

# Estate Planning and Family Law

## ~When Paths Cross~



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## Recent Estate Cases to Note



- ❖ Trotter v. Van Dyck (6/27/24) – Writings to amend a trust must be signed and adequately express an intent to amend the trust. (Trustee expressed intention to exclude a beneficiary via email and a questionnaire. She passed away before a formal amendment was made.)
- ❖ Reich v. Reich (10/24/24) – Probate court correctly declined to include the proceeds from H's IRA in W's omitted spouse share because those proceeds were to part of his "estate". The court held that the IRA proceeds are nonprobate assets and do not pass through the decedent's testamentary trust to the separate trusts created for the beneficiaries. Therefore, the IRA proceeds are not part of H's "estate" for the purpose of calculating W's omitted spouse's share.

# California Family Law Cases



❖ Marriage of Starkman (2005) – Trust agreement providing property transferred to trust was community property unless transferor identified it as separate property was insufficient to create a transmutation of H's separate property to community property.

❖ Marriage of Holtemann (2008) – Trust transmutation agreement effected a transmutation of separate property to community property, notwithstanding language that purported to qualify, limit or condition the transfer.

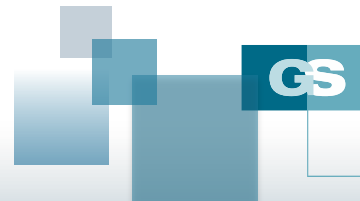
# California Family Law Cases



- ❖ Marriage of Lafkas II (2015) – When the provisions of sections FC§2581 [community property presumption] and FC§852 [transmutation] conflict, the transmutation requirements of section FC§852 must be met before the joint title presumption of section FC§2581 applies

# Estate Planning in Family Law

- We rely heavily on any estate planning documents that exist –
  - Trust agreements
  - Wills
- Premarital agreements
- Postnuptial agreements
- Applicable California Family Code sections:
  - FC §760-761 – Community Property
  - FC §770-772 – Separate Property
  - FC §852 – Transmutation of Property
  - FC §1615 – Premarital Agreements
  - FC §2581 – Acquisitions During Marriage Presumed Community
  - FC §2640 – Separate Property Rights of Reimbursement




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# California Family Code - Character of Property

**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.

## **Family Code §761** –

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- a) Unless the trust instrument or the instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee, if the trust, originally or as amended before or after the transfer, provides that the trust is revocable as to that property during the marriage and the power, if any, to modify the trust as to the rights and interests in that property during the marriage may be exercised only with the joinder or consent of both spouses.
  - b) Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. Community property, including any income or appreciation, that is distributed or withdrawn from a trust by revocation, power of withdrawal, or otherwise, remains community property unless there is a valid transmutation of the property at the time of distribution or withdrawal.
  - c) The trustee may convey and otherwise manage and control the trust property in accordance with the provisions of the trust without the joinder or consent of either spouse unless the trust expressly requires the joinder or consent of one or both spouses.

# California Family Code - Character of Property

**Family Code §770** - Separate property of a married person includes all of the following:

- 1) All property owned by the person before marriage
- 2) All property acquired by the person after marriage by gift, bequest, devise, or descent
- 3) The rents, issues, and profits of the property described in this section

**Family Code §771** - The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, after the date of separation of the spouses, are the separate property of the spouse.

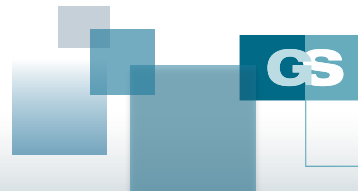
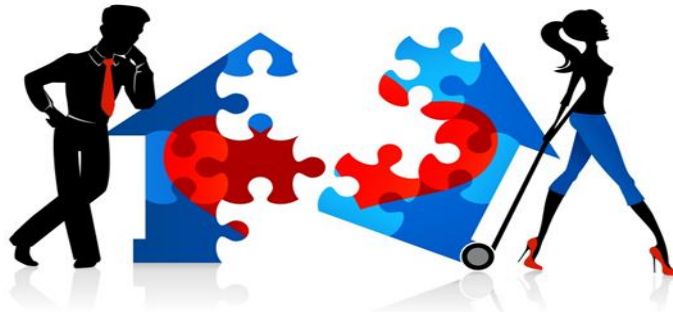
**Family Code §772** - After entry of a judgment of legal separation of the parties, the earnings or accumulations of each party are the separate property of the party acquiring the earnings or accumulations.

**Family Code §852** – A transmutation of real or personal property is not valid unless 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.

# California Family Code - Character of Property

**Family Code §2581** - Property acquired by the parties during marriage is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

- (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
- (b) Proof that the parties have made a written agreement that the property is separate property.



