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INTRODUCTION

Prior to 1985, a transmutation of community property into separate property, separate property into community property, or separate property of one spouse into separate property of the other spouse could be effected by either an express or implied agreement between a husband and wife.[1] An express agreement to transmute property could be either written or oral.[2] However, oral transmutation agreements were required to be executed, not executory.[3] Other contract requirements, such as consideration,

1. *See, e.g., In re* Marriage of Jafeman, 29 Cal. App. 3d 244, 255, 105 Cal. Rptr. 483, 490 (1972) (citing Dickson v. Dickson, 225 Cal. App. 2d 752, 756, 37 Cal. Rptr. 718, 720 (1964); Mears v. Mears, 180 Cal. App. 484, 499, 4 Cal. Rptr. 618, 628 (1960); James v. Pawsey, 162 Cal. App. 2d 740, 749, 328 P.2d 1023, 1029 (1958)) (stating that an agreement changing the character of property from separate to community may be either express or implied). The origin of the transmutation rule was the Act of 1850, which provided that spouses could contractually change their property rights by either antenuptial or postnuptial contracts. 1849-50 Cal. Stat. ch. 103, sec. 15, at 254.

2. *See, e.g.,* Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 701, 299 P.2d 657, 659 (1956) (stating that separate property may be converted into community property at any time by oral agreement between the spouses); *In re* Wieling's Estate, 37 Cal. 2d 106, 108, 230 P.2d 808, 810 (1951) (stating that a husband and wife can change the character of property by oral agreement).

3. *In re* Raphael's Estate, 91 Cal. App. 2d 931, 939, 206 P.2d 391, 395 (1949). *See, e.g.,* Tomaier v. Tomaier, 23 Cal. 2d 754, 757, 154 P.2d 905, 907 (1944) (holding that an oral agreement made at the time the deed to land purchased with separate funds was executed was effective to transmute separate property of husband to community property). *Cf.* Mather v. Mather, 25 Cal. 2d 582, 586, 154 P.2d 684, 686 (1944) (stating that "if a transaction is fully executed on both sides, it is not property described as a contract [citation omitted], but, as a transfer of title to property, is more closely akin to a conveyance.").

were generally ignored.[4] Thus, pre-1985 transmutation agreements were not required to be in writing, comply with the statute of frauds, carry consideration other than mutual promises, or specifically identify existing property.[5] The California courts had basically abandoned the contract theory as essential to effect transmutations, holding that transmutations could be implied by the conduct of the parties.[6]

In 1984, in response to the apparent ease with which a transmutation of property could be facilitated, the California Legislature adopted four statutes to revise or codify existing law.[7] These statutes were intended to clarify transmutations of community property into separate property, separate property into community property, and separate property of one spouse into separate property of the other spouse.[8]

The first of the four new statutes, California Civil Code section 5110.710, provides that married persons, by agreement *or* transfer and *without consideration,* may transmute community property into the separate property of either spouse, transmute the separate property of either spouse into community property, or transmute the separate property of one spouse into the separate property of the other spouse.[9] Section 5110.710 is generally consistent with

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4. *See, e.g., Marriage of Jafeman,* 29 Cal. App. 3d at 255, 105 Cal. Rptr. at 490 (stating that "[n]o particular formalities are required for an effective agreement"); *James,* 162 Cal. App. 2d at 749, 328 P.2d at 1029 (stating that an agreement between spouses to change the character of property need not be executed with any particular formality); *Raphael's Estate,* 91 Cal. App. 2d at 939, 206 P.2d at 396 (1949) (rejecting contention that an executed oral agreement is not enforceable because it lacked necessary requisites of a valid contract).

5. W. REPPY, COMMUNITY PROPERTY IN CALIFORNIA 28-39 (2d ed. 1988).

6. *See, e.g., Nelson,* 224 Cal. App. 2d at 143, 36 Cal. Rptr. at 355 (1964) (stating that no express or formal agreement is required to transmute separate property into community property "if it may be fairly inferred from all the circumstances and evidence that a community interest was intended by the parties").

7. *See* 1984 Cal. Stat. ch. 1733, sec. 1-4, at 6301-02 (enacting CAL. CIV. CODE §§ 5110.710-5110.740).

8. 1984 Cal. Stat. ch. 1733, sec. 1, at 6301 (enacting CAL. CIV. CODE § 5110.710). Section 5110.740, which is not discussed in this Article, provides that a declaration made in a will as to the character of property is not admissible as evidence of a transmutation of the property before the death of the declarant. CAL. CIV. CODE § 5110.740 (West Supp. 1991).

9. *Id.* (West Supp. 1991) (emphasis added).

existing statutes and case law relating to marital property agreements and was enacted merely to provide clarification.[10]

The second new statute, California Civil Code section 5110.720, subjects transmutations to the laws governing fraudulent transfers.[11] While there is case authority which supports the application of fraudulent transfer laws to transmutations,[12] section 5110.720 codified existing law and was an important clarification.[13]

California Civil Code section 5110.730, the third new statute, completely changed California community property law.[14] Section 5110.730 provides that, effective for transfers made on or after January 1, 1985, a transmutation is not valid unless it is made in a writing that includes an *express declaration* that is "made, joined in, consented to, or accepted by the spouse whose interest is *adversely affected.*"[15] Further, a transfer of personal property, such as wearing apparel, jewelry, or "other tangible articles of a personal nature" used solely or principally by the donee spouse and "not substantial in value taking into account the circumstances of the marriage" are excepted.[16] Section 5110.730 is inapplicable when commingling of separate and community property is involved.[17]

The written express declaration requirement of section 5110.730 was first applied in *Estate of MacDonald v. MacDonald.*[18] In *MacDonald,* the husband received a pension plan distribution which was conceded to be community property.[19] He deposited those

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10. *Id.* § 5110.710, Legislative Committee Comment (West Supp. 1991).
11. *Id.* § 5110.720 (West Supp. 1991).
12. *See, e.g.,* Bailey v. Leeper, 142 Cal. App. 2d 460, 464-65, 298 P.2d 684, 687 (1956) (holding that evidence supported finding that a husband's transfer of real property to wife defrauded the husband's creditors under the Fraudulent Conveyance Act, California Civil Code §§ 3439-3439.12).
13. CAL. CIV. CODE § 5110.720, Legislative Committee Comment (West Supp. 1991).
14. CAL. CIV. CODE § 5110.730 (West Supp. 1991).
15. *Id.* § 5110.730(a),(e) (West Supp. 1991) (emphasis added).
16. *Id.* § 5110.730(c) (West Supp. 1991).
17. *Id.* § 5110.730(d) (West Supp. 1991).
18. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).
19. *Id.* at 265, 794 P.2d at 913, 272 Cal. Rptr. at 155.

funds into three individual retirement accounts (IRA).[20] The IRA adoption agreements included a beneficiary designation, which provided that if the husband did not name his wife as the sole primary beneficiary to the IRAs, the wife was required to sign a consent form.[21] The husband named a living trust as his beneficiary, the terms of which provided that his wife was to receive a life estate in the income of the living trust.[22] The remainder of the trust corpus was left to his children from a prior marriage.[23] The wife signed the consent forms which read: "Being the participant's spouse, I hereby consent to the above designation."[24] At the time the wife signed the consent forms, she was terminally ill.[25] Contemporaneously with executing the consent forms, the husband and wife divided their remaining property into separate estates.[26] The wife sold her half of the community property and placed the proceeds in a separate account for the benefit of her children.[27] When the wife died approximately six months later, the executrix of her estate sought to assert a community claim against the IRAs.[28]

The trial court held that the deceased wife's signature on the consent forms constituted a waiver or transmutation of her community rights in the IRAs, effectively transferring those rights to her husband.[29] Thus, the wife's community interest in the IRAs was transmuted into the separate property of her husband.[30] This decision was reversed by the First District Court of Appeal.[31] The

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 265 n.2., 794 P.2d at 914, n.2, 272 Cal. Rptr. at 156 n.2.
25. *Id.* at 264-65, 794 P.2d at 913, 272 Cal. Rptr. at 155.
26. *Id.*
27. *Id.* at 265, 794 P.2d at 913, 272 Cal. Rptr. at 155.
28. *Id.* at 265-66, 794 P.2d at 914, 272 Cal. Rptr. at 156.
29. *Id.* at 266, 794 P.2d at 914, 272 Cal. Rptr. at 156.
30. *Id.*
31. Estate of MacDonald v. MacDonald, 213 Cal. App. 3d 456, 261 Cal. Rptr. 653, 656 (1989).

California Supreme Court affirmed the judgment of the court of appeal.[32]

The California Supreme Court determined that there was no substantial evidence to support the trial court's finding that the wife intended to transmute her community interest in the IRAs into the separate property of her husband.[33] Even if there was such evidence, the court concluded that the legislative intent of California Civil Code section 5110.730 was to overturn the prior easy transmutation rule and to require an " 'express declaration' . . . that the characterization or ownership of the property is being changed."[34] The court's decision was based, in part, on *Estate of Blair*,[35] which held that joint tenancy property was not transmuted into community property merely by listing it as community property in the wife's petition for legal separation nor by the husband's deposition in which the husband stated that he believed the property at issue was community property.[36] The *MacDonald* court found that the consent forms signed by the wife contained no language which expressly characterized the property or indicated a change in the ownership of the funds.[37]

The *MacDonald* court conceded that the statute is vague and does not indicate what language the writing itself should contain.[38] In defining what language would be sufficient to satisfy the express declaration requirement of section 5110.730(a), a majority of the court held that it was not necessary to use the word

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32. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 273, 794 P.2d 911, 919 272 Cal. Rptr. 153, 161 (1990).

33. *Id.* at 267, 794 P.2d at 914-15, 272 Cal. Rptr. at 156-57. The California Supreme Court stated: "In fact, there is absolutely no record evidence [sic] relating to [the wife's] intentions or state of mind when she signed the adoption agreements." *Id.*

34. *Id.* at 272, 794 P.2d at 918, 272 Cal. Rptr. at 160. *See* California Law Revision Comm'n, *Recommendation Relating to Marital Property Presumptions and Transmutation*, 17 CAL. L. REVISION COMM'N REP. 224-25 (1984) [hereinafter *Commission Report*].

35. 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988).

36. *Id.* at 168, 244 Cal. Rptr. at 631.

37. *MacDonald*, 51 Cal. 3d at 272-73, 794 P.2d at 918-19, 272 Cal. Rptr. at 160-61.

38. *Id.* at 268, 794 P.2d at 915, 272 Cal. Rptr. at 157.

"transmutation" or other specific language in a transfer writing.[39] Words of gift, such as, "I give to the account holder any interest I have in the funds . . .," would be sufficient.[40]

Although the California Supreme Court sought to limit its review in *MacDonald*, the court appeared to give tacit approval to one other issue that was resolved by the court of appeal: the application of the "terminable interest rule."[41] Initially, Mr. MacDonald had sought to invoke the terminable interest rule, since the IRA funds at issue were derived from a pension plan.[42] The terminable interest rule provides that when a nonparticipating spouse predeceases the participating spouse,[43] the community interest of the nonparticipating spouse in the surviving spouse's pension and/or retirement plan automatically terminates.[44] The trial court rejected this argument, finding that the IRAs were not benefits of the husband's pension plan.[45] The court of appeal affirmed, holding that the terminable interest rule had been retroactively abolished by the adoption of California Civil Code section 4800.8.[46] However, the court of appeal expressed doubt about whether the terminable interest rule ever applied to private

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39. *Id.* at 273, 794 P.2d at 918, 272 Cal. Rptr. at 161. *But see id.* at 274, 794 P.2d at 919-20, 272 Cal. Rptr. at 161-62 (Mosk, J., concurring) (asserting that section 5110.730(a) requires the writing contain "an express declaration *of transmutation*").

40. *Id.* at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161. *But see* Estate of Walsh, 66 Cal. App. 2d 704, 707, 152 P.2d 750, 752 (1944) (holding a gift of jewelry from a husband to his wife was not sufficient to transmute the jewelry paid for with community funds). *See also* Wall v. Wall, 30 Cal. App. 3d 1042, 1045-46, 106 Cal. Rptr. 690, 692-93 (1973) (holding that separate funds of a wife deposited in a joint account were transmuted into community property despite absence of intent on the part of the wife to make a gift to her husband).

41. *MacDonald*, 51 Cal. 3d at 272 n.8, 794 P.2d at 918 n.8, 272 Cal. Rptr. at 160 n.8. Although the court of appeal ruled that the terminable interest rule was inapplicable, Mr. MacDonald did not challenge the lower court's ruling in his petition for review to the supreme court. *Id.* at 266, 794 P.2d at 914, 272 Cal. Rptr. at 156.

42. *Id.*

43. In the case of pension or other retirement plans, the spouse who is the covered employee or contributor to the plan is identified as the "participant."

44. *In re* Marriage of Powers, 218 Cal. App. 3d 626, 634-35, 267 Cal. Rptr. 350, 353 (1990). *See infra* notes 330-412 and accompanying text (discussing the terminable interest rule).

45. Estate of MacDonald, 213 Cal. App. 3d 456, 261 Cal. Rptr. 653, 656 (1989).

46. 261 Cal. Rptr. at 656-57. *See* Estate of Austin, 206 Cal. App. 3d 1249, 1253, 254 Cal. Rptr. 372, 373-74 (1988) (holding that the terminable interest rule was abolished by Section 2 of Chapter 686 of Statutes of 1986).

pension plans, at least where the participant could designate the death beneficiary.[47]

Many commentators believe that both the court of appeal and the California Supreme Court failed to consider what may have been the most important issue in the *MacDonald* case: Whether, assuming Mrs. MacDonald's consent to the IRA beneficiary designations was not a waiver or transmutation of her community property rights, her consent was sufficient to constitute a gift or transfer of her community interest in the IRAs, effective upon the death of Mr. MacDonald. The supreme court's failure to address this issue leaves many questions unanswered. For example, if the husband had predeceased the wife, could the wife have revoked her consent? Also, since the wife died first, is the consent irrevocable at her death, or is it possible, as in *MacDonald*, that her personal representative could revoke the consent after her death?

The consent issue was raised by Mr. MacDonald for the first time at the supreme court.[48] According to footnote five of the opinion, the respondent argued that the beneficiary designation consent contained in the IRA documents was a form of will substitute regarding the disposition of the IRAs.[49] The court stated that there was no evidence to support the respondent's contention.[50] Moreover, Rule 29(b) of the California Rules of Court does not permit issues to be raised for the first time on appeal.[51] Of perhaps greater significance, footnote eight indicates that the court was asked to consider whether the wife's consent to the beneficiary designation constituted a consent to a gift to the

47. *MacDonald*, 213 Cal. App. 3d 456, 261 Cal. Rptr. at 657. *See* Bowman v. Bowman, 171 Cal. App. 3d 148, 155, 217 Cal. Rptr. 174, 179 (1985) (stating that "[t]he terminable interest rule was never intended to deprive a nonemployed spouse compensation for his or her spouse's interest in a pension plan").

48. *MacDonald*, 51 Cal. 3d at 267 n.5, 794 P.2d at 915 n.5, 272 Cal. Rptr. at 157 n.5 (1990).

49. *Id.*

50. *Id.*

51. *Id.*; CAL. R. CT. 29(b).

husband under California Civil Code section 5125(b).[52] The court inferred that respondent's argument would be simply a way of circumventing the written transmutation rule of section 5110.730(a),[53] but did not squarely address the gift issue.[54]

The California Supreme Court probably reached the correct decision in *MacDonald* on the issue of transmutation. The wife's signature on the consent forms merely evidenced her agreement to the death beneficiary designations and was motivated to a large extent by her terminal illness. It is difficult to find any written expression of an intent to transfer (transmute) property rights from the wife to the husband on the facts presented in *MacDonald.*[55] However, the court's strict interpretation of the express declaration requirement of section 5110.730, although probably justified by the language of the statute,[56] imposes an almost impossible burden upon spouses' abilities to alter and clarify their property rights or to make gifts to each other without hiring a lawyer to draft an express declaration. Most laypersons probably believe a "transmutation" is some form of religious experience, and would be amazed to learn that they must use that, or similar language, to make property transfers to their spouses.

There are other problems with the express declaration requirement of section 5110.730 which were not before the supreme court and remain undecided. For example, must the express declaration actually be signed by one or both spouses? The statute indicates that the declaration must be "made by, joined in, consented to, or accepted by the spouse adversely affected."[57] What does this language really mean? Who is "adversely affected"

52. *MacDonald*, 51 Cal. 3d at 272 n.8, 794 P.2d at 918 n.8, 272 Cal. Rptr. at 160 n.8. *See* CAL. CIV. CODE § 5125(b) (West Supp. 1990). Section 5125(b) provides in part that a spouse may make a gift of community personal property if consented to in writing by the other spouse. *Id.*

53. CAL. CIV. CODE § 5110.730(a) (West Supp. 1991).

54. *MacDonald*, 51 Cal. 3d at 272 n.8, 794 P.2d at 918 n.8, 272 Cal. Rptr. at 160 n.8.

55. *See id.* at 267 n.4, 794 P.2d at 914 n.4, 272 Cal. Rptr. at 156 n.4. The supreme court could not even find any evidence in the record that Mrs. MacDonald even knew that she had a community interest in her husband's pension plan proceeds. *Id.*

56. CAL. CIV. CODE § 5110.730(a) (West Supp. 1991). Subdivision (a) specifically provides that a transmutation "is not valid unless made in writing by an express declaration . . . ." *Id.*

57. *Id.*

under the statute if the spouses transmute community property into joint tenancy property? In addition, if the transfer agreement converts property from community property to a tenancy in common, are both spouses required to agree to, consent to, or accept the transmutation?

The *MacDonald* case illustrates the lack of statutory or judicial authority regarding the impact of the spousal consent rules upon gifts which take effect at death or upon nonprobate transfers of property. This Article is intended to address the problems which arise in the area of spousal transfers and to propose solutions. Part I of this Article discusses generally interspousal transfers and transfers to third persons in California under statutory law.[58] Part II summarizes the transmutation rules in other community property states.[59] Part III analyzes the application of California Civil Code section 5110.730 to interspousal transfers after *MacDonald*.[60] Part IV recommends changes in the transmutation rules and proposes new statutory language.[61] Part V discusses special problems which relate to community property interests in life insurance policies, death benefit plans, and other forms of will substitutes,[62] and Part VI proposes statutory changes in the spousal consent rules for transfers of these types of property.[63] This Article concludes that legislative action is necessary to clarify the transmutation and spousal consent statutes in order to assure that spouses have equal rights to transfer community property by gift or at death.[64]

I. SPOUSAL TRANSFERS -- GIFT OR TRANSMUTATION?

A. Interspousal Transfers of Community and Separate Property

58. *See infra* notes 65-146 and accompanying text.
59. *See infra* notes 147-192 and accompanying text.
60. *See infra* notes 193-222 and accompanying text.
61. *See infra* notes 223-248 and accompanying text.
62. *See infra* notes 249-416 and accompanying text.
63. *See infra* notes 417-460 and accompanying text.
64. *See infra* notes 461-463 and accompanying text.

A transmutation of community or separate property can occur in two ways: by an agreement between the spouses altering their property rights or by a gift or other transfer of property from one spouse to the other.[65] These two methods of transmutation are recognized by the Uniform Marital Property Act, section 7(b).[66] A transmutation may also result from application of the estoppel doctrine under some circumstances.[67]

Since 1872, California law has permitted husbands and wives to deal with each other with virtually no limitations and clearly permits them to transmute the character of their property, by agreement, from community to separate or vice versa.[68] However, California Civil Code section 5125(b) expressly provides that a spouse may not make a gift of community property, or dispose of such property without valuable consideration, without the written consent of the other spouse.[69] The question whether section 5125(b) applies to interspousal transfers was undecided prior to *MacDonald*.[70] The California Supreme Court thought that such an application might function to circumvent the express declaration writing requirement of California Civil Code section 5110.730.[71] On its face, section 5125(b) is inappropriate when applied to a gift of community property from one spouse to the other, since the consent would be made by the donee, not the donor.[72] This may

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65. CAL. CIV. CODE § 5110.710 (West Supp. 1991).

