Louisiana Law Review

Volume 72 | Number 1
The Future of Community Property: Is the Regime Still Viable in the 21st Century? A Symposium
Fall 2011

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Charlotte K. Goldberg

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INTRODUCTION

"Sharing" is the concept that defines marital property in community property states.[1] It means that property acquired during marriage is presumed to be community property unless proved otherwise.[2] It means that the earnings of either spouse are owned by the community, not the working spouse. It also means management and control of community property is shared.[3] Many couples do not even consider the community property ramifications of marriage. Marriage means opting in to the community property system, for better or worse. But, for some couples, community property concepts do not match their view of their financial life together. For those couples, there are many ways of opting out of the community property system even if sharing is legislatively mandated in community property states. Those ways of asserting their autonomy within their relationship may garner various degrees of success.

Why would some couples want to opt out? Mainly, it reflects a different view of marriage than that adopted in community property states. They have grown up with the idea of autonomy—the ability to be independent and make independent decisions about their lives. Imagine a couple considering marriage and each has a professional career. They value their work and view their earnings and success as a product of their hard work. If they marry, they want to retain the right to own and manage those earnings

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* Professor of Law, Loyola Law School, Los Angeles, B.A. Connecticut College, 1966, J.D. Georgetown University Law Center, 1978.

1. For example, the California Family Code defines "community property" as "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state." CAL. FAM. CODE § 760 (West, Westlaw current through Jan. 2011 amendments).

2. Statham v. Statham, 986 So. 2d 894, 898 (La. Ct. App. 2008) ("Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property" (citing LA. CIV. CODE ANN. art. 2340 (2009))).

3. *E.g.*, CAL. FAM. CODE § 1102(a) (West, Westlaw current through Jan. 2011 amendments) ("[E]ither spouse has the management and control of the community real property . . . but both spouses . . . must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.").

independently. In addition, they may have run the numbers and found that, because of the so-called "marriage penalty," marriage is not a tax advantage.[4] Another couple may be considering a second marriage after having had a bitter and divisive battle over community property in their first marriages. They now understand the difference between community property and separate property and prefer that their earnings be considered separate property. Also, they may want to protect those earnings as an inheritance for their children from a prior marriage. Another couple may be considering marriage where one is considered "economically superior." That person may be concerned that his/her prospective spouse is more interested in that person's wealth rather than his/her other sterling character traits. Even though all community property states consider property owned before marriage as separate property,[5] the economically superior spouse may want that understanding spelled out, and would especially want an explicit separation of property agreement concerning earnings during marriage. Another couple just may not be able to accept the principle of sharing. The following stereotypes come to mind: the wife staying at home, eating bonbons, and reading romance novels, or the husband staying at home, drinking beer, and watching sports on TV. For some, those stereotypes conjure up the image of the "at-home" spouse reaping the benefits of the "working spouse's" efforts. Therefore, in all these scenarios, those couples may consider opting out of the community property system of sharing.

This article examines various options for couples who opt in or opt out of the community property system. These options may be informal or formal, by inaction or by action. Particular attention will be given to the community property systems in California, Louisiana, and Washington.[6] The discussion is divided into three sections. The first section examines the decision to marry or not to marry. Some couples may think an informal, marital-like

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4. The "marriage penalty" is:

> The difference between the greater income-tax liability owed by a married couple filing a joint income-tax return and the lesser amount they would owe had they been single and filed individually. A marriage penalty exists whenever a married couple is treated disadvantageously under a tax code in comparison with an unmarried couple.

BLACK'S LAW DICTIONARY 1062–63 (9th ed. 2009).

5. *E.g.*, CAL. FAM. CODE § 770(a) (West, Westlaw current through Jan. 2011 amendments) ("Separate property of a married person includes all of the following: (1) All property owned by the person before marriage. (2) All property acquired by the person after marriage by gift, bequest, devise, or descent . . . . ").

6. The other traditional community property states are Arizona, Idaho, Nevada, New Mexico, and Texas.

relationship will eventually ripen into common law marriage. Some couples may think that having an informal marital-like relationship will allow them to escape the community property regime. The second section addresses the possibility of opting out of the community property system even if a couple decides to marry. This section will focus mainly on premarital agreements as an alternative. All community property states allow couples to formally opt out of the community property system through a written premarital agreement.[7] An issue does arise, however, of whether a premarital agreement could be effective if it is informal and not committed to paper. The third section deals with opting out of the community property system during marriage. In most marriages, couples arrange their financial affairs in the most informal ways without regard to requirements under community property laws. Sometimes couples find that their informal arrangements are not recognized by community property doctrine. Especially as a marriage ends, the couple discovers their informal arrangements do not match the formal requirements of community property law.