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# California Family Code - Character of Property

## **Family Code §2640** – Separate Property Rights of Reimbursements

(a) Contributions of separate property to community real property: "Contributions to the acquisition of property," as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(b) Contributions of separate property to community real property: 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.*

(c) Contribution of separate property to separate property: A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement. 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.



# California Family Code



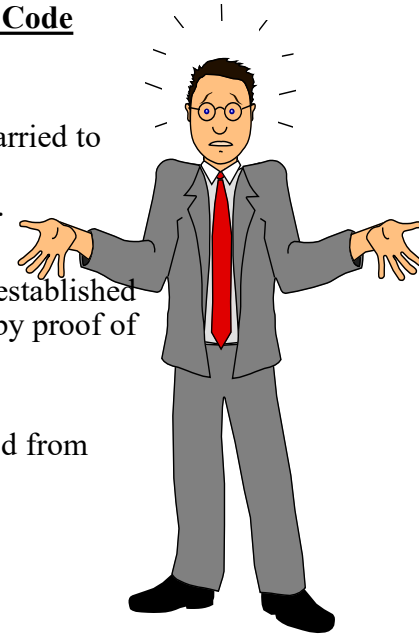
# Premarital Agreements

## **Family Code §1615 –**

- a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves the agreement (1) was not executed voluntarily or (2) was unconscionable when executed:
  - a) Not provided a fair, reasonable, and full financial disclosure
  - b) Did not voluntarily and expressly waive any right to disclosure
  - c) Did not have an adequate knowledge of the property or financial obligations
- b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
- c) A premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:
  - 1) Legal counsel or waiver
  - 2) Seven days between when final agreement first presented and signature
  - 3) If no legal counsel, must be fully informed in writing before PMA is signed
  - 4) No duress, fraud, or undue influence, and the party did not lack capacity
  - 5) Any other factors the court deems relevant.

# Probate Code §5305

- ❑ **Character of funds on deposit in a joint bank account is controlled by Probate Code §5305**
- ❑ a) Notwithstanding Sections 5301 to 5303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.
- ❑ (b) Notwithstanding Sections 2581 and 2640 of the Family Code, the presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:
  - ❑ (1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that the sums be their community property.
  - ❑ (2) The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.
- ❑ (c) Except as provided in Section 5307, a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, may not be changed by will.
- ❑ (d) Except as provided in subdivisions (b) and (c), a multiple-party account created with community property funds does not in any way alter community property rights.



## Example #1 – Character of Property in Trust

- H is in the business of buying, managing, and selling multi-unit apartment complexes. The ‘business’ was started before marriage, but properties are purchased primarily in separate entities.
- Two trusts were made for estate planning purposes – a family trust and H’s trust
- A specific list of assets were specified as H’s separate property and transferred to H’s trust and the family trust was a catch-all for everything that was not transferred to H’s trust.
- Family trust agreement noted community property to remain community property and separate property to remain separate property

## Example #1 – Character of Property in Trust

- The following types of real property transactions occurred during the marriage:
  - Purchased before marriage INO an LLC and transferred to the family trust
  - Purchased during marriage INO H's trust
  - Purchased during marriage INO H and transferred to the family trust
  - Purchased during marriage INO the family trust
  - Purchased during marriage INO H trust and an LLC created at the time of purchase
  - Purchased post-separation INO family trust
  - Purchased post-separation INO family trust and an LLC created at the time of purchase

## Example #2 – Premarital Agreements

### Premarital Agreement – Represented by counsel

- Mutual waiver of right to spousal support
- Separate property remains separate – each had a business
- 1/3 of business net income each year, up to \$50k, can be distributed as separate property. Must be deposited to separate account.
- Each party can take up to \$250k of funds from community property as separate property to be equalized upon dissolution
- Net equity of real property at date of marriage is separate, all growth is community
- All funds deposited to joint accounts opened during the marriage are intended to be community property and is a gift to the community.

### Postnuptial Agreement #1: Not represented by counsel

- Loan from community increased to \$400k
- H to loan community \$600k to buy residence
- W's business now characterized as a community asset
- Court determined both agreements to be valid and enforceable

## Example #3 – Estate Planning

- Parties were married in 1997.
- H owned and operated a business.
- W was in charge of the personal finances and managed the cash flow from their 8 investment rental properties.
- For estate planning purposes, H appointed W as power of attorney.
- During the years 2017 through 2022, W acted as H's power of attorney and sold 7 of the parties' 8 investment properties without H's knowledge (4 in Arizona; 3 in California)
- Case settled before breach of fiduciary duty trial



## Example #4 – Lack of Estate Planning

- Parties filed for divorce in their elder years, second marriage for each
- The divorce was instigated by Moneyed Party's children from 1<sup>st</sup> marriage due to concerns over inheritance
- Had there been a trust in place, the divorce, and related cost, could have been avoided