

# THE SLIP AND FALL OF THE CALIFORNIA LEGISLATURE IN THE CLASSIFICATION OF PERSONAL INJURY DAMAGES AT DIVORCE AND DEATH

*Helen Y. Chang*<sup>\*</sup>

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## I. INTRODUCTION

With the adoption of the 1849 Constitution, California affirmed the continuation of Spanish-Mexican community property principles and expressly rejected the common law doctrines of dower and curtesy.<sup>1</sup> What distinguishes the community property system from the common law is the community

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<sup>\*</sup> Associate Professor of Law, Golden Gate University School of Law. My deepest gratitude and appreciation to colleagues and friends: Professor Michael Zamperini, Professor Marc Greenberg, and Professor Janice Kosel. Without their support, comments, and encouragement, this article could not have been completed. And of course, my thanks to my family for their patience, understanding, and unconditional love throughout my research and writing.

1. Act of Apr. 17, 1850, ch. 105, Calif. Stats 1849-50, 294.

property system's retention of separate property interests for property acquired before marriage, property acquired by gifts, and the use of equal shared ownership for property acquired during the marriage.<sup>2</sup> Today, California is one of nine community property states, but the state stands alone in its classification and treatment of personal injury damages.<sup>3</sup> The eight other community property states classify personal injury damages according to the replacement purpose of each component part.<sup>4</sup> For example, compensation for earnings lost during the marriage is classified as community property, but compensation for earnings lost after divorce or death is classified as separate property of the injured spouse.<sup>5</sup> California is the only state that rejects this replacement analysis and, instead, follows a unitary approach classifying personal injury damages in toto.<sup>6</sup> Personal injury monies are treated as either community property or separate property depending on two factors: (1) when the cause of action arose, and (2) if the parties divorce.<sup>7</sup> The California statute is silent as to the classification and disposition of such monies at death; the statute classifies these monies as community property by default.<sup>8</sup>

This Article addresses the various problems that arise from this convoluted scheme of classification and treatment. By classifying all personal injury proceeds as community property during marriage, the California legislature failed to consider the nature of personal injury damages as replacement compensation for both economic damages, such as past lost wages, future lost wages, lost earning capacity, medical expenses, as well as

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2. See Michael Diehl, *The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interests on Divorce*, 64 TEXAS L. REV. 1301, 1310-11 (1986).

The two pertinent distinguishing characteristics of the community property tradition remain, first, the retention of individual ownership rights by each spouse and, second, both spouses' shared title in property acquired during marriage. Two forms of property existed: (1) the separate assets of each spouse, acquired before marriage, or during marriage by gift or inheritance; and (2) community property, acquired during marriage, usually involving the exchange of effort or other consideration traceable to and arising out of the time of the marriage.

*Id.*

3. *Id.* at 1304 n.8. There are eight other community property states: Arizona, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. *Id.* at 1309. The community property system is distinguished from the traditional common law in its concept of a shared economic marital unit in which both spouses equally own the marital property. *Id.* The eight other community property states follow a replacement analysis in their classification and treatment of personal injury damages with the result that the damages are classified in part as community property and in part as the separate property of the injured spouse. See LA. CIV. CODE ANN. art. 2344 (1973 & Supp. 2008); NEV. REV. STAT. § 123.121(1) (2007); *Brown v. Brown*, 675 P.2d 1207, 1213 (1984); *Jurek v. Jurek*, 606 P.2d 812, 815 (1980); *Rogers v. Yellowstone Park Co.*, 539 P.2d 566, 572 (1974); *Soto v. Vandeventer*, 245 P.2d 826, 832 (1952). Wisconsin adopted the Uniform Marital Property Act of 1983. UNIF. MARITAL PROP. ACT 9A U.L.A. 110-58 (1998).

4. See discussion *supra* note 3.

5. See *id.*

6. See *id.*; *infra* Part II.A.

7. CAL. FAM. CODE § 2603(b) (West 2008). Upon dissolution, personal injury damages are assigned to the injured spouse unless the interests of justice require otherwise, but upon such a determination, at least one-half of the damages shall be so assigned. *Id.*

8. See § 2603.

non-economic damages of pain and suffering.<sup>9</sup> These component parts could readily be allocated for classification.<sup>10</sup> Instead, the monies are classified as community property in toto during marriage and are awarded to the injured spouse at divorce absent proof that justice requires an alternate disposition.<sup>11</sup> The California statute provides an ambiguous standard as to when “justice require[s] another disposition” of the proceeds at dissolution, leaving the court with broad discretion over the division of such monies at divorce and leaving little predictability for spouses.<sup>12</sup>

Although the California Family Code specifies the classification of personal injury damages during marriage and directs their disposition at divorce, the California Family Code fails to provide a specific classification or distribution upon death.<sup>13</sup> Thus, personal injury damages are often treated as community property at death as within California’s general community property definition.<sup>14</sup> The classification of personal injury damages at death has a significant effect on estate tax liability and on a spouse’s testamentary control over such monies.

Part I of this Article provides an overview of California’s no-fault divorce reform, its haphazard development of community property laws, and the problems with the current statute classifying personal injury damages as community property during marriage and assigning those damages to the injured spouse at divorce, unless the interests of justice require an alternate disposition. Part II discusses the treatment and classification of personal injury damages in the eight other community property states and also offers a brief historical explanation of each state’s community property origins. Part III concludes that the California legislature should amend the statute to classify personal injury damages according to a replacement analysis for division at both divorce and death.

## II. CALIFORNIA’S HISTORICAL TREATMENT OF PERSONAL INJURY DAMAGES

Historically, the California legislature’s treatment of personal injury awards for purposes of classification, as either community or separate property, was inconsistent. Until 1957, California classified personal injury awards as community property.<sup>15</sup> Separate property was defined as property owned

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9. See discussion *infra* Part II.

10. See discussion *infra* Part II.

11. See § 2603(b).

12. *Id.*

13. See *id.*

14. CAL. FAM. CODE § 760 (West 2004). California defines community property as “all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in [California] . . . .” *Id.*

15. George Brunn, *California Personal Injury Damage Awards to Married Persons*, 13 UCLA L. REV. 587 (1965-66).

before marriage or as property acquired by gift, bequest, devise, or descent; personal injury damages fell into the category of all other property acquired after marriage and were classified as community property.<sup>16</sup> Personal injury damages were more property than personal and, thus, within the general community property presumption.<sup>17</sup> Although California's community property classification of personal injury damages conformed with the other community property states' classifications, it was not necessarily well grounded. Professor de Funiak commented that "[t]he frequently evident dissatisfaction with, the frequently inadequate reasons given for the doctrine that compensation for personal injuries to a spouse is community property lie in an incomplete understanding of the true principles of community property."<sup>18</sup>

Excluding gifts made to the marital community, community property consists only of property acquired by onerous title (by labor or industry of the spouses) or property acquired in exchange for community property (acquired itself by onerous title).<sup>19</sup> It is plainly evident that a right of action for injuries to person, reputation, property, or the like, or the compensation received therefrom, is not property acquired by onerous title.<sup>20</sup>

The distinction between assets acquired by onerous title that are community property and those acquired by lucrative title that are separate property is a remnant of the Spanish community property system.<sup>21</sup> The Spanish community property system was first codified in the *Fuero Juzgo* of 693 A.D., which became the general law of Spain superseding the prior laws of the Romans and the Goths.<sup>22</sup> Spain retained the Visigoth's community property system by recognizing that property acquired through either spouse's labor was equally owned by both spouses.<sup>23</sup> This distinction between onerous

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16. *Id.*

17. *See* *Zaragoza v. Craven*, 33 Cal. 2d 315, 319 (1949).

18. William Q. de Funiak, *PRINCIPLES OF COMMUNITY PROPERTY* § 82, at 225 (1943) [hereinafter de Funiak, 1st ed.].

19. *See id.* at 225-26.

20. *Id.* at 226.

21. *See* William Q. de Funiak & Michael J. Vaughn, *PRINCIPLES OF COMMUNITY PROPERTY* § 62, at 127-28 (Univ. of Ariz. Press 2d ed. 1971) [hereinafter de Funiak, 2d ed.].

22. RICHARD A. BALLINGER, *A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY OR GANANCIAL SYSTEM: ADAPTED TO THE STATUTES AND DECISIONS OF LOUISIANA, TEXAS, CALIFORNIA, NEVADA, WASHINGTON, IDAHO, ARIZONA, AND NEW MEXICO* § 1, at 7 (1895). "The *Fuero Juzgo* became the general law of Spain and superseded all prior systems by which Romans or Goths had been previously governed, and notwithstanding the changes attending various revolutions this Visigothic code retains its influence to-day, and still governs wherever the Spanish civil law has found a lodgment." *Id.*

23. *See* Joshua Aaron Garner, *Who is Looking Out for the Community? Piercing the Corporate Veil in Neibaur v. Neibaur*, 41 IDAHO L. REV. 565, 573 (2005):

Although the community system originated with the Visigoths, the American community system is based on Spanish community property law. Under the Spanish system, the characterization of property as community included all income or gains acquired due to the labor or industry of either spouse during marriage. The consequence of this rule provides each spouse with a vested one-half interest in all that was acquired, gained, or otherwise realized during the marriage as a result of the labor or industry of either spouse.

*Id.*

title and lucrative title still exists in California's definition of community property: property acquired by donative transfers are not community property and are classified as the separate property of the donee spouse.<sup>24</sup> Although a personal injury recovery is not necessarily the product of a spouse's labor, the recovery is neither the result of a donative transfer nor readily deemed acquired by lucrative title.

Moreover, the classification of personal injury damages as community property created problems when one spouse suffered an injury caused by the negligence of a third party and the injured party's spouse because classification of the recovery as community property could permit the negligent spouse to profit from the tort.<sup>25</sup> California corrected this problem through the doctrine of imputed negligence by barring any recovery to the tortfeasor spouse.<sup>26</sup> The doctrine of imputed negligence, however, was resoundingly criticized as putting a spouse in a worse position than a friend or acquaintance by committing a real injustice—denying an innocent person recovery because of the wrong of another.<sup>27</sup>

The classification of personal injury recoveries as wholly community property also created complications of division at divorce and death. Under California's Probate Code, each spouse has testamentary control over one-half of each community property asset.<sup>28</sup> At death, the non-injured spouse could testamentarily dispose of one-half of the personal injury award to a beneficiary other than the injured spouse, effectively reducing the funds available for the injured spouse's future medical and economic needs.<sup>29</sup> At divorce, California mandates an equal division of the community property, which results in a loss of one-half of the personal injury damages for the injured spouse.<sup>30</sup>

Over time, all of the community states eventually rejected the community property classification of personal injury recoveries and re-examined the nature of these monies.<sup>31</sup> In 1957, the California legislature joined this trend and re-classified personal injury recoveries as the separate property of the

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24. See CAL. FAM. CODE § 770(a) (West 2004). "Separate property of a married person includes all of the following: (1) All property owned by the person before marriage. (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. (3) The rents, issues, and profits of the property described in this section." *Id.*

25. See generally *Novo v. Hotel Del Rio*, 141 Cal. App. 2d 304, 307-08 (1956) (explaining that the rule precluding recovery by the community of damages for a wife's injury when the husband is guilty of contributory negligence is based on the doctrine of the law's aversion to unjust enrichment).

26. See Cal. Stats. 1968, ch. 457, § 6; *Lantis v. Condon*, 95 Cal. App. 3d 152, 155 (1979) (explaining that California abolished the doctrine of contributory imputed negligence in 1968).

27. See Brunn, *supra* note 15, at 588.

28. CAL. PROB. CODE § 100(a) (West 2002). "Upon death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent." *Id.*; see also *id.* § 6101 (West 1991).

29. § 100(a).

30. CAL. FAM. CODE § 760 (West 2004).

31. See Pamela George, *Whose Injury? Whose Property? The Characterization of Personal Injury Settlements Upon Dissolution of Marriage in Community Property States*, 32 IDAHO L. REV. 575, 588 (1996).

injured spouse.<sup>32</sup> One of the primary objectives of the re-classification was to abolish the doctrine of imputed negligence between spouses.<sup>33</sup> However, the change in classification of personal injury damages from community property to entirely the separate property of the injured spouse was not without consequences.<sup>34</sup>

Although this change in classification recognized the personal nature of the award, it failed to take into account the property aspect. For example, because earnings during marriage are classified as community property, compensation paid for lost wages during marriage would otherwise be classified as community property. The classification of personal injury monies as separate property also meant that the injured spouse retained sole testamentary control over those monies under the California Probate Code, which could deprive the surviving spouse of a substantial asset and the sole means of support.<sup>35</sup> One California judge referred to the change in classification as formalistic and “creat[ing] more problems than it solves.”<sup>36</sup>

Recognizing the shortfalls of classifying personal injury proceeds as separate property, the California legislature revised the law in 1968 following a study and recommendation by the California Law Revision Committee.<sup>37</sup> Current law reflects the 1968 change, which attempted to effect a compromise solution to the prior classification problems.<sup>38</sup> Personal injury damages are now classified as community property if the cause of action arose during marriage.<sup>39</sup> At dissolution, the damages are treated as separate property and awarded to the injured spouse, unless the interests of justice require otherwise, but the injured spouse always receives at least one-half of the personal injury damages.<sup>40</sup> The primary objective of the statute is to provide a source of

32. CAL. CIV. CODE § 163.5 (repealed 1970) (stating that “all damages, special and general” were classified as the separate property of the injured spouse).

