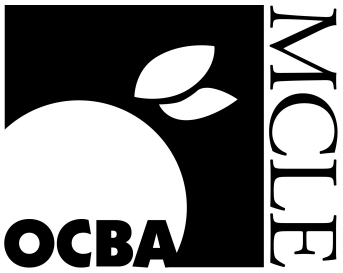
The Orange County Bar Association
Family Law Section Presents:

BRACE YOURSELVES:

THE IMPACT OF THIS NEW SUPREME COURT CASE ON FAMILY LAW TITLE PRESUMPTIONS, COMMUNITY PROPERTY, CREDITOR AND BANKRUPTCY ISSUES, AND THE NEW HOMESTEAD EXEMPTION

Wednesday, October 28 2020



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BRACE YOURSELVES

The Impact of This New Supreme Court Case on Family Law Title Presumptions, Community Property, Creditor and Bankruptcy Issues, and the new Homestead Exemption

. . . .

Table of Contents

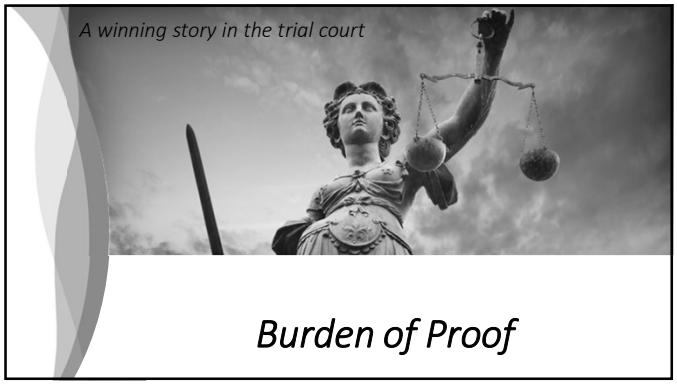
Don't Be Presumptuous About Family Law Presumptions

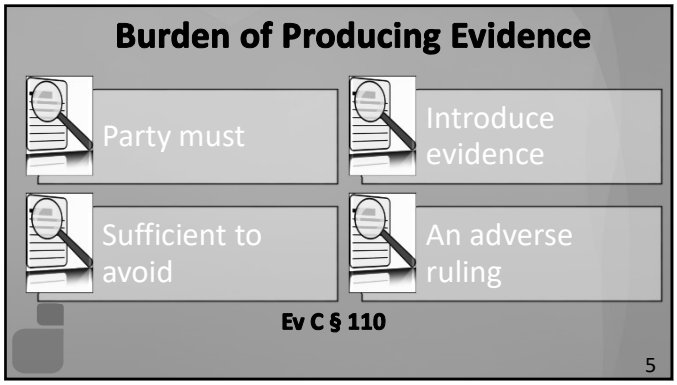
Presented by
Hon. Thomas Trent Lewis (Ret.)

Introduction

Introduction

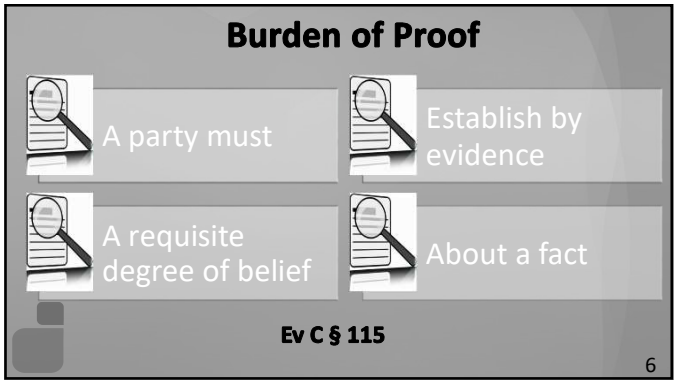
- How is burden of proof allocated?
- What are presumptions?
- What are some of the property presumptions we see most often?





First question: Who has the burden? Do you? Or your Opposing Counsel?

If you need to prove it to win it, then you have the burden of proof.



Burden of Proof by

- Preponderance
- Clear & Convincing
- Change of Circumstances
- Beyond a Reasonable Doubt

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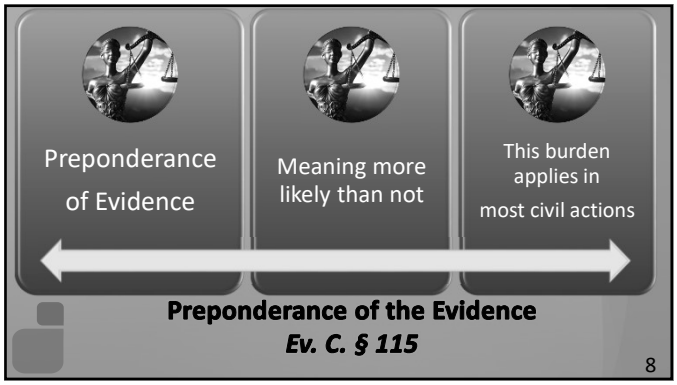

Preponderance of the Evidence
Ev. C. § 115

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Clear and Convincing Evidence Standard

- Calls for the unhesitating assent
- Of every reasonable mind

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Clear & Convincing Evidence

- To rebut parentage under
- **Fam C 7611(d)**
- The burden of proof is by CCE

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Beyond a Reasonable Doubt

- Family law contempt proceedings
- Are viewed as criminal proceedings
- ***County of Santa Clara v. Superior Court (Rodriguez)*** (1992) 2 Cal.App.4th 1686

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Burden of Proof

- Errors concerning burden of proof
- Often result in reversals
- For failure to apply the correct legal standard

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CCP 631.8 Motion for that moving party did not meet burden of proof.

By the numbers please

Analytical Framework

Analytical Framework

Determine the correct burden of proof

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Analytical Framework

Ascertain whether any presumptions apply

15

Analytical Framework

3

Assemble evidence to rebut the presumption

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You've got to carry that weight

Presumptions in General

Presumptions

- Discharges the burden
- Of producing evidence
- As to the presumed fact
- When another fact (the basic fact) has been established

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Three Types of Presumptions

Conclusive Presumptions

Rebuttable Presumptions Production

Rebuttable Presumptions Proof

Simons on Evidence §10:2

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Rebuttable Presumptions

Once the preliminary fact is proved

A finding of the conclusionary fact is required

Simons on Evidence §10:4, Ev C § 505

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Rebuttable Presumptions

Imposing upon the party against whom the presumption operates

The burden of proof as to the nonexistence of the presumed fact

Simons on Evidence §10:4, Ev C § 505

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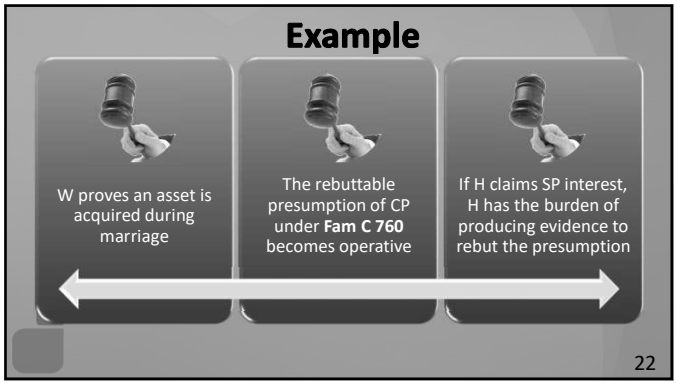
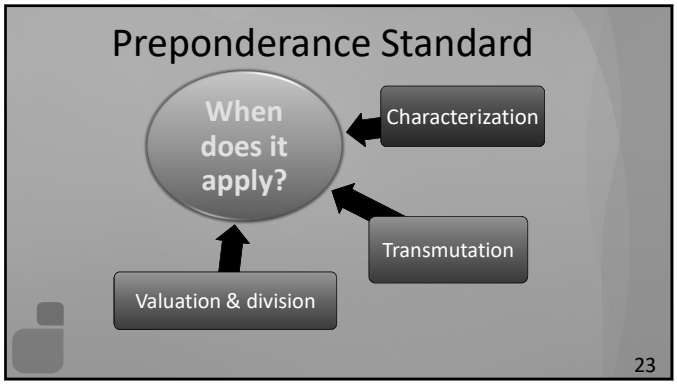
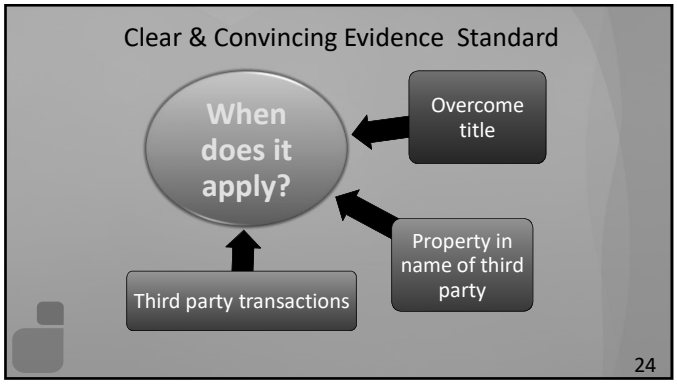
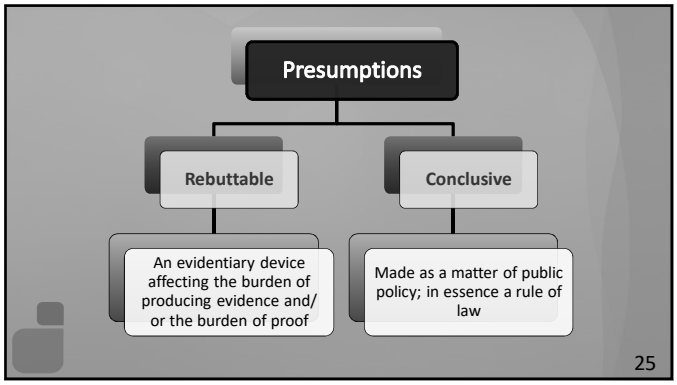
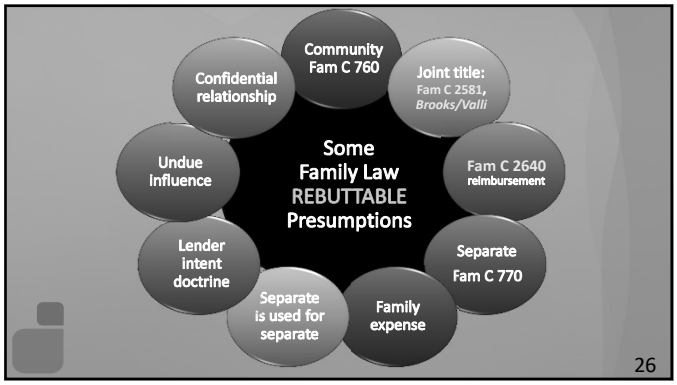




Evidence Code 662







Common Family Law Presumptions

Presumption	Type of presumption	Authority
Property acquired during marriage is CP	Rebuttable	Fam C 760, ***IRMO Ettefagh*** (2007) 150 Cal.App.4th 1578
Property acquired before marriage or after DOS is SP	Rebuttable	Fam C 770, Fam C 771
Marital presumption Of undue influence	Rebuttable	***IRMO Haines*** (1995) 33 Cal.App.4th 277, ***IRMO Delaney*** (2003) 111 Cal.App.4th 991
Title presumption	Conclusive	Ev C 662,
Parentage	Various	Fam C 7540 et seq.

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Common Family Law Presumptions (cont'd)

Presumption	Type	Authority
Estoppel by conduct	Conclusive	Ev C 623
Indicia of ownership	Rebuttable	Ev C 637, 638
Judgment when not conclusive correctly determines rights of parties	Rebuttable	Ev C 639
Writings correctly dated	Producing Evid.	Ev C 640
Letter correctly addressed	Producing Evid.	Ev C 641
Return of registered process server [Also not hearsay]	Producing Evid.	Ev C 647
Ceremonial marriage is valid	Burden of Proof	Ev C 663
Official duty regularly preformed	Burden of Proof	Ev C 664
Intend ordinary consequences of voluntary act other than in specific intent crimes	Burden of Proof	Ev C 665, 668

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How to Rebut a Presumption

Rebut a Presumption

Burden of proof

Party opposing it

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Rebuttable Presumptions

- Substantial & credible
- Admissible evidence
- Can rebut a presumption

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Timing is everything

Time of Acquisition Presumptions

Property Interest Timelines

Characterization determines division

Premarital	During marriage	After separation
SP presumption [Fam C 770]	CP presumption, unless traceable to SP source [Fam C 760, 2581, *IRMO Valli*]	SP presumption [Fam C 771]

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Property Interest Timelines (cont'd)

DOB → DOM

- **Premarital SP presumption [Fam C 770(a)(1)]**
- **Characterization determines division**

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Property Interest Timelines

DOM → DOS

- **During marriage, CP presumption unless traceable to SP source [Fam C 760, *IRMO Valli*]**
- **Characterization determines division**

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Property Interest Timelines

DOS →

- **Property acquired after DOS: SP presumption [Fam C 771]**
- **Characterization determines division**

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Acquisition of Equitable Right

Separate
- Premartial acquisition of equitable right, perfected after marriage

DOM

Community
- Marital acquisition of equitable right, perfected after separation

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The Three Step Process

Character	Value	Divide
Is it property?	Method of valuation	Award to party
SP or CP or mixed?	Determine value	Order for sale
		Reservation of jurisdiction

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Magic words? We don't need no magic words, or do we?