66. UNIF. MARITAL ACT § 7(b), 9A U.L.A. 117 (1987).

67. *See* Giacomazzi v. Rowe, 109 Cal. App. 2d 498, 503-04, 240 P.2d 1020, 1023 (1952) (holding that a wife was estopped from claiming a community interest in property at issue in dissolution after having stated that she and her husband had no community property).

68. *See, e.g.*, Tompkins v. Bishop, 94 Cal. App. 2d 546, 550, 211 P.2d 14, 16 (1949) (stating that statutory law permits spouses to change the character of their property by contract during the marriage); Fay v. Fay, 165 Cal. 469, 473, 132 P. 1040, 1042 (1913) (stating that husband and wife are permitted to change by contract the character of their property from community to separate); Title Ins. and Trust v. Ingersoll, 153 Cal. 1, 5, 94 P. 94, 95 (1908) ("There can be no doubt that a husband and wife may by contract transmute the separate property of either or both into community property.").

69. CAL. CIV. CODE § 5125(b) (West 1983 & Supp. 1991).

70. *See* Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 272 n.8, 794 P.2d 911, 918 n.8, 272 Cal. Rptr. 153, 160 n.8 (1990) (agreeing with the court of appeal that application of § 5125(b) in the case at bar would circumvent the requirements of § 5110.730).

71. *Id.*

72. *See* CAL. CIV. CODE § 5125(b) (West 1983 & Supp. 1991) (requiring the consent of the spouse not making the gift or disposition of community property).

be why the courts have not applied the written consent rule where interspousal transfers are involved.[73] In fact, until 1985 oral marital agreements that transmuted the character of both real and personal property were upheld because consideration was conclusively presumed to exist in marital agreements.[74] Thus, interspousal gifts of property were valid without satisfying the requirements of either California Civil Code section 5125 or section 5127.[75] It is likely that neither the legislature nor the courts think of interspousal transfers as gifts in the management and control sense, which is the general subject of California Civil Code section 5125.[76]

California Civil Code section 5110.730 overruled existing case law that permitted oral transmutations of personal property, with certain exceptions for certain gifts not of substantial value.[77] In recommending that the legislature adopt section 5110.730, the California Law Revision Commission stated that "California should continue to recognize informal transmutations for certain personal property gifts between spouses, but should require a writing for a transmutation of real property or other *personal property.*"[78] The legislative history of California Civil Code

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73. *See* Logan v. Thorne, 205 Cal. 26, 29, 269 P.2d 626, 627 (1928) (holding that statutory provision requiring consent of wife for gift made by husband is for wife's "benefit and protection" and has no application to case involving gift by husband directly to the wife). *See also* HOGOBOOM & KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW § 8.118-8.124 (1990).

74. CAL. CIV. CODE § 5110.730, Legislative Committee Comment (West Supp. 1991).

75. *See, e.g, In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980) (finding that wife was unable to rebut presumption that property purchased with wife's separate funds was a gift to her husband since title to the property was taken in joint tenancy). *See* CAL. CIV. CODE §§ 5125, 5127 (West 1983 & Supp. 1991) (providing for disposition of marital property; requiring consent of both spouses to effect gift or transfer of personal or real community property).

76. CAL. CIV. CODE § 5125 (West 1983 & Supp. 1991). The balance of this Article assumes a distinction between management and control issues which govern gifts in general, and contract or transfer issues which control interspousal gifts and transmutation. A key issue discussed in this Article is the extent to which a consent by a spouse to a gift by the other spouse to a third party also results in a transmutation of the property in question. *See infra* notes 81-139 and accompanying text.

77. *Commission Report, supra* note 34, at 224-25.

78. *Id.* at 214 (emphasis added). *But see* HOGOBOOM & KING, *supra* note 73, § 8.118 (stating that, despite the requirements of § 5110.730, "presumably true gifts can still be proved by evidence of the ordinary elements of a gift -- delivery and *donative intent*") (emphasis added).

section 5110.730 indicates an intent to exempt only certain interspousal gifts from the express declaration requirement.[79] Thus, under the current code, interspousal gifts of real or non-de minimis personal property require an express declaration of transmutation in writing. This is the conclusion reached by the California Supreme Court in *MacDonald.*[80]

B. Gifts of Community Property to Third Persons

Under Spanish rule, a husband acted in effect as a business manager in exercising management and control over the community property.[81] Thus, a transfer for inadequate consideration would not be in the best interests of the community and would probably be, at least if material, invalid.[82] As an outgrowth of that rule, California historically provided that a husband could not make a gift of community property without the consent of his wife.[83]

With the advent of equal management and control of community property, California Civil Code section 5125(b) originally provided that "[a] spouse may not make a gift of community personal property or dispose of community personal property without a valuable consideration."[84] Section 5125(b), as adopted, seemingly made interspousal gifts absolutely void regardless of whether both spouses consented to or joined in the gift and regardless of the existence of a written consent or agreement.[85] Prior to January 1, 1975, the written consent of both spouses was required.[86] The obvious defect in the statutory

79. *Commission Report, supra* note 34, at 205.

80. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 272, 794 P.2d 911, 918, 272 Cal. Rptr. 153, 160 (1990).

81. W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 203-05 (2d ed. 1971).

82. *Id.*

83. 1891 Cal. Stat. 425, ch. CCXX, § 1.

84. 1969 Cal. Stat. ch. 1608, sec. 8, at 3342 (enacting CAL. CIV. CODE § 5125(b)).

85. *Id.*

86. *Id.*

language of section 5125(b) was remedied in 1978 by the addition of the words "without the written consent of the other spouse."[87]

The interspousal gift statutes do not contain similar language for community real property, apparently on the assumption that California Civil Code section 5127, which requires the joinder of both spouses in any written conveyance or encumbrance of community real property, supplies the necessary protection.[88] California courts have fully protected the nonconsenting spouse's rights where a gift of real property is concerned.[89] For example, in *Gantner v. Johnson*,[90] the First District Court of Appeal held that the nonconsenting spouse could set aside the gift of real property in its entirety during her lifetime, despite the language of the management and control statute relating to transfers of community property[91] indicating that she should have taken some action within a year after her husband's conveyance was recorded.[92] There is no statutory de minimis rule permitting gifts by one spouse to a third party without the consent of the other. However, with respect to de minimis transmutations, California Civil Code section 5110.730(c) provides that an express written declaration is not required for interspousal gifts of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature for the donee spouse's use, that are insubstantial in value in light of the circumstances of the marriage.[93]

If one spouse makes a gift of community property without the consent of the other, the courts have found this to be, at a minimum, a breach of the donor spouse's fiduciary duties and, at

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87. 1977 Cal. Stat. ch. 332 , sec. 4, at 1288; 1977 Cal. Stat. ch. 692, sec. 1, at 2240 (amending CAL. CIV. CODE § 5125(b)).

88. CAL. CIV. CODE § 5127 (West 1983 & Supp. 1991).

89. *See, e.g.*, Droeger v. Friedman, 54 Cal. 3d 26, 812 P.2d 931, 283 Cal. Rptr. 584 (1991) (holding transfer of community real property in violation of statute requiring spousal consent may be invalidated by nonconsenting spouse).

90. 274 Cal. App. 2d 869, 79 Cal. Rptr. 381.

91. CAL. CIV. CODE §§ 172, 172a (West Supp. 1968) (repealed 1969).

92. *Id.* at 876, 79 Cal. Rptr. at 386.

93. CAL. CIV. CODE § 5110.730(c) (West Supp. 1991).

worst, a fraud against the other spouse.[94] Gifts made without the consent of both spouses are voidable, but only by the nonconsenting spouse.[95] The nonconsenting spouse may either set aside the gift and recover the property or seek reimbursement from the donor spouse.[96] Prior to the adoption of California Civil Code section 5125.1 in 1986, the nonconsenting spouse could seek reimbursement from the other spouse only upon the termination of the community by reason of dissolution or death.[97] California Civil Code section 5125.1 created a cause of action by one spouse against the other for breach of the duty imposed by section 5125 and section 5127 with respect to management and control of the community,[98] including making gifts without the consent of both spouses.[99]

After the marriage has terminated, the nonconsenting spouse may set aside only one-half of the invalid transfer.[100] Where the marriage is ended by dissolution, California Civil Code section 4800(b)(2) permits, as an award or offset against the property division, any sum determined to have been "deliberately misappropriated" by one spouse to the detriment of the other.[101] Section 4800(b)(2) could be construed to include unauthorized gifts.

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94. *See, e.g.*, Fields v. Michael, 91 Cal. App. 2d 443, 446-51, 205 P.2d 402, 405-08 (1949) (discussing different theories underlying cause of action to recover community interest in property which was subject of unauthorized transfer).

95. Spreckels v. Spreckels, 172 Cal. 775, 784, 158 P. 537, 540 (1916).

96. *Id. See* Trimble v. Trimble, 219 Cal. 340, 347, 26 P.2d 477, 480 (1933) (permitting wife to set aside one-half of deeds of community property conveyed by decedent husband without consent of wife).

97. *See* Harris v. Harris, 57 Cal. 2d 367, 369, 369 P.2d 481, 482, 19 Cal. Rptr. 794, 794 (1962) (stating that if a wife acts to avoid a gift during the continuance of the community, the whole gift will be avoided but if the wife acts after the community had been dissolved, she may set aside the gift as to her one-half community interest).

98. CAL. CIV. CODE §§ 5125, 5127 (West 1983 & Supp. 1991).

99. *Id.* § 5125.1. An action under § 5125.1 can be brought independently of any action for dissolution of the marriage, legal separation, or annulment of the marriage. *Id.* What is not clear from the statute is the form of relief. For example, if a nonconsenting spouse obtains a money judgment against the other spouse, how is the judgment paid? Is the judgment satisfied by the donor's "share" of community property? Or does the judgment constitute separate property of the nonconsenting spouse? These issues are beyond the scope of this Article.

100. *Id.*

101. CAL. CIV. CODE § 4800(b)(2) (West Supp. 1991).

Where the purported transfer is incomplete, or revocable, the above-mentioned rules apply.[102] However, the issue of when the transfer takes effect becomes important. At common law, a gift causa mortis was defined as a transfer that takes effect at death.[103] In *Odone v. Marzocchi*,[104] the wife transferred cash to a friend just before the wife entered the hospital.[105] The friend was instructed to pay the wife's bills and return the money to the wife if she survived, but if she did not survive, to keep the money.[106] The wife died eight days later, and her husband sought to set aside the entire transfer.[107] The California Supreme Court held that the wife's transfer of money to her friend was a valid gift causa mortis and that the husband could recover only one-half of the transfer.[108] At common law, the gift was complete when made, subject to a condition subsequent, death.[109]

In contrast, California statutory law presently provides that a "gift in view of death" takes effect at death.[110] A gift in view of death is treated as a legacy for purposes of creditors and claims.[111] A "gift in view of death" is defined as a gift of personal property made in contemplation, fear, or peril of death, including a gift made during the last illness of the giver.[112] A gift in view of death is revoked by the donor's recovery from illness or escape from peril, or the occurrence of any event which would revoke the donor's intent at the same time.[113] A gift in view of death may also be revoked by the donor during the donor's

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102. *See supra* notes 94-101 and accompanying text (discussing voidability of transfers of community property by nonconsenting spouse).

103. *See, e.g.*, Barham v. Khoury, 78 Cal. App. 2d 204, 209-10, 177 P.2d 579, 582-83 (1947) (defining "gift causa mortis").

104. 34 Cal. 2d 431, 211 P.2d 297 (1949).

105. *Id.* at 434, 211 P.2d at 299.

106. *Id.* at 436-37, 211 P.2d at 299-300.

107. *Id.* at 437, 211 P.2d at 300.

108. *Id.* at 438-39, 211 P.2d at 301.

109. Barham v. Khoury, 78 Cal. App. 2d 204, 210, 177 P.2d 579, 583 (1947).

110. *See* CAL. CIV. CODE § 1149 (West 1982) (defining "gift in view of death").

111. *Id.* § 1153 (West 1982).

112. *Id.* § 1149.

113. *Id.* § 1151 (West 1982).

lifetime.[114] Once the property is delivered, however, a bona fide purchaser is protected.[115] A gift in view of death of community or quasi-community property is subject to the rights of the donee spouse.[116] If California Civil Code section 5125 applies, both spouses would have to consent to a gift in view of death for the transfer to have any effect.[117]

The determination of whether a transfer of community property to a third person is complete when made, or whether it takes effect only at death, is critical in deciding the impact of a spouse's consent. If the gift is complete when made and both spouses consent, neither spouse can set it aside. In contrast, if the gift takes effect only at death, spouses should retain their community interests for all purposes since there is no complete transfer. A gift which takes effect at death is a completed transfer subject to a condition subsequent, and the consenting spouse may revoke his consent prior to the donor spouse's death.

A modern version of a gift which takes effect at death is a revocable transfer of property which becomes a completed gift at death in the absence of any revocation. A gift made effective at death is known as an "inchoate gift" or a nontestamentary disposition.[118] The California Supreme Court developed the concept of an "inchoate gift" to characterize revocable transfers which become complete at death in *Travelers' Insurance Co. v. Fancher*.[119] On the same day, the court also decided *Trimble v.*

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114. *Id.*

115. *Id.* The California Law Revision Commission is currently considering changes in the statutes pertaining to gifts in view of death. *See* Cal. L. Rev. Comm'n Staff Memorandum 90-54 (March 20, 1990); Cal. L. Rev. Comm'n Staff Memorandum 90-139, *Gifts in View of Death* (November 15, 1990).

116. *See* Odone v. Marzocchi, 34 Cal. 2d 431, 211 P.2d 297 (1949) (finding that husband may set aside one-half of wife's gift causa mortis of community funds to third party); CAL. CIV. CODE § 5125 (West 1983 & Supp. 1991) (provision restricting disposition of community personal property). *See also* CAL. PROB. CODE §§ 101-02 (West 1991) (provisions relating to ownership and transfer of quasi-community property after death of spouse).

117. CAL. CIV. CODE § 5125 (West 1983 & Supp. 1991).

118. *In re* Adam's Estate, 236 P.2d 418, 419 (1951) (defining gift in view of death). *See Odone*, 34 Cal. 2d at 438-39, 211 P.2d 297, 301 (1949).

119. 219 Cal. 351, 26 P.2d 482 (1933) (holding that the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy).

Trimble,[120] which involved deathbed gifts of community property by deed.[121] Although the concept of a gift in view of death was not discussed in either case, the *Trimble* facts describe a form of transfer made in view of death.[122] Types of transfers made in view of death include the following: Revocable trusts;[123] revocable beneficiary designations under life insurance policies;[124] revocable beneficiary designations under employee benefits plans, such as pension plans, profit sharing plans, and deferred compensation plans;[125] Totten trusts, which are bank accounts held by one person in trust for another, where the creator/trustee of the account can revoke the transfer during his or her lifetime by withdrawing funds from the account and, if no revocation occurs, the funds pass to the beneficiary at the trustee's death;[126] and various "pay on death" or "transfer at death" forms of holding title to bank accounts and other property.[127]

Prior to the donor's death, either spouse may revoke an inchoate transfer.[128] If the gift is made to become effective only upon the donor's death, the consenting donee spouse's death is irrelevant.[129] If the consenting spouse dies first, the donor spouse is free to revoke the transfer of the donor's community interest.[130] Following the donor's death, a nonconsenting spouse

120. 219 Cal. 340, 26 P.2d 477 (1933).

121. *Id.* at 341-42, 26 P.2d at 478.

122. *Id.*

123. *See* Katz v. United States, 382 F.2d 723, 725-28 (9th Cir. 1967) (involving revocable trust).

124. *See* Travelers' Ins. Co. v. Fancher, 219 Cal. at 352, 26 P.2d at 483 (involving life insurance policy naming decedent's children as beneficiaries); Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 94-95, 243 P. 431, 432-33 (1926) (involving life insurance policy naming decedent's sister as beneficiary).

125. *See* Estate of MacDonald, 51 Cal. 3d 262, 264-65, 794 P.2d at 911, 913-14, 272 Cal. Rptr. 153, 155-56 (1990) (involving pension plan).

126. *See* Estate of Wilson v. Bowens, 183 Cal. App. 3d 67, 69 n.1, 227 Cal. Rptr. 794, 795-96, 796, n.1 (1986) (involving Totten trusts created for wife and children of decedent).

127. *See id.*

128. *Travelers' Ins.*, 219 Cal. at 353, 26 P.2d at 483.

129. *See id.*

130. *See id.*

may only set aside one-half of the gift.[131] Although it does not, California Civil Code section 5125(b) should provide that a consenting spouse's consent is irrevocable upon the donor spouse's death since the transfer takes effect upon the donor's death.[132] Thus, in *MacDonald*, had the husband died first, there should have been no legal basis for the wife to revoke her consent to the beneficiary designations under the IRAs.

Under present law, consent can be revoked during the donor's lifetime by the donor, the consenting spouse, or the consenting spouse's personal representative.[133] However, this view assumes, as the supreme court in *MacDonald* did, that the consent was made conditional upon the donor spouse predeceasing the consenting spouse.[134] Further, this view assumes that the consenting spouse intended her consent to be revoked if she predeceased the donor spouse. Thus, if the consenting spouse predeceases the donor spouse, her community property interest would pass under the consenting spouse's will, as did the wife's interest in *MacDonald*.[135]

If the consenting spouse predeceases the donor spouse, the results are not as clear under present law. The result appears to turn upon when the transfer is effective. If the transfer becomes effective upon the death of either the consenting spouse or the donor spouse, whichever is earlier, then neither spouse, nor their personal representatives, should be able to revoke their consent. If the consenting spouse's personal representative can revoke the deceased's consent, as was permitted in *MacDonald*,[136] the donor's personal representative should have the same right of revocation, at least as to the donor spouse's community interest, if the donor spouse dies first. Otherwise, equal treatment of the spouses would be denied. If *MacDonald* is carried to its logical

131. CAL. CIV. CODE § 5125.1 (West Supp. 1991).

132. *Id.* § 5125(b) (West 1983 & Supp. 1991).

133. *See id.* § 5110.150(b) (West Supp. 1991) (relating to revocable trusts).

134. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 266, 794 P.2d 911, 914, 272 Cal. Rptr. 153, 156 (1990).

135. *Id.*, 51 Cal. 3d at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161.

136. *Id.*

conclusion, a transfer of community property can never be effective at the death of the first spouse.

The donor spouse's revocation of his consent following the death of the consenting spouse may affect the deceased spouse's community interest in the object of the transfer. Assuming that the consenting spouse knew what she was doing in consenting to the gift, then it must similarly be assumed that the consenting spouse wanted the property to pass to the designated donee or beneficiary. Thus, the designation should be irrevocable with regard to the consenting spouse's community interest in such property following her death. The *MacDonald* court failed to make this assumption.[137]

In summary, a gift intended to take effect at death is generally treated in the same manner as a gift completed during the donor's lifetime.[138] If the other spouse does not expressly consent to the transfer, the nonconsenting spouse may set it aside, but only as to that spouse's one-half community interest.[139] Where the other spouse has consented to the transfer, the result is less clear. If the gift is effective only upon the donor's death, then either spouse should be able to revoke the transfer during the donor's life. If the gift is complete to any extent upon the death of either spouse, the surviving spouse should have no power to set the completed transfer aside. This conclusion is clearly inconsistent with the contract rights under life insurance policies, death benefits, and other forms of beneficiary designations which give one spouse, generally the owner of the life insurance policy or the participant in the death benefit plan, the right to change or revoke a beneficiary designation. If a husband, with his wife's written consent, names a beneficiary under his community property insurance policy, the terms of the policy would not preclude him from changing the beneficiary subsequent to his wife's death.

