COMMUNITY PROPERTY, RIGHT OF SURVIVORSHIP, AND SEPARATE PROPERTY CONTRIBUTIONS TO MARITAL ASSETS: AN INTERPLAY

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I. INTRODUCTION

The Arizona legislature recently created a new kind of property: "community property with right of survivorship."[1] The marital property implications of the new form of title, however, were left virtually unexplained in the statutory text and legislative history. The Arizona statutes that define community and separate property[2] were not amended to reflect the new property form; the creation instead was effectuated by additional language in the probate codes. Inevitable questions arise: What is this new form of property? Why is it necessary? How does it differ both from ordinary community property and joint tenancy with right of survivorship? Why is there no mention of it in the statutes that define community and separate property?

There should be simple answers to these questions. But sorting out "community property with right of survivorship" implicates a confusing Arizona history concerning property held by husband and wife as joint tenants with right of survivorship, and reveals a morass of inconsistent Arizona rules concerning the at-divorce and at-death treatment of marital real property, bank accounts, and other marital assets. Arizona's treatment of joint tenancy and other marital property is a patchwork of odd distinctions resulting in differing treatment for marital assets that are similar. The characterization of an asset as separate property or community property, reimbursement for contributions to marital assets, and the distribution of assets at divorce all depend variously on the form of the title, on whether an asset can be traced to separate property, and on whether separate property was used to create an asset or was instead used to contribute to an

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1. ARIZ. REV. STAT. §§ 14-1201, 14-2804, 33-431 (1998).

2. ARIZ. REV. STAT. §§ 25-211, 25-213, 25-214, 25-318, 33-451, 33-452 (1998).

ongoing obligation. Arizona's rules on these topics are inconsistent, lead to undesirable results, and appear to have been selected without a principled basis.

For example, the combination of Arizona cases and statutory silence apparently dictates that joint tenancy property held by husband and wife is not community property and is to be treated differently from community property for several purposes, not just right of survivorship.[3] The at-death "right of survivorship" difference between joint tenancy and community property[4] is understandable and accurately effectuates the desires of some married couples who hold property in joint tenancy. The decisions are not limited to the at-death difference between joint tenancy and community property, however, and appear to authorize different treatment for non-death determinations concerning transmutation and reimbursement for separate property contributions. In addition, the treatment of joint tenancy property held by a married couple for management and control, creditor access, and severance issues is in doubt. The uncertainty is due to Arizona's case law insistence that joint tenancy property held by married couples is different from community property and that general "joint tenancy rules" must be applied to such property.

Owners of marital property should be able to understand and predict how the legal system will treat their property, but that is not possible given Arizona's present incoherent and incomprehensible structure. The morass of rules and distinctions without purpose needs to be identified, cleaned up, and simplified. This Article sorts out some of the morass. I describe how the relatively recent treatment of joint tenancy with right of survivorship property held by married couples has differed from treatment of community property and propose the following three principles as guidance for simplifying and clarifying the distinctions made in Arizona's treatment of marital property:

1. Irrespective of the form of title, all property not characterized as the separate property of one of the spouses should be treated identically at divorce and during marriage. Spouses' title designations, often chosen to effectuate a distributional result in the event of their deaths, should not be used to determine matters unconnected to death, such as distribution at divorce and creditor/community relationships.

2. The particular form of title chosen by a spouse is only weak evidence concerning whether tracing is sufficient to overcome a presumption that an asset is community property and whether reimbursement to a separate property contributor is appropriate. Conclusions concerning the appropriateness of tracing[5]

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3. *See* Toth v. Toth, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997); *In re* Baldwin's Estate, 50 Ariz. 265, 274–75, 71 P.2d 791, 795 (1937); Valladee v. Valladee, 149 Ariz. 304, 309, 718 P.2d 206, 211 (Ct. App. 1986).

4. At the death of one spouse, one half of community property assets goes outright to the surviving spouse; the other half passes through the deceased spouse's estate. *See* ARIZ. REV. STAT. § 14-3101 (1998). Joint tenancy with right of survivorship assets, in contrast, create immediate complete ownership in the survivor at the death of the other tenant. *See* ARIZ. REV. STAT. § 14-1201 (1998); *infra* notes 15–18 and accompanying text.

5. Tracing is the process of characterizing an asset as either separate or community by characterizing as separate or community the asset source used to acquire the

or separate property reimbursement[6] should not vary depending on title choices made by a married spouse, as the choice likely was made without any thought to the effect of the particular choice at divorce, let alone the effect on tracing and reimbursement rules.

3. Characterization and reimbursement rules should not vary depending upon the nature of an asset. Characterization and reimbursement rules should be applied consistently to all assets, so that a change in the form or nature of an asset (e.g., real property, money, stocks, bonds, personal property) will not explicitly or implicitly result in a change in characterization or a change concerning whether separate property contributions to the marital community are entitled to reimbursement.

One of the goals of this Article is simply to identify some traps for the unwary. This Article reveals some obscure but potentially significant differences between community property and property treated as marital joint tenancy with right of survivorship, and thus offers an explanation for why it may be desirable for marital couples to select "community property with right of survivorship" title rather than community property title or joint tenancy title.

Another goal of this Article, however, is to point out that the baseless and unhelpful distinctions currently made between community property and joint tenancy property held by married couples are not rendered irrelevant by the availability of "community property with right of survivorship" title. The distinctions can be expected to continue unless corrections are made. The patchwork of rules and presumptions concerning title, bank accounts, and reimbursements for separate property expenditures hinge the characterization and treatment of marital property during marriage and at divorce on the form of the title (e.g., community property v. joint tenancy) or the nature of the asset in question (e.g., money v. real property v. personal property) in a nonsensical manner.[7] Arizona judicial decisions addressing possible distinctions between community property and joint tenancy seem unaware of the currently existing problems and often head further in an undesirable direction.

To rectify the needless distinctions, I propose a compact solution: For all events other than the death of one of the spouses, all marital property not characterized as the separate property of one of the spouses should be presumed to be community property. This relatively uncomplicated, non-controversial, administrable rule will resolve virtually all "different treatment for the same asset" issues. For all events other than death distribution, a separate property proponent, seeking either a separate property characterization or some form of

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asset in question. *See, e.g.*, GAIL BIRD, CASES AND MATERIAL ON CALIFORNIA COMMUNITY PROPERTY 12 (6th ed. 1994); WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 10-1 (1997) (quoting W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1964)). *See also* sources cited and discussion *infra* note 194.

6. Reimbursement rules concern whether to reimburse a separate property owner for separate property contributions to the community or the community for community property contributions to separate property. *See* sources cited *infra* notes 71–134 and accompanying text. *See also* REPPY & SAMUEL, *supra* note 5, at 9-7 to 9-12.

7. *See* discussion *infra* Parts III and IV.

reimbursement, should only prevail by providing adequate evidence to overcome the presumption that the asset in question, be it real property, a bank account, or a reimbursement interest, is community property. This presumption should apply to all property that is not the separate property of one of the spouses; thus it dictates community treatment for all community, joint tenancy with right of survivorship, tenancy in common, and community with right of survivorship property, regardless of whether the issue is ownership or reimbursement. The presumption should be overcome only when the married couple has indicated with more specific evidence than title that they prefer a different arrangement. One effect of this presumption would be that joint tenancy with right of survivorship property held by a married couple would be treated as community property with right of survivorship.

The three principles and the proposed broad presumption do not appear to propose something all that new. One response might appropriately be: "Isn't this presumption already in place?" Yes, the proposals are consistent with longstanding community property presumptions that: (1) assets acquired by either spouse during the marriage are presumed to be community property;[8] (2) when both spouses' names are on the title, an asset traced to separate property ordinarily is presumed to be community property;[9] and (3) changes in asset form do not precipitate a change in characterization of the asset.[10] My proposals are also consistent with Arizona's statutory divorce distribution provision that all jointly-titled marital property is to be distributed as community property.[11] Implementation of this uncontroversial-sounding proposal, however, would effectuate the following desirable results:

(1) Elimination of the current unhelpful at-divorce distinctions between community property and joint tenancy with right of survivorship property held by husband and wife;

(2) Adjustment and streamlining of the rules concerning possible reimbursement for separate property contributions to community property use[12] and the rules for treatment of bank accounts;

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8. *See* Porter v. Porter, 67 Ariz. 273, 279, 195 P.2d 132, 136 (1948).

9. *See* Cooper v. Cooper, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981) (citing Sommerfield v. Sommerfield, 121 Ariz. 575, 592 P.2d 771 (1979)).

10. *See Porter*, 67 Ariz. at 281, 195 P.2d at 137.

11. *See* ARIZ. REV. STAT. § 25-318(A) (1998).

12. Because a separate property owner may contribute separate property to the marital community by taking separate property and putting title to the property in community property or joint tenancy, and this occurrence is featured prominently in Arizona cases discussing joint tenancy, my proposal inevitably requires an evaluation of the current rules concerning reimbursement for separate property contributions to the community. Arizona maintains a presumption of no reimbursement for separate property contributions to the community, *see* Malecky v. Malecky, 148 Ariz. 121, 123, 713 P.2d 322, 324 (Ct. App. 1985), and a presumption of no reimbursement if a separate property owner takes separate property and places it in joint tenancy title with her or his spouse, but a presumption of reimbursement if a separate property owner takes separate property and uses it to pay off bills or improve a joint tenancy that already exists. *See* Valladee v.

(3) Consistent application to all jointly held marital assets of the current presumption in Arizona that separate property contributions to community real property are not reimbursed;[13] and

(4) Elimination of unhelpful distinctions between real property and liquid assets, distinctions not likely to have been intended or even understood by spouses who choose real property over liquidity or vice versa. All money in any jointly-titled, joint access marital bank account, and any assets traced to such accounts, should be presumed community property regardless of the original separate property source of the money, effectuating the same treatment for jointly-titled, joint access bank accounts that currently exists for jointly titled real property.

I explain these points and proposals in a format that can loosely be described as an interplay and a review. First, I provide some background with a brief overview highlighting some of the theoretical differences in Arizona between joint tenancy with right of survivorship, community property, and community property with right of survivorship. Second, I introduce the characters and let them interact. The interplay demonstrates the treatment of various types of community and joint tenancy property, with particular emphasis on different forms of contributions: community contributions to separate property, separate property contributions to community property, and separate property contributions to joint tenancy property. Treatment of these contributions currently differs depending on the title of the asset and the nature of the asset. The interplay also explores the possibly differing treatment of community assets and joint tenancy assets for purposes of satisfaction of debts owed by one of the spouses. Third, I assess the interplay, identify community property principles and a proposal that can lead us out of the current mess, and explain how the principles and proposal can lead to a more streamlined and coherent if not a happier ending.

II. SETTING THE SCENE: ARIZONA TREATMENT OF COMMUNITY PROPERTY, JOINT TENANCY PROPERTY, AND COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP AT DEATH, AT DIVORCE, AND DURING MARRIAGE

Assets may be treated differently in Arizona depending on whether the assets in question are considered joint tenancy with right of survivorship ("joint tenancy") rather than community property ("CP"). For our purposes, however, many of the problematic differences are the ones that *do not* pertain to the major feature of joint tenancy, right of survivorship.

Valladee, 149 Ariz. 304, 308–10, 718 P.2d 206, 210–12 (Ct. App. 1986); *In re* Marriage of Berger, 140 Ariz. 156, 160–64, 680 P.2d 1217, 1221–25 (Ct. App. 1983).

13. *See Malecky*, 148 Ariz. at 123, 713 P.2d at 324 (citing Baum v. Baum, 120 Ariz. 140, 146, 584 P.2d 604, 610 (Ct. App. 1978)) (adopting the California rule). Arizona continues with this rule despite California's reversal of that presumption for many assets, *see* CAL. FAM. CODE § 2640 (West 1994), providing for reimbursement to the SP owner for SP "contributions to the acquisition" of property characterized as community property.

A. Distribution of Marital Property at Death

The distinguishing characteristic of joint tenancy is right of survivorship. If a married couple holds an asset in joint tenancy, and one of the spouses dies while married, the effect of true joint tenancy is that upon the death of one spouse the entire asset is immediately owned by the survivor.[14] In contrast, CP is handled with the perspective that death, similar to divorce, is an event necessitating transmutation of all CP into separate property ("SP") of each spouse. Prior to death, each spouse has an undivided one-half ownership interest in all community assets.[15] At death, the surviving spouse receives a complete ownership share of half of the community property.[16] The other half may be disposed of by the dead spouse as that person sees (or rather, saw) fit.[17] It can pass by will or intestate succession,[18] but need not go to the surviving spouse.

Consequently, until community property with right of survivorship was recognized as a legitimate form of title, characterization of an asset as community property precluded right of survivorship treatment of the property, and an asset characterized as joint tenancy property could not be given to someone as part of the dead spouse's community estate. Because community property does not confer a right of survivorship, married couples looking to have their community property automatically and immediately become the property of the surviving spouse upon the death of one spouse have been (and continue to be) tempted to place community property in joint tenancy as a method for obtaining right of survivorship treatment for the property.[19]

It is worth pointing out, however, that for most couples the asset probably will go to the surviving spouse whether it is community property or joint tenancy.[20] So why bother with joint tenancy?

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14. *See* ARIZ. REV. STAT. § 14-1201(28) (1998).

15. Community property ownership is common ownership. Each spouse has an equal ownership interest in the entirety of each community asset. *See* REPPY & SAMUEL, *supra* note 5, at 1-8 to 1-9; Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 20–27 (1967).

16. *See* ARIZ. REV. STAT. § 14-3101 (1998).

17. *See* REPPY & SAMUEL, *supra* note 5, at 19-1 ("All community property states, by statute, empower a decedent spouse to dispose by will of half of the community property....").

18. *See* ARIZ. REV. STAT. § 14-2102 (1998).

19. *See* GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 192, 201 (2d ed. 1993).

20. If a married person dies without a will, intestate succession provisions direct all of the dead spouse's property to the surviving spouse. There is an exception for situations where the dead spouse has children that are not children of the surviving spouse. *See* ARIZ. REV. STAT. § 14-2102 (1998). To the extent that the intestacy statutes reflect general societal preferences concerning distribution at death, this structure suggests that married people will, more often than not, leave their marital assets to their surviving spouse.

Married people frequently take advice from real estate agents, title insurance agents, bank tellers, accountants, and friends, and the advice often is: "Married people put title in joint tenancy."[21] If a couple manages to focus at all on the significance of a form of title, the couple may select joint tenancy form because the survivor takes the property outright. Accordingly, couples possibly pick joint tenancy because they get the impression that it offers an easy, cheap way to distribute property at their deaths without a will and without probate. Such a technique seems especially useful for married people, particularly those without massive resources.[22] The thinking of these couples may be: Why not just put the property and the bank account in joint tenancy, held by both spouses, so that if one dies, there will be no doubt that the other spouse will have immediate, unobstructed, and hopefully untaxed access to it.

B. Treatment of Marital Property During Marriage: Severing the Asset

In Arizona, community property cannot be turned into separate shares without an agreement by both members of the community to transmute community property into separate property.[23] In addition, community real property cannot be bought, sold, or encumbered unless both spouses consent to the transaction.[24]

In contrast to community property, true joint tenancy property can be severed by either tenant and turned into a tenancy in common. If an asset is held in true joint tenancy rather than community property, either spouse can in effect take his or her half of it and convert it to his or her own separate property. Such behavior is simply unavailable if the property is CP. Similarly, either owner can sell or encumber his or her share of the joint tenancy without obtaining consent from the co-tenant. The effect of doing so is to sever the joint tenancy.[25]

What is the proper characterization of severed marital joint tenancy property? There is no definitive answer. Arizona decisions discussing marital joint tenancy insist that marital joint tenancy property is a separate property form of ownership,[26] so community property placed in joint tenancy title has apparently

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21. *See* Carol S. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 830 (1982). *See also* Sloane v. Sloane, 132 Ariz. 414, 415, 646 P.2d 299, 300 (Ct. App. 1982) (referring to husband's testimony that he was advised by a real estate agent to place a house purchased with the husband's separate property in joint tenancy). *See also infra* notes 48–49 and accompanying text.

22. Couples with substantial assets would have to meticulously place all their assets in joint tenancy to use the title as their estate planning device and couples with significant estates tend to use probate planners and trusts to avoid estate taxes rather than joint tenancy. *See* Bruch, *supra* note 21, at 833 n.245. But for couples concerned only about a few items of real property plus a bank account or two, joint tenancy may seem attractive.

23. *See* ARIZ. REV. STAT. §§ 25-211, 25-215 (1998).

24. *See* ARIZ. REV. STAT. § 25-214 (1998).

25. *See* BLUMBERG, *supra* note 19, at 192; JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 710 (2d ed. 1997).

26. *See* Toth v. Toth, 190 Ariz. 218, 220–21, 946 P.2d 900, 902 (1997) ("[Marital] joint tenancy property remains separate property."). In addition, the *Baldwin's*

been transmuted into a separate property form of ownership. Severance would seem to create separate property tenancies-in-common, to be divided like community property at divorce,[27] but (presumably) treated like separate property during the lifetime of the marriage for joinder and other management and control matters. The severed joint tenancy property held by wife and husband, however, could also be considered to automatically revert back to community property.[28] In this event, severing would not have any effect other than removing the right of survivorship; the community property management and control, joinder, and undivided ownership requirements would then apply to the property.

C. Treatment of Marital Property During Marriage: Creditors

Creditors do not have unlimited access to all assets owned by each spouse.[29] Each debt incurred by a spouse must be characterized. If it is a community debt, all community property plus the separate property of the debt-incurring spouse is available to satisfy the debt.[30] If the debt is a separate property debt, community assets are not available. Only the SP of the debt-incurring spouse can be used to satisfy the SP debts.[31] In addition, community real property cannot be encumbered without the agreement of both spouses.[32]

The joint tenancy or community property characterization of a marital asset may influence the ability of creditors to gain access to the asset. Because there is no current definitive resolution to the issue of whether joint tenancy property is to be treated as separate property or community property during a marriage, definitive predictions are hard to come by. If marital joint tenancy is considered a form of separate property during the marriage, the joint tenancy property will not have the same protections against creditors that the same property has if it is community property. A SP creditor of one of the spouses, for example, might successfully force a severing of the joint tenancy property and collect via the debtor spouse's half of the property. CP, in contrast, cannot be severed[33] and is unavailable to satisfy SP debts. But the creditor also might be hurt

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Estate requirement of apart-from-the-deed evidence that CP was in fact turned into joint tenancy is premised on the idea that the change is a transmutation to a form of SP. *See In re* Baldwin's Estate, 50 Ariz. 265, 274–75, 71 P.2d 791, 795 (1937).

27. *See* ARIZ. REV. STAT. § 25-318(A) (1998) (authorizing division of all jointly held marital property in the same manner as community property).

28. There is an arguable basis for a community characterization for each of the severed halves. Each half is "acquired" (due to severance) during the marriage, so each half should be presumed community property, a presumption not overcome by a single name on the title. *But see* Russo v. Russo, 80 Ariz. 365, 367, 298 P.2d 174, 175 (1956) (holding that an attempted severance while divorce was pending did not turn joint tenancy property back into community property).

29. *See* ARIZ. REV. STAT. § 25-215 (1998).

30. *See* ARIZ. REV. STAT. § 25-215(D).

31. *See* ARIZ. REV. STAT. § 25-215(A).

32. *See* ARIZ. REV. STAT. § 25-214(C) (1998).

33. There is an exception for premarital debts and liabilities. *See* ARIZ. REV. STAT. § 25-215(B). CP is available to satisfy a premarital debt or obligation incurred by either spouse, "but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single." *Id.*

by a conclusion that joint tenancy title means the property is to be treated during marriage as SP. If a debt is a community debt, the entire asset would be available if it were community property (assuming any joinder requirement was satisfied).[34] Thus the community could try to avoid being forced to satisfy a community debt with a joint tenancy asset by arguing that the nondebtor spouse's share of the joint tenancy is SP unavailable to creditors of the community.[35]

D. Distribution at Divorce

In Arizona, community property is divided "equitably although not necessarily in kind."[36] This language has been interpreted to require, in the ordinary case, a roughly fifty-fifty division of the total value of all assets not considered the separate property of one spouse.[37] There is no requirement that each asset be split on a fifty-fifty basis.[38]

Originally, joint tenancy property was considered unprovided for in the distribution statute.[39] At divorce the joint tenancy was either severed, leaving the

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This results in a severing, or partition system of sorts, but is not generally relevant to the joint tenancy issue.

34. *See supra* note 30 and accompanying text.

35. Community creditors have access to all community assets (except those for which joinder is required and did not occur) and to the SP assets of a debt incurring spouse. If a joint tenancy asset is considered separate property, the nondebtor spouse will have an incentive to argue that the creditor is forcing a severing, and only the debtor-spouse's share is available. *See generally* Swink v. Fingado, 850 P.2d 978 *passim* (N.M. 1993) (evaluating whether property is joint tenancy or community property for purposes of evaluating how much of the asset is available to satisfy community bankruptcy creditors); Steven Harms, *Joint Tenancy, Transmutation and the Supremacy of the Community Property Presumption:* Swink v. Fingado, 30 IDAHO L. REV. 893 *passim* (1994) (discussing *Swink v. Fingado* and general differences between joint tenancy and community property).

36. *See* ARIZ. REV. STAT. § 25-318(A) (1998). All separate property must go to the separate property owner.

37. *See* Toth v. Toth, 190 Ariz. 218, 220–21, 946 P.2d 900, 902 (1997).

38. This structure enables a divorce court to split the entire worth of the community property and other jointly owned assets while avoiding wasteful, inefficient division of each asset. The scheme gives flexibility to trial judges to allow assets to be kept intact rather than sold in order to give each spouse half of the worth. Thus it allows, for example, a community property house with $75,000 of equity to go to one spouse and a community property business worth $50,000 plus all $25,000 from the bank account to go to the other spouse. Trial judges were thought to have very little discretion to depart from the 50-50 overall split, but recently *Toth* possibly has disrupted this idea. *See id.* at 221–22, 946 P.2d at 902–03. While *Toth* also handles joint tenancy matters and is thus relevant to topics in this Article, the topic of *Toth*'s potentially disastrous dismantling of Arizona's divorce distribution scheme will have to wait for another article.

39. The original divorce distribution statute was interpreted to prohibit a trial court from including joint tenancy property in the marital property division, and there was speculation as to whether there was trial court jurisdiction to force a partition. *See id.* at 223, 946 P.2d at 903 (Moeller, J., dissenting); Collier v. Collier, 73 Ariz. 405, 412, 42 P.2d 537, 541 (1952). *See also* Schwartz v. Schwartz, 52 Ariz. 105, 109, 79 P.2d 501, 503 (1938) (concluding that the old distribution statute did not give a divorce court the authority to award SP to someone other than the SP owner). In 1962, the distribution-at-divorce statute

ex-spouses as tenants-in-common, or continued, with the ex-spouses continuing as joint tenants. In 1973, however, the community property distribution-at-divorce statute was amended to include in the division of marital assets all property jointly held by the married couple.[40] Consequently, since 1973, joint tenancy property (as well as any other jointly titled property) held by a married couple is to be divided for divorce distribution purposes along with and indistinguishably from community property.[41]

The Arizona statutory scheme for distribution at divorce thus seems to eliminate any distinction between joint tenancy and community property for divorce distribution purposes.[42] This scheme seems sensible if, as the previous discussion suggests, the main reason for joint tenancy designation by married people is distribution at the death of one of the still-married spouses, not distribution at divorce while both spouses are still alive. Arizona case law, however, makes reimbursement available for certain SP contributions to joint tenancy property while removing that availability if the SP contribution is to a CP asset rather than a joint tenancy asset.[43] As a consequence, joint tenancy property

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was amended to include language allowing a trial court to divide joint tenancy property. The Arizona Supreme Court, however, subsequently concluded that the 1962 amendment contained only procedural direction permitting the trial court to settle all property matters at divorce. *See* Becchelli v. Becchelli, 109 Ariz. 229, 234, 508 P.2d 59, 64 (1973). The statute did not, according to *Becchelli*, enable distribution of joint tenancy property in any manner other than giving the separate property halves to each spouse. *See id.*

40. *See* ARIZ. REV. STAT. § 25-318(A) (1998) ("In a proceeding for dissolution...the court shall...also divide the community, joint tenancy and other property held in common equitably...."); *Toth*, 190 Ariz. at 220, 946 P.2d at 902 ("Before 1973, section 25-318(A) did not include joint tenancy property in the equitable...division.... The statute now expressly lists joint tenancy property as part of the property to be equitably divided.").

