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The 1986 Amendments to California Civil Code Sections 4800.1 and 4800.2: Irreconcilable Differences Between the Legislature and the Court?

INTRODUCTION

In order to simplify marital dissolutions, California community property law attempts to delineate a predictable and uniform framework for characterizing property acquired during marriage.¹ However, due to a recent conflict between the California Legislature and the California Supreme Court, the division of property upon marital dissolution is no longer predictable or uniform.² After the California Supreme Court determined that certain retroactive applications of Civil Code sections 4800.1 and 4800.2 were unconstitutional, the legislature amended the statutes to provide a modified retroactive scheme.³ The court has yet to rule on the constitutionality of the newly enacted retroactive provisions of the statutes.⁴ As a result, lower courts and practitioners are faced with the dilemma of whether to apply the amended statutes retroactively to current dissolution proceedings and estate planning devices.⁵ Despite the express intent of the legislature in amending sections 4800.1 and 4800.2, the his-

². See infra notes 202-05 and accompanying text.
⁴. See infra notes 174-75 and accompanying text.
⁵. See Dubrow & Seligman, In Re Marriage of Fabian: Reimbursement for Separate Property Contributions to Community Property Acquisitions, 3 L.A. LAWYER 34, 37-38 (1986) (the authors discuss the chronological vagueness of the holding and the confusion generated by In re Marriage of Fabian, 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986)).
torical development of related statutory and case law leading to the 1986 amendments of sections 4800.1 and 4800.2 foreshadow an unconstitutional fate for the 1986 amendments as well.

Initially, this comment will discuss the legislative and judicial development of characterizing property acquired during marriage. Second, the legislative intent underlying the 1984 enactment of sections 4800.1 and 4800.2 will be analyzed. Third, this comment will scrutinize the most recent California Supreme Court decisions in order to gain insight into the analysis employed by the court in determining the constitutionality of retroactive legislation. Next, the judicial and legislative reactions to the decisions will be examined. Finally, this comment will analyze whether the retroactive provisions of the 1986 amendments to sections 4800.1 and 4800.2 are constitutional.

I. THE HISTORY OF PROPERTY CHARACTERIZATION METHODOLOGIES

A. Property Characterization Before 1984

1. California Civil Code Section 5110

Legislative provisions characterizing property acquired during marriage as community or separate property are not a recent phenomenon. The original statutory community property presumptions, provided in Civil Code section 164, were very limited in scope. Prior to 1965, the statutes divided property upon dissolution in accordance with the form of title in which property was taken. For example, in the 1950 dissolution decision *Socol v. King*, the California Supreme Court determined the respective interests of a couple.

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6. See infra notes 10-49 and accompanying text.
7. See infra notes 50-69 and accompanying text.
8. See infra notes 70-172 and accompanying text.
9. See infra notes 173-209 and accompanying text.
11. See e.g., 1941 Cal. Stat. ch. 455, sec. 1, at 1752 (amending Cal. Civ. Code § 164) (initial statutory presumptions based upon the form in which title was taken in property acquired during marriage).
12. Id. (property acquired by husband and wife by an instrument in which they are described as husband and wife).
who purchased a residence with community funds and took title as "husband and wife as joint tenants." The supreme court stated that section 164 created a presumption that the residence was separate property in which each spouse had a half interest. However, the court held that the presumption was rebutted by evidence of an oral agreement that the property was community property.

Fifteen years after Socool, the legislature observed that the majority of married couples took title as joint tenants without knowing the legal significance of the form in which title is taken. The separate property presumption pronounced in Socool was therefore inconsistent with the ownership expectations of most couples. Consequently, the legislature amended section 164 in 1965. The amendment created a presumption that a residence acquired by husband and wife as joint tenants during marriage is community property. The amendment to section 164 reflected the legislative intent to maintain a body of law consistent with the perceived expectations of married couples.

The community property presumption created by the 1965 amendment to section 164 was significant because until the 1985 enactment of section 4800.5, courts lacked jurisdiction to divide joint tenancy property and were therefore unable to provide a complete dissolution of marital assets. The community property presumption of section 164 allowed the courts to reach property held in joint tenancy. However, the legislature did not prescribe a methodology for rebutting the community property presumption provided in section 164.

In 1969 the legislature enacted the Family Law Act which repealed section 164. However, the Family Law Act incorporated a provision...
almost identical to that of section 164 in section 5110. Additionally, section 5110 expanded upon the presumption provided in section 164 by announcing two additional and distinct community property presumptions pertaining to the acquisition of property during marriage. First, section 5110 establishes a general presumption that any property acquired during marriage is community property. Prior to the enactment of section 4800.1, a party could rebut this general presumption by tracing the funds used to acquire the property to a separate property source. Second, section 5110 establishes a presumption that property acquired by a husband and wife as husband and wife is community property. Finally, section 5110, restating the presumption of former section 164, imposed a presumption that a single family residence acquired by a husband and wife as joint tenants was community property. The legislature did not define the criteria for rebutting the presumptions enunciated in section 5110. Consequently, the courts established the criteria.

2. In re Marriage of Lucas

In re Marriage of Lucas reflects the precise situation which motivated the legislature to enact section 164, and subsequently, section 5110. In Lucas, the husband and wife acquired a single family residence, with separate and community funds, and took title as husband and wife as joint tenants. The wife contributed over 27 percent of the purchase price of the family residence from her

27. Id. The additional presumptions support the state policy favoring the community. Two presumptions have not been affected by subsequent legislation and will not be discussed further in this comment. The first presumption concerns property acquired by the wife prior to 1975. The presumptions enumerated in section 5110 are subject to the provisions of sections 5107, 5108 and 5126. Id.
28. Id. Real property had to be situated in California; personal property had no restrictions as to location. Id.
29. CAL. CIV. CODE § 5110 (West Supp. 1988) (unless a different intention was expressed in the instrument).
32. In re Marriage of Mix, 14 Cal. 3d 808, 536 P.2d 479, 166 Cal. Rptr. 79 (1975) (where no written indication of ownership is indicated, tracing property to a separate source rebuts the general presumption that all property acquired during marriage is community property). In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980) (evidentiary requirements for rebutting the presumption arising from the form in which title was taken).
33. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).
34. See supra notes 11-33 and accompanying text.
separate funds.35 She also contributed almost $3000 toward improving the residence.36 The couple used community funds for other expenses including the payment of taxes, interest, and the reduction of principal.37 The wife contended that since she could trace the funds used to acquire the residence to a separate property source, she held a separate property interest in the residence.38 The Lucas court rejected her contention based upon the policy considerations underlying the enactment of section 5110.39 The court reasoned that a party would not take title in joint and equal ownership form if a party intended to retain a separate property interest.40

The Lucas court seems to defer to legislative intent and follow established precedent. The rationale underlying section 5110 is consistent with Lucas since both resolve disputes in favor of the community.41 Moreover, the legislature did not disapprove of the methodology for rebutting the form of title presumption enumerated by the court in Socol v. King.42 Therefore, requiring proof of an oral or written agreement concerning the character of the property is consistent with developing community property law:43

The Lucas court also stated that if the spouse successfully proved the existence of an oral or written agreement indicating that the contribution was to remain separate property, the party was entitled to a pro rata apportionment of the value of the residence at the time of dissolution.44 From Lucas until the enactment of section 4800.2 in 1984, a separate property contribution toward the acquisition of property held in joint tenancy established the presumption of a gift to the community. Until the enactment of section 4800.1 in 1984,
proof of an oral or written agreement to the contrary was sufficient to rebut the presumption. 45