Transmutation

Transmutation

Must be in writing [**Fam C 852(a)**]

Applies to property acquisitions during marriage [***Marriage of Valli***]

Clear intent to change character [***Estate of MacDonald***]

No more pillow talk

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Transmutation

Transmutation principles apply to acquisitions during marriage [***Marriage of Valli***]

Marital gift exception for items not substantial in value under circumstances of the marriage [**Fam C 852(c)**]

No conditional transmutation of property [***Marriage of Holtemann, Marriage of Starkman***]

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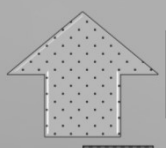
Transmutation



If spouse uses CP to purchase property, and puts property into name of W, only written transmutation doctrines apply [***Marriage of Valli***]

If spouse uses CP, and takes title in her name only, it is not exempted from transmutation statutes [***Marriage of Valli***]

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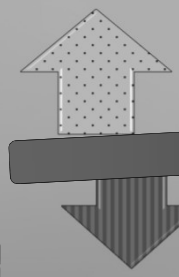
Transmutation



Consideration of transmutation statutes [***Marriage of Buie & Neighbors***, ***Marriage of Cross***, ***Marriage of Steinberger***]

Marriage of Valli

Inadequate consideration of transmutation statutes [***In re Summers***, ***Marriage of Brooks & Robinson***]

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Principle	*Steinberger*	*Cross*	*Summers*	*Brooks & Robinson*	*Buie & Neighbors*	*Valli*	*Lafkas*	*Bonvino*
Titled asset	NO	NO	YES	YES	YES	YES	YES	YES
Type of asset	Diamond	W's SP	House	House	Car	Ins.	Partner-ship	House
Use of CP/SP	CP	SP	CP	CP	SP	CP	SP	Mixed
Presumptively CP	YES	YES	YES	NO	YES	YES	NO	NO
Substantial value	YES	YES	YES	YES	YES	YES	YES	YES
Sufficient express written declaration	NO	N/A	N/A	NO	NO	NO	NO	NO

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Principle	*Steinberger*	*Cross*	*Summers*	*Brooks & Robinson*	*Buie & Neighbors*	*Valli*	*Lafkas*	*Bonvino*
True gift-delivery & donative intent	NO	NA	NA	NA	NO	NO	NO	NO
Fam C 852(c) exception applies	NO	NO	NA	NA	NO	NO	NO	NO
Fam C 2640 applies	NO	NO	NA	NO	YES	NO	NO	**NO**
Ev C 662 applies to TP transaction	NO	NO	YES	YES	NO	NO	NO	NO

Principle	*Haines*	*Delaney*	*Mathews*	*Brooks*	*Valli*	*Lafkas*	*Bonvino*
SP interest in property	YES	NO	NO	NO	NO	YES	**YES**
Fam C 2581 acquisition	NO	YES	YES	YES	YES	YES	**YES**
Third party affected	NO	NO	NO	YES	NO	NO	**NO**
Title presumption	NO	NO	NO	YES	NO	NO	**NO**

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Principle	*Haines*	*Delaney*	*Mathews*	*Brooks*	*Valli*	*Lafkas*	*Bonvino*
Manner of acquisition	Deed	Deed	Deed	Deed	Insur.	Partner-ship	Deed
Transmutation doctrine	NA	NA	NA	NA	YES	YES	
Must rebut undue influence presumption	YES	YES	NO	NA	NA	Not discussed	**YES**
Result	**Set aside**	**Set aside**	**NONE**	**NONE**	**CP**	**SP**	**Mixed**

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Deeds as Transmutation

Deeds as Transmutation

Quitclaim Deed

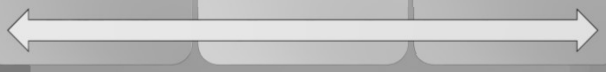
Marriage of Broderick*

Grant Deed

Estate of Bibb

Interspousal Grant Deed

Marriage of Kushesh



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Consequences of Transmutation

If the deed constitutes a transmutation

A presumption of undue influence arises

Fam C 2640 rights to reimbursement of traceable SP are generally preserved

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Presumption of Undue Influence

Presumption of Undue Influence

- A change in ownership
- Based on a deed
- Given during marriage

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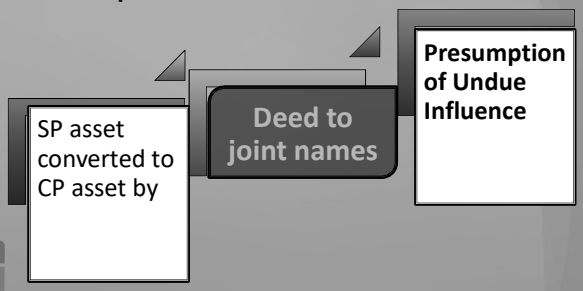
Presumption of Undue Influence



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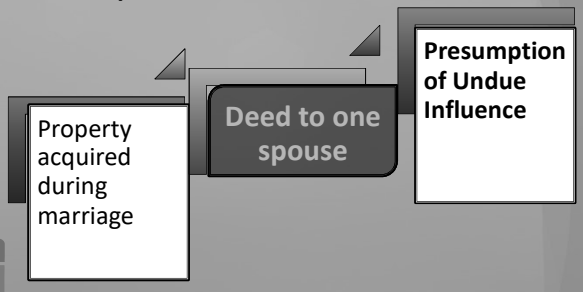
Presumption of Undue Influence



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Finally a clear answer

In re Brace

In Re Brace (2020) 9 Cal. 5th 903

- 9th Circuit Court of Appeal
- Certified question of which presumption
- Applies in bankruptcy

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In Re Brace (cont'd)

Title Presumption Ev C 662

Community Property Presumption Fam C 760

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In Re Brace (cont'd)

- CP Presumption applies in BK Court
- In adversarial proceedings
- Between H&W and trustee

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In Re Brace (cont'd)

- **Fam C 760** presumption
- The most fundamental principle
- Of CA community property law

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In Re Brace (cont'd)

- **Ev C 662** form of title presumption
- Codifies common law
- Rebuttable only by clear and convincing evidence

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In Re Brace (cont'd)

- **Ev C 662** is not a separate property exception
- TO **Fam C 760** general presumption of CP

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In Re Brace (cont'd)

- **Fam C 760** applies in actions
- Between the spouse to protect the innocent spouse
- From undue influence ***Marriage of Haines*** (1995) 33 Cal. App. 4th 277

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In Re Brace (cont'd)

- The CP system relies on the
- Time of Acquisition Rule

63

In Re Brace (cont'd)

- Common-law property states
- Determine ownership
- Based on title

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In Re Brace (cont'd)

- The **Fam C 760** community property presumption applies
- Strictly to the rights of parties to the marriage
- Not the rights of third parties or judgment creditors

65

In Re Brace (cont'd)

- The married woman's presumption
- Only applies to property acquired before 1975

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In Re Brace (cont'd)

- Disapproving ***Marriage of Lucas*** (1980) 27 Cal. 3d 808
- To the extent it can be read to extend the married woman's presumption

67

In Re Brace (cont'd)

- ***Marriage of Valli*** (2014) 58 Cal. 4th 1396
- **Fam C 760** can only be rebutted

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In Re Brace (cont'd)

- By evidence demonstrating another statute
- Makes the property something other than community property

69

In Re Brace (cont'd)

- Applying **Ev C 662**
- In actions between spouses
- Undermines the fundamental
- Tenants of the CP system

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In Re Brace (cont'd)

- Applying **Ev C 662** to spouses
- Would undermine the undue influence presumption
- ***Marriage of Haines***, supra

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In Re Brace (cont'd)

- **Fam C 2581** is a special presumption at divorce
- Specifically governing real property

72

In Re Brace (cont'd)

- Designated as joint tenancy is rebuttable only
- By a clear statement in the deed or other documentary evidence of title that the property is SP not CP

73

In Re Brace (cont'd)

- Proof that the parties have made
- A written agreement that the property is SP

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In Re Brace (cont'd)

- ***Marriage of Brooks & Robinson*** (2008) 169 Cal. App. 4th 176 involved a 3rd Party BFP
- Not simply the rights of H&W as between themselves
- So the Common Law Presumption of **Ev C 662** applied

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In Re Brace (cont'd)

- **Ev C 662** does not apply in actions between spoues
- Where the rights of a third party are unaffected

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In Re Brace (cont'd)

- **Fam C 850 et seq** statutory scheme for
- Transmutations is unaffected
- Because it has its own specialized
- Means for overcoming title presumptions

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Marriage of Brooks & Robinson (2009) 169 Cal. App. 4th 176

- W took title in her name alone
- She transferred the property
- To BFP without H's consent

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Marriage of Brooks & Robinson (cont'd)

- H joined BFP to the dissolution
- T/Ct held BFP was sole owner
- Applying **Ev C 662** to the W+BFP transaction

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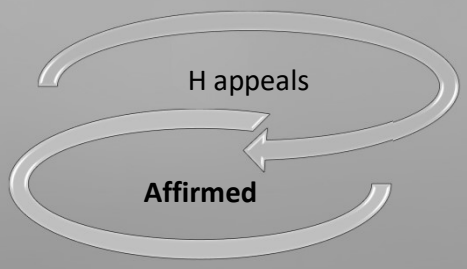
Marriage of Brooks & Robinson (cont'd)



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Marriage of Brooks & Robinson (cont'd)

- A deed to CP real property
- Given to a third-party purchaser
- Is presumed valid under **Ev C 662**

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Marriage of Brooks & Robinson (cont'd)

- **Fam C 1102(c)(2)**protects a third-party purchaser for value
- If the purchaser received the deed
- In good faith without knowledge of the marriage relation

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All the king's horses and all the king's men……

How Do We Harmonize These Presumptions

Harmonizing the Presumptions

- Time of Acquisition Presumption
- Rebutted by a valid transmutation
- Subject to presumption of undue influence
- **Fam C 2640** reimbursements preserved

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Basics of Tracing

Party claiming SP tracing

Shoulders the burden of proof

Marriage of Mix (1975) 14 Cal.3d 604

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Basics of Tracing

Direct Tracing Requirements

- Specific Records
- Establish SP funds available
- Intent to use SP funds

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Basics of Tracing

Availability of Funds + Intent to Use Funds = Tracing Burden

Marriage of Johnson (1983) 143 Cal.App.3d 57

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Basics of Tracing

- Substantial evidence is the key
- To support an adequate tracing
- ***Marriage of Higinbotham*** (1988) 203 Cal.App.3d 322

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Basics of Tracing

Practice Pointer

- Perfection is better than imperfection – don't forget the rules of perception

The David Swan Principle

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Marriage of Ficke (2013) 217 Cal.App.4th 10

Does ***Marriage of Ficke*** say no records are needed to trace?

Not necessarily – it depends, maybe

Appeals court agreed: Oral testimony enough when no evidence of commingling in source acct for mortgage pmts on H's SP rental property at marriage

T/Ct rejected W's claim that CP presumptively made mortgage reductions in H's rental property

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Tracing Methods

Recapitulation and *See*

The ***See*** court killed the marital period recapitulation approach

- Separatizer must demonstrate that CP funds were depleted at the time of the particular TVT was purchased (this means daily tracing of commingled accounts is required by ***See***

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Tracing Methods

Recapitulation & *See* Loophole

The loophole to ***See*** is missing records

- "Only when, through no fault of the husband, it is not possible to ascertain the balance of the income and expenditures at the time property was acquired, can recapitulation of the total community expenses and income throughout the marriage be used to establish the character of the property".

