ACFLS FAMILY LAW SPECIALIST

WWW.ACFLS.ORG

FALL 2012, NO. 2

JOURNAL OF THE CALIFORNIA ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

DOES CALIFORNIA LAW SUPPORT A FINDING OF MORE THAN ONE DATE OF SEPARATION?

GARRETT C. DAILEY, CFLS
ALAMEDA COUNTY
GARRETT@ATYBRIEFCASE.COM

MICHELENE INSALACO, CFLS
SAN FRANCISCO COUNTY
MI@SUCHERMAN-INSALACO.COM

Introduction

Suppose your client comes to you and reports that in the year 2000 she and her husband split up, and lived apart for five years. During this time, your client earned large commissions and used them to buy an apartment that has been rented. Then the parties reconciled, stayed together for five years, and separated again recently, prompting the wife's visit to you. What advice do you give her about the character of the rental apartment?

What if the parties actually filed for divorce in 2000, litigated vigorously for the five years of separation, and the wife had paid court-ordered support during the entire period? Different advice?

Does California law require that there can only be one date of separation? Or, if the facts support the finding, can there be successive separation dates, with a related finding that property acquired during the initial separation period is the separate property of the spouse who acquired it? Or, does a later separation vitiate an earlier period of separation? The authors submit that California law permits successive periods of separation.

The Community Ceases to Accrue Assets and Debts When Parties Begin "Living Separate and Apart"

In California, all property acquired during marriage is presumed to be community. As explained in *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, the community property presumption "is fundamental to the community property system, and stems from Mexican-Spanish law which likens the marital community to a partnership. Each partner contributes services of value to the whole, and with certain limitations and exceptions both share equally in the profits. So long as [a spouse or registered domestic partner, hereafter "spouse"] is contributing [his or] her special services to the marital community [he or] she is entitled to share in its growth and prosperity." (*Id.* at p. 449, internal citations and quotations omitted.) This describes the essence of the community property system. "'Under the principles of community property law, the [spouse], by virtue of [his or] her position as [spouse], made to that value the same contribution as does a [spouse] to any of the [other party's]

Continued on page 4 (Dailey & Insalaco)

WHAT'S INSIDE

Continued from page 1

earnings and accumulations during marriage. [He or she] is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business.'" (*Ibid.*)

It is the parties' respective contribution to the community that justifies and forms the basis for their joint ownership of the fruits of their respective labors. California, unlike all but one other community property state (Washington[1]), has elected to terminate the marital period at the date of *separation,* rather than upon the *termination of status*. This is in recognition that after the parties separate, there is no longer the joint contribution towards the community and thus no reason to perpetuate it. This principle is codified in Family Code section 771, which states, "[t]he earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, ***while living separate and apart from the other spouse*** are the separate property of the spouse" (emphasis added). Thus, in California, a judgment of dissolution is not needed to terminate the community.

Case law has held "living separate and apart" means that the parties have "'come to a parting of the ways' with no present intention of resuming their marriage." (*In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, 448, citing *In re Marriage of Imperato* (1975) 45 Cal.App.3d 432, 435436.)

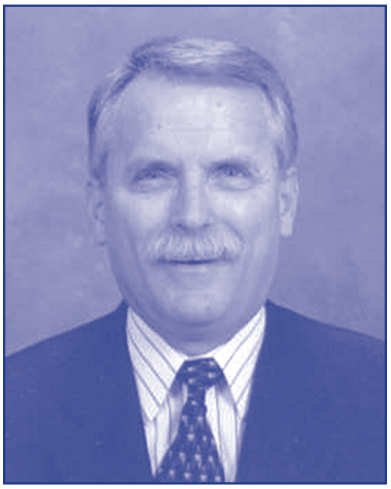
Family Code Section 771 and the Rules of Statutory Construction

The rules of statutory construction support the view that there can be successive separation dates. The first such rule is that "to justify construction [of a statute] by either an administrative agency or a court, it must first appear that construction is necessary. In *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 277, 278, the court held: "'It is elementary that, **where no ambiguity exists**, there is **no room for construction**. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation.… Construction may not be substituted for legislation.'" (*Dillman v. McColgan* (1944) 63 Cal.App.2d 405, 410, emphasis added.)

