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UNTIL DEATH DO US PART: MARITAL PROPERTY CHARACTERIZATION IN THE POSTMORTEM SETTING

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I. INTRODUCTION

The commingling of community and separate property can present significant challenges when assets are to be divided at the end of a marriage. While the bulk of the law on this subject arises from marriages that end in divorce, the division of commingled property at death often receives short shrift. This article analyzes the primary authority on this subject, and discusses the reality that some secondary sources do not necessarily accurately reflect that authority.

II. COMMUNITY AND SEPARATE INTERESTS IN A BUSINESS

A. Division upon Divorce: *Pereira-Van Camp*

In *Pereira v. Pereira*, the husband owned a saloon prior to marriage.[1] On the date of marriage, the fixtures of the business were valued at $15,500 and the annual income was approximately $5,000 per year. During the marriage, the husband acquired the building where the saloon was located on credit for $40,000.[2] On the date of separation, the debt against the building was paid off, there was a $12,000 cash balance in the business bank account, and the annual income was $11,000 per year.[3]

The court acknowledged that community efforts were the predominant reason for the appreciation of the business during the marriage; the court also recognized that the husband would have had at least some return on his separate property, even if he had merely purchased passive investments.[4] Consequently, the court held that a fair return on the separate property investment would be allowed and the community would receive the remaining appreciation, at least when the predominant reason for that appreciation was community efforts:

> It is true that is very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property. But without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and as the business was profitable it would amount at least to the usual interest on a long investment well secured. We think the court erred in refusing to increase the proportion of separate property and decrease the community property to the extent of the reasonable gain to the separate estate from the earnings properly allowable on account of the capital invested.[5]

By contrast, *Van Camp v. Van Camp* involved a business in which community efforts were not the predominant factor in producing the appreciation.[6] In *Van Camp*, the 54-year-old owner of the well-established Van Camp Seafood Company married a twenty-one year old postal worker. The husband continued to be employed by the business and received a substantial salary during the marriage.[7] As described in detail in the opinion (issued in the days before no fault divorce in California), the marriage went badly.[8] Upon divorce, the wife argued that the *Pereira* approach should be used.[9] The court compared the husband's premarital earnings, and concluded that the community had already been adequately compensated for the community efforts by the husband's salary. In particular, the court stated that the husband's ". . . . personal earnings having been conclusively fixed, any excess in value of property so acquired must be accredited to the income received from rents, issues, and profits of the separate estate, rather than to the income of the joint efforts of the community."[10] In other words, the separate property rather than community efforts was the predominant cause of any appreciation in the business.

Courts do not apply a bright line test in choosing between the *Pereira* or *Van Camp* formulas. However, there are some general concepts that apply. As summarized by one practice guide:

> No precise standards govern the trial court's decision in choosing between *Pereira* or *Van Camp* (or, for that matter, any other equitable apportionment method). Broadly, the court should adopt whatever formula will achieve substantial justice between the parties, depending on whether the capital investment or the spouse's personal activity, ability and capacity was the chief contributing factor in the realization of income and profits . . .

Pereira is typically applied where profits on a spouse's separate property are principally attributed to community efforts, as that formula will usually yield the greatest amount for the community.

Conversely, *Van Camp* is usually applied where community effort is more than minimally involved in managing a separate property asset, yet the profits are attributable primarily to natural enhancement of the underlying separate asset . . . because that formula will usually yield the greatest amount to the separate property estate.[11]

B. *Pereira* and *Van Camp* in the Postmortem Setting

The *Pereira* and *Van Camp* decisions established that community efforts adding to the value of a separate property business resulted in community property rights relating to the business upon divorce. If the saloon-owning spouse in *Pereira* had died instead, could he have deprived his spouse of her community property rights by leaving the saloon to someone else? In *Patrick v. Alacer Corp*, the court held that those community property rights do not disappear when the marriage ends by death rather than divorce.[12]

In *Patrick*, the surviving spouse of a corporate founder brought an action seeking, among other things, declaratory relief regarding her community property interest in her deceased husband's corporate stock.[13] The court analyzed the facts of the case and the factors used in determining whether to apply the *Pereira* or *Van Camp* approach, and concluded as follows:

> In sum, substantial evidence showed plaintiff had a community property interest in Alacer's increased value during the marriage, and supported apportioning that community property interest. The court acted within its discretion by using *Pereira* to apportion Alacer's value at the date of Jay's death, using the "capitalization of excess earning" method.[14]

While the court applied the *Pereira* approach, the decision indicates that it would have used the *Van Camp* formula under different facts.[15] Implicit in this analysis is the premise is that the Pereira/Van Camp analysis applies in the postmortem setting. In other words, if a spouse had a right to reimbursement in an asset upon divorce, the right does not evaporate upon death.

To be clear, this is a right of reimbursement, not a direct ownership interest in the underlying asset:

> Plaintiff contends that her community property interest in Alacer's increased value must be satisfied with an award of Alacer stock. She asserts several supporting theories, none of which hold[s] water.[16]

While rejecting the surviving spouse's arguments, the *Patrick* court's analysis is significant because it signaled that other theories of tracing would have applied in the postmortem setting under different circumstances. The surviving spouse argued that community property had been commingled by virtue of the decedent applying community property efforts towards the business on an ongoing basis during the marriage.[17] The *Patrick* court's response was that the Pereira/Van Camp analysis was performed after the marriage ended, and not on an ongoing basis during the marriage:

> California law does not require apportionment of community efforts devoted to separate property on an ongoing basis, upon pain of transmuting that separate property into community property. Courts account for community efforts toward separate property through equitable apportionment after the marriage, not transmutation during the marriage.[18]

By citing to *In re Marriage of Dekker*, the *Patrick* court's reasoning was that the same paradigm applicable to community property reimbursement in marital dissolution cases was also applicable in the postmortem setting.[19] In other words, the Pereira/Van Camp analysis was performed after the marriage ended, albeit by death rather than divorce in this instance.

The surviving spouse's argument that she should receive a *pro tanto* interest in the underlying stock was also rejected by the *Patrick* court, not because the claim was made in the postmortem setting, but because Pereira/Van Camp was the proper approach to determine the value of community efforts towards a separate property business:

> . . . [P]laintiff contends she should receive a pro tanto interest in Alacer. She relies on case law giving the community a pro tanto interest in separate property—real property, typically—purchased, paid down, or improved with community funds. (See, e.g., *In re Marriage of Moore* (1980) 28 Cal.3d 366, 373–374, 168 Cal.Rptr. 662, 618 P.2d 208, *In re Marriage of Sherman* (2005) 133 Cal.App.4th 795, 802, 35 Cal.Rptr.3d 137; see generally *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 438–440, 181 Cal.Rptr. 910.) But using the Moore/Marsden approach here would conflict with the prevailing approach used when a separate property business is improved by the devotion of community efforts—equitable apportionment using *Pereira* or

> *Van Camp*. (See, e.g., *Dekker*, *supra*, 17 Cal.App.4th at pp. 852–853, 21 Cal.Rptr.2d 642.) The court did not err by declining to extend the Moore/Marsden approach to this set of facts.[20]

Again, the *Patrick* court did not hold that the Moore/Marsden approach inapplicable in the postmortem setting, but rather that it was inapplicable because Pereira/Van Camp was the proper approach. Indeed, the application of Moore/Marsden in the postmortem setting was already well-established law by the time the *Patrick* decision was issued.

III. COMMUNITY AND SEPARATE INTERESTS IN REAL PROPERTY

A. Division upon Divorce: Moore/Marsden

The Moore/Marsden formula is used to determine the community property interest in separate property when community funds are used to purchase, pay down the principal mortgage balance, or improve that separate property.[21] The formula derives its name from two cases, *In re Marriage of Moore*[22] and *In re Marriage of Marsden*.[23]

The Moore/Marsden formula results in the apportionment of appreciation between the separate and community property interests. In other words, the community receives a portion of the appreciation following the date of marriage when community property is used towards the acquisition of separate property, such as paying down a separate property mortgage. By contrast, separate property contributions towards the acquisition of community property are only entitled to dollar for dollar reimbursement, without appreciation.[24]

The purpose of the Moore/Marsden approach is easy to understand, even if the formula is relatively complex.[25] For example, suppose that before marriage a person purchases real property subject to a thirty-year mortgage. On the date of marriage, twenty-five years remain on the term of the mortgage. Over the next twenty-five years, community property is used to pay off the principal balance and make capital improvements. There is no transmutation, and it remains titled in the person's name alone. Clearly it would be inequitable for the property to be characterized entirely separate property if the person were to file for divorce the day after the mortgage is paid off. The Moore/Marsden formula is designed to determine the amount of the community interest in that separate property asset.

