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### In Re Marriage of Lucas: The Marital Residence Acquired with Separate and Community Property Funds During the Marriage

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# **IN RE MARRIAGE OF LUCAS: THE MARITAL RESIDENCE ACQUIRED WITH SEPARATE AND COMMUNITY PROPERTY FUNDS DURING THE MARRIAGE**

## **I. INTRODUCTION**

In *In re Marriage of Lucas*,<sup>1</sup> the California Supreme Court held that a presumption of the character of ownership of a marital residence acquired during marriage arises from the form of title. The court further held that this presumption could be rebutted only by proof of an agreement between marriage partners that the form of ownership be other than as specified in the conveyance. The court also stated that the community or separate property nature of the funds used to acquire the marital residence was not sufficient to rebut the form of ownership specified in the instrument of conveyance. The holding in *Lucas* resolved a conflict among the California Courts of Appeal<sup>2</sup> regarding the proper method for determining separate and community property interests in a marital residence that was acquired with both separate and community funds.<sup>3</sup> Such resolution has been long overdue.<sup>4</sup>

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1. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

2. Not only have conflicting approaches been taken by the First and Second District Courts of Appeal, but various divisions within the second district have rendered divergent decisions. In *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979), the court of appeal developed a scheme of *pro rata* apportionment of the equity appreciation between the separate and community property contributions to the purchase price, even though title to the residence was taken in both of the marriage partners' names and as community property. In *In re Marriage of Bjornestad*, 38 Cal. App. 3d 801, 113 Cal. Rptr. 576 (1974), the court of appeal allowed reimbursement only for separate property contributions to the down payment on the purchase of the parties' residence. Five years later in the second district, the court of appeal in *In re Marriage of Trantafello*, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979), held that the residence was entirely community in nature in the absence of any evidence of an agreement or understanding between the parties to the contrary, while the court in *In re Marriage of Ashodian*, 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979), held that real property acquired in a wife's name, alone, with earnings from a real estate business conducted solely by the wife during marriage, was her separate property to the extent that such property was acquired prior to 1975. *Ashodian* is distinguishable on its facts because the property in that case was not the marital residence. The California Supreme Court stated in *Lucas* that "[w]e therefore resolve the conflict in Court of Appeal opinions by following *Trantafello* and disapproving *Aufmuth* and *Bjornestad* to the extent they are inconsistent with this opinion." 27 Cal. 3d at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

3. In *Lucas*, the California Supreme Court was not presented with, and therefore left unresolved, the issue of the proper method of determining the interests of marriage partners in a marital residence acquired *before* marriage, in which title was perfected *during* marriage. While the problems inherent in the acquisition of the marital residence before mar-

## II. FACTS OF THE CASE

Brenda and Gerald Lucas were married in March 1964, and lived

riage may be similar to those in *Lucas* concerning the *during-marriage* acquisition of the marital residence, see ASSEM. INTERIM COMM. ON JUDICIARY RELATING TO DOMESTIC RELATIONS, FINAL REPORT 2 App. to Assem. J., 1965 Reg. Sess. 121-25 (1965) [hereinafter cited as FINAL REPORT], a comparable solution may not be workable for the following reasons. First, under a community property system, the separate or community character of property is determined as of the time the property in question is acquired. See, e.g., CAL. CIV. CODE §§ 5107-5108 (West 1970) ("All property . . . owned . . . before marriage . . . is . . . separate property."); CAL. CIV. CODE § 5110 (West Supp. 1980) ("All . . . property . . . acquired during . . . marriage . . . is community property."). This concept has been called the *inception of title theory*. See generally W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 64 (2d ed. 1971). Furthermore, property received in exchange for other property, including money, may acquire the same community or separate character as that of the surrendered property. This concept has been called the *exchange principle*. See, e.g., Estate of Niccolls, 164 Cal. 368, 129 P. 278 (1912).

These principles operate without problem whenever the full legal and equitable titles to property are acquired simultaneously. However, the determination of the separate or community character of property may be more difficult when the property is acquired over a period of time, only a portion of which includes the existence of a marriage community, and when the purchase price of the property is paid with both separate and community funds. California, unlike the great majority of her sister community property states, has attempted to resolve this difficulty by resorting to the *source of the funds theory*. Under this theory, California courts have generally determined the relative interests in the marital residence acquired with both separate and community funds by apportioning such interests in a manner related to the proportional amounts of the separate and community funds used to pay the purchase price of the property. See, e.g., *Giacomazzi v. Rowe*, 109 Cal. App. 2d 498, 500-01, 240 P.2d 1020, 1021-22 (1952).

In the case of a marital residence acquired *during* marriage, it is now clear from *Lucas* that prior to the application of the *apportionment rule*, a court must find that the marriage partners agreed that their respective contributions of separate and community funds to the purchase price of the marital residence would retain their character as separate and community regardless of the form of title. 27 Cal. 3d at 816-17, 614 P.2d at 289-90, 166 Cal. Rptr. at 857-58. However, while such an *agreement rule* is workable for *during-marriage* acquisitions of the marital residence, the opportunity for such an agreement process between two people subsequently married may not present itself at the time when the premarriage acquisition of the residence occurs simply because the marriage partners may not have known each other at that time. This factor alone renders impossible any application of the *agreement rule* to *premarriage* acquisition cases. As a result, the California Supreme Court, acknowledging the need for clarification of the law in the *premarriage* acquisition situation, ruled, subsequent to *Lucas*, that apportionment is required in the *premarriage* acquisition cases. *In re Marriage of Moore*, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980). In *Moore*, a unanimous court adopted the so-called *Lucas-Aufmuth* formula as a basis for the apportionment calculation.

4. In 1969, the status of California law concerning the expenditure of separate and community funds on the marital residence was such that one commentator wrote:

The law of California must be discussed separately. It defies not only classification, but rationalization as well. It is based on misconceptions, faulty principles and errors compounded over the years. It harbors two mutually inconsistent lines of cases, and its confusion is such that consensus is lacking not only as to what it should be, but what it is.

together continuously until their separation in December 1976.<sup>5</sup> At the time of their marriage, Brenda was a beneficiary of a trust created by her father and uncle.<sup>6</sup> In September 1964, the trust corpus was distributed to her free of the trust. Brenda immediately established a revocable inter vivos trust, commonly referred to as a "grantor's trust," in which she was both trustor and beneficiary.<sup>7</sup>