Further, in *People v. Johnson* (2002) 28 Cal.4th 240, 244–248, the California Supreme Court held: "Our role in construing a statute is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning and construing them in context. If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs." (Internal citations omitted.)

Family Code section 771 states without ambiguity:

Michelene Insalaco is a partner at the law firm Sucherman-Insalaco LLP in San Francisco and a Certified Family Law Specialist. Her work focuses on complex cases, appellate work and representing minors. Ms. Insalaco is currently a member of the Executive Committee of the Family Law Section of the State Bar (FlexCom) and the Board of Directors of the Association of Certified Family Law Specialists (Director North-Elect). She is also the Vice-Chair Elect of the Family Law Section of the Bar Association of San Francisco. Ms. Insalaco is a presenter of family law continuing legal education programs and she has received numerous awards for pro bono work in family law including BASF's James P. Preovolos Award and an Angel Award from California Lawyer Magazine.



Garrett Dailey is a Certified Family Law Specialist emphasizing appeals and consultations. His office is in Oakland, California. He was previously a Lecturer at U.C. Davis School of Law, Golden Gate University Graduate School of Taxation and the University of Edinburgh. Mr. Dailey is a Fellow in both the American and International Academies of Matrimonial Lawyers. He was named the 2006 Family Law Person of the Year by the American Academy of Matrimonial Lawyers, Southern California Chapter. He was the recipient of the Association of Certified Family Law Specialist's Hall of Fame Award in 1995, the Brandeis Award from the Los Angeles County Bar Association in 2003 and is listed in The Best Lawyers of America*. He has been selected numerous times as one of Northern California's Top 100 Lawyers by SuperLawyer Magazine. Mr. Dailey is co-author of ATTORNEY'S BRIEFCASE treatises on California Family Law, Evidence, and Children and the Law. He is also co-author of Lawgic Marital Settlement and Pre/Post Marital Agreements and the author of SupporTax.*

"The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse are the separate property of the spouse." Were this statute only to apply after divorce, it would not refer to a "spouse." Were this statute to apply only after "the last separation," it would so state. It does not. Rather, it refers to earnings while spouses are "living separate and apart" which can be a period after an initial separation but before a reconciliation. There is in sum nothing in the language of the statute, or the philosophy behind the statute, that supports the idea that earnings during a period when the parties were living separate and apart should be characterized as community property.

In sum, on its face, section 771 does not prohibit taking into account successive separations when characterizing property. Note further that Section 771 has not been substantively amended[2] for many years, and so it cannot be said that by not amending the statute after publication of cases that speak to the "complete and final break" requirement for separation, the Legislature tacitly adopted such interpretation.

Interplay with the Law of Transmutation

If parties form a present intent to separate and end their marriage, property acquired after that point is separate under California law.

If they then later reconcile, were a court to hold that the property at that point was transformed to community property, this would arguably retroactively transmute the character of the property. This is contrary to California law that is very clear on the point that behavior alone cannot transmute property.

The character of property as separate or community is fixed as of the time it is acquired. (*Casas v. Thompson* (1986) 42 Cal.3d 131, 139.) The character cannot be altered unless by some means recognized by law, judicial decree, or the parties' agreement (transmutation). (*Id.*, *See v. See* (1966) 64 Cal.2d 778, 783, citations omitted ["The character of property as separate or community is determined at the time of its acquisition. [Citations.] If it is community property when acquired, it remains so throughout the marriage unless the spouses agree to change its nature or the spouse charged with its management makes a gift of it to the other."].) Moreover, separate property does not change its character automatically as a result of marriage, or use during marriage. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 484.)

California has very strict requirements as to what is required to transmute property. (*In re Marriage of Barneson* (1999) 69 Cal.App.4th 583.) It cannot be done by conduct. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096.) *Benson* explained that Family Code section 852 imposes certain requirements on marital transmutations, including that a transmutation "is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." The statute was enacted to increase certainty as to whether a transmutation had in fact occurred and to overrule previous case law insofar as it did not require a transmutation to be both written and express.