B. The Enactment of Civil Code Sections 4800.1 and 4800.2

In 1983, the California Legislature significantly changed the methodology for characterizing property upon the dissolution of marriage. 46 To illustrate, the legislature deleted the form of title presumptions provided in section 5110 and redefined those presumptions in the newly enacted section 4800.1. 47 Additionally, the legislature imposed a writing requirement to rebut the form of title presumptions provided in section 4800.1. 48 Perhaps most portentously, in enacting section 4800.2 the legislature reversed Lucas. 49 Section 4800.2 provides that a separate property contribution to the acquisition of property during marriage is not presumed to be a gift to the community. 50

1. The Legislative Intent of Section 4800.1

In enacting section 4800.1, the legislature expanded the application of the presumption that a single family residence held in joint tenancy is community property. 51 Under the language of the 1984 enactment of section 4800.1 the presumption applied to all property acquired

45. See id. (the committee states that section 4800.1 limits the manner in which property may be transmuted).

46. See generally Abney, Joint Tenancy/Community Property Presumption and Separate Property Reimbursement: Legislative History of California Law Provides Guidance, 11 COMM. PROP. J. 275 (1984) (provides in-depth review of the legislative history of sections 4800.1 and 4800.2). See generally Shue and Veldman, supra note 29, at 7 (discussion of the presumptions prescribed by section 5110 and the ways in which they were affected by section 4800.1).


48. Id. (requires a clear statement in the deed or other evidence of title or other proof of a written agreement that the property is separate). See Roman, The Division of Marital property Before and After In re Marriage of Buol and In re Marriage of Fabian, 16 Sw. U.L. REV. 563, 565-66 (1986) (discusses the evidentiary changes mandated by § 4800.1). See also Adams and Sevitch, CAL. FAM. L. REP., § D.11.3 (1986) (discusses the evidentiary requirements before and after the enactment of § 4800.1); See generally Abney, Impact of California Community Property Presumptions on Joint Tenancy, 13 COMM. PROP. J. 40 (1987) (provides a brief history of the form of title presumption as defined by statutory and case law).


during marriage in "joint tenancy form." Again, the legislature noted that most married couples take title in joint tenancy form without knowing the legal significance of joint tenancy. In enacting section 4800.1, the legislature intended to reconcile the statutory presumptions with the reasonable expectations of married couples.

Section 4800.1 modifies the Lucas rule pertaining to oral agreements. Under section 4800.1, a party attempting to rebut the presumption that property acquired in joint tenancy form is community property must furnish proof of a written agreement that the property is separate property. The legislature was concerned that the minimal evidentiary requirements set forth in Lucas were insufficient to protect the statutory form of title presumptions. As a result, section 4800.1 imposes a statute of frauds upon the party attempting to rebut the form of title presumptions.

2. The Legislative Intent of Section 4800.2

The legislature specifically stated that section 4800.2 overrules Lucas. Under section 4800.2, a separate property contributor retains a right of reimbursement from the community if the contributor can...
trace the contributions to a separate property source. To overcome the reimbursement provision, the community must produce a written waiver by the separate property contributor waiving the right to reimbursement.

Furthermore, the reimbursement provision of section 4800.2 produces a markedly different result than the pro rata apportionment method used to calculate the separate property interest in situations where there is a Lucas agreement. Section 4800.2 prohibits the separate property contributor from sharing in the appreciated value of the property acquired with the separate property contribution. Conversely, under the Lucas rule, once a separate property contributor established the existence of an agreement, the separate property contributor was entitled to an apportioned share of the appreciated value of the property. Section 4800.2, therefore, has a significant impact on the financial interests of a party who contributes separate property to the acquisition of joint tenancy property during marriage.

C. Judicial Interpretation of Sections 4800.1 and 4800.2

The legislature enacted sections 4800.1 and 4800.2 on January 1, 1984 with explicit retroactive provisions. Both sections were applicable to cases which were filed prior to but not yet final as of January 1, 1984. Shortly after the enactment of sections 4800.1 and 4800.2, creative appellants sought to take advantage of these changes by applying the newly enacted evidentiary requirements and reimbursement rules to cases filed prior to January 1, 1984 but still on

61. CAL. CIV. CODE § 4800.2 (West Supp. 1988) (the reimbursement is measured as the value of the contribution at the time the contribution was made).
62. Id. (or a writing which has the effect of a waiver).
63. Id. (denies the separate property contributor a share in the appreciation of the property). See Lucas, 27 Cal. 3d at 816, 614 P.2d at 289-90, 166 Cal. Rptr. at 858 (discussion of pro-rata calculations).
64. CAL. CIV. CODE § 4800.2 (West Supp. 1988) (the reimbursement is limited to the amount of contribution at the time the separate contribution was made). See 16 CAL. L. REV. COMM. REP. 2165 (1982) (discussion of reimbursement calculations). This is equivalent to an interest free loan to the community. Shue & Velman, supra note 5 at 8 (the authors also state that section 4800.2 supports the public policy favoring community property by awarding the appreciated valued of the property to the community).
65. See Adams & Sevitch, supra note 52 at D.11.4.1.(c) (description of the impact of section 4800.2).
67. Id.
appeal as of that date. Two California Supreme Court decisions, *In re Marriage of Buol*68 and *In re Marriage of Fabian*,70 held that sections 4800.1 and 4800.2 could not be applied to cases filed before January 1, 1984.71

1. *In re Marriage of Buol*

The California Supreme Court, in *In re Marriage of Buol*, ruled that retroactive application of section 4800.1 to cases filed before the enactment of the statute impaired vested rights without due process of law.72 In *Buol*, the wife purchased a single family residence in 1963 with separate funds and took title in joint tenancy with her husband.73 The trial court found that the couple orally agreed that the residence was the separate property of the wife.74 At the time she acquired the property, section 164 was current law.75 Under concurrent case law, proof of an oral agreement that the wife retained a separate property interest successfully rebutted the statutory presumption that the residence was community property.76 The husband filed for dissolution on August 10, 1980. At the time the dissolution was filed section 5110 was current law.77 Under concurrent case law, proof of an oral agreement that the wife retained a separate interest successfully rebutted the presumption that the residence was com-

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70. 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986).
74. *Id.*
76. *Buol*, 39 Cal. 3d at 757, 705 P.2d at 357-58, 218 Cal. Rptr. at 34.
munity property.\textsuperscript{78} Thus, the result would have been the same whether the court applied the law in effect at the time the couple acquired the property or at the time the husband filed the dissolution petition. Accordingly, the trial court held that the residence was the separate property of the wife.\textsuperscript{79} The husband was, therefore, not entitled to an interest in the property.

