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# *Community Property and Family Law*

by *Arthur M. Sammis\**

Important developments in community property and family law in California in 1967 were largely the result of legislative enactment, although several important decisions were rendered by the appellate courts of California. Those cases and statutory revisions making significant changes in the law will be discussed here under appropriate headings.

## **Orders for Support—Modification and Enforcement.**

In the past ten years, there have been more changes in the law governing payments for support and maintenance than in any other area of family law. Commencing in 1959, the legislature failed in only one general session, that of 1965, to enact amendments to Civil Code section 139. The statutory amendments have attempted to deal with the difficulties

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arising out of integrated agreements covering both property and support rights, where the provisions relating to the division of property and those relating to support constitute reciprocal consideration.<sup>1</sup>

Prior to 1959 in *Plumer v. Superior Court*<sup>2</sup> and *Puckett v. Puckett*,<sup>3</sup> provisions in agreements for child support were held subject to modification by way of increase only; the power to make a downward revision was denied. This limitation was removed by the 1959 amendment<sup>4</sup> to Civil Code section 139, which expressly was made nonretroactive. Agreements providing for child support entered into after September 18, 1959, the effective date of the amendment, may be increased or decreased upon a proper showing. Although some doubt has been expressed,<sup>5</sup> they would clearly seem to be enforceable by contempt.<sup>6</sup>

A more complicated problem is presented in cases involving support provisions for one of the spouses rather than for children. In 1957, the California Supreme Court in *Bradley v. Superior Court*<sup>7</sup> held that such provisions contained in an integrated property settlement, although merged in an interlocutory or final decree of divorce, were unenforceable by contempt. As stated by the court,

1. On the other hand, no problems arise where orders for support and maintenance are contained in decrees for divorce or separate maintenance, where such orders are not based upon agreement of the parties or, if made pursuant to such agreement, are predicated on independent covenants. Such orders are modifiable, except as to accrued amounts, and are enforceable by contempt. See Cal. Civ. Code § 139.

2. 50 Cal.2d 631, 328 P.2d 193 (1958).

3. 21 Cal.2d 833, 136 P.2d 1 (1943).

4. Stats. 1959, ch. 1399, § 1, p. 3678.

5. Report of State Bar Committee on 1963 Conference Resolutions Nos. 22, 40 and 61, July 30, 1964. See Synop-

sis of Testimony Presented to the Assembly Interim Committee on Judiciary, September 30, 1964, in Santa Monica, California, at 20.

6. The conclusion that despite the modifiability of post-1959 child-support provisions, the courts will deny contempt on the basis of the contractual origin, is refuted by the reasoning of the court in *Heller v. Heller*, 230 Cal. App.2d 679, 41 Cal. Rptr. 177 (1964), upholding enforcement by contempt of modifiable spouse-support provisions in integrated agreements subject to the 1961-1963 law under Civil Code section 139.

7. 48 Cal.2d 509, 310 P.2d 634 (1957).

[P]ayments provided in a property settlement agreement which are found to constitute an adjustment of property interests, rather than a severable provision for alimony, should be held to fall within the constitutional proscription against imprisonment for debt. That is, if the obligation sought to be enforced is contractual and negotiated, as distinguished from marital and imposed by law, even though the contract relates to marriage obligations, the remedy must be appropriate to the right asserted.<sup>8</sup>

And in the absence of agreement by the parties, or express statutory authority, such provisions are also nonmodifiable.

In 1961 further amendments to Civil Code section 139 extended the power to modify or revoke to an order for support of the other party based upon a provision for such support in an integrated property settlement agreement,<sup>9</sup> but limited this power to cases involving minor children of the parties. The 1961 amendments were repealed in 1963,<sup>10</sup> and the repeal expressly was made nonretroactive. Integrated agreements executed between the effective date of the 1961 amendment, September 15, and the effective date of the 1963 amendment, September 20, are therefore governed by the 1961 legislation and are modifiable and enforceable by contempt.<sup>11</sup> Integrated agreements executed subsequent thereto and prior to November 8, 1967 are governed by the earlier law, are nonmodifiable, and fall within the proscription of *Bradley*.