In November 1968, Brenda and Gerald purchased a marital residence for \$23,300.<sup>8</sup> Brenda used \$6,350 from her trust funds as a down payment, and she and Gerald then assumed an existing trust deed loan with a balance of \$16,950.<sup>9</sup> Title to the residence was conveyed to "Gerald E. Lucas and Brenda G. Lucas, Husband and Wife as Joint Tenants."<sup>10</sup> Brenda later testified that it was her intention, though undisclosed to Gerald at the time of purchase, to acquire the residence solely for herself.<sup>11</sup> Brenda never discussed this matter with Gerald.<sup>12</sup>

For the next eight years, with the exception of \$3,000 in improvements to the residence paid from Brenda's trust funds, all payments of loan principal and interest, real property taxes, insurance premiums, and general maintenance and upkeep were paid with community property funds.<sup>13</sup>

In December 1976, Brenda and Gerald separated,<sup>14</sup> and subsequently dissolved their marriage in April 1978.<sup>15</sup> During the eight years that Brenda and Gerald lived together in their marital residence, the fair market value of the property had increased to \$56,250,<sup>16</sup> the balance of the trust deed loan had been reduced to \$14,600,<sup>17</sup> and the net equity in the property had increased to \$41,650.<sup>18</sup>

At the dissolution proceedings, the trial court determined that the net equity in the residence was to be apportioned as follows: first, Brenda was to be reimbursed for home improvements paid for with her

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Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 44 WASH. L. REV. 379, 405-06 (1969), reprinted in 21 BAYLOR L. REV. 137, 167 (1969).

5. 27 Cal. 3d at 811, 614 P.2d at 286, 166 Cal. Rptr. at 854.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 812, 614 P.2d at 287, 166 Cal. Rptr. at 855.

11. *Id.*

12. *Id.*

13. *Id.* at 811, 614 P.2d at 286, 166 Cal. Rptr. at 854.

14. *Id.*

15. *Id.* at 812, 614 P.2d at 287, 166 Cal. Rptr. at 855.

16. *Id.* at 812, 614 P.2d at 286, 166 Cal. Rptr. at 854.

17. *Id.*

18. *Id.*

separate funds; second, the remaining equity was to be apportioned between Brenda's separate interest and the community's interest in the residence.<sup>19</sup> The basis of the apportionment was the ratio of the actual purchase price payments made from Brenda's separate funds to the actual purchase price payments from Brenda's and Gerald's community funds. As a result of such apportionment, the trial court awarded to Brenda, as her separate property, approximately 75% of the net equity in the residence, and the remaining 25% of the net equity to the community of Brenda and Gerald.<sup>20</sup>

The Court of Appeal for the Fourth Appellate District reversed

19. *Id.* at 812, 614 P.2d at 287, 166 Cal. Rptr. at 855. The approach taken by the trial court in characterizing the respective property interests of the marriage partners was a combination of the *Bjornestad* and *Aufmuth* approaches: separate property contributions to the purchase price of the marital residence were reimbursed to the contributing marriage partner with no allowance for appreciation in the market value of the residential property; and a *pro rata* apportionment of the appreciated value of the home between the separate property contributor and the community. The trial court allowed a *pro rata* apportionment of the fair market value of the home between Brenda's separate property down payment and the community's payments on the trust deed, but allowed Brenda to be reimbursed only for her contributions to the improvements of the marital residence on a dollar-for-dollar basis. The court gave no allowance for the appreciation in the fair market value of the residence attributable to the improvements.

20. The amounts stated in the interlocutory judgment differed slightly from those stated in the findings. However, the figures used as the basis of discussion by both the court of appeal and the supreme court were those stated in the trial court judgment. *In re Marriage of Lucas*, 27 Cal. 3d at 812 n.1, 614 P.2d at 287 n.1, 166 Cal. Rptr. at 855 n.1.

The trial court arrived at its figures in the following manner. First, the court accounted for the purchase price:

Down payment with separate property funds .....	\$ 6,350
Loan payments with community property funds .....	2,050
Total payments from all sources .....	8,400
Loan balance at date of separation (approximate) .....	14,600
Original purchase price of residence (approximate) .....	<u>\$23,000</u>

Next, the trial court computed the relative percentages of the payments from separate and community property funds to the total payments from all sources:

Percentage of Brenda's separate property interest .....	$\frac{\$6350}{\$8400} = 75.5\%$
Percentage of Brenda and Gerald's community property interest .....	$\frac{\$2050}{\$8400} = 24.5\%$

It is interesting to note that the trial court did not consider the effect of the character of the assumed loan "proceeds" on the calculation. For example, if the trial court had determined that the assumed loan had been "extended" by the lender on the basis of the credit of the community, that is, if the lender intended to look for repayment from future community earnings, then, under the rule of *Gudelj v. Gudelj*, 41 Cal. 2d 202, 210, 259 P.2d 656, 661 (1953), the proceeds of the loan would have been community in character. Assuming that to be the case, the resulting relative percentages would have been calculated as 27% apportioned to Brenda's separate interest, and 73% apportioned to the community interest. The

the trial court's judgment as to both the apportionment of the net equity value between the separate and community interests, and the reimbursement to the separate interest of Brenda of the \$3,000 home improvement. As to the apportionment, the court of appeal decided that the entire residence was community property by virtue of the presumption of California Civil Code section 5110, which was not rebutted by evidence of any communicated understanding or agreement.<sup>21</sup> As for the reimbursement to Brenda, the court of appeal decided that in

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California Supreme Court in *Lucas* expressed its preference for this latter method in dictum. See *infra* note 102.

The trial court then calculated the apportionable value of the residence as follows:

Fair market value of residence at separation .....	\$56,250
Less approximate loan balance .....	(14,600)
Equity in residence .....	41,650
Less reimbursement to Brenda of original cost, not current value, of improvements .....	(3,000)
Net equity in residence subject to apportionment .....	<u>\$38,650</u>

Finally, the trial court applied the respective percentages to the net equity to determine the monetary value of Brenda's separate and Brenda and Gerald's community interests in the net equity as follows:

Brenda's separate property interests . . .  $\$38,650 \times 75.5\% = \$29,200$

Brenda and Gerald's community property interest . . .  $\$38,650 \times 24.5\% = \$9,450$

21. CAL. CIV. CODE § 5110 (West Supp. 1980). The presumption of section 5110 was created by the California Legislature in 1965 to resolve the problem created by *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003, 1005 (1932). In *Siberell*, the California Supreme Court considered the relationship between joint tenancy and community property ownership and decided that the two forms of ownership were mutually exclusive. The effect of that decision was that ownership by marriage partners of a marital residence taken in the form of joint tenancy did not create a community property asset. However, in spite of *Siberell*, marital residences continued to be acquired in joint tenancy, primarily as a result of an uninformed buying public which was ill-served "by real estate brokers, escrow companies and by title companies." See FINAL REPORT, *supra* note 3, at 121-25. The result was the creation of needless problems and the frustration of property owners' expectations upon either the dissolution of a marriage or the death of a spouse. To resolve this problem, the California Legislature amended California Civil Code § 164 by adding the following provision:

[W]hen a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife.

