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Wendy L. Hillger

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Borelli v. Brusseau: Must a Spouse Also Be a Registered Nurse? A Feminist Critique

Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.

-John Stuart Mill¹

INTRODUCTION

Over time, women have been treated as unequal participants in society.² Laws were enacted which limited a woman's ability to, *inter alia*, own property, write out a will, and enter into a contract.³ Today, for the most part, women experience formal legal equality with the passage of federal and state laws which require the equal treatment of men and women.⁴ In spite of this, women have not achieved true equality.⁵ True equality stands for the proposition that women have economic and political

1. JOHN S. MILL, *THE SUBJECTION OF WOMEN* 86 (Susan Moller Okin ed., 1988).

2. See KATHARINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 1 (1993) (noting that at common law married women were thought of as their husband's property); *infra* notes 130-168 and accompanying text (delineating the historical subordination of women).

3. See BARTLETT, *supra* note 2, at 1 (stating that women were not able to enter into a contract, create a will, own property, or control their separate property estates); *infra* notes 130-132 and accompanying text (enunciating the rules applicable to women at common law).

4. See Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 68 (1979) (finding formal equality to be one way to define the principle of fundamental equality, since the exact nature of equality is ambiguous). Formal equality is said by some to be the insistence of equal application of the law. *Id.* at 68 n.53. Under the definition of equality as only being formal equality, sex discrimination law seeks to have no formal legal right be abridged on the basis of sex. *Id.* at 89. Professor Powers, however, argues that formal equality is not expansive enough. *Id.* Rather, Professor Powers advocates equal social participation of women and men as the proper goal. *Id.* at 102. Yet, since women workers have dual careers, with responsibilities at home and at work, their equal participation in the public sphere of jobs and careers is inhibited. *Id.* at 105-06; see *infra* note 174 (setting forth the numerous federal and California statutes which purport to guarantee equal access for men and women to public accommodations, housing, education, athletics, insurance, credit, government benefits, and pension plans).

5. See Powers, *supra* note 4, at 79-80 (maintaining that numerous legal barriers to women's full participation in public life still exist, such as the lawful exclusion of women from certain occupations solely on account of gender, the United States Supreme Court's recognition that separate but equal is alright based on sex in government education, and the adverse treatment that women workers face in employment benefit plans due to their childbearing responsibilities).

equality with men, in addition to formal legal equality.⁶ True equality has not been effectuated, due in part to a dichotomy that separates society into two spheres—a public sphere and a private sphere.⁷ Some feminist scholars argue that women are excluded from the public sphere, which includes politics, law, and business, while they are relegated to the private sphere, comprised of the family, home, and childrearing.⁸ Scholars argue that the effect of the public/private dichotomy is that women have traditionally been and continue to be subordinated by the law.⁹ Subordination still exists today because the law generally refrains from entering the private realm and regulating activities within the marriage.¹⁰ Thus, following the tradition of legal subordination of women, the Court of Appeal for the First District of California in *Borelli v. Brusseau*¹¹ held that a husband and wife's oral contract was unenforceable for want of consideration.¹²

6. SUSAN D. ROSS ET. AL., *THE RIGHTS OF WOMEN - THE BASIC ACLU GUIDE TO WOMEN'S RIGHTS* xiv-xv (Norman Dorsen ed., 3d ed. 1993); *See Powers*, *supra* note 4, at 102 (calling for equal participation for women and men in society).

7. *See infra* notes 137-149 and accompanying text (discussing the public/private dichotomy that operates to minimize the existence of women).

8. *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 1 n.3 (1992) (stating that feminist theories have been classified by their critique of the dichotomy); *infra* notes 147-167 and accompanying text (discussing the effects upon women of having a public/private dichotomy). *See generally Symposium on The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (showcasing a collection of treatments of the public/private distinction).

9. *See* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 154-55 (David Kairys ed., rev. ed. 1990) (establishing that the law is absent from the private sphere because of its failure to recognize and regulate familial conflicts, such as wife beating, and the failure to enforce promissory arrangements between spouses for provision of domestic services).

10. *See* LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 71 (1981) [hereinafter *MARRIAGE CONTRACT*] (highlighting the fact that courts have voided agreements by husbands to compensate wives for their work when the services are characterized by courts as a "wifely task"). Women's marital tasks have included housekeeping, entertaining, child care, participating in the husband's business or working on their husbands' farms. *Id.*; *see* *Frame v. Frame*, 36 S.W.2d 152, 154 (Tex. 1931) (striking down an agreement between husband and wife to compensate the wife for her work on his farm, since the wife had a pre-existing duty to provide these services without compensation). The wife kept the farm accounts, cooked for the hired help, collected rent, supervised field work, and sold the produce from the farm. *Id.* at 153.

11. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

12. *Id.* at 654, 16 Cal. Rptr. 2d at 20; *see MARRIAGE CONTRACT*, *supra* note 10, at 71 (contending that a wife is effectively precluded from receiving any monetary compensation for a large share of her life's work, since she is assigned the chores of domestic services by the traditional marriage contract). Since the law treats a wife's labor as her statutory duty, it deprives her of means for financial gain, and makes her dependent upon and subservient to her husband. *Id.* at 73; *see infra* notes 75-76 and accompanying text (setting out the requirements for a valid contract, in particular, mutual assent, offer, acceptance, and consideration); *infra* notes 169-185 and accompanying text (discussing the fact that even though women have largely achieved formal equality, with federal provisions like Title VII of the 1964 Civil Rights Act and their California equivalents, women are still subordinated by subtle and entrenched ways of society); *infra* notes 248-251 and accompanying text (noting the holding of *Borelli* and its discussion of consideration).

The *Borelli* court applied the traditional requirements for a valid contract and held that there was no consideration.¹³ California Family Code section 850, however, has arguably removed the consideration requirement for agreements between spouses regarding the disposition of property.¹⁴ The *Borelli* court either ignored this provision, failed to recall its existence, or believed that it was inapposite to the agreement at issue.¹⁵ Because stable marriages are essential to an ordered society and contracts for nursing care services upset marital stability, the court also held that the *Borelli*'s nursing care service contract was void since enforcement would be contrary to public policy.¹⁶ The court found that public policy requires regulation of the marriage relationship.¹⁷

Regardless of the *Borelli* court's holding that a wife cannot contract for her husband's separate property, the law is clear that under California's community property scheme married people can contract with each other with regard to the nature of their property.¹⁸ Spouses can agree to change the separate or community nature of their property at any time.¹⁹ A marital contract, including one whose terms call for changing the nature of property in exchange for nursing care services, should be treated as any

13. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20.

14. See CAL. FAM. CODE § 850 (West 1994) (providing that consideration is not required for agreements among spouses regarding property transmutions); *id.* § 1500 (West 1994) (establishing that the community property laws which define the respective property rights among husband and wife can be altered with a prenuptial agreement or other marital property agreement). Effective January 1, 1994, certain sections in the Civil Code, Code of Civil Procedure, Evidence Code, and Probate Code appear in the California Family Code. 1992 Cal. Stat. ch. 162, sec. 1-14, at 1-265. For a disposition of the repealed sections in connection with the California Family Code, see CAL. FAM. CODE at xxix-xli (West 1994). See also 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.3, at 64 (1990) (stating that consideration usually takes form as a return promise); *infra* notes 64-70 and accompanying text (discussing the requirements of California Family Code § 850); *infra* notes 60-63 and accompanying text (noting the requirements for a valid premarital agreement).

15. See *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20 (discussing consideration instead of applying California Family Code § 850).

16. *Id.*

17. *Id.* at 652, 16 Cal. Rptr. 2d at 19; see *Hill v. Hill*, 23 Cal. 2d 82, 86, 142 P.2d 417, 419 (1943) (noting that for the benefit of society, laws shall not encourage dissolution of established marital relationships); *infra* notes 243-249 and accompanying text (discussing the public policy holding of *Borelli*).

18. See CAL. FAM. CODE § 1620 (West 1994) (stating that spouses cannot alter the essential elements of marriage, such as support, or their legal obligations to each other, but can alter the character of their property by agreement); *id.* § 721 (West 1994) (allowing a husband and wife to contract with each other as if they were unmarried). Spouses are subject to a fiduciary duty of the highest good faith and fair dealing when managing community property. *Id.* California Family Code § 1101 gives a remedy where there is an impairment of the claimant spouse's interest in the community estate, as a result of a breach of the fiduciary duty. *Id.* § 1101 (West 1994).

19. See CAL. FAM. CODE § 850 (West 1994) (allowing the character of property owned by married people to be changed).

other agreement between private parties.²⁰ Indeed, a marriage certificate should not be used to limit the contracting ability of married people.²¹ Courts should adhere to the traditional contract doctrine of facilitating the objectively manifested intent of the parties in the marital contract context.²² Although contracts have been portrayed as private events to be free from government interference since the mid-nineteenth century, courts have failed to apply traditional contract doctrine by refusing to enforce spousal agreements in favor of wives.²³ The reasoning typically given is that in order to protect the domestic harmony of the couple, the law should not interfere with an ongoing marital relationship.²⁴ However, marital contracts should not be an exception to general contract principles.

In *Borelli v. Brusseau*,²⁵ the Court of Appeal for the First District of California held that a wife cannot contract with her husband to provide him with nursing care services in exchange for his separate property assets.²⁶ The wife unsuccessfully contended that their oral agreement should be enforced, since she had performed her part of the bargain.²⁷ The court, however, refused to find the agreement enforceable, by restating the traditional rule that a husband is entitled to the personal performance of nursing care services as part of the spousal duty of support.²⁸ There-

20. See *id.* § 721 (West 1994) (permitting husband and wife to enter into contracts with each other regarding property, as if they were not married); see also 2 FARNSWORTH, *supra* note 14, § 5.1 (noting that the principle of freedom of contract relies upon the premise that it is in the public interest to give broad power to people so they can order their affairs through legally enforceable agreements). In general, therefore, parties are free to make agreements, and courts will enforce them without passing judgment on their substance. *Id.*; see *infra* notes 370-374 and accompanying text (declaring it absurd for courts to allow non-married parties to contract for nursing care while refusing to enforce such contracts between married people).

21. See MARRIAGE CONTRACT, *supra* note 10, at 341 (predicating that discrimination arises when a court refuses to allow husband and wife to contract regarding support duties).

22. See *id.* at 352 (arguing that it is improper for courts to subject contracts between spouses to stricter standards than unmarried contracting parties, since a husband and wife should have expectations just like unmarried parties that their contracts will be enforced by courts); see also Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000 (1985) (stating that contract law, as reflected in the Restatement (Second) of Contracts, has a preference for objective intent over subjective intent).

23. See Dalton, *supra* note 22, at 1010 (noting that the discourse of contract doctrine has attempted to portray contract law as essentially private and free).

24. *Brooks v. Brooks*, 48 Cal. App. 2d 347, 350, 119 P.2d 970, 972 (2d Dist. 1941); *Coleman v. Burr*, 93 N.Y. 17, 25 (1883); see *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 658, 16 Cal. Rptr. 2d 16, 22-23 (1st Dist. 1993) (Poché, J., dissenting) (finding it absurd for courts to refuse to adjudicate domestic relationships where one spouse has died, as occurred in *Borelli*, since there is no longer a marital relationship to preserve); *infra* notes 87-129 and accompanying text (highlighting the traditional position of the courts in California regarding spousal contracts for services).

25. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

26. *Id.*, at 654, 16 Cal. Rptr. 2d at 20.

27. *Id.* at 649, 16 Cal. Rptr. 2d at 17; see *infra* notes 188-207 and accompanying text (summarizing the facts of *Borelli*).

28. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20.

fore, because the wife had a pre-existing duty to care for her husband, the court found the contract lacking consideration for the mutual exchange of promises and was, thus, unenforceable.²⁹ Significantly, the court's holding fails to mention Family Code section 850, which explicitly states that consideration is not required for an agreement to transmute property.³⁰

This Note argues that by not enforcing a husband's promise to transfer property in exchange for nursing care services, the Court of Appeal for the First District of California, in *Borelli v. Brusseau*,³¹ denied a woman the enforcement of a valid and performed contract, thereby evidencing the continuing subordination of women before the law.³² Part I of this Note reviews the statutory duties that spouses owe each other and outlines the historical and current legal subordination of women, which persists even in the face of formal legal equality.³³ Part II discusses the majority and dissenting opinions of the *Borelli* Court.³⁴ Part III examines the ramifications of the *Borelli* decision, specifically: the continuing subtle subordination of women; concerns regarding the consideration requirement; and feasible alternatives for enforcing spousal agreements.³⁵ The requirement of consideration is especially intriguing since the court overlooked Family Code section 850, which arguably should have controlled the agreement between husband and wife.

29. *Id.*; see *Brooks v. Brooks*, 48 Cal. App. 2d 347, 351, 119 P.2d 970, 972-73 (2d Dist. 1941) (holding that the marriage contract calls for a wife to provide her husband with nursing care services); *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (finding the performance of nursing care services without compensation by a spouse to be an implied term of the marriage contract); see also *infra* notes 87-129 and accompanying text (outlining the traditional duties of a wife, as seen in *Brooks* and *Sonnicksen*); *infra* notes 77-81 and accompanying text (discussing the pre-existing duty rule); *infra* notes 243-251 and accompanying text (discussing the holding of *Borelli*).

30. See CAL. FAM. CODE § 850 (West 1994) (stating that spouses may contract to alter the character of property from separate property of one spouse to the separate property of the other, with or without consideration).

31. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

32. See *infra* notes 336-374 and accompanying text (discussing the legal ramifications of the *Borelli* decision on women's equality).

33. See *infra* notes 36-187 and accompanying text.

34. See *infra* notes 188-323 and accompanying text.

35. See *infra* notes 324-414 and accompanying text.

I. LEGAL BACKGROUND

In 1849, a system of community property³⁶ was enacted in California, during the state's first constitutional convention.³⁷ The resulting constitutional provision encompassed the basic principle of Spanish community property law, which was in force during the period of Spanish and Mexican control of the California territory.³⁸ Spanish law characterized ownership of marital property as either separate or community.³⁹ The California Constitution mandates that all property owned by the wife before marriage and all property acquired by her after marriage by gift, devise or descent will be her separate property.⁴⁰ In addition, the California Constitution contains a provision directing the legislature to pass laws regarding community property, which the California Legislature did, starting in 1850.⁴¹ The first enactments defined separate and community property, set up the equal division of community property among the spouses in event of death or divorce, as well as established that the husband had the sole power to manage and control his wife's separate property and all of their community estate.⁴²

36. See CAL. FAM. CODE § 760 (West 1994) (defining community property as all real and personal property, wherever situated, that is acquired by a married person during the marriage while domiciled in California, unless otherwise provided by statute).

37. CAL. CONST. art. XI, § 14 (1849), amended by CAL. CONST. art. I, § 21; see GRACE GANZ BLUMBERG, *COMMUNITY PROPERTY IN CALIFORNIA* 92 (2d ed. 1993) (stating that the 1849 California constitutional convention raised the Spanish civil law of community property to constitutional status).

38. See CAL. CONST. art. XI, § 14 (1849), amended by CAL. CONST. art. I, § 21 (establishing that a wife owns all property acquired before marriage and all property acquired afterwards by gift, devise or descent as her separate property); BLUMBERG, *supra* note 37, at 92 (noting that one element of California's civil law during Spanish and Mexican rule was Spanish community property law).

39. See BLUMBERG, *supra* note 37, at 94 (noting that while California adopted the Spanish principle of property ownership as separate or community, California deviated from Spanish civil law respecting management of the community estate, and gave the power of management and control only to the husband).

40. CAL. CONST. art. XI, § 14 (1849), amended by CAL. CONST. art. I, § 21.

41. See *id.* (establishing the state legislature's power to enact laws relating to property held by the wife in common with her husband); see also BLUMBERG, *supra* note 37, at 94 (noting that the 1850 legislation followed Spanish law exactly with respect to its characterization of ownership of property as either separate property or community property).

42. See Act of Apr. 17, 1850, ch. 103, § 1, 1849-50 Cal. Stat. at 254 (defining separate property as property owned before marriage or acquired during marriage by gift, bequest, devise, or descent); *id.* § 2 (stating that common property was property acquired by either spouse during the marriage other than by gift or inheritance); *id.* § 6 (giving the wife no control over her own separate property, but rather vesting this power in her husband); *id.* § 9 (establishing the management and control of the community property estate solely in the husband); *id.* § 11 at 255 (maintaining that with the death of a spouse, one half of the community property shall go to the surviving spouse, and the other half to the descendants of the decedent); *id.* § 12 (declaring that upon divorce, each spouse will receive one half of the community estate).

Even though the purpose of adopting community property law was to increase the legal rights of women,⁴³ this objective still has not been met to the satisfaction of many.⁴⁴ Today there still exists a great inequality between men and women regarding treatment by the law in particular, and by society in general.⁴⁵ To understand a feminist critique of the court's decision in *Borelli v. Brusseau*,⁴⁶ an understanding of general principles of community property and contract law, of the traditional rule regarding spousal duties, and the history of women's subordination by the law is necessary.

A. *The Law of Community Property in California*

California is one of only nine states that has adopted community property as a system for dividing marital property.⁴⁷ Community property

43. See BLUMBERG, *supra* note 37, at 92 (stating that the constitutional convention was moved to adopt community property law in an attempt to enhance married women's legal status). Another motivation for installing a system of community property in California was to reconcile with California's Spanish-speaking minority. *Id.*

44. See *infra* notes 130-187 and accompanying text (detailing the feminist criticisms of women's traditional and current subordination before the law, due in part to their relegation to the private sphere, which encompasses the family, the home, and childrearing).

45. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 3 (1989) (noting that there is substantial inequality among men and women). The examples Okin discusses include the differential between men and women's wage earnings, elderly poverty rates, distribution of housework, and representation in government. *Id.* For example, women earn 71% of what men do. *Id.* at 3. Additionally, women are responsible for more housework and child care, even when women work outside the house as much as their husbands. *Id.* at 4.

46. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

47. See BLUMBERG, *supra* note 37, at 6-7 (stating that community property is associated with eight contiguous states, plus Wisconsin). In California, New Mexico, and Louisiana the general rule is that property is divided fifty-fifty upon divorce and at death. *Id.* at 6; see CAL. FAM. CODE § 2550 (West 1994) (stating that upon dissolution a court shall divide the community property equally); LA. CIV. CODE ANN. art. 2336 (West 1985); *Bustos v. Bustos*, 673 P.2d 1289, 1291 (N.M. 1983). Five other states, Arizona, Idaho, Nevada, Texas, and Washington, allow courts to make an equitable, not a 50-50 division per se, distribution of community property upon divorce. BLUMBERG, *supra* note 37, at 6; see ARIZ. REV. STAT. ANN. § 25-318 (1991); IDAHO CODE § 32-712 (Michie 1983); NEV. REV. STAT. § 125.150 (Michie 1991); TEX. FAM. CODE ANN. § 3.63 (Vernon 1992 Supp.); WASH. REV. CODE ANN. § 26.09.080 (West Supp. 1993). The ninth state, Wisconsin, adopted the Uniform Marriage Property Act, which is essentially the same as community property. WIS. STAT. ANN. § 766.001-97 (West 1993); see BLUMBERG, *supra* note 37, at 7 (explaining that the Uniform Marriage Property Act drafters designed a full-blown system of community property). Community property is also the marital property system of Puerto Rico. 11 Cal. Fam. L. Serv. (Bancroft-Whitney) § 11:4 (1991). The remaining forty-one states are common law jurisdictions. BLUMBERG, *supra* note 37, at 3 (stating that in common law states property is not held jointly by husband and wife unless both specifically elect to take joint title). Property thus belongs either to the husband or the wife. *Id.*; see ARK. CODE ANN. § 9-12-315 (Michie Supp. 1991) (proclaiming that all marital property shall be distributed with one-half to each party, unless the court finds that such a division will work an inequity); MINN. STAT. ANN. § 518.58 (West Supp. 1990) (stating that division will be done without regard to marital misconduct).

includes all property earned or acquired during marriage by the labor of either spouse.⁴⁸ California law provides that each spouse has a present one-half interest in all community property.⁴⁹ Separate property, on the other hand, is property acquired before marriage or property acquired during the marriage by gift, bequest, devise, or descent, and all the earnings that arise from this separate property.⁵⁰ Separate property is not subject to division at death or divorce, but remains the property of the spouse holding title.⁵¹ To determine whether property is community property or separate property, there is a general presumption which provides that all property acquired during marriage is community property.⁵²

48. See CAL. FAM. CODE § 760 (West 1994) (defining community property as all real property located in California, all personal property wherever located, and all property held in trust that was acquired during the marriage by a spouse domiciled in California, and that is not separate property of either spouse as defined in California Family Code §§ 770, 771 and 781). Community property in trust is subject to California Family Code § 761, which provides that community property transferred into a trust remains community property, if the trust is revocable and the power to modify the trust can only be exercised with the consent of both spouses. CAL. FAM. CODE § 761 (West 1994). Certain personal injury awards to a married person are also community property. *Id.* § 780 (West 1994) (providing that if the cause of action for personal injury arose during the marriage, then the damage award is community property, subject to § 781); *id.* § 781 (West 1994) (awarding a personal injury award to the separate estate of an injured spouse if the cause of action arose after dissolution of the marriage, or if the other spouse is the source of the injury upon which suit has been brought); *infra* note 52 and accompanying text (discussing the California Family Code §§ 770 and 771, which set forth the assets to be characterized as separate property).

49. See CAL. FAM. CODE § 2550 (West 1994) (providing for the equal division of the community estate between the spouses). The community estate is defined as both community property and quasi community property. *Id.* § 63 (West 1994). Quasi community property is all real and personal property, wherever located, that is acquired by either spouse while domiciled outside California, which would be community property if the spouse had been domiciled in California at the time of acquisition. *Id.* § 125 (West 1994).

50. CAL. CONST. art. I, § 21; CAL. FAM. CODE § 770 (West 1994); see *id.* § 771 (West 1994) (declaring that separate property includes the property accumulated by the spouse, and the minor children in the custody of the spouse while living separate and apart from the other); THOMAS E. ATKINSON, HANDBOOK ON THE LAW OF WILLS 4 (2d ed. 1953) (defining bequest as personal property that passes by will). Devise is the term used to describe disposing of real property by will. *Id.* Descent is the passing of real property to the decedent's heirs by intestate succession. *Id.* These terms, Professor Atkinson notes, however, are often used interchangeably, without making a difference as to their legal effect. *Id.*

51. See CAL. FAM. CODE § 752 (West 1994) (declaring that a husband or wife does not have any interest in the separate property of the other).

