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**Superior Court of California  
County of Los Angeles**

<u>In re the Marriage/Matter of:</u>	: Case No.: BD x
<b>PETITIONER:</b>	: FINDINGS & RULING ON DIVISION
<b>X,</b>	: OF PROPERTY
	: Date: x, 2008
<b>and</b>	: Time: 8:30 a.m.
<b>RESPONDENT:</b>	: Place: Department X
<b>X</b>	: Assigned To: X
	: .
	: .

The Court makes the following findings.

1. Introduction & Terms<sup>1</sup>
  - 1.1. Property- includes real and personal property under *Section 113*. As provided by *Section 700*, a leasehold interest in real property is real property not personal property.
  - 1.2. Community Property- has the meaning ascribed under *Section 65* and *Section 760*. Under *Section 751*, the respective interests of spouses in the community property during the continuance of the marriage relation are

<sup>1</sup> Unless specified all references are made to the *Family Code*. The singular includes the plural under *Section 10*.

1 present, existing, and equal interests. As provided by *Section 760*,  
2 Community Property is defined as all property real or personal wherever  
3 situated acquired by a married person during marriage while domiciled in  
4 this State. There is a presumption that property acquired during the  
5 marriage is community property. See: *See v. See* (1996) 64 Cal. 2d 778.

6 1.3. Quasi-community property includes any property which would have been  
7 community property if acquired while domiciled in this state at the time of  
8 its acquisition as provided for by *Section 125*. See: *Marriage of Roesch*  
9 (1978) 83 Cal. App. 3d 96.

10 1.4. Separate Property

11 Separate Property has the meaning ascribed to it under *Section 130* and  
12 *Section 770*. Unless the community property has acquired an interest in  
13 the separate property of a spouse, then neither party has any interest in the  
14 separate property of the other under *Section 752*. As provided by *Section*  
15 *770*, Separate Property includes all property owned by a person before  
16 marriage or any property acquired by a person after marriage by gift,  
17 bequest, devise or descent; and Separate Property includes the rents, issues  
18 and profits of the Separate Property. Under *Section 771*, the earnings and  
19 accumulations of a spouse acquired after separation are the Separate  
20 Property of the spouse acquiring it. Separate property does not include  
21 quasi-community property under *Section 2502*.

22 2. Jurisdiction of the Court

23 The Court has jurisdiction under *Section 200* to divide the property interests of the  
24 parties. To divide the property of the parties, the court must have personal  
25 jurisdiction over both parties. See: *Estin v. Estin* (1948) 334 U.S. 541. In disputes  
26 between the parties, the family law court has priority jurisdiction. See: *Marriage*  
27 *of Gagne* (1990) 225 Cal. App. 3d 277 and *Glade v. Glade* (1995) 38 Cal. App.  
28 4th 1441. Under *Section 290*, the Court has authority to make orders as the court

1 in its discretion determines necessary. In this ruling the Court exercises its  
2 authority to settle the property rights of the parties under *Section 2010(e)*. The  
3 Court further retains jurisdiction to make such other orders as are necessary to  
4 carry out the terms of this ruling under *Section 291* and *Section 2553*. Nothing in  
5 this ruling shall deprive the court of its continuing jurisdiction to divide any  
6 omitted asset or liability not adjudicated by this ruling as provided by *Section*  
7 *2556*. As permitted by *Section 2650*, the Court has jurisdiction to divide the  
8 separate property interests of the parties in real and personal property wherever  
9 situated and whenever acquired held by the parties as joint tenants or tenants in  
10 common. See: *Porter v. Superior Court (Porter)* (1977) 73 Cal. App. 3d 793.  
11 Where parties own real property located in another state, the Court has authority to  
12 divide the interests in the property as permitted by *Section 2660*. If it is not  
13 possible to divide the property without changing the nature of the interests held in  
14 the real property in another state, then the court may order a conveyance of the  
15 property or make an award of the interest in the property to one party with an  
16 equalization payment to the other party. *Marriage of Fink (Fink II)* (1979) 25 Cal.  
17 3d 877 [ruling on a predecessor statute] held that now *Section 2660* establishes  
18 only a preference that community real property situated in other states be divided  
19 without changing title thereto. The court has power to require the parties to  
20 execute conveyances to effectuate the division of the assets. See: *Marriage of*  
21 *Ben-Yehoshua* (1979) 91 Cal. App. 3d 259 and *Marriage of Economou*  
22 *(Economou I)* (1990) 224 Cal. App. 3d 1466.

23 The Court has jurisdiction over consolidated issues of law and fact involving third  
24 persons. See: *Marriage of Neill* (1984) 160 Cal. App. 3d 548 and *Porter v*  
25 *Superior Court (Porter)* (1977) 73 Cal. App. 3d 793.

26 3. Valuation of Assets

27 3.1. In General

28 The value of any asset is its fair market value which is the price at which the

1 property would change hands between a willing buyer and a willing seller, neither  
2 being under any compulsion to buy or sell, and both having reasonable knowledge  
3 of the relevant facts (3 Fed. Tax. Reg. 82, Sec. 20.2031-1(b) and *Marriage of*  
4 *Hewitson* (1984) 142 Cal. App. 3d 874 and *Marriage of Foster* (1974) 42 Cal.  
5 App. 3d 577 and *Marriage of Cream* (1993) 13 Cal. App. 4th 81 and *Evidence*  
6 *Code Section 810*. Unless specifically indicated herein, the court valued the assets  
7 and liabilities of the parties as near as practicable to the time of trial as required by  
8 *Section 2552(a)*. Where a spouse impairs the court's ability to value the assets at  
9 time of trial, the court has discretion to utilize a different date. See: *Marriage of*  
10 *Stallcup* (1979) 97 Cal. App. 3d 294. The mere passage of time is not grounds for  
11 an alternate valuation. See: *Marriage of Priddis* (1982) 132 Cal. App. 3d 349  
12 where the court denied alternative valuation of the family residence even though  
13 12 years intervened between trial and date of separation. Absent nonmarket  
14 factors, the parties should share all gains and losses equally. Increases in  
15 valuation that occur because of nonpersonal factors such as inflation or market  
16 fluctuations and not resulting from the post separation efforts of one spouse alone,  
17 the property should be valued at the time of trial. See: *Marriage of Sherman*  
18 (2005) 133 Cal. App. 4th 795. Under appropriate circumstances, the Court may  
19 elect to defer valuation of an asset until its value can be better ascertained. See:  
20 *Marriage of Munguia* (1983) 146 Cal. App. 3d 853.

### 21 3.2. Alternate Valuation

22 Upon a showing of good cause, the trial court may order an alternative  
23 valuation date. See *Section 2552(b)*. For instance, where a spouse keeps  
24 poor records, the Court may select an alternative valuation date. See:  
25 *Marriage of Nelson* (2006) 139 Cal. App. 4th 1546.

## 26 4. Presumptions Concerning Property Held in Joint Form

27 Where the parties acquire an interest in property after January 1, 1984, *Section*  
28 *2581* provides that property acquired by tenancy in common, joint tenancy or by

1 the entirety is presumptively community property. This presumption is rebuttable  
2 by either a clear statement in the deed or other title documents that the property is  
3 actually separate property (*Section 2581(a)*) or proof of a written agreement that  
4 the property is separate property (*Section 2581(b)*). The burden of proof to rebut  
5 title presumption is by a preponderance of the evidence. See: *Marriage of*  
6 *Ettefagh* (2007) 150 Cal. App. 4th 1578. Title is not conclusive as to the character  
7 of the ownership of property. See: *Marriage of Lucas* (1980) 27 Cal. 3d 808; and  
8 title can be rebutted by the conduct of the parties *Marriage of Stitt* (1983) 147 Cal.  
9 App. 3d 579.

10 5. Special Rules for Division of Community Property

11 5.1. Conditional Award of Asset

12 Where economic circumstances warrant, *Section 2601* permits the award of  
13 an asset of the community estate to one party on such conditions as the  
14 Court deems proper to effect a substantially equal division of the  
15 community estate.

16 5.2. Award of Assets to Offset Misappropriation

17 *Section 2602* empowers the Court to make an additional award or offset  
18 against existing property if the Court determines one party has deliberately  
19 misappropriated assets in the community estate. See: *Marriage of Schultz*  
20 (1980) 105 Cal. App. 3d 846 and *Marriage of Economou (Economou I)*  
21 (1990) 224 Cal. App. 3d 1466.

22 5.3. Unique Assets

23 *Marriage of Fink (Fink II)*, *supra*, held that the Court may consider an  
24 attachment to very personal or unique assets in dividing property.

25 5.4. Maximize the Community Estate

26 Where licensing requirements mandate that only one spouse may continue  
27 operation of a particular asset, such as a law practice or medical practice,  
28 the Court should maximize the community estate in awarding the asset to

1 that spouse. See: *Marriage of Fink (Fink II)*, *supra*, and *Marriage of Winn*  
2 (1979) 98 Cal. App. 3d 363.

