TRUSTS AND ESTATES
CALIFORNIA LAWYERS ASSOCIATION

TRUSTS & ESTATES
QUARTERLY

INSIDE THIS ISSUE

MCLE SELF-STUDY ARTICLE

UNTIL DEATH DO US PART: PART II: AREAS OF DIVERGENCE BETWEEN MARITAL PROPERTY DIVISION AT DEATH AND DIVORCE

Written by James P. Lamping, Esq.*

I. INTRODUCTION

This article is a sequel to *Until Death Do Us Part: Marital Property Characterization in the Postmortem Setting* (2015) 24 *California Trusts and Estates Quarterly* No. 4. The previous article pointed out that many of the rules governing the division of marital property characterization in divorce proceedings also apply in the postmortem setting. This article, by contrast, will focus on the differences between these two contexts.

The previous article included a discussion of the similarities between the rules governing property characterization in both settings. Prior to the publication of the previous article, the topic of tracing commingled community and separate property following death was often met with reactions ranging from skepticism to derision. However, the notion has subsequently gained wider acceptance. As litigation of these issues becomes more prevalent, the need to complete the analysis with a discussion of the distinctions between death and divorce became apparent.

This article is divided into two sections. The first section will provide an update of the development of case law relating to the similarities between death and divorce. The second section will focus on the salient differences between property characterization upon death as opposed to in marital dissolution proceedings.[01] This is not an exhaustive discussion of every possible area in which the rules diverge. The goal of this article is to provide the practitioner with an overview of the most commonly encountered differences.

II. FURTHER DEVELOPMENTS

A. Introduction

Several recent cases have implications for marital property characterization in the postmortem setting. Two of these cases, *In re Brace* (2020) 9 Cal.5th 903 and *Estate of Wall* (2021) 68 Cal.App.5th 168, have been addressed generally by other articles in the Trusts and Estates Quarterly.[02] Those cases are briefly summarized here to lay a foundation for discussion regarding their implications for marital property characterization in the postmortem setting. These cases are significant and warrant a careful reading.

B. The California Supreme Court's In Re Brace Decision

In *Brace*, a married couple acquired real property in joint tenancy.[03] The question presented to the California Supreme Court was whether the joint tenancy property was community property for bankruptcy purposes, or whether each spouse owned a one-half interest as his or her respective separate property.[04] Specifically, the issue presented was the operation of the potentially conflicting form of title presumption and the presumptions created under the Family Code.[05] The traditional application of the form of title presumption would result in the joint tenancy asset being characterized as the separate property of the spouses, whereas the presumptions under the Family Code would cause it to be characterized as community property.[06]

As noted by the court in *Brace*, property held in joint tenancy between spouses had historically been treated as separate property upon divorce as a general matter under the form of title presumption; however, a gradual evolution in the law led to a community property presumption increasingly gaining traction.[07] Among other things, Family Code section 760 creates a rebuttable presumption that assets acquired during marriage are community property.[08] Notably, this presumption may be overcome by tracing the source of acquisition to a separate property source.[09]

The debtor-spouses in *Brace* argued that Family Code section 760 only applied between spouses in marital dissolution proceedings, whereas the bankruptcy trustee argued that the statute also applied in relation to third parties, such as creditors.[10] After examining the legislative history and the applicable case law, the *Brace* court concluded that Family Code section 760 applied to third parties (such as creditors) in addition to parties to marital dissolution proceedings.[11] As a result, the creditor could treat the joint tenancy property as community property.[12] As discussed in detail below, the *Brace* decision specifically mentioned that joint tenancy property would not be characterized as community property upon the death of the first spouse.[13]

C. *Trenk* Turns the Tables on Creditors

The holding in *Brace* that real estate held in joint tenancy between spouses would be treated as community property in relation to third parties appeared to benefit creditors. Subsequent case law demonstrated otherwise.

In *Trenk v. Soheili* (2020) 58 Cal.App.5th 1033, an attorney was sued for malpractice.[14] To settle the dispute, the attorney agreed to make payments to the client.[15] The obligation was secured by real property that the attorney held in joint tenancy with his wife; however, the wife did not execute the note or deed of trust.[16] The attorney eventually stopped making payments.[17] A foreclosure was then initiated by the client's sister, who the client designated as the beneficiary on the deed of trust.[18]

The attorney and his wife filed an action arguing that the security interest should be voided.[19] The court agreed. Family Code section 1102, subdivision (a) requires that a deed of trust secured by community property real estate be executed by *both* spouses.[20] According to the *Trenk* court, *Brace* made it clear that an asset held in joint tenancy between spouses would generally be treated as community property in relation to third parties—including creditors.[21] Inasmuch as the joint tenancy property held by the attorney and his wife was to be treated as community property in relation to creditors, the fact that the attorney's wife had not signed the note and deed of trust rendered them voidable under Family Code section 1102.[22]

It bears mention that the *Trenk* decision went to great lengths to describe the lack of evidence presented at trial to rebut the community property presumption.[23] Under different circumstances and with different evidence, the outcome might have been different. *Trenk* also presented an unusual fact pattern. A safe assumption is that most creditors would require both joint tenants to agree to a security interest in real property. Consequently, it is unlikely that the factual scenario in *Trenk* will arise often. That said, *Trenk* offers an interesting counterpoint to the creditors in *Brace* who benefited from the characterization of joint tenancy real property as community property.

D. An Off the *Wall* Decision

Estate of Wall (2021) 68 Cal.App.5th 168 has the dubious distinction of misinterpreting not one—but two—California Supreme Court decisions in this author's opinion, calling into question its value as precedent. Practitioners should nevertheless be aware of the decision so they may provide an analysis on the arguably incorrect premise on which the court based the decision.

In *Estate of Wall*, a husband and wife wanted to take title to their home in joint tenancy; however, they were unable to obtain financing due to the wife's credit history.[24] The husband purchased the property in his name alone and encouraged the wife to sign a quitclaim deed, but repeatedly assured the wife that she would be added to title in the future.[25] Additionally, the wife had contributed funds towards the acquisition, maintenance, and improvement of the property.[26] Upon the husband's death, title remained in the husband's name alone.[27]

The wife filed a petition in probate court seeking an order that the property was community property.[28] The wife argued that the property was presumed to be community property under Family Code section 760 because it was acquired during the marriage.[29] Additionally, the wife argued that the husband's actions breached the husband's spousal fiduciary duties to the wife.[30] The husband's children objected.[31] Among other things, they pointed to the presumption under Evidence Code section 662 that the title in the husband's name alone accurately reflected the underlying ownership.[32]

The trial court determined that the presumption that an asset acquired during marriage is community property prevailed over the presumption that title to the real property accurately reflected ownership.[33] The trial court relied upon Justice Chin's concurring opinion in *In re Marriage of Valli* (2014) 58 Cal.4th 1396, which stated that the community property presumption prevailed

over the form of title presumption in litigation between the spouses.[34] For purposes of these presumptions, the trial court held that the children essentially stepped into the shoes of the deceased spouse.[35] The trial court found tracing evidence to be "interesting," although not dispositive.[36] The trial court concluded that the deceased spouse breached his spousal fiduciary duties to the surviving spouse and awarded the property to the surviving spouse.[37]

The *Wall* decision pointed to excerpts from *Brace* stating that the form of title presumption trumped the community property presumption upon the death of the first spouse.[38] However, *Brace* involved property held in joint tenancy between the two spouses, whereas *Wall* involved real property titled in the name of one spouse alone.[39] The *Wall* decision failed to recognize that critical distinction and instead purported to apply *Brace*'s joint tenancy analysis to property held in the name of one spouse alone. The reasoning of the *Wall* decision was premised upon an incorrect application of *Brace*, and therefore its conclusion was incorrect in this author's opinion.