52. See *id.* § 760 (West 1994) (creating the basic presumption that all property acquired during marriage by either spouse is community property unless it comes within a specified exception). The major exceptions are those relating to separate property. See *id.* § 130 (West 1994) (defining, for statutory consistency, that separate property includes all separate property discussed in the California Family Code sections beginning with § 760); *id.* § 770 (West 1994) (creating an exception to the general community property presumption by defining separate property of a married person as all property owned before the marriage, plus all property that the spouse acquires during marriage by gift, bequest, devise, or descent, and all the rents and profits that issue from this separate property); *id.* § 771 (West 1994) (stating that one's separate property includes property accumulated while living separate and apart from their spouse is an exception to the presumption that all property acquired during marriage is community property); *id.* § 772 (West 1994) (noting that after entry of judgment for legal separation of the spouses, each party's earnings are his or her own separate property and are not subject to the

The criteria for how courts label property as either separate or community property is established by statute.⁵³ Spouses, however, are not required to follow the label mandated by statute.⁵⁴ A husband and wife can agree by contract, before or during the marriage, to change the characterization of some or all of their marital property estate.⁵⁵ Because these agreements regarding property are contracts, a discussion of how contract law applies to the law of California community property will follow.⁵⁶

1. Spouses Can Contract Out of California Community Property Law

The state's community property laws automatically apply to married California domiciliaries.⁵⁷ A husband and wife, however, can contract around the community property laws, if they choose, by either a premarital agreement or transmutation.⁵⁸ A transmutation is an agreement between

presumption that earnings during marriage are community property); *id.* § 781 (West 1994) (stating that personal injury damages are the separate property of the injured spouse, and not community property, if the cause of action arose after dissolution or legal separation, if they are living separate and apart, or if the tortfeasor is the other spouse); *see also id.* § 803 (West 1994) (stating that pre-1975 property transfers which name a married woman as the sole transferee are presumed to be her separate property, unless the instrument expresses a different intention); *id.* § 2581 (West 1994) (providing that for the purpose of dividing property at divorce, property in any form of co-ownership, such as joint tenancy or tenancy in common, is presumed to be community property); *In re Marriage of Grinius*, 166 Cal. App. 3d 1179, 1185-86, 212 Cal. Rptr. 803, 807 (4th Dist. 1985) (stating that the general community property presumption can be rebutted by the separate property proponent).

53. *See supra* notes 48, 52 and accompanying text (setting forth the applicable California Family Code provisions that define community and separate property).

54. *See* CAL. FAM. CODE § 1500 (West 1994) (allowing spouses to change their relations regarding property by a prenuptial agreement or other agreement made during marriage).

55. *Id.*; *see infra* notes 60-63 and accompanying text (delineating the requirements for a valid prenuptial agreement); *infra* notes 64-70 and accompanying text (reporting the formalities that are to be met for a valid marital property agreement).

56. *See infra* notes 75-81, 87-129 and accompanying text (highlighting traditional contract requirements, the doctrine of pre-existing duty, and the rights and duties that spouses owe to the other, as set forth in California statutes and case law).

57. *See* CAL. FAM. CODE § 760 (West 1994) (establishing that while domiciled in California, all property acquired by a married person is community property, unless the property is defined as separate property elsewhere in the California Family Code).

58. *See id.* § 1500 (West 1994) (stating that the community property laws which prescribe the respective property rights between the spouses can be changed with a prenuptial agreement or other marital property agreement); *see, e.g.,* *Fay v. Fay*, 165 Cal. 469, 473, 132 P. 1040, 1042 (1913) (holding that husband and wife can change the character of their property from community property to separate property by contract); *Tompkins v. Bishop*, 94 Cal. App. 2d 546, 550, 211 P.2d 14, 16 (1st Dist. 1949) (stating that statutory law allows spouses to change the character of their property during the marriage by contract); *infra* notes 60-63 and accompanying text (discussing premarital agreements).

the husband and wife during marriage to alter the characterization of the community or separate property.⁵⁹

The first method to contract out of community property laws is by a premarital agreement.⁶⁰ A premarital agreement is defined as an agreement between prospective spouses made in contemplation of marriage.⁶¹ For a premarital agreement to be valid the agreement must be in writing and signed by both spouses.⁶² Consideration is not required for a valid premarital agreement.⁶³

The other method available to spouses wishing to contract out of the community property scheme is a transmutation of property.⁶⁴ Family Code section 850 states that married persons may transmute community property to separate property of either spouse; transmute the separate property of either spouse to community property; or transmute the separate property of one spouse to the separate property of the other spouse.⁶⁵ Prior to 1985, no formal requirements for a valid transmutation existed.⁶⁶ In fact, California law permitted an oral transmutation between husband

59. See CAL. FAM. CODE § 850 (West 1994) (allowing spouses to alter their property arrangements by agreement).

60. See *id.* § 1500 (West 1994) (establishing that husband and wife can use a marital property agreement or a prenuptial agreement to alter the community property scheme); see also *id.* §§ 1600-1617 (West 1994) (setting forth the Uniform Premarital Agreement Act, which provides for the proper subject matter of a premarital agreement, the date of effectiveness, and the process for revocation).

61. See CAL. FAM. CODE § 1610(a) (West 1994) (stating that a premarital agreement means an agreement between prospective spouses made in contemplation of marriage, and which will be effective upon marriage). The proper subject matter for a premarital agreement includes the right of management and control of property and the disposition of property upon death, marital dissolution, or any other event. *Id.* § 1612 (West 1994). The parties, however, cannot contract out of the support obligation, since it is the duty of every person to support his spouse. *Id.* §§ 1620, 4300 (West 1994). The effective date of a premarital agreement is when the parties marry. *Id.* § 1613 (West 1994). The premarital agreement can only be amended or revoked by a written agreement signed by both parties, with no requirement for consideration. *Id.* § 1614 (West 1994).

62. *Id.* § 1611 (West 1994); cf. *In re Marriage of Dawley*, 17 Cal. 3d 342, 352, 551 P.2d 323, 329, 131 Cal. Rptr. 3, 9 (1976) (holding that the language of a premarital agreement, an agreement between prospective spouses about the character of their separate property assets, cannot objectively promote dissolution).

63. CAL. FAM. CODE § 1611 (West 1994).

64. See *id.* § 1500 (West 1994) (stating that the community property laws which prescribe the respective property rights between the spouses can be changed with a marital property agreement).

65. *Id.* § 850 (West 1994). This provision is subject to California Family Code §§ 851-853. *Id.*; see *id.* § 851 (West 1994) (providing that transmutions are subject to the law governing fraudulent transfers); *id.* § 852 (West 1994) (stating that a transmutation must be in writing); *id.* § 853 (West 1994) (noting that a will provision which states the character of property is not admissible as evidence of a transmutation if the person who made the will has not died yet).

66. See, e.g., *Marriage of Jafeman*, 29 Cal. App. 3d 244, 255, 105 Cal. Rptr. 483, 490 (1st Dist. 1972) (holding that an effective transmutation does not have to meet any particular requirements); *James v. Pawsey*, 162 Cal. App. 2d 740, 749, 328 P.2d 1023, 1029 (1st Dist. 1958) (declaring that no particular formalities are necessary to effectuate an agreement to transmute property among spouses); *In re Raphael's Estate*, 91 Cal. App. 2d 931, 939, 206 P.2d 391, 396 (1st Dist. 1949) (rejecting the argument that an executed oral agreement should not be enforced since it did not have the traditional contract requirements).

and wife notwithstanding the statute of frauds.⁶⁷ In response to concerns about how easily property could be transmuted, Family Code sections 850 through 853 were promulgated to place requirements on transmutations.⁶⁸ Thus, a transmutation must now be in writing with an express declaration that the transmutation is adopted by the adversely affected spouse.⁶⁹ Furthermore, Family Code section 850 expressly allows a transmutation to

67. See *Kenney v. Kenney*, 220 Cal. 134, 136, 30 P.2d 398, 399 (1934) (stating that an executed oral agreement can be established by acts and declarations of the parties to the oral agreement which confirm and are consistent with a change in the characterization of the property); *In re Estate of Wahlefeld*, 105 Cal. App. 770, 775-776, 288 P. 870, 872-873 (1930) (finding an oral agreement between the spouses regarding a transmutation, if fully executed, to be sufficient and not in conflict with the statute of frauds). There are several statute of frauds provisions in California which judges avoided by the creation of the executed oral agreement exception. See, e.g., CAL. CIV. CODE § 1091 (West 1982) (requiring that every transfer of an estate of real property be documented by a writing signed by the party disposing of the estate, unless the transfer is for less than one year); *id.* § 1624 (West Supp. 1994) (providing that contracts which fall within its provisions are invalid, unless there is a written memorandum which is signed by the party to be charged). Oral agreements to devise property by will, such as the agreement in *Borelli*, fall under the writing requirement of California Probate Code section 150(a)(3), rather than California Civil Code sections 1091, 1624. CAL. PROB. CODE § 150(a)(3). But see Comment, *Oral Transmutation of Separate Property: California's Law by Dicta*, 9 STAN. L. REV. 183, 185-86 (1956) (arguing that the rule allowing the executed oral agreement exception to the statute of frauds originated and was perpetuated mainly by questionable dicta).

68. 1984 Cal. Stat. ch. 1733, sec. 1-4, at 6301-02 (adding CAL. CIV. CODE §§ 5110.710-740, effective Jan. 1, 1985) (reenacted by CAL. FAM. CODE §§ 850-53); see CAL. FAM. CODE § 852 Comment (West 1994) (noting that when section 850 was enacted in 1984, the provision overruled previous case law); LAW REVISION COMMISSION, Communication of Law Revision Commission Concerning Assembly Bill 2274, 18 CAL. L. REVISION COMM'N REP. 67, 67 (1986) [hereinafter AB 2274 Communication] (noting that the legislature enacted the new transmutation statutes to put into effect the recommendations put forth by the California Law Revision Commission, in the *Recommendation Relating to Marital Property Presumptions and Transmutations*). The Commission believed the prior law, which allowed oral transmutations between spouses for the character of marital property, should be altered to decrease the danger of fraud and increased litigation. LAW REVISION COMMISSION, Recommendation Relating to Marital Property Presumptions and Transmutations, 17 CAL. L. REVISION COMM'N REP. 213-14 (1984) [hereinafter Recommendation for Transmutations]. Having easy rules of transmutation generates fraud and increased litigation, the Committee claims, because a spouse may transform a passing comment into an 'agreement,' or even commit perjury by manufacturing an oral or implied transmutation. *Id.* at 214.

69. CAL. FAM. CODE § 852 (West 1994); see *Estate of MacDonald*, 51 Cal. 3d 262, 273, 794 P.2d 911, 919, 272 Cal. Rptr. 153, 161 (1990) (declaring that the express declaration requirement will not be satisfied by a spouse signing the consent paragraphs for an IRA account, since the paragraphs did not contain language which expressly stated that the property's character was being altered); see also Jerry A. Kasner, *Donative And Interspousal Transfers Of Community Property In California: Where We Are (Or Should Be) After MacDonald*, 23 PAC. L.J. 361, 393 (1991) (arguing that since the written express declaration requirement of California Civil Code § 5110.730 [now California Family Code § 852], as interpreted by *MacDonald*, will likely invalidate many agreements that do not use appropriate language, the legislature should clarify the form of the necessary declaration); CAL. FAM. CODE § 851 (West 1994) (noting that transmutations are subject to the laws governing fraudulent transfers); *id.* § 853 (West 1994) (stating that a will provision regarding the character of property is not admissible as evidence of a transmutation if the proceeding is started before the death of the person who made the will). See generally CAL. CIV. CODE §§ 3439-3449 (West Supp. 1994) (setting out the general laws regarding fraudulent transfers).

be valid without meeting the typical contract requirement of consideration.⁷⁰ A discussion of contract law and the duties that spouses owe each other is necessary to understand *Borelli v. Brusseau*,⁷¹ since the court relies upon the doctrine of pre-existing duty, and the resulting lack of consideration, to hold an agreement between a husband and wife will not be enforced.

2. *The Law of Contracts as Applied to California Community Property Law*

While contract law is typically concerned with the exchange of goods and services, the claim that contracts are foreign to the family context is false.⁷² Marriage is essentially a contractual relationship because the husband and wife mutually owe legally enforceable rights and duties to each other.⁷³ In particular, the marriage contract has explicit requirements, such as the duty of support both financially and emotionally.⁷⁴

70. CAL. FAM. CODE § 850 (West 1994); *see id.* Comment (West 1994) (stating that when enacted in 1984, California Family Code § 850 codified the basic rule that no consideration is required); *infra* notes 75-76 and accompanying text (discussing the traditional contract requirements of offer, acceptance, mutual assent, and consideration).

71. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

72. *See* CAL. FAM. CODE § 300 (West 1994) (stating that marriage is a civil contract between a man and a woman); *see also* MARRIAGE CONTRACT, *supra* note 10, at xv (stating that marriage is the most intimate and private social relationship, while a contract is typically for the ordering of business transactions); OKIN, *supra* note 45, at 122 (stating that marriage has been regarded as a contract for a long time, though courts have not been willing to enforce contracts among spouses). *See generally* Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 TENN. L. REV. 135, 138 (1992) (arguing that contract law has its place in family law).

73. *See* Stanley v. Illinois, 405 U.S. 645, 663 (1972) (Burger, J., dissenting) (finding marriage is like a contractual relationship because each party has rights and duties, enforceable in court, owed to the other spouse and the couple's children); *see also* CAL. FAM. CODE §§ 63, 700, 720-721, 750-755, 760-761, 770-772, 781, 783, 802-803, 850-853, 902-903, 911-916, 920, 930-931, 1000, 1100-1103, 3900, 4301-4302, 6321, 6340 (West 1994) (defining the rights and responsibilities of spouses toward each other and their children); MARRIAGE CONTRACT, *supra* note 10, at xvii (arguing that marriage is governed by an implicit unwritten contract which is based upon outmoded assumptions of family).

74. *See* CAL. FAM. CODE § 300 (West 1994) (describing the formal requirement of marriage as consent to the contract, a license, and solemnization as authorized by the code); *id.* § 720 (West 1994) (stating that mutual obligations of respect, fidelity and support are contracted for between spouses); *id.* § 4300 (West 1994) (requiring that every individual shall support his or her spouse); *id.* § 4301 (West 1994) (requiring a spouse to financially support the other from the spouse's separate property if there is no community property to support the couple). The scope of the duty of support is the issue of much litigation. *See* *In re Higgason*, 10 Cal. 3d 476, 488, 516 P.2d 289, 297, 110 Cal. Rptr. 897, 905 (1973) (stating that a wife has a duty to pay for her husband's medical bills out of her own separate property while they live together); *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (finding the marriage contract to include nursing care services); *Brooks v. Brooks*, 48 Cal. App. 2d 347, 351, 119 P.2d 970, 973 (2d Dist. 1941) (requiring a wife to provide nursing care to her husband); *infra* notes 87-129 and accompanying text (discussing the *Brooks* and *Sonnicksen* decisions).

A contract is defined as an exchange of promises, which if breached, the law gives a remedy.⁷⁵ To enforce a contract in the case of a breach, the contract must be supported by consideration.⁷⁶ An adjunct to the consideration requirement is the doctrine of pre-existing duty, which is used by courts to deny the validity of a contract modification.⁷⁷ The pre-existing duty rule states that the promise to do a task that one already has the legal obligation to do cannot constitute consideration for the return promise.⁷⁸ In the family law context, the pre-existing duty rule has been used by courts to invalidate contracts between a husband and wife, on the basis that the wife already has the duty by virtue of the marriage contract

75. RESTATEMENT (SECOND) OF CONTRACTS § 1, at 5; *see* CAL. CIV. CODE § 1549 (West 1982) (defining a contract as an agreement to do or not to do a certain thing); *id.* § 1550 (West 1982) (setting forth four essential elements for a contract to be valid: persons capable of contracting, their consent, a lawful object, and consideration).

76. *See* RESTATEMENT, *supra* note 75, § 22 (stating that offer and acceptance are also required for a valid contract as part of mutual assent); *id.* § 71 (noting that consideration is a performance or a bargained for return promise); *see also* *In re Owen*, 303 S.E.2d 351, 353 (N.C. 1983) (noting that in a contract, consideration is the 'glue' that holds the parties together). A legal detriment to the promisee, such as promising to refrain from doing something that one has the right to do, or promising to do something that one does not have to do, is the essence of the consideration requirement. *See* CAL. CIV. CODE § 1605 (West 1982) (describing consideration as encompassing either a benefit to be conferred upon the promisor, or a prejudice suffered by the promisee as an inducement to the promisor); *In re Thomson's Estate*, 165 Cal. 290, 296-97, 131 P. 1045, 1048 (1913) (holding that forbearance is good consideration for a contract); *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891) (defining legal detriment as either doing something that one was not previously obligated to do, or forbearance from something that one has the legal right to do); *see also* RESTATEMENT, *supra* note 75, § 71(2) (defining bargain as a promise sought by the promisor in exchange for his promise and given in exchange for that promise); *id.* § 71(3) (stating that a performance which can constitute consideration may be an act or a forbearance); *id.* §§ 82-94 (allowing exceptions to the formal contract requirements, such as contracts formed without consideration, e.g. detrimental reliance, and the promise to pay a debt). Virtually anything that would be bargained for in exchange for a promise can constitute consideration for that promise, typically including a return promise. *See* 1 FARNSWORTH, *supra* note 14, § 2.3 (stating that the bargain theory of consideration provides that nearly anything can be adequate consideration, if it is part of a bargain); *id.* (setting out that a bilateral contract is created when there are promises made by both parties).

77. *See* 1 FARNSWORTH, *supra* note 14, § 4.21 (finding that the pre-existing duty rule has been broadly applied to a number of contract modification situations). For example, promises to pay construction contractors more for the same work have been held to be within the pre-existing duty rule. *Id.*; *see also* Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 936 (1958) (noting judicial hostility to the pre-existing duty rule and stating that the rule has done more than anything else to disparage the doctrine of consideration). *But see* CAL. FAM. CODE § 850 (West 1994) (stating that consideration is not necessary for an interspousal transmutation of property); *supra* notes 64-70 and accompanying text (discussing California Family Code § 850 and its lack of a consideration requirement).

78. *See* *Grant v. The Aerodraulics Co.*, 91 Cal. App. 2d 68, 75, 204 P.2d 683, 687 (2d Dist. 1949) (declaring a uniform rule of law to be that a promise to do what one is already under a legal obligation to do is not sufficient consideration to support a new contract); 1 FARNSWORTH, *supra* note 14, § 4.21, at 449 (stating that it is not valid consideration to promise to do something that the promisee already has an obligation to do). Professor Farnsworth also notes that the pre-existing duty rule applies to duties imposed by law, as well as by contract. *Id.* at 450. *See* *Grant v. Green*, 41 Iowa 88, 92 (1887) (stating that a wife had a statutory duty to care for her insane husband); *see also* *Foakes v. Beer*, App. Cas. 605, 630 (1884) (affirming the common law pre-existing duty rule).

to do what she later agreed to do.⁷⁹ Courts have defined the duties required by wives very broadly over time, however, and as a result have refused to enforce agreements between spouses for the performance of domestic duties in exchange for compensation.⁸⁰ Thus, the wife's promise, usually a promise for domestic services, has not been found to constitute consideration for the return promise of remuneration made by the husband.⁸¹

The California Legislature has sought to define not only the division of marital property, but also the very rights and duties spouses owe to each other.⁸² Rights and duties proscribed by statutes include the requirements that: every individual is to support his or her spouse;⁸³ a husband and wife contract toward each other obligations of mutual respect, fidelity, and support;⁸⁴ and finally, that a married person must support his or her

79. See *Youngberg v. Holstrom*, 108 N.W.2d 498, 500, 502 (Iowa 1961) (refusing to enforce an agreement between husband and wife that provided for the wife to receive compensation for her services upon the husband's farm, including raising poultry and hogs); *Frame v. Frame*, 36 S.W.2d 152, 154 (Tex. 1931) (disallowing a service contract between husband and wife regarding the wife's participation in the husband's business); *infra* notes 243-251 and accompanying text (noting caring for an ill spouse cannot comprise consideration to support an agreement that seeks to exchange the nursing care service for property, the *Borelli* court held, since nursing care is a duty that is already created by the marriage contract).

80. See, e.g., *Mathews v. Mathews*, 162 S.E.2d 697, 698 (N.C. 1968) (holding that caring for a husband's sick relatives was required of a wife as a marital duty, and denying her compensation); MARRIAGE CONTRACT, *supra* note 10, at 340 (finding that courts have included all the labor a woman has put forth in any family enterprise, such as the home, the farm, and the family business, as owing to her husband from the marital contract in order to void domestic service contracts). Professor Weitzman, however, states that there is little rational or legal basis for courts not enforcing agreements among spouses for domestic services. *Id.* Instead, Weitzman suspects that courts have used rationales like the agreement being void due to it being against public policy or a lack of consideration, to refuse to enforce domestic service agreements where the court doubts its validity for different reasons. *Id.* For instance, the court may believe that the agreement never existed, and so it would be unjust to enforce the contract. *Id.*; see also *infra* notes 87-129 and accompanying text (setting out the traditional duties of a wife as interpreted by the courts in *Sonnicksen* and *Brooks*); *infra* notes 280-284 and accompanying text (discussing the *Borelli* holding, where the court refused to enforce an oral agreement for nursing care duties performed by the wife in exchange for transmutation of the husband's separate property).

81. See, e.g., *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (finding an implied term of the marriage contract to be that a wife is to provide nursing care to her husband); *Brooks v. Brooks*, 48 Cal. App. 2d 347, 350, 119 P.2d 970, 972 (2d Dist. 1941) (holding that domestic services are part of the wife's duty as per her marital status); see also *infra* notes 87-129 and accompanying text (discussing the California courts' traditional approach to a wife's duty).

82. See CAL. FAM. CODE § 4300 (West 1994) (stating that spouses must support each other); *id.* § 720 (West 1994) (noting that spouses have the obligations of mutual respect, fidelity, and support); *id.* § 4301 (West 1994) (mandating that one support one's spouse out of one's own separate property if there exists no community property, subject to California Family Code § 914); *id.* § 914 (West 1994) (allowing creditors to reach the separate property of the non-debtor spouse, even if community property funds of the couple exist).

83. *Id.* § 4300 (West 1994).