137. *See id.* at 266, 794 P.2d at 914, 272 Cal. Rptr. at 156 (concluding that wife did not intend to transmute her community interest in IRAs by consenting to beneficiary designations).

138. *See supra* notes 102-137 and accompanying text.

139. CAL. CIV. CODE § 5125.1.

Regardless of the form of the gift, a transfer which is revocable until the donor's death is not effective until death.

In *MacDonald*, the surviving spouse had designated a trust as the beneficiary to his IRAs.[140] His wife consented to that designation.[141] However, upon her death, the California Supreme Court permitted the wife's executor to revoke that consent.[142] The issue in *MacDonald* was whether Mrs. MacDonald had made a lifetime transfer of her interest in the IRAs, as opposed to a transfer effective at her death.[143] If a broad reading of California Civil Code section 5110.710 is followed, no transfer at death would be effective unless it met the specific requirements of the transmutation statutes.[144] The weakness of *MacDonald* is the supreme court's failure to recognize that Mrs. MacDonald made a testamentary transfer of her interest in the IRAs by signing the consent forms, which constituted a satisfactory will substitute, since it is unlikely that the legislature intended to extend the transmutation statute to transmutations which take effect at death.

If Mrs. MacDonald's actions had been correctly interpreted as a testamentary act under any of the various theories discussed, such as, inchoate gift, nonprobate transfer, or gift in view of death, then the issue of revocation would have been clear. Mrs. MacDonald's consent to the beneficiary designation could have been revoked during her lifetime, just as a will, revocable trust, or beneficiary designation might have been revoked. Following her death, Mrs. MacDonald's consent should have become irrevocable. To conclude otherwise would permit all testamentary and nonprobate transfers

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140. *MacDonald*, 51 Cal. 3d at 265, 794 P.2d at 913, 272 Cal. Rptr. at 155.

141. *Id.* at 265, 794 P.2d at 914, 272 Cal. Rptr. at 156.

142. *Id.* at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161.

143. *Id.* at 267, 794 P.2d at 915, 272 Cal. Rptr. at 157.

144. *See* CAL. CIV. CODE § 5110.710 (West Supp. 1991) (providing that married persons may transmute property, subject to the requirements of §§ 5110.720-5110.740, without consideration by agreement or transfer); *id.* § 5110.730 (West Supp. 1991) (providing that a transmutation is not valid unless made "in writing by an express declaration" which is consented to by the adversely affected spouse). The language of section 5110.710 may be interpreted to apply to all transfers of spousal property, including transfers at death. If so, these types of transfers would be subject to the requirements of section 5110.730, as interpreted by the *MacDonald* decision.

of property to be revoked after the death of the testator or transferor.

In the event that a consenting spouse revokes her consent during her lifetime, the community interest of the consenting spouse will be distributed at death as if the consent had never been given. Since the spouse who names the beneficiary or makes the nonprobate transfer is not required to notify the other spouse of his action, the consenting spouse should not be required to provide notice of the revocation of her consent.

The donor spouse's revocation of his beneficiary designation or nonprobate transfer while both spouses are alive would clearly revoke the other spouse's consent. The donor spouse's revocation following the consenting spouse's death would have one of three possible results.

First, the consenting spouse's consent to the original beneficiary designation or transfer can be viewed as a waiver, transfer, or transmutation of that spouse's community interest to or in favor of the surviving spouse. Thus, any new beneficiary or transferee would receive the entire benefit, including the predeceased spouse's community interest.

This approach was rejected by the California Supreme Court in *MacDonald.*[145] Absent proof of a lifetime transfer of the consenting spouse's community interest in the property to the other spouse, the above-stated alternative does not produce a reasonable result.

Second, the designation of a new beneficiary or a change in transferee can be seen as a revocation of the predeceased spouse's consent. The new beneficiary or transferee would then receive only the surviving spouse's community interest. The predeceased spouse's community interest would pass as it would have if included in the decedent's probate estate.

Although this approach is more attractive than the assumed waiver or transmutation, it is defective. The implied revocation

145. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 272 n.8, 794 P.2d 911, 918 n.8, 272 Cal. Rptr. 153, 160 n.8 (1990).

approach assumes, as the majority of both the court of appeal and supreme court apparently did in *MacDonald*, that the consenting spouse does not really intend to transfer his or her community interest in the property to the designated beneficiary or transferee.[146] Assuming that the transferor spouse intended to transfer his community interest in the property to the transferee or beneficiary, then, in this era of equal rights and responsibilities, it should be assumed that the consenting spouse also intended to transfer her community interest to the same person. If not, all forms of consent are meaningless.

Third, as with the second alternative, the designation of a new beneficiary or trustee can be viewed as an automatic revocation of the predeceased spouse's consent. In contrast, however, the predeceased spouse's community interest would pass in accordance with the beneficiary designation or transfer to which the predeceased spouse consented.

This approach puts the spouses in exactly the same position they would occupy if they had each executed a will or revocable trust transferring their respective property interests to the same beneficiary. During the joint lifetimes of the spouses, either spouse may revoke the transfer as to his or her community interest. Should the transferor spouse change his beneficiary designation, the consenting spouse would occupy a somewhat better position than if she had executed a will or revocable trust, since her consent is automatically revoked by the transferor's change of beneficiary. Upon the death of either spouse, the deceased spouses' community interest would be distributed on the basis of the beneficiary designation which the decedent had made or to which the decedent had consented. In the absence of consent to a change in beneficiary, the spouse who was not empowered to name a beneficiary could make a testamentary disposition of her community interest.

Given the contractual nature of life insurance and other assets which may be subject to nonprobate transfers, there appears to be no way to eliminate the inequality between participating and

146. *Id.* at 272-73, 794 P.2d at 918-19, 272 Cal. Rptr. at 160-61.

nonparticipating spouses, short of permitting the spouses to designate a transferee or beneficiary as to each spouse's community interest in such property, despite the underlying contract rights, or declaring that spousal consents to such designations are meaningless. If the transferor spouse's new beneficiary designation made after the consenting spouse's death is deemed to revoke the consenting spouse's consent post mortem, the consenting spouse's share would pass under that spouse's will or by intestate succession. This approach assumes that the consenting spouse would not have agreed to the original beneficiary designation unless the transferor spouse's community interest passed to the same beneficiary. This approach is subject to the same criticism as the *MacDonald* decision, since it assumes that -- to use the facts of *MacDonald* -- Mrs. MacDonald did not really intend to pass her community interest in the IRAs to the beneficiary trust created by her husband, even though she signed a consent to that effect. It is dangerous to assume that the deceased spouse would revoke her consent and shift her interest in the benefit to her heirs at law or beneficiaries under her will simply because the surviving spouse decided to change the beneficiary as to his community interest.

II. TRANSMUTATION RULES IN OTHER COMMUNITY PROPERTY STATES

Other community property jurisdictions have used both the gift theory and the written agreement theory to support transmutations of property. For example, when interspousal gifts are involved, Texas permits informal or "easy" transmutations.[147] Although there appears to be no statute directly on point, article XVI of the Texas Constitution, as amended in 1980, grants spouses broad

147. *See, e.g.*, Wohlenberg v. Wohlenberg, 485 S.W.2d 342 (Tex. Civ. App. 1972); Hamilton v. Charles Maund Oldsmobile-Cadillac Co., 347 S.W.2d 944 (Tex. Civ. App. 1961); Cauble v. Beaver-Electra Refining Co., 115 Tex. 1, 274 S.W. 120 (1925); Armstrong v. Turbeville, 216 S.W. 1101 (Tex. Civ. App. 1920); Wofford v. Lane, 167 S.W. 180 (Tex. Civ. App. 1914); Bruce v. Koch, 40 S.W. 626 (Tex. Civ. App. 1897).

authority to enter premarital and marital property agreements which alter their property rights.[148]

Texas cases generally recognize transmutation by gift, such as deeds from one spouse to the other or acts of one spouse indicating consent or acquiescence to a gift to the other spouse.[149] Most Texas cases hold that conveyance or delivery is sufficient to establish a gift if other competent evidence, including testimony as to statements made, supports this conclusion.[150] For example, in *Robbins v. Robbins*,[151] the husband's informal consent and acquiescence to his wife's acquisition of real property in her own name was held sufficient to establish an intent to make a gift to her.[152] In similar cases, Texas courts have held that the character of property transferred inter vivos from one spouse to the other is determined by the nature of the consideration received.[153] Surrounding circumstances may be used to show that a transfer was a gift.[154]

New Mexico, like most other community property states, including California, recognizes a variety of interspousal transactions.[155] Interspousal conveyances, at least from husband to wife, raise a rebuttable presumption of a gift and transmutation.[156] In *Estate of Fletcher v. Jackson*,[157] the Court of Appeals of New Mexico held that an agreement between spouses to transmute property from community to joint tenancy does not

148. TEX. CONST. art. XVI, § 15.

149. *See, e.g.*, McCarver v. Trumble, 660 S.W.2d 595, 598 (Tex. Ct. App. 1983) (holding joint tenancy recital in deed was sufficient to convert property purchased with separate funds into community property).

150. *See, e.g.*, Babb v. McGee, 507 S.W.2d 821 (Tex. Civ. App. 1974); McFadden v. McFadden, 213 S.W.2d 71 (Tex. Civ. App. 1948); Robbins v. Robbins, 125 S.W.2d 666 (Tex. Civ. App. 1939).

151. 125 S.W.2d 666 (Tex. Civ. App. 1939).

152. *Id.* at 672. *Accord Babb* 507 S.W.2d at 823; *McFadden*, 213 S.W.2d at 75.

153. *See, e.g.*, Hilley v. Hilley, 161 Tex. 569, 575, 342 S.W.2d 565, 569 (1961); Saldana v. Saldana, 791 S.W.2d 316, 319 (Tex. Ct. App. 1990).

154. *Babb*, 507 S.W.2d at 822-23.

155. *See* N.M. STAT. ANN. § 40-2-2 (1978) (providing that spouses may enter into "any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried . . .").

156. Overton v. Benton, 60 N.M. 348, 349, 291 P.2d 636, 637 (1955).

157. 94 N.M. 572, 613 P.2d 714 (1980).

necessarily have to be in writing.[158] The court indicated that although New Mexico Statutes Annotated section 40-2-2 does not expressly require a writing to effect an interspousal transfer of property, the transmutation must be established by clear, strong, and convincing proof -- more than a mere preponderance of evidence.[159] However, the requisite level of proof need not be established by an express written instrument.[160] The court reached its conclusion despite a New Mexico statute which defines separate property as property designated to be separate by a written agreement between the spouses.[161]

Nevada follows the written agreement rule.[162] Transfers of community property, from husband to wife, without a specific written agreement, give rise to a rebuttable presumption of gift.[163] However, in a recent case, *Verheyden v. Verheyden*,[164] the Nevada Supreme Court indicated that a mere oral expression of a gift between spouses does not satisfy the clear and convincing proof requirement necessary to overcome the community presumption.[165] In *Campbell v. Campbell*,[166] the wife made a down payment from her separate funds on a house held in joint tenancy.[167] The supreme court presumed that the down payment was a gift, despite the absence of an express written instrument.[168] Finally, in *Hopper v. Hopper*,[169] the wife's use

158. *Id.* at 579, 613 P.2d at 721.

159. *Id.* at 574-75, 613 P.2d at 716-17 (quoting *In re* Trimble's Estate, 57 N.M. 51, 56, 253 P.2d 805, 808 (1953)).

160. *Id.* at 575-76, 613 P.2d at 717-18.

161. *Id.* at 579-80, 613 P.2d at 721-22; N.M. STAT. ANN. § 40-3-8(A)(5) (1978). *See* Comment, *Community Property -- Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?*, 11 N.M. L. REV. 421 (1980) (discussing *Estate of Fletcher*).

162. *See* NEV. REV. STAT. § 123.220 (1986 & Supp. 1991) (defining community property).

163. Peters v. Peters, 92 Nev. 687, 691, 557 P.2d 713, 715 (1976); Todkill v. Todkill, 88 Nev. 231, 237-38, 495 P.2d 629, 632 (1972).

164. 104 Nev. 342, 757 P.2d 1328 (1988).

165. *Id.* at 346, 757 P.2d at 1331.

166. 101 Nev. 380, 705 P.2d 154 (1985).

167. *Id.* at 382, 705 P.2d at 155.

168. *Id. See* Graham v. Graham, 104 Nev. 472, 474, 760 P.2d 772, 773 (1988) (holding quitclaim deed in favor of joint tenancy was sufficient to convert husband's separate property into community property and that husband failed to overcome presumption that quitclaim deed constituted

of her own separate funds to pay for improvements on a home, which was the separate property of her husband, was also presumed to be a gift.[170]

In Idaho, property conveyed from one spouse to the other is presumed to be separate property.[171] Additionally, marriage settlement agreements must be formally executed.[172] Case law indicates that the same formalities followed with respect to settlement agreements must be followed to transmute property.[173]

Washington has similar statutes governing marital agreements which cover conveyances of real estate between husband and wife and agreements as to the status of property, and which require that these agreements be executed with due formality.[174] However, case law indicates that transmutation may be effected by deed or by an agreement between the parties.[175] The character of property cannot be changed by oral agreement alone since the statute of frauds applies.[176] However, as in most community property states, a conveyance from one spouse to the other will give rise to a presumption of gift.[177]

In 1895, the Washington Supreme Court held that real property conveyed to a wife by a third party was presumed to be the separate property of the wife despite extrinsic evidence which indicated that her husband intended the property to be a wedding

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an interspousal gift).

169. 80 Nev. 302, 392 P.2d 629 (1964).

170. *Id.* at 302-03 392 P.2d at 629.

171. IDAHO CODE § 33-906 (1983 & Supp. 1991).

172. *Id.* §§ 32.916, 32.919 (1983 & Supp. 1991).

173. *See, e.g.*, Stockdale v. Stockdale, 102 Idaho 870, 643 P.2d 82, 85 (1982) (holding that the separate or community character of real property may be altered only in the manner provided or permitted by statute).

174. WASH. REV. CODE ANN. §§ 26.16.050, 26.16.120 (West 1986 & Supp. 1991).

175. *See, e.g.*, Volz v. Zang, 113 Wash. 378, 194 P. 409 (1920).

176. *See* Rogers v. Joughlin, 152 Wash. 448, 277 P. 988, 991 (1929) (holding that the character of property cannot be changed from separate to community property or from community to separate property by the oral agreement of spouses alone). *See also* Churchill v. Stephenson, 14 Wash. 620, 45 P. 28, 29 (1886) (holding that a parol agreement of the husband to convey to the wife community real property was within the statute of frauds and was therefore void).

177. Denny v. Schwabacher, 54 Wash. 689, 104 P. 137, 138 (1909).

anniversary present.[178] However, in *In re Parker's Estate*,[179] a husband's direction that title to newly purchased real estate be placed in the sole name of his wife was held to be an invalid oral gift.[180]

Arizona cases recognize transmutation by conveyance plus evidence of contemporaneous conduct.[181] However, some transmutation is permitted with little formality. In *Jones v. Rigdon*,[182] the Arizona Supreme Court stated the following:

> Ordinarily, such a gift is evidenced by a conveyance from one to the other, but that is not the only method by which it is established. The fact husband causes or permits a conveyance to be made to his wife tends to show it was the intention of the parties the property should be her separate estate . . . [a]nd extrinsic evidence, including the testimony of witnesses, is admissible on this point.[183]

Wisconsin's Uniform Marital Property Act permits alteration of property rights by a "marital property agreement."[184] Wisconsin law also provides that spouses may reclassify their property by gift, conveyance signed by both spouses, marital property agreement, written consent or, in some cases, unilateral statements.[185] A marital property agreement must be signed by both spouses and include definitions of rights in property.[186] The agreement is enforceable without consideration.[187] The written consent

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178. Nixon v. Post, 13 Wash. 181, 43 P. 23, 24-25 (1895).

179. 115 Wash. 57, 196 P. 632 (1921).

180. 196 P. at 633.

181. Estate of Sims v. Hanrahan, 13 Ariz. App. 215, 217, 475 P.2d 505, 507 (1970) (citing Jones v. Rigdon, 32 Ariz. 286, 289, 257 P. 639, 640 (1927)). *See, e.g.*, Noble v. Noble, 26 Ariz. 89, 93-94, 546 P.2d 358, 362-63 (1976) (permitting evidence of both spouse's conduct to prove that parties intended property purchased with separate funds to be community property).

182. 32 Ariz. 286, 257 P. 639.

183. *Id.* at 289, 257 P. at 640.

184. WIS. STAT. ANN. § 766.17 (West 1990).

185. *See, e.g.*, Schumacher v. Schumacher, 131 Wisc. 332, 388 N.W.2d 912 (1986) (involving marital property agreement). A unilateral statement refers to preservation of income from separate property. WIS. STAT. ANN. § 766.59 (West 1990).

186. WIS. STAT. ANN. § 766.58 (West 1990).

187. *Id.* § 766.58(1) (West 1990).

provision of the Uniform Marital Property Act applies specifically to life insurance.[188] Legislative Council Notes indicate that the Wisconsin Legislature rejected broader language in the uniform law which would have allowed a written consent to substitute for a marital property agreement.[189]

In summary, although a majority of other community property jurisdictions require some form of a writing for transmutation, in many circumstances most courts seem to discount this requirement if the evidence indicates an intent to transmute and an acceptance.[190] The writing which is sufficient in many cases is relatively informal and certainly is not required to include an "express declaration" for a transmutation of the property.[191] In comparison, California -- once considered to have the easiest transmutation rules -- now has the most difficult.[192]

III. APPLICATION OF SECTION 5110.730 AFTER *MACDONALD*

The adoption of the written transmutation rules in 1985,[193] as interpreted by the *MacDonald* case,[194] signaled the end of easy transmutations. Extrinsic evidence of gift or intent to transfer could no longer be relied upon to prove an intent to transmute property.[195] However, the implications of the express declaration statute may not have been fully appreciated when it was proposed and adopted. The legislative history of California Civil Code section 5110.730 focuses on the need to eliminate the use of oral

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188. *Id.* § 766.61(3)(e) (West 1990).

189. *Id.* § 766.61, Legislative Council Committee Notes (West 1990).

190. *See supra* notes 147-189 and accompanying text (discussing Texas, New Mexico, Nevada, Idaho, Washington, Arizona, and Wisconsin community property laws).

191. *See, e.g.*, Graham v. Graham, 104 Nev. 473, 474, 760 P.2d 772, 773 (1988) (holding quitclaim deed in favor of joint tenancy was sufficient to convert husband's separate property into community property and that husband failed to overcome presumption that quitclaim deed constituted an interspousal gift).

192. *See* W.S. MCCLANAHAN, COMMUNITY PROPERTY IN THE UNITED STATES (1982) (summarizing the treatment of interspousal transfers during marriage in community property states).