I. HOW TO OPT IN, OPT OUT: DO THE OPTIONS REALLY WORK?

A. Option #1: Don't Get Married

1. Common-law Marriage

Some couples drift into a relationship and later begin living together. They may have various reasons for making that decision. One reason is they want to test their relationship to see if it can grow into something more permanent.[8] It also might make financial sense to live together if they are spending a lot of time together at one person's apartment. At that point, they would probably keep most of their finances separate but may share certain household expenses. If they are acquainted with the community property system, they may think living together will be a way to avoid the sharing principles mandated by the community property system. In most community property states, they are correct. Even

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7. *E.g.*, CAL. FAM. CODE § 1611 (West, Westlaw current through Jan. 2011 amendments) ("A premarital agreement shall be in writing and signed by both parties.").

8. Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) ("We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage.").

if the relationship lasts for a long period of time, no shared property rights would arise from the relationship.

On the other hand, many couples have the impression that if they live together for a long enough period of time, they have opted in to the community property system via common-law marriage.[9] In the past, it may have been possible for one cohabitant to try to prove that their relationship was a common-law marriage even though they had not formally married. That route of opting in is extremely difficult today. All community property states have abolished common-law marriage except Texas. Idaho was the most recent to abolish common-law marriage; as of January 1, 1996, "[m]arriage created by a mutual assumption of marital duties, or obligations shall not be recognized as a lawful marriage."[10] Texas still recognizes what are called "informal marriages," but it is not easy to prove the elements giving rise to a common-law marriage.[11] Therefore, in most community property states, living together without ever marrying may be an effective way of opting out of the community property system.

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9. Many people think they have a common-law marriage after living together for seven years. *See* Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 484 n.2 (2007).

10. IDAHO CODE ANN. § 32-201 (West, Westlaw current through Jul. 2011). The other community property states prohibited common law marriage at an earlier date: the state of Louisiana never recognized common law marriages (La. Digest of 1808 bk. I, tit. IV, Ch. II, art. 4); Washington abolished them in 1892 (*In re* MacLaughlin's Estate, 30 P. 651 (Wash. 1892)); followed by California in 1895 (CAL. FAM. CODE § 300 (West, Westlaw current through Jan. 2011 amendments) (formerly CAL. FAM. CODE § 55 (1872)); New Mexico in 1905 (N. M. STAT. ANN. § 40-1-20 (West, Westlaw current through Mar. 2011 amendments)); Arizona in 1913 (ARIZ. REV. STAT. § 25-111 (West, Westlaw current through Apr. 2011 amendments)); and Nevada in 1943 (NEV. REV. STAT. ANN. § 122.010 (West, Westlaw current through Jan. 2011 amendments)).

11. The Texas statute provides that "the marriage of a man and woman may be proved by evidence that . . . the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married." TEX. FAM. CODE ANN. § 2.401(a) (West, Westlaw current through May 2011 amendments). *See also*, Kathryn S. Vaughn, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 HOUS. L. REV. 1131, 1150 (1991) ("Although Texas officially recognizes common-law marriages, it does so rather grudgingly."); *see e.g.*, Smith v. Deneve, 285 S.W.3d 904, 910 (Tex. App. 2009) (failure to prove essential element of "holding out" as married).

2. Rights of Unmarried Cohabitants

However, cohabitants sometimes learn that long-term, marital-like relationships yield shared property rights. The most well-known case establishing that unmarried cohabitants may have a right to shared property is the California Supreme Court case of *Marvin v. Marvin*.[12] The *Marvin* Court held unmarried cohabitants may contract either in writing, orally, or through conduct to share property.[13] It is rare that cohabitants have a written agreement. It is difficult to establish an oral contract when there is a battle between the two cohabitants over who said what.[14] Yet, it is possible that a court will find an implied-in-fact contract where there has been a long-term relationship and the cohabitants' financial or business conduct demonstrates an agreement to share property.[15] The underlying reasoning behind giving long-term cohabitants shared property rights is two-fold. First, the court recognized that even though a couple is living together, they still have the right to contract with each other regarding property.[16] Second, the court recognized that an inequity can arise where one cohabitant produced all the earnings and the other cohabitant had none.[17] In the scenario that resembles a traditional marriage with the husband earning and the wife staying at home and caring for children, if the relationship ends, the husband could walk away with all the

12. 557 P.2d at 122.

13. *Id.*

14. On remand from the California Supreme Court, the plaintiff Michelle Marvin was not able to prove that she had an agreement with Lee Marvin to share equally in the property accumulated during their cohabitation. Marvin v. Marvin, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

15. In *Alderson v. Alderson*, 225 Cal. Rptr. 610, 615 (Cal. Ct. App. 1986), the Court of Appeal found an implied-in-fact agreement to share property where the couple had a long-term relationship and had pooled their finances to purchase property. *See also*, Maglica v. Maglica, 78 Cal. Rptr. 2d 101 (Cal. Ct. App. 1998).

16. *Marvin*, 557 P.2d at 116 ("[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights.").