The husband appealed the decision. While the appeal was pending the legislature enacted section 4800.1.\textsuperscript{80} The husband attempted to invoke the newly enacted statute.\textsuperscript{81} The couple did not have a written agreement; therefore, under section 4800.1, the property would be characterized as community property. Accordingly, the husband would be entitled to a one half interest in the value of the property at the time of entitled to a one half interest in the value of the property at the time of dissolution.\textsuperscript{82} The wife claimed that retroactive application of 4800.1, as provided within the statute, would impair her vested property interest without due process of law.\textsuperscript{83} The court resolved the due process issue by employing a two part test: First, the court determined whether the wife held a vested separate property interest in the asset;\textsuperscript{84} second, the court determined whether the legislature could deprive the wife of her interest without violating due process of law.\textsuperscript{85}

\textbf{a. The Vested Interest Analysis}

The Buol court defined a vested property interest as a right in property free from any condition precedent.\textsuperscript{86} Stating that property is normally characterized as community or separate at the time of acquisition,\textsuperscript{87} the court applied the law in effect at the time the couple

\begin{itemize}
  \item \textsuperscript{78} Buol 39 Cal. 3d at 757, 705 P.2d at 357-58, 218 Cal. Rptr. at 34.
  \item \textsuperscript{79} Id. at 755, 705 P.2d at 356, 218 Cal. Rptr. at 33.
  \item \textsuperscript{80} Id.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} See \textit{CAL. CIV. CODE} § 4800 (West Supp. 1988) (provides that the court shall, in the absence of enumerated circumstances, equally divide the community assets upon dissolution). Under section 4800.2, the court would reimburse the separate property contribution of the wife prior to dividing the community property assets. \textit{Id.} § 4800.2.
  \item \textsuperscript{83} Buol, 39 Cal. 3d at 756, 705 P.2d at 357, 218 Cal. Rptr. at 34. \textit{See CAL. CONST.} art. I, § 7 (due process clause).
  \item \textsuperscript{84} Buol, 39 Cal. 3d at 756-69, 705 P.2d at 357-58, 218 Cal. Rptr. at 34-36.
  \item \textsuperscript{85} Id. The court stated that statutory language alone will not always answer this issue; thus, a more extensive inquiry concerning the "realities" of the situation was warranted. \textit{Id.} at 758, 705 P.2d at 358, 218 Cal. Rptr. at 35.
  \item \textsuperscript{86} Id. at 757 n.6, 705 P.2d at 357 n.6, 218 Cal. Rptr. at 34 n.6. \textit{See In re Marriage of Bouquet}, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).
  \item \textsuperscript{87} Bouquet, 16 Cal. 3d at 591, 546 P.2d at 1376, 128 Cal. Rptr. at 432 (citing Trimble v. Trimble, 219 Cal. 340, 343, 26 P.2d 477, 479 (1933)).
\end{itemize}

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acquired the residence to determine whether the separate property of the wife was subject to a condition precedent. Since the couple effectuated an oral agreement regarding the nature of the property, the Buol court concluded that the wife held a vested separate property interest from the time of acquisition.

The court also discussed an alternate analysis for determining whether the separate property right was vested. Two district courts concluded that rather than altering vested rights retroactive application of section 4800.1 merely altered the evidentiary burden of proof. The Buol court determined that retroactive application of the writing requirement created an impossible evidentiary burden for the party asserting a separate property interest. Imposing an impossible evidentiary burden equates to a substantive measure and, therefore, results in more than a mere alteration of an evidentiary burden. Consequently, the court was required to determine whether impairment of the wife's property right violated due process of law.

b. The Due Process Analysis

The test for determining whether the state may deprive a citizen of a vested right without violating due process of law is well established in California. In exercise of state police power, the state may...
impair vested rights if reasonably necessary for the protection of the health, safety, morals, or general welfare of its citizens. In analyzing whether a statute violates the due process standard, courts generally balance the state interest in enacting the statute and the extent of the affected party's reliance on the former law.

The first factor discussed in *Buol*, the importance of the state interest served by the statute, is well settled. Previous California Supreme Court decisions have held that the state interest in providing an equitable dissolution of marriages is significant. The *Buol* court reaffirmed the vitality of this precedent. Having found a sufficiently important state interest, the court then examined the nexus between the need for retroactive application and the effectuation of the state interest.

Retroactive application of a statute that impairs a vested right is permitted only where the statute remedies a manifestly unjust law. The *Buol* court looked toward legislative findings pertaining to flaws in the prior law. The court found that the legislature was concerned that proof of an oral agreement could easily be fabricated. The legislature believed a statute of frauds provision would protect the community property interest from fabricated claims. This concern


95. *Buol*, 39 Cal. 3d at 761, 705 P.2d at 360, 218 Cal. Rptr. at 37 (quoting *In re Marriage of Bouquet*, 16 Cal. 3d 583, 592, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976)). As part of the state interest analysis, courts will consider the following factors: The importance of the state interest served by the statute; the nexus between retroactive application of the statute and the effectuation of the state interest. *Id.*

96. *Id.* In weighing the reliance factor the courts will consider: the extent the party relied upon the former law; whether the reliance was legitimate; the magnitude of the actions taken based upon the reliance; and, the extent of the disruption caused by the retroactive application of the new statute on those actions. *Id.* The California Supreme Court first set forth this analysis in *Bouquet*. *In re Marriage of Bouquet*, 16 Cal. 3d 583, 592, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432. The *Bouquet* court did not actually apply this analysis. *Id.* The court reached the decision before actually applying the factors to the facts. *Id.* See Comment, *supra* note 96, at 1016-17.

97. *Addison*, 62 Cal. 2d at 566, 399 P.2d at 897, 43 Cal. Rptr. at 106.

98. *Id.*

99. *Buol*, 39 Cal. 3d at 761, 705 P.2d at 360, 218 Cal. Rptr. at 37 (the court refers to the "states paramount interest in the equitable dissolution of the marital partnership").

100. *Id.*

101. *Id.; See Adams & Sevitch, supra* note 52 at D.11.5.0.

102. *Buol*, 39 Cal. 3d at 761, 705 P.2d at 360, 218 Cal. Rptr. at 37.


104. *See 16 CAL. L. REV. COMM. REP. 2165 (1982). The legislature also readdressed its concern over the lack of understanding most married couples have concerning the effect of taking title in joint tenancy. Id.*
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was the primary impetus for the enactment of section 4800.1.105

Despite these findings of legislative intent, the court concluded that 4800.1 did not cure a manifestly unjust law. The court also failed to find any nexus between retroactive application and the promotion of equitable marital dissolutions.106 Furthermore, the court observed that the 1984 enactment of section 4800.1 did not remedy all the alleged problems with joint tenancy title presumptions.107 For example, married couples may take title to property in forms other than joint tenancy, or they may acquire non-title property.108 Section 5110 remained applicable to those acquisitions, since the 1984 enactment of section 4800.1 was expressly limited to property taken in joint tenancy form.109 Consequently, the court concluded that section 4800.1 failed to obviate the legislature’s concern.

Next, the Buol court examined the degree and the validity of the parties’ reliance on former law.110 Because the husband or wife presented no direct evidence111 to demonstrate the extent of reliance, the court had to infer112 the extent of the parties reliance.113 Based solely upon the limited findings of the trial court, the California Supreme Court concluded that the degree of the parties’ reliance on former law was difficult to ascertain.114 Nevertheless, the court speculated that the couple would have executed a written agreement if prior law required one, because the couple formed an oral agreement which was sufficient under prior law to protect their expectations.

