for the eighth year, $6,000 for the ninth year, and thereafter alimony to cease); that defendant must pay plaintiff the sum of $150 per month for child support; that defendant must sell the parties' residence and their interest in a farm partnership and pay to plaintiff the sum of approximately $151,000 "directly from the proceeds of said sales;" that defendant must pay all tax liability resulting from income from the community property, together with all tax liability upon the personal income of the defendant "through the date of plaintiff's divorce from the defendant" and all taxes that might arise from the sale of the residence and the farm partnership; that defendant must pay his own attorney fees, with plaintiff to pay the first $12,500 of her attorney fees, and defendant to pay the remainder thereof of approximately $6,000. Finally, plaintiff was granted a divorce upon the ground of extreme cruelty "nunc pro tunc and of record as of September 20, 1976." Since we affirm the summary judgment this issue is moot.

Defendant asserts that the trial court made two errors in its property division determination. First, he argues that the trial court over-valued the parties' residence. An appraiser for plaintiff testified to a value of $115,000, while that of defendant's appraiser valued the home at $95,000. The court adopted the $115,000 value. The valuation of any property is a relatively imprecise

\footnote{The Court does not approve of the use of "nunc pro tunc" concept in this context. However, in this particular case it is immaterial because the trial court entered the partial summary judgment terminating the marriage between the parties and this Court is recognizing (See infra,) the validity and finality of that decree by holding that the plaintiff is estopped from claiming error in the granting of the decree of divorce by partial summary judgment. Therefore, it was unnecessary for the trial court in the final decree to relate the property division decree or divorce decree back to September 21, 1976.}
procedure and the trial court must make the ultimate determination as between conflicting values submitted by different appraisers. *E.g., Chugg v. Chugg*, 94 Idaho 45, 480 P.2d 891 (1971). The valuation of the residence in the instant case is not clearly erroneous, being supported by substantial, competent, although conflicting, evidence, and will not be disturbed on appeal. I.R.C.P. 52(a).

Defendant also asserts error in the trial court's order requiring him to sell the residence and a farming partnership and distribute $151,765 of the sale proceeds to the plaintiff. Defendant argues that the court should have either divided the sales proceeds equally or awarded the home to the wife and the partnership to the husband. Ordinarily, the better practice would be for the court to do as suggested by defendant, but under the facts and circumstances in this case we agree with the trial court. Where, as here, a divorce is decreed upon the ground of extreme cruelty, the community property must be assigned the proportions that the trial judge deems just. I.C. 32-712(1). A trial court thus has wide discretion in dividing the community property and its determination will not be disturbed absent a clear showing of abuse of discretion. *E.g., Simplot v. Simplot*, 96 Idaho 239, 526 P.2d 844 (1974).

Because plaintiff was moving to South Carolina and did not want the house, and would be unable to supervise the sale of the home or the partnership interest, we find no abuse of discretion in the trial court's awarding the home to the husband and then ordering him to sell the property. Also, under the facts of this case, we find no abuse of discretion in the trial court's order that the husband pay the wife a predetermined sum of the proceeds to insure her of receiving at least one-half of the value of the property.

The judgment and orders of the court below are therefore affirmed in all respects, except as indicated above.

The case is affirmed in part, reversed in part, and remanded for the limited proceedings described herein.

No costs allowed.

**Larson v. Larson, 139 Idaho 972, 88 P. 3d 1212 (Ct. App. 2003)**

PERRY, Judge.

Billie Joyce Larson appeals from the intermediate appellate decision of the district court affirming in part and reversing in part the magistrate's distribution of property in a decree of divorce. Michael James Larson cross-appeals the portion of the district court's intermediate appellate decision affirming the magistrate's determination that Billie should be awarded an unequal distribution of the community assets. For the reasons set forth below, we affirm in part,
reverse in part, and remand the case.

I. FACTS AND PROCEDURE

Billie and Michael were married in April 1986. Shortly after the marriage, Michael completed his residency as an orthopedic surgeon and Billie earned a master's degree in psychology. Billie had an opportunity to complete a Ph.D. in psychology in Texas, but the Larsons decided to move to the Rexburg area in order for Michael to establish an orthopedic practice. Billie worked at the Youth Services Center in St. Anthony but terminated her employment there in 1988 to help with the orthopedic practice. The Larsons acquired a horse ranch in Hibbard and made several improvements to it. During the spring of 1996, Michael began to develop a more personal relationship with one of the assistants at his office. On July 2, Billie and Michael separated. Thereafter, Michael began an intimate relationship with the assistant.

Michael filed a complaint for divorce in May 1997, asserting irreconcilable differences. Billie filed an answer and counterclaim for divorce on the grounds of adultery and extreme cruelty. A bench trial was held over several days. On October 1, 1998, the magistrate entered a partial decree of divorce. In the partial decree, the magistrate granted a dissolution of the Larsons' marriage and bifurcated the issues relating to the grounds for divorce and distribution of the community estate.

On July 30, 1999, the magistrate entered a judgment on the remaining issues, concluding that the divorce was caused by irreconcilable differences. The magistrate determined that Billie had intentionally dissipated community assets during the period of separation and, therefore, apportioned the value of those assets to Billie as part of her community property share. In addition, the magistrate ordered a partition of the Larsons' ranch and directed Michael to compensate Billie an amount equaling one-half of the diminution in the ranch's value which resulted from the partition.

Following a motion to alter or amend the judgment, the magistrate entered a supplemental decree of divorce on November 29. The magistrate concluded that, although there was no finding of fault by Michael or need by Billie, Billie was entitled to a distribution of $252,725 more in community assets than Michael as a result of the ranch's partition and consequent loss of value.

Billie appealed to the district court, claiming that the magistrate erred by allocating to her the amount of community assets she spent during the parties' separation. Billie additionally contended that the magistrate made a mathematical error with respect to the apportionment of the ranch's diminution in value in the supplemental decree. Michael cross-appealed, also assigning error to the magistrate's apportionment of the ranch's diminution in value. The district court affirmed in part, reversed in part, and remanded for further findings. The district court concluded that the magistrate did not err by allocating the amount of community funds spent by Billie to her as part of her share of the community estate but, because the district court was unable to determine whether the amount of the allocation was supported by the evidence, the district court remanded for further findings on that issue. Additionally, the district court concluded that the magistrate did not err by apportioning to Michael the entire loss of the ranch's value and that there was no
mathematical error in relation to the apportionment.

Billie appeals, again asserting that the magistrate erred by concluding that her share of the community assets should be credited with the value of the community funds she expended during the period of separation and that the magistrate's mathematical calculations in allocating the diminution of the ranch's value were erroneous. Michael cross-appeals, contending that the magistrate erred by allocating the entire diminution in the ranch's value to him, rather than allocating half of it to Billie. Both Billie and Michael request costs and attorney fees on the present appeal and cross-appeal.

II.
STANDARD OF REVIEW


III.
ANALYSIS

A. Dissipation of Community Assets

In the July 1999 judgment, the magistrate found that Billie had intentionally diverted, without Michael's consent or approval, approximately $390,727.92 of community funds to her own use during the period of separation. The magistrate allocated that sum to Billie's share of the community estate as a "pre-divorce distribution." On the intermediate appeal, the district court upheld the magistrate's allocation of the pre-divorce distribution to Billie as part of her share of the community property. However, the district court was unable to determine whether the amount was supported by the evidence and remanded the case for further findings concerning the specific evidence relied upon by the magistrate in determining the amount.