A number of decisions have created logical extensions of this doctrine. While *Moore* and *Marsden* involved residential real property, the application of the Moore/Marsden formula has been extended to commercial properties.[26] In analyzing the implications of the use of community funds to make capital improvements to one spouse's separate property, the holding of *In re Marriage of Wolfe*[27] found that the presumption of a gift from the use of community property to improve separate property made little sense:

> We agree there is no logical basis for denying a spouse reimbursement for a community-funded improvement to the other spouse's separate property. The rule we discard--that is, the presumption of a gift in those circumstances--is also outside the mainstream of community property principles applied in other American jurisdictions. It is a California invention, though not one in which we should take pride, cobbled together from misunderstood doctrine and mis-cited cases.

Along the same lines, the opinion in *In re Marriage of Allen*[28] held that capital improvements funded with community property would be treated similarly to principal payments on separate property mortgage:

> *Moore*, supra, 28 Cal. 3d at page 372, dealt with payments made to reduce an encumbrance on separate property. It did not deal with and did not address whether the same rule would apply to community contributions to improve separate property. The Moore/Marsden rule is based upon the principle that where community funds contribute to the owner's equity in separate property, the community obtains a pro tanto quasi-ownership stake in the property. For that reason, community payments made for taxes, interest, and maintenance are not subject to the rule. (*Moore*, *supra*, 28 Cal. 3d at p. 372.) Because contributions to capital improvements also increase the property's equity value, *Moore*'s rationale applies as well to capital improvements made to separate property.

If the separate property spouse dies, does that mean that the surviving spouse loses his or her community property rights in the family residence? In the example provided above, community property was used to pay down twenty-five out of thirty years of the mortgage. Under Moore/Marsden, this is not deemed to be a gift by the surviving spouse upon divorce. Why would it suddenly undergo a metamorphosis into a gift (or for that matter, a transmutation) upon the death of the separate property spouse? While the *Patrick* court alluded to the application of the Moore/Marsden doctrine in the postmortem setting, another court had already squarely addressed the issue.

B. Moore/Marsden in the Postmortem Setting

In *Bono v. Clark*,[29] the Moore/Marsden doctrine was applied in the postmortem setting. In *Bono*, community property was used to make capital improvements to the decedent's separate property during the marriage. The couple separated in 1994, and a petition for dissolution of marriage was filed in 1995.[30] While the surviving spouse filed an answer, and both spouses filed property declarations, no further action was taken by either party.[31]

The decedent died in November, 1998, while the dissolution action was still pending, and the decedent's estate sold the real property in 2000.[32] The surviving spouse filed a complaint seeking declaratory relief regarding her community property interest in the proceeds of sale, as well as an action for conversion of her separate property.[33]

The *Bono* court reviewed the authority relating to Moore/Marsden reimbursement rights as applied to capital contributions of community property to improve one spouse's separate property.[34] In particular, the court cited heavily to the *Wolfe* and *Allen* cases quoted above.[35] The court acknowledged that some earlier cases had held that the consent of one spouse to the use of community property to improve the other spouse's separate property resulted in a gift.[36] However, in holding that the right to reimbursement applied, the opinion observed that "developments in family law have eroded the underpinnings of the gift presumption on which those cases rely."[37]

While the *Bono* court concluded that the formula for postmortem reimbursement would be different depending upon whether the claim was for community contributions to separate property as opposed to separate contributions to community property, the opinion held that both forms of reimbursement applied in the postmortem setting:

> [W]e recognize that our holding creates an apparent anomaly on another front. In effect, it puts community contributions to separate property on a different footing than separate contributions to community property. In the latter case, recovery is limited to dollar-for-dollar reimbursement, without interest. (Fam. Code, [section] 2640, subd. (b) [separate property contributions to community property, if traced and unless waived, are reimbursed "without interest or adjustment for change in monetary value"].) Under our holding, by contrast, the investment of community funds entitles the community to share in the separate property's appreciation, even if " 'the fair market value has increased disproportionately to the increase in equity' " resulting from the community improvements. (*In re Marriage of Moore*, *supra*, 28 Cal.3d at p. 372, quoting *Bare v. Bare*, *supra*, 256 Cal.App.2d at p. 690.) In an inflationary real estate market, that entitlement may represent a tremendous boon to the community. **When compared to the limited recovery for separate property contributions (through reimbursement only), the potentially more extensive recovery for community property contributions (through recognition of a quasi-ownership interest) might appear anomalous.** (Cf. *In re Marriage of Gowdy*, *supra*, 178 Cal.App.3d at p. 1234: "[I]t would be anomalous . . . to hold that a spouse . . . who permits community funds to be used to reduce an encumbrance on the other spouse's separate property has fewer rights than a spouse who permits his or her separate property to be used for the same purpose with respect to a community property.".) Despite that, we believe that the conclusion we reach here is compelled as a logical extension of the Moore/Marsden rule. We also believe it is consistent with California's "partnership" model of marriage, which strongly favors community property. (Emphasis added).[38]

In other words, community property would be treated more favorably than separate property for purposes of determining the amount of the reimbursement in the postmortem setting, but both forms of reimbursement were available in this context. Despite the fact that thirteen years have passed since the *Bono* opinion, its application of reimbursement claims in the postmortem setting has not been questioned.[39]

It is not as though the *Bono* decision has gone unnoticed. The court in *In re Marriage of Sherman*[40] criticized the manner in which the *Bono* court calculated the community and separate interests arising from the capital contributions, but the *Bono* court's application of reimbursement rights in the postmortem setting remains good law. Moreover, as discussed above, the court in *Patrick* subsequently held that reimbursement rights applied in the postmortem setting, albeit without citing to *Bono*.

The *Bono* decision was also not the most recent case law holding that property characterization should generally be consistent regardless of whether the marriage is terminated by death or dissolution. In *Marriage of Lafkas* (2015) 237 Cal.App.4th 921, 940, the court examined the interplay between Family Code sections 852 and 2581 in marital dissolution proceedings, holding:

> Our construction of the statutory scheme avoids the absurd consequence of treating Smile Enterprises as separate property if Lafkas and Doane remained married but community property if they separated or the marriage was dissolved. If *section 2581* were to apply under the circumstances of this case without regard to the transmutation requirements, Doane would have a community property interest *at separation or dissolution* based on joint title. But if the parties *stayed married* and Lafkas arranged for his daughter to inherit his separate property, the daughter would be entitled to the entire partnership interest while Doane would have no interest because the modification agreement was not a valid transmutation under *section 852*. We decline to interpret the statutory scheme in a manner resulting in different characterizations of the ownership of property based upon the fortuities of death, dissolution, or separation. We conclude *section 2581* applies at separation or dissolution to property that has been validly transmuted to joint title under *section 852*.[41]

IV. SEPARATE PROPERTY RIGHTS IN POSTMORTEM SETTING

A. Separate Property in the Postmortem Setting

Probate Code section 28 provides the definition of "community property" for purposes of the Probate Code; however, the Probate Code does not have its own definition for "separate property." This means that "separate property" for purposes of the Probate Code generally defaults to the definition under the Family Code.[42] When separate property is combined with community property, the issue becomes more complicated.[43]

While *Patrick* and *Bono* held that reimbursement rights arising from community property contributions to the acquisition of separate property survive death, the right to reimbursement for separate property contributions towards the acquisition of community property in the postmortem setting has not been fully addressed. The law governing reimbursement rights for commingled property strongly suggests that it is available. However, the issue has not been fully explored. For the most part, it has been summarily dismissed without citation to authority, and the analysis stops once that conclusion is reached.[44] A review of the primary authority suggests something far different.

B. *Marriage of Lucas*

The opinion in *In re Marriage of Lucas*[45] and the Legislature's response to it in the statutes now codified as Family Code section 2640, subdivisions (a) and (b), are sometimes cited as precluding reimbursement for separate property contributions to community property in the postmortem setting. However, the text of the *Lucas* opinion and the legislative history of the statutory response reveal that their scope is much narrower.

The focus of *Lucas* was the interpretation of a statute authorizing the division of a family residence held in joint tenancy. The genesis of the statute was described by the court in *Lucas* as follows:

> Until modified by statute in 1965, there was a rebuttable presumption that the ownership interest in property was as stated in the title to it. Thus a residence purchased with community funds, but held by a husband and wife as joint tenants, was presumed to be separate property in which each spouse had a half interest. The presumption arising from the form of title could be overcome by evidence of an agreement or understanding between the parties that the interests were to be otherwise. It could not be overcome, however, solely by evidence as to the source of the funds used to purchase the property. Nor could it be overcome by testimony of a hidden intention not disclosed to the other grantee at the time of the execution of the conveyance.

