Introduction

Remembering requires intentionality because forgetting is natural. This article is devoted to remembering the niceties of the mother of all presumptions affecting the burden of proof - the presumption in favor of community property.

The law presumes that all property acquired during marriage is community property. The presumption is triggered by an acquisition of property during marriage. Once triggered, the presumption can be rebutted only by proof that the property is separate property. If not rebutted, the Legislature instructs the court, as fact-finder, that it must find in favor of community property. It is error to do otherwise.

This is why the presumption is “the most fundamental principle of California’s community property law,” why the presumption is called “the presumption in favor of community property,” and why the law school and bar exam subject matter is titled “Community Property.”

To begin this adventure, it is essential to establish a foundational understanding of the broader presumption affecting the burden of proof.
THE PRESUMPTION IN FAVOR OF COMMUNITY PROPERTY

The Essence of the Presumption Affecting the Burden of Proof

Overview: The very presence of a presumption affecting the burden of proof admits of tension between two opposing outcomes: the existence of a certain fact and the existence of its opposite or contrary fact. The former is the presumed fact, because public policy favors the presumed fact. This means that the presumed fact is binding on the fact-finder (jury or judge) unless and until the presumption is rebutted by proof of the existence of the contrary or opposing fact.

The presumption in favor of community property is activated by an acquisition of property during the time of marriage. The presumed fact is community property and the opposing or contrary fact is separate property. Hence, the court (as the fact-finder) is compelled by law to find that the property acquired during marriage is community unless and until there is proof that it is separate property.

Definitions:

Presumption, generally: A pre-sumption is an “advance” or “before” assumption of fact – the presumed fact, that the law requires to be made, upon proof of another fact – the foundational fact. (Evid. C. § 600 [“A presumption is an assumption of fact [aka presumed fact] that the law requires to be made from another fact or group of facts [aka foundational fact] found or otherwise established in the action”].)

Foundational fact: The independent fact that triggers or activates the presumption – for example, an acquisition of property during marriage triggers the presumption of community property.

Presumed fact: The dependent fact the law assumes to be true when the presumption is activated – for example, property acquired during marriage is presumed to be community property.

Contrary or opposing fact: The dependent fact that is in tension or competition with the presumed fact – for example, separate property is contrary to community property.

Rebuttal evidence: The evidence required to tip the scales against the presumed fact, in favor of the contrary fact – that is, to shift the law’s favor from the existence of the former (by presumption) to the existence of the latter (by proof).

Binding fact: The presumed fact is binding on the trier of fact, if the evidence does not sufficiently favor the contrary fact. For instance, if the community property presumption is not rebutted, the court is compelled by law to find the acquired property is community property. But if it is rebutted, the court is compelled to find the acquisition is separate property.
The presumed fact is favored because public policy favors it: The presumption is not neutral. Rather, it unashamedly discriminates in favor of the presumed fact. This favor is driven not by whim or caprice, but by public policy. (Evid. C. § 605 [“A presumption affecting the burden of proof is a presumption established to implement some public policy ….”].)

The presumed fact is material, if not dispositive: Indeed, public policy is what distinguishes the presumption affecting the burden of proof from the presumption affecting the burden of producing evidence. (Farr v. County of Nevada (2011) 187 Cal.App.4th 669, 680-681.) Therefore, the presumption affecting the burden of proof has “a more substantial impact in determining the outcome of litigation.” (Id. at 681.) “Such a presumption thereby ‘plays an essential part in directing the fact-finder. (citation omitted.)’” (Ibid.)

The presumed fact, if not rebutted, is a binding fact, and not a fact to be weighed against other facts: “A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.” (Evid. C. § 600 (a) [emphasis added].) What does the second sentence – “A presumption is not evidence” – mean?

“[T]he second sentence has been added here to repudiate specifically the rule of Smellie v. Southern Pac. Co., 212 Cal. 540, 299 Pac. 529 (1931). That case held that a presumption is evidence that must be weighed against conflicting evidence ….” (6 Cal. L. Rev. Comm’n, TENTATIVE RECOMMENDATION AND A STUDY relating to The Uniform Rules of Evidence, Burden of Producing Evidence, Burden of Proof, and Presumptions 1001, 1015 (1964).)

Thus, the presumption is not evidence in the sense that it is not to be weighed against other evidence. Rather, “presumptions ‘are conclusions that the law requires to be drawn (in the absence of a sufficient contrary showing) when some other fact is proved or otherwise established in the action.’” (People v. McCall (2004) 32 Cal. 4th 175, 182 [emphasis added].)