84. *Id.* § 720 (West 1994).

spouse while they are living together.⁸⁵ The rationale given for the spousal duty legislation is that marriage is an important state interest because the marriage relation is the basis of the family and the family is the foundation of society.⁸⁶

In addition to legislatively created duties between husband and wife, the courts have also defined what spousal duties exist.⁸⁷ For example, California courts have traditionally found that a wife has a marital duty to personally provide nursing care services. In *Estate of Sonnicksen v. Sonnicksen*,⁸⁸ the Court of Appeal for the First District of California established the law regarding a wife's duty to care for her ill husband.⁸⁹ The plaintiff in *Sonnicksen*, Martha Sullivan, sued the recipients of the estate of her deceased husband, Andrew Sonnicksen.⁹⁰ The spouses agreed in writing, about a year and a half before their marriage, that Martha would provide personal nursing care services for Andrew if he would convey to her some property before he died.⁹¹ Martha also agreed to give up her practice as a professional nurse.⁹² Martha and Andrew later married and lived together until Andrew died three years later.⁹³ Andrew, however, did not convey the property as promised in the written agreement

85. *Id.* § 4301 (West 1994). California Family Code § 4301 is subject to § 914, which provides that third party creditors can reach the separate property of the non-debtor spouse, even if there exists community property funds. *Id.* § 914 (West 1994).

86. *Rehfuss v. Rehfuss*, 169 Cal. 86, 92, 145 P. 1020, 1022 (1915); *see Haas v. Haas*, 227 Cal. App. 2d 615, 617, 38 Cal. Rptr 811, 812-13 (2d Dist. 1964) (noting that the public, through the state, has an interest in the formation and dissolution of the marriage relationship). *But see Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 109-10, 134 Cal. Rptr. 815, 818-19 (1976) (identifying a social trend since the 1960's towards cohabitation without marriage, with an increase in litigation regarding cohabitation relationship issues).

87. *See Brooks v. Brooks*, 48 Cal. App. 2d 347, 351, 119 P.2d 970, 972-973 (2d Dist. 1941) (holding nursing care services to be incidental to a wife's statutory duty); *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (declaring that nursing care services are an implied part of the marital bargain, and they are to be performed by the wife without compensation); *infra* notes 89-129 and accompanying text (discussing the *Brooks* and *Sonnicksen* cases in detail).

88. 23 Cal. App. 2d 475, 73 P.2d 643 (1st Dist. 1937).

89. *Id.*, at 479, 73 P.2d at 645; *see id.* (holding that a wife has a duty to care for her ill husband).

90. *Id.* at 475, 73 P.2d at 644.

91. *Id.* at 476-78, 73 P.2d at 644-45. The *Sonnicksen* court stated that the contract was not made in contemplation of marriage, so the contract did not concern any marital duties. *Id.* at 479, 73 P.2d at 645. The court did not give any details as to how much the property was worth, only describing the property at issue as being some real property and an automobile. *Id.* at 477, 73 P.2d at 644.

92. *Id.* at 477, 73 P.2d at 644. The agreement set forth that Andrew had the option of paying Martha \$100 a month for the nursing care if he so decided. *Id.* at 477, 73 P.2d at 644. The court stated that the \$100 was never paid. *Id.* The court found it unnecessary to decide whether the various provisions of the contract were valid, choosing to simply characterize the agreement as a service contract. *Id.* at 478, 73 P.2d at 645. In addition, Martha's daughter was allowed to reside in the common home they shared, and Martha and Andrew were each to pay half of the family expenses. *Id.* at 476-78, 73 P.2d at 644-45.

93. *Id.* at 479, 73 P.2d at 645.

and Martha sued in probate court for specific performance of the agreement.⁹⁴

The probate court denied Martha's petition, and the Court of Appeal for the First District of California affirmed the decision.⁹⁵ Andrew's children, the recipients of Andrew's estate, contended that the marriage contract superseded the agreement at issue, which was not enforceable.⁹⁶ The *Sonnicksen* court agreed, stating that one of the implied terms in a marriage contract is that a wife is to perform nursing care services without compensation.⁹⁷ The court, however, did not give any cases to support this broad proposition.⁹⁸ Nevertheless, the *Sonnicksen* court held the nursing care contract invalid because its terms were inconsistent with the implied terms in the marriage contract, requiring Martha to provide Andrew with nursing care services without compensation.⁹⁹

Apart from *Sonnicksen*, courts also have the power to refuse to enforce marital contracts on the basis that they violate public policy.¹⁰⁰ Courts generally refuse to enforce contracts on policy grounds because they do not want to sanction undesirable conduct, or that enforcement of an unsavory agreement is an improper use of judicial power.¹⁰¹ To determine what is public policy, courts often look to legislative enactments of what is illegal, such as gambling or usury.¹⁰² When a public policy is not so clear-cut as to be codified, the court's decision rests upon a balancing test, weighing the factors for and against enforcement of the

94. *Id.*

95. *See id.* (finding no error by the probate court).

96. *Id.* The court of appeal found it unnecessary to discuss other arguments made by the defendants, since their contention that the marriage contract terminated the first agreement, was sustained by the court. *Id.*

97. *Id.*; *see* *Sonnicksen v. Estate of Sonnickson*, 23 Cal. App. 2d 480, 73 P.2d 646 (1st Dist. 1937) (companion case to *Estate of Sonnickson v. Sonnickson*) (denying a wife's *quantum meruit* claim for the reasonable value of her services while providing nursing care services to a husband on the same theory).

98. *See* *Estate of Sonnickson v. Sonnickson*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (giving no support for the proposition that the duty of a wife to perform nursing care services is inherent in the marriage contract). The *Sonnicksen* court does cite 30 C.J. 520, but there are no California cases cited therein.

99. *See id.* (citing *In re Callister's Estate*, 47 N.E. 268 (N.Y. 1897)) (requiring the termination of a contract which has a term that is inconsistent with a term of the marriage contract).

100. 2 FARNSWORTH, *supra* note 14, § 5.1; *see* *Sternaman v. Metropolitan Life Ins. Co.*, 62 N.E. 763, 764 (N.Y. 1902) (maintaining that the power to contract has its limits, such that parties cannot create an enforceable contract that violates the law or public policy).

101. 2 FARNSWORTH, *supra* note 14, § 5.1; *see* *Bank of the United States v. Owen*, 27 U.S. 527, 538-39 (1829) (affirming the notion that a court cannot be the servant of wickedness).

102. 2 FARNSWORTH, *supra* note 14, § 5.1; *see* CAL. CIV. CODE § 1916-2 (West 1985) (outlawing usury, which is charging interest of more than \$12 per each \$100 borrowed).

agreement.¹⁰³ The public policy at issue in marital contract cases such as *Borelli v. Brusseau*¹⁰⁴ and *Brooks v. Brooks*,¹⁰⁵ is the policy against the impairment of family relations.¹⁰⁶

Four years after *Sonnicksen* was decided, the Court of Appeal for the Second District of California also held that a wife has a duty to provide personal nursing care services for her husband.¹⁰⁷ In *Brooks v. Brooks*,¹⁰⁸ the appellate court held that a prior oral contract for nursing care services was voided by the marriage of the parties on public policy grounds.¹⁰⁹ James Brooks employed his future wife, Bessie, to be his nurse for eighty dollars a month.¹¹⁰ Bessie nursed James as agreed upon for over four years, then told James that she would leave him unless he married her.¹¹¹ Bessie and James then agreed that Bessie would ask for nothing after marriage except for room, board and compensation of eighty dollars each month for the services.¹¹² James paid Bessie the agreed upon eighty dollars per month until she left of her own volition nearly four years after they married.¹¹³ James sued to recover the \$3,630 he had paid Bessie while married.¹¹⁴ The trial court sustained the wife's demurrer to the complaint, but James appealed, and the Court of Appeal for the Second District of California heard his appeal.¹¹⁵

In *Brooks*, the court of appeal began by stating the rule that a married woman cannot contract with her husband for domestic services which are incidental to her marital status, since such contracts are against public

103. See 2 FARNSWORTH, *supra* note 14, § 5.1 (setting forth some factors in favor of enforcement, such as protecting the expectations of the parties to the contract, and whether a forfeiture will result if enforcement is denied). Some factors against enforcement for a court to examine include the strength of the public policy involved, and the likelihood that refusal of enforcement will further the public policy. *Id.*

104. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

105. 48 Cal. App. 2d 347, 119 P. 2d 970 (2d Dist. 1941).

106. See 2 FARNSWORTH, *supra* note 14, § 5.4 (stating the policy at issue with contracts set in the marital sphere are the result of the notion that the marriage relation is at the foundation of our civilization).

107. See *Brooks v. Brooks*, 48 Cal. App. 2d 347, 351, 119 P.2d 970, 973 (2d Dist. 1941) (holding that nursing care services are incidental to the wife's spousal duty and that a contract for compensation based on those services is void as against public policy).

108. 48 Cal. App. 2d 347, 119 P.2d 970 (2d Dist. 1941).

109. See *id.*, at 351, 119 P.2d at 972-73 (stating that the wife was already bound to render the nursing care services, and thus her promise to provide the services could not constitute consideration for the husband's return promise of remuneration).

110. *Id.* at 348, 119 P.2d at 971. James was totally paralyzed from the waist down. *Id.* The agreement also provided room and board for Bessie and her son. *Id.*

111. *Id.* at 348-49, 119 P.2d at 971.

112. *Id.* at 349, 119 P.2d at 971. Bessie also promised to continue as nurse and housekeeper. *Id.*

113. *Id.* Bessie moved away from the house she shared with her husband after she left the marriage. *Id.*

114. *Id.*

115. *Id.*

policy.¹¹⁶ The court noted the reason behind the public policy rule is that domestic services are owed by a wife to her husband as part of the marital duty.¹¹⁷ Since the wife cannot perform these services on her own account, no contract can exist for them.¹¹⁸ Thus, if the law were to give effect to intraspousal agreements for domestic services, like nursing care, there would be three problems.¹¹⁹ First, recognizing the ability of the wife to contract for her services would be disruptive to the marriage.¹²⁰ Second, a wife's contract for services would degrade the wife by making her a menial servant.¹²¹ Finally, the court recognized that the spouses could defraud creditors who hold a claim against the husband.¹²² The court asserted that husband and wife could secretly contract for services, which would enable the husband to pass all of his property to his wife and to avoid the creditor's claim, in exchange for her domestic services.¹²³

The *Brooks* court then stated that there was no legislative enactment which allowed spouses to contract with each other in regard to domestic services.¹²⁴ In support of this, the court cited California Civil Code section 159, which states that a husband and wife cannot alter their legal relations by contract, except as they relate to property.¹²⁵ Then, without explanation, the court stated that it was obvious that nursing a sick or

116. See *id.* at 349-50, 119 P.2d at 972 (citing *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 73 P.2d 643 (1st Dist. 1937)) (noting that public policy considerations mandate the prohibition of wives from contracting for services which are part of the marital contract); *supra* notes 100-106 and accompanying text (detailing the rule that courts refuse to enforce contracts that violate public policy); *infra* notes 243-249 and accompanying text (discussing the public policy rationale in *Borelli* for refusing to enforce agreements between husband and wife for domestic services).

117. See *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972 (stating that a wife owes domestic services to her husband's family, in addition to the husband himself); *Coleman v. Burr*, 93 N.Y. 17, 25 (1883) (providing the rationale for the public policy rule that strikes down intraspousal agreements regarding the remuneration of nursing care services).

118. See *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972 (declaring that home services are rendered for the household, and not the woman personally).

119. *Id.*

120. *Id.*; *Coleman v. Burr*, 93 N.Y. 17, 25 (1883) (stating, without explanation, that the ability of a wife to sue her husband would cause discord and adversely affect marital harmony).

121. *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972; see *Coleman*, 93 N.Y. at 25 (explaining that a wife should discharge her domestic duties lovingly and with great care, not with the attitude of hired help).

122. *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972; see *Coleman*, 93 N.Y. at 25 (determining that to allow a husband and wife to contract for domestic services would greatly facilitate creditor fraud).

123. *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972; see *Coleman*, 93 N.Y. at 25 (explaining that by secret and unknown contracts a wife could acquire all of her husband's property as payment of her services, thereby preventing the husband's creditors from satisfying their debts).

124. See *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972 (finding no California statute permitting the spouses to contract for domestic services).

125. See CAL. CIV. CODE § 159 (recodified at CAL. FAM. CODE § 1620 (West 1994)) (allowing a husband and wife to alter by contract their property arrangements).

invalid spouse is part of one's marital duties.¹²⁶ The *Brooks* court thus concluded that nursing care services are not encompassed by the property exception found in California Civil Code section 159.¹²⁷

In accordance with these rules, the *Brooks* court held that the husband had stated a claim since the renewed agreement, which called for payment of services that were part of the marriage bargain, was void as against public policy.¹²⁸ Therefore, the *Brooks* court did not give effect to an agreement between husband and wife, to the detriment of the woman, further illustrating how women's legal interests have not been given the same protection as men over time.¹²⁹

B. The Historical Background of Female Subordination by the Law

The legal subordination of women can be traced back to common law when a married woman was seen as the property of her husband.¹³⁰ At that time, a woman was legally not able to make a contract, a will, own property, have control of her separate estate, or control her own body.¹³¹ The common law also allowed a husband to physically discipline his wife,

126. See *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972 (indicating that housekeeping and nursing of an ill spouse are incidents of marriage); see also CAL. FAM. CODE § 1620 (West 1994) (rejecting the ability of spouses to contract out of their legal duties to each other, except as to property); *id.* § 3580 (providing that mutual consent is sufficient consideration for a support agreement after separation).

127. *Brooks*, 48 Cal. App. 2d at 350, 119 P.2d at 972.

128. *Id.* at 351, 119 P.2d at 972-73. The appellate court in *Brooks* reversed the trial court, holding that the wife's demurrer to the complaint was improperly sustained. *Id.* The court also upheld the husband's claim because there was no consideration for the promise to pay Bessie. *Id.*

129. See Taub & Schneider, *supra* note 9, at 151 (noting that throughout the history of the United States, women have been denied basic rights of citizenship, allowed only limited participation in the economy, and also have been denied access to power, dignity, and respect).

130. See BARTLETT, *supra* note 2, at 1 (stating that the concept of women as property is one idea that led to the subordination of women in the United States); MARRIAGE CONTRACT, *supra* note 10, at 9 (indicating that married women today still experience a loss of their independent identity when they marry). The loss of identity married women experience is demonstrated when the woman takes the last name of her husband, instead of retaining her maiden name. *Id.* By taking the last name of her husband, a woman discards the life she had previously led, and becomes identified with the husband. *Id.* A woman, however, is not required by law to take her husband's surname. *Id.*

131. See BARTLETT, *supra* note 2, at 1 (recognizing that because women were thought of as property, their legal existence was virtually suspended); 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (noting that during marriage, at common law in England, the husband and wife merged into a single legal entity and therefore could not contract between each other); Joseph Warren, *Husband's Right To Wife's Services*, 38 HARV. L. REV. 421, 421 (1925) (asserting that at common law, a husband had the right to his wife's services whether rendered to him in the home or business, or whether rendered to a third party).

as part of the husband's authority.¹³² The most enduring reason for the subordinate status of women was the assumption that men represent what a human being is supposed to be, and since women are different, they are therefore considered lesser beings.¹³³

The relationship between husband and wife at common law was altered by the Married Women's Property Acts.¹³⁴ These enactments, which allowed a woman to own property and control her own separate property, were enacted in all common law property states around 1900.¹³⁵ In California, however, a woman already had the rights granted by the Married Women's Property Acts, such as being able to contract with her husband, own separate property, and keep her earnings as her own while living apart from the husband, because California had adopted the community property scheme.¹³⁶ Nonetheless, some commentators argue that

132. See *State v. Oliver*, 70 N.C. 60, 60 (1874) (rejecting the common law "rule of thumb" that a husband could harm his wife if he did not use a stick wider than his thumb); 1 BLACKSTONE, *supra* note 131, *444 (stating that the common law found it reasonable for a husband to beat his wife, since he had to answer for his wife's actions). Though domestic violence is not condoned explicitly by the law today, domestic violence is still prevalent. ROSS, *supra* note 6, at 154. In the United States, domestic violence is the greatest cause of injury to women, with 20% of emergency room visits by women the result of injuries caused by battering, and 31% of all female homicide victims in 1988 killed by their husbands or boyfriends. *Id.*; see Diana Griego Erwin, *Bobbit Case an Expose of Domestic Abuse*, SACRAMENTO BEE, Jan. 25, 1994, at A2 (noting that in California in 1992, police responded to 248,828 domestic violence calls, and that more than one million American women a year are forcibly raped by their husbands).

133. See BARTLETT, *supra* note 2, at 1-2 (summarizing the assumption that men are the norm and women are different). This assumption, however, ignores the fact that the human species consists of both male and female animals, which together comprise and represent mankind, and is not just one species without differentiation. See DRUCILLA CORNELL, TRANSFORMATIONS-RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE 141 (1993) (arguing that men and women should be given equal value despite their biological differences). Cornell also claims that affirming the feminine sexual difference is necessary to changing the status quo, without reducing the claim for women's rights to an appeal for special privilege. *Id.*

134. See BLUMBERG, *supra* note 37, at 3 (noting that the Married Women's Property Acts are a generic term for statutes passed circa 1900 in all the common law states).

135. See *id.* (explaining that all common law states passed Married Women's Property Acts); see, e.g., Ga. Code Ann. § 2993 (1914); Mich. Comp. Laws § 11485 (1915) (giving a woman the right to own property in her own name and control her separate property). The United States Supreme Court, however, held that the District of Columbia's Married Women's Property Act did not give a woman the right to her earnings from outside work. *Seitz v. Mitchell*, 94 U.S. 580, 584 (1876).

136. See CAL. FAM. CODE § 721 (reenacting CAL. CIV. CODE § 158 (1872)) (West 1994) (allowing spouses to contract with each other as if they were unmarried); CAL. CIV. CODE § 168 (1872), *repealed by* 1974 Cal. Stat., ch. 1206, § 3 at 2609 (stating that a wife's earnings are not subject to her husband's debts); CAL. FAM. CODE § 771 (reenacting CAL. CIV. CODE § 169 (1872)) (West 1994) (granting a wife the right to her earnings while living separate and apart from her spouse). While community property dictates that earnings of both spouses during the marriage are community property, until 1975 only the husband had the right to manage and control the community estate. See CAL. CIV. CODE § 172 (1872) (placing management and control of the community property estate solely with the husband); *id.* § 172a (1872) (reaffirming that the husband has management and control, but the wife must join a conveyance of community real property). *But see* CAL. FAM. CODE § 1100 (West 1994) (stating that both spouses have equal right to manage and control the community property).

even when women were finally given the right to manage and control their own property under the Married Women's Property Acts and in community property states, other inequities still persisted due to the division of society into two spheres.¹³⁷ A legal tradition evolved which recognized that the world was split into public and private spheres, with women segregated into the private sphere where the legal ideals of equality and justice do not apply.¹³⁸ In particular, feminists claim that women are relegated to the private sphere, while men are placed in the public sphere.¹³⁹ The private sphere includes family, home, and child raising.¹⁴⁰ The public sphere constitutes government, business, and the law.¹⁴¹ The separate spheres theory is used to explain the exclusion of women from the political and economic spheres, and the resulting dependent and subservient roles.¹⁴²

There are two assumptions that logically lead to the conclusion that women should be at home, under the authority and protection of their husband.¹⁴³ The first assumption is that since women give birth to children, it is necessary that women be the primary child rearer.¹⁴⁴ In addition, it is assumed that women are physically, mentally, and morally inferior to men, and therefore they are unfit to participate in public life.¹⁴⁵ The relegation of women to the private sphere has resulted in the marginalization of their existence.¹⁴⁶ This marginalization is due to the fact that the private realm, in today's modern post-industrial society, has

137. See *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (stating that the civil law, as well as nature, has always recognized a wide difference in the respective spheres and destinies of men and women); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 281 (Stanley I. Benn & Gerald F. Gaus eds., 1983) (arguing that the feminist movement is ultimately about the dichotomy between the public and private spheres); Taub & Schneider, *supra* note 9, at 152-54 (citing denial of the franchise, full participation in the economy, limitation of occupational choices, and denial of the right to reproductive choice as examples of the inequality between men and women); *infra* notes 152-156 and accompanying text (describing the limitation of occupations that women suffer).

138. Powers, *supra* note 4, at 70.

139. See Taub & Schneider, *supra* note 9, at 151 (noting that the law has explicitly excluded women from the public sphere and confined them to the private sphere).

140. BARTLETT, *supra* note 2, at 2; see Taub & Schneider, *supra* note 9, at 151-52 (detailing the woman's primary responsibilities in the private realm to include bearing and raising children and providing a refuge for men from the pressures of the capitalist world).

141. BARTLETT, *supra* note 2, at 2; see Taub & Schneider, *supra* note 9, at 151 (defining the public sphere as containing the marketplace and government).

142. See BARTLETT, *supra* note 2, at 2 (arguing that the exclusion of women from political and economic importance is due to women's relegation to the private sphere).

143. Powers, *supra* note 4, at 72.

144. *Id.*

145. *Id.* at 72-73.

146. See Gavison, *supra* note 8, at 22 (identifying the privatization of women leading to their marginalization as being the 'first' claim of feminists).

become increasingly limited and impoverished.¹⁴⁷ In particular, the private realm excludes politics and work that is financially rewarding, since it concerns only homemaking and childrearing, neither of which earn a wage.¹⁴⁸ Women's lives are also preoccupied with the provision of domestic services, which limits the amount of time left in the day to enter the public sphere.¹⁴⁹

There are many examples of how the law has excluded women from public life with the denial of certain rights.¹⁵⁰ There is the denial of the right to vote.¹⁵¹ Even though women were given the right to vote in 1920, with the ratification of the Nineteenth Amendment, women were not automatically given all the rights and duties that normally accompany elector status.¹⁵² Women were denied the right to hold an elected or appointed office,¹⁵³ the right, if married, to conduct a business,¹⁵⁴ and

147. See *id.* (finding that the private realm does not contain good work, but rather denies women rewarding lives, independence, and visibility).

148. See *id.* (noting that women are expected to take primary responsibility for childrearing, and other unpaid services in the home, while men are to be the major breadwinners). In addition, if a woman reaches a freely agreed upon contract with her spouse, in an attempt to receive compensation for the many services she provides at home, courts strike down the agreements as being void as against public policy, stating that support encompasses part of the marriage bargain. See *Brooks v. Brooks*, 48 Cal. App. 2d 347, 351, 119 P.2d 970, 972 (2d Dist. 1941) (holding that an agreement for the payment for nursing care services is void, since the services are part of the marriage contract); *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (denying enforcement of an agreement concerning property in exchange for the provision of nursing care services, on the ground that a wife is to perform such services without compensation); *supra* notes 87-129 and accompanying text (discussing *Brooks* and *Sonnicksen*).