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106. Id. Perhaps one reason for this finding is that prior to the enactment of section 4800.1, the form of title presumptions were rebuttable solely by judicially created evidentiary requirements. Id.
107. Id.
108. See CAL. CIV. CODE § 5110 (West Supp. 1988) (provides forms in which couples may acquire property).
111. CAL. EVID. CODE § 410 (West Supp.1988) (evidence that directly proves a fact without an inference or assumption).
112. Id. § 600 (West Supp. 1988) (a deduction of fact that may be logically and reasonably drawn from another fact or conclusion).
113. Buol, 39 Cal. 3d at 763, 705 P.2d at 361-62, 218 Cal. Rptr. at 38 (in fact, neither party presented evidence demonstrating knowledge of former law).
114. Id. The trial court found that the couple formed a valid oral agreement that the residence was the separate property of the wife. Id. The couple took title as joint tenants solely at the suggestion of a realtor. Id.
regarding the status of the property.\textsuperscript{115} The validity of the court’s speculation concerning the written agreement is suspect, since neither party asserted any knowledge of prior law, nor did either show that they relied on the advice of someone who did. The analysis seems to focus upon the expectation of the parties rather than the actual extent of reliance on former law.\textsuperscript{116}

The court held that retroactive application of section 4800.1 would impair the vested separate property interest of Mrs. Buol without due process of law.\textsuperscript{117} In the final paragraph of the decision, the \textit{Buol} court appears to limit the holding to cases filed before the enactment of section 4800.1.\textsuperscript{118} However, commentators and lower courts have expressed considerable uncertainty as to the limits of the \textit{Buol} holding.\textsuperscript{119} Approximately six months after determining the constitutionality of the retroactive application of section 4800.1, the California Supreme Court, in \textit{In re Marriage of Fabian}\textsuperscript{20}, decided an identical issue concerning section 4800.2.\textsuperscript{121}

2. \textit{In re Marriage of Fabian}

The legislature explicitly stated that both sections 4800.1 and 4800.2 were applicable to cases not final as of January 1, 1984. Similar to \textit{Buol}, the litigants in \textit{Fabian} acquired marital property and filed for dissolution of their marriage before the legislature enacted section 4800.2.\textsuperscript{122} The couple took title as “husband and wife as community

\begin{footnotes}
\item[115] \textit{Id.}
\item[116] \textit{Id.} “The parties’ legitimate expectations, therefore, are substantially disregarded in favor of needless retroactivity.” \textit{Id.}
\item[117] \textit{Id.} at 764, 705 P.2d at 362, 218 Cal. Rptr. at 39.
\item[118] \textit{Id.} (retroactivity would equate to a “penalty for lack of prescience of changes in the law occurring after trial”).
\item[119] \textit{See} Adams & Sevitch, supra note 52, at D.11.5.0.2 (“the elusive \textit{Buol} date could turn out to be the date of judgment, the date of trial, the date the petition is filed, the date the property is ‘acquired’ in joint tenancy, or the date on which the oral Lucas agreement is made”). \textit{See also} Abney, supra note 50, at 42-45 (discussion of the impact \textit{Buol} will have on all retroactive applications of section 4800.1 as uncertain); Roman, supra note 52 at 575 (the author raises questions regarding the dates to which \textit{Buol} would apply). When an officer of the California Law Review Commission asked the supreme court to clarify the limits of the \textit{Buol} holding, the supreme court denied the request. \textit{See} Adams & Sevitch, supra note 52, at D.11.5.0.2 (the request was made one month after the decision was published and was denied 22 days later).
\item[120] 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986).
\item[121] \textit{Fabian}, 41 Cal. 3d at 440, 715 P.2d at 253, 224 Cal. Rptr. at 334-35.
\item[122] \textit{Id.} at 443-44, 715 P.2d at 254-55, 224 Cal. Rptr. at 334-35 (the property was acquired in 1972 with title taken as husband and wife as community property).
\end{footnotes}
property.' The husband claimed that he contributed over $275,000 from a separate property source for improvements to the community property. The trial court found that the couple did not have an agreement regarding a right to reimbursement; therefore, the property was community property. The husband appealed the judgment. While the appeal was pending, the legislature enacted section 4800.2. Under section 4800.2, the husband would be entitled to reimbursement for his separate property contribution, providing that he could trace the contribution to a separate property source.

The constitutional issue in Fabian was very similar to that in Buol: Whether retroactive application of section 4800.2, as mandated in section 4800.1, deprived the wife of a vested community property interest without due process of law. Before determining whether impairment of the community property interest was unconstitutional, the Fabian court first decided whether the wife held a vested interest in a community asset.

a. The Vested Rights Analysis

The California Supreme Court upheld the trial court's holding that the husband failed to rebut the presumption that the property was community property. Applying the law in effect at the time the couple acquired the property, the Fabian court determined that the form in which the couple took title created a rebuttable presumption

123. Fabian, 41 Cal. 3d at 443, 715 P.2d at 254, 224 Cal. Rptr. at 334. Under existing law at the time the property was acquired, the property would have been presumed to be community property due to the form in which the couple took title. See CAL. CIV. CODE § 5110 (West Supp. 1988).
124. Fabian, 41 Cal. 3d at 443, 715 P.2d at 254, 224 Cal. Rptr. at 334.
125. Id. (judgment was entered on April 23, 1982). Under existing law at the time of acquisition and at the time of trial, the husband was required to offer proof of a contrary agreement to rebut the presumption that the contribution was a gift to the community. Id.
126. Id. (the husband claimed the court erred in characterizing the property, a motel, as marital property rather than business investment).
127. Id. Under prior law, a separate contribution to a community interest was presumed to be a gift to the community in the absence of an oral or written agreement. See, e.g., Lucas, 27 Cal. 3d 808, 614 P.2d 285, 202 Cal. Rptr. 853 (origin of the gift presumption). The community would share in the remaining balance of the value of the property after the husband was reimbursed his $275,000 separate property contribution. CAL. CIV. CODE § 4800.2 (West Supp. 1988). Consequently, retroactive application of section 4800.2 would operate to reimburse the husband for his separate property contribution at the expense of the community. Id.
128. Fabian, 41 Cal. 3d at 447, 715 P.2d at 257, 224 Cal. Rptr. at 337.
129. Id. at 445, 715 P.2d at 256, 224 Cal. Rptr. at 336.
that the property was community property.\textsuperscript{130} The trial court determined that the husband failed to rebut the presumption; thus, the property was community property.\textsuperscript{131} The supreme court agreed.\textsuperscript{132}

Next, the \textit{Fabian} court determined whether the wife had a vested community property interest. The court, revising the definition of vested enunciated in \textit{Buol}, stated that the wife had a vested community property interest in the motel from the time of purchase.\textsuperscript{133} The supreme court also considered the potential interests arising from the separate property contribution for improvements to the motel.\textsuperscript{134} The court applied the \textit{Lucas} rule and concluded that the husband failed to rebut the presumption that the contribution was a gift to the community.\textsuperscript{135} However, the court stated that the wife had vested rights in the property as community property when the trial court entered judgment on the dissolution.\textsuperscript{136} Thus, the \textit{Fabian} court advanced three potential theories for the analysis of a vested property interest: (1) A property interest is vested at the time of purchase in the absence of any contrary agreement; (2) a property interest is vested at the time of a separate property contribution when the separate property contributor fails to rebut the statutory presumption; and, (3) a property interest is vested when a court enters judgment declaring the existence of the interest.\textsuperscript{137}

The California Supreme Court also determined whether retroactive application of section 4800.2 would actually impair the vested property interest of the wife.\textsuperscript{138} The court compared the value of the community property interest under both prior law and section 4800.2.\textsuperscript{139} Retroactive application of section 4800.2 would impair the wife's vested interest to the extent of $138,000. Because the court determined that