Joint tenancy is inherently different from property titled in one person's name alone at death. Property properly held by two people in joint tenancy passes outright to the surviving joint tenant upon the first death. Two spouses holding property in joint tenancy produces the same result. The deceased spouse's decision to leave the asset outright to the surviving spouse through the joint tenancy therefore effectively extinguishes any question regarding the underlying character of the funds used to acquire the property.

The first spouse to die is making the equivalent of a testamentary transfer of that spouse's entire interest in the joint tenancy property to the surviving spouse upon death, regardless of the character of the assets used to acquire it. Therefore, the fact that the joint tenancy property may be traced to a community or separate property source following the first death is irrelevant. Absent a challenge to the deceased spouse's decision to take title in joint tenancy, the character of the assets used to acquire the property simply doesn't matter. The surviving spouse is entitled to the entire property as the surviving joint tenant.

Brace's discussion of joint tenancy at death clarified that the survivorship feature inherent in the joint tenancy form of title would control, rather than its characterization as community property:

> [O]ur approach does not undermine the stability of title in the context of probate. The Braces argue that the inapplicability of Evidence Code section 662 to this bankruptcy dispute would mean that at death "title companies could not insure title to the surviving spouse based upon a death certificate, but, instead would run the risk that a non-spousal heir might challenge title based upon allegations that the property was community in nature and not joint tenancy." Courts have consistently held that for property titled in joint tenancy, the form of title controls at death.[40]

In other words, the survivorship feature of the joint tenancy will govern upon death rather than its characterization as community property. Indeed, *Brace* added that the survivorship feature would control even when the property was *titled* as *community property* with right of survivorship:

> … (T)he rule that form of title controls at death was a key motivation for the Legislature's 2000 enactment of Assembly Bill No. 2913 (1999–2000 Reg. Sess.), which created a new form of title: community property with a right of survivorship. (Civ. Code, section 682.1, added by Stats. 2000, ch. 645, section 1, pp. 4203–4204.) This form of ownership combines the tax benefits of holding community property at the death of one spouse — a stepped-up basis in the full value of the community property — with the right of survivorship in a joint tenancy.[41]

The *Brace* decision held that a distinction exists between how joint tenancy assets should be treated upon divorce, and how those assets should be treated upon the death of the first spouse. While both spouses are alive, the disposition at death inherent in the joint tenancy form of title has not yet occurred. Consequently, the form of title will not inherently render the characterization of the property moot. The spouses are therefore in a fundamentally different position at divorce than they would be at the first death.

The key to *Brace's* analysis is that the survivorship feature governs upon the death of the first spouse, notwithstanding the fact that it is characterized as community property while both spouses are alive: "The Legislature has expressly recognized that characterization of joint tenancy property as community property does not "defeat the right of survivorship." Each spouse's right of survivorship arising from joint tenancy title remains an "expectancy" that is realized upon the other spouse's death."[42]

Brace concluded that its decision did not alter the procedure through which the surviving spouse-joint tenant may clear title.[43] If the deceased spouse executed a will leaving all of the deceased spouse's community property to someone other than the surviving spouse, the surviving spouse would still receive the entirety of an asset properly titled in joint

tenancy—even if it was acquired entirely with community property.[44] The legislative history to several family law statutes makes clear that the Legislature intended that result,[45] underscoring the significance of the form of title at death.

In *Wall*, the trial court's reliance upon *Valli* appears appropriate. As was the case in *Valli*, property was titled in the name of one spouse alone. Under these circumstances, it was entirely appropriate to find that the children stepped into the shoes of the deceased spouse for purposes of determining the character of the underlying asset. Further, no disposition upon death inherent in the form of title would have rendered its underlying character as community or separate irrelevant, in contrast to the joint tenancy property in *Brace*.

Nevertheless, the *Wall* decision applied *Brace's* analysis of joint tenancy property to reject the trial court's ruling:

> In light of *Brace*, we think the probate court's reliance on *Valli* was misplaced. Justice Chin's concurrence pertained to actions between spouses. And while the probate court's reasoning that the children stand in the shoes of the decedent has some intuitive appeal, it collides with the *Brace* court's teaching that form of title controls at death.[46]

The *Wall* decision was based upon an application of *Brace*'s analysis of joint tenancy assets to an asset held in the name of one spouse alone. As a result, the author contends that the holding is erroneous.

Wall nonetheless may have reached the appropriate result. In an unpublished portion of the decision, the court held that the deceased spouse had violated his fiduciary duties to the surviving spouse. As a result, the surviving spouse was awarded the real property. It is unfortunate that the only instructive part of the decision arguably should not be relied upon as precedent.

It bears mention that the form of title presumption may be rebutted. The *Wall* decision does not preclude tracing to establish a community property interest in property titled in the name of one spouse. It is well-established that the character of property titled in a form other than joint tenancy may be established by tracing following the death of the first spouse.

Suppose that a husband purchases a piece of real property the day before he is married, with a $200,000 down payment and financing the remaining $800,000 purchase price. Over the next 30 years of the marriage, the husband pays off the $800,000 mortgage using community property. The day after the mortgage is paid off, the husband files for divorce and points to the separate property title in support of his claim that the property is entirely his separate property. That argument will not be effective.

The previous article, *Until Death Do Us Part: Marital Property Characterization in the Postmortem Setting* (2015) Vol. 24, No. 4, California Trusts and Estates Quarterly, explains why. In short, it is well-established in California law under *Moore/Marsden* and its progeny that the community acquires an interest in real property titled as the separate property of one spouse when community funds are used to purchase, pay down the principal mortgage balance, or improve that separate property. Unlike property titled in joint tenancy between the spouses, property titled in the name of one spouse alone does not inherently cause a transfer that extinguishes the community interest upon the death of the first spouse. To the contrary, *Bono v. Clark* (2002) 103 Cal.App.4th 1409 specifically held that *Moore/Marsden* applies to property titled in the name of one spouse in the postmortem setting.

The *Wall* decision did not mention *Moore/Marsden* or *Bono*. It may not have been an issue at the trial court. In any event, the *Wall* decision would have no effect upon the continued viability of a *Moore/Marsden* claim in the post death setting.

E. What These Developments Mean for Postmortem Property Characterization

These cases give rise to the following observations. First, under both *Brace* and *Trenk*, real property held in joint tenancy between spouses will generally be considered community property while both spouses are alive, including in relation to third parties. Separate property contributions to the acquisition of the joint tenancy asset would give rise to a right of reimbursement to the spouse contributing the separate property.[47]

Second, real property held in joint tenancy by two spouses will generally pass outright to the surviving spouse, regardless of the character of the assets used to acquire the property. The legislative history to several statutes reveals that the Legislature intended that result. Case law is in accord.