33. Brunn, *supra* note 15, at 604.

34. See discussion *infra* notes 35-36.

35. CAL. PROB. CODE § 6101 (West 1991). If the personal injury damages are classified as the separate property of the injured spouse, then that spouse can bequeath all of those monies to someone other than the surviving spouse at death. See *id.* If these monies are the only source of income for the surviving spouse, then he or she may be without a means of financial support. See *id.*

36. Brunn, *supra* note 15, at 605.

37. See California Law Revision Commission, *Annual Report: Recommendation Relating to Damages for Personal Injuries to a Married Person as Separate or Community Property*, CAL. LAW REVISION COM. REP. 1385, 1389 (1967).

38. CAL. FAM. CODE § 780 (West 2004).

39. *Id.*:

Except as provided in Section 781 and subject to the rules of allocation set forth in Section 2603, money and other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage. *Id.*

40. CAL. FAM. CODE § 2603:

(a) “Community estate personal injury damages” as used in this section means all money or other property received or to be received by a person in satisfaction of a judgment for damages for the person’s personal injuries or pursuant to an agreement for the settlement or compromise of a claim

financial income for the injured spouse notwithstanding the needs of the non-injured spouse.<sup>41</sup> The statute is designed to assure that personal injury damages are treated as separate property upon dissolution.<sup>42</sup>

Although the California legislature attempted to improve its prior classifications of personal injury recoveries, the current scheme remains flawed. Section 2603 is silent as to the classification of the personal injury monies upon the death of one of the spouses.<sup>43</sup> If the personal injury award is the separate property of the injured spouse at death, then he or she can bequeath it all to a beneficiary of his or her choice to the exclusion of the non-injured spouse.<sup>44</sup> If the personal injury award is the sole or primary asset of the couple, then the surviving non-injured spouse may be without other significant financial means.<sup>45</sup> On the other hand, if the personal injury award is classified as community property and the non-injured spouse dies first, then he or she can bequeath his or her one-half interest to a beneficiary of his choice to the exclusion of the injured spouse.<sup>46</sup> The injured spouse may need the funds to pay for medical expenses and living expenses. Either scenario results in an untenable and potentially unfair situation.

#### A. No-Fault Divorce and the Principle of Equality

California is long overdue for a change in the treatment of personal injury damages for community property purposes. The current statute was enacted in 1968—two years prior to the 1970 enactment of no-fault divorce in California.<sup>47</sup> California was the first state to adopt no-fault divorce and the leader in the no-fault divorce revolution.<sup>48</sup> Within five years after California paved the path for no-fault divorce, most states provided for some form of no-

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for the damages, if the cause of action for the damages arose during the marriage but is not separate property as described in Section 781, unless the money or other property has been commingled with other assets of the community estate. (b) Community estate personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the community estate personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of the damages shall be assigned to the party who suffered the injuries.

*Id.*

41. Christian E. Markey & Kenneth J. Levy, *Dissolution of Marriage*, California Family Law: Practice and Procedure, § 24.11 (1978).

42. *Id.*

43. See CAL. FAM. CODE § 2603 (West 2004).

44. See *id.*

45. See *id.*

46. See *id.*

47. Family Law Act, ch. 1608, 3324-25, 1969 Cal. Stat. 3312.

48. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* at x (1985); see also HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988).

fault divorce.<sup>49</sup> Today, all states provide for some form of no-fault divorce.<sup>50</sup> Under this no-fault system, either spouse, without consent of the other, may obtain a divorce by asserting that irreconcilable differences or an irretrievable breakdown caused the irremediable breakdown of the marriage.<sup>51</sup>

The onset of the no-fault divorce revolution was the product of changing social attitudes in the twentieth century and the declining role of religion in the modern marriage.<sup>52</sup> During a time that emphasized individual autonomy, women's rights, heightened protection for family privacy, and sexual revolution, fault-based divorce quickly became an antiquated notion in the 1960's.<sup>53</sup>

The no-fault movement in family law was also a result of modern developments in tort law.<sup>54</sup> Legal reforms in workers' compensation laws, extensions of strict liability for certain ultra-hazardous activities, and automobile no-fault insurance are all examples of the imposition of legal liability without fault.<sup>55</sup> No-fault divorce was particularly well-suited in California because it was in harmony with California's principle of equality and rule of equal division of community property at divorce.<sup>56</sup> Fault had no relevance in a divorce proceeding because the law generally mandated an equal division of the community property.<sup>57</sup> The removal of fault as a factor in the division of marital property has been blamed for the feminization of poverty, the high divorce rate, negative psychological consequences for children, and declining morals.<sup>58</sup> The combination of a pure, or only, no-fault divorce

49. Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 269 (1997) (citing Franklin E. Zimring, *Forward to DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay, eds., 1990)).

50. Doris Jones Freed & Timothy B. Walker, *Family Law in the Fifty States*, 23 FAM. L.Q. 495, 514 (1990). Although Freed and Walker note that all states provide for no-fault divorce, New York retains a fault-based system without requiring a fault if the parties have agreed to a separation and have lived apart for at least one year. *Id.*; see also J. Herbie Di Fonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 591 (2007) ("The conundrum remains: why does New York, alone in the United States, retain an overwhelmingly fault-driven divorce law?"); N.Y. DOM. REL. LAW § 170 (Consol. 1999).

51. See Swisher, *supra* note 48; see also Weitzman, *supra* note 47 at xv.

52. Max Rheinstein, MARRIAGE STABILITY, DIVORCE, AND THE LAW, 10-11 (1972) (referencing a change from "Christian-conservative" ideology to an "eudemonistic-liberal" one).

53. *Id.*

54. Twila Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 59-60 (1991).

55. *Id.*

56. CAL. FAM. CODE § 751 (West 2004). "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests." *Id.* At divorce, the court is mandated to equally divide the community property absent an agreement to the contrary or other legal exception. See CAL. FAM. CODE § 2550; see also *In re Marriage of Juick*, 21 Cal. App. 3d 421, 427 (1971) ("[T]he fundamental objective of the Legislature with respect to the disposition of community property upon dissolution of a marriage [under the Family Law Act] was to provide for an equal division thereof as an additional way of advancing its primary no-fault philosophy. . . [C]learly the ideal is a mathematically equal division.").

57. See § 2550.

58. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYUL REV. 79 (1991):



system and the equal division rule has led some to conclude that the California experience with no-fault divorce cannot be applied to the majority of other states that are mixed-fault systems—permitting a divorce on fault or no-fault grounds.<sup>59</sup> And while the advent of no-fault divorce heralded a departure from the traditional fault bases for divorce, the change continued California's disorganized and haphazard evolution of family law jurisprudence.<sup>60</sup> No-fault divorce was welcomed as a fresh and modern approach to marriage and divorce but was implemented without a complete overhaul of the pre-existing rules on the classification of property.<sup>61</sup> One such example is the classification and treatment of personal injury damages.<sup>62</sup>

Prior to the enactment of the current classification rules for personal injury damages, courts applied presumptions and classification rules “mechanically, without proper regard to the nature of the particular controversy or the relationship of the particular parties involved.”<sup>63</sup>

As a result, the legislature “passed corrective legislation directed solely at the immediate problem.”<sup>64</sup> By enacting reactive, piecemeal legislation, the legislature created classification rules which are incompatible and inconsistent with the basic premises of the community property system.<sup>65</sup>

The award of personal injury damages to the injured spouse at divorce is considered an exception to California's rule of equal division.<sup>66</sup> Despite the option of a replacement analysis for such damages, the California legislature persisted with its unitary approach and ignored prior commentary suggesting a

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[N]o-fault divorce laws have been accompanied by increased rates of divorce and significant inequities in the economic consequences of divorce, often referred to as the “feminization of poverty” . . . [I]t is apparent that the significant rise in the divorce rate in the United States did not begin until the no-fault divorce reform movement was well-underway.

*Id.* at 118; see also Milton C. Regan Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 607 (“In both the legal and popular imagination . . . no-fault divorce tends to be associated with a decline in the use of moral discourse in family law.”); Dana Milbank, *No-Fault Divorce Law is Assailed in Michigan, and Debate Heats Up*, WALL ST. J., Jan. 5, 1996, at A6 (stating that David Popenoe, a sociologist at Rutgers University, claims that children of divorce are at a much greater risk of dropping out of school, becoming delinquents, having children out-of-wedlock, or becoming divorced themselves.).

59. See Matthew Butler, *Grounds for Divorce: A Survey*, 11 J. CONTEMP. LEGAL ISSUES 164, 166 (2000); see also Georgia Dullea, *How Women Fare in No-Fault Divorce*, N.Y. TIMES, Nov. 7, 1985, at C1.

60. See Butler, *supra* note 59, at 166 (“Nearly all of the mixed-grounds states recognize the stalwarts of fault-based divorce: adultery, cruelty, desertion, and habitual drunkenness.”); Donald C. Knutsen, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240, 243 (1966) (“[T]he law has developed in a haphazard and unsatisfactory fashion”).

61. See Knutsen, *supra* note 60, at 243; *supra* text accompanying notes 35-36.

62. Knutsen, *supra* note 60, at 246-47.

63. *Id.* at 243.

64. *Id.* at 244.

65. *Id.*

66. *In re Marriage of Saslow*, 710 P.2d 346, 349 n.4 (Cal. 1985). In a divorce proceeding, the California statute assigns community property personal injury damages to the party that sustained the injury unless the court, in the interest of justice, disposes of the property in another fashion. CAL. FAM. CODE § 2603(b) (West 2004). “This provision represents an exception to the otherwise strict rule in California that community property must be divided equally.” *In re Saslow*, 710 P.2d at 349 n.4.

replacement analysis.<sup>67</sup> Prior to the enactment of the current statute, the California State Bar twice recommended that personal injury damages be apportioned between community property and separate property estates.<sup>68</sup> Perhaps more significantly, sixty years ago the California Supreme Court considered apportionment of personal injury damages.<sup>69</sup> In *Zaragosa v. Craven*, Justice Carter criticized the “pigeon-holing” community property classification of personal injury in his dissent:

But when we are faced with an injury to the human body we then follow the law blindly, letter for letter, and declare that this money, given to compensate for pain, suffering and disfigurement, does not come to the particular spouse by “gift, bequest, devise, or descent,” so therefore it *must* be community! After all, what else could it be?<sup>70</sup>

Justice Carter continued to argue for an apportionment of personal injury damages in at least two later California Supreme Court opinions, but his position was never adopted by a majority of the California court.<sup>71</sup> In fact, in the *Washington* decision, Justice Traynor, while writing for the majority, acknowledged the apportionment rule as perhaps justified but then rejected it: “[a] rule permitting apportionment of the damages as suggested, however, has never been adopted in this state, and in the absence thereof, treating the entire cause of action as community property protects the community interest in the elements that clearly should belong to it.”<sup>72</sup> Justice Traynor’s protection of the community estate, however, comes at the price of excluding those portions of a personal injury award, such as pain and suffering, that more appropriately belong to the separate property estate.<sup>73</sup>

### *B. Problems with the Current California Law*

Although the California judiciary and the California legislature had opportunities to apportion personal injury damages and adopt a replacement analysis for personal injury awards, both failed to do so. These failures led to three significant problems in the present statute: (1) judicial interpretation as to

67. See *supra* text accompanying notes 52-63.

68. Conference of State Bar Delegates, 30 CAL. ST. B.J. 490, 499 (1955). In 1955, the California State Bar proposed that “compensatory damages for pain, suffering and disfigurement and temporary and future disability suffered by a married person . . . be [the] separate property of injured spouse.” *Id.* In 1959, the State Bar proposed that “special damages recovered as reimbursement for expenditures made out of community funds are community property but that there shall be no imputation of negligence between husband and wife due to the community nature of such special damages.” 1959 Conference Resolution and Committee Reports: Action by Conference and Board of Governors, 35 CAL. ST. B.J. 66, 75 (1960).

69. *Zaragosa v. Craven*, 202 P.2d 73, 76 (Cal. 1949).

70. *Id.* at 78 (Carter, J., dissenting).

71. See *Washington v. Washington*, 302 P.2d 569, 572-73 (Cal. 1956) (Carter, J., concurring); *Kelser v. Pabst*, 273 P.2d 257, 260-63 (Cal. 1954) (Carter, J., dissenting).

72. *Washington*, 302 P.2d at 571 (majority opinion).

73. *Id.* at 572 (Carter, J., concurring).

when a cause of action arises under Section 5126 is in contrast to the accrual of a cause of action for limitation periods; (2) the standards for division at divorce leave the judiciary with too much discretion; and (3) the statute is silent as to the classification of personal injury awards at death with potentially disastrous estate tax consequences.<sup>74</sup>

### 1. *The Cause of Action “Arises” Per Family Code Section 2603*

In California, community property is generally defined as all property acquired during marriage except that property acquired by gift, bequest, devise, or descent.<sup>75</sup> By complement, separate property is defined as all property acquired (1) before marriage; (2) by gift, bequest, devise, or descent; and (3) after separation.<sup>76</sup> Thus, three distinct time periods emerge as critical to classification: (1) before marriage, (2) during marriage, and (3) after separation.<sup>77</sup>

Section 2603 of the California Family Code provides that personal injury damages “means all money or other property received or to be received by a person in satisfaction of a judgment for damages for the person’s personal injuries . . . if the cause of action for the damages arose during marriage.”<sup>78</sup> A first consideration in the classification of a personal injury award at divorce is whether the cause of action arose during marriage.<sup>79</sup> For purposes of classification, a personal injury award is acquired when its related cause of action arises.<sup>80</sup> California courts interpret the date that a personal injury cause of action arises as a separate and distinct date from the accrual of the cause of action.<sup>81</sup> Although the courts’ interpretation is reasonably consistent with California’s date of acquisition rule for classification, that interpretation is at odds with the understanding of when a cause of action accrues for purposes of the statute of limitations; the seemingly simple statutory language is a potential trap for the unwary.