193. CAL. CIV. CODE §§ 5110.710-5110.740 (West Supp. 1991).

194. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

195. *See id.* at 272-73, 794 P.2d at 918-19, 272 Cal. Rptr. at 160-61 (stating that holding effects intent of legislature to enable courts to validate transmutations without resort to extrinsic evidence for various policy reasons).

evidence to prove interspousal agreements, but fails to address informal interspousal transfer and gifts.[196]

The written transmutation rule, as interpreted by *MacDonald*, directly conflicts with various title presumptions. For example, if community funds are used to acquire a personal residence and title is taken as joint tenants, *MacDonald* suggests that the joint tenancy title is invalid unless the transaction is accompanied by an express written declaration recharacterizing the community as joint tenancy property.[197]

The use of separate funds to maintain or improve community property, once rather easily classified as "gifts to the community" in the absence of evidence to the contrary, now requires evidence of an intent to recharacterize the funds so used.[198] In the absence of any intent to transmute, the contributing spouse has a right of reimbursement or possibly a separate interest in the community property which is the subject of the improvement.[199] Did the California Legislature really intend to limit informal interspousal transfers to this extent? Consider *Estate of Armstrong*,[200] where the wife used community funds to satisfy a lien on her husband's separate property.[201] The Second District Court of Appeal presumed that the wife made a gift of her community interest in the funds to her husband, thereby transmuting those community funds into his separate property.[202] In *In re LaBelle's Estate*,[203] the wife was aware that her husband was using community funds

196. *See Commission Report, supra* note 34, at 224-25.

197. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 272, 794 P.2d 911, 918, 272 Cal. Rptr. 153, 160 (1990). *See* Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988) (examining the reverse issue of transmutation from joint tenancy to community property).

198. *See MacDonald*, 51 Cal. 3d at 272, 794 P.2d at 918, 272 Cal. Rptr. at 160 (stating that transmutation writing must contain language which "expressly states that the characterization or ownership of the property is being changed").

199. CAL. CIV. CODE § 4800.2 (West Supp. 1991).

200. 241 Cal. App. 2d 1, 50 Cal. Rptr. 339 (1966).

201. *Id.* at 4-5, 50 Cal. Rptr. at 341.

202. *Id.* at 8-10, 50 Cal. Rptr. at 344.

203. 93 Cal. App. 2d 538, 209 P.2d 432 (1949).

to improve his separate property, yet took no action.[204] A gift was presumed by the First District Court of Appeal.[205]

In both *Armstrong* and *LaBelle*, there apparently was no express written declaration "which expressly states that the characterization . . . of the property is being changed."[206] In fact, there was no written documentation of any kind in *LaBelle*.[207] A finding of a right of reimbursement of a contributing spouse or, in some cases, a right to apportionment of interests in the property itself, may result in more litigation, rather than less.[208] If a spouse can prove that separate funds were used to improve community property, there is no informal transmutation resulting from an implied gift. The same applies to the use of community funds by one spouse to improve or maintain the separate property of the other spouse.

Often, the only written declaration as to the status of community property is the joint tenancy deed itself. The joint tenancy deed is not signed by the grantee spouse. However, California Civil Code section 5110.730 does not expressly require either spouse to sign the written declaration.[209] The grantee spouse need only join in, consent to, or accept the declaration.[210] Professor Reppy suggests that the "consented to or accepted by" language of section 5110.730 does not require a signature by the spouse adversely affected.[211] For example, a deed prepared upon the husband's insistence, which characterizes property as his wife's separate property, effectively transmutes the community funds used

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204. *Id.* at 544-45, 209 P.2d at 436.

205. *Id.* at 545, 209 P.2d at 436.

206. *MacDonald*, 51 Cal. 3d at 272, 794 P.2d at 918, 272 Cal. Rptr. at 160. *See Armstrong*, 241 Cal. App. 2d at 8-9, 50 Cal. Rptr. at 344 (property at issue acquired through settlement agreement and inheritance); *LaBelle*, 93 Cal. App. 2d at 539-40, 209 P.2d at 433-34 (property at issue was reputation and good will associated with husband's separate business real property).

207. *LaBelle*, 93 Cal. App. 2d at 543, 209 P.2d at 435.

208. *See In re* Marriage of Warren, 28 Cal. App. 3d 777, 780-83, 104 Cal. Rptr. 860, 862-64 (1972) (defining a right of reimbursement where no gift was made). *See also In re* Marriage of Gowdy, 178 Cal. App. 3d 1228, 1234, 224 Cal. Rptr. 400, 404 (1986) (finding that where there was no gift, the use of community funds to pay encumbrances on husband's separate property gave the community a proportionate interest in that property).

209. CAL. CIV. CODE § 5110.730(a).

210. *Id.*

211. W. REPPY, *supra* note 5, at 52.

to pay for that property into the wife's separate property.[212] However, the Legislative Committee Comment to California Civil Code section 5110.730 indicates that, with respect to transmutation of real property, the new statutory provision complies with the statute of frauds under California Civil Code sections 1091 and 1624 in requiring that the writing be signed by the transferor or party to be charged.[213] Professor Reppy also argues that acceptance of a deed which recharacterizes property is a transmutation under the statute.[214] However, the mere fact that a deed or document of title is mailed to the spouses, who probably do not even look at it, is hardly evidence that they accepted or consented to a transmutation, even if the title document contains language which could be construed as an express declaration under section 5110.730(a). Consent or acceptance requires some affirmative action by one or both spouses. Again, the problems of proof in this instance may be greater than under the easy transmutation rules.

The written transmutation rule also appears to conflict with several other California Civil Code sections.[215] For example, section 683 provides that a joint interest is created by a spousal transfer of property which expressly declares the transfer to be a joint tenancy.[216] Section 683 also provides that a joint tenancy in personal property may be created by a written transfer, instrument, or agreement.[217] Thus, section 683 is consistent with the express declaration requirement of section 5110.730 only if it is assumed that both sections require that each spouse consent to, join in, make, or agree to the transfer.

The express written declaration requirement may also be in conflict with California Civil Code section 4800.1, which provides

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212. *Id.*

213. California Law Revision Comm'n, *Communication of Law Revision Commission Concerning Assembly Bill 2274*, 18 CAL. L. REVISION COMM'N REP. 67, 68 (1986); CAL. CIV. CODE § 1091 (West 1982); *id.* § 1624 (West 1985 & Supp. 1991).

214. W. REPPY, *supra* note 5, at 52.

215. *See, e.g.*, statutes cited *infra* notes 216-220.

216. CAL. CIV. CODE § 683(a) (West Supp. 1991).

217. *Id.*

that for marital dissolution purposes, titles held in joint tenancy, tenancy by the entirety, or tenancy in common are presumed to be community property absent a contrary statement in the document of conveyance or a written agreement that the property is separate.[218] In effect, section 4800.1 creates an automatic transmutation for purposes of marital dissolution where separate funds were used to acquire property held in joint tenancy or other forms of joint title, with no express written declaration requirement.[219] However, if the document creating the joint tenancy or tenancy in common does not contain an express declaration of characterization, the transfer does not satisfy the express written declaration requirement of section 5110.730(a), and California Civil Code section 4800.1 is inapplicable.[220]

Additionally, California Probate Code section 5305, which provides that various forms of joint accounts between husband and wife are presumptively community property, is inconsistent with a requirement of an express declaration of transmutation of the funds used to create such an account or to make additional deposits to the account.[221] The community presumption can be overcome in the absence of an express declaration of transmutation by a tracing of the separate funds or by a separate written agreement providing that the funds are not community property.[222] Although these exceptions are reasonably consistent with the express declaration requirement of California Civil Code section 5110.730(a), the basic community presumption is not. The following section recommends changes in the transmutation rules and proposes new statutory language to resolve the above-discussed conflicts between section 5110.730 and other California Civil Code and Probate Code sections.

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218. *Id.* § 4800.1(b) (West 1983).

219. *See id.* (providing that for purposes of division of property upon dissolution, "property acquired by the parties during the marriage in joint form . . . is presumed to be community property.").

220. *See id.* § 5110.730(a) (requiring an express written declaration to effect transmutation); *id.* § 4800.1.

221. CAL. PROB. CODE § 5305 (West 1991).

222. *Id.* § 5305(b) (West 1991).

IV. REVISING THE TRANSMUTATION RULES

Strict adherence to the express declaration requirement of California Civil Code section 5110.730, as interpreted in *MacDonald*,[223] will result in the invalidation of many title documents for which the spouses have not executed documents with appropriate language of transmutation. To avoid such a result, the transmutation statute should be clarified regarding the form of the declaration required for a transmutation. The statute should also be coordinated with all other presumptions, including the title presumption set forth in the previous section.[224] As in other community property jurisdictions, there should be at least some distinction between marital property agreements and interspousal gifts. The following recommendations and proposed new statutory language attempt to better balance the legislature's intent to eliminate California's easy oral transmutation rule with the harsh consequences of California Civil Code section 5110.730 as interpreted by *MacDonald*.

A. Recommendations for Change

The recommendations for change in the transmutation rules are based on a general assumption that it should not be more difficult for husbands and wives to enter agreements with each other or transfer property to each other than it is for unmarried persons. At the same time, it is recognized that the nature of the marital relationship makes it difficult to prove such transfers have occurred without some degree of formality. The best way to accomplish these goals is to require some written evidence of transmutation, whether by agreement or gift.

First, the language of the transmutation statute, with regard to premarital and marital property agreements, should be coordinated

223. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

224. *See supra* notes 197-222 and accompanying text (discussing joint title presumptions).

and cross-referenced with other California Civil Code and Probate Code provisions.[225]

Second, the transmutation rules should, in the case of premarital and marital property agreements, eliminate the present language of California Civil Code section 5110.730(a) which requires an express declaration in favor of an express reference to such agreements.

Third, as in many other community property states,[226] California Civil Code section 5110.730 should include any interspousal transfer of property, including gifts, within the specific scope of transmutation.

Fourth, the statute should require a signed writing which complies with the statute of frauds.[227] The statute should provide that in the event of a gift or other transfer, the writing must be signed by either the transferor spouse or the spouse adversely affected by the transfer. In the case of interspousal agreements, the statute should require that both spouses sign the agreement. The signature requirement would apply to both sales and gifts of property from one spouse to the other where there is no formal agreement.

Finally, certain presumptions should be adopted to discourage litigation. First, where one spouse executes a deed or document of title naming the other spouse as sole owner of the property or sole owner of an interest in the property, such as a life estate or tenancy in common, a transmutation by gift should be presumed.[228] A presumption of gift satisfies the legislative intent of section 5110.730 to require written documentation.[229] The transmutation

225. *See supra* notes 215-222 and accompanying text (discussing conflict between section 5110.730 and other Civil Code and Probate Code provisions).

226. *See supra* notes 147-189 and accompanying text (discussing transmutation rules in other community property states).

227. *See* CAL. CIV. CODE § 1091 (West 1982) (requiring a writing for transfer of real estate); *id.* § 1624 (West 1985 & Supp. 1991) (codifying the statute of frauds).

228. *See* W. Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 SAN DIEGO L. REV. 143, 162 (1981) (stating that prior to the adoption of CAL. CIV. CODE § 5110.730, a gift would have been presumed).

229. *See Commission Report, supra* note 34, at 224-25.

presumption could be overcome with extrinsic evidence of the transferor's contrary intent. Second, any writing signed by the transferor which uses the words "gift" or "give" in connection with the delivery of property from one spouse to another should give rise to a presumption of gift and constitute a transmutation.

The above proposed changes would produce a less formal transmutation statute which expressly covers premarital agreements, marital property agreements, and interspousal transfers. A writing would be required, but not an express declaration. The writing requirement would trigger the parol evidence rule, which limits the admissibility of extrinsic evidence to prove the effect of the writing.[230]

Moreover, these proposed changes to the transmutation rules would have a minimal impact upon the rights of creditors. The pre-1985 easy transmutation rules permitted the use or oral testimony, often totally unsubstantiated, to establish a transmutation of real or personal property from community to separate or separate to community that was often detrimental to creditors.[231] In contrast, the present version of the express declaration statute provides that a transmutation of real property is not effective as to third parties without notice unless such transmutation is recorded.[232] Creditors are further protected under California Civil Code section 5110.720 from a transmutation of property which would be a fraudulent transfer under any applicable law.[233] The adoption of a more lenient statute of frauds test will not change that result, unless California Civil Code section 5110.730(b) is repealed or amended. Such an alteration is not suggested herein. While a recorded conveyance of real property between spouses could be characterized as a transmutation with the aid of extrinsic evidence, the change in the form of title should be sufficient to put creditors

230. *See* CAL. CIV. CODE § 1091 (West 1982); *id.* § 1624 (West 1985 & Supp.).
231. *See Commission Report, supra* note 34, at 224-25.
232. CAL. CIV. CODE § 5110.730(b) (West Supp. 1991).
233. CAL. CIV. CODE § 5110.720.

on notice. An additional requirement of an express declaration in writing is unnecessary.

With regard to personal property, the requirement of a writing which satisfies the statute of frauds instead of an express written declaration does not alter the application of California Civil Code section 3440, which conclusively presumes that a transfer without delivery is fraudulent as to the transferor's creditors.[234] However, even if there is clearly a delivery and change of possession of personal property, the express declaration requirement under existing law allows a transferor's creditors to prove that there was no transmutation, despite evidence to the contrary.

In contrast, a writing short of an express declaration permits the introduction of extrinsic evidence. For example, assume a husband makes an assignment in blank of a community property stock certificate and delivers the certificate to his wife. His wife places the certificate in a safe deposit box which is maintained in her name alone. Under the proposed revisions, the husband's signature on the certificate might be a sufficient writing to permit extrinsic evidence of delivery and change of possession to prove a completed gift and transmutation of the certificate to the separate property of the wife. A creditor would then have to prove that there was no intent to transfer or, in other words, that the husband wanted wife to assume full management of the securities in question, but did not intend to make a gift. Under present law, there would be no express declaration in writing to effectuate a transmutation in this hypothetical.

The unrealistic requirements of change of possession and delivery in the context of a marriage provide creditors more protection than they are entitled. The issue is even more complicated where the gift involves the conversion of separate personal property of one spouse to community property, since delivery is often lacking. For example, if a husband transmutes an inherited work of art into community property, the art will in all probability continue to hang on the wall of the family home. In this

234. *Id.* § 3440 (West 1970 & Supp. 1991).

case, the requirement of a writing does afford protection to creditors.

With respect to premarital and marital property agreements between spouses, the changes proposed below seek only to clarify the relationship between these agreements and the transmutation statute. In virtually every case, any transmutation which results from the provisions of premarital and martial property agreements would constitute express declarations in writing signed by both spouses. Hence, creditors and any other interested persons should be in no better or worse position under the proposed changes than under present law.

B. Proposed Statutory Language for Transmutations

The recommendations stated above can be implemented by the following statutory changes.

First, the following subdivision (h) would be added to California Civil Code section 1624:[235]

> (h) Marital agreements, including marital property agreements and premarital agreements as defined in Title 11 of this Code. The effect of this addition would be to require that all marital agreements, regardless of their subject matter, be written. A writing requirement would eliminate the problems inherent in establishing a transmutation solely on the basis of oral testimony.

Second, section 5201(a) of the California Civil Code[236] would be amended to read as follows:

> (a) The property rights of husband and wife prescribed by statute may be altered by a premarital agreement which meets the requirements of Chapter 2 of this Title or other marital property agreement.

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235. *Id.* § 1624 (West 1985 & Supp. 1991).
236. *Id.* § 5201(a) (West Supp. 1991).

This proposed amendment would cross-reference the Uniform Premarital Agreement Act[237] for clarification.

Third, a new section 5204 would be added to the California Civil Code as follows:

> A "marital property agreement" means an agreement in writing, signed by both parties, with or without consideration, which relates to the rights and obligations of the parties in any of the property of either or both of them, whenever and wherever acquired or located.

This proposed provision conforms to the language of California Civil Code section 5312(a)(1), which relates to premarital agreements.[238]

Fourth, a new section 5205 would be added to the California Civil Code as follows:

> For purposes of marital property agreements, "property" means an interest, present or future, legal or equitable, tangible or intangible, vested or contingent, in real or personal property, including present or future income from the property and present and future earnings of the spouses.

This definition of property is based on the premarital agreement language of California Civil Code section 5310(b),[239] but is broadened to specifically cover intangible property and future earnings. A new section 5205 would provide additional flexibility in planning by the spouses, particularly as to future income. However, the tax consequences of these marital agreements are unclear.

Fifth, a new section 5206 would be added to the California Civil Code as follows:

> A marital property agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or revocation is enforceable without consideration.

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237. CAL. CIV. CODE §§ 5300-17 (West Supp. 1991).
238. CAL. CIV. CODE § 5312(a)(1) (West Supp. 1991).
239. *Id.* § 5310(b) (West Supp. 1991).

This proposed provision follows the language of California Civil Code section 5314 pertaining to premarital agreements.[240]

Sixth, a new California Civil Code section 5206 would be added as follows:

> Premarital agreements and marital property agreements may alter or transmute the property rights of the parties as provided in California Civil Code section 5110.710, subject to the provisions of Sections 5110.720 and 5110.740, inclusive.

It must be clear which statute controls transmutations. While marital agreements can transmute property, they should be subject to the additional requirements of the specific transmutation provisions.

Seventh, California Civil Code section 5203[241] would be amended to read as follows:

> Nothing in this chapter *or Chapter 2 of this title* affects the validity or effect of premarital agreements made before January 1, 1986, and the validity and effect of those agreements shall continue to be determined by the law applicable to the agreements prior to January 1, 1986.

This proposed change simply restates the present section but adds the missing reference to Chapter 2.[242] A similar provision probably should be added for the changes made to both premarital and marital property agreements under these proposals.

Eighth, the following subsection (d) would be added to California Civil Code section 5110.710:[243]

> (d) As used herein, "property" means an interest, present or future, tangible or intangible, vested or contingent, in real or personal property, including present or future income from property and present or future earnings.

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240. *Id.* § 5314 (West Supp. 1991).
241. *Id.* § 5203 (West Supp. 1991).
242. *Id.* §§ 5300-17 (West Supp. 1991).
243. *Id.* § 5110.710.

This proposed addition broadens the definition of property for reasons previously outlined.[244]

Ninth, California Civil Code section 5110.730(a)[245] would be amended to read as follows:

> (a) A transmutation of real or personal property is not valid unless (1) pursuant to a premarital agreement or a marital property agreement described in Title 11, or (2) pursuant to an instrument, note, or memorandum in writing evidencing an intent to transfer, to consent to the transfer, or to waive a property right, signed by the transferor spouse or the spouse whose property interests would be adversely affected by the transmutation. For purposes of determining the nature and effect of such written instruments, notes, or memoranda, extrinsic evidence may be admitted to the extent not inconsistent with the express written provisions. If the writing is a deed or other document of title executed by one spouse naming the other spouse as sole owner of the subject property, co-owner of the property with a person or persons other than the grantor, or owner of a limited interest in the property, such as a life estate, this is presumed to be a transfer to the transferee spouse which transmutes the property or interest in the property to the transferee's separate property. The transfer of real or personal property from one spouse to the other accompanied by a writing signed by the transferor in which the transferor indicates an intent to make a gift to the donee spouse shall be presumed a gift which transmuted the property to the separate property of the transferee spouse. These are presumptions affecting the burden of proof.

This language would overrule *MacDonald*[246] by eliminating the "express declaration" language. Moreover, the proposed amendment would expressly apply to premarital and marital property agreements. The written evidence of a transmutation would have to be signed by both spouses, if pursuant to an agreement. In the event of a gift or other transfer, the transmutation writing would have to be signed by the spouse adversely affected by such gift or transfer. Additionally, the writing would be required

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244. *See supra* note 226 and accompanying text (discussing recommendation for expanding definition of property).

245. CAL. CIV. CODE § 5110.730(a).

246. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

to satisfy the statute of frauds. The proposed statute provides a presumption of transmutation where there is an express title transfer or asset transfer accompanied by a writing which indicates an intent to make a gift. If the transmutation is not clear on the face of the writing, extrinsic evidence would be admissible.