3 5.5. In Kind Division of Securities or Other Assets

4 The Court has discretion to make an in-kind division of assets such as  
5 corporate shares equally between the operating and nonoperating spouse  
6 over the objection of either party. See: *Marriage of Behrens* (1982) 137  
7 Cal. App. 3d 562. Normally, the division of fungible assets may be made  
8 by an equal division of those assets. See: *Marriage of Brigden* (1978) 80  
9 Cal. App. 3d 380. Where there is a closely held corporation or a high risk  
10 asset, the court is not obligated to divide the stock of a corporation, but may  
11 order an equalization payment. See: *Marriage of Connolly* (1979) 23 Cal.  
12 3d 590. Among other things, the court should consider whether adequate  
13 security can be given; and whether one spouse is placed in an unfavorable  
14 position because the other maintains management and control of the  
15 company; or whether there is an unfavorable tax consequence.

16 6. Transmutation of Property Interests

17 6.1. In General

18 A transmutation of property between spouses after January 1, 1985 under  
19 *Section 850* must be in writing under *Section 852*. There are special  
20 exceptions for gifts between spouses where the value of the item is personal  
21 in nature intended for use solely or principally by the spouse to whom the  
22 gift is made and the value of the item is not substantial taking into account  
23 the circumstances of the marriage as described by *Section 852(c)*. As  
24 provided by *Section 853(c)* where a spouse makes a nonprobate transfer in  
25 writing incident to a will or trust, such a document effectuates a  
26 transmutation if the document meets the requirements of *Section 852*. For  
27 transactions before 1985, parties may show either an oral or written  
28 agreement to change the status of property from community to separate.

1 See: *Estate of Wieling* (1951) 37 Cal. 2d 106 and *Marriage of Stoner*  
2 (1983) 147 Cal. App. 3d 858.<sup>2</sup> One spouse's signature on a form  
3 consenting to designation of another beneficiary for an Individual  
4 Retirement Account does not constitute a transmutation. See: *Estate of*  
5 *MacDonald* (1990) 51 Cal. 3d 262.

#### 6 6.2. Escrow Instructions Alone Not a Transmutation

7 The parties' signature on escrow instructions instructing an equal split of  
8 the proceeds of the sale of the residence is not a transmutation of the  
9 parties' interests. See: *Marriage of Leni* (2006) 144 Cal. App. 4th 1087.

#### 10 6.3. Revocable Trust Instruments

11 Provisions in a revocable trust stating that property is community unless  
12 identified as separate property does not constitute a transmutation because  
13 it lacks language expressing an intention to change the character or  
14 ownership of the property. See: *Marriage of Starkman* (2005) 129 Cal.  
15 App. 4th 659.

#### 16 6.4. Limitations on Extrinsic Evidence & Part Performance Doctrines

17 The limitations of the statute of frauds applies to stop parties from  
18 presenting extrinsic evidence of an oral transmutation based on the holding  
19 in *Marriage of Campbell* (1999) 74 Cal. App. 4th 1058. *Marriage of*  
20 *Benson* (2005) 36 Cal. 4th 1096 holds that part performance of an alleged  
21 agreement (such as signing a deed) does not meet the limitations of *Section*  
22 *852(a)*.

### 23 7. Pension Benefits

#### 24 7.1. In General

25 This ruling divides the pension benefits of the parties, including but not limited to  
26

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27 <sup>2</sup> For pre 1985 transactions involving transmutation, the standard of proof to rebut title is by clear  
28 and convincing evidence. See: *Marriage of Weaver* (1990) 224 Cal. App. 3d 478.

1 any defined benefit or defined contribution plan of either spouse whether a private  
2 plan governed by the Employee Retirement Income Security Act (ERISA) or a  
3 municipal, state or other government sponsored plan or any individual retirement  
4 account (IRA). *Section 2610(a)* requires that the court make whatever orders are  
5 necessary or appropriate to ensure that each party receives the party's full  
6 community property share in any retirement plan, including the survivor and death  
7 benefits. The division of the assets shall include a disposition of any benefits  
8 payable upon or after the death of either party (See *Section 2610(a)(1)*). The  
9 Court has jurisdiction to order a party to make an election for survivor benefits so  
10 long as the order does not require the plan to provide any increased benefits  
11 determined on the basis of actuarial value (See *Section 2610(a)(2)*). The Court  
12 shall not require the retirement plan to make payments that will result in an  
13 increase in the amount of benefits payable under the plan (See *Section*  
14 *2610(b)(1)*). No order for the division of retirement benefits as provided herein is  
15 intended to require the Court to make payment of benefits to any party at any time  
16 before the member retires unless permitted by the plan or as part of an assignment  
17 of interest in the plan (See *Section 2610(a)(3)*) subject to the limitations of *Section*  
18 *2610(c)*.<sup>3</sup>

19 7.2. Order for Joinder

20 The Court orders a joinder of any affected pension plan where appropriate  
21 or necessary under *Section 2060*.

22 7.3. Order Stayed As to Any Joined Pension Plan

23 Any order divided pension benefits under this ruling is stayed until thirty  
24 (30) days after the order is served upon the affected pension plan as

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26 <sup>3</sup> *Section 2610(c)* prohibits retroactive application to payments made by a retirement plan to any  
27 person who retired or died prior to January 1, 1987 or to payments made to any person who  
28 retired or died prior to June 1, 1988.



1 required by *Section 2073(a)*.

2 7.4. Ruling of the Court

3 The Court makes the following findings and rulings:

- 4 • X
- 5 • X

6 8. Business Interests

7 8.1. In General

8 Typically one spouse maintains sole management and control of a business  
9 enterprise after the date of separation. See: *Marriage of Rives* (1982) 130  
10 Cal. App. 3d 138. Frequently a spouse will apply for an alternative  
11 valuation of a closely held corporation or small business. See *Section*  
12 *2552(a)*. Valuation of a business interest at the date of separation  
13 ameliorates the impact of post separation increases or decreases in value of  
14 the business. See: *Marriage of Imperato* (1975) 45 Cal. App. 3d 432. The  
15 Court does have authority to reimburse the community estate where one  
16 spouse has enjoyed the exclusive use of the business enterprise after the  
17 date of separation, See: *Marriage of Watts* (1985) 171 Cal. App. 3d 366.

18 8.2. Valuation Date

19 *Marriage of Green (Green II)* (1989) 213 Cal. App. 3d 14 held that it was  
20 appropriate to value a professional practice such as a law practice as of the  
21 date of separation. Likewise, where the business enterprise depends on the  
22 operating skill, reputation and guidance of one spouse it should be valued at  
23 the date of separation. See: *Marriage of Stevenson* (1993) 20 Cal. App. 4th  
24 250. It is not the size alone of the business that determines whether the  
25 Court should use a date of separation value. For instance, *Marriage of*  
26 *Duncan* (2001) 90 Cal. App. 4th 617 involved an institutional advisory  
27 business with funds totaling \$84 million. The *Duncan, supra*, court  
28 measured the method of valuation not by the capital assets, but the skill,

1 industry, guidance and reputation of the operating spouse.

2 8.3. Apportionment of Interests Between Community Property & Separate  
3 Property

4 8.3.1. In General

5 Where one spouse owned a business prior to the date of marriage,  
6 valuation of the community property interest in the business entity is  
7 a matter of apportionment of value. *Pereira v. Pereira* (1909) 156  
8 Cal. 1, provides a formula that computes a fair rate of return to the  
9 separate property interest, then allocates the balance of any increase  
10 to the community property. The Court has broad discretion to  
11 determine the appropriate market rate of return which may be more  
12 than or less than the legal interest rate. See: *Beam v. Bank of*  
13 *America* (1971) 6 Cal. 3d 12 and *Todd v. McColgan* (1949) 89 Cal.  
14 App. 2d 509. Conversely, *Van Camp v. Van Camp* (1921) 53 Cal.  
15 App. 17 computes a fair compensation for community efforts, skill  
16 and talent during the marriage, then allocates the balance of any  
17 increase to the separate property. Where a spouse's separate  
18 property business decreases in value during the marriage, the Court  
19 has discretion to refuse evidence concerning the decrease in value.  
20 See: *Marriage of Winn* (1979) 98 Cal. App. 3d 363. The trial court  
21 is not required to track oscillations in growth or decline of a business  
22 throughout the marriage. See: *Marriage of Denney* (1981) 114 Cal.  
23 App. 3d 543.

24 8.3.2. Incorporation of Business during Marriage Not a Change in  
25 Character

26 Incorporation of a separate property business into a corporation  
27 during marriage does not change the characterization of the business  
28

1 as separate property. See: *Marriage of Koester* (1999) 73 Cal. App.  
2 4th 1032.