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See v See (1966) 64 Cal.2d 778

See tracing is primarily a bank and investment account analysis performed by accounting experts

Tracing expert utilizes a variety of documents to track SP and CP in various accounts simultaneously, usually for a number of years

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Planning the See Tracing Project

Presenting *See* Tracing Evidence

See tracing evidence usually comprises two key components

Tracing reports and supporting documents

Testimony

- Expert on the reports
- Sepratizer on his/her intent
- Others

95

Marriage of Ettefagh (2007) 150 Cal.App.4th 1578

- T/Ct is affirmed in accepting H's testimony concerning tracing
- By preponderance of evidence to overcome **Fam C 760** presumption
- T/Ct properly rejected application of clear and convincing evidence standard
- So that real property is confirmed as H's SP based on testimony alone

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Marriage of Ettefagh (cont'd)

- Documentary evidence was not required
- Virtually any credible evidence will suffice
- **Fam C 760** is a rebuttable presumption affecting the burden of proof

97

Marriage of Ettefagh (cont'd)

- The proper standard of proof
- Is the default standard of preponderance of evidence
- In civil proceedings [**Ev C 115**]

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Marriage of Ettefagh (cont'd)

- Imposition of a higher standard of proof
- Must be established by statute
- Or a higher societal interest

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Marriage of Ettefagh (cont'd)

- The determination of property rights between spouses
- As community or separate
- Are matters entirely of economic interests between the parties

100

Marriage of Ciprari (2019) 32 Cal.App.5th 83

H's accountant conducted a detailed tracing analysis

Applying commonly accepted assumptions

101

Marriage of Ciprari (cont'd)

- If some CP cash remained in the account
- but not enough to make the entire purchase he apportioned the purchase
- The acquisition was apportioned between CP & SP

A novel theory of apportionment ?

102

Marriage of Ciprari (cont'd)

- If a commingled asset was sold
- It was apportioned with the same ratio

103

Marriage of Ciprari (cont'd)

- Direct method or Indirect method
- Do not preclude a T/Ct from adopting another methodology
- *Hogoboom & King, Cal. Practice Guide: Family Law ¶8:526*

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Marriage of Ciprari (cont'd)

Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747

- T/Ct properly exercised its gatekeeper function
- By excluding the opinion of increasing valuation
- Because the company was innovative
- Rendering the opinion speculative

105

Who has the burden of proof for post separation use of funds

Allocating the burden of proof for post separation disposition of assets

Marriage of Margulis (2011) 198 Cal.App.4th 1252

- H managed finances post-separation
- W argued H should be required to account for use of funds
- T/Ct improperly imposed burden on W concerning post-separation use of funds
- H should be charged as managing spouse to prove proper disposition or lesser value of assets

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Marriage of Margulis (cont'd)

- As managing spouse
- H had wide ranging duties to disclose
- And account for disposition of assets

108

Marriage of Margulis (cont'd)

- H's duty includes obligation
- To reveal any material changes
- In the community estate, including transfer or loss of assets

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Marriage of Margulis (cont'd)

- The obligation is one of strict transparency
- Discourages unfair dealing
- Creates remedy for non-managing spouse

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Cutting them off at the pass

Motion in Limine

Motions In Limine

- Ascertain if any presumptions apply
- Allocate the burden of proof
- Ascertain the requisite burden of proof

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Motions In Limine

- Preclude impermissible evidence
- Limit unreliable expert opinions
- Preclude experts from testifying to case specific hearsay

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A winning story on appeal

Argument is not Evidence

Argument is Not Evidence

- Argument of counsel is not evidence
- The best attack of an expert is often
- Made through your expert's testimony
- Not by hoping the court will reject the other expert

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Marriage of Pasco

(2019) 42 Cal. App. 5th 585

- The unsworn statements of parties or counsel
- Are not evidence the court may consider
- ***People v. Superior Court (Crook)*** (1978) 83 Cal.App.3d 335

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Marriage of Pasco *cont'd*

T/Ct ruling based on arguments of counsel

And W's unsworn statements

Was an abuse of discretion

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A winning story on appeal

Make a Complete Offer of Proof

Protect the record by offer of proof

- No offer of proof = No record
- Who will say what & why it's relevant
- Miscarriage of justice standard applies

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A winning story on appeal

Remind T/Ct of prior stipulations and undisputed facts

Prior Stipulations

- Busy trial courts may inadvertently
- Miss or misconstrue
- Prior stipulations of facts
- You must diligently remind the court

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Prior Stipulations

- Make every effort to correct
- T/Ct errors regarding
- Stipulations of fact
- Or undisputed facts

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Marriage of Oliverez II (cont'd)

By stipulation, real property was CP **Fam C 2581** characterization applies

T/Ct ignored the stipulation

Resulting in a reversal

123

A winning story on appeal

Credibility findings can be dispositive

Sometimes it makes all the difference

- Credibility matters in the T/Ct and on appeal
- Especially with conflicting testimony

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If it helps you then make a record

- If the T/Ct makes credibility findings on the record
- Those findings can be the tipping point on appeal

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Establish an evidentiary record in support of novel theories

Novel Theories Presented at Trial Must be Supported by Admissible Evidence

- A compelling & novel new theory
- Needs an evidentiary foundation in support of the theory

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For supplemental materials:

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End

Thank You!

Brace Yourself – Community Property in Bankruptcy

1. Bankruptcy Estate Property includes Community Property

    a. The filing of a voluntary or involuntary bankruptcy petition creates an estate. 11 U.S.C. § 541(a).

    b. The estate comprises all legal and equitable interests of the debtor in property "as of the commencement of the case." *Id*.

    c. Property of the estate includes "[a]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case. 11 U.S.C. § 541(a)(2).

    d. Property rights including what constitutes community property is determined by state law. *Butner v. United States*, 440 U.S. 48 (1979).

2. Community and Separate Property Defined

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

    b. Which statutes provide otherwise (i.e. what is separate property)?

        i. Property acquired before marriage is separate property. Family Code § 770(a)(1)

        ii. Property acquired during marriage by gift, bequest, devise, or descent is separate property. Family Code § 770(a)(2)

        iii. Property earned or acquired after separation is separate property. Family Code § 771

3. Liability of Marital Property

    a. Community Property is liable for payment of Community Debts - "Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt. Family Code § 910(a).

i. "During marriage" for purposes of this section does not include the period after the date of separation, as defined in Section 70, and before a judgment of dissolution of marriage or legal separation of the parties. Family Code § 910(b).

b. Practice Pointer: Possible grounds for Separate Classification in Chapter 11

i. A creditor may enforce its claim against the debtor's separate property and all community property but may not enforce its claim against a non-debtor spouse's separate property.

ii. Separate classification requires a meaningful distinction between rights of creditors. *Steelcase Inc. v. Johnston (In re Johnston)*, 21 F.3d 323 (9th Cir. 1994) [separate classification permitted because non-debtor party also liable for unsecured claim]; *Wells Fargo Bank, N.A. v. Loop 76, LLC (In re Loop 76, LLC)*, 465 B.R. 525 (B.A.P. 9th Cir. 2012) [existence of guaranty against non-debtor permitted separate classification]; *In re S. Loop 2656 LLC*, 2013 Bankr. LEXIS 5554 (Bankr. C.D.Cal. 2013, Judge Wallace) [non-debtor source must be solvent]; *In re NNN Parkway*, 505 B.R. 277 (Bankr. C.D. Cal. 2014, Judge Albert) [rights against non-debtor must be meaningful].

iii. A creditor with rights against a non-debtor spouse's separate property (assuming such non-debtor has separate property) is in a different position than a creditor that only has a community claim against the debtor spouse.

iv. For example, one spouse suffers an adverse judgment based on a tort or breach of a contract signed only by such spouse. Debtor files bankruptcy to stay enforcement of the judgment pending appeal. The size of the judgment, however, many control the voting if all unsecured creditors are classified together. But, if some creditors have contract claims against both spouses (such as credit cards, leases, etc.), then such claims could arguably be separately classified. The result is that the judgment creditor cannot control the votes with respect to all unsecured creditors.

4. Tracing Rules and Burdens

a. Direct Tracing Method: One way to overcome the presumption that property acquired during marriage is community property is to trace it to a separate property source. *In re Marriage of Valli* (2014) 58 Cal. 4th 1396, 1400; *In re*

Marriage of Lucas (1980) 27 Cal.3d 808, 815; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 610, 612.

b. Family Living Expense Method: Assume family expenses are paid with community property, and what's left over may be separate. *In re Marriage of Frick*, 181 Cal. App. 3d 997, 1010-11 (1986).

c. Commingling. Where properties have been commingled the burden of proof to establish tracing should be higher, and the need for documentation correspondingly higher. *Frick*, 181 Cal. App 4th at 1011; See also See v. See, 64 Cal. 2d 778, 783 (1966).

d. Preponderance: A spouse's claim that property acquired during a marriage is separate property must be proven by a preponderance of the evidence. *In re Marriage of Valli* (2014) 58 Cal. 4th 1396, 1400; *In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1591 [59 Cal. Rptr. 3d 419]; *Estate of Murphy* (1976) 15 Cal.3d 907, 917.

e. Need for Records. "The burden of establishing a spouse's separate interest in presumptive community property is not simply that of presenting proof at the time of litigation but also one of keeping adequate records. The husband may protect his separate property by not commingling community and separate asset and income. Once he commingles, he assumes the burden of keeping records adequate to establish the balance of community income and expenditures at the time as asset is acquired with commingled property." *Frick* at 1011.

5. Joint Tenancy Property is Community Property

a. In 1932, the California Supreme Court held that joint tenancy property resulted in each spouse acquiring a one-half separate property interest. *Siberell v. Siberell* (1932) 214 Cal.767 ["a community estate and a joint tenancy cannot exist at the same time in the same property"].

b. Although there was language in *Siberell* that stated that "we are dealing strictly with the situation as between the parties to marriage and are not dealing with the characteristics of the property as against the claims of judgment creditors or other third persons," many California courts and federal courts applying California law extended Siberell's rule to disputes involving third-party creditors.

c. In fact, the 9th Circuit held that a joint tenancy created equal separate property interests. *Hanf v. Summers (In re Summers)*, 332 F.3d 1240, 1245 (9th Cir. 2003) ["Applying California law, we conclude that a third party conveyed joint tenancy

interests to Eugene and Ann Marie Summers [debtors], a transaction to which the transmutation statute does not apply. *See, In re Cross*, 94 Cal. App. 4th at 1147. The third-party deed specifying the joint tenancy character of the property rebutted the community property presumption, and rendered California's transmutation statute inapplicable"]. *See also, In re Reed*, 940 F.2d 1317 (9th Cir. 1991) [same].

d. In 2014, the California Supreme Court decided *In re Marriage of Valli*, 58 Cal. 4th 1396, 171 Cal. Rptr. 3d 454, 324 P.3d 274 (2014). In *Valli*, the Supreme Court heavily criticized the 9th Circuit's decision in Summers that the form of title of property upon acquisition was not subject to transmutation statutes. In Valli, the well-known singer, Frankie Valli, and his wife Randy Valli acquired a life insurance policy that had significant cash value. The couple specified that the owner of the policy would be only Mrs. Valli. Upon divorce, the trial court determined the property was community property because it was acquired during marriage. On appeal, the Court of appeal reversed holding that Evidence Code § 662 controlled. Section 662 states that "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." *In re Marriage of Valli*, 195 Cal. App. 4th 776, 124 Cal. Rptr. 3d 726 (2011). The Supreme Court reversed.

e. After *Valli*, several bankruptcy courts held that Summers was no longer binding law and concluded that joint tenancy property was the community property of one spouse's bankruptcy estate. One such case was Judge Scott Yun's decision in *In re Brace*.

    i. *See also, In re Obedian*, 546 B.R. 409 (Bankr. C.D. Cal. 2016) [Judge Kwan]; *Herrera v. Pons*, 2017 Bankr. LEXIS 4060 (Bankr. S.D.Cal. 2017, Judge Mann) aff'd 2018 U.S. Dist. LEXIS 83556 (Bankr. S.D.Cal. 2018, Judge Curiel); *Collins v. Wolf*, 591 B.R. 752 (S.D. Cal. 2018, Judge Sammartino).

f. After Brace appealed, the BAP affirmed in a published decision. *Brace v. Speier (In re Brace)*, 566 B.R. 13 (B.A.P. 9th Cir. 2017). On further appeal, the Ninth Circuit certified the question to the California Supreme Court. *Brace v. Speier (In re Brace)*, 908 F.3d 531 (9th Cir. 2018).

g. In *Brace*, the Supreme Court held that when a married couple acquires property during marriage in joint tenancy that the character of such property is still joint tenancy. After reviewing nearly a century of cases and statutes that typically reached an opposite conclusion, the Court announced the very clear rule that all property acquired during marriage is community unless there is a valid transmutation.

i. "We answer the Ninth Circuit's question as follows: HN27 Evidence Code section 662 does not apply to property acquired during marriage when it conflicts with Family Code section 760. For joint tenancy property acquired during marriage before 1975, each spouse's interest is presumptively separate in character. (Fam. Code, § 803; *Siberell, supra*, 214 Cal. at p. 773.) For joint tenancy property acquired with community funds on or after January 1, 1975, the property [**60] is presumptively community in character. (Fam. Code, § 760.)