That is, the presumption “tells the trier of fact that he or they must find the elemental [or presumed] fact upon proof of the basic [foundational] fact, at least until the defendant has come forward with some evidence to rebut the presumed connection between the two facts.” (Id. at 183 [emphasis in original].)

The most common presumption affecting the burden of proof is the presumption of community property. What is its mindset, foundationally?

The Community Property Presumption, Foundationally

The words - “acquired during marriage” - the most important words in community property. All property acquired during marriage is presumed to be community. Upon the rock of these words, community property is built.

The presumption – the original and most ancient principle of community property: “From the inception of its statehood [in 1850], California has retained the community property law that
predated its admission to the Union and consistently has provided as a general rule that property acquired by spouses during marriage, including earnings, is community property.” (In re Marriage of Bonds (2000) 24 Cal.4th 1, 12.)

The presumption – the most fundamental principle of community property: “The presumption, now codified in the Family Code, that property acquired during the marriage is community, is perhaps the most fundamental principle of California’s community property law. ‘This presumption is fundamental in the community property system and is an integral part of the community property law not only of this state but of other states and countries where the system is in operation.’ (citations omitted.) (In re Marriage of Valli (2014) 58 Cal.4th 1396, 1408-09 [concurring opinion] [emphasis added].)

The presumption unashamedly admits to discriminating in favor of community property: The presumption, like all presumptions affecting the burden of proof, is partial, not neutral, as to the outcome. Not out of whim, but because of public policy. (Evid. C. § 605.)

Specifically, the presumption of community property implements the public policy that favors community property. Hence, it is also called “the presumption in favor of community property.” (Estate of Murphy (1976) 15 Cal.3d 907, 918.) “Both of these presumptions [in Family Code § 760 and 2581] favor a finding of community property ….” (Valli, 58 Cal.4th at 1412.)

Community property is passive by presumption (or default), separate property is active by proof (or discipline): All property acquired during marriage “belongs to the community; exceptions to the rule must be proved.” (Meyer v. Kinzer (1859) 12 Cal. 247, 252.) “[T]he default classification … is community property…” (In re Marriage of Buie & Neighbors (2009) 179 Cal.App.4th 1170, 1173.) In short, separate property has to do all of the work; community property has to do none.

If not rebutted, the presumption is “absolute and conclusive”: “In the absence of such [rebuttal] proof the presumption [is] absolute and conclusive.” (Meyer, 12 Cal. at 252; accord Gudelj v. Gudelj (1953) 41 Cal.2d 202, 210 [the “presumption is controlling” when not rebutted].)

Time of acquisition determines time of characterization: “[W]hat is determinative is the single concrete fact of time.” (In re Marriage of Lehman (1998) 18 Cal.4th 169, 183 [emphasis added].) “[T]he time of acquisition of disputed property is decisive.” (See v. See (1966) 64 Cal.2d 778, 784 [emphasis added].)

"The character of property as separate or community is determined at the time of its acquisition. [Citations.] If it is community property when acquired, it remains

1 The wisdom of a court’s written opinion is tested by how long it survives the year of its authorship. By this test, Meyer v. Kinzer is abundantly wise. This 1859 decision was both cited and quoted several times recently by the Supreme Court in 2014. (Valli, 58 Cal.4th at 1408-1409.)
so throughout the marriage unless the spouses agree to change its nature or the spouse charged with its management makes a gift of it to the other.” (Id. at 783 [emphasis added].)

“The character of the property as separate or community is fixed as of the time it is acquired; and the character so fixed continues until it is changed in some manner recognized by law, as by agreement of the parties.” (In re Marriage of Rossin (2009) 172 Cal.App.4th 725, 732 [emphasis added].)

The burden of rebuttal is on the spouse challenging the presumed fact of community: “[T]he burden is on the spouse asserting its separate character to overcome the presumption.” (See, 64 Cal.2d at 783.) “Any other rule would lead to infinite embarrassment, confusion and fraud.” (Meyer, 12 Cal. at 254.)

In short, the risk of not rebutting the presumption is resolved all against the spouse claiming separate property and none against the spouse claiming community property.

The Community Property Presumption - Statutorily

Two governing statutes: In In re Marriage of Lucas (1980) 27 Cal.3d 808, 814-815, the Supreme Court “discusses two statutory presumptions, both of which … are now found in two separate sections of the Family Code. (Fam. Code §§ 760, 2581.)” (Valli, 58 Cal.4th at 1412.)

Family Code Section 760: “Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.” (emphasis added.)

Family Code Section 2581: “For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property.” (emphasis added.)

