#F-603

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07/25/86

Memorandum 86-74

Subject: Study F-603 - Retroactive Application of Property Division Legislation (complete draft of Professor Reppy's study)

At the July Commission meeting in San Diego, Professor Reppy presented the background study he prepared for the Commission on retroactivity of marital property division legislation. After hearing Professor Reppy's findings, the Commission decided on the following course of action:

(1) The matter should be scheduled for further consideration at the September meeting, with the intent to make basic policy decisions at that meeting.

(2) The staff should prepare for the September meeting a draft of Professor Reppy's proposals.

(3) The Commission requested the input of the State Bar Family Law Section concerning the practical problems caused by the existing state of the law and the reaction of the Section to Professor Reppy's proposals.

(4) The Commissioners plan to give careful review to the completed draft of Professor Reppy's study during the interval before the September meeting.

Attached to this memorandum is a copy of Professor Reppy's completed study. We will supplement this memorandum with the views of the State Bar Family Law Section when received.

A staff draft of Professor Reppy's proposals is attached as Exhibit 1, excluding the possible constitutional amendment. The staff has done some editing and added some notes to the draft, which may be supplemented by a revised or more refined draft before the meeting. The only purpose of the current draft is to attempt to condense Professor Reppy's proposals into an easily visible and reviewable form for purposes of policy discussion.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

Staff Draft

Civil Code § 4800.1 (amended)

SECTION 1. Section 4800.1 of the Civil Code [as amended by Assembly Bill No. 2897 (1986)] is amended to read:

4800.1. (a) The Legislature hereby finds and declares as follows:

(1) It is the public policy of this state to provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage in joint title form, and for the allocation of community and separate interests in that property between the spouses.

(2) The methods provided by case and statutory law have not resulted in consistency in the treatment of spouses' interests in property which they hold in joint title, but rather, have created confusion as to which law applies at a particular point in time to property, depending on the form of title, and, as a result, spouses cannot have reliable expectations as to the characterization of their property and the allocation of the interests therein, and attorneys cannot reliably advise their clients regarding applicable law.

(3) Therefore, the Legislature finds that a compelling state interest exists to provide for uniform treatment of property; thus the Legislature intends that the forms of this section and Section 4800.2, operative on January 1, 1987, *or as amended thereafter,* shall apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property, and that that form of this section and that form of Section 4800.2, *or as amended thereafter,* are applicable in all proceedings commenced on or after January 1, 1984. However, the form of this section and the form of Section 4800.2 operative on January 1, 1987, *or as amended thereafter,* are not applicable to property settlement agreements executed prior to January 1, 1987, or proceedings in which judgments were rendered prior to January 1, 1987, regardless of whether those judgments have become final.

(b) For the purpose of division of property upon dissolution of marriage or legal separation, *if* property *is* acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entireties, or as community property:

(1) It is presumed ~~to be~~ *that the property is* community property *and that neither party has a sole and separate interest in the property*. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

~~(1)~~ (A) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

~~(2)~~ *(B)* Proof that the parties have made ~~a written~~ *an* agreement that the property is separate property.

(2) Regardless whether the property is determined to be community or separate, the joint form of acquisition creates equities in the property in favor of the parties that shall be recognized by division in the manner prescribed in Section 4800.2.

Note. Professor Reppy states that the first sentence of subdivision (b) which creates the community property presumption is unnecessary with the enactment of Civil Code Section 4800.4 (enabling division of joint tenancy and tenancy in common property); the community property presumption should be replaced by a presumption that neither spouse has a separate property interest. The staff believes, however, that the general community property presumption remains useful for cases not involving true joint tenancy or true tenancy in common, since the manner of division differs depending upon whether the property is truly separate or is in fact community. If the property is separate, the separate ownership is proportionate, increasing as the value of the property increases, whereas if the property is community, the separate ownership is simply entitled to reimbursement without sharing in any increase in value. Thus we have retained the community property presumption in the current draft. Professor Reppy's study raises the issue whether these types of property should be treated differently.

Rather than spelling out the precise manner of division of property here, as suggested by Professor Reppy, we have incorporated by reference the procedure of Section 4800.2.

Professor Reppy recommends applying this revised statute prospectively as well as retroactively. This would have the virtue of providing a single rule for all property regardless of the time of acquisition. However, it would still recognize orally created separate property interests in the future, though arguably giving them lesser effect than at present.

Civil Code § 4800.2 (amended)

SEC. 2. Section 4800.2 of the Civil Code is amended to read:

4800.2. ~~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~~ *(a) If a party has contributed separate property to the acquisition of joint tenancy, tenancy in common, or community property, the contribution creates an equity in the property in favor of the party that shall be recognized upon division of the property at dissolution of marriage or legal separation. A party who contributes separate property to the acquisition of the property shall be awarded an amount equal to the separate property contribution. To the extent the value of the property exceeds the amount of the separte property contributions, the property shall be divided equally between the parties.*

(b) For the purpose of this section, the amount of a separate property contribution awarded to a party shall be calculated 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 the property"~~ *The amount shall* 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~~ *shall* not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(c) The manner of division of property prescribed in this section is subject to an agreement of the parties that prescribes a different manner of division.

Note. Professor Reppy's proposal assumes that true joint tenancy and tenancy in common property are to be divided in the same manner as community property. We do not believe this is the intent of current Section 4800.4. The Commission should consider whether or not this approach is desirable public policy.

Civil Code § 4800.4 (amended)

SEC. 3. Section 4800.4 of the Civil Code is amended to read:

4800.4. (a) In a proceeding for division of the community property and quasi-community property, the court has jurisdiction, at the request of either party, to divide the separate property interests of the parties in real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The property shall be divided together with, and in accordance with the same procedure for and limitations on, division of community property and quasi-community property.

(b) Where the property to be divided is a residence that has been occupied by one or both spouses, tenancy in common property is subject to division under this section even though the shares of the spouses are unequal and the tenancy in common is between the community estate and the separate estate of one spouse. In such a situation, the property is also divisible even though owned solely by one of the spouses as his or her separate property pursuant to agreement not appearing on the deed if the form of title on the deed creates a form of co-ownership between the spouses. In dividing property under this subdivision the greater property rights in the residence of one spouse shall be compensated, if the residence is awarded to the other spouse, by an offsetting award of other property that is distributable under Section 4800 or this section so that the net value of assets owned by the spouse is equal to the value of assets before the division of property.

~~(b)~~ *(c)* This section applies to proceedings commenced on or after January 1, 1986, regardless of whether the property was acquired before, on, or after January 1, 1986.

Note. The staff believes that subdivision (b) is not new law but is a clarification, as suggested by Professor Reppy, of one result subdivision (a) was intended to achieve. Perhaps general clarification of subdivision (a) would be preferable, with (b) becoming an illustrative portion of the Comment.

RETROACTIVE APPLICATION TO PRE-ENACTMENT ACQUISITIONS OF STATUTES PROVIDING FOR DIVISION AT DIVORCE OF ITEMS OF SEPARATE PROPERTY: AVOIDING BUOL AND FABIAN*

by

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Outline of Study

RETROACTIVE APPLICATION TO PRE-ENACTMENT ACQUISITIONS OF STATUTES PROVIDING FOR DIVISION AT DIVORCE OF ITEMS OF SEPARATE PROPERTY: AVOIDING BUOL AND FABIAN

I. Introduction

II. A Closer Analysis of Buol and Fabian: Are They Really Due Process Decisions or is Equal Protection Actually the Reason for Invalidating the Statutes as Applied?

A. How significant is the Buol reference to lack of uniformity?

B. Does Fabian signal that Sections 4800.1 and 4800.2 may be applied to pre-enactment acquisitions if the dissolution action is commenced after 1983?

III. What Is the True Scope of the Buol-Fabian Holdings? Has the Recent Urgency Measure Cured Statutory Unconstitutionality? What Additional Statutory Changes Will Improve the Case in Favor of Valid Application of the Basic Principles to Pre-Enactment Acquisitions?

A. Sections 4800.1 and 4800.2 probably cannot be constitutionally applied to pre-enactment acquisitions even in cases commenced after 1983.

B. The equal protection problems in both statutes can and should be eliminated, but additional revisions also probably are necessary to assure a holding that the reforms may apply to pre-enactment acquisitions.

C. Legislation should eliminate or reduce the due process problems caused by invalidating an oral agreement proper when made and requiring a waiver of reimbursement a spouse had no reason to ask for.

D. The California Supreme Court is unlikely to apply the "rank injustice" test in assessing the constitutionality of dividing pre-enactment acquisitions under a statute that operates solely as a property-division mandate.

E. Since the federal Constitution does not mandate use of the "rank injustice" test, correction of Buol and Fabian can at least be obtained by amendment of the California Constitution.

F. A narrowly drawn statute dealing solely with the family home is likely to be upheld and also to be politically feasible even though it provides for division of separate property.

RETROACTIVE APPLICATION TO PRE-ENACTMENT ACQUISITIONS OF STATUTES PROVIDING FOR DIVISION AT DIVORCE OF ITEMS OF SEPARATE PROPERTY: AVOIDNG BUOL AND FABIAN

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I INTRODUCTION

This study addresses the constitutional limitations on legislative power to enact statutes authorizing the awarding at marriage dissolution (divorce) to solely one spouse all of the interest in a residence or other item of marital property that is not 100% community property. Attention is given to the two most common factual situations in which the legislature would want to confer upon the court the power to make such an award of an asset that is not entirely community property. The analysis assumes continued adherence to the basic rule that only community property interests are divisible.[1] The first situation arises when a residence or other asset at issue that the court would like to award to a spouse is held under a joint tenancy title even though acquired in substantial part with community funds.

Prior to 1965,[2] these situations gave way to the "form of title" presumption.[2] This presumption was rebuttable only by a showing that the property was actually purchased with community funds, and that the parties intended to hold the property in that form.[3] However, the parties' intention had to be well-established at the time of acquisition.[4]

This situation led to many undesirable results.[5] In 1965, the legislature responded by amending Civil Code section 164 (now section 5110)[6] so that a single-family residence acquired by husband and wife as joint tenants, <u>for dissolution purposes only</u>, was presumed to be community property.[7]

In the second situation there is no joint tenancy title (or due to agreement between the spouses it is not controlling) and the actual ownership is part community, part separate property (of the spouse who is not to receive the award[8]), due to the fact that both the community and separate estates made contributions toward the acquisition of the asset.

In 1984 the California legislature enacted sections 4800.1 and 4800.2 of the Civil Code to resolve most situations in which the above problems arise. Section 4800.1 addressed the problem arising due to the joint tenancy title, providing as follows:

For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(b) Proof that the parties have made a written agreement that the property is separate property.

The problem arising out of ownership of an asset shared in undivided interests by the community estate and the separate estate of one spouse (or of both, for that matter), was "solved" for some situations in 1980 by the California Supreme Court's decision in Marriage of Lucas[9]. Under Lucas, a contribution of separate funds towards acquisition of an asset did not, if title was in joint tenancy, automatically "buy in" to a share of ownership. Such a buy-in would occur only if there was an agreement between the spouses to that effect. The agreement did not have to be in writing under Lucas.

The spouse contributing separate funds and not obtaining a share of separate ownership was not entitled at dissolution to a reimbursement award under Lucas even though he could prove absence of donative intent. He could obtain reimbursement only by proving an agreement had been made with the other spouse that reimbursement would be available. That agreement, too, could be oral.