The 1967 amendments to Civil Code section 139 are sweeping. To the extent that they deal with provisions for child support, they simply clarify and restate existing law. To the extent that they deal with modification and enforcement of provisions for the support and maintenance of either spouse, they purport to be a direct answer to *Bradley*. The section, as amended, states that the provisions of any agreement for the support of either party shall be deemed separate and severable

8. 48 Cal.2d at 522, 310 P.2d at 642.

9. Stats. 1961, ch. 2098, § 1, p. 4362.

10. Stats. 1963, ch. 861, § 1, p. 2097.

11. *Heller v. Heller*, 230 Cal. App.

2d 679, 41 Cal. Rptr. 177 (1964).

from the provisions relating to property. It further provides that all orders for support based on such agreements shall be deemed law-imposed and made under the power of the court to make such orders. Such support provisions shall be subject to subsequent modification or revocation by court order, except as to accrued amounts, and *“except to the extent that any written agreement, or if there is no written agreement, any oral agreement entered into in open court between the parties, specifically provides to the contrary”* (emphasis added). The amendment also provides that even where there has been an agreement, support orders may now be enforced by contempt, notwithstanding any agreements to the contrary.

It has been stated that “amended Section 139 encompasses the finality advantage of the integrated property settlement agreement while providing the wife and child the contempt remedy in case of non-payment as well as the availability of new court support orders if the integrated agreement is discharged in bankruptcy.”<sup>12</sup> The last portion of this statement is clearly correct; the new Civil Code section 139.1 expressly grants the power to make appropriate orders for support and maintenance where such obligation has been discharged in bankruptcy. However, at least some doubt exists whether the parties may have their cake and eat it too. Undoubtedly the California Legislature so intended, and it would seem clear that, to the extent that the support provisions are “severable,” “law imposed” and “modifiable,” the contractual and negotiated aspect to which the court referred in *Bradley* no longer exists. But the parties may contract against modification and by their agreement limit the authority of the court in this respect. We may well ask whether an order for support made pursuant to an agreement of the parties, and by their agreement not subject to later modification, is truly “law imposed” and “made under the power of the court to make such orders.”

The new legislation is, with minor variations, that discussed by the State Bar Committee in 1964 and referred to interim

12. C.E.B. REVIEW OF SELECTED 1967  
CODE LEGISLATION at 20 (1967).

committee of the Legislature for study in 1965. In its report, the State Bar Committee suggested that possibly a constitutional amendment to article I, section 15 of the California Constitution, which forbids imprisonment for debt, might be necessary to meet the *Bradley* problem, but advised that legislation be tried first. The legislation has now been enacted, and is expressly limited to agreements entered into after the effective date of the amendments. Some time will elapse, therefore, before its constitutionality may be tested. When that time comes, it may be of interest to counsel that Justice Schaur, who wrote the majority opinion in *Bradley*, and Justice Spence, who wrote the majority opinion in *Plumer*, are no longer on the bench, while Justice Traynor, who wrote strong dissents in both cases, is now Chief Justice of the Supreme Court of California.

One additional 1967 amendment to Civil Code section 139 should be noted. The third paragraph of this section now provides (except as may be otherwise agreed by the parties) for modification or revocation, upon petition of one of the parties, of any "decree or judgment granting any allowance to the other party upon proof that the wife is living with another man and holding herself out as his wife, although not married to such man . . ." with like provision concerning the husband living with another woman. The provision was enacted to negate the recent decision in *Double v. Double*<sup>13</sup> wherein it was held that such conduct was, in the absence of a showing of other changed circumstances, insufficient justification for termination of an award of alimony to the erring former wife. It will be interesting to see whether the courts will hew to the literal provisions of the statute; an avowed mistress might still collect alimony from her former husband!

### Child Support

The 1961 amendment to Civil Code section 139,<sup>14</sup> which broadened the power of the court in a divorce or separate

13. 248 Cal. App.2d 650, 56 Cal. Rptr. 687 (1967).

