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Leslie A. Cohen, Moderator
Leslie Cohen Law PC; Los Angeles

Hon. Eddward P. Ballinger, Jr.
U.S. Bankruptcy Court (D. Ariz.); Phoenix

Christopher Celentino
Dinsmore & Shohl LLP; San Diego

David K. Gottlieb
D. Gottlieb & Associates; Los Angeles

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Top 10 Things Bankruptcy Attorneys Need to Know About Family Law

The Hon. Eddward P. Ballinger, Jr.
United States Bankruptcy Court
District of Arizona
230 N 1st Ave, Suite 101
Phoenix, Arizona 85003
Edd_Ballinger@azb.uscourts.gov

Christopher Celentino
Partner
Dinsmore & Shohl LLP
655 W. Broadway, Suite 800
San Diego, California 92101
(619) 400-0519
chris.celentino@dinsmore.com

Leslie Cohen
Leslie Cohen Law, PC
506 Santa Monica Blvd., Suite 200
Santa Monica, California 90401
(310) 394-5900
leslie@lesliecohenlaw.com

David K. Gottlieb
Managing Member
D. Gottlieb & Associates, LLC
17000 Ventura Blvd., Suite 300
Encino, California, 91316
(818) 539-7980
dgottlieb@dkgallc.com

1. Property of the estate includes community property

a. Definition of CP in 541(a)(2) does not carve any potential CP out of estate: "All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is

i. (A) under the sole, equal or joint management of the debtor, or

ii. (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

In re Lewis, 515 BR 591 (9th Cir. BAP Aug 2014): "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during marriage while domiciled in California is community property. Cal. Fam.Code § 760." Involved debtor's interest in state court action in which nonfiling spouse held community interest. Cites *Valli.* Involves 363(i) which allows nondebtor spouse to purchase CP at third party purchase price before consummation of sale.

For purposes of 11 U.S.C. § 541(a)(2), all community property in California that is not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate. *In re Mantle*, 153 F.3d 1082, 1085 (9th Cir. 1998). Under California law, division of property is the event that will sever the liability of community property for community debts, and, until division, all community property of the divorcing couple is property of the first to file spouse's bankruptcy estate. 11 U.S.C. § 541(a)(2). *Id.* at 1083. While this provision defines what interests of the debtor must be transferred to the bankruptcy estate, it does not address "the threshold questions of the existence and scope of the debtor's interest in a given asset." *State of California v. Farmers Markets, Inc. (In re Farmers Markets, Inc.),* 792 F.2d 1400, 1402 (9th Cir.1986). Rather, bankruptcy courts are required to look to state property law, in this case California property law, to determine the property which is to be included in the bankruptcy estate. *See Butner v. United States,* 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). Turning to California law, it is clear that property acquired in joint form during marriage is presumed to be community property. *See* Cal. Fam.Code §§ 760, 2581.

2. Arizona Application

Property acquires its character as community or separate based on the marital status of its owner at the time of acquisition. *Potthoff v. Potthoff*, 128 Ariz. 557, 627 P.2d 708 (App. 1981). Property acquired during marriage is presumed to be community

property. *Bender v. Bender*, 123 Ariz. 90, 92-93, 597 P.2d 993, 996-96 (App. 1979). Conversely, property acquired prior to marriage is presumed to be separate property. *Potthoff*, 128 Ariz. at 562, 627 P.2d at 712. The presumptions can be rebutted by clear and convincing evidence. *Bender*, 123 Ariz. at 93, 597 P.2d at 996.

Generally, the status of property as community or separate is fixed and retains that character until changed (transmuted) by agreement of the parties, gift or by operation of law. *Cockrill v. Cockrill*, 124 Ariz. 50, 601 P.2d 1334 (1979). There are several ways property can be transmuted from community to separate or separate to community in Arizona and a few presumptions exist. Otherwise, it is largely up to the court to determine the intent of the parties. It seems from reading many of the cases, it comes down to doing what is fair and equitable.

a. Sole, equal, or joint management

i. Temporary order establishing possession in non-debtor spouse does not prevent asset from becoming CP

b. Joint Tenancy – Title take as Joint Tenants May -- but may not -- overcome presumption of community property

"Each joint tenant is vested with title to an undivided equal share of the joint tenancy property, but this interest, being undivided, runs to the entire property." 5 Harry D. Miller and Marvin B. Starr, *California Real Estate* § 12:22 (3d ed.2004). Joint tenancy carries with it the right of survivorship. *Id.*

