

Memorandum 83-65

Subject: Study F-640 - Marital Property Presumptions and Transmutations
(Comments on Tentative Recommendation)

The Commission's tentative recommendation on marital property presumptions and transmutations is attached along with the comments received on it (Exhibits 1-6). The California Judges Association and the Family Law Section of the Los Angeles County Bar Association also plan to send comments which we will forward to the Commission when received. We have met with a subcommittee of the State Bar Family Law Section Executive Committee and we will try to report their views where relevant, in the absence of written comments from them.

§ 5110.110. All property acquired during marriage is community

Section 5110.110 classifies real property acquired with community funds that is located in another jurisdiction as community property, even though the jurisdiction in which the real property is located may not be a community property jurisdiction. The reason for this classification is that California courts can and do exercise their authority over this property to the extent practical at dissolution of marriage, even though they cannot directly affect title to the property.

Henry Angerbauer, CPA (Exhibit 1), does not think it is proper to characterize out of state realty as community property. "I would let the law of situs control the character of the realty." The L.A. County Bar Association Probate and Trust officers (Exhibit 6) are also troubled by characterizing out of state realty as community property. "California cannot unilaterally impose its system of property on other states. California can recognize the community source of such property when creating spousal rights at the dissolution of the marriage or at death. We believe it more appropriate to specifically address that issue through a separate section than in the definition of community property in Section 5110.110."

The staff believes that characterization of out of state realty as community property is proper. However, if this concept is going to be troublesome to people, the staff recommends that we substitute a provision that out of state realty acquired during marriage shall be treated as if it were community property for all purposes, including but not limited to rights of the parties at dissolution and death.

The L.A. County Bar Association officers also point out that the requirement that the spouses be domiciled in this state is omitted from the draft of Section 5110.110. They are correct, and the staff will restore the language relating to domicile.

§ 5110.620. Community property presumption

Section 5110.620 creates a community property presumption for property "owned" by either spouse during marriage. The purpose of this presumption is to simplify proof matters by requiring a person seeking to establish a separate property interest to show that property owned during marriage was acquired either before marriage or during marriage by gift or inheritance. In essence the presumption favors the community.

The L.A. County Bar Association officers (Exhibit 6) do not care to have the community property presumption applied to property acquired before marriage, title to which is not changed during marriage, and which is still separately owned at the time of dissolution. "There is no reason to create a contrary statutory presumption merely to have it rebutted through the use of court time." Of course, the L.A. Bar officers are assuming the very fact that is in issue--the time of acquisition of the property; the matter will never be litigated unless the parties disagree as to its characterization.

The staff notes that the subcommittee of the State Bar Family Law Section Executive Committee was also somewhat confused by the operation of this presumption. Perhaps it would be useful to recast the presumption somewhat, e.g., "Property owned by either spouse during marriage is presumed to be acquired during marriage;" or "The burden of proof that property is separate and not community is on the party seeking to show the separate character of the property." Either of these formulations would help to achieve the same result as Section 5110.620, although in the staff's opinion neither formulation is as good.

§ 5110.630. Title presumptions

Section 5110.630 provides that the form of title in which property is held does not create a presumption as to the character of property, except at death. At death, if property stands in the name of one spouse alone, the property is presumed to be separate. This presumption is rebuttable.

Robert K. Maize, Jr., (Exhibit 2), writes that it doesn't make sense to have one set of rules during marriage and a different set at death; there should be a single set of rules. Professor William A. Reppy, Jr., (Exhibit 4) thinks this recommendation will result in great unfairness since, for example, it will be difficult for the heirs of the deceased wife to show that every share of stock held and managed by the surviving husband is not separate property but has its source in community funds. Jack E. Cooper (Exhibit 5) raises questions concerning the rebuttability of the separate property presumption where property is being managed in the name of one spouse alone for purposes of convenience. The L.A. County Bar officers (Exhibit 6) also consider it to be a grave injustice to presume that property standing in the name of the husband alone is separate; before the days of equal management "it was exceedingly common for title to community property to be taken in the name of the husband as a married man" with the universal understanding that this was community property. The officers also believe the law should be consistent during life and at death.

The reason for the special rule at death in the tentative recommendation is to address the problem pointed out by the State Bar Probate Law Section of property that is clearly separate having to go through probate because of the general community property presumption. What we are hearing now is that we have gone too far and this is not as great an evil as imposing a burden on the parties to show that property is community. This makes sense to the staff, and we would revise the presumption as suggested by the L.A. County Bar officers:

(b) Upon the death of a married person, property owned by either spouse is presumed to be owned in the manner stated in the form of title. If the form of title does not state the separate or community character of the property, property acquired during marriage standing in the name of either spouse or in the names of both spouses is presumed to be community.

§ 5110.640. Gift presumptions

Section 5110.640 presumes that most gifts between spouses are community rather than separate. However, a gift of a "tangible article of a personal nature" that is not "substantial in value taking into account the circumstances of the marriage" is presumed to be separate property.

Charles A. Dunkel (Exhibit 3--Crocker Bank) questions the basic community property presumption for gifts. "A true gift transfers title

to the donee. I see no reason for a presumption which negates the concept of a gift." The problem we are trying to address here, however, is the common experience that many "gifts" are not really intended to transfer title from community to separate property. The presumption does not preclude a spouse from showing an actual donative intent to transfer title. However, the burden is on the person seeking to show the property is not community. The staff believes this scheme is appropriate and would make no change.

The L.A. County Bar officers (Exhibit 6) question the "substantial in value" standard in the case of gifts of personal items. They believe this standard invites litigation. The staff can see no way around this unless we set some arbitrary figure, say \$10,000.

§ 5110.730. Form of transmutation

Section 5110.730 requires that a transmutation of real or personal property must be in writing and made by an express declaration with the consent of the spouse whose interest in the property is adversely affected. The L.A. County Bar officers (Exhibit 6) see this as a great improvement over existing law (which permits oral transmutions and transmutions implied by conduct).

