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PROPERTY AND INHERITANCE RIGHTS OF PUTATIVE SPOUSES IN CALIFORNIA: SELECTED PROBLEMS AND SUGGESTED SOLUTIONS

by Harry S. Laughran* & Catherine W. Laughran**

I. INTRODUCTION

California jurisprudence traditionally has treated a relationship involving cohabitation¹ as belonging to one of three categories: marital,² putative,³ or meretricious⁴ (nonmarital).⁵ Marital property rights of

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1. For purposes of this article, the cohabitants are assumed to be of opposite sex. Living arrangements involving persons of the same sex, while presenting fascinating legal questions, *see, e.g.*, Comment, *Same Sex Marriage and the Constitution*, 6 U.C.D. L. REV. 275 (1973), are not treated herein.

Most of the issues and rules of law discussed in this article are, at least at face value, sex-neutral. *But see*, with respect to underlying cultural values, economic realities, and the role of law, Laughran, *Management and Control of Community Property in California: "Retroactive" Application of the 1975 Amendments*, 9 LOY. L.A.L. REV. 493, 497-98 n.21 (1976) [hereinafter cited as Laughran].

2. Marriage is defined as "a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by . . . solemnization as authorized by this code" CAL. CIV. CODE § 4100 (West 1970).

Section 55 of the 1872 Code, the precursor of § 4100, recognized "common-law" (non-ceremonial) marriages; that statutory authority was withdrawn in 1895. Act of Mar. 26, 1895, ch. 129, § 1, 1895 Cal. Stats. 121.

3. The basis for finding a "putative marriage" is set forth in CAL. CIV. CODE § 4452 (West Supp. 1977): "Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse"

Marriages which are void *ab initio* are those which are incestuous, *id.* § 4400 (West

parties to a valid marriage are governed by California's community property regime in the absence of a contract to the contrary.⁶ Although parties to a nonmarital relationship may contract with one another respecting property rights,⁷ except "to the extent that . . . [such agreements are] explicitly founded on the consideration of meretricious sexual services,"⁸ the community property laws are inapplicable,⁹ and no property rights arise as a matter of law from the fact of the relationship.¹⁰ The good faith party or parties to a putative marriage have been accorded property rights both in cases where the relationship ends while both

1970), or bigamous, *id.* § 4401. Grounds for annulment of voidable marriages are set forth in *id.* § 4425 (a)-(f). *See generally* Comment, *Dissolution and Voidable Marriage Under the California Family Law Act*, 4 LOY. L.A.L. REV. 331 (1971) [hereinafter cited as Comment, *Dissolution and Voidable Marriage*].

4. A "meretricious relationship" is one involving cohabitation with knowledge that there is no valid marriage. Either cohabitant, or both, may be meretricious. Comment, *Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866, 873 (1962) [hereinafter cited as Comment, *Putative and Meretricious Spouse*].

5. "Meretricious" is an opprobrious term, defined as pertaining to prostitution. WEBSTER'S NEW INT'L DICT., UNABR. 1539 (2d ed. 1954). "Meretrix," a feminine term, means harlot or prostitute. *Id.* (Would the masculine equivalent be "meretror"? There is no dictionary listing. *See* note 1 *supra* on the legal impact of cultural values.)

Recognizing that "[t]he mores of . . . [our] society have . . . changed . . . radically in regard to cohabitation," *Marvin v. Marvin*, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976), courts have begun using less scurrilous terminology. Certain of such relationships may now be referred to as, for example, "nonmarital relationships," *id.*; "non-marital family relationship[s]," *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 531, 122 Cal. Rptr. 604, 605 (1975); and "actual family relationships," *In re Marriage of Cary*, 34 Cal. App. 3d 345, 353, 109 Cal. Rptr. 862, 867 (1973).

6. The community property regime is legal, not conventional; that is, marriage triggers its application as a matter of law. CAL. CIV. CODE § 5133 (West 1970). The parties may, however, contract their way out of the system, either totally or partially. *See, e.g., id.* §§ 5103, 5133-5135; *In re Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).

7. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

8. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

9. *Id.*

10. *Id.*; *Keene v. Keene*, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943).

Doubt was cast on this point in 1973, when the First District Court of Appeal held the provisions of the Family Law Act applicable to a nonmarital "actual family relationship." *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). *Cary* was followed in the Fourth District in *Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975). Other districts declined to follow *Cary*. *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (3d Dist. 1975); *Marvin v. Marvin*, No. 44359 (Cal. Ct. App., 2d Dist. July 23, 1975), *rev'd*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); *see also* *Powell v. Rogers*, 496 F.2d 1248, 1251 n.1 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974). The supreme court opinion in *Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976), expressly rejected *Cary/Atherley* on this point.

parties are living¹¹ and where it ends with the death of one "spouse."¹²

Property rights of putative spouses in California originally were governed by decisional jurisprudence and were decided on a case-by-case basis,¹³ either by analogy to the community property laws¹⁴ or under general equitable principles.¹⁵ Since 1970, in annulment actions these rights have been governed by section 4452 of the Civil Code.¹⁶ In probate, in the absence of a statutory provision, cases presumably will continue to be decided as in the past.¹⁷

Until recently, development of California law with respect to property rights of putative spouses was fairly orderly. Two recent developments have engendered confusion. First, the court in *In re Marriage of Cary*,¹⁸ by way of dictum, interpreted Civil Code section 4452 as requiring that, in annulment actions, all property acquired by either party to a putative relationship, which would have been community or quasi-community property of a valid marriage, be divided between the parties pursuant to Civil Code section 4800,¹⁹ regardless of the bad faith of one of the parties.²⁰ The supreme court in *Marvin v. Marvin*²¹ disapproved the holding of *Cary*,²² but indicated in a footnote that the *Cary* interpretation of section 4452 might be correct.²³ Second, the court in *Estate of Levie*²⁴ held that a surviving putative spouse was not an heir to the separate property of the deceased "spouse" under section 221 of the Probate Code.²⁵

The following section of this article will set forth briefly the California law governing the property of putative marriages. The next section will

11. *E.g.*, *Figoni v. Figoni*, 211 Cal. 354, 295 P. 339 (1931); *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920); *Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911).

12. *E.g.*, *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976); *Estate of Vargas*, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

13. *See generally, e.g.*, *Luther & Luther, Support and Property Rights of the Putative Spouse*, 24 HASTINGS L.J. 311 (1973) [hereinafter cited as *Luther & Luther*].

14. *Id.* at 313-14.

15. *Id.*

16. CAL. CIV. CODE § 4452 (West Supp. 1977).

17. *See Estate of Vargas*, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974).

18. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

19. CAL. CIV. CODE § 4800(a) (West Supp. 1977) sets forth a general rule of equal division.

20. *In re Marriage of Cary*, 34 Cal. App. 3d at 351, 109 Cal. Rptr. at 865.

21. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

22. *Id.* at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.

23. *Id.* at 680 n.18, 557 P.2d at 120 n.18, 134 Cal. Rptr. at 829 n.18.

24. 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975).

25. CAL. PROB. CODE § 221 (West 1956).

deal with multiple claimant problems which may arise in the future. The final two sections will examine and criticize the two developments mentioned above. In conclusion, attention will be directed to treatment of the same problems in the civil law, from which both community property²⁶ and the doctrine of putative marriage²⁷ are derived, and suggestions for reform of California law will be offered.

II. A BRIEF LOOK AT THE PROPERTY RIGHTS OF THE PUTATIVE SPOUSE IN CALIFORNIA

A. *Establishing the Status: The Requisite Good Faith*

The basis for according property rights to a party to a void or voidable marriage is that one or both parties to the relationship believe in good faith that the marriage is valid. Indeed, a person's status as a putative spouse is only recognized so long as good faith persists. No rights are accorded with respect to property acquired after a claimant learns of the impediment to the validity of the marriage.²⁸

Existence of the requisite good faith belief in the validity of the marriage is a question of fact. Intelligence, education, and experience of the claimant are among the factors to be considered in evaluating the question.²⁹ While some sort of marriage ceremony normally will have occurred, solemnization or attempted solemnization is not essential. For example, a good faith belief that the parties had entered into a valid common law marriage in a jurisdiction that recognizes such unions qualifies the claimant for putative spouse status in California.³⁰ Good faith may be found whether the claimant was laboring under a mistake of

26. See generally W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1-91 (2d ed. 1971) [hereinafter cited as DE FUNIAK & VAUGHN].

27. *Id.* at 95-99.

28. *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 718-19, 200 P.2d 49, 55 (1948). But see *Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975), involving a reverse twist on this problem. In *Atherley*, the decedent's relationship with his second "wife" began as "meretricious;" they later purported to marry (after he obtained an invalid Mexican divorce), at which time she became a putative spouse. The trial court held that she could share only as to those assets acquired after the "marriage." On appeal, the court held *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), applicable, and found the claimant to have had, in effect, the rights of a putative spouse from the inception of the relationship. 44 Cal. App. 3d at 770, 119 Cal. Rptr. at 48. The *Cary/Atherley* reasoning has been disapproved by the supreme court. See note 10 *supra*.

29. See, e.g., *Flanagan v. Capital Nat'l Bank*, 213 Cal. 664, 3 P.2d 307 (1931); *Miller v. Johnson*, 214 Cal. App. 2d 123, 29 Cal. Rptr. 251 (1963); *Santos v. Santos*, 32 Cal. App. 2d 62, 89 P.2d 164 (1939).

30. *Sancha v. Arnold*, 114 Cal. App. 2d 772, 251 P.2d 67 (1952); see CAL. CIV. CODE § 4104 (West 1970).

law³¹ or of fact.³² The discussion in the next two subsections will proceed on the assumption either that both parties are in good faith or that the party claiming an interest in property acquired by his or her "spouse" is in good faith.

B. Termination of the Relationship While Both Parties Are Living

Property acquired during a putative marital relationship which would have been community or quasi-community property of a valid marriage is termed "quasi-marital property."³³ Upon a judicial determination of nullity,³⁴ quasi-marital property is divided in accordance with section 4800 of the Civil Code.

Civil Code sections 5107 and 5108 define separate property as all property of a married person owned by that person prior to marriage, or acquired during marriage by gift, bequest, devise, or descent.³⁵ Community property is defined by exclusion in section 5110 as "all [other] real property situated in this state and all [other] personal property wherever situated acquired during the marriage by a married person while domiciled in this state"³⁶ Quasi-community property is real or personal property, wherever situated, acquired by a married person while domiciled elsewhere which would have been community property if he or she had been domiciled in California at the time of its acquisition.³⁷ Under section 4800(a), the general rule upon dissolution of a marriage is an equal division of community and quasi-community property.³⁸

The division of quasi-marital property upon annulment of a void or voidable union might best be illustrated by use of several hypothetical examples. In each case, assume that the parties are domiciled in California and an annulment action is filed; the suggested disposition of the

31. Estate of Levie, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975) (marriage between first cousins celebrated in Nevada void as incestuous under Nevada law; no indication that "wife" did not know of the consanguinity); Sancha v. Arnold, 114 Cal. App. 2d 772, 251 P.2d 67 (1952) ("common-law" marriage did not arise from relationship between parties). Since the requisite good faith may be due to a mistake of law, there is no reason why a mistaken belief in the validity of a common law marriage entered into in California should not qualify the claimant as a putative spouse.

32. *E.g.*, Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974) (marriage void as bigamous; claimant did not know of existence of other wife).

33. CAL. CIV. CODE § 4452 (West Supp. 1977).

34. Or at a later time if the court expressly reserves jurisdiction. *Id.*

35. *Id.* §§ 5107-5108 (West 1970). Rents, issues, and profits of separate property are also separate property. *Id.*

36. *Id.* § 5110 (West Supp. 1977).

37. *Id.* § 4803. For a discussion of the quasi-community property legislation, see Laughran, *supra* note 1, at 508-20, 532-34.

38. CAL. CIV. CODE § 4800(a) (West Supp. 1977).

property is that which would be ordered by the court upon finding the union void or voidable and the requisite good faith on the part of one or both parties.³⁹

1) *A* and *B*⁴⁰ purport to marry and remain domiciled in California. *A* knows of the impediment to the validity of the marriage; *B* does not. Ten thousand dollars is saved during the relationship, traceable to *A*'s earnings.⁴¹ The money is quasi-marital property,⁴² to be divided equally between *A* and *B*.⁴³

2) *A* and *B* purport to marry and remain domiciled in California. Both are in good faith. The parties save \$40,000 during the relationship. Of that amount, \$10,000 is traceable to *A*'s earnings and \$30,000 to *B*'s earnings. The money is quasi-marital property, to be divided equally between *A* and *B*.

3) *A* and *B* purport to marry and remain domiciled in California. Both are in good faith. During the marriage, *A* inherits \$10,000 and the parties acquire a parcel of land in California, paid for with *B*'s earnings.⁴⁴ The land is quasi-marital property, to be divided equally between *A* and *B*;⁴⁵ *A* takes the \$10,000 as separate property.⁴⁶

39. *Id.* § 4452.

40. So long as one spouse is male, and the other female, gender is irrelevant to the discussion. The parties here are therefore denominated *A* and *B*, rather than *H* and *W*. See note 1 *supra*.