When a debtor who is a joint tenant in property files bankruptcy, only the debtor's joint tenancy interest becomes property of the bankruptcy estate. Although the joint tenancy interest may run to the entire property, the estate does not obtain an interest in the entire estate, but instead obtains the joint tenant's undivided one-half interest. Thus, the Ninth Circuit has recognized that the bankruptcy estate has a one-half interest in jointly held property, while the joint tenant retains the other one-half interest. *Summers*

i. *In re Summers* 332 F3d.1240 (9th Cir. 2003)

Judgment was entered by United States Bankruptcy Court for the Eastern District of California, Jane Dickson McKeag, J., holding that real property acquired by Chapter 7 debtor-wife and her husband during their marriage was held in joint tenancy, such that husband's separate interest in property was not included in Chapter 7 estate. Circuit held that presumption that real property acquired by debtor-wife and her husband during their marriage was community property was rebutted, and thus husband's interest in property could not be included in chapter 7 bankruptcy estate.

Pursuant to Cal. Fam.Code § 760, "[e]xcept as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." "Thus, there is a general presumption that property*1243 acquired during marriage by either spouse other than by gift or inheritance is community property unless traceable to a separate property source." *Haines v. Haines* (*In re Marriage of Haines*), 33 Cal.App.4th 277, 289-90, 39 Cal.Rptr.2d 673 (1995) (citation omitted).

In California, the community property presumption "is overcome when a declaration in a deed or other title instrument indicates spouses take title to property as joint tenants." *Bernstein v. Pavich* (*In re Pavich*), 191 B.R. 838, 844 (Bankr.E.D.Cal.1996) (citations omitted). Where "[t]he grant deed specifically states the property is joint tenancy property," this "rebuts the community property presumption ..." *Estate of Petersen,* 28 Cal.App.4th at 1747, 34 Cal.Rptr.2d 449. " "A declaration in a deed or other title instrument that the parties take the subject property as joint tenants raises a presumption that the married couple intended to take title in joint tenancy." *Rhoads v. Jordan* (*In re Rhoads*), 130 B.R. 565, 567 (Bankr.C.D.Cal.1991).

ii. Summers rejected by California Supreme Court: In re Marriage of Valli, 58 Cal. 4th 1396 (May 15 2014):

Husband filed petition for dissolution of marriage. The Superior Court entered property division order finding that life insurance policy was community property, and wife appealed. The Court of Appeal reversed and remanded. Husband petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Married persons may, through a transfer or an agreement, transmute -- that is, change -- the character of property from community to separate or from separate to community. (Fam.Code, § 850.) A transmutation of property, however, "is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (*Id.,* § 852, subd. (a).) To satisfy the requirement of an "express declaration," a writing signed by the adversely affected spouse must expressly state that the character or ownership of the property at issue is being changed.

We recognize that some court decisions have stated that a transmutation requires an interspousal transaction and that one spouse's acquisition of an asset from a third party is therefore

exempt from the statutory transmutation restrictions. Those decisions are unpersuasive, however. The first decision to hold that a spousal purchase from a third party during a marriage was not subject to the statutory ***461* transmutation requirements was *In re Summers* (9th Cir.2003) 332 F.3d 1240, which was a bankruptcy proceeding rather than a marital dissolution proceeding. There, the federal appellate court was attempting to construe and apply California law "to determine whether the requirements of California's transmutation statute ... *1405* must be met when realty is transferred from a third party to spouses as joint tenants." (*In re Summers,* at p. 1242.) Relying on the statement by the California Court of Appeal in *Cross* that a transmutation is an " 'interspousal transaction or agreement' " (*Cross, supra,* 94 Cal.App.4th at p. 1147, 114 Cal.Rptr.2d 839), the federal court concluded "that the transmutation requisites had no relevance to the conveyance in this case." (*In re Summers,* at p. 1245.)

The year 2008 saw the first decision by a California state appellate court exempting from the transmutation requirements a spousal purchase from a third party: *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 86 Cal.Rptr.3d 624. In that marital dissolution proceeding, the husband and the wife disputed ownership of residential property they had purchased during the marriage, taking title solely in the wife's name. Court of Appeal stated that there were "no facts suggesting a transmutation, valid or otherwise" because the property "was acquired in [the wife's] name in a transaction with a third person, not through an interspousal transaction."