On the present appeal, Billie again asserts that the magistrate erred by allocating $390,727.92 to her as a pre-divorce distribution. Billie contends that there was no basis in law to justify the distribution and that there was no evidence proving that she had the intent to deprive the community of the use of the diverted funds. Billie additionally argues that the amount of the allocation was not supported by the evidence. Finally, Billie maintains that because the diverted funds were spent by the time of trial, there was no asset to be allocated to her.

Turning to Billie's claim that there was no basis in law justifying the pre-divorce distribution, we note that one of the factors a trial court may take into account in determining a proper distribution of marital assets at divorce is whether one of the spouses has dissipated or wasted marital assets by spending marital funds in some improper way, thus reducing the amount of marital assets available for distribution. See 24 AM. JUR. 2D Divorce and Separation § 560
Chapter 6: Dissolution of the Marital Community

(1998). See also In re Marriage of Seversen, 228 Ill.App.3d 820, 170 Ill.Dec. 858, 593 N.E.2d 747, 749 (1992); Harris v. Harris, 261 Neb. 75, 621 N.W.2d 491, 501 (2001). Generally, dissipation refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. Harris, 621 N.W.2d at 501. Factors to consider in determining whether dissipation of marital assets has occurred include: (1) whether the expenditure benefited the marriage or was made for a purpose entirely unrelated to the marriage; (2) the timing of the transaction; (3) whether the expenditure was excessive or de minimis; and (4) whether the dissipating party intended to hide, deplete, or divert the marital asset. Pitman v. Pitman, 721 N.E.2d 260, 264 (Ind.Ct.App.1999). The concept of dissipation has been applied in Idaho in the context of overcoming the presumption that expenditures made and indebtedness incurred during the marriage are for the benefit of the community. See Smith v. Smith, 124 Idaho 431, 436, 860 P.2d 634, 639 (1993) (Expenditures made and indebtedness incurred during the marriage are presumed to be for the benefit of the community unless the spouse alleging dissipation can demonstrate that the dissipating spouse spent community funds on something other than the community.). See also Campbell v. Campbell, 120 Idaho 394, 400, 816 P.2d 350, 356 (Ct.App.1991). Contrary to Billie's assertion, there was a legal basis supporting the magistrate's decision to apportion the amount of community funds expended by her during the period of separation to her share of the community estate.

We now consider whether Michael established that Billie intended to deprive him of the use of the diverted community funds, which is the only factor concerning dissipation disputed by Billie. Upon review of the record, this Court concludes that there was substantial evidence presented which demonstrated Billie's intent. Billie admitted at trial that she withdrew substantial amounts of community funds during the period of separation. Billie testified that she felt justified in taking these funds because her and Michael's accountant advised them at a post-separation meeting that Billie was entitled to one-half of all the income earned during separation. Billie also testified that she diverted the funds in order to provide herself with financial stability in the event Michael filed for divorce. Billie stated that she spent the diverted funds on vehicles, clothes, travel expenses, entertainment, and gifts and loans to friends and relatives. Billie also conceded that the diverted community funds were substantially different in sum and purpose than those expended by her while living with Michael. By virtue of Billie's own admissions, there was substantial evidence to support a conclusion that Billie intended to divert a substantial amount of community assets for reasons wholly personal in nature and unrelated to the community.

Billie next claims that the amount of the allocation was not supported by the evidence. On the intermediate appeal, the district court reviewed the evidence before it but was unable to determine what evidentiary basis the magistrate relied upon in formulating the amount. Having reviewed the testimony and other evidence that Michael has directed our attention to concerning the basis for the amount, this Court, like the district court, is unable to determine the evidentiary basis for the amount of the allocation. We agree with the district court that the case should be remanded. Therefore, the magistrate is instructed to make factual findings concerning whether the amount of the allocation is to accurate and articulate what evidence it relied upon in making such findings.

Finally, Billie argues that because the diverted community funds had been spent prior to trial, there was no asset left to value and allocate to her. There is disagreement among jurisdictions
as to whether a trial court is justified in awarding assets that are not part of the marital estate at the
time of the award due to one spouse's dissipation. See generally Lee R. Russ, Annotation, Spouse's
Dissipation of Marital Assets Prior to Divorce as Factor in Divorce Court's Determination of
Property Division, 41 A.L.R.4th 416, 1985 WL 287447 (1985). Those courts which have held that
an award of nonexistent assets is improper have noted that the relevant state statute appears to
restrict the trial court's authority to dispose of marital assets to property actually before it. Id. at
421. The courts that have allowed an award of nonexistent property have emphasized that such an
award is necessary to prevent one spouse from completely dissipating the marital estate and
deprising the other spouse of his or her property rights. Id. Idaho Code Section 32-712 does not
restrict the trial court's authority to dispose of only those assets actually before it. In order to avoid
depriving Michael of the benefit of the community funds dissipated by Billie during the period of
separation, we conclude that the magistrate properly apportioned to Billie, as part of her share of
the community property, the amount of community funds that she expended for purposes unrelated
to the community.

In sum, we uphold the district court's determination that the magistrate did not err by
apportioning to Billie the amount of community funds she intentionally diverted during the period
of separation and that there was substantial evidence of Billie's intent to deprive the community of
the use of the expended community funds. We also uphold the district court's decision to remand
the case for the magistrate to make factual findings concerning whether the amount of the
allocation is accurate and to articulate what evidence it relied upon in making such findings. The
decision of the district court concerning Billie's intentional dissipation of community assets is
affirmed.

B. Diminution in Value of a Community Asset

In the July 1999 judgment, the magistrate noted that Billie and Michael had stipulated to
the value of a majority of the community assets, but that one of the primary assets whose value
had not been determined by stipulation was the parties' ranch. The magistrate found that the
appraised value of the entire ranch was $1,360,000. The magistrate noted that Michael wanted the
ranch to be partitioned and to be awarded the lower portion of the ranch. The magistrate determined
that the value of the lower portion of the ranch was $325,000 and that the value of the upper
portion, which would be awarded to Billie, was $645,000. The magistrate found that partitioning
the ranch as requested by Michael would result in a $390,000 loss in value. Despite the diminution
in value, the magistrate ordered that the ranch be partitioned. Michael was ordered to absorb his
one-half of the resulting loss in the ranch's value. Additionally, the magistrate ordered Michael to
compensate Billie for her one-half share of the loss, which effectively allocated the entire
diminution in the ranch's value to Michael.

On the intermediate appeal, Michael asserted that the magistrate erred by allocating the
entire loss of the ranch's value to him, rather than allocating the diminution in value equally
between him and Billie. The district court concluded that the magistrate did not err by apportioning
the entire loss to Michael but ruled that the magistrate abused its discretion by allocating $252,725
more in community assets to Billie as a result of the diminution. The district court held that Billie
sustained a loss of only $195,000 and instructed the magistrate on remand to distribute $28,862.50
($252,725 less $195,000 divided by two) from Billie's assets to Michael's assets. Alternatively, the
district court instructed the magistrate to enter a money judgment against Billie in favor of Michael for that amount.