41. The current statute does not require that joint tenancy property be divided separately from the entire pool of marital assets. *See* Wayt v. Wayt, 123 Ariz. 444, 445–46, 600 P.2d 748, 749–80 (1979) (apparently giving one spouse CP and the other spouse the entire joint tenancy property, without mentioning a possible requirement that the joint tenancy property be split).

42. *See Toth*, 190 Ariz. at 220, 946 P.2d at 902 ("[U]nder the statute, joint tenancy property and community property are to be treated alike only for dissolution purposes...."). The "fault" regime that existed prior to 1973 encouraged divorcing spouses to argue over whether an asset should be characterized as CP or joint tenancy at divorce. Under the fault regime a "wronged" spouse could use the other spouse's "wrongs" as a reason to obtain more than 50% of the CP. But if property was characterized as joint tenancy, it was not a marital asset to be divided under the fault structure, instead it was still co-owned or severed, effectuating a 50-50 spilt of that asset. *See* BLUMBERG, *supra* note 19, at 192. The natural incentive was for the "wrongdoer" spouse to argue that an asset was a joint tenancy asset and the "wronged" spouse to argue CP rather than joint tenancy. The statutory move to no-fault in Arizona, which came at the same time that the distribution statute was amended to include its present language concerning division of all jointly titled property, seems to have eliminated the issue of whether the CP must be divided separately from joint tenancy.

43. *Collier* and *Valladee*, for example, both make this distinction. *See Collier*, 73 Ariz. at 411–14, 242 P.2d at 540–44; Valladee v. Valladee, 149 Ariz. 304, 309–10, 718 P.2d 206, 210–11 (Ct. App. 1986).

is treated differently from community property at divorce despite the seemingly sensible statutory directive otherwise.[44]

E. Community Property with Right of Survivorship

Community property with right of survivorship[45] merges the predominant feature of joint tenancy with the community property designation, making the form of title either a hybrid or an oxymoron. The title appears to reveal spousal desires that the asset be treated as community property for all purposes other than the death of one of the spouses during the marriage. Community property with right of survivorship apparently is held in undivided ownership between wife and husband and subject to either individual or joint management and control. At divorce community property with right of survivorship presumably will be divided equitably, although not necessarily in kind, along with all other jointly held marital property.[46] Due to the survivorship language in the title, however, the property will go outright in full to the survivor at the death of one of the spouses. This is in contrast to the at-death treatment of the asset if it were straight community property; that treatment is half to the survivor and half to the dead spouse's estate.[47]

Community property with right of survivorship as a new title choice is a welcome addition, but it is by no means a complete cure. Spouses who understand the differences between community property, joint tenancy, and community property with right of survivorship titles now have the chance to select the one that reflects their wishes. Community property with right of survivorship may effectively enable couples to avoid some of the unwarranted distinctions, demonstrated in this Article, between community property and joint tenancy marital property.

But the new form of property also may cause new confusion. It is unlikely to resolve old problems unless couples genuinely understand the effects of the various property forms and select accordingly. It remains to be seen whether many couples will unknowingly ignore the chance to select community property with right of survivorship. Many couples who currently hold their property in community or joint tenancy title may choose, via inertia, not to make a change. The statutory change also may prompt an unintended exacerbation of the current

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44. *See* discussion *infra* Part III. A major point of this Article is that this distinction is a bad idea.

45. In addition to Arizona, the following states have some version of community property with right of survivorship: Idaho, Nevada, New Mexico, Texas, and Washington. *See* IDAHO CODE § 15-6-201(a) (1947 & Supp. 1997); NEV. REV. STAT. § 111.064.2 (1985 & Supp. 1998); N.M. STAT. ANN. §§ 40-3-8(B), 45-2-805A (Michie 1978 & Supp. 1999); TEX. PROB. CODE ANN. § 451 (West 1989); WASH. REV. CODE ANN. § 64.28.040(1) (West 1993). The Uniform Marital Property Act also contains a comparable form of title. *See* UNIF. MARITAL PROPERTY ACT § 11e, 9A U.L.A. 124 (1987).

46. Presumably, the community property rather than the joint tenancy rules concerning reimbursement and severing will apply to the asset. *See supra* text accompanying notes 23–28, 43–44.

47. *See* ARIZ. REV. STAT. § 14-3101 (1998).

confused treatment of joint tenancy property held by married couples. Arizona courts may be tempted to conclude that an inevitable implication of a statute allowing a couple to hold in community property with right of survivorship is that joint tenancy property held by husband and wife is something different from community property with right of survivorship. Arizona courts may conclude that a "choice" of joint tenancy rather than community property with right of survivorship signals a desire that the property be treated differently from community property for all purposes, not just upon the death of one spouse.

III. THE INTERPLAY BETWEEN VARIOUS FORMS OF COMMUNITY PROPERTY AND JOINT TENANCY PROPERTY HELD BY A MARRIED COUPLE

Characters

A MARRIED COUPLE	The two main characters are spouses, each with community and separate property interests. They will contemplate placing an asset in community property, separate property, or joint tenancy. One of them may die, they may end up getting divorced before either one dies, or they may stay married.
JOINT TENANCY	This character is a much maligned, misunderstood, title-troublemaker arch-villain that is a frequent character in property and estate plays. Joint Tenancy is one title choice for assets owned by the Married Couple.
ARIZONA LAW	The general and somewhat vague Arizona community property laws, including statutes and non-statutory presumptions, as interpreted by the Arizona judiciary, is a somewhat tortured, confused role.
CALIFORNIA LAW	The marital property statutory law of California is a perhaps insignificant, perhaps insightful side character.
CREDITORS	Frequently a simultaneously sympathetic and greedy bunch, creditors present their legitimate although pushy desires to obtain satisfaction for debts by obtaining access to all assets legally available to them.
CONTRIBUTIONS	These characters are contribution siblings: (1) community property that benefits the SP interest of one of the spouses; (2) one spouse's SP that is turned into CP or used for the benefit of the community; (3) one spouse's SP used to purchase property held in joint tenancy by the spouses; (4) one spouse's SP that is used for the benefit of existing joint tenancy property owned by both of the spouses; and (5) one spouse's SP that is placed in a joint bank account that entitles either spouse to make withdrawals. Some of the siblings may be identical twins, but at this point we don't know.
NARRATOR	Alright, so I wrote a role for myself.

ACT I: THE DIFFERING AT-DIVORCE TREATMENT OF COMMUNITY PROPERTY CONTRIBUTIONS TO SEPARATE PROPERTY, SEPARATE PROPERTY CONTRIBUTIONS TO COMMUNITY PROPERTY, AND SEPARATE PROPERTY CONTRIBUTIONS TO PROPERTY HELD BY A MARRIED COUPLE IN JOINT TENANCY, DESPITE THE UNDERLYING UNIFORMITY OF THE ASSETS IN QUESTION

Scene I – Does Anyone Here Know Why We Picked Joint Tenancy?

(The scene opens with a married couple in Arizona. The couple is about to purchase an asset, and among other things they must decide whether to hold the asset as owners of community property or as joint tenants. The scene begins as they start the conversation.)

SPOUSE 1: (silence)

SPOUSE 2: (silence)

NARRATOR: The reason for the silence is that married people may not consider this issue at all when purchasing an asset. Frequently the decision is made for the couple by a real estate broker, title insurance worker, banker, or investment counselor (all complex, perhaps evil characters nevertheless written out of this play), without any specific contemplation of the differing effects of differing titles.[48] If our married couple is atypically rational, aware, and/or compulsive, however, their conversation may involve some of the following.

SPOUSES: We have a choice about our property. It appears to be a very common practice for married people to hold property as joint tenants with right of survivorship.[49] If one of us dies while we are still married, we want all the marital property to go to the survivor. If we put it in joint tenancy, that will happen without a will or probate. If we put it in community property, we will need to have a will and go through probate and maybe family squabbles.

NARRATOR: A frequently cited reason why married couples hold what would otherwise be community property in joint tenancy is to avoid probate.[50] If the

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48. *See* Schindler v. Schindler, 272 P.2d 566, 568 (1954); BIRD, *supra* note 5, at 99 (stating that "most married couples in California hold most of their property as joint tenants" due in part to "the fact that real estate and stock brokers frequently direct their clients to take title in joint tenancy"); BLUMBERG, *supra* note 19, at 201; Bruch, *supra* note 21, at 830–32 & nn.242–43; Yale B. Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 90 (1961).

49. *See* BIRD, *supra* note 5, at 99 (citing estimates that 85% of real property held by married people in California is held in joint tenancy); Bruch, *supra* note 21, at 830 ("[M]ost couples hold their realty, bank accounts, and brokerage accounts as joint tenants....").

50. *See* Needel v. Needel, 15 Ariz. App. 471, 474, 489 P.2d 729, 732 (1971) ("[W]e believe that the legislature recognized the widespread practice in the State of Arizona of putting property in joint tenancy with the right of survivorship in order to avoid the expense and delay of probate proceedings."); Bowman v. Bowman, 308 P.2d 906, 908 (Cal. Ct. App. 1957); Bruch, *supra* note 21, at 830 n.239; Griffith, *supra* note 48, at 108.

property were held as community property, each spouse could easily will their community property interest to the other spouse and, similarly, intestate succession rules ordinarily would give the property to the surviving spouse. But the apparent fear is that either way the property would have to go through estate administration. In contrast, the main feature of joint tenancy is that upon the death of one of the tenants the surviving tenant immediately becomes the outright owner of the entire property.[51] Thus joint tenancy avoids probate, and so does community property with right of survivorship.[52]

SPOUSES: We can take care of it just by changing the title to joint tenancy with right of survivorship.

NARRATOR: This impression is perhaps a little misleading. The title alone may not be sufficient to permit joint tenancy treatment; Arizona courts presume the asset is to be treated as CP and require evidence other than the deed itself in order to effectuate a joint tenancy designation.[53] Consequently, the title change by itself will suffice only when the surviving spouse has no rivals for the distribution of the deceased spouse's portion of community property. A rival, however, can be expected to argue that the joint tenancy deed by itself is insufficient to demonstrate joint tenancy treatment, and the property should be treated as CP, with half going to the surviving spouse and half to the decedent's estate.[54]

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51. *See* ARIZ. REV. STAT. § 14-3101 (1998).

52. It is not necessarily crucial or advantageous to use joint tenancy to avoid probate. An efficient system for changing title when a spouse leaves community property to a surviving spouse exists in California. *See* Bruch, *supra* note 21, at 838. Joint tenancy rather than estate transfer, however, might be used to try to avoid subjecting the property to SP creditors of the dead spouse. Arizona accomplishes a non-joint tenancy method for avoiding probate by permitting a community property with right of survivorship designation.

53. See *In re* Baldwin's Estate, 50 Ariz. 265, 274, 71 P.2d 791, 795 (1937), which requires evidence, apart from the title on the deed, that demonstrates that the spouse whose CP estate would be defeated by the joint tenancy understood that he or she was giving up that CP right.

> If the deed itself contains nothing showing this fact, such for instance, as an acceptance of the terms thereof in the handwriting of the grantees, or an endorsement by the recorder that it was placed of record at the request of the deceased spouse, it might be established by any proper extrinsic evidence.

Id. The evidence is often likely to be corroborated by the implicit consideration each spouse receives for agreeing to give up the ability to give away half at death, namely the ability to take it all outright as a survivor. Thus in CP to joint tenancy transmutations, there is likely to be consideration not always present in CP to SP transmutations. By requiring evidence of understanding independent of the title, *Baldwin's Estate* treats CP to joint tenancy transfers comparably with other CP to SP transmutations. *Cf.* Heinig v. Hudman, 177 Ariz. 66, 75, 865 P.2d 110, 119 (Ct. App. 1993); Estate of Calligaro v. Owen, 159 Ariz. 498, 502, 768 P.2d 660, 663 (Ct. App. 1988).

54. There would be a rival, for example, if the spouses placed significant assets in joint tenancy and then each had a will made up giving "all of my estate to the law school." The law school will want to argue that the significant assets should be treated as

SPOUSES: There might be a tax benefit, too.

NARRATOR: Perceptions and reality do not, of course, always match up. It is not necessarily crucial or advantageous from a tax perspective to hold property in joint tenancy rather than community property form. In fact, if there is an advantage, it may lie in community rather than joint tenancy form.[55]

SPOUSES: Other than probate avoidance and possible tax implications, we can't see any real difference between joint tenancy and community property.

NARRATOR: At a casual glance, joint tenancy and community property appear to be comparable concerning management and control, distribution at dissolution, and other non-death matters. For community property, both spouses have equal management and control power and are entitled to share in benefits generated by the asset.[56] If the management and control decision involves the purchase or sale of property, joinder is required.[57] For joint tenancy property, both tenants have management and control power and are entitled to share the benefits generated by the asset.[58] Treatment of community property and joint tenancy property under the marriage dissolution statutes is virtually indistinguishable.[59]

SPOUSES: So let's choose joint tenancy.

NARRATOR: In summary, even if our couple is aware of some of the nuances concerning CP and joint tenancy title, joint tenancy is not clearly preferable to CP. If they give any thought at all to their title choices and they select joint tenancy rather than CP, that selection is probably due to their desire to hold the property jointly yet obtain the survivorship feature at death.[60] The decision by our married couple to hold an asset in joint tenancy likely is not based upon a belief that joint tenancy property is fundamentally different from community property for purposes other than death, or on an expectation that it will be treated differently from community property for non-death events. To the contrary, our married couple, if they think about it at all, probably expects

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community property, so that one half of them will pass through the decedent's estate to the law school.

55. The tax benefit for community property rather than joint tenancy title is that if the property is sold subsequent to the death of one spouse, for community property the entire asset receives a basis "stepped-up" to the value of the asset at the first spouse's death. If the property is joint tenancy property, the surviving spouse is entitled only to a stepped-up basis for the decedent's half of the asset. *See* BLUMBERG, *supra* note 19, at 200; Arthur Andrews, *Community Property with Right of Survivorship: Uneasy Lies the Head That Wears a Crown of Surviving Spouse for Federal Income Tax Basis Purposes*, 17 VA. TAX REV. 577, 579–81 (1998). If appreciation is not a major factor, the stepped-up basis issue may be irrelevant. My colleague Art Andrews argues that the IRS may not automatically give community property with right of survivorship the community property treatment with both halves stepped up, and that "a legislative amendment...will probably be required to dispel the uncertainty concerning this issue." Andrews, *supra*, at 583.

56. *See* ARIZ. REV. STAT. §§ 25-211, 25-214 (1998).

57. *See* ARIZ. REV. STAT. § 25-214(C)(1).

58. *See* SINGER, *supra* note 25, at 711–12.

59. *See* ARIZ. REV. STAT. § 25-318(A) (1998).

60. *See* Bruch, *supra* note 21, at 833–35.

that for all purposes other than death of one of the spouses, the joint tenancy property is indistinguishable from CP. It is, after all, an asset that is jointly and equally owned by a married couple to be divided along with all other jointly held property at divorce. Each party has management and control power, including the power to dissolve the survivorship provision.[61] This description thus sounds suspiciously like a description of community property.

The addition of community property with right of survivorship as an alternative form of title raises the question of the significance that should be assigned to a decision by our couple to hold title in joint tenancy rather than in CP or community property with right of survivorship.[62] But it would be unwise to assign any significance to this decision. Real estate brokers, bank tellers, and many others upon whom married couples rely for advice[63] may be unaware of the new option or misinformed about the significance of choosing community property with right of survivorship. In addition, it does not seem likely that couples will decide to hold in joint tenancy specifically to obtain treatment different from CP or community property with right of survivorship concerning matters related to management and control, reimbursement, or distribution prior to the death of one of the spouses.

Scene II – Distribution of Assets at Divorce: Does Community v. Joint Tenancy v. Community Property with Right of Survivorship Matter?

(Our married couple purchases an asset with community funds, places the title in community property and splits up a short time later. At the divorce, Arizona Law enters.)

ARIZONA LAW: The CP asset is divided equitably though not necessarily in kind,[64] which means in this case a roughly fifty-fifty split of all CP assets. Some CP assets can go in whole to one spouse while others go in whole to the other spouse, as long as the distribution of the net worth of the community is roughly fifty-fifty.

(Now our couple backs up and purchases the same asset with the same community funds, but this time places the title in joint tenancy with right of survivorship. The couple splits up a short time later and we are once again at divorce.)

ARIZONA LAW: The joint tenancy asset is to be divided equitably, though not necessarily in kind, along with the CP assets, which means in this case a roughly fifty-fifty split of the value of all of the CP and joint tenancy assets.[65] Accordingly, there is not a meaningful difference between joint tenancy and

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61. *See* SINGER, *supra* note 25, at 710–12.

62. This applies both to couples who now can change to community property with right of survivorship from joint tenancy, or who are selecting title in the first place.

63. *See supra* notes 21–22, 48 and accompanying text.

64. *See* ARIZ. REV. STAT. § 25-318(A). *See also supra* note 38 and accompanying text.

65. *See* ARIZ. REV. STAT. § 25-318(A). *See also supra* notes 39–41 and accompanying text.

community property for distribution purposes. The statute applies to all joint tenancy property, irrespective of whether it is traceable to community property or to the separate property of one of the spouses.[66]

NARRATOR: The Arizona legislature, by providing that upon dissolution joint tenancy property is to be distributed in the same manner as CP, has to some extent facilitated the notion that joint tenancy property held by a married couple is really community property with right of survivorship. The statute permits distribution of the joint tenancy property in a manner other than a continued co-ownership or severing with a tenancy in common for each spouse for one half of the joint tenancy asset.[67] The statutory scheme is thus not consistent with the proposition that joint tenancy property is a form of SP, because pursuant to the same statute all SP must go to the SP owner.[68]

(Now our couple backs up and purchases the same asset with the same community funds. This time, however, the couple places the title in community property with right of survivorship. The couple splits up a short time later and we are again at divorce.)

ARIZONA LAW: The distribution-at-divorce statute[69] has not been amended to include community property with right of survivorship, but there is no reason to conclude it should be distributed differently from CP and joint tenancy. Accordingly, community property with right of survivorship, CP, and joint tenancy all will be considered distributable joint assets, to be divided roughly fifty-fifty although not necessarily in kind.[70]

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66. *See* Toth v. Toth, 190 Ariz. 218, 219–20, 946 P.2d 900, 901–02 (1997); Valladee v. Valladee, 149 Ariz. 304, 306, 309–11, 718 P.2d 206, 208, 211–13 (Ct. App. 1986). Both cases apply Arizona Revised Statute § 25-318(A) to divide joint tenancy property that was indisputably traced to the separate property of one of the spouses.

67. *See* ARIZ. REV. STAT. § 25-318(A); *Toth*, 190 Ariz. at 219–20, 946 P.2d at 901–02.

68. *See* ARIZ. REV. STAT. § 25-318(A) ("[A divorce court] shall assign each spouse's sole and separate property to such spouse. It shall also divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind...."). *Toth* recognizes the underlying inconsistency between the statute and the case law insistence that joint tenancy is a form of separate property, but the recognition is not crucial to the decision. *See Toth*, 190 Ariz. at 220, 946 P.2d at 902. *See also* CAL. FAM. CODE § 2580 (1994) (indicating that property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property, is presumed to be community property for purposes of dissolution).

69. *See* ARIZ. REV. STAT. § 25-318(A).

70. There is no case law on point here. I am taking an educated guess. It is hard to imagine, however, that community property with right of survivorship property would somehow receive divorce distribution treatment different from CP and joint tenancy with right of survivorship property, and the latter two are distributed at divorce indistinguishably, pursuant to Arizona Revised Statute § 25-318(A).

Scene III – Community Property Contributions to Separate Property

(During the marriage, SP Spouse purchases property with SP funds, and keeps title in his or her name. SP Spouse uses community money to pay some of the mortgage owed on the SP asset. A short time later, the couple splits up and the scene shifts to the courtroom.)

NON-SP SPOUSE: Please, Arizona Law, instruct the SP owner either that the property is community property or that the community is entitled to reimbursement for the community contribution to the separate property.

ARIZONA LAW: Well, let's see. The property was purchased during the marriage, so it is presumed community, although that presumption can be overcome by tracing.[71] By the way, SP title does not overcome that presumption or create a presumption of its own, although CP title creates a presumption of CP,[72] and joint tenancy title creates a presumption of something or other.[73] Nevertheless, here, because the source of the purchase is traceable back to SP, the SP owner has overcome the "acquired during the marriage" presumption of CP, and the asset remains SP despite the contribution.[74]

As to the contribution by the community, CP contributions to SP assets are presumed reimbursable[75] unless there is an agreement otherwise between the

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71. *See* Porter v. Porter, 67 Ariz. 273, 279–80, 195 P.2d 132, 136 (1948). *Porter* is one of many Arizona cases identifying that "all property acquired by either spouse" during the marriage is presumed community and that the presumption can be overcome by tracing. It also inexplicably identifies without apparent selection the following 10 possible standards for evidence necessary to overcome the presumption of community property: (1) "strong," (2) "satisfactory," (3) "convincing," (4) "clear and cogent," (5) "nearly conclusive," (6) "really is separate," (7) must not be "any doubt," (8) "clear, satisfactory and convincing," (9) "clearly," and (10) "circumstances of a conclusive tendency" *Id.* at 279–80, 195 P.2d at 136.

72. *See, e.g.*, Cooper v. Cooper, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1984).

73. I say "something or other" here because there is no clarity in the case law on this point. One position is that it is presumed community property because title in both names warrants a presumption of community. Another position is that the property should be presumed joint tenancy, especially if the title specifically states "joint tenancy and not community property" as often is present in a joint tenancy title formulation. Arizona cases have never been clear on this distinction. *See* Valladee v. Valladee, 149 Ariz. 304, 307, 718 P.2d 206, 209 (Ct. App. 1986) (presuming that a spouse who used SP to purchase property that was placed in joint tenancy with his wife made a gift to his wife rather than a gift to the community) (citing Becchelli v. Becchelli, 109 Ariz. 229, 232, 508 P.2d 59, 62 (1973)); Battiste v. Battiste, 135 Ariz. 470, 662 P.2d 145 (Ct. App. 1983); Sloane v. Sloane, 132 Ariz. 414, 646 P.2d 299 (Ct. App. 1982).

74. This is a standard application of the tracing rule. An asset titled in the name of one spouse that is traceable to SP will be characterized as SP. *See* sources cited *supra* note 5.

75. All community property jurisdictions, including Arizona, have some version of this reimbursement rule. *See* REPPY & SAMUEL, *supra* note 5, at 9-7 to 9-14. There is a possible exception for a situation in which one spouse uses CP to improve the SP of the other spouse. In such situations, there is an argument that the appropriate inference is one of gift of CP by the contributing spouse to the SP spouse. See *In re Marriage of Hrudka*, 186 Ariz. 84, 92–93, 919 P.2d 179, 187–88 (Ct. App. 1995), for possible application of this

married couple.[76] Mortgage payments are reimbursable only as to contributions to principal, with any increase in value also reimbursed,[77] but the specifics of the reimbursement for mortgage payments in general is a topic for another play.[78]

Scene IV – Part 1 – Separate Property Contributions to Community Property

(This time during the marriage the spouses take community funds, purchase property, and decide to hold the property as community property.)