These last two decisions (*In re Summers, supra,* 332 F.3d 1240; *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th 176, 86 Cal.Rptr.3d 624) are not persuasive insofar as they purport to exempt from the transmutation requirements purchases made by one or both spouses from a third party during the marriage. **280 Neither decision attempts to reconcile such an exemption with the legislative purposes in enacting those requirements, which was to reduce excessive litigation, introduction of unreliable evidence, and incentives for perjury in marital dissolution proceedings involving disputes regarding the characterization of property. Nor does either decision attempt to find a basis for the purported exemption in the language of the applicable transmutation statutes. Also, these decisions are inconsistent with three Court of Appeal decisions stating or holding that the transmutation requirements apply to one spouse's purchases from a third party during the marriage. (*In re Marriage of Buie & Neighbors, supra,* 179 Cal.App.4th at pp. 1173–1175, 102 Cal.Rptr.3d 387; *Cross, supra,* 94 Cal.App.4th at pp. 1147–1148, 114 Cal.Rptr.2d 839; *in Re marriage OF steinberger,*

supra, 91 caL.app.4th at pp. 1463–1466, 111 Cal.Rptr.2d 521.), Our examination of the statutory language leads us to reject the purported exemption for spousal purchases from third parties.

We need not and do not decide here whether Evidence Code section 662's form of title presumption ever applies in marital dissolution proceedings. Assuming for the sake of argument that the title presumption may sometimes apply, it does not apply when it conflicts with the transmutation statutes. (See *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 593, 81 Cal.Rptr.2d 726.)

Concurring Opinion:

What role, if any, does a common law rule codified in Evidence Code section 662 (section 662) have in determining, in an action between the spouses, whether property acquired during a marriage is community or separate?

Section 760 presumption controls in characterizing property acquired ****464* during the marriage in an action between the spouses. Section 662 plays no role in such an action. The detailed community property statutes found in the Family Code, including section 760, are self-contained and are not affected by a statute found in the Evidence Code. The presumption, now codified in the Family Code, that property acquired during the marriage is community, is perhaps the most fundamental principle **1409* of California's community property law. " 'This presumption is fundamental in the community property system and is an integral part of the community property law not only of this state but of other states and countries where the system is in operation.' " Section 662 may not nullify this fundamental presumption,

In short, the statutes in the Family Code governing community property, including the section 760 presumption, are sufficient unto themselves. Evidence Code section 662's common law presumption does not nullify the community property statutes. *All* property acquired during the marriage is presumed to be community property. Evidence that certain property is in the ***1414** name of one spouse might, depending on the circumstances, be relevant to help overcome the presumption if and only if it demonstrates that one of the statutory exemptions to the presumption applies.

In bankruptcy proceedings, the CP 760 presumption and the transmutation statutes – not the evidence code record title presumption – govern. See In re Obedian, 546 B.R. 409 (Bankr. C.D. Cal. 2016)(title taken by husband and wife as joint tenants

from third party with CP funds, despite JT on deed, not entitled to evidence title presumption and must comply with transmutation statutes, citing Valli.

See also In re Bruce, BAP. No. CC-16-1041 (March 25, 2017)(CP presumption, not record title presumption, applies in bankruptcy context.

c. Treatment of Community Property with right of survivorship

i. Estate property or treated like JT?

When a debtor who is a joint tenant in property files bankruptcy, only the debtor's joint tenancy interest becomes property of the bankruptcy estate. Although the joint tenancy interest may run to the entire property, the estate does not obtain an interest in the entire estate, but instead obtains the joint tenant's undivided one-half interest. Thus, the Ninth Circuit has recognized that the bankruptcy estate has a one-half interest in jointly held property, while the joint tenant retains the other one-half interest. *See In re Summers,* 332 F.3d 1240 (9th Cir.2003); *In re Reed,* 940 F.2d 1317, 1323 (9th Cir.1991). *Accord In re Gorman,* 159 B.R. 543 (9th Cir.BAP1993)

d. Transmutation issues

West's Ann.Cal.Fam.Code § 2581

§ 2581. Division of property; presumptions

For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy or tenancy by the entirety or as community property, 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.

i. Need writing to overcome presumption of CP.

ii. Valli, Obedian and Brace

Arizona cases on transmutation:

It is largely up to the court to determine the intent of the parties. It seems from reading many of the cases, it comes down to doing what is fair and equitable.