Act of July 17, 1965, ch. 1710, § 1, 1965 Cal. Stat. 3843. While this section was repealed in 1969 in connection with the enactment of the Family Law Act, ch. 1608, § 8, 1969 Cal. Stat. 3313, section 164 was superseded by California Civil Code § 5110, which contains a similar provision:

When a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single family residence is the community property of the husband and wife.

CAL. CIV. CODE § 5110 (West Supp. 1980). It was this special presumption to which the court of appeal referred in *Lucas*.

the absence of agreement, the rule of *See v. See*<sup>22</sup> prevented reimbursement of one marriage partner for his or her separate property funds expended on behalf of the community.

### III. ANALYSIS

#### A. *The Issue and Holding of Lucas*

The issue presented to the California Supreme Court in *Lucas* was whether a mere showing of the separate source of funds used as the down payment for a marital residence acquired during the marriage was sufficient to warrant an apportionment of the value of the residence between the separate and the community interests regardless of the form of title.<sup>23</sup> The supreme court decided that such a showing was insufficient to warrant an apportionment, and that the title to the marital residence would be presumed to be as specified in the instrument of conveyance, absent a "greater showing."<sup>24</sup> The "greater showing" required by the court was nothing less than an "understanding or agreement"<sup>25</sup> communicated by one marriage partner to the other as to the intended nature of the property interest acquired by each partner in the marital residence.

In deciding this issue, the supreme court found it necessary to evaluate the divergent approaches to the *Lucas* issue developed by the California courts of appeal<sup>26</sup> in light of the various presumptions re-

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22. 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966). In *See*, the California Supreme Court held that in the absence of an agreement to the contrary, the use of separate property for community purposes is a gift to the community of the funds expended, and that the marriage partner expending the separate funds cannot claim reimbursement upon a subsequent dissolution of the marriage. *Id.* at 785, 415 P.2d at 780, 51 Cal. Rptr. at 892; *see also* Weinberg v. Weinberg, 67 Cal. 2d 557, 570, 432 P.2d 709, 716, 63 Cal. Rptr. 13, 20 (1967).

23. 27 Cal. 3d at 811, 614 P.2d at 286, 166 Cal. Rptr. at 854.

24. *Id.* at 815, 614 P.2d at 288, 166 Cal. Rptr. at 856.

25. *Id.*, 614 P.2d at 289, 166 Cal. Rptr. at 857.

26. Prior to *Lucas*, most courts failed to distinguish the issue of the nature of property interests of the marriage partners in a residence acquired during marriage with separate and community funds, from that of whether and how to apportion separate and community interests in a marital residence acquired by one of the marriage partners before marriage. The result was a broad landscape of divergent decisions and widespread confusion as to the state of California community property law on this point. *See, e.g.*, Editorial, 6 COMMUNITY PROP. J. 381 (1979). Sometimes the courts required apportionment between the separate and community interests. *E.g.*, *In re Marriage of Moore*, 28 Cal. 3d 366, 371-72, 618 P.2d 208, 210, 168 Cal. Rptr. 662, 664 (1980); *In re Marriage of Sparks*, 97 Cal. App. 3d 353, 356-57, 158 Cal. Rptr. 638, 640 (1979); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 444, 454-57, 152 Cal. Rptr. 668, 673-75 (1979); *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 256-57, 105 Cal. Rptr. 483, 491 (1972); *Bare v. Bare*, 256 Cal. App. 2d 684, 689-90, 64 Cal. Rptr. 335, 338-39 (1967); *Garten v. Garten*, 140 Cal. App. 2d 489, 493-94, 295 P.2d 23, 25-26 (1956); *Forbes v. Forbes*, 118 Cal. App. 2d 324, 325-26, 257 P.2d 721, 722-23 (1953); *Ortega*

garding community property ownership in California.<sup>27</sup> Furthermore, the supreme court established an analytical approach that could be easily implemented by trial courts faced with the problem of characterizing the property interests of marriage partners in their marital residence.

*B. Divergent Approaches Utilized by the California Courts of Appeal*

In deciding *Lucas*, the supreme court considered the three approaches developed by the courts of appeal for determining the relative interests of marriage partners in a marital residence acquired *during* marriage, when one partner has contributed separate funds for its ac-

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v. Ortega, 118 Cal. App. 2d 589, 594-95, 258 P.2d 594, 597-98 (1953); *Giacomazzi v. Rowe*, 109 Cal. App. 2d 498, 500-01, 240 P.2d 1020, 1021-22 (1952); *Vieux v. Vieux*, 80 Cal. App. 222, 228-29, 251 P. 640, 642-43 (1926). Other courts have required reimbursement to the separate property contributor of the separate property funds expended on the marital residence; e.g., *In re Marriage of Bjornestad*, 38 Cal. App. 3d 801, 804-06, 113 Cal. Rptr. 576, 577, 578-79 (1974). Still other courts have forfeited either the separate property funds to the community, e.g., *In re Marriage of Trantafello*, 94 Cal. App. 3d 533, 542-46, 113 Cal. Rptr. 556, 562-64 (1979), or the community property funds to the marriage partner contributing the separate property funds; e.g., *Martin v. Martin*, 52 Cal. 235, 237 (1877); *Flournoy v. Flournoy*, 86 Cal. 286, 293-94, 24 P. 1012, 1013 (1890); *In re Marriage of Ashodian*, 96 Cal. App. 3d 43, 46, 157 Cal. Rptr. 555, 557-58 (1979).

27. In addition to the judicially created presumptions regarding the community property system, *see infra* note 41, the California Civil Code provides that all property acquired before marriage is separate property, CAL. CIV. CODE § 5107 (West 1970) (all property of the wife acquired before her marriage is her separate property); CAL. CIV. CODE § 5108 (West 1970) (all property of the husband acquired before his marriage is his separate property); and all property acquired during marriage is community property, CAL. CIV. CODE § 5110 (West Supp. 1980) (all real property located within California, and all personal property located anywhere is community property if acquired during a marriage). While these provisions appear absolutely conclusive as to the character of acquired property, the courts have treated them as rebuttable presumptions. For example, in *Baron v. Baron*, 9 Cal. App. 3d 933, 939, 88 Cal. Rptr. 404, 407 (1970), the court of appeal referred to the principle that all property acquired during marriage is community property as the "general presumption."