41. Property acquired during marriage is presumed to be community property; once the presumption is raised, the proponent of classification of a particular item of wealth as separate property bears the burden of proof. *Estate of Duncan*, 9 Cal. 2d 207, 217, 70 P.2d 174, 179 (1937); *Wilson v. Wilson*, 76 Cal. App. 2d 119, 125-26, 172 P.2d 568, 572 (1946). A similar presumption favoring classification as quasi-marital property should apply when the other choice is classification of a particular item as the separate property of one or the other "spouse."

42. CAL. CIV. CODE § 4452 (West Supp. 1977). It would have been community property of a valid marriage, *id.* § 5110, since it was not separate property as defined in *id.* §§ 5107-5108 (West 1970).

43. *Id.* § 4800(a) (West Supp. 1977).

44. The land should be presumed quasi-marital property if acquired during the relationship; the proponent of separate property classification should bear the burden of proof. That burden might be met by, for example, tracing the purchase price to separate (as opposed to quasi-marital) funds. If the proponent of community or quasi-marital classification of a given item were required to trace the source of the funds with which the item was acquired, "there would be but little room for the operation of the presumption." *Wilson v. Wilson*, 76 Cal. App. 2d 119, 127, 172 P.2d 568, 572 (1946).

45. California courts will declare *out-of-state* land to be community property if it was paid for with community funds, even though it is not within the literal definition of community property in CAL. CIV. CODE § 5110 (West Supp. 1977). *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P.2d 11 (1957). Presumably they would declare *out-of-state* land to be quasi-marital property if it was paid for with quasi-marital funds. Recognition of such a decree by the courts of the situs jurisdiction raises issues of full faith and credit and

4) A and B purport to marry in New York, and remain domiciled there for some years. Both are in good faith. During that time, A inherits \$50,000 and \$10,000 is saved, traceable to B's earnings. They then move to California. A invests the \$50,000 in California land. The \$10,000 is quasi-marital property, to be divided equally between A and B;⁴⁷ A takes the land as separate property.⁴⁸

Section 4452 of the Civil Code, effective in 1970, represents the first statutory recognition of the putative marriage doctrine and the institution of quasi-marital property.⁴⁹ Division of property which would have been community property of a valid marriage previously was ordered by courts in favor of a putative spouse in the absence of statutory provision.⁵⁰ With respect to property which would have been quasi-community property of a valid marriage, it seems likely that division would have been ordered in favor of a putative spouse, although no decisions on point have been found. Section 4452 settles this issue.⁵¹ The pre-section 4452 case law extended protection to the putative spouse "under a judicially created equitable community property system analogous to the legal system."⁵² The results as a general rule were the same as those indicated in the hypotheticals above and provided for in section 4452. "[P]roperty which would have been community property had the marriage been valid was treated as community property and divided pursuant to the principles governing community property."⁵³

Prior to the enactment of section 4452, although the cases established an analog to the community property system, division of property ac-

comity. *Rozan v. Rozan*, 129 N.W.2d 694 (N.D. 1964). CAL. CIV. CODE § 4800.5 (West Supp. 1977) contains special provisions for division of community and quasi-community property when the property subject to division includes real property situated in another state. Section 4800.5 presumably would apply in similar cases involving quasi-marital property, even though only § 4800 is mentioned in § 4452.

46. CAL. CIV. CODE §§ 5107-5108 (West 1970). Separate property is not divided on dissolution; the court's jurisdiction extends only to classifying the property as such. *See id.* §§ 4351, 4800, 5102 (West Supp. 1977).

47. Since it would have been quasi-community property of a valid marriage. *Id.* § 4803 (West Supp. 1977).

48. Since the land was purchased with an inheritance, which would have been separate property even if the parties had been domiciled in California when the \$50,000 was acquired. *Id.* §§ 5107-5108 (West 1970). The quasi-community property legislation is not applicable to these funds or to land purchased with them. *Id.* § 4803 (West Supp. 1977).

49. *Id.* § 4452 (West Supp. 1977); *Luther & Luther*, *supra* note 13, at 311.

50. *E.g.*, *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920); *Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911).

51. *Luther & Luther*, *supra* note 13, at 317 & n.35.

52. H. VERRALL, CALIFORNIA COMMUNITY PROPERTY 89 (3d ed. 1977) [hereinafter cited as VERRALL].

53. *Luther & Luther*, *supra* note 13, at 314.

quired during the putative relationship was accomplished under the inherent equitable powers of the courts, and according to equitable principles.⁵⁴ Section 4452 recognizes the equitable system in annulment cases⁵⁵ and mandates division according to section 4800. Absent the putative spouse doctrine, the acquisitions of each party to the relationship would be his or her separate property. It has been suggested that section 4452 does not create in favor of a putative spouse a legal or "vested" interest in the acquisitions of the other party, as in the case of community property of a fully valid marriage,⁵⁶ but rather creates a statutory remedy.⁵⁷

It will be argued below that even if a "vested" interest is created by section 4452, it exists only in favor of a good faith party, in cases where one party is not in good faith.⁵⁸ Even if the interest is only "equitable," the analogy to the community property system should make available to the putative spouse remedies which a legally married person has with respect to unauthorized gifts of community property,⁵⁹ and duties of good faith imposed on married persons should extend to putative spouses.⁶⁰ Further, reference to section 4800 in section 4452 clearly extends to a putative spouse the set-off remedy provided by section 4800(b)(2) in cases involving "deliberate misappropriation" of community or quasi-community property.⁶¹

C. *Termination of the Relationship by the Death of One of the Parties*

There is no statutory scheme governing distribution of "quasi-marital property" in the Probate Code. In fact, for purposes of succession on the

54. See, e.g., *id.* at 317 and authorities cited therein.

55. VERRALL, *supra* note 52, at 90.

56. See CAL. CIV. CODE § 5105 (West Supp. 1977); Laughran, *supra* note 1, at 538 and authorities cited therein.

57. Comment, *Dissolution and Voidable Marriage*, *supra* note 3, at 352.

58. See notes 326-35 *infra* and accompanying text.

59. See, e.g., *Britton v. Hammell*, 4 Cal. 2d 690, 52 P.2d 221 (1935) (right to set aside gift in its entirety when suit brought during marriage); *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 447 (1933) (right to set aside gift as to one half after termination of marriage).

60. See CAL. CIV. CODE § 5103 (West 1970); *id.* § 5125(e) (West Supp. 1977); *Williams v. Williams*, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971); *Fields v. Michael*, 91 Cal. App. 2d 443, 205 P.2d 402 (1949).

61. CAL. CIV. CODE § 4800(b)(2) (West Supp. 1977) provides:

The court may divide the community property and quasi-community property of the parties as follows:

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

death of a party to a putative union, there is no settled descriptive term for property which would have been community property of a valid marriage. Two recent succession cases have used the term "quasi-marital property;"⁶² for purposes of consistency and clarity, that term will be used herein.

Despite the absence of a statutory provision, by analogizing to the provision for distribution of community property, succession cases developed a distributive scheme parallel to that of the annulment cases discussed above.⁶³ Under Probate Code section 201,⁶⁴ upon the death of a married person, one half of the community property belongs to the surviving spouse and the other half is subject to the testamentary disposition of the decedent; in the absence of testamentary disposition, the survivor succeeds to the decedent's portion. Thus, upon the testate death of one party to a putative union, the surviving putative spouse takes at least one half of the quasi-marital property;⁶⁵ in the event of the decedent's intestacy, the survivor takes all of such property.⁶⁶

Although decisions initially were based on equitable principles, the courts forcefully equated the position of a surviving putative spouse with that of a legal spouse. Thus, in *Feig v. Bank of America*,⁶⁷ quasi-marital property was said to be impressed with all the incidents of community property "under the plainest principles of equity."⁶⁸ In *Estate of Krone*,⁶⁹ the surviving putative spouse was treated as an heir to the decedent's share of the quasi-marital property:

[T]he logic appears irrefutable that if according to statute the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit all.⁷⁰

Another case, while continuing to apply equitable principles, viewed the putative union as a partnership.⁷¹ Under this view, the surviving putative

62. *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976); *Estate of Vargas*, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974).

63. *E.g.*, *Feig v. Bank of America*, 5 Cal. 2d 266, 54 P.2d 3 (1936); *Mazzenga v. Rosso*, 87 Cal. App. 2d 790, 197 P.2d 770 (1948); *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

64. CAL. PROB. CODE § 201 (West 1956).

65. *See Sousa v. Freitas*, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970).

66. *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

67. 5 Cal. 2d 266, 54 P.2d 3 (1936).

68. *Id.* at 273, 54 P.2d at 7.

69. 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

70. *Id.* at 769-70, 189 P.2d at 743.

71. *Sousa v. Freitas*, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970).

spouse is treated as having, in effect, a legal interest in the quasi-marital property, one half of which is said to "belong" to the survivor.⁷²

In light of the strong language used in the cases to describe the putative spouse's interest, it would be logical to assume that a surviving putative spouse should have the same rights as a legal spouse in cases of unauthorized transfers by the decedent of property acquired during the union. One case has so held, without discussion.⁷³

Whether a surviving putative spouse will be treated as a "surviving spouse" for purposes of succession to the probate equivalent of "quasi-community property" under section 201.5 of the Probate Code⁷⁴ appears to be an open question. Although such property technically is the separate property of the decedent,⁷⁵ it would have been community property had domicile been established in California at the time of acquisition, and the distributive scheme established in section 201.5 is exactly the same as that for community property under section 201. It would seem logical to extend to a surviving putative spouse the same protection with respect to property which would have been "quasi-community property" of a valid marriage as is accorded with respect to that which would have been community property. The state's interest in protecting the otherwise unprotected⁷⁶ and the legislature's inclusion of quasi-community property within the definition of quasi-marital property for purposes of annulment actions⁷⁷ support that logic.

III. MULTIPLE CLAIMANTS

If *A* is legally married to *B* and, without dissolution of that union, purports to marry *C*, a putative spouse, situations may arise in which

72. *Id.* at 665, 89 Cal. Rptr. at 489; Estate of Ricci, 201 Cal. App. 2d 146, 148-49, 19 Cal. Rptr. 739, 740-41 (1962).

73. Patillo v. Norris, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976).

74. "Quasi-community property" is used herein to refer to property within California's jurisdiction, acquired by the decedent while domiciled elsewhere, which would have been community property if the decedent had been domiciled in California at the time of acquisition. CAL. PROB. CODE § 201.5 (West Supp. 1977).

The term "quasi-community property" is not used in the Probate Code, but the property defined in § 201.5 is substantially the same as that defined as such for purposes of dissolution actions in CAL. CIV. CODE § 4803 (West Supp. 1977).

For a discussion of "quasi-community property" in probate, see Laughran, *supra* note 1, at 508-14, 532-34.

75. See Laughran, *supra* note 1, at 513.

76. Without the quasi-community property legislation, the property defined therein, acquired during domicile in a non-community property jurisdiction, would be viewed as the separate property of the decedent under California law. Upon the testate death of the acquiring spouse while domiciled in California, the survivor could be left without any share in such property. See *id.* at 532-34.

77. CAL. CIV. CODE § 4452 (West Supp. 1977).

both *B* and *C* assert claims to property acquired by *A* during the coexistence of the relationships.⁷⁸

The problem of multiple claimants arose with some frequency under California law as it stood prior to 1972. Earnings and accumulations of a married woman living separate and apart from her husband were her separate property,⁷⁹ while those of her husband were community property. Thus, if a married woman left her husband and purported to marry a second, putative husband, there was no multiple claimant problem. The putative husband had a quasi-marital property claim with respect to her earnings during the period of their union; as to the legal husband, her earnings during that period were her separate property. If, however, a married man left his wife and purported to marry a second, putative wife, each woman could assert a claim. The putative wife had a quasi-marital property claim, while, as to the legal wife, his earnings were classified as community property even though they were not living together.

In 1972, an amendment to section 5118 of the Civil Code took effect.⁸⁰ The amended section provides that earnings and accumulations of either spouse, while living separate and apart from the other spouse, are separate property.⁸¹ In 1976, in *In re Marriage of Bouquet*,⁸² the California Supreme Court accorded retroactivity to amended section 5118, holding that the husband's earnings were separate property from the date of separation. As a result of the *Bouquet* decision, the typical multiple claimant case will no longer arise. Suppose, for example,⁸³ that *H* is married to *W*, and while living with her, contributes toward acquisition of an asset with his earnings. He then leaves *W* and purports to marry *P*, a putative spouse. While living with her, he continues to contribute toward acquisition of the same asset with his earnings. *H* then dies intestate. The claims of *W* and *P* would not overlap since they would arise from different time periods in *H*'s life. The trial court would have to

78. *B* could never assert a claim to property acquired during the *A-C* union traceable to the efforts of *C*; nor could *C* assert a claim to property traceable to *B*'s efforts, or to property of the *A-B* union acquired prior to the inception of the *A-C* relationship.

79. Act of Sept. 4, 1969, ch. 1608, § 8, 1969 Cal. Stats. 3340 (codified at CAL. CIV. CODE § 5118 (West 1970)) (amended 1971). An exception to the general rule that acquisitions during marriage are community property, see CAL. CIV. CODE § 5110 (West Supp. 1977), this provision was based on long-standing prior law. See Act of Mar. 8, 1870, ch. 161, § 2, 1869-70 Cal. Stats. 226 (codified at CAL. CIV. CODE § 169 (West 1954)) (repealed 1969).