149. See *Taub & Schneider, supra* note 9, at 151-52 (finding opportunities for women limited in the public sphere by their obligations at home in the private sphere).

150. See *Planned Parenthood of S.E. Pa. v. Casey*, 112 S.Ct. 2791, 2872 (1992) (noting that women's right to control their reproductive lives, recognized in *Roe v. Wade*, 410 U.S. 113 (1973), has facilitated women's ability to equally participate in the economic and social life of our society); *Taub & Schneider, supra* note 9, at 152-54 (citing denial of franchise, exclusion from participating fully in the economy, and loss of reproductive control). The denial of full reproductive autonomy limits a woman's work and educational opportunities, since a woman does not possess the ability to determine when she will have children, and women bear the childrearing responsibilities. *Id.* at 158-59.

151. See *Taub & Schneider, supra* note 9, at 152 (claiming that the refusal to recognize the right of women to vote is the most obvious exclusion of women from the public sphere); *ROSS, supra* note 6, at xiii (noting that at the 1848 Seneca Falls women's rights convention, Elizabeth Cady Stanton and Lucretia Mott listed the ability to vote as the 'first right of a citizen').

152. See U.S. CONST. amend. XIX (providing that no one may be denied the right to vote on account of sex); *Taub & Schneider, supra* note 9, at 152 (stating that the Nineteenth Amendment passed only after a century long struggle). See generally ELEANOR FLEXNER, *CENTURY OF STRUGGLE - THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (1975 ed.) (giving a general account of women's demands for inclusion and recognition within the legal system, from Colonial American times culminating in the Nineteenth Amendment).

153. See *Powers, supra* note 4, 71 n.68 (stating the common law rule that women could not hold office or take part in the administration of justice).

154. *Id.* at 71.

the right to hold certain occupations.¹⁵⁵ Furthermore, as late as 1961, the United States Supreme Court upheld a woman's exclusion from jury duty.¹⁵⁶

While the law has directed male dominance in the public sphere, the law has been noticeably absent from the private sphere.¹⁵⁷ For instance, courts are reluctant to enforce agreements between spouses, or adjudicate interspousal disputes.¹⁵⁸ Courts traditionally have not enforced agreements between husbands and wives for domestic services.¹⁵⁹ An example

155. See *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding a state statute which prohibited women from bartending, unless their husband or father owned the bar); *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873) (maintaining the Illinois state supreme court's refusal to admit women to practice law).

156. See *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (holding the exclusion of women from jury duty reasonable, since women are still the center of home and family life), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Minor v. Happersett*, 88 U.S. 162, 178 (1875) (holding that the right to vote was not one of the privileges and immunities of United States citizenship, thereby upholding a state constitutional provision that specifically prohibited women from voting); see also ROSS, *supra* note 6, at xiv (noting that women's rights activists pushed for passage of the Equal Rights Amendment to the United States Constitution in the 1970's, due to the prevalence of discriminatory laws against women). The Equal Rights Amendment stated that neither any state nor the United States shall deny equality of rights under the law on account of sex. *Id.* The amendment failed to be ratified by the necessary thirty-eight states by a narrow margin. *Id.* See generally MARY A. DELSMAN, *EVERYTHING YOU NEED TO KNOW ABOUT THE EQUAL RIGHTS AMENDMENT* (1975) (placing the Equal Rights Amendment in historical context, and setting out the arguments as to what the amendment will and will not do).

157. See *Taub & Schneider*, *supra* note 9, at 154 (noting that the law, by not interfering in the private sphere, operates subtly to subordinate women, since women are relegated to the private sphere); see also *Doe v. Doe*, 314 N.E.2d 128, 132 (Mass. 1974) (stating that the many delicate questions inherent in a marriage are generally left alone by the law).

158. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 639 (1980) (noting that inter-spousal disputes have long received a hands-off approach from the law); see also Powers, *supra* note 4, at 70-73 (asserting that this tradition of family autonomy subordinates wives to their husbands); *Taub & Schneider*, *supra* note 9, at 154 (arguing that even though the conflicts between parties are fundamentally the same in the public and private sphere, the law generally refuses to interfere in ongoing family relationships). Examples of the similarities between the public and private spheres can be drawn from contract law, tort law, and criminal law. *Id.* at 154-55. Contract law purportedly has the purpose to enforce promissory obligations between individuals, and yet is not available during marriage to enforce agreements between the spouses regarding matters that do not involve property, such as nursing care agreements. *Id.* at 155. Also, tort law traditionally has not been applicable to injuries inflicted by one family member on another that would be compensable but for the fact that they occurred in the private family setting, due to interspousal and parent-child immunity. *Id.* Many state rape statutes continue to carve out an exception for a husband's forced intercourse with his wife. *Id.*

159. See e.g., *Brooks v. Brooks*, 48 Cal. App. 2d 347, 351, 119 P.2d 970, 972-973 (2d Dist. 1941) (nursing care services); *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (nursing care services); *Youngberg v. Holstrom*, 108 N.W.2d 498, 502 (Iowa 1961) (services on husband's farm); *Frame v. Frame*, 36 S.W.2d 152, 154 (Tex. 1931) (looking after the farm, marketing products, and collecting and paying out money); *supra* notes 87-129 and accompanying text (discussing the *Brooks* and *Sonnicksen* cases in detail).

is the agreement for nursing care services.¹⁶⁰ When a court does not enforce an agreement that requires the husband to compensate the wife for services she has already provided, an injustice is worked against the woman.¹⁶¹ Courts which justify their refusal to intervene in intra-family disputes often invoke the image of the family as a private domain which should be free from government interference.¹⁶²

Using privacy to justify noninterference in the family translates to deregulation of marriage in the name of individual liberty.¹⁶³ The deregulation actually makes liberty and equality more elusive, since liberty and equality mean little absent some mechanism for enforcement within the family.¹⁶⁴ The effect of courts' adherence to privacy notions, there-

160. See *Brooks*, 48 Cal. App. 2d at 351, 119 P.2d at 972 (holding that an agreement among husband and wife for nursing care services violates public policy, since such services are incidental to the wife's spousal duties); *Sonnicksen*, 23 Cal. App. 2d at 479, 73 P.2d at 645 (noting that since a wife is to perform nursing care services without compensation, there cannot be a contract for the wife to be paid for these same services); *supra* notes 87-129 and accompanying text (providing a discussion of the *Brooks* and *Sonnicksen* courts' holding that nursing care services are a wife's duty).

161. See MARRIAGE CONTRACT, *supra* note 10, at 72 (stating that a married woman cannot get receive compensation for her services that she has already rendered, due to the insurmountable barrier that the law places in front of married women). Courts have not enforced spousal agreements for domestic services based upon a perceived lack of consideration. *Id.* at 71. Commentators, however, have noted that the finding of a lack of consideration is simply a tool that courts use to inject their own views. See *Dalton*, *supra* note 22, at 1011 (arguing that the entire doctrine of consideration is used by courts to make policy decisions about which agreements to enforce and which to not enforce); *infra* notes 243-251 and accompanying text (discussing the holding in *Borelli*).

162. See *Balfour v. Balfour*, 2 K.B. 571, 579 (1919) (refusing to enforce, between spouses, a written agreement for the husband to send support money to his ailing wife on the ground that the state should not interfere in an ongoing marriage). The policy of nonintervention states that the law is not to intrude into the ongoing family relationship, since people will act out of love and cooperation, and thus there is no need for legal interference. See *Gavison*, *supra* note 8, at 23 (setting out the claim by some that there is no need for legal interference in the family, since familial and common interests will ensure the welfare of all concerned). An alternate reason for the public-private distinction is that the market and business world is harsh, while the family is filled with a harmony of interests and love. *Id.* It follows that men are stronger and thus volunteer to face the cruel world. *Id.* While the worlds of business and politics may be rough, feminists argue that it is a source of self-fulfillment which is systematically denied to most women. *Id.*

163. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 95 (1989) (arguing that the traditional approach of nonintervention has been reinforced by recent decisions, such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), which raises the right of marital privacy to a constitutional level, signaling the withdrawal of regulation from an ongoing marriage); *id.* (arguing that the ideas of privacy and neutrality allow the law to avoid the appearance of imposing any one group's views upon another group).

164. See *Taub & Schneider*, *supra* note 9, at 155 (arguing that the notion of a familial privacy right is based on false assumptions). *Taub and Schneider* state that claims for privacy misconstrue the point at which the law is brought into the family situation. *Id.* Since the parties seek legal relief after the harmony of the family is disrupted, there is no additional disruption that the law causes by its intrusion, and harmonious relations are no longer possible. *Id.* at 155-56. This same argument is discussed in the *Borelli* dissent. See *Borelli*, 12 Cal. App. 4th at 657, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting) (claiming that those who favor domestic harmony over intrusion by the court are in retreat across the country, because there are obvious wrongs that need to be addressed). In addition, there is no marriage relationship to preserve when one spouse has died, such as occurred

fore, is to ratify or allocate the power of one family member over another.¹⁶⁵ Thus, by not allowing women to enforce agreements that were made between spouses as consenting adults, courts send the message that household work is not real work, since it is not a proper subject for a contract.¹⁶⁶ Because the law has so little to do with women's concerns, the insignificance of women becomes underscored and has been perpetuated through modern times.¹⁶⁷ Even though women have moved out of the home and into the working world in great numbers, women have still not achieved equality with their male counterparts because of the legal subordination.¹⁶⁸

C. While Women Have Substantially Achieved Legal Equality, Women are Still Kept from True Equality

Equality is a long honored value of the Anglo-American legal tradition.¹⁶⁹ At a minimum, equality means equal application of the law to all people.¹⁷⁰ We have seen that women have not always been treated as equals with men before the law.¹⁷¹ Over time, however, all the statutes and court opinions which denied women the right to participate in the

in *Borelli*, so the familial privacy argument is not applicable. *Id.* at 658, 16 Cal. Rptr. 2d at 22-23.

165. See Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174-75 (1985) (claiming that the practical consequence of a court refusing to settle intra-spousal financial disputes is to leave the parties in the position that they are). Affirming the status quo, however, allocates power in the husband, since he usually is the one who makes household decisions. *Id.* at 1175; see Taub & Schneider, *supra* note 9, at 156 (arguing that isolating women to the private sphere, where the law does not enter, contributes directly to women's inferior status). Since the law does not enter the private sphere, women do not have access to the legal relief needed to improve their situation. *Id.* In addition, by not adjudicating men's conduct in the private realm, the law sanctions the rule of men. *Id.*

166. See Taub & Schneider, *supra* note 9, at 156 (claiming that the portrayal of women's work as not being real work maintains a woman's subordinate status, since it devalues her worth).

167. See *id.* (noting the image that the law is for business and other important things, thus, implying that women's concerns about spousal support, household duties, and provision of nursing care are not important); *supra* notes 150-166 and accompanying text (illustrating how the law excludes women from the public sphere yet gives women no assistance in the private sphere).

168. See OKIN, *supra* note 45, at 3 (arguing that there exists substantial inequality between the sexes even today).

169. See U.S. CONST. pmbl. (emphasizing the importance of justice, along with the blessings of liberty); *id.* amend. XIV, § 1 (announcing that no state shall deny any person the equal protection of the laws); *The Slaughter-House Cases*, 83 U.S. 36 (1873) (advancing the first examination of the Fourteenth Amendment); OKIN, *supra* note 45, at 3 (finding that the Pledge of Allegiance also claims to bestow 'liberty and justice for all'); Powers, *supra* note 4, at 68 (proclaiming that a basic principle of the United States is the inherent equality of all people); ROSS, *supra* note 6, at 2 (finding that the Equal Protection Clause prohibits an action by government from treating citizens differently, or singling out one group for special treatment over another group); Taub & Schneider, *supra* note 9, at 151 (stating that equality is a value of our legal tradition).

170. Taub & Schneider, *supra* note 9, at 151.

171. See *supra* notes 130-168 and accompanying text (detailing the historical subordination of women).

public sphere have been reversed.¹⁷² Women can now vote, serve on juries, and hold elected or appointed offices.¹⁷³ Equal access to public accommodations, housing, credit, insurance, education, athletics, government benefits, and pension plans are also all guaranteed to women.¹⁷⁴ Despite these reforms, however, there still exist legal barriers to women's full participation in the public sphere.¹⁷⁵ For example, the doctrine of separate but equal for the different sexes has been approved in government education by the United States Supreme Court in *Vorchheimer v. School District of Philadelphia*.¹⁷⁶ In contrast, the 1954 decision of *Brown v. Board of Education* rejected the separate but equal doctrine in the racial context.¹⁷⁷ *Vorchheimer* and *Brown* exemplify the United States Supreme Court's application of equal protection, with a result that race-based

172. Powers, *supra* note 4, at 79.

173. *Id.*; see U.S. CONST. amend. XIX (allowing women the right to vote); 28 U.S.C. § 1861 (Supp. 1993) (providing that all citizens, with limited exceptions, are competent to sit on federal juries; *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding a state statute that exempted women automatically from jury service, unless they volunteered, as violating the Sixth Amendment guarantee of an impartial trial); *In re Opinion of the Justices*, 135 N.E. 173, 176 (Mass. 1922) (interpreting the Nineteenth Amendment as having the effect of making women eligible to hold office).

174. Powers, *supra* note 4, at 79; see Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1982 & Supp. 1993) (making it unlawful for any creditor to discriminate against any applicant of a credit transaction based upon sex); Title XI of the Educational Amendments of 1972, 20 U.S.C. § 1681 (1990) (providing that no person shall be excluded from participation in any educational program receiving federal funds on the basis of sex); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1978) (establishing that no employer who is subject to the federal minimum wage laws shall discriminate on the basis of sex with regard to the wage rate for equal jobs); Public Health Service Act, 42 U.S.C. 292(d) (Supp. 1993) (restricting grants, loan guarantees, or interest subsidy payments to schools of medicine, optometry, pharmacy, podiatry, or public health to those schools which make satisfactory assurances that the school will not discriminate on the basis of sex in admissions); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-2 (1981) (making it unlawful to refuse to hire, to discharge, or otherwise discriminate against an individual for employment based upon his race, color, religion, sex, or national origin); Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1977 & Supp. 1993) (prohibiting sex discrimination in the sale, rental, or financing of housing); Unruh Act, CAL. CIV. CODE § 51 (West Supp. 1994) (forbidding sex discrimination by business establishments); *id.* § 1812.30-1812.31 (West 1985 & Supp. 1994) (disallowing sex discrimination in credit, and providing recovery for actual and punitive damages); CAL. EDUC. CODE §§ 40, 41, 51500, 51501 (West 1989 & Supp. 1994) (prohibiting discrimination based upon sex in schools, their athletic programs, and use of textbooks that reflect adversely upon people due to race, sex, color, and handicap); CAL. GOV'T CODE § 12900-12995 (West Supp. 1994) (requiring that people do not discriminate against applicants for employment and housing based upon sex); CAL. INS. CODE § 10119.5 (West 1993) (forbidding sex discrimination in insurance for pregnant women).

175. Powers, *supra* note 4, at 79.

176. See *Vorchheimer v. School Dist. of Philadelphia*, 430 U.S. 703, 703 (1977) (upholding, without opinion, Philadelphia's two sex-segregated elite high schools because they were separate but equal).

177. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that having separate educational systems for white and black children violates the equal protection guarantee of the Fourteenth Amendment).

classifications receive a higher standard of judicial review than sex-based classifications.¹⁷⁸

The lack of true equality between men and women, in the face of numerous federal and state statutes requiring formal equality, is also demonstrated by the great economic and political inequality that women suffer.¹⁷⁹ For example, the poverty rate of elderly woman is nearly twice that of elderly men.¹⁸⁰ In addition, three-fifths of chronically poor households with dependent children are headed by a single female parent.¹⁸¹ Women are also underrepresented in the government.¹⁸² There are fifty-five U.S. women representatives in the 1993-94 congressional term, and until recently, one out of nine Supreme Court Justices was deemed to be enough female representation in the highest court of the land.¹⁸³ The inequality women suffer is evidenced by the fact that women are paid less for the same work and bear most of the burden of the housework and child

178. See ROSS, *supra* note 6, at 6 (noting that in *Craig v. Boren*, 429 U.S. 190, 197 (1976), the United States Supreme Court articulated its constitutional standard of review for gender classifications as an intermediate test, which requires a statute to be substantially related to the achievement of important government objectives); cf. *Korematsu v. United States*, 323 U.S. 214, 215 (1944) (holding that race classifications are immediately suspect and subject to strict scrutiny). The United States Supreme Court has never declared that gender is a suspect class, which would subject gender classifications to the strict scrutiny standard of review that race classifications receive. ROSS, *supra* note 6, at 7. The California Supreme Court, however, has adopted the strict scrutiny test when applying the state constitution's equal protection clause for laws discriminating against women. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17, 22, 485 P.2d 529, 539, 543, 95 Cal. Rptr. 329, 339, 343 (1971) (applying the strict scrutiny test to strike down California Business and Professions Code § 25656, which prohibited the hiring of women as bartenders unless they or their husbands held the liquor license); see also CAL. CONST. art. I §§ 11, 21 (providing the state equivalent to the federal equal protection law).

179. Powers, *supra* note 4, at 79; see OKIN, *supra* note 45, at 3 (noting that while the United States prides itself on democratic values, such as equality of opportunity for all, equality has not been accomplished); Taub & Schneider, *supra* note 9, at 152-54 (finding that women are excluded from armed combat duty, cannot make certain occupational choices, and are not in charge of their own reproduction choices).

180. OKIN, *supra* note 45, at 3; Bureau of Labor Statistics, U.S. Department of Labor, Employment and Earnings (July 1987); RUTH SIDEL, WOMEN AND CHILDREN LAST: THE FLIGHT OF POOR WOMEN IN AFFLUENT AMERICA xvi, 158 (1986); DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 84, 84 (1988); see LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 339 (1985) [hereinafter DIVORCE REVOLUTION] (reporting that one year after divorce, women's standard of living decreased by 73%, while men's had increased by 42%). But see Saul D. Hoffman & Greg J. Duncan, *What are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) (finding only a 33% decline in living standards for women after divorce, even using Weitzman's raw data).

181. OKIN, *supra* note 45, at 3.

182. See *id.* (finding that 2 out of 100 U.S. Senators are women, and the number of men chosen in each congressional election far exceeds the number of women who have been elected during the entire history of the United States).

183. William J. Eaton, *Women in Congress Cite Gains on Family Issues*, L.A. TIMES, Dec. 3, 1993, at A41. In 1993, Ruth Bader Ginsburg became the second woman on the United States Supreme Court, joining Justice O'Connor. Sam Fulwood III, *Ginsburg Confirmed as 2nd Woman on Supreme Court*, L.A. TIMES, Aug. 4, 1993, at A1.

rearing.¹⁸⁴ The subtle discrimination that occurs against women, and holds them back from achieving true equality with men constantly arises. A recent case before the Court of Appeal for the First District of California, *Borelli v. Brusseau*,¹⁸⁵ is such an example. The justices were presented with the opportunity to overturn precedent that perpetuated injustices against women, and yet a majority of the court failed to do so. The question presented to the *Borelli* court involved the enforceability of a contract among married parties for the performance of nursing care services.¹⁸⁶ Although this issue had already been decided by two courts of appeal in *Sonnicksen* and *Brooks*, the appellate court had the opportunity to decide the impact of Family Code section 850.¹⁸⁷

II. THE CASE

A. Factual and Procedural History

Hildegard and Michael Borelli entered into a prenuptial contract on April 24, 1980, which presumably retained both partners' property as separate property.¹⁸⁸ They married the next day and remained married until Michael died in 1989.¹⁸⁹ Michael was admitted to a hospital in 1983, 1984 and 1987 as a result of heart problems.¹⁹⁰ Following the last

184. See OKIN, *supra* note 45, at 3-4 (submitting that husbands do not share in the family chores equally with their wives); Janet Rosenberg et al., *Now That We Are Here: Discrimination, Disparagement, and Harassment at Work and the Experience of Women Lawyers*, 7 GENDER & SOCIETY 415, 428 (1993) (reporting that almost one-half of the female attorneys in private sector workplaces describe inequalities in salary and promotions); OKIN, *supra* note 45, at 144 (citing Bureau of Labor Statistics, U.S. Department of Labor, Employment and Earnings (July 1987); U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 149, Money Income and Poverty Status of Families and Persons in the United States: 1984, at 2 (1985)) (finding that full-time working women earn on average 71% of the earnings of full-time working men); *id.* at 145 (reporting that for the same job title, such as secretary, in 1985 male secretaries earned a median wage of \$365 per week, while the median for female secretaries was \$278).

185. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993) (*rev. denied*).

186. *Id.*

187. *Id.* The *Borelli* court, however, failed to calculate the effect of California Family Code section 850 in its decision. *Id.*; see *supra* notes 87-129 and accompanying text (reporting the facts and holdings of *Sonnicksen* and *Brooks*).

188. *Borelli*, 12 Cal. App. 4th at 650, 16 Cal. Rptr. 2d at 17. The content of the prenuptial agreement was not given by the court of appeal. *Id.*; see *id.* at 659 n.2, 16 Cal. Rptr. 2d at 23 n.2 (Poché, J., dissenting) (stating that the trial court record does not include a copy of the prenuptial agreement, but the agreement seems to have preserved Michael's substantial assets as separate property).

189. *Id.* at 650, 16 Cal. Rptr. 2d at 17.

190. *Id.* The court noted that the hospitalizations occurred in March 1983, February 1984, and January 1987. *Id.*

hospitalization, Michael had fears about his health and told Hildegard that he intended to leave her a substantial amount of property.¹⁹¹

While hospitalized, in August 1988, Michael suffered a stroke.¹⁹² During his recovery in the hospital and at a subsequent rehabilitation center, Michael repeatedly told his wife that he did not like the hospital, and that he did not like being away from home.¹⁹³ Michael also told his wife that he did not want to be admitted to a nursing home, and reaffirmed his desire to be back home, even though this would require twenty-four hour a day care by Hildegard and modifications to the house.¹⁹⁴ The doctors recommended that Michael stay in either a rest home or a convalescent hospital.¹⁹⁵

In October 1988, Michael and Hildegard entered into an oral agreement.¹⁹⁶ Michael promised to change his current will to provide that Hildegard receive a large portion of his separate property, including a lot in Sacramento, California, a life estate for the use of a condominium in Hawaii, a twenty-five percent interest in Borelli Meat Co., and all the cash remaining in his bank accounts at the time of his death.¹⁹⁷ In exchange for Michael's promise to leave his separate property to her, Hildegard promised to personally care for Michael at home for the duration of his illness.¹⁹⁸ This agreement satisfied Michael's desire not to be admitted into a nursing home.¹⁹⁹

191. *Id.*

192. *Id.* The court of appeal did not state why Michael was in the hospital this time. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 651, 16 Cal. Rptr. 2d at 18.