1. Disclaimer deed.

As a matter of law, an enforceable disclaimer deed is clear and convincing evidence necessary to rebut the community property presumption. *See Bender,* 123 Ariz. at 93, 597 P.2d at 996*; Bell-Kilbourn v. Bell-Kilbourn,* 216 Ariz. at 524, 169 P.3d at 114 (App. 2007).

2. Quit claim deed.

A quit claim deed does not as a matter of law transmute the property from community to separate because, unlike a disclaimer deed where the spouse is disclaiming ever having had an interest in the property, a quit claim deed relinquishes or gifts the property in which the person had an interest to another. *Bender*, 123 Ariz. at 94, 597 P.2d at 997. It appears that additional factors would have to be considered to determine whether the parties intended the quit claim deed to actually change the character of the property from community to sole and separate.

3. Gift.

Sole and separate property can be gifted to the community and vice versa. The rules are different, however, depending on the direction of the gifting.

First, there is a presumption in certain circumstances that separate property is being gifted to the community. The reason for the presumption is based on the premise that "the [party providing the separate funds to the community] is discharging [his or her] legal duty to provide support for [the other spouse]. *Bobrow v. Bobrow*, 241 Ariz. 592, 595, 391 P.3d 646, 649 (App. 2017). Example, Arizona law presumes a gift when one spouse purchases real property with his or her own sole and separate property, or refinances sole and separate property, but titles it in both spouses names. *Battiste v. Battiste,* 135 Ariz. 470, 472, 662 P.2d 145, 147 (App.1983). The gift presumption also exists when a spouse uses his or her separate property to pay community expenses during the marriage. *Baum v. Baum*, 120 Ariz. 140, 146, 584 P.2d 604 (App. 1978). To rebut the presumption and make a claim for reimbursement, the spouse providing the funds would have to prove by clear and convincing evidence that it was not a gift. *Bobrow, 241 Ariz. at 595, 391 P.3d at 649.*

This gift presumption is not uniformly applied in Arizona, however. There appear to be somewhat inconsistencies among Arizona courts regarding whether a presumption of a gift exists when separate property is used to improve or otherwise increase equity in jointly owned real estate. In *In re Marriage of Berger*, 140 Ariz. 156, 161–62, 680 P.2d 1217 (App. 1983), the court of appeals followed the well settled presumption that the wife intended a gift to her husband when she purchased a lot with her sole and separate property and titled it jointly with her husband. The court refused

to extend the presumption of a gift to the improvements made to the property by the wife using her sole and separate property.

We agree with the wife, however, that extension of the Bechelli presumption to improvements place on the property soon after its acquisition violated the principles of *Collier v. Collier, supra; Graham v. Allen, supra;* and *Bowart v. Bowart, supra.*

In *Collier,* the husband caused real property which he owned as separate property to be deeded to both himself and his wife in joint tenancy. Thereafter, the wife invested her separate funds in improving the property. The supreme court recognized a co-tenant's right to reimbursement for funds expended in improving joint tenancy property with the consent of the other co-tenant. The court further recognized that the general rules pertaining to joint tenancy apply when the joint tenants are husband and wife.

Similarly, in *Bowart,* Division Two of this court recognized that a presumption of gift arises when title to real property is taken in joint tenancy. However, the court properly concluded that:

Appellee is correct in maintaining that she is entitled to reimbursement for the separate funds she expended on property known as the Barnes property. The trial court found there was a gift of one-half of the property to appellant when title was taken in joint tenancy with right of survivorship. Both parties testified there was no agreement regarding the division of the property nor for reimbursement of the wife's contribution. When one joint tenant expends sums to benefit the other joint tenant, as appellee did here by using her separate funds to **162 **1223* pay the joint obligation, the paying joint tenant is entitled to reimbursement. *Graham v. Allen,* 11 Ariz.App. 207, 463 P.2d 102 (1970); 20 Am.Jur.2d, Cotenancy and Joint Ownership Sec. 58 at 147. Appellee is therefore entitled to a reimbursement in the amount of $15,457.24.

128 Ariz. at 336–337, 625 P.2d at 925–926.

Compare this with *Rosenthal v. Rosenthal*, 2010 WL 5033517 (Ariz. App.), where the court held that the husband's payment of the mortgage expenses on the community home from separate property was a gift in light of husband's admission that the initial down payment was a gift and in light of the fact he never expressed any lack of donative intent to his wife regarding the mortgage payments.