80. Act of Dec. 10, 1971, ch. 1699, § 1, 1971 Cal. Stats. 3640 (amending CAL. CIV. CODE § 5118 (West 1970)).

81. CAL. CIV. CODE § 5118 (West Supp. 1977).

82. 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976). An extensive discussion of the *Bouquet* case appears in Laughran, *supra* note 1, at 523-36.

83. The example is drawn from a modified and simplified version of the facts of *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976).

determine the extent to which the funds were attributable to those periods and apportion the asset accordingly.⁸⁴

Multiple claimant problems may continue to arise in atypical situations. In *Estate of Vargas*,⁸⁵ *H* was living with both his legal wife (*W*) and his putative wife (*P*) simultaneously. His "terrestrial [*sic*] paradise"⁸⁶ ended with his intestate death. Each woman, absent the other, would have been entitled to all of the property which *H* had accumulated while living with her.⁸⁷ Since it was found that "both wives contributed in indeterminable amounts and proportions to the accumulations of the communit[ies],"⁸⁸ the court "cut the Gordian knot of competing claims"⁸⁹ by dividing the estate equally between them,⁹⁰ observing that "the wisdom of Solomon is not required to perceive the justice of the result."⁹¹

A more troublesome *Vargas*-type situation would arise if the practicing bigamist (*A*) died testate, leaving all property of which he or she might lawfully dispose to a third person (*X*), and survived by both spouses, *B* (legal) and *C* (putative). Assuming that all of the property on hand was acquired by *A* during the coexistent unions with *B* and *C*, neither of whom knew of the other, the court's task would be unenviable. The statutes "are not designed to cope with the extraordinary circumstance of purposeful bigamy at the expense of two innocent parties."⁹² Earlier cases seem inapposite, since they involved seriatim rather than simultaneous living arrangements. In *Sousa v. Freitas*,⁹³ for example, the husband died testate, leaving all his property to the putative wife. All the property in question was acquired during the putative relationship. The trial court in effect denied his right to leave any property by will, reasoning that the legal wife was entitled to one half of the property as community property, and that the surviving putative wife was entitled to the other half.⁹⁴ The court of appeal held the putative wife entitled to three fourths of the property and the legal wife to one fourth. The

84. *Id.* at 217, 219, 135 Cal. Rptr. at 216, 217.

85. 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974).

86. *Id.* at 716, 111 Cal. Rptr. at 779.

87. See CAL. PROB. CODE § 201 (West 1956) (*W*'s claim); *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948) (*P*'s claim).

88. 36 Cal. App. 3d at 719, 111 Cal. Rptr. at 781.

89. *Id.*

90. *Id.*

91. *Id.* The mixed metaphor may not have been inappropriate in light of the bizarre fact situation.

92. *Id.* at 718, 111 Cal. Rptr. at 781.

93. 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970).

94. *Id.* at 664-65, 89 Cal. Rptr. at 489.

putative wife was found to have been "in effect" in a partnership with the decedent, with the property held "in effect" in tenancy in common.⁹⁵ Thus, upon the husband's death, the putative wife owned one half of the property; the other one half was community property of the legal marriage, half of which was subject to the decedent's testamentary disposition.⁹⁶

In the case posited, either *B* or *C*, in the absence of the other, would be entitled to one half of the property, with *X* taking the other half under *A*'s will.⁹⁷ With the presence of both *B* and *C* in the controversy with *X*, there are at least three possible solutions.

First, *X* could be awarded one half of the property, with *B* and *C* each taking one fourth.⁹⁸ This result would be reached by attributing one half of the property to the legal community and one half to the putative community. As to each community, *A* would have rights of testamentary disposition over one half of the attributed assets.⁹⁹

Second, focusing on the rights of *B* and *C*, they could each be awarded one half of the property, with *X* taking nothing.¹⁰⁰ If, as between *A* and *B*, *B* was entitled to one half and, as between *A* and *C*, *C* was entitled to one half, and there was only one pie, there would be nothing left for *A* to leave to *X*.¹⁰¹

95. *Id.* at 666, 89 Cal. Rptr. at 489.

96. *Id.*

97. CAL. PROB. CODE § 201 (West 1956); see *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

The same type of problem could occur while *A* is living and is one of the competing claimants. Suppose, for example, that *B* finds out about *C* and sues *A* for dissolution, and that *C* thereby finds out about *B* and sues *A* for a declaration of nullity. The assets acquired by *A* during the relationships are quasi-marital property under § 4452 of the Civil Code, to be divided as per § 4800; they are also community property under § 5110, again to be divided under § 4800.

98. This result is suggested in H. VERRALL & A. SAMMIS, CALIFORNIA COMMUNITY PROPERTY 67 (2d ed. 1971) [hereinafter cited as VERRALL & SAMMIS].

99. This result was reached by the trial court in *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976), a case involving an analogous question. The court of appeal reversed and remanded, however, since the case involved seriatim, not simultaneous relationships, and the trial court had failed to anticipate the supreme court's holding on the retroactivity of CAL. CIV. CODE § 5118 (West Supp. 1977) in *In re Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

100. This was the approach to the problem under Spanish law; it has been followed in Louisiana. See generally Comment, *The Putative Marriage Doctrine in Louisiana*, 12 LOY. L. REV. 89, 119-27 (1967) [hereinafter cited as Comment, *Louisiana*]. The same result was reached by the trial court in *Sousa v. Freitas*, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970). See text accompanying notes 93-94 *supra*. But see VERRALL & SAMMIS, *supra* note 98, at 66, for an argument against this solution.

101. Since, in this situation, *A* was by definition in "bad faith," the solution does not seem offensive; estoppel principles could easily apply.

Third, a court could apply a dash of "Solomonic wisdom" and "cut the Gordian knot"¹⁰² by awarding each claimant one third of the property.¹⁰³ The property could be viewed as having been acquired by a *de facto* partnership consisting of A, B, and C, the contributions and interests of each having been equal.¹⁰⁴

Another atypical, if not bizarre, situation involving multiple claimants may arise under the "doctrine of apportionment of business profits."¹⁰⁵ Under the ruling in *George v. Ransom*,¹⁰⁶ codified in Civil Code sections 5107 and 5108, income or gain attributable to separate capital must also be considered separate property. On the other hand, the skills, efforts, and personality of a married person are community assets,¹⁰⁷ and income or gain attributable to community property is also community property.¹⁰⁸ It has long been settled that when the skill and effort of a married person are expended in the management of separate capital, resultant profits and increases in capital value must be apportioned between the community and the separate estate of the spouse.¹⁰⁹

Two leading cases have provided the names for the prevalent methods of accomplishing such an apportionment: the "*Pereira Method*"¹¹⁰ and the "*Van Camp Method*."¹¹¹ As explained by the supreme court in *Beam v. Bank of America*,¹¹² apportionment is accomplished under the *Pereira Method* by allocating interest representing a fair rate of return on the capital investment to the separate estate, with the rest of the gain allocated to the community.¹¹³ Under the *Van Camp Method*, the community is credited with the fair value of the spouse's efforts with the balance of the gain allocated to his or her separate estate.¹¹⁴ The community allocation under the latter method might amount to little or nothing if large

102. Estate of Vargas, 36 Cal. App. 3d 714, 719, 111 Cal. Rptr. 779, 781 (1974).

103. This possibility has been suggested in W. REPPY & W. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 65 (1975) [hereinafter cited as REPPY & DE FUNIAK] and by one of the authors of this article in classes and in unpublished teaching materials.

104. Cf. Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974) (estate divided equally between legal and putative spouse).

105. VERRALL, *supra* note 52, at 219.

106. 15 Cal. 322 (1860).

107. See, e.g., *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909). See also CAL. CIV. CODE § 5110 (West Supp. 1977).

108. See, e.g., *Boyd v. Oser*, 23 Cal. 2d 613, 145 P.2d 312 (1944); *In re Marriage of Imperato*, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975).

109. *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909).

110. *Id.*

111. *Van Camp v. Van Camp*, 53 Cal. App. 17, 199 P. 885 (1921).

112. 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

113. *Id.* at 18, 490 P.2d at 261, 98 Cal. Rptr. at 141.

114. *Id.*

amounts already have been taken by the managing spouse, either as salary or profits, and expended for community purposes.¹¹⁵ While it has been stated that the *Pereira* Method is the "usual method of apportionment,"¹¹⁶ the supreme court has indicated more recently that there is no "rule" beyond that which demands apportionment; in achieving apportionment, the trial court in its discretion "may select [whichever] formula will achieve substantial justice between the parties."¹¹⁷

In *In re Marriage of Imperato*,¹¹⁸ the husband in 1969 had formed a corporation of which he was sole shareholder, president, and manager. On the date of separation in 1971, the corporation had a net worth of over \$1,600, which was stipulated to be community property. The husband continued to operate the corporation after separation. At trial in 1973 the court ruled that the community property would be valued as of the date closest to the trial date for which proof of value existed.¹¹⁹ On that date, just under two months prior to trial, the net worth of the corporation was over \$17,600. It was agreed that the husband would retain the business and pay to the wife the value of her interest.¹²⁰ The trial court found that the capital increment of almost \$16,000 which had accrued between the date of separation and the date of trial was community property.¹²¹

On appeal, the husband urged, first, that because of the applicability of amended section 5118 of the Civil Code,¹²² the community property should have been valued as of the date of separation, "with all of the increase in value subsequent thereto passing to the spouse that devoted time and effort to its preservation."¹²³ The court rejected that argument, noting that it "overlooks the inherent growth factor found in many assets, investment and re-investment of capital, market fluctuations, and

115. See, e.g., *Gilmore v. Gilmore*, 45 Cal. 2d 142, 149-50, 287 P.2d 769, 773-74 (1955); *Tassi v. Tassi*, 160 Cal. App. 2d 680, 690-91, 325 P.2d 872, 878-79 (1958).

116. *Estate of Neilson*, 57 Cal. 2d 733, 740, 371 P.2d 745, 748, 22 Cal. Rptr. 1, 4 (1962).

117. *Beam v. Bank of America*, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137, 141 (1971).

118. 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975).

119. *Id.* at 434, 119 Cal. Rptr. at 591; see *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *Randolph v. Randolph*, 118 Cal. App. 2d 584, 258 P.2d 547 (1953).

120. 45 Cal. App. 3d at 434, 119 Cal. Rptr. at 591.

121. That finding is implicit from a reading of the appellate opinion; it is not expressly stated.

122. CAL. CIV. CODE § 5118 (West Supp. 1977). See text accompanying note 81 *supra*.

123. 45 Cal. App. 3d at 437, 119 Cal. Rptr. at 593. This argument overlooked the fact that amended § 5118 was not effective until March 4, 1972, so that his earnings from the date of separation in 1971 until that date were still community property. 45 Cal. App. 3d at 436 n.3, 119 Cal. Rptr. at 592 n.3. Amended § 5118 was subsequently held retroactive in *In re Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

numerous other components that can increase the value of most assets."¹²⁴ The court held that the valuation "should be determined as near to the date of trial as reasonably practicable,"¹²⁵ but that

[i]f the earnings of a spouse in some manner increase the value of a community asset, the court must then determine what portion of the asset is community property and what portion is separate property. . . . *Valuation on date of separation is important only when it is used in conjunction with the final valuation for apportioning community and separate property.*¹²⁶

The husband argued alternatively that the increase in net worth of the corporation between the date of separation and the date of valuation should be considered earnings or accumulations within the meaning of Civil Code section 5118 and classified as his separate property.¹²⁷ The trial court rejected this argument, in part because he had paid himself a salary from the business during that time period.¹²⁸ Earnings of a corporation generally are considered "profits" of the corporation, not normally attributable to individual shareholders.¹²⁹ On the other hand, the term "earnings" . . . can encompass income derived from carrying on a business as a sole proprietor where the earnings are the fruit or award for labor and services without the aid of capital."¹³⁰ The husband sought to establish that the corporation was in fact his *alter ego*, so that, as in the case of a sole proprietorship, its increase in value could be attributed to his efforts. The trial court ruled inadmissible certain proffered evidence in support of the *alter ego* theory.¹³¹ The appellate court found that "a special situation exists when a husband and wife who are the sole stockholders of a corporation are dissolving their marriage,"¹³² so that if the facts support the *alter ego* theory, an exception should be recognized to the general rule that "a sole stockholder is estopped to deny the validity of his own corporation."¹³³ Since the trial court had failed adequately to consider the *alter ego* theory, and had precluded the

124. 45 Cal. App. 3d at 437, 119 Cal. Rptr. at 593.

125. *Id.* at 436, 119 Cal. Rptr. at 592-93 (quoting *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 110, 113 Cal. Rptr. 58, 68 (1974)).

126. 45 Cal. App. 3d at 436, 119 Cal. Rptr. at 593 (emphasis added).

127. *Id.* at 437, 119 Cal. Rptr. at 593; see CAL. CIV. CODE § 5118 (West Supp. 1977).

128. 45 Cal. App. 3d at 438, 119 Cal. Rptr. at 594.