Third, if the spouses transfer joint tenancy property to a revocable trust, the property would retain the same character as community, separate or some combination of the two.[48] Even if the form of title presumption applied, it would have no impact. A presumption that the trust is the owner of the property would provide no indication regarding its community or separate character. Unlike joint tenancy property, the form of title would not inherently carry a particular disposition upon death. As a result, the language in *Brace* discussing joint tenancy upon death

(as well as *Wall*'s analysis of that text which was faulty according to this author) would be inapplicable.

Fourth, an action seeking an adjudication regarding property characterization in the postmortem setting should include a breach of fiduciary duty claim whenever applicable. The *Wall* decision conceded that a breach of fiduciary duty claim could overcome the form of title presumption, albeit in an unpublished portion of the decision. This topic is explored in more detail below.

III. PROPERTY CHARACTERIZATION RULES THAT ARE DIFFERENT WHEN A MARRIAGE ENDS BY DEATH RATHER THAN DIVORCE

A. Overview

Many of the rules governing the division of marital assets in marital dissolution proceedings are the same as those applying upon death. That is not always the case, however. As the litigation of postmortem marital property characterization claims becomes more common, the importance of recognizing these distinctions has increased.

These distinctions may produce seemingly unfair results. In divorce proceedings, each spouse generally receives his or her separate property, as well as one half of the community property.[49] But that is not always the result following the death of the first spouse. In many instances, the distinction in the rules may result in one spouse's side of the balance sheet receiving more when the marriage ends by death rather than divorce.

B. Non-California Real Property Held Directly by the Deceased Spouse

The rules governing non-California real property titled in the name of one spouse at divorce are different than those applying upon the death of the first spouse. California courts have some latitude to enter orders relating to out-of-state real property in marital dissolution proceedings. By contrast, a California probate court does not have jurisdiction to enter an order controlling the disposition of out-of-state real property following the death of one of the spouses. Indeed, California law expressly concedes that such property is not community property following the death of a spouse.

In marital dissolution proceedings, California courts are expressly authorized to enter orders relating to out-of-state real property held by one of the spouses. Family Code section 2660 provides:

> (a) Except as provided in subdivision (b), if the property subject to division includes real property situated in another state, the court shall, if possible, divide the community property and quasi-community property as provided for in this division in such a manner that it is not necessary to change the nature of the interests held in the real property situated in the other state.
>
> (b) If it is not possible to divide the property in the manner provided for in subdivision (a), the court may do any of the following in order to effect a division of the property as provided for in this division:
>
> (1) Require the parties to execute conveyances or take other actions with respect to the real property situated in the other state as are necessary.
>
> (2) Award to the party who would have been benefited by the conveyances or other actions the money value of the interest in the property that the party would have received if the conveyances had been executed or other actions taken.

Strictly speaking, a divorce court entering a ruling under Family Code section 2660 is not directly adjudicating property rights in out-of-state real property.[50] Instead, the court is using its personal jurisdiction over the parties to require one of them to execute a deed transferring an interest in the out-of-state real property to further a division of the marital assets.[51]

For example, in *Tomaier v. Tomaier* (1944) 23 Cal.2d 754, a trial court entered an order requiring a spouse in marital dissolution proceedings to execute a deed to real property located in Missouri. The California Supreme Court concluded:

> Defendant contends that California courts lack jurisdiction to render a decree affecting title to land in Missouri. It is well settled, however, that a California court having jurisdiction over the parties can require them to execute conveyances to foreign land to insure a complete determination of the controversy before the court.[52]

If the litigant in divorce proceedings refuses to sign the deed, the California court can hold that litigant in contempt.[53] Further, the California order may be considered res judicata in the state where the real property is located.[54]

By contrast, a California court can no longer exercise personal jurisdiction over a person that has died. Instead, a California court may appoint a personal representative to administer the estate of a decedent who was domiciled or

left property in California.[55] However, "[t]he authority of a ... personal representative ... does not extend beyond the jurisdiction of the government under which that person was invested with authority, except to the extent expressly authorized by statute."[56]

A full analysis of all conflict of laws rules relating to real property is beyond the scope of this article. The basic rule is that the decedent's interest in non-California real property must be administered in the jurisdiction in which the real property is located. As summarized by one practice guide:

> The state of the decedent's domicile usually admits the will to probate, issues letters, and thus provides for original administration. But if the decedent has left property located in another state or country, that state or country has jurisdiction to administer that property, and there will be a secondary probate, otherwise known as ancillary administration.[57]

As a result, a California court cannot adjudicate the disposition of out-of-state real property held in the name of the decedent. The California Legislature has confirmed this point. California Probate Code section 28 defines "community property" in the post death context as follows:

> (a) Community property heretofore or hereafter acquired during marriage by a married person while domiciled in this state.
>
> (b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person while domiciled elsewhere, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition.
>
> (c) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person in exchange for real or personal property, wherever situated, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time the property so exchanged was acquired.

Of course, real property located outside California and titled directly in the name of a decedent is not "real property situated in this state." Therefore, it is not "community property" under the Probate Code. A California court would not have jurisdiction to enter an order regarding the out-of-state property. Therefore, even if the out-of-state property titled in one spouse's name alone was acquired entirely with community property, it still will not be considered community property before a California court.

C. California Real Estate Held in Joint Tenancy between Spouses

It is a consistent theme in California law that real property held by spouses in joint tenancy is to be treated upon death differently than it is to be treated upon divorce. The *Brace* decision made it clear that joint tenancy property held by spouses would not be treated as community property upon death.[58]

The reason is that the deceased spouse's entire interest in the joint tenancy—regardless of its character—passes outright to the surviving spouse. As summarized by a leading practice guide:

> When one joint tenant dies, the entire estate automatically belongs to the surviving joint tenant(s). This right attaches as a result of the original grant that created the joint tenancy, and not as a result of the death of a joint tenant. On the joint tenant's death, the surviving joint tenant or tenants continue in the ownership of the entire property, including the former title of the deceased joint tenant. The interest of the deceased joint tenant passes to the surviving joint tenant or tenants by operation of law.[59]

The deceased spouse-joint tenant no longer has any interest in the joint tenancy property upon his or her death:

> On death, the interest of the deceased joint tenant is not a part of his or her estate and does not pass to heirs or devisees. He or she cannot dispose of it by will, and heirs acquire no interest or estate in the property because the deceased joint tenant had no estate to pass. When only one surviving joint tenant remains, ownership of the property becomes one in severalty. The entire title to the property becomes a part of the estate of the surviving joint tenant and descends to his or her heirs or devisees on his or her death.[60]

As a result, property held by spouses in joint tenancy will pass outright to the surviving spouse-joint tenant, even if it was acquired entirely with community property.[61] The survivorship feature of the joint tenancy supersedes any characterization of the property as separate or community.[62] While no published cases appear to directly address the point, the above quoted practice guide suggests that its analysis of joint tenancy upon death would apply equally to community property with right of survivorship. In other words, the survivorship feature of the form of title

results in the property passing outright to the surviving spouse—even if the form of title is itself community property.[63]

That is not to say that the source of funds used to acquire the joint tenancy property should be ignored. Directly tracing the source of the funds used to acquire the joint tenancy property may not permit the deceased spouse to leave a direct interest in the property. It may nonetheless be relevant to an attack on the joint tenancy form of title. If the joint tenancy form of title is set aside, the survivorship feature of joint tenancy property does not apply.