196. *Id.* at 651, 16 Cal. Rptr. 2d at 17; *cf. id.* at 659 n.2, 16 Cal. Rptr. 2d 23 n.2 (Poché, J., dissenting) (refuting the possibility of a statute of frauds defense to their oral agreement, since an affirmative defense is detrimental reliance); *infra* notes 397-414 and accompanying text (arguing that the *Borelli* court could have enforced the agreement between Michael and Hildegard on the basis of detrimental reliance or unjust enrichment).

197. *Borelli*, 12 Cal. App. 4th at 650, 16 Cal. Rptr. 2d at 17. The property involved was: (1) a lot in Sacramento, California; (2) a life estate for the use of a condominium in Hawaii; (3) a 25% interest in Borelli Meat Co.; (4) all cash remaining in all existing bank accounts at the time of his death; (5) the costs of educating Michael's step-daughter, Monique Lee; (6) Michael's entire interest in a residence in Kensington, California; (7) all furniture located in the residence; (8) Michael's interest in a partnership; and (9) health insurance for Hildegard and Monique Lee. *Id.* Hildegard's complaint alleges that Michael was to 'leave' the property to Hildegard, which implies that they agreed to a will transfer. *Id.* at 651, 16 Cal. Rptr. 2d at 17. Hildegard did not allege that a transfer was to occur during Michael's lifetime. *Id.* See also Letter from Richard T. White, partner at Fitzgerald, Abbott & Beardsley, attorney for Hildegard Borelli, to Wendy Hillger, Comment Writer, *Pacific Law Journal* (Jan. 19, 1994) (copy on file at the *Pacific Law Journal*) (noting that the property promised to Hildegard was valued at approximately \$500,000).

198. *Borelli*, 12 Cal. App. 4th at 651, 16 Cal. Rptr. 2d at 17-18.

199. *Id.* at 650, 16 Cal. Rptr. 2d at 17.

Hildegard cared for Michael as promised, but Michael did not perform his promise before he died in 1989.²⁰⁰ Instead of changing his will to effectuate the promise, Michael left Hildegard \$100,000 and his interest in the residence they owned as joint tenants.²⁰¹ The bulk of the estate passed to Michael's daughter, Grace Brusseau, the defendant.²⁰²

Hildegard sought specific performance of the promise by her deceased husband to transmute his separate property to her.²⁰³ The Superior Court of California in Contra Costa County denied Hildegard's claim to the property by sustaining Grace Brusseau's demurrer to Hildegard's complaint without leave to amend.²⁰⁴ In particular, the trial court held that the agreement failed for lack of consideration and that to enforce the contract would be against public policy.²⁰⁵

The Court of Appeal for the First District of California reviewed the case of *Borelli v. Brusseau* to decide whether an enforceable contract may exist between a wife and husband for the performance of nursing care duties.²⁰⁶ In *Borelli*, the court of appeal held that the contract violated public policy and lacked consideration, thereby prohibiting Hildegard from enforcing the agreement with her husband for his nursing care.²⁰⁷

B. The Majority Opinion

The Court of Appeal for the First District of California, in an opinion written by Justice Perley, affirmed the decision of the trial court, which

200. *Id.* at 651, 16 Cal. Rptr. 2d at 18.

201. *Id.* Since Hildegard and Michael were joint tenants in the residence they shared, Hildegard would have received his one-half interest upon Michael's death regardless of the provision in Michael's will. *Grothe v. Cortlandt Corp.*, 11 Cal. App. 4th 1313, 1317, 15 Cal. Rptr. 2d 38, 40 (4th Dist. 1992) (noting that nothing passes from the deceased joint tenant to the survivor, but rather, the survivor takes from the instrument which created the joint tenancy); 2 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 6.1, at 7 (A. James Casner ed. 1952) (stating that the last survivor of a joint tenancy owns the property in its entirety).

202. See Letter from Richard T. White, *supra* note 197 (estimating the total value of Michael's estate as approximately \$1,500,000).

203. *Borelli*, 12 Cal. App. 4th at 649, 16 Cal. Rptr. 2d at 17; see *supra* notes 64-70 and accompanying text (discussing the law of transmutations).

204. *Borelli v. Brusseau*, No. C91-03356 (Contra Costa County Super. Ct. 1991).

205. *Borelli*, 12 Cal. App. 4th at 649, 16 Cal. Rptr. 2d at 17.

206. *Id.* at 649, 16 Cal. Rptr. 2d at 17.

207. *Id.* at 654, 16 Cal. Rptr. 2d at 20. But see CAL. FAM. CODE § 850 (West 1994) (providing that consideration is not a requirement for an intraspousal transmutation); *infra* notes 324-414 and accompanying text (discussing the legal ramifications of the *Borelli* court ignoring California Family Code section 850). Review of the *Borelli* case was denied by the California Supreme Court on April 1, 1993. *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993), review denied, 1993 Cal. LEXIS 1981, at *1 (Apr. 1, 1993).

sustained the demurrer of Grace Brusseau.²⁰⁸ The court held that Hildegard Borelli had not established a cause of action, since she has a pre-existing statutory duty as a wife to provide nursing care services for her husband.²⁰⁹ In upholding the decision against Hildegard, the court addressed the duties which stem from the marital relationship,²¹⁰ and examined whether nursing care services are to be characterized as being part of the duty of support.²¹¹ Next, the court attempted to resolve whether a marriage contract should be treated the same as other contractual relationships.²¹² Due to the public interest in marriage, the *Borelli* court found a contract for the provision of nursing care services is void as against public policy, since a spouse is supposed to provide nursing care services as part of the spousal statutory duties.²¹³ The court then confronted an issue raised by Hildegard's counsel, namely that the cases relied upon by the majority lack precedential value today.²¹⁴ Finally, the court addressed the other arguments made by the dissent, namely that but for the agreement between Michael and Hildegard to transmute property in exchange for nursing care, Hildegard would have left Michael, and that spouses should be treated as any other contracting parties.²¹⁵ In holding that Hildegard had not stated a cause of action, the court first examined the duties that spouses owe each other as a result of the marriage contract.

208. *Borelli*, 12 Cal. App. 4th at 649, 16 Cal. Rptr. 2d at 17. Justice Perley was joined by Presiding Justice Anderson. *Id.* at 655, 16 Cal. Rptr. 2d at 20. Justice Poché filed a dissenting opinion. *Id.* (Poché, J., dissenting); see *infra* notes 266-323 and accompanying text (discussing Justice Poché's dissenting opinion).

209. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20.

210. *Id.* at 652, 16 Cal. Rptr. 2d at 18; see *infra* notes 217-221 and accompanying text (delineating marital duties).

211. *Borelli*, 12 Cal. App. 4th at 652-53, 16 Cal. Rptr. 2d at 18-19; see *infra* notes 222-226 and accompanying text (holding that nursing care is a statutory duty).

212. *Borelli*, 12 Cal. App. 4th at 651, 16 Cal. Rptr. 2d at 18.

213. *Id.* at 652, 16 Cal. Rptr. 2d at 19; see *infra* notes 324-374 and accompanying text (arguing that not enforcing contracts made between husband and wife as consenting adults results in the subordination of women).

214. *Borelli*, 12 Cal. App. 4th at 652-53, 16 Cal. Rptr. 2d at 19; see *infra* notes 227-239 and accompanying text (examining the majority's discussion of Hildegard's arguments).

215. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20; see *infra* notes 253-265 and accompanying text (noting the majority's discussion of the dissent's arguments). Though the contract between Hildegard and Michael was not enforced, Hildegard did receive \$100,000 from Michael's will, and his one-half interest in their shared residence, which was owned by Michael and Hildegard as joint tenants. *Id.* at 651, 16 Cal. Rptr. 2d at 18. Grace Brusseau was the recipient of most of her father Michael's estate. Mike McKee, *Wife Obligated To Provide Nursing Care, Court Holds; Dissenter Blasts First District's Reasoning as Outdated*, THE RECORDER, Jan. 20, 1993, at 1.

1. *Nursing Care Services are Included in the Statutory Duty to Support*

The California Court of Appeal for the First District found that society has concerns regarding marriage, and in accord with the need for the state to protect and promote marriage, legislation has been enacted which promulgates these societal concerns.²¹⁶ The *Borelli* court pointed out that a contract is created by entrance into the marital state.²¹⁷ By getting married, it must be assumed that the parties entered the marriage with the knowledge that they assume mutual legal and moral obligations of support.²¹⁸ Justice Perley noted that the support obligations have been defined broadly by courts, going so far as to hold that a spouse must give the other sympathy, confidence, and fidelity, not simply cohabitation.²¹⁹ The court also asserted that the support obligations include the provision of protective supervision services for the other spouse, without receiving compensation.²²⁰ Protective supervision services have been defined by the Court of Appeal for the Fourth District of California as the observation and monitoring of a mentally impaired or mentally ill person, to ensure that the recipient of the service does not get hurt.²²¹

After recognizing that the duty of support includes providing protective supervision, the court then addressed whether protective supervision

216. *Borelli*, 12 Cal. App. 4th at 651, 16 Cal. Rptr. 2d at 18; see CAL. FAM. CODE § 720 (West 1994) (declaring that a husband and wife contract toward each other mutual obligations of respect, fidelity, and support); *id.* § 721 (West 1994) (providing that a husband and wife can contract with each other regarding property as if they were unmarried); *id.* § 1620 (West 1994) (stating that a husband and wife cannot alter their legal relations in a contract except as to property); *id.* § 4300 (West 1994) (requiring that every individual shall support his or her spouse); *id.* § 4301 (West 1994) (requiring a married person to support the other spouse while they are living together); see also *supra* notes 87-129 and accompanying text (discussing the traditional duties of a wife, as declared by *Sonnicksen* and *Brooks*).

217. *Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 18; see *Department of Mental Hygiene v. Kolts*, 247 Cal. App. 2d 154, 165, 55 Cal. Rptr. 437, 444 (2d Dist. 1966) (stating that entrance into the marital state creates a contract between husband and wife).

218. *Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 18; *Department of Mental Hygiene*, 247 Cal. App. 2d at 165, 55 Cal. Rptr. at 444 (noting that upon entrance into marriage, it is assumed by the law, that the parties know of the obligations that are required of each spouse towards the other); see also *supra* notes 87-129 and accompanying text (discussing the spousal duties stemming from the marriage contract, as enunciated by *Sonnicksen* and *Brooks*).

219. *Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 18; see *In re Marriage of Rabie*, 40 Cal. App. 3d 917, 922, 115 Cal. Rptr. 594, 597 (2d Dist. 1974) (holding that a husband has the duty to offer sympathy, confidence, and fidelity).

220. See *Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 18; see *Miller v. Woods*, 148 Cal. App. 3d 862, 877, 196 Cal. Rptr. 69, 79 (4th Dist. 1983) (stating that spouses must provide each other uncompensated protective supervision services).

221. *Miller*, 148 Cal. App. 3d at 867 n.2, 196 Cal. Rptr. at 72 n.2.

included nursing care services.²²² The court noted two cases, *Estate of Sonnicksen v. Sonnicksen*²²³ and *Brooks v. Brooks*,²²⁴ which held that a wife is obligated, by the marriage contract, to provide nursing-type care to an ill husband, under California Civil Code sections 242, 4802, 5100, 5103, and 5132, and in accordance with public policy.²²⁵ The *Borelli* court relied upon *Sonnicksen* and *Brooks* in holding that a wife has a duty to provide nursing care services.²²⁶ The court then addressed two arguments made by Hildegard's counsel regarding the inapplicability of *Sonnicksen* and *Brooks*.²²⁷ The first argument claimed that *Sonnicksen* and *Brooks* lacked precedential value, since the cases are based upon outdated views of women and marriage.²²⁸ Hildegard also claimed that *Sonnicksen* and *Brooks* deny a woman equal protection of the laws, since wives have to provide actual nursing services without receiving compensation, while husbands only have a financial obligation of support.²²⁹ The Court of Appeal for the First District of California rejected both of these arguments by stating that the underlying rule and reasoning of *Sonnicksen* and *Brooks* has been applied in modern cases to both spouses.²³⁰

The court of appeal found precedent holding that a wife has the right to her husband's services, to rebut Hildegard's claim that only wives have been held to have to provide services, in violation of her equal

222. *Borelli*, 12 Cal. App. 4th at 652-53, 16 Cal. Rptr. 2d at 18-19.

223. 23 Cal. App. 2d 475, 73 P.2d 643 (1st Dist. 1937).

224. 48 Cal. App. 2d 347, 119 P.2d 970 (2d Dist. 1941).

225. *Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 18-19; *Brooks v. Brooks*, 48 Cal. App. 2d 347, 119 P.2d 970 (2d Dist. 1941); *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 73 P.2d 643 (1st Dist. 1937). California Civil Code sections 242, 4802, 5100, 5103, and 5132 have been recodified in the California Family Code at sections 720, 721, 1620, 4300, and 4301. See *supra* note 216 (delineating these California Family Code provisions); *supra* notes 87-129 and accompanying text (discussing the *Sonnicksen* and *Brooks* cases). But see *Ayoob v. Ayoob*, 74 Cal. App. 2d 236, 248, 168 P.2d 462, 470 (3d Dist. 1946) (holding *Sonnicksen* and *Brooks* inapplicable to a prenuptial agreement, since the *Sonnicksen* agreement was formulated before the parties contemplated marriage, and the parties in *Brooks* considered their marriage only incidental to the provision of necessary nursing care services).

226. *Borelli*, 12 Cal. App. 4th at 652-53, 16 Cal. Rptr. 2d at 18-19.

227. *Id.* at 652-53, 16 Cal. Rptr. 2d at 19.

228. See *id.* at 652, 16 Cal. Rptr. 2d at 19 (setting forth the arguments of Hildegard Borelli); *supra* notes 87-129 and accompanying text (analyzing the *Sonnicksen* and *Brooks* decisions).

229. *Borelli*, 12 Cal. App. 4th at 652-53, 16 Cal. Rptr. 2d at 19.

230. *Id.* at 653, 16 Cal. Rptr. 2d at 19 (citing *Krouse v. Graham*, 19 Cal. 3d 59, 67, 562 P.2d 1022, 1025, 137 Cal. Rptr. 863, 866 (1977); *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 404-405, 525 P.2d 669, 683-84, 115 Cal. Rptr. 765, 779-80 (1974); *In re Marriage of Rabie*, 40 Cal. App. 3d 917, 922, 115 Cal. Rptr. 594, 597 (2d Dist. 1974)).

protection.²³¹ Thus, the court found that a wife is entitled to compensation when she is deprived of her husband's physical assistance in operating the family home.²³² In further support of its assertion that *Sonnicksen* and *Brooks* are still valid, the *Borelli* court discussed precedent which allowed a husband to recover consortium damages in the wrongful death action of his wife, since she had taken care of him with his emphysema condition.²³³ Since a husband was allowed to recover for the loss of his wife's services when she died, Justice Perley considered the precedent illustrative of the idea that *Sonnicksen* and *Brooks* did not violate Hildegard's right to equal protection.²³⁴ The *Borelli* court also discovered recent case law that spoke approvingly of *Sonnicksen* and *Brooks*.²³⁵ The majority, therefore, noted that the recent approval of *Sonnicksen* and *Brooks* reaffirmed their precedential value.²³⁶ The precedent relied upon, according to the *Borelli* court, demonstrates that marital support means more than physical care that could be provided by hired help.²³⁷ The court found that support means sympathy, comfort, love, companionship, and affection.²³⁸ Thus, the court of appeal concluded that the duty of support is personally owed by the spouse, and

231. *Borelli*, 12 Cal. App. 4th at 653, 16 Cal. Rptr. 2d at 19; see *Rodriguez*, 12 Cal. 3d at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782 (holding that a wife can recover consortium damages for loss of a husband's physical assistance in maintenance of the family home). Consortium was defined by the *Borelli* court as the legal right of a spouse to the other spouse's service, companionship, and love. *Borelli*, 12 Cal. App. 4th at 653, 16 Cal. Rptr. 2d at 19 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 240 (1981)).

232. *Borelli*, 12 Cal. App. 4th at 653, 16 Cal. Rptr. 2d at 19; see *Rodriguez*, 12 Cal. 3d at 409 n.31, 525 P.2d at 687 n.31, 115 Cal. Rptr. at 783 n.31 (1974) (finding that a married woman can claim loss of consortium for the deprivation of her husband's personal assistance around the house).

233. *Borelli*, 12 Cal. App. 4th at 653, 16 Cal. Rptr. 2d at 19; see *Krouse*, 19 Cal. 3d at 70, 562 P.2d at 1027, 137 Cal. Rptr. at 868 (defining consortium).

234. See *Borelli*, 12 Cal. App. 4th at 653, 16 Cal. Rptr. 2d at 19 (arguing that the rule and policy of *Sonnicksen* and *Brooks* has recently been applied to both men and women, so the rule of *Sonnicksen* and *Brooks* is still valid as precedent); see also *Krouse*, 19 Cal. 3d at 70, 562 P.2d at 1027, 137 Cal. Rptr. at 868 (stating that a husband can recover for lost consortium when he is deprived of his deceased wife's nursing care services).

235. *Borelli*, 12 Cal. App. 4th at 653, 16 Cal. Rptr. 2d at 19.

236. *Id.*; see *Watkins v. Watkins*, 143 Cal. App. 3d 651, 654-55, 192 Cal. Rptr. 54, 55-56 (3d Dist. 1983) (approving the rule propounded by *Sonnicksen* and *Brooks*, but not extending the rule to cover the period before marriage). *Watkins* held that a woman could recover for the homemaking services that she provided prior to the marriage. *Id.*

237. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20.

238. *Id.*; see *Krouse*, 19 Cal. 3d at 67, 562 P.2d at 1025, 137 Cal. Rptr. at 866 (finding support to include comfort); *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d at 404, 535 P.2d 669, 683-84, 115 Cal. Rptr. 765, 779-80 (1974) (stating that marital support also includes love, companionship, and affection); *In re Marriage of Rabie*, 40 Cal. App. 3d 917, 922, 115 Cal. Rptr. 594, 597 (2d Dist. 1974) (holding sympathy to be part of the support that spouses owe each other).

cannot be delegated to a third party.²³⁹ The *Borelli* court reached this conclusion by finding that the personal duty implicit in the definition of marriage is a personal relation arising out of a civil contract.²⁴⁰ The court, therefore, adhered to the longstanding rule that a spouse is not entitled to compensation for support.²⁴¹ In addition, the court affirmed the rule that performance of a personal duty created by the marriage contract does not constitute new consideration for the agreement at issue.²⁴² Given that nursing care is within a spouse's duty of support, the court turned to the issue of whether Hildegard and Michael's contract was enforceable.

2. *A Marital Contract for Nursing Care Services is Void as a Violation of Public Policy and Under the Pre-existing Duty Rule*

The *Borelli* court stated that due to the public interest in marriage, the marriage contract is fundamentally different from other contractual relations.²⁴³ Though not discussed by the court, other California decisions have held that the public interest in marriage is to preserve the marriage relationship because it is essential to the maintenance of organized society.²⁴⁴ The *Borelli* court then stated that to effectuate the public

239. See *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20 (noting that marital duties are owed by husband and wife personally, since other statutory duties such as fidelity and mutual respect cannot be delegated); *infra* notes 301-323 and accompanying text (describing Justice Poché's dissent in *Borelli* and his rejection of the requirement that a spouse must personally perform the nursing care).

240. See *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20 (citing CAL. CIV. CODE § 4100 (West 1983) (reenacted by CAL. FAM. CODE § 300 (West 1994)) (providing that marriage is a personal relation arising out of a civil contract between a man and a woman)).

241. *Id.* The court noted that a spouse does have rights to the community property of the couple, since community property is a result of both spouses' labor. *Id.*

242. *Id.*; see *Estate of Sonnicksen v. Sonnicksen*, 23 Cal. App. 2d 475, 479, 73 P.2d 643, 645 (1st Dist. 1937) (holding that a wife is to provide nursing care services to her spouse as part of the marriage contract). But see *infra* notes 375-396 and accompanying text (arguing that consideration is not required for intraspousal property transmutation agreements, as governed by California Family Code section 850).

243. *Borelli*, 12 Cal. App. 4th at 651, 16 Cal. Rptr. 2d at 18 (quoting from *Hendricks v. Hendricks*, 125 Cal. App. 2d 239, 242, 270 P.2d 80, 82 (1st Dist. 1954)).

244. See *Elden v. Sheldon*, 46 Cal. 3d 267, 275, 758 P.2d 582, 587, 250 Cal. Rptr. 254, 259 (1988) (asserting that the public policy in favor of marriage stems from the necessity in an organized society of providing an institutional basis for defining people's fundamental responsibilities and rights); *De Burgh v. De Burgh*, 39 Cal. 2d 858, 870, 250 P.2d 598, 604 (1952) (stating that the public has an interest in the children of the marriage, as well as encouraging the prospect of reconciliation among spouses); *Hill v. Hill*, 23 Cal. 2d 82, 86, 142 P.2d 417, 419 (1943) (stating that the law will not enforce agreements between spouses that encourage dissolution of the marriage because preservation of established marriages are necessary for society). The public interest requires the court to foster and protect marriage, to encourage parties to live together, and to prevent separation. *Id.*; *Deyoe v. Superior Court*, 140 Cal. 476, 482, 74 P. 28, 30 (1903) (declaring that probably every

interest in marriage, the State must regulate the formation and dissolution of marriage.²⁴⁵ Regulation of the marital relationship, as the court noted, is solely within the province of the legislature, except as restricted by the Constitution.²⁴⁶ The laws relating to marriage and divorce, the court continued, were enacted because of the public concern for the dignity and stability of the marriage relationship.²⁴⁷ The agreement between Michael and Hildegard did not deserve to be enforced, the *Borelli* court decided, on two separate grounds—a public policy argument, and the pre-existing duty rule.²⁴⁸ The court first concluded, without any more explanation, that since a spouse is required to provide nursing care, a contract where a spouse receives compensation for nursing care services is void as against public policy.²⁴⁹

The court then employed the pre-existing duty rule, to hold that because Hildegard already had to provide nursing care as part of her marital duties, there was no consideration for her husband's promise to exchange his separate property for the nursing care.²⁵⁰ The court held

state in the country has enacted statutes regarding marriage which seek to foster marriage, to discourage the parties from separating, and to prevent illicit unions).