(SP Spouse uses SP to pay some of the mortgage owed on the CP asset.)

(A short time later, the couple splits up and the scene shifts to the courtroom.)

SP SPOUSE: Please, Arizona Law, reimburse me for the SP contributions I spent on the CP mortgage. That would be consistent with the treatment you give to all sorts of CP contributions to SP involving work, pensions, improvements,

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exception. The general rule is that the community is entitled to reimbursement because, among other reasons, if there were no reimbursement, the SP spouse could cheat the community by putting CP into his or her SP. When the husband was the sole manager and controller of community property (in Arizona this was abandoned in 1973), the classic example was that the husband would use CP for the benefit of his SP and in the event of divorce try to take the benefit when he took the SP, something the reimbursement rule was designed to prevent.

76. The amount of reimbursement may be the value of the contribution when made, the value of the contribution at dissolution including appreciation, or a disguised pro-rata ownership form, depending on the nature of the contribution and the nature of the SP asset. *See generally* Honnas v. Honnas, 133 Ariz. 39, 40, 648 P.2d 1045, 1046 (1982) (finding community entitled to share in the increased value of the asset when community contributes time and money); Cockrill v. Cockrill, 124 Ariz. 50, 53, 601 P.2d 1334, 1337 (1979) (finding community entitled to apportioned share for community labor at an SP business when there is an increase in value of the business during the marriage, with the share determined using either a reasonable value of the community effort or the excess beyond a reasonable rate of return on the SP business); Rothman v. Rimbeck, 54 Ariz. 443, 453, 96 P.2d 755, 759 (1939) (finding community entitled to reimbursement for premiums paid rather than a proportionate part of the proceeds on an SP life insurance policy); Drahos v. Rens, 149 Ariz. 248, 250, 717 P.2d 927, 929 (Ct. App. 1985) (finding community entitled to reimbursement of payments to principal plus a share of appreciation based on percentage of principal paid by community compared to total purchase price). CP payments on an SP house, CP work at an SP business, CP improvements on SP property, CP contributions to pensions initially generated by pre-marriage SP work, and CP generation of goodwill in an SP business all raise the same issue of CP contribution to an asset that starts out as SP. There is different terminology and treatment in Arizona for each of these situations. Why that is a bad idea and why it came to be so is a topic for another time.

77. *See Drahos*, 149 Ariz. at 250, 717 P.2d at 929.

78. Arizona has adopted California's structure for CP contributions to ownership of SP, but claims it does so for reimbursement purposes only. *See id.* at 250, 717 P.2d at 929 (adopting the California formula without acknowledging that California has a different ownership characterization scheme). California developed its structure to allocate pro rata ownership shares, rather than for reimbursement purposes. *See In re* Marriage of Moore, 618 P.2d 208, 210 (Cal. 1980). Thus Arizona uses a formula designed for ownership but calls it reimbursement.

and house payments, all of which are presumed reimbursable, with various rates of return possible.[79]

ARIZONA LAW: In Arizona, SP contributions to CP obligations are presumed to have been unreimbursable gifts to the community, a presumption overcome only by clear and convincing evidence of agreement by the community to reimburse the SP contributor.[80] While our presumption of no reimbursement for SP contributions to CP is the exact opposite of the presumption of reimbursement for the mirror twin, CP contributed to SP, we won't say why it is appropriate to treat the two in opposite ways.[81] Why do we have the rule that SP contributions to CP obligations are presumed to be an unreimbursable gift? We have taken the rule from our neighbor to the west, California.[82] Thus our support for the proposition that SP contributions to CP are presumed unreimbursable is neither empirical nor analytical; it is an assertion that California does it this way.

SP SPOUSE: I'm confused. I thought California statutorily presumes that SP contributions are generally reimbursable.[83]

(California Law enters)

CALIFORNIA LAW: No one should be copying us about any of this, as we have a long, confused history of our own about joint tenancy and SP contributions to CP.[84] But the fact is that in 1983, after *Baum* but before *Malecky*, we

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79. *See generally Honnas*, 133 Ariz. at 40, 648 P.2d at 1046 (allowing reimbursement of CP contribution towards improvements on SP house); Johnson v. Johnson, 131 Ariz. 38, 40, 638 P.2d 705, 707 (1981) (stating that CP work effort toward a pension is CP even if the employee spouse began work prior to marriage); *Cockrill*, 124 Ariz. at 52, 601 P.2d at 1336 (holding that CP contributions to SP work may be reimbursed); *Drahos*, 149 Ariz. at 249, 717 P.2d at 928 (reimbursing CP contributions to SP house); *supra* note 76 and accompanying text.

80. *See* Malecky v. Malecky, 148 Ariz. 121, 123, 713 P.2d 322, 324 (Ct. App. 1985) ("[A] spouse who elects to expend separate property on community expenses is entitled to reimbursement from the community or separate property of the other spouse only if there is an agreement to that effect." (quoting Baum v. Baum, 120 Ariz. 140, 146, 584 P.2d.604, 610 (Ct. App. 1978))).

81. *See id.* at 123, 713 P.2d at 324 (announcing the rule without discussion of the fact that if the asset were SP and CP had contributed, there would be reimbursement).

82. *See id.* at 123, 713 P.2d at 324 ("The court in *Baum*...adopted as the rule in Arizona the California rule." (citation omitted)).

83. SP Spouse is correct here. *See* CAL. FAM. CODE § 2640 (West 1994).

84. Prior to 1966, California used title as presumptive information. Accordingly, if title was in joint tenancy, even if the property was traceable back to CP, the property was by default treated as a form of separate property and divided fifty-fifty between the spouses. But this presumption led to problems, many of which are identified in this Article, and the problems led the California legislature in 1965 to amend its civil code to statutorily require that joint tenancy residences acquired by husband and wife during the marriage be presumed community property at divorce. *See In re* Marriage of Hilke, 841 P.2d 891, 893–94 (Cal. 1992) (discussing the history of the statutes). In *In re Marriage of Lucas*, 614 P.2d 285, 288–89 (Cal. 1980), the California Supreme Court used this statutory mandate as a basis for concluding that SP contributed for a down payment and some mortgage payments on a home acquired and placed in joint tenancy title during the marriage was not

statutorily reversed our presumption of gift[85] when SP contributions are made to CP. The statutory changes established a presumption of reimbursement[86] unless a party has made a written waiver of the right to reimbursement.[87] Prior to these statutory revisions, we used the general presumption that SP contributions to CP were not reimbursable.

CP SPOUSE: Oh, I get it. *Malecky* incorrectly asserted that Arizona has adopted the California rule. A correct statement would have been that Arizona adopted a former California rule that California by statute has explicitly reversed.[88]

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reimbursable to the SP owner unless there was an agreement to do so. The tracing back to SP was not sufficient to overcome the community presumption effectuated by placing the title in joint tenancy. In response to *Lucas*, the California legislature reversed the presumption concerning SP contributions to CP, making reimbursement the default but removing the ownership interest of the SP owner. *See Hilke*, 841 P.2d at 894; BLUMBERG, *supra* note 19, at 211–12. The effort was to try to effectuate a result in *Lucas* situations pursuant to which the SP owner would be entitled to reimbursement for the dollars spent toward principal on the home but would not have an ownership interest and thus would not share in any appreciation. *See id.* This statutory structure still is in effect in California. *See* CAL. FAM. CODE § 2640.

The mechanics of the statutes trying to reverse the *Lucas* result, however, were highly problematic and questions arose about retroactive application of the statutes. *See In re* Marriage of Buol, 705 P.2d 354, 355 (Cal. 1985) (refusing to give retroactive application to all aspects of the new statutory scheme). In response, the legislature enacted a statute conceding the retroactivity issue and then reinstated the retroactive effect. *See* BLUMBERG, *supra* note 19, at 226–28.

85. *See supra* note 84 and accompanying text.

86. SP contributions "include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property." CAL. FAM. CODE § 2640. Reimbursement is without interest, and applies to down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement. It does not apply to payments of interest on a loan or payments made for maintenance, insurance, or taxation of the property. *See id.* This statute may have taken away from the SP owner the ability to share pro rata in the ownership of the property because of a contribution to the purchase price. Prior to the statute, SP contributions to CP appear to have been treated by giving ownership shares in the asset to the community and to the SP contributor. Thus reimbursement is not exactly the right word. *See generally In re* Marriage of Moore, 618 P.2d 208, 210–11 (Cal. 1980) (considering CP interest and SP interest co-owners when the community contributes ownership payments to what originally started out as SP).

87. *See* CAL. FAM. CODE § 2640.

88. CP Spouse is correct here. *See supra* note 84 and accompanying text. Arizona is not shy about looking to California for community property rules to borrow. *See generally* Cockrill v. Cockrill, 124 Ariz. 50, 53–54, 601 P.2d 1334, 1337–38 (1979) (borrowing a California rule for apportionment of CP effort toward an SP business); Drahos v. Rens, 149 Ariz. 248, 250, 717 P.2d 927, 929 (Ct. App. 1986) (borrowing a California rule for home ownership); Baum v. Baum, 120 Ariz. 140, 146, 584 P.2d 604, 610 (Ct. App. 1978) (citing the old California rule that SP contributions to CP were presumed an unreimbursable gift). But Arizona joint tenancy cases, perhaps understandably or perhaps in uninformed bliss, have stayed away from mentioning the California changes mentioned in the footnotes above.

CALIFORNIA LAW (musing rather than specifically speaking):[89] In addition to the "perceived unfairness"[90] some may have felt about denying reimbursement to an SP contributor, California might have more of a need for its current rule than Arizona did at the time of *Malecky*. In California the community may end well prior to the final decree of divorce or separation.[91] Thus at the end of a marriage, the salary of each spouse may become separate property, and if it is used, for example, to pay the mortgage on a community home, there is a need to reimburse the SP payments before dividing the community home.

ARIZONA LAW: Whatever.[92] The rule for Arizona purposes still is that SP contributions to community obligations are presumed unreimbursable, and thus the spouse who paid the mortgage bill with separate property is not entitled to reimbursement in the absence of evidence of intent on the part of the community to reimburse.[93]

Scene IV – Part 2 – Separate Property Contributions to Joint Tenancy Property

(This time the married couple during the marriage purchases the property with community funds and designates the property as joint tenancy property.)

(SP Spouse uses SP funds to pay the mortgage of the joint tenancy property.)

(Shortly after, the couple splits up and the scene again shifts to the courtroom.)

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89. In other words, this is the Author's speculation.

90. *See* BIRD, *supra* note 5, at 101 ("The *Lucas* decision was perceived as unfair by many family law practitioners and scholars largely because it tended to deny any form of credit or compensation to a spouse who had contributed separate property to a joint tenancy asset. Legislation was subsequently enacted to remedy this perceived injustice.").

91. *See* CAL. FAM. CODE § 771 (West 1994) (providing that if the spouses are "living separate and apart" their "earnings and accumulations...are...separate property").

92. Arizona has recently changed its rules concerning when divorcing spouses cease to generate community property. *See* ARIZ. REV. STAT. §§ 25-211, 25-213 (1998). Under the statutory regime prior to the 1999 amendments, the community did not end until the final decree of divorce. *See* Lynch v. Lynch, 164 Ariz. 127, 129, 791 P.2d 653, 655, 659 (Ct. App. 1990) (finding that the husband's $2.2 million lottery jackpot, won subsequent to a default divorce hearing but prior to the issuance of a final divorce judgment, was community property rather than the separate property of the husband). In 1999, however, the legislature amended the statutes. *See* ARIZ. REV. STAT. §§ 25-211(2), 25-213. Pursuant to the changes, if a spouse files for divorce and the other spouse receives proper notice, all assets generated by either spouse subsequent to the filing and notice are SP assets rather than CP assets, but only if the filing results in a final decree of divorce. *See id.* Consequently, Arizona now needs to rethink the reimbursement rule for situations where SP contributions to CP occur after someone has filed for divorce and notice has been served. For example, suppose someone takes post-filing/notice salary and uses it to make a house payment on a community home? It seems odd to change the statute yet conclude that the SP owner has made an unreimbursable gift to the community. Nevertheless, the statute is silent about such a situation.

93. *See supra* notes 80–83 and accompanying text.

SP SPOUSE: Please, Arizona Law, reimburse me for the SP payments for the mortgage.[94]

CP SPOUSE: Don't be ridiculous. You are not entitled to reimbursement when you make an SP contribution to CP, so you should not be entitled to reimbursement when you contribute to joint tenancy owned by husband and wife. Assuming I know anything about what joint tenancy means, it is about death, and there isn't any death here. The statute treats CP and joint tenancy property the same for distribution at divorce.[95] So there should not be any reimbursement here absent clear and convincing evidence of agreement to reimburse, and there was no agreement to do so.

NARRATOR (to audience): Here is where I think the results become confusing, odd, and generally unacceptable.

ARIZONA LAW: The general rules of joint tenancy apply to property held in joint tenancy by married couples.[96] One of the regular joint tenancy rules is that contributions by either tenant that pay existing joint tenancy obligations are presumed reimbursable.[97] Therefore, reimbursement is required. We are not

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94. It is not entirely clear from what source the contributing spouse seeks reimbursement: is it from the community or from the joint tenancy asset itself? The dissolution statute simply indicates that the joint tenancy asset, upon divorce, will be divided as if it is community property. *See* ARIZ. REV. STAT. § 25-318(A) (1998). Thus the SP owner could argue that he or she is entitled to reimbursement out of the joint tenancy property, which must be split after he or she has been given a share that reflects the SP contribution. Or the SP owner may argue that before the joint tenancy property and the rest of the CP is distributed, the SP owner should be reimbursed by the community for her or his contribution to the joint tenancy property. Either result, by the way, will be that the SP owner will only get half the full reimbursement, because when the community reimburses the SP owner, the SP owner reduces his or her ultimate share of CP. Thus if there is $10,000 of CP and the SP spouse obtains reimbursement of $2000, the SP spouse will only come away with $1000 more than if there were no reimbursement. No reimbursement yields $10,000/2 or $5000; reimbursement yields $2000 + $8000/2 or $6000. In effect, when the community reimburses the SP contributing spouse, that spouse is reimbursing him or herself for 50% of the amount. If the joint tenancy asset is going to be divided separately from the community assets, *see* discussion *supra* notes 38–42 and accompanying text, then the SP contributor may ask for a larger share of the joint tenancy asset that reflects the amounts of SP contributed.

95. *See* ARIZ. REV. STAT. § 25-318(A).

96. *See* Collier v. Collier, 73 Ariz. 405, 411, 242 P.2d 537, 541 (1952) ("'The general rules relating to joint tenants and tenants in common are applicable to husband and wife when they are deemed to hold as joint tenants....'" (quoting 41 C.J.S. *Husband and Wife* § 23)); Valladee v. Valladee, 149 Ariz. 304, 309, 718 P.2d 206, 211 (Ct. App. 1986) ("Arizona has long recognized that the general rules of joint tenancy apply between husband and wife." (citations omitted)). *See also* Toth v. Toth, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997); Whitmore v. Mitchell, 152 Ariz. 425, 427, 733 P.2d 310, 312 (Ct. App. 1987); Berger v. Berger, 140 Ariz. 156, 161–63, 680 P.2d 1217, 1222–24 (Ct. App. 1983); Bowart v. Bowart, 128 Ariz. 331, 336–37, 625 P.2d 920, 924 (Ct. App. 1980).

97. *See Valladee*, 149 Ariz. at 309, 718 P.2d at 211.

> Under the general rules of joint tenancy, a tenant has a right to contribution from his cotenants for expenditures or obligations made for the benefit of the common property. However, before a tenant can claim

entirely clear concerning the proper method of reimbursement, the method for valuing the reimbursement,[98] or which contributions are eligible for reimbursement. We do not preclude reimbursement for interest payments, unlike CP mortgage payments contributed to SP but attributed to interest rather than principal.[99] Nevertheless, like CP mortgage payments toward principal contributed to SP[100] or other CP improvements to SP,[101] we suggest that "enhanced value" may be the proper reimbursement measure.[102] We leave all of those questions to the regular joint tenancy rules, which may include reimbursement for mortgage and tax payments.[103] This result is not hinged to tracing, so it does not matter whether the asset is traced back to CP or to SP.[104]

> a right to such contribution, it must appear that there existed a common obligation or liability among the cotenants at the time the contributing tenant made the expenditure or incurred the obligation.

Id. (citing Collier v. Collier, 73 Ariz. 405, 242 P.2d 537 (1952); Graham v. Allen, 11 Ariz. App. 207, 209, 463 P.2d 102, 104 (1970); 20 AM. JUR. *Cotenancy and Joint Ownership* § 58 (1965)). *See also Berger*, 140 Ariz. at 161, 163, 680 P.2d at 1222, 1224; SINGER, *supra* note 25, at 712–13.

> Co-owners generally have a duty to share basic expenses needed to keep the property, including *mortgage* payments, property *taxes* and other assessments, and property *insurance*, in accordance with their respective shares.... Some courts will hold that co-owners also have a duty to share basic *maintenance* and *necessary repairs* for the premises so that it does not become dilapidated. However the authorities are mixed on this question.... Co-owners do seem to be able to obtain a credit for repairs they have performed in calculating their monetary share of partition proceeds.

SINGER, *supra* note 25, at 712–13 (emphasis in original) (citations omitted).

98. *See Berger*, 140 Ariz. at 163, 680 P.2d at 1224 ("[T]he general rules of joint tenancy apply between husband and wife...and the general measure for reimbursement where the property has appreciated in value is the enhanced value."). *But see Collier*, 73 Ariz. at 413–14, 242 P.2d at 542–43 (offering guidance to the trial court concerning how to value reimbursement and indicating in an example that the reimbursement is limited to the amount spent).

99. *See* Drahos v. Rens, 149 Ariz. 248, 250, 717 P.2d 927, 929 (Ct. App. 1986).

100. *See id.*

101. *See generally* Honnas v. Honnas, 133 Ariz. 39, 648 P.2d 1045 (1982) (holding that CP contributions to improvement of SP are reimbursable using increased value method).

102. *See Berger*, 140 Ariz. at 163, 680 P.2d at 1224.

103. *See* sources cited *supra* note 97.

104. *Valladee* and *Collier* both involve joint tenancy property traceable to SP, but neither case indicates that the reimbursement rule applies solely to joint tenancy property traceable to SP. To the contrary, both decisions instead take the position that the reimbursement for SP contributed to a joint tenancy asset is appropriate because joint tenancy is different from CP, is a form of SP, and thus the general joint tenancy rules are applicable to the property irrespective of tracing. *See* Collier v. Collier, 73 Ariz. 405, 410–13, 242 P.2d 537, 540–44 (1952); Valladee v. Valladee, 149 Ariz. 304, 309, 718 P.2d 206, 211 (Ct. App. 1986). *See also Berger*, 140 Ariz. at 161, 680 P.2d at 1222 (applying the general rules of joint tenancy to allow a spouse to be reimbursed for SP funds spent improving a joint tenancy traceable back to the spouse who improved it with SP funds).

SP CONTRIBUTION TO EXISTING JOINT TENANCY OBLIGATION (pointing at SP Contribution to Existing CP Obligation while speaking to Arizona Law): Wait a minute. Why am I any different from SP contributed to CP? I'm only a contribution, but I can't believe we are not treated the same. We are identical twins. The underlying asset for which we both paid the same bill was owned in undivided ownership by both spouses and will be distributed identically upon divorce. Death has not come, so the right of survivorship is irrelevant. It is absurd to even contemplate that the married couple placed the property in joint tenancy intending or even realizing that if there was a divorce during the lifetime of the couple and one of them contributed SP to the asset, the result would be to do what Arizona doesn't do (but California does do) for community property, which is to reimburse. It cannot be that you are treating me the same as my effective mirror twin CP contribution to SP, because you don't treat SP contribution to CP the same as CP contribution to SP. And under your scheme, SP contributed to joint tenancy actually may provide greater reimbursement than would CP contributed to SP.

ARIZONA LAW:[105] Yes, you look and act exactly the same as SP contributed to CP. But your name has joint tenancy in it rather than CP, so we will treat you differently, even though the reason for your joint tenancy name has nothing to do with the question of whether reimbursement is appropriate.

(As a little bit of comic/tragic relief, in a sidebar dialogue, the court of appeals in Valladee *vehemently insists that it is disagreeing with the court of appeals in* Malecky *and adopting a rule opposite from the rule established in* Malecky.[106] *But matters concerning joint tenancy and the rule* Valladee *adopts are in fact nowhere to be found in* Malecky.[107]*)*

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105. This is my language here; I am describing the results of the case law. There is not any case or statute that actually comes out and admits this.

106. *Valladee* asserts:

> While *Malecky* appears to be dispositive of this appeal, we decline to follow it and choose to base our holding on different grounds....
>
> ....[In *Malecky*] the court found that a presumed gift to the community was created when husband placed real property acquired with his own funds in joint tenancy with his wife.... [T]he result reached in *Malecky* rested upon the assumption that the presumed gift which arises when one spouse places separate property in joint tenancy is a gift to the community.... [S]ince no agreement existed between the parties, *Baum* applied and prohibited any reimbursement to the husband for his separate expenses in acquiring the property.

Valladee, 149 Ariz. at 308, 718 P.2d at 210.

107. According to *Malecky*'s version of what *Malecky* was deciding:

> The second issue...concerns [the husband's] separate funds used as partial repayment of a loan executed in connection with the purchase of a 7-Eleven franchise.... The trial court found that the 7-Eleven store was community property....
>
> ....

Scene IV – Part 3 – Using Separate Property To Purchase an Asset that is Placed in Community Property Title

(SP Spouse takes the same SP asset that was SP contribution to CP and to joint tenancy in parts 1 and 2 of this scene, and this time uses it to purchase an asset. SP Spouse puts CP title on the asset. Shortly after, the couple splits up, and the scene shifts to the courtroom.)

SP SPOUSE: Please, Arizona Law, either decide that the property is my SP, or at a minimum, instruct the community to reimburse me for my SP contribution to the purchase of the asset. If there were no stated title on this property, the property would be my SP, as it would be traceable back to my SP.[108] Because

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> In Arizona when one spouse pays for real property which is then taken jointly in both spouses' names, the presumption is that a gift to the community was the intention of the paying spouse.

Malecky v. Malecky, 148 Ariz. 121, 123, 713 P.2d 322, 324 (Ct. App. 1985). The last sentence of the quote is the only language in *Malecky* that possibly could be construed to involve joint tenancy. There is no other indication that the 7-Eleven franchise was joint tenancy rather than community property. The husband argued that the money was reimbursable because it was traceable, not because it was contributed to joint tenancy property. *See id.* The trial court found the 7-Eleven to be community property and that the husband had not intended the SP money to be a gift to the community. *See id.* at 121–22, 713 P.2d at 322–23. There was no discussion in the appeals court opinion concerning whether the conclusion that the 7-Eleven was CP was incorrect and no discussion about joint tenancy at all. I reviewed the entire file of this case, and there is no indication that the title of the 7-Eleven was joint tenancy. There is simply no way that *Malecky* was deciding that SP contributions that go toward the purchase price of a joint tenancy asset are unreimbursable. *See also* Whitmore v. Mitchell, 152 Ariz. 425, 427 n.1, 733 P.2d 310, 312 n.1 (Ct. App. 1987) (recognizing the irrelevance of *Malecky* to the issue of whether to reimburse for SP contributions to joint tenancy). What *Malecky* did do was hold that SP contributions to the purchase price of a CP asset are unreimbursable, reiterating the rule from *Baum*. *See Malecky*, 148 Ariz. at 123, 713 P.2d at 324 (citing Baum v. Baum, 120 Ariz. 140, 146, 584 P.2d 604, 610 (Ct. App. 1978)).