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74. See discussion *infra* Part II.B.

75. CAL. FAM. CODE §§ 760, 770 (West 2004).

76. § 770.

77. See §§ 760, 770-71. The date of separation can be a critical fact in determining the classification of property at divorce. § 771. Section 771 provides that “[t]he earnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse.” *Id.* California courts have interpreted that the standard of “living separate and apart” requires the spouses to have come to “a parting of the ways with no present intention of resuming marital relations, but also, more importantly, conduct evidencing a complete and final break in the marital relationship.” *In re Marriage von der Nuell*, 28 Cal. Rptr. 2d 447, 450 (Cal. Ct. App. 1994).

78. § 2603(a).

79. *Id.* §§ 781, 2603.

80. §§ 781, 2603.

81. See *Klug v. Klug*, 31 Cal. Rptr. 2d 327, 334 (Cal. Ct. App. 2005) (distinguishing between when a legal malpractice cause of action arises versus accrues).

California courts have long recognized that a property claim arises for purposes of classification when the right to the interest vests.<sup>82</sup> The date of vesting is deemed the date of acquisition for purposes of classification. For example, in a will contest action, the California Court of Appeals concluded that the cause of action arose when the decedent died: “[H]is right to contest the will was cast upon him immediately upon the death of his son.”<sup>83</sup> Because the claimant was not married at that time, the settlement monies received after marriage were properly classified as the separate property of the claimant.<sup>84</sup>

In classifying employment benefits, “[p]ension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding.”<sup>85</sup> Thus, the classification of employment termination benefits depends upon whether the right to such benefits arose during marriage even if the actual benefits were paid after separation or divorce.<sup>86</sup>

Using the date of acquisition to determine classification is consistent with an essential California community property principle known as “the source rule.”<sup>87</sup> In the landmark decision *George v. Ransom*,<sup>88</sup> the California Supreme Court departed from the traditional Spanish principles of community property and held that the rents and profits from separate property remain separate property, even if such monies are received during marriage.<sup>89</sup> Rents, income, profits, and dividends retain the same character as their source.<sup>90</sup> Not all of the other community property states are in accordance with California’s source rule.<sup>91</sup>

Courts have also utilized acquisition dates to determine the classification of attorneys’ fees and title to real property acquired through adverse possession;

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82. See *Vick v. Dacorsi*, 1 Cal. Rptr. 2d 626, 630 n.35 (Cal. Ct. App. 2003). “A cause of action to recover money damages, as well as the money recovered is a chose in action and therefore a form of personal property.” *Id.*

83. *In re Clark’s Estate*, 271 P. 542, 547 (Cal. Ct. App. 1928).

84. See *id.* at 548.

85. *In re Marriage of Brown*, 544 P.2d 561, 562-63 (Cal. 1976).

86. See *In re Marriage of Frahm*, 53 Cal. Rptr. 2d 31, 32 (Cal. Ct. App. 1996). Notably, the *Frahm* court rejected a replacement analysis for termination of employment benefits that other appellate courts had utilized to characterize such benefits:

The past services or future compensation test is inapt for determining the character of the benefit, and looking to its purpose is equally unavailing. Both focus on the wrong question; that which motivates an employer to offer an incentive is an irrelevant consideration because “[t]he schemes are designed for business purposes and may not have as their main concern community property issues.”

*Id.* at 36 (citing *In re Marriage of Gram*, 30 Cal. Rptr. 2d 792 (Cal. Ct. App. 1994)).

87. See *Estate of Newman*, 30 Cal. Rptr. 2d 547, 549 (Cal. Ct. App. 1994).

88. *George v. Ransom*, 15 Cal. 322 (1860).

89. See de Funiak, 2d ed., *supra* note 21, at 160.

90. See Mary Moers Wenig, *Increase in Value of Separate Property During Marriage: Examination and Proposals*, 23 FAM. L. Q. 301, 304 (1989) (“The principal divergence comes with respect to the ‘fruits’ rule.”).

91. See *id.*

classification was determined after all the elements for adverse possession were satisfied, not when title was judicially quieted.<sup>92</sup> For accounts receivable and attorneys' fees owed but not yet paid at the time of divorce, California courts have held that such fees are community property, to the extent that the fees were earned during marriage, even if received after separation or divorce.<sup>93</sup> Likewise, contingent attorneys' fees earned while single but received after marriage were classified as separate property because the fees were earned prior to marriage.<sup>94</sup> As evidenced by these examples, the date of acquisition controls the classification of the asset.<sup>95</sup>

The date of acquisition can be tricky in the context of a personal injury cause of action containing several elements that do not necessarily occur simultaneously.<sup>96</sup> In the *Klug* case, the husband and wife retained the services of attorney Christensen to create a limited partnership to protect the couple's assets from possible litigation related to the husband's medical practice.<sup>97</sup> After the parties separated, the husband transferred various community assets out of the country and into accounts under his sole control with the assistance of attorney Christensen.<sup>98</sup> Following the divorce, the wife filed a legal malpractice action against attorney Christensen that settled for \$346,000.<sup>99</sup> The husband claimed that the award was community property, which the wife disputed.<sup>100</sup> The trial court framed the critical issues as follows: "Did the cause of action *arise* during marriage or post-separation? Did the cause of action *arise* by the mere drafting of the estate planning documents or when they were acted upon in derogation of Mrs. Klug's rights?"<sup>101</sup> The trial court then concluded that the wife's legal malpractice action accrued after the parties separated and, therefore, classified the settlement monies as her separate property.<sup>102</sup>

Despite the trial court's erroneous reference to the accrual date for the wife's legal malpractice claim, the court of appeals affirmed the decision, finding that the error was harmless because the cause of action arose after the date of separation.<sup>103</sup> The court addressed the difference between the date of accrual and the date a cause of action arises.<sup>104</sup> Because the underlying policy considerations for statutes of limitations are distinct and different from causes

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92. See *Siddall v. Haight*, 64 P. 410, 411 (Cal. 1901) (holding adverse possession elements satisfied before marriage, but title quieted thereafter).

93. See *Waters v. Waters*, 170 P.2d 494, 497 (Cal. Ct. App. 1946).

94. See *Crouch v. Crouch*, 147 P.2d 678, 681 (Cal. Ct. App. 1944).

95. See *Waters*, 170 P.2d at 497; *Crouch*, 147 P.2d at 681; *Siddall*, 64 P. at 411.

96. See *In re Marriage of Klug*, 31 Cal. Rptr. 3d 327, 331 (Cal. Ct. App. 2005).

97. See *id.* at 330.

98. See *id.*

99. See *id.*

100. See *id.* at 331.

101. *Id.*

102. *Id.* at 330.

103. *Id.*

104. *Id.* at 334.

of action as defined by substantive law, the date a cause of action accrues for purposes of the statute of limitations is irrelevant to the question of when a cause of action arises for purposes of classification in the family law context.<sup>105</sup> “The legislative goal underlying limitations statutes is to require diligent prosecution of known claims so that legal affairs can have their necessary and finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh.”<sup>106</sup> The court explained that a cause of action ordinarily accrues “upon the occurrence of the last element essential to the cause of action,” but for policy reasons, the legislature may postpone accrual until the date of discovery.<sup>107</sup> In the family law context, for purposes of classification as separate or community property, a cause of action arises when all of the elements have been established, regardless of the date of discovery.<sup>108</sup>

The distinction between the accrual date and the date a cause of action arises is subtle and not readily apparent from the statutory language classifying personal injury damages.<sup>109</sup> The lack of harmony between the general civil law understanding of the date of accrual and the family law interpretation of the date a cause of action arises is a glaring example of the piecemeal development of California family law jurisprudence.<sup>110</sup>

## 2. *Division of Personal Injury Damages at Divorce*

Although personal injury damages are classified as community property if the cause of action arose during marriage, such monies are assigned to the injured spouse at divorce unless the interests of justice require otherwise. The injured spouse, however, will always receive at least one-half of such monies.<sup>111</sup> Section 2603(b) of the California Family Code states that the court should take “into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case” when deciding the amount to be awarded.<sup>112</sup> The award of personal injury damages at divorce is considered an exception to the general rule of equal division of community property at divorce; therefore, the court may not offset the award with other property to effect a numerical equal division between the spouses.<sup>113</sup>

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105. *Id.*

106. *Id.* (citing *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 756 (1998)).

107. *Id.* at 334-335 (citing *Howard Jarvis Taxpayers Ass’n v. City of La Habra*, 25 Cal. 4th 809, 815 (2001)).

108. *Id.* at 334.

109. *See id.* at 331-35.

110. *Id.*

111. CAL. FAM. CODE § 2603(b) (West 2004).

112. *Id.*

113. *See In re Marriage of Morris*, 139 Cal. App. 3d 823, 827-28 (1983).

Although the statutory language is necessarily broad to allow for judicial flexibility, the language is also vague, lacks specific standards, and has the potential to lead to anomalous results.<sup>114</sup> The scant number of California appellate cases addressing the award of personal injury damages at divorce reflects the uncertainty of the discretionary rule.<sup>115</sup> In all five of those reported cases, the personal injury damages were awarded entirely to the injured spouse.<sup>116</sup> In *Morris v. Morris*, the wife received over \$42,000 for personal injuries she suffered due to a runaway horse.<sup>117</sup> At divorce, the husband sought a portion of the settlement award, and, in the alternative, an offsetting of other property to equalize the property division.<sup>118</sup> The California Court of Appeals affirmed the entire award to the wife, finding that the husband failed to meet his burden of proving that the interests of justice required an alternate disposition.<sup>119</sup> The court pronounced that the husband's burden was a showing of "exceptional circumstances" to warrant any award of the personal injury damages to him.<sup>120</sup> "The statute is designed to assure that other than in exceptional circumstances, community property personal injury damages, or the bulk thereof, will be awarded to the injured spouse. . . ."<sup>121</sup>

The judicial interpretation of the statute creates a significant hurdle at divorce: the non-injured spouse bears the burden of proving that "exceptional" circumstances exist warranting any award of the personal injury damages to him or her.<sup>122</sup> If the legislature intended for such a high showing of exceptional circumstances, the legislature should have included such language in the statute. Instead, the legislature merely provided for an exception to the

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114. See § 2603(b).

115. *Jackson v. Jackson*, 212 Cal. App. 3d 479, 486-87 (1989) (awarding all uninsured motorist damages to injured wife despite community property funds used to pay for the insurance premiums); *In re Marriage of Jacobson*, 161 Cal. App. 3d 465, 475 (1984) (awarding all medical malpractice damages to wife as the injured spouse); *In re Marriage of Devlin*, 138 Cal. App. 3d 804, 811 (1982) (awarding all personal injury damages from auto accident to injured husband); *In re Marriage of Mason*, 93 Cal. App. 3d 215, 226 (1979) (awarding all personal injury damages held in trust to injured husband despite wife's name on trust instrument); *In re Morris*, 139 Cal. App. 3d at 827-28 (awarding all personal injury settlement monies to wife injured by a runaway horse).

116. *Id.*

117. *Morris*, 139 Cal. App. 3d at 825.

118. *Id.* at 824.

119. *Id.* at 825. ("Husband's contention that the court failed to consider the factors suggested by the statute and to determine that the interests of justice required a disposition other than assignment of the settlement proceeds to wife is devoid of merit.")

120. *Id.* at 827.

121. *Id.*

122. See Timothy R. Ault, *Problems with "Community Estate Personal Injury Damages" and Their Allocation in California Divorce Proceedings*, 11 J. CONTEMP. LEGAL ISSUES 303. Apparently, "exceptional circumstances" must be established before the court can consider whether to award any of the personal injury damages to non-injured spouse. *Id.* "The quoted phrase, however, is not a test the court must use in deciding how to allocate the award in the first instance; instead, it is part of the statutory test the court must use before "assigning" any part of the award to the non[-]injured party, or to the community." *Id.*

otherwise general rule that personal injury damages be awarded to the injured spouse at divorce.<sup>123</sup>

Because the non-injured spouse apparently bears the burden of proving that exceptional circumstances exist to warrant any award of the personal injury damages, and given the court's inclination to award such monies in their entirety to the injured spouse, the savvy non-injured spouse may pursue two rather unpleasant options to realize an interest in such monies: (1) irretrievably commingle the personal injury damages with other community property assets so they cannot be distinguished at divorce, or (2) spend the personal injury monies before divorce.<sup>124</sup> Either option defeats the primary purpose of the statute, which is to provide financial security for the injured spouse and is a trap for the unwary injured spouse who may be particularly vulnerable following a personal injury.