For example, where property held by spouses in joint tenancy originated with the separate property of one spouse, it may be possible to set aside that title if that title resulted from a breach of fiduciary duty. Family Code section 721, subdivision (b) provides:

> [In] transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners….

As a matter of public policy, this standard applies to transactions between the spouses involving one spouse's separate property as well as community property.[64] For example, *Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996, held that Family Code section 721, subdivision (b) applied when a relatively unsophisticated husband was induced to transfer title of real estate from his separate property into joint tenancy with his wife, who was much more experienced in dealing with financial matters.[65]

Explaining the implications of Family Code section 721, subdivision (b) in the context of a case brought following the death of the first spouse, the court in *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1353 summarized:

> Thus, " '[i]f one spouse secures an advantage from the transaction, a statutory presumption arises under section 721 that the advantaged spouse exercised undue influence and the transaction will be set aside.' " (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 344, 121 Cal.Rptr.3d 195.) An advantage results to one spouse when that spouse gains or when the other spouse is hurt by the transaction. (*Gaines v. California Trust Co.* (1941) 48 Cal.App.2d 709, 714, 121 P.2d 28.) A spouse obtains an advantage when the "spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits. [Citation.]" (*In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 629, 35 Cal.Rptr.3d 1.) The presumption is rebuttable; the spouse advantaged by the transaction must establish that the disadvantaged spouse acted freely and voluntarily, with " ' " 'full knowledge of all the facts, and with a complete understanding of the effect of' the" transaction.' " (*In re Marriage of Fossum*, supra, 192 Cal.App.4th at p. 344, 121 Cal.Rptr.3d 195.)

Lintz is instructive because it included an action for financial elder abuse. Welfare and Institutions Code section 15610.30, subdivision (a)(3) provides that a person commits financial elder abuse when one "(t)akes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70." The surviving spouse in *Lintz* was first required to overcome the presumption of undue influence under Family Code section 721, subdivision (b). At the same time a finding of undue influence within the meaning of section 15610.70 may result in liability for elder abuse.[66]

Taken together, these authorities may be read as holding that a transfer of real property from the separate property of one spouse into a joint tenancy between both spouses may give rise to a presumption of undue influence following the death of the spouse who made the transfer. The failure to overcome the presumption of undue influence may lead to the imposition of liability for elder abuse.

An unfair advantage for purposes of Family Code section 721, subdivision (b) may require careful scrutiny of the circumstances surrounding the transaction, even if the transaction initially appears to be fair. For example, if two spouses each add the other as joint tenants to properties of roughly equal value, it may at first appear that neither spouse has gained an advantage. However, if one spouse is healthy and the other is terminally ill, such that it is a virtual certainty that the healthy spouse will receive everything, perhaps the trade was not fair after all.

When breach of fiduciary duties between spouses involves mismanagement or misappropriation of community property, an action under Family Code section 1101 may be appropriate. This statute provides the court with the discretion to award the entire community property asset involved to the aggrieved spouse. The only time bar on such a claim is laches.

For example, in *Yeh v. Tai* (2017) 18 Cal.App.5th 953, the facts were similar to the facts in *Wall*. The husband

and wife had initially planned to purchase real property together; however, the property was titled in the husband's name alone because the wife had a poor credit history.[67] The husband's revocable trust, which held title, left the entire property to his children from a prior relationship.[68] Following the husband's death, the wife filed an action under Family Code section 1101 seeking to void the transaction and have the real property transferred to her.[69] The trial court sustained the children's demurrer on statute of limitations grounds.[70] In reversing the trial court's decision, the appellate court noted that a claim brought under these circumstances was not subject to any statute of limitations, although laches could be raised as a defense.[71]

While *Yeh* was nominally directed to the statute of limitations applicable to a claim under Family Code section 1101, it nevertheless provides a useful discussion of the statute. As mentioned above, the only instructive portion of *Wall* – the part discussing spousal fiduciary duties – was unpublished. By contrast, *Yeh* provides a useful and published analysis of spousal fiduciary duties under both Family Code sections 721 and 1101.

If the joint tenancy can be successfully attacked based upon the surviving spouse's breach of his or her fiduciary duties to the deceased spouse, the joint tenancy form of title may be set aside. As a result, the survivorship feature of the joint tenancy will no longer govern its disposition.

D. ERISA Qualified Retirement Plans

Retirement plans often represent the second most valuable community property assets (after real property) held by married couples. They also yield some of the most counterintuitive and seemingly unfair results following the death of a spouse. That funds in an ERISA qualified retirement account may be traced to a community property source is generally irrelevant. If the nonparticipant spouse is the first to die, he or she will likely be unable to control the disposition of the asset.

The Employee Retirement Income Security Act of 1974 (ERISA)[72] was designed to provide a uniform national system for retirement plans coming within its auspices.[73] The most common category of retirement plans within the scope of ERISA are 401(k) plans.[74] The contributions to these plans can be substantial. For example, the maximum contribution to a self-employed 401(k) is $61,000 in 2022, with a catch-up contribution of an additional $6,500 for those persons aged 50 or older.[75] The value of these contributions may substantially increase because of the tax-free compounding within the accounts.

In the absence of an agreement between the spouses to the contrary, the earnings of a married person in California will ordinarily be considered community property.[76] However, the moment that a married person transfers community property earnings from his or her bank account into a 401(k), his or her spouse's ability to enforce community property rights are severely restricted.[77] The funds are not considered separate property, but rather enter a kind of twilight characterization created by federal law. The participant spouse's ERISA qualified retirement plan (e.g., a 401(k)) is not subject to the rules applicable to most community property assets and a state court lacks subject matter jurisdiction to hold to the contrary.

ERISA is federal law. As summarized by the United States Supreme Court, "ERISA expressly preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.'"[78] As a result, an interest in a participant spouse's ERISA qualified account is not treated in the same manner as community property under state law for most purposes. That the funds deposited into the retirement account were community property under state law at the time of their deposit is irrelevant. In other words, if the participant spouse had simply left the funds in his or her bank account, those funds would have been considered community property. In that case, the nonparticipant spouse would have had a right to dispose of one half of those funds upon his or her death.[79]

However, when the participant spouse transfers community property funds into his or her 401(k), the nonparticipant spouse loses testamentary control over one half of the funds if they are the first to die because they are no longer treated as ordinary community property. As articulated by the United States Supreme Court in *Boggs v Boggs* (1997) 520 U.S. 833, 835-836:

> We consider whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 USC, section 1001 et seq., pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits. Given the pervasive significance of pension plans in the national economy, the congressional mandate for their uniform and comprehensive regulation, and the fundamental importance of community property law in defining the marital partnership in a number of States, the question is of undoubted importance. We hold that ERISA pre-empts the state law.

The crux of the problem is that ERISA includes an anti-alienation provision which provides that "(e)ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[80] Congress created only a very limited exception to the anti-alienation rule for

nonparticipant spouses. It generally does not apply after the nonparticipant spouse has died.

For a state court order to be effective to transfer any interest in an ERISA qualified plan, it must be a qualified domestic relations order ("QDRO").[81] The statutory scheme provides a detailed description of what constitutes a qualified domestic relations order.[82] The nonparticipant spouse's will or other testamentary instrument does not meet these requirements. Therefore, a state trial court lacks subject matter jurisdiction to order the transfer of an interest in a surviving spouse's 401(k) based upon the nonparticipant spouse's will or other testamentary instrument.