The companion statute to section 4800.1 was section 4800.2. It provided a solution to the problem of nondivisibility that would result if the separate property contributor were viewed as "buying in" to a share of title that would otherwise be viewed at dissolution as community. Section 4800.2 implicitly assumes there is no buy-in to title. It does overturn the Lucas holding that reimbursement is not avaialble, except pursuant to an interspousal agreement, providing:

In the division of community property under this part [i.e., at dissolution by divorce] 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 contribution 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, "contibutions to the acquisition of the property" include down-payments, 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.

Sections 4800.1 and 4800.2 were enacted as part of Assembly Bill 26 of the 1984 Legislature. An uncodified section of A.B. 26 provided that both statutes should be partially[10] retroactive in that they would apply in all dissolution cases in which the division of property portions of the judgment were not final as of January 1, 1984.[11] That meant, of course, the legislature intended to apply the new rules concerning divisibility of property and rights of reimbursement at dissolution to assets acquired before the effective date of the statutes, January 1, 1984.

Two California Supreme Court decisions in 1985 and 1986 have held unconstitutional most of the legislatively desired retroactive applications of section 4800.1 and 4800.2. In Marriage of Buol,[12] the wife had purchased with separate funds[13] a residence but had had title placed in the spouses' names as joint tenants. The court found she and her husband had an oral agreement that she would separately own the residence because of her separate property contribution. The agreement was effective under Lucas but not under section 4800.1, which required a written agreement to preserve the spouse's claim based on separate contributions in the face of a joint tenancy (presumed community) title. The Buol case was on appeal when section 4800.1 took effect, and thus because of the clear legislative mandate for retroactive application in such a case the Supreme Court had to determine the constitutionality of revising the Lucas-based judgment for Wife by dividing the residence now worth $167,500[14] between the spouses while awarding Wife reimbursement of a maximum $17,500 under section 4800.2

The Court held such retroactive application would violate the due process clause of the state constitution.[15] The due process clause of the United States constitution was not directly referred to.

Marriage of Fabian,[16] involved commercial realty acquired by deed declaring it to be community property. Husband had made a substantial separate property contribution without obtaining even an oral agreement for either reimbursement or a share of ownership based on the contribution. The trial court, acting before section 4800.2 became effective, assumed that although Lucas dealt with a joint tenancy deed of a residence (which was at dissolution presumptively community by virtue of the predecessor statute to section 4800.1, Civil Code section 5110), the Lucas rule barring reimbursement absent an agreement would apply where ownership was community due to the force of the deed rather than a statute. Husband invoked section 4800.2's granting of the right of reimbursement in such a case without proof of any agreement. The Supreme Court held that to do so would unconstitution-

ally take Wife's property. As in Buol, only the due process clause of the state constitution was relied on.[17]

There have been two post-Buol legislative developments of note. First, the uncodified section on retroactivity in A.B. 26 through which section 4800.1 and 4800.2 were enacted has been amended by an urgency measure that passed the legislature in the spring of 1986. It provides:

> This act applies to proceedings commenced on or after January 1, 1984, regardless of the date of acquisition of property subject to the proceedings or date of any agreement affecting the property.

This statute acquiesces in Buol (and the subsequent Fabian decision as well) insofar as it holds that due process was violated by changing the law applicable to division of property after the trial court had rendered its judgment on that issue and while the matter was pending on appeal.

Secondly, Civil Code section 4800.4 has been enacted to provide as follows:

> (a) In a proceeding for division of the community property and the quasi-community property, the court has jurisdiction, at the request of either party, to divide the separate property interests of the spouses in real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The property shall be divided together with, and in accordance with the same procedure for and limitations on, division of community property and quasi-community property.
>
> (b) This section applies to proceedings commenced on or after January 1, 1986, regardless of whether the property was acquired before, on, or after January 1, 1986.[18]

This will, in some cases, moot the issue of the constitutionality of applying to pre-enactment acquisitions the presumption of section 4800.1 that property held under a joint tenancy title was actually community property.[19] (Section 4800.1 had extended that presumption from a single family residence to any asset held by the spouses under a joint tenancy title.) The issue becomes moot where all contributions to acquire the property under a joint tenancy title were community funds or where the property was given to the spouses by a donor who intended them to be co-owners but did not negate on his instrument of title co-ownership in community property form, rather than the joint tenancy form recited in the instrument.[20]

The following questions are analyzed in detail below:

(1) Has the urgency measure that drops application of sections 4800.1 and 4800.2 to cases commenced before 1984 cured all of the constitutional impediments to application of these statutes to pre-enactment acquisitions? Conclusion: almost certainly not.

(2) Can the statutes be redrafted to achieve substantially what was intended by the 1983 legislature while operating in such manner that they may constitutionally be applied to pre-enactment acquisitions? Conclusion: quite possibly, yes. By authorizing the dissolution court to divide two narrowly-defined classes of separate property, legislation can avoid purported overturning of oral agreements valid when made and avoid conditioning a party's rights on the failure to obtain a written waiver he or she, at the time of the transaction, had no reason to believe would be required by the law.

(3) If the suggestion in (2) immediately above fails because retroactive application is still unconstitutional, what can be done?

(a) Since the original retroactivity scheme intended by the 1983 legislature almost certainly does not violate the due process clause of the Fourteenth Amendment to the United States constitution, Buol and Fabian can be abrogated and the original intent achieved by an amendment to the California constitution.

(b) Probably the statutes would be held constitutional when applied to preenactment acquisitions if rewritten as suggested in (2) above and limited in application to the family home.

(c) The legislature may apply to pre-enacment acquisitions a scheme under which one spouse's separate property interest in a particular type or class of assets (such as the family home) may be awarded to the other spouse with a compensating, offsetting award from other divisible property in favor of the spouse losing the separate property interest.

II. A CLOSER ANALYSIS OF BUOL AND FABIAN: ARE THEY REALLY DUE PROCESS DECISIONS OR IS EQUAL PROTECTION ACTUALLY THE REASON FOR INVALIDATING THE STATUTES AS APPLIED?

A. How Significant Is the Buol Reference to Lack of Uniformity?

It will be recalled that, under Lucas, the wife in Buol was the sole owner of the residence at issue even though she had chosen to have title taken in the names of both spouses as joint tenants. This was so because she had separately supplied all the funds for the acquisition and had an oral agreement with her husband that because her separate funds had been used the residence was her separate property. The subsequent enactment of section 4800.1 made the residence divisible community property at dissolution, while 4800.2 substituted for the wife a reimbursement claim that was about 1/10 the value of her separate property claim under Lucas. It is important to keep in mind that the statutory scheme did not purport to make divisible a particular class of separate property of a spouse. On the contrary, if Mr. and Mrs. Buol had signed a writing stating their understanding that the residence was her separate property, that asset would not have been divisible. It was the absence of a writing that worked to Mr. Buol's detriment, not the character of the residence as separate, community or joint tenancy property.[21]

The Buol opinion begins by describing the wife's rights under Lucas as "vested." But this was defined to mean merely that there was no unsatisified condition precedent to the right.[22] The label is of no importance.[23] The dissolution court seldom encounters rights subject to a condition precedent. Unvested pension interests[24] are likely the only such asset encountered at dissolution with any frequency. Moreover, since Brown recognizes the great importance, economically, to the worker and his spouse of nonvested pension rights, it seems improbable the courts would hold that simply because there is a condition precedent attached to the rights they may freely be impaired by retroactive legislation.[25]

Buol next holds that section 4800.1 operated on Mrs. Buol's rights as a substantive rather than a procedural statute. This is quite correct, since producing a writing signed by Mr. Buol confirming her separate ownership of the residence was no ministerial step -- or procedure, if you will -- for her.

The inquiry then turns to whether the taking of Mrs. Buol's vested right was a taking with due process of law, as recognized in Addison v. Addison[26] and Marriage of Bouquet.[27] At all stages of the opinion the Court assumes the "right" at issue is to claim separate ownership of the residence through an oral agreement. At no point does the court directly consider a spouse's "right" not to have any of his or her separate property given at divorce to the other spouse.[28]

Thus, in discussing what Mrs. Buol relied on with respect to the law as it existed before enactment of sections 4800.1 and 4800.2, the court looked solely to the enforceability of the couple's oral agreement and never alluded to any reliance on the nondivisibility of separate property. The Court said: "Had existing law [i.e., at the time of their oral agreement] required the parties to execute a writing as proof that the property was to remain separate, the likelihood that Esther and Robert [Buol] would have done so appears great."[29]

The Buol court's discussion of Addison and Bouquet leaves some uncertainty as to whether it also viewed application of section 4800.1 as unfairly depriving Mrs. Buol of the right under prior law not to have any of her property handed over at divorce to her husband. Of course both the cited cases involved similar situations. Addison upheld application of the quasi-community property system, which authorizes the dissolution court to take half of a spouse's separate property onerously acquired during marriage while domiciled in a separate property state and transfer it to the non-owning spouse. (See what are now Civil Code §§ 4800 and 4803.) Bouquet tested the validity of the statute at issue there only as applied at dissolution. The legislature had amended Civil Code section 5118 so that it made a husband's as well as a wife's earnings after a final separation the acquiring spouse's separate property. The Bouquets had separated in 1969 and the husband had earnings before the March 1972 effective date of the amendment. The Bouquet court viewed the wife as being "deprive[d] . . . of her half share of the income" at issue at the subsequent divorce, not in March 1972. Thus Bouquet was a case where a wife's possible reliance on being able to keep at dissolution her full share of community property was dashed by retroactive application of a statute.

The Court found from Bouquet and Addison the following principles:

(1) The state has an interest in "equitable dissolution" of marriage and will apply a law at this stage retroactively if necessary to remedy a "rank injustice" created by prior law.

(2) "[T]he state's paramount interest in the equitable distribution of the marital partnership justifies legislative action abrogating rights in marital property where those rights derive from manifestly unfair laws."[30] The Lucas rule enforcing the oral agreement of a separate ownership interest was held not to be unjust or unfair.

In the middle of its due process analysis the Buol opinion shifts to language that is more consistent with the theory that equal protection, not due process, was the basis for invalidating retroactive application of the statute, although neither the state nor federal equal protection clause nor any case applying either of them was cited:

> [B]ecause the writing requirement applies only to joint tenancy property, it fails to achieve uniformity in the division of marital property. The presumption that property taken as "husband and wife" is community property . . . may still be rebutted by evidence of a contrary oral agreement(*). Nontitle property acquired during marriage is presumed to be community property . . . but may be proved otherwise by tracing alone.
>
> Thus, whether or not a spouse will be able to prove that certain property is separate may well depend on happenstance alone.

39 Cal. 3d at 763, 218 Cal. Rptr. at 38, 705 P.2d at 361.[31]

Finally, at the end of some five pages of constitutional analysis the Buol court indicated that it found it unfair to Mrs. Buol to have the law applicable to property division at her dissolution changed after the trial was completed and appeal was pending. The complete statement in this regard runs about a fifth of a page, or four or five percent of the portion of the opinion devoted to legal analysis, and is set forth herein in footnote 32, citations omitted.[32] The California Law Revision Commission asked the Court to modify the opinion to clarify whether the fact that the trial in Buol had been completed before enactment of section 4800.1 was essential to the Court's decision that retroactive application of section 4800.1 was unconstitutional. No such modification was made.

Unfortunately the concluding paragraph of Buol is of no help in determining which of several theories is the real basis for decision:

> We conclude that retroactive application of section 4800.1 would substantially impair Esther's vested property right without due process of law. The state interest in equitable distribution of the marital partnership is not furthered by retroactive effect. Retroactivity only serves to destroy Esther's legitimate separate property expectations as a penalty for lack of prescience of changes in the law occurring after trial. Due process cannot tolerate such a result.