### 3. *The Classification of Personal Injury Damages at Death*

Much academic, judicial, and legislative discussion over the years has focused on the classification and treatment of personal injury damages, culminating in the enactment of California Family Code Section 2603 in 1968.<sup>125</sup> Despite the academic discourse, the California legislature failed to specify the classification of such damages at death; the current statute is silent.<sup>126</sup>

Classification at death has a critical impact on the spouse's estate planning and inheritance taxes under state and federal law. A decedent's estate includes all property owned on the date of death, including the decedent's one-half interest in any community property.<sup>127</sup> For decedents in 2008, no federal estate taxes are owed for taxable estates less than \$2 million.<sup>128</sup> For persons who die in 2009, the applicable exclusion increases so that no federal estate taxes are

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123. CAL. FAM. CODE §2603(b) (West 2004).

124. See CAL. FAM. CODE §2603(a), n.27. The definition of "community estate personal injury damages" specifically excludes personal injury damages that have been commingled with other community property assets. See *In re Marriage of Devlin*, 138 Cal. App. 3d 804, 810 (1982) ("Commingling" as used in the statute "refers to the mixture of community property/personal injury damages with other community property into one undistinguishable, amorphous mass.").

125. See *In re Marriage of Pinto*, 28 Cal. App. 3d 86 (1972). Since 1968, the California legislature has made a few minor amendments to the statute. See *id.* For example, prior to 1979, the statute defined community personal injury damages as monies actually received during the marriage. See *id.* The case held that an unliquidated claim or cause of action for personal injury damages did not constitute "community personal injury damages" within the statute. *Jackson v. Jackson*, 212 Cal. App. 3d 479, 483 fn.5 (1989) (quoting *In re Pinto*, 28 Cal. App. 3d at 88). The statute was amended in 1979 to include sums "received or to be received" for personal injuries. CAL. FAM. CODE § 2603 (West 2004).

126. See § 2603.

127. I.R.C. § 2033 (2009) ("The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.").

128. I.R.C. § 2010 (2009).



owed for taxable estates less than \$3.5 million.<sup>129</sup> The federal estate tax is repealed for 2010 but is set to return in 2011.<sup>130</sup>

Although estate taxes may not be a serious concern for those with smaller estates, estate taxes impact a number of Americans, including those who reside in community property states. Because the value of a decedent's estate affects the amount of potential estate tax liability, the classification of property as community, and, therefore, owned in part by a decedent spouse, is an important estate planning consideration. The California Family Code details the classification and distribution of personal injury damages at divorce, but fails to make any mention of the classification of such damages at death.<sup>131</sup>

A personal injury recovery can be the single most valuable asset in a marital estate. The ultimate allocation or characterization of that recovery can have far-reaching and potentially devastating results. Simply put, characterization of a tort recovery is an issue which comes to the forefront each time a marriage ends in death or divorce while a fair amount of the proceeds remain intact.<sup>132</sup>

The impact of classification on a decedent's estate tax liability can be illustrated in the hypothetical case of decedent Dan and his widow Wendy. Dan sustained serious personal injuries that were ultimately fatal when he was electrocuted because of a negligently installed wire at his workplace.

Dan sued the tortfeasor and recovered a \$3 million personal injury settlement. Dan died in 2009. His taxable estate includes his one-half interest in their family home valued at \$1 million, a \$1 million life insurance policy, and the personal injury settlement. If the personal injury award is classified as community property, then Dan's gross taxable estate includes only one-half of the settlement, bringing the total value of his estate to \$3.5 million, which is within the federal applicable exclusion and not subject to estate taxation. If the personal injury award is classified in its entirety as Dan's separate property, then the entire award is included in Dan's gross taxable estate, bringing the total value to \$5 million, which is in excess of the federal applicable exclusion and subject to estate taxation.<sup>133</sup>

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129. *Id.*

130. *Id.*; see also Tye J. Klooster, *Repeal of the Death Tax? Shoving Aside the Rhetoric to Determine the Consequences of the Economic Growth and Tax Reconciliation Act of 2001*, 51 *DRAKE L. REV.* 633, 648. Klooster states the following:

One of the most important aspects of the 2001 Tax Act that is not widely known, publicized or reported is that the 2001 Tax Act 'sunsets' in 2011. Section 901 is a 'sunset provision,' which repeals all the provisions of the 2001 Tax Act after December 31, 2010. In short, this means that if Congress fails to take action, everything will return to the levels of 2002, or a \$1 million applicable exclusion amount and a fifty percent top marginal tax rate.

*Id.*

131. CAL. FAM. CODE § 2603.

132. George, *supra* note 31, at 589-90.

133. See I.R.C. § 2056 (2009). The simple hypothetical assumes no deductions in calculating Dan's net taxable estate. One potential deduction is the unlimited "marital deduction," which provides that certain

In *Estate of Kirby*, the widow challenged the separate property classification of a personal injury settlement received by her late husband because its inclusion in his estate resulted in estate tax liability.<sup>134</sup> Mr. Kirby was injured in an accident in 1966 and filed a personal injury action.<sup>135</sup> At the time of Mr. Kirby's injury, California classified personal injury damages as the separate property of the injured spouse.<sup>136</sup> However, Mr. Kirby did not settle his claim or receive any damages until 1969.<sup>137</sup> At the time of his settlement and actual receipt of damages, California had re-classified personal injury damages as community property.<sup>138</sup> He died in 1970.<sup>139</sup>

The California Court of Appeals summarily rejected the widow's argument to apply the newly enacted statute since the personal injury damages had vested as separate property at the time of the injury.<sup>140</sup> "The act reclassifying such sum as community property could not impair that right by changing the separate property character of money paid to a spouse in settlement of his personal injury action commenced before the effective date of the act, even though the money was paid after that date."<sup>141</sup> *Kirby* suggests that personal injury damages would have been properly classified as community property if Mr. Kirby's injury had arisen after the effective date of the new statute.<sup>142</sup>

A similar conclusion was reached by the California Court of Appeals in *Estate of Hafner*.<sup>143</sup> Charles Hafner legally married Joan in 1954.<sup>144</sup> They resided in New York and had three daughters together. In 1957, Charles left

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transfers of assets from a decedent to a surviving spouse may be deducted from the decedent's gross estate. *Id.*; see GEORGE G. BOGRET & GEORGE T. BOGRET, *THE LAW OF TRUSTS AND TRUSTEES*, § 275.10, at 445-61 (2d ed. 1964). One of the purposes behind the marital deduction is to achieve parity of estate tax treatment between decedents in common law property states and those in community property states. BOGRET, *supra*, at 444. As stated by the authors:

[T]he Revenue Act of 1948 . . . repealed the community property provisions added to the Code in 1942 and created the "marital deduction." The effect of the 1948 law was to restore the pre-1942 federal estate tax treatment to spouses in community property states and to give spouses in common law states a substantially equal federal estate tax advantage.

*Id.* at 447-48.

134. *Estate of Kirby*, 59 Cal. App. 3d 288 (1976).

135. *Id.* at 290.

136. *Id.* at 291 n.2 (quoting former CAL. CIV. CODE § 163.5: "[a]ll damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person.").

137. *Id.* at 290.

138. *Id.* at 290-91. "[T]he Legislature in 1968 amended Civ. Code § 163.5 to restore the community property status of personal injury damages recovered during the marriage, and enacted § 169.3 to provide that damages received after dissolution are the separate property of the injured spouse." *Id.*

139. *Id.* at 290.

140. *Id.* at 292.

141. *Id.*

142. The newly enacted statute was the former CAL. CIV. CODE § 163.5.

143. *Estate of Hafner*, 184 Cal. App. 3d 1371, 1393-1400 (1986).

144. *Id.* at 1377.

Joan and moved to California where he met and then married Helen in 1962.<sup>145</sup> In 1973, Charles was involved in a car accident and sustained permanent physical injuries and brain damage.<sup>146</sup> He sued and recovered a \$900,000 settlement.<sup>147</sup> In 1982, Charles died intestate survived by a legal spouse Joan, a putative spouse Helen, and four daughters.<sup>148</sup> His entire estate consisted of the remains of the personal injury settlement.<sup>149</sup> The California Court of Appeals struggled with the proper distribution of the estate.<sup>150</sup> After considering both California intestate succession and community property laws, the court ultimately awarded one-half of the personal injury settlement to Helen as the putative spouse.<sup>151</sup>

*Hafner* is significant because of the court's assumption that the personal injury settlement would be classified as the marital property of the putative spouses if there had not been a surviving legal spouse. The court could have classified the personal injury settlement in its entirety as the decedent's separate property and then distributed his estate accordingly.<sup>152</sup> Instead, the court interpreted the general statute regarding the division of the quasi-marital property of putative spouses and concluded that the personal injury settlement was within its scope as marital property.<sup>153</sup> Applying principles of equity, the court analyzed the estate "from the perspectives" of both the legal and putative spouses.<sup>154</sup> From the perspective of the putative spouse, the personal injury

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145. *Id.* at 1379. Charles and Helen attempted to marry in 1962 but were later advised by an attorney that the marriage was not valid. *See id.* They "re-married" in 1963. *Id.*

146. *Id.*

147. *Id.* at 1380.

148. *Id.* at 1376-77. If a marriage is void or voidable but at least one of the spouses in good faith believes that a legal marriage exists, then the parties may be putative spouses and the property acquired during their putative marriage deemed quasi-marital property. *See* CAL. FAM. CODE § 2251 (West 2004). If the division of property is in issue, then the quasi-marital property will be divided in the same manner as the community property of a valid marriage. *See id.* "The principle issue presented by this case is: as between the surviving, innocent, wife and children of a bigamous husband, and his surviving, innocent, putative spouse and their child, who is entitled to succeed to the husband's intestate estate when that estate is, as to his surviving wife and children, the husband's separate property and is, as to the putative spouse, quasi-marital property?" *Hafner*, 184 Cal. App. 3d at 1376-77.

149. *Hafner*, 184 Cal. App. 3d at 1380.

150. *Id.* at 1400.

151. *Id.* (holding the decedent's estate "should be awarded one-half to his putative spouse, Helen Hafner, and the other half to be awarded to and divided among his legal and surviving spouse, Joan, and his four children . . . in accordance with former section 221 of the Probate Code.").

152. Under the former Probate Code § 221, the intestate distribution of a decedent survived by a spouse and two or more children would result in one-third of the decedent's separate property distributed to the surviving spouse and two-thirds to the children. *See* CAL. PROB. CODE § 221 (West 1980), *repealed by* Cal. Stats. 1983, ch. 842, § 19.

153. *See Hafner*, 184 Cal. App. 3d at 1393. The court stated the following:

[I]f we were to look only to Civil Code section 4452, and to give it the broadest possible construction, Charles' entire intestate estate would be treated as though it were the community property of Charles and Helen and, pursuant to former section 201 of the Probate Code, the entire estate would go to Helen, and Joan and the four children would receive nothing.

*Id.*

154. *See id.* at 1394. "It is clear that our statutes are not designed to provide for the unique circumstances present in this case. When statutes are in conflict, the requirements of some being in irreconcilable opposition

settlement was quasi-marital property.<sup>155</sup> From the perspective of the legal spouse, the personal injury settlement was the decedent's separate property.<sup>156</sup> The court concluded by awarding one-half of the estate to the putative spouse and the other one-half to the legal spouse to be shared with all four children.<sup>157</sup>

While the *Hafner* decision may appear fair and the court's classification of the personal injury settlement may appear correct under the California rules, the classification of personal injury proceeds as community property at death raises potential problems. First, classification of personal injury damages as community property adds to the value of a decedent's probate and taxable estate, thereby potentially increasing probate fees and estate taxes.<sup>158</sup> Second, classification of the personal injury settlement as community property can result in the non-injured decedent spouse devising the damages to a third party. For example, if Helen Hafner died testate leaving all her property to her mother, Helen's mother would inherit one-half of Charles' personal injury settlement.<sup>159</sup>

This result could have disastrous consequences for a surviving injured spouse who may be financially dependent on the personal injury damages to survive, especially if there are no other assets. Certainly, the California legislature could not intend to leave a surviving injured spouse bereft of the very damages paid to compensate for lost wages, medical expenses, and pain and suffering.

On the other hand, a separate property classification for personal injury damages at death can lead to a similarly unjust result. If the injured spouse dies first, then he or she can bequest all of the damages to a third party and deprive the community estate of reimbursement for paid medical expenses. The

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to others, only the chancellor can protect the innocent and render justice." *Id.*

155. *See id.* at 1383. "As to Helen, the entire probate estate is quasi-marital property." *Id.*

156. *See id.* The court held that from the perspective of the legal spouse, the personal injury settlement should be classified as the decedent's separate property since the decedent and Joan were separated at the time of the settlement. *See id.*

157. *See id.* at 1403 (Lui, P.J., dissenting). The dissent argued that the majority ignored California's intestate distribution laws by failing to award the putative spouse a share in the decedent's estate since one-half of the personal injury settlement as quasi-marital property was already owned by the putative spouse and not a part of the estate. *See id.* at 1400-05. The dissent made the following argument:

The proper legal distribution of the decedent's estate in this case should result in the surviving putative spouse taking one-half of the decedent's entire estate pursuant to section 4452 as her quasi-marital property. As to the remainder of the decedent's estate, . . . the putative and legal spouses should be treated equally. Therefore, under former Probate Code section 221, the proper legal distribution of the remainder of the decedent's estate should be as follows: one-third of that portion of the estate should be divided equally between the surviving putative and legal spouses; the remaining two-thirds should be distributed in equal shares to the decedent's four children by both relationships.