Additionally, CAL. CIV. CODE § 5110 (West Supp. 1980) sets forth certain "special presumptions." Among these are: (1) the presumption that any property acquired by a married woman prior to January 1, 1975 is her separate property if the acquisition is evidenced by a writing; (2) the presumption that if such married woman acquires property with another person, she takes the property as a tenant in common unless a different intention is expressed in the writing; (3) the presumption that, if a married woman acquires property with her husband prior to January 1, 1975 and the acquisition is evidenced by a writing, the property is community property; and (4) the presumption that a single family residence acquired by marriage partners in the form of a joint tenancy during their marriage is community property solely for the purposes of dissolution or legal separation.

Like the judicially created presumptions, these statutory presumptions are rebuttable either by a showing that the underlying fact or facts giving rise to the presumption (the *basic fact*) does not exist, or that the *presumed fact* does not exist. *Baron v. Baron*, 9 Cal. App. 3d 933, 939, 88 Cal. Rptr. 404, 407 (1970).



quisition.<sup>28</sup> These approaches either (1) allowed for a pro rata apportionment,<sup>29</sup> (2) required reimbursement of separate funds to the contributing marriage partner,<sup>30</sup> or (3) presumed the title to be as stated in the conveyance of title.<sup>31</sup> While the court in *Lucas* did not limit itself to these alternatives, it eventually "followed" the third approach.<sup>32</sup> For a proper understanding of *Lucas*, it is important to analyze the various approaches presented to the court.

### 1. The *Bjornestad* approach

The first of the three approaches established by the courts of appeal was in *In re Marriage of Bjornestad*.<sup>33</sup> In *Bjornestad*, a husband and wife purchased their home with each partner providing a portion of the down payment from their separate property funds, the wife providing \$5,400 and the husband \$450.<sup>34</sup> While the title to the house was in joint tenancy, the marriage partners actually intended that it be held as community property.<sup>35</sup> Furthermore, neither marriage partner intended to make a gift to the other of the down payment funds expended from their respective separate funds.<sup>36</sup>

The trial court determined that (1) the family-residence-in-joint-tenancy presumption of California Civil Code section 5110<sup>37</sup> required that the home be considered community property *to the extent that the home's value exceeded the wife's and husband's initial separate funds contributed to the purchase price down payment*; and (2) because the marriage partners did not intend to make a gift of their separate-fund down payments to each other, each was entitled to reimbursement for the amount of his or her respective contributions to the down payment.<sup>38</sup> In a brief opinion, the Second District Court of Appeal affirmed the trial court's judgment.<sup>39</sup>

In several respects the *Bjornestad* approach is inconsistent with the supreme court's holding in *Lucas*. First, California Civil Code section 5110 explicitly provides that when a family residence is acquired by the

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28. 27 Cal. 3d at 813, 614 P.2d at 287, 166 Cal. Rptr. at 855.

29. *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

30. *In re Marriage of Bjornestad*, 38 Cal. App. 3d 801, 113 Cal. Rptr. 576 (1974).

31. *In re Marriage of Trantafello*, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979).

32. 27 Cal. 3d at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

33. 38 Cal. App. 3d 801, 113 Cal. Rptr. 576 (1974).

34. *Id.* at 803, 113 Cal. Rptr. at 576-77.

35. *Id.*, 113 Cal. Rptr. at 577.

36. *Id.*

37. *See supra* note 27.

38. 38 Cal. App. 3d at 806, 113 Cal. Rptr. at 578-79.

39. *Id.*, 113 Cal. Rptr. at 579.

marriage partners in joint tenancy, it is presumed to be community property for the purposes of dissolution or legal separation. This presumption apparently applies to the ownership interest in the residence as a whole. The court of appeal's piecemeal approach to the joint tenancy presumption of section 5110 appears to be unique and is not supported by the language of the section.

Second, it is difficult to rationalize the court of appeal's holding which allowed reimbursement to the marriage partners in the absence of an agreement that the partners would be reimbursed for separate expenditures on behalf of the community. The mere absence of an intent to make a gift of separate property by one partner to the other is not an agreement to reimburse and, therefore, would not be sufficient to rebut the presumption of *See v. See*.<sup>40</sup>

Finally, the trial court found that the marriage partners had intended to hold the residence as community property despite the joint tenancy form of title. Assuming that the partners had communicated this intent to each other, the court of appeal should have held that the form of title was determined by the intent of the marriage partners which, in this case, was to create community property rather than joint tenancy.<sup>41</sup> Nonetheless, the supreme court in *Lucas* disapproved of the *Bjornestad* approach,<sup>42</sup> and declined to follow the piecemeal application of the family-residence-in-joint-tenancy presumption of section

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40. 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966). *See supra* note 22.

41. The California courts have developed certain judicial presumptions regarding community property. Among them is the presumption that the character of an interest in property is as stated in the written title evidencing the ownership. *E.g.*, *Machado v. Machado*, 58 Cal. 2d 501, 506, 375 P.2d 55, 58, 25 Cal. Rptr. 87, 90 (1962); *Gudelj v. Gudelj*, 41 Cal. 2d 202, 212, 259 P.2d 656, 662 (1953); *Socol v. King*, 36 Cal. 2d 342, 345-46, 223 P.2d 627, 629-30 (1950); *Tomaier v. Tomaier*, 23 Cal. 2d 754, 757, 146 P.2d 905, 907 (1944). However, this presumption arising from the form of title can be rebutted by evidence of an agreement or understanding between the marriage partners that the property interests in the marital residence were to be other than as evidenced in the conveyance of title. *Machado v. Machado*, 58 Cal. 2d at 506, 375 P.2d at 58, 25 Cal. Rptr. at 90; *Gudelj v. Gudelj*, 41 Cal. 2d at 212, 259 P.2d at 662.

Other judicial presumptions developed by the California courts regarding community property law are: (1) separate property funds expended on behalf of the community are a gift to the community in the absence of an agreement for reimbursement, *e.g.*, *Weinberg v. Weinberg*, 67 Cal. 2d 557, 571, 432 P.2d 709, 716, 63 Cal. Rptr. 13, 20 (1967); *See v. See*, 64 Cal. 2d 778, 785, 415 P.2d 776, 780-81, 51 Cal. Rptr. 888, 892-93 (1966); and (2) the character of loan proceeds extended to the community on the basis of the community credit (the creditor's intent to look to the community for repayment) are community property funds. *Gudelj v. Gudelj*, 41 Cal. 2d at 210, 259 P.2d at 661.

All of these presumptions are rebuttable either by a showing that the underlying fact or facts giving rise to the presumption, *i.e.* the "basic fact," does not exist, or by a showing that the "presumed fact" does not exist. *See supra* note 27.