245. *Borelli*, 12 Cal. App. 4th at 651, 16 Cal. Rptr. 2d at 18 (quoting *Haas v. Haas*, 227 Cal. App. 2d 615, 617, 38 Cal. Rptr. 811, 812-13 (2d Dist. 1964)).

246. *Id.* The *Haas* court does not specify whether regulation of marriage is restricted by the federal Constitution or the California Constitution. *Haas*, at 617, 38 Cal. Rptr. at 812. *But see* Henry H. Foster, Jr., *Marriage: A "Basic Civil Right Of Man,"* 37 FORDHAM L. REV. 51, 51 (1968) (arguing that the United States Supreme Court, with the decisions of *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Loving v. Virginia*, 388 U.S. 1 (1967), has cast doubt as to the State's complete control over marriage, which may now be subject to federal evaluation, due to the constitutional rights of individual liberty and privacy).

247. *Borelli*, 12 Cal. App. 4th at 651, 16 Cal. Rptr. 2d at 18 (citing CAL. CIV. CODE §§ 55-181) (reenacted by CAL. FAM. CODE §§ 7000-7002, 7050-7052, 7110-7111, 7120-7123, 7130-7137, 7140-7143 (West 1994)). *But see id.* at 661, 16 Cal. Rptr. 2d at 24 (Poché, J., dissenting) (showing that if a spouse has left, and the other promised something to get the absent spouse to return, California courts have enforced such agreements as supported by consideration); e.g., *Bowden v. Bowden*, 175 Cal. 711, 714-15, 167 P. 154, 155 (1917) (noting that the law favors reconciliation between husband and wife, and reconciliation contracts are commendable); *Braden v. Braden*, 178 Cal. App. 2d 481, 483, 3 Cal. Rptr. 120, 122 (4th Dist. 1960) (upholding an agreement between husband and wife which was that if they could not work out their differences, the wife would return the money he had put into the house owned by her).

248. *Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 19; *see supra* notes 100-106 and accompanying text (discussing the public policy rule, stating that a contract against public policy is not enforceable); *supra* notes 77-81 and accompanying text (explaining the pre-existing duty rule, which provides that there will be no consideration for an agreement if the promisee agrees to do some duty which she already must perform).

249. *See Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 19 (holding that agreements among spouses for the provision of nursing care services violate public policy, and are thus void); *supra* notes 243-244 and accompanying text (discussing the public policy rationale of the California courts, as expressed in *Hill v. Hill*, 23 Cal. 2d 82, 86, 142 P.2d 417, 422 (1943)). The *Hill* court stated that public policy requires courts to foster and protect marriage, to encourage parties to live together, and to prevent separation. *Hill*, 23 Cal. 2d at 86, 142 P.2d at 422.

250. *Borelli*, 12 Cal. App. 4th at 652, 16 Cal. Rptr. 2d at 19.

that the nursing care agreement was void without consideration.²⁵¹ Justice Perley, however, apparently ignored an arguably relevant legislative provision, Family Code section 850, which allows a husband and wife to transmute property by agreement, without meeting the typical contract requirement of consideration.²⁵² In support of its decision, the *Borelli* court rebutted the argument made by the dissent that the cases followed by the majority are no longer good law.

3. *The Dissent's Claim that the Precedent is Outdated is Not Persuasive*

The *Borelli* court then went on to answer three issues raised by the dissent.²⁵³ The dissent first claimed that no rule of law becomes untouchable as a result of the duration of its existence.²⁵⁴ The majority agreed with the dissent's proposition, but the court stated that there are no valid reasons to overturn the well-established rule of not allowing compensation for the provision of nursing care to one's spouse.²⁵⁵ Instead, the court of appeal noted that even if the rule, in its origins, was used to deny compensation for women only, this fact is not a consideration in *Borelli*, since the rule is applied in a gender-neutral way today.²⁵⁶ In support of the rule, the majority stated that the rule protects against fraud.²⁵⁷ Creditor fraud can occur when a debtor spouse transfers property to the non-debtor spouse solely to remove the property from the creditor's reach, but is done under the guise of payment for domestic services.²⁵⁸ The court acknowledged that this possibility of fraud is not

251. See *id.* (stating directly that there was no consideration, and that consideration is needed for an interspousal property transmutation). But see CAL. FAM. CODE § 850 (West 1994) (allowing these transmutations without fulfilling the traditional consideration requirement); *supra* notes 75-81 and accompanying text (discussing consideration and the pre-existing duty rule); *infra* notes 375-396 and accompanying text (asserting that consideration is not a requirement for a transmutation, as set forth by California Family Code § 850).

252. See CAL. FAM. CODE § 850 (West 1994) (providing that spouses may agree to transmute property without consideration); *infra* notes 375-396 and accompanying text (discussing the legal ramifications of the *Borelli* court overlooking California Family Code § 850).

253. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20; see *infra* notes 266-323 and accompanying text (discussing the dissenting opinion of Justice Poché).

254. *Id.*; see *id.* at 659, 16 Cal. Rptr. 2d at 23, 25-26 (Poché, J., dissenting) (quoting JUSTICE OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 187 (1920), stating that it is not proper for the sole rationale of a law to be that it was formulated in the time of Henry IV); *infra* notes 266-323 and accompanying text (discussing the opinion of the dissent).

255. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20.

256. *Id.*

257. *Id.*

258. *Coleman v. Burr*, 93 N.Y. 17, 25 (1883).

enough to justify the rule, but claimed that the rule is still viable, since not all rationales for the rule are outdated.²⁵⁹

In dissent, Justice Poché argued that refusing to enforce such spousal agreements will lead to marriage dissolution, and that, but for the agreement, Hildegard would have left her husband Michael.²⁶⁰ In response, the majority stated that the real issue was whether negotiations at the bedside of an ill spouse are contrary to the institution of marriage, and found that enforcement of such agreements indeed would be antithetical to preserving a marriage.²⁶¹ The majority also stated that it did not believe marriage would be encouraged by a rule that enforced bargaining made at the sickbed.²⁶²

The majority responded to Justice Poché's final argument that social mores have changed such that spouses can be treated the same as any other parties who are negotiating at arm's length.²⁶³ The majority did not agree that spouses should be treated the same as any other party to a contract, because marriage is still defined by the legislature as a personal relationship of mutual support.²⁶⁴ Thus, the court held that a nursing care agreement between spouses will not be enforced.²⁶⁵

C. The Dissenting Opinion by Justice Poché

Justice Poché wrote separately because he disagreed with the majority's view that a wife has a pre-existing duty to personally provide nursing care.²⁶⁶ Justice Poché's dissent can be separated into two assertions

259. *Id.*

260. *See Borelli*, 12 Cal. App. 4th at 661, 16 Cal. Rptr. 2d at 24 (Poché, J., dissenting) (noting that no legal force could compel Hildegard not to leave Michael after he became ill); *id.* at 661 n.3, 16 Cal. Rptr. 2d at 24 n.3 (Poché, J., dissenting) (finding the implication that Hildegard would have left Michael if there was no agreement, from her complaint, which states that she gave up the opportunity to live an independent life as consideration for the agreement); *infra* notes 313-323 and accompanying text (reporting the dissent's argument that not enforcing agreements such as the Borelli's may foster not reconciliation, as the majority hopes, but rather dissolution).

261. *Id.* at 654-55, 16 Cal. Rptr. 2d at 20.

262. *Id.*

263. *Id.*; *see id.* at 657, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting) (discussing the changing economic realities of today's society, in that a wife may make significant financial contributions by having employment outside the home).

264. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20. To substantiate the statement that spouses should be treated differently from other parties to a contract, the court asserted that marital support is one of the few situations left that cannot command a price. *Id.*

265. *Id.*

266. *Id.* at 655, 16 Cal. Rptr. 2d at 20 (Poché, J., dissenting); *see supra* notes 216-226 and accompanying text (discussing the majority's marital duty analysis in *Borelli*).

supporting the notion that the traditional rule, reaffirmed by the majority in *Borelli*, should be reconsidered.²⁶⁷ In particular, Justice Poché argued that the attitudes regarding marriage, as relied upon in the traditional rule of *Sonnicksen* and *Brooks*, are outdated.²⁶⁸ Second, Justice Poché dissented because there is no requirement that nursing care for one who is ill must be personally provided by a spouse.²⁶⁹

1. *The Traditional Rule of Sonnicksen and Brooks Ignores the Legal and Economic Realities of the 1990's*

Justice Poché began his opinion by stating that while the majority read and applied the cases of *Sonnicksen* and *Brooks* correctly, the reasoning behind those decisions is outdated and, therefore, should be abandoned.²⁷⁰ Justice Poché acknowledged that the rule of *Sonnicksen* and *Brooks*, denying a spouse compensation for nursing care services, is followed nationwide.²⁷¹ The dissent claimed that precedent illustrates the mores of society that existed when the *Sonnicksen* and *Brooks* cases were decided, including the idea that a husband is authorized to receive his wife's services.²⁷² The dissent sought to demonstrate, by implication, that society has changed dramatically from the time the decisions came down, and thus their legal basis has eroded.²⁷³ Therefore, Justice Poché concluded that the cases relied upon by the majority should be overturned.²⁷⁴ The obsolete beliefs include the notions that contracts for domestic services will make the woman a servant in her home where she should happily perform the domestic duties, and that spouses should perform nursing

267. See *Borelli*, 12 Cal. App. 4th at 655, 16 Cal. Rptr. 2d at 21 (Poché, J., dissenting) (arguing that the logic behind the *Sonnicksen* and *Brooks* cases is ripe for reexamination).

268. *Id.* at 655, 16 Cal. Rptr. 2d at 20-21 (Poché, J., dissenting); see *infra* notes 270-286 and accompanying text (discussing the dissent's view that the social mores of the time when *Sonnicksen* and *Brooks* came down have changed and that our society has left behind traditional gender roles).

269. *Borelli*, 12 Cal. App. 4th at 658, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting); see *infra* notes 301-323 and accompanying text (stating the position of Justice Poché that since a spouse does not have to personally provide the nursing care, a contract for such services should be enforced).

270. *Borelli*, 12 Cal. App. 4th at 655, 16 Cal. Rptr. 2d 20-21 (Poché, J., dissenting).

271. *Id.* at 655-56, 16 Cal. Rptr. 2d at 21 (Poché, J., dissenting); see *id.* (citing *Bohanan v. Maxwell*, 181 N.W. 683 (Iowa 1921); *Foxworthy v. Adams*, 124 S.W. 381 (Ky. 1910); *Martinez v. Martinez*, 307 P.2d 1117 (N.M. 1957); *Ritchie v. White*, 35 S.E.2d 414 (N.C. 1945); *Oates v. Oates*, 33 S.E.2d 457 (W.Va. 1945)).

272. *Borelli*, 12 Cal. App. 4th at 656, 16 Cal. Rptr. 2d at 21 (Poché, J., dissenting).

273. *Id.*

274. *Id.* at 659, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting).

care services automatically due to the love and affection between husband and wife.²⁷⁵

Justice Poché rejected cases like *Sonnicksen* and *Brooks*, because statements by these courts, that a husband is entitled to his wife's services, seem like an application of the common law doctrine of coverture.²⁷⁶ The dissent noted that coverture was rejected by the United States Supreme Court in 1960 because the doctrine was founded upon archaic medieval views that are offensive to today's society.²⁷⁷ Justice Poché concluded, therefore, that the *Sonnicksen* and *Brooks* rule likewise should be abandoned.²⁷⁸

Justice Poché further argued that current economic realities also impact the case law cited by the *Borelli* majority.²⁷⁹ First, Justice Poché stated that the assumption that few wives can contribute financially to the family is outdated.²⁸⁰ In particular, Justice Poché noted that many married women today make significant economic contributions to the marriage by being employed outside the home.²⁸¹ Second, husbands today take part in the household chores.²⁸² Last, the option of divorce is frequently used

275. *Id.* at 656, 16 Cal. Rptr. 2d at 21 (Poché, J., dissenting); *Foxworthy v. Adams*, 124 S.W. 381, 383 (Ky. 1910); *see* *Coleman v. Burr*, 93 N.Y. 17, 25 (1883) (noting that to allow wives to contract with their spouse for domestic services degrades the wives like servants); *supra* notes 107-129 and accompanying text (discussing the *Brooks* court rationale, which held that enforcement of contracts for the payment of domestic services would breed discord, degrade the wife into a common servant, and possibly allow the spouses to defraud their creditors).

276. *Borelli*, 12 Cal. App. 4th at 656, 16 Cal. Rptr. 2d at 21 (Poché, J., dissenting); *see* 1 BLACKSTONE, *supra* note 131, at 442 (stating that during marriage at common law in England, the husband and wife merged into a single legal entity); MARRIAGE CONTRACT, *supra* note 10, at 1 (describing that under coverture a married woman could not own property free from her husband's claim or control, or make a contract); *see also* *United States v. Yazell*, 382 U.S. 341, 359 (1966) (Black, J., dissenting) (noting that in reality the single legal entity is the husband).

277. *Borelli*, 12 Cal. App. 4th at 657, 16 Cal. Rptr. 2d at 21-22 (Poché, J., dissenting). (discussing *United States v. Dege*, 364 U.S. 51, 52-53 (1960)). Justice Poché noted that in coverture it was assumed that a wife could not contribute to the family economically. *Id.* There also was an implicit agreement for the husband to support the family financially, which entitled him to his wife's domestic services. *Id.* Coverture has also been rejected in California. *See id.* at 657, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting) (citing California Civil Code §§ 242, 5100, 5132, which states that there are mutual duties of support between a husband and wife). *But see* MARRIAGE CONTRACT, *supra* note 10, at 64, 75 (arguing that many other disabilities are still imposed upon the married woman, such as the obligation of a wife to provide domestic services, which deprives her of the legal right to her own labor, ignores her contribution to the family's prosperity, and leads to vulnerability in old age, upon divorce, and in disability).

278. *Borelli*, 12 Cal. App. 4th at 657, 16 Cal. Rptr. 2d at 21 (Poché, J., dissenting).

279. *Id.* at 657, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting).

280. *Id.* The dissent, however, did not cite any statistics to support this proposition. *Id.*

281. *See id.* (Poché, J., dissenting) (asserting that the number of two income families is no longer significant).

282. *Id.* No support was given for this proposition by the dissenting justice. *Borelli*, 12 Cal. App. 4th at 657, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting).

to escape an unhappy situation.²⁸³ Justice Poché therefore concluded that, as a society, we have left behind traditional gender roles.²⁸⁴ Justice Poché noted that women are not necessarily relegated solely to the kitchen and expected to do all the domestic chores.²⁸⁵ Thus, in Justice Poché's opinion the provision of extensive nursing care, as in Michael Borelli's case, is not within the duties owed by a wife to her husband, and can be the subject of a marital agreement.²⁸⁶

Justice Poché also established that the law is no longer blind as to what goes on within the marriage, even if public policy protects the institution of marriage.²⁸⁷ Justice Poché reasoned that the previous noninterference by the law into marital relations was to protect domestic harmony.²⁸⁸ The argument for noninterference, as noted by Justice Poché, has been rejected in part to allow interspousal litigation.²⁸⁹ Since spouses can now sue each other, Justice Poché stated that it is not a stretch to allow a wife to sue on a contract for the performance of nursing care services.²⁹⁰ Also, Justice Poché pointed out that in cases where one spouse has died, as was the case in *Borelli*, it is absurd to speak of not enforcing the agreement between the spouse and the deceased spouse's estate due to a concern for preserving domestic harmony.²⁹¹ Since Michael is deceased, there is no marriage relationship to preserve.²⁹²

283. *Id.*

284. *Id.*

285. *Id.*; see *supra* notes 137-149 and accompanying text (discussing the public/private dichotomy, which argues that women are subordinated to the private sphere, consisting of the home and childrearing); *supra* notes 169-186 and accompanying text (submitting that women are still discriminated against due to their gender).

286. See *Borelli*, 12 Cal. App. 4th at 657, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting) (noting that where marital duties and rights regarding property are not governed by positive law, they may be altered by formal agreement or informal accommodations, as allowed by California Civil Code §§ 5200, 5310-5312).

287. *Id.* at 657-58, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting); see *People v. Pierce*, 61 Cal. 2d 879, 880, 395 P.2d 893, 894, 40 Cal. Rptr. 845, 846 (1964) (expressing the proposition that the law no longer ignores crimes committed by one spouse against the other); see also CAL. PENAL CODE § 262 (West Supp. 1994) (providing criminal sanctions for rape of one's spouse).

288. *Borelli*, 12 Cal. App. 4th at 658, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting); see *supra* notes 137-149 and accompanying text (discussing the public/private sphere distinction).

289. See *Borelli*, 12 Cal. App. 4th at 658, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting) (discussing the removal of barriers to interspousal litigation for criminal acts, tortious conduct, and breach of contract); cf. *Gibson v. Gibson*, 3 Cal. 3d 914, 915-16, 479 P.2d 648, 648, 92 Cal. Rptr. 288, 288 (1971) (concluding that the immunity granted to parents from suits by their children, since abolished, is comparable to the intraspousal immunity, which also has been significantly cut back).

290. *Borelli*, 12 Cal. App. 4th at 658, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting).

291. *Id.* at 658, 16 Cal. Rptr. 2d at 22-23 (Poché, J., dissenting).

292. See *id.* (stating that preservation of the marriage is merely an academic concern in cases such as *Borelli*).

The dissent recognized that a concern about fraud in regard to creditors was another reason for the *Brooks-Sonnicksen* rule against enforcement of nursing care agreements in exchange for property between husband and wife.²⁹³ Justice Poché, however, stated that the California Supreme Court has renounced the idea that an entire category of litigation between husband and wife could be barred due to the possibility of fraud.²⁹⁴ Today, as noted by Justice Poché, litigation between husband and wife is allowed, and the fact finders are to decide whether fraud was committed.²⁹⁵ Since the decisions giving the issue of fraud to the fact finder came down after *Brooks* and *Sonnicksen* were decided, Justice Poché argued that the new cases provide one more reason to reconsider and reject the traditional rule that does not allow agreements between spouses regarding nursing care services.²⁹⁶ Besides claiming that the traditional rule forbidding spouses from making contracts that contemplate the exchange of services for property is no longer persuasive, the dissent also established that the rule is contrary to legislative enactments.

Justice Poché pointed out that California Civil Code sections 4802 and 5103 permit spouses to enter into any transaction regarding property with each other as if they were unmarried.²⁹⁷ The dissent argued that these statutes and the idea of freedom of contract should enable agreements such

293. *Id.* at 658, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting); *see supra* note 258 and accompanying text (setting forth the manner in which fraud could be perpetrated by a husband and wife).

294. *Id.* (Poché, J., dissenting); *see* *Emery v. Emery*, 45 Cal. 2d 421, 431-32, 289 P.2d 218, 225 (1955) (stating that courts will not immunize tortfeasors from liability in a whole class of cases because of the possibility of fraud).

295. *Borelli*, 12 Cal. App. 4th at 658, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting). Before fraud was decided at trial, the demurrer was used to decide whether a contract was induced by fraud. *Id.*

296. *See id.* (quoting JUSTICE OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 187 (1920)) (finding it revolting for a law to persist simply because it was enforced that way in the past, when the reasons for the law have since vanished).

297. *See id.* (noting that the California Legislature passed California Civil Code §§ 4802 and 5103, without fear that it would make a spouse a hired servant by enforcing an agreement between the spouses to exchange nursing services for property); CAL. FAM. CODE § 721 (West 1994) (reenacting CAL. CIV. CODE § 5103) (permitting spouses to contract with each other as if they were not married); *id.* § 1620 (West 1994) (reenacting CAL. CIV. CODE § 4802) (providing the ability of husband and wife to contract with each other regarding property); *see also id.* § 850 (West 1994) (allowing husband and wife to transmute the character of their property from one's separate property to the other spouse's separate property, or transmute separate property to community property, and vice versa); *Brooks v. Brooks*, 48 Cal. App. 2d 347, 350, 119 P.2d 970, 972 (2d Dist. 1941) (stating that enforcement of domestic service agreements degrades a wife by making her a paid servant, when she should do such chores out of love); *supra* notes 107-129 and accompanying text (discussing the *Brooks* holding); *supra* notes 64-70 and accompanying text (defining transmutations and the statutory requirements for a valid transmutation).

as the one at issue in *Borelli* to be enforced.²⁹⁸ The existence of a marriage certificate should not deprive spouses of the freedom of contract that they would enjoy if not married, according to Justice Poché.²⁹⁹ Since Michael and Hildegard could validly contract for nursing care in exchange for property if they were not married, Justice Poché opined that their freedom to contract is denied by the majority's approach.³⁰⁰ In addition to denying married parties the same freedom of contract as unmarried people, the dissent also found fault with the majority's holding that a spouse must provide nursing care to an ill spouse personally.

2. *There is No Requirement that Nursing Care Must Be Personally Provided by the Spouse*

Justice Poché, in dissent, recognized that a duty of support is owed between husband and wife and that the provision of medical care is part of this duty.³⁰¹ Justice Poché, however, did not find that the cases cited by the majority require that the obligation be personally provided by the spouse.³⁰² The dissent noted that when *Sonnicksen* and *Brooks* were decided, it was logical for those courts to say that a wife could only perform her spousal duty by caring for her ill husband personally.³⁰³ A holding which stated that a wife could only fulfill her duty by personally providing nursing care stems from the fact that before World War II, women in general did not work much outside the home, so there was no other way to take care of their sick husbands but to do so personally.³⁰⁴ Since women were expected to be at home and to care for their sick spouses, a wife was giving up nothing of value by agreeing to perform the nursing care duty.³⁰⁵

298. *Borelli*, 12 Cal. App. 4th at 658, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting); see *Perkins v. Sunset Tel. and Tel. Co.*, 155 Cal. 712, 720, 103 P. 190, 194 (1909) (stating that California Civil Code § 5103, providing that spouses may enter into contracts with each other as if they were unmarried, is an example of the state giving the utmost freedom of contract to spouses).

299. *Borelli*, 12 Cal. App. 4th at 659, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting).

300. See *id.* at 659, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting) (noting that Michael and Hildegard, if strangers, could validly contract with each other for the provision of nursing care services).