The proposed revision to section 5110.730 is inconsistent with the joint title presumptions previously discussed.[247] If it is desirous to preserve those presumptions, the following language would have such a result:

> Notwithstanding the foregoing provisions, if title to property is held in a form of ownership specified in Civil Code Sections 4800.1 or 4800.2, or in an account specified in Probate Code Section 5305, the rules and presumptions of those provisions will be fully applicable. Further, if title to real or personal property is held in joint tenancy in accordance with Civil Code Section 683, it shall pass by right of survivorship to a surviving joint tenant or joint tenants.

Section 5110.730(a), as revised, potentially varies the requirements for a contract or agreement between spouses. Thus, the amended statute should not be applied retroactively. Although an amended section 5110.730(a) would not interfere with existing contracts which meet the more stringent standard of the express written declaration, the amendment could have the effect of making an informal transfer that does not otherwise meet the express declaration requirements a completed transmutation, thereby altering existing property rights.

Finally, the following language should be added to California Civil Code section 5110.730:[248]

> To the extent property rights which are the subject of transmutation under these provisions include rights of a surviving spouse described in Probate Code section 141, the validity of any agreement, transfer, or waiver of such rights shall be determined under the provisions of Probate Code sections 140-47.

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247. *See supra* notes 197-222 and accompanying text (discussing joint title presumptions).
248. CAL. CIV. CODE § 5110.730.

This proposed addition would clarify the controlling statute with regard to transmutation at death caused by a surviving spouse's waiver of property rights.

V. COMMUNITY PROPERTY INTERESTS IN LIFE INSURANCE, DEATH BENEFITS, AND OTHER WILL SUBSTITUTES

The lack of statutory or judicial authority regarding the impact of spousal consent rules upon gifts effective at death or nonprobate transfers of property is especially problematic with respect to life insurance policies, death benefit plans, and other forms of will substitutes. These problems are discussed below.

A. Life Insurance Policies

Life insurance policies, like any other property, are community property if acquired with community property during marriage.[249] This principle is illustrated by *Prudential Insurance Co. v. Harrison*[250] and *Manufacturer's Life v. Moore*.[251] In these two cases, the claimants killed their spouses.[252] The claimants were each the intended beneficiary of an insurance policy on the life of their respective spouses.[253] The policies were paid for with community funds.[254] In both cases, although the claimants were precluded from profiting from their wrongful acts, each surviving spouse nevertheless was held to have a one-half community interest

249. *See* Estate of Mendenhall, 182 Cal. App. 2d 441, 447, 6 Cal. Rptr. 45, 47-48 (1960) (concluding that for California inheritance tax purposes, a life insurance policy is community property and the predeceased, nonparticipant spouse's community interest in the policy was subject to inheritance tax). *See also* Scott v. Comm., 374 F.2d 154, 159 (9th Cir. 1967) (stating that a spouse's community interest in the participant spouse's life insurance policy is in the contract, and not just the right to receive the cash surrender value of such policy); United States v. Stewart, 270 F.2d 894, 898 (9th Cir. 1959) (affirming the trial court's conclusion that husband's insurance policies were community property since premiums were paid with community funds, unless the wife subsequently released her interest, converting it into the separate property of her husband).

250. 106 F. Supp. 419 (S.D. Cal. 1952).

251. 116 F. Supp. 171 (S.D. Cal. 1953).

252. *Harrison*, 106 F. Supp. at 421; *Moore*, 116 F. Supp. at 173.

253. *Harrison*, 106 F. Supp. at 421; *Moore*, 116 F. Supp. at 173.

254. *Harrison*, 106 F. Supp. at 426; *Moore*, 116 F. Supp. at 176.

in the deceased spouse's policy.[255] In *Harrison*, the spouse was allowed to collect one-half of the proceeds, while in *Moore* the spouse was limited to one-half of the cash surrender value.[256]

The issue of the community rights of spouses in life insurance policies has also arisen in the context of simultaneous death.[257] The statutory presumption is that where the insured and the beneficiary of the policy die simultaneously, the beneficiary is presumed to have died first.[258] However, where the insured and beneficiary are spouses, and the policy is community property, the proceeds are distributed as community property, despite the presumption.[259]

Employee group life insurance also presents some troubling issues. For example, *In re Marriage of Lorenz*[260] held that an employee's rights under an employer-sponsored group term life insurance policy were not subject to division as part of a marital dissolution.[261] In contrast, *In re Marriage of Gonzales*[262] suggested that *Lorenz* excluded employee group term life insurance from the division on the ground that the policy had no ascertainable value, not because the policy was not community property.[263] *In re Estate of Logan*[264] excluded employee group term life insurance from the division on the no value theory.[265] However, the result in *Logan* was limited to situations where the employee was still insurable.[266]

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255. *Harrison*, 106 F. Supp. at 426; *Moore*, 116 F. Supp. at 177.

256. *Harrison*, 106 F. Supp. at 426; *Moore*, 116 F. Supp. at 177.

257. *See, e.g., In re* Estate of Sugino v. Flournoy, 267 Cal. App. 2d 591, 73 Cal. Rptr. 150 (1968); Estate of Hudson, 158 Cal. App. 2d 385, 322 P.2d 987 (1958).

258. *See* CAL. PROB. CODE § 224 (West 1991). Section 224 does not apply if there is an alternate beneficiary other than the estate or personal representative of the insured. *Id.*

259. *See In re* Wedemeyer's Estate, 109 Cal. App. 2d 67, 71, 240 P.2d 8, 11 (1952); *In re* Castagnola's Estate, 68 Cal. App. 732, 736, 230 P. 188, 190 (1924).

260. 146 Cal. App. 3d 464, 194 Cal. Rptr. 237 (1983).

261. *Id.* at 467, 194 Cal. Rptr. at 238.

262. 168 Cal. App. 3d 1021, 214 Cal. Rptr. 634 (1985).

263. *Id.* at 1024, 214 Cal. Rptr. at 636. *Accord* Bowman v. Bowman, 171 Cal. App. 3d 148, 217 Cal. Rptr. 174 (1985) (generally following *Gonzales*).

264. 191 Cal. App. 3d 319, 236 Cal. Rptr. 368 (1987).

265. *Id.* at 325-26, 236 Cal. Rptr. at 372.

266. *Id.* at 325, 236 Cal. Rptr. at 372.

To conclude that employee group term life insurance, or for that matter any form of term insurance with no cash value, is not community property has serious implications when the noninsured spouse predeceases the insured spouse. If the policies are not community property, then the predeceased spouse would have not power to make a testamentary or nonprobate transfer of an interest in the proceeds of the policy. However, this conclusion is incorrect. After *In re Marriage of Brown*,[267] the fact that a property right is not vested, contingent, or of no value is not an acceptable reason to exclude the property right from community characterization.[268]

Assuming the term life insurance is characterized as community property and the noninsured spouse predeceases the insured spouse, the extent of the deceased spouse's community interest in the policy must be determined. If the deceased spouse's community interest is based on the cash value or related interpolated terminal reserve value, the interest is zero since term life insurance by definition only provides protection for the policy period and accumulates no reserve or residual value. If the noninsured spouse attempts to make a testamentary disposition of her community interest in her spouse's term life insurance policy, the interest would be worthless. The extent of the noninsured spouse's interest was clearly a major issue considered by the court of appeal in *Logan*, which argued that the only community interest in such insurance is the prepaid insurance premiums paid during marriage.[269] The court's position in *Logan* apparently overrules *Modern Woodmen of America v. Gray*[270] which held that, at least in the case of the insured's death, community and separate interests in life insurance should be based on apportionment of all premiums paid while the policy is in effect.[271]

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267. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

268. *Id.* at 844-47, 544 P.2d at 566-68, 126 Cal. Rptr. at 638-40. *See, e.g., In re* Marriage of Ames, 57 Cal. App. 3d 838, 129 Cal. Rptr. 334, 336 (1976) (stating that *In re Marriage of Brown* eliminated the distinction between vested and unvested interests in employee group plans); *In re* Marriage of Smith, 56 Cal. App. 3d 247, 128 Cal. Rptr. 410, 411 (1976) (citing the holding of *In re Marriage of Brown*).

269. *Logan*, 191 Cal. App. 3d at 324, 236 Cal. Rptr. at 371.

270. 113 Cal. App. 729, 299 P. 754 (1931).

271. *Id.* at 734, 299 P. at 755.

One solution for determining the uninsured deceased spouse's community interest in term life insurance is to measure the interest by the cash surrender or interpolated terminable reserve value of the policy, unless the insured dies while covered by premiums paid with community funds. In that case, the proceeds would be allocated on the basis of the total premiums paid with separate and community funds. This result retains the apportionment theory of *Modern Woodmen*, while recognizing the lack of any real value in the community interest of the predeceased spouse. The "no value-no community property" rule of *Logan* is not recommended.[272]

Another solution is to continue the apportionment rule after death, as discussed below. In *Scott v. Commissioner*,[273] Mrs. Scott predeceased her husband, leaving her entire estate to their two sons.[274] At the time of her death, the husband maintained two life insurance policies on his own life.[275] These policies were purchased with community funds.[276] One-half of the policies were included in Mrs. Scott's estate.[277] Thus, one-half of the cash surrender value of the policies was subject to federal estate tax.[278] Mr. Scott subsequently changed the beneficiaries to the two sons and continued premium payments on the policies until his death.[279] One-half of the insurance proceeds was included in Mr. Scott's estate.[280] The IRS sought to include one hundred percent of the proceeds less the one-half cash surrender value previously included in Mrs. Scott's estate.[281]

Interpreting California law, the federal court of appeals rejected the IRS's contention that Mrs. Scott's community interest in the policy was limited to one-half of the cash surrender value at her

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272. *See supra* notes 264-271 and accompanying text (discussing *Logan*).
273. 374 F.2d 154 (9th Cir. 1967).
274. *Id.* at 156.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 157.

death.[282] The court held that upon Mrs. Scott's death, her sons became tenants in common in the policies with their father.[283] When Mr. Scott continued to pay the premiums, admittedly with separate funds, his proportionate interest in the policies was increased, while the proportionate interest of his sons decreased.[284] Upon Mr. Scott's death, a proportionate share of the proceeds would be included in his estate, based upon the proportion of premiums paid with community or separate funds.[285] Thus, the Ninth Circuit applied apportionment based on premium payments to post death premium payments.[286]

The tenants in common approach of *Scott* is a reasonable way to determine property interests in life insurance policies where the noninsured spouse is the first to die. However, insurance companies will likely resist attempts by the noninsured spouse's executor and successors to assert rights in the policies reserved to the owner. A more realistic measurement of the deceased spouse's community interest in the policy is the surrender value of the policy. Such a measurement permits the policy owner to assert all other policy rights and pay additional premiums. Thus, the deceased spouse's interest would be limited to the cash surrender value at his death and would no longer include a share of the proceeds on the subsequent death of the insured spouse.[287] The deceased spouse's successors are denied participation in the interest or growth factor attributable to that value after death. In most modern cash value or universal life insurance policies, there is an investment element

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282. *Id.* at 161.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. There is extensive authority on the classification of the insurance proceeds as community property. *See, e.g.*, Polk v. Polk, 228 Cal. App. 2d 763, 781, 39 Cal. Rptr. 824, 835 (1964) (holding group life insurance proceeds are community property; Gettman v. Los Angeles, 87 Cal. App. 2d 862, 865, 197 P.2d 817, 819 (1948) (holding employee plan proceeds are community property)); Modern Woodmen of Am. v. Gray, 113 Cal. App. 729, 733-34, 299 P. 754, 755 (1931) (holding fraternal benefit society policies are community property). *See also*, Tyre v. Aetna Life Ins. Co., 54 Cal. 2d 399, 404, 352 P.2d 725, 728, 6 Cal. Rptr. 13, 15 (1960) *and* Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 355, 26 P.2d 482, 483 (1933) (both cases illustrating a variety of other life insurance policies, the proceeds of which are community property).

which will continue to grow. However, defining that element in legislation is almost impossible.

Where a spouse is named as the beneficiary of a community property life insurance policy, the "inchoate gift" rule applies.[288] Cases have held that by naming a spouse as the beneficiary, the insured spouse makes an inchoate gift to the other spouse of the insured spouse's community interest in the plan, which becomes complete upon the insured spouse's death.[289] Thus, the proceeds of the policy constitute the separate property of the surviving spouse.[290] This inchoate gift-separate property result should be considered in the context of cases which have forced the surviving spouse to elect between rights as a beneficiary under such policies and community property rights. In *Mazman v. Brown*,[291] the husband named his wife as a beneficiary as to one-third of the policy proceeds and his parents as beneficiaries as to the other two-thirds.[292] The court of appeal held that the wife could not claim one-third of the proceeds as separate property and still assert a community claim as to one-half of the remaining two-thirds.[293] In *Tyre v. Aetna Life Insurance Co.*,[294] the husband/insured elected a life income benefit for his wife, with a remainder to a child.[295] The California Supreme Court held that the wife could set this election aside and claim her community one-half, but could not then also assert a claim as beneficiary.[296]

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288. *See supra* notes 118-132 and accompanying text (discussing inchoate gift rule).

289. *See, e.g.*, Sieroty v. Silver, 58 Cal. 2d 799, 376 P.2d 563, 26 Cal. Rptr. 635 (1962); California-Western States Life Ins. Co. v. Kester, 129 Cal. App. 2d 476, 277 P.2d 70 (1955); Reliance Life Ins. Co. v. Jaffe, 121 Cal. App. 2d 241, 263 P.2d 82 (1953).

290. *See In re* Miller's Estate, 23 Cal. App. 2d 16, 18, 71 P.2d 1117, 1117 (1937) (holding that husband's designation of a beneficiary to a beneficial association for which community funds were used to pay his membership fees and dues initiated an inchoate gift of such money to the beneficiary).

291. 12 Cal. App. 2d 272, 55 P.2d 539 (1936).

292. *Id.* at 276, 55 P.2d at 539-40.

293. *Id.* at 277, 55 P.2d at 541-42.

294. 54 Cal. App. 399, 353 P.2d 725, 6 Cal. Rptr. 13 (1960).

295. *Id.* at 402, 353 P.2d at 15, 6 Cal. Rptr. at 727.

296. *Id.* at 405, 353 P.2d at 17, 6 Cal. Rptr. at 729.

The forced election decisions are consistent with the inchoate gift theory since the latter assumes the transmutation from community to separate property is contingent upon the donor's death. If a gift causa mortis approach is followed, the decedent accomplishes the same result as with a forced election under a testamentary document. In other words, a forced election bequest in a will also converts decedent's share of community to separate property on death, but the transmutation is contingent on an election.

However, if the insurance proceeds really become separate property upon death, a difference arises insofar as creditors are concerned. The liability of separate and community property for the debts of either spouse is covered generally under California Civil Code sections 5120.110 through 5120.160.[297] In general, the separate property of one spouse may not be applied to pay debts incurred by the other spouse.[298] Further, California Probate Code section 11444, dealing with the allocation of debts between the estate of a deceased spouse and a surviving spouse, bases the allocation of debts on the ratio of community property to separate property.[299] If the death of an insured spouse automatically converts a community property asset into the separate property of the surviving spouse, that property arguably cannot be reached to pay the deceased spouse's debts or provide the basis for allocation of such debts.

Interests in community property that pass at death from one spouse to the other or, for that matter, pass to third persons, should be no different than other assets which pass as the result of a testamentary or nontestamentary disposition. The transferor spouse's interest should retain its community character until the transfer is complete. There should be no transmutation or automatic conversion to separate property. However, there is authority to the contrary, at least with respect to joint tenancies, which holds that

297. CAL. CIV. CODE §§ 5120.110-5120.160 (West Supp. 1991).
298. *See* CAL. CIV. CODE § 5120.130(b)(1) (West Supp. 1991).
299. CAL. PROB. CODE § 11444 (West 1991).

surviving joint tenants take free and clear of claims against the deceased joint tenant.[300]

Assuming that an insurance policy and its proceeds are both community property, what are the rights of the spouses in the policy while both spouses are alive? The insured spouse may, of course, exercise all rights under the terms of the policy, including designating a beneficiary. To the extent that the policy rights fall into the category of management, it seems clear that the insured spouse can exercise those rights without the other spouse's consent under the equal management and control provisions of California Civil Code sections 5125 and 5127.[301] A policy owner's rights include the right to cash the policy in, borrow against the policy, select dividend options, and convert the policy into another form of contract. However, as with the assignment of any community property interest, the nonconsenting spouse should be able to set aside the assignment of a community property life insurance policy despite the owner's right to assign under the terms of the policy under California Civil Code section 5125(b).[302] Similarly, to the extent that the owner spouse elects a beneficiary other than the surviving spouse, and the surviving spouse does not consent, the nonconsenting spouse may set that beneficiary designation aside.[303] This right to set aside is absolute during the joint lifetimes of the spouses.[304]

As the foregoing indicates, the assignment of a life insurance policy or its proceeds or the designation of a beneficiary is regarded much like a lifetime gift of community property, even though the transfer may not take effect until death. After the death of the insured spouse, the nonconsenting spouse's right to set aside is limited to one-half of the proceeds.[305] Further, where the

300. *See* Zeigler v. Bonnell, 52 Cal. App. 2d 217, 126 P.2d 118 (1942).

301. CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1991).

302. CAL. CIV. CODE § 5125(b).

303. Sieroty v. Silver, 58 Cal. 2d 799, 803, 376 P.2d 563, 566, 26 Cal. Rptr. 635, 638 (1962); Typre v. Aetna Life Ins. Co., 54 Cal. 2d 399, 404, 653 P.2d 725, 728, 6 Cal. Rptr. 13, 16 (1960).

304. *See* Benson v. Los Angeles, 60 Cal. 2d 355, 363, 384 P.2d 649, 653, 33 Cal. Rptr. 257, 261 (1963).

305. *See* New York Life v. Bank of Italy, 60 Cal. App. 602, 603, 214 P. 61, 61 (1923).

surviving spouse is named as the beneficiary to part of the proceeds, the forced election rule may apply.[306] The prior death of the noninsured spouse does not change her community interest in the policy or its proceeds. Similarly, the surviving spouse should be able to set aside a settlement or payment option that confers upon the surviving spouse less than one-half of the proceeds payable under the policy, subject to a possible election.

Where the noninsured spouse consents to the designation of a third person beneficiary, the courts assume, without prolonged discussions, that the noninsured spouse's consent waives a community claim against the proceeds of the insurance.[307] In *Benson v. Los Angeles*,[308] the California Supreme Court stated, "In the case of insurance, any change in the beneficiary away from the wife without her consent, and without a valuable consideration other than substitution of beneficiaries, is voidable in its entirety by her during her husband's lifetime."[309] There was no consent in the *Benson* case.[310]

The language in *Benson* is a logical extension of the inchoate gift rule. If the beneficiary designation is donative, the designation is a gift and may, therefore, be set aside by a nonconsenting spouse, but not by a consenting spouse. To permit a consenting spouse to completely revoke her consent would be inconsistent with the theory of waiver set forth in *Benson*.[311]

Where the noninsured, nonconsenting spouse predeceases the insured spouse, the deceased spouse's personal representative or successor in interest apparently has the right, and probably the duty, to claim a one-half interest in the insurance policy for the estate.[312] The exercise of any rights over the insurance policy by

306. *See supra* notes 291-96 and accompanying text (discussing the forced election rule).

307. *See, e.g., Benson*, 60 Cal. 2d. 355, 360-61, 384 P.2d 257, 651-52, 33 Cal. Rptr. at 259-60 (1963).

308. *Id.* at 363, 384 P.2d at 653, 33 Cal. Rptr. at 261.

309. *Id.*

310. *Id.* at 362, 384 P.2d 649, 652, 33 Cal. Rptr. 260.