Jack E. Cooper (Exhibit 5) raises the question of the effect of a declaration in a will that property is community and not separate. Does this declaration bind the heirs of the person executing the will? Must the decedent's spouse consent to the transmutation, and if so, is a companion will executed by the spouse sufficient to do this? The staff believes the statute is properly drafted as tested against this situation--only the adversely affected spouse (not the heirs or the spouse that benefits from the transmutation) is required to execute the transmutation for it to be valid.

Section 5110.730 also provides that a writing is not required for a transmutation by gift between spouses of "tangible articles of a personal nature." The State Bar Family Law subcommittee points out that this rule should only apply where the articles are not substantial in value, consistent with the general gift presumption. The staff will make this change. Mr. Dunkel (Exhibit 3--Crocker Bank) has difficulty with the "tangible article of a personal nature" terminology. We adopted this term after being informed it was in common use among lawyers involved in estate planning, as a result of CEB forms. If the terminology

is not familiar now, it will become familiar in the near future. The staff believes the language is satisfactory.

Mr. Dunkel also notes that under the draft, a transmutation of real property must be recorded if it is to affect third persons who do not have notice of the transmutation. Mr. Dunkel believes notice is irrelevant; the transmutation should not affect third parties at all unless recorded. "I think recording is a reasonable requirement for validity of any change in title to real property." The staff believes this position is sound and would delete the reference to third persons "without notice" of the transmutation.

§ 5110.920. Application of chapter

The draft statute applies the new presumptions retroactively, but applies the new characterization and transmutation rules only to property acquired after the operative date (preserving existing law as to property acquired before the operative date). Professor Reppy (Exhibit 4) is astonished by the prospective approach and points out the efforts that have been made in the past to apply new laws to all community property "to avoid the incredible problems caused by having different rules of management and control apply to different community assets." He sees this approach as sensible and the switch of the tentative recommendation inexplicable. The subcommittee of the State Bar Family Law Section was also confused by the discrepancy in operative date provisions, and the officers of the L.A. Bar Association (Exhibit 6) believe the provision requiring prospective application should be deleted. "Then the law would be consistent and most easily applied by both practitioners and the Courts." The staff agrees, and would apply all the new rules retroactively.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

6/25/83.

California Law Revision Commission

Regarding the Tentative Recommendation relating to Marital Property Presumptions and Transmutations, I am glad to see the Commission is proposing legislation to overrule the Lucas decision.

I have no special recommendations to make regarding the proposal and basically agree with its substance.

I don't think however that out of state real property should be characterized as community even though it was acquired during marriage. I would let the law of situs control the character of realty.

Thank you
Sincerely,
H

ROBERT K. MAIZE, JR.

Attorney at Law

900 COLLEGE AVENUE
P.O. BOX 11648
SANTA ROSA, CALIFORNIA 95406

TELEPHONE (707) 544-4462

July 8, 1983

California Law Revision Commission
4000 Middlefield Road, Suite 2-D
Palo Alto, CA 94306

Re: Marital Property Assumptions

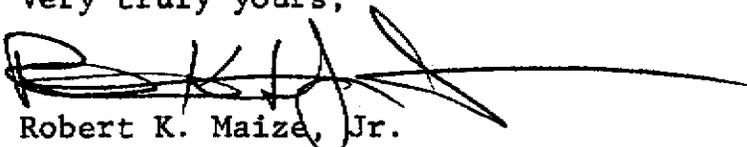
Gentlemen:

I have had an opportunity to review tentative Recommendations Relating to Marital Property Presumptions and Transmutations dated May 5, 1983.

There is one provision that I have difficulty with and that is the proposed Civil Code §110.630(b). I see a different set of rules being established for the probate of an estate of a deceased spouse than would be operating during the life of the spouse. It seems to me that property is either community property or not and the same conclusion should be reached either during the spouses lifetime or at the spouse's death. With the different presumptions that may not be the result.

I think that a single set of rules for determining the respective property rights, for all purposes, between the spouses would be preferable.

Very truly yours,



Robert K. Maize, Jr.

RKM:jb

 **The Crocker Bank**

Charles A. Dunkel
Vice President
Trust Officer

July 13, 1983

The California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: Marital Property Presumptions and Transmutations

Gentlemen:

The following comments relate to your tentative recommendation on the above subject dated May 5, 1983.

On Page 13, in the second paragraph you refer to Civil Code Section 5110.510. I am unable to locate this section either in the present code or in your recommended code sections.

On Page 15, proposed Section 5110.730(a) states that a transmutation of real property is not effective as to third parties without notice thereof unless recorded. I would eliminate "with notice thereof". I think recording is a reasonable requirement for validity of any change in title to real property.

In subsection (b) the phrase "other tangible articles of a personal nature" is used. I have difficulty with this terminology, it is not clearly defined in the law and is therefore subject to interpretation and litigation. I would either specify which other articles this section refers to or provide that all transmutations of personal property must be in writing.

On Page 13, Section 5110.640 presumes that most property acquired by a married person during marriage by gift from the person's spouse is community property. I feel the presumption should be that the property is separate property. A true gift transfers title to the donee. I see no reason for a presumption which negates the concept of a gift.

Except for the above, I approve of the tentative recommendation.

Yours truly,



Charles A. Dunkel
Vice President and Trust Officer

CAD:BW:1365

Duke UniversityDURHAM
NORTH CAROLINA
27706

SCHOOL OF LAW

July 21, 1983

TELEPHONE (919) 684-2834

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Nat:

I returned yesterday from a month in Europe and am immediately back to "the grind". I thank you for your letter concerning what bills relating to community property are and are not likely to be enacted. Also thanks for your reprint.

This letter is written primarily to express my negative reaction to proposed Civil Code § 5110.630. I think it will result in great unfairness.

Consider the typical situation where a wife in a second marriage of, say, twenty years' duration dies with a will leaving everything to her children by the first marriage. The wife never worked. Her husband did and invested income in stocks, etc., in his own name. The husband is aged sixty now and has worked for forty years.