Valladee cites *Ivancovitch v. Ivancovitch*, 24 Ariz. App. 592, 540 P.2d 718 (1975), as also holding that SP turned into joint tenancy is a gift to the community. *See Valladee*, 149 Ariz. at 308, 718 P.2d at 210. But *Ivancovitch* concluded only that a residence deeded to both spouses as "husband and wife, and purchased and constructed using money from accounts that had been commingled was properly characterized as community property at divorce. *See Ivancovitch*, 24 Ariz. App. at 594, 540 P.2d at 720. *Ivancovitch* thus supports the notion that although money used to purchase property is traceable back to separate property, if the title names the couple as husband and wife, the property is presumed community. In fact, however, based upon the questionable distribution of the community assets upheld by *Ivancovitch*, there appeared in the case to have been a de facto reimbursement (although not dollar for dollar) to the wife of SP she spent on community expenses during the marriage. *See id.* at 594–95, 540 P.2d at 720–21. In any event, joint tenancy was not an issue in the case—the expression was not used in the opinion. *See id.*

108. This is the standard result of combining the tracing rule with the rule that an asset form does not ordinarily change the underlying characterization of the asset. Arizona defines separate property as all property owned by either spouse prior to marriage, all property acquired during the marriage by gift, descent, or devise, and the increases, rents, issues and profits of SP. *See* ARIZ. REV. STAT. § 25-213 (1998). The asset in question would be presumed CP due to the fact that it was acquired during the marriage. But the

I have read ahead in this interplay, I know that if, instead of buying the property, I took the SP money I used to buy the asset and placed it in a jointly titled bank account, I would be allowed to trace it and get my portion.[109] Some people save in bank accounts, some people save in untitled assets, and some people save in real property. Why am I not allowed to trace it when it is the same SP money but is in real property rather than in a bank account or untitled property? In addition, CP contributions to SP are presumed reimbursable,[110] and if CP assets were used for the purchase but title was put in SP, the property still would be presumed to be CP.[111] So I must be entitled to something. I would prefer that you use the tracing rule to conclude that it is my SP. But I did place title in CP, so you may conclude that the property is CP and must be divided as part of the community assets. If so, reimburse me for my SP contribution to what became a CP asset due to the title choice.

CP SPOUSE: Don't reimburse. This is the same as any other SP contribution to the community; presume no reimbursement.[112]

SP SPOUSE: No, this is a different situation. I am not taking SP and contributing to ongoing community expenses, such as using SP to pay medical bills or part of a community mortgage. When that happens, the SP asset is either used up or is in effect residing in a community asset. What I have done here is create an asset that is entirely traceable back to my SP. So even if the property must be divided as community property, there is no reason why I shouldn't get my contribution back.

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presumption just means that the SP proponent must show that the correct characterization is SP. Pursuant to longstanding community property principles, property purchased during a marriage with SP is characterized as SP if the SP proponent provides sufficient evidence to trace the property to SP. *See* Nace v. Nace, 104 Ariz. 20, 23, 448 P.2d 76, 79 (1968); Porter v. Porter, 67 Ariz. 273, 281–82, 195 P.2d 132, 137 (1948); Blaine v. Blaine, 63 Ariz. 100, 109, 159 P.2d 786, 790 (1945). Accordingly, if the property has no stated title, the SP proponent is entitled to trace the property back to its source, and here the source is SP, dictating SP treatment for the asset. It is only when there is a joint title that the title presumption comes along and in effect "trumps" the tracing result by presuming CP irrespective of tracing. *See* Cooper v. Cooper, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981) (quoting Sommerfield v. Sommerfield, 121 Ariz. 575, 577–78, 592 P.2d 771, 773–74 (1979)).

109. This is the rule for bank accounts: joint title on the account, including joint tenancy title, does not preclude an SP claimant from tracing the funds on the account back to SP. *See* Safley v. Bates, 26 Ariz. App. 318, 320–21, 548 P.2d 31, 33–34 (1976). *See infra* text accompanying notes 135–139 for a discussion of the different treatment for bank accounts compared to real property.

110. *See supra* text accompanying notes 71–78.

111. While title with both spouses' names on it dictates a presumption that the property is CP, there is no presumption that a sole name on the title is SP. CP would be presumed because the asset was acquired during the marriage and, if the purchase is not traced back to SP, the asset would be characterized as CP. Title in one name is evidence of a transmutation to the named spouse, but absent other evidence of a transmutation, SP title by itself will not dictate an SP characterization. *See* Jones v. Rigdon, 32 Ariz. 286, 291, 257 P. 639, 640 (1927).

112. *See supra* notes 79–93 and accompanying text.

ARIZONA LAW: The placing of title in CP, as well as the fact that the asset is acquired during the community, lead to the presumption that the property is CP.[113] These presumptions can be overcome only if you: (1) trace the source of the acquisition back to SP, which you have done here, and (2) if you produce clear and convincing evidence that the CP designation did not transmute the SP contribution into CP despite the title designation,[114] which you have not done here. Thus the property, although created by your SP assets, is CP. You have made a separate property contribution, namely ownership of the asset and the full worth of any SP you invested in the property, to the community.

SP SPOUSE: Let me try to understand this. You have concluded that I made a gift of a still-existing asset to the community and precluded the usual tracing effect, and thus gave up any claim to SP ownership, simply because I decided to place title in CP? That seems to be a rather strong presumption, given that I was not really aware when I designated the CP title of the strong difference between no formal title designation and CP title and that I was giving up of the tracing argument. I may be willing to abide by the gift idea to the extent of acknowledging that because I did choose CP title, the community is entitled to management and control, use, the right to take half outright if I die while married, and inclusion of the asset in the division of community assets at divorce. Isn't this enough of a gift to presume at divorce? Because I was not contemplating divorce at the time I put the asset in CP, it did not occur to me that at divorce I would not at least get out of it what I put in. If I am not at least reimbursed for the amounts I put in, too much significance is assigned to both my placing title in CP, which I did only because I was married, and to choosing a formal title at all, which I did just because it is customary to select a title for this asset.

ARIZONA LAW: What you say may be true.[115] We nevertheless treat such a contribution exactly like its twin, SP contribution to an existing CP asset.[116] Therefore, in the absence of an agreement,[117] there is no reimbursement.

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113. *See Cooper*, 130 Ariz. at 260, 635 P.2d at 853; Sommerfield v. Sommerfield, 121 Ariz. 575, 577–78, 592 P.2d 441, 773–74 (1979).

114. *See Cooper*, 130 Ariz. at 260, 635 P.2d at 853 (citing Sommerfield v. Sommerfield 121 Ariz. 575, 592 P.2d 771 (1979)); Becchelli v. Becchelli, 109 Ariz. 229, 508 P.2d 59 (1973) (indicating that in the absence of contrary evidence the title presumption dictates even if the assets are traceable back to SP); Malecky v. Malecky, 148 Ariz. 121, 123, 713 P.2d 322, 324 (Ct. App. 1985) (reaffirming the rule that SP contributions are presumed unreimbursable, even when the SP is involved in paying purchase price). *See also* Ivancovitch v. Ivancovitch, 24 Ariz. App. 592, 594, 540 P.2d 718, 720 (1975); *supra* notes 79–93 and accompanying text.

115. This may be generous. I have not seen any acknowledgment of this matter in the cases.

116. *See* sources cited *supra* notes 79–94, 114 and accompanying text.

117. If there is an agreement, the reimbursement should be undertaken in accordance with the agreement. *See* Noble v. Noble, 26 Ariz. App. 89, 93, 546 P.2d 358, 362 (1976). In *Noble*, although the title on the property was community property, the couple had held the property with the belief that under the community property laws as they

Scene IV – Part 4 – Using Separate Property To Purchase an Asset Titled in Joint Tenancy

(SP Spouse takes the same SP that was used to purchase the asset placed in CP in Part 3 of this scene and was the SP contribution to CP and to joint tenancy in Parts 1 and 2 of this scene, and again uses it to purchase an asset. This time SP Spouse places title to the asset in joint tenancy. Shortly after, the couple splits up, and the scene shifts to the courtroom.)

SP SPOUSE: Please, Arizona Law, instruct the community to reimburse me for my SP contribution to the purchase of the joint tenancy. I'm not disputing the fact that the property has a joint tenancy title and thus must be divided along with all CP and other joint tenancy property. You already indicated that neither SP contributions to an existing CP asset nor SP contributions to the purchase of that asset are reimbursable, so you must want to treat all such contributions as conceptually the same entity.

But you also already told us that joint tenancy is a form of separate property rather than CP,[118] so this title change is not really an SP to CP event. In addition, SP contributions to existing joint tenancy are reimbursable,[119] while SP contributions to existing CP are not,[120] confirming that SP contributed to a joint tenancy differs from SP contributed to the community. Therefore, an SP contribution that purchases and creates a joint tenancy must be the same as SP contributions to an existing joint tenancy and must differ from SP contributions to the purchase of CP. Because an SP contribution to joint tenancy purchase and creation is not meaningfully distinguishable from an SP contribution that benefits existing joint tenancy, there should be reimbursement.

ARIZONA LAW: No, sorry. Can you take it, Swarthmore?[121]

SWARTHMORE: (befuddled, bewildered silence)

ARIZONA LAW: Well, the answer is: (1) because the property was titled in joint tenancy, we will presume that a gift of joint tenancy has been made by the SP

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understood them, the SP spouse who had purchased the property with her SP was entitled to reimbursement for the amount contributed to the purchase. *See id.* That understanding was respected by the divorce distribution; the property was divided as CP, but the SP spouse was first given reimbursement for the SP she had used to purchase the property. *See id.* at 94, 546 P.2d at 363.

118. *See supra* note 96 and accompanying text.

119. *See supra* notes 97–98 and accompanying text.

120. *See supra* notes 79–93 and accompanying text.

121. This is a joke. The reference is to a very old quiz show called *College Bowl*.

owner to the other spouse.[122] Joint tenancy property is not CP, so we will not treat this as a gift to the community...[123]

CP SPOUSE (interrupting): But that isn't the right presumption. Both names on the title usually lead to a presumption of community,[124] and the distribution statute does not distinguish between joint tenancy and CP for divorce distribution purposes.[125] Thus there is no reason to presume for purposes of divorce characterization and distribution that this is anything other than a gift to the community. This situation should be treated no differently from the currently unreimbursable SP contribution of an asset to the community that occurs when a spouse places CP title on an asset traced to SP.[126]

ARIZONA LAW (cutting CP Spouse off): ...but nevertheless (2) the SP contribution to the creation of joint tenancy property is not reimbursable. Only SP contributions to existing joint tenancy property are reimbursable. SP used to purchase a joint tenancy asset is a contribution to creation rather than a contribution to existing joint tenancy, and is "clearly" an unreimbursable gift to the other spouse,[127] at least in the absence of agreement.[128]

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122. *See* Toth v. Toth, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997); Collier v. Collier, 73 Ariz. 405, 411, 242 P.2d 537, 540 (1952); Hatcher v. Hatcher, 188 Ariz. 154, 159, 933 P.2d 1222, 1227 (Ct. App. 1996); Valladee v. Valladee, 149 Ariz. 304, 308–09, 718 P.2d 206, 210–11 (Ct. App. 1986); Battiste v. Battiste, 135 Ariz. 470, 472, 662 P.2d 145, 147 (Ct. App. 1983).

123. *See Toth*, 190 Ariz. at 220, 946 P.2d at 902; *Collier*, 73 Ariz. at 411, 242 P.2d at 540; *Hatcher*, 188 Ariz. at 159, 933 P.2d at 1227; Whitmore v. Mitchell, 152 Ariz. 425, 427, 733 P.2d 310, 312 (Ct. App. 1987); *Valladee*, 149 Ariz. at 309, 718 P.2d at 211; *Battiste*, 135 Ariz. at 472, 662 P.2d at 147; Batesole v. Batesole, 24 Ariz. App. 83, 85–86, 535 P.2d 1314, 1316–17 (1975).

124. *See* Sommerfield v. Sommerfield, 121 Ariz. 575, 577–78, 592 P.2d 771, 773–74 (1979) ("[W]here title to real property is taken in the names of both husband and wife, even though the source of funds for the purchase of the property is separate property of one spouse, a presumption arises that the parties intended to own the property as community property." (citations omitted)).

125. *See* ARIZ. REV. STAT. § 25-318 (1998).

126. *See supra* notes 108–117 and accompanying text.

127. The "clearly" and the entire point shows up in *Valladee*:

> The trial court's reimbursement scheme *clearly* conflicts with the legal presumption of a gift to wife as a result of placing the properties in joint tenancy. The gift to the wife of an interest in the property *clearly* encompasses any monies spent in the past by husband in order to acquire it.

Valladee, 149 Ariz. at 310, 718 P.2d at 212 (emphasis added). *See also Toth*, 190 Ariz. at 220, 946 P.2d at 902; *Whitmore*, 152 Ariz. at 428, 733 P.2d at 313. It is possible to read *Toth* as having considered the argument that the SP spouse should be entitled to reimbursement for the worth of the property at the time it was placed in joint tenancy. *See Toth*, 190 Ariz. at 222, 224, 946 P.2d at 904, 906 (Moeller, J., dissenting). Since the marriage was very brief, that would have required a reimbursement of the full amount of the worth of the property. But the majority, without much analysis, rejected that result as inconsistent with the statutory requirement that joint tenancy be divided along with the community property at divorce. *See id.* In fact, however, the marital property statutes are silent concerning all issues of reimbursement.

SP SPOUSE: This makes no sense. You are drawing a distinction between a contribution of SP to joint tenancy which *is* the underlying asset (unreimbursable) and a contribution of SP that *contributes to* existing joint tenancy (reimbursable). That doesn't work.

CP SPOUSE: I agree. It is not sensible to allow the usual CP presumptions to control one contribution reimbursement decision but not the other. If the CP presumption of unreimbursable gift is appropriate for the issue of reimbursement for the asset itself, as you just said, that solution needs to be applied towards reimbursement of the subsequent contributions as well.

SP SPOUSE: No, the opposite result is correct. If subsequent contributions to joint tenancy are different from subsequent contributions to CP, and you say that they are different because you reimburse when it is joint tenancy, there is no room to conclude that the initial contribution to joint tenancy is the same as one to CP. This result not only seems inevitably inconsistent with something, but more important, it yields a silly result: if I spend $100,000 of my SP to create a new asset and place it in joint tenancy, none would be reimbursable, while if I take that same $100,000, spend $1000 to create the joint tenancy asset, and the other $99,000 on the already created joint tenancy asset, $99,000 would be reimbursable. For the reasons I explained when I took SP and gave it a CP title,[129] it isn't clear to me why I should be precluded from tracing and claiming the entire property as mine at divorce, so at a minimum I should be reimbursed. My argument is even stronger here. If I meant anything by taking my SP and putting it in joint tenancy, my goal was to make a gift to the other spouse that takes place only in the event I die while still married. The presumption that I made a gift of the entire investment that is redeemable without reimbursement in the event of divorce is unwarranted.[130]

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128. *See* Bowart v. Bowart, 128 Ariz. 331, 336–37, 625 P.2d 920, 924 (Ct. App. 1980). *Bowart* found that joint tenancy property purchased with the SP of one of the spouses was held by the couple with the understanding that the couple would split any profits after the SP spouse's investment had been reimbursed, and that the trial court's distribution of the property required the reimbursement. *See id.*

129. *See supra* notes 108–117 and accompanying text.

130. A presumption against reimbursement is to some extent curious from a contract perspective, because it presumes the largest rather than a smaller gift from the SP owner to the community. Presuming the largest gift possible is inconsistent with the idea behind the consideration rule. The requirement of bargained-for exchange for enforcement of a promise promotes the idea that people should not be held to substantial transfers unless there is good evidence they meant to do so. Consideration is good evidence that the actor was paid for doing the act in question and thus is more likely to have meant it, to be relied upon, and to be aware of the reliance. But consideration is often absent when an SP spouse re-titles SP in community property, joint tenancy, or some other form of joint title. True, one response is: "no consideration or bargain is needed when there is a fully delivered gift." The fully delivered gift rule is sensible; the completed delivery of a gift is powerful evidence that the giver was serious, that the recipient relied, and that the giver ought to know the recipient would rely. But the fully delivered gift rule simply restates the problem. What was the fully delivered gift? The full asset? Just the community or joint title characterization, a characterization worth plenty in its own right? Or, in the case of joint tenancy or community property with right of survivorship, a desire to give nothing other

ARIZONA LAW: Well, at least you are both unhappy.[131] We nevertheless stick with our rule that when married couples hold property in joint tenancy, the general laws of joint tenancy apply.[132] Although there is a general rule of joint tenancy calling for reimbursement for amounts spent for the benefit of an existing joint tenancy,[133] there is no comparable rule for amounts spent creating the joint tenancy.[134]

Scene IV – Part 5 –Separate Property Money in a Community Property or Joint Tenancy Bank Account

(This time, the SP Spouse, instead of buying property or contributing to an existing CP or joint tenancy asset, puts that same SP money into a bank account, and places title of that account in joint tenancy with right of survivorship. This is done by checking off a little box on the signature card. Both spouses have access to make withdrawals from the account. No other money has been put into or withdrawn from the joint tenancy account. The couple splits up and the scene shifts to the courtroom.)

CP SPOUSE: Please Arizona Law, characterize the account as either CP or joint tenancy, to be distributed as part of the community at divorce. The language of the divorce distribution statute appears to dictate[135] such a result. In addition, this result would be entirely consistent with the real property result: SP money that is turned into real property placed at the time of purchase in joint tenancy title is considered joint tenancy property for divorce division. While the money placed in the bank account may be traceable back to SP, the fact that SP money used to purchase joint tenancy real property is similarly traceable does not negate the result that the joint tenancy real property is divided like community property at divorce. And the result would be exactly

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than the ownership at death?

131. Neither spouse really has an incentive to point it out, but tracing back to the SP source of the joint tenancy makes the *Valladee* result of reimbursement for SP contributions to an ongoing joint tenancy yet none for SP creations of joint tenancy appear perverse. If distinctions are to be made between joint tenancy traceable to CP and joint tenancy traceable to SP, and between SP contributions to joint tenancy asset creation and SP contribution to an existing joint tenancy, a more sensible result might well be exactly the opposite: if an SP spouse places his or her SP in joint tenancy with his or her spouse, presume only a gift to take place at death, and reimburse for the SP value at the time of the title change in the event of a divorce (absent good evidence of other intent). Reimbursement for SP pre-death upkeep expenses, despite the "general joint tenancy rule," is less justifiable, because the contribution was made to an asset that SP spouse is trying to give only at death and thus is responsible for in an SP sense until death.

132. *See* cases cited *supra* note 96.

133. *See supra* text accompanying notes 96–104.

134. *See* Valladee v. Valladee, 149 Ariz. 304, 311, 718 P.2d 206, 213 (Ct. App. 1986). The creation of the joint tenancy is apparently presumed a gift in the absence of any consideration. *See* sources cited *supra* note 127.

135. ARIZ. REV. STAT. § 25-318(A) (1998) ("[The divorce court shall] divide the community, joint tenancy and other property held in common equitably...."). CP Spouse says "appears to dictate" because the statutes do not indicate one way or another whether tracing is permitted to overcome a title designation.

the same if the title on the real property were CP rather than joint tenancy: title requires a presumption of community property that is not overcome by tracing.

ARIZONA LAW: We hate banks. They complicate matters, because they have their own rules and regulations and, unlike a lot of other assets, always have a title card.[136] We have some problems with this, but we guess this is different, because it is in a bank.[137] There is no presumption from the title or the joint access; ordinary tracing rules apply for bank accounts.[138] So even though both spouses had spending access, if the money is all traceable back to SP Spouse, it belongs to SP Spouse, is not part of the marital property to be divided, and must go to the SP Spouse.[139] And, incidentally, the result would be exactly the same if the bank account title had been CP rather than joint tenancy.[140]

INTERMISSION

Let's use the intermission for a brief review. A quick recap of Act I reveals that the following results occur at divorce in the absence of express evidence to the contrary:

- CP contributed to an SP existing obligation is reimbursable to the community.[141]
- CP money used to purchase an asset that is then placed in SP title renders the asset a community asset.[142]
- SP contributions to CP existing obligations are not reimbursable.[143]
- SP contributions to existing joint tenancy obligations are reimbursable.[144]

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136. *See* Safley v. Bates, 26 Ariz. App. 318, 321–22, 548 P.2d 31, 33–34 (1976).

137. *See* Grant v. Grant, 119 Ariz. 470, 471–72, 581 P.2d 704, 705–06 (Ct. App. 1978) ("We have some problem with the present state of Arizona's law on the issue. We find it difficult to reason why there is a presumption of a gift when one spouse places separate real property in joint tenancy while there is no presumption of a gift when a spouse places separate personal property in the form of cash into a joint bank account. The general Arizona case law dealing with presumptions is confusing at best." (citation omitted)).

138. *See Safley*, 26 Ariz. App. at 321–22, 548 P.2d at 33–34. *See also* Bowart v. Bowart, 128 Ariz. 331, 335, 625 P.2d 920, 924 (Ct. App. 1980). In *Bowart*, SP funds were placed in a joint checking account and both spouses had authority to write checks on the account, but there was no presumption of community. *Bowart*, by the way, appears to ignore the presumption that all money in a commingled account is community, concluding that "sporadic and meager" community contributions to the account "did not render the entire household account community property." *Bowart*, 128 Ariz. at 335, 625 P.2d at 924 (citation omitted).

139. *See* O'Hair v. O'Hair, 109 Ariz. 236, 238–40, 508 P.2d 66, 68–70 (1973); *Grant*, 119 Ariz. at 472, 581 P.2d at 706; *Safley*, 26 Ariz. App. at 321–22, 548 P.2d at 33–34.

140. *See O'Hair*, 109 Ariz. at 238–40, 508 P.2d at 68–70; *Grant*, 119 Ariz. at 472, 581 P.2d at 706; *Safley*, 26 Ariz. App. at 321–22, 548 P.2d at 33–34.

141. *See supra* notes 71–78 and accompanying text.

142. *See supra* notes 71–78 and accompanying text.

143. *See supra* notes 79–93 and accompanying text.

144. *See supra* notes 97–98 and accompanying text.

- SP money used to purchase an item that is then placed in CP title is not reimbursable.[145]
- SP money used to purchase an item that is then placed in joint tenancy is not reimbursable.[146]
- SP money placed in a CP or joint tenancy bank account, if successfully traced, is SP despite the title designation on the account.[147]

ACT II: THE ROLE OF TITLE DURING MARRIAGE

The second act involves the possible influence of joint tenancy title in contrast to CP in an ongoing marriage. It explores management and control and creditor/debtor implications of the Act I conclusions that joint tenancy, rather than community property, may be a form of separate property to which the regular rules of joint tenancy apply.

Scene I – There is No Unilateral Severing of Community Property During a Marriage

(The couple purchases an asset with community funds during the marriage. They place title in CP. There are no contributions present. This time the couple non-acrimoniously stays married.)

OVEREXTENDED SPOUSE: Can I take my part of the community property, sever it, turn it into my separate property and perhaps pay off a separate property debt?

DEBT-FREE SPOUSE: Why would you want to do such a thing?

CREDITOR OF OVEREXTENDED SPOUSE: Hey, it was our idea. We want to be able to get at Overextended Spouse's portion of the CP to satisfy SP obligations.