Section 852 sets forth the requirements for a valid transmutation. It states that a change in character is "not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (Fam. Code § 852, subd. (a).) Our Supreme Court in *Estate of MacDonald* (1990) 51 Cal.3d 262, 264, held that a writing satisfies the "express declaration" requirement only if it states on its face that a change in the character or ownership of the subject property is being made. *MacDonald* also made clear that this construction of section 852(a) precludes the use of "extrinsic evidence" to prove that the writing effected a transmutation. The Court explained that the Legislature sought to increase certainty and honesty in marital property disputes, and to decrease the burden on the courts in resolving these issues.

Our Supreme Court has also found the requirement of a written express declaration to be without exception. For example, parties cannot transmute property by an oral agreement or partial performance. (*In re Marriage of Benson, supra*, 36 Cal.4th 1096.) In *Benson*, husband quitclaimed his community interest in the family home to wife after she allegedly orally promised to waive, in writing, her community interest in his retirement accounts. Wife never executed the written waiver. The Court found that husband's performance of his part of the bargain was not sufficient under section 852 and that there had been no transmutation. (*Id.* at p. 1100.)

California Already Recognizes That Periods of Separation During Marriage Affect Marital Rights

The case *Patillo v. Norris* (1976) 65 Cal.App.3d 209,[3] is instructive. In this case, husband and wife #1 married in 1942 and separated in 1949. They remained apart for 20 years, but neither filed for divorce. In 1951 husband "married" wife #2 (later found to be a putative spouse) and they remained together until 1969. Later in 1969 husband and wife #1 reconciled, and remained together for two years, at which time they broke up, and around the same time wife #2 filed for divorce. The next year, husband died. (*Id*. at pp. 213-14.) The issue presented was how to distribute proceeds of two policies of insurance on husband's life for which husband had paid premiums during the periods of both marriages. Should one or both of the wives receive the proceeds, or a friend who husband had designated as beneficiary on the policies? The trial court held that the beneficiary should receive half of the proceeds and the two wives should split the other half. (*Id*. at p. 213.) Wife #2 appealed, asserting that the trial court erred in not applying Family Code section 771 (then Civil Code section 5118) to the funds attributable to the period when husband was living separate from wife #1. (*Id*.)

The appellate court reversed. It held that the trial court should have apportioned the proceeds based on the character of the funds used to pay the premiums, and that "the community property claims of each wife… applied to different periods in [husband's] life." (*Id*. at p. 216.) Hence, premiums paid during husband's initial separation from wife #1 were *not* her community property. This was found to be the case, *even though husband and wife #1 later reconciled*. In other

Continued on page 6 (Dailey & Insalaco)

Continued from page 5

words, the appellate court impliedly held that the reconciliation did not vitiate the initial separation period. Premiums later paid when husband and wife #1 they were again living together were again the community property of wife 1. (*Id.*) The premiums paid during the marriage to (putative) wife #2 were her community property. (*Id.*) Thus, wife #1 and wife #2 were to each receive half of their community property, and the remaining property of husband would go to the beneficiary. (*Id.*) The appellate court instructed the trial court to proceed to determine "the extent to which the funds were attributable to the various periods in [husband's] life and to work out disputes on dates of separation and reconciliation. (*Id.* at pp. 216-17.)[4]

Although it can be argued that the Court of Appeal was merely doing equity between a spouse and a putative spouse, it is difficult to reconcile the result without recognizing that there can be successive separation dates.

Further, the holding of the California Supreme Court in *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, is informative. When finding that the amendment of Family Code section 771 (then Civil Code section 5118) would apply retroactively, Justice Tobriner wrote that the prior version had "blatantly discriminated against the husband during **periods of separation**." (*Id.* at p. 589, emphasis added.) Had the Supreme Court believed that there can in all cases be only one, final separation, it would not have referenced "periods of separation" in the plural.