17. *Id.* at 121 ("[A]lthough parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married, other expectations and equitable considerations remain. The parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort.").

earnings because unmarried cohabitants are not subject to community property laws.[18]

Almost all community property states have considered how to determine cohabitants' property rights after the termination of their relationship. Some have followed the *Marvin* Court's lead: Arizona and Nevada have explicitly adopted the *Marvin* approach.[19] Texas has explicitly rejected *Marvin* oral and implied agreements and has adopted by statute the requirement of a written agreement.[20] Similarly, New Mexico prohibits implied agreements but permits express oral agreements.[21] Louisiana retains the term "concubinage" to describe unmarried cohabitants and has strict requirements to establish a share in real property.[22]

The courts in Washington play a strong role in determining whether informal living arrangements represent opting in to the sharing principles of the community property system. Washington gives the most rights to cohabitants who can establish a "meretricious relationship," which is defined as a "marital-like relationship."[23] If that relationship can be established (and the requirements are onerous), then the courts will divide property that would have been considered community property if they had married. Thus, unmarried cohabitants may think they are opting out of the community property system by just living together, but in some community property states, courts may impose a sharing regime based on their conduct during the relationship. Thus, an attempt to opt out of the community property system by avoiding marriage and just living together may result in property rights that did not match the couple's expectations or at least one of the cohabitant's expectations.

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18. *See* Alderson v. Alderson, 225 Cal. Rptr. 610 (Cal. Ct. App. 1986) (couple lived together for 12 years, had 3 children together and accumulated significant property).

19. *See* Cook v. Cook, 691 P.2d 664 (Ariz. 1984); Western States Construction v. Michoff, 840 P.2d 1220 (Nev. 1992).

20. TEX. FAM CODE ANN. § 1.108 (West, Westlaw current through May 2011 amendments); *see also*, Zaremba v. Cliburn, 949 S.W. 2d 822, 826 (Tex. App. 1997) (hostility toward "palimony" suits).

21. *See* Merrill v. Davis, 673 P.2d 1285, 1286–87 (N.M. 1983) (recognizing implied agreements would circumvent the prohibition of common-law marriage); Dominguez v. Cruz, 617 P.2d 1322, 1323 (N.M. Ct. App. 1980) (express oral contract between two cohabiting adults permitted).

22. *See* Broadway v. Broadway, 417 So. 2d 1272, 1277 (La. Ct. App. 1982).

23. *In re* Marriage of Pennington, 14 P.3d 764, 770 (Wash. 2000) (To determine if a "meretricious relationship" exists, a court must analyze five factors: (1) continuous cohabitation, (2) duration of the relationship, (3) the purpose of the relationship, (4) the pooling of resources and services for joint projects, and (5) the intent of the parties.).

In the Washington case, *Lindemann v. Lindemann*,[24] David was surprised to learn his auto body repair business would be considered community property by analogy. In *Lindemann*, David married Kimi in 1978, separated in 1981, and ultimately obtained a divorce decree in 1982. In 1982, after the divorce, he started his business. In 1985, he and Kimi began living together again but did not remarry. When they separated again in 1995, Kimi petitioned the court for equitable division of their property, including David's business. It was clear David's business was separate property, and Washington law precludes equitable distribution of separate property acquired during a "quasi-marital" relationship.[25] However, under Washington law, the increase in value attributable to community labor could be equitably divided. David's business had increased in value while David and Kimi had lived together due to David's labor, and the court awarded Kimi one-half of that increase, $109,362.75.

David's arguments on appeal indicated his frustration with community property concepts being applied to what he clearly felt was "his" property. First, he argued that the rule that "the marital community is entitled to the fruits of all labor performed by either party to the relationship" should not be applied to an unmarried couple. The Washington Court of Appeals rejected that argument because it would leave little remaining of the major Washington case establishing that the property a couple earns through their efforts during their quasi-marital relationship is to be "justly divided."[26] Second, he argued that the labor he contributed to his business should have been viewed as "separate" labor. This common misconception that "my" work is "mine" was also rejected as the Court of Appeals pointed out that there is no basis in the community property system to allocate "one party's labor to a separate property account."[27] Both of David's arguments reflect the view that not marrying was sufficient to opt out of the community property system. But, the Court of Appeal corrected this misconception. David had opted in to the sharing concept by having a "quasi-marital" relationship—a long-term, marital-like relationship.

Thus, opting out of the community property system by not marrying may prove unsuccessful in many community property

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24. Lindemann v. Lindemann, 960 P.2d 966 (Wash. Ct. App. 1998).

25. Connell v. Francisco, 898 P.2d 831, 837 (Wash. 1995) (The court will divide only the "property that would have been characterized as community property had the parties been married.").

26. *Lindemann*, 960 P.2d at 970–71 (citing *Connell*, 898 P.2d at 836).

27. *Id.* at 971.

states. Some cohabiting couples may find their expectations of economic autonomy will be thwarted when community property law extends its reach to unmarried couples.