On the present cross-appeal, Michael again contends that the magistrate erred by allocating the entire diminution of the ranch's value to him. Michael asserts that the diminution in the value of the ranch as a result of his requested partition is not a compelling reason justifying an unequal distribution of the community property.

Idaho Code Section 32-712 directs the trial court to make a substantially equal division of the community property between spouses, unless there are compelling reasons to do otherwise. There are several factors a trial court must consider in making such a division. See I.C. § 32-712. The threshold choice between substantial equality and an unequal but equitable division is committed to the discretion of the trial court, guided by statutory and case law. Bailey v. Bailey, 107 Idaho 324, 327, 689 P.2d 216, 219 (Ct.App.1984). If the trial court chooses substantial equality, the issue on appeal is a factual one--whether substantial and competent evidence supports that such equality has been achieved. Id. at 327-28, 689 P.2d at 219-20. Conversely, if the trial court elects an unequal division, our inquiry is whether the trial court has abused its discretion under the circumstances. Id. at 328, 689 P.2d at 220.

In the present case, the magistrate's rulings with respect to the division of the Larsons' community assets are ambiguous and inconsistent. In the July 1999 judgment, the magistrate specifically stated that it did not find any compelling reason to significantly deviate from a substantially equal property division, although it acknowledged that Billie was awarded more property than Michael. In the supplemental divorce decree, the magistrate noted that Billie received $252,725 more than Michael and that such an unequal division was made because of the diminution in the ranch's value as a result of Michael's requested partition.

It appears from the supplemental decree that the magistrate intended an unequal distribution of the Larsons' community assets and that the reason for such a division was that Michael's requested partition caused a diminution in value of the ranch. Because the magistrate elected an unequal division, the magistrate's decision is reviewed under an abuse of discretion standard. See Bailey, 107 Idaho at 328, 689 P.2d at 220. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. Sun Valley Shopping Ctr., Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

The dispute in the present case centers on whether the magistrate acted consistently with the legal standards applicable to the division of community property at divorce. The magistrate had the option of awarding the entire ranch to Billie to continue operating as she requested, ordering a partition of the ranch as requested by Michael, or ordering a sale of the ranch and dividing the proceeds equally between Billie and Michael. See I.C. § 32-713. The magistrate elected partition but ordered Michael to reimburse Billie for one-half of the diminution of the ranch's value as a result of the partition. Although the Idaho appellate courts have not had occasion
to address how to allocate a diminution in the value of a community asset, this Court's opinion in *Carr v. Carr*, 108 Idaho 684, 701 P.2d 304 (Ct.App.1985), is instructive. In that case, the husband and wife owned a truck stop, which the magistrate ordered to be sold during the parties' divorce proceedings. The magistrate determined that the truck stop had a net worth of $761,309 but assigned no value to the truck stop's goodwill. Prospective buyers insisted on a provision in the sales agreement limiting the husband's ability to open a competing business for five years and within ten miles of the truck stop. The husband eventually signed an earnest money agreement containing such a noncompetition provision. On appeal from the distribution of the community assets, this Court concluded that the goodwill of the truck stop had been sold by virtue of the husband entering into a covenant not to compete with the truck stop. Consequently, this Court held that the goodwill of the truck stop comprised a portion of the value of the truck stop which should have been valued and distributed by the magistrate.

The reasoning of the opinion in *Carr* applies by analogy to the present case. The Larsons' ranch as a whole has a value of $1,360,000. Although the portions of the ranch after partition have a combined value of $970,000, the $390,000 difference between the combined value of the tangible parts of the ranch and the value of the ranch as a whole comprises a portion of the value of the ranch. Therefore, the $390,000 diminution in the ranch's value at partition becomes analogous to the goodwill of the truck stop in *Carr* and should be apportioned equally unless compelling reasons exist to justify an unequal distribution.

The magistrate concluded that Michael's requested partition was a compelling reason to justify an unequal distribution of the parties' community assets. We do not agree. As the magistrate found, the ranch had significant sentimental value to both Billie and Michael. Although Billie desired to have the entire ranch awarded to her in order to continue the ranching operation, the magistrate determined that she could not realistically expect to make a living from the operation if she were to receive the ranch as a unit. Therefore, the magistrate rejected the proposal set forth by Billie. The evidence presented at trial indicates that the ranch was partitioned in such a way as to give Billie and Michael the portions of the ranch that held their respective interests.

Furthermore, with regard to factors contained in Section 32-712, Billie and Michael are both vocationally skilled individuals. The magistrate found that Billie is an able-bodied person with a master's degree in psychology and that she could earn a good salary with minimal retraining if she so desired. Indeed, the magistrate denied Billie's request for maintenance after concluding that Billie had been awarded sufficient property to provide for her reasonable needs. The magistrate noted that the value of the community estate awarded to Billie free and clear of debt exceeded $1,800,000. Thus, there was no economic need demonstrated by Billie to justify requiring Michael to absorb the entire loss in the ranch's value.

Finally, as noted, neither Billie nor Michael wanted to sell the ranch.10 Billie requested the

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10 Had the magistrate elected to sell the ranch and divide the proceeds equally between Billie and Michael, which was another option the magistrate rejected, Billie would have received approximately $680,000. The value of the portion awarded to Billie, as a result of the partition, is $645,000, only $35,000 less than she would have received had the magistrate elected to sell the ranch. Conversely, the value of the portion awarded to Michael is $325,000, an amount
entire ranch, which was impractical because there were insufficient community assets to compensate Michael for such an award to Billie. Michael requested partition, which could not be accomplished without diminishing the ranch's value. Given these choices, the magistrate elected partition. Although the magistrate elected to grant Michael's request, the magistrate's decision to partition the ranch does not justify penalizing Michael unequally for the diminution in the value of the ranch. Moreover, as a result of the partition, Michael received significantly less than he would have received had the ranch been sold. Accordingly, we conclude that the magistrate abused its discretion by allocating the entire loss of the ranch's value to Michael, rather than allocating it equally between Billie and Michael. The decision of the district court on this issue is, therefore, reversed.

Having determined that the diminution of the ranch's value should be apportioned equally between Billie and Michael, we next address how the diminution should be mathematically allocated. The scope of our consideration of this issue has been narrowed by the parties. Billie and Michael have conceded that, absent an allocation for the diminution of the ranch's value, Michael's allocation of community assets is $1,360,035 and Billie's allocation is $1,612,760. In order to apportion the $390,000 loss in the ranch's value equally between Billie and Michael, we instruct the magistrate on remand to add $195,000 to each of Billie's and Michael's shares of the community assets. Thus, the total value of community assets awarded to Billie becomes $1,807,760 ($1,612,760 + $195,000) and the total community asset value awarded to Michael becomes $1,555,035 ($1,360,035 + $195,000). Because there exists a difference of $252,725 in favor of Billie, the magistrate is further instructed to deduct half of that amount, $126,362.50, from Billie's assets and add that amount to Michael's assets in order to achieve an equal division of the community estate.

IV. CONCLUSION

We hold that there was a legal basis supporting the magistrate's decision to apportion to Billie the amount of community funds she intentionally diverted during the period of separation and that there was substantial evidence of Billie's intent to deprive the community of the use of the expended community funds. However, because we are unable to determine the evidentiary basis for the amount of allocation, we remand the case and instruct the magistrate to make factual findings concerning whether the amount of the allocation is accurate and to articulate the evidentiary basis for such findings. Thus, the decision of the district court in this regard is affirmed.