*Id.* at 1403.

158. *See* CAL. PROB. CODE §§ 10800, 10810 (West 1991 & Supp. 2009). In California, probate fees are based upon a percentage of the decedent's gross probate estate. *Id.*

159. *See* CAL. PROB. CODE § 100 (West 2002). Because each spouse has testamentary control over his or her one-half community property, Helen Hafner could leave her one-half of the marital property to a beneficiary other than her husband. *See id.*

surviving spouse may have spent years caring for the injured spouse, may be older, or may have difficulty re-entering the workforce.

A simple solution is to classify the personal injury damages according to their component parts pursuant to a replacement analysis. Compensation for lost wages earned during marriage would be classified as community property. If the parties separate or divorce, then compensation for future lost wages (after separation or divorce) would be classified as the separate property of the injured spouse.<sup>160</sup> Medical expenses paid by the community estate could be reimbursed back to the community estate from the personal injury damages.<sup>161</sup> Compensation for medical expenses occurring after separation or divorce should be classified as the injured spouse's separate property because he or she would be liable for such debt individually.<sup>162</sup> Damages awarded for pain and suffering should also be classified as the injured spouse's separate property.<sup>163</sup> This classification is the conclusion that the other community property states have reached: Apply a replacement analysis to classify personal injury damages.<sup>164</sup>

### III. THE CLASSIFICATION OF PERSONAL INJURY DAMAGES IN THE OTHER COMMUNITY PROPERTY STATES

#### A. Arizona

When Congress carved out Arizona from the New Mexico territory in 1863, the newly formed territorial government simply continued to follow the community property rules in New Mexico.<sup>165</sup> In 1926, the Arizona Supreme Court first considered the classification of personal injury damages and held that such damages were community property.<sup>166</sup> In so ruling, the Arizona court

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160. CAL. FAM. CODE § 771(a) (West 2004). "The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse." *Id.*

161. See §§ 2550, 2640 (West. 2004 & Supp. 2008).

162. *Id.* § 770.

163. *Zaragosa v. Craven*, 33 Cal. 2d 315, 322 (1949) (Carter, J., dissenting). The dissent argued the following:

The holding of the majority in this case is reminiscent of the period when a wife was a mere chattel of her husband, possessing no rights or property not subject to his ownership or control. The majority ignore the fact that a married woman, when wrongfully injured by a third person, may recover damages for her disfigurement and pain and suffering, which are elements of damage personal to her, and by no reasonable construction of our statutes can be said to constitute community property.

*Id.*

164. See discussion *infra* Part III.

165. M.R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 5 (1936). Although Arizona repudiated all of its civil laws in 1864 in favor of the English common law, the state re-adopted its civil laws in 1865. *Id.*

166. *Pac. Constr. Co. v. Cochran*, 243 P. 405, 406 (Ariz. 1926). In *Cochran*, husband and wife sued their employer for personal injuries suffered by the wife when she fell into an unmarked ditch. *Id.* The husband's contributory negligence was imputed to the wife since any recovery was community property. See

cited the “Ruling Case Law Treatise” and referenced several other community property state decisions, including California:

As a general rule, causes of action for injury to the person of either spouse during marriage and the damages recovered therefore are community property, and where this rule prevails contributory negligence on the part of the husband will defeat an action to recover for an injury to the wife.<sup>167</sup>

For the next fifty-four years, the community property classification of personal injury damages remained the rule in Arizona despite the demise of the imputed negligence doctrine and the rise of the women’s movement. In 1980, the Arizona Supreme Court revisited the issue and, sitting en banc, reversed the community property classification of personal injuries for married persons.<sup>168</sup> The Arizona court admitted that its ruling fifty-four years earlier was without analysis: “The rule announced in *Pacific Construction* was based upon the general rule in community property states, particularly California. There was no analysis in our early cases of the various component parts which make up a recovery for personal injuries.”<sup>169</sup>

The Arizona court criticized the unitary classification of personal injury damages as a misunderstanding of the general community property definition and a failure to distinguish between onerous and lucrative title.<sup>170</sup> The court concluded that the personal injury damages should be apportioned in accordance with its component parts:

In the case at issue the serious injuries to the appellant are personal to him. In the same fashion as pointed out in *Soto*, the body which he brought to the marriage is certainly his separate property. The compensation for injuries to his personal well-being should belong to him as his separate property. Any expenses incurred by the community for medical care and treatment and any loss of wages resulting from the personal injury should be considered community in nature, and the community is entitled to recover for such losses.<sup>171</sup>

Arizona has since followed this replacement/apportionment classification for personal injury damages.<sup>172</sup> The *Jurek* court recognized that each spouse

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also *Jurek v. Jurek*, 606 P.2d 812, 813 (1980) (“The long-standing rule in Arizona has been that a cause of action for injury to the person of either spouse during marriage and the damages recovered therefore are community property. The rule announced in 1926 has been followed consistently ever since.”).

167. *Cochran*, 243 P.2d at 406.

168. *Jurek*, 606 P.2d at 813.

169. *Id.*

170. *See id.* “In construing community property statutes, the basic principles applicable to such property are often ignored. The underlying distinction between onerous and lucrative titles is often overlooked.” *Id.*

171. *Id.* at 814.

172. In *Brumbaugh v. Pet Inc.*, 129 Ariz. 12, 13, 628 P.2d 49, 51 (1981), the Arizona court held that a mother’s recovery for the wrongful death of her son was her separate property (“We believe that the pain, suffering and mental anguish which appellant has suffered as a result of her loss are injuries to her well being

owns his or her body and that compensation for personal injuries should be classified as the separate property of the injured spouse.<sup>173</sup> This line of reasoning is similar to that of Justice Carter, who called the majority of the California Supreme Court absurd for failing to recognize that each spouse owns his or her own body as separate property and that compensation for personal injuries should be classified accordingly.<sup>174</sup> The Arizona judiciary asserted its authority to re-classify personal injury damages in 1980, but the California courts are reluctant to exercise their judicial power without more specific legislation.

### B. Idaho

When Idaho became part of United States territory in 1863, its provisional government specifically adopted legislation recognizing and continuing the common law of England.<sup>175</sup> Four years later, the provisional government rejected the common law and adopted the community property system.<sup>176</sup> The new community property laws were modeled after California's community property laws:

There is little explanation why Idaho adopted the community property system. It appears that this decision was based on several reasons; first, at that time in history the common law was being debated as archaic, womanizing and devoid of equality, the community property laws were more "women" oriented than England's common law; second, the West was looking forward to a new world, like that created in California, who had already adopted this new law focused on a shared marital relationship; third, this law seemed to encourage women to settle in this new frontier; and fourth, forward thinking legislators could see taxation as the inevitable process for collecting government revenue in the future and they saw the possibility of tax

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within the contemplation of the *Jurek* court and thus, any award she recovers for these injuries is her separate property.") In *Brumbaugh*, a father driving in the scope of his employment resulted in the death of his minor son. *Id.* at 13, 50. The mother sued Pet Inc. claiming that the father's negligence occurred within the scope of his employment and Pet Inc. was liable for the accident. *Id.*

173. *Jurek*, 606 P.2d at 814.

174. *Zaragosa v. Craven*, 33 Cal. 2d 315, 323 (1949) (Carter, J., dissenting). The dissent stated the following:

As an illustration of just how absurd this attitude is, one need only note that property owned by either spouse *before marriage* is considered his or her separate property. And yet, when the undeniably separate property of the wife's person is disfigured, or she suffers pain because of an injury to that property, any damages recovered are community property.

*Id.*

175. See Gary R. Stenzel & Jeff Banks, *Defunct Marriage: Its Possible Application in Idaho Divorce Law*, 30 IDAHO L. REV. 725, 741 (1994) (quoting an announcement from the Idaho territorial government that "the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of the land.").

176. See W.J. Brockelbank, *THE COMMUNITY PROPERTY LAW OF IDAHO* 14 (1962).

advantages with a system that split ownership of property and clarified its character.<sup>177</sup>

Idaho was slow to develop its community property laws in part due to its common law roots and to an atmosphere of “male chauvinism and victorian concepts of chivalry, that appeared to never gain an insight into the proper application of this new more egalitarian system of community property law.”<sup>178</sup> Despite this beginning, the Idaho Supreme Court rejected the in toto classification of personal injuries in 1975 in *Rogers v. Yellowstone Park Co.*<sup>179</sup> In *Rogers*, a wife sued her husband’s employer for personal injuries resulting from her husband’s negligent driving of his employer’s car.<sup>180</sup> The employer argued that the wife’s action was barred because any recovery would be community property and inure to the husband’s benefit.<sup>181</sup> The Idaho Supreme Court rejected the doctrine of interspousal immunity and, more importantly, adopted a “nature of the right” analysis for classifying personal injury damages:

We now come to the critical issue concerning the nature of the interest which appellant by this action seeks to protect. If one relies on the cases previously cited by respondent involving tort claims against third party tortfeasors, it is clear that there is only one answer, i.e., appellant’s recovery for damages suffered in the automobile accident would be community property and this present action would be barred. However, without exception none of those cases considered the character of the right harmed for which the damages were sought.

. . . . .  
 . . . [W]e believe the correct concept is first to consider the nature of the right or interest invaded or harmed by the negligence of a defendant, and based on a determination of the nature of this right, then to characterize the damages recovered in relation to the right violated. Thus, the character of any judgment in this type of case as separate or community would take its character from the nature of the right violated.<sup>182</sup>

Citing a Washington decision setting forth the proper classification for the component parts of a personal injury award, the Idaho Supreme Court

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177. Stenzel & Banks, *supra* note 175 at 741-42; see also Kelly M. Cannon, *Beyond the “Black Hole”—A Historical Perspective on Understanding the Non-Legislative History of Washington’s Community Property Law*, 39 GONZ. L. REV. 7, 17 (2003-2004) (“The territory of Idaho, like Washington, abandoned the common law with respect to marital property rights and instituted a community property system in its place. There is no explicit explanation for the decision of Idaho, but, again, it is clear that the California law of 1850 served as the model.”).

178. Stenzel & Banks, *supra* note 175 at 744.

179. See *Rogers v. Yellowstone Park Co.*, 539 P.2d 566, 576 (1974).

180. See *id.* at 567. The defendant employer had given permission for the wife and infant son to be in the car for a business trip from San Francisco to Yellowstone Park. *Id.* The husband fell asleep at the wheel while driving and caused the car to leave the highway. *Id.* Wife claimed \$4,200 in medical expenses, \$10,000 in future medical expenses, and \$50,000 for pain and suffering. *Id.*

181. *Id.* at 568.

182. *Id.* at 570.



adopted the following formula: (1) special damages are community property because they are a community liability; (2) loss of future earnings which would otherwise be classified as community property are one-half recoverable by the injured spouse as separate property; and (3) damages for pain and suffering and emotional distress are the separate property of the injured spouse.<sup>183</sup>

The Idaho court's nature of the right approach is simply a replacement analysis and classifies the damages as it would the property it replaces. This approach was again followed by the Idaho Supreme Court in 1981 to classify the component parts of a workers compensation award at divorce.<sup>184</sup> Thus, compensation for past lost earning capacity during marriage was community property, but after divorce, the portion of the award replacing future lost earning capacity would be the separate property of the injured spouse.<sup>185</sup> Whether called a nature of the right approach or a replacement analysis, the logic is identical: personal injury damages should not be classified in toto, but instead according to their component parts.

### C. Louisiana

The state of Louisiana has a rich history with roots in French, Spanish, and Roman law.<sup>186</sup> Although much of Louisiana's family law is based upon Roman law, its community property system descends directly from Spanish law.<sup>187</sup> Dating back to 1808, Louisiana's community property system is the oldest among the nine community property states.<sup>188</sup>

One of the basic tenets of a community property regime is the recognition that each spouse contributes to the success of the marital partnership and,

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183. Freehe v. Freehe, 500 P.2d 771, 777 (Wash. 1972), *overruled by* Brown v. Brown, 675 P.2d 1207 (Wash. 1984); *see Rogers*, 539 P.2d at 572.

184. Cook v. Cook, 637 P.2d 799 (Idaho 1981) (California does not treat workers compensation awards in the same manner as personal injury damages for purposes of classification as community property or separate property.); *see In re Marriage of Fisk*, 2 Cal. App. 4th 1698, 1701 (1992).

185. Cook, 637 P.2d at 802. The Cook court stated the following:

[S]ince workmen's compensation is paid to make good the impairment or loss of an individual's future capacity to earn, the community cannot lay claim to the whole of the benefit where it compensates for a period of disability which extends beyond the time of divorce. To hold otherwise would result in the deprivation of an individual's basic source of financial security. The dispositive question in classifying workmen's compensation benefits as community or separate property, therefore, is not whether the right to receive benefits vested during marriage, but rather to what extent the award compensates for loss of earning capacity during marriage.

*Id.*

186. *See* Dane S. Ciolino, *Why Copyrights Are Not Community Property*, 60 LA. L. REV. 127, 131 (1999); *see also Cannon*, *supra* note 177, at 10-11.

187. *See Cannon*, *supra* note, 177 at 9-11.