39 Cal. 3d at 763-64; 218 Cal. Rptr. at 39, 705 P.2d at 362.

This is consistent with four possible theories for decision. (1) Due process was violated by voiding the oral contract. (2) Due process was violated by changing the general rule that no separate property of a spouse can be awarded at dissolution to the other spouse (see reference to "Esther's legitimate separate property expectations"). (3) Due process was violated by changing the law after trial had been completed. (4) Equal protection was denied Mrs. Buol because under the statutory scheme her oral agreement would have been valid had the deed

recited community or tenancy in common ownership or just referred to the spouses as grantees (see the second sentence of the quotation, noting that section 4800.1 did not further equitable distribution of property at dissolution).

B. Does Fabian Signal that Sections 4800.1 and 4800.2 May Be Applied to Pre-enactment Acquisitions If the Dissolution Action Is Commenced After 1983?

Fabian, as would be expected, relies very strongly on the prior Buol decision to invalidate application of section 4800.2 to property acquired before its effective date. The result is continued uncertainty as to the ground of decision in both cases.

In Fabian, it will be recalled, Husband made a separate property contribution towards the acquisition of commercial realty -- a motel -- under a title reciting community ownership. He did so without obtaining any agreement from Wife that he would have either a share of separate ownership based on his separate contribution or a right of reimbursement. Under Lucas no right of reimbursement arose as a matter of law but, after trial in the case and while Husband's appeal was pending, section 4800.2 purported to confer him the right of reimbursement as a matter of law.

The Court's legal analysis begins by declaring that Mrs. Fabian had a vested property right in the motel. It is then stated that ever since See v. See[33] it had been "well established that, absent an agreement to the contrary, separate property contributions to a community asset were deemed gifts to the community."[34] This was error. See did not involve the problem of using separate funds to contribute toward an acquisition under a title designating co-ownership. See held merely that no reimbursement was owed where a husband who had exhausted community funds drew on his separate wealth to pay for family living expenses and then later replenished the community coffers. Indeed, the Supreme Court's opinion in Lucas reveals on its face that there existed -- before being resolved by the decisionmakers there --a three-way split in authority as to how to deal with the problem of separate contributions toward an acquisition held under co-ownership title.[35] The motel in Fabian had been acquired several years before Lucas was decided. The basic theory of Buol should have precluded any suggestion in Fabian that the husband there ought to have anticipated a future decision that would required him to obtain an agreement from his wife in order to be able to assert that his separate property expenditure either bought in to a share of ownership or created a right of reimbursement. It was very unfair of the court to assert that both spouses should have been relying on settled law that was not settled until eight years after the acquisition in question.[36]

The Fabian opinion then declares that "section 4800.2 would operate to decrease [Mrs. Fabian's] share in the motel more than one third . . . ."[37] This, too, is technically wrong. In Cali-

fornia a right of reimbursement is not secured by a lien on the property, dealings with which generated the claim.[38] A judgment ordering Mrs. Fabian to reimburse her husband could be satisified by her in any way she pleased. If she did not pay it, the judgment creditor husband could levy on any nonexempt property she may own. The "vested right" Mrs. Fabian had before section 4800.2 was enacted was the nonexistence of any debt owed to her husband. Section 4800.2 tried to foist one on her.

Following its analysis in Buol, the Fabian court inquired whether the prior law changed by section 4800.2 -- no reimbursement for separate contribution despite lack of donative intent -- caused a "rank injustice," concluding it did not.[39] This part of the analysis includes a re-interpretation of Addison that, as will be explained below, has disturbing implications. The rank injustice was that Mrs. Addison was an "innocent" spouse (i.e., no fault of hers had led to the breakdown of the marriage) who would not have received a property award if the quasi-community property statute had not been applied to assets her husband had acquired before its enactment.

A significant portion of the Fabian analysis focuses on section 4800.2's charging Mrs. Fabian with the obligation of obtaining a written waiver of reimbursement if she is not to be liable. She had no reason to believe such a waiver would have to be produced to assert her rights.[40] Thus the Court considered more to be involved in application of section 4800.2 than a directive to the trial court to make an unequal division of certain classes of community property.[41]

The Fabian court also makes a cryptic reference to the notion that "uniformity" would be advanced by its constitutional holding. What can this mean? The holding creates two classes of separate property contributors identical in all respects except as to where their cases fall vis a vis the date that divides permissible from unconstitutional application of section 4800.2. Members of one class get reimbursement; those in the other do not. This is the antithesis of uniformity. In Buol, as we have seen, reference to "uniformity" suggested an equal protection analysis. One similar to that found in Buol could have been made in Fabian, and perhaps that is what the court had in mind when the word was used. Section 4800.1 applies only to separate contributions to community property. Under the theory of Lucas, if a spouse made a separate property contribution to an acquisition taken under an instrument reciting tenancy in common ownership by the spouses or true joint tenancy (i.e., it negated community property ownership on its face so that section 4800.1 would not convert it at dissolution into community property), he would have no right of reimbursement unless he obtained an agreement (which could be oral) with the other spouse recognizing that right. A good case can be made that the distinction section 4800.2 draws between community property and other forms of co-ownership such as true joint tenancy that are popularly used by

married grantees is so arbitrary as to deny equal protection of the law.

Finally, Fabian's due process analysis stresses several times the fact that the retroactivity clause applicable to section 4800.2 sought to change the applicable law in that case several months after the Superior Court had entered its judgment applying the reimbursement law then in effect. The Court states in a footnote:

> We hold only that application of the statute to cases pending on January 1, 1984, impairs vested rights without due process of law.[42]

Even though the Court in Buol had declined the suggestion that it modify its opinion to contain a similar limitation, Fabian's treatment of Buol may be construed as having, belatedly, done just that. Fabian says that the

> holding in Buol was that application of section 4800.1 to dissolution proceedings commenced prior to January 1, 1984, impaired vested property interests without due process . . . .

41 Cal. 3d at ___, 224 Cal. Rptr. at 338, 715 P.2d at 258.

To sum up, the Fabian opinion could support the conclusion that the basis for decision is one of three theories, and it hints at yet a fourth possibility. (1) Due process is violated by imposing on Mrs. Fabian an obligation she never agreed to at the time she could have acted to protect her interests and by requiring a written waiver she could not foresee would be necessary. (2) Due process is violated by changing the law after acquisition of a community asset to provide for unequal rather than equal division of it at dissolution. (3) Due process is denied by changing the law applicable to division of property at divorce after the case has been filed or after the trial court has made its decision. (4) Equal protection is denied by creating a right of reimbursement for a separate-property contributor to acquisitions held in community property form but not acquisitions in joint tenancy or tenancy in common.

III. WHAT IS THE TRUE SCOPE OF THE BUOL-FABIAN HOLDINGS? HAS THE RECENT URGENCY MEASURE CURED STATUTORY UNCONSTITUTIONALITY? WHAT ADDITIONAL STATUTORY CHANGES WILL IMPROVE THE CASE IN FAVOR OF VALID APPLICATION OF THE BASIC PRINCIPLES TO PRE-ENACTMENT ACQUISITIONS?

A. Sections 4800.1 and 4800.2 Probably Cannot Be Constitutionally Applied to Pre-enactment Acquisitions Even in Cases Commenced After 1983.

As noted above, the urgency measure enacted in the spring of 1986 changed the retroactivity proviso applicable to both sections 4800.1 and 4800.2 so that they are inapplicable in dissolution cases commenced before the effective date of the statutes, January 1, 1984. In cases filed on and after that date, however, they would apply fully. Spouses in the position of Mrs. Buol in such cases would still be required by a law passed long after the fact to have obtained a written agreement confirming that her separate property contribution was buying her a share of ownership notwithstanding a form of title reciting equal co-ownership. Parties in the position of Mrs. Fabian would still have to ask for written waivers of reimbursement at the time their spouses made separate property contributions in order to effectuate an understanding between them that the contribution was a gift to the community.

For the Supreme Court to declare that the urgency measure had cleaned up all the constitutional infirmities present in Buol and Fabian would require the Court to declare about ninety-five percent of the constitutional analysis in Buol and some ninety percent of such discussion in Fabian not only to be dictum but to be erroneous dictum. It is hard to be believe the Court would so readily discard so much of what it must have, at the time of writing Buol and Fabian, considered to have been correct statements of constitutional principles. Morever, as discussed below, the Court's equal protection point and one of its due process theories appear to be meritorious.

In one Fabian type case involving the constitutionality of applying section 4800.2 to a pre-enactment acquisition under a co-ownership title involving a separate property contribution, the dissolution action was commenced before the effective date of section 4800.2, but the judgment dividing the property was not entered until 7 1/2 months later (August 16, 1984).[43] The trial court had applied section 4800.2 and granted reimbursement. Relying on Buol, the Court of Appeals held that "retroactive" application of section 4800.2 would be unconstitutional, choosing not to distinguish the case before it from Buol on the basis that the lower court had the benefit of the new law at the time of trial and had no convenience in applying it. The possibility of drawing such distinction was obvious in light of the Buol comment concerning the great inconvenience arising from retroactive application of a statute on appeal where the trial court had correctly applied the law in effect at the time of trial.

Admittedly Lachenmyer is of little guidance in assessing whether the urgency measure has eliminated constitutional problems because (a) factually it did not meet the terms of the new retroactivity provision since the dissolution suit was filed before 1984 and (b) the opinion does not discuss the possibility of distinguishing Buol based on the time of trial. Nevertheless, based on all of the foregoing points I conclude that there is almost no possibility that the restructuring of the retroactivity clause so that sections 4800.1 and 4800.2 are to apply to pre-enactment acquisitions only in cases commenced after the effective date of these statutes would eliminate constitutional problems.

On the other hand, the provision of the urgency measure should be retained if further amendments are made to the legislative package consisting of sections 4800.1, 4800.2, and the retroactivity provision. Although the legislature may in some instances change the law applicable to a case after the action has been filed or after the trial court has entered judgment, the California Supreme Court would likely apply the "rank injustice" test to this kind of retroactivity. The Court has, of course, in Buol and Fabian already determined that the prior laws that sections 4800.1 and 4800.2 sought to replace did not cause "rank injustice." Thus, the statute eliminating retroactive application of the statutes in cases commenced before 1984 may usefully be retained, even if substantive changes are made in sections 4800.1 and 4800.2.

It is suggested below that sections 4800.1 and 4800.2 be amended so that they operate solely as statutes authorizing division of a particular class of separate property and unequal division of a class of community property. It is further suggested that the Court will decline for practical reasons to apply the "rank injustice" test to changes in the law that affect only the power of the court to make what the legislature considers a fair division of property at dissolution. Nevertheless, if the legislature seeks to change the rules concerning division after an action has been filed -- and especially after it has gone to judgment in the trial court -- the "rank injustice" analysis of pre-reform law will be made in assessing the constitutionality of the change in law, even though the change relates solely to the manner of division.

B. The Equal Protection Problems in Both Statutes Can and Should Be Eliminated, but Additional Revisions Also Probably Are Necessary To Assure A Holding that the Reforms May Apply to Pre-enactment Acquisitions.

As noted above, the Buol court found that section 4800.1 operated non-uniformly. If by happenstance the parties chose a form of co-ownership title that recited joint tenancy but did not negate community ownership, their oral agreement as to what separate property interests existed despite the form of title was ineffective. However, if the document of title they chose

created a true joint tenancy (by negating community ownership) or if it recited community ownership or ownership in tenancy in common, an oral agreement as to ownership of all or a portion of the asset as separate property by one of the spouses would be valid. Additionally, although Fabian did not directly note it, section 4800.2 is discriminatory. It permits operation of the Lucas rule barring reimbursement absent an agreement despite the separate-property contributor's lack of donative intent in situations where the document of title creates a true joint tenancy or tenancy in common but not where the result of the form of instrument is such that the dissolution court treats the asset as community property. The separate-property contributor luckily gets reimbursement as a matter of law without any agreement only if there is no document of title or if the form of title is of the latter type (i.e., it recites community ownership, it recites joint tenancy without negating community ownership, or it names both spouses or one spouse alone as owner without qualifying the form of ownership).