Likewise, our supreme court held when a spouse's separate funds are deposited in a joint bank account, the marital relationship alone does not presume the deposit was a gift. *O'Hair v. O'Hair*, 109 Ariz. 236, 239, 508 P.2d 66 (1973); *Bowart v. Bowart*, 128 Ariz. 331, 335, 625 P.2d 920 (App. 1980). The court in *O'Hair* noted that "[g]ifts from a husband to his wife are not presumed from the marital relationship but are governed by the same rules as gifts between strangers, namely, there must be an intention to part with the interest in and dominion over the property and there must be delivery of the property." 109 Ariz. at 239, 508 P.2d 66 (quoting *Rasmussen v. Oshkosh Sav. & Loan Ass'n*, 35 Wis.2d 605, 151 N.W.2d 730, 732 (1967)). The court held that to be a gift, the

donor must "manifest a clear intent to give to the party claiming as donee." *Id.* The burden is on the party claiming the action was a gift to establish the claim by clear and convincing proof. *Id*.

Additionally, the presumption of a gift does not necessarily operate in the reverse – i.e., where the community contributes capital to the spouse's sole and separate property. In that situation, the community is considered to have an equitable lien for reimbursement on the separate property for either the resulting increase in principal or for the increase in property value. *See Tester v. Tester*, 123 Ariz. 41, 43, 597 P.2d 194, 196 (App.1979) ("The community is entitled to reimbursement when community funds are spent to increase one spouse's equity in separate property."); *see also Honnas v. Honnas*, 133 Ariz. 39, 40, 648 P.2d 1045, 1046 (1982).

In the absence of the presumption of a gift, no express words or actions are needed to show that a gift has been made to the community. *See In re Marriage of Berger,* 140 Ariz. 156, 162, 680 P.2d 1217, 1223 (App.1983) (agreeing that "a gift 'need not be expressed but can be inferred', particularly in the context of a marital relationship"). Further, donative intent is not conclusively determined solely by the later-expressed subjective intent of the donor; rather, donative intent is determined by considering the totality of the surrounding circumstances. *See id.* (citation omitted) (finding that "donative intent is ascertained in light of all surrounding circumstances, however, and is not inferred simply because of a marital relationship between the parties"); *accord Neely v. Neely,* 115 Ariz. 47, 51, 563 P.2d 302, 306 (App.1977). In order to find that donative intent existed, there must be evidence that the donor "manifest[ed] a[c]lear intent to give to the party claiming as donee and give to the latter before death full possession and control of the property." *Neely,* 115 Ariz. at 51, 563 P.2d at 306 (quoting *O'Hair v. O'Hair,* 109 Ariz. 236, 508 P.2d 66 (1973))

For example, in *In re Marriage of Cupp*, 152 Ariz. 151, 730 P.2d 870 (App. 1986), the wife was able to establish that the only reason the property was titled in both spouses' names was to avoid probate in the event of her death, as well as to protect the future of the parties' four children.

4. Agreement.

A spouse can agree that his or her sole and separate property is to be considered community property. *Moser v. Moser*, 117 Ariz. 213, 314, 572 P.2d 446, 448 (App. 1977) (husband testified at trial that he considered his life insurance policy a community asset, despite now attempting to claim that it was not on appeal). Similarly, spouses can agree that sole and separate property provided to the community will be reimbursed to overcome the presumption that it was a gift. *Baum. v. Baum*, 120 Ariz. 140, 584 P.2d 604 (App. 1978).

5. Commingling.

Where community property and separate property are commingled, the entire fund is presumed to be community property unless the separate property can be

explicitly traced. *Cooper v. Cooper*, 130 Ariz. 257, 635 P.2d 850 (1981). The commingling must be of such an extent that the identity of the property as separate or community is lost. *Potthoff*, 128 Ariz. at 562, 627 P.2d at 713. The simple deposit of separate funds into a community bank account does not transmute those funds automatically into community funds. *Noble v. Noble*, 26 Ariz. App. 89, 546 P.2d 358 (1976).1 Additionally, commingling of separate and community funds in a community account doesn't necessarily transmute the entire account, as long as the funds remain traceable and especially where the community funds are negligible. *Noble v. Noble*, 26 Ariz. App. 89, 546 P.2d 358 (1976). Mortgage payments made using commingled funds are presumed to have been paid with community funds. *Drahos v. Rens*, 149 Airz. 248, 717 P.2d 927 (App. 1985). The spouse claiming a portion of the funds as sole and separate bears the burden of proof by clear and satisfactory evidence. *Cooper*, 130 Ariz. at 259-60, 635 P.2d at 852-53.