3 8.3.3. Which Method

4 Typically the labor intensive professional practice or service  
5 business is valued under the Pereira Method of computing a fair  
6 return on the separate property investment as a long-term investment  
7 well secured, then allocating the balance of the increase to the  
8 community estate. If the business is capital intensive and capitalized  
9 with separate property then the Van Camp Method of computing a  
10 fair compensation for the community efforts, skill and talent  
11 rendered during the marriage, then allocating the balance of the  
12 increased value to the separate property of the business owner. The  
13 Court has broad discretion to apply whichever method accomplishes  
14 substantial justice. See: *Marriage of Imperato* (1975) 45 Cal. App.  
15 3d 432 and *Marriage of Dekker* (1993) 17 Cal. App. 4th 842. If  
16 there is a minimal expenditure of time devoted to a stock investment  
17 portfolio, the Court may deny any apportionment to the community  
18 estate. See: *Estate of Ney* (1963) 212 Cal. App. 2d 891. If the  
19 business at issue increased in value as a result of inflationary  
20 appreciation, the Van Camp Method is probably more appropriate.

21 8.3.4. Reasonable Compensation

22 The determination of reasonable compensation probably requires the  
23 presentation of expert testimony (See *Evidence Code Sections 801,*  
24 *802*). Factors for consideration by the Court on reasonable  
25 compensation include established comparable compensation from  
26 similar enterprises; the expert must quantify the amount and  
27 importance of the working spouse's efforts; the nature and amount  
28 of time spent in operating the business; the risk factor for the

1 particular industry or business; the actual duties performed by the  
2 spouse within the business. Expert testimony is the preferable  
3 method of demonstrating reasonable compensation. See *Marriage of*  
4 *Rosen* (2002) 105 Cal. App. 4th 808 and *Marriage of Ackerman*  
5 (2006) 146 Cal. App. 4th 191 where the court suggested using a  
6 headhunter or compensation expert to establish reasonable  
7 compensation of a similarly situated person.

#### 8 8.4. Elements of Business Valuation

##### 9 8.4.1. In General

10 Disclosure of relevant information about the business is an important  
11 element in any business valuation. The issue becomes more  
12 complex where a party is a minority shareholder in the business. In  
13 that setting, it is important for the Court to protect the privacy rights  
14 under *California Constitution Article I §1*. See *Schnabel v. Superior*  
15 *Court (Schnabel) (Schnabel I)* (1993) 5 Cal. 4th 704.

##### 16 8.4.2. Accounts Receivables Earned During Marriage

17 Accounts receivable earned during the marriage are community  
18 property even if paid after separation. See: *Marriage of House*  
19 (1975) 50 Cal. App. 3d 578. Valuation of accounts receivable  
20 appropriately includes aging the accounts receivable for  
21 collectability. See Also: *Marriage of Green* (1989) 213 Cal. App.  
22 3d 14, *Marriage of Marx* (1979) 97 Cal. App. 3d 552, *Marriage of*  
23 *House* (1975) 50 Cal. App. 3d 578, *Marriage of Lopez* (1974) 38  
24 Cal. App. 3d 93, *Thomasset v. Thomasset* (1953) 122 Cal. App. 2d  
25 116. Of course, the Court must protect against the disclosure of  
26 confidential information when reviewing accounts receivable for  
27 doctors, lawyers, therapists and others who have a confidential  
28

1 relationship protected by law. See: *Marriage of Lopez* (1974) 38 Cal.  
2 App. 3d 93.

3 8.4.3. Work in Progress

4 Characterization of work in progress depends on the nature,  
5 necessity and extent of the work and when it was completed. See:  
6 *Jewel v. Boxer* (1984) 156 Cal. App. 3d 171, *Champion v. Superior*  
7 *Court (Boccardo)* (1988) 201 Cal. App. 3d 777, *Grossman v. Davis*  
8 (1993) 28 Cal. App. 4th 1833, *Rothman v. Dolin* (1993) 20 Cal. App.  
9 4th 755.

10 8.4.4. Time Rule Apportionment

11 The Court has discretion to apportion between the community estate  
12 and the separate property services rendered in securing a recovery  
13 for a contingent fee case. See: *Waters v. Waters* (1946) 75 Cal. App.  
14 2d 265. Any apportionment is not necessarily a function of the time  
15 spent in producing the result. See: *Marriage of Poppe* (1979) 97  
16 Cal. App. 3d 1. However, use of a time rule formula for  
17 apportionment may be appropriate. See: *Marriage of Kilbourne*  
18 (1991) 232 Cal. App. 3d 1518

19 8.4.5. Balance Sheet Assets

20 On the issue of the tangible assets of the business the Court was  
21 presented the following evidence:

- 22 • X
- 23 • X

24 8.5. Valuation of Business Interests Taking into Account Majority or Minority  
25 Ownership

26 Where a spouse owns a minority interest in a business enterprise, the Court  
27 will typically adjust the value of the interest based on this factor. See:  
28 *Marriage of Behrens* (1982) 137 Cal. App. 3d 562. In the minority interest

1 setting, the degree of control is a significant factor. In *Ronald v. 4-Cs*  
2 *Electronic Packaging, Inc.* (1985) 168 Cal. App. 3d 290, the Court  
3 observed that the lack of control inherent in minority shares would  
4 substantially decrease their value on the open market. Conversely, if there  
5 is a majority ownership interest, the Court may consider a bonus being  
6 awarded for control. Where there are restrictive stock ownership  
7 agreements, valuation may be governed by the agreement. See: *Marriage*  
8 *of Micalizio* (1988) 199 Cal. App. 3d 662 and *Marriage of Rosan* (1972) 24  
9 Cal. App. 3d 885. Significant restrictions on transferability of a minority  
10 interest results in illiquidity that will affect valuation.

## 11 8.6. Goodwill

### 12 8.6.1. In General

13 The goodwill of a business is an intangible asset valued based on the  
14 expectation of continued public patronage. See: *Business &*  
15 *Professions Code Section 14100*. Goodwill is the advantage or  
16 benefit which is acquired by an establishment beyond the mere value  
17 of the capital stock, funds or property employed therein. Goodwill is  
18 the consequence of the general public patronage and encouragement  
19 which a business receives from constant or habitual customers, on  
20 account of its local position, or common celebrity, or reputation for  
21 skill, affluence, or punctuality, or from other accidental  
22 circumstances, or necessities, or even from ancient partialities or  
23 prejudices. More simply, it is the probability that old customers will  
24 return and the business will continue in the future as it has in the past  
25 adding to the profits of the concern and contributing to the means of  
26 meeting its engagements as they come.

### 27 8.6.2. Goodwill Limitations

28 Case law supports the proposition that goodwill does not exist in

1 certain settings. For instance a partner in a large medical partnership  
2 (Kaiser Permanente) is actually in the nature of an employee with no  
3 ownership interest who is paid for services rendered. See: *Marriage*  
4 *of Slivka* (1986) 183 Cal. App. 3d 159. Further, an individual whose  
5 personal skill, experience and knowledge affording him or her elite  
6 professional standing may have an individual expectation of  
7 continued opportunity to perform services, but the individual person  
8 is not possessed of a transferable asset sufficient to result in a  
9 finding of goodwill. In *Marriage of Iredale and Cates* (2004) 121  
10 Cal. App. 4th 321, the Court of Appeal affirmed a finding that a  
11 partner in a large nationwide law practice did not have an individual  
12 component of goodwill within the firm since her partnership  
13 agreement provided that there was no goodwill in the firm for any  
14 member of it.<sup>4</sup> See: *Marriage of McTiernan and Dubrow* (2005)  
15 133 Cal. App. 4th 1090 where the trial court held that a successful  
16 movie producer's standing in the community did not warrant a  
17 finding of a transferable business justifying a finding of goodwill.<sup>5</sup>

### 18 8.6.3. Formulas for Calculation of Goodwill

19 Within certain limitations, the court has discretion to use whatever  
20 formula to determine goodwill that accomplishes substantial justice.  
21 In *Mueller v. Mueller* (1956) 144 Cal. App. 2d 245, the Court of  
22 Appeal approved the use of capitalization of excess earnings

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24 <sup>4</sup> In *Iredale and Cates, supra*, the attorney had her own professional law practice; and she  
25 provided services to the nationwide firm through her professional law corporation. At trial, she  
26 stipulated that she had goodwill within her professional law corporation.

27 <sup>5</sup> Numerous cases affirm trial court findings of goodwill for doctors, lawyers, other professionals  
28 and small and large businesses. See: *Golden v. Golden* (1969) 270 Cal. App. 2d 401.