B. Option #2: Let's Get Married but Opt Out by Premarital Agreement

For those couples who want to retain their independence or protect their wealth, premarital agreements are the surest way to opt out of the community property sharing regime. Almost all community property states have adopted the Uniform Premarital Agreement Act (UPAA).[28] That Act was conceived as a way of ensuring that married couples could arrange their property rights as they wished. The thought was that if a couple spelled out their rights clearly in writing before marriage, there would be less litigation upon divorce. To achieve that certainty, the Act provided that a premarital agreement would be unenforceable only if it was entered into involuntarily or if it was unconscionable at the time of execution of the agreement and there was inadequate knowledge or disclosure of the property of the other party.[29] Only Louisiana and Washington have not adopted the UPAA.[30] Those states also require premarital agreements to be in writing but have limitations on what can be achieved through those agreements. Therefore, when a married couple wishes to opt out of the community property system, there are formal requirements to ensure their views of their property will be respected.

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28. *See generally* UNIF. PREMARITAL AGREEMENT ACT (1983), adopted in Arizona in 1991 (ARIZ. REV. STAT. §§ 25-201–5 (West, Westlaw current through Apr. 2011 amendments)); California in 1985 (CAL. FAM. CODE §§ 1600–17 (West, Westlaw current through Jan. 2011 amendments)); Idaho in 1995 (IDAHO CODE §§ 32-921–9 (West, Westlaw current through Jul. 2011 amendments)); Nevada in 1989 (NEV. REV. STAT. §§ 123A.010–100 (West 2008)); New Mexico in 1995 (N.M. STAT. ANN. §§ 40-3A-1–10 (West, Westlaw current through Mar. 2011 amendments)); Texas in 1997 (TEX. FAM. CODE §§ 4.001–.010 (West, Westlaw current through May 2011 amendments). Louisiana and Washington did not adopt the UPAA. *See* La. Civ. Code arts. 2329–30 (2011); *In re* Marriage of Matson, 730 P.2d 668 (Wash. 1986); *In re* Marriage of Bernard, 204 P.3d 907 (Wash. 2009).

29. UNIF. PREMARITAL AGREEMENT ACT § 6 cmt. (1983) ("Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property are binding upon the court unless those terms are found to be unconscionable." (quoting Commissioner's Note, UNIF. MARRIAGE AND DIVORCE ACT § 306)); *see e.g.* CAL. FAM. CODE § 1615 (West, Westlaw current through Jan. 2011 amendments).

30. *See* La. Civ. Code arts. 2329–30; *Matson*, 730 P.2d 668 (Wash. 1986); *Bernard*, 204 P.3d 907 (Wash. 2009).

The question then arises whether it is possible to opt out informally, as through an oral agreement. It is possible, at least in some instances, that an oral premarital agreement will be upheld, though it is unusual.[31]

However, in *DewBerry v. George*, the Washington Court of Appeals did just that. Emanuel George and Carla DewBerry had orally agreed before they married to treat their earned income as separate property. This is the classic way to opt out of the major precept of the community property system. During their nine-year marriage, they acted in accord with their agreement, and this was proved by clear and convincing evidence. When they were dating, Carla had just graduated from Boalt Hall School of Law and was working toward becoming a CPA. Emanuel was a college-educated music industry executive. In 1981, the couple discussed marriage. Emanuel had strong feelings about the community property system because he had a friend who had lost his house in a divorce settlement. He had specific demands regarding how to structure their marriage, including that "each party's income and property would be treated as separate property; each party would own a home to return to if the marriage failed . . . ."[32] The evidence showed they "continually affirmed this agreement through words and actions."[33] They had separate bank accounts where they deposited their incomes. They had used a joint account only to handle agreed-upon household expenses after their first child was born. By the time they separated in 2000, they had accumulated minimal community property in the form of joint accounts and jointly purchased possessions. On the other hand, they had many investment, bank, and retirement accounts. Those accounts were considered owned, managed, and controlled by the spouse who created and contributed to the accounts. The beneficiaries of their accounts were either their children or the estate of each spouse. In addition, the houses that Carla purchased were treated as her separate property, and Emanuel had indicated in writing that he had no interest in the houses. Both Carla and Emanuel worked full-time, but Carla's salary increased rapidly. By 2000, Carla's salary was over $1 million, but Emanuel's salary had remained in the $40,000 to $50,000 range.[34]

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31. Freitas v. Freitas, 159 P. 611, 612 (Cal. Ct. App. 1916); Hall v. Hall, 271 Cal. Rptr. 773, 778 (Cal. Ct. App. 1990); DewBerry v. George, 62 P.3d 525, 526 (Wash. Ct. App. 2003).

32. *DewBerry*, 62 P.3d at 526. He also had other conditions: that Carla would always be fully employed and that Carla would not get fat. *Id.*

33. *Id.*

34. *Id.* at 527.