The presumption arising from the form of title created problems upon divorce or separation when title to the parties' residence was held in joint tenancy.[46]

The *Lucas* decision mentioned that a house held in joint tenancy "could not be awarded to the wife as a family residence for her and the children," and cited the legislative history of the statutory response to the problem. However, it did not fully articulate the problems the statute enacted in 1965 was designed to address. The legislative history to the statute currently codified as Family Code section 2640, subdivisions (a) and (b), provided a more detailed explanation of the problems under the pre-1965 law:

> At dissolution of marriage . . . The court had no jurisdiction to divide joint tenancy property and therefore may be unable to make the most sensible disposition of all of the assets of the parties. For instance, it may be desirable to award temporary occupancy of the family home to the spouse awarded

> custody of the minor children; this can be done if the property is community but not if it is joint tenancy. Moreover, because the joint tenancy property cannot be divided at dissolution, it will have to be subsequently partitioned in a separate civil action.[47]

The *Lucas* opinion described the legislative response as follows:

> In 1965, in an attempt to solve these problems, the Legislature added the following provision to Civil Code section 164: "[W]hen 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 divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife."[48]

However, *Lucas* went on to observe that the Legislature did not provide for separate property reimbursement in the context of this statute:

> There is no indication that the Legislature intended in any way to change the rules regarding the strength and type of evidence necessary to overcome the presumption arising from the form of title.[49]

As a result, the court reasoned, the form of title presumption arising from joint and equal ownership in joint tenancy property requires evidence of an agreement or understanding to the contrary in order to maintain the right to reimbursement for separate property contributions towards the acquisition of joint tenancy assets:

> The rule requiring an understanding or agreement comes into play when the issue is whether the presumption arising from the form of title has been overcome. . . . The act of taking title in a joint and equal ownership form is inconsistent with an intention to preserve a separate property interest. Accordingly, the expectations of parties who take title jointly are best protected by presuming that the specified ownership interest is intended in the absence of an agreement or understanding to the contrary.[50]

The *Lucas* decision *did not* hold that separate property contributions to community property were not subject to reimbursement. The issue before the court was whether the Legislature intended to change the form of title presumption as applied to joint tenancy property when it enacted the single-family residence exception in 1965. Consequently, the most often cited portion of the *Lucas* holding was limited to determining the construction of a now repealed statute that only applied to *joint tenancy* property. The *Lucas* decision *did not* restrict the right to reimbursement for separate property contributions to the acquisition of community property generally.

To the contrary, the *Lucas* court made it very clear that its decision was limited to circumstances in which the form of title presumption applied (i.e., that joint tenancy property was owned in equal shares). When the form of title presumption did not apply, the *Lucas* court explicitly stated that tracing contributions to a separate property source was sufficient to establish a separate property interest in an asset:

> The presumption arising from the form of title is to be distinguished from the general presumption set forth in Civil Code section 5110 that property acquired during marriage is community property. It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption. It is because of this express designation of ownership that a greater showing is necessary to overcome the presumption arising therefrom than is necessary to overcome the more general presumption that property acquired during marriage is community property. In the latter situation, where there is no written indication of ownership interests as between the spouses, the general presumption of community property may be overcome simply by tracing the source of funds used to acquire the property to separate property. It is not necessary to show that the spouses understood or intended that property traceable to separate property should remain separate.[51]

The *Lucas* decision dealt with the form of title presumption, rather than reimbursement rights, when the form of title presumption does not apply. This was driven home by the court's analysis of community property contributions towards the acquisition of a vehicle titled in the name of one spouse. In holding that the husband did not have a community property interest in the vehicle, the *Lucas* court stated:

> Contrary to Gerald's contention, the trial court's determination that he made a gift of his interest is supported by substantial evidence. Title was taken in Brenda's name alone. Gerald was aware of this and did not object. This evidence constitutes substantial support for the trial court's conclusion that Gerald was making a gift to Brenda of his community property interest in the motorhome.[52]

In other words, the form of title presumption operated to create the presumption that the vehicle remained the separate property of the wife, even though community funds were partially responsible for its acquisition. Of course, this is directly contrary to the *Moore* and *Marsden* cases, which held that community property contributions towards the acquisition of assets (albeit real property) titled as separate property gave right to a reimbursement right. In addition, it is contrary to the modern trend of finding in favor of reimbursement rights rather than deeming the gift has occurred.[53] The California Supreme Court has explicitly held that this portion of *Lucas* is no longer good law.[54] That being said, this portion of the *Lucas* decision drives home the point that the holding dealt with the form of title presumption rather than reimbursement rights more generally.

C. *Expressio Unius Est Exclusio Alterius*

While Family Code section 2640, subdivision (b), is limited to the division of property under the Family Code, that does not necessarily imply the Legislature must have intended to preclude separate property reimbursement in all other contexts. That is a matter of statutory interpretation. More specifically, the question is whether *expressio unius est exclusio alterius* compels that result.

As stated by the California Supreme Court, the maxim *expressio unius est exclusio alterius* means "the expression of some things in a statute necessarily signifies the exclusion of other things not expressed."[55] In other words, "where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."[56] While it is a general rule, its application in practice is nuanced. In *Estate of Banerjee*, the California Supreme Court summarized it as follows:

> *[E]xpressio unius est exclusio alterius* is no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions. . . . More in point here, however, is the principle that such rules shall always be subordinated to the primary rule that the intent shall prevail over the letter. Moreover, exceptions to a general provision of a statute are strictly construed and will not be understood as a limitation on general powers except to the extent the limitation fully appears. [57]

One of the exceptions mentioned by the *Banerjee* court in footnote 10 of the opinion was that the maxim would not apply "to a matter which is only incidentally dealt with in a statute," citing the California Supreme Court decision in *Galland v. Galland*.[58] In *Galland*, the question presented was whether the Legislature's enactment of a statute providing that alimony could be ordered by a court in the context of a divorce action meant that the court was precluded from ordering alimony in any other context. Rejecting that contention, the court held:

> The maxim "*expressio unius est exclusio alterius*" is invoked as applicable to this proposition. But, in my opinion, it has no application to the case. The main subject-matter of the statute was the regulation of divorce; and only as incidental to that subject the statute prescribes the power of the Court in respect to alimony in that class of cases. The Legislature was not dealing with the general subject of alimony, as an independent subject-matter of legislation; but, only, as one of the incidents of an application for divorce. It saw fit to define the power of the Court over the allowance of alimony on an application for divorce; but was not considering the subject of alimony in any other class of cases. If it had provided that a writ of *ne exeat or distringas* might issue against a defendant in an action for divorce, it would scarcely be claimed by any one that this was equivalent to a declaration that such writs should not issue in any other class of actions. For the same reason, a provision for alimony in a suit for divorce is not to be considered as a declaration that alimony shall not be allowed in other actions. The maxim which is invoked has no application to this class of cases.[59]

While the legislative history to Family Code section 2640, subdivision (b), repeatedly references the *Lucas* decision, and the statute is limited to actions under the Family Code, it does not discuss whether or not reimbursement for separate property contributions to community property should ever be allowed in the postmortem setting. Just as with the alimony statute in *Galland*, there is no evidence the Legislature intended to preclude a remedy available in a divorce action in another context under all circumstances.

In order to make a finding that the Legislature intended to occupy the field in other contexts, the California Supreme Court has held that "[f]actually there should be some evidence the legislature intended its (expressio unius) application lest it prevail as a rule of construction despite the reason for and the spirit of the enactment. Furthermore, the principle always is subordinate to legislative intent."[60] The legislative history of Family Code section 2640, subdivision (b), reveals that it was designed to counter the portion of the *Lucas* decision dealing with the form of title presumption upon divorce, but does not evidence any legislative intent to preclude reimbursement in other contexts.