Statutory law in California also recognizes successive separation dates. One of the most important factors in determining the duration of a spousal support order is the length of the marriage. If it is a marriage of "long duration," meaning in excess of ten years duration, then the presumption is that an indefinite award is appropriate. If it is less than that, then the presumptive duration is one-half the length of the marriage. (Family Code § 4320 (l).) However, although we measure the length of the marriage from date of marriage to date of separation, years that the parties are living separate and apart during that period do not necessarily count. Family Code § 4336 (b) states (emphasis added):

> For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration. However, the court may consider **periods of separation** during the marriage in determining whether the marriage is in fact of long duration.

Again, the code references "periods of separation" in the plural. There is as discussed above a logical reason for this, based upon the same policy reasons at play in this matter. Arguably the community/separated spouse should not reap a benefit from the other spouse's services during a period when the parties were separated and no joint efforts were contributed to the enterprise.

On the other hand, Family Code section 910(b), related to debt, states: "'During marriage' for purposes of this section does not include **the period** during which the spouses are living separate and apart before a judgment of dissolution of marriage or legal separation of the parties." This statute seems to contemplate that debt is a party's separate property only during the one period after the "final" separation prior to judgment.

Public Policy Supports Successive Periods of Separation

Another argument in favor of successive dates of separation is that such a position is in keeping with California public policy to promote marriage. Allowing for successive periods of separation without transmuting the character of the property acquired during such periods, would facilitate parties working on their marriage without fear of what effects reconciliation efforts might have on their estates. If separated spouses knew that by attempting reconciliation they would be transmuting potentially years of separate property earnings into community property they would be foolish to even give it a try. That certainly does not serve the public policy of preserving marriage. The rule of successive periods of separation has been promoted by various commentators:

> Ethical attorneys are expected to attempt to save marriages that they believe may be salvageable, but they are also required to advise their clients that if they say or do anything that indicates there is a possibility of reconciliation, the parties will not be deemed separated and their earnings will continue to be community property, to be divided equally with the other spouse.
>
> There should be some way for a high earning spouse to say to the other spouse, "Our marriage is dead, but I'm willing to go with you to a marriage counselor, or act to the world like we have a good marriage while we investigate the possibility that we can overcome our differences. However, in the meantime, I want you to know that I'm not willing to continue to share my earnings with you."
>
> One can hope that the legislature or supreme court will see fit to enact a rule that would permit such behavior. The rule would certainly make lawyers representing unhappy spouses more comfortable about giving them advice.

(Goodman, Determining Date of Separation in a Marital Dissolution (2001) 24 NOV L.A. Law 14.)

> There is nothing in Fam. Code § 771 to suggest that there can only be one date of separation. In fact, the very wording of the statute, i.e., "[t]he earnings and accumulations of a spouse… while living separate and apart from the other spouse, are the separate property of the spouse," suggests the contrary. Moreover, to hold that an attempted reconciliation vitiates an established date of separation would injure the public policy of encouraging reconciliation.

(Dailey, Attorney's BriefCase (2011) FL2011.2 MaSt 082.01.)

California's Published "Date of Separation" Cases

A detailed analysis of the key published cases in California where the date of separation was at issue makes clear that these cases all explore whether under certain fact patterns the parties separated. They do not hold that, if the evidence of an initial separation is clear, there cannot be as a matter of law successive separation dates.

In the seminal case *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, the disputed issue was when the parties had separated under California law. Husband moved out of the family home after an argument with his wife, the couple never had sexual relations thereafter, and the husband later moved into his own apartment with a girlfriend. However, the husband also continued to maintain close contact with the family including eating dinner at the house; bringing home his laundry; using the home address as his address; receiving mail at the family home; going on family vacations; spending the night at the house on one occasion; taking his wife to dinner; sending birthday and anniversary cards including one card stating, "I love you"; filing an enrollment card at the parties' daughter's school stating that she lived at home with both parents; and filing joint tax returns. Based on these and other facts, the court held that there was no date of separation until 1975 when husband filed for divorce. (*Id*. at p. 449.)