The trial court found the couple had a valid oral agreement and that there had been complete performance of that agreement during their marriage.[35] Because Washington courts can distribute both community and separate property equitably, the trial court awarded Carla $2.3 million, or approximately 82% of their property. Emanuel challenged the oral separate property agreement on appeal, arguing it was "void under Washington's community property law and the statute of frauds."[36] That argument was rejected by the Court of Appeals because the "part performance exception to the statute of frauds applied," and the agreement was enforceable.[37]

One argument Emanuel made was that "Washington law prohibits parties from entering into an agreement to repudiate the community property system and that such an agreement is void because it conflicts with public policy favoring creation of community property."[38] The Court of Appeals rejected the argument as "not an accurate statement of Washington law."[39] The Court stated that "Washington courts have long held that a husband and wife may contractually modify the status of their property."[40] In addition, premarital agreements that opt out are encouraged because they are "'generally regarded as conducive to marital tranquility and the avoidance of disputes about property in the future.'"[41] Thus, the Court of Appeals validated the practice of opting out of the community property system via premarital agreement, even by the informal method of an oral agreement fully performed.

DewBerry shows the advantages and disadvantages of an informal premarital agreement. Emanuel clearly wanted it both ways. If the informal agreement benefited him, he would have relied on it. If the informal agreement had not benefited him, he could argue that it was void under community property law. However, he did not take into account that Carla was both a law graduate and a CPA. She understood that an oral agreement is doubtful unless there is an exception to the statute of frauds and that scrupulous records must be kept to show performance of the agreement. The Court even noted that they were both well-educated professionals who were aware of each other's circumstances and had ample time to consider their financial

35. *Id.*
36. *Id.* at 528.
37. *Id.* at 530.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* (quoting Friedlander v. Friedlander, 494 P.2d 208, 213 (Wash. 1972)).

arrangements during their five-year engagement and 14-year marriage. Thus, opting out informally was upheld.

The equities of a particular situation may push a court in a jurisdiction wedded to formal requirements, like California, to recognize an oral premarital agreement. That was the situation in a 1990 California Court of Appeal case, *Hall v. Hall*.[42] In that case, an older couple was considering marriage. Carol hesitated to marry Aubrey because she was concerned she would not have a place to live for the rest of her life. Aubrey had asked Carol to give up her job, apply for Social Security at age 62, and give him $10,000. In return, he orally promised that she could live in his house until she died. Pursuant to the agreement, they married. Carol fulfilled her side of the agreement, and Aubrey took steps to fulfill his side by having an attorney draft papers giving Carol a life estate in the house. Unfortunately, Aubrey died before he signed the papers. Aubrey's children from a former marriage challenged Carol's right to stay in the house. Clearly, the formal writing requirements of California law regarding a premarital agreement were not met. Yet the trial court held that Carol's actions in reliance on Aubrey's promise were sufficient to uphold their agreement under an exception to the statute of frauds.[43] The Court of Appeal affirmed, illustrating that even in California where premarital agreements must be in writing, there is still room to bend those formal rules to recognize informal agreements where inequity would result.[44]

C. Option #3: Get Married and Informally Opt Out

If a couple marries, they automatically opt in to the community property system. Although it may be a good idea, a pamphlet explaining the community property regime is not usually handed out with an application for a marriage license.[45] If the couple has a long and happy marriage, they are free to arrange their property as they wish and can opt out of the sharing principles of community property law. They have full autonomy to decide how to arrange

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42. Hall v. Hall, 271 Cal. Rptr. 773 (Cal. Ct. App. 1990).

43. *Id.* at 778; *See also* Freitas v. Freitas, 159 P. 611, 612 (Cal. Ct. App. 1916) (upholding an oral agreement to make the wife the beneficiary of a life insurance policy as a fully executed antenuptial agreement).

44. *Id.* at 779.

45. When California extended community property rights to registered domestic partners, three separate notices were sent to all registered domestic partners, advising them that if they did not dissolve their partnership before the effective date of the Act, Jan. 1, 2005, all the rights and obligations of the community property system would apply to them. CAL. CONTINUING EDUC. OF THE BAR, CALIFORNIA DOMESTIC PARTNERSHIPS, §§ 1.16–.17 (2011).

their financial affairs. They may decide that one will work outside the home and the other will stay at home and care for children and be a homemaker. They can decide between themselves that all the earnings of the working spouse are essentially owned and managed by that spouse. Thus, they have informally opted out of sharing principles of community property law. In essence, the community property system intrudes on the financial affairs of a married couple only if they are involved with the courts, either in a divorce proceeding or when one of the couple dies.

1. Transmutation Requirements

However, the community property system does, at least, attempt to intrude on the ability of the happily married couple to make informal arrangements regarding their property. For instance, California has stringent requirements for transmutation of property. By statute, transmutation from community property to separate property and vice versa must be "made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."[46] Also, the requirements have been strictly construed to mean that the spouse adversely affected must know he or she is giving up his or her interest in the property.[47] Thus, a married couple has the ability to change the status of their property so long as they meet these stringent requirements. However, these requirements have led to surprising results for some couples, when written documents intended to specify the character of property only at death were applied at divorce.