42. 27 Cal. 3d at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

5110, and the reverse application of the rule of *See v. See*.<sup>43</sup>

## 2. The *Aufmuth* approach

The second approach considered by the California Supreme Court was that established in *In re Marriage of Aufmuth*,<sup>44</sup> which involved a marital residence held as community property.<sup>45</sup> In *Aufmuth*, husband and wife purchased a family residence for \$66,500. The home was purchased with a \$16,500 down payment from the wife's separate property, with the balance of the purchase price obtained from a trust deed loan. The trial court found that the wife had not intended to make a gift of the down payment to the community, and that neither partner had communicated with the other as to the separate or community status of the funds used for the down payment.<sup>46</sup>

Upon the dissolution of the marriage, the trial court held that the down payment had retained its separate character,<sup>47</sup> and apportioned the net equity in the home between the wife's down payment and the community interest in the trust deed loan.<sup>48</sup> Both of the marriage partners objected. The wife claimed that because the down payment had been made with her separate funds and the balance of the purchase price had been obtained from a loan secured by the residence, the house should be characterized entirely as separate property, subject to the community's right to reimbursement for community funds expended on the property.<sup>49</sup> The husband contended that because of the general presumption of California Civil Code section 5110 that all property acquired during marriage is community property,<sup>50</sup> the resi-

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43. The rule of *See* operates as follows: a marriage partner expends separate property funds for the benefit of the community. Unless the partners have affirmatively agreed or have an understanding that the contributing partner will be reimbursed for the expenditure, the contributing partner has made a gift to the community. The *Bjornestad* court would reverse this presumption, requiring reimbursement absent an affirmative agreement or understanding between the marriage partners not to look for subsequent reimbursement of separate funds expended on behalf of the community. The court in *See* clearly stated that such a reverse presumption is not the rule: "The basic rule is that the party who uses his separate property for community purposes is entitled to reimbursement from the community or separate property of the other *only if there is an agreement between the parties to that effect*." 64 Cal. 2d at 785, 415 P.2d at 781, 51 Cal. Rptr. at 893 (emphasis added).

44. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

45. *Id.* at 453, 152 Cal. Rptr. at 672.

46. *Id.* at 455, 152 Cal. Rptr. at 673-74.

47. *Id.* at 456, 152 Cal. Rptr. at 674.

48. *Id.* at 457, 152 Cal. Rptr. at 675.

49. *Id.* at 454, 152 Cal. Rptr. at 673.

50. *See supra* note 21.

dence should be characterized as entirely community property.<sup>51</sup> The husband also argued that the wife's expenditure of her separate funds for the down payment was a gift to the community.<sup>52</sup>

The court of appeal in *Aufmuth* disagreed with both contentions and upheld the trial court's theory and method of apportionment.<sup>53</sup> In so doing, the court of appeal analyzed both the down payment and the trust deed loan proceeds to determine their character as separate or community property.<sup>54</sup> The court applied California Civil Code section 5107<sup>55</sup> and the principle that property exchanged for other prop-

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51. 89 Cal. App. 3d at 454, 152 Cal. Rptr. at 673.

52. *Id.*

53. *Id.* at 454, 457, 152 Cal. Rptr. at 673, 675. The apportionment formula approved by the court of appeal in *Aufmuth* is identical to that used by the supreme court in *Lucas*. The formulae in both cases were based on the respective percentages of the actual payments made by the separate property contributor and by the community to the total actual payments. In both cases, "actual payments" included trust deed loan proceeds still outstanding as of the date of dissolution. The supreme court in *Lucas* approved the *Aufmuth* apportionment formula in dictum proffered as "guidance in the event that on reconsideration the [trial] court finds there was an understanding or agreement that [the wife] was to retain a separate property interest in the residence." 27 Cal. 3d at 816, 614 P.2d at 289-90, 166 Cal. Rptr. at 857-58. The court concluded that the *Aufmuth* formula was "the most equitable method of calculating the separate and community interests," *id.* at 816, 614 P.2d at 289, 166 Cal. Rptr. at 857, and then illustrated the application of the rule. *Id.* at 816 n.3, 614 P.2d at 290 n.3, 166 Cal. Rptr. at 858 n.3. Careful analysis of the *Lucas* and the *Aufmuth* formulae will reveal that the balance of the trust deed loan proceeds as of the date of dissolution or legal separation is included in calculating the respective separate and community interests. Thus, depending upon the amount of the loan balance and its characterization as either separate or community in nature, *see supra* note 5, the resulting calculations can be skewed greatly towards one interest or the other. *See supra* note 20.

54. It is not clear why the *Aufmuth* court insisted upon beginning its analysis of the character of the property interests by focusing upon the source of the acquiring funds instead of relying upon the *form-of-the-title* presumption. One explanation may be that seven years earlier an appellate court from the same district stated in *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 256, 105 Cal. Rptr. 483, 491 (1972) that "[i]f community funds are used to pay part of the purchase price of property acquired by one spouse prior to marriage, the property cannot be considered wholly community for the separate and community sources of the property can be traced." However, *Jafeman* involved the acquisition of a marital residence by one marriage partner *prior* to the marriage, and is, therefore, distinguishable from *Aufmuth* and *Lucas*. Both of those cases involved acquisitions of the marital residence *during* the marriage. The preservation of the separate interest in the *premarriage* situations is clearly desirable because: (1) some precautionary measure is needed to prevent the "unintentional" loss of pre-existing property interests by parties entering marriage relationships; and (2) the tracing of acquiring funds to their respective sources is facilitated by the establishment of a fixed date for the commencement of the community. However, when the acquisition of the marital residence takes place *during* the marriage, a more logical starting point in the analysis is to look at the intention of the marriage partners as expressed in the form of the title of ownership.

55. CAL. CIV. CODE § 5107 (West 1970) provides that "[a]ll property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property."

erty acquires the same character as the surrendered property;<sup>56</sup> the court therefore concluded that the wife's down payment established a separate property interest in the residence. The court also applied the presumption of *Gudelj v. Gudelj*,<sup>57</sup> that the community character of property purchased with loan proceeds is determined by the lender's reliance on community assets for repayment of the loan, and found no evidence sufficient for rebuttal. Thus, the court of appeal held that the loan proceeds were community property in character because the lender had extended credit to the community. Furthermore, the court of appeal stated that the general presumption "that all property acquired during marriage is community is controlling *only when it is impossible to trace* the source of the specific property."<sup>58</sup> The *Aufmuth* court noted that:

The amounts of separate and community funds are ascertainable in the present case. . . . [The] wife contributed \$16,500 of her separate funds for the down payment on the home while the community contributed the balance of the purchase price in the amount of \$50,000. Thus, the trial court correctly determined that [the] wife had a separate property interest to the extent of her investment in the home and that the balance was community property.<sup>59</sup>

It is interesting to note that even though the residence in *Aufmuth* was held to be community property, the court of appeal did not consider controlling the judicial presumption that the form of ownership interest in the residence was as stated in the title, absent an agreement or understanding of the marriage partners to the contrary. The court stated that "[t]he form of the instrument under which the parties hold title is not conclusive of the status of the property."<sup>60</sup>

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56. See *supra* note 3.