The wife dies. Her children are going to have a hell of a time overcoming the presumption you want to impose on them that all the stocks are separate property because of the form of title. Common sense indicates that most of the stocks will stem from the last twenty years worth of earnings by the husband, but how can the stepchildren prove that? The mere fact that a block of stock was acquired during the marriage won't overcome the presumption of separate ownership, because that fact does not negate the possibility that the acquisition was made during marriage with funds earned before marriage. Time of acquisition (during marriage) raised under older cases a presumption of community ownership but your proposed statute indicates that presumption does not apply at death. Accordingly, the kids must negate as to each certificate in husband's name the possibility that the money used to buy the stock was traceable to pre-marriage savings. It is not enough for them to show that it is impossible or improbable that all the stocks could have such a source. See Estate of Adams, 132 Cal. App. 2d 190 (1955) (analogous problem).

Section 5110.36 with its anti-community bias is completely inconsistent with the emphasis in much of the reform legislation. It puts magic into "title" that is inconsistent with basic community property theory (and inconsistent with your laudatory effort to overrule the Lucas holding concerning effect of title to the minimotorhome).

I am also astonished by § 5110.920's approach to prospectivity. The Family Law Act of 1970 sought to apply the new laws there enacted to all community property to avoid the incredible problems caused by having different

Mr. Nathaniel Sterling
July 21, 1983

-2-

rules of management and control apply to different community assets. This was upheld as constitutional in Robertson v. Willis, 77 Cal. App. 3d 358 (1978). Why do we now back away from that sensible approach? Why not apply the new rule allowing reasonable gifts without a written consent to all community property? Why not bar post-1983 oral transmutation of all community realty? The switch in approach from the 1970 reform is inexplicable to me.

Sincerely,

Bill

William A. Reppy, Jr.
Professor of Law

WAR/hc

JACK E. COOPER

ATTORNEY AT LAW

225 BROADWAY, SUITE 1500

SAN DIEGO, CALIFORNIA 92101

(619) 232-4525

July 29, 1983

California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94306

Re: Marital Property Presumptions And Transmutations

Gentlemen:

Thank you for providing me with a copy of your tentative recommendation concerning the above-referenced subject.

I have just completed a hearing involving the following facts:

Man and wife, married for a number of years acquire property (real) with another couple. Later, to enable the husbands to deal with the property, more particularly with regard to a sale, the wives quit claim their interests to their husbands. Property is sold and note given for part of sale price is only in names of men. Later, husband and wife execute companion wills each of which states that all property they own is community property. Husband dies. Children of husband's first marriage, as pretermitted heirs, claim an interest in the promissory note as separate property.

Proposed §5110.630 raises the presumption that the property (note) is decedent's separate property.

Proposed §5110.710 permits transmutation of character of property, in this case from separate back to community.

Under the provisions of proposed §5110.730:

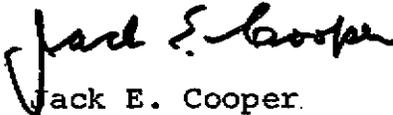
1. Is the apparent transmutation in the wills effective as far as the pretermitted children are concerned?
2. Since the surviving spouse was not adversely affected by the statement in the decedent's will, was she required to join in, consent to, or accept the transmutation? If so, is her will, executed at the same time sufficient?
3. Would you anticipate that the statement in the wills would be sufficient to overcome the presumption of §5110.630?

JACK E. COOPER

ATTORNEY AT LAW

The matter which I was involved in was on a petition to set aside a community property order. The decision of the court was to deny the petition to set aside. Although the decision was not based solely on transmutation of the note to community property, it was a matter considered by the court.

Very truly yours,

A handwritten signature in cursive script that reads "Jack E. Cooper". The signature is written in dark ink and is positioned above the typed name.

Jack E. Cooper.

1801 Century Park East
Suite 740
Los Angeles, California 90067
August 31, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Re: Tentative Recommendations
F-600, F-640 and L-627

Dear Sirs:

The undersigned officers of the Probate and Trust Law Section of the Los Angeles County Bar Association, speaking as individuals rather than officially on behalf of the Section, wish to comment on these Tentative Recommendations. Our individual practices reflect the experiences of city and suburb, large and small law firms, the wealthy and those with low and middle incomes.

F-600, Disposition of Community Property

The tentative recommendations appear to be basically sound. A technical correction should be made to Section 5125.299(c), so that January 1, 1983 is changed to January 1, 1985.

F-640, Marital Property Presumptions and Transmutations

This report, dated May 5, 1983, is a refinement of Study F-640 which was put out in Memorandum 82-103 dated October 14, 1982. At the time that memorandum came out, the Estate Planning, Trust and Probate Law Section of the California State Bar commented on the memorandum. While some of those comments apparently led to improvements, others apparently were not followed, so that some of the same problems continue to exist in Tentative Recommendation F-640. In general, the presumptions regarding title are much improved, but there are still problems which need to be addressed.

Applying normal conflict of laws provisions, it is unconstitutional for California to assert that property acquired while the party was domiciled outside of the State of California is community property. Normal tracing rules would indicate that that such property, separate when acquired, would remain separate, even though traced to the earnings of a spouse during marriage while residing in another state. Special rules regarding this type of property

(denominated "quasi-community property") have been devised to fairly govern disposition of that property at dissolution of the marriage or upon death of one of the marital partners. Section 5110.110 should continue to recognize the distinction and should be revised to read as follows:

"Except as otherwise provided by statute, all real property and all personal property wherever situated acquired by either spouse during marriage while domiciled in this state is community property."

Normal conflict of law provisions also state that the laws of the state where real property is located govern the character of real property. We understand that it may create an "anomaly" when community property funds are invested in real property in a state which does not recognize community property. However, California cannot unilaterally impose its system of property on other states. California can recognize the community source of such property when creating spousal rights at the dissolution of the marriage or at death. We believe it more appropriate to specifically address that issue through a separate section than in the definition of community property in Section 5110.110.