129. *Id.*

130. *Id.* at 437, 119 Cal. Rptr. at 593 (citing *Romanchek v. Romanchek*, 248 Cal. App. 2d 337, 56 Cal. Rptr. 360 (1967)).

131. 45 Cal. App. 3d at 438, 119 Cal. Rptr. at 594.

132. *Id.* at 440, 119 Cal. Rptr. at 595.

133. *Id.* at 439 n.9, 119 Cal. Rptr. at 595 n.9.

husband from presenting all of his evidence on the issue, the judgment was reversed and the case remanded to the trial court.¹³⁴

In remanding, the *Imperato* court noted that if the trial court treated the corporation as a sole proprietorship a "reverse" application of the normal apportionment methods would be necessary.¹³⁵ Thus, although the court's task would remain the apportionment of profits or gains between separate and community property, in this case the capital would be community property, while gain traceable to the efforts of the married person, living separate and apart from the other spouse, would be allocable to separate property.¹³⁶

Application of apportionment principles, as interpreted in *Imperato*, clearly could have great impact in multiple claimant cases. Assume a situation involving our old friends, *A*, *B*, and *C*. *A* marries *B* and, while they are living together, accumulates \$10,000 in community property. *A* leaves *B*, taking the \$10,000. *A* purports to marry *C*, who is in good faith. During the relationship between *A* and *C*, *A* opens and operates a business which is capitalized with the \$10,000. As between *A* and *B*, the capital is community property, but the fruits of *A*'s efforts after their separation are allocable to *A*'s separate property.¹³⁷ As between *A* and *C*, the capital is *A*'s separate property,¹³⁸ in which *C* has no interest;¹³⁹ however, the fruits of *A*'s efforts during the "marriage" and while *A* and *C* are living together¹⁴⁰ are allocable to quasi-marital property.¹⁴¹ If *A* dies, or in the event of an annulment action (and/or a dissolution action), a multiple claimant "reverse" apportionment problem could arise.¹⁴²

The context and the apportionment method chosen will affect the interests of not just two, but all three of the persons involved. An apportionment of community and separate property between *A* and *B* will affect *C*'s interests, since what is *A*'s separate property as between *A* and *B* would be quasi-marital property of *A* and *C*. *B* would be affected similarly as a result of an apportionment between *A* and *C*. In

134. *Id.* at 440-41, 119 Cal. Rptr. at 595-96.

135. *Id.* at 438-39, 119 Cal. Rptr. at 594.

136. *Id.* at 439, 119 Cal. Rptr. at 594.

137. CAL. CIV. CODE § 5118 (West Supp. 1977).

138. Since it was owned prior to "marriage." See *id.* §§ 5107-5108 (West 1970).

139. *Id.* § 5102 (West Supp. 1977).

140. *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976).

141. CAL. CIV. CODE § 4452 (West Supp. 1977).

142. Such a problem could also arise in the event of the testate death of *B* or *C* if the testator attempted to bequeath community or quasi-marital property to someone other than *A*.

the hypothetical set forth above, assume that *B* brings a dissolution action against *A* three years after their separation and the *A/C* "marriage." The value of the community property at the date of separation would be \$10,000 (the money *A* took on leaving *B*). If the business is worth \$40,000 at the time of trial, a "reverse" apportionment will be necessary as to the \$30,000 increment. If the *Pereira* Method is used, a fair return will be allocated to the community capital, with the rest of the gain allocated to *A*'s separate estate. Assuming a seven per cent rate of return,¹⁴³ the total allocation to the community for the three year period would be \$2,100, with the rest of the gain, \$27,900, allocated to *A*'s separate estate. As between *A* and *C*, the \$27,900 would be quasi-marital property. Under the *Van Camp* Method, the reasonable value of *A*'s services (less draws or salary actually taken)¹⁴⁴ would be determined and allocated from the gain to *A*'s separate estate, with the rest of the gain allocated to the community. If, for example, *A* had withdrawn \$25,000 a year in salary, and the evidence showed that a reasonable salary for the general manager of such a business would not have exceeded that amount,¹⁴⁵ the entire \$30,000 gain conceivably could be allocated to the community, with no allocation to *A*'s separate estate¹⁴⁶ (considered quasi-marital property of *A* and *C*).¹⁴⁷

The potential fact situations are too diverse for individual treatment,¹⁴⁸ and a court is not bound to one apportionment formula.¹⁴⁹ Indeed, one noted authority has observed that the "substantial justice" language in the cases

143. The court is not bound to a predetermined rate of return. For example, in *In re Marriage of Folb*, 53 Cal. App. 3d 862, 126 Cal. Rptr. 306 (1975), *disapproved on other grounds*, *In re Marriage of Fonstein*, 17 Cal. 3d 738, 749 n.5, 552 P.2d 1169, 1175 n.5, 131 Cal. Rptr. 873, 879 n.5 (1976), the evidence supported allowance of a twelve per cent rate of return.

144. *In re Marriage of Imperato*, 45 Cal. App. 3d 432, 439, 119 Cal. Rptr. 590, 594 (1975).

145. *See Tassi v. Tassi*, 160 Cal. App. 2d 680, 690, 325 P.2d 872, 878 (1958).

146. Unless *A* could show that, because of the nature of the business, unique personal attributes and efforts, and other pertinent factors, his or her personal contribution to the gain exceeded the \$25,000 withdrawn annually.

147. If there is a time gap between *A*'s separation from *B* and "marriage" to *C*, any gain attributable to *A*'s efforts during that period would belong to *A* and would not be part of the quasi-marital property. *Patillo v. Norris*, 65 Cal. App. 3d 209, 216-19, 135 Cal. Rptr. 210, 215-17 (1976).

148. For instance, if some of *A*'s capital investment were separate property and the rest community property of *A* and *B*, the same principles would apply, but the problem obviously would be more complex. Even more complicated would be a problem where *A*'s living arrangements with *B* and *C* were simultaneous during part of the relevant time period. *See* notes 78-104 *supra* and accompanying text.

149. *See* note 117 *supra* and accompanying text.

is certainly no invitation for a trial court to disregard any evidence bearing on the productivity of capital or of management. . . . Equally it is no invitation for the trial court to select one or the other of the formulas because in its uncontrolled discretion it believes the result will be abstract fairness to the parties. It can only mean that the court should select the formula that the evidence requires.¹⁵⁰

The hypothetical examples above are set forth merely to illustrate the working of the apportionment formulas in a simple multiple claimant situation and the varying impact on the interests of the claimants depending on the formula applied.

Because of that potential impact, the problem should be approached by focusing on the "new wealth"¹⁵¹ in question (the gain) and the relationships existing at the time of its acquisition. "New wealth acquired during marriage is presumptively community property and business profits are new wealth."¹⁵² By parity of reasoning, "new wealth" acquired during the "marriage" of *A* and *C* is presumptively quasi-marital property. It should be incumbent upon the person urging a different classification¹⁵³ of part of the gain to rebut that presumption with clear and convincing proof.¹⁵⁴ Thus, in the absence of proof of a greater (or lesser) contribution, the capital contribution (community property of *A* and *B*) would be presumed entitled to a fair rate of return,¹⁵⁵ with the rest of the gain allocated to the quasi-marital property. In many instances this approach will result in a greater allocation to the quasi-marital property, to the detriment of the legal spouse. The focus on the time period during which the gain accrued is, however, perfectly consistent with community property principles, and is also consistent with the approach of the courts in other competing claimant situations.¹⁵⁶

150. VERRALL, *supra* note 52, at 223.

151. *Id.* at 220.

152. *Id.*

153. In the hypothetical, *A*, urging classification as separate property in an action between *A* and *C*, or *B*, urging classification as community property in an action between *B* and *A* or between *B* and *C*.

154. See CAL. EVID. CODE §§ 115, 160, 502, 660 (West 1976); *id.* § 605 (West Supp. 1977). See also *Estate of Duncan*, 9 Cal. 2d 207, 217, 70 P.2d 174, 179 (1937) ("clear and satisfactory proof"); VERRALL, *supra* note 52, at 147-48.

155. *Pereira v. Pereira*, 156 Cal. 1, 7, 103 P. 488, 491 (1909).

156. See *Sousa v. Freitas*, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970); *cf.* *Estate of Ricci*, 201 Cal. App. 2d 146, 149, 19 Cal. Rptr. 739, 740 (1962) (interest of putative spouse limited to property acquired during relationship between putative spouse and decedent).

IV. RIGHTS OF A SURVIVING PUTATIVE SPOUSE TO SEPARATE PROPERTY OF THE DECEDENT: ESTATE OF LEVIE

A party to a fully valid marriage has no interest in the separate property of the other spouse during the marriage;¹⁵⁷ the same is true of a party to a putative marriage. A married person who dies may dispose of all of his or her separate property by will;¹⁵⁸ only in the event of intestacy does the surviving spouse share in the separate property of the decedent.¹⁵⁹ Depending on the facts, the surviving spouse takes one third,¹⁶⁰ one half,¹⁶¹ or all¹⁶² of the separate property of the intestate decedent. The conclusion would seem inescapable that if a surviving putative spouse is a "surviving spouse" for purposes of succession to property which would have been community property of a fully valid marriage,¹⁶³ the same person is a "surviving spouse" for purposes of succession to separate property.¹⁶⁴ In a poorly-reasoned, unsound¹⁶⁵ decision, the court in *Estate of Levie*¹⁶⁶ held otherwise.

In *Levie*, the "husband" died intestate, survived by the "wife" and more than one child, all of whom were the issue of a previously dissolved marriage. The "wife" petitioned for a determination of heirship. It was stipulated that she and the decedent had believed in good faith in the validity of their marriage. The trial court determined that, as a surviving putative spouse, she was entitled to all of the quasi-marital property and to one third of the separate property of the decedent.¹⁶⁷ The administratrix (one of the decedent's children) appealed. The court of appeal reversed in part, limiting the putative wife's rights to succession to quasi-marital property.¹⁶⁸

On appeal, the "widow" argued first, that her marriage to the decedent should be recognized as valid in California judicial proceedings, and second, that even if the marriage was invalid, she should receive a

157. CAL. CIV. CODE § 5102 (West Supp. 1977).

158. CAL. PROB. CODE § 20 (West Supp. 1977).

159. *Id.* § 220 (West 1956). See also *id.* §§ 221, 223-224.

160. If the decedent also is survived by more than one child, or by one child and the lawful issue of one or more deceased children. *Id.* § 221.

161. If the decedent also is survived by only one child or the lawful issue of a deceased child, *id.*, or by a parent or parents or the issue of either parent, *id.* § 223.

162. If the decedent leaves neither issue, parent, nor issue of a parent. *Id.* § 224.

163. See, e.g., *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

164. Compare CAL. PROB. CODE § 201 (West 1956) with *id.* §§ 221, 223-224.

165. W. REPPY, 1977 SUPP. TO REPPY & DE FUNIAK, *supra* note 103, at 1 [hereinafter cited as REPPY, 1977 SUPP.].

166. 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975).

167. *Id.* See CAL. PROB. CODE §§ 201, 221 (West 1956).

168. 50 Cal. App. 3d at 577, 123 Cal. Rptr. at 447.

surviving spouse's share of the separate property of the decedent. The court rejected both arguments.

The "widow" and the decedent, who were first cousins, were residents of California both before and after the marriage ceremony. They entered into a procedurally valid ceremonial marriage in Nevada. The marriage was void as incestuous under Nevada law because of their consanguinity,¹⁶⁹ although, as first cousins, they could have been lawfully married in California.¹⁷⁰ The administratrix contended that the marriage was void in California because it was void in Nevada, the jurisdiction where it was contracted. The "widow," relying on a choice-of-law analysis supported by *Hurtado v. Superior Court*,¹⁷¹ argued that because the marriage would have been valid if celebrated in California, it should be treated as valid in the probate proceeding in the California forum. In rejecting her argument, the court relied on section 4104 of the Civil Code which provides: "All marriages contracted without this state, which would be valid by the laws of the jurisdiction in which the same were contracted, are valid in this state."¹⁷² The court held that section 4104 "by implication adopts the common law rule that 'the law of the place of marriage controls the question of its validity,'"¹⁷³ and that it "is a legislative direction governing the choice of law."¹⁷⁴ Thus, Nevada law was controlling in the California forum, and the marriage was void.¹⁷⁵

169. *Id.* at 575, 123 Cal. Rptr. at 446 (citing NEV. REV. STATS. § 122.020 (1973)).

170. See CAL. CIV. CODE § 4400 (West 1970).

171. 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

172. CAL. CIV. CODE § 4104 (West 1970); see also Act of Apr. 22, 1850, ch. 140, § 5, 1850 Cal. Stats. 424, the predecessor of the present version.

173. 50 Cal. App. 3d at 576, 123 Cal. Rptr. at 447 (quoting *Colbert v. Colbert*, 28 Cal. 2d 276, 280, 169 P.2d 633, 635 (1946)).

174. 50 Cal. App. 3d at 576, 123 Cal. Rptr. at 447.