188. Boggs v. Boggs, 520 U.S. 833, 840 (1997) (citing de Funiak 1st ed., *supra* note 18, at 85-89). "The community property regime in Louisiana dates from 1808 when the territorial legislature of Orleans drafted a civil code which adopted Spanish principles of community property." *Id.*

therefore, shares equally in the ownership of marital property.<sup>189</sup> Addressing the possible preemption of Louisiana's community property laws by the federal Employee Retirement Income Security Act of 1974 (ERISA), the United States Supreme Court recognized that the community property system is "more than a property regime," because it represents "a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship."<sup>190</sup> Despite this settled principle of equality, for many years Louisiana adhered to a "head and master" rule, which placed the husband as the sole manager of the community property.<sup>191</sup> The head and master rule gave rise to procedural complexities because the husband was a necessary party litigant for all claims inuring to the benefit of the community.<sup>192</sup> This procedural rule was consistent with the archaic non-legal status of married women and worked with the pre-1902 rule classifying a wife's personal injury claim as community property.<sup>193</sup>

After 1902, Louisiana changed the classification of the wife's personal injury claim to her separate property but retained a community property classification for the husband's personal injury claim.<sup>194</sup> Louisiana's gender specific rule regarding the classification of personal injury damages created procedural and substantive anomalies: only the wife had standing to sue for her personal injuries but only the husband, as the head and master, could sue for any recovery owed to the community.<sup>195</sup> Recovery to the community included recovery for the loss of "services as a housewife."<sup>196</sup> Recovery also included claims for medical expenses for either spouse.<sup>197</sup>

*McConnell v. Travelers Indemnity Company* is an example of the procedural problems created by Louisiana's gender specific classification of

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189. RESTATEMENT (THIRD) OF PROPERTY § 9.1, cmt. (b) ("The prevailing view of marriage is that it is an economic partnership, which imports a goal of equalizing the marital assets. The community property system implements this theory of marriage.").

190. *Boggs*, 520 U.S. at 840.

191. See de Funiak 2d ed., *supra* note 21, §§ 1, 7; 3 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW, pt. 1, ch. 1, § 891, at 74 (LA. ST. L. INST. trans., 11th ed. 1959) ("It is most probable that the community system came into being in the late Middle Age, perhaps between the 8th and the 10th centuries.") see also Kelly Kromer Boudreaux, *So You've Married a Mismanager: The Inadequacy of Louisiana Civil Code Article 2354*, 68 LA. L. REV. 219, 224 (2007).

192. See *id.* at 224.

193. See *Fournet v. Morgan's L. & T.R. & S.S. Co.*, 43 La. Ann. 1202, 1202 (1891). ("[A]ctions for personal injuries and wrongs to the wife should be brought in the name of the husband only, as the amount realized, if any, falls into the community, of which he is head and master.").

194. *Mead v. Mead*, 442 So.2d 870, 872 (La. App. 3 Cir., 1983) ("Prior to January 1, 1980, personal injury awards inuring to the husband were deemed community property, whereas in similar instances involving the wife, the same was deemed her separate property."); see also *McConnell v. Travelers Indem. Co.*, 346 F.2d 219, 220 (1965) ("Under Louisiana community property law, the wife's claim for personal injuries is her separate property; the husband's claim for personal injuries belongs to the community.").

195. *Muse v. United States Cas. Co.*, 306 F.2d 30, 31 (C.A. La. 1962) ("[I]t is clearly the settled jurisprudence of the State of Louisiana that the husband is head and master of the community, and he is its only legal representative in suits by or against the community.").

196. *Hollinquest v. Kansas City Southern Ry. Co.*, 88 F. Supp. 905, 908 (D.C. La. 1950).

197. *McConnell*, 346 F.2d at 220.

personal injury damages when applied with its head and master rule.<sup>198</sup> In *McConnell*, both spouses were injured in an automobile accident.<sup>199</sup> The wife sued in state court for her personal injuries, and the husband joined to recover the monies paid for her medical expenses.<sup>200</sup> The husband then filed a new action in federal court seeking \$85,000 in damages for his personal injuries and medical expenses.<sup>201</sup> The defendant sought a summary judgment in federal court arguing that the husband was not permitted to split his cause of action under Louisiana law.<sup>202</sup> To avoid this potential defense, the husband dismissed his state court claim with prejudice.<sup>203</sup> The federal court then denied the defendant's summary judgment motion.<sup>204</sup> The defendant then filed a second summary judgment motion claiming res judicata on the basis of the husband's dismissal with prejudice in the state action.<sup>205</sup> Writing for the Fifth Circuit Court of Appeals, Judge Wisdom acknowledged the "disastrous effects" on the husband under these circumstances:

We are aware that the result we reach produces an anomaly. The husband and wife may split their tort claims, but the husband's lawsuit must include any claim for the wife's medical expenses. In effect, therefore, the parties may twice litigate the issue of the wife's injuries. On the other hand, the plaintiff's theory of the case would also produce an anomaly. The purpose of the tort claims is compensation. Under Louisiana law the community of acquets and gains suffers the injury. The plaintiff's theory would divide community damages among several potential lawsuits. It is the Louisiana community property system that causes the anomaly, not the rules of res judicata. This Court must apply the Louisiana law as the Court finds it.<sup>206</sup>

The Louisiana Supreme Court's struggle with the proper application of the gender-specific classification of personal injury damages is best exemplified in *Chambers v. Chambers*.<sup>207</sup> Mr. Chambers suffered personal injuries while working as a railroad flagman, and he filed suit seeking over \$1 million.<sup>208</sup> Although Mr. Chambers was married when the accident occurred,

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198. *Id.*

199. *Id.*

200. *Id.* at 220-21.

201. *Id.*

202. *Id.* at 221.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 223-24. "This hard case involving, for the plaintiff, disastrous effects from splitting his cause of action, is an invitation to make bad law. We decline the invitation." *Id.* at 220.

207. *Chambers v. Chambers*, 249 So. 2d 896, 902, *cert. denied*, 404 U.S. 856 (1971), *overruled by* West v. Ortega, 325 So. 2d 242 (La. 1975). "There is a disparity in the treatment of husband and wife, but '[t]he office of judges is jus dicere not jus dare, to interpret law, not make law or give law. The instant case is a matter that addresses itself to the legislature not to the courts.'" *Id.*

208. *Id.* at 897.

he did not file the complaint until after he and his wife had separated.<sup>209</sup> A settlement was reached, and the monies were paid after the divorce became final.<sup>210</sup> Mrs. Chambers claimed a one-half community property interest in the settlement.<sup>211</sup> In the first *Chambers* opinion, the Louisiana Supreme Court appeared to apportion the settlement monies by reimbursing the community estate for paid medical expenses but affirmed the trial court's classification of the settlement as community and awarded it to the wife.<sup>212</sup> In the later per curiam opinion, the court held that the all of the personal injury damages were community property without any apportionment for medical expenses paid by the community estate.<sup>213</sup>

The *Chambers* decision was criticized and expressly overruled four years later in *West v. Ortega*.<sup>214</sup> In *West*, the Louisiana Supreme Court held that personal injury damages should be classified according to their component parts: "[W]here a husband's settlement monies, acquired after dissolution of the community, but based upon a pre-dissolution, accident-related cause of action, compensate for both pre-dissolution and post-dissolution losses, that portion of the settlement which compensates for post-dissolution losses falls into the separate estate of the husband."<sup>215</sup>

The Louisiana legislature codified the *West* decision, effective January 1, 1980, by amending article 2344 of the Louisiana Civil Code to cure its gender specific classification of personal injury damages and to codify a rule of apportionment between the separate and community property estates.<sup>216</sup>

209. *Id.* at 899.

210. *Id.*

211. *Id.*

212. *Id.* at 904.

213. *Id.* at 907. "[A] husband's cause of action for damages resulting from a tort committed against him while living with his wife in community is community property . . . . [And] the damages received by judgment of court or the funds received in settlement of a compromise of such cause of action are also community property." *Id.*

214. On rehearing, the *McLeod* court stated the following:

Our original opinion in this case was adopted and filed by this panel with considerable reluctance. It was the feeling of the Court that the result reached was inequitable, but we felt constrained to follow the opinion of the Supreme Court in *Chambers v. Chambers* . . . . In doing so, however, we had serious doubt that the ultimate decree in that case actually reflected the majority view of the Court. We held up action on the application for rehearing in view of the decision of the Third Circuit Court of Appeal in *West v. Ortega* . . . and the granting of writs in that case by the Supreme Court. It was our hope that the *Chambers* decision would be reconsidered by the Supreme Court and the jurisprudence on the issue clarified.

*McLeod v. McLeod*, 325 So. 2d 883, 886 (La Ct. App. 1976).

215. *West v. Ortega*, 325 So. 2d 242, 248-49 (La. 1975).

216. The Louisiana Civil Code states:

Damages due to personal injuries sustained during the existence of the community by a spouse are separate property. Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse.

Personal injury damages are now the separate property of the injured spouse, but any recoveries for expenses paid by the community or for lost earnings are community property.<sup>217</sup>

#### D. Nevada

In 1848 by the Treaty of Guadalupe Hidalgo, the United States acquired the territory that today comprises Arizona, Nevada, and part of New Mexico.<sup>218</sup> When Nevada became a state in 1864, its constitution continued the community property system leftover from its Spanish heritage.<sup>219</sup>

In 1940, Nevada became the first state to recognize the separate property nature of personal injury damages.<sup>220</sup> Declining to follow California's classification of such monies, the Nevada Supreme Court classified a wife's recovery for personal injuries as her separate property, but also followed the common law "head of household" rule in permitting the husband to recover for any medical expenses paid and loss of wife's services.

The husband as head of the community sustains the same relation to the wife as at common law, so far as the present question is concerned—he is entitled to her services, and is liable for the expense of her care and cure, and for the violation of these rights he should recover. But neither at common law or by the law of community does he hold the wife's right to personal security and should not be permitted to recover for the violation of this right. It does not belong to him nor to the community. The wife's physical pain and suffering are not his loss nor the loss of the community.<sup>221</sup>

The Nevada legislature codified the apportionment replacement rule for the classification of personal injuries in 1975.<sup>222</sup> The present statute provides that damages for personal injuries and for pain and suffering are the separate property of the injured spouse but that damages for loss of services and medical expenses are community property.<sup>223</sup> The Nevada rule recognizes that

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LA. CIV. CODE ANN. art. 2344 (1985); *see also* Chambers, 249 So. 2d at 902.

217. *See* LA. CIV. CODE ANN. art. 2344, 1979 revision comments. Compensation for lost earnings post-dissolution is classified as separate property but if the marriage is terminated by death, the recovery for lost earnings is community property in the interest of the surviving spouse. *See id.*

218. Cannon, *supra* note 177, at 11 (citing ROBERT L. MENNELL & THOMAS M. BOYKOFF, COMMUNITY PROPERTY IN A NUTSHELL 14 (2d ed. 1988)).

219. *Id.*

220. Douglas W. Schroeder, *Adding Insult to Injury: California's Community Property Classification of Personal Injury Damage Awards—Proposed Statutory Reform*, 16 W. ST. U. L. REV. 521, 530 (1989) (citing *Frederickson & Watson Const. Co. v. Boyd*, 102 P.2d 627, 629 (1940)).

221. *Frederickson*, 102 P.2d at 628-29.

222. NEV. REV. STAT. § 123.121 (2007).

223. The Nevada Statute states the following:

When a husband and wife sue jointly, any damages awarded shall be segregated as follows: 1. If the action is for personal injuries, damages assessed for: (a) Personal injuries and pain and suffering, to the injured spouse as his separate property. (b) Loss of comfort and society, to the

compensation for personal injuries belongs to the injured spouse but that lost earnings and compensation for medical expenses should be classified as community property because those monies replace lost community income.<sup>224</sup>

### E. New Mexico

The 1848 Treaty of Guadalupe Hidalgo (the Treaty) ended a two year war between Mexico and the United States that began over the United States' annexation of Texas.<sup>225</sup> Part of the Treaty's terms included the sale of certain land, which included New Mexico, to the United States, effectively doubling the territory of the United States and reducing that of Mexico's by one-half.<sup>226</sup> Contained in the Treaty was a specific promise by the United States to "inviolably respect" the property rights of Mexicans residing in New Mexico.<sup>227</sup> Article VIII of the Treaty stated:

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States.<sup>228</sup>

The Treaty of Guadalupe Hidalgo did not differentiate the property interests of men versus women. This omission left the Mexican women in New Mexico caught between two very different marital property systems—the common law and the civil law.<sup>229</sup> In 1848, married women under the common

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spouse who suffers such loss. (c) Loss of services and hospital and medical expenses, to the spouses as community property. 2. If the action is for injury to property, damages shall be awarded according to the character of the injured property. Damages to separate property shall be awarded to the spouse owning such property, and damages to community property shall be awarded to the spouses as community property.

*Id.*

224. *See id.*

225. *See* Refugio I. Rochin, *Reflections on the Treaty of Guadalupe Hidalgo and the Border It Established*, 5 SW. J. L. & TRADE AM. 141 (1998). Some academics consider the Treaty of Guadalupe Hidalgo as one of the most important treaties in American history. *See id.*

226. *See* Jose Angel Pescador Osuna, *The War Between Mexico and the U.S.A. and the Treaty of Guadalupe Hidalgo of 1848*, 5 SW. J. L. & TRADE AM. 193, 194 (1998).

227. Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., art. VIII, Feb. 2, 1848, *reprinted in* 9 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 791-811 (Charles I. Bevans ed., 1972).

228. *Id.* at 796.