ARIZONA LAW: You've got to be kidding. One of the basic premises of the Arizona community/separate property structure is that one spouse cannot sever her or his community share and creditors cannot force such a result.[148] In order to protect the undivided ownership interests of the debt-free spouse, attempts by the overextended spouse or by creditors to sever community property are not allowed.[149] Jointly agreed-upon transmutations are permissible,[150] but the undivided one-half ownership of CP precludes

145. *See supra* notes 108–117 and accompanying text.

146. *See supra* notes 118–127 and accompanying text.

147. *See supra* notes 128–134 and accompanying text.

148. *See* ARIZ. REV. STAT. §§ 25-214, 25-215 (1998). *See generally* Schilling v. Embree, 118 Ariz. 236, 238–39, 575 P.2d 1262, 1264–65 (Ct. App. 1978) (concluding if a debt is not a community debt that no community property is available); Howe v. Haught, 11 Ariz. App. 98, 101, 462 P.2d 395, 398 (1970) (same).

149. *See* ARIZ. REV. STAT. § 25-215 (1998).

150. *See* Hrudka v. Hrudka, 186 Ariz. 84, 91, 919 P.2d 179, 186 (Ct. App. 1995) (indicating the standard community property rule that transmutation agreements that change the characterization of property from CP to SP and SP to CP, including prenuptial agreements and agreements during the marriage, are generally enforceable); Williams v. Williams, 166 Ariz. 260, 262, 801 P.2d 495, 497 (Ct. App. 1990) (same). *See also* ARIZ. REV. STAT. § 25-203(A) (1998) (establishing that premarital agreements concerning any

unilateral efforts to sever. Attempts by creditors to foreclose on a CP asset are handled as part of the general Arizona CP/SP debt rule: if it is a community debt, community assets are available, plus the SP of the debtor spouse; if it is not a community debt, community assets are not available.[151] There is no partition, not even for torts.[152] There is a statutorily authorized partition system of sorts for premarital debts,[153] but that is to avoid marital bankruptcy behavior not relevant here. So creditors, if it is an SP debt, you lose. You cannot get at the debt-incurring spouse's "share" of the CP, as there really is no such thing. But there is a bit of a quid pro quo; if it is a community debt, you get complete access to not just the debtor spouse's share but all CP, subject to joinder rules.[154]

Scene 2 – Can Joint Tenancy Property Held by a Married Couple Be Severed?

(This time the couple purchases the property with community funds during the marriage and holds the property in joint tenancy. They are still married.)

OVEREXTENDED SPOUSE: Can I take my share of the joint tenancy property, sever it, turn half of it into my separate property, and perhaps pay off a separate property debt? According to the joint tenancy rules, I am allowed to sever and turn it into a tenancy in common, and I will then own half of that.[155] After all,

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matter are generally enforceable); *In re* Estate of Harber, 104 Ariz. 79, 87, 449 P.2d 7, 15 (1969) (permitting spouses to convey real and personal SP to the community or CP to the other spouse as SP); Arizona Cent. Credit Union v. Holden, 6 Ariz. App. 310, 313, 432 P.2d 276, 279 (1967) (permitting spouses to agree to convey CP and SP interests to each other). Transmutations cannot, of course, be used to defeat the rights of creditors. *See* Lincoln Fire Ins. Co. v. Barnes, 53 Ariz. 264, 268, 88 P.2d 533, 534 (1939). *But see* Elia v. Pifer, 194 Ariz. 74, 83–84, 977 P.2d 796, 805–06 (Ct. App. 1998) (indicating tentatively that a transmutation agreement eliminating CP does preclude subsequent creditors from seeking what would be CP but for the transmutation).

151. *See* ARIZ. REV. STAT. § 25-215 (1998).

152. *See Schilling*, 118 Ariz. at 238–39, 575 P.2d at 1264–65 (concluding if a debt is not a community debt then no community property is available); *Howe*, 11 Ariz. App. at 101, 462 P.2d at 398 (same). Both cases indicate that the Arizona structure is all-or-nothing; for CP torts, all CP is available, and for SP torts, no CP is available. For a contrasting rule concerning community liability for the torts committed by a spouse, see generally *DeElche v. Jacobsen*, 622 P.2d 835, 840 (Wash. 1980) (establishing a limited partition system for SP torts not done for community benefit).

153. See *supra* note 33 and accompanying text concerning Arizona Revised Statute § 25-215(B), which effectuates a partition system of sorts for premarital SP liabilities.

154. Arizona law indicates that both spouses must exercise management and control for real property transactions, including the encumbering of an interest in real property. *See* ARIZ. REV. STAT. § 25-214 (1998). Consequently, if there is no joinder concerning the transaction in question, community real property cannot be used to satisfy the obligation.

155. *See* SINGER, *supra* note 25, at 710.

> [A] joint tenant who transfers her property interest can destroy the right of survivorship of her fellow owners. For example, if *A* and *B* own property as joint tenants, each owner has the right to obtain full ownership of the property when the other cotenant dies (the right of

Arizona Law has emphatically stated that joint tenancy is a form of SP and is different from CP.[156]

CREDITOR OF OVEREXTENDED SPOUSE: Hey, that's a good idea. We want to get at overextended spouse's portion of the joint tenancy property to satisfy overextended spouse's SP obligation. We ought to be able to force a severing and get at overextended spouse's ownership interest in the resulting tenancy in common.

DEBT-FREE SPOUSE: What? You couldn't get at this asset if it were CP.[157] Why should you get at it just because we designated that at death it should all pass outright to the surviving spouse? It should be presumed community property because it was acquired during the community.[158] It should be presumed community property because it was purchased with community funds.[159] It should be presumed community property because both of our names are on the title.[160] It should be presumed community property because at divorce it would be divided and distributed as marital property, not separate property.[161] If by some odd chance severing is permitted, the severed portion of Overextended Spouse should still be presumed community property rather than SP tenancy in common because the severed ownerships were acquired during the marriage.[162] Thus the severed portion should be characterized as CP and be unavailable for SP debts.

OVEREXTENDED SPOUSE: Don't be so hasty. The community could benefit, too. If joint tenancy is really a form of separate property, it may be unavailable in full to satisfy community debts. True, a creditor of the community may be able to get access to the SP of the debtor spouse if there is not enough CP around to satisfy the obligation,[163] but at the very least the joint tenancy

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survivorship). If *A* sells her one-half undivided interest to *C*, however, the joint tenancy is *severed*, and *B*'s right of survivorship is destroyed. The result is that *B* and *C* will own the property as tenants in common.

Id. (emphasis in original).

156. *See* Toth v. Toth, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997) ("Joint tenancy property is separate, not community, property...." (citations omitted)); Becchelli v. Becchelli, 109 Ariz. 229, 234, 508 P.2d 59, 64 (1973); Collier v. Collier, 73 Ariz. 405, 411, 242 P.2d 537, 540 (1952); Valladee v. Valladee, 149 Ariz. 304, 309, 718 P.2d 206, 211 (Ct. App. 1986) (reaffirming the Arizona rule that "the legal consequence of holding property jointly is that each spouse takes an undivided *separate property* interest in one-half of the property" (emphasis in original) (citations omitted)).

157. *See* ARIZ. REV. STAT. § 25-215(A) (1998) (CP not liable for SP debts).

158. See *supra* notes 113–114 and accompanying text concerning the presumption that assets acquired during the marriage are CP.

159. *See* sources cited *supra* note 5.

160. See *supra* note 72 and accompanying text concerning presumption of CP if both names are on the title.

161. *See* ARIZ. REV. STAT. § 25-318(A) (1998); *supra* notes 25, 28 and accompanying text.

162. *See supra* notes 23–28 and accompanying text.

163. *See* ARIZ. REV. STAT. § 25-215(D) (1998) (establishing that community debts and obligations are satisfied "first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation").

property could be severed, and if the severed portions are SP, that would make the non-debtor spouse's SP share unavailable for community debts.[164]

CREDITORS: Hey, we don't like the looks of that, although we really like being able to get at the joint tenancy assets to satisfy SP debts. So our position on this issue can be expected to flip-flop, depending on the situation. If we are a community creditor, we will argue that the joint tenancy property is all really CP, to be able to get at all of it. If it turns out there was no joinder for the asset in question and joinder is required to make the asset available for satisfaction of a community obligation,[165] we will argue that the joint tenancy property is SP, to get a part of that which due to the joinder requirement we would not be able to get any were it CP. If we are an SP creditor, we will argue that joint tenancy is SP, to get a part of what we would not get if it were CP.

ARIZONA LAW (A monologue in a dream, struggling and not speaking to the issue):[166] So do we really mean it when we say that the regular joint tenancy rules apply to joint tenancy property held by a married couple? In true joint tenancy, when severance is desired by one of the tenants or is sought by a creditor, the result is tenancy in common.[167] One of the features of joint tenancy is that any tenant can dissolve the joint tenancy and turn it into a tenancy in common, with each share encumberable.[168] Is this the result we want for marital joint tenancy property?

Do we really mean to say that during the marriage, joint tenancy property held by a married couple is truly a form of SP of each spouse?[169] If so, portions of it can presumably be disposed of or encumbered without joinder or the management and control influence of other spouse. In addition, a creditor could get at portions for a separate property debt, and portions might be

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164. *See id.*

165. ARIZ. REV. STAT. § 25-214(C) (1998) (establishing that joinder, meaning a management and control decision by both spouses, is required for the sale, purchase, or encumbering of real property, and for guaranty, indemnity, and suretyship transactions).

166. In other words, this monologue reflects the Author's attempt to apply the conflicting case law statements and statutes to the problem of how marital joint tenancy property should be treated for creditor and management and control matters.

167. *See* BLUMBERG, *supra* note 19, at 192; SINGER, *supra* note 25, at 710; Bruch, *supra* note 21, at 835; *supra* text accompanying note 25.

168. *See* BLUMBERG, *supra* note 19, at 192; Bruch, *supra* note 21, at 835.

169. *See* Toth v. Toth, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997).

> From the 1973 modification, one could argue that the legislature abrogated the rule that joint tenancy property is separate property. But whether property is treated as separate or community has consequences beyond dissolution, particularly with respect to tax liability and the rights of creditors.... The statute does not provide that marital joint tenancy property is now, in all respects, community property. It only allows it to be treated as community property upon dissolution. Joint tenancy property remains separate property, but is excepted from the requirement that separate property be assigned to each spouse separately upon dissolution.

Id. See also ARIZ. REV. STAT. § 25-318(A) (1998).

unavailable for a community debt. If severed, what remains would be tenancy in common property, distributed indistinguishably from community property or joint tenancy property upon divorce, and treated rather similarly to community property and differently from joint tenancy property at death. But this is neither divorce nor death.

We aren't sure what we mean. In *Toth*, *Baldwin's Estate*, *Collier*, *Valladee*, and other cases we seem to stress that joint tenancy is different from CP and is to be handled at death, at divorce, and for reimbursement matters using joint tenancy rules that differ in some respects from CP rules.[170] In *Baldwin's Estate* and its progeny, for example, we seem to insist on greater evidence than just the language in the deed to overcome the presumption of community property, and thus require additional evidence reflecting an understanding of the change to joint tenancy.[171] But *Baldwin's Estate* concerns what to do at death. Similarly, *Collier*, *Valladee* and their progeny insist that joint tenancy held by husband and wife be treated not like CP but like joint tenancy, even if it means reimbursement for contributions that would not be reimbursed if the property were CP.[172] But *Valladee*, *Toth*, *Collier*, and *Baldwin's Estate* were not focused on and thus did not address the possible undermining of rules concerning management and control and community protection from creditors.

Community property with right of survivorship may solve some of these matters for couples who select that title, but it also complicates matters. It allows couples to designate that they want community treatment during lifetime, with right of survivorship at the death of the first spouse.[173] If joint tenancy with right of survivorship held by married couples is something different from community property with right of survivorship, the perhaps inevitable conclusion is that joint tenancy must be a form of SP.

Longstanding presumptions also take us in a confusing direction. Using the language of presumptions, all property with both spouses' names on the title is presumed community property, and this presumption cannot be overcome by evidence of tracing.[174] Accordingly, should joint tenancy property be

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170. *See In re* Baldwin's Estate, 50 Ariz. 265, 273–75, 71 P.2d 791, 794–95 (1937); *supra* note 104 and accompanying text.

171. *See Baldwin's Estate*, 50 Ariz. at 273–75, 71 P.2d at 794–95. *See also* McClennen v. McClennen, 11 Ariz. App. 395, 398, 464 P.2d 982, 985 (1970). This is language of transmutation, the same standard that applies to transmutation of CP to SP generally. *See In re* Estate of Harber, 104 Ariz. 79, 87, 449 P.2d 7, 15 (1969) (requiring husband to prove by clear and convincing evidence that a CP to SP transmutation agreement is valid); Bender v. Bender, 123 Ariz. 90, 92–93, 597 P.2d 993, 995–96 (Ct. App. 1979) (requiring contemporaneous conduct indicating the spouse's understanding that he has given up a CP interest, but probably incorrectly concluding that evidence is present in a disclaimer deed).

172. *See supra* notes 96–98 and accompanying text

173. *See supra* text accompanying notes 45–46.

174. *See* Cooper v. Cooper, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981) ("'[W]here title to real property is taken in the names of both husband and wife, even though the source of funds for the purchase of the property is separate property of one

presumed community property, with no severing allowed until the party desiring to sever can prove the property was truly joint tenancy property? Perhaps the approach used in *Baldwin's Estate* concerning presumptions at death[175] should be applied during marriage as well: require sufficient non-deed evidence that the spouses understood at the time the property was designated joint tenancy property that they were giving up a CP interest, including the right to prevent severance.

Such an evidentiary requirement would be problematic, however, in part because the title may indicate "joint tenancy with right of survivorship, *and not community property*."[176] A rule that would presume community property status because of the joint title and ignore the "not community property" part of it seems more than a little odd. In addition, because the property is either joint tenancy or community property,[177] should the presumption and evidentiary burden concerning the understanding of the spouses about lifetime events apply at death?[178] A presumption of community property for treatment at death essentially requires evidence of an enforceable transmutation agreement as a prerequisite for a valid joint tenancy.[179] If steadfastly enforced, it would invalidate many joint tenancy arrangements even at the death of one of the spouses, as many spouses will be unaware of the non-death aspects of joint tenancy.

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spouse, a presumption arises that the parties intended to own the property as community property.'" (quoting Sommerfield v. Sommerfield, 121 Ariz. 575, 577–78, 592 P.2d 771, 773–74 (1979))).

175. *See Baldwin's Estate*, 50 Ariz. at 273–75, 71 P.2d at 794–95 (stating that at death joint tenancy marital property is presumed community property and joint tenancy proponent must overcome the presumption with more evidence than just the language on the deed). *See also supra* notes 53, 176 and accompanying text.

176. Valladee v. Valladee, 149 Ariz. 304, 309, 718 P.2d 206, 211 (Ct. App. 1986).

> Further, the parties' intention in the case at hand is made clear by the language of the joint tenancy deeds themselves, which contain the usual 'boilerplate' language, universally employed in Arizona joint tenancy deeds, that the parties were taking the properties as joint tenants with the right of survivorship, and not as community property or as tenants in common....

Id. See also Collier v. Collier, 73 Ariz. 405, 410, 42 P.2d 537, 540 (1952) (describing joint tenancy deed reciting that the conveyance was to husband and wife "as joint tenants Grantees, not as tenants in common and not as a community property estate, but as joint tenants with right of survivorship").

177. *See* Toth v. Toth, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997); *Baldwin's Estate*, 50 Ariz. at 273–75, 71 P.2d at 794–95.

178. In other words, will a surviving spouse trying to prove an asset was joint tenancy rather than community property have to prove not only that the deceased spouse understood he or she was giving up the ability to give away half the asset at death, but also that the deceased spouse understood he or she was giving up the ability to assert undivided one-half ownership during lifetime events? This latter understanding is extremely hard to prove, so the requirement has the potential to force a CP rather than joint tenancy result at death when the treatment of joint tenancy property held by a married couple is contested.

179. *See supra* note 171 and accompanying text.

Furthermore, title is not always the basis for a presumption. A single name on a title is not sufficient to presume SP,[180] for example, and joint title on a bank account does not preclude the SP spouse from proving the SP nature of funds in the account by tracing.[181] So should joint tenancy property that is traceable to SP be treated as SP and therefore be severable, while joint tenancy that is traceable to CP be treated as CP and not severable?

The tracing result, too, would be inconsistent with many aspects of the treatment of Arizona marital property. It does not conform with the presumption that once title has been changed to joint ownership on real property, tracing is not sufficient to overcome the presumption of community property.[182] It is inconsistent with the *Valladee* rule that there is no reimbursement to the SP owner who purchased with SP (in other words, tracing the property itself for purposes of reimbursement is not permitted).[183] It is also inconsistent with the divorce distribution statute,[184] which divides joint tenancy property as marital property without regard to tracing. In addition, the decisions that treat joint tenancy as a form of SP do not differentiate between treatment at divorce for joint tenancy traceable to SP and joint tenancy traceable to CP; joint tenancy is treated as a form of SP irrespective of the original source.[185]

The general community property management and control rules suggest both that a spouse should not be permitted to defeat management and control rules and that a creditor should not be entitled to more, or less, simply because one or both spouses may have tried to use title to avoid probate at the death of the first spouse. But this suggestion is just another way of posing the question: for lifetime events such as reimbursement, severing, and availability to creditors, is this community property, with its management and control rules, or has it been transmuted to separate property?

(curtain)

(As the crowd shuffles away, a giant scoreboard reflects the cumulative Arizona result.)

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180. *See* Sommerfield v. Sommerfield, 121 Ariz. 575, 577–78, 592 P.2d 771, 773–74 (1979); Armer v. Armer, 105 Ariz. 284, 288, 463 P.2d 818, 822 (1970); Bowart v. Bowart, 128 Ariz. 331, 336–37, 625 P.2d 920, 924 (Ct. App. 1980).

181. *See* O'Hair v. O'Hair, 109 Ariz. 236, 238–40, 508 P.2d 66, 68–70 (1973); Safley v. Bates, 26 Ariz. App. 318, 321–22, 548 P.2d 31, 33–34 (1976).

182. *See supra* notes 108–111 and accompanying text.

183. *See supra* notes 118–127 and accompanying text.

184. *See* ARIZ. REV. STAT. § 25-318(A) (1998).

185. *See supra* note 104 and accompanying text.

CP CONTRIBUTIONS TO SP: Presumed reimbursable; tracing may indicate that the asset is SP but has no influence on reimbursement

SP CONTRIBUTIONS TO CP: Presumed unreimbursable gift; tracing CP asset to original source has no influence on reimbursement decision[186]

SP CONTRIBUTIONS TO "ONGOING" JTWRS: Presumed reimbursable; tracing JTWRS asset to original source has no influence on reimbursement decision

CP FUNDS PURCHASE ASSET, TITLE IN NAME OF ONE SPOUSE ALONE: Presumed CP because acquired during marriage; title in one name not presumptive of SP; tracing to CP=CP unless clear and convincing evidence otherwise

SP FUNDS PURCHASE ASSET, TITLE PLACED IN CP: SP funds presumed not reimbursable; asset is presumed CP; tracing does not overcome the presumption

SP FUNDS PURCHASE ASSET, TITLE IN JTWRS: SP funds not reimbursable; JTWRS is presumed SP gift to other spouse; tracing does not overcome the presumption

SP FUNDS PURCHASE ASSET, NO TITLE CHOSEN, OR TITLE STAYS IN SP SPOUSE'S NAME: Title or lack thereof not presumptive; asset is presumed CP because acquired during marriage; tracing overcomes presumption and asset characterized as SP

CP FUNDS PLACED IN BANK ACCOUNT, TITLE AND ACCESS IN NAME OF ONLY ONE SPOUSE: Funds traced to CP=CP; no presumption from title

SP FUNDS PLACED IN BANK ACCOUNT WITH CP TITLE, BOTH SPOUSES HAVE ACCESS: Funds traced to SP=SP; tracing overcomes any presumption of CP because of title

SP FUNDS PLACED IN BANK ACCOUNT WITH JTWRS TITLE, BOTH SPOUSES HAVE ACCESS: Funds traced to SP=SP; tracing overcomes any presumption of gift to other spouse because of title

SP FUNDS PLACED IN BANK ACCOUNT WITH ONLY SP SPOUSE'S NAME ON TITLE, ONLY SP SPOUSE HAS ACCESS: Funds traced to SP=SP; no presumption from title

CP CANNOT BE SEVERED DURING MARRIAGE without agreement of both spouses; creditors cannot get debtor spouse's "share" of CP to satisfy SP debt, but get all CP to satisfy CP debt

SP "SEVERING" not an issue; SP managed and controlled by SP owner; SP available to creditors for all debts incurred by SP spouse; SP unavailable for CP debts incurred by other spouse

JTWRS SEVERABLE DURING MARRIAGE? Uncertain if creditors can get debt-incurring spouse's "share" of JTWRS to satisfy SP debt, and if creditors are precluded from non-debt incurring spouse's "share" for CP debts. Uncertain if tracing JTWRS asset matters.

CP AT DIVORCE is marital property divided 50-50 although not necessarily in kind

SP AT DIVORCE is not marital property to be divided; SP must go to the SP owner

JTWRS AT DIVORCE is marital property divided 50-50 although not necessarily in kind

CP AT DEATH is divided, ½ outright to surviving spouse, ½ to dead spouse's estate

SP AT DEATH of one spouse is not divided and goes all to dead spouse's estate

JTWRS & CPWRS AT DEATH of one spouse are not divided and go outright in full to the surviving spouse, not through the estate

186. In other words, the fact that the SP contribution was directed toward CP traceable to SP does not influence the rule, once the property toward which the SP contribution was directed is characterized as CP. *See* Malecky v. Malecky, 148 Ariz. 121, 123, 713 P.2d 322, 324 (Ct. App. 1985) (noting that trial court concluded the asset was CP and applied the rule presuming unreimbursable gift of SP).

IV. THE INEVITABLE UNFAVORABLE REVIEW AND THREE PROPOSED COMMUNITY PROPERTY PRINCIPLES

There is no need for symmetric treatment just for symmetry's sake. But these widely varied results seem inconsistent with what couples either probably had in mind or would accept as a default rule if they did not have any of it in mind, and do not seem to further any conceivable purpose of the community property rules (other than perhaps to maximize legal system and judicial involvement). The rules treat marital joint tenancy property differently from community property at divorce, despite a statute that seemingly mandates identical treatment and the fact that a couple's decision to select joint tenancy rather than community property had in all likelihood nothing to do with divorce. The current results meaningfully distinguish between, for example, a $100,000 SP investment that is placed in joint tenancy title and a $100,000 SP investment in a marital joint tenancy that already exists, reimbursing for one and not the other. The results also treat $100,000 of SP invested in a joint bank account differently from $100,000 of SP invested in a jointly titled piece of real property, allowing tracing for one and not the other. Equally troubling, the justifications for such treatment offered in the cases appear to support the conclusion that the differing treatment applicable to joint tenancy property may defeat community property management and control and creditor limits as well.[187] The distinctions are especially problematic considering that there is no strong evidence that such routine investment decisions are usually, or even occasionally, made by spouses with an understanding that the choice of investment or title form could make a significant difference in the event of divorce.[188]

These distinctions seem more than purposeless; they undermine the marital property system. Senseless distinctions distort rather than facilitate use of marital assets during a marriage and distribution of those assets at divorce and death. If the rules are at least partially for the benefit of marital partners and influence their during-marriage behavior,[189] the rules should effectuate as closely

187. *See supra* Part III.

188. *See supra* text accompanying notes 21–22, 48–53.