175. While a thorough discussion of the choice-of-law problem presented in *Levie* is beyond the scope of this article, it is worth noting that the *Levie* court's application of the *lex celebrationis* rather than the *lex fori et domicilii* has been termed "plainly wrong." REPPY, 1977 SUPP., *supra* note 165, at 1. Professor Reppy cites to REPPY & DE FUNIAK, *supra* note 103, at 471-72, where the "interest analysis" approach, which California courts use in other situations, is discussed. A more thorough discussion of choice-of-law principles relating to the validity of marriages may be found in A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 376-87 (1962), wherein Professor Ehrenzweig argued that marriages which are invalid where celebrated but which would have been valid if celebrated in the forum should be recognized under a "Rule of Validation." Validation of the marriage in *Levie* would, of course, have depended upon a different reading of CAL. CIV. CODE § 4104 (West 1970) than that of the court. The court construed § 4104 as a legislative directive precluding application of the *lex fori et domicilii*. Under a narrow reading of the section, it would be inapplicable in a case such as *Levie*, since by its terms it is limited to recognition by California of the validity of marriages which were valid under the *lex celebrationis*. If the section were so construed, the California court arguably would be free to apply a "Rule of Validation."

The court then summarily rejected the "widow's" contention that, notwithstanding the invalidity of the marriage, she should be considered a "surviving spouse" for purposes of intestate succession to separate property of the decedent under Probate Code section 221. The court stated:

No California decision has been found, suggesting that a putative spouse is entitled to succeed, under Probate Code section 221, to an interest in any property which the decedent owned before the putative marriage. The equities connected with property acquired during the putative marriage do not apply, as the joint efforts of the putative spouses did not contribute to the acquisition of previously held property; to recognize in the putative spouse an interest in previously held property of the decedent would unjustifiably disregard the statutory scheme governing intestate succession of separate property.¹⁷⁶

The intestate succession issue seems to have been argued poorly;¹⁷⁷ certainly, the court failed to grasp it. There were three stated bases for the decision. The court found, first, that there was no precedent "suggesting"¹⁷⁸ support for the "widow's" position. It will be pointed out below¹⁷⁹ that the court failed to consider strongly analogous precedents in her favor. An initial examination of the second and third bases for the decision will reveal the true issue, in light of which those analogous precedents seem compelling. Those bases are closely related: that the "equities" favoring a surviving putative spouse with respect to quasi-marital property are inapplicable with respect to separate property of the decedent,¹⁸⁰ and that a decision favoring the surviving putative spouse would "unjustifiably disregard the statutory scheme governing intestate succession of separate property."¹⁸¹

176. 50 Cal. App. 3d at 576-77, 123 Cal. Rptr. at 447 (citation omitted).

177. No authority was cited for the "widow's" proposition that she qualified as a "surviving spouse." *Id.* at 576, 123 Cal. Rptr. at 447. Instead, citing *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), she argued that it was the intention of the Family Law Act "to exclude concepts of fault and punishment from any influence in the determination of family property rights." 50 Cal. App. 3d at 576, 123 Cal. Rptr. at 447. Since, as a putative spouse, she was by definition in good faith, it is difficult to grasp the significance of the argument. In rejecting this reasoning, the court further confused the issue, stating that "the right of a putative spouse to succeed to an interest in property which would have been community property but for the invalidity of the marriage is not based on concepts of fault." *Id.* While the argument was properly rejected, the court's stated reason is equally elusive, since a person who is "at fault" (*i.e.*, not in good faith) does not qualify as a putative spouse.

178. 50 Cal. App. 3d at 576, 123 Cal. Rptr. at 447.

179. See notes 190-263 *infra* and accompanying text.

180. 50 Cal. App. 3d at 576-77, 123 Cal. Rptr. at 447.

181. *Id.* at 577, 123 Cal. Rptr. at 447.

Probate Code section 201 provides for the rights of a "surviving spouse" with respect to community property. When succession to quasi-marital property is at issue, a putative spouse is treated as a "surviving spouse" under that section.¹⁸² Sections 221, 223, and 224 of the Probate Code provide for the rights of a "surviving spouse" with respect to separate property of an intestate decedent. The only issue in cases such as *Levie* is whether a putative spouse should be treated as a "surviving spouse" under those sections. While it is true that the joint efforts of putative spouses do not contribute to the acquisition of separate property, it is equally true that the efforts of a legally married person do not contribute to the acquisition of separate property of the other spouse. It therefore begs the question to state that the "equities" of a putative spouse differ depending upon whether rights of succession to quasi-marital or separate property are at issue, since the same distinction applies to the "equities" of a legally married person with respect to rights of succession to community and separate property. Thus, as to rights of intestate succession to separate property of the decedent, the "equitable" position of a surviving legal spouse and a surviving putative spouse is the same. The *Levie* court stated that the putative spouse's right to succeed to an interest in quasi-marital property is based upon "equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith."¹⁸³ That very language dictates a decision in favor of the surviving putative spouse in cases involving succession to separate property, since the rights of a "surviving spouse" under sections 221, 223, and 224 of the Probate Code are "benefits attending the status of marriage."

To hold a surviving putative spouse entitled to succeed to separate property of the decedent would not be to "disregard the statutory scheme governing intestate succession,"¹⁸⁴ but to honor it. "[T]he right to succession is not an inherent or natural right,"¹⁸⁵ but purely a creature of statute. There are no vested rights to succession; the law in effect at the decedent's death is controlling.¹⁸⁶ A surviving legal spouse thus inherits separate property of the decedent only because the statutes provide that a person having the status of "surviving spouse" takes a certain share. If

182. *E.g.*, Estate of Krone, 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

183. 50 Cal. App. 3d at 576, 123 Cal. Rptr. at 447 (quoting *Vallera v. Vallera*, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943)).

184. 50 Cal. App. 3d at 577, 123 Cal. Rptr. at 447.

185. *Brennfleck v. Workmen's Comp. Bd.*, 3 Cal. App. 3d 666, 673, 84 Cal. Rptr. 50, 54 (1970) (quoting *Estate of Simmons*, 64 Cal. 2d 217, 221, 411 P.2d 97, 100, 49 Cal. Rptr. 369, 372 (1966)).

186. *Estate of Phillips*, 203 Cal. 106, 109-10, 263 P. 1017, 1019 (1928).

there is no surviving spouse, the intestate distribution of separate property differs.¹⁸⁷ To accord to a surviving putative spouse the status of "surviving spouse" in such a case would be simply to recognize that, because the marriage was entered into in good faith, he or she should be in the same position as a survivor of a fully valid marriage.

To deny the status could lead to anomalous, if not shocking, results. For example, envision a case such as *Levie* where the children were the issue of the void marriage¹⁸⁸ rather than of a previous marriage of the decedent. The surviving putative spouse would be denied rights of inheritance even though his or her natural children would be accorded such rights and, in the absence of other issue of the decedent, would inherit the entire separate estate.¹⁸⁹ Further, inheritance rights of a putative spouse who may have been "married" to and lived with the decedent for many years would be denied, while a legal spouse would qualify for inheritance rights as a surviving spouse even if the decedent expired on the wedding day.

Only three prior California cases have been found in which the court was faced directly with the issue of a surviving putative spouse's rights of succession to separate property. Although all three are technically distinguishable from *Levie*, it is not insignificant that in each the rights of the putative spouse were recognized.

In *Estate of Long*,¹⁹⁰ a man died intestate, survived by four half-siblings and a woman who was found by the trial court to be his "surviving widow" and to have believed in good faith in the validity of the marriage at the time of the ceremony and throughout the relationship.¹⁹¹ The trial court awarded all of the quasi-marital property and one half of the decedent's separate property¹⁹² to the "widow."¹⁹³ The widow, Emma Long, had married one Johnnie Brown in South Carolina in 1930 and separated from him in 1947. In 1948 she had "married" the decedent, Clabe Long, in Los Angeles. Although she had filed suit against Johnnie Brown in South Carolina in 1947 and had obtained a legal separation,¹⁹⁴ she apparently had never been divorced.¹⁹⁵ The court

187. CAL. PROB. CODE §§ 221-224 (West 1956).

188. Issue of a void marriage are legitimate, CAL. CIV. CODE § 7002 (West Supp. 1977), and thus have rights of intestate succession to separate property of their deceased natural parent.

189. See Comment, *Putative and Meretricious Spouse*, *supra* note 4, at 868.

190. 198 Cal. App. 2d 732, 18 Cal. Rptr. 105 (1961).

191. *Id.* at 735, 18 Cal. Rptr. at 107.

192. See CAL. PROB. CODE § 223 (West 1956).

193. 198 Cal. App. 2d at 735, 18 Cal. Rptr. at 107.

194. *Id.* at 736 n.1, 18 Cal. Rptr. at 108 n.1.

195. *Id.* at 736-37, 18 Cal. Rptr. at 108-09.

of appeal affirmed the trial court's decree of distribution. Even if her prior marriage to Johnnie Brown was undissolved when she "married" Clabe Long, the record supported a finding that she was in good faith,¹⁹⁶ so that she was entitled to all of the quasi-marital property.¹⁹⁷ She was entitled to one half of decedent's separate property, not because she was a surviving putative spouse, but because it had not been proved that she was not a surviving legal spouse.¹⁹⁸ The trial court was warranted in finding that she was the "surviving widow" of Clabe Long:

It is well established that when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage.

The presumption of the validity of the last marriage was not overcome in the present case because no evidence was offered by the appellant to show that Johnnie Brown was alive at the time of the ceremonial marriage in Los Angeles.¹⁹⁹

Long has been cited as having held that "[w]hen the relationship is terminated by death, the surviving putative spouse has been awarded . . . a spousal share of the decedent's separate property,"²⁰⁰ and, thus, as contra to *Levie*.²⁰¹ Although those two points are technically inaccurate, the *Long* case is significant for two reasons. First, *Long* (as are other analogous precedents hereinafter discussed) certainly is a California decision *suggesting* that a putative spouse is entitled to succeed to an interest in decedent's separate property under the Probate Code.²⁰² Second, the *Long* approach, involving recognition of the rights of a person who appears to be a putative spouse by invoking the presumption of validity of the marriage, may be useful to proponents of the inheritance

196. *Id.* at 738, 18 Cal. Rptr. at 109.

197. *Id.* at 738-39, 18 Cal. Rptr. at 109. See CAL. PROB. CODE § 201 (West 1956); Estate of Krone, 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

198. 198 Cal. App. 2d at 739, 18 Cal. Rptr. at 110.

199. *Id.* (quoting Estate of Smith, 33 Cal. 2d 279, 281, 201 P.2d 539, 540 (1949)).

200. Kay & Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937, 941 (1977) [hereinafter cited as Kay & Amyx].

201. *Id.* at 941 n.33.

202. *Levie* stated that "[n]o [such] California decision ha[d] been found." 50 Cal. App. 3d at 576, 123 Cal. Rptr. at 447. *Levie* involved a claim under CAL. PROB. CODE § 221 (West 1956), while *Long* involved a claim under § 223. It has been pointed out that "[t]he factual difference between allowing a putative spouse to share separate property with decedent's issue under Probate Code § 221 rather than with the immediate family under § 223 is not sufficient to support a difference in result between *Levie* and *Long*." Kay & Amyx, *supra* note 200, at 941 n.33.

rights of such persons, since the true issue might be avoided in a particular case. In *Levie*, for example, the facts were stipulated.²⁰³ Since more cases are likely to involve bigamy than incest,²⁰⁴ with the prior, legal spouse perhaps difficult to locate, the opponents of the putative spouse might have difficulty proving the invalidity of the second marriage.

A second significant precedent is *Estate of Shank*.²⁰⁵ There, a woman died intestate, leaving an estate consisting entirely of separate property. She was survived by a legal husband, a putative husband, and three adult siblings. Under Probate Code section 223, the siblings were entitled to one half of the estate and a "surviving spouse" to the other half; in the absence of a "surviving spouse," the siblings would inherit the entire estate under section 225.²⁰⁶ The trial court awarded the entire estate to the siblings, finding the legal husband estopped from inheriting the property and refusing to recognize rights in the good faith survivor of the second, bigamous relationship.²⁰⁷ The legal husband had acquiesced in and relied upon a Mexican divorce decree which the trial court found to be invalid; he had purchased property in his own name as a "single man" and had cohabited with another woman, to whom he had referred as his wife.²⁰⁸ The court of appeal found that, as against the putative husband, the legal husband was estopped from contending that the divorce was invalid.²⁰⁹ The decedent had procured the invalid divorce, married the putative husband, and permitted him to support her. Under those circumstances, she was precluded from denying the validity of the Mexican divorce as against her putative husband during her lifetime, and her heirs, being in privity with her, were bound by the estoppel which bound her.²¹⁰ Since there was no one with standing to assert the invalidity of his marriage, the putative husband was thus a "surviving spouse." He was entitled to one half of the estate; the siblings took the other one half in equal shares.²¹¹

A final succession case worthy of note is *Garrado v. Collins*,²¹² where the dispute involved a two-thirds undivided interest in real property in Los Angeles which was the decedent's separate property. The parties to

203. 50 Cal. App. 3d at 574, 123 Cal. Rptr. at 446.

204. The authors have no authority for this proposition.

205. 154 Cal. App. 2d 808, 316 P.2d 710 (1957).

206. CAL. PROB. CODE § 225 (West 1956).

207. 154 Cal. App. 2d at 810-11, 316 P.2d at 711.

208. *Id.* at 810, 316 P.2d at 711.