229. One author characterized the confusion as follows:

While the wording of the ratified Article IX suggests that under the Treaty, Mexicans would receive all the rights of Americans, if Mexican women were to take on the rights of American women, it is unclear what the legal status of their property holdings would have been. The Treaty was a document created by men, for men, and its potential impact on women was ignored."

Dana V. Kaplan, *Women of the West: The Evolution of Marital Property Laws in the Southwestern United States and Their Effect on Mexican-American Women*, 26 WOMEN'S RTS. L. REP. 139, 144 (2005).

law system lacked the legal capacity to hold property, but the Spanish civil law system recognized a married woman's equal ownership interest in marital property.<sup>230</sup> Thus, Mexican women continued to hold property under Mexican community property laws but were left to the mercy of the United States courts in enforcement and interpretation of those rights under the common law. An example of such a case is *Botiller v. Dominguez*.<sup>231</sup>

Dominga Dominguez held legal title to property under Mexican law, but she lost that title to homesteaders in the American courts.<sup>232</sup> Considered a test case as to whether the United States would inviolably respect the property rights of Mexicans as promised in the Treaty of Guadalupe Hidalgo, the Supreme Court refused to enforce the treaty stating: "This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard."<sup>233</sup> Ms. Dominguez lost her land for failing to register her property with the land grants office despite her vested rights under Mexican law. Although the United States promised to honor the property interests of the Mexican-born citizens who remained in the newly acquired territory, many lost their property rights within several years.<sup>234</sup>

In 1884, New Mexico formally adopted the Spanish community property system, which it recognized in its state constitution in 1912.<sup>235</sup> Although New Mexico's community property laws are now codified, their Mexican and Spanish heritage is reflected in both judicial application and interpretation.<sup>236</sup>

New Mexico's community property law provides that "[p]roperty acquired during marriage by either a husband or wife, or both, is presumed to be community property."<sup>237</sup> As to the classification of personal injury damages, the critical question is whether such monies are acquired during marriage and

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230. *Id.* at 145 ("Women in the United States were still living under this theory of feme covert in 1848, when the United States annexed the Mexican territories. The law deprived a married woman of the right to own any type of property. . . ."); see W. S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES §§ 3:12-3:34 (1982).

231. *Botiller v. Dominguez*, 130 U.S. 238 (1889).

232. *Id.* at 238.

233. *Botiller*, 180 U.S. at 247; see Kaplan, *supra* note 229, at 160.

234. Kaplan, *supra* note 229, at 160-61.

235. New Mexico law stated:

All property, real, personal and mixed, and choses in action, owned by any married women, or owned or held by any woman at the time of her marriage, shall continue to be her separate property, notwithstanding such marriage, and any married woman may, during coverture, receive, take, hold, use and enjoy property of any and every description, and all avails of her industry, free from any liability of her husband on account of his debts, as fully as if she were unmarried.

Act of Apr. 2, 1884, ch. 14, §§ 1-4, 1884 N.M. Laws 44; see Kaplan, *supra* note 229, at 156-57.

236. N.M. STAT. § 40-3-8 (1978 & Supp. 2006). "Although [New Mexico's] community property scheme is statutory, it 'was modeled after the civil law of Spain and Mexico and those laws will be looked to for definitions and interpretations.'" *Portillo v. Shappie*, 97 N.M. 59, 62, 636 P.2d 878, 881 (1981) (citing *McDonald v. Senn*, 53 N.M. 198, 201, 204 P.2d 990, 991 (1949)).

237. N.M. STAT. § 40-3-12 (1978 & 2006).

within the community property presumption. The New Mexico Supreme Court addressed this issue for the first time in *Soto v. Vandeventer*.<sup>238</sup> After considering the case law in several other community property states, the New Mexico court decided upon a narrow interpretation of the word “acquired” consistent with the concept of onerous title:

We are persuaded that the word should be read and interpreted in the light of the uses and purposes of community property and the establishment of community rights; and in so reading it we doubt very much whether it logically can be said that the Legislature used the word in the sense that it was to be all-comprehensive. It seems more logical to conclude that the word was used in the more restricted sense of embracing wages, salaries, earnings, or other property acquired through the toil or talent or other productive faculty of either spouse; that they did not have in mind compensation for an injury to the person which arises from the violation of the right of personal security, which said right the wife brings to the marriage.<sup>239</sup>

The New Mexico Supreme Court proceeded to recognize the component portions of personal injury damages and classified them as community or separate according to a replacement analysis.<sup>240</sup> Thus, personal injury damages are the separate property of the injured spouse, but recovery for medical expenses, lost earnings, and loss of services to the community are community property.<sup>241</sup> In its opinion, the New Mexico court cited an article written by a former California law school dean who labeled the California community

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238. *Soto v. Vandeventer*, 245 P.2d 826 (1952). The court framed the issue as follows:

The questions involved have never been decided in New Mexico, but the other community property states except Louisiana (where a statute gives the cause of action to the wife) and Nevada (where the cause of action and the judgment for the injury, pain and suffering is held by judicial decision to belong to the wife) hold the cause of action, as well as the judgment for such injury, is property, and as such falls into the community as ‘other property’ under identical or practically identical statutes as are quoted above.

*Id.* at 827.

239. *Id.* at 828-29.

240. *See id.* at 832-33.

241. *See id.* The court stated:

[W]e hold the cause of action for the personal injury to the wife, and for the resultant pain and suffering, belongs to the wife, and that the judgment and its proceeds are her separate property. She brought her body to the marriage and on its dissolution is entitled to take it away; she is similarly entitled to compensation from one who has wrongfully violated her right to personal security.

. . . .

The cause of action for the damages to the community for medical expenses, loss of services to the community, as well as loss of earnings, if any, of the wife still belongs to the community, and the husband as its head is the proper party to bring such an action against one who wrongfully injures the wife.

*Id.*



property classification of personal injury damages as “utter nonsense” and “absurd.”<sup>242</sup>

#### F. Texas

When Texas became the twenty-eighth state in 1845, it continued the Spanish-Mexican community property system in its state constitution.<sup>243</sup> Despite amendments to the Texas Constitution since 1845, the constitutional definition of community property remains virtually unchanged. Article XVI, Section 15 of the Texas constitution provides:

All property, both real or personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property. . . .<sup>244</sup>

According to the rule of “implied exclusion,” anything not specifically delineated as separate property is, by exclusion, community property.<sup>245</sup>

Early cases appear to classify personal injury damages as community property because such monies were not otherwise acquired by lucrative title. In *Ezell v. Dodson*, the wife brought suit complaining of an assault and battery.<sup>246</sup> The Texas Supreme Court held that the claim was community property and dismissed the suit because the husband was a necessary party plaintiff and had refused to join in the lawsuit.<sup>247</sup> Notably, the court’s dismissal rested upon its classification of the personal injury claim as community property. “Of course such property as is derived by reason of a personal trespass committed upon her falls under neither of these heads of gift, devise or descent, and necessarily forms part of the acquits and gains of the marital partnership.”<sup>248</sup> Three years later, the Texas Supreme Court created an exception to the community property classification in *Nickerson v. Nickerson* by classifying a wife’s personal injury

242. *Id.* at 829; Orrin K. McMurray, *Comment on Recent Cases: Statute of Limitations: Marriage as a Disability: Right of Wife to Sue Alone for Personal Injuries*, 2 CAL. L. REV. 161, 162 (1914).

243. Aloysius A. Leopold, “Loss of Earning Capacity” Benefits in the Community Property Jurisdiction—How Do You Figure?, 30 ST. MARY’S L.J. 367, 376-77, 420 (1999). The 1845 Texas constitution provided that “[a]ll property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or, descent, shall be the separate property; and laws shall be passed more clearly defining the rights of the wife’ in relation to separate and community property.” TEX. CONST. art. VII, § 19 (1845).

244. TEX. CONST. art. XVI, § 15.

245. Leopold, *supra* note 212, at 377-78 (citing *Arnold v. Leonard*, 273 S.W. 799, 802 (Tex. 1925) (discussing the rule of implied exclusion)).

246. *Ezell v. Dodson*, 60 Tex. 331, 1883 WL 9331, at \*1 (Tex. 1883).

247. *Id.* at \*2. “The refusal of a husband to become a party to an ordinary suit to recover community property would not give the wife the power to sue alone . . . .” *Id.*

248. *Id.*

damages as her separate property.<sup>249</sup> The court affirmed the soundness of its earlier decision classifying a wife's personal injury damages as community property.<sup>250</sup> However, the court held that an exception existed when the husband was one of the tortfeasors and the parties were separated due to the fault of the husband.<sup>251</sup>

In 1915 and 1925, the Texas legislature made two unsuccessful attempts to classify personal injury damages as entirely separate property of the injured spouse.<sup>252</sup> Both statutes were struck down as unconstitutionally overbroad because they failed to specify any apportionment for lost earnings.<sup>253</sup> In 1967, the Texas legislature amended the Texas Family Code to specifically classify personal injury damages as the injured spouse's separate property "except any recovery for loss of earning capacity during marriage."<sup>254</sup> Texas's statutory definition of separate property is nearly identical to that of California's: property acquired before marriage and acquired by lucrative title is separate property.<sup>255</sup> Unlike the California statute, however, the Texas statute codifies an apportionment of the personal injury award and replaces the community estate with those amounts it lost because of the personal injury—lost earnings.

Although the Texas statute fails to classify medical expenses, the Texas Supreme Court addressed the issue in *Graham v. Franco* and classified recovery for medical expenses as community property by following a replacement analysis.<sup>256</sup> The court held that "[t]o the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse; and both spouses have a claim against the wrongdoer. The recovery, therefore, is community in

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249. Nickerson v. Nickerson, 65 Tex. 281, 1886 WL 4666, at \*4 (Tex. 1886).

250. *Id.* at \*4. "In *Ezell v. Dodson*, 60 Tex. 33[1], it was held that damages to be recovered from a third person for a tort committed upon a wife, by such person alone, would be community property, and we have no doubt of the correctness of this general proposition." *Id.*

251. *Id.* The court explained the exception as follows:

The husband and wife were living separate when the injury was inflicted, and the cause of this separation was such as to justify the wife in withdrawing from his society. Under such facts, it may be true that she could have maintained this action, before divorce, against Matson; and that the facts which rendered the separation from her husband justifiable, would, as to her right to the sum to be recovered, place her in the same position in which she would have been had she been a *feme sole* at the time the injury was inflicted, had her husband not been a party to it.

*Id.*

252. *Graham v. Franco*, 488 S.W.2d 390, 395-96 (Tex. 1972) (discussing the early legislation and overruling the holding in *Ezell v. Dodson*).

253. See *Few v. Charter Oak Fire Ins. Co.*, 463 S.W. 2d 424, 427 (Tex. 1971) (finding the 1915 statute overbroad); *N. Tex. Traction Co. v. Hill*, 297 S.W. 778, 780 (Tex. Civ. App.—El Paso 1927, writ ref'd) (holding the 1925 statute unconstitutional).

254. TEX. FAM. CODE ANN. § 3.001 (Vernon 2006).

255. See *id.* "A spouse's separate property consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage." *Id.*

256. See *Graham v. France*, 488 S.W.2d 390 (1972).

character.”<sup>257</sup> Texas’s attempts to classify personal injury damages as entirely separate property were unconstitutional because of the failure to recompense the community estate for its losses. Likewise, California’s classification of personal injury damages as entirely community property may be subject to constitutional challenge.<sup>258</sup>

### G. Washington

Unlike the other community property states, Washington, Idaho, and Wisconsin do not have strong historical ties to Mexico or Spain to explain their adoption of a community property system.<sup>259</sup> Washington was initially part of the Oregon Territory whose provisional government first adopted the common law of Iowa in 1843.<sup>260</sup> In 1853, Congress carved out the Washington Territory and provided that the laws previously in place in Oregon would simply continue to be in effect.<sup>261</sup> In 1869, the provisional government of Washington abruptly repudiated the common law and adopted the community property system.<sup>262</sup> Little evidence exists as to why the community property system was chosen, but the two principal reasons appear to be the large influx of Californians who moved into Washington and the desire to attract more women into the state.

Based on what little information there is regarding the lack of women in Washington Territory, it is clear that the bachelors of the territory were interested in a certain kind of woman. The conditions of frontier life meant that a woman had to be willing and capable to perform hard work and to live in difficult circumstances. The community property system gave more rights to women and was more likely to attract the strong-minded and adventurous women needed on the West Coast. In fact, it has been asserted that the continuation of the doctrine of community property in the Pacific Northwest was due to the challenges to survival that were faced by frontier

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257. *Id.* at 396.

258. CAL. FAM. CODE § 780 (West 2004). The California statute may contravene the constitution since each spouse enters a marriage already owning his or her body parts. *See* CAL. CONST. art. 1, § 21; CAL. FAM. CODE § 780. Article 1, Section 21 of the California Constitution provides that “Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property.” CAL. CONST. art. 1, § 21. Also, the California legislature has specified that personal injury damages are community property if the cause of action arises during marriage. CAL. FAM. CODE § 2603.

259. Cannon, *supra* note 177, at 12 (“Washington and Idaho, however, did not have strong French, Spanish, or Mexican traditions like the other community property states. Because of this, Washington and Idaho are said to have copied the idea from one of the other community property jurisdictions.”); *see also* Harry M. Cross, *The Community Property Law* (Revised 1985), 61 WASH. L. REV. 13, 17 (1986) (“Community property law in the United States is principally of Spanish origin. Washington, however, has no history of significant contact with Spanish culture, as do many of the original ‘old line’ community property states.”).