We recommend that the word "acquired" be substituted for the word "owned" in Section 5110.520. It is clear that if you acquire property prior to marriage, do not change title during the entire length of the marriage, do not contribute personal services to its management, and still own it at the time of dissolution of marriage, it is separate property. There is no reason to create a contrary statutory presumption merely to have it rebutted through the use of court time.

While generally the presumptions in 5110.640 are sound and in accord with people's usual expectations, we believe that the last line of subparagraph (b) will invite litigation over the issue of whether the gift is "substantial in value taking into account the circumstances of the marriage".

Section 5110.730, regarding transmutation, is a great improvement over both the previous versions and the current law.

The transitional provisions need revision. If we are going to enact statutory presumptions, they should apply to all marital property, even if acquired before the operative date of the statute. Section 5110.930 makes a meaningful distinction for purposes of litigation. However, Section 5110.930 conflicts with § 5110.920, because 930 requires use of the presumptions regardless of when the property has been acquired and 920 says the presumptions do not apply to acquisitions prior to January 1, 1985. Section 5110.920 should

be omitted so long as the definition of community property is not altered and the changes to rebuttable presumptions do not alter the rights of any parties. Section 5110.699 recognizes the rights of married women who acquired property before January 1, 1975. Section 5110.630(b) should also be changed to recognize the rights and expectations of parties who acquired property before January 1, 1985, as discussed in more detail below. We believe it is better policy to correct Section 5110.630(b) and eliminate Section 5110.920 than to retain Section 5110.920. Then the law would be consistent and most easily applied by both practitioners and the Courts.

Subsection (b) of Section 5110.630 states that if the form of title does not state the separate or community character of the property, property standing in the name of one spouse is presumed to be separate upon the death of a married person. California should not enact such a presumption. When community property management was the sole province of the husband, it was exceedingly common for title to community property to be taken in the name of the husband as a married man. It was universally understood that said property was community property of the husband and wife. Since that form of title does not explicitly state that it is community property, under the proposed change to the law, that property would be treated as separate property. This would create grave injustice to many married couples through the State.

It would be far fairer to all parties to hold that if the form of title does not state the separate or community character of the property, then the property shall be presumed to be community absent clear evidence to the contrary. This has two salutary effects. (1) In the case of property acquired before January 1, 1975, with title in the name of the husband, it confirms the community nature of that property, thus according with the usual practice at the time and with the understanding of the parties. (2) If we are really to encourage the independent management and control by either husband or wife without transmutation of the property, then it seems that all presumptions, whether at death or during lifetime, should be consistent with that. It is inconsistent and illogical to create a special rule for property passing at death. We suggest revising subsection (b) to state that

"Upon the death of a married person, property owned by either spouse is presumed to be owned in the manner stated in the form of title. If the form of title does not state the separate or community character of the property, property acquired during marriage standing in the name of either spouse or in the names of both spouses is presumed to be community."

L-627, Execution of Witnessed Wills

A.B. 25, submitted to the legislature by the Law Revision Commission, contained provisions substantially identical to the provisions in this report. Members of the Los Angeles County Bar Association, including ourselves, and others criticized these provisions. Because of the almost universal negative reaction of the Bar, A.B. 25 was amended during the legislative process. It appears that A.B. 25 will soon become law in a form which takes into account the numerous comments of California lawyers acting individually and through their bar associations. We see no need for further change.

While there is no doubt that some wills have been invalidated in cases where there was no doubt that the testator intended the instrument to be a will and there was no suspicion of fraud, these cases are not numerous. There are other situations where the presence of more than one disinterested witness helps to insure the lack of fraud, duress or undue influence and provides valuable evidence of testamentary capacity. While some states may not have the requirement of two witnesses, other jurisdictions have the same requirements or ones which are more strict than ours.

With a growing aged population, separated from close family by distance, the opportunity for abuse and fraud by caretakers or others will increase. It is in the public interest to encourage the solemnity of those occasions when a person provides for disposition of property to take effect at death. The chances for abuse are most present when the testator is not wealthy.

Local practice among middle and lower income clients makes the attorney aware of the opportunities for fraud and deception not seen by "high powered law firms" and which wealthy clients are not exposed to. Since the erosion of the disinterested witness rules is already likely to be enacted with the enactment of A.B. 25, we believe it is much better for the State to see how the new provisions work and whether substantial justice or injustice is served before further eroding these safeguards.

Contrary to the expectations of the drafters, by permitting formal execution of a Will by witnesses at more than one time and place, the chances for invalidating a will may actually increase. The necessity for proving compliance with the formalities on two separate occasions would increase the possibility of failure of proof on one of those two occasions.

Because we consider the presence of at least two witnesses to be important, one notary public is not a sufficient safeguard for testators and their heirs and beneficiaries. The Uniform Probate Code requires two witness and a swearing to a notary public by the testator and both witnesses to have a self-proving will. This is the law in Colorado and we've been told it works well there. If such were enacted here, we might be willing to support the revised language of Section 6110(c)(1).

We urge you to carefully consider our comments. We believe the constructive criticism offered can greatly improve Tentative Recommendation F-640. We believe it would be a mistake, however, for the Law Revision Commission to continue to press for the passage of the provisions in L-627 as currently drafted.