D. The Legislative History of Family Code Section 2640, Subdivisions (a) and (b)

The statute currently codified as Family Code section 2640, subdivisions (a) and (b), has sometimes been referred to as the "anti-*Lucas* statute." This was part of a larger statutory scheme. The bill enacting this statute also enacted the statute currently codified as Family Code section 2581, providing that property acquired in the names of both spouses during marriage was presumed to be community property for purposes of dividing the asset "on dissolution of marriage or legal separation."[61] This expanded the 1965 statute (which limited the court's power to divide joint tenancy assets to the family residence) to provide that all jointly titled assets were presumed to be community property equally owned by each spouse for purposes of dividing the assets upon divorce or legal separation.[62]

To the extent that the *Lucas* decision was limited to the form of title presumption, the bill was initially introduced as one producing the right to reimbursement for separate property contributions towards the acquisition of joint tenancy property. It was structured as creating a statutory right to rebut the form of title presumption by tracing its acquisition to a separate property source:

> For the purpose of this section the interests of the parties in the property are presumed to be equal. This presumption is a presumption affecting the burden of proof and is rebuttable by proof of different proportionate contributions of the parties to the acquisition of the property or by proof of an agreement of the parties that their interests in the property are different.[63]

This would have countered the portion of the *Lucas* holding dealing with the form of title presumption.[64] However, another bill in the Legislature proposed to apply the right to reimbursement for separate property contributions to community property generally.[65] The Assembly Judiciary Committee report initially suggested that "[i]f both bills are to be enacted, they should be consolidated in order to avoid confusion," and a subsequent handwritten annotation to the report indicates that the two bills were combined in committee.[66]

Strictly speaking, this should not have been necessary. It is clear from the above-quoted text that the *Lucas* court actually held that separate property contributions to community property were subject to reimbursement when traceable, even in the absence of an agreement or understanding, when the form of title presumption did not apply.[67] Indeed, the court in *Lucas* specifically held that tracing to a separate property source was sufficient in order to establish a separate property right in that instance.[68] It was only when the form of title presumption applied (e.g., when title was held in joint tenancy or in the name of one spouse alone) that an agreement or understanding for reimbursement needed to be established.[69]

Nevertheless, the sponsor of the legislation (the California Law Revision Commission) observed that the "Lucas holding has been extended by the courts to other types of community property in addition to property taken in joint tenancy form."[70] In other words, the expansion of the coverage of the statute from joint tenancy property to community property generally was designed to prevent courts from continuing to misapply the holding of *Lucas*. It was not necessitated by the text of the *Lucas* decision.

The final result was the enactment of Civil Code section 4800.2 (recodified in 1992),[71] which is essentially identical to the current Family Code section 2640, subdivisions (a) and (b), that provide:

> (a) "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) 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.[72]

The legislative history of Family Code section 2640, subdivisions (a) and (b), does not provide any evidence that the Legislature intended for *expressio unius est exclusio alterius* to preclude separate property reimbursement in the postmortem setting, or for that matter, that the Legislature even considered the issue in connection with the enactment of the statute. As articulated by the California Supreme Court, the maxim would therefore have no application to the statute. Moreover, it would be narrowly construed even if it did apply.

E. The Purpose of the "Under This Division" Language

1. The Implication of Silence

Why then did the Legislature include the "under this division" language in Family Code section 2640, subdivision (b)? There are several areas in which the Legislature's silence allowed other laws to resolve issues by default. In those areas, reimbursement in any form may be precluded.[73] However, that does not imply that the Legislature must have intended to preclude reimbursement in all areas in which it is not precluded by some other law.[74]

2. Real Property Held in Joint Tenancy

One of the areas in which separate property reimbursement would be unavailable in the postmortem context is when real property is held in joint tenancy. Family Code section 2581 and section 2640, subdivision (b), trace their origins to former Civil Code section 164, the statute creating the "single family dwelling" exception which was enacted in 1965 and quoted by *Lucas*.[75] That statute only applied to treat a single family dwelling held in joint tenancy between spouses as community property "for the purpose of the division of such property upon divorce or separate maintenance only."[76] The statute now codified as Family Code section 2581, as initially enacted, expanded the reach of that statute to create a presumption that all joint tenancy property was community property, but again only for purposes of marital dissolution or legal separation.[77]

By remaining silent on the characterization upon death, the Legislature allowed other laws to address the disposition of property held in joint tenancy between spouses upon death by default. For example, in *Dorn v. Solomon,*[78] the wife attempted to assign her interest in joint tenancy property to an irrevocable trust shortly before her death; however, the statutory requirements for severance of the joint tenancy were not met. The wife's estate argued that Family Code section 2581 created a presumption of community property which would allow her to assign her interest into the trust as community property.[79] However, the court correctly held that the application of Family Code section 2581 was limited to the family law context, and therefore the statute did not apply to cause the joint tenancy property to be treated as community property after death.[80] If the surviving spouse wanted to sever the joint tenancy, she would have been required to meet the statutory requirements for accomplishing that result.[81] Her failure to do so left the joint tenancy deed intact, and the surviving spouse inherited the property as the surviving joint tenant.[82]

While not addressed by the opinion, this result also precludes reimbursement for separate property contributions towards the acquisition of the joint tenancy property following death. The joint tenancy property passes to the surviving spouse as the surviving joint tenant by operation of law. The characterization of the property would therefore be moot, as would any right of reimbursement relating to the property.

3. Property Not Subject to California Jurisdiction

The "under this division" language also avoided having to address conflict of laws issues. In a divorce, the California court has personal jurisdiction over the parties and can therefore enter orders pertaining to non-California real estate titled in the name of either spouse.[83] However, jurisdiction over non-California real property titled in the name of either spouse following death will be held by the court where the real property is located, and not by the California court.[84] If the California Legislature purported to treat all joint tenancy property (including non-California property) as community property, subject to a separate property right of reimbursement, it would have created a conflict of laws problem.[85] Again, by remaining silent, the Legislature allowed this issue to take care of itself through the application of other laws.

Former Civil Code sections 164 and 4800.1 avoided creating a conflict of laws problem by treating joint tenancy property as community property only for purposes of actions for divorce or separate maintenance.[86] Similarly, former Civil Code section 4800.2 (now codified as Family Code section 2640, subdivision (b)) avoided creating a conflict of laws issue by stating that the statutory right to be reimbursed for separate property contributions towards the acquisition of community property was limited to family law actions. The existence of a reimbursement right for separate property contributions toward the acquisition of a community property asset presupposes that the asset is community property in the first place. However, a California court would not have jurisdiction to make a finding that property is (or is not) community property with respect to a decedent's real property located in another state.

While the legislative history of the statute currently codified as Family Code section 2640, subdivision (b), does not mention this issue, it has reared its head in connection with the enactment of related property characterization statutes.[87] When the bill proposing the enactment of the statutes governing transmutations currently codified as Family Code sections 850, et seq., was initially introduced, the bill also included a proposed statute that would have treated all property (subject to statutory exceptions) acquired by a married person while domiciled in California as community property.[88] This would have included real property "wherever situated."[89] However, that portion of the bill was withdrawn because it raised conflict of laws issues.[90]

The concern was that the proposed language would purport to "classify as community property real property acquired outside of California during the marriage. . . ."[91] While Probate Code section 28 modifies the Family Code definition of community real property at death to include only real property situated in another state that is community property or a substantial equivalent type of marital property under the laws of that jurisdiction, the issue with this bill was that "[p]roposed [s]ection 5110 is not limited to real property in another jurisdiction which would be community property."[92] As a result, the proposed statute was "contrary to the basic conflict of laws rules relating to real property. In the probate context, for example, a California [p]robate [c]ourt does not have jurisdiction over out-of-state real property standing in the name of the decedent. Out-of-state property must be probated in the jurisdiction in which the real property is located."[93]

An attempt to classify non-California real property as community property would create a number of problems in the probate context. In particular, the rights of the various parties may need to be litigated applying conflict of laws rules.[94] In light of the resulting ambiguity as to whether community property laws would apply, it may be difficult to determine what assets would need to be included on the decedent's federal estate tax return.[95] The conflict of laws issues would have been addressed by limiting the application of the proposed statute to family law actions; however, it was noted that if the proposed statute was "limited so as to give a court handling the marital dissolution the ability to divide out-of-state real property, the [s]ection does not so indicate."[96]

While the potential conflict of laws issues were not discussed in the legislative history for the initial enactment of the statutes currently codified as Family Code section 2581 and section 2640, subdivision (b), the same analysis would equally apply to the statutes. In order to find that a spouse is entitled to reimbursement for separate property contributions towards the acquisition of community property, the court would first have to find that the property was community property. If the real property were located in a state that does not recognize community property laws, a conflict of laws issue would arise. Moreover, even in a community property state, the laws of that state would control the surviving spouse's right to reimbursement for separate property contributions to that community property. By remaining silent regarding how these issues would apply upon death, the Legislature left unchallenged the rule that the disposition of real property is controlled by the laws of the state where the property is located. It remains clear that a California court cannot make this determination for real property that is beyond its jurisdiction.[97]

4. Third Party Bona Fide Purchasers

The "under this division" language in Family Code section 2640, subdivision (b), also avoided modifying the form of title presumption as applied to parties other than the spouses. Family Code section 2581 and section 2640, subdivisions (a) and (b), modified the form of title presumption as between the spouses; however, they were not intended to modify the form of title presumption vis-à-vis third parties. In other words, a third-party bona fide purchaser for value with no notice of the spousal reimbursement claim should not be responsible for reimbursing the spouse whose name was not on title for his or her community property contributions. As summarized by the concurring opinion in the California Supreme Court case *In re Marriage of Valli*.