We further hold that the diminution of the value of the Larsons' ranch by virtue of Michael's requested partition comprises a portion of the ranch's value as a whole and should be distributed substantially less than Michael would have received had the ranch been sold. Forcing Michael to absorb the entire loss of the ranch's value due to the partition, despite Billie technically suffering a loss of only $35,000, results in double punishment to Michael and gives Billie more than she is entitled to.
equally between Billie and Michael unless there are compelling reasons to do otherwise. Because no compelling reasons have been demonstrated which justify an unequal apportionment, we conclude that the magistrate erred by allocating the entire diminution to Michael. The district court's determination in this regard is reversed. The magistrate is instructed on remand to allocate the diminution in the ranch's value equally between Billie and Michael by adding $195,000 to Billie's and Michael's respective shares of the community assets. Because an equal apportionment results in a difference of $252,725 in favor of Billie, $126,362.50 is to be deducted from Billie's share of the community assets and added to Michael's share.

B. Dividing Omitted Assets


WALTERS, J.

Several months after a divorce decree had been entered, Frances McDonald commenced an independent action against her former husband, Kimber Ray Barlow. McDonald alleged that Barlow had fraudulently misrepresented during property settlement negotiations leading to the divorce the status and value of his interest in a trust. By an amended complaint, McDonald further alleged that income generated by the trust was community property not mentioned in or affected by the property settlement agreement or subsequent divorce decree. Following trial in the independent action, the district court entered judgment for $30,890.70 plus interest and certain costs on behalf of McDonald -- an amount far less than she sought. On appeal, McDonald maintains the trial court correctly determined she was entitled to bring this independent action, but incorrectly concluded she had no right to share in distributions made after the parties were divorced. Barlow disputes the propriety of the independent action and, in his cross-appeal, argues issues we need discuss only if we conclude the independent action was proper. Because we hold that McDonald was barred from bringing this independent suit, we do not discuss the other issues raised.

Frances McDonald married Ray Barlow in March, 1947. When his mother died in 1951, Barlow received by devise forty percent of his mother's one-half interest in the community property owned by his parents. The net value of the bequest, which amounted to a twenty percent interest in certain properties, was $67,273.82 in 1951. By far the most valuable portion of the bequest was corporate stock in two ranching operations -- K.C. Barlow, Inc., and K.C. Barlow Ranch, Inc. -- which were controlled and managed by Barlow's father. In 1963, the Barlows transferred all interest they had in the ranching operations (including the interest owned by Ray Barlow that he had received from his mother's estate) to a master trust administered by the United States National Bank of Oregon. In exchange for transferring his twenty percent interest to the master trust, Ray Barlow was to receive thirty percent of the value of the trust when the trust property was distributed. Hereinafter we will refer to Barlow's thirty percent interest in the master trust as the "trust interest." Distributions of Barlow's share from the master trust were to be made to the K. Ray Barlow individual trust. Although Barlow could exercise no control over the trustee administering the master trust, he could compel distributions from the individual trust. McDonald
participated in executing the master trust in 1963.

By the terms of the master trust, the elder Mr. Barlow was given a life estate in the trust assets. Also, upon his death, the master trust would become irrevocable.

The elder Mr. Barlow died in December, 1964. Prior to his death, however, the corporation, K.C. Barlow, Inc., was liquidated and, in March, 1964, that corporation was dissolved. Its remaining assets were transferred to the master trust. In July, 1964, the assets of K.C. Barlow Ranch, Inc. were sold. That corporation however, continued in existence until 1977, when it was dissolved and the balance of its assets were transferred to the master trust. From 1966 until 1977, K.C. Barlow Ranch, Inc. declared dividends to the master trust in various amounts.

McDonald and Barlow separated in 1976 and were divorced on September 2, 1977. Property settlement negotiations occurred during the separation. McDonald was represented by able counsel during the negotiations, and she also enlisted the advice of a friend who was a prominent local business man. McDonald, her attorney, and her advisor all knew the master trust existed, but Barlow and his attorney maintained during the property settlement negotiations that Barlow's trust interest was not vested, that no distributions had been made from the master trust, and that, in any event, the trust interest was Barlow's separate property. McDonald made no independent inquiries nor did she compel discovery regarding the trust. The property settlement agreement reached in August, 1977, in which McDonald relinquished all claims to the trust, was merged into the September divorce decree.

Sometime after the divorce decree was entered, McDonald discovered that Barlow had received, through the individual trust, substantial distributions from the master trust. One distribution of $160,714.00 was received in December, 1976 while McDonald and Barlow were separated but still married. Distributions in 1977 after the divorce decree and in 1978 and 1979 brought the total received by Barlow from the trust to $475,368.61.

McDonald commenced this suit independent of the divorce proceedings on July 17, 1978, claiming she was entitled to one-half of all trust distributions received by Barlow. Following a bench trial, the judge entered findings of fact and conclusions of law as required by I.R.C.P. 52(a). The judge found that neither Barlow nor his attorney misrepresented any facts in regard to separate or community property of the parties and that in negotiating the property settlement agreement, McDonald did not rely on Barlow or his representations, but relied upon independent advice from her attorney and from her financial consultant. The court concluded there was no fraud on the part of Barlow in regard to the property settlement agreement or in obtaining the divorce judgment. However, after concluding that the divorce action did not preclude the independent action on principles of res judicata, the trial judge held that McDonald was entitled to a portion of the trust distributions made while the parties were still married, but that she had no right to share in distributions following entry of the divorce decree. (footnote omitted)

Generally, a judgment entered is res judicata with respect to all issues which were or could have been litigated. Compton v. Compton, 101 Idaho 328, 612 P.2d 1175 (1980); Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct. App.1983). By preventing multiple litigation of the same claim, the doctrine of res judicata furthers important fundamental purposes. The doctrine preserves the
acceptability of judicial dispute resolution by preventing inconsistent results; it serves the public interest in protecting the courts against the burdens of repetitious litigation; and it advances the private interest in repose from the harassment of repetitive claims. *Aldape v. Akins, supra.* In limited circumstances, however, relief from a judgment may be obtained in an equitable independent action. See I.R.C.P. 60(b); *Compton v. Compton, supra.* In such instances, the policies furthered by granting relief from the judgment outweigh the purposes of res judicata.

As is the case at bar, *Compton* was an independent equitable action brought by the wife seeking relief from the property division portion of a divorce decree. In discussing the burden borne by one who seeks such equitable relief, our Supreme Court stated:

> [T]he independent action in equity is a most unusual remedy, available only rarely and under the most exceptional circumstances. It is most certainly not its function to relitigate issues determined in another action between the same parties, or to remedy the inadvertence or oversight of one of the parties to the original action. It will lie only in the presence of an extreme degree of fraud.

101 Idaho at 335, 612 P.2d at 1182. Accordingly, McDonald had the burden "to allege such fraud as to support an independent action for relief from judgment." *Compton*, 101 Idaho at 336, 612 P.2d at 1183. Without the existence of the requisite fraud, an independent action in equity may not be brought. Instead, res judicata prevails.