The legislative line-drawing here involves no suspect classification such as gender or race, so that validity of the discrimination will be assessed under an "any rational basis test." I cannot imagine any rational basis, especially for distinguishing the true joint tenancy deed and the "collapsible" joint tenancy deed, that is one where by operation of section 4800.1 the joint tenancy created at the time of conveyance is converted at dissolution into community property. How can it possibly be argued that the chances of fraud and perjury are greater in the case of the collapsible joint tenancy so that when this form of deed is used an agreement recognizing separate property interests of one spouse must be in writing?

At most one can urge that a legislature is free to deal with just a part of a societal problem and need not tackle all of it at once. Reportedly, some eighty-five percent of recorded deeds of realty to husband-and-wife grantees are in joint tenancy form.[44] One could thus infer that the legislature has dealt with the bulk of the problem of false claims of oral agreements in derogation of written deeds. However, the cited study does not indicate what percentage of the joint tenancy deeds created true joint tenancies. There has long been some benefit to be obtained by use of the true joint tenancy deed. It eliminates the possibility of a creditor of one spouse attempting to impeach the form of title by proof that the parties actually thought they owned the asset in community.[45] (Usually a creditor who succeeds in making such an argument reaches all of the asset rather than only the joint tenancy half interest of the debtor spouse). The true joint tenancy deed also eliminates possible litigation at death of a spouse as to whether the living spouse obtains full ownership by right of survivorship or, because the spouses understood that ownership was actually in community (or as the decedent's separate property), an interest in the property passes under the decedent's will.[46] Thus it is only a guess that sec-

tion 4800.1 deals with most of the problem of fraudulent claims of oral agreements in derogation of the form of title.

Compared with the extent to which 4800.1 dealt with the problem it addressed, section 4800.2 does embrace more of the factual situations raising the problem it was concerned with: the Lucas denial of reimbursement in favor of a separate-property contributor lacking donative intent who neglected to obtain an agreement that he or she would be reimbursed. That is so because section 4800.2 extends to untitled acquisitions in community and all forms of acquisitions under a title that creates community property for purposes of division at dissolution.

Nevertheless, in the case of both statutes no reason seems to exist for carving out the "part" of the problem to be rectified. To defeat an equal protection attack on sections 4800.1 and 4800.2, such a reason must be forthcoming. For if applied without any limitation, the maxim that the legislature can address just part of a problem would simply eliminate the equal protection clauses of the state and federal constitutions.

It should be stressed that the equal protection problems arise not only when the statutes are applied "retroactively" to assets acquired by the spouses before January 1, 1984, but also when they are applied wholly prospectively. The contention of the wife in the situation of Mrs. Buol -- that equal protection is denied when her oral agreement is voided although such an agreement is enforced in favor of other wives where a true rather than a collapsible joint tenancy deed has been used -- is just as strong when the acquisition occurs in 1986 rather than 1970.

The equal protection problems can be readily eliminated[47] by simple amendments. As noted above, with enactment of Civil Code section 4800.4, the presumption of section 4800.1 that joint tenancy property is community serves no purpose. The first sentence of section 4800.1 should be deleted and replaced with the following:

> Where the manner of acquisition of an asset raises a presumption of community ownership or the deed or other document of title conveying an asset to a husband and wife names them as co-owners. whether in joint tenancy, in tenancy in common, or without designation of the form ownership, a presumption arises that neither spouse has as his or her sole and separate property an interest in the asset.

Discrimination in section 4800.2 can be eliminated by deleting the first nine words thereof (referring to division of community property) and substituting the following new sentence (after which the second sentence would begin with the word "unless" as found in the present text):

In dividing joint tenancy, tenancy in common, and community property co-owned by the spouses, the court may grant reimbursement to one or both of the spouses for separate property contributed to acquire the property.

C. Legislation Should Eliminate or Reduce the Due Process Problems Caused by Invalidating an Oral Agreement Proper When Made and Requiring a Waiver of Reimbursement A Spouse Had No Reason to Ask For.

As has been stressed above, section 4800.1 cannot be construed as a statute which, like the quasi-community property legislation, merely authorizes division at dissolution of a particular class of separate property owned by one spouse. Or, if one attempts to define the class of separate property that is divisible, the distinction is so arbitrary as to violate substantive due process or deny equal protection. Section 4800.1 could have, but does not, flatly provided that a dissolution court should divide in the same manner as community property an interest owned separately by one spouse due to a separate property contribution when the form of title specifies coownership by the spouses. Instead, the divisibility of the separate property interest depends on whether the necessary Lucas agreement was oral or written. The class of divisible property consists of separate interests created by oral Lucas agreements. It is undeniable, then, that the statute does invalidate an agreement lawful when made. If this feature of section 4800.1 is removed, the due process analysis shifts from the constitutionality of invalidating an agreement made before enactment of the new law by engrafting a statute of frauds on to it to the constitutionality of amending the law concerning division of property at dissolution by creating a new category of separate property that is divisible no matter when the asset was acquired.

Stated differently, application of the statute to pre-enactment acquisitions is far more likely to be upheld if the thrust of the statute is not (a) that the legislature considers certain types of oral contracts suspect and is looking for a way to defeat them, but rather (b) that the legislature considers it equitable that certain types of separate property be made divisible at dissolution. It is likely that the Supreme Court applied the "rank injustice" test in Buol in assessing pre-enactment law because it perceived (correctly) that section 4800.1 did operate as in (a) above rather than (b).

The revised statute must not attempt to undo the oral agreement favoring one in the position of Mrs. Buol. The statute must permit the oral agreement to operate and create a separate interest in her, just as section 4800.1 as presently drafted allows a written agreement to create such an interest. The separate-property contributor will have all the benefits of separate ownership during marriage. She will have exclusive management and control; her spouse's creditors ordinarily will be unable to reach the

property (unless they relied on the title naming him as co-owner) etc.

The revised statute would then declare that because the separate-contributor either acting alone as in Buol or together with her spouse (as when community funds are used for a downpayment and subsequently separate money is drawn on to reduce principal owing on the purchase money mortgage) has used a title naming the other spouse as co-owner, certain equities are created in the latter which should be recognized at divorce. The precise method of recognition of this equity arising out of the use the spouse's name on the title is to enable him to share half of the capital gain arising out of the separate property contribution. This is achieved by dividing the asset as follows: an amount equal to the separate property contribution is awarded to the contributor spouse and the balance is divided equally between the two.[48]

Such a statutory directive concerning division of property is, of course, subject to being displaced by a contract between the spouses dealing with how their marital property will be divided at dissolution. Whether made before marriage,[49] during marriage, or in contemplation of divorce, such contracts are now enforced if made without duress, with fair disclosure, and without eliminating a spouse's right to receive support from the other.[50] This kind of agreement, to which the revised section 4800.1 would be subject, is different from the written agreement now provided for in the statute that protects the separate-contributor's fullest right to "buy in" to title. The latter merely characterizes property and does not provide for how it will be divided at dissolution. If a characterization agreement, after consideration of all relevant extrinsic evidence, can be construed to not only confirm the separate property character of the asset or portion thereof but in addition its nondivisibility at dissolution, that agreement would override the division mandate of the revised section 4800.1.

If, as suggested below, California will not apply the "rank injustice" test to decide whether the legislature can change the rules concerning how marital property is divided at divorce but will allow any change that does not itself work an injustice, the constitutional prospects for the proposed revision would seem to rest on whether the Court will agree that the use of the title naming both spouses as owners creates an equity at divorce in favor of the spouse who did not make a separate property contribution entitling him to a division award based on gains stemming from that contribution. The connection is by no means obvious. Yet the contributor spouse must have had in mind something flowing in favor of the other when she chose or agreed to the form of title. For the legislature to convert that "something" -- whatever it was -- into an equitable claim at divorce is at least arguably not unreasonable.

The proposed revisions to section 4800.1 could, of course, be made applicable only to assets acquired before 1984. The presently-worded section 4800.1 (after correcting for equal protection problems) could remain applicable as a statute of frauds, rather than a property division statute, for post-enactment acquisitions. Thus fragmentation of the applicable rule of law, with a different rule depending on the date of acquisition, does cause inconvenience to the courts and creates such problems as what is presumptively the acquisition date when no evidence thereof exists, etc. Unless awarding a portion of separate property to the non-owner spouse in the face of a writing classifying the asset or part thereof as separate property is considered quite offensive, sound policy suggests making the revised section 4800.1 applicable to all assets, whenever acquired.

The case for constitutionally revising section 4800.2 so it can apply retroactively is stronger, since the existence of an equity in favor of the party obtaining reimbursement under that statute is so obvious. For the reasons stated in proposing revision of section 4800.1, the amended section 4800.2 should operate as one dealing with how marital property should be divided at divorce. The present section 4800.2 quite properly allows Lucas to operate so that the asset can be divided despite a separate property contribution from a spouse having no intent to make a gift to the community. However, rather than creating a cause of action for reimbursement by the contributor against the other spouse, as section 4800.2 now does, the proposed revision would state that the contribution creates an equity in favor of the contributor-spouse, making an unequal division of the asset fair. The prescribed method of division would be: first award to the separate-contributor an amount equal to the value of his or her contribution; then divide the remaining value equally between the spouses.[51]

The unequal-division rule of revised section 4800.2 would also be subject to a valid agreement by the spouses calling for a different treatment of the asset at divorce. The written waiver of reimbursement, the agreement now referred to in section 4800.2 would clearly be construed as such a contract altering the statutory rules governing a court's division of marital property at dissolution. However, all reference to such a "waiver" agreement in section 4800.2 should be stricken (unless it is to be confined to post-1983 acquisitions). What bothered the Court in Fabian was the notion inherent in section 4800.2 as presently drafted that a party was expected at the time his or her spouse made a separate property contribution to obtain a written waiver agreement to prevent the right of reimbursement from arising when, under Lucas, her refusal to make any agreement would have that effect. To tamper with the effect of Lucas is to make the statute more than one acting on the division of property at divorce.

A presently pending bill does not take the above-suggested approach[52] to curing the due process problems Buol and Fabian found in sections 4800.1 and 4800.2 Assembly Bill No. 2897,

1985-86 regular session, as amended in the Senate June 16, 1986, and in the Assembly May 5, 1986, after attempting to cure the equal protection problems previously discussed,[53] seems to proceed on the theory that the "rank injustice' holdings of Buol and Fabian will not be controlling if the legislature finds a "compelling state interest" in uniform application of the laws governing division of property at divorce. That is, a compelling interest that there not be one rule for pre-1984 acquisitions under a joint title but a different rule for post-1983 acquisitions of the same type.[54] (I do not read A.B. 2897 as attempting to declare that pre-1984 law inflicted "rank injustices," a matter that is stare decisis to the contrary, in any event.)

Personally, I doubt a statement by the legislature that effectively says "we don't like your Buol-Fabian holdings" will cause the Supreme Court to overrule them. The Court surely was aware in deciding those cases that it was resurrecting the old spectre[55] of the burden of determining when an asset was acquired in order to know what law applied to it. Assembly Bill 2897 is likely to be seen as making only one legally significant change: eliminating all equal protection problems existing in sections 4800.1 and 4800.2.[56] As stated above, I don't think that is enough.

D. The California Supreme Court Is Unlikely to Apply the "Rank Injustice" Test in Assessing the Constitutionality of Dividing Pre-enactment Acquisitions Under a Statute that Operates Solely as a Property-Division Mandate.