14. Stats. 1961, ch. 2098, § 1, p. 4362.

maintenance action from that of merely providing for the "maintenance" of minor children to that of providing for "support, maintenance and education", was held in *Franklin Life Insurance v. Kitchens*<sup>15</sup> to constitute a proper basis for sustaining that portion of a divorce decree requiring a parent to carry a life insurance policy for the benefit of minor children. The divorce decree, in dividing the community property, awarded a life insurance policy under which the wife was the beneficiary to the husband upon condition that his minor children should be named as beneficiaries until they reached majority. The husband failed to change the policy to accommodate this condition. In an action on his death, the insurance company interpleaded the former wife as the named beneficiary and the children as claimants. The court, while finding that the children had no direct interest in the policy, held that they could enforce the provisions of the divorce decree against their mother, who was a party to the original action and bound by the order of the court. This decision is contrary to *McKannay v. McKannay*<sup>16</sup> which had held that the court in a divorce action can only divide community property between the parties and cannot set up terms and conditions as to its use, and *Miller v. Miller*,<sup>17</sup> in which the court, in reversing a decree requiring the father to keep life insurance in effect in favor of a minor child, held that the authority of the court in a divorce action to order child support was limited to an allowance of money and did not include the power to allocate specific property.

While confirming the right of a first wife as a premarital creditor to levy for alimony and child-support payments due against the community property of a former husband's second marriage, the California Supreme Court in *Weinberg v. Weinberg*<sup>18</sup> recognized that an apportionment of such obligations between separate and community income is appropriate. During his second marriage, the defendant husband used community funds to pay both alimony and child support ordered

15. 249 Cal. App.2d 623, 57 Cal. Rptr. 652 (1967).

16. 68 Cal. App. 701, 230 P. 214 (1924).

17. 52 Cal. App.2d 443, 126 P.2d 357 (1942).

18. 67 Cal.2d 567, 63 Cal. Rptr. 13, 432 P.2d 709 (1967).

in the decree terminating his first marriage; in the interlocutory decree terminating his second venture in matrimony, the trial court held that he must reimburse the second community for the alimony payments but that child support was properly chargeable against the community estate. In reversing, the California Supreme Court noted that both are continuing obligations based on both the separate and community income of the husband. However, the court determined that, although his earnings from separate property were sufficient to pay the obligations, an apportionment should be made on the basis of the total separate and community income (including all capital increases in his separate investments) during his second marriage. Since both obligations are continuing, and are based in part on his community income, it would be inequitable to charge the whole of either, or the combined total, to separate income.

In two cases, the responsibility of a mother to provide support for her children when the father has difficulty doing so has been strengthened, and in one of these, *Smith v. Workmen's Compensation Appeals Board*,<sup>19</sup> the mother's obligation is implied to be equal to that of the father. In that decision, the court agreed with the Appeals Board that the children of Jacqueline Louise McDonald were "totally dependent" upon her, even though they lived with and in the custody of their father who provided them with the basic necessities of life. However, the standard of living they enjoyed before their parents' divorce was maintained only by virtue of Mrs. McDonald's completely voluntary gifts and contributions, "and by virtue of these circumstances the mother was legally liable for support of her children . . . ."<sup>20</sup> They were therefore entitled to certain workmen's compensation benefits upon her industrially caused death. In *Levy v. Levy*<sup>1</sup> a father who suffered financial reverses was successful in his petition for assistance from the mother to help support their child, even though she did not have physical custody. The father's

19. 245 Cal. App.2d 292, 53 Cal. Rptr. 816 (1966).

1. 245 Cal. App.2d 341, 53 Cal. Rptr. 790 (1966).

20. 245 Cal. App.2d at 295, 53 Cal. Rptr. at 822.



duty to support is not absolute, but “must depend upon the urgency of the needs of the child and the relative hardship to each parent in contributing to such needs.”<sup>2</sup> Mrs. Levy was required to contribute a substantial portion of her income to a child she had scarcely seen in years. Do these cases indicate a lessening of a father’s responsibility to his children? Clearly not; however, if the father is having difficulty in meeting his obligations, it seems likely that courts in the future will require the mother to assist, before allowing the children’s needs to go unsatisfied.