In evaluating the degree of fraud demonstrated by particular facts, we must assess the nature of the relationship between the parties who are alleged to have acted fraudulently as well as the character of the actual conduct involved. *Compton v. Compton, supra.* Throughout the property settlement negotiations, the relationship between McDonald and Barlow was that of husband and wife. The fiduciary duty arising from that relationship was not affected by the parties' separation. *Id.* Thus, during the property settlement negotiations, the fiduciary duty required, at least, a disclosure by both parties of all information within their knowledge regarding the existence of community property and of pertinent facts necessary to arrive at a reasonable valuation of the property. Like a business partner, each spouse is free to adopt a position favorable to himself or herself regarding the property's valuation, its inclusion in the community, or other such issues. They are not free, however, to resolve such issues unilaterally by concealing the very existence of particular items or amounts of property. 101 Idaho at 336, 612 P.2d at 1183.

With this understanding of McDonald's and Barlow's fiduciary duty to each other in mind, we turn to an analysis of the conduct in this case to determine whether it presents fraud in such degree as to support an independent action for relief from judgment. According to *Compton*, it is appropriate to consider McDonald's diligence in challenging Barlow's representations regarding the master trust as well as the erroneous or misleading nature of the representations themselves. The record indicates that Barlow maintained throughout the negotiations that his trust interest, and any income or proceeds distributed by the trust, were his separate property. His position that the trust interest should not be included in the community was not, according to *Compton*, a breach of his fiduciary duty to McDonald. Nor did he breach his duty by misstating the value of the trust interest. The record also demonstrates a distinct absence of diligence by McDonald in challenging Barlow's representations regarding the trust. McDonald made no effort to compel discovery of the
terms of the trust, nor did she challenge Barlow's valuation of the trust interest or his classification of it as separate property. "Her inadvertence or misjudgment in failing to do so when the opportunity was ripe is an excellent example of the type of conduct which the independent action to relieve a party from judgment will not lie to correct." *Compton v. Compton*, 101 Idaho at 337, 612 P.2d at 1184. Because McDonald failed to demonstrate the existence of fraud sufficient to support an independent action for relief from judgment, the trial court erred by modifying the property settlement agreement merged into the divorce decree. *See Compton v. Compton, supra, and Paul v. Paul*, 97 Idaho 889, 556 P.2d 365 (1976).

McDonald argues, however, that this suit independent of the divorce action is not affected by the divorce decree because the property at issue was not contemplated when the property settlement agreement was negotiated. Because the settlement and subsequent decree treated the trust interest as Barlow's separate property, McDonald asserts the community interest in the trust was not affected. Thus, McDonald argues, the parties became tenants in common as to the community portion of the trust because the divorce decree failed to divide the community interest, and an independent action may be brought to divide the property. We are not persuaded. Although in some circumstances an independent action will lie to divide community property not disposed of in a divorce decree, *Quinlan v. Pearson*, 71 Idaho 26, 225 P.2d 455 (1950), application of that rule is not appropriate under the facts in this case. The property settlement agreement between the parties provided in part:

> The wife waives any and all claims against the separate property of the husband, including his interest in a Trust at the U.S. National Bank of Oregon and any proceeds therefrom.

The trial court construed this provision by holding that the agreement waived any right the wife might have in the husband's separate interest in the trust but she did not waive any claim to any interest that she might have in the trust. The court then held that the December 30, 1976, distribution was community property -- not the husband's separate property -- and, after deducting a portion allocated to discharge of community obligations, awarded one-half of the net amount to the wife.

We believe the trial court's construction of the agreement ignores the clear implication of the words "and any proceeds therefrom." It is undisputed that the trust was established at its inception with the separate property of the husband, together with other property owned by persons other than Barlow and McDonald. Subsequently, any income in the trust estate was acquired by the trust, not by Barlow. *See Matter of Marriage of Burns*, 573 S.W.2d 555 (Tex.Civ.App.1978). By the property settlement agreement, the wife waived any claim to the proceeds of the trust res, whether those proceeds arguably might be otherwise characterized as community property, separate property, or a mixture of both in a situation where the proceeds result from property which is not held in trust.

The entire trust interest was therefore assigned to Barlow in the property settlement agreement and in the divorce decree. McDonald had ample opportunity to challenge Barlow's valuation and classification of the trust interest as separate property in the divorce action. She did not contest the status of the trust in that proceeding. Accordingly, we hold this independent action
was barred by res judicata and the trial court erred in treating any part of the trust distribution as property not disposed of in the divorce decree.

The judgment of the trial court is reversed. This case is remanded with direction to the district court to dismiss the action on the basis of res judicata. No attorney fees on appeal, costs to respondent cross-appellant, Barlow.

BURNETT, J., dissenting.

I respectfully depart from my colleagues' view of this case on three points. First, I believe the property settlement agreement has a plain meaning with respect to the wife's waiver of any claim against the trust funds. Second, I believe the majority has enunciated an unnecessarily restrictive standard governing the availability of equitable relief from a judgment procured by fraud. Third, and finally, I believe the majority opinion fails to examine the fraud issue in sufficient detail.

Before addressing each point, it is important to recall what is at stake in this litigation. During the marriage the husband inherited from his mother an interest in income-generating corporate stock and real estate. He later transferred this interest to a master family trust created by his father. The master trust, administered by an institutional trustee, was surrounded by a satellite group of individual trusts for beneficiaries in the family. The beneficiaries had unrestricted access to any funds deposited in their individual trust accounts but they had no power to compel distributions from the master trust.

For many years, the institutional trustee managed the assets of the master trust without making distributions. The master trust received dividends on the corporate shares and eventually received liquidating distributions when the corporations were dissolved. The master trust also received interest income from installment sales of the real estate and from the trust's reinvestment of its own funds. In December, 1976, while the parties in this case were separated but still married, the master trust distributed approximately $160,000 to the husband's individual trust account. Several other distributions after the divorce brought the total to more than $475,000. The wife received none of this money. She now claims part of it, but the husband maintains that he is entitled to keep it all.

At times pertinent to this case, I.C. §32-906 provided, with exceptions not applicable here, that the "rents and profits" of separate property are community property. (The statute today simply provides that the "income of all property, separate or community, is community property . . . ") The wife has contended that the master trust distributions included "rents and profits" and therefore comprised, at least in part, community property. The husband has responded that the wife waived

1The majority deems it undisputed that the interest transferred was entirely the husband's separate property. For the sake of discussion I will presume likewise. However, I note that several years elapsed between the mother's death and the transfer of assets into the trust. If the assets had grown during this period by reinvesting income that the husband was entitled to receive, the assets might have acquired a partially community character.
any claim to such distributions when she signed the property settlement agreement and that the divorce decree has the preclusive effect of res judicata.

I

The first issue is waiver. The property settlement agreement provides as follows:

The wife waives any and all claims against the separate property of the husband, including his interest in a Trust at the U.S. National Bank of Oregon and any proceeds therefrom.

The district court held that this language does not contain a waiver. The majority's decision today insists that it does. I agree with the majority's conclusion, although not with its reasoning.

The district court found that when the husband and wife signed the property settlement agreement, they intended to dispose of community and separate interests in all of their property. However, the court held that the agreement failed to accomplish this purpose. Noting that the agreement referred only to "his" (the husband's) interest in the trust, the court ruled that the wife "did not waive her claims to her interest in the specified trust." (Emphasis original.) I think the district court has burdened the pronoun "his" with a weight it cannot carry against the context and plain meaning of the entire sentence in which it appears. The sentence, in my view, clearly declares that the "Trust" is the husband's separate property and that the wife waives any claim against it.