209. *Id.* at 811-12, 316 P.2d at 712.

210. *Id.* at 812, 316 P.2d at 712.

211. *Id.*

212. 136 Cal. App. 2d 323, 288 P.2d 620 (1955).

the action were her putative husband and two children of an earlier, legal marriage. The trial court held the putative husband to be entitled to all property which would have been community property of a valid marriage,²¹³ including the other one-third undivided interest in the Los Angeles realty, which had "acquired the characteristics of community property."²¹⁴ He was also awarded one third of the two-thirds interest in the real estate which was decedent's separate property, with the children each taking one third of that interest.²¹⁵ The children appealed from the award of an interest in the separate property to the putative husband; he moved to dismiss the appeal on the ground that the children were not aggrieved by the judgment. The court of appeal agreed that the children were not aggrieved parties and were not entitled to appeal.²¹⁶ Assuming the existence of a legal husband,²¹⁷ the children would in no event inherit the interest in question, since it would go either to the surviving legal husband or to the surviving putative husband.²¹⁸ Since the appeal was dismissed, it was unnecessary for the court to rule on the merits of the case. Two points are worthy of note, however. First, the trial court ruling was left standing, so that, as against the children, the putative husband retained the one-third interest of a "surviving spouse." Second, the court of appeal envisioned the possibility that the "surviving spouse's" share might have gone to the putative husband even as against the legal husband.²¹⁹

The question of the status of a putative spouse has arisen in other analogous contexts. In each case, a surviving putative spouse has been

213. *Id.* at 325, 288 P.2d at 621.

214. *Id.*

215. *Id.*; see CAL. PROB. CODE § 221 (West 1956). The putative husband argued that Estate of Krone, 83 Cal. App. 2d 766, 189 P.2d 741 (1948), supported his theory that he was entitled to a share in the separate property. 136 Cal. App. 2d at 325-26, 288 P.2d at 621. *Krone*, of course, involved quasi-marital property, as to which the surviving putative spouse was held to have the same rights of inheritance as a legal spouse would have had under CAL. PROB. CODE § 201 (West 1956). Thus, in *Garrado*, the putative husband must have been arguing that if he was an heir, or "surviving spouse" under, or by analogy to, § 201, he was also an heir, or "surviving spouse" under, or by analogy to, § 221. That argument, which was accepted by the trial court, is the same as that advanced in the text accompanying notes 182-89 *supra*.

216. 136 Cal. App. 2d at 326, 288 P.2d at 622.

217. There was no finding on that point, but the children were held bound by their averment that the earlier marriage had never been terminated and that their father was still living. *Id.* at 325, 288 P.2d at 621. The trial court had found that the earlier marriage had not been dissolved by death or legal proceedings at the time of the putative marriage. *Id.*

218. *Id.* at 325-26, 288 P.2d at 621.

219. *Id.* Why one or the other? Why not split it between them? See text accompanying notes 268-85 *infra*; see, e.g., Estate of Ricci, 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962).

recognized by California courts, and by federal courts applying California law, as having the status of "heir,"²²⁰ "surviving spouse,"²²¹ "surviving widow,"²²² "widow,"²²³ or "surviving wife,"²²⁴ within the meaning of those terms in various statutory enactments.

In *Speedling v. Hobby*,²²⁵ the issue arose in the context of a claim for "mother's insurance benefits" under the Social Security Act.²²⁶ In order to qualify, a claimant must have the same status as a "widow" relative to succession to intestate personal property of the decedent.²²⁷ The *Speedling* court held a surviving putative spouse entitled to such benefits. The court relied on *Estate of Krone*²²⁸ in finding that, under California law, the claimant had the same status as a lawful widow.²²⁹ *Krone* held that, with respect to quasi-marital property, the survivor had the same rights as a surviving legal spouse with respect to community property under section 201 of the Probate Code.²³⁰ The *Speedling* court discussed the possibility that, under California law, "the putative widow may have no right to take separate property,"²³¹ but disposed of that issue by finding that, with respect to the claimant, there was no separate property involved, "as all of the property . . . [had] been given community property status by the California courts."²³² The claimant was thus legally entitled to decedent's entire estate and had the same status as a legal widow.²³³

A similar result was reached in *Aubrey v. Folsom*.²³⁴ There, a Social Security referee had denied a surviving putative wife both mother's

220. *Kunakoff v. Woods*, 166 Cal. App. 2d 59, 332 P.2d 773 (1958) (California Wrongful Death Act).

221. *Adduddell v. Board of Administration*, 8 Cal. App. 3d 243, 87 Cal. Rptr. 268 (1970) (Public Employees' Retirement System).

222. *Neureither v. Workmen's Comp. Appeals Bd.*, 15 Cal. App. 3d 429, 93 Cal. Rptr. 162 (1971); *Brennfleck v. Workmen's Comp. Appeals Bd.*, 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (1970) (Workers' Compensation).

223. *Aubrey v. Folsom*, 151 F. Supp. 836 (N.D. Cal. 1957); *Speedling v. Hobby*, 132 F. Supp. 833 (N.D. Cal. 1955) (Social Security Act).

224. *Holland America Ins. Co. v. Rogers*, 313 F. Supp. 314 (N.D. Cal. 1970) (Longshoremen's and Harbor Workers' Compensation Act).

225. 132 F. Supp. 833 (N.D. Cal. 1955).

226. Social Security Act § 202(g), 42 U.S.C. § 402(g) (Supp. V 1975).

227. *Id.* § 216(h)(1), 42 U.S.C. § 416(h)(1) (1970).

228. 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

229. 132 F. Supp. at 836.

230. 83 Cal. App. 2d 766, 189 P.2d 741 (1948); see CAL. PROB. CODE § 201 (West 1956).

231. 132 F. Supp. at 836.

232. *Id.*

233. *Id.*

234. 151 F. Supp. 836 (N.D. Cal. 1957).

insurance benefits²³⁵ and, in her capacity as guardian, child's insurance benefits.²³⁶ The district court upheld the denial of benefits for the child, who was the daughter of the putative wife by her first marriage and who had never been adopted by the decedent.²³⁷ The surviving putative wife was held entitled to mother's insurance benefits, however, since, under applicable state law, she had a legal right of inheritance.²³⁸ The government's argument that California law recognized property rights of a surviving putative spouse only as a matter of equity and not as a rule of intestate succession was rejected by the court.²³⁹ The government also argued that, even if the surviving putative spouse was entitled to succeed to quasi-marital property in the decedent's estate, she did not have the same status as a wife or widow as defined in the Social Security Act,²⁴⁰ since she did not have the same rights as a legal spouse with respect to the decedent's separate property.²⁴¹ Citing *Garrado v. Collins*²⁴² as the only California case even remotely bearing on the question,²⁴³ the court noted that it had been "unable to locate any reported California decisions which have either granted or denied inheritance rights in a decedent's separate property to a surviving putative spouse."²⁴⁴ The court then side-stepped the issue, holding that "if the applicant is treated as standing in a family relationship necessary to qualify for benefits under the Act for *any* purpose under the state law of intestate succession, such applicant would qualify under § 416(h)(1)."²⁴⁵ *Speedling* and *Aubrey* clearly interpret California law to include a "right of inheritance" in a putative spouse.

235. Social Security Act § 202(g), 42 U.S.C. § 402(g) (Supp. V 1975).

236. *Id.* § 202(d), 42 U.S.C. § 402(d) (Supp. V 1975).

237. 151 F. Supp. at 838. To qualify for benefits, the child would have had to be either a "child" or "stepchild" of the decedent. Under the Social Security regulations the status of "stepchild" is dependent on the valid marriage of the applicant's natural parent and the decedent. The daughter thus did not qualify as a "stepchild." She also did not qualify as a "child," since Social Security Act § 216(h)(1), 42 U.S.C. § 416(h)(1) (1970), conditions a determination of that status on the intestate succession laws of the state of domicile, and under California law, she had no inheritance rights in the decedent's estate. In sum, for purposes of the Social Security Act, the court was unable to recognize the girl as a "putative stepchild."

238. 151 F. Supp. at 839-40 (citing CAL. PROB. CODE § 201 (West 1956); *Mazzenga v. Rosso*, 87 Cal. App. 2d 790, 197 P.2d 770 (1948); *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948)).

239. 151 F. Supp. at 839.

240. Social Security Act § 216(h)(1), 42 U.S.C. § 416(h)(1) (1970).

241. 151 F. Supp. at 839.

242. 136 Cal. App. 2d 323, 288 P.2d 620 (1955); see notes 212-19 *supra* and accompanying text.

243. 151 F. Supp. at 839 n.4.

244. *Id.* at 839.

245. *Id.* at 840 (emphasis in original).

The *Aubrey* court, in interpreting section 201 of the Probate Code and *Estate of Krone*,²⁴⁶ emphasized that this was a legal, rather than an equitable right.²⁴⁷ *Krone*, the leading California case on the surviving putative spouse's rights to quasi-marital property, appears to so hold, although the court's language is perhaps purposefully vague; the court there cited a number of prior cases holding a putative spouse entitled, on equitable grounds, to a share in property acquired during the relationship and concluded that those cases established that "upon the dissolution of a putative marriage by decree of annulment or by death the wife is to take the same share to which she would have been entitled as a legal spouse."²⁴⁸ None of the prior cases had considered the subsequently enacted section 201 of the Probate Code, under which a surviving legal spouse takes all of the community property in the event of the deceased spouse's intestacy. *Krone* held that the enactment affected the rights of a surviving putative spouse, so that such a person would "inherit all."²⁴⁹ The claim was stated to be "pursuant to section 201,"²⁵⁰ with the "widow's" rights as owner established "under section 201."²⁵¹ *Krone* thus can and should be read to hold that, at least with respect to quasi-marital property, the rights of a surviving putative spouse conform to the rights of a "surviving spouse" under the intestate succession statutes, and that those rights are legal, not equitable.²⁵²

This interpretation was followed in *Kunakoff v. Woods*,²⁵³ in which the issue was whether a surviving putative wife was an "heir" with

246. 83 Cal. App. 2d 766, 189 P.2d 741 (1948).

247. 151 F. Supp. at 839.

248. 83 Cal. App. 2d at 769, 189 P.2d at 743.

249. *Id.* at 769-70, 189 P.2d at 743.

250. *Id.* at 770, 189 P.2d at 743.

251. *Id.*

252. Since "putative spouses" were not mentioned in the California statutes, it originally was necessary to exercise "equitable jurisdiction" in order to accord them property rights. A property right, including a right of inheritance, is nonetheless a right for having been found to exist after an exercise of "equitable jurisdiction" as the following extracts exemplify:

[S]he justly claims the estate by virtue of the authorities above reviewed, pursuant to section 201 . . . [I]t would now be contrary to established law to deny this putative wife her rights as a surviving spouse to inherit the total of the gains of the putative marriage [under section 201].

Id.

In some of the older cases there are statements that such property cannot be considered community property because community property is an incident of only a legally recognized marriage. However, it is further stated that the property should be distributed the same as it would be if it were community property. The more recent cases have discarded this "double talk" . . .

Kunakoff v. Woods, 166 Cal. App. 2d 59, 63, 332 P.2d 773, 776 (1958) (quoting *W. BURBY*, FAMILY LAW FOR CALIFORNIA LAWYERS 357-58 (1958)).

253. 166 Cal. App. 2d 59, 332 P.2d 773 (1958).

standing to bring a wrongful death action under section 377 of the Code of Civil Procedure.²⁵⁴ The court held that she was an "heir" and could maintain the action.²⁵⁵ The court quoted extensively from *Krone*, *Speedling*, and *Aubrey*, among other cases, and stated that the surviving putative wife "under . . . [California] law, is recognized as a surviving legal spouse for the purposes of succession . . . ,"²⁵⁶ and that "she inherits . . . [the decedent's] property, not as a matter of equity, but as an heir"²⁵⁷

More recently, in *Brennfleck v. Workmen's Compensation Appeals Board*,²⁵⁸ a surviving putative spouse was held to be a "surviving widow" for purposes of receipt of benefits under the workers' compensation laws.²⁵⁹ The court relied primarily on *Krone* and *Kunakoff* and interpreted *Krone* in the same manner as the *Kunakoff*, *Aubrey*, and *Speedling* courts.²⁶⁰ Also, in *Adduddell v. Board of Administration*,²⁶¹ it was held that a surviving putative spouse is a "surviving spouse" within the meaning of the Government Code, for the purpose of entitlement to benefits under the Public Employees' Retirement System,²⁶² since he or she is "recognized as the surviving spouse for the purposes of succession under Probate Code section 201."²⁶³

When rights of succession to quasi-marital property are at issue, a surviving putative spouse takes the same share as would a legal spouse not because of a *de facto* contribution toward acquisition of the wealth, but because he or she is deemed to have contributed²⁶⁴—that is, to have had the status of the decedent's spouse. A surviving legal spouse shares in separate property of his or her deceased spouse not as a matter of natural right, or because of any contribution toward acquisition of that property, but because of having had the status of "spouse." "Generically, the term 'spouse' may include a putative . . . [spouse]."²⁶⁵ Descent

254. CAL. CODE CIV. PROC. § 377 (West Supp. 1977).

255. 166 Cal. App. 2d at 67-68, 332 P.2d at 778.