And after a nonparticipant spouse has died, a state court generally lacks subject matter jurisdiction to enter a QDRO. For example, the court in *Ablamis v. Roper* (9th Cir.1991) 937 F.2d 1450, 1456, unequivocally held that "(a)n estate, even of a deceased spouse, certainly does not fall within even the most liberal construction of the phrase 'spouse, former spouse, child or other dependent of the participant' within the meaning of ERISA."[83]

A nonparticipant spouse may file a petition with the family law court for the entry of a QDRO meeting the requirements of the federal statute before the nonparticipant spouse's death. The cost is minimal. A QDRO would allow the nonparticipant spouse to control the disposition of an interest in the surviving spouse's ERISA qualified account.

The United States Supreme Court specifically held that a nonparticipant spouse does not have the right to assert community property rights upon death:

> ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist. It should cause little surprise that Congress chose to protect the community property interests of separated and divorced spouses and their children, a traditional subject of domestic relations law, but not to accommodate testamentary transfers of pension plan benefits. … In accord with these principles, Congress ensured that state domestic relations orders, as long as they meet certain statutory requirements, are not pre-empted.[84]

Federal law provides that the deceased nonparticipant spouse's estate could not assert a community property interest in the surviving participant spouse's ERISA qualified plan. Consequently, the deceased nonparticipant spouse did not have a testamentary right to dispose of an interest in the retirement account.

The implication of *Boggs* is that a state court may not do an end run around the ERISA protections by awarding an offset of other assets based upon the value of the surviving participant spouse's ERISA qualified plan. For example, a state court cannot fund a credit trust representing the deceased spouse's share of the value of the ERISA qualified plan—even if both spouses had agreed to that division. As summarized by a leading practice guide:

> In *Boggs v Boggs* (1997) 520 US 833, 117 S Ct 1754, the U.S. Supreme Court held that the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC, sections 1001–1461) preempts the community property interest in a qualified plan held by the nonparticipant spouse at death. *See also Egelhoff v Egelhoff* (2001) 532 US 141, 121 S Ct 1322 … *Boggs* appears to preclude funding the credit trust with assets representing the nonparticipant spouse's community property interest in the survivor's qualified plan….[85]

An offsetting amount is not permitted because the nonparticipant spouse's interest terminates upon the death of the nonparticipant spouse. As summarized by *California Trust and Probate Litigation* (Cont. Ed. Bar, 2019) section 18.46:

> All of the foregoing issues concerning the characterization of assets as community or separate property must be viewed in light of the federal preemption of Employee Retirement Income Security Act of 1974 (ERISA) (Pub L 93–406, 88 Stat 829) (29 USC, sections 1001–1461) benefits as set forth in *Boggs v Boggs* (1997) 520 US 833, 117 S Ct 1754. *Boggs* held that ERISA preempts California's community property law to the extent that California law allows a spouse who does not participate in funding the ERISA retirement plan of the other spouse to transfer by testamentary devise any interest in the pension plan benefits that have not been distributed at the time of the nonparticipating spouse's death. Even though California creates a community property interest in the accumulation of those retirement benefits, federal law provides that the nonparticipant spouse's interest in the ERISA-regulated funds terminates if that spouse dies first.

The fact that the nonparticipant spouse cannot control the funds in an ERISA qualified plan upon his or her death can produce seemingly unfair results. For example, suppose that a husband and wife each have a child by a prior relationship

at the time they are married. Their wills provide that one half of the community property of the first spouse to die will pass to that spouse's child. When the wife dies, their assets consist of $500,000 in a bank account and $500,000 in the husband's 401(k), all of which is directly traceable to community property. The wife's child will only receive $250,000—one half of the community property bank account.

Meanwhile, the husband receives his $250,000 community property interest in the bank account, as well as his entire $500,000 401(k) account. The husband can then leave $750,000 to his child. The nonparticipant spouse (the wife) had no right to control the testamentary disposition of the participant spouse's ERISA qualified account. From the perspective of the wife's child from a prior relationship, that result may appear unfair.

The designation of the nonparticipant surviving spouse as the beneficiary of an ERISA qualified plan upon the death of the participant spouse is generally mandatory, absent the consent of the nonparticipant spouse.[86] In the example provided above, this would mean that the nonparticipant wife would have received the entire 401(k) and her half of the bank account if she had been the one to survive. She would then have had the ability to leave $750,000 to her child upon her death. In other words, the spouses are each gambling that they will be the one to survive. Following the death of the first spouse, the interests in the ERISA qualified plan become fixed and even tracing under California law will not overcome the Federal law governing its disposition.[87]

The exceptions to the anti-alienation rule of ERISA are narrow. The transfer can be set aside if it can be shown that the transfer to the ERISA qualified plan was itself an act of wrongdoing. For example, in *In re Marriage of LaMoure* (2013) 221 Cal.4th 1463, 1476-1480, a transfer into an ERISA qualified plan was properly attacked where the husband wrongfully funded community property assets into the account in connection with divorce proceedings.[88] While no published cases appear directly on point, it is conceivable that grounds may exist for attacking a transfer to an ERISA qualified plan in the postmortem setting under the appropriate circumstances.[89] Absent those circumstances, the entire account will belong to the surviving spouse, as designated beneficiary.[90]

E. Individual Retirement Accounts

A surviving spouse's ERISA qualified plan is not treated as a community property asset upon the nonparticipant spouse's death. A different analysis, however, applies to an IRA titled in the name of a surviving spouse alone:

> This rule applies to undistributed qualified pension and profit-sharing plan benefits, IRC, section 401(k) plan benefits, and plans under IRC, section 403. It is not clear whether it will also apply to distributed benefits, or to undistributed IRA accounts or SEP-IRA accounts, which are not covered by ERISA, but for which the logic of the majority opinion in *Boggs v Boggs* might apply.[91]

The extension of this analysis to IRAs is supported by Internal Revenue Code section 408(a), which states that "the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries...."

Subdivision (g) of this statute provides that "(t)his section shall be applied without regard to any community property laws."

The result appears to be that the surviving spouse who is the owner of the IRA has the exclusive right to control all of the IRA proceeds following the death of the first spouse, notwithstanding that the deceased spouse had a community property interest in a portion of the assets.[92] The first spouse to die does not have the power to affect the disposition of the surviving spouse's IRA upon the first spouse's death, whether by will or otherwise.

The surviving spouse is in a different position with respect to IRAs owned by the first spouse to die. The surviving spouse does not have a direct right of action for so long as the IRA is in the name of the deceased spouse. The surviving spouse may proceed against any beneficiaries to recover his or her community property interest after it is transferred out of the decedent's name.[93] However, the deceased spouse does not have the right to control an IRA owned by a surviving spouse while the surviving spouse is still alive, whether by will or some other mechanism.

IV. TAKING MY HALF OUT OF THE MIDDLE: A SPOUSE MAY RECEIVE MORE WHEN A MARRIAGE ENDS BY DEATH RATHER THAN DIVORCE

A. Overview

Divorce courts are generally required to order that each spouse receives his or her separate property, as well as one half of the total value of the community property; however, that is not always the result in the postmortem setting. While intuitively this may seem unfair, it nevertheless is the proper result in many cases. The mechanical form of division that courts are required to apply in martial dissolution proceedings is different than the form of division applicable at death.