### **Paternity: Admissibility of Blood Tests**

An additional exception to the conclusive presumption of legitimacy set forth in section 621 of the Evidence Code appears to be the result of a recent decision of the California Supreme Court, *Jackson v. Jackson*.<sup>3</sup> That section, which restates without substantive change former section 1962.5 of the Code of Civil Procedure, provides: “Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate.”

The “conclusive” presumption proved to be of little assistance to Jackie Carol Jackson, who married Garland Jackson in Nevada on November 9, 1964. The parties returned to California to live and on the morning of November 13, less than four days after the marriage ceremony, Garland discovered that his wife had left him. In his subsequent action for annulment, she denied that she had not intended to live with him at the time they were married and also alleged that she was pregnant with plaintiff’s child. An order for support, prenatal care, hospital expenses, and counsel fees was entered, and a subsequent order, after the birth of the child, provided for child support and required compliance with the previous order with respect to counsel fees. The court also ordered plaintiff, defendant, and the child to submit to blood tests. The trial court thereafter refused to admit

2. 245 Cal. App.2d at 359, 53 Cal. Rptr. at 801.

3. 67 Cal.2d 241, 60 Cal. Rptr. 649, 430 P.2d 289 (1967).

into evidence the results of the blood tests, which demonstrated that the plaintiff could not have fathered the child, and denied plaintiff's motion to terminate all prior court orders for support, doctor and medical expenses. Upon plaintiff's appeal the Supreme Court reversed, the majority holding that the ruling of the trial court denied plaintiff a fair opportunity to prove that defendant's child was not conceived during the short period the couple cohabited. In a four-to-three decision, with Justices Burke, Tobriner and Sullivan dissenting, the court distinguished the case from its decision in *Kusior v. Silver*<sup>4</sup> on the ground that the earlier case was based primarily on the erroneous definition of "cohabiting" by the trial court. On the other hand, the majority opinion reiterates the statement in *Kusior* that the statutory presumption of legitimacy is not so much a conclusive presumption as a substantive rule of law that a husband will be treated as the father of a child born to his wife and conceived while they were cohabiting. Ergo, he must be given the chance to prove that he is not the legal father by demonstrating the impossibility that the child was conceived during cohabitation with his wife. The statute does not refer to "conception during cohabitation" but conclusively presumes that it occurred; the court has judicially amended the section to permit proof to the contrary. No matter how the majority may put it, the end result of the opinion is to add one additional method, based on blood-test evidence, of avoiding the operation of the presumption. It is "conclusive" only if the fact which it conclusively determines to be true is not shown to be impossible, and the manner of proof of impossibility is being constantly broadened.<sup>5</sup>

### Quasi-Community Property

Brief mention should be made of the decision in the *Estate of Rogers*<sup>6</sup> upholding the constitutionality of section 13672

4. 54 Cal. 2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

5. The conclusive presumption also does not apply when the husband had no access to his wife during the time of conception, *Madden v. Madden*, 160

Cal. App.2d 422, 325 P.2d 538 (1958); or is sterile, *Hughes v. Hughes*, 125 Cal. App.2d 781, 271 P.2d 172 (1954).

6. 245 Cal. App.2d 101, 53 Cal. Rptr. 572 (1966).

of the Revenue and Taxation Code. The section treats, for inheritance tax purposes, joint-tenancy property having its source in quasi-community property<sup>7</sup> as if one-half of the consideration for the acquisition of such property were furnished by each spouse, as opposed to section 13671.5, which provides that if husband and wife place community property in their joint names, the joint tenancy shall be treated as if it were community property. The superior court found that the statute violated not only the equal protection clause of the United States Constitution, but also violated provisions of the California Constitution.<sup>8</sup> In reversing, the Court of Appeal, in a divided opinion, pointed out that quasi-community property has become *sui generis*; it is not community property, but neither is it like other separate property, because it is burdened with both the wife's expectancy in the event of the husband's death and her contingent rights in the event of a divorce or decree of separate maintenance. There is, therefore, reason for permitting a legislative classification, and the statute is constitutional.<sup>9</sup>