Very truly yours,

Leslie D. Rasmussen

Leslie D. Rasmussen
Chair

Robert D. Bannon

Robert D. Bannon
Vice-Chair

Valerie J. Merritt

Valerie J. Merritt
Secretary-Treasurer

VJM:par

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

MARITAL PROPERTY PRESUMPTIONS AND TRANSMUTATIONS

May 5, 1983

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN AUGUST 31, 1983.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

TENTATIVE RECOMMENDATION

relating to

MARITAL PROPERTY PRESUMPTIONS AND TRANSMUTATIONS

Property acquired during marriage is as a general rule community property, unless acquired with separate funds.¹ Thus there is a presumption that property of a married person is community property, but the married person can rebut the presumption by tracing to a separate property source.² These rules can be altered by agreement of the spouses. In particular, the spouses can indicate their intent with respect to the character of the property initially by specifying the form of title in which it is held, and thereafter the spouses can transmute the character of the property as between each other (and to some extent as it affects third parties).³

Separate Property Title Presumptions

Civil Code Section 5110, in addition to stating the basic rule that all property acquired during marriage is community property unless acquired with separate property funds, also states a number of exceptions based on presumptions drawn from the form of title to property. Among the title presumptions created by Section 5110 are:

(1) Property acquired by a married woman by an instrument in writing prior to January 1, 1975, is presumed to be her separate property. This presumption dates from the time when the husband had management and control of community property (prior to January 1, 1975) and does not apply to property over which the wife had management and control.⁴ The

1. Civil Code §§ 687, 5110.

2. See, e.g., discussion in Lichtig, Characterization of Property, in 1 California Marital Dissolution Practice § 7.16 (Cal. Cont. Ed. Bar 1981); Comment, Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement," 15 U.C.D. L. Rev. 95, 97-98 (1981).

3. See generally Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 829-30 (1982).

4. In re Marriage of Mix, 14 Cal.3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).

presumption can be rebutted both by tracing to a community property source and by evidence of a contrary understanding or agreement of the parties.⁵

(2) Property described in paragraph (1) that is acquired with another person is presumed to be held as tenants in common. However, if the other person with whom the married woman acquires property is her husband and the instrument describes them as husband and wife, the presumption is that the property is community. This presumption was enacted to overcome the rule of Dunn v. Mullan⁶ that husband and wife acquisitions were presumptively half community and half the separate property of the wife. The presumption is now restricted to pre-January 1, 1975, property. It cannot be rebutted by tracing to a source of separate property but only by evidence of a contrary understanding or agreement of the parties.⁷

(3) Although Civil Code Section 5110 expressly limits the title presumptions applicable to a married woman to property acquired before January 1, 1975,⁸ the cases nonetheless continue the effect of the title presumptions by creating an inference of a gift as to property acquired before or after January 1, 1975. If title is taken in the name of one spouse alone, and if the other spouse was aware of the state of title and acquiesced or did not object, there is an implication or inference that a gift has been made and that the property is the separate property of the spouse in whose name title stands.⁹

The case law inference of a gift, like the statutory presumption of the separate property of the wife, dates from a time when the husband had management and control of the community property. At that time it was logical to find a gift when the husband allowed title to stand in the wife's name alone. However, with either spouse having management and control of the community property, this logic is no longer apt. The Legislature limited the separate property statutory presumption to pre-January 1, 1975, property when it enacted equal management and control,

5. In re Marriage of Rives, 130 Cal. App.3d 138, 181 Cal. Rptr. 572 (1982).

6. 211 Cal. 583, 296 P. 604 (1931).

7. In re Marriage of Cademartori, 119 Cal. App.3d 970, 174 Cal. Rptr. 292 (1981).

8. 1973 Cal. Stats. ch. 987, § 5.

9. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 583 (1980).

but the courts have failed to overturn the corresponding separate property case law gift implication.

In In re Marriage of Lucas,¹⁰ for example, title to a mini-motorhome acquired in part with community funds and in part with separate funds of the wife was taken in the wife's name alone; the husband did not object to the form of title. The court found the mini-motorhome to be the separate property of the wife based on the case law inference that a gift is created by title in the wife and the husband's failure to object, despite evidence tracing the source of the funds.

Under equal management and control the husband had no reason or right to make such an objection. The wife was entitled to manage and control the community property funds and could purchase property with them in her own name if she wished to do so. There is no reason why one spouse, living happily with the other and not contemplating dissolution of marriage, would object when the other spouse exercises the statutory equal management and control powers. The gift inference of Lucas seems contrary to public policy in that it penalizes the husband for acceding to his wife's exercise of equal management powers.¹¹ Under equal management and control, convenience, concerns with insurance, taxation or probate, or chance may be more likely to determine which spouse purchases or takes title to a given item than is an independent decision of the spouses as to ownership.¹²

In addition to the fact that the rationale for the separate property title presumptions is no longer sound, the presumptions have caused substantial problems in practice. The courts have failed to provide a standard to determine whether a "common understanding or agreement" between the spouses exists sufficient to overcome the effect of the presumptions, with detrimental results for the parties, their attorneys,

10. 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 583 (1980).

11. The gift preference interjects disharmony into marriage by encouraging husbands to demand that their wives carry on management powers only in the husband's or both partner's names. Reppy, Debt Collection for Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 157 (1981).

12. Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 227, 265 (1982).

and the judicial system.¹³ Moreover, application of the presumptions has led to anomalous results in a number of situations.¹⁴

Civil Code Section 5110 should be revised not only to eliminate the title presumptions but also to overrule the title inferences of separate property. These presumptions and inferences were intended to protect the interest of the wife in an era when her rights in the community were minimal, but the presumptions and inferences are now obsolete. The law should continue to state the basic rule that all property acquired during marriage is community unless traced to a separate property source or transmuted by the spouses. The form of title should not create a separate property presumption or inference but should simply be evidence, like any other, of the intent of the spouses as to the manner of holding the property.¹⁵

Out-of-State Real Property

Community property, as defined by Civil Code Section 5110, does not include real property situated outside California, even though the property may have been acquired by the spouses with community property during their marriage while domiciled in California.¹⁶ The reason for this gap in the community property law is the assumption that California courts will apply the universally accepted choice of law rule that the law of the situs of real property governs the nature of interests acquired therein. Therefore, it is for the situs state to determine the kinds of estates in real property that exist there and to determine which of these is acquired in consequence of a purchase by a married person domiciled in California.¹⁷

13. Comment, Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement," 15 U.C.D. L. Rev. 95 (1981).
14. See discussion in Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 247-55 (1966).
15. This rule would not apply upon the death of a spouse, where the use of title presumptions would expedite passage of title and resolution of probate questions.
16. Civil Code Section 5110 provides, in relevant part, that "all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state . . . is community property."
17. See Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere, 3 Cal. L. Rev. Comm'n Reports at I-12 to I-13 (1961).