256. *Id.* at 67, 332 P.2d at 778.

257. *Id.* (emphasis in original).

258. 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (1970).

259. CAL. LAB. CODE § 4702 (West Supp. 1977).

260. 3 Cal. App. 3d at 670, 672-73, 84 Cal. Rptr. at 50, 53-54.

261. 8 Cal. App. 3d 243, 87 Cal. Rptr. 268 (1970).

262. CAL. GOV'T CODE § 21364 (West Supp. 1977).

263. 8 Cal. App. 3d at 248, 87 Cal. Rptr. at 271 (citing, *e.g.*, Estate of Krone, 83 Cal. App. 2d 766, 189 P.2d 741 (1948)).

264. "The proportionate contribution of each party . . . is immaterial" *Kunakoff v. Woods*, 166 Cal. App. 2d 59, 63, 332 P.2d 773, 775 (1958) (citing *Vallera v. Vallera*, 21 Cal. 2d 681, 683, 134 P.2d 761, 762 (1943)).

265. *Id.* (citation omitted).

and distribution of property on intestacy are "strict creatures of statute,"²⁶⁶ and the courts have consistently "treated the term 'spouse' as it appears in a statute as encompassing the term 'putative spouse.'" ²⁶⁷

Recognition of the right of a surviving putative spouse to inherit separate property of his or her deceased spouse may give rise to multiple claimant problems when a legal spouse of the decedent is also a claimant.²⁶⁸ In a given case, the legal spouse may be estopped to claim as such.²⁶⁹ In other cases, where the claims of both spouses are cognizable, the problem is complex, but not insoluble. As the court noted in *Addudell*, "it appears that when such problems have arisen they have been found readily susceptible of equitable resolution."²⁷⁰

In a case falling under Probate Code section 224, where a single "surviving spouse" would inherit all of the decedent's separate property,²⁷¹ the property should be divided equally between the two claimants. This has been the solution in cases such as *Estate of Ricci*²⁷² and *Estate of Vargas*,²⁷³ where both a surviving legal wife and a surviving putative wife had intestate claims to quasi-marital property; it is supported by other analogous authority.²⁷⁴ This solution would be equitable in atypical cases where the living arrangements were simultaneous.²⁷⁵ In cases involving seriatim relationships, the surviving putative spouse,²⁷⁶ as the

266. *Brennfleck v. Workmen's Comp. Appeals Bd.*, 3 Cal. App. 3d 666, 673, 84 Cal. Rptr. 50, 54 (1970).

267. *Id.* (emphasis in original).

268. It is possible, of course, that the legal spouse of the deceased would not appear as a claimant. See *Garrado v. Collins*, 136 Cal. App. 2d 323, 288 P.2d 620 (1955).

269. See *Estate of Shank*, 154 Cal. App. 2d 808, 316 P.2d 710 (1957); notes 205-11 *supra* and accompanying text.

270. 8 Cal. App. 3d at 249, 87 Cal. Rptr. at 271.

271. This would be the case if the decedent left a surviving spouse and "neither issue, parent, brother, sister, nor descendant of a deceased brother or sister." CAL. PROB. CODE § 224 (West 1956).

272. 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962).

273. 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974).

274. See CAL. LAB. CODE § 4703 (West 1971), dealing with workers' compensation benefits, which provides in part: "If there is more than one person wholly dependent for support upon a deceased employee, the death benefit shall be divided equally between them." See also *Brennfleck v. Workmen's Comp. Appeals Bd.*, 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (1970) (dictum).

275. See *Estate of Vargas*, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974). The shares would be different if decedent had been living simultaneously with more than two persons with cognizable claims. See note 276 *infra*.

276. Or the most recent one, in the unlikely event that decedent was survived by a legal spouse and more than one putative spouse. Should such a case arise, the authors suggest that the several claimants share the estate in equal portions, since each would qualify as a "surviving spouse."

person who in all probability was living with the decedent at the date of death,²⁷⁷ would seem to have more "equities" than the legal spouse; however, since each would be a "surviving spouse" within the meaning of the statute, the suggested solution should apply.

In a case where the decedent was survived by a parent or parents,²⁷⁸ so that under Probate Code section 223 a lone "surviving spouse" would inherit one half of the separate property, the other one half going to the parent(s), there are two possible solutions. The first, following the statutory scheme, would be to preserve the parental share, with the "surviving spouses" dividing equally the spousal share. The second would be to divide all of the property equally between the "surviving spouses."²⁷⁹ That solution seems to ignore the statutory scheme, and deprives the parent(s) or their issue of a share in the decedent's separate property. It has been argued, however, that "since the parents would not have taken had there been issue of either marriage,²⁸⁰ . . . [that result] does not seem as harsh as would a denial of the expectation of either the legal . . . or the putative spouse."²⁸¹

Whichever of the proffered solutions is adopted in a case where parents are involved, it seems clear that in a case involving a child or children²⁸² of either or both unions,²⁸³ the interests of the child or children should be protected. Descendants (particularly minors) are more likely to have been dependent on the decedent for support than would have been the decedent's parent(s) or sibling(s), and they are favored in the statutory scheme. In the absence of a surviving spouse, for example, the entire separate estate goes to the decedent's issue, if any, to the exclusion of all other relatives.²⁸⁴ If the decedent had one child, of either marriage, that child should inherit one half of the separate property under Probate Code section 221, with the two "surviving spouses" dividing equally the spousal share of one half. If there were two or more children,

277. See, e.g., *Sousa v. Freitas*, 100 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970); *Estate of Ricci*, 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962). But see *Patillo v. Norris*, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976). In that case, the husband separated from the legal wife and later "married" the putative wife. He subsequently drove the putative wife from the house at gun-point and, later, resumed living with the legal wife. They later separated again, so that he was living with neither woman when he died.

278. Or, if both are dead, by their issue, or the issue of either of them. CAL. PROB. CODE § 223 (West 1956).

279. Comment, *Putative and Meretricious Spouse*, *supra* note 4, at 868.

280. CAL. PROB. CODE §§ 221, 222 (West 1956).

281. Comment, *Putative and Meretricious Spouse*, *supra* note 4, at 868.

282. Or lawful issue of a deceased child. CAL. PROB. CODE § 221 (West 1956).

283. Since children of a putative marriage are legitimate, CAL. CIV. CODE § 7002 (West Supp. 1977), they would have the same inheritance rights as children of a legal marriage.

284. CAL. PROB. CODE § 222 (West 1956).

they should divide the children's two-thirds share, with the spousal one-third share divided equally between the "surviving spouses." This approach would protect fully the rights of the children and, insofar as possible, those of the "surviving spouses."²⁸⁵

Whatever solutions are adopted in the resolution of cases involving claims by two "surviving spouses," it is clear that a surviving putative spouse is a "surviving spouse," and that he or she should receive a spousal share of the decedent spouse's intestate separate property. Neither logic nor justice can support a holding that a putative spouse is a "spouse" for some purposes but not for others. The *Levie* decision is wrong in its analysis of the "equities," wrong as a matter of statutory construction, and it ignores compelling analogous precedents. It should be rejected in the appellate courts and overruled by the supreme court.

V. INTERPRETATION OF CIVIL CODE SECTION 4452: THE "BAD FAITH PUTATIVE SPOUSE"?

No discussion of special problems relating to the property rights of putative spouses would be complete without at least a glance at the current dispute as to the proper construction of Civil Code section 4452 in cases in which one party to a "marriage" believes in good faith in its validity, but the other party is in "bad faith"—that is, knows of the impediment to the validity of the marriage. There is no doubt that, where both parties are in good faith, or where one is in good faith and is claiming a quasi-marital property interest in earnings of the bad-faith party accumulated during the putative union, for example, section 4452 codifies judicially-developed doctrine and represents no departure from prior law. Controversy exists as to the meaning of the section in cases in which a bad-faith party might attempt to assert a quasi-marital property interest in property acquired during the relationship through the economic activities of the other, good-faith party. The possibility of this controversy was envisioned shortly after the enactment of section 4452 in a perceptive comment in these pages,²⁸⁶ and the controversy was engendered by the interpretation accorded the section in *In re Marriage of Cary*,²⁸⁷ itself one of the most controversial California decisions in recent history.²⁸⁸

285. The approach to division suggested in the text was suggested previously in Comment, *Putative and Meretricious Spouse*, *supra* note 4, at 868.

286. Comment, *Dissolution and Voidable Marriage*, *supra* note 3, at 351-53.

287. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

288. See, e.g., *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); *Kay & Amyx*, *supra* note 200; Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226 (1974); Comment, *In re Marriage of Cary [sic]: The*

Section 4452 reads, in relevant part:

Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed "quasi-marital property."

In *Cary*, the parties had lived together for more than eight years. Although both knew that they were not married,²⁸⁹ they had established what the court of appeal characterized as an "actual family relationship."²⁹⁰ The court held that the Family Law Act²⁹¹ had superseded "contrary pre-1970 judicial authority"²⁹² which had distinguished putative marriages and non-marital, or "meretricious," relationships, and applied to any case involving a "determination of family property rights, whether there be a legal marriage or not, and if not, regardless of whether the deficiency is known to one, or both, or neither of the parties."²⁹³ Property acquired during the relationship of Paul Cary and Janet Forbes "Cary" was thus subject to equal division under Civil Code section 4800.²⁹⁴ In reaching this result, the court "recognized that the policy underlying the Family Law Act was to remove the concept of fault, guilt, or punishment from the grounds for divorce and the distribution of marital property."²⁹⁵ The court then noted that the Act applies not only to valid marriages, but also "expressly covers a family relationship based

End of the Putative-Meretricious Spouse Distinction in California, 12 SAN DIEGO L. REV. 436 (1975) [hereinafter cited as Comment, *Cary* [sic]]; Case Note, *In re Marriage of Cary: Equitable Rights Granted to the Meretricious Spouse*, 9 U.S.F. L. REV. 186 (1974).

289. 34 Cal. App. 3d at 348, 109 Cal. Rptr. at 863. *But see* Kay & Amyx, *supra* note 200, at 945-46, stating that Janet Forbes "Cary" "testified that she believed common law marriages were valid" and that "[t]he case was briefed and argued on the theory that Janet claimed the status of a putative spouse."

290. 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 867. They held themselves out as a married couple, had four children, bought a home, and generally conducted themselves in every way as husband and wife. *Id.* at 348, 109 Cal. Rptr. at 863.

291. CAL. CIV. CODE §§ 4000-5138 (West 1970 & Supp. 1977).

292. 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 866.

293. *Id.* at 352-53, 109 Cal. Rptr. at 866. The court emphasized that the Act required an "actual family relationship" and not merely an "ostensible marital relationship" or an "unmarried living arrangement." *Id.* at 353, 109 Cal. Rptr. at 867.

294. *Id.*

295. Kay & Amyx, *supra* note 200, at 946.

on a void or voidable marriage 'where either party or both parties believed in good faith that the marriage was valid.'"²⁹⁶ The court construed Civil Code section 4452 to require equal division of quasi-marital property even in favor of a bad faith party to a void or voidable marriage. Thus, if *A*, a "practicing bigamist,"²⁹⁷ purported to marry *B*, who believed in good faith in the validity of the marriage, and money was acquired through *B*'s economic activity during the union, upon a declaration of nullity that money would be divided equally between *A* and *B*, pursuant to section 4800. That result would be inconsistent with a refusal to divide equally property acquired during a non-marital actual family relationship simply because both parties knew that they were not married.²⁹⁸

The *Cary* court's construction of section 4452 was almost universally condemned by commentators.²⁹⁹ However, in *Marvin v. Marvin*,³⁰⁰ a case which "enjoys the singular honor of being one of the most misunderstood decisions of modern times,"³⁰¹ the California Supreme Court hinted that it might agree with the *Cary* interpretation.³⁰² *Marvin* involved an alleged express oral contract between unmarried cohabitants that the parties "would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined."³⁰³ The court held that such a contract, if proved,³⁰⁴ would be enforceable, "except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."³⁰⁵ It also held that "[i]n the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties,"³⁰⁶ and that "[t]he courts may also employ the doctrine of quantum

296. 34 Cal. App. 3d at 351, 109 Cal. Rptr. at 865 (quoting CAL. CIV. CODE § 4452 (West Supp. 1977)).

297. See *Estate of Vargas*, 36 Cal. App. 3d 714, 719, 111 Cal. Rptr. 779, 781 (1974).

298. *In re Marriage of Cary*, 34 Cal. App. 3d 345, 351-52, 109 Cal. Rptr. 862, 865-66 (1973).

299. See law review sources cited note 288 *supra*.

300. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

301. *Kay & Amyx*, *supra* note 200, at 954.

302. 18 Cal. 3d at 680 n.18, 557 P.2d at 120 n.18, 134 Cal. Rptr. at 829 n.18.

303. *Id.* at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819.