Two forms of acquisitions

Section 760 form of acquisition: This statute governs all property acquired by a married person during the marriage” – such as untitled property, property titled in the name of one spouse, or property titled in the name of a third-party.

Section 2581 form of acquisition: This statute governs all “property acquired by the parties during marriage in joint form.”

Exclusive characterizing authority: Sections 760 and 2581 “are sufficient unto themselves.” (Valli, 58 Cal.4th at 1413.) This arguably means that both statutes enjoy exclusive

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2 A fascinating read on the origin and evolution of the joint title presumption now codified in Family Code section 2581, and the public policy considerations in section 2580, can be found at kimcheatum.com/articles/Cheatum_Lafkas-who-is-on-first_April2017.pdf, pages 21-33.
characterizing authority over all acquisitions during marriage. Hence, nothing outside of the presumptions can add to or subtract from this exclusive and sovereign authority.

**The Community Property Presumption - Operationally**

**Overview:** The Legislature directs the court (as the trier of fact) to instruct the parties and their attorneys, “before” the characterization phase of every dissolution of marriage case, on the nature or essence of the presumption in favor of community property.

**Court’s Instructions to Attorneys and Parties**

The importance of the following instructions cannot be overstated. They are the governing principles on how to resolve disputes regarding the character of property at the time it is acquired during marriage.

All property acquired during marriage is presumed community. If the presumption is not rebutted, the court is compelled by law to find that the property is community property. The court has no discretion to do otherwise.

Accordingly, if one spouse claims that an asset acquired during marriage is his/her separate property, the spouses must go to one of the following rooms:

**Room 760:** If the property is in a form other than joint title – that is, untitled, titled in the name of one spouse, or titled in the name of a third party, go to Room 760. On the blackboard are instructions on what evidence is required to rebut the presumption.

**Room 2581:** If the property is held in joint form or joint names, go to Room 2581. On the blackboard are instructions on what evidence is required to rebut the presumption.

**Room 760 Instructions**

**Foundational fact:** Property acquired by a spouse during marriage in a form other than joint title.

**Presumed fact:** Property is community property, at the time of its acquisition.

**Rebuttal burden:** On spouse claiming acquisition is separate property.

**Rebuttal standard:** Evidence that preponderates in favor of a finding that the property is “(1) traceable to a separate property source (citations omitted); (2) acquired by gift or bequest (citations omitted), or (3) earned or accumulated while the spouses are living separate and apart (citations omitted).” (*Valli*, 58 Cal. 4th at 1400.)

**Binding fact:** The court, as trier of fact, is compelled by the Legislature to find in favor of the presumed fact, if the presumption is not rebutted. The court errs if it does otherwise.
Room 2581 Instructions

Foundational fact: Property acquired during marriage in joint form or title.  

Presumed fact: Property is community property, at the time of its acquisition.

Rebuttal burden: On spouse claiming acquisition is separate property.

Rebuttal standard: Evidence that preponderates in favor of a finding that the property is “. . . rebutted by either of the following: (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property. (b) Proof that the parties have made a written agreement that the property is separate property.”  

Binding fact: Presumed fact of community is binding on the fact-finder, if the evidence does not preponderate in favor of one of the exclusive means for rebutting the presumed fact. (See also Jefferson’s California Evidence Benchbook (4th edit. 2016) p. 48-37 to 48-38, § 48.42.)

Protections to Separate Property

Overview: The law’s clarity and consistency have been separate property’s best friends.

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3 Separate property owned before marriage that is retitled in joint names during marriage is an acquisition within the meaning of section 2581. (In re Marriage of Anderson (1984) 154 Cal.App.3d 572, 577-578; disapproved on other grounds, In re Marriage of Buol (1985) 39 Cal.3d 751, 763; and In re Marriage of Fabian (1986) 41 Cal.3d 440, 451.) If the joint title presumption is not rebutted, the property is community. But the equity in the property at the time it is jointly titled is subject to the reimbursement mandate of section 2640, absent a written waiver. (In re Marriage of Walshrath (1998) 17 Cal.4th 907, 914-915; In re Marriage of Perkal (1988) 203 Cal. App.3d 1198, 1202, and cases cited therein; Appendix VII Report of the Senate Committee on Judiciary o Assembly Bill 26, 17 Cal. L. Rev. Comm’n Reports 863, 864 (1984).) What is the net change? Any appreciation after the joint titling is owned by the community. Conversely, if the property thereafter depreciates, the property is community property in form, but separate property in substance because the equity is consumed by the right of reimbursement under section 2640. (Walwrath, 17 Cal.4th at 914-915.)