If such property was acquired before 1985, the parties can show a transmutation from community property to separate property by oral or written agreement or a common understanding. (Fam. Code, § 852, subd. (e); *Estate of Blair, supra*, 199 Cal.App.3d at p. 167.) HN28 Although a joint tenancy deed is insufficient to effect a transmutation, a court may consider the form of title in determining whether the parties had a common agreement or understanding under the pre-1985 rules. (*See MacDonald, supra*, 51 Cal. 3d at p. 270 & fn. 6.) For joint tenancy property acquired with community funds on or after January 1, 1985, a valid transmutation from community property to separate property requires a written declaration that expressly states that the character or ownership of the property is being changed. (Fam. Code, § 852, subd. (a); *MacDonald*, at p. 272). A joint tenancy deed, by itself, does not suffice." *In re Brace*, 9 Cal. 5th 903, 938 (2020).

6. Right of Survivorship

a. The liability of community property for payment of community claims terminates upon division. *Litke O'Farrell, LLC v. Tipton*, 204 Cal. App. 4th 1178, 139 Cal. Rptr. 3d 548 (2012). In *Litke*, the court held that a creditor with a judgment against one spouse could no longer enforce its claim against property received by the non-debtor spouse pursuant to a marital settlement agreement. In other words, the non-debtor spouse received property that would have otherwise been subject to payment of a judgment.

i. *See also, Matter of Paderewski*, 564 F.2d 1353 (9th Cir. 1977). If property has been divided prior to bankruptcy, the estate is bound by the terms of that order subject to fraudulent transfer claims.

ii. Practice Pointer: If you're representing a creditor, you need to intervene in the dissolution proceeding or enforce your claim prior to any division of community property.

b. What if debtor spouse dies before creditor enforces judgment?

i. *Dang v. Smith*, 190 Cal. App. 4th 646, 118 Cal. Rptr. 3d 490 (2010). Judgment creditor recorded an abstract against their judgment debtor who owned a joint tenancy interest in real property. Before the judgment was enforced, the judgment debtor died. Because the right of survivorship arises at the time the deed reflecting the joint tenancy is recorded which pre-dated the judgment lien, the lien only attached to what the judgment debtor held.

ii. *Practice Pointer*: The Dang case was a malpractice action against counsel for the judgment creditor for not executing on the judgment more expeditiously.

c. Right of survivorship in Bankruptcy? Does the debtor's death cause joint tenancy property to evaporate out of the estate?

i. Bankruptcy Estate loses

1. *Cohen v. Chernushin (In re Chernushin)*, 911 F.3d 1265 (10th Cir. 2018). In Cohen, the 10th Circuit held that the debtor's death resulted in the property leaving the estate.

a. "It appears every court that has considered a case involving a joint tenancy where either a debtor joint tenant or non-debtor joint tenant died has assumed, without explanation, that the joint tenancy operates exactly as it would in the absence of the bankruptcy. *See, e.g., In re Peet*, No. 11-62549, 2014 Bankr. LEXIS 5413, 2014 WL 11321405, at *3 (Bankr. W.D. Mo. Aug. 25, 2014) (finding a lack of severance of joint tenancy and thus, after the death of the non-debtor joint tenants, "the [bankruptcy] estate now holds the entire interest" in the property), aff'd sub nom. *Peet v. Checkett (In re Peet)*, 529 B.R. 718 (B.A.P. 8th Cir. 2015), aff'd, 819 F.3d 1067 (8th Cir. 2016); *In re Benner*, 253 B.R. 719, 723 (Bankr. W.D. Va. 2000) (finding a lack of severance of joint tenancy so, at the non-debtor joint tenant's death, "the trustee had no one else to share the property with and, therefore, he takes it all"); *Durnal v. Borg-Warner Acceptance Corp. (In re DeMarco)*, 114 B.R. 121, 126-27 (Bankr. N.D.W.Va. 1990) (finding a lack of severance of joint tenancy so, at the death of the debtor joint tenant, "there remains no interest or

property right in the deceased" and the property was no longer in the bankruptcy estate). At least two other courts have mentioned in dicta the same conclusion with respect to the effect of a joint tenancy or life estate death on a bankruptcy estate. *See Daff v. Wallace (In re Cass)*, No-12-1513-Kipata, 2013 Bankr. LEXIS 4653, 2013 WL 1459272, at *3 (B.A.P. 9th Cir. Apr. 11, 2013) (quoting, without comment, from a bankruptcy court order that "[u]pon the Debtor's death, the life estate terminated and no longer constituted property of bankruptcy estate which could be administered by the Trustee for the benefit of creditors"); *Feldman v. Panholzer (In re Panholzer)*, 36 B.R. 647, 651-52 (Bankr. D. Md. 1984) (after determining that filing for bankruptcy severed joint tenancy, opining that under joint tenancy, the bankruptcy estate would either be "depleted by the death of the debtor who is a joint tenant" or "enriched by the death of a joint tenant survived by the debtor"). *Cohen v. Chernushin (In re Chernushin)*, 911 F.3d 1265, 1271 n.2 (10th Cir. 2018).

2. Practice Pointer re Severing Joint Tenancy: Attorneys representing Chapter 7 trustees should confirm in writing that they have advised their clients of this risk and the right to sever the joint tenancy to avoid this risk.

3. Does the Brace holding that joint tenancy property is community property and thus property of the estate change this outcome?

    a. Probably not – The last sentence of the Brace decision states: "Nor does our decision alter the operation of the right of survivorship that is the main incident of joint tenancy title." *In re Brace*, 9 Cal. 5th 903, 939 (2020).

7. Transmuting Character of Property

    a. Family Code § 850 - Married persons may agree or transfer

        i. Transmute community property to separate property

        ii. Transmute separate property to community property

iii. Transmute separate property of one spouse to separate property of the other spouse

b. Requirements for transmutations of real or personal property

i. Only valid if "made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." Family Code § 852(a)

1. Applies to all property acquired during marriage and not just transfers between spouses. Valli criticizing Summers as the first case to exempt transmutation requirements to form of title when spouses acquire property from third parties.

ii. A transmutation of real property is not effective as to third parties without notice unless recorded. Family Code § 852(b)

1. Query: Whether a trustee's strong-arm powers as a hypothetical BFP under Section 544(a)(3) would defeat an unrecorded transmutation of community real property to separate property?

c. Form of Title Does Not Control

i. Title being in the name of only one spouse does not control. In *Valli*, the wife argued that because the parties arranged for the life insurance policy to be just in her name, it was her separate property.

d. No formalities for Transmutations.

i. But, must evidence intent to part with rights. *Estate of Bibb*, 87 Cal. App. 4th 461, 104 Cal. Rptr. 2d 415 (2001) [transmutation occurred when husband signed deed transferring title to separate real property to himself and his wife as joint tenants].

e. Transmutations subject to avoidance as Fraudulent Transfers

i. "A transmutation is subject to the laws governing fraudulent transfers." Family Code § 851

ii. *Stadtmueller v. Sarkisian (In re Medina)*, __ B.R. __, 2020 Bankr. LEXIS 2181 (9th Cir. BAP Aug. 14, 2020). In *Medina*, The Chapter 7 trustee obtained a money judgment against a third party who was married. During the litigation, the married couples entered into a transmutation agreement that provided that each spouse received half of the assets as their separate

property. When the trustee discovered the agreement, he brought a fraudulent conveyance case seeking to avoid the transmutation agreement as having been made with actual intent to hinder, delay, or defraud. The bankruptcy court granted summary judgment to the creditors who argued that the trustee needed to prove damages which had not been alleged. The BAP reversed. The BAP held that California's UVTA does not require proof of actual damage in order to avoid a fraudulent transfer made with actual intent to hinder, delay, or defraud.

iii. Query: If each spouse receives an equal amount of community property as their separate property, isn't that reasonably equivalent value? Not necessarily. As was the case in Medina, a creditor can enforce a judgment against the judgment debtor's separate property and all community property but not the non-debtor spouse's separate property. As such, if there is $1 million of community property and a $1 million judgment, then the judgment creditor could be paid in full. However, if the community property is equally divided, now the judgment creditor would only have $500k available to satisfy its judgment.

f. Division of Community Property as Fraudulent Transfer

i. *Mejia v. Reed*, 31 Cal. 4th 657, 74 P.3d 166, 3 Cal.Rptr.3d 390 (2003). Marital settlement agreements subject to avoidance as "actual fraud" or "constructive fraud." Specifically, California law does not "grant married couples a one-time-only opportunity to defraud creditors by including the fraudulent transfer in an MSA." *Id* at 668.

ii. *In re Beverly*, 374 B.R. 221 (9th Cir. BAP 2007), aff'd, 551 F.3d 1092 (9th Cir. 2008) Pursuant to an MSA, debtor's spouse received $1 million in liquid community assets and debtor received the entire exempt interest in his pension plan worth $1.1 million. The court avoided the division of property finding actual intent to defraud creditors by retaining the exempt assets with the intention of filing bankruptcy.

iii. Court judgment dividing property likely not subject to avoidance as fraudulent transfer. *Batlan v. Bledsoe (In re Bledsoe)*, 569 F.3d 1106 (9th Cir. 2009) [Ninth Circuit held that "under Oregon law, a party who challenges a dissolution judgment must allege and prove 'extrinsic fraud.' Following the lead of the Fifth Circuit in *Ingalls v. Erlewine (In re Erlewine)*, 349 F.3d 205 (5th Cir. 2003), we also hold that a dissolution judgment that follows from a regularly conducted, contested divorce proceeding conclusively establishes 'reasonably equivalent value' under 11

U.S.C. § 548(a)(1)(B) in the absence of fraud, collusion, or violation of state law." *Id* at 1108.

g. Pre-nuptial Agreements

i. *Sturm v. Moyer*, 32 Cal.App.5th 299, 243 Cal.Rptr.3d 556 (2019). Debtor entered a premarital agreement which provided that each party's earnings and income, and any property acquired during the marriage by each spouse, would be that spouse's separate property, acknowledging that these earnings, income, and property otherwise would be community property. Court held that such pre-marital agreements are enforceable but subject to fraudulent transfer statutes.

8. Community Property Interest in Separate Property

a. *In re Marriage of Moore*, 28 Cal.3d 366, 168 Cal.Rptr. 662 (1980) and *In re Marriage of Marsden*, 130 Cal.App.3d 426, 181 Cal.Rptr. 910 (1982). When community property is used with regard to one spouse's separate property, the community acquires an interest. This rule is known as the "Moore/Marsden" and results in an apportionment of appreciation in the separate property's value due to the funds expended by the community.

9. Right of Reimbursement when Separate Property is used for Community Property

a. Family Code § 2640 – "(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division."

b. The right of reimbursement does not create a property right. *Dumas v. Mantle (in Re Mantle)*, 153 F.3d 1082 (9th Cir. 1998). If anything, it's only a creditor claim.

10. What claims are paid from community property in bankruptcy?

a. Section 726(c) requires that community property be segregated into sub-estates to pay community claims.

b. Section 101(7) defines a community claim as one for which community property is liable. In other words, the liability of community property to pay claims is defined by state law.

c. What happens if there is a surplus of community property after all community claims are paid?

i. *In re McCoy*, 111 B.R. 276 (9th Cir. BAP 1990). Non-debtor spouse's interest in proceeds from the sale of the community property residence not liable for the debts incurred by the debtor spouse after separation. *See also, In re Merlino*, 62 B.R. 836 (Bankr. W.D. Wa. 1986).

ii. In the event of a surplus of community property while a dissolution is pending relief from stay should be granted for the excess community property to be divided. Whatever property is awarded to the non-debtor spouse will leave the estate to avoid a windfall to debtor and his separate property creditors. Whatever property is awarded to debtor will remain in the estate for payment of post-separation debts.

iii. Note: The Interest of Justice - Section 726(c)(1) provides that the court should apportion payment of administrative claims between separate property and community property "as the interest of justice requires." *Naylor v. Farrell (In re Farrell)*, 610 B.R. 317 (Bankr. C.D.Cal. 2019, Judge Wallace).

11. Domestic Support Obligations are post-separation separate debts that cannot be paid from community property

a. The issue whether a claim is in fact a super-priority DSO is determined by the bankruptcy court without regard to the labels affixed to such claim by the state court or any marital settlement agreement. Factors for determining whether a claim is in the nature of support include: (1) the parties' intent at the time the agreement was made; (2) actual need; (3) income imbalance between the parties at the time of the divorce decree; (4) when the obligations terminate; (5) to whom and when payments are made; and (6) the labels given to the payments by the parties.

b. Courts apply federal law in determining whether an obligation is "in the nature of alimony, maintenance, or support." *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996) (overruled on other grounds by *In re Bammer*, 131 F.3d 788 (9th Cir. 1997)); *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984). The intent of the parties at the time the agreement was executed is dispositive. *Id*. (citing *See In re Sampson*, 997 F.2d 717, 723 (10th Cir.1993) ("the critical inquiry is the shared

intent of the parties at the time the obligation arose") and *In re Combs*, 101 B.R. 609, 615 (9th Cir. BAP 1989) ("the court must ascertain the intention of the parties at the time they entered in their stipulation agreement")); *Shaver*, 736 F.2d at 1316 ("In determining whether an obligation is intended for support of a former spouse, the court must look beyond the language of the decree to the intent of the parties and to the substance of the obligation.").