As has been stressed, the Supreme Court in Buol and Fabian did not view the statutes they were dealing with as simply providing for division of certain properties at dissolution. Rather it viewed section 4800.1 as invalidating an oral agreement valid when made and section 4800.2 as penalizing a spouse for not obtaining an agreement barring a reimbursemnent claim at a time when the law put the burden on the other spouse to obtain an agreement permitting reimbursement. That the Court in this context required that prior law work a "rank injustice" in order to uphold application of the reform rules to pre-reform acquisitions does not mean the same test will be used where the law to be applied "retroactively" just changes the rules concerning how marital property is to be divided at dissolution.

However, the "rank injustice" language comes directly out of Addison v. Addison and Marriage of Bouquet, both of which dealt with statutes that were construed to operate as only property-division statutes.[57] In Addison the prior law gave a spouse at divorce no award of property even though the the other spouse owned considerable property acquired by his labor during marriage (because he acquired it while domiciled in a state that had no law providing for division of property at divorce). The law applicable in Addison if the quasi-community property legislation could not apply to pre-enactment acquisitions was unjust and the

Court could properly declare it to be so. It does not follow, however, that such a characterization was necessary to the decision. Similarly, the Addison court stressed that the wife there seeking a quasi-community property award was an "innocent" spouse -- i.e., she had not been at fault in causing breakdown of the marriage.[58] Again, while it may have been proper to observe this fact, it seems improbable it was necessary to the decision. Can one believe Mrs. Addison would have been denied an award of quasi-community property upon proof she had nagged her husband to such an extent that he decided to get a divorce?

In Bouquet the prior law was very unfair. It made the earnings of a wife after a final separation her separate property but let her share fifty percent co-ownership in community her husband's post-separation earnings. It does not follow, however, that the legislature could not have changed the law concerning division at dissolution -- what it had done was to call for awarding the entire interest in a particular type of community property, husband's post-separation earnings, to the husband -- where the pre-reform law was not unjust but rather just not as good as it could be.

Because of the strong interest in having a uniform body of laws concerning division and the great inconvenience of having multiple laws for similar assets, depending on the acquisition date, mandatory application of the "rank injustice" test would effectively freeze a division-of-property scheme once enacted. Suppose the legislature saw that it had made what it now considered a major error in handling the division of a particular type of asset, but that the existing law, while subject to improvement, was not rankly unjust. If the "rank injustice" test were to be applied, the legislature would choose not to amend and improve the distribution scheme because doing so would create the inconvenience of having two sets of rules concerning distribution depending on the date of acquisition.

Strict application of the "rank injustice" test to property-division statutes would have disturbing -- almost absurd -- consequences under existing laws as well. California's quasi-community property statute might not apply, and the division laws of the state of former domicile would apply,[59] to all pre-1961[60] acquisitions that would meet the definition of quasi-community property in Civil Code section 4803. Inquiry would have to be made as to how unjust was the divorce law concerning property of the former domicile where the couple resided when the assets at issue were acquired. A few states in 1961 were making equitable distribution awards. Did these laws cause a "rank injustice" if caselaw indicated a wife seldom got fifty percent, but more regularly thirty-three percent of what California would classify as quasi-community property? Would there still be injustice if the other state gave only thirty-three percent but classified more types of assets as marital and divisible than did California? (A common example is rents and profits of what California considers

purely separate property -- e.g., an inheritance. In many states such rents and profits are divisible at divorce.)

The legislation that became effective in 1970 and that calls for equal division at dissolution in California of community property[61] displaced a prior law under which a spouse not at fault in the breakdown of the marriage had a right against the other spouse who was an adulterer or who had committed extreme cruelty to more than half the community property. If that was a "vested" right that attached to pre-1970 community assets, the equal division rule has been unconstitutionally applied many times unless pre-1970 division law was rankly unjust. And yet today a fault-free spouse who can identify pre-1970 community assets has a claim against the other spouse at fault for more than fifty percent of the asset, since Civil Code section 4800, the equal-division statute, cannot constitutionlly apply to the pre-1970 asset.

The Family Law Act has provided since 1971 that if the community estate at dissolution is less than $5000 it may be awarded in its entirety to the party petitioning for dissolution where the other spouse cannot be located.[62] Under prior law a fault-free spouse always got fifty percent of the community. Thus there should be situations where application of section 4800(b) to pre-1971 assets is unconstitutional if the "rank injustice" test is applied. The guarantee of fifty percent for a fault-free spouse was hardly unjust. Additionally, the rank injustice test means the legislature cannot increase the $5000 figure to, for example, $10,000 and end up with a uniform rule. The present law is certainly not unjust. The result of such an amendment would be that pre-amendment assets could go to the petitioner spouse only to the extent of $5000 while an additional $5000 of post-amendment assets could be awarded her.[63]

Since 1970 the Family Law Act has provided that up to 100 percent of community property personal injury damages can be awarded to the victim spouse.[64] Under prior law the non-victim spouse was assured that he or she could retain his or her fifty percent interest in community in such damages. Suppose a case where Wife was tortiously injured in a 1968 accident and took in settlement an annuity purchased by the tortfeasor that will pay her $25,000 per year for the rest of her life. In a dissolution action today, assuming application of the "rank injustice" test to changes in laws governing division of marital property at dissolution, the court could not, under section 4800(c), award more than fifty percent of the annuity to Wife if Husband were fault free (unless it could be held that pre-1970 law caused a rank injustice).

The above analysis should cause the California Supreme Court to seriously consider whether "rank injustice" in prior law was essential to the holdings in Addison and Bouquet. The Court should find it instructive that no other state has hobbled its legislature and effectively prevented it from reforming divorce

laws concerning property rights by such a restrictive reading of the due process concept.[65] I predict that the "rank injustice" test will be confined to cases like Buol and Fabian where the retroactive legislation voided contracts and created reimbursement causes of action.

E. Since the Federal Constitution Does Not Mandate Use of the "Rank Injustice" Test, Correction of Buol and Fabian Can at Least Be Obtained by Amendment of the California Constitution.

If, contrary to the prediction above, the California Supreme Court insists on making the "rank-injustice-of-prior-law" test mandatory in cases where the issue is constitutionality of applying a change in the law governing division of property at dissolution to pre-enactment acqusitions, it may be advisable to alter the governing constitutional framework by amending the state constitution. This should be successful. The court very carefully relied solely on the state constitution in Buol and Fabian. Instances where the California constitution has been held to grant individuals greater rights against the government than those granted by analogous provisions of the federal constitution are not uncommon.[66]

Addison, where the "rank injustice" language first emerged, did hold that the quasi-community property statute violated neither the state nor federal constitutions' due process clauses.[67] Although the United States Supreme Court has not considered a case directly in point, its post-Addison due process decisions concerning retroactivity are very generous in according to the legislatures power to alter statutory law and to apply the new law to pre-enactment events.[68] That Court in recent years has in no way even intimated that prior law must have been causing rank injustices for retroactive application of the new law to be consistent with due process.

A number of non-California state appellate decisions have dealt with the power of state legislatures to change the laws governing division of property at divorce and to have the new law applied to assets acquired by spouses before its enactment. Their opinions have sometimes applied the due process clause of the Fourteenth Amendment[69] and sometimes that provision in conjunction with a state constitution's due process clause.[70] All of these decisions have held that application of the new law to pre-enactment acquisitions is not unconstitutional.[71] None of the state courts has felt it necessary to declare prior property-division law (or absence thereof) to be rankly unjust as a predicate for upholding the "retroactive" application of the new division rules to all assets before the court in a divorce case, including pre-enactment acquisitions.

In one case[72] where the new law merely modified an equitable distribution scheme previously enacted rather than displacing a

system that precluded any property award to a non-owner spouse with a property-division statute, no legitimate argument for "rank injustice" of pre-amendment law could have been made. The state appellate court found no difficulty in applying the amendment to pre-enactment acquisitions.

In these retroactivity decisions, the state courts have analyzed numerous United States Supreme Court decisions involving the Fourteenth Amendment due process and have found none of them to bar this kind of "retroactive" application of a domestic relations law. Again, it was never felt necessary in applying the federal cases to find prior law to have been causing "rank injustice." To the contrary, at least one state has adopted a rule converse to the rank injustice approach found in California cases. In New Jersey a change in the law concerning division of property may be presumptively applied "retroactively" to pre-enactment acquisitions unless the party objecting demonstrates that to do so would cause "manifest injustice."[73]

In an analogous context, other states have found no due process violation in a statute that reduces a spouse's testamentary power of property by increasing the nonbarrable share of the surviving spouse.[74] In that situation it is fairly obvious that the married person has no "vested right" barring change of the law. Such a party should have greater reliance in the immutability of laws concerning how much his or her spouse will receive out of marital property at divorce.

In sum, only the California due process clause stands in the way of granting the legislature broad freedom to amend the laws governing division of property at dissolution while retaining the benefits of uniform rules applicable to all assets. If necessary, an amendment to the state constitution granting the legislature that power would be beneficial.

F. A Narrowly Drawn Statute Dealing Solely With the Family Home Is Likely to Be Upheld and Also to Be Politically Feasible Even Though It Provides for Division of Separate Property.

Under present law a pre-1984 oral or written agreement and a subsequent written agreement can result in a separate property contributor having a sole-and-separate ownership interest in a house that is titled in the names of both spouses. Mrs. Buol's case where the agreement made her exclusive owner of the house is likely to be unusual. More likely, the co-ownership title (whether in joint tenancy or a form creating community ownership on its face is irrelevant) was chosen because a substantial amount of community funds did go into the consideration paid or would be flowing in by way of later note payments. The separate property buy-in is more likely to occur when community ownership was intended but, at a time when liquid community assets were unavailable, one of the spouses made note payments with separate property money she had on hand after obtaining an agreement that this contribution would obtain a share of title. A few such note payments may result in a case where at the time of judicial dissolution, the home is under Moore-Marsden pro rata sharing calculations ninety-five percent community property and five percent the separate property of one spouse, say Husband, who made separate property contributions that reduced principal owing and who had a valid "buy in" agreement.

If the court thinks it equitable to award the full interest in the house to the wife -- because, for example, she will be obtaining physical custody of minor children accustomed to living there -- under present law this probably cannot be done. Civil Code section 4800.4 provides:

> (a) In a proceeding for division of the community property and the quasi-community property, the court has jurisdiction, at the request of either party, to divide the separate property interests of the parties in real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The property shall be divided together with, and in accordance with the same procedure for and limitations on, division of community property and quasi-community property. [emphasis added]

Because joint tenancy interests of the spouses as a matter of law must be equal and because the final sentence of section 4800.4(a) envisions a 50-50 division of assets equally owned, it is unlikely that the statute's reference to tenancy in common extends to the hypothetical situation where a separate contributor's buy in has created a cotenancy of ninety-five percent community, five percent husband's separate estate (or the equivalent 52 1/2 percent husband's property, 47 1/2 percent wife's).

If I am wrong and section 4800.4 does embrace this kind of cotenancy, the final sentence of the statute, calling for use of 50-50 division principles declared in section 4800(a), apparently means that if H's five percent separate property (as tenant in common) interest is awarded to W, H must get an offsetting award paid from W's share of community property (or her share of divisible joint tenancy or tenancy in common property).

Section 4800.4 should be amended to make explicit that in the hypothetical situation the dissolution court can award H's five percent interest to W by making an offsetting award of other property to him so he leaves the marriage with net value of property equal to his net value before the property division. If this cannot be done, the court can only (1) award the house solely to the noncustodial parent H or (2) leave the divorcing parties as cotenants -- H having at least a five percent interest, and a 52 1/2 percent interest if the community interests in the house are not disturbed. This will enable H to bring a partition action, forcing a partition sale at which he may be able to buy the house.[75] He can then force his ex-wife and children to leave their accustomed abode.