301. *Id.* (quoting *Hawkins v. Superior Court*, 89 Cal. App. 3d 413, 418-19, 152 Cal. Rptr. 491, 495 (4th Dist. 1979)).

302. *Id.*

303. *Id.*

304. *Borelli*, 12 Cal. App. 4th at 659-60, 16 Cal. Rptr. 2d at 23-24 (Poché, J., dissenting).

305. *Id.*

The dissent argued that today, however, women should not be expected to personally discharge their spousal duty for nursing care.³⁰⁶ The world has changed dramatically since *Sonnicksen* was decided, due to the transformation of society that occurred with the onset of World War II.³⁰⁷ To illustrate the societal changes, Justice Poché pointed out that hundreds of thousands of women left home and went to work in jobs vacated by male workers initially to help with the war effort.³⁰⁸ Women have continued to work since then, in growing numbers.³⁰⁹ Since many women today work outside the home, in Justice Poché's opinion, there should be alternatives to personally providing nursing care.³¹⁰ Options should be available because if a non-working spouse takes ill, the *Borelli* rule would mandate that the working spouse quit work and stay home twenty-four hours a day.³¹¹ As alternatives to quitting one's job to care for the spouse personally, Justice Poché listed paying for professional help, paying for non-professional assistance, and getting help from friends and relatives.³¹²

The dissent characterized the majority's rule as limiting the contracting power of married people.³¹³ Justice Poché stated that it is improper to limit spouses' contracting power, since spouses then have less power than non-married people, which is not justified by legitimate public policy.³¹⁴ The public policy that the majority claims it is upholding, posits Justice Poché, is to foster marriage.³¹⁵ The dissent asserted that the effect of the traditional rule as affirmed by the majority may be to actually force separations.³¹⁶ In fact, California courts have found consideration and, therefore, have enforced agreements where one spouse has left the relationship and the other spouse has promised property on the condition that the absent spouse returns.³¹⁷ Michael and Hildegard reached largely the same result, the dissent contends, without obtaining a legal separation,

306. *Id.*

307. *Id.* at 660, 16 Cal. Rptr. 2d at 24 (Poché, J., dissenting).

308. *Id.*

309. See OKIN, *supra* note 45, at 142 (noting that women's participation in the labor force has risen, from 35% in 1960, to 57% in 1986).

310. *Borelli*, 12 Cal. App. 4th at 660, 16 Cal. Rptr. at 24.

311. *Id.* Justice Poché noted that if Hillary Clinton got sick, President Clinton would have to drop everything and personally care for Hillary. *Id.*

312. *Id.*

313. *Id.* at 661, 16 Cal. Rptr. 2d at 25 (Poché, J., dissenting).

314. *Borelli*, 12 Cal. App. 4th at 661, 16 Cal. Rptr. 2d at 25 (Poché, J., dissenting).

315. *Id.* at 661, 16 Cal. Rptr. 2d at 24 (Poché, J., dissenting).

316. *Id.*

317. *Id.*

if Hildegard's complaint is read to imply that, but for the agreement, she would have left Michael.³¹⁸ Justice Poché argues that there is no sound reason why the Borelli's contract should not be as valid as a reconciliation contract, since both types of contracts facilitate continuation of the marriage relationship.³¹⁹ The justification given by the majority in favor of its decision to invalidate the *Borelli* agreement is that to allow spouses to contract for domestic services is disruptive to the marital relationship.³²⁰ The dissent, however, felt that the possibility of disharmony between husband and wife is not enough of a threat to deny a spouse the ability to receive compensation provided in a contract.³²¹ The idea behind the majority rule is the notion that one spouse should care for the other through sickness and in health, but the rationale was not persuasive to Justice Poché.³²² The sentiment of spousal love, in the dissent's view, is not a substitute for modern day reality, and Justice Poché believes it improper to deny married people the same contracting power that non-married people have to order their affairs.³²³

III. LEGAL RAMIFICATIONS

The decision in *Borelli v. Brusseau*³²⁴ reaffirmed the traditional law relating to a wife's statutory duties toward her husband.³²⁵ The *Borelli* decision thus fails to foster true equality among the sexes, since refusing to enforce spousal contracts does not treat women as equal to men. When the law mandates that wives must personally provide nursing care services to their husbands, the law acts to relegate women to the private sphere.³²⁶ The relegation results in unequal treatment for women, because by fulfilling their gender role as homemakers, women are given little

318. *Id.*

319. *Id.* at 661, 16 Cal. Rptr. 2d at 24 (Poché, J., dissenting).

320. *Id.* at 661, 16 Cal. Rptr. 2d at 25 (Poché, J., dissenting). Justice Poché states that intraspousal litigation may be unseemly, but is not a novelty anymore. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 661, 16 Cal. Rptr. 2d at 25 (Poché, J., dissenting).

324. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

325. *Id.* at 654, 16 Cal. Rptr. 2d at 20 (stating that nursing care is a spouse's statutory duty); *see also supra* notes 87-129 and accompanying text (discussing the traditional law relating to nursing care duty, as seen in *Sonnicksen* and *Brooks*).

326. *See Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20 (holding that a wife is obligated by the marriage contract to personally provide nursing care to her husband).

opportunity to obtain power, prestige, or paid work.³²⁷ Men, on the other hand, are free to enter the working world to gain money and power, without feeling the subtle, but entrenched, gender restraints that force women to do the childrearing and housework.³²⁸

As a result of the distribution of labor within the family by gender, women become financially dependent upon their husbands.³²⁹ The inability to leave home due to responsibilities there, and the inability to earn money for providing domestic services, which is the sole occupation of many wives, creates a dependence of women upon their husbands.³³⁰ This financial dependence is compounded by the fact that if women do get jobs outside the home, they are not paid the same as men.³³¹ Having little independent income may not be a problem for women if the marriage remains intact, since the husband will financially support his wife; however, women become vulnerable to poverty upon the death of their husbands or upon divorce.³³² Lifetime housewives also experience regret about relinquished career opportunities.³³³

Besides keeping women tucked away in the private sphere, the *Borelli* holding also gives women less contracting power than men. In addition, the *Borelli* case may be incorrectly decided from the standpoint of California statutory law. The decision arguably goes against the express language of Family Code section 850 which states that consideration is not

327. See MARRIAGE CONTRACT, *supra* note 10, at 73 (arguing that the only way most people can acquire income and property is through their own labor); OKIN, *supra* note 45, at 142-44 (fulfilling their gender role as the homemaker forces women to sacrifice career opportunities, which leads to women's limited access to work, power, prestige, self-esteem, and security).

328. See OKIN, *supra* note 45, at 149 (finding that women do far more housework and childcare than men do, in almost all families).

329. *Id.* at 151-52.

330. See MARRIAGE CONTRACT, *supra* note 10, at 73 (noting that when the law treats a woman's labor as her 'wifely duty' and denies her compensation for it, she is deprived of her major, and often only, means of financial gain).

331. See *supra* note 184 and accompanying text (delineating the disparity in men's and women's wages).

332. See OKIN, *supra* note 45, at 4 (finding women vulnerable and dependent upon their husbands, since they do not develop the skills necessary for re-entry into the job market if there is a divorce or death of the husband); MARRIAGE CONTRACT, *supra* note 10, at 58 (arguing that women are given a false sense of security when they rely upon the husband's promise to support the couple, since there may not be enough financial support during the marriage or upon dissolution).

333. MARRIAGE CONTRACT, *supra* note 10, at 58; see Christine E. Grella, *Irreconcilable Differences: Women Defining Class After Divorce and Downward Mobility*, 4 GENDER & SOC'Y 43 (1990) (reporting that divorce shakes women loose from their identity with a certain social class and the core of their self-esteem, which had before been exclusively determined by their husband's education, occupation and income). Professor Grella notes that divorced women, when asked to evaluate their own social status, i.e., upper, middle, or lower class, routinely measured their status in terms of their ex-husband or father, thus denying that they actually had any status of their own. *Id.* at 42 (citing Ruth A. Brandwein et. al., *Women and Children Last: The Social Situation of Divorced Mothers and Their Families*, 36 J. MARRIAGE & FAM. 498, 500 (1974)).

a requirement for a transmutation of property among spouses.³³⁴ Lastly, there existed alternate methods which would have allowed the *Borelli* court to enforce the *Borelli*'s agreement, even in the absence of consideration.³³⁵

A. Courts Must Stop Relegating Women to The Private Sphere of Home and Family

The stance of the *Borelli* court—mandating that a woman personally provide services for her husband—perpetuates the traditional model of the family, which has a male head of the household as its sole breadwinner, with the woman staying home in the private sphere to cook, clean, and care for the children.³³⁶ The traditional model of the family continues to be a strong influence on what men and women think and how they behave.³³⁷ Accordingly, women place the commitment to family first, while men are to provide financial support.³³⁸

When courts do not regulate private agreements between husband and wife, existing power relationships stay intact.³³⁹ Men benefit by the maintenance of the status quo, since men have more power than women in the typical relationship.³⁴⁰ Male domination within the marriage is strongly reinforced by the belief in the role of the male as provider.³⁴¹

334. See CAL. FAM. CODE § 850 (West 1994) (rejecting the requirement of consideration for property transmutations among spouses during marriage, in favor of allowing the agreement to be enforced with or without consideration); see also *supra* notes 64-70 and accompanying text (outlining the requirements of California Family Code § 850 (West 1994)); *infra* notes 375-396 and accompanying text (urging the legislature to clarify California Family Code § 850 and overrule *Borelli*, since the court misapplied the consideration requirement).

335. See *infra* notes 398-401, 403-407 and accompanying text (setting forth the doctrines of detrimental reliance and unjust enrichment).

336. See OKIN, *supra* note 45, at 141 (noting that marital responsibility within the marriage is traditionally sex-differentiated, with women having the role of the primary parent and homemaker, while men are placed in the role of primary breadwinner); Powers, *supra* note 4, at 72 (expressing the assumption that since women give birth, it is necessary for them to be the primary raisers of children).

337. OKIN, *supra* note 45, at 141.

338. See *id.* at 142 (finding young women are more likely than young men to regard having a good marriage and family life as extremely important). Valuing family is due to socialization and culture. *Id.*

339. See Powers, *supra* note 4, at 73 (stating that the law does not regulate most aspects of the private sphere, since to regulate it would blur the demarcation between the two spheres).

340. OKIN, *supra* note 45, at 141.

341. *Id.*; see MARRIAGE CONTRACT, *supra* note 10, at 5 (finding that the husband is the head of the family, as shown by the fact that his wife and kids assume his name, and his social and economic status). Placement of the obligation of primary support on the husband reinforces his place at the head of the household with legal power over family finances. *Id.* at 26. See also CAL. FAM. CODE §§ 1100, 1102 (West 1994) (placing the right to management and control of community property with the spouses equally). This is a change from pre-1973 law, which allowed only the husband to manage and control the couple's community property estate. CAL. CIV.

Since a husband's work is paid, and our society values economic success, the husband receives status, prestige, and power within the marriage.³⁴² Since a wife's traditional work at home in the private sphere is not paid, however, she has little power and prestige.³⁴³ In keeping with their ideas of the importance of family, women make occupational choices that facilitate the demands of being a primary parent, such as flexible hours.³⁴⁴ The jobs women choose in order to care for their families, however, are low-paying, involve poor working conditions, and possess little possibility for upward mobility.³⁴⁵

The absence of law in the private sphere allows men to control the marriage relationship and leaves power in the male/female relationship to the party who is economically, politically, and physically stronger, usually the male.³⁴⁶ It is thus not uncommon for a husband to use his status as the primary bread-winner to enforce his wishes regarding household issues, such as who is to do the bulk of the housework.³⁴⁷ The single-income male dominated household, relied upon by the *Estate of Sonnickson v. Sonnickson*,³⁴⁸ *Brooks v. Brooks*,³⁴⁹ and *Borelli v. Brusseau*³⁵⁰ courts

CODE § 5125 Historical Note (West 1983).

342. OKIN, *supra* note 45, at 141; see MARRIAGE CONTRACT, *supra* note 10, at 26 (noting that placement of the primary obligation of support upon the husband reinforces his position as head of the household, and women are thus dependent and subservient).

343. See MARRIAGE CONTRACT, *supra* note 10, at 74 (noting that for the time women spend doing housework, they lose the opportunity to develop their own earning power). Women do not seek out the most lucrative career choices because they are responsible for most of the work at home, such as the cooking, cleaning, and childrearing duties. *Id.*; Elaine J. Hall, *Waiting/Waitressing: Engendering the Work of Table Servers*, 7 GENDER & SOC'Y 329, 332 (1993) (contending that when women do leave the home and work in the public sphere they occupy jobs that culturally are considered extensions of femininity, in that they serve, support, and defer to men).

344. OKIN, *supra* note 45, at 143.

345. See *id.* at 144 (finding sales, clerical work, and other predominately female professions, such as nursing or teaching, provide low pay, poor working conditions, and limited mobility). Instead of science and engineering fields, which are among the top fields in providing the best economic rewards for an undergraduate degree, women are much more likely to enter service occupations, such as secretaries, waitresses, and flight attendants. See Hall, *supra* note 343, at 330 (noting that 82% of all restaurant servers in 1991 were women); Stacy J. Rogers & Elizabeth G. Menaghan, *Women's Persistence In Undergraduate Majors: The Effects of Gender-Disproportionate Representation*, 5 GENDER & SOC'Y 549, 552-53 (1991) (finding the majors of aerospace, aviation, engineering, economics, and natural resources to be 80-99% male in 1986 at Ohio State University). Although women comprise 44% of the labor force, women hold only 15% of all engineering and science related positions. See *id.* at 549 (citing NATIONAL SCIENCE FOUNDATION, WOMEN AND MINORITIES IN SCIENCE AND ENGINEERING (1988)).

346. Powers, *supra* note 4, at 72-73.

347. See OKIN, *supra* note 45, at 153 (finding that men are able to compel their wives to do the household chores). Studies have shown that husbands do not help with housework when their wives also work full-time jobs. *Id.* In particular, those husbands of women with full-time jobs contributed only about two minutes more of housework a day, on average, than did husbands of housewives. *Id.*

348. 23 Cal. App. 2d 475, 73 P.2d 643 (1st Dist. 1937).

for their holdings that wives must personally provide nursing care, does not reflect reality today, due to the transformation of society which occurred after World War II.³⁵¹ Thus, despite the formal equality women largely have achieved with federal statutes such as Title VII of the 1964 Civil Rights Act³⁵² and the 1963 Equal Pay Act,³⁵³ there still exists entrenched gender patterns from the long history of women's subordination, which courts systematically ignore and the *Borelli* court perpetuated.³⁵⁴

Courts, like the *Borelli* court, have failed to recognize the impact of not enforcing contracts between spouses for the provision of nursing care services, because the damage is often difficult to recognize. The result of not enforcing a private agreement between spouses does not appear harmful at first glance, since the ruling does not explicitly discriminate on its face against one gender over another.³⁵⁵ Saying that both genders are treated equally when private agreements are not enforced or calling the family a private area ignores reality.³⁵⁶ The *Borelli* majority made both of these faulty arguments.³⁵⁷ The feminist critique of the public/private dichotomy shows that it is not always beneficial for courts to stay out of the marriage relationship.³⁵⁸ Courts did not want to interfere with the

349. 48 Cal. App. 2d 347, 119 P.2d 970 (2d Dist. 1941).

350. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

351. See OKIN, *supra* note 45, at 140 (submitting that until World War II, society strongly disapproved of married women working outside the home for a wage); *supra* notes 301-312 and accompanying text (highlighting the dissent's statement that since women work outside the home in greater numbers today than before World War II, women should not be required to quit their jobs and personally care for ill husbands).

352. 42 U.S.C. §§ 2000e to 2000e-2 (1981); see *supra* note 174 and accompanying text (setting forth the federal and state provisions which guarantee equal access for women in society).

353. 29 U.S.C. § 206(d) (1978); see *supra* note 174 and accompanying text (noting legislative enactments that attempt to give women the same treatment as men).

354. See *supra* notes 130-187 and accompanying text (discussing the chronology of the historical subordination of women, followed by the achievement of formal equality, but noting that there is still subtle discrimination against women).

355. See *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 654, 16 Cal. Rptr. 2d 16, 20 (1st Dist. 1993) (noting that the rule it perpetuates, which permits no compensation for nursing care services, was applied in *Borelli* in a gender-neutral way).

356. See *id.* at 651, 16 Cal. Rptr. 2d at 18 (refusing to enforce an agreement made within the context of a marriage, out of concern for the dignity of marriage).

357. See *id.* at 654, 16 Cal. Rptr. 2d at 20 (noting that the rule of *Sonnicksen* and *Brooks* has been applied to both husbands and wives in a gender-neutral way, and so it does not matter that the rule denying compensation for support originated due to conditions peculiar to women); *supra* notes 227-239 and accompanying text (discussing the *Borelli* majority's reasoning).

358. For example, at one time women were not given legal protection or remedies when their husbands physically abused them. See BLACKSTONE, *supra* note 131, at *444-45 (finding that at common law a husband was allowed to physically harm his wife); Karst, *supra* note 158, at 639 (reporting that the law has approached disputes between a husband and wife with a laissez-faire attitude). Even today rape laws in many states give an exception for a husband's forced intercourse with his wife. Taub & Schneider, *supra* note 9, at 155. See *supra*

marital relationship, until quite recently, because lawsuits by one spouse against another would allegedly disrupt marital harmony.³⁵⁹ Courts have stated, without giving any explanation, that discord will arise if wives are given the right to sue their husbands.³⁶⁰ The failure to enforce private agreements for nursing care, however, overlooks the effects of gender roles played by men and women, and ignores the economic structure of marriage.³⁶¹

Courts, thus, need to pierce the public/private veil in order to treat men and women truly equally.³⁶² Judges need to recognize the injustice that they perpetuate. It is not enough for judges to take notice that men and women need to be given the same treatment under the law. Courts also should take positive action to correct the non-enforcement of domestic contracts, and thereby stop sending the message that the issues which concern women are not important, if they are not the proper subject for a contract. The first step is to stop adhering to outdated precedent. As put forth forcefully by Justice Poché's dissent in *Borelli*, society has changed since *Sonnicksen* and *Brooks* were decided. To personally care for someone twenty-four hours a day, as Hildegard Borelli did for her spouse struck by a debilitating stroke, requires that the woman forgo or terminate a career; no matter how lucrative, thus is not realistic.³⁶³ More attractive options exist, such as obtaining professional and non-professional help, and getting assistance from friends and relatives.³⁶⁴ In addition to courts like *Borelli* failing to take into account entrenched gender roles which subjugate women, the refusal to enforce a contract between husband and

notes 157-168 and accompanying text (decrying the absence of the law from the private sphere, which works to the detriment of women by allowing men to control the marriage relationship).

359. See *Brooks v. Brooks*, 48 Cal. App. 2d 347, 350, 119 P.2d 970, 972 (2d Dist. 1941) (declaring that to allow spouses to contract with each other for domestic services will disrupt their marriage relationship).

360. *Coleman v. Burr*, 93 N.Y. 17, 25 (1883).

361. See Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 722-23 (1993) (arguing that women who make the commitment to the family rather than employment are hurt by the shift from fault-based grounds for divorce to no-fault divorce, since no-fault grounds remove the protection for these women who put the family first). Under fault-based divorce, courts gave an innocent wife permanent support money from her husband. *Id.* at 722.

362. See Powers, *supra* note 4, at 73 (finding irony in the fact that while the legal order serves to enforce and legitimize the segregation of women into the private sphere, the law provides the tools to alleviate the segregation).

363. *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 660, 16 Cal. Rptr. 2d 16, 24 (1st Dist. 1993) (Poché, J., dissenting).

364. *Id.*; see PETER HANSEL & CYNTHIA WILLIAMS, CALIFORNIA SENATE OFFICE OF RESEARCH, WHO'LL TAKE CARE OF MOM AND DAD? IMPROVING ACCESS TO LONG-TERM CARE SERVICES FOR CALIFORNIA'S GROWING ELDERLY AND FUNCTIONALLY IMPAIRED POPULATION 1 (Rebecca LaVally ed., 1991) (discussing the life of an elderly woman who cares for her disabled husband). She gets a respite from nursing him, when the volunteers and hired help arrive, for only eight hours a week. *Id.*

wife deprives women of the power to contract.³⁶⁵ Denial of the power to contract for nursing care keeps women at home in the private sphere, since it takes away two options—first, she cannot contract out of the personal duty and get another person to care for her ill husband while she works, and second, non-enforcement of marital contracts mandates that she cannot not receive compensation for that which may be her only occupation, domestic services.

Marital contracts should be treated the same as contracts between non-married parties to prevent subordination of women.³⁶⁶ Parties should be free to enter into agreements and have courts enforce their objectively manifested intent.³⁶⁷ In fact, the freedom of contract policy has been established by the California Legislature.³⁶⁸ Family Code section 721 permits husband and wife to contract with each other as if they were not married.³⁶⁹ The *Borelli* court ignored this statutory provision and, as a result, denied Hildegard the ability to work outside the home, since she was to personally provide nursing care to Michael. Therefore, courts should apply section 721 and let husbands and wives contract with each other for domestic services.

The absurdity of the inability of spouses to contract for domestic services is demonstrated by *Marvin v. Marvin*.³⁷⁰ In *Marvin*, the contract was between a couple that was not married, but rather had been living together for seven years.³⁷¹ The Supreme Court of California held that a contract that exchanged property for domestic services was enforceable, and not against public policy.³⁷² The *Marvin* Court stated that a promise to perform homemaking services is adequate consideration to support a contract.³⁷³ The only difference between the *Marvin* contract and the *Borelli* agreement was a marriage certificate. Both agreements sought to exchange the provision of household services for property, and were between two people who lived together in a confidential relationship.

365. See MARRIAGE CONTRACT, *supra* note 10, at 341 (arguing that the practice of allowing spouses to contract regarding property, but not the duties that comprise support, is arbitrary and may produce discriminatory results).

366. See *id.* at 352 (noting the impropriety of failing to give married parties the same assurances that their contracts will be enforced as unmarried parties).

367. See Dalton, *supra* note 22, at 1000 (describing the Restatement (Second) of Contracts as preferring objective intent, instead of the unexpressed subjective intent).

368. CAL. FAM. CODE § 721 (West 1994).

369. *Id.*

370. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

371. *Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976).

372. *Id.*, 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32 (1976).

373. *Id.* at 670 n.5, 557 P.2d at 113 n.5, 134 Cal. Rptr. at 822 n.5.