311. *Id.*

312. *See* United States v. Stewart, 270 F.2d 894, 901 (9th Cir. 1959) (stating that for federal estate tax purposes, the estate of the predeceased, noninsured spouse includes one-half of the interpolated terminal reserve value assigned to the policy by the insurance company; this amount is

the estate of the deceased spouse, other than the continuation of premium payments, would be inconsistent with the contract rights under the policy, assuming the surviving spouse is the owner. Arguably, the only interest that passes to the heirs or beneficiaries of the deceased spouse is either the right to one-half of the cash surrender value at the deceased spouse's date of death or the right to one-half of the insurance proceeds upon the insured's death.

If the surviving spouse changed the beneficiary after the death of the consenting spouse, the change would affect only one-half of the proceeds.[313] However, if the surviving spouse desired to borrow against the policy, would the surviving spouse be similarly restricted to one-half of the available amount? Where the predeceased, noninsured spouse consented to a beneficiary designation, *MacDonald* indicates that the deceased spouse's consent may be set aside by the decedent's estate, which claims a community interest in the pension plan.[314] Although *MacDonald* involved an IRA beneficiary designation,[315] there are clear parallels between life insurance policies and other forms of death benefits or contractual rights which provide for a nonprobate transfer through the designation of beneficiaries by one or both spouses. However, there are also differences, which are explored below.

B. Death Benefit Plans

While the foregoing discussion focuses on life insurance benefits, many of the same principles apply to other kinds of death benefits, such as employee death benefits, self-employed retirement plans (herein called Keogh plans), deferred compensation plans,

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roughly equivalent to the cash surrender value in most cases, assuming the premiums are paid with community funds).

313. Benson v. Los Angeles, 60 Cal. 2d 355, 363, 384 P.2d 649, 653, 33 Cal. Rptr. 257, 261 (1963); New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 603, 214 P. 61, 67 (1923).

314. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 273, 794 P.2d 911, 919, 272 Cal. Rptr. 153, 161 (1990).

315. *Id.* at 265, 794 P.2d at 913-14, 272 Cal. Rptr. at 155-56.

death benefit plans, and IRAs. The contractual requirements of these plans and, in some cases, applicable state and federal law, tend to vest complete management of the plans in the employee, self-employed person, or account holder. Except with respect to issues of federal preemption or application of the terminable interest rule,[316] management of the above-described plans does not materially differ from the control exercised by the insured spouse over a life insurance policy.

The right to designate a death beneficiary under an employee benefit plan may be limited by the terms of that plan. For example, an employee may have no right to designate a beneficiary under a death benefit plan sponsored by the employer. Logically, the employee's spouse would be similarly restricted. In fact, it is not clear that employee death benefits are properly classified as community property.[317] Although the benefits are earned during marriage, the nonemployee spouse's interest may be only an expectancy.[318] However, once funds are removed from a death benefit plan and come within the total control of a spouse, general community property principles apply.[319]

The death benefit plan maintained by IBM for the surviving spouse or children of employees provides an excellent illustration.[320] Under the provisions of this plan, if an IBM employee dies while employed by IBM, a specified death benefit is paid to the surviving spouse, if any, otherwise to certain

316. *See infra* notes 317-412 and accompanying text (discussing the terminable interest rule).

317. *See, e.g.*, Williamson v. Williamson, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167 (1962) (holding that a plan under which husband was entitled to withdraw contributions prior to retirement or upon termination did not constitute community property).

318. *See* French v. French, 17 Cal. 2d 775, 778, 112 P.2d 235 (1941) (concluding that a husband's right to retirement pay is an expectancy not subject to division as community property); *Williamson*, 203 Cal. App. 2d at 11, 21 Cal. Rptr. at 166 (1962) (stating that "pensions become community property, subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds."). *But see In re* Marriage of Carnall, 216 Cal. App. 3d 1010, 1018, 265 Cal. Rptr. 271, 274 (1989) (stating that nonvested pension rights may be community property subject to division upon dissolution of the marriage).

319. *French*, 17 Cal. 2d at 778, 112 P.2d at 236.

320. *See* Estate of Schelberg v. Comm., 612 F.2d 25 (2d Cir. 1979) (holding that death benefits payable, under a plan provided by IBM over which the insured has no control, are not decedent's property).

surviving issue.[321] The employee has no control over this plan and no right to designate a beneficiary.[322] For federal estate tax purposes, the benefits payable under this plan are not property owned by the decedent and, therefore, are not included in the decedent's estate.[323]

The contractual death beneficiary under most employee benefit plans is usually the employee's surviving spouse. Thus, the issues of transmutation addressed in this discussion do not arise where the employee dies first. However, where the nonemployee spouse predeceases the employee spouse, it is not clear whether the deceased spouse's personal representative has any claim to benefits under an employee death benefit plan. A claim by the nonemployee spouse's representative would directly interfere with contractual rights under the plan, which was distinguished in *MacDonald.*[324]

California Civil Code section 4800.8 addresses court orders relating to rights under retirement plans to assure that the parties receive their community rights in such plans, including death benefits and survivor benefits.[325] Section 4800.8 also covers the division of retirement benefits paid on or after the death of either party.[326] The statute does not, however, by its terms, purport to overrule the contractual provisions of a benefit plan.[327] In fact, section 4800.8 specifically authorizes the court to order a party to elect a survivor benefit "in any case in which a retirement plan provides for such an election."[328] It appears that section 4800.8 does not apply to death benefits unless they arise under a retirement plan.[329]

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321. *Id.* at 27-28.
322. *Id.*
323. *Id.* at 29.
324. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 267-68, 794 P.2d 911, 913-15, 272 Cal. Rptr. 153, 157-59 (1990).
325. CAL. CIV. CODE § 4800.8 (West 1988).
326. *Id.*
327. *Id.*
328. *Id.* § 4800.8(b) (West 1988).
329. *Id.* (specifically providing for division of retirement plans).

The above discussion suggests that the community property rights to designate beneficiaries for death benefits under any plan should be subject to contractual limitations under the plan itself. New legislation intended to clarify the rights of spouses to designate beneficiaries, consent to beneficiary designations, and revoke designation consents should be limited to situations where the identity of the beneficiary is not determined under the terms of the plan itself. Clearly, such contractual limitations can lead to inequitable results. An employee who has earned a substantial death benefit during marriage, which is only payable to a surviving spouse, can divest the spouse of that benefit by divorce. Further, if the nonemployee spouse is the first to die, the nonemployee spouse cannot dispose of any part of the benefit even though the benefit was clearly earned during the marriage. Short of direct interference with contract rights, however, there is no satisfactory solution.

The California Supreme Court was faced with the problem of contractual limitations on beneficiaries under pension plans in *Benson v. City of Los Angeles*,[330] which produced at least one element of the terminable interest doctrine.[331] In *Benson*, the husband and wife divorced, but their property rights were never adjudicated.[332] The husband's employer provided a municipal pension plan which would pay a death benefit to an employee's widow.[333] The husband subsequently remarried.[334] Although the court conceded that the pension was community property, it held that the first wife had no vested interest in the pension plan.[335] Thus, the first wife's community interest in the plan terminated upon the husband's death.[336] The court emphasized that the plan at issue was a retirement plan for public employees and that there was a public purpose in making provisions for a widow.[337] The

330. 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963).
331. *Id.* at 361, 384 P.2d at 652, 33 Cal. Rptr. at 260.
332. *Id.* at 358, 384 P.2d at 650, 33 Cal. Rptr. at 258.
333. *Id.* at 359, 384 P.2d at 651, 33 Cal. Rptr. at 259.
334. *Id.* at 358, 384 P.2d at 650, 33 Cal. Rptr. at 258.
335. *Id.* at 362, 384 P.2d at 653, 33 Cal. Rptr. at 261.
336. *Id.*
337. *Id.*

court limited its ruling to situations in which the employee spouse could not designate a beneficiary.[338]

It is not clear whether *Benson* had the effect of converting the pension plan into the husband's separate property.[339] Some courts have established a distinction between a right to payment during the employee spouse's lifetime, which falls under the general community property rules, and death benefits, which may be mandated by the form of the pension agreement.[340]

Some years later, the California Supreme Court expanded the terminable interest rule to hold that the community interest of a nonemployee spouse in a public retirement plan was not subject to testamentary disposition by the nonemployee spouse if she predeceased the employee spouse.[341] The court's holding in *Waite v. Waite* was the clearest expression of the terminable interest rule as it applied to transfers at the prior death of the nonparticipant spouse. Later cases extended the doctrine to private retirement plans.[342] For example, *In re Marriage of Bruegl*[343] held that while it was actuarially correct to divide community interests in a private noncontributory pension plan at divorce, nothing could be done to mandate a death benefit payment to the nonparticipant spouse.[344] The *Bruegl* decision was specifically overruled by the

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338. *Id.* at 363, 384 P.2d at 654, 33 Cal. Rptr. at 262. *See* Gettman v. Los Angeles Dep't of Water and Power, 87 Cal. App. 2d 862, 865-66, 197 P.2d 817, 819 (1948) (holding that where the participant spouse can name a death benefit beneficiary, the nonparticipant spouse has an enforceable community interest); Cheney v. City and County of San Francisco, 7 Cal. 2d 565, 568, 61 P.2d 754, 755-56 (1936) (holding that where parties had entered into a written contract providing that earnings of each should be separate property, the surviving spouse was not entitled to proceeds from the decedent's retirement plan).

339. *See* Culhane, *Toward Pension Equality: A "Death Blow" to California's Terminable Interest Doctrine*, 12 COMMUNITY PROP. J. 199, 202-04 (1985).

340. *See* Phillipson v. Board of Admin. of Pub. Retirement Sys., 3 Cal. 3d 32, 49-50, 473 P.2d 765, 776-77, 89 Cal. Rptr. 61, 72-73 (1970).

341. Waite v. Waite, 6 Cal. 3d 461, 467-68, 492 P.2d 13, 20-21, 99 Cal. Rptr. 325, 332-33 (1972).

342. *See infra* notes 341-48 and accompanying text (discussing cases which extended the terminable interest rule).

343. 47 Cal. App. 3d 201, 120 Cal. rptr. 597 (1975).

344. *Id.* at 206, 120 Cal. Rptr. at 598.

California Supreme Court in *In re Marriage of Brown*.[345] *Estate of Allen*[346] and *Marriage of Peterson*[347] lend further support to the expansion of the terminable interest rule.[348]

However, judicial resistance to the terminable interest doctrine arose. One court of appeal refused to apply the doctrine to a public retirement plan in part because the husband made direct contributions of community property to the plan.[349] Another decision rejected application of the terminable interest doctrine to any private pension plan.[350]

In response, the legislature adopted California Civil Code section 4800.8 in 1986.[351] This statute expanded the power of California courts to divide pension and employee benefits at divorce.[352] The legislative intent was "to abolish the terminable interest rule set forth in *Waite v. Waite*, [citation omitted], and *Benson v. City of Los Angeles*, [citation omitted], in order that retirement benefits shall be divided in accordance with Section 4800. . . ."[353] Thus, the legislative intent was two-fold. First, the legislature sought to abolish the terminable interest doctrine as delineated in *Waite* and *Benson*, which were not divorce cases.[354] Second, the legislature sought to abolish the rule as it applied in divorce cases. Consequently, where there is no divorce, the nonemployee spouse has a right to make a testamentary disposition of his community interest in the employee's death benefit.

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345. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

346. 108 Cal. App. 3d 614, 166 Cal. Rptr. 653 (1980).

347. 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (1974).

348. *See Allen*, 108 Cal. App. 3d at 617-18, 166 Cal. Rptr. at 655 (1980) (rejecting arguments against extending the application of the terminable interest rule to private pension plans); *Peterson*, 41 Cal. App. 3d at 656, 115 Cal. Rptr. at 194 (1974) (permitting wife to share in husband's pension rights prior to his death even though she had no vested interest in any amounts payable after his death).

349. *See* Chirmside v. Board of Admin., 143 Cal. App. 3d 205, 211, 191 Cal. Rptr. 605, 609 (1983) (concluding that the *Benson-Waite* line of terminable interest rule cases was inapplicable in the case at bar).

350. *See* Bowman v. Bowman, 171 Cal. App. 3d 148, 152, 217 Cal. Rptr. 174, 176 (1985).

351. CAL. CIV. CODE § 4800.8 (West 1988).

352. *See id.* (empowering courts to make "whatever orders are necessary or appropriate" to assure each party is awarded an equal share of the community property upon dissolution of marriage).

353. 1986 Cal. Stat., ch. 686, sec. 1, at 506.

354. *See supra* notes 330-48 and accompanying text (discussing *Waite* and *Benson*).

Four recent California court of appeal cases have upheld the retroactive statutory abolition of the terminable interest rule.[355] *Marriage of Taylor*[356] held that the terminable interest rule was abolished in the case of a divorce.[357] *Estate of Austin*[358] and *Estate of MacDonald*[359] held that the rule was also abolished for the purposes of transfers at death.[360] *Marriage of Powers*[361] involved a marriage dissolution which occurred in 1979.[362] The trial court reserved jurisdiction over the community property pension plan.[363] Since the terminable interest rule had been abolished retroactively for all purposes, the court of appeal held that the abolition applied to the former spouse's unresolved community interest in the pension plan.[364] The court of appeal in *MacDonald* concluded that the wife's community interest in the pension plan in question had been terminated.[365] Therefore, the court stated that "[n]o interference with contractual rights between an employer -- private or public -- and its employee could have occurred."[366]

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355. *See In re* Marriage of Powers, 218 Cal. App. 3d 626, 639, 267 Cal. Rptr. 350, 356 (1990) (concluding that retroactive application of section 4800.8 furthers the state's interest in equitable division of marital property); Estate of MacDonald v. MacDonald, 213 Cal. App. 3d 456, 261 Cal. Rptr. 653, 656-57 (1989) (concluding that the terminable interest rule has been abolished in all contexts); Estate of Austin, 206 Cal. App. 3d 1249, 1255, 254 Cal. Rptr. 372, 377 (1988) (applying the law in effect at the time of decedent's death, excluding the terminabler interest rule, in an inheritance tax proceeding); *In re* Marriage of Taylor, 189 Cal. App. 3d 435, 440, 234 Cal. Rptr. 486, 489-90 (1987) (applying section 4800.8 retroactively to determine wife's interest in husband's retirement benefits).

356. 189 Cal. App. 3d 435, 234 Cal. Rptr. 486.

357. *Id.* at 440, 234 Cal. Rptr. at 489.

358. 206 Cal. App. 3d 1249, 254 Cal. Rptr. 372.

359. 213 Cal. App. 3d 456, 261 Cal. Rptr. 653.

360. *Austin*, 206 Cal. App. 3d at 1255, 254 Cal. Rptr. at 377; *MacDonald*, 213 Cal. App. at 456, 261 Cal. Rptr. at 656-57.

361. 218 Cal. App. 3d 626, 267 Cal. Rptr. 350.

362. *Id.* at 639, 267 Cal. Rptr. at 356.

363. *Id.* at 634, 267 Cal. Rptr. at 355-56.

364. *Id.* at 635-36, 267 Cal. Rptr. at 357.

365. Estate of MacDonald v. MacDonald, 213 Cal. App. 3d 456, 261 Cal. Rptr. 653, 657 (1989). The terminable interest rule was not discussed by the supreme court. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 266, 794 P.2d 911, 915, 272 Cal. Rptr. 153, 157 (1990).

366. *MacDonald*, 213 Cal. App. 3d 456, 261 Cal. Rptr. at 657.

It is technically arguable that the adoption of California Civil Code section 4800.8 did not abolish the terminable interest rule for all purposes. It is also technically arguable that the rule had either been abolished or weakened to the point of extinction by case law prior to the adoption of section 4800.8. As Professor Reppy points out, the technical basis for application of the terminable interest rule at death was effectively eliminated when *Waite* "was legislatively jettisoned."[367] The conclusion is inescapable that the terminable interest rule should be laid to rest for all purposes. Unfortunately, this kind of doctrine does not die easily. The terminable interest doctrine arose when applied to "widow's" pensions.[368] Simply abolishing the rule does not answer the question of how to handle widow's pensions or other death benefits which mandate payment only to specified persons and do not permit an employee or participant to designate a beneficiary.

For all of its strong language about abolition of the terminable interest rule, California Civil Code section 4800.8 appears to hedge its bets. In the case of a marital dissolution, the statute orders the court to do one of the following:

> (a) Order the division of any retirement benefits payable on or after the death of either party in a manner consistent with Section 4800.
> (b) Order a party to select a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, *in any case where the retirement plan provides for such a selection.*[369]

How should a court apply this direction where the death benefit under the plan must be paid to a surviving spouse? Should courts attempt to change the terms of the plan itself by, as some have suggested, extending "surviving spouse" to include a former

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367. Reppy, *Update on the Terminable Interest Doctrine: Abolished in California; Adopted and Expanded in Arizona*, 14 COMMUNITY PROP. J. 1, 2 (July 1987).

368. *See, e.g.*, Waite v. Waite, 6 Cal. 3d 461, 473-74, 492 P.2d 13, 21-22, 99 Cal. rptr. 325, 333-34 (1972) (refusing to subject judicial retirement benefits to division upon death of participating spouse).

369. CAL. CIV. CODE § 4800.8 (West 1988) (emphasis added).

spouse?[370] In view of constitutional and other dangers in changing the terms of a plan, should courts impose a lien or constructive trust on the death benefit when paid? And what if, as in the case of the IBM plan,[371] there is a provision that the benefit will be paid to children of the employee in the absence of a surviving spouse? Should the children be forced to pay the community share to the former spouse?

Perhaps an example will best illustrate why something as simple as abolishing the terminable interest rule is not so simple after all. A husband and wife have been married and living in California for thirty years. During that time, the husband's employer provided a death benefit payable to the surviving spouse of any employee who dies while working for the company. The wife dies in 1990. Under the wife's will, her entire estate passes to her children. The husband remarries in 1991 and dies shortly thereafter. Who receives the death benefit? Does part of the benefit pass to the children under the deceased wife's will? If so, how much of the benefit will pass? Since this is a nonvested property right, contingent on the husband's continued employment with the company, the community interest of the wife would probably be valued under rules similar to those used in the case of nonvested pension benefits on divorce. Assuming there is an interest in the plan which passes under the deceased wife's will, may the employer be compelled to pay it directly to the children, despite the terms of the plan, or will the children have to seek collection from the widow?

Valdez v. Ramirez,[372] a Texas case involving a federal preemption issue, dealt specifically with the above-stated problem.[373] In *Valdez*, the wife was a civil service employee of

370. *See In re* Marriage of Nice, 230 Cal. App. 3d 444, 452, 281 Cal. Rptr. 415, 420 (1991) (concluding that case law and section 4800.8 suggest that with respect to pension plans on dissolution of marriage, community property rights have priority over contractual ones).

371. *See supra* notes 320-323 and accompanying text (discussing IBM employee illustration).

372. 574 S.W.2d 748 (1978).