1 method. *Marriage of Ackerman* (2006) 146 Cal. App. 4th 191, the  
2 Court approved the capitalization of excess earnings method to  
3 calculate goodwill in a medical practice. Typically the capitalization  
4 of excess earnings method relies upon a determination of the  
5 comparable salary of an employee with experience comparable to  
6 the business owner by reference to appropriate journals cataloguing  
7 compensation, and then determining the amount by which this  
8 business owner's income exceeds the normed income resulting in  
9 "excess earnings" which are then capitalized at a justified rate. To  
10 arrive at a fair representation of the business, evaluators typically use  
11 three (3) to five (5) years to determine business trends. Sometimes  
12 averaging or weighting the past years to indicate fair value. The  
13 court is obliged to consider average annual net earnings before taxes  
14 by looking at a reasonably illustrative period of earnings. See:  
15 *Marriage of Garrity and Bishton* (1986) 181 Cal. App. 3d 675 and  
16 *Marriage of Rosen* (2002) 105 Cal. App. 4th 808. The Court cannot  
17 speculate about a hypothetical employment contract in determining  
18 goodwill valuation. See: *Marriage of Duncan* (2001) 90 Cal. App.  
19 4th 617.<sup>6</sup>

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21 <sup>6</sup>Revenue Ruling 68-609 provides that the excess earnings approach is a percentage return on the  
22 average annual value of the tangible assets used in a business determined by using a period of  
23 years (preferably not less than five) immediately prior to the valuation date. The amount of the  
24 percentage return on tangible assets, thus determined is deducted from the average earnings of  
25 the business for such a period and the remainder if any, is considered to be the amount of the  
26 average annual earnings from the intangible assets of the business for the period. This amount  
27 considered as the average annual earnings from intangibles is capitalized a percentage of say 15  
28 to 20 percent is the value of the intangible assets of the business determined under the formula



1 8.6.4. Methods for Determining Goodwill

2 The Court's discretion to determine goodwill does not permit the  
3 Court to split the difference in determining goodwill by picking a  
4 number between the two expert reports. See: *Marriage of Webb*  
5 (1979) 94 Cal. App. 3d 535 and *Marriage of Hargrave* (1985) 163  
6 Cal. App. 3d 346.<sup>7</sup>

7 8.6.5. Goodwill Valuation Should Not Consider Projected Income

8 While the goodwill is the value of an expectation of future earnings,  
9 the Court should refrain from looking at actual future earnings in  
10 determining goodwill valuation. See: *Marriage of Fortier* (1973) 34  
11 cal. App. 3d 384 and *Marriage of Lopez* (1974) 38 Cal. App. 3d 93.<sup>8</sup>

12 Any valuation method that relies upon a potential income approach  
13 impermissibly depends on contemplated future earnings. See:

14  
15 approach. In the typical family law proceeding, business evaluations usually equate to factors of  
16 1 to 5. This is typically called the factor or multiplier. By way of example, if the excess  
17 earnings are \$10,000 and the gross multiplier is 3, then the goodwill is \$30,000. There are no  
18 standardized methods for determining capitalization rates. See Revenue Ruling 59-60.

19 <sup>7</sup> The Court has authority to reject all the testimony on the issue of goodwill, but if it does so, the  
20 Court should consider appointing its own expert under the authority of *Evidence Code Section*  
21 *460* and *Marriage of Hargrave, supra*.

22 <sup>8</sup> The *Lopez, supra*, court articulated factors that affect value for a professional practice as  
23 including the practitioner's age, health, past demonstrated earning power, professional reputation  
24 in the community as to his judgment, skill, knowledge, his comparative professional success, and  
25 the nature and duration of his business as a sole practitioner or as a member of a partnership or  
26 professional corporation to which his professional efforts have made a proprietary contribution.  
27 In addition, consideration should be given to the value of the fixed and other assets of the  
28 professional business with which the goodwill is to continue in relationship.

1 *Marriage of Rives* (1982) 130 Cal. App. 3d 138 and *Marriage of*  
2 *King* (1983) 150 Cal. App. 3d 304.

3 8.6.6. Buy Sell Agreements & Goodwill

4 Courts have discretion to consider the value in a business entity  
5 based on the buy sell agreements of the parties. See: *Marriage of*  
6 *Aufmuth* (1979) 89 Cal. App. 3d 446 [disapproved in *Marriage of*  
7 *Lucas, supra*, on other grounds] and *Marriage of Slater* (1979) 100  
8 Cal. App. 3d 241. Other cases have held that the buy sell agreement  
9 is not conclusive as to the interests of the community estate. See:  
10 *Marriage of Fenton* (1982) 134 Cal. App. 3d 341 and *Marriage of*  
11 *Nichols* (1994) 27 Cal. App. 4th 661.

12 8.6.7. Covenant Not to Compete & Goodwill

13 A covenant not to compete may affect goodwill depending on the  
14 nature of the covenant and whether it was negotiated in good faith  
15 and so long as it is not too speculative to value. See: *Marriage of*  
16 *Czapar* (1991) 232 Cal. App. 3d 1308. In *Marriage of Quay* (1993)  
17 18 Cal. App. 4th 961, the Court of Appeal held that the trial court  
18 must assign all the impact of a covenant not to compete to the entire  
19 community interest since absent the agreement, the sale of the  
20 company would not have taken place and the stock would have had  
21 no actual value.

22 8.7. Methods of Business Valuation

23 8.7.1. Formulas for Public Companies

24 Courts should refrain from using formulas intended to establish  
25 values for publicly traded companies since price earnings formulas  
26 for public traded companies reflect market trends and may not  
27 reflect actual value. See: *Marriage of Lotz* (1981) 120 Cal. App. 3d  
28 379. Instead, the case law proposes the use of methods designed to

1 demonstrate value of a small or closely held company *Marriage of*  
2 *Hewitson* (1983) 142 Cal. App. 3d 874.<sup>9</sup>

### 3 8.7.2. Capitalization Rate

4 After adjusting a business's actual earnings over a reasonably  
5 representative period, adding back excess salary or nonstandard  
6 perquisites, the appraiser determines the expected rate of return  
7 appropriate to the business and the risks.

### 8 8.7.3. Minority Discounts

9 There must be substantial evidence supporting the decision to  
10 impose a minority discount in valuation of the community interest in  
11 a business. See: *Marriage of Micalizio* (1988) 199 Cal. App. 3d  
12 662.

## 13 8.8. Award of Business

14 The Court is required to award the business interest of the parties to the  
15 spouse who possesses the greater skill and ability to run the business. See:  
16 *Marriage of Brigden* (1978) 80 Cal. App. 3d 380, *Marriage of Smith* (1978)  
17 9 Cal. App. 3d 725, *Marriage of Winn* (1979) 98 Cal. App. 3d 554,  
18 *Marriage of Behrens* (1982) 137 Cal. App. 3d 562, *Marriage of Burlini*

---

19  
20  
21 <sup>9</sup> The *Hewitson, supra*, court gave weight to the factors contained in Revenue Ruling 59-60,  
22 which include:(a) the nature of the business and the history of the enterprise from its inception  
23 (b) the economic outlook in general and the condition and outlook of the specific industry in  
24 particular (c) the book value of the stock and the financial condition of the business (d) the  
25 earning capacity of the company (e) the dividend paying capacity (f) whether the enterprise has  
26 goodwill or other intangible value (g) whether the enterprise has goodwill or other intangible  
27 value (h) the sales of stock and the size of the block of stock to be valued (i) the market price of  
28 stocks of corporations engaged in the same or similar line of business whose stocks are actively  
traded in a free and open market.

1 (1983) 143 Cal. App. 3d 65. However, it is not an abuse of discretion to  
2 award a business to an otherwise qualified spouse who has the appropriate  
3 level of skill and training (*Marriage of Kozen* (1986) 185 Cal. App. 3d  
4 1258) unless only a licensed professional practitioner is allowed to operate  
5 the business (*Marriage of Fink (Fink II)* (1979) 25 Cal. 3d 877) See:  
6 *California Corporation Code Section 13406*. Courts are not permitted to  
7 order an interspousal auction of the business. See: *Marriage of Cream*  
8 (1993) 13 Cal. App. 4th 81. While it is possible to order parties to continue  
9 to operate a business together, such situations are rare. Litigation in  
10 dissolution proceedings typically involves such interpersonal hostility so as  
11 to make any post dissolution business companionship impossible. See:  
12 *Marriage of Rives* (1982) 130 Cal. App. 3d 138.

#### 13 8.9. Ruling of the Court

14 The Court makes the following findings and rulings:

- 15 • X
- 16 • X
- 17 • X

#### 18 9. Stock Options & Other Rights

##### 19 9.1. In General

20 Stock options are a property right divisible upon dissolution of marriage.  
21 See: *Marriage of Harrison* (1986) 179 Cal. App. 3d 1216. The principle  
22 question is when the option was earned by the employee spouse, which  
23 usually requires considering the corporation's motives for granting the  
24 options and the type of options awarded. The grant of the options involves  
25 a "striking price" defined as the price at which an employee may buy stock  
26 on or after a fixed date. If an option is granted and vested during the  
27 marriage, the option is divisible community property in which each spouse  
28 has a present and equal interest under *Sections 65, 760 and 751*. Where

1 options require a spouse to remain employed after the separation for the  
2 options to vest, and then typically there is an apportionment between the  
3 community (*Section 760*) and separate property interests (*Section 770*).  
4 Case law supports a time rule formula in making an apportionment. See:  
5 *Marriage of Judd* (1977) 68 Cal. App. 3d 515. Typically in using the time  
6 rule apportionment, the date of the grant is used in the formula although  
7 where the court finds that the options replace an earlier set of options that  
8 had become worthless, the court may use the date of employment. See:  
9 *Marriage of Hug* (1984) 154 Cal. App. 3d 780. Options are typically not  
10 transferable; so that only the employee spouse can exercise the option. The  
11 Court has discretion to order the employee spouse to exercise the option  
12 (*Marriage of Harrison* (1986) 179 Cal. App. 3d 1216) and hold the  
13 proceeds in trust with an appropriate allocation for the income tax  
14 consequences (*Marriage of Nelson* (1986) 177 Cal. App. 3d 150).<sup>10</sup> Most  
15