57. The court in *Gudelj* stated that:

[t]he character of property acquired by a sale upon credit is determined according to the intent of the seller to rely upon the separate property of the purchaser or upon a community asset . . . . In the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the [general] presumption [of Civil Code section 5110].

41 Cal. 2d at 210, 259 P.2d at 661.

58. 89 Cal. App. 3d at 457, 152 Cal. Rptr. at 674 (emphasis added).

59. *Id.*

60. The *Aufmuth* court cited *Gudelj v. Gudelj*, 41 Cal. 2d 202, 259 P.2d 656 (1953), as authority for this proposition. 89 Cal. App. 3d at 455, 152 Cal. Rptr. at 673. It is not clear what the *Aufmuth* court meant by "conclusive." If the court was stating that the form of title is not a "conclusive" presumption as to the character of the property ownership, then the citation to *Gudelj* was proper. However, if the *Aufmuth* court meant that the form of title

By comparison, the key to the *Lucas* decision is the resurrection by the California Supreme Court of the form-of-the-title presumption. The supreme court noted that this presumption had not been abolished or modified in any way by the Legislature's attempt to resolve the joint tenancy problem in 1965. In that year, the Legislature added the special family-residence-in-joint-tenancy presumption to section 5110 of the California Civil Code.<sup>61</sup> Moreover, the supreme court did not believe that the showing required to rebut the form-of-the-title presumption had been modified in any way by the Legislature.<sup>62</sup> The court reasoned that the *Lucas* rule would further the intentions and expectations of the marriage partners as to the consequences of the specified form of ownership of the marital residence.<sup>63</sup>

The court in *Lucas* also noted that the initial point in the analysis should be the determination of the form of the title taken by the parties.<sup>64</sup> A line of California Supreme Court cases had established previously that the form of the title of property ownership created a rebuttable presumption that the ownership interest in the property was

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does not even rise to the level of a presumption of the specified form of ownership, it was clearly incorrect. The court in *Gudeli* stated that:

[t]he presumption arising from the form of the deed may not be rebutted solely by evidence as to the source of the funds used to purchase the property . . . . Nor can the presumption be overcome by testimony of a hidden intention not disclosed to the other grantee at the time of the execution of the conveyance.

41 Cal. 2d at 212, 259 P.2d at 662 (citations omitted).

61. See *supra* note 27. The supreme court noted a report conducted by the California Assembly in 1965 that cited the much abused use of the joint tenancy form of ownership by marriage partners acquiring a family residence, and the problems that resulted upon a subsequent dissolution of the marriage, or upon the death of one of the marriage partners. FINAL REPORT, *supra* note 3, at 121. One of the major problems that the supreme court noted was that caused by the division of property upon a marriage dissolution. If the title to the family residence were held in community property form, or in such a form that the home were found to be community property, then the court could award the entire residence to one marriage partner or the other pursuant to California Civil Code § 4800(b)(1). The court noted that social policy favored allowing the trial court to award such residence to the "wife as a family residence for her and the children." 27 Cal. 3d at 814, 614 P.2d at 288, 166 Cal. Rptr. at 856 (citation omitted). If the title were held in joint tenancy, however, the trial court would be precluded from awarding the entire residence to one partner. The Legislature attempted to solve this problem by adding the presumption to California Civil Code § 5110 that although a single family residence was acquired by marriage partners in joint tenancy, upon dissolution of the marriage or separation, the residence would be presumed to be community property. See 1969 Cal. Stat. 3339 (1969).

62. "There is no indication that the Legislature intended in any way to change the rules regarding the strength and type of evidence necessary to overcome the presumption arising from the form of title." 27 Cal. 3d at 814, 614 P.2d at 288, 166 Cal. Rptr. at 856 (citation omitted).

63. *Id.* at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

64. *Id.* at 813, 614 P.2d at 287, 166 Cal. Rptr. at 855.

as specified in the form of title.<sup>65</sup> The court in *Lucas* noted that this line of cases allowed for a rebuttal of the form-of-the-title presumption only by evidence of a marital agreement or understanding that the ownership interests were to be different from those specified in the form of title.<sup>66</sup> Finally, the supreme court stated that tracing of the acquiring funds to a separate or community property source, or evidence of an undisclosed intention by one partner to maintain the separate property character of any contributions, was insufficient to rebut the presumption of the form of ownership as evidenced in the conveyance of title.<sup>67</sup>

In *Lucas*, the supreme court was concerned with the erosion of the form-of-the-title presumption and the sufficiency of the level of proof required to rebut that presumption. The holding in *Lucas* can be viewed as an attempt by the court to revitalize the form-of-the-title presumption. For example, the court made reference to the fact that the presumption had been modified by statute in 1965.<sup>68</sup> This reference was to the addition of the family-residence-in-joint-tenancy" presumption to California Civil Code section 5110, which operates to convert a joint tenancy form of title into community property in the event of a dissolution or legal separation.<sup>69</sup> The court specified the problems which the Legislature sought to solve by this modification, and implied that the modification was extremely narrow in scope.<sup>70</sup>

Furthermore, through its disapproval of *Aufmuth* the court expressed its concern about the apportionment line of cases that involved acquisitions of the marital residence *during* marriage.<sup>71</sup> However, it is significant that the *Lucas* court failed to criticize *In re Marriage of Jafeman*,<sup>72</sup> an apportionment case which involved the acquisition of the marital residence *prior* to marriage. Since its decision in *Lucas*, the supreme court has required the apportionment approach in the *premarriage* acquisition cases.<sup>73</sup>

Finally, it must be noted that the court in *Lucas* did not categori-

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See *supra* note 61.

70. 27 Cal. 3d at 813-14, 614 P.2d at 287-88, 166 Cal. Rptr. at 855-56.

71. See *Estate of Neilson*, 57 Cal. 2d 733, 744, 371 P.2d 745, 751, 22 Cal. Rptr. 1, 7 (1962); *Bare v. Bare*, 256 Cal. App. 2d 684, 689-90, 64 Cal. Rptr. 335, 338-39 (1967); *Forbes v. Forbes*, 118 Cal. App. 2d 324, 325-26, 257 P.2d 721, 722-23 (1953); *Giacomazzi v. Rowe*, 109 Cal. App. 2d 498, 500-01, 240 P.2d 514, 597-98 (1952); *Vieux v. Vieux*, 80 Cal. App. 222, 228-29, 251 P. 640, 642-43 (1926).