Subject to certain relatively narrow exceptions, courts in marital dissolution proceedings are required to divide the community property equally between the two spouses.[94] As long as the overall value received by each spouse is equal, a divorce court has broad discretion to award specific assets entirely to one spouse.[95] Thus, for example, "the court may award one or more items of the property to one party and require that party to make an equalizing payment to the other."[96]

By contrast, a probate court has less discretion regarding the division of assets following the death of the first spouse. In many instances, the applicable rules will result in the surviving spouse receiving more than one half of the community property, whether from the application of a non-pro rata division of community property or the item theory of community property.

B. Aggregate Theory Agreement and a Non-Pro Rata Division Are Not the Same

The concepts of an aggregate theory agreement and a non-pro rata distribution of community property are often mistakenly conflated. But these concepts are separate and distinct. Probate Code section 100 provides:

> (a) Upon the death of a person who is married or in a registered domestic partnership, one-half of the community property belongs to the surviving spouse and the other one-half belongs to the decedent.
>
> (b) Notwithstanding subdivision (a), spouses may agree in writing to divide their community property on the basis of a non pro rata division of the aggregate value of the community property or on the basis of a division of each individual item or asset of community property, or partly on each basis. Nothing in this subdivision shall be construed to require this written agreement in order to permit or recognize a non pro rata division of community property.

The first sentence of Probate Code section 100, subdivision (b) provides that a non-pro rata division of the aggregate value of community property is permissible—provided that the spouses entered into a written agreement to that effect.[97] The second sentence of the statute clarifies that a written agreement is not required for a non-pro rata distribution generally (albeit one that is not based upon the aggregate value of all community property).

Suppose that a couple had two pieces of real property, Blackacre and Whiteacre, each of which was valued at $10,000, and the surviving spouse had an IRA with a value of $20,000. For purposes of this example, these assets are community property.

A written aggregate theory agreement signed by both spouses might permit the value of the IRAs to be considered in the division of assets.[98] In the above example, the value of the IRA may be taken into account for purposes of the total pool of assets to be divided—despite the fact that the federal law prohibits the division of the IRA itself. Thus, such a written agreement might permit a non-pro rata distribution of both Blackacre and Whiteacre to the deceased spouse's estate while the surviving spouse's community property interests would be offset by her IRA of equal value. The aggregate theory distribution would be illustrated as follows:

ILLUSTRATION OF AGGREGATE THEORY DISTRIBUTION

Deceased Spouse's Estate	Surviving Spouse
Whiteacre $10,000	IRA $20,000
Blackacre $10,000	
Total $20,000	Total $20,000

The first sentence of Probate Code section 100, subdivision (b) requires a written agreement for such an aggregate theory allocation to be used. In other words, a written agreement is required if the value of assets not subject to division (such as an IRA) are to be taken into account for purposes of allocating assets between the two shares.

By contrast, the second sentence of Probate Code section 100, subdivision (b) makes it clear that a written agreement between spouses is not required to permit a non-pro rata distribution of the assets that can be divided. As discussed above, federal law does not permit a deceased spouse to dispose in his or her will of an interest in the surviving spouse's IRA. Thus, the assets subject to division in the above example would be limited to Blackacre and Whiteacre in the absence of a written aggregate theory agreement between the spouses.

Consequently, the surviving spouse could demand a pro rata distribution of fifty percent of each of Blackacre and Whiteacre in the above example. Alternatively, the surviving spouse could agree to a non pro rata distribution of Blackacre to one side of the balance sheet and of Whiteacre to the other side of the balance sheet. And the second sentence of Probate Code section 100, subdivision (b) makes it clear that a written agreement between spouses is not required for such a non pro rata distribution.

In contrast, in an aggregate theory agreement, assets not subject to division (such as an IRA) are taken into account for purposes of determining the allocation. A court may not apply the aggregate theory of community property in the

absence of such a written agreement. The default rule in California (in the absence of a written agreement) is that the "item theory" of community property applies following the death of the first spouse.

For example, in *Estate of Wilson* (1986) 183 Cal.App.3d 67, a husband died intestate with several Totten trust bank accounts payable to his children that were funded with community property. The wife argued that she was entitled to one half of each of the accounts. The children argued that they were entitled to all the money in the accounts because it was less than one-half of the total value of all of the community property. The *Wilson* decision framed the issue as follows: "The phrase "one-half of the community property" is, on its face, capable of meaning either one-half of the "total value" of all community property or one-half of "each item" of community property."[99]

Wilson then held that the division of community property following the death of the first spouse must be made on an item-by-item basis:

> Because **each asset** is only half his or hers to give, a spouse **cannot** make a testamentary disposition to a third party of **any specific item of community property** except by a "forced election" requiring the surviving spouse to elect either to take under the testamentary scheme or to take his or her community property share. To give an example, one spouse cannot devise the family residence to a third party even if there are sufficient other community assets to counterbalance the gift's value, because each spouse only owns an undivided one-half interest in the residence. Obviously, the decedent cannot give away more than he or she owns. Indeed, it would be quite unfair to allow either spouse to give away an asset that both spouses treasure based merely on the contingency of who dies first. The mere existence of a Totten trust at the time of the death of one spouse does not put the surviving spouse to a forced election.[100]

After *Wilson*, the Legislature enacted Probate Code section 5021, which permits a surviving spouse to petition to set aside nonprobate transfers created without the surviving spouse's consent.[101] Consistent with the *Wilson* decision *Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, held that a surviving spouse could recover a community property interest in each of the pay-on-death bank accounts established by her husband without her consent, notwithstanding that she was already receiving more than a one-half share of the total community property.

In reaching its conclusion, the court rejected the argument that the subsequent enactment of Probate Code section 5021 was intended to abrogate *Wilson's* holding:

> We conclude section 5021 codifies the *Estate of Wilson* rule, and Evangelina is entitled to one-half of the community property funds in each of the pay-on-death accounts Raul established, notwithstanding her previous receipt of more than one-half of the community estate. Because Evangelina did not consent to the transfers Raul made, the funds were "only ... half his ... to give."[102]

Consequently, if a surviving spouse files a petition pursuant to Probate Code section 5021 seeking to set aside the deceased spouse's nonprobate transfers of community property, the "item theory" of community property still applies. The surviving spouse is entitled to set aside the transfer of one half of each individual asset, even though the surviving spouse may receive more than fifty percent of what otherwise would have constituted the total of all community property.

This result stands in stark contrast to marital dissolution cases in which a court's failure to divide the community estate equally will generally be reversible error.[103] That the surviving spouse may receive more than half of the community property following the death of the first spouse underscores that some rules applicable to a divorce are different than the rules applicable at death.

V. CONCLUSION

While many of the rules governing the division of marital property in marital dissolution proceedings apply in the postmortem setting, significant exceptions exist. Many of these exceptions have their own nuanced limitations. This area of law is frequently misunderstood, and can have a significant impact when applicable.