In *In re Marriage of Marsden* (1982) 130 Cal. App. 3d 426, the couple had separate residences, but continued to take vacations and spend several holidays together, as well to as consult a marriage therapist. In both of these cases, the Court of Appeal reversed the trial court's acceptance of the earlier of the two alleged separation dates.

Likewise in *In re Marriage of von der Nuell* (1994) 23 Cal. App.4th 730, 736, the issue was whether the parties had separated at an earlier or later date based on an examination of the facts. In *von der Nuell*, husband left the family home in 1987 and filed for divorce in 1989, but did not serve the petition. Wife believed that the marriage could be saved and wanted marriage counseling, but husband refused. Until 1991, the parties maintained joint checking accounts, credit cards, tax returns, and took title to a car jointly. Husband maintained contact with his wife including frequent visits to the home, taking wife on vacations, going out socially, sending cards and gifts on special occasions and holidays, and the parties maintained sexual relations until 1991. (*Id*. at p. 733.) Later, husband argued that the date of separation was 1987 when he moved out of the house, and the trial court so found. However, the appellate court reversed, holding that there was no substantial evidence to support this earlier separation date.

In *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 1159, again examined the facts to determine when the parties separated. In *Norviel*, husband argued for an earlier date of separation, while wife argued for a later one. The appellate court reversed the trial court's finding of an earlier date based on the parties' actions during the disputed time period when the parties shared the marital home (but slept in separate bedrooms), shared occasional meals together, planned a family vacation, kept their finances combined, and husband sent flowers to wife for their fifteenth wedding anniversary.

In re Marriage of Hardin (1995) 38 Cal.App.4th 448, although different from the above cases in that the trial court was reversed on appeal because it applied the wrong standard (of whether society at large would deem the couple to be separated based upon the facts and evidence), is another case in which the dispute is as to when the parties separated. There the trial court found in favor of husband's earlier date of separation, because he had moved out of the home, never slept there again, and after that the parties never attended social events again together. (*Id*. at pp. 450, 453454.) The appellate court reversed because the trial court did not sufficiently consider the other evidence, such as that during the disputed period the parties saw each other regularly, their economic relationship remained unchanged, and husband continued to receive mail at the house. (*Id*. at pp. 455.)

In *In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, the court held that date of separation is determined by parties' "subjective intent" legal standard, not the public-perception standard. In that case, husband moved out of the family residence and into an apartment. However, the parties agreed to hide their separation from family and friends until after the year-end holidays. The appellate court held that the date of separation was the date the parties agreed to separate and that the parties' own "subjective intent" controls over a public-perception standard when the parties agree to hide a separation.

Again, none of the above cases hold that if the court makes a factual finding that the parties lived separate and apart with no evidence of efforts to save the marriage, there cannot be a separation if the parties reconcile months or years later.

Arguments on the Other Side

The main argument against successive separation dates is the line of cases that hold that a separation is defined as the "complete and final break" in the marital relationship. (E.g., *In re Marriage of Manfer* (2006) 144 Cal.App.4th at p. 929.) One can argue that a "break" cannot be "final" if the parties ever reconcile, even for one day after years of living separate and apart with no present intention of resuming marital relations. Any reconciliation means, as a matter of law, that the prior separation was not final but "temporary."

The problem with this argument is that it misstates its major premise. It relies on the words "complete and final break in the marital relationship" without the preceding phrase, "conduct evidencing a…." Thus, what these cases require is "conduct evidencing a complete and final break in the marital relationship." That is very different from the "last, final separation prior to judgment," which is how the cases would need to be read to hold that a reconciliation vitiates a previous period of separation.

The Rutter Family Law Practice Guide says on this point:

Continued on page 8 (Dailey & Insalaco)

Continued from page 7

> Because conduct evidencing a complete and final break in the marriage is the critical earmark of the separation date, it is unlikely there will ever be a series of several separation dates for [section 771] property characterization purposes. More likely, evidence of successive physical separations and reconciliations will be construed to mean the parties were vacillating in their intent to effect a 'final' break in the marriage; and that conclusion will probably defeat [section 771] separate property characterization with regard to acquisitions during those time-frames.