> Significantly, the statutory presumption regarding property in the form of joint tenancy applies "[f]or the purpose of division of property on dissolution of marriage." (Fam. Code, [section] 2581; see Civ. Code, former [section] 5110.) This language suggests that rules that apply to an action between the spouses to characterize property acquired during the marriage do not necessarily apply to a dispute between a spouse and a third party.[98]

This was illustrated in *In re Marriage of Brooks & Robinson*.[99] In *Brooks*, the wife took title to real property in her name alone without referring to her marital status in the deed.[100] Following the spouses' separation, the wife sold the property to a bona fide third-party purchaser.[101] The husband filed suit against the third-party purchaser seeking to set aside the wife's transfer of the property, claiming that the husband had a community property interest in the property.[102]

The court reviewed the *Lucas* decision and the legislative history to the Legislature's response in the statutes currently codified as Family Code sections 2581 and 2640.[103] It concluded that, while the Legislature intended to modify the form of title presumption as between the two spouses in a family law action, the Legislature did not intend to overturn the form of title presumption as applied between the spouses and a third party.[104] In other words, other law (i.e., the form of title presumption) remained intact when not modified by Family Code sections 2581 and 2640.

While the husband might very well have a right to recover his community property interest in an action against his wife, the *Brooks* court concluded that the Family Code sections were not enacted to allow him to seek recovery against an innocent third party purchaser:

> Family Code, section 2640 (the recodification of Civ. Code, former [section] 4800.2), also applies only to "the division of the community estate," and creates a right to reimbursement for a spouse who made separate property contributions to the community. (Fam. Code, [section] 2640, subd. (b); see *In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 867-868 [26 Cal. Rptr. 3d 121].) Again, this bifurcated case does not involve a division of the community estate between Brooks and Robinson. Whether Robinson might be obligated to reimburse Brooks for his contributions to the Property was not before the trial court and is not an issue on appeal. The statute has no application here.[105]

Another portion of the *Brooks* opinion purported to follow the portion of the *Lucas* decision that held that the titling of a vehicle in the name of one spouse precluded reimbursement for community property contributions towards the acquisition of that asset under the form of title presumption.[106] The *Valli* court specifically overruled that portion of the *Brooks* decision.[107] However, the California Supreme Court did not overrule the portion of the *Brooks* opinion holding that the statute was inapplicable to actions between the spouses and third parties: "*Brooks* might have been correct to apply section 662 to an action between one of the spouses and a third party bona fide purchaser. That question is not implicated here, and I express no opinion on it."[108]

5. The Implications of Leaving Other Law Intact

The legislative history of the statute now codified as Family Code section 2640, subdivision (b), clearly shows that the statute was enacted to counter the *Lucas* decision. While the Legislature did not wade into the minefield of other laws that would be implicated by a broader statute, that alone cannot be used to imply the Legislature must have intended to preclude separate property reimbursement in the postmortem setting.[109]

The argument that the "under this division" language of Family Code section 2640, subdivision (b), should be interpreted so as to exclude the possibility that the court could order reimbursement for separate property contributions to community property in the postmortem also overlooks implications of the absence of that language from Family Code section 2640, subdivision (c).

F. Family Code Section 2640, Subdivision (c)

1. Marriage of Cross

Family Code section 2640, subdivision (c), was enacted to overrule the holding in *In re Marriage of Cross*.[110] The *Cross* court held that there was no right to reimbursement when a husband used his separate property to improve his wife's separate property.[111] In other words, the opinion concluded that there was no right of reimbursement for separate property contributions to the separate property of the other spouse.

The *Cross* opinion correctly stated that the then effective version of Family Code section 2640, did not provide for separate property to separate property reimbursement, and therefore the husband could not directly rely upon the statute as a basis for reimbursement.[112] However, the court went on to conclude that it could only order reimbursement if the Legislature expressly authorized it.[113] While not articulated as such, this is essentially an argument that *expressio unius est exclusio alterius* precluded reimbursements for separate property contributions to the other spouse's separate property because the Legislature did not include that form of reimbursement in Family Code section 2640, subdivision (b). Such use is a misapplication of the maxim. In order for the maxim to apply, there must be some evidence that the Legislature intended that result. In reality, Family Code section 2640, subdivision (b), was the legislative reaction to *Lucas*, which involved separate property contributions to joint tenancy property. There is no evidence that the Legislature even considered the issue of reimbursement for separate property contributions towards the acquisition of the other spouse's separate property.[114]

The *Cross* decision does not indicate whether the husband argued that the court should imply that such a right existed. While it is true that Family Code section 2640, subdivision (b), did not provide for separate property to separate property reimbursement, it also did not expressly preclude ordering such a reimbursement. Indeed, the bulk of the law relating to reimbursements has been developed by case law rather than statute.[115] The legislative history of the statute reveals that the Legislature was concerned with countering the *Lucas* decision, and did not consider the possibility of separate property to separate property reimbursement. Nevertheless, the *Cross* court implied that this silence must mean that the Legislature had intended to prohibit that form of reimbursement. The Legislature disagreed.

2. The Enactment of Family Code Section 2640, Subdivision (c)

The legislative history of Family Code section 2640, subdivision (c), makes it clear that the enactment of the statute was viewed as part of a broader body of California law finding that implying a gift when community property and separate property are commingled "was not viable or accurate in today's society."[116] Indeed, the legislative history repeatedly cites to the *Moore*, *Marsden*, *Wolfe*, and *Allen* cases in support of the proposition that the proposed Family Code section 2640, subdivision (c), was part of a broader policy favoring reimbursement when community and separate property are commingled.[117]

For example, the Senate Judiciary Committee report reflects that the bill enacting Family Code section 2640, subdivision (c), was "viewed as a needed and appropriate logical extension of California's current 'right of reimbursement law' as represented by Family Code section 2640 and the relatively recent cases of *In Re Marriage of Wolfe* and *In Re Marriage of Allen*."[118] The same Senate Judiciary Committee report also cites the *Moore* and *Marsden* cases.[119] These cases were cited again by the Assembly Judiciary Committee report, as well as a number of other places in the legislative history.[120] It is notable that all of them apply in the postmortem context.[121]

As enacted, Family Code section 2640, subdivision (c), provides:

> 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.

Noticeably absent from this statute is the "under this division" language of Family Code section 2640, subdivision (b). Consequently, even if that language in Family Code section 2640, subdivision (b), would preclude a court from ordering reimbursement for separate property contributions to community property, no such restriction would exist for separate property contributions to separate property under Family Code section 2640, subdivision (c). Indeed, the Probate Code would compel that result by its failure to provide its own definition of separate property.[122]

3. Importing "Under This Division" -- Family Code Section 2640, Subdivision (c)

Even though Family Code section 2640, subdivision (c), does not have the "under this division" language of Family Code section 2640, subdivision (b), there are some who insist it must be part of the statute. For example, *Crossover Issues in Estate Planning and Family Law* (Cal CEB, 2014) section 5.122, asserts:

> Some have argued, however, that unlike [section] 2640(b), which specifically applies "in the division of the community estate under this division," [section] 2640(c) includes no language that limits its applicability to dissolution division of property. However, the legislative counsel's digest to Stats 2004, ch 119 (which added subsection (c) to [section] 2640) states that the bill would require, "in connection with the division of property upon the dissolution of marriage," that a party 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, even though that clause was not actually included in the body of subsection (c).