The majority opinion, apparently eschewing this holistic approach, fixes upon yet another isolated part of the sentence -- the phrase "and any proceeds therefrom." The majority seems to suggest that if "his interest in a Trust" refers only to the husband's separate property, the words "proceeds therefrom" broaden the waiver to include any community property. But the "proceeds" of property retain the same community or separate character as the property itself. I.C. §32-903; see, e.g., Travelers Insurance Co. v. Johnson, 97 Idaho 336, 544 P.2d 294 (1975). The term "proceeds" designates a form of property, implying nothing as to its character. Consequently, the phrase "proceeds therefrom" neither broadens nor narrows the language preceding it as far as the community or separate character of the trust assets is concerned. By focusing on the term "proceeds" the majority simply begs the question of whether the wife waived her claim of a community interest in the underlying trust assets.

In any event, because I think the quoted language as a whole contains a plain expression of waiver, I join the majority's ultimate conclusion that the property settlement agreement disposed of any claim by the wife against the trust funds. The next question is whether the wife is entitled to equitable relief from the agreement and from the decree incorporating it.

II

The majority correctly notes that when a former spouse seeks by a separate action to obtain relief from a divorce decree, the principles of equity and res judicata are placed in conflict. In Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct.App.1983), we adopted the claim preclusion component of res judicata as set forth in the RESTATEMENT (SECOND) OF JUDGMENTS.
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(1982) (herein cited as the Second Restatement). Relying upon Second Restatement §19, we held that a valid and final personal judgment bars another action on the same claim. Citing Second Restatement §§24 and 25, we further held that the concept of a claim is sufficiently broad to include evidence or theories which were not, but could have been, presented in the first action. In the case before us, the wife has presented evidence and a theory concerning the trust assets that could have been presented in the original divorce action.

On the other hand, equity long has recognized that when a judgment is the product of a fraud, it may be set aside. In *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980), our Supreme Court surveyed the development of equitable remedies. The Court cited numerous case decisions and treatises, which need not be listed again here, supporting the proposition that upon a sufficient showing of fraud, the interests of res judicata will yield to the interests of equity. The Second Restatement also embodies this view. Section 70 of the Second Restatement provides that "a judgment in a contested action may be avoided if the judgment . . . [w]as based on a claim that the party obtaining the judgment knew to be fraudulent."

However, the majority opinion does not apply this straightforward legal standard for obtaining equitable relief. Rather, the majority seeks to narrow the availability of relief by quoting a *dictum* from *Compton* and by treating it as a more rigorous standard than that contained in the Second Restatement. The *dictum* appears in the following passage:

Among the non-conclusory points we can make are that the independent action in equity is a most unusual remedy, available only rarely and under the most exceptionable circumstances. It is most certainly not its function to relitigate issues determined in another action between the same parties or to remedy the inadvertence or oversight of one of the parties to the original action. It will lie *only* in the presence of an *extreme* degree of fraud.

101 Idaho at 335, 612 P.2d at 1182 (emphasis added).

Of course, no one would quarrel with the observations that an independent action in equity is available only in exceptional circumstances and that it is not a remedy for mere inadvertence or oversight. Indeed, as we shall see, the section of Second Restatement pertinent here requires a clear showing of fraud. On the other hand, no legitimate interest in protecting the finality of judgments requires us to say that relief is available only if the proven fraud is "of an extreme degree." Fraud is fraud. Nothing is gained, and much confusion may be created, by suggesting that the courts will disregard some frauds while deeming others worthy of relief. I believe the instant case should be examined for simple fraud, as envisioned by the Second Restatement.

III

Section 70 of the Second Restatement provides that a party seeking relief must:

(a) Have acted with due diligence in discovering the facts constituting the basis for relief;
(b) Assert his claim for relief from the judgment with such particularity as to
indicate it is well founded and prove the allegations by clear and convincing
evidence; and
(c) When his claim is based on falsity of the evidence on which the judgment was
based, show that he had made a reasonable effort in the original action to ascertain
the truth of the matter.

Comment d to section 70 further explains these requirements and breaks them into four elements
required for relief from fraud:

First, it must be shown that the fabrication or concealment was a material basis for the
judgment and was not merely cumulative or relevant only to a peripheral issue. Second,
the party seeking relief must show that he adequately pursued means for discovering
the truth available to him in the original action. *** Third, the applicant must show
due diligence after judgment, in that he discovered the fraud as soon as might
reasonably have been expected. ***

Finally, the party seeking relief must demonstrate, before being allowed to present
his case, that he has a substantial case to present, and must offer clear and
convincing proof to establish that the evidence underlying the judgment was indeed
fabricated or concealed. This heavy burden of proof is an important measure of
protection against attacks on honestly procured judgments. It also transforms the
issue from a retrial of a question previously litigated to a search for something
approaching incontestable proof as to the truth of the underlying matter in issue.

The first requirement, that the concealment must be material to the judgment, invokes the
wife's theory of entitlement to a share in the trust distributions. As noted earlier, the wife has
claimed that the distributions contained "rents and profits" constituting community property. The
district court adopted this theory, but applied it only to the pre-decree distribution. The court
apparently relied, by analogy, upon Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), and
Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974). In those cases our Supreme Court held that
the earnings of a corporation, in which a husband held shares as his separate property, did not
represent "rents and profits" if they were retained by the corporation for legitimate business reasons
rather than being distributed to a spouse-shareholder. The Supreme Court reasoned that to
postulate a community interest in retained corporate earnings, and to require satisfaction of such
an interest in a divorce, would be tantamount to compelling the corporation to declare a dividend
to which the shareholder would not otherwise have been entitled. In the present appeal the wife
has attacked the Simplot-Speer analogy, arguing that the beneficiary of a trust, unlike a corporate
shareholder, has a vested and enforceable, albeit future, interest in the undistributed trust assets.
Accordingly, she claims a community interest in all distributions, whenever made.

It is unnecessary, in this opinion, to discuss the validity of the wife's theory of broader
recovery. It is sufficient under section 70, comment d, that concealment of the pre-decree
distribution was material to the property settlement agreement and to the decree. Had the
distribution been timely disclosed, the wife -- even if limited by the Simplot-Speer analogy --
would have been entitled to her share of any "rents and profits" contained in that distribution. The
allocation of community property in the settlement agreement and decree would have been
significantly affected.

For reasons to become apparent later, I will defer for a moment a discussion of the second requirement under comment d -- that a party seeking relief from a fraudulently obtained judgment must have pursued available means for discovering the truth during the original action. As to the third requirement, that of due diligence after judgment, the district court made no findings. Neither has this requirement been argued as an issue on appeal. Consequently, it need not be discussed further.

The fourth requirement relates to proof of the fraud. As noted by the majority, the district court found that the husband had not "misrepresented" the assets in the trust. The court concluded that the husband had engaged in no fraud. However, it is undisputed that the wife and her attorney inquired about trust distributions while the divorce was pending and that neither the husband nor his attorney communicated the existence of the pre-decree distribution. Indeed, the husband was asked at trial in this case whether he had disclosed the pre-decree distribution to his wife, to her attorney, to anyone else representing his wife, or even to his own attorney. He replied that he had informed his accountant, "[b]ut those people that you enumerated, no."