189. There are many different positions one could take concerning the true purposes and goals of a marital property regime, ranging from promotion of sharing principles in marriage to affirmative wealth distribution to a default need to have some system. *See generally* BLUMBERG, *supra* note 19, at 28–53 (discussing many different views of the purposes of marital property laws, particularly divorce rules); June Carbone & Margaret Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 953–56 (1991) (identifying several different underlying bases for divorce rules, especially alimony); Susan Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977) (identifying sharing principles as an underlying basis for community property laws). Under any view or combination of views, however, differing treatment of similarly situated assets, undertaken without any specific goal in mind, is undesirable. The complete set of distinctions I have pointed out in this Article are not justifiable by application of any particular theory of marital property, and the case law and statutes offer no such justification. The purpose of this Article is only to identify the distinctions and propose some clean-up for the current structure.

as possible the wishes of the marital partners. In any event, marital property rules should not pose traps for unwary married couples.

In order to impose a more consistent structure on the current regime, and to effectuate results that are a little closer to the likely understanding (if any) of married couples, I propose that marital property rules be administered in a manner mindful of the following three general community property principles:

> *Principle I: Irrespective of the form of title, all property not characterized as one spouse's SP should be treated identically at divorce and during marriage.*

Unless the asset in question is determined to be the SP of only one spouse,[190] it is marital property, owned in some way by both of the spouses irrespective of the form of title chosen. The title designations made by married couples concerning such property, often geared only toward what will happen in the event of the death of one of the spouses, should not be presumptively determinative of matters unconnected to death, such as distribution at divorce and creditor/community relationships. For all property not characterized as the SP of one of the spouses, if the judicial system comes along and uses title as a decision tool concerning reimbursement, management and control, and creditor relationships, the result will be some combination of: (a) a trap; (b) a distortion for creditors; (c) a distortion of decisions during marriage requiring a trade between survivorship on the one hand and divorce distribution and management and control considerations on the other;[191] or (d) at worst an opportunity for fraud on the part of one spouse who is aware of the effect of title choices when the other spouse is not aware. This situation is easily avoided by treating all property not characterized as the SP of one of the spouses in the same manner—give it all CP treatment.

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190. What I mean here by "SP of only one spouse" is all property that must entirely go to the SP owner. *See* ARIZ. REV. STAT. § 25-318(A) (1998) (requiring all SP to be distributed at divorce to the SP owner). Joint tenancy and other forms of co-ownership under this definition are not the SP of only one spouse, as they are to be divided between the spouses at divorce. *See id.*

191. A knowing selection of a right of survivorship provision, for example, is by definition made in anticipation of what will happen upon the death of one of the spouses. It is also possible, of course, that couples select (or end up with) a right of survivorship provision without any particular understanding of what it means and what its effect may be. In either event, to take that selection and use it as the sole basis for determining matters raised by divorce or during an ongoing marriage is baseless. It takes a selection made for a completely different reason or for no articulable reason at all and uses it as the decision tool. Such a result is no more supportable or helpful than treating assets differently during a marriage or at divorce based on the color choices made by the spouses concerning the asset. Neither the decision concerning color nor the decision to choose right of survivorship reveal any intent concerning how a couple anticipates distribution at divorce.

Principle II: A particular form of title chosen by a spouse is only weak evidence concerning whether tracing is sufficient to overcome a presumption that an asset is community property and concerning whether reimbursement to an SP contributor is appropriate.

The form of title is not particularly powerful evidence concerning how the parties think an asset will be treated at divorce.[192] While title changes from separate property to some joint form of title may signal the SP owner's decision to include the asset in the category of marital assets used by the community, relying too heavily on the form of title can work fraud on the community,[193] and may produce distorted, unintended results. Decisions concerning whether to characterize property as SP based on tracing, and whether to reimburse an SP contributor for contributions to the marital community, should not be hinged to the title form in which the asset is held.

Principle III: Characterization and reimbursement rules should not vary depending upon the nature of an asset.

A change in the form or nature of an asset, e.g., real property, money, stocks, bonds, personal property, should not explicitly or implicitly result in a change in characterization.[194] Such a change similarly should not result in a change concerning whether to reimburse a contributor to the asset. There is little reason to distinguish between SP that is spent on something with an affirmative joint title and SP that either sits unspent in a joint account or is spent on something for which there is no official title customarily designated. Decisions by spouses to

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192. The presumptions concerning joint title appear to be premised on the idea that the joint forms of title "appear to evidence an *agreement of the parties* to hold in that form." BLUMBERG, *supra* note 19, at 183 (emphasis in original). This premise leads to the question of whether the selection of a particular joint title is particularly powerful evidence of agreement concerning divorce distribution matters and treatment of property during marriage. My proposition is that a title selected either for an at-death result or without any understanding of the during marriage or at divorce effects is, at best, weak evidence of agreement of the parties concerning the treatment of the property.

193. This antifraud protection is a possible basis for the "nonpresumption" that title placed in one spouse's name is not sufficient evidence to demonstrate a CP to SP transmutation. *See id.* at 182–83 ("It is necessarily a basic principle of community property law that a spouse may not appropriate community property to himself by placing title in his name alone.").

194. This is a longstanding community property principle. In *Principles of Community Property*, the authors trace the history of the rule that when separate property is used during a marriage to acquire other property, the newly acquired property is properly characterized as separate. *See* WILLIAM DEFUNIAK & MICHAEL VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 180–85 (2d ed. 1971). "This unquestionably was a well understood feature of the community property system in Spain from the time of the introduction of that system by the Visigoths (West Goths), for the same feature appears in Visigothic customs and laws in other parts of Europe." *Id.* at 181. The authors also identify that the same concept has always applied for community property. "There was no question in the Spanish law, of course, that upon the acquisition or purchase of other property through the use of community property, the property so acquired or purchased was also community property...." *Id.* at 182.

invest in a particular way or form[195] likely are made without thought to how the particular form in which the new asset is held will influence characterization and reimbursement issues arising at divorce. Such investment form decisions should not turn out years later to have been the impetus for a particular distribution or reimbursement result at divorce. To the extent that people become aware of the varied treatment, spouses may respond to the variances by making pointlessly distorted, inefficient, or perverse decisions concerning SP and CP assets.

V. APPLICATION OF THE PRINCIPLES WOULD YIELD SIGNIFICANT, WORTHWHILE CHANGES

These principles are fairly straightforward, and do not propose anything remarkably new. They are consistent with and make some use of the current vague, nonstatutory presumption that an asset is presumed community property when both husband and wife are on the title.[196] They also make use of the longstanding idea that community or separate characterization of property should not change simply because the asset changes form.[197]

The principles, however, yield the following conclusions concerning community property, community property with right of survivorship, joint tenancy with right of survivorship held by a married couple, jointly titled bank accounts, and SP contributions to such property:

- For purposes of all events prior to the death of one of the spouses, including divorce distribution, reimbursements, and management and control matters, distinctions should not be made between assets with CP, joint tenancy, and community property with right of survivorship title. They should all be given CP treatment. Community property with right of survivorship and marital joint tenancy with right of survivorship property should be presumed to be the same thing and treated the same way.
- Characterization decisions should be made by assessing whether an asset is an individual spouse's SP or is instead some form of jointly held marital property.
- CP management and control and creditor relationship rules should apply to all "non-SP" assets irrespective of title.
- The reimbursement and tracing rules used at divorce, which ultimately depend on consistent decisions about whether an SP contributor is entitled to reimbursement for SP contributions to the marital community, should be consistently applied using the current Arizona presumption that SP contributions to CP are presumed to be unreimbursable gifts to the

195. For example, using SP or CP to buy real property, to buy a vacation, to pay for improvements to CP, to generate interest in a CD, or to keep a cash flow in a bank account.

196. *See supra* notes 113–114, and accompanying text. California by statute requires a presumption of community property for joint tenancy titled property. *See* CAL. FAM. CODE § 2581 (West 1994).

197. *See supra* note 194 and accompanying text.

community. The reimbursement and tracing rules used at divorce should not vary depending on title or by investment type, so current distinctions between jointly titled real property, bank accounts, and single or nontitled assets should be eliminated.

- The bank account rule should be changed to conform with the presumption for non-liquid, jointly-titled assets that tracing is not sufficient to obtain SP characterization or reimbursement.
- CP contributions to SP should still be presumed reimbursable despite inconsistency with the rule concerning SP contributions to CP.
- At death, the right of survivorship should be respected for all property titled "community property with right of survivorship" and "joint tenancy with right of survivorship," but either spouse should be entitled to revoke the survivorship feature while both spouses are still alive.

A. The Explanations Behind the Conclusions

1. Characterization Should Be Either an Individual Spouse's Separate Property or "Non-Separate Property" Marital Assets To Be Treated as Community Property

For all non-death matters, all property held by a married couple should be characterized as either the separate property of one of the spouses or "non-SP" marital property.[198] All "non-SP" marital assets should be treated as community property irrespective of title.[199] Doing so will effectuate consistent treatment of marital property, avoid placing undue emphasis on title, and avoid different treatment depending on the choice of investment.

All property that is not characterized as one spouse's SP is some kind of marital property. The form of joint title in which the property may be held is not relevant concerning management and control, creditor relationships, and reimbursement at divorce issues. Right of survivorship and the decedent's intent concerning right of survivorship are not germane prior to the death, so the question is whether the form of joint title (be it joint tenancy, tenancy in common, community property, community property with right of survivorship, or husband and wife as husband and wife) should play a determinative role concerning severance, other management and control decisions during marriage, and divorce-related distribution and reimbursement decisions. The answer is no. For all assets not characterized as the SP of one of the spouses, the form of title is not a significant piece of information.

Title is not powerful evidence concerning the desires of the couple for treatment of the property during the lifetime of the couple. As the interplay demonstrates, many choices by a married couple concerning which form of joint

198. *See supra* note 190 and accompanying text.

199. This assumes the absence of sufficient evidence indicating a different result was intended by the particular title designation or asset form chosen. If there is such evidence, the treatment should be as the evidence indicates.

title in which to hold property signify nothing concerning lifetime marital property-related events.[200] In the absence of specific indications by a couple concerning their intent associated with a particular title, married couples do not appear to hold assets in joint tenancy or other non-CP joint title to obtain a different result from the CP result for distribution of the property and contributions to it in the event of divorce, or to change management and control and creditor dealings. It is not likely when one or both of the spouses select a particular joint title that the couples anticipate that the form of title chosen will affect treatment of the asset at divorce or during the marriage. If there is any intent, joint tenancy is likely to be selected with a focus on death and assumption of a continuing marriage.

When a court imposes non-death-event differences between CP and joint tenancy held by a married couple, the rules, rather than facilitating a comfortable marital relationship, turn into a trap. Such a result is highly undesirable. Among other reasons to avoid assigning significance where it is not warranted, when the judicial system imposes distinctions without purposes, citizens may come to view the legal system as an elitist, unresponsive, destructive Byzantine labyrinth rather than a system designed to help us all get along with each other.

Treating as community property all assets not characterized as the SP of one of the spouses avoids trapping couples into unintended effects of title choices. A presumption is a decent, simple, administrable way to avoid the trap. It sets the default at the result consistent with the most likely desires of the spouses who acted without providing evidence of their goals, and gives those who do intend a different result the opportunity to provide evidence to overcome the presumption.[201] Those who actually do contemplate matters and want a different result concerning distribution at divorce, contribution reimbursement, management and control, creditor relationships, and severance, are free to achieve that result by providing evidence of such a transmutation.[202] Requiring those who want something a bit different to provide evidence concerning their wants is not particularly intrusive compared with assuming on the basis of a title choice that the couple had something in mind when in fact they did not.

When the only evidence present is the couple's decision concerning a choice between various forms of joint title, the default should be set to avoid traps and senseless distinctions. Accordingly, the default should approximate the reality that spouses do not intend, by selecting joint tenancy, to preserve any distinction

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200. *See supra* text accompanying notes 48–62. *See also supra* notes 21–22 and accompanying text.

201. The traps occur at the time a spouse designates the title. The effect of the traps, however, are often not evident until the time of divorce, when the differences matter but advice comes too late. Those spouses who do understand the at-divorce significance of title choices will not fall into the traps and can effectuate whatever they desire by providing evidence of their desires when they designate a particular title.

202. Arizona, like other CP/SP states, permits married couples to make agreements concerning ownership of their marital property and how it is to be characterized and distributed at divorce and death. *See supra* note 150 and accompanying text. *See also* Uniform Premarital Agreement Act, ch. 4, 1 Ariz. Sess. Laws 15 (1991) (codified as amended at ARIZ. REV. STAT. § 25-201 to -205 (1998)).

between joint tenancy and CP other than right of survivorship at the death of one of the spouses during the marriage.[203] The form of the title is especially insignificant when the question is whether, during the lifetime of the spouses, to treat joint tenancy held by husband and wife differently from CP.[204]

The recognition that the form of joint title is not particularly useful evidence concerning treatment of all non-SP is consistent with general community property presumptions,[205] the recent creation of community property with right of survivorship, and the divorce distribution statute.[206] The presumption that regardless of title an asset acquired during the marriage is presumed community property has a decent basis: Do not give SP treatment on the basis of title alone, as title is not the most reliable evidence.[207] The addition of community property with right of survivorship gives couples an opportunity to eliminate some unanticipated title-related departures from community treatment prior to death by signaling that they want CP treatment. The divorce distribution statute, by attempting to render the particular form of joint title irrelevant for purposes of distribution of assets at divorce, also supports the proposition that form of title should not yield differences pertaining to events other than death. These sensible purposes are undermined by distinctions between community property and other jointly held forms of title for reimbursement, creditor relationships, and management and control rules.

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203. This is not automatically the correct default if the goal of an SP/CP system is to effectuate a particular distributional result, however. See BLUMBERG, *supra* note 19, at 28–53; CARBONE & BRINIG, *supra* note 189, at 953–56, for identification and discussion of many possible purposes behind marital property and divorce laws, including purposes related to specific distributional goals. If the distributional goal is, for example, to maximize the community regardless of the intent of the SP spouse concerning the title change, then a default that calls all jointly titled property unreimbursable CP will effectuate the goal. If the distributional goal is to maximize all SP, the opposite default should be set.

204. *See supra* note 65 and accompanying text concerning the similarities between community property and joint tenancy for nondeath purposes.

205. Characterization of all property acquired during the marriage starts with the presumption that the property is CP. *See supra* notes 71–72 and accompanying text.

206. *See* ARIZ. REV. STAT. § 25-318(A) (1998).

207. *See supra* notes 108–117 and accompanying text. A main concern, when the husband was the sole manager and controller, may have concerned fraud. The husband, as sole manager and controller, had complete access to make a title change. The presumption of community, not overcome by evidence that title is in one spouse's name only, protected the wife from a husband who advantageously placed title in his name alone. Pursuant to statutory changes enacted in 1973, each spouse now has management and control power. *See* ARIZ. REV. STAT. § 25-214 (1998). But the fact may be that one spouse, either male or female, will end up as the manager of a particular community asset, and that spouse will have access to change title. In any event, each spouse now has access, but that does not eliminate the problem of relying on title alone.

2. The Community Property Rules for Management and Control and Creditor Relationships Should Apply to All "Non-Separate Property" Assets Irrespective of Title

The community property rules for management and control, meager and unspecified as they currently are,[208] should apply to all property jointly held by husband and wife unless there is an enforceable agreement by them to the contrary. When joint tenants are a married couple, unilateral severance of any aspect other than the right to survivorship should not be permitted, exactly as it is not permitted for CP. A debtor spouse's share of joint tenancy property should not be available to satisfy SP debts.[209] To the extent that such property would be available to satisfy a community debt if it were community property, however, all jointly titled property should be similarly available to satisfy community debts, subject to joinder rules and requirements concerning procedural notice to the community.

3. Community Property with Right of Survivorship and Marital Joint Tenancy with Right of Survivorship Property Are the Same Thing and Should Be Treated the Same Way

Community property with right of survivorship and joint tenancy with right of survivorship held by a married couple are not meaningfully different things. Accordingly, they need to be treated exactly the same way. The new statutes mercifully enable a couple to choose to designate their property as community property with right of survivorship.[210] Identical treatment, however, should be given to property titled joint tenancy with right of survivorship held by married couples. Particular significance should not be assigned to a married couple's choice of joint tenancy with right of survivorship rather than community property with right of survivorship unless there is sufficient evidence to conclude that the couple understood possible differences and deliberately chose joint tenancy rather than community property with right of survivorship because of

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208. Other than designating a joinder requirement for a relatively small number of transactions, *see* ARIZ. REV. STAT. § 25-214(C), Arizona has little statutory guidance concerning the responsibilities spouses owe each other when they manage and control the community assets. *Cf.* Carol Bruch, *Protecting the Rights of Spouses in Intact Marriage: The 1987 California Community Property Reform and Why It Was So Hard to Get*, 1990 WIS. L. REV. 731 *passim* (1990) (discussing the California system).

209. This result could be altered, of course, by an enforceable transmutation agreement that specifically allows for severance and other non-death event separate property treatment of the property. The designation of joint tenancy, by itself, is not sufficient evidence to presume such a transmutation.

210. *See* ARIZ. REV. STAT. §§ 14-1201, 14-2804, 33-431 (1998). Community property with right of survivorship is a convenient method for achieving a result many married people would probably like to achieve. Facilitating marital desires, on the margin, perhaps contributes to marital happiness and success. Community property with right of survivorship property presumably will be treated as community property for all matters arising during the lifetime of the spouses and like joint tenancy property upon death.

those differences.[211] There is no basis for presuming that designations of joint tenancy rather than community property with right of survivorship will be done with an understanding of potential divorce distribution or creditor relationship differences between community property and joint tenancy. If couples adopt a right to survivorship designation with anything in mind, it is a death-focused designation that should not influence lifetime treatment.

Consequently, prior to the new statutory changes, joint tenancy property held by husband and wife should have been presumed community property for all purposes other than death. That same presumption should apply to designations of joint tenancy by husband and wife occurring subsequent to the enactment of the statute, as there is little basis to conclude the couple's choice of joint tenancy rather than community property with right of survivorship was done with any understanding of the possible differences. Similarly, a decision (or, more likely, a non-decision) by a married couple to keep title in joint tenancy, rather than to go to the trouble to change it to community property with right of survivorship, should not be the basis for a conclusion that the couple wanted something other than community treatment of the asset for all non-death events.

4. Reimbursement and Tracing Rules Used at Divorce Should Not Vary Depending on Title or By Investment Type. The Uniform Rule Should Be that All Separate Property Invested in or Contributed to Marital Property of Any Type or Title is Presumed an Unreimbursable Gift to the Community

The reimbursement and tracing rules currently vary by title and by investment type.[212] In order to eliminate this variance, SP that is placed in joint title, or that is invested in any non-SP asset, should be presumed an unreimbursable gift to the community.[213] This rule should be applied uniformly to all forms of title: assets should be characterized as the SP of one spouse or "marital, not-SP" (meaning CP, community property with right of survivorship, joint tenancy, tenancy in common, or some other jointly held title) and the uniform rule that tracing does not overcome "marital, non-SP" treatment should be applied irrespective of the form of title. In order to maintain consistent treatment for similarly situated assets, the rule that SP contributions are reimbursable or not

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211. In those cases, like other enforceable transmutation agreements, the ultimate treatment should be dictated by the terms of the agreement. *See In re* Estate of Harber, 104 Ariz. 79, 87, 449 P.2d 7, 15 (1969); Hrudka v. Hrudka, 186 Ariz. 84, 92–93, 919 P.2d 179, 187–88 (Ct. App. 1995); Noble v. Noble, 26 Ariz. App. 89, 93, 546 P.2d 358, 362 (1976).

212. *See* discussion *supra* Part III.

213. This is the current presumption for SP contributions to CP. *See* Malecky v. Malecky, 148 Ariz. 121, 123, 713 P.2d 322, 324 (Ct. App. 1985) (citing Baum v. Baum, 120 Ariz. 140, 146, 584 P.2d 604, 610 (Ct. App. 1978)). Accordingly, this proposal is that: (1) the rule that tracing is not sufficient to overcome the presumption of community treatment for jointly titled property, for SP contributions to CP, and for SP creations of joint tenancy property should be continued, and (2) the rule should also be applied to SP contributions to existing joint tenancy property and to bank accounts, which currently allow tracing by the SP contributor for reimbursement (joint tenancy) and characterization (bank accounts) purposes.

depending on the particular joint title for the property (CP v. joint tenancy, for example) should be scrapped in favor of a uniform rule that SP contributions to all "marital, not-SP" assets are presumed unreimbursable gifts irrespective of title.[214]

a. The Distinction Between Community Property and Joint Tenancy for Reimbursement Purposes

One unacceptable distinction Arizona makes involves the differing reimbursement treatment at divorce based on whether an asset is held as community property or in joint tenancy.[215] The difference will not always be trivial—if the SP contribution to an asset is substantial, reimbursement may significantly alter what the other spouse must give up and what the SP contributor will get.[216] These potentially significant distributional changes should not depend on a decision to hold in joint tenancy rather than as CP. Such decisions, if given any thought at all, are made with no understanding concerning the different divorce reimbursement ramifications.

b. The Reimbursement and Tracing Distinctions between Jointly Titled Real Property, Bank Accounts, and Single or Nontitled Assets

Another unhelpful set of distinctions demonstrated by the interplay are the tracing and reimbursement distinctions between marital real property, marital liquid assets, and marital non-jointly titled assets. Currently, CP titled real property traced to SP is presumed CP, a presumption not overcome by simply tracing the property back to SP.[217] Joint tenancy property traced to SP is similarly presumed to be no longer the separate property of the SP spouse. Instead, the title yields a presumption of gift to the other spouse of the joint tenancy, including the effect of division at divorce.[218] In contrast, however, money in jointly titled bank accounts is characterized SP if adequately traced to SP.[219] The same SP characterization results when assets without a formal title and assets with title in the SP spouse's name alone are adequately traced to SP, even when those assets are acquired during the marriage.[220]

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214. While title selections are shaky evidence for SP to CP transmutations, the default rule of no reimbursement for SP contributions to CP, contained in *Malecky* and *Baum*, has an adequate basis beyond just the title selection. The "no reimbursement" presumption should be applied regardless of whether the asset contributed to has joint tenancy or CP title, regardless of whether the asset contributed to is traceable to CP or to SP, and regardless of whether the SP contribution took the form of title change, purchase, or contribution to an already-existing CP or joint tenancy asset. *See Malecky*, 148 Ariz. at 123, 713 P.2d at 324; Baum v. Baum, 120 Ariz. 140, 146, 584 P.2d 604, 610 (Ct. App. 1978); *infra* notes 242–243 and accompanying text.

215. *See supra* notes 80–107 and accompanying text.

216. *See supra* notes 80–107 and accompanying text.

217. *See supra* notes 108–111 and accompanying text. The presumption can only be overcome by evidence that the spouses intended and understood there was no transmutation.

218. *See supra* notes 118–134 and accompanying text.

219. *See supra* text accompanying notes 135–140.

220. *See supra* note 108 and accompanying text.

The bank account/no title/SP spouse's-name-alone-on-title treatment is thus in marked contrast to the treatment of the same SP money, if, rather than remaining in an account, that money is used to buy real property placed in some form of joint title. Although the jointly titled property is traceable to SP, the fact that both names are on the title forces a presumption of transmutation that overrides the tracing.[221] Pursuant to the distribution statute, jointly held property is to be divided indistinguishably from community property.[222] There is no presumption of reimbursement to the SP owner for the initial investment in the property due to the general presumption that there is no reimbursement for SP contributions to CP and the indication in *Collier*,[223] *Valladee*[224] and *Toth*[225] that there is no reimbursement for ownership amounts when SP is changed to joint tenancy title. Thus the change in form of the asset (from jointly titled bank account to jointly titled real property) precipitates a change that wipes out the tracing concept, forcing exactly the opposite result from the bank account situation: A jointly titled asset traceable to SP is treated as CP, with no reimbursement to the SP owner.