6. Real estate is different.

Thus, where property of identical character, such as money, is so mixed together that a court is unable to tell how much money was originally separate and how much was originally community, a transmutation of separate money into community money occurs. *Evans v. Evans*, 79 Ariz. 284, 288 P.2d 775 (1955). This concept is simply not applicable to real property because of the "unique" nature of that type of property. You cannot mix Black Acre with White Acre and obtain Gray Acre.

Potthoff, 128 Ariz. at 562, 627 P.2d at 713. Further, the fact that the spouse holding the separate real property spent considerable time and effort managing the property [read provided communal value] does not transmute the real property into community property automatically either. *Potthoff*, 128 Ariz. at 564, 627 P.2d at 715.

We emphasize, however, that the separate property of the spouse remains separate. It is merely the profits or the increase in value of that property during marriage which may become community property as a result of the work effort of the community.

Cockrill v. Cockrill, 124 Ariz. at 52, 601 P.2d at 1336. The profits from a separate business, however, may be classified as separate or community depending on whether the profits are produced inherently from the property or from the spouse's efforts. Arizona courts have long agreed that the results of a spouse's labor are community property. *Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986) ("[I]t is established law that ... the fruits of labor expended during marriage are community property ...."). In resolving the specific issue regarding separate property profits and increase in value, Arizona courts have looked to the nature, or source, of the profit from

1 There is also no presumption of a gift in that situation, as mentioned *supra*, citing *O'Hair v. O'Hair*, 109 Ariz. 236, 239, 508 P.2d 66 (1973); *Bowart v. Bowart*, 128 Ariz. 331, 335, 625 P.2d 920 (App. 1980).

or increase of the separate property business. *Cockrill v. Cockrill*, 124 Ariz. 50, 53, 601 P.2d 1334, 1337 (1979); *Rundle v. Winters*, 38 Ariz. 239, 245, 298 P. 929, 931 (1931). The rule is that if the profits and/or increase result from the "inherent qualities of the business," the profits and increase are separate property; if the profits and/or increase result from the "individual toil and application of the spouse," they are community property. *Rundle*, 38 Ariz. at 245, 298 P. at 931.

a. What happens after community claims paid

b. ***In re Provenza***, 316 BR 177 (Bankr.ED La. 2003) – rights when surplus. Corollary: until creditors paid, separate property estates are "equity holders" only if a surplus; if no surplus, possible fraudulent conveyance issues – key issue: attorney's fees discussion.

Absent a partition following termination of community property regime, entire property of former community, even the half belonging to non-debtor spouse, becomes property of the estate upon the filing of bankruptcy petition by debtor spouse. Bankr.Code, 11 U.S.C.A. § 541(a)(2).

Bankruptcy Code provision governing distribution of property of Chapter 7 estate in cases in which estate consists both of community and of non-community property acts to create "sub-estate" that calls for segregation of community property from other property of estate, and for order of distribution of these two kinds of property in payment of creditor claims. Bankr.Code, 11 U.S.C.A. § 726(c).

Community "sub-estate" created when divorced spouse with interest in both unpartitioned community assets and his own separate property filed for Chapter 7 relief would be charged with payment of community claims, as well as with payment of administrative expenses consisting of capital gains and other income taxes generated from liquidation of community assets, but not with other administrative expenses, where it was solely as result of debtor's own misconduct, in filing series of incomplete and erroneous bankruptcy schedules that either omitted or substantially undervalued estate assets, in converting estate funds to his own use, and in ignoring court orders, that case had lingered in bankruptcy court and had resulted in such a huge expenditure of judicial and professional resources

c. In Chapter 11, then may never be a division. Could potentially confirm plan, value claim over time and no division in kind. In 9th circuit, creditors get paid first. In re Teel, 34 B.R. 762 (9th Cir. BAP 1983),result right without good description. Community creditors must be paid in full before determining if non-filing spouse has equity in estate

d. In a surplus estate, bankruptcy judges usually grant RFS to allow proposed division

7. Automatic Stay

a. 362(b) exceptions

i. True family law issues like support, paternity, etc.