Should the amendment allow the dissolution court to divest H of his separate property cotenant's share when the community portion is less than fifty percent? For public policy reasons, I should think this is wise. Since 1965 California law has sought a method to make the family home awardable as a unit to the custodial spouse. Since the proposal allows no net economic loss to be inflicted on H (because of the offsetting award he receives), he has little basis for complaint.

There is no way to construe section 4800.4 to extend to Mrs. Buol's case, it should be clear. Her Lucas agreement made her the sole owner of the home notwithstanding a joint tenancy title. It seems not unreasonable for the law to provide, however, that a separate owner who chooses this form of title submits the property so titled to property division by the dissolution court. One who seeks to keep property nondivisible at divorce should take care to have the record title consistent with such a desire. Accordingly, it is recommended that section 4800.4 be amended as follows:[76]

> (b) Where the asset at issue is a residence that has been occupied by one or both spouses, tenancy in common property is subject to division under this section when the shares of the spouses are unequal and where the tenancy in common is between the community estate and the separate estate of one spouse. Where the asset is such a residence, the property is also divisible even though owned solely by one of the spouses as his separate property pursuant to agreement not appearing on the deed if the form of title on the deed creates a form of co-ownership (tenancy in common, joint tenancy, or community property). In dividing property under this

> subsection the greater property rights in the residence of one spouse shall be compensated, when the residence is awarded to the other spouse, by an offsetting award of other property that is distributable under section 4800 or this section so that the net value of assets owned by such spouse is equal to the value of assets before such division of property.

In many situations the residence is the only divisible asset of substantial value. Whether the residence is co-owned 50-50 or in some other fraction, the offsetting award in favor of the spouse not awarded the residence must be in the form of a promissory note. The obligor on such a note can have it subsequently discharged in bankruptcy. Thus it is clear that such a division cannot assure the spouse not receiving the residence that the ultimate result will be a 50-50 division of property.

In other situations it must transpire that the court awards W, who has the house, spousal support not only so she can make mortgage payments on the house but with the idea she will draw on such support to pay her obligations on the equalizing promissory note held by H. The note holder then is in effect paying off his own note. This too is not exactly an assured equal division.

If there is a substantial equity in the residence, the court will secure the payment of the note by a mortgage in favor of H, the note holder, junior to the purchase money mortgage.[77] If ex-W misses a payment owed ex-H on the note, he will foreclose on the equity that secured payment of his note and once again be able to force W and the children out of their accustomed abode.

Public policy favors a clean break in which ex-W, the custodial parent, gets the house without liens in favor of ex-H and to the extent possible without depending on spousal support (which is hard to collect). Clean break policies would be furthered substantially by a major change in the philosophy of property division at dissolution confined, however, to the family residence. The proposal is that this asset be subject to equitable rather than 50-50 division.

I am aware that the state bar and other interest groups have previously indicated distaste for a shift to equitable division of property at dissolution, but I do not think these concerned parties have considered limiting the equitable division rule to the family residence.

There is long-standing precedent for such treatment of the family home at marriage dissolution by death -- the probate homestead. In effect that doctrine at a death dissolution results in either an award of a separate property interest of the decedent spouse to the survivor (despite a will making different disposition) or an unequal division of the community estate in favor of the surviving spouse.

Sections 120-126 of the Probate Act of 1851 gave the probate judge power to set aside, for use of a widow and/or minor children of decedent, any property exempt from execution out of the decedent's estate.[78] The probate homestead laws have treated a homestead drawn from community property differently than that composed of the deceased's separate property. Thus, 1880 amendments to the probate homestead legislation provided that a homestead of community property would pass in fee to the widow but that if separate property of decedent were taken for the homestead, it should be assigned "for a limited period."[79] At present all probate homesteads are of limited duration.[80]

The probate homestead theory in essence makes an equitable award of the residence to the spouse who needs it. Representatives of the other spouse (decedent) end up with less property of net value than they would have had under the ordinary approach to ownership interest of property at a death dissolution assuring the decedent's legatees of full ownership of half the community property and half the separate property.

The 135 years of acceptance of the probate homestead should tend to dilute opposition to the very limited proposal here of adoption at judicial dissolution of the equitable division doctrine.

FOOTNOTES

1. Robinson v. Robinson, 65 Cal. App.2d 118, 150 P.2d 7 (1944).

2. Siberall v. Siberall, 214 Cal. 767, 7 P.2d 1003 (1932): "[A] community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such an estate." Id., 214 Cal. at 773, 7 P.2d at 1005.

3. Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944).

4. Socal v. King, 36 Cal. 2d 342, 346, 223 P.2d 627, 630 (1950) ("secret intention" by one of the parties to hold property taken in joint tenancy form as community not enough to defeat joint tenancy); Machado v. Machado, 58 Cal. 2d 501, 504, 375 P.2d 55, 57 (1962) (presumption not overcome even though both spouses testified that they did not intend to take title in joint tenancy form).

5. "At dissolution of marriage . . . the court has no jurisdiction to divide joint tenancy property and therefore may be unable to make the most sensible disposition of all 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 hproperty 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." California Law Revision Commission, Report Concerning Assembly Bill 26, 83 Senate Journal 4865 (July 14, 1983) (hereinafter AB 26 Report).

6. Cal. Stats. 1965, c. 1710, p. 3843.

7. The Assembly Interim Committee on the Judiciary issued a report, Final Report of Assembly Interim Committee on Judiciary Relating to Domestic Relations (1965), reprinted in 2 Appendix to the Journal of the Assembly (1965 Reg. Sess.), which was somewhat misleading in explaining the purpose of the legislation.

The report discussed situations in which married couples acquire property in joint tenancy form, but their intention was to hold it as community:

> [H]usbands and wives take property in joint tenancy without legal counsel . . . primarily because deeds prepared by real estate brokers, escrow companies, and by title companies are usually presented to the parties

> in joint tenancy form. The result is that they don't know what joint tenancy is, that they think it is community property, and then find out upon death or divorce that they didn't have what they thought they had all along and instead have something else which isn't what they intended.

Id. at 124.

In discussing a proposal to amend section 164 to allow the court to dispose of the marital residence, whether joint tenancy or community property, the report stated:

> The purpose of this proposal is not to make any more favorable the ultimate award granted to the wife but to make it possible, in a proper case, to award the family home to the wife in order that the children may continue their lives with minimal trauma notwithstanding the divorce.

Id. at 122.

The latter quote most certainly represents the ultimate objective of the amendment to section 164. The thrust of the amendment as enacted was to allow the court to divide property in joint tenancy form at dissolution. If the primary concern had been with meeting the intention of the parties, which seems to be indicated by the former quote, the amendment would not have been limited to operate for dissolution purposes only.

8. Although statutory solutions to the problems discussed will by their terms cover the situation where the separate property owner is the spouse who will be awarded the entire asset, this fact situation has never caused any difficulty requiring legislative action. The dissolution court has always had the power to confirm the separate property owner as owner of his or her undivided interest in the asset, while awarding the entire community interest to that spouse. (Since the 1970- Family Law Act began requiring a 50-50 division of the community at dissolution, the assertion that there is no difficulty in such a case assumes, of course, that there are other community assets of sufficient value to constitute an equal, offsetting award to the other spouse.)

9. 27 Cal. 3d 841, 166 Cal. Rptr. 853, 614 P.2d 285 (1980).

10. The term partial retroactivity is used to denote that the new law had no effect on property divisions made in judgments that had become final.

11. Section 4 of A.B. 26 provided:

> This act applies to the following proceedings:
>
> (a) Proceedings commenced on or after January 1, 1984.
> (b) Proceedings commenced before January 1, 1984, to the extent proceedings as to the division of property are not yet final on January 1, 1984.

1983 Cal. Stats., ch. 342 § 4.

12. 39 Cal. 3d 751, 218 Cal. Rptr. 31, 705 P.2d 354 (1985).

13. It is interesting that these separate contributions were Wife's earnings during marriage, which, she asserted, Husband had said were "hers to do with what she pleased." Husband "conceded that he considered [wife's] earnings to be hers alone." 39 Cal. 3d at 755, 218 Cal. Rptr. at 33, 705 P.2d at 356. This kind of vague transmutation is now ineffective. Presently the husband, rather than conceding what he "considered" the earnings to be, could invoke the statute of frauds for marital property transmutations, Cal. Civ. Code § 5110.730 (requiring express declaration "made, joined in, consented to, or accepted by the spouse whose interest is adversely affected). That statute is prospective only and would have been of no help to Husband in Buol, even it had been on the books at the time of his trial. See id., subdivision (d) (applies only to post-1984 transmutations).

14. The original purchase price was $17,500. The Supreme Court's opinion suggests the original purchase-money mortgage had been fully paid off. See 39 Cal. 3d at 760, 218 Cal. Rptr. at 31, 705 P.2d at 354.

15. 39 Cal. 2d at 757, 218 Cal Rptr. at 39, 705 P.2d at 362 (1985).

16. 41 Cal. 3d 440, 224 Cal. Rptr. 333, 715 P.2d 253 (1986).

17. Headnote No. six to the Fabian case prepared by the West Publishing Co. for the California and Pacific reporters cites the Fourteenth Amendment to the United States constitution as being implicated. It is difficult to substantiate that conclusion. The same is true of the reference to the Fourteenth Amendment in West's headnote No. thirteen to its reports of Buol.

18. This convenient procedure has been used for several years to allow the court to partition joint tenancy property in Arizona and Nevada. See Ariz. Rev. Stat. § 25-318, as amended by Ariz. Law 1980, Ch. 113, § 3, Nev. Rev. Stat. § 125.150, as amended by 1979 Nev. Stat. p. 1821. Interestingly, the 1980 amendment to the Arizona statute made it retroactive. This amendment has been held constitutional, at least as applied to

the quasi-community property aspect of the statute. Sample v. Sample, 135 Ariz. 599, 663 P.2d 591 (Ariz. App. 1983).

The "retroactive" feature of new section 4800.4 is unquestionably constitutional. It is merely a procedural change in the law not having any substantive effect on vested rights. See the extensive discussion in Buol of the difference between procedural and substantive laws for purposes of analysis of retroactive statutes under the due process clause 39 Cal. 3d at 758-760, 218 Cal. Rptr. at 34-36; 705 P.2d at 358-360.

Under pre-enactment law either of the joint tenant spouses could have brought a partition action, under Code of Civil Procedure Section 872.010 et seq., at the same time the dissolution action was filed. Possibly the two could have been consolidated for trial in Superior Court pursuant to Code of Civil Procedure Section 404. Section 4800.4 merely brings the two issues together into the same suit and additionally permits an award of the entire joint tenancy asset to one spouse (with an offsetting award of community property) rather than merely partition in kind or by sale. But unlike application of sections 4800.1 and 4800.2 in Buol and Fabian in comparison to pre-enactment law, use of the procedural device of section 4800.4 leaves the spouses owning the same amount of property in value as each owned under the law before section 4800.4 was enacted. Even assuming that such rearranging of property rights is a "taking" (for full value paid, of course), the public interest in streamlining the division of properties between divorcing parties should authorize applying the new law to pre-enactment acquisitions. See generally Addison v. Addison, 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965). It seems inconceivable that the California Supreme Court would hold that one of two joint tenants married to the other has a vested right to have the joint tenancy property divided up in a separate partition action that becomes violated when the partition is merged into the division of community property owned by the pair by a court exercising jurisdiction conferred by the Family Law Act.