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\item \textsuperscript{130} \textit{Id.} The court subscribed to the maxim that property is normally characterized as community or separate at the time the property is acquired. \textit{Id. See} \textit{CAL. CIV. CODE} § 5110 (West 1983) (section 5110 was the operative law at the time of acquisition).
\item \textsuperscript{131} \textit{Fabian}, 41 Cal. 3d at 443, 715 P.2d at 256, 224 Cal. Rptr. at 337.
\item \textsuperscript{132} \textit{Id. at} 446-47, 715 P.2d at 256-57, 224 Cal. Rptr. at 337.
\item \textsuperscript{133} \textit{Compare Id. at} 446, 715 P.2d at 446, 224 Cal. Rptr. at 336 (wife had a vested interest at time of purchase) \textit{with In re Marriage of Buol}, 39 Cal. 3d at 757, 705 P.2d at 357, 218 Cal. Rptr. at 34 (vested means interest not subject to a condition precedent). The \textit{Fabian} court stated that the record was devoid of any evidence that the property was \textit{not} to be community property. \textit{Fabian}, 41 Cal.3d at 446, 715 P.2d at 256, 224 Cal. Rptr. at 336.
\item \textsuperscript{134} \textit{Fabian}, 41 Cal.3d at 446, 715 P.2d at 256, 224 Cal. Rptr. at 336.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id. at} 446-51, 715 P.2d at 257-60, 224 Cal. Rptr. at 337-40. \textit{See} Adams & Sevitch \textit{supra} note 52, at D.11.5.0.2 (the authors note similar problems in determining the timing of vesting).
\item \textsuperscript{138} \textit{Fabian}, 41 Cal. 3d at 447-48, 715 P.2d at 257, 224 Cal. Rptr. at 337.
\item \textsuperscript{139} \textit{Id. at} 448, 715 P.2d at 257, 224 Cal. Rptr. at 337-38.
\end{itemize}
the wife held a vested interest in the motel as community property, and the retroactive application of section 4800.2 would impair that interest, the supreme court proceeded to analyze whether impairment of the vested interest was constitutional.140

b. The Due Process Analysis

The due process analysis employed in Fabian paralleled the approach the court took in Buol.141 To determine whether retroactive application of section 4800.2 was reasonably necessary, the Fabian court considered such factors as the importance of the state interest, the nexus between retroactive application of a statute and the effectuation of the statute. The court also considered whether the parties relied on the former law and the whether their reliance was legitimate.

In Buol the court considered legislative intent, but did not find a sufficiently significant state interest in implementing section 4800.1 to warrant retroactive application of the statute.142 The Fabian court also examined the legislative intent in enacting section 4800.2.143 The court found that the legislature was concerned that the result reached in Lucas did not accurately reflect the expectation of parties who contribute separate property funds to the community.144

The court stated that prior to the enactment of section 4800.2, a spouse wishing to preserve the separate property status of a contribution could have done so by simply informing the other spouse that the contribution was not a gift.145 Consequently, the court did not find that prior law was manifestly unjust.146 Since, retroactive application of the statute did not cure an unjust law, the court reasoned that the state interest in the equitable dissolution of marriages was not enhanced by retroactive application of section 4800.2.147

140. Id. at 447, 715 P.2d at 257, 224 Cal. Rptr. at 337-38.
141. Id. at 448, 715 P.2d at 337, 224 Cal. Rptr. at 257-58. See Buol, 39 Cal. 3d at 761-62, 705 P.2d at 360-61, 218 Cal. Rptr. at 37-38. The state, when exercising its police powers, may impair vested rights if enactment of a law is considered reasonably necessary for the protection of the health, safety, morals, or general welfare of the people. See Addison v. Addison 62 Cal. 2d 558, 566, 399 P.2d 897, 907, 43 Cal. Rptr. 97, 106 (1965); Comment, supra note 96 at 1024-26 (summary of community property decisions which focused on due process).
142. Id. (applies to cases filed prior to the enactment of the statute).
143. Fabian 41 Cal. 3d at 448-49, 715 P.2d at 258, 224 Cal. Rptr. at 338.
144. Id.
145. Id. at 449, 715 P.2d at 258-59, 224 Cal. Rptr. at 338-39.
146. Id.
147. Id.

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In *Fabian*, as in *Buol*, the supreme court found that the extent to which the parties relied on former law was difficult to ascertain.\(^{148}\) Consequently, the court focused instead on whether reliance on the former law was legitimate.\(^{149}\) Under the law existing at the time of acquisition, the husband could have protected his interest by executing an oral or written agreement with the wife at the time of the acquisition.\(^ {150}\) The court speculated that if the couple had sought competent counsel, they would have been advised of the applicable presumptions concerning the status of the property as well as the method in which to rebut the presumptions.\(^ {151}\) Prior to enacting 4800.2, the legislature expressed no concern with the judicially created *Lucas* rule; therefore, the court concluded that a party, or counsel, could have legitimately relied on the former law.

Finally, the court considered the extent that retroactive application of section 4800.2 would disrupt the expectations of the parties.\(^ {152}\) The husband was responsible for his predicament because he failed to protect the separate property interest by invoking the methods available at the time of the contribution.\(^ {153}\) Moreover, the husband would probably be unwilling to sign a written waiver to his right of reimbursement for the separate property contribution after he filed the petition for dissolution.\(^ {154}\) Yet, if section 4800.2 were retroactively applied, the wife would need to furnish proof of such a waiver in order to protect the community's one half interest in the full value of the property.\(^ {155}\) The court stated that this dilemma facing the wife was an example of the severely disruptive effect the retroactive application of section 4800.2 would have on marital dissolution proceedings.\(^ {156}\)

*Fabian* held that retroactive application of section 4800.2 to cases filed prior to the enactment of the statute impaired vested property rights without due process of law.\(^ {157}\) The California Supreme Court

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148. *Id.* (reliance was "difficult to pinpoint with accuracy"). *See* *In re* Marriage of *Buol*, 39 Cal. 3d at 763, 705 P.2d at 361-62, 218 Cal. Rptr. at 38.
149. *Fabian*, 41 Cal. 3d at 450, 715 P.2d at 259, 224 Cal. Rptr. at 339.
150. *Id.* (by stating that the contribution was to remain his separate property).
151. *Id.* at 449, 715 P.2d at 258, 224 Cal. Rptr. at 338.
152. *Id.*
153. *Id.* at 450, 715 P.2d at 259, 224 Cal. Rptr. at 339.
154. *Id.*
156. *Fabian* 41 Cal. 3d at 450, 715 P.2d at 259, 224 Cal. Rptr. at 339 (retroactive application would disrupt "the interest of finality, uniformity, and predictability" of marital property dissolutions).
157. *Id.* at 451, 715 P.2d at 259-60, 224 Cal. Rptr. at 339-40.
expressly limited the holding of *Fabian* to cases pending on the date the legislature enacted section 4800.1. Given the analysis in *Fabian*, however, rights may vest upon the occurrence of at least two conditions in addition to the one specifically referred to in the holding. As a result of the deliberate limitation of the holdings of *Buol* and *Fabian* to cases filed before the enactment of sections 4800.1 and 4800.2, the legislature, lower courts and practitioners are unclear as to the applicability of the sections to cases filed after their enactment.

**D. Legislative and Judicial Reaction to Buol and Fabian**

Since the California Supreme Court decisions of *Buol* and *Fabian*, only two appellate court decisions, *In re Marriage of Delgado*¹⁶¹ and *In re Marriage of Griffis¹⁶², have ruled on the retroactive application of sections 4800.1 and 4800.2. Unfortunately, both decisions involved the application of sections 4800.1 and 4800.2 to cases filed before the legislature enacted the 1986 amendments to the sections. Nevertheless, the analysis employed by the appellate courts provide insight to the judicial reaction to *Buol* and *Fabian.¹⁶³

1. **In re Marriage of Delgado**

The chronology of events in *Delgado* was similar to *Buol*. Prior to the enactment of section 4800.1, the couple in *Delgado* acquired

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¹⁵⁸. *Fabian*, 41 Cal. 3d at 451 n.12, 715 P.2d at 260 n.12, 224 Cal. Rptr. at 340 n.12 (expressly limits the holding to cases filed prior to the enactment of section 4800.2: "We hold only that application of the statute to cases pending on January 1, 1984 impairs vested rights without due process of law").