4 “The statute [Family Code section 2581] delineates two ways of rebutting the presumption . . . .” (In re Marriage of Hilke, (1992) 4 Cal.4th 215, 223-224 [emphasis added].) “Under that section the only means of rebutting the presumption that property acquired during marriage in joint [form] is community property is by providing evidence of a written agreement that the property is separate property.” (In re Marriage of Buol (1985) 39 Cal.3d 751, 755 [emphasis added].) More broadly, the statute requires “a writing evidencing the parties’ intent to maintain the [jointly titled] asset as separate property . . . .” (Id. at 757 [emphasis added].)

In short, once triggered by an acquisition of property in joint names or form, “the only means of rebutting the presumption” is by the rebuttal evidence prescribed therein. “Only” means only. There is no exception. That which cannot be done directly, cannot be done indirectly.
Clear and consistent notice – the presumption favoring community property: Separate property is protected both by the clarity of the notice – all property acquired during marriage is presumed community, and by the consistency of the notice – it has been the same and only notice since California became a state in 1850.

Clear and consistent notice – the due process opportunity to rebut the presumption: Since 1850, the law has also given the same clear and consistent notice on the opportunity to rebut the presumption and how to do it.

Clear and consistent notice – the mandatory right of reimbursement: Failing rebuttal, separate property contributed to property characterized under the presumption as community does not vanish or disappear. It mutates to a mandatory right of reimbursement under Family Code section 2640.

Clear and consistent notice – the conditional authority to transmute: Finally, the parties “may” also transmute community property to separate property, subject to the dual requirements of section 721 (a) [authority to transact exists because the circumstances are pleasing to the fiduciary standard] and of section 852 [authority to transact manifests itself in the proper written form, namely, an “express declaration”]. (In re Marriage of Haines (1995) 33 Cal.App.4th 277, 293.)

Beyond these protections, there are none.
**Conclusion**

The presumption in favor of community property, once triggered by an acquisition of property during marriage, can be defeated by rebuttal evidence, and rebuttal evidence only. To rebut or not to rebut, that is the only question. To do otherwise is error.\(^5\)

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\(^5\) Therefore, the court in *In re Marriage of Lafkas* (2015) 237 Cal.App.4th 921 erred when it defeated a presumption by means other than rebuttal evidence. In particular, the court concluded that the presumption in section 2581 conflicts with the transmutation requirement in section 852, the latter is more specific, and therefore, the former should yield to it.

The errors of *Lafkas*, along with the history and meaning of Sections 2580, 2581, 2640, and 850-852, are exhaustively (and exhaustingly) presented in the article that can be found at [http://kimcheatum.com/articles/Cheatum_Lafkas-who-is-on-first_April2017.pdf](http://kimcheatum.com/articles/Cheatum_Lafkas-who-is-on-first_April2017.pdf).

In a nutshell, a presumption affecting the burden of proof cannot, as a matter of law, conflict with, or otherwise be defeated by, a non-presumption. No court has authority to transmute a legislative presumption (“before” a non-presumption) to a post-summption (“after” a non-presumption).

Moreover, sections 2581 and 850-852 do not conflict with each other. A companion statute to section 2581 is section 2640. They are joined at the hip. In both, the Legislature struck a balance between community and separate property. In section 2581, the court strengthened the presumption in favor of community property. In section 2640, the Legislature mandated a right of reimbursement to separate property. Thus, if section 2581 causes separate property owned before marriage to become community property because it is jointly titled during marriage, the separate property does not disappear. Rather, it mutates separate property to a right of reimbursement. A mutation is not a transmutation. But even if a transmutation, the transmutation is caused by the Legislature in sections 2580 and 2581. The Legislature is not governed by what spouses “may” do in section 850.

Indeed, sections 2581 and 850-852, complement each other in the same way the presumption of community property and the principle of transmutation complemented (or checked and balanced) each other for all of the years before the statutes were enacted. The presumption establishes what the court “must” do, whereas the principle of transmutation establishes what the spouses “may” do to change what the court “must” otherwise do. This rhythm or dynamic relationship between what the court “must” do and what the spouses’ “may” do to change what the court must otherwise do, is the genius of community property.

But even if conflicting, the presumption in section 2581 speaks loudly and clearly through the Legislature’s megaphone in section 2580, namely, its declarations that the joint title presumption is uniquely supported by both public policy and a compelling state interest. Section 852 enjoys neither declaration. Therefore, sections 2580 and 2581 prevail over section 852. *Lafkas* completely ignores section 2580.

In the simplest of terms, the presence of a transmutation rebuts the presumption in section 2581, but the absence of a transmutation does not.