In two recent California cases, *In re Marriage of Holtemann*[48] and *In re Marriage of Lund*,[49] the couples signed documents that transmuted the husband's property from separate property to community property. In *Holtemann*, the language used indicated a transmutation: "Husband agrees that the character of the property . . . is hereby transmuted from his separate property to the community property of both parties."[50] Similarly, in *Lund*, the language used also indicated a transmutation: "All of the property . . . is hereby converted to the community property of Husband and Wife."[51] The purpose of the documents in both cases was to

46. CAL. FAM. CODE § 852(a) (West, Westlaw current through Jan. 2011 amendments).

47. *See In re* Estate of MacDonald, 794 P.2d 911, 918–19 (Cal. 1990).

48. *In re* Marriage of Holtemann, 83 Cal. Rptr. 3d 385 (Cal. Ct. App. 2008).

49. *In re* Marriage of Lund, 94 Cal. Rptr. 3d 84 (Cal. Ct. App. 2009).

50. *Holtemann*, 83 Cal. Rptr. 3d at 388.

51. *Lund*, 94 Cal. Rptr. 3d at 89.

provide favorable tax treatment in the event one of the spouses died. The couples divorced, however, before that event occurred. The husband in both cases argued that the transmutation should apply only in the event of death and was not effective at divorce. The California Courts of Appeal in both cases rejected the argument. The *Holtemann* Court held transmutation cannot be "conditional or temporary."[52] Thus, a change in the character of the property during marriage was ironclad. Compliance with stringent statutory requirements resulted in a change that was certainly unintended by the husbands in these cases. Therefore, formal opting in to the community property system via transmutation contradicted the informal intentions of the parties who followed these directives.

The California transmutation statute allows an exception to the stringent writing requirement for certain kinds of gifts, including diamond rings. The "express declaration in writing"[53] does not apply to "a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage."[54] In *In re Marriage of Steinberger*,[55] James and Buff purchased a loose diamond with community funds. James later had it set in a ring and gave it to Buff after their fifth anniversary with a card referring to the five years and congratulating Buff on a promotion at work. Buff testified at trial that it was a woman's ring and she wore it. James testified that, "Ah, it was as a gift and as an investment, something that we both could enjoy."[56] He also testified that it was not his intent to give her a five-year anniversary ring, and the most expensive gift he had given during their marriage was a Christmas gift that cost a few hundred dollars. The trial court found the diamond ring was a gift and therefore was Buff's separate property.

On appeal, James argued the ring remained community property because there was no express declaration in writing to show he had given up his interest in the ring. Specifically, he argued one of the gift exception requirements had not been met: "that [the gift] is not substantial in value taking into consideration

52. *Holtemann*, 83 Cal. Rptr. 3d at 391.

53. CAL. FAM. CODE § 852(a) (West 2004, Westlaw current through Jan. 2011 amendments).

54. CAL. FAM. CODE § 852(c) (West, Westlaw current through Jan. 2011 amendments).

55. *In re* Marriage of Steinberger, 111 Cal. Rptr. 2d 521(Cal. Ct. App. 2001).

56. *Id.* at 525.

the circumstances of the marriage."[57] Unfortunately for Buff, the trial court found the ring was substantial in value considering the circumstances of the marriage. Buff had testified that the ring was worth at least $13,000 or $14,000, and the trial court stated "the ring, or the stone, was of substantial value even taking into account the circumstances of the marriage."[58] The California Court of Appeal agreed with James that the gift exception did not apply and thus an express declaration was necessary.[59] The card that accompanied the ring did not meet those requirements and the ring remained community property.[60] On the other hand, if their marriage had endured until James died, it is likely that their informal arrangement regarding the diamond would have had the opposite result. The ring would have been considered a gift to Buff and, ultimately, her separate property.

The Court of Appeal recognized that the transmutation statute "with its bright-line test regarding transmutations, may seem harsh in light of the informal, everyday practices of spouses making gifts during a marriage."[61] However, the Legislature, in enacting the written transmutation requirements, had to balance the convenience and practice of informal oral transmutations against the danger of fraud and increased litigation at divorce regarding those oral transmutations.[62] The statute recognizes that ordinary married couples should expect that formality is the norm regarding personal property such as automobiles, bank accounts, and shares of stock, but informality is the norm regarding personal property gifts, such as jewelry, unless substantial in value.[63] The Court of Appeal stated that "[i]n light of the Legislature's decision and the clear language of the statute, it would be inappropriate to hold that a transmutation of jewelry that was substantial in value taking into account the circumstances of the marriage occurred here without the writing required by section 852."[64] Thus, the diamond ring was community property, and the value should have been divided equally at divorce. When it comes to gifts in California, formality trumps informality.