b. What property does the stay not cover

i. Commencement or continuation of action re paternity and establishment/modification of domestic support order (DSO)

ii. Child custody/visitation orders

iii. Collection of domestic support obligations from non-estate property such as income from ch 7 debtor.

iv. Withholding of income that *is* proper of estate for domestic support obligation by order or statute (Ch 13, 11)

v. Exempt property – payment of domestic support obligations

8. Exemptions

a. Once exemption final, then no longer property of the estate. Mwangi.

b. Once no longer property of estate, then non-filing spouse can pursue

i. Consider ramifications of allowing exemptions to become final

ii. Can a trustee administer otherwise exempt property to pay the family law claim?

c. Debtor's right to receive support may be exempt under CCP Section 703.140(b)(10)(D)

d. Spouses not allowed to file separate bankruptcy cases to double-up on exemptions – no stacking

i. Applies to RDPs – Rabin 359 BR 242 (2007) -Judge Smith on BAP panel

Debtors who were members of same-sex couple, and who had registered as domestic partners under the California Domestic Partner Rights and Responsibilities Act (DPRRA), were limited to single homestead exemption in residential property in which they each held one-half interest, when they each filed separate Chapter

7 petition; the DPRRA, in specifying that, with certain limited exceptions, registered domestic partners were to be treated as "spouses" under California law, dictated that they be treated as "married" persons for purpose of applying California homestead statute. Notwithstanding the fact that they could not file joint petitions at the time (DOMA), they were only entitled to one exemption.

9. DSO

a. Definition in Section 101 covers post-petition payments

b. 502(b)(5) doesn't allow as a claim post-petition payments

c. What allows Ch 11 debtor to pay post-petition DSO?

i. Administrative expenses do not always have to benefit estate

d. DSO gets superpriority under Section 726

i. 9th Circuit Case in Sternberg determines if something is actually support

10. Intention of parties and Needs

a. If bankruptcy court does not abstain, then does bankruptcy court assume Jurisdiction over family law claims?

b. Judge Smith case non-filing spouse has nondischargeable claim against filing spouse. Debtor doesn't list non-filing spouse as creditor. Whether claim is discharged. Concurrent jurisdiction for family law court to determine whether creditor received notice, etc.

11. Non-DSO Claims

a. Equalization, etc.

b. Only for debts not discharged before family law case filed. Citation.

c. Can be super-discharged in Chapter 13

12. 726 Sub-Estates

a. Extent to which CP can pay claims – discussion of sub-estates below.

Sub-estates are created in Section 726(c), consisting only of section 541(a)(2) property (*i.e.,* community property subject to community claims). Community claims—even community claims that would otherwise fit within the rubric of section 507 as priority claims—must look solely to the sub

estates (and distribution scheme) set up by section 726(c). 11 U.S.C. § 726(c)(2). There are four sub estates set up under section 726(c)(2), but community claims assertable against the non-debtor are restricted to recoveries out of the first and last sub estates only. The last estate, being residual, might well be empty because the other sub estates may (and usually will) be exhausted by satisfying other claims.

i. Section 726 and sub-estates

Community property in a bankruptcy case is segregated and distributed under Section 726(c)(2)(A)–(D) which creates four "sub estates" as follows:

Sub estate A consists of Section 541(a)(2) property (*i.e.* community property) which is available for payment of community claims.

Sub estate B consists of Section 541(a)(2) property which is solely liable for claims against the debtor. That is, if there is a provision in State law for certain community property to be liable for debts of the debtor (presumably including separate debts) it would be available in bankruptcy for those same debts.

Sub estate C consists of non–541(a)(2) property (*i.e.* separate property) which is available for satisfaction of separate claims as well as any community claims not satisfied in Sub estates (A) and (B). It should be noted that non–541(a)(2) property includes 541(a)(3) property which consists of "any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title." It may be that the scheme mandated by the Code would at this point permit payment of a separate claim for recovery of transferred community assets under one of the denominated sections.

Sub estate D consists of all remaining property of the estate which the Code makes available to satisfy community claims not satisfied in the preceding sub estates. It is available to satisfy separate claims.

It appears that the intent of the drafters of the Bankruptcy Code was to mirror state community property law as closely as possible.