260. Cannon, *supra* note 177, at 13-14 (“The first territorial legislature promptly adopted the Iowa statutes of 1839 as the law of the newly-formed territory, thus continuing the common law tradition.”).

261. *Id.* at 14.

262. *Id.*

settlers; challenges which were similar to those confronted by the Visigoths in western Europe.<sup>263</sup>

In 1869, the Washington provisional government passed its first community property legislation titled “An Act Defining the Rights of Husband and Wife,” modeled on California’s community property statute.<sup>264</sup> Although over 150 years have passed, Washington’s current community property statutes have remained largely unchanged, with the exception of amendments in 1972 that specifically provided equal management for both spouses.<sup>265</sup> Washington defines community property as all property that is not otherwise separate property “acquired after marriage or after registration of a state registered domestic partnership. . . .”<sup>266</sup> Separate property includes property acquired before marriage, property acquired by donative transfer, and the rents and profits thereof.<sup>267</sup>

The Washington courts had an early opportunity to consider the classification of personal injury damages for an injury caused by a third party tortfeasor.<sup>268</sup> In *Hawkins v. Front St. Cable Ry. Co.*, the wife was injured while riding as a passenger on a streetcar.<sup>269</sup> The court classified the recovery as community property, in part because of adherence to the common law rule that only the husband had standing to sue for the wife’s injuries:

But inasmuch as the right to sue for a tort which one has suffered is a chose in action, and therefore property, in those states where, as here, all property acquired by either spouse, otherwise than by gift, bequest, demise, or descent, is common or community property, this chose in action is suable by that member of the community who has the disposition of the community personality.<sup>270</sup>

Subsequent Washington cases followed the *Hawkins* rule and classified personal injury damages as community property until 1984.<sup>271</sup> The community property classification rested upon the court’s inability to find that a personal injury claim fell within the definition of separate property:

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263. *Id.* at 17, 24-25. “There is some data indicating that a significant percentage of Washington’s early settlers actually moved there from California rather than Oregon (from which Washington Territory was created).” *Id.* at 24-25.

264. *Id.* at 15.

265. Cross, *supra* note 259, at 18-19.

266. WASH. REV. CODE ANN. § 26.16.030 (West 2006 & Supp. 2009).

267. *Id.* § 26.16.010.

268. *Hawkins v. Front St. Cable Ry. Co.*, 28 P. 1021 (Wash. 1892).

269. *Id.*

270. *Id.* at 1022.

271. See *Brown v. Brown*, 675 P.2d 1207 (Wash. 1984) (overruling *Hawkins*, 28 P. 1021); see also *In re Marriage of Parsons*, 622 P.2d 415 (1981); *Chase v. Beard*, 346 P.2d 315 (Wash. 1959); *Ostheller v. Spokane & Inland Empire R. Co.*, 182 P. 630 (Wash. 1919); *Hammond v. Jackson*, 8154 P. 1106 (Wash. 1916).

This “waste basket” definition of community property results in property being characterized as community unless it meets the definition of separate property. The Washington rule is that fortuitous acquisition of damages for personal injury by a third party tort-feasor is community property because it does not fit within the definition of separate property.<sup>272</sup>

In 1984, the Washington Supreme Court again considered the classification of personal injury damages and reviewed cases from the community property states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Texas.<sup>273</sup> The Washington Supreme Court noted the community property classification of personal injury damages was “criticized by legal commentators” and rejected by all of the community property states with the exception of California.<sup>274</sup> The court concluded that the *Hawkins* rule was based “upon a too literal reading of our community property statutes, [and] was wrong from the beginning.”<sup>275</sup>

#### H. Wisconsin

The community property origins for Wisconsin are very different from the eight other community property states.<sup>276</sup> Unlike the others, Wisconsin became a community property state in the twentieth century and is the only state to base its community property laws on the Uniform Marital Property Act.<sup>277</sup> Although Wisconsin refers to acquisitions during marriage as marital property and individual property, Wisconsin is considered to be the last community property state.<sup>278</sup>

Public discussions and legislative debates over marital property rights and property distribution at death and divorce began at least twelve years prior to

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272. *Brown*, 675 P.2d at 1210.

273. *Id.* at 1211-12. Wisconsin was not a community property state at the time of the *Brown* decision. *See id.*

274. *Id.* at 1212. “Only California has a different rule.” *Id.*

275. *Id.*

276. *See* Howard S. Erlanger and June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769 (1990).

277. *See id.* at 769-70. The Wisconsin Marital Property Act went into effect on January 1, 1986, and was based upon the Uniform Marital Property Act. *See id.* at 769.

278. *Id.* As explained by Erlanger and Weisberger:

Because the Wisconsin statutes (and the Uniform Act) refer to the adoption of a marital property system rather than a community property system, there was initially some question as to the community property status of the Wisconsin system, especially for federal tax purposes. This point was clarified for state law purposes by section 766.001 of the Wisconsin statutes, adopted as part of Trailer Bill I, which states that “It is the intent of the legislature that marital property is a form of community property.” Soon after the enactment of WMPA, Internal Revenue Service officials informally recognized that WMPA would transform Wisconsin into a community property state.

*Id.* at n. 2 (citing Boykoff, *Wisconsin Tax Practice and the Marital Property Act*, 68 MARQ. L. REV. 424, 427 (1985)).

the formal enactment of the Wisconsin Marital Property Act.<sup>279</sup> The new divorce laws, enacted in 1977, set the stage for the community property change by recognizing marriage as a partnership.<sup>280</sup> Other reasons for the change include the existence of community property jurisprudence in other states, the adoption of the Uniform Marital Property Act by the National Conference of Commissioners on Uniform State Laws, bipartisan support for the community property model, and the lobbying efforts of influential women's groups.<sup>281</sup>

Section 766.31 of the Wisconsin Marital Property Act specifies a replacement approach for the classification of personal injury damages. The statute classifies such monies as individual property "except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage."<sup>282</sup>

One year after codifying the replacement approach for personal injury damages, the Wisconsin Supreme Court applied the approach to classify a spouse's unliquidated personal injury claim.<sup>283</sup> In *Richardson v. Richardson*, the plaintiff wife filed a medical malpractice suit against a physician for personal injuries that rendered her unable to have children.<sup>284</sup> While the suit was pending, the parties divorced, necessitating a classification of the personal injury claim for division at divorce.<sup>285</sup> Curiously, the Wisconsin Supreme Court did not consider the jurisprudence on this issue from the other community property states.<sup>286</sup> Instead, the court relied upon the reasoning in a New Jersey case that followed a replacement analysis for the division of a personal injury award at divorce:

As the [New Jersey] court and others have noted, compensation for loss of bodily function, for pain and suffering and for future earnings replaces what was lost due to a personal injury. Just as each spouse is entitled to leave the

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279. *Id.* at 771.

280. *Id.* n.10. "Distribution of spousal property at divorce without regard to title or property ownership during marriage follows from the conception of marriage as a partnership and attempts to recognize homemaking and childrearing contributions as well as financial contributions." *Id.* (citing HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 4-5 (1988); KEVIN J. GRAY, REALLOCATION OF PROPERTY ON DIVORCE 22-67 (1977); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 829 (1983); Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 69-77 (1981); Elizabeth A. Cheadle, Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1282-83 (1981)).

281. *See id.* at 771-75.

282. WIS. STAT. ANN. § 766.31 (West 2005). Wisconsin expanded the statute by adding the language "and except for the amount attributable to loss of income during marriage" to the Uniform Marital Property Act's version. *See* § 766.31(f); *see* Lynn F. Hendon, *Classification of Personal Injury Awards in Divorce Actions*, 27 J. OF FAM. L. 453, 471 (1989).

283. *Richardson v. Richardson*, 407 N.W.2d 231 (Wis. 1987).

284. *Id.* at 232.

285. *Id.*

286. *Id.*

marriage with his or her body, so the presumption should be that each spouse is entitled to leave the marriage with that which is designed to replace or compensate for a healthy body. We therefore conclude that the statutory presumption of equal distribution should be altered with respect to certain components of a personal injury claim. Instead of presuming equal distribution of a personal injury claim, the court should presume that the injured party is entitled to all of the compensation for pain, suffering, bodily injury and future earnings. With regard to other components of a personal injury claim, such as those that compensate for medical or other expenses and lost earnings incurred during the marriage, the court should presume equal distribution.<sup>287</sup>

As Wisconsin had only recently adopted a community property system, the state did not experience the socio-economic changes and growing pains of the older community property states and was able to avoid the problems of reconciling the doctrine of imputed negligence with the community property presumption of equal division.<sup>288</sup> Likewise, the Wisconsin court did not engage in an in-depth discussion as to the nature of personal injury claim as property acquired by onerous or lucrative title; rather, the court simply concluded that the personal injury claim was property within the meaning of its marital property statute and subject to division at divorce.<sup>289</sup> The court further held that a replacement analysis also applies at death so that future lost earnings of the injured surviving spouse will be classified as the spouse's individual property after the death of the non-injured spouse.<sup>290</sup> The logic and rationale of the replacement analysis that the Wisconsin legislature and judiciary so readily adopted and applied has eluded the California legislature and judiciary for more than forty years.

#### IV. CONCLUSION

California's community property jurisprudence once had a significant influence in those states choosing a community property system. However, California's community property rules have developed haphazardly in response to specific problems without an overhaul of the entire system of rules and case law.

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287. *Id.* at 233-35.

288. *See* discussion *supra* Part II.

289. Richardson, 407 N.W.2d at 234. ("Mrs. Richardson fails to offer a definition of property, a rationale or relevant precedent justifying the exclusion of a claim for personal injury from the concept of 'property' under section 767.255. Accordingly we conclude that a claim for personal injury is property subject to division under section 767.255.")

290. WIS. STAT. ANN. § 766.31(7m) (West 2009). "To the extent that marital property includes damages for loss of future income arising from a personal injury claim of a surviving spouse, the surviving spouse is entitled to receive as individual property that portion of the award that represents an income substitute after the death of the other spouse." *Id.*

One such example is California's mechanistic classification of personal injury damages. California classifies damages in their entirety as community property during marriage, awards them to the injured spouse at divorce absent "exceptional circumstances" to the contrary, and treats them as community property upon the death of either spouse.<sup>291</sup> This unitary approach fails to protect the injured spouse during marriage or at death and can be patently unfair to the non-injured spouse.

During marriage, the couple may unwittingly commingle the personal injury damages so that segregation at divorce is impossible. Even without commingling, an award of the personal injury damages entirely to the injured spouse is not fair to the non-injured spouse who has foregone economic opportunities to care for the injured spouse. The community property classification of personal injury damages at death is also potentially unfair. If the non-injured spouse dies first, then that spouse can testamentarily dispose of one-half of the personal injury damages to a third party, depleting the funds available to pay for any future needs of the injured spouse.

California's community property classification of personal injury damages should be changed to reflect the economic component parts of a personal injury award. Whether called a replacement analysis or an analytic approach, all other community property states, and a majority of common law states, divide personal injury awards into their component parts and classify them accordingly at divorce and at death.<sup>292</sup> A breakdown of a personal injury award as compensation for past and future medical expenses, lost earnings, loss of earning capacity, pain and suffering, and punitive damages represents a practical and realistic assessment of the losses to the community estate and the injured spouse.<sup>293</sup>

California's in toto classification of personal injury damages is outdated. No-fault divorce reform, social and legal changes in the recognition of women's rights, and modern tort law have all undergone significant developments since California's 1968 statute that classifies personal injury damages as community property but awards any remainder to the injured spouse at divorce unless the interests of justice warrant otherwise. The

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291. See discussion *supra* Part II.B.2-3.

292. Amanda Wine, *Treatment of Personal Injury Awards During Dissolution of Marriage*, 20 J. AM. ACAD. MATRIMONIAL LAW. 155, 155-56 (2006). The author states:

A majority of courts in both community property and equitable distribution states have now adopted the analytic approach to classification of personal injury awards. This approach takes into consideration whether the award is compensation for loss experienced by the marriage or loss experienced by the individual and classifies each component of the award as marital or separate property accordingly.

*Id.*

293. See George, *supra* note 31, at 614-15. Because punitive damages are intended to punish the tortfeasor, to deter similar wrongful conduct, and "to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations" an argument can be made that such damages should be classified as the injured spouse's separate property. *Id.*, (quoting BLACK'S LAW DICTIONARY 390 (6th ed. 1990)).



California statute fails to provide a workable and specific standard for the court to determine when circumstances warrant any award to the non-injured spouse at divorce. Indeed, none of the reported California cases have ever awarded any portion to a non-injured spouse at divorce.<sup>294</sup> Notably, the statute does not require proof of exceptional circumstances to justify such an award, but this high standard was judicially created in 1983 and has since remained the rule.<sup>295</sup> The exceptional circumstances exception has never been met, leading one to question whether this judicially created standard fulfills the legislature's intent regarding the treatment of personal injury damages at divorce. While this article is not the first to urge the California legislature and judiciary to revise its mechanistic approach in the classification of personal injury damages, perhaps it will be one of the last before such reform.

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294. See discussion *supra* Part II.B.2.

295. See *In Re Marriage of Morris*, 139 Cal. App. 3d 823, 827-28 (Cal. Ct. App. 1983).