Homestead Issues[1]

I. Basics Features of Exemptions.

A. The Bankruptcy Code provides that a debtor may choose to exempt property under either the exemptions provided in the Bankruptcy Code, §522(d), or the exemptions provided by the debtor's particular state. Section 522(b)(1). See also FRBP 4003(a).

B. The code also permits individual states to "opt out" of the federal exemptions and require use of exemptions provided under that state's law. Section 522(b)(2). Most states have opted out including California. CCP 703.130.

C. In California, a debtor may choose (cannot mix and match) between two lists both identified in the California Code of Civil Procedure.

1. The first list is called the "federal" list because it generally follows §522(d) although with many differences. CCP 703.140(b). The second list is called the "state" list. CCP 704 *et seq*. It is much longer and more expansive than the federal list, *specifically with regards to a homestead exemption.*
2. In addition to §522(b) exemptions, debtors in California may only claim exemptions provided by California law. *In re Applebaum*, 422 B.R. 684 (9th Cir. BAP 2009).

D. The amount of exemption is determined as of petition date.

1. When the homeowner files bankruptcy, her right to claim an exemption is fixed as of the petition date; this is often referred to as the "snapshot rule." *Wolfe v. Jacobson (In re Jacobson),* 676 F.3d 1193, 1199 (9th Cir. 2012) (citing *White v. Stump,* 266 U.S. 310, 313 (1924)).
2. However, appreciation in the value of property of the estate during the administration of the estate belongs to the estate. Section 541(a)(6). *In re Vu,* 245 B.R. 644 (9th Cir. BAP 2000).
3. If a debtor's residence has no equity above the homestead exemption when the case is filed but increases in value thereafter, the increase in value belongs to the estate and the trustee may sell the home notwithstanding the fact that the residence was claimed fully exempt on the petition date. *Schwab v. Reilly*, 130 S. Ct. 2652 (2010); *In re Chappell*, 373 B.R. 73 (9th Cir. BAP 2007).

E. Recent California Exemption for deposit accounts subject to needs -

1. "Money in a judgment debtor's deposit account that is not otherwise exempt under this chapter is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." CCP 704.225 - effective 1-1-2020

F. State exemptions vary between states – several provide an *unlimited* homestead exemption and about half provide a homestead exemption of $25,000 or less. This has led to people moving from one state to another for the sole purpose of obtaining the more favorable exemption scheme of the new state.

1. The 2005 amendments addressed this perceived abuse by providing that the debtor must claim the exemption of the state in which he lived the two years prior to filing the petition. If the debtor did not live in one state for two consecutive years prior to filing, he must use the exemptions of the state in which he lived the 180 days (or the majority of the 180 days) *before* the two years before the bankruptcy filing. Section 522(b)(3)(A).

[1] Materials prepared by Roksana D. Moradi-Brovia of Resnik Hayes Moradi LLP

G. *Objections to Claimed Exemptions*
   1. Must be filed within 30 days of conclusion of meeting of creditors
      i. However, see *Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli),* 542 B.R. 245 (9th Cir. BAP Dec 2015) - trustee's objection to the debtor's homestead exemption was not late because the debtor fraudulently asserted the claim of exemption pursuant to FRBP 4003.
   2. Debtors can amend at any time
   3. Burden of Proof: 4003(c) versus CCP § 703.580(b)?
      i. If an exemption is claimed under state law, then the recent BAP and California bankruptcy courts have held that the burden of proof is determined by reference to state law. *Diaz v. Kosmala (In re Diaz),* 547 B.R. 329 (B.A.P. 9th Cir. 2016), In *re Pashenee*, 531 B.R. 834, 836-837 (Bankr. E.D. Cal. 2015, J. Jaime); *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal. 2015, J. Klein). Under Cal. Civ. Code § 703.580(b), the burden of proof rests upon the claimant, not the objector ["[a]t a hearing under this section, the exemption claimant has the burden of proof"].
      ii. But, there is a countervailing position that FRBP 4003 should control and that the burden should remain on the objecting party. See, *Exemption Disputes in Opt-Out States: Does State Law Allocate the Burden of Proof?* 35 Cal.Bankr.J. 59 (2019), Kathleen Shaffer, former judicial extern for Judge Mann.
   4. Order determining exemption is a final order subject to appeal. *Preblich v. Battley*, 181 F.3d 1048 (9th Cir. 1999).

H. *Voluntary transfers result in loss of exemptions upon avoidance*
   1. If a debtor makes a voluntary transfer that is later avoided by a bankruptcy trustee, the debtor loses his or her exemption in the recovered asset(s). 11 U.S.C. § 522(g). *Hitt v. Glass (In re Glass)*, 164 B.R. 759, 763 (9th Cir. BAP 1994), aff'd, 60 F.3d 565 (9th Cir. 1995):
   2. Pursuant to §522(g)(1), Debtor cannot claim the homestead exemption in property that he concealed on the petition date and that was recovered for the estate by the trustee. *Elliott v. Weil (In re Elliott),* 544 B.R. 421 (9th Cir. BAP January 2016) debtor
   3. However, Bankruptcy courts may not "surcharge" a debtor's exempt property as a remedy for fraudulent conduct. *Law v. Siegel*, 134 S.Ct. 1188 (2014).
   4. But, a claim of exemption may be denied pursuant to Section 522(g) or state law. *Id*.

I. *Carve-outs vs. Subordination Agreements*
   1. A carve-out agreement is not specifically recognized by the Code but the nothing prohibits the trustee from entering such a contract subject to Court approval. *In re KVN Corp*., 514 B.R. 1 (B.A.P. 9th Cir. 2014).
   2. A debtor may be able to exempt a trustee's recovery from a carve-out. *In re Wilson*, 494 B.R. 502 (Bankr. C.D. Cal. 2013).
   3. But, a Trustee's recovery under a subordination agreement may not be subject to a carve-out. *Roach v. Marshack (In re Roach)*, 2019 Bankr. LEXIS 263 (B.A.P. 9th Cir. Jan. 29, 2019).
      i. In *Roach*, the Trustee entered into a subordination agreement with a secured creditor. Under the agreement, the creditor subordinated half of its secured claim. Under Section 510(c)(2), a lien securing a subordinated claim is transferred to the

estate. Under Section 522(g), a debtor may not claim an exemption in property recovered by a trustee under Section 510(c)(2).

II. Homestead Exemptions under the "State List"

A. Homestead is limited to "dwellings"

1. A dwelling is defined in CCP § 704.710(a) as:

A place where a person resides and may include but is not limited to the following:
A house together with the outbuildings and the land upon which they are situated.
A mobilehome together with the outbuildings and the land upon which they are situated.
A boat or other waterborne vessel.
A condominium, as defined in Section 783 of the Civil Code.
A planned development, as defined in Section 11003 of the Business and Professions Code.
A stock cooperative, as defined in Section 11003.2 of the Business and Professions Code.
A community apartment project, as defined in Section 11004 of the Business and Professions Code.

2. Determined by physical residency or intention to occupy as permanent domicile.
   i. *Klein v. Anderson (In re Anderson),* 613 B.R. 279 (9th Cir. BAP March 2020)
      a. Case concerns Washington homestead exemption but has a nice analysis of all 9th Circuit homestead law.
   ii. The requirement that debtor reside in the property does not mean that he must physically occupy the property on the petition date. *Diaz v. Kosmala (In re Diaz),* 547 B.R. 329 (9th Cir. BAP March 2016)
   iii. Debtor need not actually own the home in order to qualify for the automatic homestead exemption. However, debtor must establish an intent to reside in the home in order to qualify for the automatic homestead exemption. *Phillips v. Gilman (In re Gilman),* 887 F.3d 956, (9th Cir. April, 2018)
3. Dwelling does not need to be located in California. *In re Arrol*, 170 F.3d 934 (9th Cir. 1999).

B. Declared – CCP § 704.910

1. The declared homestead is expressly limited to an interest in real property (whether present or future, vested or contingent, legal or equitable) that is a dwelling as defined in Section 704.710, but does not include a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust. Cal. Civ. Proc. Code § 704.910(c).
2. Applies to voluntary sales.
3. Declared homestead rights benefit debtors only in the context of a voluntary sale and do not provide debtors with a residential exemption in a sale by a bankruptcy trustee. *Kelley v. Locke (In re Kelley)*, 300 B.R. 11, 21 (B.A.P. 9th Cir. 2003).

C. Automatic – CCP § 704.710

1. Limited to involuntary sales

D. Proceeds remain exempt for six months
   i. If the debtor has not reinvested the proceeds in a new home within that six months, the proceeds are no longer exempt. *In re Golden,* 789 F.2d 698 (9th Cir. 1986).
      a. In *Golden,* the debtor sold homestead property prepetition and declared the proceeds exempt under California law, but failed to reinvest the proceeds within six months. The court noted that the policy behind requiring

reinvestment is to "prevent the debtor from squandering the proceeds for nonexempt purposes."

ii. *In re Jacobson*, 676 F.3d 1193 (9th Cir. 2012).
   a. Debtors' homestead rights arising from an automatic homestead on the petition date are contingent on a "reinvestment" of the proceeds of the sale "in a new homestead within six months of receipt".
   b. In *Jacobson,* the Ninth Circuit expanded *Golden* to the situation where the homestead was sold postpetition. Chapter 7 debtor claimed a California homestead exemption in property that was her residence on the petition date. The bankruptcy court lifted the stay for a judgment creditor to foreclose on the residence and the debtor thereafter received the amount of her homestead exemption from the proceeds of the sale. She did not reinvest and the chapter 7 trustee sought turnover of the proceeds to the estate. The bankruptcy court denied the trustee's motion, reasoning that the exemption was fixed as of the petition date. The Ninth Circuit Court of Appeals reversed - under *Golden,* the debtor's right to a homestead exemption was contingent on the proceeds being reinvested within six months of receipt. Because she did not abide by that condition, the Court held that the debtor had forfeited the exemption. The homestead exemption merely gave the debtor a conditional right to a portion of the proceeds from the sale of the property. There was no exemption in the property itself.

iii. *In re Rockwell* – recent 1st Circuit decision which follows the "snap-shot" rule.
   a. Chapter 13 debtor sells home and reinvests only some of his homestead exemption funds; ultimately, he converts to chapter 7 and the trustee objects to his homestead exemption. Court affirmed the bankruptcy and district court's decisions to deny the trustee's objection.
   b. The estate does not begin anew when a debtor converts a Chapter 13 bankruptcy proceeding into a Chapter 7 proceeding. 11 U.S.C. § 348(a). "So, without a doubt, we examine Rockwell's claim of a homestead exemption on the date he filed for his Chapter 13 bankruptcy."
   c. The Code enumerates those exceptions where property that is properly exempt on the day of filing (the day the snapshot is taken) can be later incorporated into the estate (because the snapshot was only partial and can therefore be edited): (1) debt from certain taxes and customs duties, (2) debt related to domestic support obligations, (3) liens that cannot be avoided or voided, including tax liens, and (4) debts for a breach of fiduciary duty to a federal depository institution." See 11 U.S.C. § 522(c). "Therefore, we must conclude that the complete snapshot rule applies to homestead exemptions taken pursuant to § 522, where none of the statute's enumerated exceptions applies.
   d. This result lines up with the Code's priority of providing a "fresh start" for debtors. Debtors can best make a fresh start where they can make healthy financial choices moving forward, knowing what property is out of the reach of the pre-petition creditors. "[E]xemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a fresh start." *Schwab v. Reilly,* 560 U.S. 770, 791 (2010).

e. The court expressly refuses to follow *Jacobson* and found the case to be unpersuasive because it not address the Code's valued fresh start "principles as articulated in Harris, 135 S. Ct. 1829, or the Supreme Court's admonishments in Law, 571 U.S. 415, that courts reach the result required by the text of the Bankruptcy Code."