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57. *Id.* at 531.
58. *Id.* at 532 n.3.
59. *Id.* at 532.
60. *Id.* at 534.
61. *Id.* at 532–33.
62. *Id.* at 533.
63. *Id.* (citing *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. L. REVISION COMM'N REPORTS 205, 213–14 (1984), *available at* http://clrc.ca.gov/pub/Printed-Reports/Pub145.pdf).
64. *Id.*

In Louisiana, the general principles of community property control the characterization of gifts, including diamond rings. In the case of *Statham v. Statham*,[65] Jody and Butch Statham were married in 1970 and divorced in 2005. According to a hearing officer conference report, a diamond ring valued at about $17,000 and acquired during marriage was probably a birthday present to Jody and, thus, her separate property. At trial, Jody testified that the ring was purchased for more than $15,000 and given to her as a birthday present. The ring was purchased two days before her birthday in 2002, and her husband had said previously that they should get her a ring for her birthday when they were joking about their daughter-in-law's engagement ring being larger than hers. Jody also admitted that the ring was bought at about the same time they received money back from a cancer policy after Butch's bout with cancer. Butch testified that, after they received that money, they each got an expensive item—she got the ring and he got a four-wheeler. According to Butch, his birthday gift to Jody was a portrait of their son which was placed on a billboard. The trial court found the ring was community property.

The trial court and the Louisiana Circuit Court of Appeal used traditional community property principles to determine the character of the ring. Property in possession of a spouse during marriage is presumed to be community property, but either spouse may prove that it is separate property.[66] The spouse seeking to rebut the presumption bears the burden of proving it is separate property. Great deference is given to the trier of fact, "because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear on" the credibility of witnesses.[67] In their testimony, the husband and wife "diametrically contradicted each other on the subject of the ring."[68] Because the trial court found both sides equally credible, Jody failed to carry her burden of rebutting the community property presumption. Thus, the trial court's finding that the ring was community property was upheld. Traditional community property principles were able to sort out the dispute at divorce about the ring.

The result was the same in both *Steinberger* and *Statham*. A valuable ring given to the wife did not become her separate property. In both cases, the wives considered the diamond ring a gift. This would not be unusual considering that in one case, it was given at the time of their wedding anniversary, and in the other, it

65. Statham v. Statham, 986 So. 2d 894 (La. Ct. App. 2008).
66. *Id.* at 898 (citing LA. CIV. CODE ANN. art. 2340 (2008)).
67. *Id.*
68. *Id.*

was given at the time of the wife's birthday. However, the substantial value of the rings, both worth over $10,000, demanded more proof that both husband and wife intended the informal action to be a transmutation from community property to separate property. We can conclude that the informal interaction of giving a ring may not hold up in the event of a divorce when the community property regime must determine how to characterize and divide the couple's acquisition during marriage.

2. Fiduciary Duty

Although California has codified the concept of "equal" management and control of community property, California's Family Code mandates that a spouse has a fiduciary duty to act in good faith with respect to the other spouse in the management and control of the community property.[69] Although the Code provides that a spouse can sue the other spouse for breach of the fiduciary duty even during marriage,[70] it is doubtful the marriage would survive such a lawsuit. The Code does recognize that some spousal transactions regarding community property must be formal and others may be informal. For instance, if a spouse makes a gift of community personal property to a person outside of the marriage, that gift is subject to the written consent of the other spouse.[71] The Code also requires that spouses must "join in executing any instrument" in which community real property is sold, conveyed, or encumbered.[72] An example of informality is that a spouse who manages a community business is given "primary" management and control and may act alone in all transactions.[73]

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69. CAL. FAM. CODE § 1100(e) (West, Westlaw current through Jan. 2011 amendments); CAL. FAM. CODE § 721 (West, Westlaw current through Jan. 2011 amendments).

70. CAL. FAM. CODE § 1101(a) (West, Westlaw current through Jan. 2011 amendments) ("A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate. . . ."); CAL. FAM. CODE § 1101(b) (West, Westlaw current through Jan. 2011 amendments) ("A court may order an accounting of the property and obligations of the parties to a marriage . . . ."); CAL. FAM. CODE § 1101(c) (West, Westlaw current through Jan. 2011 amendments) ("A court may order that the name of a spouse shall be added to community property held in the name of the other spouse alone. . . .").

71. CAL. FAM. CODE § 1100(b) (West, Westlaw current through Jan. 2011 amendments).

72. CAL. FAM. CODE § 1102(a) (West, Westlaw current through Jan. 2011 amendments).

73. CAL. FAM. CODE § 1100(d) (West, Westlaw current through Jan. 2011 amendments). However, the managing spouse must give "prior written notice to the other spouse" of major actions such as "sale, lease, exchange, encumbrance,

However, the general spousal fiduciary duty to "act in good faith" regarding community property continues throughout the marriage and extends until the "date of the distribution of the community or quasi-community asset or liability in question."[74] Therefore, the fiduciary duty commences upon marriage and continues until the couple's property is divided. During divorce proceedings, the spouses are subject to a "temporary restraining order" that restrains "both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court. . ."[75]

The essence of the fiduciary duty is that one spouse should not "take any unfair advantage of the other."[76] Too many married people, once separated from their spouse, no longer feel bound by the community property system and sometimes violate their fiduciary duty. California law does recognize that earnings during separation are the separate property of the earning spouse.[77] However, separate property is included in the temporary restraining order that prohibits disposing of that property unless the other spouse gives written consent or the court orders it. Accordingly, spouses who have thought that "separation" is equivalent to "opting out" of the community property system have been profoundly mistaken.