72. 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972).

73. See *supra* note 3.

cally disapprove of the apportionment approach of *Aufmuth*. Rather, the court merely indicated that before apportionment would be applicable, the marriage partners must show that they agreed or understood that, despite the form of title, they had intended such apportionment.<sup>74</sup>

### 3. The *Trantafello* approach

A third approach considered by the California Supreme Court was that established in *In re Marriage of Trantafello*,<sup>75</sup> which involved a marital residence held in joint tenancy. In *Trantafello*, a husband and wife purchased a residence during their marriage. The down payment was made from the husband's separate property funds,<sup>76</sup> with the balance of the purchase price obtained from a trust deed loan. Although the marriage partners took title to the residence as joint tenants, they never discussed the character of their ownership, nor were they aware of the form of title in which the residence was held until their marriage dissolution proceedings had commenced.<sup>77</sup> The trial court found that the residence was entirely the husband's separate property.<sup>78</sup>

The wife contended, on appeal, that the home was community property because it had been acquired during their marriage and the husband, therefore, had no right of reimbursement for his separate funds used for the down payment.<sup>79</sup> The husband argued that the trial court was correct in awarding him the residence as his separate property, but if the trial court had erred, he was entitled to reimbursement for the down payment.<sup>80</sup>

The court of appeal decided that the residence was community property in its entirety, and that the husband had no right to reimbursement for his expenditures of his separate property.<sup>81</sup> In arriving at this decision, the *Trantafello* court's analysis proceeded in two steps. First, the court noted that the residence was held in joint tenancy,<sup>82</sup> which would invoke the special family-residence-in-joint-tenancy presumption of California Civil Code section 5110,<sup>83</sup> absent sufficient evidence to rebut the presumption. Thus, the court looked for proof that

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74. 27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 857.

75. 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979).

76. *Id.* at 536-37, 156 Cal. Rptr. at 558.

77. *Id.*

78. *Id.* at 537, 156 Cal. Rptr. at 559.

79. *Id.* at 538, 156 Cal. Rptr. at 559.

80. *Id.*

81. *Id.* at 539, 156 Cal. Rptr. at 559-60.

82. *Id.*, 156 Cal. Rptr. at 560.

83. *See supra* note 61.



the presumption had been rebutted.<sup>84</sup> The court stated that the only evidence sufficient to rebut the presumption was a "common understanding that the joint tenancy deed to the family home was not to have the legal effect given it by Civil Code section 5110."<sup>85</sup> The court concluded that "the record is devoid of any evidence on which the trial court could find that the residence of the parties was not community property."<sup>86</sup>

Second, the court considered whether the husband should have been reimbursed for his expenditure of separate funds for the down payment. The court of appeal noted the rule of *See v. See*,<sup>87</sup> and looked for evidence of an agreement between the marriage partners that the husband should have been reimbursed for these expenditures. Finding none, the court of appeal stated that:

[m]ere tracing of the funds establishing their separate character does not under such circumstances suffice to prove a right to reimbursement.

. . . .

The rule remains [that the] [h]usband's right to reimbursement cannot be based solely upon proof that his separate funds were employed to make the down payment upon the family residence which was acquired as community property. To be entitled to reimbursement, he was required to show that there was a mutual agreement between himself and [his] [w]ife to preserve the separate property status of the contributed funds.<sup>88</sup>

Thus, *Trantafello* stands for the following propositions: (1) taking title to a family residence as joint tenants presumes the existence of a joint tenancy unless the marriage partners have agreed otherwise; (2) upon a dissolution of the marriage, or a legal separation, the joint tenancy is presumed to be a community property interest; and (3) neither marriage partner shall be reimbursed for separate property expenditures made on the behalf of the community in the absence of an agreement to the contrary. It is this approach that the California Supreme Court endorsed and adopted in *Lucas*.

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84. 94 Cal. App. 3d at 540, 156 Cal. Rptr. at 560.

85. *Id.* at 542, 156 Cal. Rptr. at 561.

86. *Id.*, 156 Cal. Rptr. at 562.

87. 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966). *See supra* note 22.

88. 94 Cal. App. 3d at 544-45, 156 Cal. Rptr. at 564-65.

C. In Re Marriage of Lucas: *An Analytical Approach*

In *Lucas*, the California Supreme Court established a two step analytical approach for determining the character of the ownership interests of the marriage partners in the marital residence. First, the form of the title *as actually taken* by the marriage partners must be determined.<sup>89</sup> The title may specify a particular form, such as "joint tenants," "community property," or "tenants in common." Or, the court may determine that no form of title is specified in the conveyance, because the written instrument of title may evidence only a conveyance to the marriage partners as named grantees. For example, the document may simply read "to Brenda and Gerald."

If a particular form of ownership is specified in the written instrument of title, then the form of ownership will be presumed to be as specified.<sup>90</sup> This presumption arising from the form of title can be rebutted only by a showing that the marriage partners had an agreement or understanding to the contrary.<sup>91</sup> If no agreement or understanding contrary to the apparent form of title can be shown, the character of the ownership of the residence is determined by the instrument of title.<sup>92</sup> Mere tracing to the source of the acquiring funds will not be sufficient to rebut this form of title presumption.<sup>93</sup>

If no particular form of ownership is specified in the written instrument of title, then California Civil Code section 5110 creates a general presumption that the residence is community property.<sup>94</sup> This general presumption may be rebutted by a "lesser showing" than is necessary to rebut a special presumption created by an instrument of conveyance which does state the form of title.<sup>95</sup> A general presumption may be rebutted merely by tracing the source of the funds used to acquire the residence.<sup>96</sup> It is in this latter instance, or upon a showing

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89. 27 Cal. 3d at 813, 614 P.2d at 287, 166 Cal. Rptr. at 855.

90. *Id.* at 813-15, 614 P.2d at 287-88, 166 Cal. Rptr. at 855-56.

91. *Id.* at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

92. *Id.*

93. *Id.* at 813-15, 614 P.2d at 287-88, 166 Cal. Rptr. at 855-56.

94. *Id.* at 815, 614 P.2d at 288, 166 Cal. Rptr. at 856.