Nevertheless, as mentioned, the district court concluded that there had been no fraud. The only findings of fact arguably supportive of that conclusion are a finding that the wife received a computer printout from the institutional trustee showing the existence of the pre-decree distribution and a finding that the wife received from the accountant a copy of an income tax return showing the distribution. But even if these findings were correct, they would not necessarily lead to the conclusion that the husband's conduct was free from fraud. It has long been recognized that a fraudulent misrepresentation is not alleviated by the availability of other, truthful sources of information. Only if the recipient of the fraudulent information undertakes and relies upon his or her own independent investigation is the taint of fraud removed. See generally Annot., 61 A.L.R. 492, 514, 537 (1929) (collecting cases relating to sales of personal property). Moreover, the district court's findings regarding the printout and tax return are binding on appeal if, but only if, they are supported by substantial evidence in the record. E.g., Rasmussen v. Martin, 104 Idaho 401, 659 P.2d 155 (Ct.App.1983). I now turn to the evidence.

The printout was a multi-page document. On its sixth page, according to testimony in the present case, it contained an entry to the following effect: "TRF to 4-08909- . . . .  K. Ray Barlow trusts share of cash in this partial distribution. Tax Code 94. Disbursed $ 143,268.96." The printout arrived in the mail at the family home after the husband had moved away. The envelope was addressed to both the husband and the wife. The wife opened the envelope and, being unable to decipher the meaning of the printout, asked a financial adviser to help her. When the adviser could not interpret it either, they took it to the wife's attorney. The attorney examined it but could not discern anything contrary to the husband's earlier representation about the status of the master trust. The attorney asked a second lawyer in his office, the holder of a tax degree, to examine the printout. This individual was similarly unable to find anything significant in the document. In the presence of the wife and her financial adviser, the attorney also called the husband's attorney and asked him what the printout signified. According to the wife's attorney, the husband's attorney responded that the printout merely showed internal operations of the master trust. The husband's attorney later testified, "I have no recollection that such a conversation occurred. And by that, I
am not saying that it did or did not. I just simply don't recall anything about it." In my view, the foregoing summary of the record does not reveal "substantial" evidence that the wife or her attorney were meaningfully informed of a distribution from the master trust to the husband's individual trust, where he would have full control over the money.

The tax return was prepared in 1977. It related to income received by both spouses during 1976. The pre-decree distribution was received by the husband in December, 1976. The tax return filed with the U.S. Internal Revenue Service did, in fact, refer to trust distributions received by the husband. However, the wife testified, contrary to the judge's finding, that she did not see a copy of the completed return, with trust information included, until 1980, several years after the decree of divorce was entered.

The accountant testified that on or before April 13, 1977, Mrs. Barlow brought him information concerning her earnings during 1976. A tax return was prepared by April 13. It was not customary for the accountant to have clients sign returns unless they were completed. However, in this case, two returns were prepared. After the first return had been completed, the husband came to the office on April 14 with information not previously furnished. This information concerned the trust distribution. The accountant then prepared a second return, incorporating some pages from the first return. The accountant testified that he did not know when the wife received a copy of this second, completed return. The wife's attorney testified that the wife did not provide, and he did not otherwise obtain, a copy of the ultimate 1976 joint tax return before the divorce decree was entered. This testimony, as I view it, does not comprise "substantial" evidence that the wife or her attorney actually received, prior to the decree, a completed tax return showing the receipt of a trust distribution by the husband.

To be sure, an appellate court, when examining the record to determine whether a judge's findings are supported by "substantial" evidence, must give due regard to the judge's unique opportunity to observe the demeanor, and to evaluate the credibility, of witnesses. I.R.C.P. 52(a); Church v. Roemer, 94 Idaho 782, 498 P.2d 1255 (1972). However, in this case, the trial judge made no findings or other comments in the record concerning the credibility of witnesses. Upon the present record I would hold that the judge's findings regarding the wife's purported knowledge of the trust distributions prior to the decree were not supported by "substantial" evidence. Consequently, they do not support the court's ultimate conclusion on the issue of fraud.

I now return to the second requirement for equitable relief -- that the applicant must have "adequately pursued means for discovering the truth available to him in the original action." In my view, this requirement calls for a balancing decision to be made by the trial judge. Comment d to section 70 identifies the appropriate criteria:

Under modern procedure in trial courts of general jurisdiction in cases involving substantial stakes, abundant devices exist for discovering an opposing party's proof and subjecting it to investigation prior to trial and adequate incentive usually exists to use such devices. Hence, in such circumstances, only a well concealed or unforeseeable fraud is likely to survive a reasonably diligent effort to ascertain the truth. On the other hand, in cases involving limited stakes, it may be unreasonably costly to pursue intensive discovery or investigation when there is no indication
that the other side may offer fabricated evidence. Furthermore, in some situations a litigant is entitled to be passive and unquestioning with respect to the proofs of another party. Thus, the cases allowing relief from fraud practiced by a trustee often advert to the fact that a beneficiary should not have to anticipate a trustee's deliberate falsification of the accounts he presents to the court.

In this case, the district court engaged in no weighing of such factors nor did the judge make any ultimate determination concerning the reasonableness of efforts by the wife and her attorney to ascertain the truth about trust distributions. Of course, through discovery the wife's attorney could have probed beneath the surface of general information received from the husband and his attorney concerning the nature of the trust and the reported lack of any distributions. However, the husband owed a fiduciary duty of disclosure to his wife, and the wife's attorney felt he could rely upon information furnished by the reputable attorney representing the husband. Moreover, the wife's attorney testified:

[The wife] was a school teacher, and . . . she had, of course, a pension income from the State of Idaho, being a teacher, which had been depleted. She had a son living with her. She had an old Toronado automobile. She did not have any particular disposable income. Money was important to [her]. . . . I indicated to [her] . . . that we could engage in extensive discovery, but that I had no reason not to believe [the husband's attorney]; [I] thought that our discovery would produce exactly what [he] told me, and did not think that spending huge quantities of her money was going to generate anything, except a bill from me.

The question, then, is how these competing factors should have been balanced. Where, as here, a trial court has failed to make its decision by reference to the proper criteria, the correct appellate response is to remand the case. But the majority, instead of recognizing the competing factors to be weighed, simply declares, as though it were a question of undisputed fact, that the record "demonstrates a distinct absence of diligence" by the wife in challenging the husband's representations regarding the trust. Not only does this declaration usurp the district court's role but it is misguided to the extent that it criticizes the wife's failure to challenge what the majority calls the husband's "valuation of the trust interest or his classification of it as separate property." Valuation and classification are not the issues critical to the instant case. Rather, the critical issue is the husband's failure to disclose the existence of a trust distribution that would have been material to the outcome of the divorce proceedings.

Thus, this case is fundamentally different from Compton. There, the Supreme Court, after acknowledging the availability of equitable relief from a fraud, held that the husband had not fraudulently withheld information concerning the existence of assets. Rather, he had simply taken a position -- as he is permitted to do -- concerning the value and separate character of the assets. In contrast, here the existence of an asset, the pre-decree trust distribution, was withheld. Accordingly, I would vacate the judgment below and remand the case for reconsideration of the availability of equitable relief in light of the criteria enunciated by the Second Restatement.

PERRY, Judge.

