

WHOSE HOUSE IS IT?

A Look at Home Ownership in Divorce



Philip M. Daigneault

- Mr. Daigneault is a member of the Los Angeles County Bar Association where he serves as a member of the Bench and Bar Committee. The Bench and Bar Committee serves as a liaison between the judges and the attorneys who practice as members of the LACBA. He is also a former Director of the South Bay Bar Association where he chaired the Litigation Committee. He has served on numerous charitable foundations including the Peninsula Education Foundation where he served as Trustee and chaired the Endowment Committee.
- Mr. Daigneault has taught and lectured other attorneys at California Mandatory Continuing Legal Education courses on topics ranging from phantom income, complex cash flow and business valuations to domestic violence and child custody.
- In his spare time he enjoys traveling with his wife, Linda, and three beautiful children, Taylor, Ashley, and Derek. Mr. Daigneault is also an avid waterman and enjoys surfing and sailing.

Wendy S. Jones

- Ms. Jones is a Certified Family Law Specialist, with a special focus in alternative dispute resolution for couples and families, including work as a collaborative attorney, a mediator, and an advising attorney to those in mediation. Ms. Jones also represents clients in litigation and prepares and reviews premarital and other types of agreements.
- In addition to her almost thirty years of experience in the field of family law, Wendy has completed advanced collaborative training and intensive mediation training. She is one of the original members and a past President of one of the first collaborative practice groups in Southern California, A Better Divorce. Helping clients find and pursue the process which best meets their legal, emotional, and financial needs, whether it be traditional litigation, collaboration, or mediation, is a passion. She is a 15-year member of the International Academy of Collaborative Professionals.
- Ms. Jones is a past President of the South Bay Bar Association. In 2002 she received one of the highest honors bestowed by the Los Angeles County Bar Association, the Honorable Benjamin Aranda III Outstanding Public Service Award, which recognized her volunteer work for the Association's Domestic Violence project.
- Ms. Jones has been married for 34 years to Patrick now retired from American Airlines, and they have a treasured family to which Ms. Jones devotes most of her leisure time.

SEPARATE PROPERTY FC 770

- Separate property: “Separate property” includes (Fam.C. § 770(a)):
- Property owned before marriage (or before registration of a domestic partnership);
- Property acquired during marriage (or a domestic partnership) by gift, bequest, devise or descent; and
- the “rents, issues and profits” of any such property. [Cal. Const. Art. I § 21; Fam.C. § 770(a)(1), (2) & (3)]

COMMUNITY PROPERTY FC 760

- Community property: “Except as otherwise provided by statute,” community property is all property acquired by a married person during marriage while domiciled in California. [Fam.C. § 760; see also Civ.C. § 687; Marriage of Bonds (2000) 24 C4th 1, 12, 99 CR2d 252, 258]

SEPARATE PROPERTY CONTRIBUTIONS

FC 2640

§ 2640. Contribution to the acquisition of property of the community property estate; waivers; amount of reimbursement

(a) “Contributions to the acquisition of property,” as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.

(c) A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.

TRANSMUTATIONS FC 852

TRANSMUTATION REQUIREMENTS. (Converting CP to SP and SP to CP)

(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.

(e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply.

TRANSMUTATIONS “BE CAREFUL”

- A subtle language difference can make a big difference.
- Quitclaim from W as a Single Woman to W & H a married couple probably not enough.
- Quitclaim from W as a Single Woman to W & H as a married couple as community property might be.
- ISTD is enough IRMO Kushesh & Kushesh-Kaviani

Moore/Marsden

- Home acquired BEFORE marriage—separate property title, mortgage paid down with community funds.
- SP percentage interest is determined by crediting separate property with the downpayment and the full amount of the loan, less the amount by which CP payments reduced the principal balance of the loan, and dividing that sum by the purchase price.
- CP percentage interest is ascertained by dividing CP payments in reduction of principal by the purchase price.

MORTGAGE PAYMENTS AFTER DOS EPSTEIN CREDITS

- Reimbursement when separate property funds are used to pay the mortgage on a community home after the date of separation and before the divorce unless it would be unfair and unreasonable for that spouse to expect reimbursement.
- For example, if the spouses agree there will be no reimbursement, the payments were intended as a gift, the spouse making the payments continued to live in the home and the payments were not substantially greater than the rental value of the home, or the payments were made in lieu of or as a form of spousal support.