¹⁵⁹. *See supra* note 145 and accompanying text (provides the three theories advanced by the court pertaining to the vesting of rights). Because the court stated that the wife had a vested interest from the time of purchase, any retroactive application of section 4800.2 adversely affecting a right that vested prior to the section’s enactment would seem to violate due process. *See Dubrow and Seligman, supra* note 5, at 37-38 (the authors discuss the chronological vagueness of the holding and the confusion generated by *Fabian*).

¹⁶⁰. *See Dubrow and Seligman, supra* note 5, at 37-38. *See also* Adams & Sevitch *supra* note 52 at D.11.5.3 and accompanying text.


¹⁶³. Therefore, neither appellate decision provides authority for retroactive application to cases filed after the legislature amended sections 4800.1 and 4800.2 in 1986 where the property was acquired prior to 1984. *See 1986 Cal. Stat. ch. 539, sec. 1 at ___* (amending CAL. CIV. CODE §§ 4800.1 and 4800.2) (retroactive application was amended to comport with the narrowest holding of *Buol* and *Fabian*).
title to property during marriage by an instrument naming them as joint tenants.\textsuperscript{164} The trial court held that the husband and wife agreed at the time of acquisition that the property was the separate property of the wife.\textsuperscript{165} \textit{Buol} clearly applied because the wife filed the petition for dissolution prior to the enactment of section 4800.1.\textsuperscript{166} Nevertheless, the \textit{Delgado} court was highly critical of \textit{Buol}.\textsuperscript{167}

In criticizing \textit{Buol}, the \textit{Delgado} court stated that the California Supreme Court unnecessarily left open the question of whether all retroactive applications of section 4800.1 violate due process.\textsuperscript{168} The court then stated that the legal analysis in \textit{Buol} would not constitutionally permit retroactive application of section 4800.1 to cases where an agreement took place prior to the enactment of the statute.\textsuperscript{169}

\textbf{2. Enactment of the Urgency Statute}

In April of 1986, the legislature, reacting to \textit{Buol},\textsuperscript{170} enacted an urgency statute which repealed the retroactive application of sections 4800.1 and 4800.2 to proceedings commenced prior to January 1, 1984.\textsuperscript{171} The legislature further amended sections 4800.1 and 4800.2 and declared that the statutes were applicable to all proceedings commenced on or after January 1, 1984 regardless of when the

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\item \textsuperscript{164} \textit{Delgado}, 176 Cal. App. 3d at 668, 222 Cal. Rptr. at 120. The property was conveyed to the wife by her sister via a grant deed naming the couple as joint tenants. \textit{Id}.
\item \textsuperscript{165} \textit{Id}. The agreement that the property was the separate property of the wife was actually between the grantor and the husband. \textit{Id}.
\item \textsuperscript{166} \textit{Id}. at 669, 222 Cal. Rptr. at 121 (in addition, the trial court entered judgment prior to enactment of the section).
\item \textsuperscript{167} \textit{Id}.
\item \textsuperscript{168} \textit{Id}. at 670, 222 Cal. Rptr. at 121 ("the question is left open for speculation"). Justice King of the First Appellate District, author of the \textit{Delgado} opinion, also was the author of the vacated \textit{Buol} appellate court opinion. \textit{See In re Marriage of Buol}, 159 Cal. App. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985), \textit{vacated}, 39 Cal. 3d 751, 705 P.2d 754, 218 Cal. Rptr. 31 (1985).
\item \textsuperscript{169} \textit{Delgado}, 176 Cal. App. 3d at 670-71, 222 Cal. Rptr. at 121. \textit{Buol} stated that the oral agreement between the husband and wife established the wife's separate property interest from the time the wife purchased the home. \textit{In re Marriage of Buol}, 39 Cal. 3d 751, 757, 705 P.2d 354, 358, 218 Cal. Rptr. 31, 34 (1985). This statement may not necessarily mean that an oral agreement made prior to or subsequent to the acquisition of property will be treated the same as an oral agreement made at the time of the acquisition of property. The status of property is normally determined at the time of acquisition. \textit{Id}. Whether the same deference will be given to oral agreements regarding the status of the property as community or separate is unclear. \textit{See Adams and Sevitch}, supra note 52 at D.11.5.0.2 partially supports the interpretation of \textit{Buol} expressed by the \textit{Delgado} court, but also offers a much wider array of alternatives for limiting or extending \textit{Buol}).
\item \textsuperscript{170} \textit{See} 1986 Cal. Stat. ch. 49, sec. 2, at 91-92 (specifically cites \textit{Buol} in the text of the statute).
\item \textsuperscript{171} \textit{Id}., sec. 1, at 91.
\end{itemize}
\end{footnotesize}
parties acquired the property. The legislature also contended that the judicially imposed limits on retroactive application of sections 4800.1 and 4800.2 were unclear. Since the enactment of the emergency statute, the courts have decided only one case concerning sections 4800.1 and 4800.2.

3. In re Marriage of Griffis

In In re Marriage of Griffis, the couple established a joint checking account in both their names. Both husband and wife contributed separate property funds to the account. In Griffis the husband filed the petition for dissolution after the 1984 enactment of sections 4800.1 and 4800.2 but before the enactment of the 1986 urgency statute. The husband contended that the funds in the account were primarily his separate property.

The Griffis court affirmed the trial court's characterization of the account as community property. The appellate court did not, however, affirm the application of section 4800.2. The court applied the constitutional analysis employed in Buol and Fabian to determine whether the application of section 4800.2 to the account was unconstitutional.

The Griffis court first determined whether the wife had a vested right in the account. The couple opened the account during the

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173. 187 Cal. App. 3d 160, 231 Cal. Rptr. 510 (1986) (the case was filed after the enactment of section 4800.2, but prior to the urgency statute enacted in April 1986). The Griffis court refers to the issue as "one of first impression." Id. at 164, 231 Cal. Rptr. at 514.
175. Id.
176. Id. at 160, 231 Cal. Rptr. at 511. See 1983 Cal. Stat. ch. 342, secs. 1-2, at 1538 (enacting CAL. CIV. CODE §§ 4800.1 and 4800.2 (West Supp. 1988)).
178. Id. at 162, 231 Cal. Rptr. at 512-13 (the result would have been the same applying either pre-1984 statutory or case law). The trial court determined that the couple did not effect an agreement regarding the status of the account as community or separate. Id. Both section 4800.1 and the previous form of title presumption of section 5110 require proof of an agreement to rebut the community property presumption, and therefore, since no agreement was found (oral or written), no conflict existed between the new and prior law. See CAL. CIV. CODE § 4800.1 (West Supp. 1988) (written agreement required to rebut presumption).
179. Id. at 162-67, 231 Cal. Rptr. at 513-17.
180. Id. The Griffis court applied the Bouquet definition of a vested interest: property not subject to a condition precedent is vested. In re Marriage of Bouquet, 16 Cal. 3d 583, 591, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976).
period section 5110 and *Lucas* were in effect. The account was not subject to a condition precedent. Accordingly, the *Griffis* court determined that, from the time the couple opened the account, the wife held a vested community property interest in the account.

Next, the *Griffis* court determined whether the impairment of the vested right violated due process of law. To this end, the court applied the constitutional analysis pronounced in *Buol* and *Fabian*. *Griffis* primarily focused on the nexus between the need for retroactive application and the effectuation of the state interest. With only minimal analysis, the court found the nexus insufficient to justify impairment of a vested interest. The *Griffis* court stated that the California Supreme Court holdings in *Buol* and *Fabian* clearly resolved this issue.