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16 <sup>10</sup> The *Marriage of Pearlstein* (2006) 137 Cal. App. 4th 1361 court observed that unlike actual  
17 shares of stock, stock options do not represent an ownership interest in the underlying business,  
18 but are merely a contractual right to purchase stock at a set price (the 'strike price'). This right to  
19 purchase stock is usually subject to conditions, such as limitations on when the options may be  
20 exercised, and a requirement that the option holder continue employment with the issuing  
21 company. The value of unexercised stock options is inherently speculative, because it lies in the  
22 potential that a difference may arise, by the time the options are exercised, between the strike  
23 price and the market price. If the market price climbs higher than the strike price, the holder of  
24 the options will be able to realize income, in the form of the difference between the two prices, if  
25 he or she purchases the underlying stock and then immediately sells it. Only if the option holder  
26 chooses to purchase the stock at the strike price, but does not sell it, will he or she have acquired  
27 an equity interest in the underlying business. In order to do that, however, the option holder must  
28 invest funds in the amount of the strike price times the number of shares purchased. (See

1 of the cases in this area are very fact specific as to the terms of the grant  
2 date and exercise date. In *Marriage of Walker* (1989) 216 Cal. App. 3d 644,  
3 the court observed that: "Considerations of exercisability of the options and  
4 vesting of the stocks are, however, extremely significant.... To ignore this  
5 difference is to misconstrue the entire time rule concept.... [T]he  
6 community does not lose its interest in [employment benefits conferred  
7 during marriage] simply because they are ••received•• after separation.  
8 Conversely, however, when the parties separate before the benefits are  
9 vested, the community does not ••receive•• all of them. There must be an  
10 allocation taking into account the periods of time before and after  
11 separation." (*Id.* at p. 651.)<sup>11</sup> The case law differentiates between whether  
12 the options were designed to attract new employees or reward future  
13 efforts. See: *Marriage of Nelson* (1986) 177 Cal. App. 3d 150. The date  
14 on which the option is no longer subject to risk of forfeiture is a key  
15 component in the apportionment. See: *Marriage of Harrison* (1986) 179  
16 Cal. App. 3d 1216.<sup>12</sup>

17  
18 generally *Scully v. US WATS, Inc.* (2001) 238 F.3d 497, 507-508 [explaining nature of executive  
19 stock options generally]; Karns & Hunt, Should Unexercised Stock Options Be Considered  
20 "Gross Income" Under State Law for Purposes of Calculating Monthly Child Support Payments?  
21 (2000) 33 Creighton L.Rev. 235, 253.)

22 <sup>11</sup> See Also Attorney's BriefCase FL 2008.1 EmBe 046.01, et seq.

23 <sup>12</sup> In discussing the issue of the concepts of stock options, Dailey in Attorney's BriefCase FL-  
24 2008.1 EmBe 051.00 observes that: In order to understand how options are valued, one must first  
25 understand what they are:

26 "A stock option is the right to buy a designated stock, if the holder of the option chooses, at  
27 any time within a specified period, at a determinable price, or to sell a designated stock within an  
28 agreed period at a determinable price. An option to buy stock is termed a 'call,' and option to sell

1 10. Contract & Other Rights

2 10.1. In General

3 The Court has discretion to allocate between separate and community  
4 property interests arising from contractual rights. In *Garfein v. Garfein*  
5 (1971) 16 Cal. App. 3d 155, the Court held that where a party entered into a  
6 contract before separation for a pay or play contract, that funds paid under  
7 the contract for post separation efforts or availability under the contract did  
8 not constitute community property. A consulting contract with a covenant  
9 not to compete where the covenant not to compete results in payment of  
10 funds after separation, the funds received for the post separation period are  
11 the separate property of the spouse bound by the covenant. See: *Marriage*  
12 *of Fischer* (1976) 78 Cal. App. 3d 556.

13 10.2. Apportionment

14 The Court may apportion between the community estate and the separate  
15 property of the parties' earnings and profits from a creative effort after  
16 separation as permitted by *Marriage of Zaentz* (1990) 218 Cal. App. 3d  
17 154.

18 10.3. Findings & Ruling of the Court

19 The court makes the following findings and rulings:

20  
21 stock is labeled a 'put,' and an option to do either is denominated a 'straddle.' The terms of the  
22 option determine whether it is or is not transferable." (*Richardson v. Richardson* (Ark. 1983) 280  
23 Ark. 498, 659 S.W.2d 510, 512-513.)

24 "Options to buy or sell listed stock, puts and calls, are regularly traded on listed exchanges."  
25 (*In re Marriage of Harrison, supra*, 179 Cal. App. 3d at p. 1225, fn. 2.) "As a result, many of the  
26 transferable options have a value fixed daily in the marketplace just as does traded common  
27 stock." (*Richardson v. Richardson, supra*, 280 Ark. at p. 513.)

1           •     X

2           •     X

3 11.    Loan Proceeds

4        11.1. In General

5           Typically proceeds from a loan are characterized based on the intention of  
6           the lender who granted the loan; so that the Court should determine the  
7           intent of the lender in characterizing the loan and its proceeds as separate or  
8           community property. See: *Gudelj v. Gudelj* (1953) 41 Cal. 2d 202 and  
9           *Marriage of Lucas* (1980) 27 Cal. 3d 808. However, the lender's intent is  
10          only one factor as indicated in *Marriage of Stitt* (1983) 137 Cal. App. 3d  
11          579. See also: *Marriage of Neal* (1984) 153 Cal. App. 3d 117.

12        11.2. Findings & Ruling of the Court

13           The court makes the following findings and rulings:

14           •     X

15           •     X

16 12.    Personal Injury Proceeds

17        12.1. In General

18           Where the cause of action arises during marriage, personal injury proceeds  
19           are community property under *Section 780*. If the cause arises after  
20           separation or entry of judgment, then the proceeds are the separate property  
21           of the injured spouse under *Section 781*. There are special rules for injuries  
22           sustained by one spouse as a result of the actions of the other under  
23           *Sections 782, 782.5 and 783*.

24        12.2. Award to the Injured Party

25           Where the community estate personal injury damages (See *Section*  
26           *2603(a)*) received as a result of a cause of action for damages that arose  
27           during the marriage (not otherwise separate property under *Section 781*)  
28           unless commingled with other assets of the community estate, those



1 damages shall be assigned to the party who suffered the injuries under  
2 *Section 2603(b)*.

3 12.3. Award of Portion of Proceeds to the Non-Injured Party

4 The Court may award a portion of the proceeds of a community estate  
5 personal injury award under *Section 2603(b)* based:

- 6
- 7 • The economic needs of each party
  - 8 • The time that has elapsed since the recovery of the damages
  - 9 • All other facts of the case as determined by the Court demonstrate that  
10 the interests of justice require another disposition.

11 The Court possesses broad discretion in awarding the personal injury  
12 proceeds. See: *Marriage of Devlin* (1982) 138 Cal. App. 3d 804; but in any  
13 case, the injured spouse shall be awarded at least one half of the damages.

14 The Court is not required to make an equalizing or offsetting award from  
15 the other assets. See: *Marriage of Morris* (1983) 139 Cal. App. 3d 823 and  
16 *Marriage of Klug* (200) 130 Cal. App. 4th 1389.

17 12.4. Ruling of the Court

18 The Court makes the following rulings and findings:

- 19
- 20 • X
  - 21 • X

22 13. Other Assets

23 13.1. Severance Pay- Under *Marriage of Horn* (1986) 181 Cal. App. 3d 540 the  
24 character of the severance pay follows the period for which services would  
25 be provided and subject to apportionment between community and separate  
26 property.

27 13.2. Term Insurance- There are cases that hold term insurance is divisible upon  
28 divorce (*Marriage of Gonzalez* (1985) 168 Cal. App. 3d 1021) or is  
divisible (*Marriage of Lorenz* (1983) 146 Cal. App. 3d 464).

1 13.3. Accrued Vacation or Sick Pay- is community property under *Suastez v.*  
2 *Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774.

3 13.4. Frequent Flyer Mileage

4 13.5. Jewelry

5 13.6. Annuities

6 13.7. Pets

7 13.8. Choses in Action may be community property- *Schauer v. Mandarin Gems*  
8 *of California* (2005) 125 Cal. App. 4th 949.