373. *Id.* at 749.

the federal government, which provided a pension plan.[374] The pension plan provided retirement payments to the employee.[375] In the event of the employee's death, the payments were to be paid to the employee's surviving spouse or, under certain circumstances, the employee's children, or both the spouse and children.[376] There was no provision for payment outside of the immediate family.[377] The wife elected a joint and survivor annuity for herself and her husband.[378] Her husband predeceased the wife and through intestate succession the husband's community property passed to his two adult children.[379] The Texas Supreme Court concluded that the children had no claim against their mother's annuity since payment to the children would be contrary to the terms of the Civil Service Act and the wife's election of a joint and survivor annuity.[380]

Valdez was subsequently distinguished by the Texas Supreme Court in *Allard v. Frech*.[381] In *Allard*, the pension at issue was a private retirement plan, the terms of which provided the employee with options as to the payments under the plan.[382] The employee in *Allard* did not elect a joint and survivor annuity.[383] The *Allard* court distinguished *Valdez* on the ground that it would have been "contrary to the entire contract, policy, and plan of the Federal Retirement Act" to allocate benefits to the heirs of the predeceased nonemployee spouse.[384] It is not clear what the result would have been if the plan in *Allard* had mandated a death benefit only to a surviving spouse. However, *Valdez* and *Allard* noted that certain assets, including pension claims, are subject to different management and control provisions under which the participant

374. *Id.*
375. *Id.* at 750.
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.* at 749.
380. *Id.* at 751.
381. 754 S.W.2d 111 (1988).
382. *Id.* at 113.
383. *Id.* at 114.
384. *Id.*

spouse has sole management and control.[385] As a result, the nonparticipant spouse could not object to the selection of a joint and survivor annuity option in *Valdez* or the failure to select that option in *Allard*.[386] A similar conclusion was reached in *O'Hara v. Public Employees Retirement Board*,[387] in which the Nevada Supreme Court held that "[a]n employee spouse may select among retirement options so long as the community property interest of the nonemployee spouse is not defeated."[388]

The issue of federal preemption of death benefits from qualified retirement plans must be considered in light of the various federal laws governing these plans, in particular the Retirement Equity Act of 1984.[389] In general, regardless of any plan provisions or state law to the contrary, most retirement plans are required to pay benefits in the form of an annuity to the surviving spouse on behalf of the deceased participant who had not yet retired or achieved what is referred to as an annuity starting date.[390] Where the participant dies after the annuity starting date, usually the date of retirement, the benefit must be in the form of a joint and survivor annuity with the spouse.[391] The nature, extent, and amount of the required annuity payments depend upon the plan involved.[392] The joint and survivor annuity or survivor annuity may be waived with a written election by the participant in which the spouse joins.[393] The writing must designate the beneficiary and the form of benefit, both of which may only be changed with the nonparticipant spouse's signed general consent. A variety of other technical requirements for these elections and consents are set forth in

385. *Valdez*, 574 S.W.2d 748, 751; *Allard*, 754 S.W.2d at 120 (Spears, J., dissenting & concurring).

386. *Valdez*, 574 S.W.2d at 751; *Allard*, 754 S.W.2d at 120 (Spears, J., dissenting & concurring).

387. 104 Nev. 642, 764 P.2d 489 (1988).

388. *Id.* at 644, 764 P.2d at 490.

389. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 203(b), 98 Stat. 1441 (1984) (codified as amended at 26 U.S.C. § 417 (1991)).

390. I.R.C. § 401(a)(11)(A) (1991).

391. *Id.*

392. *Id.*

393. I.R.C. § 417(a)(1),(2) (1991).

Internal Revenue Code section 417.[394] Although there is no real authority on point, most practitioners believe that this mandate of the form of retirement benefits, particularly under private pension plans, does not recharacterize the community or separate status of the benefits.

The status of death benefits is not clear where the nonparticipant spouse who has a community interest in the plan predeceases the participant spouse. The Employee Benefits Committee of the American College of Trusts and Estates Counsel is currently seeking to clarify legislation in this area. The recent study of the California Law Revision Commission on the repeal of California Civil Code section 704, *Passage on Death of Ownership of U.S. Savings Bonds*, is instructive in this respect. This study suggested that California Civil Code section 704 be replaced with a codified statement of applicable federal law or related federal material. The Commission disagreed with this approach for various reasons, including the possibility that federal law will not be correctly stated, is frequently amended, and will control in any case.[395] These reasons are equally valid in the area of death benefits.

Additionally, federal law does not preempt beneficiary designations in all cases, such as the situation in *MacDonald*, and preemption may not cover one hundred percent of the death benefit.[396] It is doubtful that the federal rules actually change the community character of death benefits, whereas comparable state law might be construed as changing its community status. In other words, if a state statute specifically limits the right of a participant to name a death beneficiary of a pension plan, the community characterization of the benefit received under the plan might be questioned.

Assuming the terminable interest rule has been or should be abolished, is the abolition retroactive? Three California courts of

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394. *Id.* at § 417 (1991).

395. Cal. L. Revision Comm'n Staff Memorandum 90-91 (1990).

396. *See, e.g.*, Savings and Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038, 1040 (1983) (holding ERISA did not preempt state court from awarding spouse one-half of beneficiary's interest in a pension fund as part of a divorce property settlement).

appeal have had no difficulty concluding that the abolition is retroactive.[397] However, the abolition of the terminable interest rule as it applies to property interests in death benefits, aside from marital dissolution cases, could be deemed an alteration of property rights of the spouses. But does the rule or its abolition deprive spouses of vested rights? Does abolition of the terminable interest rule impair contract obligations? The terminable interest rule was not based on a contract or agreement between the spouses. Further, the rule was judicially created and, as many cases indicate, the extent of its application was never clear.[398] The terminable interest rule did not extend to transfers at death.[399] Thus, the abolition of the terminable interest rule may be analogous to application of quasi-community property law in marital dissolution cases, in which courts have held that there is no interference with vested property rights.[400]

If the California terminable interest rule dictates that the nonparticipant spouse has no community interest in a pension or death benefit plan, but new legislation specifically confers upon the nonparticipant spouse a testamentary power over the plan, a constitutional issue may arise. Professor Reppy suggests that benefits paid after death, which he characterizes as a future interest, are the participant spouse's separate property under the terminable interest rule.[401] The vested or contingent nature of this future interest is irrelevant to the issue of constitutional protection.[402]

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397. *In re* Marriage of Powers, 218 Cal. App. 3d 626, 267 Cal. Rptr. 350 (1990); Estate of Austin, 206 Cal. App. 3d 1249, 254 Cal. Rptr. 372 (1988); *In re* Marriage of Taylor, 189 Cal. App. 3d 435, 234 Cal. Rptr. 486 (1987). *See* Reppy, *supra* note 367, at 4 (discussing the retroactive application of the abolition of the terminable interest rule).

398. *Powers*, 218 Cal. App. 3d at 635, 267 Cal. Rptr. at 353 (noting that the terminable interest rule was judicially-developed and that it was subject to "considerable appellate and academic criticism.").

399. *See In re* Marriage of Nice, 230 Cal. App. 3d 444, 450, 281 Cal. Rptr. 415, 419 (1991); *Powers*, 218 Cal. App. 3d at 635, 267 Cal. Rptr. at 653 (quoting *Chirmside v. Board of Admin.*, 143 Cal App. 3d 205, 208, 191 Cal. Rptr. 605, 606 (1983)).

400. Addison v. Addison, 62 Cal. 2d 558, 568, 43 Cal. Rptr. 97, 103 (1965). *Addison* did not extend to the transfer of quasi-community property at death. *Id.* at 565-66, 43 Cal. Rptr. at 101.

401. Reppy, *supra* note 397, at 5.

402. *Id.*

Thus, a statute giving the nonparticipant predeceased spouse testamentary power over employee death benefits would permit a nonparticipant spouse to dispose of the participant spouse's separate property. This result exceeds the scope of California Probate Code section 66.[403]

The Internal Revenue Service has issued a private letter ruling discussing generally the terminable interest rule and the possible impact of federal tax law.[404] Although private letter rulings may not be cited as precedent, private letter ruling 89-43-006 provides useful commentary in this area. The ruling held that a nonparticipant spouse's community interest in a pension plan was included in her taxable estate for federal estate tax purposes even though her interest terminated upon her death under applicable state law and passed to the surviving spouse.[405] The Service's conclusion was based in part upon the application of the terminable interest rule as applied in *Ablamis v. Roper*.[406] In *Ablamis*, the trial court concluded that the terminable interest rule had not been abolished for purposes of transfers at death.[407] Moreover, the Service concluded that preemption under federal law requires the same result.[408]

The result in the private letter ruling is correct in that it acknowledges that the deceased spouse's interest in the death benefit is community property which does not magically disappear at death and magically reappear as the surviving spouse's separate property. Rather, as the Service observed, the decedent's community interest passes to the surviving spouse by operation of state or federal law or the terms of the plan itself.[409] To the extent that a state or federal legislature can control the distribution of community property at death, the legislature can mandate a

403. *See* CAL. PROB. CODE § 66 (West 1991) (defining quasi-community property).
404. Priv. Ltr. Rul. 89-43-006 (Oct. 27, 1989).
405. *Id.*
406. No. 80 Civ. 20353 (D.C. N.D. Cal. 1989); Priv. Ltr. Rul. 89-43-006 (Oct. 27, 1989).
407. *Ablamis*, No. 80 Civ. 20353 (D.C. N.D. Cal. 1989), *aff'd* 937 F.2d 1450 (1991).
408. Priv. Ltr. Rul. 89-43-006 (Oct. 27, 1989).
409. *Id.*

testamentary or nonprobate transfer of this community asset as well as any other asset.

Based on the foregoing, retroactive legislation permitting the nonparticipant spouse to make a testamentary disposition of death benefits probably is not subject to constitutional attack, but this is by no means certain. This conclusion is based on the fact that the terminable interest rule evolved through case law, that the extent of its application has never been clear, and that the decisions applying the rule do not specifically hold that death benefits are something other than community property or that they automatically lose their community identity upon death. Four California decisions have found that the repeal of the terminable interest rule was retroactive.[410] However, the California Supreme Court did not consider the issue in *MacDonald*.[411] Further, adoption of the view that a pension or retirement benefit is community property while both spouses are alive, but that the death benefit arising from that plan automatically becomes separate property at the death of either spouse, would seem to permit the legislature to repeal the rule of automatic transmutation. However, where a plan specifically provides that the payee shall be the participant's surviving spouse or children, legislation which automatically rewrites the plan to change the beneficiary designation and allows a deceased spouse to transfer a community interest in the benefit would interfere with contract rights.

The California Legislature may well decide to leave the above-described issues to the courts. Hence, new legislation could only confirm the right of the nonparticipant spouse to make a testamentary disposition or consent to a nonprobate transfer of her

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410. *In re* Marriage of Powers, 218 Cal. App. 3d 626, 267 Cal. Rptr. 350 (1990); Estate of MacDonald v. MacDonald, 213 Cal. App. 3d 456, 261 Cal. Rptr. 653 (1990); Estate of Austin, 206 Cal. App. 3d 1249, 254 Cal. Rptr. 372 (1988); *In re* Marriage of Taylor, 189 Cal. App. 3d 435, 234 Cal. Rptr. 486 (1987). For a discussion of these cases, see *supra* notes 351-71 and accompanying text.

411. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 266, 794 P.2d 911, 914, 272 Cal. Rptr. 153, 156 (1990). Although the court of appeal declined to apply the terminable interest rule to the pension funds at issue, Mr. MacDonald did not challenge the lower court's decision in his petition for review. *Id.*

community interest in a retirement plan or death benefit in a manner not inconsistent with the provisions of the plan or any applicable state or federal law. If the terminable interest rule has in fact been abolished for all purposes, legislation should not only acknowledge the rule's abolition, but also permit the nonparticipant spouse to act accordingly. New legislation should not specifically authorize the spouse to make a disposition contrary to the provisions of the plan or to alter any provisions of public retirement plans which specify the identity of the death beneficiary and should probably acknowledge the possibility of federal preemption. To address the issue of retroactivity, without attempting to resolve it, the new statute should be made effective only for deaths occurring after the effective date of the legislation, as are other California Probate Code provisions.[412]

C. Other Will Substitutes

There are a variety of other forms of will substitutes, such as, Totten trusts, joint bank accounts, and agreements for the purchase of business interests on the death of shareholders and partners, which produce issues similar to those which arise with respect to life insurance and death benefits. Unfortunately, after the court's decision in *MacDonald*, these forms of will substitutes are also suspect insofar as spousal consents are concerned. For example, *MacDonald* raises the danger that a spousal consent to a sale of community property stock under a corporate buy and sell agreement could be rescinded upon the consenting spouse's death if the personal representative argues that the price is inadequate and deprives the beneficiaries of the estate of the stock's true value.[413]

The Law Revision Commission is currently considering the use of transfer-on-death designations for motor vehicles and vessels in

412. *See* CAL. PROB. CODE § 3 (West 1991).

413. *See MacDonald*, 51 Cal. 3d at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161 (stating that an underlying policy of § 5110.730 is "the desirability of assuring that a spouse's community property entitlements are not improperly undermined . . .").

California.[414] Given the number of Vehicle Code sections that would be affected by this proposal,[415] the best solution would be to specifically bring all transfers of motor vehicles and vessels, due to the owner's death, within the scope of California Probate Code section 5000.[416]

VI. RECOMMENDATIONS FOR CHANGE IN SPOUSAL CONSENT STATUTES

The effect of spousal consents to death beneficiary designations and other forms of will substitutes involving community property should be determined under gift rules, not transmutation rules. While *MacDonald* was probably correct in its determination that the spousal consent at issue did not result in a transmutation of the husband's IRAs to separate property,[417] the decision was incorrect in its failure to recognize the effectiveness of the consent upon a gift which took effect at death. Although the California Supreme Court's review of *MacDonald* was limited to the issue of transmutation, the language in footnotes four and five of that review discounts the effectiveness of spousal consent in general and the effectiveness of consent as a will substitute in particular.[418]

One of the most effective forms of a will substitute for transfer of community property is the revocable living trust. A revocable living trust is a lifetime transfer of property in a form which can be revoked by at least one spouse.[419] Upon the death of either

414. Cal. L. Revision Comm'n Staff Memorandum 90-141, *TOD Registration of Vehicles and Vessels* (November 20, 1990).

415. CAL. VEH. CODE §§ 5600-6502 (West 1987 & Supp. 1991) (providing for transfers of title or interest in vehicles).

416. *See* CAL. PROB. CODE § 5000 (West 1991) (providing for form of nonprobate transfers effective at death).

417. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 272, 794 P.2d 911, 918, 272 Cal. Rptr. 153, 160 (1990).

418. *Id.* at 267 nn. 4-5, 794 P.2d at 915 nn. 4-5, 272 Cal. Rptr. at 157 nn. 4-5.

419. M. KINEVAN, PERSONAL ESTATE PLANNING (20th ed. 1989).

spouse, a revocable living trust disposes of that spouse's community interest in trust assets.[420]

Former California Civil Code section 5113.5 provided that the assets in a trust would retain their community status if the trust was revocable during the joint lives of the spouses, limited trustee management powers to those the spouses would have in the community property, and could not be altered or amended unless both spouses agreed.[421] Section 5113.5 was replaced by current California Civil Code section 5110.150, effective July 1, 1987.[422] The new statute similarly provides that assets held in a trust will retain community status if the trust is revocable during the marriage and that the power to modify the trust *as to the rights and interests in that property during the marriage* requires the joinder or consent of both spouses.[423] Unless the trust specifically provides otherwise, it can be revoked by either spouse acting alone.[424] The management powers of the trustee are somewhat broader than under the prior statute, and there is no requirement that trust document specifically provide that assets in the trust will retain their community status.[425] Under section 5110.150, all assets withdrawn from the trust retain community status.[426]

The statutory history of the revocable living trust defines community property rights while both spouses are alive, but does not deal with the dispositive provisions of the trust after the death of one spouse.[427] Since the other forms of will substitutes focus on transfers at death rather than lifetime management, the revocable trust may be distinguished from other forms of will substitutes. However, revocable trust statutes and the Ninth Circuit decision in *Katz v. United States*[428] focus on the question of whether consent to the terms of a trust results in a transmutation or waiver of

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420. *Id.*
421. CAL. CIV. CODE § 5113.3 (West 1983) (repealed 1986).
422. 1986 Cal. Stat. ch. 820, sec. 14 (enacting CAL. CIV. CODE § 5110.150).
423. CAL. CIV. CODE § 5110.150 (West Supp. 1991).
424. *Id.*
425. *Id.*
426. *Id.*
427. *Id.* § 5110.150 Legislative Committee Comment (West Supp. 1991).
428. 382 F.2d 723 (9th Cir. 1967).

community property rights.[429] *Katz* held that a consent does not result in a transmutation or waiver.[430] Further, based on statutory and case law, it is generally assumed that, barring a specific transmutation, consent to the terms of a revocable trust will not alter the consenting spouse's property rights in the trust until death.[431] In *Katz*, the court of appeals found that no transmutation or conveyance of community property to the husband resulted from the wife's consent to the establishment of the trust.[432]

The statutory history of the revocable trust does suggest possible alternative approaches to beneficiary designations for life insurance, death benefits, and other forms of will substitutes.[433] One possibility is to require the consent of both spouses to select a beneficiary.[434] However, dual consent would be expressly contrary to the provisions of most policies or death benefit plans and does not address the issue of revocability of the beneficiary designation.

Another possibility is to permit either spouse to revoke the beneficiary designation while both spouses are alive. However, this approach ignores the provisions of most policies or death benefit plans and would force the insurer or plan administrator to recognize the existence of a community interest in the plans or benefit and honor a notice received from someone who is not a party to the contract.

In the case of life insurance policies, the Wisconsin version of the Uniform Marital Property Act follows the second alternative, to some extent, with the following provisions:

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429. *Id.*; CAL. CIV. CODE § 5110.150 (West Supp. 1991); *id.* § 5113.5 (West 1983) (repealed 1986).

430. *Katz*, 382 F.2d at 729-30.

431. *See, e.g., In re* Estate of Carson, 234 Cal. App. 2d 516, 44 Cal. Rptr. 360 (1965).

432. *Katz*, 382 F.2d at 730.

433. California Law Revision Comm'n, *Proposing Trust Law*, 18 CAL. L. REVISION REP. 50 (1985).

434. *See* Bruch, *Management Powers and Duties Under California's Community Property Laws; Recommendations for Reform*, 34 HASTINGS L.J. 227 (1982) (discussing the requirement of both spouses' consent to beneficiary designations).

> (e) A written consent in which a spouse consents to the designation of another person as beneficiary of the proceeds of a policy . . . is effective, to the extent the written consent provides, to relinquish or reclassify all or a portion of that spouse's . . . ownership interest or proceeds of the policy without regard to the classification of property used by a spouse or another person to pay premiums on that policy. Unless the written consent expressly provides otherwise, a revocation of a written consent is effective no earlier than the date on which it is to reclassify and property which was reclassified or in which the revoking spouse relinquished an interest from the date of the consent to the date of revocation.
> (f) Designation of a trust as the beneficiary of the proceeds of a policy with a marital property component does not by itself reclassify that component.[435]

The Wisconsin provisions, last amended in 1985, are confusing. The statute permits the use of consent to transmute a marital property interest in a policy, but indicates that the consent to a beneficiary designation is revocable.[436] A revocation, however, does not change the transmutation of interests. Two things are being confused here: a consent which operates as a waiver or transfer of a community or separate interest in the policy, a transmutation; and a procedure for consenting to and revoking a consent to a beneficiary designation.