* *The Law Office of James P. Lamping, San Francisco, California*

01 *Until Death Do Us Part: Marital Property Characterization in the Postmortem Setting* (2015) 24 Cal. Tr. & Est. Q No. 4. The previous article mentioned certain areas in which the rules applying in divorce diverge from those applying upon the death of the first spouse, albeit in establishing the outer boundaries for the similarities in the two contexts. For example, the Legislature intended Family Code section 2640, subd. (b) to be inapplicable at death for real property held between spouses in joint tenancy. While some differences were mentioned in the context of the discussion regarding the similarities between the two areas, this article is to squarely address the areas of divergence.

02 *Tips of the Trade: Brace Yourself: Why In Re Brace May Prove 2020's Most Significant Non-Probate, Non-Trust Case for California Probate and Estate Planning Practitioners*. (2021) 27, Cal. Tr. & Est. Q. No. 3.

03 *In re Brace* (2020) 9 Cal.5th 903, 913.

04 *Id.* at p.911.

05 *Id.* at pp.911-912.

06 *Id.* at p.911.

07 *In re Brace*, *supra*, 9 Cal.5th at pp.915-918.

08 *Id.* at p.914.

09 *Id.* at p.914.

10 *In re Brace*, *supra*, 9 Cal.5th at pp. 915-916.

11 *Id.* at p. 912.

12 *Id.* at p. 912.

13 *Id.* at p. 932.

14 *Trenk v. Soheili* (2002) 58 Cal.App.5th1033, 1038.

15 *Id.* at pp. 1038-1039.

16 *Id.* at p. 1039.

17 *Ibid.*

18 *Ibid.*

19 *Trenk v. Soheili*, *supra*, 58 Cal.App.5th at p. 1039.

20 *Id.* at pp. 1044-1045.

21 *Id.* at pp. 1045-1046.

22 *Id.* at pp. 1044-1045.

23 *Trenk v. Soheili*, *supra*, 58 Cal.App.5th at pp. 1047.

24 *Estate of Wall* (2021) 68 Cal.App.5th 168, 171-172.

25 *Ibid.*

26 *Id.* at pp. 172.

27 *Id.* at pp. 170.

28 *Estate of Wall*, *supra*, 68 Cal.App.5th at p. 169.

29 *Id.* at p. 172.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Estate of Wall*, *supra*, 68 Cal.App.5th at pp. 172-173.

34 *Id.* at p. 173.

35 *Id.* at p. 173.

36 *Id.* at p. 173.

37 *Id.* at p. 173.

38 *Estate of Wall*, *supra*, 68 Cal.App.5th at p. 175.

39 *In re Brace*, *supra*, 9 Cal.5th at p. 913; *Estate of Wall*, *supra*, 68 Cal.App.5th at p. 170.

40 *In re Brace*, *supra*, 9 Cal.5th at p. 931.

41 *In re Brace*, *supra*, 9 Cal.5th at p. 932.

42 *In re Brace*, *supra*, 9 Cal.5th at p. 933 (citations omitted).

43 *In re Brace*, *supra*, 9 Cal.5th at p. 934.

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

45 E.g., Fam. Code, sections 2581, 2640.

46 *Estate of Wall*, *supra*, 68 Cal.App.5th at p.175.

47 Fam. Code, section 2640.

48 See Fam. Code, section 852.

49 Fam. Code, section 2550 provides: "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally."

50 "Section 2660 recognizes that the judgment of the court dividing the property cannot directly affect real property in another state, even though the court has personal jurisdiction over both spouses, unless the judgment is allowed that effect by the laws of the state in which the property is situated." Law Revision Commission comments to Family Code section 2660, citing *Fall v. Eastin* (1909) 215 U.S. 1; *Rozan v. Rozan* (1957) 49 Cal.2d 322; *Taylor v. Taylor* (1923) 192 Cal. 71, 218 P. 756.

51 "On the other hand, where the court has personal jurisdiction over both parties, it may order one of the parties to execute a deed by acting in personam; if the person so ordered does execute the deed, it effectively conveys the interest transferred, even though executed under threat of contempt proceedings." Cal. Law Revision Com. com. Family Code, section 2660 (citing *Fall v. Fall* (1907) 75 Neb. 104, 113 N.W. 175, aff'd, *Fall v. Eastin*, *supra*, 215 U.S. 1).

52 *Tomaier v. Tomaier*, *supra*, 23 Cal.2d at p. 760. See also *In re Marriage of Ben-Yehoshua* (1979) 91 Cal.App.3d 259.

53 *Fall v. Fall*, *supra*, 75 Neb. 104.

54 See, e.g., *Rozan v. Rozan* (1957) 49 Cal.2d 322, 330; *Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1479-1480.

55 Prob. Code, section 8000 et seq.

56 Code Civ. Proc., section 1913, subd. (b).

57 Gold et al., *Cal. Civ. Prac. Probate and Trust Proceedings* section 22:1 (Thomson Reuters, 2022), citing *In re Glassford's Estate* (1952) 114 Cal.App.2d 181 & *Smith v. Cimmet* (2011) 199 Cal. App.4th 1381.

58 This is entirely consistent with longstanding California law. As stated by *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." It bears mention that the death of a party to divorce proceedings generally results in the abatement of the marital proceedings. (See, e.g., *In re Marriage of Hilke* (1992) 4 Cal.4th 215, 220.) This means that the rationale of *Mitchell* will apply to any joint tenancy real property in which no judgment of dissolution has been entered.

59 4 Miller and Starr, Cal. Real Est. (4th ed. 2022) section 11:22 citing *Grothe v. Cortlandt Corp.* (1992) 11 Cal.App.4th 1313, 1317; *Estate of Blair* (1988) 199 Cal.App.3d 161, 167; *Rupp v. Kahn* (1966) 246 Cal.App.2d 188, 196; *Zeigler v. Bonnell* (1942) 52 Cal.App.2d 217, 219–220; *In re Gurnsey's Estate* (1918) 177 Cal. 211, 215; *Grothe v. Cortlandt Corp.* (1992) 11 Cal.App.4th 1313, 1317; *In re Moore's Estate* (1958) 165 Cal.App.2d 455, 460; *Goldberg v. Goldberg* (1963) 217 Cal.App.2d 623, 628; *In re Hobart's Estate* (1947) 82 Cal.App.2d 502, 507; *Siberell v. Siberell* (1932) 214 Cal.767, 771; *De Witt v. City of San Francisco* (1852) 2 Cal. 289, 297; *Cole v. Cole* (1956) 139 Cal.App.2d 691, 694; *Plante v. Gray* (1945) 68 Cal.App.2d 582, 588; *Dando v. Dando* (1940) 37 Cal.App.2d 371, 372; *In re Moy's Estate* (1963) 217 Cal.App.2d 24, 29; *Tenhet v. Boswell* (1976) 18 Cal.3d 150, 158; *Pearce v. Briggs* (2021) 68 Cal.App.5th 466, 483; *Estate of Gebert* (1979) 95 Cal.App.3d 370, 376; *Estate of Wilson* (1976) 64 Cal.App.3d 786, 791.

60 4 Miller and Starr, Cal. Real Est. (4th ed. 2022) section 11:22; citing *Pearce v. Briggs* (2021) 68 Cal.App.5th 466, 480–481; *Santoro v. Carbone* (1972) 22 Cal.App.3d 721, 729 (disapproved of on other grounds by, *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18); *People v. Nogarr* (1958) 164 Cal.App.2d 591, 593; *Cole v. Cole* (1956) 139 Cal.App.2d 691, 694; *Plante v. Gray* (1945) 68 Cal.App.2d 582, 588; Civ. Code, section 681; *Estate of Propst* (1990) 50 Cal.3d 448, 459 (dictum); *Tenhet v. Boswell* (1976) 18 Cal.3d 150, 158; *Daniels v. Harney* (1952) 111 Cal. App.2d 400, 401; *In re Hobart's Estate* (1947) 82 Cal.App.2d 502, 507.