9 14. Preemption Under Federal Law

10 14.1. In General

11 Under the Preemption Clause of the United States Constitution, the  
12 ownership interests of a party in certain assets are governed by Federal  
13 Law. See: *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572 and *McCarty v.*  
14 *McCarty* (1981) 453 U.S. 210. In the absence of Federal Legislation  
15 authorizing state court action, the California Court may not divide interests  
16 in property right in assets where the Federal Government has intentionally  
17 occupied the field. There are some federal enabling legislative provisions  
18 for some assets, most notably military retirement benefits where federal law  
19 permits division between spouses under certain conditions.<sup>13</sup> The mere fact  
20 that a particular asset is created by Federal Law does not mean that the  
21 Federal Government has *occupied the field* as defined by the law of  
22 preemption. For instance, interests in copyrights may be divided between  
23 the parties See: *Marriage of Worth* (1987) 195 Cal. App. 3d 768.

24 14.2. Assets Preempted by Federal Law

25 The following assets are preempted under federal law:

- 26 • Federal Savings Bonds- *Yatchos v. Yatchos* (1964) 376 U.S. 306

27  
28 <sup>13</sup> See the Uniformed Services Former Spouses' Protection Act 10 USC §1408 (USFSPA).

- 1 • Military Insurance Policies- *Wissner v. Wissner* (1950) 338 U.S. 655
- 2 and *Ridgway v. Ridgway* (1981) 454 U.S. 46.
- 3 • Primary Social Security Benefits- *Marriage of Hillerman* (1980) 109
- 4 Cal. App. 3d 334.

#### 5 14.3. Ruling of the Court

6 The Court makes the following rulings and findings on the question of  
7 whether these assets are awarded without offset or equalization because of  
8 the doctrine of preemption:

- 9 • X
- 10 • X

#### 11 15. Reimbursement Claims for Contributions to the Community or Separate Estate

##### 12 15.1. In General

13 Under *Section 2640*, grants the Court jurisdiction to reimburse traceable  
14 contributions to the acquisition of property of the community property  
15 estate. Special rules govern any waiver of the right of reimbursement.  
16 *Section 2640* reach extends reimbursement rights to the parties who  
17 acquired the property prior to marriage in joint names. See: *Marriage of*  
18 *Weaver* (2005) 127 Cal. App. 4th 858.

##### 19 15.2. Contributions to the Acquisition of Property

20 A contribution to the acquisition of property under *Section 2640(a)*  
21 includes:

- 22 • Down payments
- 23 • Payments for improvements
- 24 • Payments that reduce the principal of a loan used to finance purchases
- 25 • Improvement of the property.

26 Contributions do **not include** payments of interest on the loan or payments  
27 made for maintenance, insurance or taxation of the property. For instance,  
28 reimbursement is not permitted for the use of separate property used to pay

1 down unsecured debt to improve the credit score of parties so they may  
2 qualify for an acquisition loan. See: *Marriage of Nicholson and Sparks*  
3 (2002) 104 Cal. App. 4th 289. Taxes are defined as property taxes so that  
4 reimbursement was permitted for mitigation fees imposed by a municipality  
5 incident to the acquisition of a building permit. These fees constituted fees  
6 related to the improvement itself. See: *Marriage of Cochran* (2001) 87 Cal.  
7 App. 4th 1050.

### 8 15.3. Requirements for Waiver of Interests

9 *Section 2640(b)* provides the right of reimbursement is automatic unless it  
10 is waived. A waiver must be a signed writing that has the effect of a  
11 waiver. A deed of transfer alone is not sufficient under *Marriage of Fabian*  
12 (1986) 41 Cal. 3d 440. An annotation on a deed of transfer that the transfer  
13 was a gift is not sufficient under *Marriage of Perkal* (1988) 203 Cal. App.  
14 3d 1198. A note and deed of trust is also not sufficient under *Marriage of*  
15 *Lange* (2002) 102 Cal. App. 4th 360. A prenuptial agreement with  
16 provisions that a separate property residence would be deemed community  
17 property after marriage was not a sufficient waiver of rights of  
18 reimbursement. See: *Marriage of Carpenter* (2002) 100 Cal. App. 4th 424.  
19 *Marriage of Perkal, supra*, indicates that a waiver of reimbursement under  
20 *Section 2640* requires a showing of:

- 21 • A voluntary act
- 22 • Knowingly done
- 23 • With sufficient awareness of the relevant circumstances and likely  
24 consequences.

### 25 15.4. Reimbursement is Subject to Tracing of Interest

26 *Section 2640* reimbursement requires tracing of the contribution to a  
27 separate property source. Where separate property funds are used to  
28 acquire other assets, those traceable contributions may be extended to the

1 other assets such as where a party borrows money by refinancing property.

2 See: *Marriage of Walrath* (1998) 17 Cal. 4th 907.

3 15.5. Extent of Reimbursement

4 Reimbursement rights are limited under *Section 2640(b)*. The amount of  
5 reimbursement shall not exceed the net value of the property at the time of  
6 the division. See: *Marriage of Neal* (1984) 153 Cal. App. 3d 117.

7 15.6. Reimbursement for Separate Property To Other Spouse

8 Where a spouse contributes separate property to the separate property of the  
9 other spouse, then the contributing spouse shall be reimbursed under  
10 *Section 2640(c)* unless there is a waiver and transmutation in writing. The  
11 amount of the reimbursement shall not exceed the net value of the property  
12 at the time of the division.

13 15.7. Findings & Ruling on Issue of Reimbursement

14 The Court makes the following findings and rulings on the issue of  
15 reimbursement:

- 16 • X  
17 • X

18 16. Moore & Marsden Claims for Reimbursement to the Community Estate

19 16.1. In General

20 *In Re Marriage of Moore* (1980) 28 Cal. 3d 366 permits apportionment  
21 between the community property and the separate property where  
22 community property is used to improve or service debt on separate  
23 property. A return of the community property contribution based on the  
24 reduction of the principal balance on the loan is made to the community  
25 estate. Additionally, the community estate is awarded an apportioned  
26 interest in the increased value of the separate property under *Marriage of*  
27 *Marsden* (1982) 130 Cal. App. 3d 426. The trial court may properly  
28 apportion appreciation in residential or commercial properties using the

1 *Moore, supra*, formula calculating separate and community property  
2 percentages based on the purchase price. See *Marriage of Frick* 181 Cal.  
3 App. 3d 997, and *Marriage of Nelson* (2006) 139 Cal. App. 4th 1546.

4 16.2. Findings & Rulings on Reimbursement to the Community Estate

5 The Court makes the following findings and rulings on the issue of  
6 reimbursement:

- 7 • X
- 8 • X

9 17. Reimbursement for Contribution to Education or Training

10 17.1. In General

11 The community estate shall be reimbursed for contributions to the  
12 education of a spouse subject to specific limits set forth in *Section 2641*.

13 **The Court should review these requirements at the time of the ruling.**

14 17.2. Ruling on Issue of Educational Expense Reimbursement

15 The Court makes the following findings and rulings on the issue of  
16 reimbursement:

- 17 • X
- 18 • X

19 18. Other Equitable Reimbursements

20 18.1. In General

21 Where a spouse acts in bad faith, the Court may order a reimbursement to  
22 the community property. For instance, where a spouse acts in bad faith by  
23 using community property for payment of a separate property debt, the  
24 Court may order reimbursement to the community estate. See: *Marriage of*  
25 *Lister* (1984) 152 Cal. App. 3d 411. Where a spouse wastes community  
26 property assets, the Court may order reimbursement to the community state.

1 See: *Marriage of Czapar* (1991) 232 Cal. App. 3d 1308.<sup>14</sup>

2 18.2. Ruling on Other Equitable Reimbursements

3 The Court makes the following findings and rulings on the issue of other  
4 equitable reimbursement:

- 5 • X
- 6 • X

7 19. Reimbursement to the Community Estate for the Use of Assets

8 19.1. In General

9 Where one spouse has the use of an asset, the Court has jurisdiction to  
10 order the spouse who had the use of the asset to reimburse the community  
11 estate for the use of the asset. See: *Marriage of Watts* (1985) 171 Cal. App.  
12 3d 366. Authority to order reimbursement includes the power to order a  
13 spouse to reimburse the community estate for the reasonable rental value of  
14 the asset. See: *Marriage of Jeffries* (1991) 228 Cal. App. 3d 548. The  
15 power to order reimbursement includes reimbursement to the spouse who  
16 paid any expenses related to the asset such as the mortgage.

17 19.2. Ruling on Other Equitable Reimbursements

18 The Court makes the following findings and rulings on the issue of other  
19 equitable reimbursement:

- 20 • X
- 21 • X

22 20. Reimbursement to the Community Estate for Use of Funds to Improve the  
23 Separate Property of the Other Spouse

24 20.1. In General

25 Community property funds used to pay for improvements to one spouse's  
26

---

27 <sup>14</sup> These forms of equitable reimbursement are independent of rights for claims of breach of  
28 fiduciary duty discussed herein.

1 separate property are not presumed to be a gift and shall be reimbursed to  
2 the community estate. See: *Marriage of Wolfe* (2001) 91 Cal. App. 4th  
3 962. The trial court has discretion to order not only a dollar for dollar  
4 reimbursement, but the reimbursement may extend to consideration of the  
5 extent to which the use of the community property funds had added value  
6 to the underling property. See: *Marriage of Allen* (2002) 96 Cal. App. 4th  
7 497. The Court's obligation includes determining the extent to which the  
8 contributions had increased the value of the property. See: *Bono v. Clark*  
9 (2002) 103 Cal. App. 4th 1409.