Notwithstanding the rule that marital real property situated outside California is not community property, the property may nonetheless be treated as community property for purposes of division of property at dissolution of marriage or legal separation.¹⁸ Although the California court dividing the property cannot directly affect title to the property, if the court has personal jurisdiction over parties it can make appropriate orders to effectuate the division.¹⁹

The statute should accurately state that community property may include out-of-state real property. The California courts properly exercise their jurisdiction over out-of-state real property to the greatest extent possible, and this practice should be statutorily confirmed.²⁰

Transmutations

Apart from the effect of the form of title in creating presumptions or inferences as to the character of marital property, there is a body of law governing agreements between the spouses to change community property to separate and separate property to community. Agreements of this type are known as transmutations. Under California law it is quite easy for spouses to transmute both real and personal property; a transmutation can be found based on oral statements or implications from the conduct of the spouses.²¹

California law permits an oral transmutation or transfer of property between the spouses notwithstanding the statute of frauds.²² This

18. See, e.g., *Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11 (1957); *Ford v. Ford*, 276 Cal. App.2d 9, 80 Cal. Rptr. 435 (1969).

19. See Civil Code § 4800.5; Report of Assembly Committee on Assembly Bill 124, Assembly J. (March 11, 1970) at 1109.

20. This recommendation is consistent with that made in Liability of Marital Property for Debts, 17 Cal. L. Revision Comm'n Reports 1, 12-13 (1984). Where it is desirable to limit the jurisdiction of the court, this may be done specifically. See, e.g., Prob. Code § 28 ("community property" defined) [AB 25].

21. For a detailed analysis of the law, see Reppy, Debt Collection From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981); 7 B. Witkin, Summary of California Law Community Property § 73, at pp. 5161-62 (8th ed. 1974).

22. See, e.g., *Woods v. Security First National Bank*, 46 Cal.2d 697, 299 P.2d 657 (1956). California is the only community property jurisdiction that has a clearly established rule dispensing with the statute of frauds in land transmutation cases. W. Reppy, Community Property in California 39 (1980).

rule recognizes the convenience and practical informality of inter-spousal transfers.²³ However, the rule of easy transmutation has also generated extensive litigation in dissolution proceedings. It encourages a spouse, after the marriage has ended, to transform a passing comment into an "agreement" or even to commit perjury by manufacturing an oral or implied transmutation.

The convenience and practice of informality recognized by the rule permitting oral transmutations must be balanced against the danger of fraud and increased litigation caused by it. The public expects there to be formality and written documentation of real property transactions, just as it expects there to be formality in dealings with personal property involving documentary evidence of title, such as automobiles, bank accounts, and shares of stock. Most people would find an oral transfer of such property, even between spouses, to be suspect and probably fraudulent, either as to creditors or between each other.

California law should continue to recognize informal transmutations for certain personal property gifts between the spouses, but should require a writing for a transmutation of real property or other personal property. In the case of personal property "gifts" between the spouses, gifts of most items such as household furnishings and appliances should be presumed community and gifts of clothing, wearing apparel, jewelry, and other tangible articles of a personal nature should be presumed separate (unless large or substantial in value). These presumptions most likely correspond to the expectations of the ordinary married couple.

Fraudulent Conveyances

The general rule is that if a transmutation is not fraudulent as to creditors of the transferor, the transmutation can affect the right of creditors to reach the property.²⁴ Whether a transmutation is fraudulent as to creditors is governed by general fraudulent conveyance law.²⁵

23. See discussion in Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 227, 262 (1982).

24. Cf. Bailey v. Leeper, 142 Cal. App.2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); Wikes v. Smith, 465 F.2d 1142 (1972) (bankruptcy).

25. Uniform Fraudulent Conveyance Act, Civil Code §§ 3439-3439.12. The act affects the validity of a transfer as to third-party creditors and not as between the parties to the transfer.

If a transfer of property from one member of a household to another has the effect of defeating creditors, the transfer is inherently suspect, whether the parties to the transfer are husband and wife, parent and child, or occupy some other relationship within the household. The likelihood of fraud in such a situation is sufficiently great that, in addition to the general rules governing fraudulent conveyances, two other rules apply to the transfer:

(1) The transfer is conclusively presumed fraudulent as to creditors if there is no immediate delivery of the property followed by an actual and continued change of possession.²⁶

(2) The intimate relationship between the parties to the transfer may raise an inference of fraud as to creditors.²⁷

The conclusive presumption of fraud is ill-suited to transfers between members of a household.²⁸ The main purpose of Civil Code Section 3440 in requiring an immediate delivery and continuous change of possession is to give notice to creditors.²⁹ This purpose is difficult to achieve in a household setting where the personal property that is transferred may remain in the same place as before and may be used by the same persons of the household who originally used it. There may be an actual and bona fide transfer of ownership between members of a household, but the transfer may not be apparent to third parties.

Transfers of personal property between household members tend to be casual and informal. The formalities applicable to a transfer in a purely business relationship are unwarranted in such a setting. Failure

26. Civil Code § 3440. Section 3440 governs all transfers in which there is no delivery and change of possession of the property transferred, including transfers within the household. See, e.g., *Pfunder v. Goodwin*, 83 Cal. App. 551, 257 P. 119 (1927); *Gardner v. Sullivan & Crowe Equipment Co.*, 17 Cal. App.3d 592, 94 Cal. Rptr. 893 (1971).

27. See, e.g., *Wood v. Kaplan*, 178 Cal. App.2d 227, 2 Cal. Rptr. 917 (1960).

28. See Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 227, 270 (1982); Reppy, Debt Collection From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 221-25 (1981).

29. See *Joseph Henspring Co. v. Jones*, 55 Cal. App. 620, 203 P. 1038 (1921).

of delivery between household members should not be conclusively presumed fraudulent. The members should at least have the opportunity to rebut the presumption of fraud and show that the transfer was bona fide. Otherwise, every transfer among household members, even though bona fide, will be fraudulent as to creditors since the transferor will always remain in constructive possession as a member of the household.