Concealment of community property funds is considered a breach of the fiduciary duty. In *In re Marriage of Rossi*,[78] shortly before the wife, Denise, filed a petition for dissolution of her marriage to her husband Thomas, she became part of a lottery pool at work. The pool won, and Denise's share totaled more than $1.3 million. She never revealed that she had won to Thomas, nor did

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or other disposition of all or substantially all of the personal property used in the operation of the business." *Id.*

74. CAL. FAM. CODE § 1102(a) (West, Westlaw current through Jan. 2011 amendments).

75. CAL. FAM. CODE § 2040(a) (West, Westlaw current through Jan. 2011 amendments). There are exceptions for the "usual course of business" or for the "necessities of life." However, the temporary restraining order does not preclude use of property to pay reasonable attorney's fees. *Id.*

76. CAL. FAM. CODE §721(b) (West, Westlaw current through Jan. 2011 amendments).

77. CAL. FAM. CODE §771(a) (West, Westlaw current through Jan. 2011 amendments) ("The earnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse.").

78. *In re* Marriage of Rossi, 108 Cal. Rptr. 2d 270 (Cal. Ct. App. 2001).

she include it in the required disclosure of assets during the dissolution proceedings. Two years after the divorce, Thomas found out about the lottery winnings. He sought an award of all the winnings based on California Family Code §1101(h), which states that the remedy for breach of fiduciary duty involving fraud "shall include . . . an award to the other spouse of 100 percent . . . of any asset undisclosed or transferred in breach of the fiduciary duty."[79] It was clear that Denise had gone to great lengths to conceal from Thomas the winnings that were community property. Thus, because Denise's actions involved fraud, the California Court of Appeal upheld the trial court's award of the lottery winnings to Thomas.[80] Thus, Denise's attempt to opt out of sharing community property had dire results.

In a high-profile California case, *In re Marriage of McTiernan*,[81] John McTiernan violated the temporary restraining order that was in effect during divorce proceedings. Apparently, he thought he could deal with community property stocks under the "equal" management and control provisions of California law. In fact, he used the proceeds to pay community expenses. However, the stock's market price had increased substantially by the time of trial. The trial court awarded wife Donna Dubrow one-half of the lost profits. The Court of Appeal rejected John's arguments that his actions were either an exception to the prohibitions in the temporary restraining order or just a technical violation.[82] Instead the Court viewed the violation as equivalent to a nonmalicious breach of fiduciary duty, where the remedy is an award of 50% of any asset undisclosed or transferred in breach of that duty.[83] Obviously, John had thought that he was not subject to the community property laws once he had separated from Donna and entered into divorce proceedings. In short, after marriage, it is not possible to completely opt out until community property is finally divided at divorce.

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79. CAL. FAM. CODE § 1101(h) (West, Westlaw current through Jan. 2011 amendments).

80. *Rossi*, 108 Cal. Rptr. 2d at 278.

81. 35 Cal. Rptr. 3d 287 (Cal. Ct. App. 2005).

82. *Id.* at 297.

83. *Id.* (citing CAL. FAM. CODE § 1101(g) (West, Westlaw current through Jan. 2011 amendments) ("Remedies for breach of the fiduciary duty . . . shall include . . . an award to the other spouse of 50 percent . . . of any asset undisclosed or transferred in breach of the fiduciary duty. . . .")).

II. CONCLUSION

Although autonomy is a value treasured in American society, the community property regime may intrude on that autonomy whether a couple is married or unmarried. Formal "opting out," as in the case of written premarital agreements, provides the most certain way to assert a couple's independence from the sharing concepts of community property laws. Informal methods of "opting out," either through oral premarital agreements or unwritten financial arrangements, will meet varying degrees of success. In a long and stable marriage, it can be assumed that the couple has informally worked out the mechanics of sharing or not sharing to their satisfaction. When the unfortunate event of divorce occurs, couples may try to assert their view of the property accumulated during the marriage. However, assuring that couples deal fairly with each other regarding the property accumulated during the marriage becomes the paramount role for the courts.

The question remains whether other community property states will follow California's lead in legislatively mandating formal requirements regarding many areas of spousal autonomy. California's requirements regarding transmutation and fiduciary duty are examples of guidelines on how courts should deal with spouses' attempts to opt in or opt out of the community property system. Washington courts have great discretion to deal with informal arrangements of couples, in extending some community property rights to those in a marital-like relationship and in recognizing that an oral premarital agreement may be upheld. Louisiana courts stick to the basic principles of characterizing property that are claimed to be intraspousal gifts. The California view tends to treat spouses more like business partners where their financial arrangements are formal and in writing. The other states considered in this essay remain committed to recognizing the informality of many married couples' arrangements and attempt a case-by-case analysis to determine how to fulfill spousal expectations regarding their property.