These currently conflicting conclusions are troubling and generally unacceptable. They violate my proposed CP principles that a change in the form of an asset by itself should not precipitate a characterization change and that overemphasis on title choice is not healthy. Bank accounts and other liquid forms of SP contribution to the community need not be treated differently from SP invested in real property. A SP investment in real property that has joint title is not particularly different from an SP investment in a more liquid asset with joint title or an SP investment in a community-use asset for which title is not usually designated. The decision concerning the nature of an SP contribution to the marital community is not likely to be made with any understanding of "if I leave it in a bank account or buy something without title I can get some of it back at divorce, but if I put it in property with joint title I can't."[226] Varying the result creates either a trap or a distorted, likely inefficient incentive to stay liquid. This conflict should be eliminated, to avoid largely unanticipated differences depending on how an SP

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221. *See supra* notes 118–134 and accompanying text.

222. *See* ARIZ. REV. STAT. § 25-318(A) (1998).

223. Collier v. Collier, 73 Ariz. 405, 411, 242 P.2d 537, 540 (1952).

224. Valladee v. Valladee, 149 Ariz. 304, 309, 718 P.2d 206, 211 (Ct. App. 1986).

225. Toth v. Toth, 190 Ariz. 218, 220–22, 946 P.2d 900, 902–04 (1997).

226. The result, however, currently depends on what was done with the asset. If it remains liquid, it can be traced to SP irrespective of the title on the account. For all tangible items traced to money in an account, tracing also may be used to overcome the "acquired during the community" presumption. Thus if SP is put in a joint account, but there is no CP money in it, the things bought with the money in that account, if they still exist and if they do not have a joint title, are considered traced to SP and are characterized as SP. *See supra* notes 135–140 and accompanying text; sources cited *supra* note 5. Thus treatment will vary depending on whether SP was used to purchase something for which title is usually designated (e.g., a car or real property) or something for which title usually is not designated (e.g., a couch, piano, or a great big jar of mayonnaise).

spouse invests, and to avoid distorting investment decisions for those SP spouses who may be vaguely aware of the different results.[227]

c. What Reimbursement and Tracing Treatment Will Be Given to Community Property with Right of Survivorship?

Treatment of community property with right of survivorship for purposes of presumptions concerning tracing and reimbursement is unfortunately a bit uncertain. There is no statutory help here; the new statutes are quiet on the matter of reimbursement for SP contributions to "community property with right of survivorship," leaving the matter vaguely in doubt. The approach that certainly was intended,[228] and should be adopted for community property with right of survivorship, is community property treatment for all aspects other than death. Thus title changes from SP to community property with right of survivorship would be presumed to be CP, tracing would not be sufficient to overcome the presumption, and there would be no reimbursement, because those are the rules for CP.

But given the conflicting analysis revealed in the interplay, there are no flat out guarantees in Arizona. A stated basis for the no-reimbursement rule is the old California rule,[229] which never applied to a community property with right of survivorship form. California currently presumes reimbursement.[230] In addition, the current rule calling for reimbursement for SP contributions to an ongoing joint tenancy is based on "the general rules of joint tenancy." As the survivorship feature of community property with right of survivorship is also the defining characteristic of joint tenancy, it could be argued that the reimbursement presumption for joint tenancy is due to the availability of the survivorship. Under this line of thinking, the same reimbursement presumption should apply to all right

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227. For those who know the rules, perhaps the incentives are not overpowering, as someone with complete information about the structure who is concerned about preserving his or her SP can invest in real property and leave title in his or her name alone. But the incentive to leave it liquid or put it in something traceable without formal title may still be present. For real property items, the desire to leave it at death to a surviving spouse may result in a right of survivorship title, which under the current regime changes the characterization of the asset. And in any event, incentives and how they will be distorted are had to predict in the face of large numbers of decisionmakers who will not have perfect information concerning the effect of a particular choice.

228. *See* ARIZ. REV. STAT. §§ 14-1201, 14-2804, 33-431 (1998). The question is: when the new statute uses the expression "community property" as part of "community property with right of survivorship" does it automatically take the meaning of "community property" that has been developed by common law and statutory interpretation concerning reimbursement, management and control, and other lifetime events? I say "lifetime events," because community property with right of survivorship does change the treatment of community property at death. There is little reason to conclude the legislature had something other than the currently-applied rules concerning community property in mind for lifetime events, even though the statute is proposing a change in the status of community property at death.

229. *See supra* notes 79–93 and accompanying text.

230. *See supra* notes 83–86 and accompanying text.

of survivorship forms of property.[231] In any event, even if community property with right of survivorship is treated as CP for reimbursement rule purposes, that treatment will dictate that it is treated differently from marital joint tenancy with right of survivorship. This will be a senseless distinction whenever there is no evidence suggesting that the spouse who chose joint tenancy anticipated anything other than survivorship for a particular marital asset.

d. Reimbursement and Tracing Rules Ultimately Depend on a Consistent Decision Concerning Reimbursement for Separate Property Contributions to the Marital Community

When a spouse takes SP and places it in joint title, the act of doing so is a subspecies of the larger category of acts involving all SP contributions to the marital community. As the interplay demonstrates, a spouse may contribute SP to the marital community in several ways (e.g., by changing title on SP to some joint title; by making SP contributions to existing marital property; and by making SP money available for community use and management and control). Title is merely one piece of evidence. In order to keep unhelpful distinctions to a minimum, the real question to resolve is what to *presume* about the SP spouse's interest whenever the SP spouse contributes to the marital community in any of these different ways. Consequently, analysis of the issues surrounding (1) reimbursement rules, (2) the presumptive effect of title changes, and (3) whether tracing is sufficient to overcome such presumptions cannot adequately take place apart from the overriding question: what is the most useful general rule for SP contributions to the marital community?

There are several possible general solutions regarding whether tracing to SP should be sufficient to overcome a joint title characterization and whether reimbursement should be given for SP contributions to the marital community. The solutions include the following approaches.

The rule applied to real property in Arizona. Presume a transmutation if SP has been placed in joint title, do not allow the SP owner to overcome the presumption by tracing, and do not reimburse the SP spouse for the SP contributed by changing the title.[232] Using facts similar to *Valladee* and *Toth* as an example,[233] suppose the SP spouse takes $100,000 of his SP, buys real property, and titles it in joint tenancy with right of survivorship with his spouse. Under this solution, at

231. I am by no means endorsing this analysis. I am trying to anticipate, based on the conflicting analysis revealed in the interplay, what might be argued by SP proponents who have made contributions to community property with right of survivorship and are looking for a way to be reimbursed.

232. *See supra* text accompanying notes 108–134. This solution is the result announced as the general rule for SP that is placed "in the names of both husband and wife" in *Cooper v. Cooper*, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981), and applied in *Toth v. Toth*, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997), and *Valladee v. Valladee*, 149 Ariz. 304, 309–10, 718 P.2d 206, 211–12 (Ct. App. 1986), concerning SP placed in joint tenancy title.

233. *Toth*, 190 Ariz. at 220, 946 P.2d at 902; *Valladee*, 149 Ariz. at 309–10, 718 P.2d at 211–12.

divorce the property is presumed jointly titled, and the presumption cannot be overcome by tracing.[234] It will be divided between the spouses. The SP spouse will not be given reimbursement for the $100,000 spent acquiring the property.

The California solution. Presume a transmutation if SP is placed in joint title, do not allow the SP owner to overcome the transmutation presumption by tracing, but allow reimbursement to the SP owner for amounts contributed to ownership that are traced to SP.[235] Using the same facts as above: At divorce the property is presumed jointly titled, and the presumption cannot be overcome by tracing.[236] The property will be divided between the spouses, but the SP spouse will be reimbursed by the community for the $100,000. If there was any appreciation during the marriage, the community will take the appreciation, and the property could go to either spouse. The initial SP contribution to the jointly titled asset, however, will be reimbursed.[237]

The Arizona bank account/nontitled assets/title-in-SP-spouse's-name-alone rule. Do not presume a transmutation merely from the placing of SP in joint title. Presume the asset is CP if it is acquired during the marriage, but the

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234. *See Toth*, 190 Ariz. at 220, 946 P.2d at 902; *Cooper*, 130 Ariz. at 260, 635 P.2d at 853; *Valladee*, 149 Ariz. at 309–10, 718 P.2d at 211–12.

235. This solution is also consistent with the Arizona reimbursement for SP contributions to an existing joint tenancy. *See supra* notes 96–98 and accompanying text. California, after a long regime in which title changes to joint title precluded tracing to SP and SP contributions of all kinds were presumed unreimbursable, switched its default rules. *See supra* notes 84–86 and accompanying text. California's solution still may pose possible distinctions between jointly titled and SP-spouse titled or non-titled property traceable to SP. To the extent that California adopts the usual rules that tracing overcomes joint title for money in a bank account, *see* BIRD, *supra* note 5, at 10–12, 269–75, and that tracing an asset not titled jointly to an SP source will dictate SP characterization for that asset, *see id.* at 10–12, the California solution also leaves possible distinctions between jointly titled bank accounts and jointly titled real property traceable to SP.

236. *See supra* notes 79–88 and accompanying text.

237. In *Toth*, the husband spent $140,000 of SP the day after the marriage and purchased a house placed in joint tenancy. The marriage was very brief and there was no meaningful appreciation on the property during the marriage. *See Toth*, 190 Ariz. at 219, 946 P.2d at 901. Accordingly, under the approach described here, the entire $140,000 would be reimbursed to the SP owner. Since the property was the only marital asset, reimbursement and characterization of the house would be virtually the same thing, although the wife would have a theoretical possibility of an opportunity to pay the full $140,000 in cash and keep the property, because the distribution statute would still apply to divide the marital property. This solution, by the way, could have resolved the "inequity," perceived by the majority of the Arizona Supreme Court, the trial judge, and a dissent at the court of appeals level, in dividing the marital asset in a fifty-fifty split. *See id.* at 219, 222, 946 P.2d at 901, 903. The method the majority chose was to conclude that the words "equitably" in the statute did not require a fifty-fifty split, thus throwing into some doubt the generally accepted interpretation of "equitably" that required a roughly fifty-fifty split, *see id.* at 223, 225, 946 P.2d at 902, 904 (interpreting ARIZ. REV. STAT. § 25-318(A) (1998)), and thus raising the possibility in every divorce case that a party will argue that given the circumstances of the investment, the nature and duration of the marriage, and behavior during the marriage, something other than a fifty-fifty split would be equitable.

presumption is overcome by tracing back to SP.[238] Using the same facts: At divorce the property is presumed CP because it is acquired during the marriage. But the asset is traceable back to SP, will be characterized as SP, and goes entirely to the SP owner.[239] The joint title, while evidence of a possible transmutation, is not sufficient evidence by itself to dictate community treatment. If there were any community contributions to the asset during the marriage, the community is entitled to reimbursement for those contributions.[240]

Arizona should select one reimbursement presumption for all SP contributions to jointly titled assets. Which one should it be? There are, needless to say, quite a few credible positions one could take on this entire matter. The Arizona divorce distribution statute is silent concerning all matters of reimbursement and presumptions concerning tracing, and none of the solutions are precluded by the current statutes.[241] Whichever solution is chosen, however, should not vary depending on the form of title chosen. Nor should it vary by the type of contribution made by the SP owner, as there is not a meaningful difference between using SP to acquire an asset and using SP to pay for an ongoing obligation on jointly titled property. Nor should the rule vary depending on whether the SP contribution to a jointly titled asset is a liquid contribution in a bank account or a contribution to real property. Currently in Arizona, the rule varies in all of these ways. Any one of the above-identified solutions, if selected and applied in a manner consistent with the three community property principles I have identified, would be a significant improvement over the existing situation in Arizona. Each of the solutions, applied consistently, would eliminate the somewhat preposterous result of reimbursing for some SP contributions to existing joint tenancy assets while not reimbursing SP contributions to CP and not reimbursing SP contributions to creation of the joint tenancy.

My proposals in this Article for uniformity, simplification, and elimination of needless distinctions adopt the Arizona real property rule identified above as the baseline for treatment: SP contributions of all kinds to all jointly

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238. *See supra* text accompanying notes 135–140.

239. *See supra* notes 139–140 and accompanying text.

240. *See supra* notes 71–78 and accompanying text.

241. Reimbursement for the "SP contribution to ownership" of the property at the time of a title change to joint title can be viewed as largely undermining the statutory mandate to divide all jointly titled property, *see* ARIZ. REV. STAT. § 25-318(A) (1998), because as a valuation matter, only the amount above the value of the SP investment contemporaneous with the joint title designation would be divisible marital property. But unlike property characterized as SP, the SP spouse would only get reimbursement, and the property itself could go to either spouse. Accordingly, reimbursement, like tracing, is not inconsistent with the statute's distributional scheme. This is in effect what California has tried to do by statutorily entitling reimbursement for the SP contributor. *See supra* notes 83–86 and accompanying text. Jointly titled property is presumed to be CP for divorce purposes, but the SP owner is entitled to reimbursement for contributions to ownership of such property. *See* CAL. FAM. CODE § 2580 (establishing that property in joint title is presumed community property); § 2640 (West 1994) (establishing that SP contributions to community real property are presumed reimbursable); *supra* notes 83–86 and accompanying text.

titled property should be presumed unreimbursable transmutations.[242] The effect of this presumption would be to place on the SP proponent spouse a burden of generating, at the time of the contribution, evidence that non-community treatment of a marital asset was envisioned by the community in the event of divorce. If the SP proponent cannot produce that evidence at divorce, the asset in question should be treated as community property and there will be no reimbursement. In part, I propose this particular structure because it would require the least amount of change to the current infrastructure. But I also chose this particular solution because I think it is substantively superior to other solutions to the entire issue of whether to reimburse for SP contributions to the marital community.[243]

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242. *See supra* notes 232–234 and accompanying text

243. This Article is already insufferably long. To include my detailed explanations why the preferable result for Arizona is to always presume no reimbursement for SP contributions to the marital community would make it even more insufferable in length. I will accordingly leave details to an upcoming (hopefully not insufferably long) article, and cursorily set some of my reasons out in this (insufferably long) footnote.

A presumption against reimbursement is an uncomfortable presumption in part because it may rely heavily on a title change—when an SP spouse changes title on SP property to CP or joint tenancy, the presumption is that the title change alone has effectuated an unreimbursable, immediately effective gift of the entire worth of the asset. This conclusion is questionable given that the reason to make the change may have been to only effectuate a result at death or may have been made without any thought to divorce effects. *See supra* text accompanying notes 48–63. Nevertheless, it is a supportable presumption. The basis for a presumption against reimbursement is not solely that when there is joint title the spouse who receives the benefit knows his or her name is on the title or the account and should be able to rely on it to some extent, even without payment (although that may be true in some cases). Nor is the basis solely that people who put their spouses on the title ought to know that their spouses are going to consider that they now own it, too, and will not perceive that it is only a gift of future effect (although that, too, may be true in some cases). The basis is also a default of community maximization, which is the fallback norm in most situations in most CP/SP states already—the default for every asset held by either spouse, including intangible reimbursement interests, should be community treatment. This general presumption against a spouse who seeks a separate property characterization (usually phrased "all property acquired or controlled by either spouse during the marriage is presumed community") is nothing new; it exists in some form not only in Arizona but in virtually all CP jurisdictions. *See supra* notes 71–72 and accompanying text.

Thus for all reimbursement issues, rather than trying to assign too much significance to a title change or the form of an asset, I would apply the general presumption that because all assets controlled by either spouse may influence community decisions, all assets should be presumed part of the marital community. This forces a shift of the question away from whether the title change demonstrates intent to treat as community, to whether tracing jointly titled, joint access, or given-to-the-surviving-spouse-at-death property to SP, without more of an indication concerning reimbursement intentions, is particularly persuasive evidence that the community must reimburse the SP owner. Tracing, by itself, does not demonstrate all that much concerning the understanding and desires of the couple, including the SP spouse, about how their assets should be divided at divorce.

The result of this use of the presumption would be to tell SP owners that if they care about keeping their SP assets separate, they must either (1) be passive with the assets and never connect them to the community in any way such as putting both names on the title or giving unfettered access to both spouses, or (2) communicate to their spouses about the

e. The Bank Account Rule Should be Changed To Conform with the Presumption for Non-Liquid Jointly-Titled Assets that Tracing is not Sufficient To Obtain Separate Property Characterization or Reimbursement

The rules concerning whether tracing to an SP source is sufficient to overcome joint title or to receive reimbursement currently[244] vary depending on whether the asset is liquid or the asset is real property. In order to avoid a result hinged on the form of an asset, the same rule should apply for both real property and bank accounts: either tracing should be permitted in each case, or tracing alone should not be sufficient in each case. As part of my proposal that all SP contributions to marital assets be presumed unreimbursable, I propose a shift to the latter rule. If the SP proponent successfully traces money in a jointly titled account to an SP source, but the account has both names on it for access, the tracing should be insufficient to demonstrate SP treatment for that money.

This requires a change from the current bank account rule that permits an SP proponent to claim as SP all money sufficiently traced to SP.[245] But it is not a drastic change. To the contrary, the liquid nature of the asset, the genuine joint access that spouses have to the asset, and the probable inevitable influence the asset has on community spending and saving decisions all suggest that money in a jointly titled account should always have been presumed community property regardless of tracing.

When a spouse places SP in a jointly titled account, or provides the other spouse access to an SP account, the SP spouse has immediately implicated the influence of this liquid asset on community finances. When the SP spouse permits the other spouse to have access to spend what is in the account, in the absence of an understanding concerning reimbursement, that act appears sufficient to conclude there has been a fully delivered gift to the community of everything in that account, as it gives substantial control of the asset to the community.[246] If each

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separate nature of the asset at the time it becomes involved with the community and generate evidence concerning the substance of the communication. If not, their jointly titled or otherwise community-influencing SP assets will be split without reimbursement. That result, which realistically will occur quite frequently, is not the worst thing in the world, as the SP owner will still get one-half.

244. *See supra* notes 78–83, 108–117, 135–140 and accompanying text.

245. *See supra* notes 135–140 and accompanying text.

246. The fully delivered gift concept is an interesting analogy. To grossly simplify what is in fact a somewhat complicated set of propositions, the proposition is that even though there is no consideration, once someone has actually turned over an item the giver cannot get it back by arguing there was no consideration for it. This leads to the question of when it is that an intangible is fully delivered and when is it that something that cannot itself be placed in the recipients hands (e.g., a house or the access to money in an account) has been fully delivered. One conclusion is that an asset may be fully delivered by symbolic delivery such as changing the name on the deed or delivery of a passbook for a bank account. *See* E. ALLAN FARNSWORTH, CONTRACTS § 2.5, at 50–52, § 11.6, at 723–25 (3d ed. 1999). When the SP spouse places unfettered ability in the other spouse to withdraw the entire amount without a decision by the SP spouse, yet retains the ability to withdraw the money, the situation sounds suspiciously like a fully delivered gift to the community.

spouse has current withdrawal access, it is hard not to conclude that the money in the account is community money for which there will be division and no reimbursement.

The title and access to an account also suggest the money in the account will play a role in the community decisions concerning spending and saving of all community money (not just the money in this account). Unless the SP spouse keeps the money separate, does not provide joint access and joint title, or indicates at the time of possible community involvement exactly what his or her intentions are concerning that money in the event of divorce, it is reasonable to presume that the money has been made available to the community. Tracing money to SP at divorce is not particularly powerful evidence that the money did not influence community financial decisions. For many couples the money accessible to one spouse is likely to influence every decision made by both spouses to spend or not spend community money irrespective of title choices and access.[247] Consequently, the presumption of community property not overcome by tracing, for all money in accounts for which there is joint access, is not a particularly extreme rule.

This change will force SP spouses who wish to preserve the SP nature of their money to either keep their SP money separate or get the other spouse to acknowledge the SP status of the SP money during the marriage. These are not particularly large burdens and may serve the purpose of keeping the non-SP spouse aware of the true financial state of the community. The change will hurt only those spouses who do not know about the requirements but in fact relied on an opportunity to trace the money in their joint access accounts back to SP at divorce. For these spouses, there will be a smaller amount of SP and a larger amount of CP to be divided between the spouses at divorce.

A presumption of community treatment, not overcome by tracing, for all funds in a commingled or a jointly titled joint access bank account, is a natural extension of the rule that all money in commingled accounts is presumed to be community property.[248] The expanded presumption has the additional advantage of

247. I am making an assumption here about how many humans in marriage behave concerning their more liquid assets; it is an empirical assertion that certainly is not correct in every case and may not be correct nearly as often as I am assuming. The assumption is that when marital partners do not communicate explicitly concerning the issue and are not immediately contemplating divorce, if one spouse in fact has access to separate property money, that access will influence how, why, and when that spouse spends community money, and how much is spent. The assumption is not crucial to my proposed change, however. Even if it turns out to be incorrect, there are still sufficient reasons to presume that jointly titled, joint access bank accounts should be presumed community property and the presumption should not be overcome by tracing.

248. The general rule for commingled accounts is that all money in such an account is presumed CP. *See* Cooper v. Cooper, 130 Ariz. 257, 259–60, 635 P.2d 850, 852–53 (1981) ("[T]he burden is upon the person claiming that the commingled funds, or any portion of them, are separate to prove that fact and the amount by clear and satisfactory evidence."); Porter v. Porter, 67 Ariz. 273, 281, 195 P.2d 132, 137 (1948) ("Where community property and separate property are commingled, the entire fund is presumed to be community property unless the separate property can be explicitly traced."). A basis for this presumption may be that once CP funds are placed in the same account with SP, regardless of the title on that account, either spouse has management and control power

reducing some odd tracing-related biases that presently exist,[249] and will also streamline the evidentiary process by changing the nature of the inquiry. The current focus for money in accounts concerns accounting and identification of various assets acquired with CP or SP money at various times.[250] The expanded presumption will shift focus to whether the community recognized that the money in question remained SP and was to be reimbursed. It accordingly minimizes, although it does not eliminate, the temptation to identify separate and community money by efforts that recapitulate across a marriage[251] and/or that adopt a family

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concerning some of the money in the account. The commingling thus carries with it a strong presumption that the entire amount in the commingled account is for the community to manage. *But see* REPPY & SAMUEL, *supra* note 5, at 10-1 ("It is important to keep in mind that commingling does not itself transmute separate funds to the community.").

249. The current regime, permitting a spouse to prove that money in an account is SP by tracing, creates an odd incentive for an SP owner to either keep the SP liquid or spend it on something that does not customarily involve a title designation. Compare for a moment $7000 either left in a jointly titled account, used to purchase a $7000 computer or used to purchase a $7000 car. The money in the account, successfully traceable back to SP, will be characterized as SP. Similarly, the computer, successfully traceable back to SP money in a jointly titled account, can be characterized as SP without more evidence. If the title of the car designates both spouses, however, the SP source does not overcome the presumption of CP. If the car is titled in joint tenancy, under the current rules the $6000 is not reimbursable, but the next $1000 used for repair, traceable back to SP, might very well be. Of course, if neither spouse is particularly aware during the marriage of the tracing rules and the titled asset rules, at divorce the SP spouse currently benefits from the fortuity of either buying a non-titled durable (rather than a consumable like food or a vacation that is no longer around) or not spending at all (perhaps because there was community money to spend instead) and suffers from the fortuity of spending SP on a titled asset and placing both names on the title.