Exclusive Use and Possession of Family Home after Separation (Watts Charges)

A spouse who has exclusive use and possession of the family home between separation and divorce may be charged with the fair rental value of the home for that time period, owing half of that value to the other spouse when the property is divided.

DEFERRED SALE OF HOME ORDER

Family Code Section 3801 & 3802

- Court first must consider if economically feasible considering resident parents income, support being received and any other sources of funds (FC 3801).
- Then consider if necessary to minimize the adverse impact of divorce.

FAMILY CODE 3801

(a) If one of the parties has requested a deferred sale of home order pursuant to this chapter, the court shall first determine whether it is economically feasible to maintain the payments of any note secured by a deed of trust, property taxes, insurance for the home during the period the sale of the home is deferred, and the condition of the home comparable to that at the time of trial.

(b) In making this determination, the court shall consider all of the following:

- (1) The resident parent's income.
- (2) The availability of spousal support, child support, or both spousal and child support.
- (3) Any other sources of funds available to make those payments.

(c) It is the intent of the Legislature, by requiring the determination under this section, to do all of the following:

- (1) Avoid the likelihood of possible defaults on the payments of notes and resulting foreclosures.
- (2) Avoid inadequate insurance coverage.
- (3) Prevent deterioration of the condition of the family home.
- (4) Prevent any other circumstance which would jeopardize both parents' equity in the home.

FAMILY CODE 3802

(a) If the court determines pursuant to Section 3801 that it is economically feasible to consider ordering a deferred sale of the family home, the court may grant a deferred sale of home order to a custodial parent if the court determines that the order is necessary in order to minimize the adverse impact of dissolution of marriage or legal separation of the parties on the child.

(b) In exercising its discretion to grant or deny a deferred sale of home order, the court shall consider all of the following:

(1) The length of time the child has resided in the home.

(2) The child's placement or grade in school.

(3) The accessibility and convenience of the home to the child's school and other services or facilities used by and available to the child, including child care.

(4) Whether the home has been adapted or modified to accommodate any physical disabilities of a child or a resident parent in a manner that a change in residence may adversely affect the ability of the resident parent to meet the needs of the child.

(5) The emotional detriment to the child associated with a change in residence.

(6) The extent to which the location of the home permits the resident parent to continue employment.

(7) The financial ability of each parent to obtain suitable housing.

(8) The tax consequences to the parents.

(9) The economic detriment to the nonresident parent in the event of a deferred sale of home order.

(10) Any other factors the court deems just and equitable.

COURT ORDERED SALE FC 2108

- At any time during the proceeding, the court has the authority, on application of a party and for good cause, to order the liquidation of community or quasi-community assets so as to avoid unreasonable market or investment risks, given the relative nature, scope, and extent of the community estate. However, in no event shall the court grant the application unless, as provided in this chapter, the appropriate declaration of disclosure has been served by the moving party.

Marvin vs Marvin

A famous case involving actor Lee Marvin and his live in girlfriend Michelle Marvin:

We (Supreme Court of California) conclude: (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision. (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

SINGLE WOMAN BUYS HOUSE WHILE LIVING WITH BF AND SELLS IT

- No rights unless able to meet the very high threshold of Marvin vs. Marvin
- Requires an express agreement
- No Common Law marriage in, but a viable Common Law marriage from, another state will be recognized in California.
- Possible real property partnership issues – Statute of Frauds

SW BUYS HOME IN HER NAME GETS MARRIED

- Married 3 days realizes mistake files disso
- Married 3 years realizes mistake files disso
- 30 years of House Payments
 - Type of Loan? Fully Amortized or HELOC
Interest only
 - IRMO Moore
 - IRMO Marsden

SW BUYS HOME GETS MARRIED AND PUTS H ON TITLE AS J/T as 1st ANNIVERSARY GIFT

- FC sec. 2640
- FC sec. 852
- Look to writing
- Look for Consideration (Undue influence)
- IRMO Haines | IRMO Delaney

MC BUYS HOME AS JT WITH DOWN PAYMENT GIVEN AS A GIFT BY H's PARENTS

- Look at to whom and how gift was given
- Deposit into an existing SP account?
- Deposit into an existing CP account?
- Deposit directly into Escrow with a signed statement to lender that this is a gift?
- Common issue with 1st time home buyers

PRENUPTIAL AGREEMENTS FC 1615

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

(2) The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.

LITIGATION – MEDIATION COLLABORATIVE LAW

- Litigation is expensive financially/emotionally.
- Collaborative Law – Begins with an agreement not to litigate.
- Mediation – Directive vs Passive Styles.