To afford some protection to the insurance companies, section 766.61(2)(b) of the Wisconsin Statutes clearly provides that an insurer may rely on its own records.[437] If an insurer takes action based on the policy provisions and its own records, the insurer cannot be held liable.[438] Classifying the policy as marital property does not affect the insurer's duties.[439] However, if the insurer receives notice of a claim against the policy at least five days before taking action, and documentation of that claim is received within fourteen days thereafter, the insurer can postpone action

435. WIS. STAT. ANN. § 766.61(3)(e),(f) (West Supp. 1991).
436. *Id.*
437. *Id.* § 766.61(2)(b)(1) (West Supp. 1991).
438. *Id.*
439. *Id.* § 766.61(2)(b)(2) (West Supp. 1991).

until the claim is resolved.[440] Documentation may be in the form of a decree, a marital property agreement, a written directive signed by the beneficiary and surviving spouse, a consent as discussed above, or proof that legal action has been commenced.[441]

The Wisconsin statute functions as an inchoate gift rule as well as a transmutation statute, since it results in reclassification of the policy or premiums. A transfer of a policy or its premiums is a revocable gift or transmutation, except to the extent that interest on the policy accrues between the date of consent and the date consent is revoked. While the Wisconsin approach is good in many respects, the most questionable aspect of the statute is the extent of transmutation effected. For example, if only a beneficiary designation consent is involved, it is difficult to see the policy behind classifying the designation consent as a transmutation rather than simply a gift which becomes complete at death. An actual transmutation of the policy or premiums should be handled under the usual transmutation rules. On the other hand, the revocability provision of the statute accords with the consenting spouse's right to change his mind regarding beneficiary designations, settlement options, and other decisions relating to insurance policies. The statute does lack a requirement of notice of revocation, both to the insurer and the other spouse, which seems a reasonable requirement. Also, thought should be given to an automatic revocation provision in the event the policy owner seeks to change a beneficiary or exercise other rights under the policy.

Section 12(c)(5) of the Uniform Marital Property Act, from which the Wisconsin version is derived, also applies a transmutation consent rule to life insurance as follows:

> Written consent by a spouse to the designation of another person as the beneficiary of the proceeds of a policy is effective to relinquish that spouse's interest in the ownership interest and proceeds of the policy

440. *Id.* § 766.61(2)(c)(1) (West Supp. 1991).
441. *Id.* § 766.61(2)(c)(2) (West Supp. 1991).

> without regard to the classification of property used by a spouse or another to pay premiums on the policy.[442]

In view of the confusing language in the Wisconsin statutes, which permit a transmutation with regard to a beneficiary designation, and the *MacDonald* argument that a consent is not a transmutation,[443] the designation of a beneficiary, exercise of rights or options under a policy or plan, or spousal consent to the exercise of these rights, should not result in a transmutation of either spouse's community interest in the plan, unless there is express written documentation of transmutation.

A third approach to the consent issue is to require the nonparticipating spouse's written consent to change the beneficiary designation or other options under the plan or policy. This approach is subject to the same objections as the requirement that both spouses consent to any beneficiary designation. Furthermore, the third alternative overlooks the problems created by marital disharmony. Thus, this approach is not a good solution.

Following the lead in the revocable trust area, the exercise of rights in insurance policies, pension plans, Keoghs, IRAs, and other assets which may pass by contractual designation while both spouses are alive should fall within basic management and control rules, regardless of the consent of the nonowner spouse. The Wisconsin statute illustrates the problems of conferring management rights upon a nonowner spouse. To the extent a nonowner spouse believes his community interest in the policy or plan is being mishandled or is in jeopardy, he can seek relief from the courts under California Civil Code section 5125.1, or in the case of pension plans, under California Civil Code sections 4363 through 4363.2.[444]

The new statutes should clearly provide that consents or waivers only as to death beneficiary designations are not deemed transmutations of community or separate interests in these policies

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442. UNIF. MARITAL PROPERTY ACT §12(c)(5), 9A U.L.A. 127 (1987).

443. Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 272, 794 P.2d 911, 918, 272 Cal. Rptr. 153, 160 (1990).

444. CAL. CIV. CODE § 5125.1, §§ 4363-4363.2 (West 1983 & Supp. 1991).

or plans, absent specific compliance with California Civil Code section 5110.730.[445] Designation consents, which must be written, should be revocable while both spouses are alive, much like revocable living trusts. However, if the owner spouse changes a beneficiary without obtaining a new consent from the other spouse, the consent should be automatically revoked. The designation of a beneficiary or the exercise of any other rights under a plan or policy by one spouse without the written consent of the other spouse should not affect the community property interest of the other spouse in the plan or policy. This last proposal is merely a restatement of existing law, which provides that upon the death of either spouse, the surviving spouse's one-half community interest in the plan or policy would be fully vested, but subject to a forced election.[446]

It has been suggested that spouses have the power to make a nonprobate transfer of their community interest in assets which normally pass outside a will, such as life insurance policies or death benefits.[447] However, it is extremely unlikely that any insurance company, trustee, or pension plan administrator will accept a beneficiary designation other than from the owner of the life insurance policy or the plan participant.

Present and proposed legislation on nonprobate transfers of community property should clearly provide that spouses have the power to dispose of their community interest in community assets by either of the following:

> (1) a nonprobate transfer at death, if the transferor is authorized to do so by a written instrument described in Probate Code section 5000, or

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445. *See id.* § 5110.730 (West Supp. 1991) (requiring an express written declaration to effect a transmutation).

446. *See supra* notes 291-96 and accompanying text (discussing forced elections).

447. *See, e.g., In re* Marriage of Saslow, 40 Cal. 3d 848, 710 P.2d 346, 221 Cal. Rptr. 546 (1985) (concluding that transfer of husband's insurance policies was ineffective specifically because wife exerted undue influence on husband); Life Ins. Co. of North Am. v. Cassidy, 35 Cal. 3d 599, 676 P.2d 1050, 200 Cal. Rptr. 28 (1984) (holding that marital agreement permitting husband to change beneficiary on life insurance policy free from wife's community property interest was valid waiver of wife's rights in the policy).

> (2) a testamentary disposition or succession, if the transferor is not authorized to make a nonprobate transfer at death under a written instrument.

To the extent that one spouse makes an irrevocable lifetime transfer of an interest in a plan or policy without full consideration, the statutes should clearly provide, in accordance with existing law, that the other spouse can set the transfer aside entirely. To the extent that the action taken is revocable, the other spouse cannot set it aside, but should retain testamentary power over her full community interest. In other words, a beneficiary designation by one spouse cannot apply to the community interest of the other spouse without the other spouse's written consent.

The statutes should also provide that to the extent one spouse irrevocably designates a beneficiary or irrevocably assigns any interest in a plan or policy with the written consent of the other spouse, neither spouse can set aside the transfer or assert a community interest in the death benefit. The transfer should be deemed a completed gift with consent, and even if the benefits are not received until death, neither spouse should be able to set the transfer aside. However, this action should not be construed as a transmutation of the consenting spouse's community interest in the plan to the separate property of the other spouse. If the transfer is to the other spouse rather than to a third party, there must be written evidence that the consent was intended to operate as a transmutation.

If one spouse's beneficiary designation is revocable, and the other spouse consents to the designation, the gift should be deemed complete upon the death of either spouse, as to the consenting spouse's community interest. The surviving spouse's revocation or alteration of the beneficiary designation should be ineffective as to the community interest of the predeceased consenting spouse, and the community interest should pass in accordance with the beneficiary designation to which the decedent consented.

If the transferor spouse revokes or alters the transfer without the written consent of the other spouse, the other spouse's consent is made ineffective. Further, the consenting spouse may, during the

transferor spouse's lifetime, withdraw the consent. In either case, the property will be distributed as if no consent was obtained.

The preceding recommendations could be implemented with the following statutory changes.

First, California Probate Code section 5000(a) would be adopted as follows:

> (a) A provision for a nonprobate transfer on death in an nsurance policy, contract of employment, bond, mortgage, promissory note, certified or uncertified security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature or any other written instrument effective as a contract, gift, conveyance, or trust is not invalid because the instrument does not comply with the requirements for execution of a will.

The above language, borrowed from Uniform Probate Code section 6-201, would clarify the application of the law to partnership agreements, stock redemption plans, buy-sell agreements, powers of appointment, and other such agreements.[448] Otherwise, the above-stated language follows proposed legislation already developed by the Law Revision Commission staff.

Second, California Probate Code section 5001, defining property which is subject to nonprobate transfer, would be adopted as follows:

> Except as otherwise provided by statute, a provision for a nonprobate transfer on death in a written instrument described in Section 5000 may dispose of the following property:
>
> (a) The transferor's separate property.
> (b) The one-half of the community property that belongs to the transferor under Section 100, if the written instrument authorizes the transferor to make a nonprobate transfer.

448. UNIF. PROBATE CODE § 6-201, 8 U.L.A. 534 (1983).

> (c) The one-half of the transferor's community property that belongs to the transferor under Section 101, if the written instrument authorizes the transferor to make a nonprobate transfer.
> (d) In the event the surviving spouse of the transferor has executed a written consent to a nonprobate transfer, then subject to the provisions of Section 5003, the transferor may dispose of the surviving spouse's community or quasi-community interest in property subject to the nonprobate transfer, if the written instrument authorizes the transferor to make a nonprobate transfer.

The first three subdivisions follow the recommendations of the Law Revision Commission Staff.[449] Subdivision (d) specifically authorizes a spousal consent to the nonprobate transfer.

Third, California Probate Code section 5002, describing the testamentary power of a spouse not authorized to make a nonprobate transfer, would be added as follows:

> To the extent the written instrument described in Section 5000 does not authorize a spouse to make a nonprobate transfer as described in Section 5001, such spouse's community interest in the property subject to the nonprobate transfer shall be disposed of in accordance with Section 6101 or Sections 6400-14, inclusive. This provision shall apply regardless of which spouse is the first to die, but shall not apply to the extent a spouse has executed a written consent to a nonprobate transfer pursuant to Section 5001(d).

This proposed section would serve to clarify the nonconsenting spouse's right to make a testamentary disposition of her community interest in property subject to nonprobate transfer, unless she has executed a written consent.

Fourth, California Probate Code section 5003, describing the effect of written consents to nonprobate transfer, would be added as follows:

> (a) A written consent by a spouse to a nonprobate transfer pursuant to California Probate Code section 5000 shall not be deemed a relinquishment or transmutation of such spouse's community or separate

449. *Id.*

> interest in the property subject to the nonprobate transfer unless such consent meets the requirements of Civil Code section 5110.730.
> (b) Unless the written consent described in Paragraph (a) provides otherwise, the consent can be revoked in writing only during the lifetime of the consenting spouses, and is effective only with respect to the beneficiary or transferee named in it. Any revocation is effective no earlier than the date executed by the consenting spouse.
> (c) Any change of beneficiary or transferee with respect to a nonprobate transfer described in Probate Code section 5000 or during the joint lifetimes of the spouses shall automatically revoke entirely a written consent described in Paragraph (a) unless the consent expressly provides otherwise; provided, however, that in the event of the death of the consenting spouse, any subsequent change in beneficiary or transferee, or exercise of other rights over the property subject to the nonprobate transfer by the surviving spouse shall not be effective as to the community interest of the deceased spouse in such property, which shall be transferred in accordance with the provisions of the nonprobate transfer to which the predeceased spouse consented.

Subdivision (c) might alternatively provide the following:

> (c) Any change of beneficiary or transferee with respect to a nonprobate transfer described in Probate Code section 5000 shall revoke entirely a written consent described in Paragraph (a) unless the consent expressly provides otherwise, and the consenting spouse's community interest in such property shall be disposed of in accordance with Section 6101 or Sections 6400-14, inclusive.
> (d) Unless the written consent described in Paragraph (a) provides otherwise, such consent cannot be revoked after the death of the consenting spouse, either before or after the death of the other spouse, and the community interest of the deceased consenting spouse, shall be distributed to the beneficiary or beneficiaries to whom the consent applies.

Subsection (a) codifies the result in *MacDonald.*[450] Subsection (b) specifically reserves the consenting spouse's right to revoke a consent, but limits the period of revocation to the consenting

450. *See* Estate of MacDonald v. MacDonald, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

spouse's lifetime. Subsection (c) clearly provides that the spouse authorized to make a nonprobate transfer can change the beneficiary or transferee at any time. If the beneficiary or transferee is changed while both spouses are alive, consent is revoked. If changed after the consenting spouse's death, the beneficiary or transferee to whom the decedent consented will take a community interest, assuming that the deceased spouse intended her community interest to pass to that person. The alternate subsection (c) assumes that if the beneficiary is changed after the consenting spouse's death, the consent is also automatically revoked. However, the alternate subdivision (c) provides that the consenting spouse's community property interest passes by testamentary disposition.

Subsection (d) reverses the *MacDonald* result with regard to post mortem revocation of consent.[451] If the proposed alternate subsection (c) is adopted, the provision should end with the language, "either before or after the death of the other spouse."

Fifth, a new provision relating to gifts in view of death would be added to the California Civil Code as follows:

> A gift in view of death of property in which the spouse of the donor has a community interest is effective only as to the donor's community interest in such property; provided, however, that in the event that the donor's spouse consents in writing to the gift, the consent shall, unless either the gift or consent is revoked by either spouse, be effective as to the consenting spouse's community interest in the property. A revocation of the gift shall automatically revoke the consent for all purposes; a revocation of the written consent, if made during the lifetime of both spouses, shall revoke the gift only as to the community interest of the consenting spouse; an attempt to revoke the consent after the death of either spouse shall be ineffective.

This recommended provision is not as extensive as those suggested for nonprobate transfers because a gift in view of death is much less likely to occur, the subject matter is limited, and the time frame for revocation is much shorter.

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451. *See id.* at 267, 794 P.2d at 918, 272 Cal. Rptr. at 160 (concluding that there was no substantial evidence to support the trial court's finding that wife intended her consent to the beneficiary designations to be a transmutation of her community interest in the IRAs).

Finally, possible statutory provisions defining rights in community property life insurance could include the following:

> If a noninsured spouse predeceases an insured spouse, the community or separate interest of the deceased spouse in the insurance policy shall, in the absence of a written agreement or written consent to the contrary, be a dollar amount equal to a fraction of the interpolated terminable reserve plus prepaid premiums for the policy on the date of the predeceased spouse's death; such fraction to be determined on the bases of the total separate and community funds used to pay premiums during the entire period the policy is in effect. To the extent the source of premium payments cannot be traced, it shall be presumed all premiums paid during the marriage were paid with community funds.

A possible addition to the California Civil Code could be made as follows:

> (a) If the insurance policy has no interpolated terminable reserve value and the insured spouse dies during a period that the prepaid premiums providing the insurance coverage at the date of the insured's death were paid with community funds during the marriage, the community interest of the predeceased insured spouse shall be determined in accordance with paragraph (b).
> (b) If the noninsured spouse survives the insured spouse, the community or separate interest of the surviving spouse in then community or separate interest of the surviving spouse in the insurance policy shall, in the absence of a written agreement or consent to the contrary, be a dollar amount equal to a fraction of the proceeds of the policy; such fraction to be determined on the bases of the total separate and community funds used to pay premiums during the entire period the policy is in effect. To the extent the source of premium payments cannot be traced, it shall be presumed that all premiums paid during marriage were paid with community funds.

The above changes would clarify the extent of a noninsured spouse's community interest in a life insurance policy. The Internal Revenue Service's approach is generally followed in valuing a community interest in life insurance where the noninsured spouse

predeceases the insured spouse.[452] The interpolated terminal reserve is believe to better reflect the true economic value of the policy, rather than its cash surrender value, although the two values are often close.

The possible addition to the California Civil Code covers term insurance with no cash surrender value, but implements the suggestion in *Logan* that the surviving spouse has community rights in the proceeds of an insurance policy paid for with community funds.[453] The last part of the proposed statute simply restates existing apportionment rules.

These proposed recommendations do not address all of the problem issues regarding life insurance. They do not indicate how the predeceased spouse's interest can be protected after his death, as where the owner of the policy decides to cash the policy in or borrow against it. Nor do these recommendations resolve the issue raised by *Scott* as to whether the decedent's interest in the policy will continue to grow to reflect its investment value and whether the decedent's interest will translate into a share of the proceeds upon the insured's death.[454] These recommendations merely define the extent of the deceased spouse's community interest in the participant spouse's life insurance.

The following statutory change relating to nonparticipant spouses' rights to dispose of interests in retirement plans and death benefits should be considered:

> A predeceased spouse may dispose of his or her community interest in any contract of employment, compensation plan, pension plan, individual retirement plan, employee benefit pan, or self-employed retirement plan in which the surviving souse is the employee, participant, or owner pursuant to the provisions of Probate Code sections 5000-03, 6101, or 6400-14, to the extent such a testamentary disposition or consent to a nonprobate transfer is not inconsistent with the provisions of such contract or plan, or the provisions of any state or federal law applicable to such contract or plan.

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452. *See supra* notes 404-09 and accompanying text (discussing Internal Revenue Service's approach).

453. *See supra* notes 264-271 and accompanying text (discussing *Logan*).

454. *See supra* notes 273-87 and accompanying text (discussing *Scott*).

This proposed statute assumes the repeal or abolition of the terminable interest rule and permits and nonparticipant spouse to act accordingly, but not if such action is in conflict with the plan or applicable law.

Because of the possibility of the surviving spouse's waiver of rights to survivor benefits under Internal Revenue Code section 417,[455] thought should be given to a new statute relating to the effect of waivers of rights to survivor benefits under federal law, such as:

> A waiver of a right to a survivor benefit or other benefit under provisions of the Internal Revenue Code will not be characterized as a transmutation of the community property rights of the spouse or spouses executing the waiver.

The execution of waivers of rights to joint and survivor annuities or survivor benefits under the provisions of the Retirement Equity Act of 1984 should not be construed as a transmutation of community property rights.[456]

The provisions of California Probate Code sections 140 through 147, previously discussed, cover the waiver of property rights by a surviving spouse.[457] The scope of these provisions should extend to nonprobate transfers. Thus, the following provision should be added to Probate Code section 141(a):[458]

> (10) Any property right which may be subject to a nonprobate transfer pursuant to Section 5000-03 of the Probate Code.

No specific reference has been made in existing statutes to quasi-community property subject to testamentary disposition by the acquiring spouse. The definition of quasi-community under California Probate Code section 66 is applicable.[459] To the extent

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455. *See supra* notes 393-94 and accompanying text (discussing I.R.C. § 417).
456. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 203(b), 98 Stat. 1441 (1984).
457. *See supra* note 248 and accompanying text (discussing CAL. PROB. CODE §§ 140-47).
458. CAL. PROB. CODE § 141(a) (West 1991).
459. *Id.* § 66 (West 1991).

that an insurance policy, death benefit, or other property which could be the subject of nonprobate transfer is quasi-community property, the language of existing statutes may be even more confusing. The better solution would be one statute specifying that for purposes of the interspousal transfer provisions, quasi-community property, as defined under California Probate Code section 66, shall be treated in the same manner as community property *where the acquiring spouse is the first to die.*[460] Thus, a consent to a beneficiary designation would be covered by these provisions if the acquiring spouse predeceases the consenting spouse, but would be meaningless if the consenting spouse is the first to die.

CONCLUSION

The *MacDonald* case encompassed a variety of issues relating to lifetime transfers and transfers at death of community property and caused the need for statutory clarification to become apparent.[461] The requirements for transmutation and recharacterization of property rights were addressed by the legislature in the 1985 additions to the transmutation rule, but it is clear that further clarification is needed.[462] The rights of spouses to make testamentary dispositions of community and quasi-community property in the traditional manner by will are well-established. However, the increasing frequency of nonprobate transfers at death, by contract or other method, requires legislative action to define the community and quasi-community rights of the spouses, particularly where only one spouse has the right to make the disposition under the terms of the contract or plan.[463] Finally, the nature and extent of community property rights in assets such

460. *Id.*

461. *See supra* notes 18-56 and accompanying text (discussing *Estate of MacDonald v. MacDonald*, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990)).

462. *See supra* notes 7-17 and notes 193-222 and accompanying text (discussing CAL. CIV. CODE §§ 5110.710-5110.740).

463. *See supra* notes 249-416 and accompanying text (discussing community property interests in life insurance policies, death benefit plans, and other forms of will substitutes).

as life insurance policies and death benefits should be more clearly defined. The emphasis should be to assure, to the extent possible, equal rights of both spouses in all forms of community property, regardless of the property's unusual characteristics, including equal rights to transfer community property by gift or at death.