Elimination of the conclusive presumption of fraud in a transfer of personal property between members of the same household would not validate a transaction made with the purpose of defeating creditors. The Uniform Fraudulent Conveyance Act enables a creditor to avoid such a transfer not only if it was made with fraudulent intent but also if it was made for less than a fair consideration and either resulted in the transferor's insolvency or was made once the transferor was already insolvent. In the reported cases dealing with transfers with a household, inequitable results to third-party creditors could readily have been avoided without the conclusive presumption of fraud.³⁰

Elimination of the conclusive presumption of fraud will not affect the inference of fraud that may be drawn from an intrahousehold transfer. It has been held judicially that since direct proof of fraudulent intent is often impossible because the real intent of the parties and the facts of a fraudulent transaction are peculiarly within the knowledge of the parties to the fraud, a creditor may infer fraud from circumstances surrounding the transaction, the relationship, and the interest of the parties.³¹ The relationship of parent and child, for example, when coupled with suspicious circumstances may be sufficient to raise an inference of fraud in a conveyance from one to the other.³² The inference of fraud should be codified as a presumption affecting the burden of proof, to replace the conclusive presumption of fraud in a transfer within the household.

30. See Bruch, Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hastings L.J. 227, 270 (1982).

31. See, e.g., Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935).

32. See, e.g., Menick v. Goldy, 131 Cal. App.2d 542, 280 P.2d 844 (1955).

The Commission's recommendations would be effectuated by enactment of the following measure.

An act to add Sections 3444 and 5109 to, to add Chapter 2 (commencing with Section 5110.110) to Title 8 of Part 5 of Division 4 of, and to repeal Sections 687 and 5110 of, the Civil Code, relating to marital property.

The people of the State of California do enact as follows:

043/144

SECTION 1. Section 687 of the Civil Code is repealed.

~~687. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.~~

Comment. The substance of former Section 687 is continued in Section 5110.110 (all property acquired during marriage is community).

045/081

SEC. 2. Section 3444 is added to the Civil Code to read:

3444. In the case of a transfer between members of the same household of personal property within or incident to the household, the presumption created by this chapter is not conclusive but is a presumption affecting the burden of proof.

Comment. Section 3444 is added in recognition of the fact that a valid transfer of property between members of a household may not involve an actual and continued change of possession due to the nature of household property. Section 3444 in effect codifies the inference of fraud that may arise in such a transfer. See, e.g., *Menick v. Goldy*, 131 Cal. App.2d 542, 280 P.2d 844 (1955).

045/082

SEC. 3. Section 5109 is added to the Civil Code to read:

5109. As used in this title, real property does include, and personal property does not include, a leasehold interest in real property.

Comment. Section 5109 continues the substance of the last sentence of former Section 5110.

SEC. 4. Section 5110 of the Civil Code is repealed.

5110. Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. When a single/family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single/family residence is the community property of the husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyance, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

Comment. The substance of the first portion of the first sentence of former Section 5110 is continued in Section 5110.110 (all property acquired during marriage is community). The substance of the second

portion of the first sentence and the third sentence are continued in Section 5110.699 (property acquired by married woman before January 1, 1975).

The second sentence relating to a single-family residence held in joint tenancy form is superseded by Section 4800.1 [AB 26]. The fourth sentence relating to actions to invalidate a conveyance of real property acquired by a married woman prior to May 19, 1889, is not continued because it is obsolete. The last sentence is continued in Section 5109 (leasehold interest as real or personal property).

045/209

SEC. 5. Chapter 2 (commencing with Section 5110.110) is added to Title 8 of Part 5 of Division 4 of the Civil Code, to read:

CHAPTER 2. CHARACTERIZATION OF MARITAL PROPERTY

Article 1. Community Property

§ 5110.110. All property acquired during marriage is community

5110.110. Except as otherwise provided by statute, all real property and all personal property wherever situated acquired by either spouse during marriage is community property.

Comment. Section 5110.110 continues the substance of former Section 687 and the first portion of former Section 5110, and extends the definition to include real property situated outside this state. Section 5110.110 states the basic rule that all property acquired during marriage is community unless it comes within a specified exception. The major exceptions are those relating to separate property. See, e.g., Sections 5107 (separate property of wife), 5108 (separate property of husband), 5126 (personal injury damages). Community property may be converted to separate property by transmutation or by a general marital property agreement. See, e.g., Section 5110.710 (transmutation). Section 5110.110 is not an exhaustive statement of property classified as community. See, e.g., Section 5113.5 (property transferred to trust).

101/182

[Articles 2-5. Reserved]

Article 6. Presumptions

§ 5110.610. Effect of presumptions

5110.610. (a) The presumptions established by this article are presumptions affecting the burden of proof.

(b) The presumptions established by this article are rebuttable by tracing the property to a different source or by proof of a transmutation of the character of the property.

Comment. Section 5110.610 codifies the rule that the statutory presumptions as to the character of marital property are rebuttable presumptions affecting the burden of proof. They may be rebutted by tracing the property to a contrary source or by proof of a contrary agreement of the spouses. See, e.g., discussion in Lichtig, Characterization of Property, in 1 California Marital Dissolution Practice § 7.13 (Cal. Cont. Ed. Bar 1981).

404/105

§ 5110.620. Community property presumption

5110.620. Except as otherwise provided by statute, property owned by either spouse during marriage is presumed to be community property.

Comment. Section 5110.620 codifies the case law community property presumption, rebuttable by agreement or by tracing to a separate property source. See, e.g., Haldeman v. Haldeman, 202 Cal. App.2d 498, 21 Cal. Rptr. 75 (1962); Lynam v. Vorwerk, 13 Cal. App. 507, 110 P. 355 (1910); See v. See, 64 Cal.2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966). Exceptions to the general community property presumption created by this section may be found in Sections 5110.630 (title presumptions) and 5110.640 (gift presumptions). [See also Article 5 (commencing with Section 5110.510) (community property with right of survivorship).]