### **National Service Life Insurance Policies and the Wissner Rule**

In *Thoen v. Thoen*<sup>10</sup> plaintiff's former husband, following his remarriage, changed the beneficiary of his National Service Life Insurance Policy<sup>11</sup> from plaintiff to his second wife. The change was made in violation of the provisions of the divorce decree awarding all of the community property to plaintiff and enjoining the husband from changing the beneficiary or otherwise altering the terms and conditions of the policy. The policy was community property of the parties. Upon death of the husband, defendant, his second wife, received the proceeds of the policy and plaintiff sued to establish a constructive trust. Plaintiff relied on two cases involving

7. That is, property acquired outside of the state which would have been community property if acquired in California. See Cal. Civ. Code § 140.5.

8. Cal. Const. art. I, §§ 11 and 21; art. IV, §§ 25(10) and 25(33).

9. For analysis critical to the court's solution of the constitutional issue, see

Leahy, CONSTITUTIONAL LAW in this volume.

10. 248 Cal. App.2d 354, 56 Cal. Rptr. 614 (1967).

11. An N.S.L.I. policy is a low-cost life insurance policy made available to servicemen by the federal government,

a conflict between local community property laws and federal laws. Both *Free v. Bland*<sup>12</sup> and *Yiatchos v. Yiatchos*<sup>13</sup> recognized that the survivorship provisions, allowing beneficiaries to be designated at will, in the United States Savings Bonds should not “become a sanctuary for wrongdoers’ gains”<sup>14</sup> and that relief should be available where there appears to have been “fraud or a breach of trust tantamount thereto on the part of the husband while acting in his capacity as manager of the general community property”.<sup>15</sup> The Court of Appeal, in affirming a judgment of dismissal, distinguished between the strong federal policy announced in the earlier case of *Wissner v. Wissner*<sup>16</sup> (upholding the supremacy of the federal statute in the N.S.L.I. situation) and the regulations governing savings bonds, and pointed out that this distinction had been noted in *Free v. Bland*. The *Wissner* case controls, and relief by way of constructive trust is not available.

### Annulment

In *Whealton v. Whealton*<sup>17</sup> the husband, a chief petty officer on active duty with the United States Navy, instituted an action for annulment in California against his wife whom he had married in Maryland and who was still a domiciliary of and resided in that state. Upon service by publication, he was awarded a default judgment. The court held the original judgment to be void. The theory of ex parte jurisdiction in an annulment cannot rely on the concept of a res or status found within the state, as in the case of divorce actions; however, the courts have recognized a state’s interest in providing a forum for some annulment actions even though the court

12. 369 U.S. 663, 8 L.ed.2d 180, 82 S.Ct. 1089 (1962).

13. 376 U.S. 306, 11 L.ed.2d 724, 84 S.Ct. 742 (1964).

14. 369 U.S. at 671, n. 12, 8 L.ed.2d at 186, 82 S.Ct. at 1094. Brief for the United States as *amicus curiae* at 21.

15. 369 U.S. at 670, 8 L.ed.2d at 186, 82 S.Ct. at 1094. Plaintiff does not appear to have cited the California case of *Estate of Bray*, 230 Cal. App.2d 136,

40 Cal. Rptr. 750 (1964), applying the two United States Supreme Court decisions and requiring an accounting as to one-half of U. S. savings bonds improperly registered in the joint names of the husband and a third party.

16. 338 U.S. 655, 94 L.ed. 424, 70 S.Ct. 398 (1950).

17. 67 Cal.2d 667, 63 Cal. Rptr. 291, 432 P.2d 979 (1967).

lacked personal jurisdiction over one of the parties. The primary issue under the facts in this case was whether due process concepts of fairness to a defendant permit a plaintiff to chose a forum inconvenient to the defendant when personal jurisdiction has not been obtained. Although the domicile of plaintiff would afford jurisdiction to award an ex parte annulment, he neither pleaded nor proved domicile in California; the marriage took place elsewhere, the matrimonial domicile was elsewhere, and defendant lived elsewhere. "The court was therefore without jurisdiction to enter the default judgment."<sup>18</sup> However, after the entry of judgment, the wife appeared generally in the action. May the court, on re-trial, award an annulment when both parties are before it, even though neither is a domiciliary of the state? Yes. As stated by the court, ". . . the interests of the state of celebration of the marriage or the state of domicile of either party do not preclude a court that has personal jurisdiction over both parties from entertaining an annulment action."<sup>19</sup> Must the court then exercise this jurisdiction in all cases? No.