The complex distribution scheme is sought to be justified as an attempt to track closely the rights of creditors under state law, thereby avoiding unwarranted windfalls to certain classes of creditors that might encourage petitions in bankruptcy by creditors seeking to improve their collection status.

b. What are they and what do they generally provided

c. Merlino and McCoy cases – non-debtor spouse has a right to surplus assets after payment of community claims. Debtor doesn't get a windfall to pay his post-separation claims

d. Judge Bason ruling re post-separation attorneys' fees of non-debtor spouse are not community claims that can be paid from CP

i. Post-separation attorneys' fees incurred to benefit a CP asset may be a community claim

e. Section 726 applies in Chapter 11 through 1129(a)(7)

13. POC

a. Property right in surplus of assets after payment of community claims is not a creditor claim but a property right.

b. But, credits and rights of reimbursement are creditor claims.

c. Tardily filed DSO claims still get priority under Section 726(a)(1)

d. Credits such as Watts and Epstein are creditor claims

e. Right to reimbursement from separate property contribution is a creditor claim and not a property right. Mantle.

14. Discharge

a. Where solvent case to divide assets, Snow White cleansed gets transferred to

b. Article to be circulated by Chris

c. Co-Debtor discharge

d. 524 applies to community claims so long as spouses stay married

e. In community property state, bankruptcy discharge operates as injunction against actions by creditor to recover community property of debtor acquired after commencement of case on account of community claim, unless action is to collect community claim that is excepted from debtor's discharge, or that would be excepted in hypothetical case involving debtor's **spouse**, if **spouse** had filed case when debtor's case was filed, and if provisions relating to objections to the **discharge** of **spouse's** debt are met. Bankr.Code, 11 U.S.C.A. § **524**(a)(3).

15. Registered Domestic Partners (RDPs)

a. Family Code Section 297.5 provides that RDPs have all the same rights and responsibilities as spouses.

b. Thus, RDPs have acquire CP

c. RDPs have 523(a)(5) and (a)(15) support and non-support obligations excepted from discharge

16. Preference and Fraudulent transfer issues

a. Defense to preference action is bona fide support payments – 547(c)(7)

b. MSAs can be set aside as fraudulent transfers

c. Judgments of family law court cannot be set aside as fraudulent transfers

17. Undoing the Mischief

a. What can the bk court?

b. What can the family court do?

Arizona Statutes

ARS 25-211. Property acquired during marriage as community property; exceptions; effect of service of a petition

a. All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is:

i. Acquired by gift, devise or descent.

ii. Acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.

b. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal separation or annulment does not:

i. Alter the status of preexisting community property.

ii. Change the status of community property used to acquire new property or the status of that new property as community property.

ii. Alter the duties and rights of either spouse with respect to the management of community property except as prescribed pursuant to § 25-315, subsection A, paragraph 1, subdivision (a).

ARS 25-215 Separate Property

a. A spouse's real and personal property that is owned by that spouse before marriage and that is acquired by that spouse during the marriage by gift, devise or descent, and the increase, rents, issues and profits of that property, is the separate property of that spouse.

b. Property that is acquired by a spouse after service of a petition for dissolution of marriage, legal separation or annulment is also the separate property of that spouse if the petition results in a decree of dissolution of marriage, legal separation or annulment.

c. Notwithstanding subsection B of this section and § 25-214, subsection C, a mortgage or deed of trust executed by a spouse who acquires the real property encumbered by that mortgage or deed of trust after service of a petition for dissolution of marriage, legal separation or annulment shall be enforceable against the real property if the petition does not result in a decree of dissolution of marriage, legal separation or annulment.

d. A contribution to an irrevocable trust that has or will have as its principal asset life insurance on the person making the contribution is a contribution of the insured's separate property if the spouse of the insured is the primary beneficiary of the trust.

California Statutes

Cal. Evidence Code 662

The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

Cal. Family Code § 760. "Community property" defined

Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

Cal. Family Code § 850. Transmutation by agreement or transfer

Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following:

(a) Transmute community property to separate property of either spouse.

(b) Transmute separate property of either spouse to community property.

(c) Transmute separate property of one spouse to separate property of the other spouse.

Cal. Family Code § 851. Transmutation subject to fraudulent transfer laws

A transmutation is subject to the laws governing fraudulent transfers.

Cal. Family Code § 852. Requirements

(a) A transmutation of real or personal property is not valid unless made *in writing* by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.

(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(c) This section 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.

(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.

Cal. Family Code § 2581. Division of property; presumptions

For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common*, joint tenancy,* or tenancy by the entirety, or as community property, 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.

Bankruptcy Statutes

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

§ 726. Distribution of property of the estate

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.