19. The constitutional issue is technically alive if raised during cases where judgment did not become final before 1986 and the presumption was applied to authorize the dissolution court to divide the property. For the reasons stated in footnote 14, supra, application of the broader presumption of section 4800.1 to preenactment acquisitions under a joint tenancy title would be constitutional in a case where the contributions of both spouses were equal.

20. It was held under the predecessor statute to section 4800.1 that if a donor made a gift to the spouses using a joint tenancy deed, the statute converted the form of ownership to community if the spouses had not made an agreement to the contrary. See Marriage of Gonzales, 116 Cal. App. 3d 556, 172 Cal. Rptr. 179 (1981). Compare Marriage of Camire, 105 Cal. App. 3d 859, 164 Cal. Rptr. 667 (19--) (donor's intent -- communicated to

Husband -- that gift by deed reciting joint tenancy ownership by the spouses be owned solely by Wife, donor's sister, given effect).

21. In an earlier writing I opined that a Buol-like decision holding "retroactive" application of section 4800.1 unconstitutional was wrong, at least as an application of the due process clause, because the statute did no more than make an award of one spouse's separate property to the other at divorce. W. Reppy, Community Property in California 79 (1985 cum. supp.), commenting on Marriage of Milse, 205 Cal. Rptr. 616 (App. 1984), hearing granted and cause retransferred for reconsideration in light of Buol. At that time I had overlooked the significance of the fact that if the asset were separate property in the clearest sense (because of a written agreement to that effect) it would not have been divisible. The California Law Revision staff has opined that Buol "is plainly wrong." Document No. F-602, First Supplement to Memorandum 85-102 (Nov. 25, 1985) at p. 5 [hereinafter cited as "Doc. No. F-602"]. Perhaps this conclusion was based on the same oversight.

22. 39 Cal. 3d at 757 n. 6, 218 Cal. Rptr. at 34 n. 6, 705 P.2d at 357 n. 6 (1985).

23. See Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977, 1047-50 (1975) (hereinafter cited as "Reppy Retroactivity"). The Buol court's use of the term "vested" is also criticized at Doc. No. F-602, supra note 21, at 9.

24. See Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

25. Suppose two remainder persons, B and Y, received devises under the following clauses: (1) to A for life then to B, but if is not married to C; (2) to X for life then, if he be married, to Y, but if he is not, to Z. During A's life, B has a vested remainder subject to divestment; during X's life Y has a contingent remainder because the marriage-condition clause is annexed to the language of gift. Surely the constitutionality of a statute retroactively impairing the interest of either B or Y would be assessed in like manner.

26. 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965).

27. 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976).

28. The Family Law Act authorizes division of community and quasi-community property. Calif. Civ. Code § 4800. Other kinds of separate property (i.e., other than quasi-community) are not mentioned. The case law has concluded that separate property is not divisible. See Robinson, supra, note 1.

29. 39 Cal. 3d at 763, 218 Cal. Rptr. at 39, 705 P.2d at 362 (1985).

30. 39 Cal. 3d at 761, 218 Cal. Rptr. at 37, 705 P.2d at 360 (1985).

31. The Court cited as an example a case where title to an automobile might name the owners as "Patricia or Henry" or might refer to "Patricia and Henry." The former wording creates a joint tenancy so that 4800.1 would void an oral agreement that the auto was owned by one of the spouses who, for example, paid for it. Under the latter wording the auto would be community property not subject to section 4800.1 and the oral agreement would be valid. The court was speaking, of course, of the state of the law before Civil Code section 5110.730 became effective (see note _____, supra). Moreover, even after 1984 section 5110.730, with its requirement of a writing to effectuate a transmutation, would not moot the problem of the automobile title in many instances. If the oral agreement was made before or at the time of the acceptance of the title that raised a presumption of community ownership on its face by naming both spouses connected by "and" as the owners, joint tenancy ownership never would have attached and there would have been no attempted oral transmutation from joint tenancy to separate property (a form of transmutation defined in Civil Code § 5110.710(c).

> 32. Two other policy considerations work against retroactive application of section 4800.1 First, '. . . to the extent the statute furthers a policy of evidentiary convenience, that policy is not served by application of the statute to cases already tried.' . . . This is particularly true in cases, such as the one at bench, where the trial court correctly applied existing law in determining the asset to be separate property. Second, the manifest interest in finality pervading this sensitive area of the law is thwarted by retroactive application of the statute. 'The net effect of retroactive legislation is that parties to marital dissolution actions cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then applicable law.'

39 Cal. 3d at 763, 218 Cal. Rptr at 38-39, 705 P.2d at 362.

33. 64 Cal. 3d 778, 51 Cal. Rptr. 888, 415 P.2d 776 (1966).

34. 41 Cal. 3d at ___, 224 Cal. Rptr. at 336, 715 P.2d at 256.

> 35. The courts of appeal have taken conflicting approaches to the question of the proper method for determining the ownership in interests in a residence

> purchased during the parties' marriage with both separate and community funds. In In re Marriage of Bjornestad (1974), 38 Cal.App. 3d 801, 113 Cal.Rptr 576, the Court of Appeal allowed reimbursement for separate property contributions to the down payment the purchase price of the parties' residence. In In re Marriage of Aufmuth (1979) 89 Cal.App. 3d 446, 152 Cal.Rptr. 668, the Court of Appeal developed a scheme of pro rata apportionment of the equity appreciation between the separate and community contributions to the purchase price. The Court of Appeal in In re Marriage of Trantafello (1979) 94 Cal. App. 3d 533, 156 Cal.Rptr. 556, however, held that the residence was entirely community in nature in the absence of any evidence of an agreement or understanding between the parties to the contrary.

27 Cal. 3d at 812-13, 166 Cal. Rptr. at 855-54, 614 P.2d at 287. The Court, of course, chose to follow Trantafello while the legislature in section 4800.2 opted for Bjornestad.

36. As demonstrated in the prior footnote, the governing law was highly uncertain before Lucas. The court had not "consistently" held that a contribution like that made by Mr. Fabian was converted as a matter of law into a gift to the community. 41 Cal. 3d at ---, 224 Cal. Rptr. at 339, 715 P.2d at 259. Nor would any "competent counsel" have assured Mr. Fabian that an agreement with his wife was necessary to prevent the contribution from becoming a gift. Id. It must be conceded, however, that "competent counsel" would have suggested the agreement due to the uncertainty of the law.

37. 41 Cal. 3d at ___, 224 Cal. Rptr. at 337, 715 P.2d at 257.

38. See W. Reppy, Community Property in California 107-08 (1980), citing Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931), and Lewis v. Johns, 24 Cal. 98 (1864).

39. 41 Cal. 3d at ___, 224 Cal. Rptr. at 338, 715 P.2d at 258.

40. 41 Cal. 3d at ___, 224 Cal. Rptr. at 339, 715 P.2d at 259.

41. But for the portion of the statute dealing with a written waiver of the right of reimbursement, section 4800.2 was capable of being construed as a directive to make an unequal division of a community asset that had been purchased in part with community funds. That was so because the amount of what was

labeled reimbursement could "not exceed the net value of the property at the time of division." The California rule for ordinary reimbursement cases is that the claimant gets no less than the amount expended, see Marriage of Warren, 28 Cal. App. 3d 777, 783, 104 Cal. Rptr. 860, 864 (1972) (dictum). Under this general rule if the motel in Fabian had, due to deterioriation in the neighborhood decreased in value below $275,000 -- the amount of Husband's separate contribution -- he would have nevertheless been entitled to return of his full contribution. This is fair, because the community alone can get the benefit of expected increase in value due to inflation and other market forces; thus it should bear the risk of an unlikely decrease in value below purchase price. In the case of the hypothetical decrease below purchase price in Fabian, applying section 4800.2 and its limit on the amount of "reimbursement," the court would almost certainly just award the entire asset to the contributor-husband.

42. 41 Cal. 3d at ---, 224 Cal. Rptr. at 340 n. 12, 715 P.2d at 260 n. 12.

43. Marriage of Lachenmyer, 174 Cal. App. 3d 558, 560, 220 Cal. Rptr. 76, 78 (1985).

44. See Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927, 928 (1983).

45. See Hansford v. Lassar, 53 Cal. App. 3d 364, 125 Cal. Rptr. 804 (1975); see also Lovetro v Steers, 234 Cal. App. 2d 461, 44 Cal. Rptr. 604 (1965) (issue whether one spouse acting alone could convey to creditor all or just half interest in a collapsible joint tenancy asset).

46. Use of the true joint tenancy form of ownership may sacrifice the federal income tax benefit of a stepped-up basis in death of one co-owner spouse for the survivor's half interest, a benefit available only if the co-ownership is by way of community property. 26 U.S.C. § 1014(b)(6).

47. The discrimination in section 4800.1 between separate interests created by oral agreements compared to those created by written agreements is addressed below as a due process problem that must be corrected. Concededly, that an equal protection attack on this line-drawing in section 4800.1 can reasonably be made as well.

48. The revised statute should indicate that the rights to distribution created are "aggregate theory" rights. The entire asset can be awarded to either spouse so long as there is an offsetting award of other divisible property equal to the amount the other spouse would have received had the asset been sold proceeds divided according to the formula in text.

49. See Calif. Civil Code § 5123(a)(3).

50. See Calif. Civil Code § 5125; Marriage of Higgason, 10 Cal. 3d 476, 110 Cal. Rptr. 897, 516 P.2d 289 (1973).

51. An "aggregate theory" of division would be provided for. See footnote 25.

52. The bill continues the statute-of-frauds approach now found in section 4800.1 and makes no changes in section 4800.2. It does not convert these sections into property-division statutes.

53. The bill makes sections 4800.1 and 4800.2 "apply to all property held in joint title." Thus, with respect to untitled community property or property acquired during marriage in the name of one spouse alone, a pre-1985 oral agreement creating separate property interests would be effective. (After 1984 Civil Code section 5110.730 would require the writing, and it operates prospective only.) The distinction drawn between joint-titled and untitled property seems quite reasonable and should not fall to an equal protection attack. The same is true with respect to cases where "title" is in the name of only one spouse yet the ownership is community. In such a case the oral derogation is not in derogation of the writing, since the writing never was intended to reflect the true ownership. That was true, too, of the facts in Buol where the writing recited joint tenancy title, but there is an important distinction. Since one spouse alone can acquire community property assets by spending community property in his or her control, it is expected that there will be "titles" to community assets naming just the acquiring spouse as buyer. There is no reason to expect a person spending separate funds intending to maintain separate ownership (as did Mrs. Buol) to choose a joint tenancy form of title.

The bill declines to deal with the problem as it relates to pre-1985 oral agreements in derogation of separate property deeds. (E.g., the instrument, acknowledged by Husband, conveys property to Wife, reciting it is her separate property; she later orally transmutes it to Husband's separate property.) This probably does not deny equal protection. Joint-titles seems reasonably to constitute a distinct "part of the problem" of perjured transmutation agreements that the legislature could deal with separately.

54. The bill would amend section 4800 to declare the "compelling state interest" after a legislative finding of the benefits of a uniform law and a finding that existing caselaw and statutes are inconsistent and "have created confusion as to which law applies at a particular point in time to property, depending on the form of title, "with the result that "spouses cannot have reliable expectations as to the characterization of their property and the allocation of the interests therein, and attorneys cannot reliably advise their clients regarding applicable law."