#### 10 20.2. Ruling on Reimbursements

11 The Court makes the following findings and rulings on the issue of  
12 reimbursement to the community property estate for use of funds to  
13 improve the separate property of the other spouse:

- 14 • X
- 15 • X

#### 16 21. Fiduciary Duty Claims

##### 17 21.1. In General

18 Under *Section 720*, parties contract toward each other obligations of mutual  
19 respect, fidelity and support. *Section 721(b)* describes marriage as a  
20 confidential relationship that imposes a duty of the highest good faith and  
21 fair dealing which prohibits spouses from taking unfair advantage of the  
22 other. Spouses owe each other a fiduciary duty. This fiduciary duty  
23 includes providing complete access to records, providing true and correct  
24 information, accounting and holding as a trustee any benefit or profit  
25 derived from any transaction by one spouse without the consent of the other  
26 spouse. Under *Section 1100(e)*, the fiduciary duty includes the obligations  
27 to make a full disclosure of all material facts and information regarding the  
28 existence, characterization and valuation of all assets in which the



1 community has or may have an interest and debts for which the community  
2 is or may be liable and to provide equal access to all information pertaining  
3 to those matters. The duty of a spouse to the other spouse is created by and  
4 defined by the *Family Code*. Courts are not permitted to create new rights  
5 or obligations beyond those established by the *Code*. See: *Marriage of*  
6 *Leni, supra*.

#### 7 21.2. Length & Scope of Duty

8 Each party's fiduciary duty under *Section 721* applies to any activity  
9 affecting the assets and liabilities from the date of separation to the date of  
10 distribution of the assets or liabilities in question. The duty applies to  
11 community and separate property transactions. See: *Marriage of Walker*  
12 (2006) 138 Cal. Ap. 4th 1408. The duty includes but is not limited to the  
13 following:

- 14 • Accurate and complete disclosure of all assets and liabilities in  
15 which the party has or may have an interest or obligation under  
16 *Section 2102(a)(1)*. This disclosure duty includes an immediate, full  
17 and accurate update or augmentation of any material changes.
- 18 • As provided by *Section 2102(a)(2)*, accurate and complete written  
19 disclosure of any investment opportunity, business opportunity or  
20 other income-producing opportunity that presents itself after the date  
21 of separation that results from any investment, significant business  
22 activity outside the ordinary course of business. All written  
23 disclosures shall be made in sufficient time for the other spouse to  
24 make an informed decision as to whether to participate in the  
25 investment opportunity, business or other potential income  
26 producing opportunity. The remedy for nondisclosure of an  
27 investment opportunity is governed by the standards provided by  
28 *Section 2556*.

- 1           •     The operation or management of a business or an interest in a  
2           business in which the community may have an interest under *Section*  
3           *2102(a)(3)*.
- 4           •     Under *Section 2102(b)*, between the time of any valid, enforceable  
5           and binding resolution of the disposition of the asset or liability in  
6           question is reached, until the asset or liability has actually been  
7           distributed, the standards of *Section 721* apply. Once the particular  
8           asset or liability is distributed, the duties and standards under *Section*  
9           *721* shall end as to that asset or liability.
- 10          •     Under *Section 2102(c)*, the fiduciary duty under *Section 271*  
11          continues as to all issues relating to the support and fees, including  
12          immediate, full and accurate disclosure of all material facts and  
13          information regarding the income or expenses of the party.

#### 14   21.3. Remedies for Breach of Fiduciary Duty

15           The Court has the following remedies for a breach of fiduciary duty under  
16           *Section 1101(b)* and *1101(c)*:

- 17          •     Order an accounting
- 18          •     Determine rights of ownership
- 19          •     Classify the property
- 20          •     Reform title to add the name of the claimant spouse unless title is  
21          held in a partnership, unincorporated business or where revision  
22          would adversely affect the rights of a third person.

#### 23   21.4. Statute of Limitations & Laches

24           For transactions that occurred after July 1, 1987, the statute of limitations  
25           for breach of fiduciary duty is three (3) years under *Section 1101(d)(1)*.

26           Also, the doctrine of Laches applies as provided by *Section 1101(d)(3)*.

#### 27   21.5. Waiver of Consent of Spouse

28           *Section 1101(e)* gives the court jurisdiction so it may waive the consent of

1 one spouse to a transaction if the transaction is in the best interests of the  
2 community estate (*Section 1101(e)(1)*) or where consent by one spouse has  
3 been arbitrarily refused or cannot be obtained because of a lack of capacity  
4 or prolonged absence (*Section 1101(e)(2)*).

5 21.6. Remedies for Breach of Fiduciary Duty

6 Under *Section 1101(g)*, the Court may award 50% of the value of the  
7 property plus attorney's fees and costs at the highest value of the property,  
8 or such other value as determined by the Court. If the breach of fiduciary  
9 duty is conduct compensable as an act of oppression, fraud or malice under  
10 *Civil Code Section 3294*, the Court may award 100% of the property or  
11 value of the property and attorney's fees and costs of the property to the  
12 claimant spouse. See: *Marriage of Rossi* (2001) 90 Cal. App. 4th 34.

13 21.7. Nondisclosure of Income As Breach

14 Where one spouse does not disclose his or her true income, this conduct  
15 may constitute a breach of the fiduciary duty under *Section 2102*. See:  
16 *Marriage of Geraci* (2006) 144 Cal. App. 4th 1278.

17 21.8. Power to Set Aside Transactions

18 Under *Section 1102(a)* the Court may set aside transactions involving a  
19 breach of fiduciary duty where a spouse has entered into a lease of real  
20 property for more than one year or any sale or conveyance or encumbrance  
21 of the property up to one half (1/2) the amount involved.

22 21.9. Showing of Harm Not Required

23 There is no requirement of a showing of economic harm before remedies or  
24 sanctions for breach of the fiduciary duty may be imposed. See: *Marriage*  
25 *of Feldman* (2007) 153 Cal. App. 4th 1470.

26 21.10. Presumption of Undue Influence in Interspousal Transactions

27 Where a spouse uses undue influence to obtain an interest in property, the  
28 court may set aside the transaction. See: *Marriage of Balcof, supra*. When

1 a spouse acts under duress because of the actions of the other spouse, the  
2 Court can set aside the transaction. See: *Marriage of Matthews* (2005) 133  
3 Cal. App. 4th 624.

4 Because the parties owe each other a fiduciary duty concerning any  
5 disposition of any asset, the decisional law extends the right to claim undue  
6 influence as a defense to a claim of a valid transfer of an interest in the  
7 property of the parties. See: *Marriage of Haines* (1995) 33 Cal. App. 4th  
8 277. *Marriage of Delaney* (2003) 111 Cal. App. 4th 991 extends the  
9 fiduciary duty to any Interspousal property transaction where evidence is  
10 offered that one spouse was disadvantaged by the other. In transactions  
11 between spouses, there is a presumption of undue influence which may be  
12 rebutted by a preponderance of the evidence under *Evidence Code Section*  
13 *115*. See: *Marriage of Matthews* (2005) 133 Cal. App. 4th 624. When  
14 neither spouse gains an unfair advantage and both obtain advantages  
15 because of the transaction, the presumption of undue influence does not  
16 apply. See: *Marriage of Burkle (Burkle II)* (2006) 139 Cal. App. 4th 712.

#### 17 21.11. Single or Series of Transactions

18 Among other things, the Court must determine whether a breach of  
19 fiduciary duty has occurred that has had a detrimental impact upon the  
20 community estate under *Section 1101(a)*, the Court is obligated to make  
21 findings on whether a single or pattern or series of transactions have caused  
22 a detrimental impact on the claimant spouse.

#### 23 21.12. Findings and Rulings

24 The Court makes the following findings and rulings on the issue of undue  
25 influence claims between the parties:

- 26 • X
- 27 • X
- 28 • X

1 22. Division of the Community Property Estate

2 As required by *Section 2550*, the Court divides the community property estate  
3 equally between the parties.

4 23. Findings Concerning the Community Property Estate

5 The Community Property Estate consists of the following:

6 23.1. X

7 23.2. X

8 24. Award of Community Property to the Petitioner

9 Petitioner is awarded the following community property assets at the values  
10 assigned here:

11 24.1. X

12 24.2. X

13 25. Award of Community Property to the Respondent

14 Respondent is awarded the following community property assets at the values  
15 assigned here:

16 25.1. X

17 25.2. X

18 26. Reservation of Jurisdiction to Divide Community Property Assets

19 The Court reserves jurisdiction to divide the following community property assets:

20 26.1. X

21 26.2. X

22 27. The Separate Property Interests of the Parties

23 27.1. Tracing of Separate Property Interests

24 Separate property does not lose its character as separate property as long as  
25 it is ascertainable as separate under *Hicks v. Hicks* (1962) 211 Cal. App. 2d  
26 144. The two methods of tracing are commonly called the direct tracing  
27 method and the indirect tracing method. The burden of proof to trace a  
28

1 separate property interest rests with the person claiming it. See: *Mason v.*  
2 *Mason* (1960) 186 Cal. App. 2d 209.