Given the discriminatory results, a marriage certificate should not be used to limit the contracting ability of spouses.³⁷⁴

B. The California Legislature Should Clarify Family Code Section 850 and Nullify Borelli, Since its Holding is Contrary to a Specific Legislative Enactment

The effect of *Borelli* is unclear since Family Code section 850 arguably controlled the *Borelli*'s agreement, but was ignored by the court.³⁷⁵ It is, therefore, unfortunate that *Borelli* may be followed by other courts. If *Borelli* is followed, the court's misapplication of the law and its negative effect upon women will be perpetuated. To establish that the *Borelli* court was incorrect to ignore Family Code section 850, it is necessary to show that the statute was applicable to the agreement between Hildegard and Michael. The statute's applicability depends upon its correct interpretation, in light of the express language and the legislative intent.

Without any reference to Family Code section 850, the majority in *Borelli* decided that the agreement between Michael and Hildegard was unenforceable due to a lack of consideration.³⁷⁶ The court reasoned that there was no consideration because a pre-existing duty requires a married person to care for her ill spouse.³⁷⁷ Since Hildegard already had the statutorily created duty to provide for Michael, the *Borelli* court stated that she gave up nothing by agreeing to provide the nursing care services to him.³⁷⁸ The express language of Family Code section 850, however, specifically states that consideration is not required for a transmutation agreement regarding property.³⁷⁹

When construing a statute, the place to begin is with the language of the statute.³⁸⁰ Courts should give effect to the plain meaning of the

374. MARRIAGE CONTRACT, *supra* note 10, at 341; *see Borelli*, 12 Cal. App. 4th at 658, 16 Cal. Rptr. 2d at 23 (Poché, J., dissenting) (finding fault with the rule that would allow Michael and Hildegard to contract for nursing care if they were strangers, but not allowing it simply because they happened to be married).

375. *See* CAL. FAM. CODE § 850 (West 1994) (noting that married persons may agree to transmute property with or without consideration); *supra* notes 64-70 and accompanying text (discussing the requirements for a transmutation, and that consideration is explicitly not required).

376. *Borelli*, 12 Cal. App. 4th at 654, 16 Cal. Rptr. 2d at 20.

377. *Id.*

378. *Id.*

379. CAL. FAM. CODE § 850 (West 1994); *see supra* notes 248-252 and accompanying text (discussing *Borelli*, which held that because there was no consideration, the contract was not entitled to enforcement); *supra* notes 64-70 and accompanying text (outlining the requirements of California Family Code § 850 (effective Jan. 1, 1994) (reenacting CAL. CIV. CODE § 5110.710 (West Supp. 1993))).

380. *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

statute's words.³⁸¹ The issue here is whether the word 'transmutation' in section 850 contemplates only gift transmutations that are already executed, or whether it also allows for executory agreements such as the agreement in *Borelli*.³⁸² The agreement between Hildegard and Michael is an executory contract because Michael had not changed title of the property to Hildegard's separate property as agreed.³⁸³ Section 850 does not expressly limit itself to executed transmutations. It is, therefore, logical to conclude that the legislature intended the language of the statute to apply to *all* transmutations.³⁸⁴ Consideration is not required for executory transmutations.

It may be necessary to look at more than the statute's language, since a plain reading of the statute may not illuminate the subtle issues that confronted the drafters. While the language of a statute is usually considered conclusive, it may be necessary to explore whether there is a contrary legislative intent expressed elsewhere.³⁸⁵ In this vein, California Civil Code section 1859 provides that a court should attempt to understand the intention of the legislature when interpreting a statute.³⁸⁶ The transmutation sections now codified at Family Code sections 850 to 853 were added to effectuate the recommendations of the California Law Revision Commission (the Commission). Therefore, any legislative intent behind the enactment of the strict standards for transmutations would be found in the

381. *Burden v. Snowden*, 2 Cal. 4th 556, 562, 828 P.2d 672, 676 (1992). Courts should effectuate the intent of the legislature which promulgated the statute, which is accomplished by looking at the language of the statute. *See Duty v. Abex Corp.*, 214 Cal. App. 3d 742, 749, 263 Cal. Rptr. 13, 16 (1st Dist. 1989) (noting that courts should adopt the literal interpretation of a statute, unless that meaning would be repugnant to the obvious purpose of the statute).

382. *See William A. Reppy Jr., Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriages*, 18 SAN DIEGO L. REV. 143, 145 (1981) (stating that community or separate property of a husband or wife can be changed into another form of ownership by either a spousal contract or by a gift from one spouse to the other).

383. *See Linville v. Linville*, 132 Cal. App. 2d 800, 803, 283 P.2d 34, 35 (2d Dist. 1955) (pointing out that for an executory contract, there is some act by a contracting party that remains to be done). In comparison, an executed contract requires no additional acts by either party to complete the transaction. *Id.*

384. *See Digital Biometrics, Inc. v. Anthony*, 13 Cal. App. 4th 1145, 1160, 17 Cal. Rptr. 2d 43, 53 (3d Dist. 1993) (noting that a court should presume the legislature knows how to say what it wants, and means what it says). Thus, when the legislature fails to mention something, a court should conclude that it was intentional. *Id.* at 1160, 17 Cal. Rptr. 2d at 54.

385. *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *see CAL. CIV. CODE* § 1858 (West 1985) (limiting the judge's duty to declaring what is contained in the statute's language, and not to removing terms that have been inserted).

386. *CAL. CIV. CODE* § 1859 (West 1983).

Commission's reports.³⁸⁷ The Commission's reports, however, are silent on the issue of executory transmutations.³⁸⁸ The Commission instead focused discussion upon the requirements for a writing, and upon how the new law dispenses with prior case law allowing oral transmutations.³⁸⁹ Given that neither the express language of the statute nor the legislative intent prohibits application of section 850 to an executory agreement, the *Borelli* court should have applied Family Code section 850.

The legislature needs to clarify the effect which section 850 has on executory agreements and thereby nullify *Borelli*. The need for legislative action is particularly acute given the California Supreme Court's denial of review in *Borelli*.³⁹⁰ Since precedent is to be followed by all inferior tribunals under the principle of stare decisis, even an improper decision must be followed by lower courts.³⁹¹ *Borelli* establishes dangerous precedent for dealing with intraspousal transmutations, since its decision is contrary to the statutes. Trial courts throughout the state are bound by decisions of all the courts of appeal.³⁹² Since trial courts decide most of the cases in our judicial system, the misapplication of the law, and the effect of the

387. See AB 2274 Communication, *supra* note 68, at 67 (stating that California Assembly Member McAlister introduced Assembly Bill 2274, which added California Civil Code §§ 5110.710 to 5110.740, to implement the Commission's advice). California Civil Code §§ 5110.710 to 5110.740 have been recodified in the new California Family Code at sections 850 to 854, effective January 1, 1994.

388. See Recommendation for Transmutations, *supra* note 68, at 213-15 (failing to address both the consideration requirement and the issue of executory transmutations).

389. See *id.* (discussing rejection of the traditional California rule that allowed easy transmutations, without meeting the Statute of Frauds requirement). Prior to the enactment of California Family Code sections 850 to 853, case law permitted spouses to transmute property with a writing, an oral declaration, or by the court implying an agreement from the conduct of the parties. See, e.g., *Woods v. Security First Nat'l Bank*, 46 Cal. 2d 697, 701-02, 299 P.2d 657, 659-60 (1956) (holding the wife's statement to her husband, that when they got married her considerable separate property would become the couple's community property, was a transmutation of her separate property to community property); *Linville v. Linville*, 132 Cal. App. 2d 800, 802, 283 P.2d 34, 35 (2d Dist. 1955) (finding a transmutation when the husband stated, along with other similar statements, that the home was to be 'ours'); *In re Raphael's Estate*, 91 Cal. App. 2d 931, 936-37, 206 P.2d 391, 394 (1st Dist. 1949) (maintaining a transmutation where the decedent told his wife that they were partners in everything, and everything was fifty-fifty).

390. *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993), *review denied*, *Borelli v. Brusseau*, 1993 Cal. LEXIS 1981, at *1 (Apr. 1, 1993).

391. *People v. Von Villas*, 11 Cal. App. 4th 175, 235, 15 Cal. Rptr. 2d 112, 148 (2d Dist. 1992); see *People v. Franc*, 218 Cal. App. 3d 588, 593, 267 Cal. Rptr. 109, 112 (2d Dist. 1990) (maintaining that only the California Supreme Court, and not a lower California court, can depart from an appropriate precedent set by the California Supreme Court).

392. *Reygoza v. Superior Court*, 230 Cal. App. 3d 514, 521, 281 Cal. Rptr. 390, 394 (2d Dist. 1991); see *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2808 (1992) (contending that respect for precedent is indispensable to the very concept of the rule of law); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1988) (noting that any departure from stare decisis requires special justification). When a court is asked to overrule an established precedent regarding interpretation of a statute, a greater burden of proof is placed upon the proponent, due to the special force precedent has in the area of statutory interpretation. *Id.*

incorrect law upon women, will be perpetuated. Although other courts of appeal are not bound by the holding in *Borelli*, the decision may have a persuasive effect on these courts, especially if it is an issue of first impression for that court of appeal.³⁹³

If no action is taken by the legislature, judges will be forced to decide on a case-by-case basis the adequacy of consideration in marital agreements. Judicial measuring of the adequacy of consideration has expressly been rejected by most courts, including those in California, the Restatement (Second) of Contracts, and also by legal commentators.³⁹⁴ Permitting judges to rule upon the adequacy of consideration will give them too much latitude to inject their views into written documents.³⁹⁵ It is likely that judges will have a traditional view which favors the male. Subjectivity on the part of the judges will allow them to infuse their views when deciding which promises deserve enforcement, rather than looking solely to the document at issue.³⁹⁶

An effect of judicial subjectivity is that there will be no assurances of whether the consideration given is adequate, and one will not know if a marital agreement will be considered valid by a court adjudicating the issue in the future. Not knowing whether the consideration will support an

393. See *Henry v. Associated Indem. Corp.*, 217 Cal. App. 3d 1405, 1416, 266 Cal. Rptr. 578, 585 (4th Dist. 1990) (declaring that under the doctrine of stare decisis, California appellate court decisions are not binding on other California courts of the same level).

394. See *Taylor v. Taylor*, 66 Cal. App. 2d 390, 398, 152 P.2d 480, 488 (2d Dist. 1944) (holding that consideration of any value, no matter how slight, will support the most onerous obligation); RESTATEMENT, *supra* note 75, § 79 cmt. c (rejecting both an adequacy and a sufficiency test for the requirement of consideration); 1 FARNSWORTH, *supra* note 14, § 2.11 (stating the traditional adequacy of consideration 'pepper corn' test as allowing things of very small value to serve as consideration so long as they are part of a bargained exchange); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 88 (3d ed. 1986) (declaring it improper to have courts decide upon adequacy of consideration, since a court would have to decide whether the contract terms are reasonable, which courts are even less equipped to do than are the parties to the transaction at issue); see also *Spaulding v. Benenati*, 442 N.E.2d 1244, 1246 (N.Y. 1982) (showing that courts, following the Restatement (Second) of Contracts, recognize that adequacy of consideration is not within the proper scope of judicial scrutiny); *Whitney v. Stearns*, 16 Me. 394, 397 (1839) (noting that valuable consideration can be met with a cent or a pepper corn).

395. See *Duncan v. Louisiana*, 391 U.S. 145, 168-69 (1968) (Black, J., concurring) (stating that tests which allow judges to interject their own ethics and morals are dangerous, since they permit judges to strike down laws they do not like, rather than be restricted by the fixed boundaries of the documents' written words); *In re Freeman's Estate*, 238 Cal. App. 2d 486, 488, 48 Cal. Rptr. 1, 3 (2d Dist. 1965) (reporting that courts will not weigh the sufficiency of consideration for a promise once it has been found to be of some value, and some value generally means any value whatsoever); *Blonder v. Gentile*, 149 Cal. App. 2d 869, 875, 309 P.2d 147, 150 (4th Dist. 1957) (noting that valid consideration does not depend upon its value, and the law ordinarily does not weigh its quantum).

396. *Duncan* at 168-69; see *Morris Cohen, The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933) (submitting that the decision of whether to enforce an agreement is a policy decision); *Dalton*, *supra* note 22, at 1099 (arguing that since courts can inject their own policy decisions in deciding whether to find an enforceable contract, virtually any decision is possible).

already agreed upon contract puts the party which complies with the agreement in a perilous position. If one party has completed its side of the contracted performance, but the other party does not comply, the party that has performed will look to a court for a remedy. The complying party will assert that a court should enforce the agreement, since that party, like Hildegard, will have totally performed. Failure by a court to enforce these contracts due to a subjective measurement which concludes there is a lack of consideration will frustrate the party who fulfilled its side of the agreement. The frustration will be valid, since the complying party performed its end of the bargain with the belief that the other party would also comply, and if not, that a court could be persuaded to compel contract performance.

C. The Borelli Majority Ignored the Alternatives to Consideration

Even if one accepts that the *Borelli* court overlooked Family Code section 850, there were alternatives available to enforce the agreement as Hildegard requested. The failure of the *Borelli* court to implement any of these widely accepted methods demonstrates how modern courts continue to subtly discriminate against women. There exist two alternatives to the traditional consideration requirement for contracts, both of which have their roots in equity.³⁹⁷

First, the *Borelli* court could have rejected the demurrer to Hildegard's complaint by examining exceptions to the formal contract requirements. In particular, contracts formed without consideration can be overcome by showing detrimental reliance.³⁹⁸ The doctrine of detrimental reliance, also called promissory estoppel, is a substitute for consideration.³⁹⁹ The doctrine has been accepted by the California Supreme Court.⁴⁰⁰ There are three requirements for detrimental reliance—the promisee must actually

397. See *Vargas Estate*, 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779, 781 (2d Dist. 1974) (stating that equity allows exceptions to the rule of law where the application of a universal law would cause injustice). If there is no adequate remedy at law, then courts may dispense equitable relief. *Estes v. Rowland*, 14 Cal. App. 4th 508, 535, 17 Cal. Rptr. 2d 901, 917 (1st Dist. 1993).

398. See RESTATEMENT, *supra* note 75, § 90 (establishing that a court may grant a remedy for a breached promise, if the promisor should reasonably have expected the promise to induce such action by the promisee, and the promise did in fact induce such action).

399. *Blatt v. University of S. Cal.*, 5 Cal. App. 3d 935, 943, 85 Cal. Rptr. 601, 606 (2d Dist. 1970); see *MacIsaac & Menke Co. v. Freeman*, 194 Cal. App. 2d 327, 333, 15 Cal. Rptr. 48, 52 (2d Dist. 1961) (stating that a lack of consideration does not have to stop enforcement of a promise, since the very purpose of detrimental reliance is to make a promise binding, even without consideration, if there exists reasonable reliance upon the promise).

400. *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 413, 333 P.2d 757, 759 (1958).

rely upon the promise, the promisor must have had reason to expect the reliance that occurred, and courts can limit the recovery to that which is necessary to do justice.⁴⁰¹ Hildegard relied upon the promise that Michael would transmute his separate property to her, to her detriment, and therefore the remedy of specifically enforcing the agreement is available to the court even if there was no consideration for the agreement. Those in opposition to contracts for domestic services, however, would likely point to the *Sonnicksen-Brooks* rule that forbids enforcement of such contracts, and argue that detrimental reliance or any other doctrine should not be used to circumvent the prohibition. The *Sonnicksen-Brooks* rule, though, should no longer be a bar, since it has been demonstrated it is based upon outmoded views of women, which lead to their subordination.⁴⁰²

Second, the remedy of unjust enrichment is another ground for recovery that the *Borelli* court could have employed to give Hildegard relief. The doctrine of unjust enrichment, also referred to as *quantum meruit*, is a common law remedy which has been accepted by California courts.⁴⁰³ Unjust enrichment gives a remedy where one party has become unjustly enriched as a result of another party's actions.⁴⁰⁴ California courts have specifically stated that unjust enrichment applies to a situation such as the one which was present in *Borelli*: a person who renders services under an invalid oral contract to dispose of real property by will may secure *quantum meruit* for the value of those services.⁴⁰⁵ A possible remedy for unjust enrichment is a fair monetary sum that represents the worth of the benefit conferred.⁴⁰⁶

401. RESTATEMENT, *supra* note 75, § 90(1); see 1 FARNSWORTH, *supra* note 14, § 2.19 (noting that the Restatement's most influential rule is § 90). Professor Farnsworth also points out that the Restatement (First) of Contracts differs from the Restatement (Second) of Contracts in that the Second Restatement allows for courts to limit the remedy as justice requires, rather than requiring specific performance of the promise. *Id.*

402. See *supra* notes 87-129 and accompanying text (discussing the decisions in *Sonnicksen* and *Brooks*).

403. Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84, 87-88 (1920); Freedom Fin. Thrift & Loan v. Golden Pac. Bank, 20 Cal. App. 4th 1305, 1314, 25 Cal. Rptr. 2d 235, 240 (2d Dist. 1993); Orella v. Johnson, 38 Cal. 2d 693, 697, 242 P.2d 5, 7 (1952).

404. 1 FARNSWORTH, *supra* note 14, § 2.20.

405. Zellner, 184 Cal. at 88, 193 P. at 87-88; Orella, 38 Cal. 2d at 697, 242 P.2d at 7; see RESTATEMENT OF RESTITUTION, § 40 cmt. a (stating that where one has obtained services by manifesting a desire to receive the services from the party rendering them, as if there existed an agreement, it is not unfair to require him to pay for the services).

406. See RESTATEMENT, *supra* note 405, § 1 cmt. a (stating that the normal measure of restitution is the amount of the enrichment received); *id.* § 4(f) (noting that an unjust enrichment judgment can be for a payment of money, either directly or by way of set off or counter-claim).

There are two requirements that Hildegard must have plead to establish her *quantum meruit* claim: a benefit conferred upon Michael by her actions; and that it would be unjust for Michael to retain the benefit.⁴⁰⁷ Here, Hildegard meets the two-prong requirement for a recovery based upon unjust enrichment. First, she provided nursing care to Michael. The nursing care, according to California law and the Restatement of Restitution, is a benefit conferred, since it saved the community from having to pay for nursing care out of the community property.⁴⁰⁸ If no community property existed, then Michael would have had to use his own separate property to cover the nursing care expenses. Any form of advantage is a benefit.⁴⁰⁹ The second requirement, unjustness, is met, due to the fact that Hildegard performed her side of the bargain, only to have Michael fail to change his will to effectuate their agreement. Besides fulfilling the two requirements necessary, the policies behind unjust enrichment also favor a recovery for Hildegard. Society wants its members to deal with each other on a level of fundamental fairness, which leads to condemning a member who receives unjust enrichment at the expense of another.⁴¹⁰ The policy advocating fairness favors Hildegard because she contracted with her husband, possessing of free will, and he failed to come through on his side of the agreement. Enforcement would also implement policies that advocate protection of the justified expectations of the parties, and prevention of any forfeiture which might result if the contract is not enforced.⁴¹¹

The last method the *Borelli* court could have used to uphold Hildegard's claim would have been to seek out an alternative basis for consideration without resorting to equity. Consideration did in fact exist in *Borelli*, since Hildegard took on a legal detriment. Failing to assert a right that one possesses is enough to fulfill the consideration requirement.⁴¹² Hildegard refrained from asserting a legal right of hers. In particular, she did not leave the marriage by divorce, even though she had the legal right

407. California Fed. Bank v. Matreyek, 8 Cal. App. 4th 125, 132, 10 Cal. Rptr. 2d 58, 62 (2d Dist. 1992); RESTATEMENT, *supra* note 405, § 1 cmt. a.

408. *Matreyek*, 8 Cal. App. 4th at 131, 10 Cal. Rptr. 2d at 61; RESTATEMENT, *supra* note 405, § 1 cmt. b.

409. RESTATEMENT, *supra* note 405, § 1 cmt. b.

410. *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 174, 793 P.2d 479, 516, 271 Cal. Rptr. 146, 182 (Mosk, J., dissenting).

411. 2 FARNSWORTH, *supra* note 14, § 5.1.

412. See *In re Thomson's Estate*, 165 Cal. 290, 296-97, 131 P. 1045, 1048 (1913) (stating that forbearance, which is refraining from doing that which one has the right to do, is sufficient consideration to support a contract).

to a divorce.⁴¹³ As the promisee, Hildegard assumed a legal detriment by forbearing from doing something that she had a legal right to do. This action meets the definition of consideration.⁴¹⁴ The refusal by the *Borelli* court to enforce the agreement in favor of Hildegard, in the face of several feasible alternatives, illustrates the subtle subordination of women in today's society.

CONCLUSION

The Court of Appeal for the First District of California, in *Borelli v. Brusseau*,⁴¹⁵ reiterated the traditional view toward the enforcement of agreements between spouses for the provision of nursing care services by refusing to enforce such an agreement.⁴¹⁶ As a result of such holdings, women are not allowed to contract with their husbands for the provision of any domestic services that they render, thus depriving many women of their sole means to earn a living. Women who do not work outside the home are financially dependent upon their husbands. Being dependent usually is not an issue when the marriage relationship stays intact. Women become vulnerable to financial problems, however, when there is a divorce or death, since their means of support, the husband, is no longer there to provide support.

The effect of the *Borelli* rule is to continue the subordination of women. The subordination occurs due to the dichotomy of the public and private spheres. The public/private dichotomy arises when courts hold that a woman's only place is in the home, taking care of her husband and children. These entrenched gender patterns keep women from venturing into the public world of business, politics and law by mandating that women spend time in the private sphere. In order to gain true equality for women, versus the formal equality women have largely achieved through legislative enactments, courts must begin to understand what wrongs their decisions cause. Only by piercing the veil that protects the private sphere

413. See CAL. FAM. CODE § 2310 (West 1994) (providing that irreconcilable differences are grounds for a dissolution); *id.* § 2311 (West 1994) (defining irreconcilable differences as substantial reasons which allow a court to decide that the marriage should not continue, but rather, that it should be dissolved).

414. See *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891) (finding a legal detriment where the promisee abstained from doing something he had the legal right to do—smoke cigarettes—in exchange for monetary compensation); *supra* notes 312-323 and accompanying text (noting an argument of the dissent, that if Hildegard had left, and Michael enticed her to come back by offering his separate property should she return, a court would likely find consideration for the agreement).

415. 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d 16 (1st Dist. 1993).

416. See *supra* notes 208-265 and accompanying text (discussing the majority's decision in *Borelli*).

from law's intrusion, and bringing justice into the private world where many women dwell, will women ever have true equality with men.

Wendy L. Hillger