I doubt very much that the Supreme Court will allow itself to be bound by a legislative declaration that that Buol and Fabian have left the law in a state of confusion. The legislative finding seems more a conclusion of law than of fact. If the spouses cannot reliably expect application of the law as it stands after Buol and Fabian, that is because of loud signals from the legislature of an intent to change it once again. Is it possible the constitution would permit the legislatureitself to create confusion and uncertainty which it then invokes to overturn a constitutional decision of the Supreme Court? I doubt it. The present law is inconvenient, to be sure, but attorneys do know what it is and can in fact (if they ignore legislative threats to change it once again) advise clients as to how property will be divided at divorce. In my view, then, the only finding in A.B. 2897 is that of the strong public interest in a uniform law of division of property that eliminates the need to determine when an asset was acquired or when an oral agreement was made. As is shown in text, this can be achieved by enactment of new laws that operate solely as property division statutes and that do not void oral agreements valid when made (Buol) or change the legal rules so that the burden to obtain an agreement relating to reimbursement is shifted -- after critical events have transpired -- from the party who wants reimbursement to the party who opposes it (Fabian). The availability of less drastic means to achieve uniformity casts doubt on the constitutional success of the corrective scheme of A.B. 2897.

55. See generally, Reppy Retroactivity, supra note 23 at pp. 1059-1118.

56. See footnote 52, supra.

57. Addison, 62 Cal. 2d at 594, 43 Cal. Rptr. at 102, 399 P.2d at 902; Bouquet, 16 Cal. 3d at 594, 128 Cal. Rptr at 433, 546 P.2d at 1377.

58. This aspect of Addison was reiterated in Fabian. 41 Cal. 3d at ___, 224 Cal. Rptr. at 338, 715 P.2d at 258.

59. See Marriage of Roesch, 93 Cal. app. 3d 96, 147 Cal. Rptr. 586 (1978) (where quasi-community property law of California was inapplicable, rights of spouses in property at divorce were governed by laws of former marital domicile, which was place of acquisition by husband). Note, too, that if the "rank injustice" test of Addison is to be strictly applied, so then, too, should be the "innocence of spouse" test. This would import into every dissolution action involving quasi-community property acquired before 1961 (see footnote 36, infra) inquiries into "fault" of a spouse, in direct contradiction of the strong no-fault policies of California's Family Law Act of 1970.

60. The quasi-community property statutes (most importantly what are now Civil Code sections 4800 and 4803) were first enacted in 1961. 1961 Cal. Stats. ch. 636, p. 1838, §§ 1, 2.

61. 1969 Cal. Stats ch. 1608, p. 3333, § 8.

62. Calif. Civ. Code § 4800(b)(3) (enacted by 1970 Cal. Stats. ch. 962, p. 1727, § 3.5).

63. The rule applies when the respondent spouse is absent. Perhaps the constitutional points made in text would arise if the respondent appeared after judgment was entered under section 4800(b)(3) in time to appeal. Perhaps a collateral attack would lie.

64. Calif. Civ. Code § 4800(c) (____).

65. See part E, below, the final section of text.

66. **Due Process:** Planned Parenthood Affiliates v. Dan De Kamp, 226 Cal. Rptr. 361 (Cal. App. 1986) (California constitutional guarantee of sexual privacy to minors broader than federal counterpart); People v. Fioritto, 68 Cal. 3d 714, 441 P.2d 6725, 68 Cal. Rptr. 817 (1986) (relies on the California cognate of the Fifth Amendment for broadest application of the Miranda decision); In re Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985) (broad Miranda enforcement declining to follow United States v. Nobles, 422 U.S. 225 (1975)); People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984) ("Briggs instruction" violates due process under Art. IV, § 8 and Art XVI, § 5 of the California Constitution which conflicts with California v. Ramos, 403 U.S. 992 (1986)); People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978) (broad Miranda enforcement declining to follow Michigan v. Mosley, 433 U.S. 96 (1975)); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (no presumption of racial neutrality in use of peremptory challenges declining to follow the then controlling Swain v. Alabama, 380 U.S. 202 (1965)); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) ("We . . . reaffirm the independent nature of the California constitution and our own responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution;" broad enforcement of Miranda declining to follow Harris v. New York, 401 U.S. 222 (1971).

Equal Protection: Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (discriminatory bartending statute declining to follow Goesaert v. Cleary, 335 U.S. 464 (1948)).

First Amendment: California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981) (textbook loan to private schools no violation of California constitution, declining to follow Board of Educ. v. Allen, 392 U.S. 236 (1968)); Robins v. Prune Yard Shopping Centers, 23 Cal. 3d 849, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), aff'd, 497 U.S. 74 (1980) (shopping mall considered public area for passing out

leaflets declining to follow Lloyd v. Tanner, 407 U.S. 551 (1972)); Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (1979) (reasonable accommodation rule (Art. I § 8 of the California Constitution) does not violate the Establishment Clause, a ruling which conflicts with Transworld Airlines v. Hardison, 432 U.S. 63 (1977)).

Fourth Amendment: People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (search of opaque bottle during weapon patdown unreasonable under California Constitution, declining to follow United States v. Robinson, 414 U.S. 218 (1973); People v. Laima, 34 Cal. 3d 716, 669 P.2d 1278, 195 Cal. Rptr. 503 (1983) (unreasonable search and seizure declining to follow Robinson and Gustafson v. Florida, 414 U.S. 260 (1973)).

Eighth Amendment: People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), cert. denied, 406 U.S. 958 (capital punishment declared cruel and unusual, declining to follow In re Kemmler, 136 U.S. 447 (1890); see also Falk, The State Constitution: A More than "Adequate" Nonfederal Ground, 61 Cal. L. Rev. 273 (1973) (extensive footnote listing pre 1972 cases establishing California constitutional independence); Goldberg, Stanley Mosk: A Federalist for the 1980's, 12 Hastings Const. L.Q. 395 (1985). Finally, many of the preceding decisions presenting evidentiary issues have been overturned by Proposition 8 (Art. I § 28 of the California constitution).

67. 62 Cal. 2d at 566-7, 43 Cal. Rptr. at 102-3, 399 P.2d at 902-3. Bouquet refers only to "the due process clause." 16 Cal. 3d at 592 and 594, 128 Cal. Rptr. at 432, 434, 546 P.2d at 1376, 1378. It cites Addison as well as one case involving the United States constitution, Calder v. Bull, 3 Dall.(3 U.S.) 386 (1798). Apparently the Bouquet court like Addison thought it made no difference whether the state or federal due process clause was applied.

68. The leading modern case is Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). The Federal Coal Mine Health and Safety Act had been amended so as to retroactively increase benefits of miners even though they had terminated their employment before enactment. This was upheld, the Court declaring:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . . (O)ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.

428 U.S. at 15-16. See also Pension Benefit Guarantee Corp. v. Gray, Co., 467 U.S. 717, 104 S.Ct. 2709 (1984) (Congress can retroactively penalize employer for withdrawal from pension plan occurring five months before statute enacted).

69. See McCree v. McCree, 464 A. 2d 922 (D.C. App. 1983) (retroactive application of statute providing for just division of marital property including civil service pensions); Valladares v. Valladares, 80 A.D. 2d 244, 438 N.Y. Supp. 2d 810 (1982) affirmed 55 N.Y. 2d 388, 434 N.E.2d 1054, 499 N.Y.S.2d 687 (1982) (just division of marital property).

70. See Kujawinski v. Kujawinski, 71 Ill.2d 563, 376 N.E.2d 1382, 17 Ill.Dec. 801 (1978) (retroactive application of statute providing that all property acquired during marriage is presumptively marital); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974) (retroactive effect of equitable distribution statute does not amount to a deprivation of property without due process);

71. See McCree V. McCree, supra; Kujawinski v. Kujawinski, supra; In re Marriage of Thornquist, 79 Ill.App.3d 791, 399 N.E.2d 176, 35 Ill.Dec. 342 (1979) (just division of marital properety); Fournier v. Fournier, 376 A.2d 100 (Me.1977) (just division of marital property); Corder v. Corder, 546 S.W.2d 798, 804 (Mo.1977) (just division of marital property); Rothman v. Rothman, supra; Gibbons v. Gibbons, 86 N.J. 515, 432 A.2d 80 (1983) (exclusion of gifts, bequests, devises from marital property); Castiglioni v. Castiglioni, 192 N.J.Super. 594, 471 A.2d 809 (1984) (inclusion of military pensions in marital property); Bellinger v. Bellionger, 177 N.J.Super. 650, 427 A.2d 620 (1981) (exclusion of gifts, devises, bequests from marital property); Vallardares v. Vallardares, supra; Wilson v. Wilson, 73 N.C. App. 96, 325 S.E.2d 668 (1985) (amendment of statutory definition of marital property); Bacchetta v. Bacchetta, 498 Pa. 227, 445 A.2d 1194 (1982) (all marital property subject to equitable distribution).

72. Gibbons v. Gibbons, 86 N.J. 515, 432 A.2d 80 (1963). In Gibbons at the time of trial New Jersey law classified as marital, and thus divisible, property assets received by a spouse during marriage by way of gift, intestate succession, devise or bequest. The trial court made an award of some such property owned by the husband to the wife. Pending appeal the legislature amended New Jersey's equitable distribution statute to make such assets received by gift or succession nondivisible. The New Jersey Supreme Court decided to apply the amendment retroactively to the pending case despite an express legislative directive to do so. It held no reliance interests of the wife precluded such retroactive application.

See also Wilson v. Wilson, 73 N.C. App. 96, 325 S.E. 2d 668 (1979), where, after a divorce action was filed but before it went to trial, the state's equitable distribution statute was amended to exclude from the class of marital (divisible) property

post-separation acquisitions of a spouse. The court held the amendment could constitutionally be applied to preclude the wife from sharing in the husband's post-separation earnings.

73. Rothman, supra note 70, analyzed: Nebbia v. New York, 291 U.S. 502 (1934) (due process does not prevent state regulation of milk prices that promote public welfare); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (state law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held not invalid as violation of due process); Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421, (1952) (financial burden accompanying statute designed in interest of public welfare was within the police power of the state); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (required payment of minimum wages to women held not invalid as arbitrary or capricious); Village of Euclid v Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinance held not clearly arbitrary and unreasonable or without substantial relation to public health, safety, morals or general welfare -- no need for strict scrutiny); Standard Oil Co. v. City of Maryland, 279 U.S. 582 (1929) (ordinance requiring underground storage tanks for petroleum no deprivation of property without due process).

Valladares, supra note 69, analyzed in addition to the above: Chase Securities Corp. v. Donaldson, 325 U.S. 304 (revision of state blue sky laws lifting bar of statute of limitations in pending litigation held not taking of vested property in violation of Fourteenth Amendment).

Gibbons, supra note 71 analyzed: Bradley v. School Board of Richmond, 416 U.S. 696 (1974) (federal law may constitutionally provide for award of attorney fees for services rendered before enactment); Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) ((tenant of federally assisted housing could not be evicted prior to notification of reasons for eviction and without opportunity to reply pursuant to procedures provided for in federal law enacted after eviction proceedings had been initiated but while tenant was still in residence).

74. Gibbons v. Gibbons, supra note 72, 432 A.2d at 83 n. 5.

75. I would assume that prices obtained at partition sales are not often as high as can be obtained by a long-term marketing strategy not under compulsion of judicial process.

76. What is presently subsection (b) would be renumbered subsection (c).

77. If there is not solid security the note cannot be valued at face value in determining if an equal division has been made but must be greatly discounted. See Marriage of Hopkins, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977).

78. 1851 Cal. Stats., ch. 124, pp. 462-63. Section 124 of the Act specifically lists the family home as property that could be set aside to the widow. The early probate homestead could not exceed $5000. If the widow was not in need it went solely to the minor children.

79. See generally Comment, The Probate Homestead in California, 53 Cal. L. Rev. 655 (1965). The limited interest in a separate property homestead was retained when clarifying amendments were made in 1931. 1931 Cal. Stats., ch. 281, p. 626.

80. Cal. Prob. Code § 6524.