There are several problems with this argument. First of all, it is unclear what is meant by "the body" of the statute, as this seems to imply that there is some appendage that can be used to add language to the statute that is absent. This position overlooks the rules of statutory interpretation. As articulated by the California Supreme Court, the starting point for the interpretation of a statute is its plain meaning.[123] When the text of a statute is unambiguous, the plain meaning of the statute will govern.[124] Extrinsic evidence is generally inadmissible to show a different meaning in that situation:

> [U]nder ordinary rules of statutory interpretation, a court would not look to an extrinsic document for help interpreting an ordinance that is clear on its face. This is the rule of *Legislature v. Eu* (1991) 54 Cal.3d 492, 504–505, 286 Cal. Rptr. 283, 816 P.2d 1309, on which petitioner would rely. Instead, a court looks to " 'indicia of voters' intent other than the language of the provision itself' " only to help resolve ambiguities in " 'the provision itself.' " (54 Cal.3d at pp. 504–505.) "Courts may look to [extrinsic sources] to construe a statute only when the statutory language is susceptible of more than one reasonable interpretation." (*Pacific Gas & Electric Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 86, 92, 102 Cal. Rptr. 2d 20.) "[W]hen statutory language is 'clear

> and unambiguous there is no need for construction, and courts should not indulge in it.' " (Ibid., quoting *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198, 137 Cal. Rptr. 460, 561 P.2d 1148.) No principle of statutory construction allows petitioner's circular argument—using extrinsic evidence of voters' intent to create an ambiguity, using that ambiguity to allow consideration of extrinsic evidence, and then using the original extrinsic evidence to construe an ambiguity it created itself. "Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.' [Citation.]" (*Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 326, 14 Cal. Rptr. 2d 813, 842 P.2d 112.)[125]

Attempting to use legislative history in an effort to both create and resolve an ambiguity runs directly counter to this authority. The text of Family Code section 2640, subdivision (c), does not contain language that ambiguously refers to a postmortem right of reimbursement; it does not include that language at all. A court cannot, even using legislative history, imply that the Legislature must have intended to include language that was not included in the text of the statute.[126]

This argument also overlooks the presumption articulated by the California Supreme Court that "[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning."[127] As a result, there is a presumption that the Legislature intended that subdivision (b) of Family Code section 2640 would have a different meaning from subdivision (c) when it included the "under this division" language in the former, while omitting it in the latter. While there are exceptions to these general rules, it is clear that legislative history may only be used to prove a meaning of which language is "reasonably susceptible."[128]

Moreover, the language from the legislative counsel's digest does not support the conclusion that the Legislature must have intended to preclude the statute from applying in the postmortem setting. It is clear that Family Code section 2640, subdivision (c), does apply "in connection with the division of property upon the dissolution of marriage." However, applying the statute upon divorce does not preclude it from applying in the postmortem setting; both can be true at the same time. The premise that the statute applies upon divorce therefore does not support the conclusion that it does not apply after death.

Even if the two statutes did conflict, such a situation would not authorize a court to redraft the statute. As stated by the California Supreme Court in *State Dept. of Public Health v. Superior Court*:[129]

> [T]he requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 479 [66 Cal. Rptr. 2d 319, 940 P.2d 906] ["the general policy underlying legislation 'cannot supplant the intent of the Legislature as expressed in a particular statute'"].) The cases in which we have harmonized potentially conflicting statutes involve choosing one plausible construction of a statute over another in order to avoid a conflict with a second statute. (See, e.g., *Pacific Palisades*, *supra*, 55 Cal.4th at p. 803 [characterizing the statute being construed as "unclear or ambiguous"]; *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1067–1068 [126 Cal. Rptr. 3d 428, 253 P.3d 522] [harmonizing two federal statutes where the first statute was "silent" on the question at issue].) This canon of construction, like all such canons, does not authorize courts to rewrite statutes.[130]

Against this backdrop, the sole piece of evidence offered that the Legislature must have intended to include the "under this division" language in Family Code section 2640, subdivision (c), is the legislative counsel's digest referring to the statute applying "in connection with the division of property upon the dissolution of marriage." However, this analysis does not refer to the repeated references in the legislative history to the broader policy of favoring reimbursements generally under California law, nor does it address the repeated citations to the *Moore, Marsden, Wolfe,* and *Allen* cases, all of which apply in the postmortem setting. If it is contended that legislative counsel's digest carries more authoritative weight than the reports from the Assembly Judiciary or Senate Judiciary committees, or the remainder of the legislative history, a citation is not offered in support of that proposition.

Putting aside the multiple presumptions that apply against the interpretation offered by the above quoted text, there is no evidence the Legislature intended to preclude this form of reimbursement in the postmortem context when it enacted Family Code section 2640, subdivision (c). Quite to the contrary, the bulk of the legislative history would point to the opposite conclusion. Therefore, even if one were to ignore the impermissible attempt to add language to the statute, this argument would still fail as an attempt to invoke *expressio unius est exclusio alterius* because the legislative history does not provide the required evidence that the Legislature intended that result.[131]

4. What's Left After "Under This Division"?

As stated above, the limitation of Family Code section 2640, subdivision (b), to proceedings in family law matters does not preclude a court from ordering reimbursement for separate property contributions to community property in the postmortem setting. However, even if the limitation were interpreted in that manner, most other forms of reimbursement would still be available in the postmortem context. Community property contributions to the acquisition of separate property, as well as separate property contributions to the acquisition of the other spouse's separate property, would be subject to reimbursement in the postmortem setting.

Even if successful, the argument that the "under this division" language of Family Code section 2640, subdivision (b), precludes reimbursement in the postmortem setting would only operate to cause the right to reimbursement for separate property contributions towards the acquisition of community property that existed during life to evaporate upon death. Aside from the fact that Family Code section 2640, subdivision (b), does not compel that result, that is a rule that would make little sense. Such a rule is also directly contrary to the modern trend against implying that one spouse must have intended to make a gift even in the absence of any evidence of that intent.

V. CONCLUSION

Case law has established that much of the law relating to community property contributions towards the acquisition of separate property applies in the postmortem setting. The possibility that separate property contributions towards the acquisition of community property or the other spouse's separate property would apply in the postmortem setting is typically dismissed without analysis. The result has been that the subject has not received the attention it deserves. A more accurate reflection of the primary authority is that reimbursement for separate property contributions is not precluded, and the modern trend of case law and legislation suggests that separate property reimbursement is available in the postmortem context.

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1 *Pereira v. Pereira* (1909) 156 Cal. 1, 6.

2 *Ibid*.

3 *Ibid*.

4 *Pereira v. Pereira, supra,* 156 Cal. at p. 7.

5 *Pereira v. Pereira*, *supra*, 156 Cal. at p. 7 (citations omitted).

6 *Van Camp v. Van Camp* (1921) 53 Cal.App. 17, 20.

7 *Id.* at pp. 24-25.

8 *Id.* at p. 19.

9 *Id*. at p. 20.

10 *Id.* at p. 26.

11 Hogoboom et al., Cal. Practice Guide: Family Law (The Rutter Group 2001) sections 8:347-8:348 (citations omitted).

12 *Patrick v. Alacer Corp.,* (2011) 201 Cal.App.4th 1326.

13 *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th at p. 1330.

14 *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th at p. 1342.

15 *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th at pp. 1340-1341.

16 *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th at p. 1343.

17 *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th at p. 1343.

18 *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th at pp. 1343-1344, citing *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 852-853.

19 *In re Marriage of Dekker*, *supra,* 17 Cal.App.4th at pp. 852-853.

20 *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th at p. 1344.

21 Payments for interest, insurance and maintenance do not give rise to a Moore/Marsden reimbursement right. See, e.g., discussion in *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421-1422.

22 *In re Marriage of Moore* (1980) 28 Cal.3d 366.

23 *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426. The *Moore* decision was refined by *Marsden* because, unlike the latter case, there was little to no premarital appreciation in the former case.

24 See discussion of Fam. Code, section 2640, *post*.

25 For more, see *Practice Under the California Family Code: Dissolution, Legal Separation, Nullity* (Cont. Ed. Bar 2015), Ch. 5.

26 *Marriage of Frick* (1986) 181 Cal.App.3d 997, 1007-1008.

27 *In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962, 967.

28 *In re Marriage of Allen* (2002) 96 Cal.App.4th 497, 502.

29 *Bono v. Clark*, *supra,* 103 Cal.App.4th 1409.

30 *Ibid.*

31 *Ibid.*

32 *Bono v. Clark*, *supra,* 103 Cal.App.4th at p. 1415.

33 *Ibid.*

34 *Bono v. Clark*, *supra*, 103 Cal.App.4th at pp. 1421-1423.

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Bono v. Clark*, *supra,* 103 Cal.App.4th at pp. 1428-1429.

39 The reference to separate property in the above quoted text may very well be dicta. The claim in *Bono* relating to separate property was for conversion, not a reimbursement right, which turned out to be barred by the statute of limitations. That being said, the comments of the court

in *Bono*, even if dicta, are a significant indication of how the court would have ruled on that issue.

40 *In re Marriage of Sherman* (2005) 133 Cal.App.4th 795.

41 The *Lafkas* decision was issued immediately before the submission of this article for publication, and is a marital dissolution case in any event. Consequently, it is only briefly mentioned here.