"In other annulment actions, where personal jurisdiction is the sole jurisdictional basis, . . . the doctrine of forum non conveniens might well be invoked by one of the parties or asserted by the court, to cause a discretionary dismissal when fairness and the interests of judicial administration so demand."<sup>20</sup>

As a result, except for saying that where neither party is a domiciliary and personal jurisdiction exists as to one only, the court lacks jurisdiction, the opinion fails to lay down much in the way of guidelines as to jurisdiction in annulment proceedings. Apparently domicile of plaintiff will suffice, and the court *may* (or may not, in its discretion) entertain the action if it has personal jurisdiction over both nondomiciliary parties.

<sup>18</sup>. 67 Cal.2d at 674, 63 Cal. Rptr. at 295, 432 P.2d at 982.

<sup>19</sup>. 67 Cal.2d at 676, 63 Cal. Rptr. at 296, 432 P.2d at 983.

<sup>20</sup>. 67 Cal.2d at 676, 63 Cal. Rptr. at 297, 432 P.2d at 984.

## Presumptions and the Evidence Code<sup>1</sup>

On January 1, 1967, presumptions ceased to be evidence in California.<sup>2</sup> Under the new law, presumptions are of two distinct kinds, and have very different effects. Every presumption is either (1) a presumption affecting the burden of producing evidence, or (2) a presumption affecting the burden of proof.<sup>3</sup> What will be the status of the various statutory and non-statutory presumptions which play such an important part in the field of community property? The Evidence Code specifies a number of presumptions as belonging in one class or the other,<sup>4</sup> but community property is not mentioned. In the absence of further legislation, it will be the task of the courts to apply the criteria set forth in the Evidence Code and to add unclassified presumptions to the classified list.

Perhaps the most important presumption applied in the community property cases is the general non-statutory presumption, arising from the statutory definitions of separate and community property, that property acquired during marriage is community property.<sup>5</sup> The presumption is one of fact and is rebuttable, but the cases have uniformly held that it requires a holding that an acquisition is community property in the absence of rebutting evidence.<sup>6</sup> In the presence of such evidence, the inference from acquisition during marriage is weighed against the rebuttal evidence. The presumption has been referred to as "fundamental to the community property system."<sup>7</sup> Is this now a presumption affecting the burden of proof, or merely one affecting the burden of producing evidence?

Reference to the Evidence Code gives these guidelines: (1) a presumption affecting the burden of producing evidence is one established to implement no public policy other than to facilitate the determination of the particular action in which

1. For further analysis see Degnan, *EVIDENCE* in this volume, honey, 71 Cal. App.2d 65, 161 P.2d 944 (1945).

2. Cal. Evid. Code § 600(a).

3. Cal. Evid. Code § 601.

4. See generally, Cal. Evid. Code §§ 630-668.

5. *Fidelity & Casualty Co. v. Ma-*

honey, 71 Cal. App.2d 65, 161 P.2d 944 (1945).

6. See, *e.g.*, *Fountain v. Maxim*, 210 Cal. 48, 290 P. 576 (1930); *Estate of Jolly*, 196 Cal. 547, 238 P. 353 (1925).

7. *Estate of Duncan*, 9 Cal.2d 207, 70 P.2d 174 (1937).

the presumption is applied;<sup>8</sup> (2) a presumption affecting the burden of proof is one based on implementation of a public policy.<sup>9</sup> In the light of these provisions, it would seem that the general community property presumption is one affecting the burden of proof. The status of other community property presumptions, such as the specific statutory presumption as to property acquired by a married woman by an instrument in writing, is less clear.

**8. Cal. Evid. Code § 603.**

**9. Cal. Evid. Code § 605.**