iv. Creative reinvesting tips

III. "Unusual" types of interest in property still found to be valid homesteads.

A. *In re Douglas William Sain,* Case No. 14-09610-MM7

1. Facts - debtor bought back from his home from the trustee during his bankruptcy case. Although he made substantial contributions to finance the sale from personal assets that were not property of the estate, his father actually took title to facilitate obtaining a loan for the purchase, but debtor retained lease/option rights. In total, debtor invested at least $90,635.43 in the property including paying $50,000 in attorneys' fees incurred to buy his interest and defend his homestead rights. Trustee thereafter sought turnover of the $75,000 in homestead proceeds claiming debtor was not entitled to the proceeds because he did not acquire fee title in the property and did not reinvest the proceeds in a new homestead after receipt. "By involving both a lease and a debtor's repurchase of a home from a trustee, this case is outside the standard scenario of a chapter 7 trustee sale of a homestead to a third party. No case was found, and none was cited to the court, addressing the facts present here, so the issues are of first impression."
2. Judge Mann ruled that a leasehold interest must be considered a homestead and nothing in the statute prevents timely applying the exemption proceeds to a "pre" investment when the outcome was that debtor was able to stay in his home and the proceeds were put to proper use (i.e., not squandered) that was not detrimental to creditors.
   i. The exemption is not intended to allow the debtor to withdraw sales proceeds from the reach of creditors unless the proceeds were invested in another homestead." *In re Golden*, 789 F.2d 698, 700 (9th Cir. 1986).
3. "[The] statutory definition [of a homestead] was expressly intended to include 'any [] property in which the judgment debtor . . . resides.' Hastings v. Holmes (In re Hastings), 185 B.R. 811, 814 (B.A.P. 9th Cir. 1995) (quoting legislative committee comment to CCP § 704.710(a)). The examples provided by the statutory language illustrate this point by including both real and personal property, i.e. boats and mobilehomes. CCP § 704.710(a)(2) and (3)."
4. Even though a leasehold is not expressly listed as an example of a "dwelling" under CCP § 704.710(a), that conclusion is undeniable from other statutory provisions, which specifically address how a leasehold is to be handled under the homestead law.
   i. See CCP § 704.820 (permitting executing creditors to sell "the interest of the judgment debtor" and not "the dwelling" where the debtor owns a "leasehold or other interest less than a fee interest"); CCP § 704.740 (executing creditors need not obtain a court order to sell a debtor's dwelling if it is a "leasehold estate with an unexpired term of less than two years at the time levy").

B. *In re Nolan,* __ B.R. __ (Bankr. C.D.Cal. July 21, 2020, J. Clarkson)

1. Facts - debtor and his brother were 50/50 beneficiaries of their father's trust. Debtor was the successor trustee of the trust that should have sold the house and split the

proceeds after father's death. Debtor did nothing for several years which his brother alleged was a breach of fiduciary duty and he commenced probate proceedings. Brother got relief from stay and the probate court removed debtor as trustee and appointed brother as successor trustee. The eviction moratorium prevented the brother to bring his intended unlawful detainer action. Trustee filed an objection to the claimed homestead arguing that the only thing the debtor had as of the petition date was his claim in the probate proceeding to 50% of the proceeds from the sale of the property; the exemption does not apply to such an interest because the trustee was not seeking to sell the debtor's home to pay creditors.

2. Judge Clarkson found that the debtor's beneficiary interest, coupled with his residency in the Property, is reachable by judgment creditors, thus entitling Debtor to claim an automatic homestead exemption. "[A] judgment creditor of a beneficiary to a trust may attach an enforcement lien to real property trust res. This underscores the legislature's intent to include a debtor's beneficiary interest in a trust within the scope of interests entitled to an automatic homestead exemption, even if it is the trust that holds the title to the real property."
3. Decision includes a detailed analysis of all applicable statutes, the legislative history and policy behind the California homestead exemption statutes – including why the automatic homestead was created after the Legislature found that many homeowners were not receiving the benefits of the homestead because of their ignorance of the law or their failure to satisfy the technical requirements for declaring a homestead.
4. Likely issues on appeal?

I. <u>Increased Homestead</u>

A. Current amounts
   1. $75,000 – Single
   2. $100,000 - Family Unit
   3. $175,000 – Elderly, disabled or low income
B. AB 1885/SB 832
   1. The bill does away with the current 3-tiered homestead exemption and replaces it with a county-based prior-year median single-family home value, with a floor of $300,000 and a ceiling of $600,000. The exemption is then adjusted annually for inflation, beginning on January 1, 2022.
   2. If Gov. Newsom signs the bills into law, we can likely expect exemptions in these amounts:
      i. Los Angeles County: $600,000 (estimated $664,500 median)
      ii. Riverside County: $400,500
      iii. San Bernardino County: $370,215
      iv. Orange County: $600,000 (estimated $765,497 median)
      v. San Diego County: $600,000 (estimated $628,500 median)
      vi. San Francisco County: $600,000 (estimated $1,444,000 median)
C. Unsettled issues
   1. Reinvestment?
   2. Consequences to "county shopping"?
D. Practice pointers
   1. Wait to file

Dismiss pending cases?

BRACE YOURSELVES: THE IMPACT OF THIS NEW SUPREME COURT CASE

Supplemental Case Update[1]

Summaries by Richard G. Heston

Community Property and Sequential Bankruptcy Filings by Married Couple, or "Honey, I'll Race You"

In In re Marisa Moreno, Case No.: 6:19-bk-11255-WJ (Bankr. C.D. Cal. July 17, 2020) – Judge Wayne Johnson of the Riverside Bankruptcy Court sustained the Chapter 13 trustee's objection and denied confirmation of Chapter 13 plan, but also denied the trustee's motion to dismiss when spouses filed sequential bankruptcy cases, holding that all community assets were included in the estate of the first in time case on the theory that first estate created was comprised of 100% of the debtor's interest in community property.

Facts: Husband and wife were in an intact 25-year marriage when husband filed an individual Chapter 7 case. While that case was still pending, wife filed her individual Chapter 13. The parties each had an interest in the community property 2018 Toyota. In the Chapter 13 case, wife proposed to reduce the interest rate and extend the term of the Toyota loan. Trustee objected to confirmation and moved to dismiss.

Held: Husband's Chapter 7 case created a bankruptcy estate comprised of all community property in which the parties had an interest, including the Toyota. When wife filed her Chapter 13 case, the Toyota was already property of the estate in the Chapter 7 case. When she filed her case, it created an estate, but it did not include the property already in husband's Chapter 7 estate. As Judge Johnson put it, "the community property of a couple flows into the bankruptcy estate of the spouse who arrives at the bankruptcy court first." Accordingly, wife's Chapter 13 plan proposing to modify a loan secured by property not included in the estate could not be confirmed.

Ironically, husband's Chapter 7 case proceeded to discharge quickly, while wife's Chapter 13 case was pending. Because the Toyota was abandoned back to husband upon discharge and closure of his case, a contingent reversion right that had existed when wife filed her case, the Toyota reverted to husband and wife as community property, which made it automatically property of wife's Chapter 13 estate.

Comment: Moreno stands for the proposition that community assets cannot be property of concurrent bankruptcy estates and will be administered in the first case filed. While Bankruptcy Code §726(c) ensures that community property is first applied to community claims before being applied to separate claims, not all community claims are joint liabilities nor are all community claims dischargeable. Thus, a nondischargeable student loan incurred during the course of a marriage not subject to assignment to one spouse alone pursuant to Family Code § 2641 is a community debt that the spouse who incurred the loan may want paid where community assets will be administered. In that situation, the race to the courthouse can be important since that loan may be paid if the borrower files bankruptcy first.

[1] The comments and opinions expressed herein are solely those of the author and do not necessarily represent the views of the Orange County Bar Association Family Law Section nor its directors, officers or members.

"He Filed Bankruptcy. Why List My Creditors?" Court Holds in Community Property State, Notice of Bankruptcy Must Be Given to Not Only Debtor's Creditors, But to Creditors of Non-Filing Spouse.

In re Cowser, Case No.: 6:19-bk-21008-WJ (Bankr. C.D. Cal. Feb. 28, 2020) – Judge Wayne Johnson addressed the issue of whether notice must be given to wife's creditors, when only husband filed a Chapter 13 case, giving notice of commencement only to his creditors. Finding such notice was required, the court denied confirmation of the plan served only upon husband's creditors and dismissed the case.

Facts: After approximately three years of marriage, husband alone commenced a Chapter 13 case, scheduling only those claims of his creditors. None of wife's creditors were scheduled. Accordingly, notice of commencement of the proceedings and service of the Chapter 13 plan was made only upon creditors with claims against husband. When the Chapter 13 trustee objected and moved for dismissal, the court sustained the objection and dismissed the case.

Held: All creditors must be given notice of bankruptcy cases, and in a community property state, that includes all creditors holding community claims. Since Family Code § 910 provides that the community estate is liable for debts incurred by either spouse before or during marriage, the debts of the nonfiling spouse constitute community claims. Because the holders of the community claims against wife did not receive notice nor were they served with husband's Chapter 13 plan, there had been no compliance with Bankruptcy Code § 342(a), which states that "[t]here shall be given such notice as is appropriate, including notice to any holder of a community claim…" Such failure warranted denial of confirmation and dismissal.

Comment: Both of the decisions of Judge Wayne Johnson point up the unique aspect of community property and the inability to have "his and hers" property or debts. While the separate property of the nonfiling spouse may avoid inclusion in the bankruptcy estate of the filing spouse, community debts, including those of the nonfiling spouse, must be addressed by inclusion in the case of the filing spouse.

Fraudulently Transferring What You Don't Even Own, or "Marry a Poor Wife"

Sturm v. Moyer, 32 Cal.App.5th 299 (Cal. Ct. App. 2019) – In this case seemingly originating in a parallel Orwellian universe, the trial court was reversed when it declined to apply the Uniform Voidable Transfers Act (Civ. Code, § 3439 et seq., formerly known as the Uniform Fraudulent Transfer Act, or UFTA) to a premarital agreement

Facts: Prior to marrying in 2014, husband and wife executed a premarital agreement with routine language that provided that each party's earnings and income, and any property acquired during the marriage by each spouse, would be that spouse's separate property; each party acknowledged that these earnings, income, and property otherwise would be community property. The agreement became effective only if the parties married, which they did. Previously in 2005, Sturm obtained a $600,000 judgment in bankruptcy court against husband which was held nondischargeable. Husband listed the liability in the premarital agreement. During a judgment debtor examination of husband in 2016, Sturm learned of the marriage and the premarital agreement. He sued husband and wife under the Uniform Voidable Transfers Act (UVTA), claiming husband's premarital transfer to wife of any community interest he might otherwise have in her post-marital earnings was fraudulent. The trial court sustained the couple's demurrer to Sturm's complaint without leave to amend and dismissed the case. Sturm appealed.

Held: Although neither party had any interest in the future earnings and accumulations of the other prior to marriage, such interest would attach upon entry into marriage. The premarital agreement was

not effective until the parties married. Thus, in the instant that the parties married and acquired interests in one another's future earnings, the agreement became effective, transferring and negating those interests in the same moment. Rejecting the couple's argument that they had simply elected to opt out of the community property system, as permitted by the Uniform Premarital Agreement Act (UPAA), the court rejected their "textualist" view of the statute and delved into legislative history and in particular a study authored by Professor William A. Reppy Jr. of Duke Law School, "Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage", 18 San Diego L. Rev. 143 (1981). Concluding that Professor Reppy's conclusion that the position of Sturm vis-à-vis husband had not changed, only husband's marital status, was wrong, the court held that the premarital agreement could constitute a fraudulent transfer, noting that by marrying wife, husband might enjoy an improved standard of living. The case was remanded for further proceedings.

Comment: In a case that defies logic and common sense, husband and wife thought they were launching their marriage when the officiant said "you may now kiss the bride", unaware that by entering into blissful matrimony they had actually committed fraud against husband's creditor. In part, the court relied on State Bd. of Equalization v. Woo, 82 Cal.App.4th 481 (2000) where a married couple had entered into a post marital agreement to convert wife's future earnings to her separate property, so as to stop garnishment of her salary for husband's premarital debt. The Woo decision has always defied logic by overlooking the fact that future earnings are an expectation, not a property right, a critical distinction which the Woo court gave short shrift. If there is a take-away from this case, at least until it is reversed, it is that if you are in debt and about to get married, marry someone who doesn't earn much. Alternatively, consider having the prenuptial agreement interpreted under law of a jurisdiction other than California, and marry elsewhere, even if planning to reside in California.

While Characterization of Claim as Marital Debt or as Support Is Question of Federal Bankruptcy Law, "State Court Labels Matter"

Quintanilla v. Crews (In re Crews), No. 11-45982 CN (Bankr. N.D. Cal. Mar. 30, 2020) – Judge Charles Novack of the Northern District of California rejected the claim of debtor's former spouse that equalization payments were in the nature of spousal support, finding the express waiver of spousal support and the parties' labeling of the payments as equalization payments controlling under In re Sternberg, 85 F.3d 1400 9th Cir. 1996). Accordingly, the claim was held to be dischargeable in Chapter 13.