42 Prob. Code, section 1000, provides that "the rules of practice applicable to civil actions" apply when the Probate Code does not provide to the contrary. It could be argued that this only results in the application of procedural rules, such as those relating to discovery. However, the fact remains that Fam. Code, section 770, et seq. provides a statutory definition of separate property, and the Probate Code does not provide another definition.

43 Even when separate property is transmuted to community property, the spouse whose separate property was transmuted retains the right to be reimbursed for the value of his or her separate property interest on the date of transmutation. *In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 1175. To the extent that a right of reimbursement exists for separate property contributions to the acquisition of community property in the postmortem context, that same right may apply.

44 See, e.g., *Crossover Issues in Estate Planning and Family Law* (Cont. Ed. Bar, 2014) section 5.122.

45 *In re Marriage of Lucas* (1980) 27 Cal.3d 808.

46 *In re Marriage of Lucas*, *supra,* 27 Cal.3d at p. 813 (internal quotes and citations omitted).

47 Background Statement, June 20, 1983, by the Cal. Law Revision Com. (the sponsor of the legislation enacting statutes now codified as Fam. Code, section 2640, subdivisions (a) and (b)) to Assem. Bill 26 (1982-1983 Reg. Sess.).

48 *In re Marriage of Lucas*, *supra,* 27 Cal.3d at p. 814.

49 *In re Marriage of Lucas*, *supra,* 27 Cal.3d at p. 814.

50 *In re Marriage of Lucas*, *supra,* 27 Cal.3d at p. 815.

51 *In re Marriage of Lucas*, *supra,* 27 Cal.3d at pp. 814-815.

52 *In re Marriage of Lucas*, *supra,* 27 Cal.3d at p. 818.

53 See, e.g., *Bono v. Clark*, *supra,* 103 Cal.App.4th 1409; *In re Marriage of Wolfe*, *supra,* 91 Cal.App.4th 962; and *In re Marriage of Allen*, *supra,* 96 Cal.App.4th 497.

54 *In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1406 fn. 2.

55 See, e.g., *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 126.

56 *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 410. See also *People v. Johnson* (1988) 47 Cal.3d 576, 593 ("[u]nder the doctrine of expressio unius est exclusio alterius we must infer that the listing of terms and conditions is complete, and that there are no additional requirements which bind petitioner").

57 *Estate of Banerjee* (1978) 21 Cal.3d 527, 539-540 (internal quotations and citations omitted).

58 *Galland v. Galland* (1869) 38 Cal. 265, 267-268.

59 *Galland v. Galland*, *supra,* 38 Cal. at pp. 267-268.

60 *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 126 (internal quotations and citations omitted).

61 Former Civ. Code, section 4800.1, as enacted by Assem. Bill No. 26 (1982-1983 Reg. Sess.), as added Stats. 1983 ch. 342, section 1.

62 Former Civ. Code, section 164, quoted in the *Lucas* decision, note 45, *ante*.

63 Proposed Civ. Code, section 4800.1, subd. (b) as originally introduced on Dec. 6, 1982 in Assem. Bill No. 26 (1982-1983 Reg. Sess.).

64 "This bill would authorize the court, at the request of either party in a proceeding for dissolution of marriage or legal separation, to divide the interests in certain property held by the parties as joint tenants or tenants in common *as if such property were community property*." Assem. Com. on Judiciary, Rep. on Assem. Bill No. 26 (1982-1983 Reg. Sess.) as amended Feb. 22, 1983 (emphasis added). The fact that it states that the division of property shall be made "as if such property were community property" reflects that it would not actually be community property, but rather only treated as community property for purposes of divorce.

65 Assem. Bill No. 1976 (1982-1983 Reg. Sess.).

66 Assem. Com. on Judiciary, Rep. on Assem. Bill No. 26 (1982-1983 Reg. Sess.) as amended May 9, 1983 (emphasis added).

67 *In re Marriage of Lucas*, *supra,* 27 Cal.3d at pp. 814-815.

68 *Ibid.*

69 *In re Marriage of Lucas, supra,* 27 Cal.3d at pp. 814-815

70 Background Statement, Jun. 20, 1983, by the Cal. Law Revision Com. (the sponsor of the legislation enacting statutes now codified as Fam. Code, section 2640, subd. (a) and (b)) to Assem. Bill No. 26 (1982-1983 Reg. Sess.).

71 As enacted, former Civ. Code, section 4800.2, provided: "In the division of community property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property 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 shall not exceed the net value of the property at the time of the division. As used in this section, 'contributions to the acquisition of property' 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 payment of interest on the loan or payments for maintenance, insurance, or taxation of the property."

72 Fam. Code, section 2640, subd. (a) and (b).

73 In these areas, this would preclude reimbursement for community property contributions towards the acquisition of separate property, reimbursements for other forms of commingling, or for recovery against third parties for community property rights. For example, a spouse cannot recover against a third party for community property rights against a bona fide third party purchaser of real property titled in the name of one spouse. (*In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, overruled on other grounds in *In re Marriage of Valli*, *supra,* 58 Cal.4th at p. 1405). In these situations, other laws fill the silence created by the "under this division" limitation in Fam. Code, section 2640, subd. (b). When there is no other law that would preclude

a court from ordering reimbursement, it cannot be implied that the Legislature must have intended to preclude reimbursement when it is otherwise permissible. By remaining silent, the Legislature merely left other laws in place that would address the situation. As discussed above, even if *expressio unius est exclusio alterius* did apply, its scope would be construed narrowly in any event. (*Estate of Banerjee*, *supra,* 21 Cal.3d at pp. 539-540).

74 See discussion above regarding *expressio unius est exclusio alterius*, *Estate of Banerjee*, *supra,* 21 Cal.3d at pp. 539-540; *Galland v. Galland*, *supra,* 38 Cal. at pp. 267-268; *Silverbrand v. County of Los Angeles*, *supra,* 46 Cal.4th 106. While the right to separate property reimbursement could not apply to joint tenancy property, property outside of the jurisdiction of the California courts, or as against third parties, these issues would not serve as impediments to a California court from making such an order as to property held by a trust subject to California jurisdiction. Fam. Code, section 761, subd. (a), provides that community property transferred into a revocable trust remains community property. By definition, this requires that both spouses be alive at the time of the transfer. (The fact that the statute provides that property must be "transferred . . . during the marriage," means that the transfer in trust refers to the funding of the property into the trust while both spouses are alive, rather than after death, because both spouses must be alive in order for the transfer to have been made "during the marriage.") However, the separate property interest in property is not community property, and nothing in Fam. Code, section 761, subd. (a), results in a transmutation. Funding property into a revocable trust does not, in and of itself, change the character of the property. It remains community or separate as the case may be. Again, bearing in mind the Family Code determines the meaning of separate property, that separate property right would remain intact upon the initial transfer into the trust. There is nothing in the Probate Code that causes these interests to disappear upon death. Unlike a joint tenancy deed that passes interest by operation of law at death, the trust instrument would govern where the assets would pass. In the case of a trust in which the deceased spouse gives his or her separate property and one half interest in community property to someone other than the surviving spouse, the retention of the separate property right of reimbursement could have a significant impact.

75 Civ. Code, section 164, was analyzed by *Lucas, supra,* 27 Cal.3d 808, and the statutes now codified as Fam. Code, section 2581, and section 2640, subd. (a) and (b), were enacted in response.

76 It is also notable that the statute by definition would have had no application upon death. If the single-family residence were held in joint tenancy between the two spouses, it would pass to the surviving spouse upon the first spouse's death by operation of law. As discussed in more detail below, there may be jurisdictional concerns as to out-of-state real property. However, the principal residence of two parties to a California divorce would likely be in California (and therefore subject to California jurisdiction) in any event.

77 Former Civ. Code, section 4800.1, as added Stats. 1983 ch. 342, section 1.

78 *Dorn v. Solomon* (1997) 57 Cal.App.4th 650.

79 Former Civ. Code, section 5110, now codified as Fam. Code, section 2581, was enacted as part of the same bill that enacted current Fam. Code, section 2640, subd. (a) and (b), and also only applies in dissolution or legal separation. While this case addressed Fam. Code, section 2581, rather than Fam. Code, section 2640, the application of the limitation to the family law setting in Fam. Code, section 2581, provides some insight into how the limitation would apply in Fam. Code, section 2640.

80 *Dorn v. Solomon*, *supra,* 57 Cal.App.4th at p. 652

81 *Id.* at p. 653.

82 See also, e.g., *Estate of Mitchell* (1999) 76 Cal.App.4th 1378, 1386: "If one spouse dies during a dissolution proceeding but before there is a judgment of dissolution, [the Family Code section 2581] community property presumption does not apply. Property held in joint tenancy will pass, by right of survivorship, to the surviving spouse."