3 27.2. Direct Tracing

4 In *Marriage of Mix* (1975) 14 Cal. 3d 604 the court held that separate  
5 property is directly traced if there is a showing of a chronological  
6 itemization of the source and use of funds with credible testimony  
7 establishing an intention to use separate property. See also: *Beam v. Bank*  
8 *of America* (1971) 6 Cal. 3d 12 and *Marriage of Johnson* (1983) 143 Cal.  
9 App. 3d 57. A lack of adequate records may result in the Court finding a  
10 failure to trace the separate property interest. See: *Marriage of Marsden*  
11 (1982) 130 Cal. App. 3d 426 and *Marriage of Higinbotham* (1988) 203 Cal.  
12 App. 3d 322.

13 27.3. Sufficiency of Evidence- the Court may rely on the credible testimony of a  
14 single witness as a basis to justify a finding that separate property was  
15 traced. See *Marriage of Mix, supra*, where the court found that the spouse  
16 seeking reimbursement of separate property had not fully traced every  
17 transaction. In *Marriage of Ettefagh* (2007) 150 Cal. App. 4th 1578, the  
18 Court of Appeal rejected the requirement of showing that the burden of  
19 proof by clear and convincing evidence is necessary to rebut *Section 760* of  
20 the *Family Code* [presumption property acquired during marriage is  
21 community property]. According to the panel, only a preponderance of  
22 evidence [*Evidence Code Section 115*] is required to overcome the  
23 presumption of community property under *Section 760*. Further, the  
24 credible testimony of a single witness may be sufficient to establish a  
25 tracing of separate funds.

26 27.4. Indirect Tracing- under the family expense method of tracing separate  
27 property, there must be a showing of an agreement for reimbursement and  
28 there must be a restatement of the family finances demonstrating that the

1 community expenses exceeded the community property income at the time  
2 of the acquisition as established by the court in *See v. See, supra*. Further,  
3 there must be a showing of the actual use of funds and payments made  
4 when separate property funds were present in the account as required by  
5 *Marriage of Higinbotham* (1988) 203 Cal. App. 3d 322.

6 27.5. Ruling of the Court

7 The Court makes the following findings and rulings:

- 8 • X
- 9 • X
- 10 • X

11 28. The Separate Property of Petitioner

12 28.1. The Court finds that the separate property of the Petitioner consists of the  
13 following:

14 28.2. X

15 28.3. X

16 29. The Separate Property of Respondent

17 The Court finds that the separate property of the Petitioner consists of the  
18 following:

19 29.1. X

20 29.2. X

21 30. Liabilities

22 30.1. In General

23 For the purposes of this ruling, debt means an obligation incurred by a  
24 married person before or during marriage whether based on contract, tort or  
25 otherwise under *Section 902*. A contractual debt is incurred when the  
26 contract is made. A debt arising from a tort occurs when the tort occurs;  
27 and in other cases, a debt occurs when the obligation arises as provided by  
28 *Section 903*. Community property is liable for the debts of a married

1 person whether the debt occurred before marriage or during marriage  
2 occurred under *Section 910 (a)*. The compensation for personal services of  
3 a spouse earned during the marriage are not liable for the debts of the other  
4 spouse if the debt was incurred before marriage so long as the earnings  
5 remain on deposit in a deposit account solely in the name of the spouse who  
6 is not liable for the debt as provided by *Section 911*. This rule for liability  
7 for debt extends to quasi-community property under *Section 912*. As  
8 provided by *Section 913*, the separate property of a spouse is liable for all  
9 debts incurred by the person incurring the debt regardless of when the debt  
10 was incurred. A married person is liable for the debts incurred for the  
11 necessities of life of their spouse or for common necessities of life of the  
12 person's spouse while the spouse are living separately under *Section 914*.  
13 In the absence of a written waiver of the right of reimbursement (*Section*  
14 *920(a)*), the measure of the right of reimbursement is equal to the value of  
15 the property or interest in property at the time the right arises. Under  
16 *Section 920(c)* a party must exercise the right of reimbursement at the  
17 earlier of three (3) years after the spouse has actual knowledge of the gift or  
18 at the time of the division of the community property estate. This ruling  
19 divides all the liabilities for which the community estate is liable which are  
20 unpaid at the time of trial community as required by *Section 2620*. Any  
21 premarital debts of the parties are confirmed without offset to the spouse  
22 who incurred the debt. As required by *Section 2551*, the court  
23 characterizes, confirms and assigns the liabilities of the parties equally  
24 between the parties as required by *Section 2622(a)*. Where the community  
25 debts exceed the total community and quasi-community assets, the excess  
26 of debt shall be assigned as the court deems just taking into account factors  
27 such as the parties' relative ability to pay as permitted under *Section*  
28 *2622(b)*. As a general rule, debts incurred after the date of separation but



1 before the entry of the judgment shall be confirmed to the spouse incurring  
2 the debt. As permitted by *Section 2623(a)*, the Court does have jurisdiction  
3 to make an award of debts incurred after the date of separation for the  
4 common necessities of life according to the parties' respective needs and  
5 ability to pay at the time the debt was incurred; and any such award of  
6 debts for the common necessities of life of a party may be made without  
7 offset (See *Section 2623*). Debts incurred after entry of a judgment of  
8 dissolution of marriage, but before termination of the parties' marital status  
9 shall be confirmed without offset to the spouse who incurred the debt under  
10 *Section 2624*. Separate property debts include those debts incurred by a  
11 spouse before the date of marriage or incurred by a spouse during marriage  
12 and before the date of separation that were not incurred for the benefit of  
13 the community. Debts that fall within this category shall be assigned to the  
14 spouse who incurred the obligation without offset under *Section 2625*.

15 30.2. Presumption Where Separate & Community Funds Commingled

16 Where community property funds and separate property funds are  
17 commingled into a single account, the Court must presume that the  
18 community funds are used to pay community debts. See: *Marriage of*  
19 *Cochran* (2001) 87 Cal. App. 4th 1050.

20 30.3. Exception for Purchases Made in Anticipation of Separation

21 Where a spouse incurs debt in anticipation of separation, then the Court has  
22 discretion to award the obligation to the spouse as a separate obligation  
23 without offset or equalization. See: *Marriage of Mahone* (1981) 123 Cal.  
24 App. 3d 17.<sup>15</sup>

25 30.4. Equitable Reallocation

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27 <sup>15</sup> Allocation of debts in this manner is equitable allowed and is a remedy independent of any  
28 remedy for breach of fiduciary duty.

1 Where a spouse acts in bad faith and creates a liability to the community  
2 estate, the court has equitable authority to reallocate the obligation between  
3 the parties. For instance in *Marriage of Stitt* (1983) 147 Cal. App. 3d 579,  
4 the Court assigned liability for embezzled funds to the spouse who  
5 committed the act. Where the community actually benefits from the  
6 wrongful conduct, the Court may exercise its discretion to equally assign  
7 any obligation. See: *Marriage of Bell* (1006) 49 Cal. App. 4th 300.<sup>16</sup>

8 30.5. Summary of Findings

9 Based on the evidence presented, the Court makes the following findings:

- 10 • X
- 11 • x

12 31. Award of Obligations to the Petitioner

13 As provided by *Section 2620*, Petitioner is awarded the following community  
14 property debts:

15 31.1. X

16 31.2. X

17 32. Confirmation of Separate Property Debts to Petitioner

18 As provided by *Section 2621*, Petitioner is confirmed the following separate  
19 property debts:

20 32.1. X

21 32.2. X

22 33. Award of Obligations to the Respondent

23 As provided by *Section 2620*, Respondent is awarded the following community  
24 property debts:

25 33.1. X

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26  
27 <sup>16</sup> Allocation of debts in this manner is equitable allowed and is a remedy independent of any  
28 remedy for breach of fiduciary duty.

1 36.3.2.1. X

2 37. Tax Considerations

3 37.1. In General

4 Generally, courts divide assets without consideration of the tax basis or  
5 other tax matters related to the asset. To justify consideration of a tax  
6 consequence on the division of the community property, must find that the  
7 consequences are: (a) immediate (b) specific and (c) in connection with the  
8 dissolution of the marriage. See: *Marriage of Fonstein* (1976) 17 Cal. 3d  
9 738, *Marriage of Epstein* (1979) 24 Cal. 3d 76. Under state and federal tax  
10 law, an award of property between the parties qualifies as a nontaxable  
11 event under *Internal Revenue Code Section 1041*.

12 37.2. Findings and Rulings of the Court

13 The Court makes the following findings and rulings on the issue of tax  
14 consequences:

- 15 • X
- 16 • X

17 38. General Provisions

18 38.1. X

19 38.2. X

20 38.3. X

21 38.4. X

22 Date: x

23  
24 \_\_\_\_\_  
25 X  
26 JUDGE OF THE SUPERIOR COURT  
27  
28