Unlike prior decisions which focused on the constitutionality of retroactive application of sections 4800.1 and 4800.2, *Griffis* is completely devoid of any discussion of reliance on former law. The appellate court in *Griffis*, in reversing the trial court’s application of section 4800.2, stated that application of 4800.2 would impair the wife’s vested right in the account without due process of law. The language of the urgency statute enacted by the legislature did not influence the *Griffis* court.

183. Id. at 166, 231 Cal. Rptr. at 516.
184. Id.
185. Id. See also *Bouquet*, 16 Cal. 3d at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432 (factors in this type of due process analysis).
186. *Griffis*, 187 Cal. App. 3d at 166, 231 Cal. Rptr at 516. “If a property right vests before the enactment of a statute, such a right may not be altered except in those rare instances when it is necessary to promote a significantly important state interest.” Id.
187. Id.
188. *Fabian*, 41 Cal. 3d at 448-49, 715 P.2d at 258, 224 Cal. Rptr. at 338 (the legislative intent for enacting 4800.2 is without merit). See supra notes 210, 223 and accompanying text.
189. *Griffis*, 187 Cal. App. 3d at 166, 231 Cal. Rptr at 516 (*Buol* and *Fabian* attempt to determine the degree to which the parties relied on prior law).
190. Id. at 167, 231 Cal. Rptr. at 516 (the husband was denied reimbursement for his contributions).
191. Id. at 167, 231 Cal. Rptr. at 516. The *Griffis* court observed:
The emergency enactment itself notes that the *Buol* decision has caused confusion and frustrates the intent of the legislature. However, it does not appear that the confusion caused by the non-retroactive application of sections 4800.1 and 4800.2 in addition to the frustration of legislative intent provides a sufficient basis for impairing vested property rights.

*Id.*
4. Further Legislative Reaction

The legislature enacted another version of sections 4800.1 and 4800.2, effective January 1, 1987. The legislature's express intent for enacting the amendments was to remedy the inconsistency and confusion caused by statutory and case law. The statute expressly finds that the state has a significant interest in applying sections 4800.1 and 4800.2 retroactively. Whether the court will agree that retroactive application of the statutes will not violate due process remains to be seen.

II. Proposal for Future Analysis

The Buol and Fabian decisions clearly define the constitutional tests for determining whether the retroactive application of a statute violates due process of law. The courts weigh the state interest in retroactively enacting a statute against the interest of a party whose interest is impaired by the retroactive enactment. This balancing test necessarily requires that either the legislature or the California Supreme Court assign an appropriate weight to the state interest and the impaired right. The analysis should, therefore, commence with a discussion of the respective roles of the two branches of state government in determining those interests.

The California Constitution, unlike the federal Constitution which is a grant of power to Congress, is a restriction on the powers of the legislature. The legislature may therefore exercise any power which is not denied by the Constitution. Any doubt concerning the power of the legislature to act should be resolved in favor of the legislature.

Accordingly, the courts must have no doubt that ret-

192. 1986 Stat. ch. 539, sec. 1, at ___ (amending 1986 Cal. Stat. ch. 49, sec. 1, at ___) (the amendment is to the text of section 4800.1; however, the text expressly states that the amended provisions also apply to section 4800.2).


194. Id. See e.g., Collins v. Rile, 24 Cal. 2d 912, 914, 152 P.2d 169, 171 (1944) (states that the legislature is the exponent of the public will and acts of the legislature should be
reactive application of either section 4800.1 or 4800.2 violates due process before declaring these sections unconstitutional. However, the state interest in enacting section 4800.1 and section 4800.2 differs. Therefore, the future of each statute will be discussed separately.

A. Section 4800.1

The legislature contends that section 4800.1 is evidentiary in nature. Generally, the legislature may alter evidentiary rules affecting the burden of proof. The Buol court, however, rejected the claim that section 4800.1 merely affected the burden of proof. Rather, the statute imposed an impossible evidentiary burden on the party asserting a separate property right and, therefore, was a substantive measure.

The chronology of events in Buol can be distinguished from those addressed by the 1986 amendment to section 4800.1. When the Buols filed for dissolution, existing law did not require a party asserting a separate property interest to prove the existence of a written agreement concerning the character of the property. Since the wife in Buol had virtually no chance of obtaining a written agreement after the case was filed, the wife was confronted with an "impossible evidentiary burden." Because the provisions of the
1986 enactment may not necessarily impose an equivalent impossible evidentiary burden of proof, the statute may survive constitutional scrutiny.

Presumably, under section 4800.1, if a couple wished to comply with the retroactive writing requirement mandated in the 1986 amendment, they could simply memorialize their prior oral agreement.\textsuperscript{202} The statute does not state that the written agreement must be contemporaneous with the acquisition of the property.\textsuperscript{203} To the contrary, the legislature apparently encourages couples to confirm oral agreements in writing prior to dissolution.\textsuperscript{204} Under these circumstances, the post acquisition agreement would not create an “impossible evidentiary burden” previously denounced by the California Supreme Court.

If a spouse is unwilling to confirm a prior oral agreement in writing, however, the \textit{Buol} principle should remain intact. In such an instance, the “statute of frauds” provided in section 4800.1 bars the spouse from asserting the existence of a prior oral agreement.\textsuperscript{205} Under \textit{Buol}, an absolute bar to the assertion of a vested interest is the equivalent of an impossible evidentiary burden.\textsuperscript{206} The retroactive application of section 4800.1 impairs the vested interest which arose under the oral agreement.\textsuperscript{207} \textit{Buol} forbids such an impairment. Consequently courts must continue in these circumstances to determine the status of property in accordance with the methodology discussed in \textit{Lucas} despite the express language to the contrary in section 4800.1.


\textsuperscript{203} \textit{CAL. CIV. CODE} § 4800.1(a)(3) (West Supp. 1988).

\textsuperscript{204} \textit{Id. See 18 CAL. REV. COMM. REP. 383 (1986) (“it is appropriate to require that the parties reconfirm an oral agreement in writing . . .”).}

\textsuperscript{205} \textit{CAL. CIV. CODE} § 4800.1(b) (West Supp. 1988).

\textsuperscript{206} \textit{Buol}, 39 Cal. App. 3d at 758-60, 705 P.2d at 358-59, 218 Cal. Rptr. at 35-36. The California Supreme Court has already determined that the nexus between the effectuation of the state interest and the retroactive application of section 4800.1 is insufficient to justify impairment of vested property interests. \textit{Id.} at 761-62, 705 P.2d at 360-61, 218 Cal. Rptr. at 37-38. The court also stated that, in enacting the 1984 version of section 4800.1, the legislature failed to set forth the reasons underlying a statute of frauds requirement. The motivation of the legislature was inferred by the court. The court also stated that retroactive application of section 4800.1 in \textit{Buol} would not have advanced the inferred goal of providing for the equitable distribution of community property because the property was the separate of the wife. This argument is circular, however, because the determination that the property was separate property was, in fact, dependent on whether section 4800.1 was retroactively applied or not. \textit{Id.} at 754, 705 P.2d at 355, 218 Cal. Rptr. at 32.

\textsuperscript{207} \textit{Id. See id. at 759, 705 P.2d at 359, 218 Cal Rptr. at 35-36} (the court states that section 4800.1 affects the vested property right itself).
This result would not comport with the express intent of the legislature in enacting section 4800.1. The legislature, in enacting section 4800.1, primarily intended to eliminate the need to maintain two different bodies of family law. Yet, where retroactive application of section 4800.1 creates an impossible evidentiary burden for the separate property contributor, the need for the former characterization rules remain. Because the legislative intent is significantly frustrated, the state interest in retroactively enacting the statute is accordingly less apparent.