(Hogoboom & King, Cal.Practice Guide: Family Law 1 (The Rutter Group 1995) § 8:114.1, p. 8–28.) Note however the conditional language of this treatise, which indicates that the answer is not entirely clear. Moreover, the issue the Rutter authors address is a slightly different one, namely establishing the date of separation when the parties' actions are ambiguous. As discussed below, their point is well-taken. Reconciliation is certainly a valid factor to consider in deciding whether the conduct meets the stringent criteria for establishing a separation date. However, that begs the question of the effect of reconciliation when the conduct is not ambiguous.

It may be also argued that turmoil and uncertainty will result if the concept of successive separation dates is recognized by the courts. This concern is unwarranted. The not infrequent litigation we have regarding the date of separation is a by-product of Fam. Code § 771, yet no one suggests repealing it to avoid litigation. It will be an unusual situation where the parties can establish multiple dates of separation. However, when the evidence warrants such a finding, there is no basis for holding that an unsuccessful reconciliation attempt vitiates a bona fide period of separation, thereby transmuting what was separate property when acquired irrevocably into community property.

Practical Considerations

Certainly, until a case is published to clarify the law on this point, any party who has separated and is contemplating reconciliation is well advised to insist on a separation agreement. The parties can agree that, until a certain length of time passes after reconciliation, or until further written agreement, the property they acquired during their initial separation shall remain separate property. This will lessen the risks involved in a reconciliation effort.

As a practical matter, in most cases a reconciliation will make it difficult to show that parties who were living separate and apart for a period of time had formed the requisite intent to make a complete break in their marriage. The spouse seeking a holding that all efforts were community will likely testify that he or she always held out hope for the marriage, and this is evidenced by the later reconciliation. However, intent must be found by objective evidence, and certainly there will be cases where all objective evidence points to "*conduct* evidencing a *complete and final break* in the marital relationship" (*In re Marriage of von der Nuell, supra,* 23 Cal.App.4th at p.736, emphasis added.), even if the parties later reconciled – however briefly. This will require that the cases discussed above be applied to see if the parties' conduct satisfied the strict criteria for establishing a date of separation. If it did, then there is no logical reason to find that it was lost because of a subsequent attempt to get back together.

Conclusion

The law in California supports a finding that there can be successive dates of separation during which parties may accumulate separate property. Counsel should explore the facts with new clients to determine whether this issue may exist in their cases.

Endnotes:

1 There appear to be no published cases in Washington addressing the issue of whether there can be successive separation dates in that jurisdiction.

2 Section 771 was originally enacted in 1872 (as Former Civil Code § 169) and provided that the earnings of a wife and her minor children, while the wife lived separate from her husband, were her separate property. This section was re-enacted without change as Former Civil Code § 5118, which became operative in 1970. Section 5118 was amended effective 1972 to read: "The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while the spouse is living separate and apart from the other spouse, are the separate property of the spouse." In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 588, the California Supreme Court (J. Tobriner) held that this amendment, which corrected a statute that had "blatantly discriminated against the husband during periods of separation" was to be applied retroactively. The section was next amended in 1999 to designate the existing provisions as subdivision (a) and add subdivision (b) relating to contracts of a type described in § 6750. The section was most recently amended in 1992, but without substantive change as part of the creation of the Family Code. Hence, since 1872 the language related to a spouse's earnings during separation being separate property has not been substantively modified, but only expanded to apply to both husbands and wives.

3 Brought to the authors' attention by a post to the ACFLS listserv by attorney Seth Kramer

4 An interesting side point: Wife #2 left husband "out of fear for her life when [husband] pointed a gun at her" and told her to leave. (*Id.* at p. 211.) She later argued that section 5118's provisions should not apply due to these circumstances. The appellate court rejected this idea, holding: "Lois cites no authority for her argument that Civil Code section 5118 is inapplicable to her because she separated from David at the point of a gun. Section 5118 makes no reference to the cause of the separation." (*Id.* at FN 5.) ■