304. The appeal was taken by the female participant in the defunct relationship from a judgment on the pleadings rendered by the trial court for the defendant, her erstwhile cohabitant. *Id.*

305. *Id.*

306. *Id.*

meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case."³⁰⁷

A thorough discussion of the *Marvin* opinion is beyond the scope of this article; it has been treated fully in an excellent recent article.³⁰⁸ The supreme court rejected "the reasoning"³⁰⁹ of *Cary*³¹⁰ to the effect that "the Family Law Act requires an equal division of property accumulated in nonmarital 'actual family relationships,'" ³¹¹ stating that such an interpretation "distends the act."³¹² The court thus recognized a continuing, if blurred distinction between putative marriages and nonmarital "actual family relationships," a distinction which had been obliterated by *Cary*:

We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them only as we do any other unmarried persons.³¹³

. . . .

Thus we do not hold that plaintiff and defendant were "married," nor do we extend to plaintiff the rights which the Family Law Act grants valid or putative spouses; we hold only that she has the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other unmarried person.³¹⁴

With respect to quasi-marital property rights, the supreme court in *Marvin* noted the dispute over the *Cary* interpretation of section 4452, but declined to resolve it.³¹⁵ The language of the court which suggests possible agreement with the *Cary* interpretation appears in a footnote:

Even if *Cary* is correct in holding that a "guilty" putative spouse has a right to one-half of the marital property, it does not necessarily follow that a non-marital partner has an identical right. In a putative marriage the parties will arrange their economic affairs with the expectation that upon dissolution the property will be divided equally. If a "guilty" putative spouse receives one-half of the property

307. *Id.*

308. Kay & Amyx, *supra* note 200.

309. 18 Cal. 3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.

310. The court also rejected the reasoning in *Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975), which had adopted the *Cary* rationale. *Marvin v. Marvin*, 18 Cal. 3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.

311. 18 Cal. 3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.

312. *Id.*

313. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

314. *Id.* at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.

315. *Id.* at 680 n.18, 557 P.2d at 120 n.18, 134 Cal. Rptr. at 829 n.18.

under section 4452, no expectation of the "innocent" spouse has been frustrated. In a non-marital relationship, on the other hand, the parties may expressly or tacitly determine to order their economic relationship in some other manner, and to impose community property principles regardless of [*sic*] such understanding may frustrate the parties' expectations.³¹⁶

The phrase "'guilty' putative spouse" is a contradiction in terms;³¹⁷ as interpreted by *Cary*, section 4452 would represent a complete departure from prior law. The authors join other commentators in arguing that the *Cary* interpretation is incorrect and "should be rejected in an appropriate case."³¹⁸

The legislative history of section 4452 has been thoroughly examined elsewhere;³¹⁹ further detailed examination would be redundant. The most recent work on the subject states unequivocally that "[n]ot a shred of legislative history supports the *Cary* court's radical suggestion that section 4452 was meant to award property rights to a person 'who in bad faith brought about the pseudomarrriage.' "³²⁰ The legislative intent clearly was to codify the decisional jurisprudence relating to quasi-marital property rights of good faith parties:

It was the Commission's opinion that some protection was needed for a good-faith spouse in a void marriage, especially one of long duration. Though the property rights of a putative spouse are generally recognized in present decisional law, it was deemed wise to spell out by statute the right of such "innocent" spouse to an interest in the "quasi-marital property" and to support it by analogy to the laws governing the division of property and alimony in the case of valid marriages.³²¹

Further support for the interpretation of section 4452 urged herein is the contemporaneous enactment of section 4455,³²² which, as amended, provides:

The court may, during the pendency of a proceeding to have a marriage adjudged a nullity or upon judgment, order a party to pay for the support of the other party in the same manner as if the

316. *Id.*

317. Kay & Amyx, *supra* note 200, at 959 n.137.

318. *Id.*

319. *See, e.g., id.* at 948-51; Comment, *Carey [sic]*, *supra* note 288, at 442-44.

320. Kay & Amyx, *supra* note 200, at 951.

321. GOVERNOR'S COMM'N ON THE FAMILY, REPORT 46 (1966) [hereinafter cited as COMM'N REPORT].

322. For the legislative history of § 4455, see Kay & Amyx, *supra* note 200, at 949-51.

marriage had not been void or voidable, provided that the party for whose benefit the order is made is found to be a putative spouse.³²³

Section 4455 provides for the first time legislative authorization for spouse support payments upon declaration of nullity of a void or voidable marriage; payments may be ordered only in favor of a good faith party. In light of that section, it would be inconsistent to interpret section 4452 as having been intended to benefit a bad faith party with respect to property division.

Section 4452 itself is ambiguous.³²⁴ The basis for the *Cary* interpretation seems to be its provision that the court "shall divide, in accordance with Section 4800, that property acquired during the union which would have been community or quasi-community property if the union had not been void or voidable." The words "that property" could be read to include accumulations traceable to the earnings of the putative spouse, even in cases where one of the parties was in bad faith. The section also provides that if "the court finds that either party *or both parties* believed in good faith that the marriage was valid, *the court shall declare such party or parties to have the status of a putative spouse.*"³²⁵ Under the *Cary* interpretation, the italicized language is mere surplusage; whenever one party was found to have been in good faith, the equal division provision would be triggered.

The better reading of the section is that only a party who is declared "to have the status of a putative spouse" can place "the division of property in issue."³²⁶ Under that reading, the section would be in conformity with prior law. Assume a void or voidable marriage between *A* and *B*. If both were in good faith, all property acquired during the union through the economic activities of either would be quasi-marital property and would be divided equally. If *A* was in good faith and *B* in bad faith, only *A* could raise the property division issue, and the only property in issue would be that traceable to *B*'s economic activities during the union. Any property traceable to *A*'s economic activities

323. CAL. CIV. CODE § 4455 (West Supp. 1977).

324. One reason for that ambiguity may be that the redactors of the section had in mind the typical case which had been adjudicated in the past, where only one of the parties, the "husband," was a wage-earner and, if only one party was in good faith, that one was the "wife." Support for this suggestion appears in the comment to the original draft of §§ 4452[014b] and 4455[014c]: "Section 014b essentially codifies existing case law Section 014c creates new law to conform the support rights of a putative spouse to those of a legal wife." COMM'N REPORT, *supra* note 321, at 76-77 (emphasis added). See note 1 *supra* on the impact of cultural values.

325. CAL. CIV. CODE § 4452 (West Supp. 1977) (emphasis added).

326. *Id.*; Comment, *Dissolution and Voidable Marriage*, *supra* note 3, at 352; Comment, *Carey [sic]*, *supra* note 288, at 446.

would be *A*'s separate property, as to which *B* would have no claim.³²⁷ If property had been acquired with the commingled funds of both parties, it could be treated as quasi-marital property, with the "community" considered as owing a debt to *A* in the amount of his or her earnings used for the purchase.³²⁸

To adopt the *Cary* interpretation of section 4452 would lead to seemingly anomalous results, in that no property rights would result as a matter of law from nonmarital cohabitation between persons who were both fully aware of their status, while a person who deceived another into believing in the validity of a "marriage" would be awarded one half of the property attributable to the economic activities of the innocent party. No justification for the latter result is found in the *Marvin* court's statement that "no expectation of the 'innocent' spouse has been frustrated"³²⁹ by such division. The putative spouse has been deceived as to his or her marital status; the result under the *Cary* analysis is the "very antithesis"³³⁰ of the underlying basis of the putative spouse doctrine, which is to extend benefits attendant to the status of marriage to a person who believes in good faith that he or she is a married person, not to reward a deceiver who could have had no legitimate expectations as to status or property rights.³³¹

To adopt the *Cary* interpretation would lead to another anomaly. Section 4452 is not applicable to probate cases. Thus, except in the almost inconceivable event that the section, as interpreted in *Cary*, were applied by analogy, the results with respect to a given couple would differ depending upon whether the action was for a judgment of nullity or one in probate. Clearly a bad faith survivor could claim no share in the estate of a good faith decedent;³³² nor should a bad faith decedent be allowed rights of testamentary disposition over any property attributable to the economic activities of a good faith survivor.

The *Cary* interpretation of section 4452 should be rejected; the section should not be read so as to reward the offensive conduct of a non-putative party with rights "unavailable but for his [or her] misconduct."³³³ Under the *Cary* interpretation, the state would be "a party to the unjust enrich-

327. See Comment, *Carey [sic]*, *supra* note 288, at 445-46.

328. Comment, *Louisiana*, *supra* note 100, at 112-13.

329. *Marvin v. Marvin*, 18 Cal. 3d 660, 680 n.18, 557 P.2d 106, 120 n.18, 134 Cal. Rptr. 815, 829 n.18 (1976).

330. *Kay & Amyx*, *supra* note 200, at 959 n.137.

331. *Id.*

332. *Miller v. Johnson*, 214 Cal. App. 2d 123, 29 Cal. Rptr. 251 (1963).

333. Comment, *Dissolution and Voidable Marriage*, *supra* note 3, at 352.

ment of the culpable non-putative spouse,"³³⁴ and "such odious conduct as fraud or force might become profitable ploys for the unscrupulous."³³⁵

VI. CONCLUSION

The basic outline of California law governing the property and inheritance rights of putative spouses is generally straightforward. Cases may arise in the future which will present the complex problem of sorting out the competing claims of a legal and a putative spouse of the same person, with, in some instances, a third claimant involved.³³⁶ California courts have been confronted with similar problems and, while adopting different theoretical bases of decision, have protected the claim of the putative spouse. Recognition and protection of the putative spouse in multiple claimant cases should continue. The decision in *Estate of Levie*,³³⁷ in which a putative spouse was denied spousal status for purposes of inheritance of separate property, was unsound and should be rejected. The "bad faith putative spouse" envisioned under the *Cary*³³⁸ court's interpretation of Civil Code section 4452 is a mirage which should fade from view.

Full legal rights attendant to spousal status should be accorded the putative spouse. The legislature has taken steps in that direction with respect to property³³⁹ and support³⁴⁰ rights of the putative spouse in an action for a judgment of nullity. The legislature should take further action to revise and reform the law; further developments should not be left to decisional jurisprudence.

Perhaps the simplest legislative solution to the problem would require a look to the civilian heritage from which California acquired both its community property system³⁴¹ and the putative spouse doctrine.³⁴² One section of the existing California legislation is perhaps hopelessly vague;³⁴³ all of our existing legislation should be replaced with concise,

334. *Id.*

335. *Id.* at 353.

336. Either the bigamist or someone claiming under him or her.

337. 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975).

338. *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

339. CAL. CIV. CODE § 4452 (West Supp. 1977).

340. *Id.* § 4455.

341. *See, e.g.*, *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197 (1926); *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897). *See generally* DE FUNIAK & VAUGHN, *supra* note 26, at 1-91.

342. *See, e.g.*, *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920); *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948). *See generally* DE FUNIAK & VAUGHN, *supra* note 26, at 95-99.

343. *See* text accompanying notes 286-325 *supra* for a discussion of § 4452.

cross-cutting legislation. For example, looking to articles 117 and 118 of the Louisiana Civil Code of 1870, we could enact two sections dealing with the effects of void or voidable marriages:

1. The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.³⁴⁴
2. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage.³⁴⁵

Although the Louisiana sections are literal translations of articles 201 and 202 of the Code Napoleon,³⁴⁶ the redactors of the original Louisiana provisions drew from both French and Spanish sources,³⁴⁷ and noted that the provisions "were conformable to the Spanish law."³⁴⁸

Adoption of the suggested legislative approach would clarify and reform California law. Full legal recognition would be accorded the putative spouse, and recognition would be continued for children of the union. Since, absent a contract to the contrary, application of the community property system is one of the civil effects of a marriage,³⁴⁹ community property rights would be accorded a putative spouse as a matter of law. While the basic outline of California law is analogous to that of the parent system and would not change, the suggested provisions would insure that the claim of a putative spouse would be accorded full legal recognition in multiple claimant cases. Since recognition of spousal status for purposes of inheritance is also a civil effect of marriage, the *Levie* decision would be rejected and a putative spouse would be recognized as a "surviving spouse" for all purposes under the Probate Code. Finally, the second suggested section would dispel forever the *Cary* myth of the "bad faith putative spouse."

344. LA. CIV. CODE ANN. art. 117 (West 1952).

345. *Id.* art. 118.

346. Succession of Marinoni, 164 So. 797 (La. 1935); Comment, *Louisiana*, *supra* note 100, at 90 n.4. On the French law, see generally 1 M. PLANIOL, CIVIL LAW TREATISE pt. 1, nos. 1091-1117, at 613-24 (12th ed. La. St. L. Inst. transl. 1959).

347. Note, *Putative Marriages: What Are "Civil Effects"?*, 36 LA. L. REV. 704, 705 (1976).

348. *Id.* at 705 n.8 (citing PROJET OF THE CIVIL CODE OF 1825, art. 10, 1 LA. LEGAL ARCHIVES 10 (1939), and LAS SIETE PARTIDAS bk. 4, tit. 13, L. 1 (Scott transl. 1931)). See also DE FUNIAK & VAUGHN, *supra* note 26, at 96-97. Parallel provisions appear in the current Mexican code. CIV. CODE OF MEXICO arts. 255-256 (Schoenrich transl. 1950); see also *id.* arts. 198-202. For parallel provisions in an earlier Mexican code see CÓDIGO CIVIL DEL DISTRITO FEDERAL Y TERRITORIO DE LA BAJA CALIFORNIA arts. 278-279 (1883).

349. CAL. CIV. CODE § 5133 (West 1970).