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

62 For this reason, the previous article concedes that Family Code section 2640, subdivision (b) would not apply to joint tenancy property in the postmortem setting.

63 "The same result would appear to apply to title held as community property with right of survivorship." 4 Miller and Starr, Cal. Real Est. (4th ed. 2022) section 11:22 fn. 11. See also, *In re Brace*, *supra*, 9 Cal.5th at p. 932 (discussing community property with right of survivorship). This rationale would also appear to a transfer on death deed, as it also would include a survivorship feature inherently in the form of title.

64 *Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1419 ("… like the trial court, we deem Wife's assertion that a spouse cannot be subject to statutory breach of fiduciary duty for mismanagement of separate property to be contrary both to sound public policy and to the language of Family Code section 721, subdivision (b) which speaks of the confidential relationship between husband and wife imposing on them the duty of 'highest good faith and fair dealing' and 'not taking unfair advantage of the other.' We can fathom no reason to distinguish between a spouse's duty to deal fairly and in good faith with separate property and her duty to deal fairly and in good faith with community property.") Notably, Family Code section 1101, for instance, is limited to breaches of fiduciary duties involving community property.

65 *Delaney* involved a marital dissolution action in which it was argued that a transfer into joint tenancy would have been treated as a transmutation into community property for purposes of Family Code section 2581. Additionally, it was argued that the formal title presumption under Evidence Code section 662 prevailed. The *Delaney* decision rejected both of these arguments. (*Marriage of Delaney*, *supra*, 111 Cal.App.4th at pp.997-998.)

66 As discussed in the *Lintz* decision, there may be different statutory definitions of "undue influence" depending upon the nature of the issues presented. *Lintz v. Lintz*, *supra*, 222 Cal. App.4th at pp. 1355-1357. Nevertheless, as was the case in *Lintz*, it seems a reasonable supposition that most trial courts would make findings sufficient to satisfy each statute rather than finding that there both was and was not undue influence.

67 *Yeh v. Tai* (2017) 18 Cal.App.5th 953, 958.

68 *Ibid.*

69 *Id.* at pp. 958-959.

70 *Id.* at p. 959.

71 *Id.* at p. 957.

72 Pub.L. 93–406 (Sept. 2, 1974) 88 Stat. 829, codified in part at 29 USC, section 1001 et seq.

73 "With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." Statement of Rep. Dent, 120 Cong. Rec. 29197 (Aug. 20, 1974) , quoted in *Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 99.

74 See IRC, section 401(k).

75 26 USC, section 415 (c)(1)(A); IRS Notice 2021-61.

76 Fam. Code, section 760.

77 See, e.g., *Stewart v. Thorpe Holding Co. Profit Sharing Plan* (9th Cir. 2000) 207 F.3d 1143, 1158.

78 *Gobeille v. Liberty Mutual Insurance Company* (2016) 136 S.Ct. 936 (quoting 29 USC. section 1144(a)).

79 Prob. Code, section 100.

80 29 USC, section 1056(d)(1).

81 29 USC, section 1056(d)(3)(A); and see, e.g., *Branco v UFCW-Northern Cal. Employers Joint Pension Plan* (9th Cir. 2002) 279 F.3d 1154.

82 29 USC, section 1056(d)(3)(B)-(N).

83 For purposes of this analysis, it will be assumed that divorce proceedings had not been initiated and no action was taken to obtain a QDRO at the time of the death of the nonparticipant spouse. It bears mention that a nonparticipant spouse may be able to request the entry of a QDRO following the death of the participant spouse under certain circumstances. (See, e.g., *Miletello v. RMR Mechanical, Inc.* (5th Cir. 2019) 921 F.3d 493.)

84 *Boggs v Boggs*, *supra*, 520 U.S. at p. 848.

85 California Trust Administration (Cont.Ed Bar, 2020 2d ed.) section 14.65.

86 IRC, sections 401(a)(11)(B)(iii)(I), 417(a)(2).

87 This may present an interesting issue to be addressed in the estate planning context. To be clear, a full analysis of possible approaches to address this issue is beyond the scope of this article. The point made here is that the ordinary California state law rules that would govern the characterization of property upon divorce generally will not extend to ERISA qualified plans following the death of one of the spouses. Due to federal preemption, tracing the source of the account to the funds used to acquire would be a wholly irrelevant exercise.

88 See also, e.g. *Planned Consumer Marketing, Inc. v. Coats and Clark, Inc.* (1988) 71 N.Y.2d 442 (fraudulent transfer into ERISA qualified plan successfully attacked).

89 For example, when the funds were acquired through an act of elder abuse.

90 Of course, this assumes that no portion of the account was previously awarded to a prior spouse.

91 California Trust and Probate Litigation (Cont.Ed. Bar, 2019) section 18.46.

92 See, e.g., Miller, *Application of "Spousal Consent Rules" to Community Property Individual Retirement Accounts* (2020) 26, Cal. Tr. & Est. Q. no. 3.

93 Prob. Code, sections 5012, 5020; see, e.g., Miller, *supra*.

94 Fam. Code, section 2550.

95 *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 88.

96 *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 880.

97 As discussed in more detail below, California follows the "item theory" of community property in the absence of a written agreement that the "aggregate theory" of community property will be applied.

98 Estate planning attorneys have attempted to use aggregate theory agreements to maximize the amounts to be funded into credit trusts. (See, e.g., California Trust Administration (Cont. Ed Bar 2d ed. 2020) section 14.58 However, it is arguable whether such an allocation would be recognized for federal tax purposes. (26 US Code, section 408(a) & (g).)

99 *Estate of Wilson* (1986) 183 Cal.App.3d 67, 70.

100 *Estate of Wilson*, *supra*, 183 Cal.App.3d at p. 73.

101 Prob. Code, section 5021, added by Stats. 1992, ch. 51, section 6, provides:

(a) In a proceeding to set aside a nonprobate transfer of community property on death made pursuant to a provision for transfer of the property executed by a married person without the written consent of the person's spouse, the court shall set aside the transfer as to the nonconsenting spouse's interest in the property, subject to terms and conditions or other remedies that appear equitable under the circumstances of the case, taking into account the rights of all interested persons.

(b) Nothing in subdivision (a) affects any additional remedy the nonconsenting spouse may have against the person's estate for a nonprobate transfer of community property on death without the spouse's written consent.

102 *Estate of Miramontes-Najera*, *supra*, 118 Cal.App.4th at p.760, citing *Estate of Wilson*, *supra*, 183 Cal.App.3d at p.72. It should be noted that this case occurred following the enactment of Prob.Code, section 100, subd. (b) in Stats. 1998, ch. 682, section 2.

103 See, e.g., *In Re Marriage of Cooper* (2008) 160 Cal.App.4th 574, 580: "… except as otherwise agreed by the parties or specifically provided by statute, no trial court has discretion to divide the community estate unequally and if it does so, the trial court errs as a matter of law. (Fam. Code, section 2550.)"