Facts: Pro per at the time they reached a settlement in their divorce, husband and wife divided the community property, including four real property interests, with wife to pay husband $108,000 at $3,000 per month over 36 months. Both parties waived their right to seek spousal support. While the Family Court approved the settlement, the issues were never litigated. After making only one payment to husband, wife filed a Chapter 13 bankruptcy, listing the unpaid balance owing to husband as an unsecured debt that would be dischargeable. Husband filed a proof of claim, asserting that the obligation was one in the nature of domestic support. Wife objected to the claim on the basis it was not support. The parties stipulated to return to the Family Court to resolve the issue of what was actually intended. Nevertheless, ultimately the motion filed by husband in the Family Court went unresolved and went off calendar for nonappearance. Husband withdrew his claim in the bankruptcy and wife completed the plan and received a discharge. Undaunted, husband proceeded to renew his efforts to collect the $108,000. Wife responded by seeking declaratory relief in the bankruptcy case.

Held: Wife's obligation to husband was discharged. Unlike all other chapters of the Bankruptcy Code, marital debts made nondischargeable in other chapters pursuant to §523(a)(15) are dischargeable in

Chapter 13. While the question of whether the debt is in the nature of support or not is a question of bankruptcy law, the intent of the parties at the time of the settlement was dispositive. The bankruptcy court considered the parties' financial circumstances at the time of the settlement and noted there was not a significant disparity of income. The $3,000 per month payments were nontaxable and did not terminate upon the death or remarriage of husband. Both parties explicitly waived support. And perhaps most importantly, the parties labeled the obligation as one intended to equalize the division.

Comment: In re Crews is another in a series of cases which underscore the deference bankruptcy courts give to the determinations made in the family courts, even those that are the result not of judicial rulings, but of the litigants' settlements. In re Sternberg, 85 F.3d 1400 (9th Cir. 1996) tells us that is the intention at the time that the claim arises that is controlling. Subsequent events will not alter that determination. In discerning that intent, bankruptcy courts give great weight to the label attached. In In re Ashworth, No. 8:11-bk-10946-RK (Bankr. C.D. Cal. Oct. 1, 2012) the bankruptcy court felt bound by Sternberg in the face of even more compelling facts. In that case, support in a fixed amount of $305,000 payable over 17 years was ordered following a brief 2-3 year marriage, made nontaxable to wife and not terminable upon her remarriage, which occurred only 10 months later. The order resulted from a settlement reached between husband and wife, negotiated by the same counsel who was representing wife in concurrent civil litigation to recover a claim of $10 million in damages against husband for sharing with wife a case of herpes he had contracted as a result of an illicit affair. The $10 million tort claim was dismissed in exchange for $1.00 and a $305,000 non-terminable, nontaxable payout labeled as alimony. Again, the court followed the strict reading of Sternberg and held the parties' stated intent was best gleaned from the language of the settlement in which the obligation was characterized as support.

How NOT to Try to Collect Attorney's Fees from Former Clients in Bankruptcy

Lionetti v. Law Offices of Steven H. Marcus (In re Lionetti), 613 B.R. 13 (9th Cir. BAP 2020) – After unsuccessfully seeking a determination that their fees were nondischargeable, debtor was awarded attorney's fees she incurred in her successful defense of her former family law attorneys' attempt to enforce their claim for fees.

Facts: Debtor hired attorneys in 2011 with a payment of $10,000 spread over three credit cards, advising them she could not afford to pay the $50,000 she owed her prior counsel. She signed an agreement giving them a charging lien but was not advised to seek independent counsel or given a cooling-off period. While they represented her, the debtor advised attorneys she was considering bankruptcy. In 2015 she filed Chapter 7. Attorneys sued to have their claim for $150,000 in fees held nondischargeable based on fraud under Section 523(a)(2) and their charging lien declared valid. The bankruptcy court granted summary judgment for debtor upon all claims but denied debtor's request for fees pursuant to Section 523(d), which requires an award of fees if a creditor requests a determination of dischargeability under 523(a)(2) and the debt is discharged, i.e., debtor prevails. Both sides appealed.

Held: The 9th Circuit BAP upheld the grant of summary judgment but remanded for determination of the award of fees to debtor. On remand, the bankruptcy court again denied debtor's request, finding lawyers were justified in pursuing nondischargeability. Debtor again appealed the denial of fee award. Finding lawyers lacked substantial justification, the BAP rejected their assertion of unfairness based upon the totality of circumstances and reversed. Notably, the BAP rejected the claim that 523(d) fee awards should be limited to credit card transactions or other one-sided battles over consumer debts, observing "Without the deterrent of § 523(d), a law firm may be much more likely to pursue questionable litigation in an attempt to obtain a settlement in a weak or meritless case."

Comment: This is a classic case of overly-aggressive tactics. First, lawyers claimed that debtor fraudulently induced them to render services for which she did not intend to pay when she actually had made known her financial difficulties and that she was considering bankruptcy. Second, they had debtor sign an agreement for a charging lien without complying with Rule 3-300 of the California Rules of Professional Responsibility. Unable to show any triable issues of fact, lawyers' nondischargeability case could not even make it past summary judgment, yet they appealed. When debtor then sought an award of fees, while lawyers convinced the trial court that they had been substantially justified, this time debtor appealed. With the case now remanded back to the trial court, lawyers settled by agreeing to pay debtor $70,000. Ironically, on his website attorney Steven Marcus currently includes the following tweeted endorsement: *"If you need a pitbull defense attorney, I highly recommend Steve Marcus in Valencia. BAM! to my cyberbully."* Some people never learn.

"What is Once Well Done is Done Forever", or How to Not Effectively Execute an Interspousal Transfer

Salven v. Nijjar (In re Nijjar), No. 17-12781-A-7 (Bankr. E.D. Cal. Mar. 27, 2020) – Judge Frederick Clement held that prepetition transfers by recorded quitclaim deeds of community property by debtor to his nonfiling spouse under terms of property settlement agreement failed to comply with transmutation requirements of California Family Code § 852 and were presumed to have been the result of undue influence, as a result of which the transferred property remained property of the bankruptcy estate.

Facts: During their 19-year marriage, husband and wife acquired four parcels of real property, one of which was their home. In contemplation of divorce, they negotiated a property settlement that awarded all four properties to wife, in exchange for release of her interest in a business operated by husband. Quitclaim deeds were recorded for the four properties, and the business was transferred to husband. Subsequently, an uncontested divorce was filed, and findings of fact and conclusions of law, as well as the judgment of divorce, in which the court found "[t]hat there are no community property and community debts or obligations that the parties are requested (sic) to be adjudicated by the court." Eight years later, husband filed a Chapter 7 bankruptcy. The appointed trustee filed an adversary proceeding against husband and wife seeking a determination that all of the community property remained community property and thus property of the bankruptcy estate. The parties brought cross-motions for summary judgment.

Held: The court made short work of any claim of transmutation by citing to Estate of MacDonald, 51 Cal.3d 262 (1990) for the proposition that a mere transfer between parties who are married does not amount to a transmutation, absent an express declaration that the spouse whose interest is adversely affected is releasing all further interest, finding no such expression of intent by husband. Because husband had transferred his interest in the four properties to her, wife had the burden of showing that he entered into the transaction freely and voluntarily, with full knowledge and understanding of the effect. To refute the presumption of undue influence, wife testified that she believed the division to be fair and that there was no undue pressure or influence exerted by her. In addition, her declaration averred to the fact that husband had conferred with "elders" of his community. The bankruptcy court found that no evidence was offered that husband had full knowledge of the facts in a complete understanding of the effect. That he had communicated with his "elders" was of no avail, since there was no evidence that these elders had any knowledge or understanding of the law that they could have communicated to husband. Accordingly, the transfers were held invalid and the four properties transferred to wife were held to be property of the bankruptcy estate of husband.

Comment: In the very first sentence of the opinion, the court quoted Henry David Thoreau, who once said "What is once well done is done forever". He might as well have referred to the "blind leading the blind." While acknowledging that the family courts have on occasion accepted quitclaim deeds as expressed declarations for purposes of transmutation (see Marriage of Haines, 33 Cal.App.4th 277 (1995); In re Marriage of Matthews, 133 Cal.App.4th 624 (2005); and In re Marriage of Starr, 189 Cal.App.4th 277 (2010)), the court focused on the fiduciary duty obligations of the wife and her obligation to show husband fully understood all facts and the effect of the transfers in order to rebut the presumption. While the opinion does not make clear exactly who the community "elders" were, it is clear there is no substitute for talking to an attorney when legal advice is sought. Attorneys offering mediation services should be mindful that the parties need to be not only advised to seek independent counsel, but some evidence that the parties fully understand the effect of executing transfers that are intended to alter the character of marital property.

"But Your Honor, I am Supporting Her Already and Her Attorney Isn't Entitled to Support"

Voss v. Voss (In re Voss), BAP No. ID-20-1053-SGF (B.A.P. 9th Cir. July 30, 2020) - The BAP rejected a Chapter 13 debtor's argument that sufficiency of support awards made during his Idaho divorce proceeding undercut any basis to claim that attorney fee award made in the same divorce proceeding was intended to constitute nondischargeable support pursuant to § 523(a)(5), rendering the fee award dischargeable in Chapter 13 as a marital debt pursuant to § 523(a)(15). The BAP found that the divorce court's consideration of other factors, including but not limited to need and ability to pay, did not require the bankruptcy court to reject the claim that the fee award was in the nature of support.

Facts: In their Idaho divorce, the court awarded wife monthly child support of $579.67 and spousal support of $1,500.00, half the cost of her future college tuition or vocational training, and attorney fees of $35,916.80. Husband subsequently filed Chapter 13, where support obligations are nondischargeable, but marital debts not in the nature of support can be discharged. When wife filed a claim asserting the attorney fee award was in the nature of support and nondischargeable, husband objected to the claim, contending wife was receiving adequate support and therefore the fee award was merely a discharge of marital debt. The court found the fee award to be in the nature of support and overruled husband's objection. On appeal, the 9th Circuit BAP affirmed.

Held: Whether an award of attorney fees is in the nature of support is a question of federal law, although bankruptcy courts need to look to state law for guidance. Examining the Idaho statute, which in large part tracks the same factors as California law, with the notable exception that Idaho family courts may consider the additional element of fault, the BAP held that the needs of wife were only one of the enumerated factors. While arguably those needs were thoroughly met by the support orders, the weight given to any single factor was committed to the sound discretion of the Family Court, and among those factors was fault, which was considered.

Comment: The Voss decision largely reaffirms the prior holding in a colorful case of more local origin, Gionis v. Wayne (In re Gionis), 170 B.R. 675 (9th Cir. BAP 1994). In that case, wife (the daughter of the late and wealthy actor John Wayne) was awarded no spousal support in her divorce from husband (the infamous "bloodless" surgeon who was also charged with hiring Swiss thugs to assault his wife's boyfriend in tony Newport Beach). Nevertheless, the court awarded $185,000 in attorney's fees against Dr. Gionis. On appeal, the BAP affirmed, rejecting the argument that if wife was not found needing support, how could the attorney fees be in the nature of support. The BAP found that the award pertained largely to the contentious custody battle, and therefore the needs of the child were a factor that rendered the award in the nature of support.

Speaker Biographies

Honorable Thomas Trent Lewis (Ret.)

Judge Lewis is a member of Signature Resolution providing mediation, arbitration, and privately compensated judge pro tem services . From 2016 to 2019, he served as the Supervising Judge for the Los Angeles County Family Law Division overseeing the operations of over 70 family law departments in the county. From 2014 to 2016 he served in a long cause family law trial department in Los Angeles; he was Assistant Supervising Judge of the Family Law Division from 2011 to 2014. Judge Lewis served in a regular family law department from his appointment in 2006 until 2014.

During his tenure with the court, Judge Lewis served on the Judicial Council Family Law & Juvenile Law advisory committee. Judge Lewis was also active in judicial teaching through the CJER program. Judge Lewis was appointed by the Chief Justice of California as a judicial liaison on matters involving child abduction and relocation.

Judge Lewis is a 1975 graduate of UCLA, cum laude, a 1978 graduate of La Verne College of Law, cum laude, Dean's List and Law Review. In 2019, Judge Lewis completed advanced training at the Program on Negotiation at Harvard Law School in 2019. In 2020, Judge Lewis enrolled at the Pepperdine University Caruso Law School in the LLM program for Dispute Resolution.

Judge Lewis became a Certified Family Law Specialist in 1985 and was inducted into the American Academy of Matrimonial Lawyers (AAML) in 1987. He was inducted as a Fellow of the International Academy of Family Law in 2016. He served on the Family Law and Juvenile Advisory Commission until 2014; and he is a past faculty member for the judicial training committee for Family Law (CJER). He is a past president of the California Chapter of the Association of Family and Conciliation Courts. He is also a contributing author of The Rutter Group's **California Practice Guide: Family Law** and serves as Program Director for CFLR for the update program, the

advanced family law program, the basic training program, the evidence programs, and the expert series programs.