95. *Id.*

96. Thus, under the *Lucas* approach, the court in *Aufmuth* would have held that the property involved was community property. The court would have reached this conclusion as follows: first, the court would have ascertained that the form of title specified in the written instrument was "as community property"; therefore, a presumption of community property ownership would have arisen. Because there was an express designation of ownership in the form of title, the "greater showing" of an agreement or understanding between the marriage partners contrary to the form of title would have been required to rebut the presumption of community property ownership. Second, the court would have looked for

that the parties agreed and understood that separate contributions to the purchase price would remain the separate property of the contributing partner, that apportionment of property interests in the marital residence would be appropriate.

In applying the foregoing analytical approach to the facts before it, the *Lucas* court first noted that Brenda and Gerald took title to their marital residence as joint tenants. Therefore, the court reasoned that a presumption arose from the form of ownership that Brenda and Gerald owned the residence as joint tenants, and not as community property.<sup>97</sup>

Next, the court looked for a "greater showing" to rebut the presumption of a joint tenancy, in the form of an agreement or understanding between Brenda and Gerald that the ownership of the residence was not to be held in joint tenancy form. The only evidence as to the Lucas' intentions regarding separate ownership was a desire by Brenda, undisclosed to Gerald, that the residence was to be her separate property.<sup>98</sup> The court found that this undisclosed intent was insufficient to rebut the presumption of the joint tenancy form of ownership.<sup>99</sup>

A presumption of joint ownership of a family residence having been established, the court noted that the special presumption of California Civil Code section 5110 was operative.<sup>100</sup> The result was that, for the purpose of the dissolution proceeding only, absent a "common understanding that the joint tenancy deed to the family home was not to have the legal effect given it by Civil Code section 5110,"<sup>101</sup> the marital residence was presumed to be Brenda and Gerald's community

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evidence of such agreement or understanding to the contrary. In *Aufmuth*, no such agreement or understanding was present. Therefore, the presumption of community property ownership of the marital residence would have prevailed, regardless of the separate funds expended on behalf of the community for the purchase price down payment.

Likewise under the *Lucas* rationale, the *Bjornestad* court would have found that the residence at issue was held as community property. First, the court would have determined that the form of title was specified to be "joint tenancy." Thus, a presumption of joint tenancy ownership would be created, rebuttable only by a showing of an understanding or agreement between the marriage partners to hold the property other than in that form. In *Bjornestad*, there was evidence that the partners had in fact agreed and understood that the marital property was to be held as community property. Therefore, the form of the title presumption would have been sufficiently rebutted under *Lucas*. The court would have determined that the marital residence was the Bjornestads' community property in its entirety, absent an agreement under the rule of *See v. See*, see *supra* note 22, to reimburse either of the partners for any separate property funds expended on behalf of the community.

97. 27 Cal. 3d at 814-15, 614 P.2d at 289, 166 Cal. Rptr. at 857.

98. *Id.* at 812, 614 P.2d at 287, 166 Cal. Rptr. at 855.

99. *Id.* at 815-16, 614 P.2d at 289-90, 166 Cal. Rptr. at 857-58.

100. *Id.* at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857. See *supra* note 61.

101. *In re Marriage of Trantafello*, 94 Cal. App. 3d at 542, 156 Cal. Rptr. at 561.

property.<sup>102</sup>

#### IV. CONCLUSION

The California Supreme Court in *In re Marriage of Lucas* clarified the law concerning the acquisition of the family residence by marriage partners during marriage, the purchase price of which may be paid for with a mixture of the partners' community property and one or both of the partners' separate property. In analyzing the rationale for the analytical approach established by the court, it is apparent that the court was concerned with the consequences of applying strict real property rules unforeseen by marriage partners ill served by "real estate brokers, escrow companies and by title companies,"<sup>103</sup> who continue to advise

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102. The supreme court in *Lucas* remanded the case to the trial court for additional proceedings:

Neither the parties nor the court applied the correct rules to this case, and it is possible that had they done so the proof might have been different. In the interest of justice, therefore, the matter of the community or separate property character of the residence must be remanded for reconsideration in light of these rules.

27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 857.

Additionally, the supreme court, in dictum, illustrated the "most equitable" method of calculating the separate and community interests in the Lucas' family residence should the trial court find on remand that Brenda and Gerald had in fact agreed and understood that Brenda's separate property funds used for the down payment were to remain her separate property. *Id.* at 816 & n.3, 614 P.2d at 290 & n.3, 166 Cal. Rptr. at 858 & n.3. *See also In re Marriage of Aufmuth*, 89 Cal. App. 3d at 457, 152 Cal. Rptr. at 675. It is interesting to note that the court expressly used the *Aufmuth* formula as its reference point. This method differed significantly from the approach used by the trial court in *Lucas*. *See supra* note 53. First, the supreme court fractionalized the fair market value of the marital residence "at the time of trial" into (1) the original purchase price and (2) the capital appreciation. As to the original purchase price, the separate interest and the community were reimbursed for the funds actually contributed to the purchase price. As to the capital appreciation, the court determined the relative proportion of contributions as of the date of the acquisition of the marital residence. Next, the court applied the rule of *Gudelfj*, *see supra* note 60, to determine the character of the trust deed loan proceeds. Assuming that the loan was extended by the lender on the basis of the community credit, the court included the loan proceeds as a community contribution. The resulting proportions were applied to the amount of capital appreciation and allocated between the marriage partners accordingly. *Compare supra* note 20. As has been shown, *see supra* note 53, this method will generally produce the larger portion of the interest in the residence for the community, assuming that the trust deed loan has been extended to the community and not to one of the marriage partners on the basis of his or her separate credit. This inclusion of the loan balance in the calculation illustrates that the supreme court prefers a community property result. For a brief critique of the *Lucas-Aufmuth* apportionment formula, *see Barnett, Lucas v. Lucas, or Footnotes from Far-Away Forums*, L.A. Daily J., Dec. 19, 1980, (Report), at 15.

The supreme court subsequently approved use of the same formula for apportioning property interests in a *premarriage* acquisition of a marital residence that had been partially paid for with separate property funds, and partially with community property funds. *In re Marriage of Moore*, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980).

103. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

home buyers that: (1) home ownership should always be in the joint tenancy form; and (2) joint tenancy and community property are equivalent forms of ownership. The *Lucas* court was also apparently concerned about the consequences of strict rules regarding the division of property upon the dissolution of a marriage. The court believed that in the majority of instances when marriage partners acquire a marital residence, they expect their ownership interests in the residence to be community property. Therefore, the court in *Lucas*, assisted by the operation of certain judicial and statutory presumptions in community property law, attempted to align as closely as possible the consequences of home ownership with the expectations of the marriage partners as expressed either in the title to the residence at the time of the acquisition of the home, or in subsequent supplementary communications between the marriage partners.

*Ralph Joseph Novotney Jr.*