2940

§ 5110.630. Title presumptions

5110.630. (a) Except as otherwise provided by statute, the form of title to property acquired by either spouse during marriage does not create a presumption or inference as to the character of the property, and is not in itself evidence sufficient to rebut the presumptions established by this article.

(b) Upon the death of a married person, property owned by either spouse is presumed to be owned in the manner stated in the form of title. If the form of title does not state the separate or community character of the property, property standing in the name of one spouse is presumed to be separate and property standing in the names of both spouses is presumed to be community.

Comment. Subdivision (a) of Section 5110.630 makes clear that the form in which title to property is taken does not create a presumption or inference contrary to the basic community property presumption. This overrules cases that held, for example, that where title to property acquired with community funds is taken in the name of one spouse alone with the knowledge of and without objection by the other spouse, there

is an inference of a gift of community property to the person in whose name title is taken. See, e.g., In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). Under Section 5110.630 the form of title may be evidence of an agreement or of the source of the property, the weight of which depends on the circumstances of the case. The form of title is not in itself sufficient to rebut the basic community property presumption. A change in the form of title made during marriage in connection with a transmutation or transfer of ownership, however, may be evidence sufficient to rebut the community property presumption.

The rule of subdivision (a) that the form of title does not create a presumption as to the character of the property is subject to a number of exceptions. Subdivision (b) creates title presumptions for the purpose of probate and passage of title upon the death of spouse. Section 4800.1 [AB 26] creates a presumption for the purpose of division of property at dissolution of marriage applicable to property acquired in joint tenancy form. [See also Article 5 (commencing with Section 5110.510) (community property with right to survivorship).]

404/106

§ 5110.640. Gift presumptions

5110.640. The following presumptions apply to property acquired by a married person during marriage by gift from the person's spouse:

(a) Except as provided in subdivision (b), the property is presumed to be community property.

(b) Clothing, wearing apparel, jewelry, and other tangible articles of a personal nature, used solely or principally by the person, are presumed to be the person's separate property except to the extent they are substantial in value taking into account the circumstances of the marriage.

Comment. Section 5110.640 qualifies the general rule that property acquired by a spouse by gift during marriage is separate property. See Sections 5107 (separate property of wife) and 5108 (separate property of husband). Notwithstanding this general rule, interspousal "gifts" are presumed to be separate or community depending on the nature of the property given. Section 5110.640 also qualifies the general rule that the spouses may transmute the character or ownership of property. See Section 5110.710 (transmutation). The presumptions established by Section 5110.640 can be rebutted by proof that the parties intended by the gift a transmutation of the character of the property.

§ 5110.699. Property acquired by married woman before January 1, 1975

5110.699. Notwithstanding any other provision of this chapter, whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the following presumptions apply, and are conclusive in favor of any person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest, regardless of any change in her marital status after acquisition of the property:

(a) The presumption is that the property is the married woman's separate property.

(b) If acquired by the married woman and any other person, the presumption is that the married woman takes the part acquired by her as tenant in common, unless a different intention is expressed in the instrument.

(c) If acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that the property is the community property of the husband and wife.

Comment. Section 5110.699 continues the substance of a portion of former Section 5110.

404/192

Article 7. Transmutation

§ 5110.710. Transmutation of character of property

5110.710. Notwithstanding any other provision of this title and subject to the limitations provided in this article, the spouses may by agreement or transfer, with or without consideration, do any of the following:

(a) Transmute community property to separate property of either spouse.

(b) Transmute separate property of either spouse to community property.

(c) Transmute separate property of one spouse to separate property of the other spouse.

Comment. Section 5110.710 codifies the basic rule that spouses may transmute the character of community or separate property. See, e.g., discussion in Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981). In addition to the limitations on transmutation provided in this article, the spouses are subject to the general rules governing the validity of agreements and transfers as well as the special rules that control the actions of persons occupying confidential relations with each other. See Section 5103. The characterization of community and separate property may be affected by a general marital property agreement, antenuptial or otherwise, as well as by a transmutation of specific property.

404/286

§ 5110.720. Fraudulent conveyance laws apply

5110.720. A transmutation is subject to the laws governing fraudulent transfers.

Comment. Section 5110.720 codifies existing law. Cf. Bailey v. Leeper, 142 Cal. App.2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); Wikes v. Smith, 465 F.2d 1142 (1972) (bankruptcy). See, e.g., Section 3444 (presumption of fraud in transfer between members of household without delivery).

101/157

§ 5110.730. Form of transmutation

(a) A transmutation of real property is not valid unless made in writing and is not effective as to third parties without notice thereof unless recorded.

(b) A transmutation of personal property is not valid unless made in writing. This subdivision does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature.

(c) A transmutation is not valid unless made by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.

Comment. Section 5110.730 imposes formalities on interspousal transmutations for the purpose of increasing certainty in the determination whether a transmutation has in fact occurred.

Subdivision (a) makes clear that the ordinary rules and formalities applicable to real property transfers apply also to transmutations of real property between the spouses. See Civil Code §§ 1091, 1624 (statute of frauds); 1213-1217 (effect of recording). This overrules existing

case law. See, e.g., *Woods v. Security First Nat'l Bank*, 46 Cal.2d 697, 701, 299 P.2d 657, 659 (1956).

Subdivision (b) overrules existing law that permits oral transmutation of personal property; however, an oral transmutation by gift of certain personal property is recognized.

404/942

[Article 8. Reserved]

Article 9. Transitional Provisions

§ 5110.910. Operative Date

5110.910. As used in this article, "operative date" means January 1, 1985.

§ 5110.920. Application of chapter

5110.920. Except as otherwise provided in this article, this chapter applies only to marital property acquired on or after the operative date. Marital property acquired before the operative date is governed by the applicable law in effect before the operative date.

§ 5110.930. Presumptions

5110.930. The presumptions established by this chapter apply in a proceeding commenced on or after the operative date, regardless whether the property was acquired before, on, or after the operative date. commenced.