83 See Fam. Code, section 125.

84 See California Decedent Estate Practice (Cont. Ed. Bar, 2014) section 11.6.

85 As noted above, former Civ. Code, section 4800.1, as enacted by Assem. Bill No. 26 (1982-1983 Reg. Sess.), as added Stats. 1983 ch. 342, section 1 was limited to joint tenancy property when initially enacted. The current version of the statute continues to apply to joint tenancy property.

86 Former Civ. Code, section 4800.1, is currently codified as Prob. Code, section 2581.

87 Assem. Bill No. 2274 (1983-1984 Reg. Sess.).

88 Proposed Civ. Code, section 5110.110, Assem. Bill No. 2274 (1983-1984 Reg. Sess.), as introduced Jan. 5, 1984.

89 *Ibid*.

90 Assem. Bill No. 2274 (1983-1984 Reg. Sess.), as amended Apr. 3, 1984. With the deletion of that provision, the bill was enacted as former Civ. Code, section 5110.710, as added Stats. 1984 ch. 1733, section 1.

91 Charles A. Collier, Jr., Estate Planning, Trust and Probate Law Section of the State Bar of California, letter to Assemblyman Allister McAllister, Feb. 28, 1984, p. 2.

92 *Ibid*.

93 *Id*. at p. 3.

94 Charles A. Collier, Jr., Estate Planning, Trust and Probate Law Section of the State Bar of California, letter to Assemblyman Allister McAllister, Feb. 28, 1984, p. 3.

95 Lois J. Scampini and Philip W. Aaron, Goth, Dennis, & Aaron, letter to Assemblyman Robert W. Naylor, Mar. 19, 1984, p. 2.

96 Charles A. Collier, Jr., Estate Planning, Trust and Probate Law Section of the State Bar of California, letter to Assemblyman Allister McAllister, Feb. 28, 1984, p. 3.

97 That is not to say that a California court cannot find that a right of reimbursement exists with respect to real property that is within its jurisdiction generally and in the postmortem context specifically. (See, e.g., *In re Marriage of Moore*, *supra,* 28 Cal.3d 366; *In re Marriage of Marsden*, *supra,* 130 Cal.App.3d 426; *Bono v. Clark*, *supra,* 103 Cal.App.4th 1409; and *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th 1326.

98 *In re Marriage of Valli*, *supra,* 58 Cal.4th at p. 1412 (con. opn. of Chin, J., joined by Corrigan, J., and Liu, J.).

99 *In re Marriage of Brooks & Robinson*, *supra,* 169 Cal.App.4th 176.

100 *Id*. at p. 180.

101 *Id*. at pp. 181-182.

102 *Id*. at p. 180.

103 *In re Marriage of Brooks & Robinson*, *supra,* 169 Cal.App.4th at pp. 188–189.

104 *Id*. at p. 189.

105 *In re Marriage of Brooks & Robinson*, *supra,* 169 Cal.App.4th at p. 188.

106 *In re Marriage of Brooks & Robinson*, *supra,* 169 Cal.App.4th at pp. 186-187.

107 *In re Marriage of Valli*, *supra,* 58 Cal.4th at p. 1405.

108 *Id*. at p. 1412 (conc. opn. of Chin, J., joined by Corrigan, J., and Liu, J.).

109 *Silverbrand v. County of Los Angeles*, *supra,* 46 Cal.4th at p. 126 (there must be evidence that the Legislature intended for *expressio unius est exclusio alterius* to apply in order to invoke the maxim); *Estate of Banerjee*, *supra,* 21 Cal.3d at pp. 539-540 (exceptions to a general statute are construed narrowly for purposes of *expressio unius est exclusio alterius*).

110 *In re Marriage of Cross* (2001) 94 Cal.App.4th 1143.

111 *Id*. at p. 1148.

112 *In re Marriage of Cross*, *supra,* 94 Cal.App.4th at p. 1147.

113 *In re Marriage of Cross, supra,* 94 Cal.App.4th at p. 1147. "If the Legislature had intended to give a spouse a right to reimbursement for separate property contributions made to the other spouse's separate property, the Legislature could have included language to achieve this intent. It did not."

114 The court in *Cross* specifically found that a transmutation had not occurred. Finding that the transfer must have been a gift is directly contrary to the modern trend of implying that a gift was intended. See, e.g., *In re Marriage of Wolfe*, *supra,* 91 Cal.App.4th 962; *In re Marriage of Allen, supra,* 96 Cal.App.4th 497.

115 See, e.g., *In re Marriage of Moore*, *supra,* 28 Cal.3d 366; *In re Marriage of Marsden*, *supra,* 130 Cal.App.3d 426; *Pereira v. Pereira*, *supra,* 156 Cal. 1; *Van Camp v. Van Camp*, *supra,* 53 Cal.App. 17; *In re Marriage of Wolfe*, *supra,* 91 Cal.App.4th 962; *In re Marriage of Allen*, *supra,* 96 Cal.App.4th 497; *Bono v. Clark*, *supra,* 103 Cal.App.4th 1409; *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th 1326.

116 Sen. Com. on Judiciary, Report on Sen. Bill No. 1407 (2003-2004 Reg. Sess.), Apr. 27, 2004, p. 3.

117 See, e.g., Sen. Com. on Judiciary, Report on Sen. Bill No. 1407 (2003-2004 Reg. Sess.), Apr. 27, 2004, p. 2; Sen. Rules Com., Off. of Sen. Floor Analyses, Report on Sen. Bill No. 1407 (2003-2004 Reg. Sess.), as amended May 4, 2004, p. 1; Assem. Com. on Judiciary, Report on Sen. Bill No. 1407 (2003-2004 Reg. Sess.), as amended May 27, 2004, p. 2.

118 Sen. Com. on Judiciary, Report on Sen. Bill No. 1407 (2003-2004 Reg. Sess.), Apr. 27, 2004, p. 4.

119 *Id*. at p. 2.

120 Assem. Com. on Judiciary, Report on Sen. Bill No. 1407 (2003-2004 Reg. Sess.), as amended May 27, 2004, p. 2.

121 *Bono v. Clark*, *supra,* 103 Cal.App.4th 1409; *Patrick v. Alacer Corp*., *supra,* 201 Cal.App.4th 1326.

122 Prob. Code, section 1000; Fam. Code, section 770, et seq.

123 *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.

124 *Ibid.*

125 *Monette-Shaw v. San Francisco Bd. of Supervisors* (2006) 139 Cal.App.4th 1210, 1219 (footnote omitted).

126 See, e.g., *Estate of Damskog* (1991) 1 Cal.App.4th 78, fn. 4 and accompanying text; see generally Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (2012 Thompson/West) p. 93 ("Nothing is to be added to what the text states or reasonably implies [*casus omissus pro omissio habendus est*]. That is, a matter not covered is to be treated as not covered)."

127 *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1107.

128 *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37 (discussing the interpretation of instruments generally).

129 *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940.

130 As discussed above, the "under this division" language of Family Code section 2640, subdivision (b), avoids creating conflicts with other laws. The absence of that language in Family Code section 2640, subdivision (c), does not create a different result. While the statute now codified as Family Code section 2640, subdivision (b), as originally enacted applied only to joint tenancy properties held between spouses, that would not be the situation in connection with Family Code section 2640, subdivision (c), reimbursement claim in the postmortem setting. (By definition, the separate property of one spouse would not be held in joint tenancy with the other spouse, and even if it were, the surviving spouse would take as the surviving joint tenant in any event). A more likely scenario would be that the scenario in *In re Marriage of Brooks & Robinson*, *supra,* 169 Cal.App.4th 176 would play out with separate instead of community property being contributed to the separate property of the other spouse. In that situation, the court would be called upon to harmonize the two statutes. Inasmuch as the Evidence Code provision would more specifically address that situation, it would take precedence over the more general statute dealing with separate property rights in that situation. (See, e.g., *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783). As to non-California real property, the situs of the real property would be controlling in any event, and an attempt to recover these interests would be governed by the laws of the state in which real property is located. Unlike subdivision (b) of Family Code, section 2640, subdivision (c) does not require that out-of-state property be treated as community property. As a result, the potential for creating conflict of laws problems is not as great. That being said, in the final analysis the laws of the state where the real property is located will control.

131 See, e.g., *Estate of Banerjee*, *supra,* 21 Cal.3d 527; *Silverbrand v. County of Los Angeles*, *supra,* 46 Cal.4th 106, 126, discussed in note 109, *ante* (evidence must show that the Legislature intended to apply the maxim in order for it to apply).