250. Under the current rules, tracing of SP money in an account is undertaken by either direct tracing or an exhaustion method. Direct tracing involves accounting for all SP placed in and withdrawn from a commingled account, and necessitates a conclusion concerning how much SP was in an account at the time of a withdrawal. The exhaustion method requires accounting for all CP placed in and withdrawn from the account, and necessitates a conclusion concerning how much CP was in an account at the time of a withdrawal. *See Cooper*, 130 Ariz. at 259–60, 635 P.2d at 852–53; See v. See, 415 P.2d 776, 780 (Cal. 1966); REPPY & SAMUEL, *supra* note 5, at 10-1 to 10-17.

251. Recapitulation is a method for tracing that totals up all the SP or CP deposits and withdrawals over the marriage without regard to SP or CP levels in the account at any one time. The dangers of recapitulation are well-known. The technique is inadvisable because it can yield a result that bears little relationship to the actual use of SP funds. It has the effect of turning community undivided one-half ownership into nothing more than a contingent claim at divorce. *See See*, 415 P.2d at 780. *See generally In re* Marriage of Mix, 536 P.2d 479 (Cal. 1975); Linda Gach, *The* Mix-Hicks *Mix: Tracing Troubles Under California's Community Property System*, 26 UCLA L. REV. 1232, 1243–55 (1979) (discussing the problems with recapitulation as a tracing method). A rule that tracing is not sufficient to overcome a presumption of community for joint bank accounts would reduce the number of situations in which recapitulation could be tried, because in the absence of other evidence that the community understood the money in the joint account was SP, there would be no point in attempting to trace. When there is evidence sufficient to demonstrate that the community scheme was to reimburse, however, some method must be used to identify SP placed in the account for which reimbursement was contemplated, and the temptation to use recapitulation might still be present.

expense accounting presumption.[252] While neither recapitulation nor the family expense presumption would be eliminated by a rule that requires more than just tracing to prove the SP nature of money in a joint account, the temptations would be reduced. SP shown by an SP titled account and passivity will not require any tracing, and for all other accounts, there will be no reason for anyone to try to trace unless the SP owner can produce evidence that both spouses understood that the community scheme involved reimbursement to the SP owner for amounts of SP money in the accounts.

5. Community Property Contributions to Separate Property Should Be Presumed Reimbursable Despite Inconsistency with the Rule Concerning Separate Property Contributions to Community Property

The current presumption that CP contributions to SP are reimbursable (and that if CP is used to buy property, it is presumed CP regardless of title)[253] need not be consistent with a rule that SP contributions to CP are not presumed reimbursable. To the contrary, the presumption of reimbursement when CP is contributed is consistent with a rule that places the burden on the SP proponent to show that an asset is not CP.

The utility of presuming CP reimbursement is most apparent when the SP-owning spouse is involved in using the CP funds for the benefit of the SP. The

252. The family expense/exhaustion presumption, possibly approved in Arizona in *Cooper*, 130 Ariz. at 259–60, 635 P.2d at 852–53, *Porter v. Porter*, 67 Ariz. 273, 277, 283–84, 195 P.2d 132, 134, 138–39 (1948), and *Potthoff v. Potthoff*, 128 Ariz. 557, 562, 627 P.2d. 708, 713 (Ct. App. 1981), applies in a tracing context. It presumes for accounts containing both community and separate money that all family expenses paid for out of the account were paid out of the community money, with not a cent of SP money used until all of the community money is used up. *See* BLUMBERG, *supra* note 19, at 235–36. Thus the SP proponent will try to show that all CP money in a commingled account was exhausted by the family expenses, leaving the remainder, and any amount spent on currently existing significant assets traceable to the account, as SP. The family expense/exhaustion presumption, inconsistent with a presumption of no reimbursement for SP money spent on community expenses and a burden on the SP proponent to demonstrate reimbursement was intended, in effect reimburses the SP owner for all SP money put into the account unless the community proponent shows there was an intent to spend SP money on community expenses. The family expense/exhaustion presumption's greatest damage is probably done when combined with recapitulation. See *See*, 415 P.2d at 776, where a trial court had accepted as sufficient to overcome the CP presumption the husband's evidence that because over the marriage there were more family expenses incurred than CP money made, anything left in the accounts must be SP. But the presumption, with a strong bias toward the SP owner, also yields the undesirable result of assuming that the divisible community money was used up during the marriage, despite spending habits most likely related to the full amount of money (CP and SP) available to the community. *See* Comment, *Community Property: Commingled Accounts and Family-Expense Presumption*, 19 STAN. L. REV. 661, 661–70 (1977). My proposal is that tracing is not permitted for commingled or joint accounts unless there is evidence that the community intended to trace and reimburse. If tracing must be done, an apportionment based on shares is one solution: if there is a fifty-fifty commingled account, 50% of each family expenditure is presumably an SP expenditure for which no reimbursement should be presumed.

253. *See supra* text accompanying notes 71–78.

presumption discourages the SP owner, who has the ability to manage and control community funds, from making expenditures of community funds that benefit the SP and deplete the community. If the presumption were one of no reimbursement, upon divorce the SP owner would benefit by taking the SP outright (as required by the distribution statute) while only paying half the contribution in the form of receiving half of a smaller total amount of CP. The result would leave the community with nothing to show for the contribution to the SP and provide a large incentive for SP owners to spend CP (rather than SP) to benefit their separate property.[254]

Because the presumption of reimbursement effectively protects the non-SP spouse, and there is no comparable need to protect the SP owner (who does not share ownership or management and control of SP with the other spouse), symmetry between the "SP contributions to CP" rule and the "CP contributions to SP" rule is not crucial. While the differing treatment may anger SP holders if it results in presuming CP contributions to SP are reimbursable but separate contributions to CP are not,[255] the need to preserve and protect SP assets from raiding by members of the community simply does not exist. In contrast, there is a need to protect and preserve CP from a raiding SP spouse. The likely anger of SP owners because of the asymmetric treatment demonstrates the inevitable distributional implication of all marital property rules, including presumptions. But the need to protect the SP owner from her or himself is nevertheless lacking.

6. At Death, the Right of Survivorship Should Be Respected for All Property Titled "Community Property with Right of Survivorship" and "Joint Tenancy with Right of Survivorship," but Either Spouse Should Be Entitled To Revoke the Survivorship Feature While Both Spouses Are Still Alive

a. At Death, Respect the Survivorship Provision in the Title by Presuming it Will Apply

What should be the at-death presumption concerning treatment of jointly titled right to survivorship property? The question is what to make of survivorship title when it is the only evidence the deceased spouse left that indicates how a particular asset should be distributed at his or her death. A presumption against survivorship, which exists now for real property with joint tenancy title,[256] defeats

254. *See* BIRD, *supra* note 5, at 327. The presumption of reimbursement does not appear to be imperative if the CP is contributed pursuant to a management and control decision made solely by the spouse that does not own the SP. *See* REPPY & SAMUEL, *supra* note 5, at 9-7 ("When one spouse uses community funds to improve the other spouse's separate estate...it is possible to infer that the spouse doing the improving intended to make a gift of the funds and thus is not entitled to any reimbursement.").

255. *See* BIRD, *supra* note 5, at 101 (describing a California decision precluding reimbursement for certain SP contributions as "perceived as unfair by many family law practitioners and scholars").

256. *See In re* Baldwin's Estate, 50 Ariz. 265, 274–75, 71 P.2d 791, 794–95 (1937). In *Baldwin's Estate*, the property held in joint tenancy with right of survivorship by husband and wife was presumed community property. In order for the wife to take the

some right of survivorship arrangements that were desired. A presumption of survivorship, which exists for joint tenancy bank accounts,[257] may fail to reflect the intent of designating spouses who lacked understanding concerning "right of survivorship" and what the result would be in its absence.

The default rule for right of survivorship language should be to presume survivorship and force a contestor to prove that some other result was intended. While the survivorship result may be dictated solely by title and is thus a risky conclusion, the surviving spouse taking all is a result that many married couples desire if one spouse dies while still married.[258] The title basis for presuming survivorship treatment at death is bolstered by the result of presuming survivorship, because the presumption is consistent with, rather than contrary to, the general presumption that marital property is community unless proven otherwise.

Community property systems often view spousal attempts to depart from community treatment for marital assets with suspicion.[259] The suspicion is manifest in a presumption of community for all assets acquired by either spouse during the marriage and for which both spouses' names are on the title, as well as in heightened evidentiary burdens that a proponent of the departure must satisfy to obtain non-community treatment.[260] As long as both spouses are alive, the

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property by survivorship rather than have half pass through her dead husband's estate to his heirs and not to the wife, the wife was required to prove by evidence other than just the joint tenancy title on the deed that the husband knew he was giving up his ability to at death give half away to someone other than his spouse.

257. *See* Safley v. Bates, 26 Ariz. App. 318, 321–22, 548 P.2d 31, 33–34 (1976) (presuming that all money in a jointly titled account goes outright to the survivor at the death of one of the account owners and placing a burden on the estate to prove a different intention by clear and convincing evidence). *See also* ARIZ. REV. STAT. § 14-6212 (1998) (stating that at the death of one party to a multiple party account, the money in the account belongs to the surviving party in the absence of a pay-at-death designation, but survivorship is not presumed if the account is without survivorship by the terms of the account).

258. The intestate succession provisions indicate that in the absence of a will, all of the community property in the deceased spouse's estate goes to the surviving spouse (unless there are children of the deceased spouse that are not children of the surviving spouse). *See* ARIZ. REV. STAT. § 14-2102 (1998). To the extent that intestate succession reflects an attempt to effectuate the unstated desires of people who die without a will, a presumption of survivorship that applies due to the title is consistent. The absence of any survivorship language in a title, while often not reflective of any intent one way or another, is nevertheless a sufficient basis to revert to the basic scheme of a fifty-fifty split of CP between the surviving spouse and the dead spouse's estate. Changing the entire default to a presumption that all CP goes to the surviving spouse, however, would not wreak havoc, and might in fact more accurately reflect the unstated, uncontemplated desires of the majority of people about what to do if they die while married.

259. Transmutation rules generally require clear and convincing evidence for CP to SP transmutations. *See supra* note 150 and accompanying text.

260. The usual heightened standard is clear and convincing evidence. *See* Sommerfield v. Sommerfield, 121 Ariz. 575, 577–78, 592 P.2d 771, 773–74 (1979); Armer v. Armer, 105 Ariz. 284, 288, 463 P.2d 818, 822 (1970); *In re* Baldwin's Estate, 50 Ariz. 265, 274–75, 71 P.2d 791, 794–95 (1937); Hatcher v. Hatcher, 188 Ariz. 154, 159, 933 P.2d 1222, 1227 (Ct. App. 1996).

community-maximizing presumptions and evidentiary burdens serve a useful purpose of protecting one spouse from the other during marriage and in the event of divorce. The presumptions hinder efforts by one spouse to designate single title and on that basis claim some property to be his or her SP for individual use, disposal, or distribution at divorce.[261]

When the issue, however, is whether to presume straight CP or a right to survivorship for the surviving spouse, and the only evidence is the title, the utility of the "presume CP" approach is limited. A survivor seeking right of survivorship treatment is seeking a departure from community treatment of the asset, because the community treatment calls for half to go through the estate rather than all to go outright to the survivor. But comparable suspicion and evidentiary burdens, rather than being consistent with the need to protect the community, are not appropriate concerning right to survivorship treatment of marital assets.[262]

Applied at the death of one spouse during marriage, the presumption of CP rather than right of survivorship in the other spouse is in effect a presumption in favor of the dead spouse's beneficiaries at the expense of the surviving spouse, hardly a community-maximizing presumption.[263] The effect of presuming community rather than right of survivorship is to suggest that absent a designation that can be counted upon, most spouses would rather give away half their property to someone other than their spouse, a proposition inconsistent with intestacy presumptions and with what spouses tend to do with their property when they die while married.[264]

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261. *See supra* notes 71, 207 and accompanying text.

262. Use of title to impose right of survivorship treatment rather than CP treatment is far less dangerous than, for example, an attempt by a spouse to place CP in single title and argue that it should be presumed SP because of the title. The rule that assets acquired during the marriage are presumed CP irrespective of a title in one spouse's name addresses attempts by a managing spouse to appropriate CP as SP at a divorce.

263. Presuming CP rather than right of survivorship, however, would protect against a spouse somehow placing a right of survivorship designation on title contrary to the wishes of his or her spouse, who in fact did not wish to give all the property to his or her spouse at death. In addition, a presumption of community rather than right of survivorship is a compromise presumption, because the surviving spouse still takes half of all community property outright, and will take more than half if the surviving spouse shares as well in some of the decedent's estate. If the decedent indicates by will that all CP is to go to the surviving spouse, of course, the presumption concerning survivorship is largely irrelevant.

264. *See* Bruch, *supra* note 21, at 865–66 & nn.399–401. Bruch points out that the major exception to the general desire of spouses to leave their shares of community property to their surviving spouses is in cases where the deceased spouse has children that are not children of the surviving spouse. *See id.* For these situations, apparently the spouses do not assume that their children will receive complete financial support from the surviving spouse and ultimately receive the deceased spouse's share when the surviving spouse dies. *See id.* It would be consistent with the Arizona intestate succession structure and with the data cited by Bruch to allow children of the deceased spouse who are not children of the surviving spouse to assert a presumption of CP rather than right of survivorship. That presumption would force the surviving spouse to prove the deceased spouse's intent to give

Thus when married couples designate survivorship title, and one spouse dies during the marriage, the survivorship designation should be respected,[265] absent good evidence to the contrary concerning the dead spouse's intent. Presuming right to survivorship on the basis of title will not defeat the community interests of the surviving spouse (in contrast to a presumption of separate property joint tenancy rather than community for purposes of a non-death issue such as divorce distribution reimbursements or availability to satisfy SP debts). Accordingly, I propose a change in the presumptions currently assigned to joint tenancy real property (currently a presumption of community rather than survivorship treatment) to the presumption of survivorship that currently applies to joint tenancy accounts. The survivorship presumption should apply to all assets titled either joint tenancy with right of survivorship or community property with right of survivorship. Presuming survivorship for community property with right of survivorship and not for joint tenancy, or vice versa, without basis for concluding the different treatment was intended by the title selection, would of course be undesirable.

b. Either Spouse Should Be Allowed to Individually Decide to Terminate the Right of Survivorship Portion of Joint Tenancy or Community Property with Right of Survivorship

Any rule about right of survivorship treatment concerning a transfer at death ultimately should be analogous to rules concerning what to presume generally about a spouse's desires with respect to distribution of property at death. If there is good evidence that the spouse did not want the right of survivorship result and wanted to give to someone other than the surviving spouse his or her specific portion of joint tenancy or community property with right of survivorship property, that evidence should suffice to overcome the presumption of right of survivorship that comes with the title.[266] Otherwise, once a spouse designated property as joint tenancy or community property with right of survivorship, it would have to remain that way unless both spouses consented to a change. This

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up the normal community property attribute, i.e., the ability to give at death one-half of the property to someone other than the surviving spouse.

265. Except for an estate consisting of children of the deceased spouse who are not children of the surviving spouse. *See supra* note 264 and accompanying text.

266. If evidence demonstrates that there was an enforceable deal to leave property in right of survivorship form, then a unilateral change cannot be made without breach. Two spouses who each agree to give up the ability to give half to someone other than the other spouse in exchange for getting a chance at outright ownership, for example, may have created an enforceable deal. But the act by a married couple of placing acquired property in right of survivorship title falls short, by itself, of sufficient evidence of an actual agreement. When there is no evidence of agreement, either the spouses had no idea what survivorship meant or they were each trying to give their spouse outright ownership in the event of their death. In the event that either spouse finds out what it means or changes his or her mind, there is no strong reason why either spouse ought not be free to change the death distribution for that particular asset, so long as it is not a breach of an enforceable deal and does not attempt to defeat the one-half community result. Any attempt to remove the right of survivorship aspect ought not have any bearing on the treatment of the property prior to death.

inflexibility is in contrast to nontitle methods for designating how the same property should be distributed at death, such as a will.[267] Thus, as is currently the case for real property in Arizona,[268] either spouse should be permitted to sever the right to survivorship aspect of community property with right of survivorship and joint tenancy held by a married couple.[269] A spouse who is unhappy with the right of survivorship idea is entitled to express and effectuate his or her desire to revert to the usual community property result.[270]

VI. CONCLUSION

Arizona marital property rules are far from a comfortable, streamlined, convenient system. They are incomprehensible to married couples as they engage in the day-to-day aspects of marital behavior. The financial ramifications of marrying, buying and/or assigning title to property, indicating on a bank card who has access to an account, spending cash on assets and deciding what kind of investments to make, anticipating death and indicating what will happen to various assets at that time, and divorcing are hard enough to fathom without anticipating

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267. Each spouse is free to change his or her own will unilaterally, unless the change would be a breach of an enforceable agreement.

268. *See* ARIZ. REV. STAT. § 33-431 (1998) (establishing that either spouse can terminate the right of survivorship portion of community property with right of survivorship by recording an affidavit indicating that the spouse's intent is to terminate the right of survivorship). The statute indicates that terminating the survivorship provision does not extinguish the community property status of the asset.

269. Professor Bruch concluded that for California marital property there should be unilateral ability to terminate the right of survivorship feature of joint tenancy and community property with right of survivorship, *See* Bruch, *supra* note 21, at 834–38. She also expressed some uneasiness with the proposition. *See id.* at 834–38 & n.248. Discomfort with unilateral severing almost surely stems from a conclusion that the default should be right of survivorship unless both spouses agree otherwise. That means, however, that the community property distribution-at-death rule is itself the problem, and should be changed to right of survivorship for all community property unless both spouses agree otherwise. As long as a spouse is not compelled to give outright ownership of the community property to his or her surviving spouse, when spouses choose during their lifetime to do so by title, it is fully consistent with the general scheme of property disposal at death that one spouse can change his or her mind and change the designation to something else. Non-title evidence indicating a spouse rejected the survivorship effect should be sufficient to overcome the survivorship evidence, which is, after all, just the title.

270. Permitting unilateral severing of the survivorship provision to some extent ameliorates one worry that may underlie the general fallback presumption precluding SP treatment on the basis that only one name is on the title: a fear that one spouse will via title fraudulently defeat the community interest of the other spouse. While unilateral severing of the right to survivorship provision will not solve the problem of a defrauded spouse who vehemently did not want the surviving spouse to take outright in the event of his or her death but never discovered or understood the right of survivorship language in a deed, it will allow spouses who discover or understand prior to their death the opportunity to effectuate their desired result without having to change title and get the other spouse's approval. And in any event, using right of survivorship title language to defraud is possible only in the cases where the spouse who dies first truly preferred to deprive the other spouse of half the property, and there is a bit of a gamble for a defrauder, who may die first.

the different treatment at divorce, death and during marriage that a particular choice may bring.

Arizona has the antithesis of a user-friendly system. At-divorce treatment of similarly situated assets varies depending on the designation and form of title. Sometimes treatment varies depending on whether the asset is traceable back to separate property, while other times tracing to separate property is not permitted. Sometimes separate property contributions to a marital asset are considered reimbursable, and other times they are not. Reimbursement may vary depending on whether the contribution went toward community-consumed items, non-titled assets, a titled asset with single title, a titled asset with community property title, a titled asset with joint tenancy title, was used to pay expenses for an existing community or joint tenancy property, or went into a bank account.

Distinctions between forms of joint title play far too important a role in the process of treatment of marital assets at divorce, especially in light of the fact that many people who choose between community property and joint tenancy title have little clue about the possible ramifications of choosing one or the other. To the extent that people understand anything about joint tenancy, for example, they suspect it has something to do with avoiding probate. Most, I suspect, do not dream that it has something to do with separate property reimbursement in the event of divorce, or the availability of the asset for satisfaction of separate property debts. Nonetheless, even though a purposeful joint tenancy designation is likely to focus only on right of survivorship at death rather than during-the-marriage or divorce related events, Arizona is currently treating joint tenancy property held by married couples differently, for non-death purposes, from how it would treat the same asset if it were held in community property title.[271] The differing treatments, and their title-based justifications, create the case-law-defensible but result-preposterous possibility that joint tenancy property held by husband and wife will be treated for management and control purposes and for relationships with creditors as severable, accessible separate property rather than community property.

Rather than de-emphasizing title choice as a decision-making tool and clarifying that joint tenancy held by married couples should be treated indistinguishably from community property for all aspects other than right of survivorship, Arizona has recently created an additional form of title: community property with right of survivorship.[272] This hybrid, apparently designed to allow community property treatment for all aspects of the asset except for right of survivorship at death, hopefully will resolve some of the confusion surrounding treatment of survivorship property held by married couples. But its success will come only if married couples and courts alike understand and correctly define community property with right of survivorship. And unless its use becomes so pervasive as to eradicate all other forms of title, the new form of property may add further to a confusing array of distinctions at divorce, based on title and the form

271. *See supra* notes 96–98, 155–185 and accompanying text.

272. *See* ARIZ. REV. STAT. §§ 14-1201, 14-2804, 33-431 (1998); *supra* notes 45–47 and accompanying text

of the asset, between separate property, community property and joint tenancy property held by a married couple.

This patchwork of distinctions, which often assigns unwarranted significance to title, and yields odd, distorted, marital distributions that hinge on decisions made for reasons far removed from the distributional result, needs to stop. I propose one clean, fairly easy to administer starting point for each disputed marital property asset: in order to obtain separate property treatment or reimbursement, the separate property proponent must provide decent evidence that the community understood that the asset in question would be treated as separate property or be reimbursable at divorce. Tracing, by itself, is not a sufficient reason to treat as separate property those assets that play a significant role in community financial planning. Stronger evidence that the community recognized the separate nature of the asset and anticipated reimbursement in the event of a split-up should be required before such assets are characterized as SP or the SP owner is reimbursed for contributions to the community. The weakest evidence that still would be satisfactory to justify separate treatment would be tracing to a separate property source plus either separate property title or no title plus passivity concerning the asset (in other words, no indication of joint title and no involvement of the asset in community financial matters).

All commingled accounts or jointly titled assets, regardless of the asset form (liquid, real, intangible, etc.) and regardless of form of title (joint tenancy, community property, community property with right of survivorship, tenancy in common, or two individual names), should be given community property treatment during marriage and at divorce. The separate property proponent should not be able to take the asset or the separate property "value" in the asset simply by tracing back to a separate property source. A desirable consequence of this result is that joint tenancy, community property and community property with right of survivorship property will all be indistinguishable for matters other than death distribution. The community result will apply for all.

Adopting a presumption against separate property and therefore placing the burden on the separate property proponent is not particularly new. Such a presumption is fairly pervasive in Arizona and most community property jurisdictions.[273] The presumption, however, has never been applied to all issues; instead, title designations, bank accounts, tracing, and the issue of reimbursement for separate property contributions have all been viewed as distinct matters necessitating distinct but conflicting treatment.

Adopting a single approach for all assets and issues, and sticking with it, will alleviate perverse results. It places a burden on a separate property holder to identify, keep a record for, and provide evidence for all separate property assets he or she wishes to keep separate in the event of divorce. It preserves, however, a fairly easy opt out for any couples that wish a different result. It eliminates results that fortuitously benefit either the separate property spouse or the community property spouse depending on the liquid, asset-originating, or contribution-to-asset

273. *See supra* notes 71–78 and accompanying text.

nature of an separate property contribution. It avoids results that vary depending on whether title was placed in community property or joint tenancy. It reduces the temptation some separate property spouses may face at divorce to use tracing combined with family expense or recapitulation accounting concepts to identify large amounts of separate property. It reduces the highly undesirable assignment of significance to title changes not designed to effectuate the result for which such significance is assigned, and will assign all close calls to the community, which results in a fifty-fifty solution rather than the all-or-nothing SP result.