B. Section 4800.2

The conflict between the legislature and the judiciary over the retroactive application of section 4800.2 is straightforward. The legislature disapproves of the judicially created gift presumption. The legislature retroactively replaced the gift presumption with section 4800.2. According to the California Supreme Court, retroactive application impairs vested property rights without due process. The due process analysis of Fabian requires an examination of the state’s interest in enacting the statute. If the law sought to be remedied is not a manifestly unjust law, retroactive application of the law is not reasonably necessary for the effectuation of a sufficiently important state interest. The California Supreme Court determined that the rule in Lucas is not manifestly unjust. Thus all retroactive applications of section 4800.2 apparently fail to serve the requisite state interest. The court, however, should examine whether section 4800.2 legitimately accom-

208. See 18 CAL. L. REV. COMM. REP. 383 (1986). The legislature expressly stated that the intent underlying the enactment of section 4800.1 is to provide a uniform and consistent standard of proof for the characterization of property acquired during marriage. The writing requirement of section 4800.1 supposedly provides a reliable test which eradicates problems of memory and recall. The requirement also impedes a spouse from falsely claiming the existence of an oral agreement. Id.

209. Id.

210. See id. (the legislature stated that the injustice caused by the gift presumption of Lucas is a widespread and substantial cause of public concern).


212. See In re Marriage of Fabian 41 Cal.3d 440, 449, 715 P.2d 253, 258, 224 Cal. Rptr. 333, 338 (1986) (Lucas was not inherently inequitable or unfair).

213. See supra notes 151-158 and accompanying text.

214. See e.g., Fabian 41 Cal. 3d at 448-49, 715 P.2d at 258, 224 Cal. Rptr. at 338 (the court states that the legislature has an "unexplained desire" to overrule Lucas).

plishes the express goals the legislature.\textsuperscript{216} In amending section 4800.2, the legislature intends to protect the interests of the separate property contributor.\textsuperscript{217} However, the legislature also expounds support for the strong public policy favoring community ownership.\textsuperscript{218}

Prior to enactment of section 4800.2, a spouse could preserve the separate property nature of a contribution simply by effectuating an oral agreement to that end.\textsuperscript{219} The effectuation of an oral agreement regarding the status of the property is strong evidence that the parties were aware of and relied on existing law in arranging their affairs.\textsuperscript{220} With the enactment of section 4800.1, however, oral agreements have no effect in preserving a separate property right.\textsuperscript{221} Recognizing the unfairness of completely abrogating the oral agreement, the legislature enacted section 4800.2 to preserve some separate property rights.\textsuperscript{222} Thus, section 4800.2 is consistent with the premise that a party should not be penalized for reliance on the law.\textsuperscript{223}

Yet, section 4800.2 operates to reimburse a party who has no agreement regarding the character of the separate property contribution in the same manner as a party who has an oral agreement which is nullified by section 4800.1.\textsuperscript{224} In contrast to the reliance on prior law evidenced by an agreement consistent with the law, the absence of an agreement is evidence of either a lack of reliance or of the intent of a gift to the community.\textsuperscript{225} The state interest will not be served better by rescuing parties who had the opportunity, but, failed to protect their interests. Also, if the parties relied on prior law and intended that the separate property contribution was a gift to the community, section 4800.2 penalizes the community for relying on prior law. Since prior law created a presumption of a gift to the community, the community gained nothing by memorializing an oral agreement. In

\begin{footnotesize}
\textsuperscript{216} See supra notes 206-09 and accompanying text.
\textsuperscript{217} 18 CAL. L. REV. COMM. REP. 383 (1986) (the committee refers to the injustice to persons who contributed separate property for use by the community).
\textsuperscript{218} Id.
\textsuperscript{219} In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).
\textsuperscript{220} Buol, 39 Cal. 3d at 763, 705 P.2d at 362, 218 Cal. Rptr. at 39.
\textsuperscript{221} CAL. CIV. CODE § 4800.1(b) (West Supp. 1988).
\textsuperscript{222} See Shue & Velman, supra note 5, at 8 (the authors suggest that section 4800.2 was enacted to mitigate the impact of section 4800.1). The authors also describe the statute as creating a no interest loan to the community. Id.
\textsuperscript{223} See Buol, 39 Cal. 3d at 764, 705 P.2d at 362, 218 Cal. Rptr. at 39 (the court disapproves of retroactive application of section 4800.1 as a "penalty for prescience of changes in the law").
\textsuperscript{224} CAL. CIV. CODE § 4800.2 (West Supp. 1988).
\textsuperscript{225} In re Marriage of Fabian, 41 Cal. 3d at 450-51, 715 P.2d at 259-60, 224 Cal. Rptr. at 339-40.
\end{footnotesize}
fact, the community interest was equally served by evidence that the parties had no agreement whatsoever regarding the status of the contribution. In such instances, section 4800.2 negates the effect of a prior oral agreement by creating a right of reimbursement in the separate property contributor at the expense of the community. This application of section 4800.2 undermines the public policy favoring the community ownership.\textsuperscript{226}

Additionally, the reimbursement scheme provided in section 4800.2 does not completely abrogate the pro rata apportionment scheme as claimed by the legislature.\textsuperscript{227} A written agreement, executed prior to 1984, satisfies the later enacted writing requirement provided in section 4800.1, and therefore successfully rebuts the presumption that arises from the form of title.\textsuperscript{228} Prior to the enactment of sections 4800.1 and 4800.2, a party who rebutted the community property presumption was entitled to a pro-rata apportionment of the value of the residence.\textsuperscript{229} In contrast, section 4800.2 provides that the separate property contributor is entitled to reimbursement. In such an instance, section 4800.2 interferes with vested contractual rights and therefore runs afoul of due process.\textsuperscript{230}

Moreover, section 4800.2 expressly states that the section applies to the division of community property.\textsuperscript{231} Once a spouse establishes a separate interest in property acquired during marriage under section 4800.1, the property is not entirely community property.\textsuperscript{232} Hence, section 4800.2 should not apply. As a result, courts will be required to apply the pro rata apportionment method for dissolution provided in \textit{Lucas}.\textsuperscript{233}

\textbf{CONCLUSION}

Despite the explicit statement of Legislative intent provided by the 1986 amendments to sections 4800.1 and 4800.2, retroactive application

\begin{itemize}
\item \textsuperscript{226} 18 CAL. L. REV. COMM. REP. 383 (1986).
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} CAL. CIV. CODE § 4800.1 (West Supp. 1988) (the statute does not state that the agreement must have been contemporaneous with acquisition).
\item \textsuperscript{229} \textit{In re Marriage of Lucas}, 27 Cal. 3d at 816, 614 P.2d at 290, 166 Cal. Rptr. at 858.
\item \textsuperscript{231} CAL. CIV. CODE § 4800.2 (West Supp. 1988).
\item \textsuperscript{232} \textit{Id.} § 4800.1 (b) (referring to the property as separate property and not community property).
\item \textsuperscript{233} \textit{In re Marriage of Lucas}, 27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858.
\end{itemize}
of the sections fails to further the state interest in providing for the equitable dissolution of marriages. Impairing vested rights of parties who relied on former law in order to provide an allegedly more equitable result to parties who did not rely on prior law violates due process. Additionally, retroactive application of sections 4800.1 and 4800.2 will not eliminate the need to maintain two sets of law for cases in which the parties had prior oral or written agreements. The least confusing and the most equitable resolution of the retroactivity conflict is to prohibit the retroactive application of sections 4800.1 and 4800.2 to property interests which arose under the prior law.

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