In 2010, he was awarded the **Outstanding Jurist Award** by AAML's Southern California Chapter. In 2012, the Association of Certified Family Law Specialists (ACFLS) awarded him the ACFLS Outstanding Service to Family Law Award; and in 2014, he became the first emeritus member of ACFLS. In 2015, he received the Los Angeles County Bar Association Family Law Section **Spencer Brandeis Award**, the highest honor bestowed by them. In 2016, he received the Southern California Inn of Courts, **Outstanding Jurist Award**. In 2017, he was honored by the San Fernando Valley Bar Association, Stanley Mosk **Legacy of Justice Award**. In 2018, he received the California Lawyer's Association **Family Law Judge of the Year Award.** In 2018, he was awarded the Association of Family Law Specialist (ACFLS) Hall of Fame Award, the highest honor bestowed by ACFLS.

D. EDWARD HAYS

D. Edward Hays, is a founding member of the firm of Marshack Hays LLP. He was born in Los Angeles, California. He graduated with honors from California State University at Fullerton in 1989 with a Bachelor of Arts degree in Business. He graduated from the University of Southern California Law Center in 1992 where he was a member of the Hale Moot Court Honors program. Mr. Hays was admitted to practice in 1992.

Since 2017, Ed has been certified as a bankruptcy law specialist by the State Bar of California. In 2019-2020, Ed was the President of the California Bankruptcy Forum. In 2020, he was selected to serve a three-year term on the Insolvency Law Committee for the California Lawyers Association. In 2019, Ed spoke at the National Conference of Bankruptcy Judges in Washington, DC and the National Association of Bankruptcy Trustees in Denver. In 2018, he spoke at the National Association of Consumer Bankruptcy Attorneys. He has also served as a panelist on dozens of programs on a wide array of bankruptcy topics including family law issues in bankruptcy, exemptions, spendthrift trusts, busting trusts, Chapter 11 reorganizations, the absolute priority rule, competing plans, defensive appellate rights, discharge issues, pre-trial procedures, evidence, and trials. Ed has over two dozen published cases and has co-authored three law review articles published in the California Bankruptcy Journal.

PROFESSIONAL RESUME OF RICHARD G. HESTON

Richard G. Heston is a Partner in the law firm of Heston & Heston, located in Irvine, California. The firm specializes in bankruptcy, family law, probate and estate planning matters. Mr. Heston is a graduate of the University of California, Irvine, where he was awarded a Bachelors Degree in Social Ecology from the Department of Criminology, Law and Society in 1976. He attended Southwestern University, School of Law where he received his Juris Doctor degree in 1979. Mr. Heston is certified as a Specialist in Consumer Bankruptcy Law by the American Board of Certification, which is sponsored by the American Bankruptcy Institute and accredited for certification by the State Bar of California and the American Bar Association. In addition, he was certified as a Specialist in Family Law by the Board of Legal Specialization of the State Bar of California from 1992 to 2017.

Mr. Heston holds an "AV" rating by Martindale-Hubble, the highest rating for attorney ability and ethics offered by the nation's oldest publisher of attorney ratings. He is listed in "Who's Who in American Law." He has been selected to 2016 through 2020 “Super Lawyers” list of leaders in his field. He has been recognized in the field of consumer bankruptcy practice by Coast Magazine in 2015 through 2019, and by O.C. Metro Magazine in its 2009 through 2014 editions as one of "O.C.'s Top Lawyers" from 2009 through 2019 for Consumer Bankruptcy and Family Law Practice. Mr. Heston is a current member of the Family Law and Commercial and Bankruptcy Law Sections of the Orange County Bar Association, the Orange County Bankruptcy Forum, and the National Association of Consumer Bankruptcy Attorneys.

Mr. Heston currently serves as a lawyer representative to the Ninth Circuit Judicial Conference. Previously, he served on the Bankruptcy Law Advisory Commission of the Board of Legal Specialization of the State Bar of California from 1993 to 1997, acting as Chairman in his final term. In addition, he served on the Board of Directors of the American Board of Certification from 1995 to 2001. He also served on the Board of Directors of the Orange County Bankruptcy Forum from 1998 to 2004, where he co-chaired the Pro Bono Services and Community Outreach Committees. Mr. Heston served on the Client Relations Committee of the Orange County Bar Association, in which capacity he served as a volunteer fee arbitrator, and as a member of the Pro Bono Committee, in which capacity he oversaw the monthly Chapter 7 and Reaffirmation clinics offered free of charge to the members of the public unable to afford paid counsel.

Since 1988, Mr. Heston has served as panelist or speaker for numerous continuing legal education programs, including "Family Law vs. Bankruptcy Law, Common Pitfalls/Practical Solutions", co-sponsored by the Family Law and Bankruptcy Law Sections of the Orange County Bar Association, "Everything You Ever Wanted to Know About the Chapter 7 Trustees . . . But Were Afraid to Ask", sponsored by the Orange County Bankruptcy Forum, "Family Law Impact of the 1994 Bankruptcy Reform Act and Other Developments" sponsored by the Family Law Section of the Orange County Bar Association, "New Uses for Chapter 13 with Expanded Eligibility Requirements", "Intersection of Family Law & Bankruptcy", "Recent Developments Affecting Family Law: Bankruptcy and Case Law Updates", and "National Bankruptcy Review Commission Recommendations and Pending Legislative Proposals Affecting Consumer Bankruptcy" sponsored by the Orange County Bankruptcy Forum, and"Bankruptcy and Divorce: A Sordid and Dysfunctional Relationship" sponsored by the Inland Empire Bankruptcy Forum.

He also served as a speaker at "When Worlds Collide - Bankruptcy and Family Law" and "Recent Developments in Bankruptcy Law for the Family Law Practitioner" sponsored by the Orange County Bar Association, and "Bankruptcy and Family Law Crossover issues before the San Bernardino County and Riverside County Bar Associations. Mr. Heston participated as a panelist before the Business Law Section of the State Bar of California at the First Annual Education Institute in Monterey, California on the topic of "Exemptions in Bankruptcy", and presented the seminar "Advanced Consumer Bankruptcy Issues in California" sponsored by the National Business Institute.

Additionally, he presented the programs "Treatment of Support Claims in Chapter 13 Bankruptcy" before both the Orange County Bankruptcy Forum and the Family Law Section of the Orange County Bar Association, "The Tug of War Between Bankruptcy and Divorce" presented by the Orange County Bankruptcy Forum at Chapman University School of Law, and "Recent Developments in Bankruptcy Practice" presented by the Orange County Bar Association at Whittier School of Law, "What Every Family Law Attorney Needs to Know About the New Bankruptcy Act" presented by the Orange County Bar Association, "Impact of the New Bankruptcy Code on Chapters 7 and 13", presented jointly by the Orange County Bar Association and the Orange County Bankruptcy Forum, and "What Every Family Law Attorney Needs to Know About the Bankruptcy Abuse Prevention and Consumer Protection Act" presented by the Association of Certified Family Law Specialists.

Mr. Heston served as a panelist speaking to the Orange County Bar Association at the program "Bankruptcy 2009: What Family Law Practitioners Need to Know", "Recent Developments in Bankruptcy Affecting Family Law", and"Bankruptcy 101: The Nuts and Bolts of Chapter 7 Practice." Most recently, has served as recurring guest lecturer at the UCI School of Law, presenting "Bankruptcy and Family Law" as part of a series of lectures, as a panelist at the annual California Bankruptcy Forum 2013 Insolvency Conference program entitled "Raiders of the Lost Ark - Identifying Estate Interests in Atypical Property" and as a speaker at the State Bar's 2014 Solo and Small Firm Summit program entitled "Bankruptcy and Dissolution".

Mr. Heston has served as a recurring guest lecturer at the University of California, School of Law's course in Family Law, addressing the issue of the interface of family and bankruptcy law. Mr. Heston was as a consultant and contributing editor to Personal and Small Business Bankruptcy Practice in California (Cont.Ed.Bar 1st ed. 2003), published by Continuing Education of the Bar (CEB) in association with the University of California. Articles written by Mr. Heston include "How to Escape from Bankruptcy Court", published in the June 1994 edition of Family Law Corner column, a monthly feature of Orange County Lawyer, the publication of the Orange County Bar Association, "Family Law Aspects of the Bankruptcy Reform Act of 1994", which appeared in the April 1995 Family Law Corner column, and Spring 1995 Edition of the Legal Specialization Digest, the quarterly publication of the Board of Legal Specialization of the State Bar of California, and his article "Discharge - What Discharge? The Community Discharge in Bankruptcy" appeared in the December 2000 Family Law Corner column. At the invitation of the editors, Mr. Heston wrote a guest editorial concerning the significance of the appellate decision in Burt v. County of Orange (see below) for publication in the Orange County Register editorial on September 26, 2004.

Mr. Heston is admitted to practice before all courts of the State of California, as well as the United States District Courts for the Central, Northern and Southern Districts of California, the Ninth Circuit Court of Appeals, and the United States Tax Court. Mr. Heston's practice emphasizes the fields of family law and bankruptcy law. He has handled numerous bankruptcy matters, including cases under Chapters 7, 11, and 13, as well as adversarial litigation. Mr. Heston has served as special counsel to several of the Chapter 7 trustees in the Central District of California.

Mr. Heston's reported decisions include In re Ashworth, 2012 WL 4596217 (Bkrtcy.C.D.Cal. 2012), affd. (9th Cir.BAP) 2013 WL 6620863, affd. 637 Fed.Appx. 387 (9th Cir. 2016), In re Voelkel, 322 B.R. 138 (9th Cir.BAP 2005), Hoose v. Beauchamp, No. G032873, 2004 WL 1345080 (Cal. Ct. App. 2004), Burt v. County of Orange, 120 Cal.App.4th 273, 15 Cal.Rptr.3d 373 (2004), In re Beauchamp, 236 B.R. 727 (9th Cir.BAP 1999) affd. 5 Fed.Appx. 743, (9th Cir., Mar. 12, 2001), In re Marriage of McCann, 41 Cal.App.4th 978, 48 Cal.Rptr.2d 864 (1996), and In re Kullgren, 109 B.R. 949 (Bkrtcy.C.D.Cal.1990). His unreported decisions include In re Ziegler, 2016 WL 3267387 (B.A.P. 9th Cir. June 6, 2016), In re Cusimano, 2013 WL 9736597 (Bankr. C.D. Cal. Nov. 12, 2013), In re Beckx, 2000 WL 35888261 (B.A.P. 9th Cir. Mar. 18, 2009), Bergstrom v. Lobherr, 2006 WL 2536462 (Cal. Ct. App. Sept. 5, 2006), Hoose v. Beauchamp, 2006 WL 3524919 (Cal. Ct. App. Dec. 7, 2006) and Johannsen v. Sullivan, (B.A.P. 9th Cir. September 9, 2004).

Mr. Heston is married to Halli B. Heston, who in addition to being his co-founding partner in Heston & Heston, is also certified as a Bankruptcy Law Specialist. A resident of Newport Beach since 1959, Mr. and Mrs. Heston have three grown children, a daughter and two sons, and five grandchildren. Mr. Heston is an avid skier and boater.

Richard A. Marshack is a founding member of the firm of Marshack Hays LLP and has been a bankruptcy attorney since 1982 (38 years). He is a frequent lecturer and presenter of seminars (over 50) on Bankruptcy and Commercial Law issues. Additionally, he has authored more than 20 articles and materials relating to the practice of law. Richard has two practices: serving as an attorney and as a professional fiduciary. As an attorney, his focus is commercial matters arising in bankruptcy proceedings, such as representing debtor/businesses and creditors/creditor committees in reorganization proceedings and representing Bankruptcy Trustees. As a professional fiduciary, he serves as a Chapter 7 and 11 Trustee. He has served as a Trustee since 1985 and has served as a Receiver, Examiner, Special Trustee for Probate Court, Chief Responsible Officer, Disbursing Agent and Provisional Director. Some of Richard's more interesting cases include: Representing a Creditors Committee in the County of Orange case, Representing 8,000 Wildfire Victims in the Pacific Gas and Electric case, Serving as a Bankruptcy Trustee for: Eagan Avenatti, several restaurants including Ruby's, two large mobile home parks with substantial environmental issues, two large ponzi scheme cases, a fantasy football league, a case involving recovery of $4m transferred to Cook Islands and bodily detention of the debtor until funds were received and a case requiring 4 years of litigation that resulted in a return to equity in excess of $18m. Richard is a graduate of the University of California, Irvine (1979) and California School of Law, Magna Cum Laude (1982). Thereafter, he served as Law Clerk to the Honorable Folger Johnson, Chief Judge of the United States Bankruptcy Court, District of Oregon, 1982-1984.