Wayne G. Pike appeals from the decision of the district court reversing the magistrate's order granting summary judgment in an action to divide allegedly omitted property following the entry of a decree of divorce. For the reasons set forth below, we affirm the district court.

I. FACTS AND PROCEDURE

On February 8, 2000, Carolyn B. Pike filed a divorce action, pro se, by means of a "form" complaint. In her complaint, Carolyn listed a single residence as the only real property acquired during the marriage. Carolyn did not list any personal property in the complaint but did check a box indicating that the community personal property had been "divided prior to this action." On March 13, 2000, Carolyn appeared at a default hearing. The magistrate granted a default and entered a decree of divorce. The language in the divorce decree mirrored the language of the complaint with regard to the division of community personal property, reciting that it was "divided prior to this action." The decree did not list specific items of personal property or purport to make any award of personal property to either party.

More than thirteen months later, Carolyn filed another "complaint" in the divorce case seeking a division of omitted property. Carolyn alleged that certain community personal property in the form of Wayne's retirement accounts--a military retirement pension, a Civil Service pension, and a thrift savings account--were not divided during the divorce proceedings and, therefore, should be categorized as omitted assets. Wayne filed an answer denying the allegations and asserting various affirmative defenses.

Both parties knew of the accounts prior to Carolyn filing for divorce and prior to the default hearing. Carolyn alleged in the new complaint, however, that she and Wayne had not reached an agreement regarding the division of the retirement accounts. Wayne contended that he and Carolyn had agreed that he would retain all benefits from the accounts.

On September 18, 2001, Wayne filed a motion for summary judgment. Wayne asserted that, because the divorce decree provided that any personal property had been "divided prior to this action," the retirement accounts were not omitted assets. Carolyn also filed a motion for summary judgment. The magistrate granted Wayne's motion and denied Carolyn's.

Carolyn appealed to the district court. The district court concluded that a genuine issue of material fact existed with regard to the parties' understanding of the retirement accounts. Additionally, the district court concluded that, because the parties failed to memorialize any alleged agreement in writing pursuant to I.C. § 32-917, the agreement was unenforceable and the accounts were therefore omitted assets. The district court reversed the magistrate's order and remanded the case for division of the accounts. Wayne now appeals.
On appeal, Wayne argues that the district court erred in looking beyond the four corners of the decree of divorce and considering the intent of the parties to discern whether the retirement accounts were omitted assets. Wayne also argues that the district court erred in concluding that a valid and enforceable agreement to divide community property must be in writing pursuant to I.C. § 32-917. Both parties request costs and attorney fees on appeal.

II. DISCUSSION

On appeal, Wayne argues that the district court erred in reversing the magistrate's order granting summary judgment. On review of a decision of the district court, rendered in its appellate capacity, we examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision. Hentges v. Hentges, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct.App.1988).

We first note that summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App.1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); Sanders v. Kuna Joint School Dist., 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. Eliopulos v. Knox, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App.1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. Dumnick v. Elder, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. Heath v. Honker's Mini-Mart, Inc., 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct.App.2000). Once such an absence of evidence has been established the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). Sanders, 125 Idaho at 874, 876 P.2d at 156.

A. Retirement Accounts as Omitted Assets

Wayne argues that the magistrate correctly granted summary judgment when it determined that, based on the express terms of the divorce decree, the retirement accounts were not omitted property. If the language of the decree is clear and unambiguous, determination of its meaning and legal effect is a question of law. Toyama v. Toyama, 129 Idaho 142, 144, 922 P.2d 1068, 1070 (1996). If, on the other hand, the language of the decree is reasonably susceptible to conflicting interpretations, it is considered ambiguous, and the determination of its meaning is a question of
At issue in the present case is whether the division of the community property language found in Carolyn's complaint and mirrored in the divorce decree is ambiguous. Specifically, the language in both documents indicate that any community property, aside from the parties' residence, was "divided prior to this action." Wayne argues that the language "divided prior to this action" is unambiguous and, thus, the district court erred by not relying on the plain meaning of the words to determine that the retirement accounts were not omitted assets.

On the other hand, Carolyn contends that the district court did not err in looking beyond the four corners of the decree of divorce. Carolyn argues that aside from stating that the community residence should be sold and any remaining money divided equally, the divorce decree did not address the division of the property. We agree.

The language in the decree, "divided prior to this action," unambiguously does not divide or award any personal property. It does not describe what property was divided or how any such property was divided. The decree stated, "[n]ow, therefore, it is hereby ordered, adjudged and decreed, and this does order, adjudge and decree" that with respect to the community property of Carolyn and Wayne, not including the community residence, the "remaining community property of the Parties shall be divided as follows: Plaintiff: Divided prior to this action; Defendant: Divided prior to the action." Because the decree does not adjudicate any community personal property, the retirement accounts were omitted assets.

Additionally, Wayne argues that the district court erred in concluding that his alleged agreement with Carolyn regarding the retirement accounts is unenforceable because they failed to memorialize it in writing. Agreements made in contemplation of divorce are "marriage settlements" and are subject to the requirement set forth in I.C. § 32-917, which provides that such agreements must be in writing and acknowledged. See Stevens v. Stevens, 135 Idaho 224, 16 P.3d 900 (2000). Idaho Code Section 32-917 provides that all "contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved."

Wayne asserts that the alleged agreement concerning the division of the retirement accounts is enforceable even if not in writing because he and Carolyn did not intend to create a marriage settlement agreement. In the alternative, Wayne contends that the divorce decree satisfies the writing requirement.

In this case, it is undisputed that no writing exists to memorialize an agreement regarding the division of the retirement accounts. If Wayne and Carolyn did reach an agreement as Wayne describes, the agreement was made in contemplation of their divorce. Based on the Idaho Supreme Court's decision in Stevens, any agreement reached between the parties concerning the division of retirement accounts must be in writing because they made it in contemplation of divorce. Because any agreement regarding the division of the retirement accounts is not in writing, it is unenforceable by either party. The divorce decree does not satisfy the writing requirement because it does not adopt or describe the terms of any agreement for the disposition of any community personal property and does not comport with I.C. § 32-917. Therefore, the district court did not err.
in concluding that the alleged oral agreement between Wayne and Carolyn is unenforceable, and we remand this case to the magistrate for a division of the omitted assets.

B. Costs and Attorney fees

Wayne requests attorney fees with respect to Carolyn's appeal of the magistrate's decision pursuant to I.C. § 12-121 and I.A.R. 41. The district court denied Wayne's request. Carolyn requests attorney's fees with respect to the present appeal pursuant to I.C. § 12-121 and I.A.R. 41. An award of costs and attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party, and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct.App.1995).

Neither party brought or defended an appeal frivolously, unreasonably, or without foundation. Therefore, the Court denies attorney fees to both parties pursuant to I.C. § 12-121 and I.A.R. 41. As the prevailing party, Carolyn is awarded costs.

III. CONCLUSION

Based upon the foregoing, this Court concludes that the district court did not err in reversing the magistrate's order granting summary judgment in favor of Wayne. The decision of the district court is affirmed and the issue of the division of the omitted assets is remanded to the magistrate. Neither party brought or defended this appeal frivolously, unreasonably, or without foundation and thus, no attorney fees are awarded to either party. However, costs on appeal are awarded to respondent, Carolyn B. Pike.